

# VICTIMS AND INTERNATIONAL SENTENCING: AN UNCHARTED TERRITORY?

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## ABSTRACT

The sentencing phase plays a crucial role in international criminal trials. However, the role and impact of victim participation during international sentencing have received little attention within international criminal law discourse. This study seeks to understand and explain the rationale behind international sentencing by examining the theories of retributive and restorative justice within the context of the International Criminal Court. In addition, the study also addresses the neglected aspect of victims' role in sentencing hearings as well as the degree to which victims' rights and interests are considered at the sentencing phase. Researchers have utilised qualitative interviews in the available scholarship to assess victim participation at the ICC. This article has decided to complement the available scholarship in this area by using a rarely-used and vital data source for evaluating victim participation during sentencing. Namely, case transcripts. In investigating this question, the researcher used the decided case of Prosecutor v Thomas Lubanga case.

**Keywords:** Victims, Sentencing, Restorative Justice, Retributive Justice

## INTRODUCTION

Central to the traditional criminal justice system is retributive justice. However, with the ICC establishment, some commentators suggest a shift from a purely retributive justice approach to incorporating restorative elements and victim-oriented agenda for the ICC.<sup>i</sup> This restorative element is reflected during criminal proceedings, primarily via victim-participation and victim trust fund programmes.<sup>ii</sup> Besides, victims' impact on the sentencing outcome and the extent to which their interests are considered at the sentencing stage remains unclear. Therefore, this article does not intend to go into an extensive discussion of restorative justice theory. Rather, the debate on restorative justice would be limited to how it can be used to assess the role victims' interests play in sentencing.

It is noteworthy that the Rome Statute does not proffer comprehensive specifications on what principles are applicable at the sentencing stage. Judgment, particularly sentencing, is an essential aspect of the criminal justice process, and it is the outcome of the criminal proceedings.

Researchers have not treated the victims' role in sentencing at the ICC in detail in previous studies. Therefore, this paper examines victims' role during sentencing by analysing the case transcripts of *Prosecutor v. Lubanga (Lubanga case)*. Also, this article will critically discuss if victims influenced sentencing decisions. Finally, it is found, victims are permitted to participate during the sentencing hearing, but this is very restrictive and regulated by the court.

The following section gives a brief overview of the relationship that exists between retributive justice and restorative justice.

The remaining part of the paper is structured into an analysis of the sentencing hearing and sentence decision in the *Lubanga* case.

## RETRIBUTIVE JUSTICE

The international criminal justice system may be described as a social control system whose philosophy is based on a penal justice approach. According to a definition provided by Smith

and Darley, “Retributive justice is a system by which offenders are punished in proportion to the moral magnitude of their intentionally committed harms.”<sup>iii</sup> From this definition, it is apparent that retributive justice places the offender's punishment at the forefront. Hence, the penalty is awarded according to proportionality, i.e. the offender is punished by the proportion of the harm<sup>iv</sup>. It is no gainsaying that retributive justice addresses the wrong rather than the harm. Thus, the offender is the central focus of retributive justice.

The idea of retributive justice has played a dominant role in theorising about punishment over the past few decades. Still, many features of it—‘especially the notions of desert and proportionality, the normative status of suffering, and the ultimate justification for retribution—remain contested and problematic.’<sup>v</sup> The three justifications of retributive justice are deterrence, retribution and rehabilitation.

Some proponents of retributive justice argue that it serves as a deterrent (individual or general) while reducing society's crime rates.<sup>vi</sup> In the same vein, Schafer supports his argument with Pope Clement VI’s words “any punishment that makes the offender not commit a crime again is worth administering: and a punishment that does not correct should not be given”.<sup>vii</sup> From the above arguments, one can infer that deterrence and rehabilitation propel punishment in most domestic criminal justice systems. Bagaric and Morss submit that general deterrence is the primary rationale behind punishment in international criminal trials.<sup>viii</sup> However, little research suggests that punitive measures deter future offenders. From McGonigle’s perspective, there is no empirical evidence that retributive justice prevents crimes.<sup>ix</sup> Although theoretically, retributive justice might deter crimes, pragmatically, retributive justice's effectiveness might be questioned because of the increased crime's occurrence.

On victims’ and sentencing, Ashworth suggests that the traditional forms of criminal justice may adversely affect the involvement and the extent of applicability of victims’ rights in the criminal justice system.<sup>x</sup> He cautions that remarkable consequences are likely to arise for introducing victims into an already balanced system- the accused and the defence.<sup>xi</sup> This argument supposes the traditional criminal justice; notably, the criminal trial setting lacks a well-equipped structure to incorporate victims’ interests and rights, empowering their involvement..

In contrast, it is believed that retributive justice is victim-oriented because the manner of punishment depicts society’s cohesion with the victim.<sup>xii</sup> The critical problem with this

argument is that it trivialises the victim's interest on an individual basis. The penalty only shows the intention to address the wrong done to society rather than the victim's harm. Thus, the victim's satisfaction is forfeited in place of societies. The traditional criminal justice system would have been more supportive in addressing victims' needs if retributive justice provided a central role for victims and response to the victims' harm.

Gohan cautions about over-stretching retributive justice, especially within the context of victims' interests, because of its likelihood of victimisation of the accused (convict) or sabotaging its effectiveness.<sup>xiii</sup> Perhaps, the notion of retributive justice within the domestic context slightly differs from retributive justice within the international sentencing context. In the international jurisdiction, the ICC deals with extensive scale violations of human rights, considered '*serious*', with many victims that must have suffered harm. Henham opines that victims tend to play significant roles within international sentencing as opposed to domestic sentencing. The large scale of crime and collective violence may require victim involvement.<sup>xiv</sup> The similarity within both contexts espouses justice as the accountability of the offender to the state or community. With victims' participation in criminal justice, justice should move beyond accountability.

Besides, the ICC has witnessed a progression from purely retributive norms to incorporating restorative justice elements<sup>xv</sup>; despite this, there are still challenges in fully accommodating victims' rights and interests in sentencing. Empowering victims to participate during criminal proceedings may prejudice the rights of the accused.<sup>xvi</sup> It could also shift the trial's focus from the '*wrong*' to the '*harm*' suffered by the victim. This idea restructures the traditional criminal justice system into a tripartite construct.

Article 22 and 23 of the Rome Statute contains the Latin expression *nullum crimen sine lege, nulla poena sine lege*. The principle indicates a mandatory connection between punishment (crime) and a fixed, predetermined law-the basis for criminal responsibility, a principle of legality which is considered one of the foundations of international criminal law.<sup>xvii</sup> It is also espoused in customary international law and international treaties such as the International Covenant on Civil and Political Rights 1966 and the Universal Declaration of Human Rights 1948. It is noteworthy that Article 22 generated a consensus amongst the delegations during the Rome Conference.<sup>xviii</sup> Hence, the origin of the court's power is to investigate and prosecute individuals most responsible for violations of the most severe crimes. If the Rome Statute does not prohibit the offence, such persons cannot be considered accused/convicts.<sup>xix</sup> Article 21

mirrors the legitimacy and jurisdiction of the ICC. The elements of crime underscore the objectives of Article 22, especially about the jurisdiction of the Court.<sup>xx</sup>

Furthermore, Article 77 of the Rome Statute empowers the Court to impose penalties on individuals convicted by the Court of crimes within its jurisdiction. The penalties include imprisonment, not more than 30 years, life imprisonment fines or forfeiture. It appears the Rome Statute is cautious about the imposition of some severe forms of penalties.<sup>xxi</sup>This qualification may be the rationale behind the exclusion of the death penalty from the Statute. The delisting of the death penalty, corporal punishment, and other forms of sentences implies an intention to adhere to the limitations provided by international treaties like the UNCHR and the UN minimum rules for prisoners' treatment.<sup>xxii</sup> Article 80 notes that these provisions do not prejudice the applicable laws in the national jurisdictions. Although, the ICC does not acknowledge harsher punishment like the death penalty and other forms of sentences which could lead to torture or another form of degrading treatment.

Nevertheless, the implementation of the stipulated provision does not preclude its enforcement in the State party domestic jurisdictions. Additionally, of equal importance is the restrictive application of life imprisonment as a form of penalty. The Chambers are required to ensure that the imposition of life imprisonment is subject to the fulfilment of strict conditions.<sup>xxiii</sup> Life imprisonment is justified by the extreme gravity of the crime and one or more aggravating circumstances.<sup>xxiv</sup>This interpretation sums up a liberal approach of the ICC to individual rights and rehabilitation of offenders. While at the same time respecting the existing criminal law applicable in national jurisdictions of the affected parties.

A considerable amount of literature reveals that, in most national jurisdictions, retributive justice is at the heart of their criminal justice systems. International criminal law, as a distinct area in public international law, incorporates some of the theories and principles of national jurisdictions with relatively few modifications.<sup>xxv</sup>Nevertheless, it is primarily founded on retributive justice.

Having discussed that, the following section shall examine the classic theories of justifications of punishment: deterrence, retribution, and rehabilitation.

Deterrence is the primary justification for the punishment in an international criminal trial.<sup>xxvi</sup> Rothe and Mullin asserts that international criminal tribunals have integrated accountability



and ‘instilled long-term inhibitions against international crimes in the global community.’<sup>xxvii</sup>

The inhibitions are measures towards deterrence and accountability.

Nevertheless, it is questionable if international criminal law, courts and tribunals have been able to pass on a deterrent effect in the international community. There are still instances of severe violations of human rights around the world. At best, it could be posited that the rate of severe human rights abuses has reduced slightly. Arguably, a harsher punishment may restrict future offenders. The perpetrator is sanctioned to serve as an example for future offenders. Thus, deterrence is perceived as a legal threat to crime control.<sup>xxviii</sup> This sanction could be in the form of the death penalty, imprisonment or fine.

Furthermore, the absence of a general provision for sentencing objectives in the Rome Statute leaves a gap for the rationale behind the punishment. Notwithstanding, a cursory look at the Preamble shows a deterrent function: “Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”<sup>xxix</sup> And “Determined to these ends and for the sake of present and future generations.”<sup>xxx</sup> Thus, preamble 5 and 9 support the deterrent function of the Rome Statute.

Retribution is at the heart of criminal law theory.<sup>xxxi</sup> It underscores punishment as a reaction to the commission of a crime. The foundation of retribution is deeply rooted in respect for the autonomy of the offender. It is a notion that justifies the imposition of punishment because it is deserved.<sup>xxxii</sup> In Moore’s words, “Punishment is justified if it is given to those who deserve it.”<sup>xxxiii</sup> ‘Desert ...is a sufficient condition of just punishment, not only a necessary condition’<sup>xxxiv</sup> It is not yet certain if the offender's punishment can be equated to the harm and suffering inflicted on the victims. Therefore, the fact that the offender is deserving of punishment does not mean that such punishment is quantifiable to the victim's plight, given that they occur within two different contexts. As such, punishment is motivated by ‘*just deserts*’ and *proportionality*. Punishment is mainly imposed because the offender has committed a crime. This offender is sanctioned by punishment or reward because he deserves it; this is the philosophy behind just desert. The sanction is a reaction to the breaking of rules by the offender. Theoretically, the offender’s punishment is proportionate to the wrongful act committed. How to measure the proportionality of the punishment remains unsettled. Different courts adopt different approaches. The proportionality principle is significant in the determination of retribution. Nevertheless, it is difficult to ascertain if the sentencing matches the crime committed.<sup>xxxv</sup>

The principle of proportionality determines the sentencing that is appropriate for the gravity of the crime. The gravity of the crime must be commensurate with the severity of the crime. The principle of proportionality is a commonly –used notion in sentencing, yet it is a concept difficult to define precisely. It is argued that proportionality is a principle in determining the punishment, while retribution is an objective of criminal punishment. The principle of proportionality is a determinant of sentencing, and it is a means to an end, which is sentencing. It measures the gravity of the crime in determining the severity of the punishment. Presumably, a sentence that matches the seriousness of offences is deemed fairer than a punishment that does not.<sup>xxxvi</sup> It is worthy of mention that proportionality as a concept is nebulous. We should be careful not to confuse the justification for punishment with the determinant for sentencing. While the former focuses on retribution, deterrence and rehabilitation, the latter aims to determine the reasoning or logic why a particular quantity (measurement/amount) of a sentence is given in response to the gravity of the crime.

Retribution as a concept regarding proportionality and just deserts depends on moral relativism and public opinion.<sup>xxxvii</sup> The moral values of society dictate if a crime should get a harsher punishment.<sup>xxxviii</sup> The crime and punishment are paired together on two scales to determine equality. The morals of the society gradually crystallise into law for determining the sentence. One of the reasons the death penalty and life imprisonment are considered the highest form of punishment on the pyramid. According to the Orthodox school, the law is criminal when the individual who contravenes it is punished.<sup>xxxix</sup> The judicial punishment invokes sanction on the offender as a response to a violation of the law. Husak argues that a sanction does not qualify as a punishment without ‘*punitive intention*’.<sup>xl</sup> It is believed that there must be a functional idea behind the imposition of sanctions on the offender. What does the sanction intend to achieve by imposing punishment? It could be the correction of the wrong or to address the harm. Most times, the intention behind the punitive measure is to reinforce social control.

In addition, some of the Rome Conference delegates proposed proportionality between the gravity of the crimes and severe penalties; they suggested the death penalty and life imprisonment reflect the magnitude of the offence.<sup>xli</sup> In response, a few of the delegations counteracted the bid, who pointed to the compliance of human rights treatise. The opposing delegations suggested humane means of punishment which would gradually reform and rehabilitate the offenders.<sup>xlii</sup>

After rigorous debate on the issue of mode of punishment, all the delegates at the Diplomatic Conference unanimously agreed to include imprisonment as the main punishment.<sup>xliii</sup> While some delegations advocated for a maximum sentence, the counterpart preferred judicial discretion to determine a sentence rather than a specific cap.<sup>xliv</sup> It is observed that the delegations reached no consensus on the rationale behind punishment. Although, there were “widely differing” opinions on the objectives of penalties because of the significant disparity between the moral values, norms, principles and practices operating in their different jurisdictions.<sup>xlv</sup> Unfortunately, the delegates failed to conclude the issue. However, the Rome Statute Preamble gives us guidance on the purpose of penalty: “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution...”<sup>xlvi</sup> The phrase “must not go unpunished” emphasised the inclination for retribution as an objective of sentencing.

### ***Rehabilitation***

Andrews and Bonita argue that more attention should be given to offenders' rehabilitation rather than increasing punitive measures.<sup>xlvii</sup> In their opinion, punitive measures have not curtailed criminal recidivism; instead, there is an increase in correctional facilities' proliferation, affecting government budgets.<sup>xlviii</sup> Possibly, punitive measures do not deter crimes to the expectation of society.

For more clarification, it is imperative to define rehabilitation. According to Hudson, Rehabilitation is:

“Taking away the desire to offend, is the aim of reformist or rehabilitation punishment. The objective of reform or rehabilitation is to reintegrate the offender into society after a period of punishment, and to design the content of the punishment so as to achieve this.”<sup>xlix</sup>

Rehabilitation takes place during and after punishment. Presumably, the courts' contribution to offenders' rehabilitation after the sentence term can result in re-integration into society. One viable approach is for the court to address the consequences of a conviction for the convict/sentenced person.<sup>1</sup> Court's involvement in rehabilitation would demonstrate their interest in deterrence and retribution. However, it would also show their interests in the offender's life post-conviction and reintegration into society. Re-integration is a pillar of restorative justice, indicating that retributive justice is not totally punitive. Therefore, rehabilitation entails a restorative element.



Triffterer notes that the most effective means to ‘fight’ criminality is to prevent the commission of crimes.<sup>li</sup> Therefore, he recommends an early evaluation of the different ways to challenge impunity.<sup>lii</sup> Undoubtedly, in the absence of a Utopia society, where society struggles to prevent criminal acts, correcting criminal acts through deterrence and repression is a sustainable means of fighting impunity.

Rehabilitation has been described as a humane alternative to retribution and deterrence; sometimes, the punishment is lenient to dissuade recidivism.<sup>liii</sup> However, article 110(4) and Rule 223 states the Conditions and factors for Sentence review at the ICC.<sup>liiv</sup> These provisions that may ensure the convicts' early release could conflict with the deterrent and retribution function because it focuses on reformation and resocialisation of the offender, which may outweigh or preclude the deterrent's objectives retribution. Possibly, rehabilitation of the offender could be why the maximum term of imprisonment is 30 years. How these conditions and factors reflect the rationale of the penalty is decided according to the panel's discretion.

Arguably, the ICC could use a combination of deterrence, retribution and rehabilitation for sentencing since they are not mutually exclusive. Somewhat it is easy for the ICC to enforce deterrence and retribution, it could become challenging for the ICC to implement and supervise offenders' rehabilitation. While article 110 of the Rome Statute and Rule 223 of the ICC RPE provides for the reduction of sentencing and expressly list reintegration and re-socialisation, respectively, these provisions do not stipulate a medium of compliance with these conditions during the convict's incarceration and after the release. It seems rehabilitation as a purpose of punishment would be more effective in the domestic context.

That being said, this study does not intend to discuss rehabilitation extensively, and criminologists have written a lot on rehabilitation.<sup>liv</sup> So far, this section has focused on retributive justice; the following part addresses the theory and principles of restorative justice

## **RESTORATIVE JUSTICE**

Considering the implications of retributive justice and its elements within the ambience of sentencing in criminal courts, this segment will discuss restorative justice and its impact on sentencing. It is necessary here to clarify what is meant by restorative justice. Zehr is one of

the first authors to define restorative justice. He is referred to as the father of restorative justice. According to Zehr:

*“Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things right as possible.”<sup>lvi</sup>*

Similarly, Zehr’s definition shares the same content as Marshall’s. Marshall defines it ‘*as a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future*’.<sup>lvii</sup> Be that as it may, Doolin is critical of Marshall’s definition. From her perspective, Marshall’s description is limited to the process of restorative justice. Doolin contends for clarity of the concept of restoration because Marshall’s definition excludes some crucial restorative justice elements.<sup>lviii</sup> Some of the questions raised include; “who should be involved in collective resolution? How do those involved arrive at the collective resolution? What is meant by dealing with the aftermath of an offence and its implications for the future? Moreover, what are the best ways to resolve such issues in terms of the spirit of restorative justice? This debate opens a range of broad questions within the process of restorative justice. Doolin gives a comprehensive perspective on restorative justice.

Doolin also proposes that a sound definition of restorative justice should not be restricted to the ‘*process*’ involved, but the outcome should also be considered. She pointed out that Marshall’s definition is ambiguous; hence his interpretation did not refer to the result to be achieved.<sup>lix</sup> Doolin’s assertion prioritises the voluntariness and informal settings of the process. It raises questions of coercion, State and community role, and the absence of the stakeholder for the process and outcome of the restorative justice. A possible implication of this is that the process might lead to a ‘*non-restorative ends*’ thereby compromising the intention of restorative justice.<sup>lx</sup> The coercion of an unwilling stakeholder leads to victimisation of the offender or re-victimisation of the victim thereby defeating the purpose of the practice.

One of the restorative justice aims is to reposition victims as ‘*active agents*’ rather ‘*passive objects*’ of the justice process.<sup>lxi</sup> It puts the needs of both parties at the forefront. One benefit of restorative justice is that it proffers an inclusive approach for all stakeholders.

Moreover, Ness and Strong divide restorative justice into three categories. The three categories are referred to as three key pillars of restorative justice; ‘encounter’, ‘*amends*’ and ‘*reintegration*’.<sup>lxii</sup> These commentators argue that victims have a central participatory role in the three pillars of restorative justice processes. Realistically, victims ought to be involved in direct participation in this process. The three key pillars of restorative justice shall be discussed in the following section:

### ***Encounter***

According to Van Ness and Heetderks, Encounter is the first pillar of RJ. The encounter between victims and the offender is an essential element of the RJ process. This encounter may be referred to as a meeting. It is vital that this meeting must involve the voluntary participation of victims. No participant should be coerced to attend or participate in the conference. The conference provides a platform for communication for both the victims and offenders to narrate their experiences, the harm they suffered, and the impact on their lives.<sup>lxiii</sup>

Interestingly, flexibility is one unique aspect at the encounter stage. For example, the victims can tell their stories in their own words, instead of speaking in legal language. Besides, they can also emote and use emotional language. So, in a way, it becomes easier for understanding the relationship between the parties and the implications of their actions.

Arguably victims’ narratives may be riddled with subjectivity rather than a factual, objective account. Nevertheless, storytelling and its consequences espouse victims’ truth which opens a discussion between the victims and offenders. McCold and Wachtel maintain that restorative justice's dialogue stage helps in the ‘collaborative problem-solving approach,’ the central focus of restorative justice practice.<sup>lxiv</sup> It follows that the meeting between the participants aims to highlight the problems/issues. Afterwards, the participants proffer solutions to these issues collaboratively. It is also noteworthy that the discussion grants them the freedom to make their choices/decisions. The result of the encounter is to reach an ‘outcome agreement.’<sup>lxv</sup> Thus, encounter emphasises the practice of restorative justice or, best put, the process of restorative justice.

### ***Amends***

As mentioned earlier, amends is the second pillar of restorative justice-typically a role of the offender.<sup>lxvi</sup> Given that ‘encounter’ means the practice of restorative justice, then ‘amends’

means the outcome<sup>lxvii</sup> Thus, the outcome of restorative justice is to heal individuals, communities and nations after harm caused by wrongdoing.<sup>lxviii</sup> An essential determinant of repair is the input/involvement from those mainly affected by the crime. This ability to repair connotes taking on responsibility for the crime of the offender. Thereby finding ways to correct the victims' harm.

Moreover, making amends could be in tangible ways.<sup>lxix</sup> Also, amends could be made through an acknowledgement of the crime or sincere apologies. It has been submitted that in most conferences of restorative justice, the crux of discussion 'always presents a moment when it is natural for an apology to be offered in recognition of emotional restoration needed by the victim.'<sup>lxx</sup>

Research suggests that in the criminal justice system, victims are affected by their experiences.<sup>lxxi</sup> Victimologists have described this as 'secondary victimisation' or re-traumatisation.<sup>lxxii</sup> They may be characterised as anti-therapeutic experiences that victims of crimes go through as a result of their involvement or contact with the actors of the criminal justice system

While Courts are not therapeutic centres, they are not expected to carry out therapeutic functions; their primary function is to prosecute criminal and administer justice. So naturally, the settings of the court are not victim-centred or focused. On the other hand, restorative justice parameters are more relaxed and could foster genuine communication between the offender and the victims.

We should bear in mind that the dialogue for restorative justice does not operate within the context of adversarial settings. It involves victims, offenders and other affected individuals or participants.<sup>lxxiii</sup> The amends here could include individual or collective measures. The individual measures may be in the form of victim-offender mediation. Here, the offender tender apologies to the victims. The victims ask the offenders questions and also narrate the real impact of the crime against them.<sup>lxxiv</sup> On the other hand, RJ's collective measures are the truth commission and other forms of justice aimed at disclosing the truth regarding the commission of the crime and acknowledging the wrongdoing to the victims.<sup>lxxv</sup>

This part has analysed amends within the context of restorative justice. It is now necessary to explain re-integration as the last pillar of restorative justice.

### ***Re-integration***

Christie writes that conflicts are valuable commodities that have been taken away from their rightful owners (victims and communities) and given to professional thieves-lawyers, prosecutors and the criminal justice system.<sup>lxxvi</sup> He submits that ‘the bigger loser is us-to the extent that society is us. The loss is first and foremost, a loss in opportunities for norm-clarification.’<sup>lxxvii</sup> If properly managed, conflict, he believes, could give rise to a crucial opportunity for community development. The question that arises is, ‘is re-integration also a property.’ It is noteworthy that both the victims and offenders need re-integration within the context of the community.

Van Ness and Strong define reintegration as the re-entry into community life as a whole, contributing, productive person.<sup>lxxviii</sup> For offenders, re-integration includes rehabilitation into the community. Stigmatisation is an indispensable occurrence in the aftermath of crime. Consequently, it may cause the ostracisation or exclusion of the offender from the community or family relationship. Through reintegration, restorative justice intends to ‘build or rebuild relationships between offenders and their communities.’<sup>lxxix</sup> This includes but is not limited to reinforcing the offender’s ties with adults and peers and changing the offenders’ view of law-abiding citizens and community.<sup>lxxx</sup> Therefore, the channels of socialisation need to be involved in the policies and strategies for re-integration.

Set against this background, it is almost certain that some restorative justice elements could enhance victims' involvement in the sentencing stage. Such could include consultation with victims on how the crime has affected them; this may be in the form of VIS. It could also be an encounter between the victim and the offender, remorse, public apology, acknowledging the crime, admission of guilt, and efforts to address the harm done. Finally, since sentencing is also a process, some of the restorative justice elements could be incorporated to enhance the process and outcome for the victims.

The following section shall discuss *Lubanga* sentencing

## **VICTIMS IN SENTENCING-THE PROSECUTOR V. LUBANGA**

A key aspect of criminal trials is sentencing. Victims participation in sentencing raises questions of balance and impact. Therefore, this chapter examines the significance of victims



in sentencing. Through the analysis of the *Lubanga* sentencing, the pages that follow shine new light on the complexities of interaction between the victims and the convicted person (perpetrator) as well as the emerging role of victims in this stage. It will be argued that victim participation at sentencing is restricted.

This section intends to investigate victims' role during the sentencing hearings to Lubanga's sentencing analysis.<sup>lxxxix</sup>

In the determination of the judgment, the chamber resorted to documentary video evidence and evidence of a former UPC soldier who was over 15 years when he joined the UPC, testimonies of P-38 and P-10.<sup>lxxxix</sup> This section aims not to address the judgment of Lubanga; some scholars have discussed the fairness of the decision.<sup>lxxxiii</sup>

That being said, it is evident from the ICC transcripts that victims participated through their LRVs during the sentencing hearing via written observations/submissions in sentence hearings.<sup>lxxxiv</sup> However, what is not yet clear is if these written observations/submissions have a significant role or influence in the ICC's sentencing decision.

In determining the sentence, the Chamber considered five relevant factors. These factors were (1)The gravity of the crime,(2)The large and widespread nature of the crimes committed, (3)The degree of participation and intent of Thomas Lubanga Dyilo,(4)The aggravating circumstances and (5)The mitigating circumstances

In determining the gravity of the crime, the Trial Chamber ordered the victims' legal representatives to submit their views on all evidence discussed during the trial.<sup>lxxxv</sup> In response to Trial Chamber 1's order, the LRVs provided evidence examined during the proceedings to establish aggravating and mitigating circumstances for the convicted person. In the determination of sentencing, the legal representatives were allowed to make oral and written submissions in the event of a sentencing hearing. In their written observations, the LRV submitted three aggravating pieces of evidence, with no mitigating evidence.

The Prosecution listed the aggravating circumstances as '*harsh conditions in the camps*' and '*the brutal treatment of children*.'<sup>lxxxvi</sup> The Prosecution had requested the Chamber to consider sexual violence as an aggravating factor.<sup>lxxxvii</sup> However, the Chamber rejected the evidence; it found the evidence insufficient because it was inadequate to establish a conclusion beyond a reasonable doubt that the punishment of children under the age of 15 years of age occurred in

the ordinary course of the crime for which the chamber convicted the accused.<sup>lxxxviii</sup> The prosecutor's arguments were insufficient to hold Lubanga responsible for cruel treatment.

Furthermore, the prosecution requested the imposition of a 30-year sentence on Lubanga.<sup>lxxxix</sup> Thirty years is the maximum term of imprisonment under the Rome Statute. The Prosecutor supported his claim by referring to the Special Court's precedents for Sierra Leone, where sentences for similar offences fell within seven to fifty years.<sup>xc</sup> Subsequently, the prosecution submitted that it would reduce the sentence from 30 years to 20 years, provided that Mr Lubanga offers 'a genuine apology' to victims of the crimes.<sup>xcii</sup> It is believed that this sincere apology demonstrates acknowledgement of the offence and remorse from the perpetrator.

In their written observations, the LRVs urged the Chamber to consider the aggravating factors such as the abuse of the official functions by Lubanga, the particular vulnerability of the victims and the motive for the discriminatory aspect.<sup>xciii</sup> They argued that Lubanga as the president of the UPC and commander-in-chief of the FLPC, abused his role and position to recruit children under the age of 15 and use them to participate actively in hostilities.<sup>xciiii</sup> They presented evidence of expert's opinions which corroborated their proof. Also, their observations revealed how the soldiers threatened and raped women and girls.<sup>xciv</sup> The LRVs supported the statements with the testimonies and evidence of witnesses and victims.<sup>xcv</sup> The victims submitted that the convicted person, Mr Lubanga, had a discriminatory motive that instigated him to commit crimes, leading to soldiers' sexually abusing female child soldiers.<sup>xcvi</sup>

Mitigating circumstances are factors that could reduce the convicted person's term of imprisonment. It is more beneficial to the convict because these are facts or situations that do not relate to the defendant's guilt, but these circumstances support the leniency of the sentence.<sup>xcvii</sup> For instance, the defendant's cooperation with the ICC is perceived as a mitigating factor because it expedites the ICC's work.<sup>xcviii</sup> Glickman cautions that the mitigation for surrender may undermine the court's role in fostering general deterrence, but rather, entrench special deterrence. It appears the ICC is not under any obligation to consider local practices in the determination of sentences.

The crucial factors to be considered were the convict's expression of remorse, acknowledgement of the offence, and the effect of a guilt admission.<sup>xcix</sup> Arguably, the convict's expression of remorse, recognition of the crime, admission of guilt and apology can promote a restorative process, provided the victims acknowledged the apologies and articulation of

remorse which may accelerate the healing process of the victims and correct the relationship between the victims and the offender/convict. An apology by the offender/convict demonstrates the expression of responsibility and acknowledgement of the harm done.

Mitigating factors is very significant because, if considered, it may decrease the term of sentence. Perhaps, the most severe disadvantage of the rule on mitigating circumstances is that it requires proof- a balance of probabilities- as opposed to the aggravating factors. Balance of probabilities is also known as the preponderance of the evidence. It does not require a piece of overwhelming evidence—a reflection of what is applicable in the jurisprudence of the ICTY.<sup>c</sup> Hence, the threshold is lower for the balance of probabilities. For instance, in the *Lubanga* case, the implication of mitigating factors is that it resulted in a lenient sentence of 12 years imprisonment for the convict. As a result of the lower threshold for mitigating circumstances, one may deduce that from the ICC's Statute and RPE, the ICC rules' intention makes it easier for mitigating circumstances to lessen a sentence. In comparison, aggravating circumstances require a higher threshold to get an increased sentence.

The prosecution and the legal representatives (V01 and V02) noted no mitigating circumstances in the case.<sup>ci</sup> On the other hand, the defence tendered several extenuating circumstances.<sup>cii</sup> The factors included necessity, peaceful motives and demobilisation orders, cooperation with the Court.<sup>ciii</sup>

Furthermore, the Chamber rejected the Prosecution's submissions that sexual violence and rape should be considered an aggravating factor because there was no relevant evidence to link Mr Lubanga to sexual violence in the ordinary recruitment course. The Prosecution failed to prove beyond a reasonable doubt. Therefore, this factor did not reflect his culpability for the sentence.<sup>civ</sup>

The Chamber submitted that it would be '*inappropriate*' to sentence the convicted person-Mr Lubanga- to life imprisonment because it has not found any aggravating factors in this case.<sup>cv</sup> The Chamber noted that it would consider other evidence necessary to determine an 'appropriate' sentence in its observations. This 'appropriate' sentence should be proportionate to the offence. The proportionality is determined by balancing all the relevant factors.<sup>cvi</sup>

The Chamber did not accede to the aggravating factors presented by the Prosecutor and the LRV; it ruled that the evidence was insufficient to establish beyond a reasonable doubt that child soldiers under the age of 15 years were subject to punishments such as 'whippings and

canings' in the ordinary course' of the conflict.<sup>cvii</sup> The Chamber reiterated that the convicted person had not 'ordered or encouraged' the infliction of these punishments.

In addition, the Chamber pointed out the prosecutor's failure to include sexual violence in the charges and his inability to introduce new evidence of gender-based violence during the sentencing phase.<sup>cviii</sup> In the same vein, the Chamber rejected the children's vulnerability and discriminatory motives as aggravating factors. While the former was denied based on the facts that it qualifies as a double count, the Chamber rejected the latter because there was no sufficient evidence to prove that Mr Lubanga '*deliberately discriminated against women, given that his commanders sexually abused female soldiers.*'<sup>cix</sup> Therefore, the Chamber found no aggravating factors.

The Chamber considered the convicted person's cooperation with the Court during the proceedings as a mitigating factor. The Chamber factored in Lubanga's '*notable cooperation*' and commented on the prosecution's refusal to disclose evidence with its consequent delays.<sup>cx</sup> By inference, the reasoning behind this decision shows an offender-centred approach.

### ***The Sentence***

In determining the declared sentence, it is revealed that the majority of the Chambers took into account: the widespread use of child soldiers during the time frame of the charges, the influential position of Mr Lubanga within the UPC/FLPC and his capacity by virtue of his position of authority to supervise the foot soldiers. Besides, the majority of the Chamber dismissed the aggravating circumstances (as presented by the LRVs). The Chamber's reasoning, the aggravating factors were insufficient to warrant an influence on the sentence, as they submitted that they found no aggravating circumstances in the LRVs submissions.

The chamber outlined the declared sentence.<sup>cxii</sup>

Furthermore, the Chamber pronounced a joint sentence of a total period of imprisonment as 14 years.<sup>cxiii</sup>

On the same point, Judge Odio buttressed the gravity of the suffering of child soldiers with the expert opinion of Ms Schauer and evidence of Ms Radhika Coomarasway. They both testified to the negative impact on their (child soldiers) education psychological development and the female child soldiers subjected to sexual violence.<sup>cxiiii</sup> The witness reported that the children narrated an account of systematic sexual violence in the camps—the incidences of pregnancies and abortions and the subsequent expulsion of the pregnant girls. The learned judge opined that



the Majority disregarded the damage caused to the victims and their families. However, she reasoned that ‘punishment and ‘sexual violence’ should have been considered as aggravating factors. Because they resulted in severe and often irreparable harm to the victims and their families; which puts them *at risk of severe physical and emotional harm’ and death.*<sup>cxiv</sup>. Judge Odio emphasised that the Chamber received sufficient evidence to establish the punishments, harsh conditions and sexual violence suffered by the victims due to their recruitment in the camps. Therefore, these items should have been factored in when determining the sentence against the convicted person as it precipitates ‘*serious*’ and ‘*irreparable harm*’ to the victims and their families.<sup>cxv</sup>

Regarding the term of imprisonment, judge Odio criticised the majority’s decision to impose a lower sentence to the crime of enlistment, 12 years, a higher sentence to the crime of conscription, 13 years and an even severer punishment to the crime of the use of children to participate in the hostilities, 14 years. She asserted that the distinction in terms of imprisonment gives a wrong impression about each crime's consequences. Although the crimes are ‘distinct and separate crimes’, they result from a common plan implemented by Mr Lubanga.<sup>cxvi</sup> The learned judge opined that Mr Lubanga should be sentenced to 15 years imprisonment for each of the crimes of enlistment, conscription and the use of children under the age of 15 years to participate actively in hostilities.<sup>cxvii</sup> Thus, the joint years of imprisonment should have been 15 years of imprisonment.<sup>cxviii</sup> Judge Odio's proposed 15 years sentence leaves little or no difference from the declared sentence; both are within the same range.

The declared sentence shows that the criminal proceedings' outcome is a product of convincing evidence from the parties, rather than the stated sentence being victim-focused. Hence, this corroborates the fact that the outcome relies heavily on the preponderance of the evidence.

Following the sentencing, and the appeal after that, Mr Lubanga, filed an action on the possibility of a review of his sentence. Pursuant to Article 110 of the Statute, the Court is empowered to review a convicted person's sentence when he has served two-thirds of the penalty or 25 years imprisonment.<sup>cxix</sup> Accordingly, the presiding judge's scheduling Order invited the participating victims to express in written submissions their views and concerns regarding any reduction in the convicted person’s sentence.<sup>cxx</sup> Furthermore, Article 110(4) lists the conditions that the Court must be satisfied with to reduce the offender’s sentence. These conditions include the offender's willingness to cooperate with the ICC at the initial stage. Subsequently, the offender must have rendered voluntary assistance to the court to enable ease



enforcement of the judgments, a clear and significant change in circumstances that warrant a sentence reduction.<sup>cxxi</sup>

Furthermore, Rule 223 states other factors that will be considered in sentence review.<sup>cxxii</sup> It has commonly been assumed that a sentence reduction may be a remedy for alleged violations of the human rights of the convict, to serve his sentence without risk of physical harm.<sup>cxxiii</sup> Moreover, it is observed that reducing a sentence as a remedy based on alleged violations of human rights is not provided for in article 110(4) of the Statute or rule 223 of the Rules. Nevertheless, evidence suggests that some common law jurisdictions do grant review of sentence reduction, not as a remedy to human rights violations, but as the basis of the convict's cooperation with the legal authorities, or if a particular part of the sentence has been served.<sup>cxxiv</sup> The reduction of a sentence is not an automatic right; it is subject to some conditions. In addition, it seems the reduction of sentence and review is not new to the criminal justice system; it is prevalent in most national jurisdictions.

Hole notes that sentence reduction tries to strike a balance between the interests of offenders, victims, and the community. From his perspective, the sentence review checks 'an arbitrary' discretion' to the Court.<sup>cxxv</sup> Sentence reduction will probably address unresolved issues between the sentenced person and victims, which the original sentence has not corrected. The notion is applicable where a sentence is meant to promote the rehabilitation of the offender. The sentence review embraces a holistic approach towards repairing the relationship between the stakeholders-victims, offenders, and society.

Arguably, the sentence review gives victims a more participatory role. Similarly, one could argue that it permits a deeper interaction between the victims and the sentenced person. The conditions listed in Rule 223 appears to stress an integrative or holistic approach to addressing sentence review. These conditions expressly inform an expectation of the offender's reformation, particularly concerning building a relationship with the victims. The conditions imply that the offender's early release is made conditional on 'significant actions' to address the harm caused to the victims. In a similar vein, the rules also highlight the implications of the offender's release on the community. Therefore, this explores the interrelationship between the offender, victims and the community-a subtle approach to restorative justice.

The Court's primary function was to evaluate the convicted person on the criteria set out by Article 110(4). In this sentence review, the Prosecutor, the OPCV, the LRVs, V01 and V02

concluded on the absence of the factors in Article 110(4)(a) and (b), Rule 223. The LRVs 01 submitted written observations. In the words of the Court:

“[[t]he Appeals Chamber invited the participating victims to express in written submissions their views and concerns in relation to any reduction in the sentenced person’s sentence, having regard to the criteria set out in article 110(4) of the Statute and rule 223 of the Rules of Procedure and Evidence”.<sup>cxxvi</sup>

In response to the court’s order, the victims submitted their observations. The victims concluded that the legal criteria for a reduction of the sentence were not present.<sup>cxxvii</sup> In the LRVs 01’ observations, the victims averred that criteria (a) to (d) of rule 223 affected the victims’ interests directly. These criteria are duplicated in article 110(4).

In the victims’ assertions, Mr Lubanga Dyilo ‘consistently denied his responsibility’ for the crimes he committed. Additionally, the victims observed that his conduct and behaviour did not reflect dissociation from those crimes.<sup>cxxviii</sup> They recommended that the sentenced person’s apology and expression of regret would suffice as a step towards reparations. They pointed out that his unrepentant ways were likely to escalate the continuing tension in Ituri. At the same time, an apology and expression of regret could ease the existing tension in Ituri.<sup>cxxix</sup> These victims’ observations highlighted their expectations and the thorough follow-up of the convicted person’s activities (Lubanga). In addition, the victims also expressed their concerns about the consequences that might arise if Mr Lubanga returned to the Ituri region. They expressed fears that his release “might hamper implementation of the Trust Fund for Victims’ reparations programme, as a result of Lubanga’s influence on public opinion.” They averred that Lubanga’s return would negatively influence the collective reparations process and the symbolic reparations.<sup>cxxx</sup>

Regarding reintegration into society, the victims averred that Mr Lubanga would face challenges, which could negatively impact his ability to resettle in the community with peace and reconciliation. They reported the lack of motivation on Mr Lubanga’ part reflected his attitude towards victims.

On the risk of social instability, the victims felt the offender’s return to the region could aggravate the communities’ tension, provided Lubanga does not change his attitude.<sup>cxxxi</sup> They also contended that Mr Lubanga’s return might escalate reprisal attacks as well as the beginning of new war crimes.

Furthermore, the LRVs (victims V01) also claimed that Mr Lubanga has not participated in any conduct that shows that he has taken ‘*significant action*’ to benefit the victims. Mr Lubanga failed to make public apologies, which could have formed part of the reparations; he refused to cooperate throughout the reparations proceedings.<sup>cxxxii</sup> He objected to the inclusion of child soldiers in the reparations programmes. He blatantly refused to recognise the fact that he was responsible for the former child soldier’s recruitment. The Registry corroborated this assertion. The LRVs of Victims V02 argued that Lubanga was required to prove his good faith and wish to cooperate with the reconciliation process in Ituri.<sup>cxxxiii</sup> The LRV concluded that none of the sentenced person's conduct could be considered ‘*change*’ to qualify for the legal criteria for a sentence reduction. Finally, the LRV’s submitted that the statutory criteria for sentence reduction were not, at this juncture, present. Therefore, they deferred the sentence review for six months.<sup>cxxxiv</sup>

The Defence contested the LRV’s assertion and claimed that Lubanga offered an apology letter in response to this. They reiterated that Lubanga’s apologies were genuine. The Defence argued that the conduct antecedent to sentence review supported Lubanga’s application for a sentence reduction.

Nonetheless, the Panel considered the LRV’s submissions. It dismissed Lubanga's application for a sentence reduction because he failed to comply with the rules, including his lack of remorse and insincere apology. Given the information received from the LRVs, the Panel concluded that Mr Lubanga had not genuinely dissociated from his crimes.<sup>cxxxv</sup> However, the Panel acknowledged the prospect for the resocialisation and successful resettlement of Mr Lubanga in the DRC.<sup>cxxxvi</sup> Based on the above factors' assessment and the absence of evidence to establish Mr Lubanga’s dissociation from the crimes, the judges found no elements favouring Lubanga’s release.<sup>cxxxvii</sup> Furthermore, the judges held that Lubanga had not satisfied the court that there was any indication that supported the fact that he has taken ‘*significant action*’ to benefit the victims of his crimes.

Interestingly, the first sentence review underscored the significance of remorse and sincere apology in sentencing, especially in assessing the relationship between victims and perpetrators. Perhaps victims may find closure from the offender’s apologies. On the other hand, remorse and public apology could be mitigating factors for the convicted person at sentencing. Since apology may perform a restorative function towards mending the broken relationship between the victims and sentenced person, victims tend to expect this from the

perpetrator. In this particular case, from their perspectives, the victim believed the apology was not genuine. Thus, remorse and sincere apology could fit a medium to teach offenders lessons, vindicate victims and expedite reintegration into society.<sup>cxviii</sup>

In summary, the Panel found no factors in favour of Lubanga's release. The panel reached this decision based on the absence of evidence that he had genuinely dissociated himself from the crimes and failure to establish any indication that supported the fact that he had taken 'significant action' to benefit the victims of his crimes.

The sentenced person, Mr Lubanga, applied for a second review for a sentence reduction. Rule 224(3) of the Rules provides for the review of sentence reduction every three years. The Panel requested Defence, the Prosecutor, the LRV V01, the LRV V02, the OPCV, the DRC and the Registrar to submit written representations for the sentence review concerning Mr Lubanga Dyilo.<sup>cxix</sup> Since the initial sentence review, the review's scope was restricted to questions on any significant change in circumstances.<sup>cxl</sup> This review included a piece of new information available that demonstrated any changes since the issuance of the first sentence review decision.

*As claimed by LRVs V01:*

*"In view of the Legal Representatives of Victims V01, a traditional ceremony to be attended by the victims could be problematic for those who fear retaliation and would have to make known their participation in the proceedings. In their submission, the Letter of 7 September 2017, which refers extensively to the 2015 Sentence Review Hearing which was already considered by the Panel in its First Sentence Review Decision, does not reflect a genuine change of attitude."<sup>cxli</sup>*

The LRV V01 argued the sentenced person, Mr Lubanga, refused to cooperate in the reparations proceedings. They also averred that Mr Lubanga failed to accept that he was responsible for recruiting the former child soldiers, as he was reluctant to accept their reparations.<sup>cxlii</sup> The LRV V01 asserted that since Mr Lubanga's first sentence review decision, his conduct *had not shown his dissociation from the crimes from which he was sentenced.*<sup>cxliii</sup>

In a similar vein, the LRV V02 submitted that Mr Lubanga was required to establish good faith and wish to cooperate with the reconciliation process in Ituri. Although the LRV acknowledged Mr Lubanga's good faith and intention to collaborate with the reconciliation process in Ituri, however, this intention was not sufficient.<sup>cxliv</sup> *Besides, the LRV V02 pointed out the pernicious*



*reaction to Mr Lubanga's release, which included the risk of social instability, the potential for stigmatisation of victims during the implementation of the reparations.*"<sup>cxlv</sup> They submitted that Mr Lubanga should "adopt a more cooperative approach towards victims."<sup>cxlvi</sup>

Additionally, the Panel rejected Lubanga's statement concerning serving his full sentence to promote the victims' wellbeing. The Panel ruled that this did not constitute a significant change in circumstances because none indicated a significant action taken by Mr Lubanga for the victims' benefit.<sup>cxlvii</sup>

In reaching the decision, the Panel evaluated the significance of any actions taken by the sentenced person, Mr Lubanga, for the victims' benefit (as stipulated in rule 223(d) of the Rules). The Panel acknowledged Lubanga's proposal of a public ceremony to meet with victims and offer his apologies. Although this constituted a change in circumstance, the Panel did not consider it significantly sufficient to modify Lubanga's sentence. It reasoned that the proposal was more intentional than feasible.

These taken together, the Panel determined that there had been no significant change in circumstances since the first sentence review decision would merit a reduction of Mr Lubanga's sentence.<sup>cxlviii</sup>

Doubts remain as to the extent of ICC's role in the rehabilitation and reintegration of convicts. Rehabilitation is preventive-reduces recidivism-at the same time ensuring the reintegration of the offender into society.<sup>cxlix</sup>In a similar vein, offender rehabilitation is a form of punishment and a condition for early release. It is an offender-centred treatment mechanism and intervention.<sup>cl</sup>However, the absence of an individualised programme for the restoration of international prisoners and post-sentence strategy questions its effectiveness. Seemingly, there is disconnect between offender's rehabilitation, incarceration and the post-sentence phase.

Hola, in her research titled, "When justice is done" describes the offender rehabilitation program as "poorly."<sup>cli</sup> She submitted that the system could not support the restoration and reintegration of convicts. From her interview, she observed that the prison officers are not 'sufficiently trained' to promote offender rehabilitation in these facilities.<sup>clii</sup> Thus, one would conclude that the deficiency in the reformation and reintegration of these perpetrators would mean a loophole in the justice system—a futile effort to transform offenders.

Lubanga served his term in Makala local prison, Kinshasa, DRC. On 15 March 2020, Thomas Lubanga was released amidst jubilation by Kinshasa's residents after completing his time.<sup>cliii</sup>



He immediately celebrated his release at a Church with different attendees, including the Senate's second vice president.<sup>cliv</sup> This celebration saw the grand entry of the 'innocent messiah' in DRC.

As explained by him:

*"You know me better than these three international court judges who tried to present me as a devil, I remain Thomas Lubanga, who suffered with you in 2002 - 2003, during this conflict in Ituri I remain the same to you, my people."*<sup>clv</sup>

From Lubanga's address, one could infer the absence of remorse and his persistent reluctance to take responsibility for the war crimes, an issue which the victims raised during the sentence review. Nevertheless, most of the residents celebrated, and his statement portrayed him as a victor. Thus, it does not appear that the correctional facility made any impact during his incarceration. With this, his reintegration back into society may be smooth. Nonetheless, one ponders on the reactions of Lubanga's victims.

A day after the release of Lubanga from prison, Katanga was also released. The release of both ex-warlords is a consequence of an agreement between FRPI and the government. It has been noted that their release is a springboard for reconciliation because they are key players in promoting peace within the community.<sup>clvi</sup> Presumably, this idea is a strategic pathway of actively involving them in resettlements.

A summary of the main findings, together with the discussion, is provided in the following section.

## **DISCUSSING FINDINGS**

Henham's study reveals that international criminal law is founded on a measure of consensus for punishment and morality; however, there is little agreement on how to reinforce the penalty.<sup>clvii</sup> To date, there is no consensus on the path to take. One implication of this is the disparity between different national jurisdictions with varying approaches to sanctions and punishments. While the Rome Statute outlines the applicable penalties, presumably, the victims, in this case, are familiar with the penalties applicable in their local jurisdictions. However, some victims do not comprehend the ICC's approach to punishment or the justification for such sentences.

In Beresford words, “the passing of a sentence on an offender is, after all, probably the most public face of the international criminal justice system...”<sup>clviii</sup> Beresford’s statement draws our attention to the function of this phase of proceedings—sentencing—in international criminal justice. A climax that every stakeholder of the criminal justice system expects. Seemingly, transparency is expected in sentencing. Sentencing within the global context is described as a response to collective violence.<sup>clix</sup> A response to this end indicates a more significant number of victims. Victims and the international community look forward to international sentencing. As opposed to national jurisdictions, sentencing operates within a broader context of gross violations of human rights. It is settled that the Rome Statute provisions do not prejudice the existing national laws of the State parties.

The application of these rules differs within the ICC jurisprudence. ICC’s approach may seem liberal, given that it excludes some harsh penalties like a death sentence and corporal punishment. Hence, the delegations of the Rome negotiations agreed to more humane punishments.. There are divergent opinions by penal lawyers on the purpose of sentencing. Schabas proposes that human rights principles are more suitable to achieve rehabilitative goals over retributive goals. More attention should be given to rehabilitating offenders rather than promoting punitive purposes.<sup>clx</sup> Human rights principles are used as guidelines, explaining the leniency of penalties at the ICC, an attempt at rehabilitation. Nevertheless, there are still doubts if war criminals are genuinely rehabilitated.

In contrast, Danner believes that the driving force of international criminal sentencing is retributive justice.<sup>clxi</sup> While rehabilitation is a subset of retributive justice, retribution takes the forefront in sentencing. Perhaps, striking a balance between retribution, deterrence, and rehabilitation would enhance the role of retributive justice. Combining these parts would create a more holistic approach to sentencing if the court contributes towards rehabilitation and liaises with the national jurisdiction involved.

Judge Odio’s dissenting opinion highlighted the discrepancy between the declared sentence and the seriousness of the crime. However, the learned judge’s opinion on the sentence is unsatisfactory because the observed difference between the declared and recommended sentences, one year difference, seems negligible. The learned Judge’s opinion might have been more persuasive if she had suggested a higher sentence. Nonetheless, her observations on the majority’s decision reveal her objection to the length of the declared sentence.

On proportionality of the gravity of the crime and the deserving punishment, it is not yet settled if there is a threshold for measuring punishment. There is no universal principle; preferably, the cardinal proportional principle is applied; this principle of proportionality is not universal; it is determined based on moral relativism.<sup>clxii</sup> Thus, it is open to inconsistencies and different interpretations. From the Lubanga case data, it is apparent that the declared term of imprisonment of fourteen years expresses acts of retributive justice. Nonetheless, one could argue that these stated terms of imprisonment are perceived as an expression of general deterrence.

Interestingly, the Mr Lubanga sentencing demonstrates that victims were permitted to submit observations and participate through their LRVs during sentencing. This form of participation connotes a regulated and restricted medium of involvement. Therefore, it can be assumed that the sentencing phase enhances victim engagement, subject to judicial discretion. Also, one may argue that protecting the sentenced person's rights from a human rights perspective is the basis for this restricted participation. Cretney and Davis opine that based on moral reasons, victims should be given roles to play in the delivery of punishment because it can reassure them that they have '*public recognition and support*'.<sup>clxiii</sup> From these commentators' submissions, victims' role in delivering punishment should emanate from a moral standpoint.<sup>clxiv</sup> This submission resonates with Christie's analysis of 'stolen property' within most common law jurisdictions' adversarial system.<sup>clxv</sup> From a moral perspective, the victims should be allowed to participate. Nevertheless, the impact of their participation in the sentence is regulated by judicial discretion/power. This finding agrees with Henham's ideas, suggesting that the extent of victims' involvement in sentencing is curtailed by judicial discretion.<sup>clxvi</sup>

Moreover, the Lubanga case also emphasised the importance of apology (genuine) for victims in sentencing. The Prosecutor requested the convicted person to make a genuine apology to the victims because of his culpability.<sup>clxvii</sup> The Prosecutor asserted that he would be willing to reduce the request for a proposed thirty years to twenty years provided the convicted person made a genuine apology to the victims. The Chamber eventually dismissed this request. However, this request shed light on the significance of sincere apologies for victims. It also shows that apology from the convict may be perceived as an essential aspect of sentencing and review. Here, it performs a dual function as a mitigating circumstance for the defence and a restorative function for victims. As mitigating circumstances, they may be used as metrics for

punishment or as an approach to teach offenders lessons, vindicate and expedite reintegration into society.<sup>clxviii</sup>

Moving on now to consider sentence review, arguably, the sentence review gives victims a more participatory role- within two polarised parties. Similarly, one could argue that it permits a deeper interaction between the victims and the sentenced person. The conditions listed in Rule 223 appears to stress an integrative or holistic approach to addressing sentence review. These conditions expressly inform an expectation of the offender's reformation, particularly concerning the victims' relationship. By implication, the offender's early release is conditioned on 'significant actions' to address the harm caused to the victims. The same rules also emphasise the consequences of the offender's release on the community. Therefore, this explores the relationship between the offender, victims and the community.

Arguably, the sentenced person's denial to accept his responsibility for child soldier's recruitment and his reluctance to include them in the reparations programmes tacitly demonstrates the limit of sentencing; retribution's objective to ensure he took responsibility for his actions. Feasibly, the sentenced person's stance can impede rehabilitation or the process of restorative justice. The convicted person, Mr Lubanga, refusal to acknowledge his crimes; his lack of remorse and sincere apology reveals the implications on victims. The chamber cannot coerce the sentenced person to render an apology; instead, an apology from the convict should be voluntary. Coercion is not an effective strategy to receive an apology from the convict. Even imprisonment could not induce him to apologise to the victims.

Be that as it may, it is noteworthy that the Rome Statute provisions overlook the consequences that follow the offender's release due to sentence reduction or regular discharge after imprisonment. It is not sure if there is any provision to support the offender regarding reintegration after his release. The domestic criminal justice system needs to fill this gap to promote offenders' rehabilitation and reintegration.

In general, therefore, it seems that the ICC restricts victims' ability to influence sentencing, particularly the term of imprisonments for the convicted person. The finding observed in this study seem to be consistent with the research of Perez-Leon –Acevado. Perez-Leon points out that the ICC impose limits on the involvement of victims at the sentencing stage.<sup>clxix</sup>

Additionally, restorative justice process may provide a context for forgiveness and reconciliation, especially in community settings.<sup>clxx</sup> Admittedly, there is no pure model for

restorative justice process.<sup>clxxi</sup> However, it is clear from the sentencing process that the Rome Statute and the Rules of Evidence and Procedure infused some elements of restorative justice. Nonetheless, the effectiveness of restorative justice might be subverted in the absence of a guilty plea by the offender and refusal to participate in such activity.

The sentence review seems to embrace emoting and resolving the damaged relationship between the offender and victims rather than a more punitive approach. It also incorporates rehabilitation and reintegration of the convicted person; however, there seems to be a gap in the offender's restoration because the ICC does not monitor correctional facilities' role in transforming the victims. The convict might feign adherence to the conditions and factors (Article 110(4) and Rule 223) of good behaviour, prospects, reflections, individual characteristics and acknowledgement of responsibility for early release.

It has been shown that victim participation cannot fulfil all victims' interests, for instance, regarding story-telling. Truth commission can complement the works of the ICC. The environment of TRCs is more suitable for victims' healing and reconciliation. Sometimes victims' rights and interests are secondary to the mandate of the ICC-prosecution of the most responsible individuals for serious violation of human rights and humanitarian law. Therefore, there is a limit to the function of the ICC in achieving justice for victims.

The ICC's struggle to increase its focus on victims and strike a balance between retributive and restorative justice unravels during sentencing and sentence reduction. Factors such as the absence of a guilty plea by the convicted person and the sentenced person's reluctance frustrate the restorative justice approach. While there are elements of restorative justice such as interactions between the convicted person and victims, encounter, amends, and reintegration are best achieved in an informal setting, with cooperation from all stakeholders-victims offenders, and community. This activity could be implemented in the affected domestic jurisdiction with the monitoring and compliance by the ICC.

There is a thin line between justice and vengeance; a clamour for a higher sentence for the convicted persons shows the quest for vengeance. On the other hand, it appears the ICC is liberal (western ideas) in mapping out a declared sentence for the convicted person. Consequently, the outcome reveals the disconnect between the expectations of some victims and the declared. Unfortunately, from their perspective, the gravity of the crime should be proportionate to the penalty. A lesser term in prison may be interpreted as undermining their



suffering. In some domestic jurisdiction, their criminal laws stipulate the justifications for the penalty's punishment and determination<sup>clxxii</sup>. In the ICC context, neither the Rome Statute nor the ICC RPE set out the sentencing rationale. With this in mind, the victims might not have grasped the rationale behind the sentencing.

One could argue that sentencing outcome goes beyond proportionality; instead, it underscores both general and individual deterrence. The declared sentence serve as a just dessert for the convicted person as well as a deterrent function. Prior studies also note that deterrent as an arm of retributive justice serves a more rhetoric function then a pragmatic one.<sup>clxxiii</sup> Therefore, sentencing at the ICC drifts towards reforming the convict. The Rome Statute provisions and the ICC Rules of Evidence and Procedure mirrors a transformative approach towards retributive justice. A classic example is found in the strict conditions<sup>clxxiv</sup> set out for the imposition of a life sentence and the exclusion of death sentence—an attempt to foster reintegration and rehabilitation of offenders.

One notable point is the ICC's role and penal servitude in promoting the restoration of the offender. There are speculations about the outcome of rehabilitation for international prisoners, which raises the question of the degree of transformation the sentenced person is exposed to post-conviction. It is crucial to assess the effectiveness of rehabilitation and the impact of the sentencing decision on the convicts. The assessment would enable us to weigh the outcome of sentencing on international criminals. If the Rome Statute aims to encourage convicts' reformation through a rehabilitation program (imprisonment), it is reasonable to examine international sentences' enforcement system.

Since the ICC has not established a specialised prison for convicts, Article 103 of the Rome Statute stipulates that the sentenced person shall serve their term of imprisonment in a State designated by the Court from a list of States which have agreed to accept sentenced persons. Given this situation, it implies that convicts' transformation is left under the host State's supervision. Therefore, one question that comes to mind if these prisons are well equipped for the rehabilitation of international prisoners. The study of Hola et al. advances answers to this question. Hola found that correctional facilities lack provisions for transforming the calibre of international prisoners.<sup>clxxv</sup> She noted that the staff were exclusively trained for local prisoners.<sup>clxxvi</sup> If the host prison is not upgraded to quality of reform, then the international prisoner is subject to the lower/poor standard of rehabilitation, defeating the purpose of sentencing.

## CONCLUSION

The article has also shown that victims' role in sentencing is very restricted; thus, they have a relatively low impact on the sentencing decision. The extent of the applicability of their participation is subject to judicial discretion. Understandably, the Court must take caution when considering the impact of LRVs observations and submissions in sentencing. The court's sentence mostly requires objectivity because emotions and vengeance may obscure most victims' expectations. The chamber compromises the victims' expectations and the convicted person's rights, which results in a liberal approach. The Rome Statute envisages the humane treatment of a convicted person as opposed to strict punitive measures.

Unfortunately, the ICC sentence may not always meet victims' expectations. There is a thin line between justice, and vengeance.-The opposition of victims against the declared sentence reveals ICC's challenges in managing victims' expectations. A reasonable approach to tackle this issue is to strike a balance between victims' interests in sentencing and the justification of sentencing by the court. Additionally, the court may also need to enhance victim participation during sentencing by increasing the restorative function of dialogue. One explanation for this is the absence of statutory provision and arrangements for the sentenced person's reintegration into society.

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

It is commendable that the court recognised the importance of the convicted person's apology to the victims and the offender's expression of regret and remorse, which enables the restorative function.

The sentence review seems to embrace emoting and resolving the damaged relationship between the offender and victims rather than a more punitive approach. It also incorporates rehabilitation and reintegration of the convicted person; however, there seems to be a gap in the offender's restoration because the ICC does not monitor correctional facilities' role in transforming the victims. The convict might feign adherence to the conditions and factors (Article 110(4) and Rule 223) of good behaviour, prospects, reflections, individual characteristics and acknowledgement of responsibility for early release.

Research might also explore the ICC's role in reintegrating the victims and offenders in the community. It is suggested that the ICC should establish a unique rehabilitation centre for convicts to serve their term; this will ensure monitoring and compliance with standards. It is also noted that the convicts must be willing to partake in the rehabilitation. For example, a sentenced person who denies responsibility for the charges and allegations may not be interested in his restoration. This information can be used to develop targeted interventions to supervise and upgrade offenders' correctional facilities for better results.

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cxii "In considering these factors, the majority chamber meted a separate sentence for each of the three crimes for which Lubanga had been convicted. The following is the crime and the corresponding punishment: Conscription of children under 15 years old-13 years imprisonment; Enlistment of children under 15 years old-12 years imprisonment; and The use of children under 15 years to participate actively in hostilities-14 years imprisonment.

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<sup>clxxiii</sup> Ralph Henham, *Punishment and Process in International Criminal Trials*(Ashgate Aldershot, 2005)

<sup>clxxiv</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court ,228-234;United Nations Document A/AC.249/WP.35;Decisions taken by the Preparatory Committee at its Session held from 1 to 12 December 1997, Annex V, Report of the Working Group on Penalties , UN Doc. A/AC.249/1997/1.9/Rev.1,p.18;Rolf Einar Fife, “Penalties” in Roy Lee(ed.) *The International Criminal Court: The Making of the Rome Statute* (The Hague Kluwer 1999)319-344;Rolf Einar Fife, “Article 77”, in Otto Triffterer(ed.), *Commentary on the Rome Statute for the International Criminal Court: Observers Notes, Article by Article*(Brill Nijhoff 1999)985-998.



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

<sup>clxxvi</sup> Ibid.

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

