

# INJURING FAMILY RELATIONS THROUGH GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

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*Drawing a line between victims and non-victims in the context of gross violations of international humanitarian and international human rights law is not an easy task. On the one hand, mass atrocities lead to widespread victimisation of individuals, groups and communities who suffer from various types of harm and damage incurred in the process of their commission. On the other hand, clearly not every person affected by an ongoing conflict and mass criminality should be considered an injured party. This article addresses such conceptual dilemmas by casting light on the function of family relations as grounds of indirect victimhood. To this end, it identifies two theoretical models of victimhood and showcases how they have been put into practice by international and hybrid courts and tribunals in their respective reparative and punitive regimes.*

**Keywords:** family relations, victimhood, international criminal tribunals, hybrid criminal tribunals

## 1. INTRODUCTION

Despite its singular form, the concept of victimhood is not one-dimensional. There are in fact two related words – direct and indirect – which define victimhood in domestic and international law. This commonly used distinction, however, is far from clear, which is why it leads to further conceptual questions. What makes one person a direct victim and another an indirect victim? What are the criteria employed to determine this? In which forms and modalities does direct and indirect victimhood appear in criminal trials? Is there any difference between these conceptions as far as their functional justification is concerned?

The article addresses these issues in two steps. The first step is by identifying various understandings of victimhood in proceedings before the International Criminal Tribunals for Rwanda and for the former Yugoslavia (ICTR, ICTY), the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) on the basis of the distinction between harm-based and wrong-based models of victimhood; the second step is by showcasing the function that these international and hybrid criminal tribunals (IHCTs) have attributed to

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indirect victimhood in relation to reparative and punitive justice (Sections 3, 4 and 5).<sup>1</sup> In this respect it will be demonstrated that, despite certain similarities, there are material differences in the way in which the concept of indirect victimhood has been approached in reparation orders and sentencing decisions of IHCTs. In some configurations it has been considered explicitly (reparation orders of the ICC). In others, however, it has been referred to only in passing, with no mention of the label of indirect victimhood (sentencing decisions of IHCTs). For this reason, I will argue that in order to comprehend the function and scope of indirect victimhood before IHCTs, it may often be indispensable to search for a broader idea of indirect victimisation rather than for a specific term ('indirect' victim) as such (Section 6.1).

In addition to these analytical objectives,<sup>2</sup> the article pursues two normative arguments relating to the character of indirect victimhood and the function of family relations in the context of gross violations of international human rights and humanitarian law.

The first claim refers to argumentative shortcomings of the jurisprudence of IHCTs ('arbitrariness': Section 6.2). It provides that while *some* types of harm sustained by family members and other people regarded as indirect victims should be assessed and weighed in relation to reparative and punitive justice, they should not be taken into consideration by IHCTs – especially in their sentencing decisions – as freely as has been the case to date. Considering that many decisions of IHCTs do not scrupulously substantiate general requirements of causation and imputation relating to this category of victims, it asserts that this approach is inherently unjust towards the perpetrators of international crimes in that it may lead to an overly extensive attribution of unverified and remote consequences of their actions in the process of determining the sum of reparations and selecting an appropriate punishment.

The second claim revolves around the scope of indirect victimhood and the nexus between direct and indirect victimhood ('substantive argument': Section 6.3). In contrast to some decisions of IHCTs, the article rejects the family criterion that limits the scope of indirect victimhood only to those who are formally related to direct victims (such as parents). Instead, it advocates an

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<sup>1</sup> Substantive justice is not the only formula of justice that IHCTs pursue in their daily work. The other is procedural justice, which may also be used to assess the system of international criminal justice through the lens of victims' interests; see Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests through Participation at the International Criminal Court' (2015) 26 *Criminal Law Forum* 255, 264 ('Victim-orientated justice would reflect victims' interests in procedural and substantive justice dimensions, by enabling victims to participate and ensuring that such interests are considered in decision making'); Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice' (2017) 5 *Restorative Justice* 198 (offering critical remarks on how victim participation operates in practice). Mirjan Damaška indicates that international criminal tribunals try to pursue numerous objectives of an intrinsically diverse character. In his own words, '[i]t does not require much pause to realize that the task of fulfilling all these self-imposed demands is truly gargantuan': Mirjan Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 331.

<sup>2</sup> To borrow from Michelle Madden Dempsey and Matthew Lister, this article thus engages in 'conceptual activism'. As pointed out by these authors, 'the conceptual activist offers arguments regarding the substance and scope of concepts in hopes that the improved understanding of the concepts will ultimately improve policies': Michelle Madden Dempsey and Matthew Lister, 'Applied Political and Legal Philosophy' in Kasper Lippert-Rasmussen, Kimberley Brownlee and David Coady (eds), *A Companion to Applied Philosophy* (Wiley Blackwell 2017) 313, 321.

inclusion of elaborate references to *all* indirect victims in decisions of IHCTs (rather than merely to those sustained by ‘direct victims and their relatives’), it questions the recognition of harm sustained by undefined collective victims and suggests that some but not all types of harm sustained by indirect (and direct) victims should be afforded a normative weight. Recognising the interests of all potential indirect victims, the article further argues against an acceptance of family-oriented presumptions and postulates that all persons capable of proving that criminal acts against a direct victim have led to certain proximate and negative consequences on their part should be considered indirect victims of international crimes.

## 2. THEORETICAL BASES OF VICTIMISATION AND VICTIMHOOD: INTERNATIONAL LAW AND THEORETICAL APPROACHES

### 2.1. HARM-BASED AND WRONG-BASED APPROACHES TO VICTIMHOOD

Victimisation represents the victim-centred perception of gross violations of international human rights and humanitarian law.<sup>3</sup> In other words, it reflects the commission of an international crime from the perspective of victims and, as such, it rearranges the dominant approach to the crime phenomenon, which consists of picturing the crime through the lens of its commission,<sup>4</sup> and a subsequent attribution of such criminal (in)actions to an offender.<sup>5</sup> The concept of victimhood, in turn, reflects the status of being a (crime) victim, and takes either a naturalistic (harm-based) or a normative (wrong-based) form.<sup>6</sup> Depending on which model of victimhood is applied, not only the contours of direct victimhood but also the normative content and boundaries of indirect victimhood will change accordingly. However, before presenting the use of these models in relation to gross violations of international human rights and humanitarian law, it is useful to start

<sup>3</sup> See also Joshua Kleinfeld, ‘A Theory of Criminal Victimization’ (2013) 65 *Stanford Law Review* 1087 (discussing the concept of victimisation in relation to the vulnerability of individual victims).

<sup>4</sup> All the same, what constitutes an international crime – the source of legally relevant victimisation in international criminal law – is still debated; see Kevin Jon Heller, ‘What Is an International Crime? (A Revisionist History)’ (2017) 58 *Harvard International Law Journal* 353; and responses from Alejandro Chehtman, Astrid Reisinger Coracini and Mia Swart: Alejandro Chehtman, ‘“What Is an International Crime?”: What Kind of Question Is It and How We Should Answer It’, *Harvard International Law Journal*, <https://harvardilj.org/wp-content/uploads/sites/15/Cehtman-Response-1.pdf>; Astrid Reisinger Coracini, ‘“What Is an International Crime?”: A Response to Kevin Jon Heller’, *Harvard International Law Journal*, <https://harvardilj.org/wp-content/uploads/sites/15/Coracini-Response.pdf>; Mia Swart, ‘The Legal Foundation for Criminalizing International Crimes: A Response to Kevin Jon Heller’, *Harvard International Law Journal*, <https://harvardilj.org/wp-content/uploads/sites/15/Mia-Swart.pdf>.

<sup>5</sup> Which, admittedly, raises significant and complex issues in its own right; see Neha Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Hart 2005).

<sup>6</sup> See also Pietro Sirena, ‘The Concepts of Harm in Italian and French Civil Law’ in Jean-Sébastien Borghetti and Simon Whittaker (eds), *French Civil Liability in Comparative Perspective* (Hart 2019) 205, 212 (noting three different methods for delimiting the scope of liability: the French model consisting of the use of a ‘general clause’, the German model understood as an infringement of rights enumerated in the provision, and finally the Italian model, which is located somewhere in the middle by introducing the requirement that reparable types of harm must be unlawful first (*danno ingiusto*)); Cees van Dam, *European Tort Law* (2nd edn, Oxford University Press 2013) 168–69.

with an explanation of why they should not be treated as simply different methods of expressing the same normative content of victimhood.

The harm-based model of victimhood assumes, as its name suggests, that what matters is whether anyone has been *harmed* by an action or inaction of a prima facie criminal character. This model thus requires there to be a nexus between such (*in*)actions and negative effects (*results* or *consequences* – see below) that stem from them. It remains immaterial, however, which interests or goods become violated by the said criminal behaviour. As long as there is a causal connection between the presumed source of victimisation and its various effects (harm), a person who has sustained the latter will be recognised as a victim. The harm-based model accepts virtually every crime to be a source of diverse types of harm that may be sustained by various people even if they are not immediate victims against whose goods specific criminal acts have been directed. One may thus be a direct victim of a crime which does not violate their individual, specifically protected interests, but merely exerts some negative effects (harm) onto them.

An approach that revolves around interests, goods and rights is, in turn, depicted by the wrong-based model of victimhood, which probes into the protective sphere of every type of crime. For example, one becomes a direct victim of the crime of murder only when one is unlawfully killed in so far as the crime of murder is prohibited in order to protect human beings' right to life. An analogous reasoning can be employed in examining other crimes (theft, pillage, rape), although some offences are more difficult to pinpoint from that victim-centred perspective (offences against the state). In terms of victimhood, what the wrong-based model therefore submits is that it is only those subjects against whose protected interests an act has been directed who can be recognised as direct victims (property rights of an owner – theft). Others, in turn, even if they have also sustained some harm (XYZ's loss of income as a result of the theft of ABC's car) cannot be treated in this way as their violated goods or interests are not protected by the definition of the offence in question (theft – loss of income by a third party).

The wrong-based model of victimhood thus creates a strong normative link between each unlawful act and its direct victims, and allows one to identify them even before an offence is committed through analysis of its definition.<sup>7</sup> One thing that remains debatable in relation to the wrong-based model, however, is whether it pursues what may be called a constrained or an extended model of victimisation. The former assumes that one may be considered a victim only if the crime has been *committed* and one's interests have been effectively *infringed* (right to life – death). By contrast, the latter model does not deny this dimension but supplements it with an additional protective sphere against acts which do not *violate* but merely *endanger* certain protected interests. Accordingly, one may become a victim even if the violation (result –

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<sup>7</sup> Unless one accepts the claim that there are victimless crimes: see Louis Veneziano and Carol Veneziano, 'Are Victimless Crimes Actually Harmful?' (1993) 9 *Journal of Contemporary Criminal Justice* 1; Alan Wertheimer, 'Victimless Crimes' (1977) 87 *Ethics* 302, 305 (noting various definitions and approaches to the question of what makes a crime victimless).

death) does not occur. It is sufficient that one's protected interests have been put at risk by a criminal act (victim of an attempted murder).<sup>8</sup>

A comparative analysis of both models of victimhood justifies the conclusion that while they overlap to some extent, each focuses on different aspects of victimisation. The wrong-based model considers only normative criteria, which are either expressed explicitly (death as a normative result) or not (the right to sexual autonomy protected under the laws prohibiting sexual violence).<sup>9</sup> It is not concerned with more remote consequences. The harm-based model, in turn, is premised on both immediate and distant effects (types of harm) which may often be numerous and not easily identifiable.

Some conceptual assistance in this respect, however, may be found in the distinction between conduct and result crimes. The latter category, as its name suggests, points to specific results in definitions of crime. Result crimes, such as murder, may thus be committed only when the requisite result (death) actually occurs. By contrast, conduct crimes do not introduce such conditions, which means that they may be committed regardless of their negative effects.<sup>10</sup>

However, *results* (harm 1) do not exhaust the whole category of negative *effects* of victimisation; for, apart from results, crimes may also bring *consequences* (harm 2). According to the adopted terminology, effects of victimisation may thus take the form of *results* or *consequences*. What distinguishes consequences from results is that only the latter category takes a normative form by being mentioned explicitly in definitions of specific offences (death as a result of murder). Results, therefore, characterise only result crimes. Consequences, on the other hand, may arise in relation to both result and conduct crimes in that they are not defined in their respective definitions but may arise following their commission.

This distinction, arguably, is useful for when the concept of victimhood is wrong based, consequences (such as psychological harm resulting from rape) will remain immaterial for determining who may be a direct victim.<sup>11</sup> Results, on the other hand, will always have to be considered

<sup>8</sup> This idea finds application especially in relation to crimes of endangerment as well as inchoate and preparatory acts which precede the actual commission of a crime; see Antony Duff, 'Criminalizing Endangerment' (2005) 65(3) *Louisiana Law Review* 967; Jérôme de Hemptinne, 'Attempt' in Jérôme de Hemptinne, Robert Roth and Elies van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge University Press 2019) 340 ('Another justification that is usually put forward by those advocating the criminalization of attempt in ICL is the danger posed to the international legal order by those individuals who intend to commit international crimes').

<sup>9</sup> Result crimes may be considered graver *in abstracto*. This is because their function is to provide reasons to avoid bringing about certain results. In *Ntaganda*, the ICC made this distinction clear when it noted that 'ordering displacement does not require for displacement as such to actually occur', and therefore it was justified for the Chamber to consider 'the crime under Article 8(2)(e)(viii) of the Statute to be *in abstracto* less serious compared to forcible transfer of population, which requires the actual infliction of harm on the victims': ICC, *Prosecutor v Ntaganda*, Sentencing Judgment, ICC-01/04-02/06-2442, Trial Chamber, 7 November 2019, para 163.

<sup>10</sup> eg, in *Ntaganda*, the ICC established that '[t]he prohibition of attacks directed against civilians aims to protect lives and to avoid the unnecessary suffering of individuals not taking a direct part in hostilities during an armed conflict. Article 8(2)(e)(i) of the Statute does not require any actual harm to civilians to ensue from the attack and the crime can be committed by its mere launching': *ibid* para 53 (emphasis added). In *Ongwen*, in turn, the Chamber admitted that this is 'a conduct crime': ICC, *Prosecutor v Ongwen*, Sentence, ICC-02/04-01/15-1819-Red, Trial Chamber, 6 May 2021, para 149.

<sup>11</sup> In relation to the above excerpt from *Ntaganda* (n 10), the wrong-based model would attempt to locate those individuals who did not take a direct part in hostilities but who were targeted by an offender; they would be

by a court of law as they must be proven for the crime to have occurred and, given that they specify the protective sphere of each crime (murder – death – right to life), are necessary for the determination of direct victimhood.<sup>12</sup> By contrast, and as regards the harm-based model of victimhood, there is little difference between results and consequences as they both provide sufficient grounds for the recognition of one's direct and indirect victimhood. The harm-based model of victimhood is therefore broader in this respect.

It does not follow, however, that the harm-based model is broader in every case. For, as mentioned above, the wrong-based model may also recognise an endangerment of certain protected interests as the basis of direct victimhood. In such a case, neither results nor consequences need to be corroborated for an applicant to be accepted as a direct victim. It suffices that their interests have been endangered by the criminal behaviour of an offender. Although it cannot be excluded that the victim applicant will be able to prove to have suffered, for instance, psychological harm as a result of an attempted crime,<sup>13</sup> in practice this seems to be less probable mainly for evidentiary reasons. The wrong-based model thus appears to be more effective in safeguarding such interests by creating an additional sphere of protection around the core protected value (life – (1) attempted murder – (2) murder).

Furthermore, it should also be stated that neither of the two models of victimhood is flawless. The harm-based approach suffers from a legal under-specification by leaving broad discretionary powers to the judges as far as identification of relevant types of harm is concerned (see Section 6.3). It thus moves the whole burden of determining the scope of victimhood to evidentiary standards and causal requirements. Moreover, the harm-based model makes it difficult to distinguish between immediate and remote victims pursuant to the causal distance between criminal acts and the consequences sustained by them. As regards the wrong-based model, its main problem lies in identifying and framing interests and goods protected by specific offences (for instance, the crime of aggression). At least in some configurations, this exercise may even provide arguments for questioning whether any abstract (individual) victimhood can be derived from such offences at all.

## 2.2. HARM-BASED AND WRONG-BASED MODELS OF VICTIMHOOD IN INTERNATIONAL LAW

According to the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>14</sup> victims are:

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recognised as direct victims. By contrast, the harm-based model would require an applicant to identify types of harm that they have suffered as a result of the commission of this crime irrespective of their status under international humanitarian law (individuals not taking a direct part in hostilities).

<sup>12</sup> *Ongwen*, Sentence (n 10) para 153 ('the value protected by the incrimination is human life, which is a strong factor of gravity').

<sup>13</sup> Nevertheless, in the case of *Ntaganda*, the Chamber noted that 'victims of the attacks, particularly the victims of attempted murder still bear permanent scars with serious consequences, including trauma, psychological harms, and extensive physical scarring': ICC, *Prosecutor v Ntaganda*, Reparations Order, ICC-01/04-02/06, Trial Chamber, 8 March 2021, para 146 (emphasis added). They were thus recognised by the ICC as direct victims of an attempted murder.

<sup>14</sup> UNGA Res 40/34 (29 November 1985), UN Doc A/RES/40/34. See also M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 *Human Rights Law Review* 203.

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

Apart from direct victims, the Declaration recognises the concept of indirect victimhood, stipulating that ‘the term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization’.

Twenty years later, the Basic 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 were adopted.<sup>15</sup> Although they feature a similar definition of victimhood in their provisions and refer in a similar fashion to family members as potential victims, in comparison with the Declaration they focus on a more specific source of victimisation, namely an infringement of international human rights law and international humanitarian law. Accordingly, victims are defined as:

persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate ..., the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

These broad and internally varied definitions absorb both *types of harm* (injury, suffering, loss) and *wrongs* (impairment of rights) as grounds of victimhood.<sup>16</sup> As such, they combine two previously discussed theoretical models of victimhood. Moreover, they are not confined to direct injuries but provide that those individuals who were not directly targeted may also fall within the scope of legally recognised victimhood. Since such victims do not have to be in any way related to a direct victim (immediate family or dependants), the personal scope of victimhood derived from these documents is undoubtedly broad.

<sup>15</sup> UNGA Res 60/147 (16 December 2005), UN Doc A/RES/60/147. See also Theo van Boven, ‘Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines’ in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill-Nijhoff 2009) 17.

<sup>16</sup> For the presentation of an idea that victimisation may consist of the violation of ‘subjective rights’, see Philipp-Alexander Hirsch, ‘Verletzung in eigenen Rechten – Zur strafrechtsdogmatischen Stellung des Verletzten’ in Markus Abraham and others (eds), *Verletzte im Strafrecht* (Nomos 2020) 31. Moreover, it has been argued that ‘rights and wrongs may come apart’: Nicolas Cornell unpacks this argument by claiming that one may be *wronged* even if it is not their right that has been violated, but somebody else’s. Cornell expresses this idea in stating that ‘parties may sometimes be put in a special moral position to complain and seek justification ex post, not by conduct over which they could have asserted any rights claim of their own ex ante, but rather by conduct that was wrong for other reasons, like violating someone else’s rights’: Nicolas Cornell, ‘Wrongs, Rights, and Third Parties’ (2015) 43 *Philosophy & Public Affairs* 109, 113.



### 2.3. PUNITIVE AND REPARATIVE JUSTICE APPROACHES TO VICTIMHOOD

International punitive justice advances predominantly retributivist and deterrent ideals.<sup>17</sup> Together with other, less relevant sentencing objectives, these two philosophical currents form bases for punishing guilty offenders. They evidence that punishment should be both backward- and forward-looking. From the victim-centred perspective, this signifies that punishment is intended to address both the wrongness and harmfulness of acts already committed (for instance, against specific victims – ‘real victimhood’) as well as to prevent other similar violations from taking place in the future (against potential victims – ‘future victimhood’). Even if the spectrum of retributivism and deterrence is not constrained solely to that victim-centred perspective but includes other actors (an offender, society and others), real and future victimhood are arguably present in both of these theories.

As demonstrated by the jurisprudence of IHCTs, just sentence is determined, among others, by reference to the gravity of crimes and aggravating circumstances, which may also comprise the consequences of international crimes such as harm suffered by direct and indirect victims.<sup>18</sup> With regard to the gravity criterion, it has been reasoned that some international crimes are inherently more serious than others.<sup>19</sup> In *Al Mahdi*, for instance, the ICC clarified that ‘not all crimes forming the grounds for a criminal conviction are necessarily of equivalent gravity and the Chamber has the duty to weigh each by distinguishing, for example, between those against persons and those targeting property’.<sup>20</sup> The reason for this differentiation lies in an *abstract victimhood* that underpins most international crimes. Certain values, such as life (murder) or sexual autonomy (rape), are therefore more significant than other goods such as property (pillage).<sup>21</sup> Consequently, crimes directed at vital interests such as life will be considered particularly grave – both *in abstracto* and *in concreto* – justifying a more severe punitive response to their violation or endangerment.<sup>22</sup>

<sup>17</sup> For a comprehensive case law analysis, see Marc Zeccola, *Die Strafzumessung im Völkerstrafrecht unter besonderer Berücksichtigung der Rechtsprechung der Ad-hoc-Tribunale der Vereinten Nationen* (Duncker & Humblot 2018); Andreas Werkmeister, *Straftheorien im Völkerstrafrecht* (Nomos 2015); Barbora Holá, *International Sentencing: ‘Game of Russian Roulette’ or Consistent Practice?* (BOXPress 2012); Silvia D’Ascoli, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (Hart 2011); Luigi Cornacchia, *Funzione della Pena Nello Statuto della Corte Penale Internazionale* (Giuffrè Editore 2009).

<sup>18</sup> ICC, *Prosecutor v Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15, Trial Chamber, 27 September 2016, para 76 (in addressing the gravity of the crime committed, the Court considered, among others, the extent of damage caused).

<sup>19</sup> *ibid* para 77.

<sup>20</sup> *ibid* para 72.

<sup>21</sup> *Ntaganda*, Sentencing Judgment (n 9) para 14 (underscoring the distinction between crimes against persons and crimes against property of which the former are less grave from the perspective of potential victims).

<sup>22</sup> ‘[T]he gravity is generally measured *in abstracto*, by assessing the constitutive elements of the crime and the mode of liability in general terms, and *in concreto*, by assessing the particular circumstances of the case looking at the *degree of harm* caused by the crime and the culpability of the perpetrator’: *ibid* para 11 (emphasis added).



Indirect victimhood, however, is not expressed in definitions of international crimes. As such, it does not constitute another principle justifying international criminalisation<sup>23</sup> and cannot be translated directly into an assessment of the *in abstracto* gravity of an offence. On the other hand, once confirmed with regard to the circumstances of a particular case, indirect victimhood may also modify the penalty imposed on a responsible actor. For instance, according to Rule 145(1)(c) of the Rules of Procedure and Evidence of the ICC (RPE ICC),<sup>24</sup> in determining the sentence the Court shall ‘give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to *the victims and their families*’.<sup>25</sup> Similarly, the ICTY has held that the gravity of the offences is assessed, among others, through the prism of ‘the effect of the crimes on the broader targeted group, and the suffering inflicted on the victims’.<sup>26</sup>

Reparative justice is a more recent addition to the field of international criminal law.<sup>27</sup> Its philosophical foundations have been displayed most explicitly in provisions and the case law of the ECCC and the ICC. Rule 23(1)*quinquies* of the Internal Rules of the ECCC (IR ECCC)<sup>28</sup> stipulates, for instance, that reparations awarded to Civil Parties ‘acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused’ has been convicted and ‘provide benefits to the Civil Parties’. In the legal regime of the ICC reparations are intended to fulfil several functions as well. To start with ‘they oblige those responsible for serious crimes to repair the harm they have caused and enable the Court to ensure that offenders account for their acts’.<sup>29</sup> Moreover, they aim to ‘relieve the suffering caused by serious crimes, afford justice to the victims by addressing *the consequences* of the wrongful acts committed by the convicted person, deter future violations, and enable the victims to recover their dignity’.<sup>30</sup> However, even if specific forms and modalities of affording reparative justice to victims will differ given the circumstances of specific cases, it has been explicitly acknowledged that ‘[a] victim-centred approach shall guide the reparations proceedings, and the Court should strive to ensure that reparations are prompt and meaningful to the victims’.<sup>31</sup> By its nature, reparative justice is therefore focused predominantly on countering negative effects of victimisation. Its function, however, is

<sup>23</sup> Kai Ambos, ‘Punishment Without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law’ (2013) 33 *Oxford Journal of Legal Studies* 293 (seeking justification in the idea of the supranationality of the world order and the concept of the ‘world citizen law’ (*‘Weltbürgerrecht’*)); Kai Ambos, ‘The Overall Function of International Criminal Law: Striking the Right Balance between the *Rechtsgut* and the Harm Principles’ (2015) 9 *Criminal Law and Philosophy* 301; Larry May, *Crimes against Humanity: A Normative Account* (Cambridge University Press 2004); Antony Duff, ‘Authority and Responsibility in International Criminal Law’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 589, 600.

<sup>24</sup> Rules of Procedure and Evidence of the International Criminal Court (entered into force 9 September 2002), ICC-ASP/1/3 (Part II-A), ICC-PIDS-LT-02-002/13\_ENG (RPE ICC).

<sup>25</sup> Emphasis added.

<sup>26</sup> ICTY, *Prosecutor v Galić*, Judgment and Opinion, IT-98-29-T, Trial Chamber, 5 December 2003, para 758.

<sup>27</sup> Sara Kendall, ‘Restorative Justice at the International Criminal Court’ (2018) 70 *Revista Española de Derecho Internacional* 217.

<sup>28</sup> Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 9), 16 January 2015 (IR ECCC).

<sup>29</sup> *Ntaganda*, Reparations Order (n 13) para 2.

<sup>30</sup> *ibid* para 3 (emphasis added). Nonetheless, according to the terminology adopted in this article (Section 2.1), they address the effects (results and consequences) of victimisation, rather than simply its consequences.

<sup>31</sup> *ibid* para 4.

not limited to direct victims and their harm as – at least in theory – it follows an ambitious vision that every type of harm stemming from international crimes and sustained by both direct and indirect victims should be recognised as reparable (critically, Section 6.3).

Despite their general importance, the above definitions of victimhood (Section 2.2), developed within the United Nations system, were not translated directly into the pluralistic system of international criminal law. The ensuing discrepancy spans not only definitional but also practical aspects of victim participation before IHCTs:<sup>32</sup> both direct and indirect victims are no longer merely anonymous and distant figures whose presence in international criminal justice remains limited to an indirect form (judicial reasoning in the field of punitive and reparative justice) or to the traditional role of witnesses in criminal proceedings.<sup>33</sup> Some IHCTs have also afforded victims a separate standing of direct participant in a criminal trial<sup>34</sup> and granted them specific rights (such as the right to reparations<sup>35</sup>). To whom the victim label will be afforded before these tribunals is therefore not just of symbolic importance as it may also bring significant practical consequences for the system of international criminal justice.

In Sections 3, 4 and 5 the article presents three approaches to victimhood that can be derived from documents and case law of IHCTs. Moreover, it demonstrates how the concept of indirect victimhood premised on both family and situational links has been employed in the field of punitive and reparative justice.

### 3. THE CONCEPT OF INDIRECT VICTIMHOOD BEFORE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

#### 3.1. FAMILY RELATIONS, INDIRECT VICTIMHOOD AND REPARATIVE JUSTICE BEFORE THE ICTY AND THE ICTR

The first model of victimhood was adopted by the ICTY and the ICTR (ad hoc tribunals). Although victims possessed a markedly weak position in the proceedings before these tribunals,<sup>36</sup> the Rules of Procedure and Evidence (RPE ICTY/ICTR)<sup>37</sup> did provide for a definition of

<sup>32</sup> Kinga Tibori-Szabó and Megan Hirst (eds), *Victim Participation in International Criminal Justice. Practitioners' Guide* (Springer 2017); Charles P Trumbull, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29(4) *Michigan Journal of International Law* 777.

<sup>33</sup> Until entry into force of the ICC Statute (Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90), 'victims were recognized only in their capacity as witnesses' in international criminal justice: Mina Rauschenbach and Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?' (2008) 90 *International Review of the Red Cross* 441, 444.

<sup>34</sup> Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011).

<sup>35</sup> Michaela Lissowsky, *Das Menschenrecht auf Reparationen. Theoretische Grundlagen und praktische Umsetzung am Internationalen Strafgerichtshof* (Duncker & Humblot 2021).

<sup>36</sup> Rosette Muzigo-Morrison, 'The Rights of Victims' in Anne-Marie de Brouwer and Alette Smeulders (eds), *The Elgar Companion to the International Criminal Tribunal for Rwanda* (Edward Elgar 2016) 385.

<sup>37</sup> ICTY, Rules of Procedure and Evidence, UN Doc IT/32/Rev.50, 8 July 2015; ICTR, Rules of Procedure and Evidence, last revised 13 May 2015. In what follows, I mainly invoke the ICTY system to present the framework of ad hoc tribunals.

victimhood. Accordingly, a victim was defined as '[a] person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed' (Rule 2 RPE ICTY/ICTR). This concise definition explicitly displayed a narrow conception of victimhood premised on *wrongs* as factors that delimit its scope (the wrong-based model). As such, it hinged on a normative nexus between specific international crimes and their victims. This, in turn, seems to have precluded any notion of indirect victimhood in so far as indirect victims are not persons *against whom* a criminal act is being committed. This feature characterises only direct victims.

The definition adopted by ad hoc tribunals thus followed the model of direct victimisation and victimhood. It was premised on the idea that for a person to be recognised as a victim, an offender must act against their protected interests. To give just two, rather obvious, examples: in the case of rape, the raped person would be considered the sole direct victim of this crime; in the case of murder, only a killed person would be a direct victim. Accordingly, for the recognition of victimhood it would not be sufficient that certain harm has stemmed from a crime if the said crime was not committed *against* an alleged victim.

The definition of victimhood applicable before the ICTY and the ICTR could not be translated directly into the sphere of reparative justice as neither of the two ad hoc tribunals was empowered to grant reparations to victims of international crimes. Instead, their legal frameworks provided for practically inoperative mechanisms of restitution and compensation for victims.<sup>38</sup> Article 24(3) of the ICTY Statute<sup>39</sup> stipulated, for instance, that '[i]n addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their *rightful owners*'.<sup>40</sup>

More detailed regulations were included in the rules of ad hoc tribunals. Rule 105(D) RPE ICTY provided that '[s]hould the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate'. This provision, however, did not feature any explicit reference to victims as such. Nevertheless, one could argue that 'rightful owners' who have lost their property are in fact direct victims given that it is to their detriment that the crime attributed to an offender was committed.<sup>41</sup> On the other hand, restitution of this kind could not be granted to indirect victims as the only harm from which they could suffer would be secondary by its nature – that is, an injury sustained from the loss of property.

Apart from substantiating the said provision in relation to the restitution of property, the Rules also contained a separate provision entitled 'Compensation to Victims', which provided

<sup>38</sup> Rodney Dixon and Karim AA Khan, *Archbol: International Criminal Courts. Practice, Procedure and Evidence* (Sweet & Maxwell 2013) 1484; Nandor Knust, *Strafrecht und Gacaca: Entwicklung eines pluralistischen Rechtsmodells am Beispiel des ruandischen Völkermordes* (Duncker & Humblot 2013) 238.

<sup>39</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (3 May 1993), UN Doc S/25704, adopted by UNSC Res 827 (25 May 1993), UN Doc S/RES/827 (ICTY Statute).

<sup>40</sup> Emphasis added.

<sup>41</sup> Not only a direct offender could be held responsible, however; see Rule 105(B) RPE ICTY ('The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty').

that '[t]he Registrar shall transmit to the competent authorities of the States concerned the judgment finding the accused guilty of a crime which has caused injury to a victim' (Rule 106 RPE ICTY). Accordingly, victims could be compensated on the basis that they have suffered *harm* (injury) stemming from a crime attributed to an offender only if domestic courts issued such decisions. In spite of defining 'victims' in Rule 2 RPE ICTY/ICTR, however, the framework established for ad hoc tribunals did not specify whether *indirect* victims could also pursue their own compensatory actions before domestic courts on these bases.

### 3.2. FAMILY RELATIONS, INDIRECT VICTIMHOOD AND PUNITIVE JUSTICE BEFORE THE ICTY AND THE ICTR

Ad hoc tribunals, as already noted above, were equipped with the definition of victimhood premised on the wrong-based model of victimhood applicable solely to direct victims. This definition, however, was not considered explicitly by these tribunals in their sentencing judgments, which do not mention Rule 2 RPE ICTY/ICTR despite featuring numerous references to victims who could well be considered *indirect* under virtually all definitions of indirect victimhood. Thus, although it enriches the conceptual landscape of victimhood in international criminal law, the utility of the wrong-based definition of direct victimhood turned out to be minimal in the operation of ad hoc tribunals. In what follows, I demonstrate that the wrong-based definition of victimhood was, in fact, omitted in sentencing practices of ad hoc tribunals, which opted to adopt the harm-based model of victimhood. This allowed them to consider indirect victimhood in the process of determining penalties for international crimes.

The ICTY and the ICTR did not limit their sentencing reasoning to direct victims. Many cases completed before these tribunals confirm that harm sustained by people other than those directly victimised may also be relevant for sentencing purposes. In the case of *Blaskić*, for instance, the ICTY reasoned that 'the effects of the crime on relatives of the immediate victims may be considered as relevant to the culpability of the offender and in determining a sentence'.<sup>42</sup> In *Mrksić et al.*, in the course of assessing the reasoning of the Trial Chamber (TC), the Appeals Chamber contended that 'in light of the murders of the prisoners of war, close family members had been left without their loved ones, and that in almost all cases the anguish and hurt of such tragedy had been aggravated by uncertainty about the fate which befell these victims'.<sup>43</sup> In the same vein, in the more recent case of *Mladić*, the ICTY underlined that the gravity of the offence may be assessed by reference to 'the overall impact of the crimes upon the victims and their families'.<sup>44</sup>

This initial compilation shows that the consequences of international crimes often are not limited to immediate direct victims and may also involve the suffering of remote direct and indirect

<sup>42</sup> ICTY, *Prosecutor v Blaskić*, Judgment, IT-95-14-A, Trial Chamber, 29 July 2004, para 683.

<sup>43</sup> ICTY, *Prosecutor v Mrksić and Slijivancanin*, Judgment, IT-95-13/1-A, Appeals Chamber, 5 May 2009, para 412.

<sup>44</sup> ICTY, *Prosecutor v Mladić*, Judgment, IT-09-92-T, Trial Chamber, 22 November 2017, para 5185.

victims.<sup>45</sup> Accordingly, in the case of *Jelisić* the ICTY recognised harm suffered not only by immediate victims, but also by their families as well as witnesses to the crime who found themselves in a situation similar to those targeted – that is, ‘at the mercy’ of the accused.<sup>46</sup> Related findings were entered in the cases of *Mladić* and *Kayishema et al.* before the ICTY and the ICTR respectively.<sup>47</sup> In *Galić*, the Chamber referred to ‘the effect of the crimes on the broader targeted group’.<sup>48</sup> Similarly, in *Obrenović* the Tribunal stated that crimes following the fall of Srebrenica had an impact ‘not only upon specific individuals, but also upon the entire Bosnian Muslim community’.<sup>49</sup> In *Krajišnik*, the Chamber noted that collective victimisation to which the defendant contributed will be felt ‘in Bosnia-Herzegovina for decades, affecting hundreds of thousands of people’.<sup>50</sup>

On the other hand, some sentencing decisions provide more conflicting visions as far as the recognition of remote effects of victimisation is concerned. In *Krnjelac*, for instance, the TC rejected the Prosecutor’s submission to be guided by the effects that the offence in question brought ‘on the relatives of immediate victims’.<sup>51</sup> Such an approach, it was contended, ‘would be unfair’ for determining the sentence.<sup>52</sup> Under the TC’s approach, what should be seen as relevant in relation to sentencing is consideration of the consequences that a crime has caused only to those directly affected by it.<sup>53</sup> For, as explained in the previously decided case of *Kunarac et al.*, ‘consideration of the consequences of a crime upon the victim who is *directly* injured by it is ... always relevant to the sentencing of the offender’.<sup>54</sup> By contrast, harm suffered by indirect victims should not be normatively connected to the offender’s culpability. It would be substantively unfair to attribute this to the convicted person and punish them more severely on such grounds.<sup>55</sup>

This reasoning raised controversies and was subsequently challenged before the Appeals Chamber of the ICTY. The Appeals Chamber adopted a critical assessment of the TC’s restrictive approach, and explained that ‘even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that *his victim did not live cut off from the world but had established bonds with others*’.<sup>56</sup> In other words, by inflicting such suffering on direct victims, offenders are deemed to be aware that they do not harm only those immediate

<sup>45</sup> ICTY, *Prosecutor v Babić*, Sentencing Judgment, IT-03-72-S, Trial Chamber, 29 June 2004, para 53 (ruthless crime strongly affecting victims and their relatives).

<sup>46</sup> ICTY, *Prosecutor v Jelisić*, Judgment, IT-95-10-T, Trial Chamber, 14 December 1999, para 132.

<sup>47</sup> *Mladić*, Judgment (n 44) para 5188; ICTR, *Prosecutor v Kayishema and Ruzindana*, Sentence, ICTR-95-1-T, Trial Chamber, 21 May 1999, para 16.

<sup>48</sup> *Galić*, Judgment and Opinion (n 26) para 758.

<sup>49</sup> ICTY, *Prosecutor v Obrenović*, Sentencing Judgment, IT-02-60/2-S, Trial Chamber, 10 December 2003, para 68.

<sup>50</sup> ICTY, *Prosecutor v Krajišnik*, Judgment, IT-00-39-T, Trial Chamber, 27 September 2006, para 1151.

<sup>51</sup> ICTY, *Prosecutor v Krnjelac*, Judgment, IT-97-25, Trial Chamber, 15 March 2002, para 512.

<sup>52</sup> *ibid* para 512.

<sup>53</sup> *ibid* para 512.

<sup>54</sup> ICTY, *Prosecutor v Kunarac et al.*, Judgment, IT-96-23-T and IT-96-23/1-T, Trial Chamber, 22 February 2001, para 852 (emphasis added).

<sup>55</sup> *ibid* para 852.

<sup>56</sup> ICTY, *Prosecutor v Krnjelac*, Appeal Judgment, IT-97-25, Appeals Chamber, 17 September 2003, para 260 (emphasis added); see also ICTY, *Prosecutor v Mrda*, Sentencing Judgment, IT-02-59-S, Trial Chamber, 31 March 2004, para 39.

victims, but exert an impact on other people's lives as well. This explanation has been followed by the Tribunal in subsequent cases.<sup>57</sup> In *Brdanin*, for instance, the ICTY underscored that 'the impact of the crimes ... affected not only specific individuals but almost the entire Bosnian Muslim and Bosnian Croat communities in the ARK that ended up forcibly displaced'.<sup>58</sup>

#### 4. THE CONCEPT OF INDIRECT VICTIMHOOD BEFORE THE INTERNATIONAL CRIMINAL COURT

##### 4.1. FAMILY RELATIONS, INDIRECT VICTIMHOOD AND REPARATIVE JUSTICE BEFORE THE ICC

A novel definition of victimhood was introduced to international criminal law together with the codification of the RPE ICC.<sup>59</sup> For Rule 85 RPE ICC, which codes a binary definition of victimhood, is premised on the notion of *harm*. According to Rule 85(a) RPE ICC, victims are 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'. The second prong of this definition is expressed in Rule 85(b) RPE ICC, which stipulates that '[v]ictims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.

Considering that the victimhood of legal persons is constrained by the directness of harm, it does not provide for the recognition of indirect victimhood suffered by institutions and organisa-

<sup>57</sup> Confirmed also in ICTY, *Prosecutor v Češić*, Sentencing Judgment, IT-95-10/1-S, Trial Chamber, 11 March 2004, para 39 ('The impact on the victims' relatives and friends is among the factors that are considered when evaluating the inherent gravity of a crime'). Still, the standard applied by the Tribunal for recognition of indirect victimhood as a relevant sentencing factor was not 'average' in so far as the Tribunal concluded its examination reflecting on whether 'victims experienced significantly more suffering than that usually incurred by the violent death of, or the inhumane acts suffered by, beloved ones' (ibid para 44); ICTY, *Prosecutor v Stanišić and Župljanin*, Judgment, IT-08-91-T, Trial Chamber, 27 March 2013, para 892.

<sup>58</sup> ICTY, *Prosecutor v Brdanin*, Judgment, IT-99-36-T, Trial Chamber, 1 September 2004, para 1107.

<sup>59</sup> There is already voluminous literature presenting the character of victim participation in proceedings before international and hybrid criminal tribunals; see Mikaela Heikkilä, *International Criminal Tribunals and Victims of Crime* (Abo Akademi University 2004); T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press 2015); Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014); Tatiana Bachvarova, *The Standing of Victims in the Procedural Design of the International Criminal Court* (Brill-Nijhoff 2017); Ghislain M Mabanga, *La victime devant la Cour pénale internationale* (L'Harmattan 2009), Aurélien-Thibault Lemasson, *La victime devant la justice pénale internationale: Pour une action civile internationale* (Pulim 2011); O Abo Yousef, *Die Stellung des Opfers im Völkerstrafrecht unter besonderer Berücksichtigung des ICC-Statuts und der Rechte der Opfer von Völkerstrafrechtsverbrechen in der Schweiz* (Schulthess Verlag 2008); Stefanie Bock, *Das Opfer vor dem Internationalen Strafgerichtshof* (Duncker & Humblot 2010); Juliane Niendorf, *Extensive Opferbeteiligung im Verfahren vor dem Internationalen Strafgerichtshof: Eine kritische Betrachtung* (Logos Verlag 2017); Esperanza O Calatayud, *Las víctimas y la Corte Penal Internacional: Análisis de la participación de las víctimas ante la Corte* (Thomson Reuters 2014); Salvador G Palomares, *La defensa procesal de las víctimas ante la Corte Penal Internacional* (Thomson Reuters 2014).



tions other than those *directly* harmed by international crimes.<sup>60</sup> Although this additional qualification of directness is mentioned in relation to harm, Rule 85(b) RPE ICC clearly pursues the wrong-based model of victimhood. The consequence of this legislative decision is that legal persons cannot be indirect victims of international crimes in proceedings before the ICC, and their victimhood will be recognised only in relation to some types of international crime (war crimes) which protect specific property interests.

Natural persons, on the other hand, may suffer from both direct and indirect (physical, psychological, monetary and other) types of harm as victims pursuant to Rule 85(a) RPE ICC. Negative effects of the offender's actions are therefore not constrained in the substantive sense. As long as they are capable of proving the nexus between the crime falling within the jurisdiction of the Court and their personal harm, they may be considered victims even if the said crime (source of their alleged victimisation) was not designed in such a way as to protect interests consequentially violated by the crime in question (for instance, psychological harm resulting from crimes against property). Thus, while Rule 85(a) RPE ICC follows the harm-based model (direct and indirect victimhood), Rule 85(b) RPE ICC espouses the wrong-based model of victimhood (direct victimhood). Viewed in its entirety, the ICC definition of victimhood is effectively premised on the mixed model of victimhood.

The link between family relations and victimhood has been examined extensively by the ICC. In the first case against Thomas Lubanga Dyilo, the Court openly admitted that:<sup>61</sup>

harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims ... [for instance] when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child.

Indirect victims, therefore, are those who suffer harm as a result of the harm suffered by direct victims. In the 2009 Decision on Indirect Victims, the ICC clarified the criteria that are applicable to the evaluation of an applicant with regard to victim status.<sup>62</sup> The question at stake concerned the status of those allegedly victimised by Thomas Lubanga's crimes.<sup>63</sup> The Trial Chamber was asked to determine 'whether applicants who *are the victims of crimes committed by persons* conscripted or enlisted whilst *under the age of fifteen*, or used to participate actively in hostilities, can be considered "indirect victims"'.<sup>64</sup> The Court answered this question in the negative by

<sup>60</sup> Patryk Gacka, 'Institutions and Organizations as Victims of International Crimes? A Critical Analysis' (2018) 89 *Revue Internationale de Droit Pénal* 83.

<sup>61</sup> ICC, *Prosecutor v Lubanga*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432 OA9 OA10, Appeals Chamber, 11 July 2008, para 32.

<sup>62</sup> ICC, *Prosecutor v Lubanga*, Redacted version of Decision on 'Indirect Victims', ICC-01/04-01/06, Trial Chamber, 8 April 2009. This decision was analysed in detail by Valentina Spiga, 'Indirect Victims' Participation in the Lubanga Trial' (2010) 8 *Journal of International Criminal Justice* 183.

<sup>63</sup> That is an unlawful conscription of children below the age of 15 into armed forces.

<sup>64</sup> *Lubanga*, Decision on 'Indirect Victims' (n 62) para 40 (emphasis added).



reasoning that the concept of indirect victimhood is ‘restricted to those whose harm is linked to the *harm* of the affected children when the confirmed offences were committed, not those whose harm is linked to any subsequent conduct by the children, criminal or otherwise’.<sup>65</sup> Accordingly, ‘the person attacked by a child soldier is not an indirect victim ... because his or her loss is not linked to the *harm* inflicted on the child when the offence was committed’.<sup>66</sup>

A few years later, in the first decision to establish the principles of reparations, the ICC contended that indirect victims must possess ‘a close personal relationship’ with a direct victim, ‘for instance as exists between a child soldier and his or her parents’.<sup>67</sup> Apart from that, and following its previous considerations, the TC added that those who have ‘suffered harm when helping or intervening on behalf of direct victims’ may also be considered indirect victims.<sup>68</sup> In this particular case, it may be contended that the nexus between a direct and an indirect victim took a strictly situational form in so far as the connection between a direct and an indirect victim stemmed from the latter being involved in assisting a direct victim. This is not a requirement that is associated with a paradigmatic form of indirect victimhood premised on family relations (for example, parents learning about their child’s victimisation *ex post facto*).

However, the scope of indirect victimhood and its bases were not set in stone by the TC in the case of *Lubanga*. On the contrary, they were further expounded by the Appeals Chamber, which identified four different types of harm that indirect victims may suffer, and which are remediable under Article 75 of the ICC Statute. The said list comprised (i) ‘psychological suffering experienced as a result of the sudden loss of a family member’; (ii) ‘material deprivation stemming from the loss of the family members’ contributions’; (iii) ‘loss, injury or damage suffered by the intervening person in attempting to prevent the child from being further harmed as a result of a relevant crime’; and (iv) ‘psychological and/or material sufferings as a result of aggressiveness on the part of former child soldiers relocated to their families and communities’.<sup>69</sup> In the most recent decision in what has already become ‘the *Lubanga* saga’, the Court underlined that ‘the situation of indirect victims ... must be addressed in an appropriate manner, again appreciating the difference in needs that such victims have, as they most likely require reparations that differ from those required for direct victims’ (here, child soldiers).<sup>70</sup>

The case of *Lubanga* was followed by the cases of *Germain Katanga* and *Ahmad Al Mahdi*, which also contained references to various dimensions of indirect victimhood. In *Al Mahdi*, some victim applicants claimed that as a result of attacks against the protected objects in Timbuktu

<sup>65</sup> *ibid* para 52.

<sup>66</sup> *ibid*.

<sup>67</sup> ICC, *Prosecutor v Lubanga Dyilo*, Decision establishing the Principles and Procedures to be applied to Reparations, ICC-01/04-01/06, Trial Chamber, 7 August 2012, para 195.

<sup>68</sup> *ibid* para 196; *Lubanga*, Decision on ‘Indirect Victims’ (n 62) para 51.

<sup>69</sup> ICC, *Prosecutor v Lubanga*, Judgment on the Appeals against the ‘Decision establishing the Principles and Procedures to be applied to Reparations’ of 7 August 2012, ICC-01/04-01/06 A 2 A 3, Appeals Chamber, 3 March 2015, para 191(b). See also *Lubanga*, Decision on ‘Indirect Victims’ (n 62) para 50.

<sup>70</sup> ICC, *Prosecutor v Lubanga*, Judgment on the Appeals against Trial Chamber II’s Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable, ICC-01/04-01/06 A7 A8, Appeals Chamber, 18 July 2019, para 39.

(Mali), harm was sustained either by them personally or by *their families*.<sup>71</sup> It was also submitted that ‘moral harms’ resulting from deaths connected with the destruction of these buildings were suffered by other victims.<sup>72</sup> These applications were eventually rejected by the Court on account that such types of harm did not play ‘any part in the criminal plan’ of Ahmad Al Mahdi, and therefore they were not ‘sufficiently foreseeable’ to meet the requisite standard of normative causation.<sup>73</sup>

In *Al Mahdi*, the Court also addressed a rather distinctive form of victimisation of ‘those whose ancestors’ burial sites were damaged in the attacks (such as ‘descendants of the saints’), given that they have had ‘a different kind of emotional connection to the destroyed sites than the rest of the Timbuktu population’.<sup>74</sup> It was confirmed that in order to properly address the mental pain and anguish of those victims, it would be justifiable to afford them individual reparations.<sup>75</sup> The main reason for the recognition of those applicants’ suffering arguably lay in the specific connection that they had had with their relatives: it lay, in other words, in their *family relations*.<sup>76</sup> It was because of this connection that the destruction of burial sites led to their legally relevant victimisation as opposed to the rest of the population of Timbuktu. This example attests to the fact that in the domain of reparations, it is not just the crime of murder but also other criminal acts directed at the deceased that may provide grounds for recognition of indirect victimhood.

The case of *Katanga* contains a more internally diverse analysis of the contours of victimhood in the sphere of reparative justice. To begin with, some victim-applicants claimed to have suffered harm ensuing from the destruction and pillaging of family property which belonged to

<sup>71</sup> ICC, *Prosecutor v Al Mahdi*, Reparations Order, ICC-01/12-01/15, Trial Chamber, 17 August 2017, para 94 (emphasis added).

<sup>72</sup> *ibid* para 95.

<sup>73</sup> *ibid* paras 97–99.

<sup>74</sup> *ibid* para 89. Admittedly, it could be argued that this is a separate form of direct (and not indirect) harm given that these actions could not properly target those already dead. On the other hand, it is hardly disputable that the main reason why these victim applicants suffered from their harm was *because of* previous attacks against the burial sites of their next of kin.

<sup>75</sup> *ibid* para 104(iii).

<sup>76</sup> The concept of family must be understood within the specific social context. It may therefore have ‘many cultural variations’ (*Lubanga*, Decision establishing the Principles and Procedures (n 67) para 195). Although in *Lubanga* the Court contended that the way in which the concept of ‘family’ is understood follows the presumption ‘that an individual is succeeded by his or her spouse and children’ (ICC, *Prosecutor v Thomas Lubanga Dyilo*, Order for Reparations, ICC-01/04-01/06-3129-AnxA, Trial Chamber, 3 March 2015, para 7), in the subsequent case of *Katanga* it underlined that it will not apply generalised notions of a family but will pay particular attention to the meaning that this concept has been assigned in the Democratic Republic of the Congo and in Ituri, where the case was geographically situated (ICC, *Prosecutor v Katanga*, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07, Trial Chamber, 24 March 2017, para 121). The concept of family may thus absorb different meanings in international criminal law. Further, the ICC’s determination clarifies that one may approach the task of defining a family either by way of searching for a universal definition to be applicable across the whole system of law and all cases tried by the Court, or by adopting its more localised definition, thereby avoiding a natural temptation to impose a certain way of perceiving this or that phenomenon in a top-down manner. Moreover, in *Katanga* the Court also decided to accept a more relaxed standard of assessment as to who may qualify as a family member by stating that ‘it is of little consequence whether the relative was near or distant’. Nevertheless, by emphasising that this understanding has been accepted ‘in the specific circumstances of the attack on Bogoro’, the Court did not set a precedent by adjusting the definition to features of this particular case: *ibid* para 121.

their ancestors.<sup>77</sup> The ICC TC did not consider itself competent to grant those reparations, however, because of the difficulty in deciding the terms of succession, as well as related evidentiary obstacles.<sup>78</sup>

The most explicit and thorough picture of indirect victimhood in the context of reparations was presented by the Court with regard to psychological harm. This is not surprising, of course, for even intuitively one may contend that psychological harm will constitute the most common denominator of indirect victimhood. Accordingly, in *Katanga*, some applicants submitted that they suffered harm as a result of the deaths of their relatives.<sup>79</sup> In response to this submission, the TC explained that '[t]he harm caused to an indirect victim may include psychological suffering experienced as a result of the sudden loss of a family member ... To that end, the applicant must show that he or she had a close personal relationship with the direct victim'.<sup>80</sup>

After establishing that the deaths of the applicants' relatives resulted from the crimes of which Germain Katanga was convicted and ascertaining the veracity of the documents notifying the deaths of direct victims, the Chamber identified close personal relations between direct and alleged indirect victims. In a rather liberal fashion, it further decided that 'it is of little consequence whether the relative was near or distant'.<sup>81</sup> A detailed analysis presented by the Court concluded with the statement that the psychological harm resulting from the death of a relative had been properly established.<sup>82</sup> Accordingly, indirect victims were granted the right to receive individual reparations for their harm.<sup>83</sup> In its concluding findings the Court confirmed that 201 and 284 instances of psychological harm resulted from the death of, respectively, a near or a distant relative.<sup>84</sup> Considering that the total number of applications received by the Court in these proceedings amounted to 341, the final number of recognised indirect victims showcases that the concept of indirect victimhood played a significant role in determining the scope of Germain Katanga's liability.<sup>85</sup>

Further, psychological harm was addressed by the Court in the context of sexual violence. The Chamber reasoned that the gravity of acts amounting to rape and sexual slavery is premised on two foundations: first, the gravity of these crimes stems from the nature of the acts themselves; second, it comprises psychological consequences for the victim which result from such criminal

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<sup>77</sup> *ibid* para 106.

<sup>78</sup> *ibid* para 107.

<sup>79</sup> *ibid* para 112.

<sup>80</sup> *ibid* para 113. Note, however, that the Appeals Chamber determined that '[t]he definition of "victims" in Rule 85(a) of the Rules ... emphasises the requirement of the existence of harm rather than whether the indirect victim was a close or distant family member of the direct victim': ICC, *Prosecutor v Katanga*, Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute', ICC-01/04-01/07 A3 A4 A5, Appeals Chamber, 8 March 2018, para 5.

<sup>81</sup> *Katanga*, Order for Reparations (n 76) para 121.

<sup>82</sup> *ibid* para 122.

<sup>83</sup> It should be noted that the Court decided to distinguish between types of harm even those of the same character depending on their source. Accordingly, it ruled that 'where an Applicant alleges psychological harm resulting from the death of a relative and psychological harm connected to the experience of the attack on Bogoro, the Chamber will consider the Applicant to have suffered two distinct types of psychological harm': *ibid* para 131.

<sup>84</sup> *ibid* para 174.

<sup>85</sup> *ibid* para 168.

acts.<sup>86</sup> The gravity, in other words, is premised on the *wrongness* of such conduct as well as on its *harmfulness*. More importantly for this analysis, however, the Court subsequently contended that physical pain compounded by psychological suffering ‘has repercussions on the life of the victim, but also on the lives of the victim’s *nearest and dearest*’.<sup>87</sup>

Yet another form of indirect victimhood that was addressed by the ICC in the case of *Katanga* took the form of what the Court dubbed a *sui generis* harm – that is, among others, a loss of standard of living,<sup>88</sup> which constitutes one form of damages that indirect victims may sustain according to some domestic legal systems.<sup>89</sup> Victim-applicants put forward an allegation that:<sup>90</sup>

the attack on Bogoro entailed a loss of standard of living due to the death of a relative on whom all or part of the family’s livelihood depended, or due to the fact that the Applicants now have dependents who are the offspring of a deceased family member.

Because of insufficient evidentiary support, however, the Chamber decided not to award compensation on these bases, but instead underlined that the category of psychological harm connected with the attack on Bogoro, already recognised by the Court, also encompasses such *sui generis* harm.<sup>91</sup>

The approach of the ICC TC towards indirect victimhood in *Katanga* was subsequently challenged by the defence counsel in the appellate proceedings. Interpreting the TC judgment, the Appeals Chamber (AC) assessed that the TC ‘*presumed* psychological harm in respect of all family members of direct victims of the attack on Bogoro’, which meant that the applicant ‘did not have to specifically prove the existence of the claimed psychological harm, even if that family member was distant’.<sup>92</sup> The presumption adopted by the TC was therefore straightforward: relatives, by definition, will suffer harm because of the loss of their next of kin. The AC further observed that what Article 75 of the ICC Statute and Rule 85 RPE ICC emphasise is ‘the requirement of the existence of harm rather than whether the indirect victim was a close or distant family member of the direct victim’.<sup>93</sup> By rejecting Germain Katanga’s submission as to the limitation of

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<sup>86</sup> *ibid* para 146.

<sup>87</sup> *ibid* (emphasis added).

<sup>88</sup> *ibid* para 136. The two other types of such *sui generis* harm were the loss of opportunity and the forced departure. However, given that the alleged types of *sui generis* harm were assumed to have been caused by an attack more broadly conceived, rather than by the deaths of family members of those applying for reparations, they do not seem to fall within the confines of indirect victimhood.

<sup>89</sup> See, eg, Polish Civil Code (1964), art 446(3) (‘The court may also award appropriate compensation to the closest members of the deceased’s family if as a result of his death their living standard has deteriorated significantly’). See also Van Dam (n 6) 366 (‘If a person dies as the consequence of an accident for which another person is liable, third parties may also suffer damage, particularly the parents, the partner, the children, and other relatives of the victim. These are what the French call *victimes par ricochet*: the rebound victims’); WV Horton Rogers (ed), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Springer 2001).

<sup>90</sup> *Katanga*, Order for Reparations (n 76) para 136.

<sup>91</sup> *ibid* para 139.

<sup>92</sup> *Katanga*, Judgment on the Appeals (n 80) para 113, 126–127 (accepted by the AC) (emphasis added).

<sup>93</sup> *ibid* para 115.

the personal scope of indirect victimhood, the AC seems to have accepted the robust and extensive interpretation of this concept.

Following the orders for reparations in the cases of *Lubanga*, *Al Mahdi* and *Katanga*, the latest decision pursuant to Article 75 ICC Statute was issued by the ICC in the case of *Bosco Ntaganda*, who was previously convicted of five counts of crimes against humanity and thirteen counts of war crimes.<sup>94</sup> In terms of conditions that must be met by victims applying for reparations, the Court confirmed that '[n]atural persons may be direct or indirect victims, provided they suffered a personal, but not necessarily direct, harm'.<sup>95</sup> In contrast to direct victims 'whose harm is the result of the commission of a crime',<sup>96</sup> '[i]ndirect victims are those who suffer harm as a result of the harm suffered by the direct victims'.<sup>97</sup> Following the 'case of *Lubanga*, in *Ntaganda* the ICC identified four categories of indirect victims, namely (i) the family members of direct victims;' (ii) 'anyone who attempted to prevent the commission of one or more of the crimes under consideration'; (iii) 'individuals who suffered harm when helping or intervening on behalf of direct victims;' (iv) 'other persons who suffered personal harm as a result of these offences'.<sup>98</sup>

The four groups of indirect victims enumerated by the Court have a general character. Consequently, the personal scope of indirect victimhood before the ICC remains largely unspecified. The fourth group shows that virtually every person capable of proving the nexus between their harm and that sustained by a direct victim may be recognised as an indirect victim. Moreover, the Chamber's reasoning in *Ntaganda* confirms that one person may have a dual status by being both a direct and an indirect victim. Such victims will thus be allowed to act on two separate grounds when seeking reparations for the harm suffered.<sup>99</sup>

Apart from direct and indirect victims, however, there are other people who become affected in different ways by international crimes. The Court admitted that 'the inherent features of the crimes under the jurisdiction of the Court also result in mass victimization, affecting victims as members of families and entire communities'.<sup>100</sup> This broader vision of victimhood is noticeable not only in the Court's reasoning; it is also reflected in reparation programmes that enable direct victims as well as 'their families, and their communities to benefit from measures over an extended period of time'.<sup>101</sup>

In the process of considering the scope of *Bosco Ntaganda*'s liability, the Court accepted that indirect victims sustained various types of harm as a result of *Ntaganda*'s crimes. The TC thus reaffirmed determinations previously entered by the AC in the case of *Katanga*, and emphasised that 'the concept of indirect victims shall not lead to the discrimination of individuals on the basis of birth or marital status'.<sup>102</sup> The Court decided that children of female victims of rape or sexual

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<sup>94</sup> *Ntaganda*, Reparations Order (n 13).

<sup>95</sup> *ibid* para 33.

<sup>96</sup> *ibid* para 34.

<sup>97</sup> *ibid* para 35.

<sup>98</sup> *ibid* para 36.

<sup>99</sup> *ibid* para 39.

<sup>100</sup> *ibid* para 74.

<sup>101</sup> *ibid* para 91.

<sup>102</sup> *ibid* para 126.

slavery, persons who did not have a close personal relationship with a direct victim but who remained important in their lives, as well as those who witnessed the crime when it was committed may also be recognised as indirect victims and receive reparations.<sup>103</sup> This determination attests to the fact that the concept of indirect victimhood in the ICC system is not constrained by strict formal criteria apart from the requirement, repeatedly underlined by the Court in its case law, that every indirect victim must be able to demonstrate having suffered harm as a result of the commission of a crime against a direct victim.

In specifying the harm sustained by indirect victims in *Ntaganda*, the Chamber identified six types of harm of such victims:<sup>104</sup>

(i) material deprivation that accompanies the loss of the family member's contributions; (ii) loss, injury or damage suffered by a person intervening to attempt to prevent the direct victims from being further harmed as a result of the relevant crime; (iii) psychological harm experienced as a result of the sudden loss of a family member, including behavioural disorders such as trauma, depression, suicidal tendencies and feelings of hatred; (iv) psychological harm and trauma as a result of what they witnessed during or after the attacks; (v) psychological, psychosocial and material harm resulting from aggressive behaviour of former child soldiers reunited with their families and communities; and (vi) transgenerational harm of children of direct victims.

What they demonstrate is an internal variety of victimisation of indirect victims that is not constrained to family members only. Moreover, they point to the practical difficulty that may arise in identification of specific negative consequences on the part of alleged indirect victims. An approach adopted by the Court to this end will obviously have a direct bearing on the number of people recognised as indirect victims. Tellingly, in the case of *Ntaganda*, the Chamber underscored that the Appointed Experts were not able to ascertain the exact number of indirect victims eligible for reparations in contrast to the number of direct victims, estimated at 3,500 victims at least.<sup>105</sup> This is yet another indicator of the inherently imprecise nature of direct and indirect victimhood.

#### 4.2. FAMILY RELATIONS, INDIRECT VICTIMHOOD AND PUNITIVE JUSTICE BEFORE THE ICC

The practice of affording certain weight to harm suffered by family members and other people affected by gross violations of international human rights and humanitarian law in sentencing decisions characterises not only the reasoning of ad hoc tribunals (Section 3.2), for already in the first case of *Lubanga*, the ICC – following Rule 145(1)(c) RPE ICC – made a similar finding by emphasising that crimes attributed to an offender were serious as they left an impact not just on direct victims (child soldiers) but also on other subjects (the international community,

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<sup>103</sup> *ibid* paras 122, 127, 128.

<sup>104</sup> *ibid* para 183(d).

<sup>105</sup> *ibid* para 232.

family).<sup>106</sup> It was indicated in the case of *Bemba* that in so far as ‘murder deprives the direct victim of life’, it is ‘the ultimate harm’.<sup>107</sup> However, harmful consequences do not end with a direct victim given that ‘[r]elatives and dependents left behind are not only deprived of the direct victim, an impact that cannot be underestimated, but may also be directly injured – physically and/or psychologically – as a result of the murder’.<sup>108</sup> To support this determination, the TC referred in that case to the testimony of a witness who was present when his sister was murdered. In his words, ‘I saw the brain of my sister. I saw that as if an animal’s skull had been hit’.<sup>109</sup>

Psychological harm of relatives of direct victims is probably the most common source of indirect victimhood. In *Bemba*, however, the Chamber noted that negative consequences may also take other forms. Jean-Pierre Bemba’s (alleged) crimes<sup>110</sup> ‘rippled through the relevant communities. Owing to the prevailing chaotic and traumatic circumstances, *family members* of, and *others with special bonds of affection to*, some murder victims were deprived of the comforts that funeral services and burial rituals may provide in periods of grief’.<sup>111</sup> For some victims ‘the impact of the murders was chronic and severe’.<sup>112</sup> All of this led the ICC to rule that the crime of murder was of serious gravity in so far as ‘[t]he direct victims lost their lives. The indirect victims, in particular, *family members*, also suffered severe and lasting harm’.<sup>113</sup>

Occasionally, however, less precise expressions employed by IHCTs make it difficult to pinpoint the genuine nature of victimhood (direct versus indirect) and its overall impact on sentencing. In the case of *Al Mahdi*, for instance, the ICC explained that the attacks on the protected objects appeared ‘to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community’.<sup>114</sup> At first sight this conclusion may seem to suggest that crimes attributed to Ahmad Al Mahdi led to both direct and indirect victimhood. However, once one considers the nature of the destruction of cultural heritage, it becomes clear that all three groups (local population, people of Mali, international community) were, in fact, viewed by the Court as direct victims of this crime, although their victimisation differed considerably in terms of its character and distance.<sup>115</sup> For some it was proximate (local population); for others it was not (international community).

<sup>106</sup> ICC, *Prosecutor v Lubanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06, Trial Chamber, 10 July 2012, paras 37–38, 44.

<sup>107</sup> ICC, *Prosecutor v Bemba*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08, Trial Chamber, 21 June 2016, para 29.

<sup>108</sup> *ibid.*

<sup>109</sup> *ibid.*

<sup>110</sup> I use the term ‘alleged’ advisedly as Jean-Pierre Bemba was eventually acquitted by the Court: ICC, *Prosecutor v Bemba*, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’, ICC-01/05-01/08-3636-Red, Appeals Chamber, 8 June 2018.

<sup>111</sup> *Bemba* (n 107) para 30.

<sup>112</sup> *ibid* para 31.

<sup>113</sup> *ibid* para 32 (emphasis added). Note that according to the phrasing adopted by the TC in this case, indirect victimhood was not exhausted by the normative element of family relations.

<sup>114</sup> *Al Mahdi*, Judgment and Sentence (n 18) para 80.

<sup>115</sup> This conclusion may be challenged by the claim that it was in fact the international community as a whole that was directly victimised by these crimes in so far as it is the international community in whose interests lies the



The Chamber's reasoning in *Al Mahdi* not only denoted a consequential way of thinking about victimisation, but also involved, even if only implicitly, an element of harm gradation. Harm, after all, may not only take different forms; it may also be of divergent intensity *in abstracto* and *in concreto*. Importantly, and without introducing any distinction between direct and indirect victims, the Court clarified that:<sup>116</sup>

[i]n order to sufficiently and adequately reflect the moral and economic harm suffered by the victims of the present case and fulfil the objectives of sentencing, the Chamber must impose a sentence that is proportionate to the gravity of the crime and the individual circumstances and culpability of Mr Al Mahdi.

After *Lubanga*, *Katanga* and *Al Mahdi*, the idea that harmful effects of indirect victimisation should be examined for sentencing purposes was followed by the ICC in two most recent cases that resulted in the imposition of severe sentences of 30 (Bosco Ntaganda) and 25 (Dominic Ongwen) years' imprisonment.<sup>117</sup>

The Court confirmed in *Ntaganda* that, in the case of murder, 'relatives and dependants left behind are deprived of a family member, and thereby of love and care, and, depending on the situation, of support, be it financial, physical, emotional, psychological, moral, or otherwise'.<sup>118</sup> Apart from close relatives of those killed, the Court acknowledged that other people may also be indirectly made victims by such offences. For instance, 'some individuals who survived or witnessed these crimes still bear permanent scars'.<sup>119</sup> These findings led the Court to conclude that '[t]he murders ... irreversibly impacted not only the direct victims but also those who witnessed them, and the direct victims' family members and relatives left behind'.<sup>120</sup> However, crimes against human life and security are not the only ones that may result in indirect victimisation. In relation to particularly gruesome sexual offences, the Court made note of the fact that '[s]ome of the effects were also experienced by the victims' family members and communities'.<sup>121</sup>

On the other hand, a noticeable absence of references to non-direct victims characterises the sentencing decision in the case of *Ongwen*. Indeed, only two crimes attributed to Dominic Ongwen were considered by the Chamber as sources not just of direct, but also of indirect victimisation. First, the ICC underscored that 'it is important to pay sufficient attention also to the psychological harm done to the victims and their family members' by the crime of

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protection of international cultural heritage. This perspective is displayed by the global mandate of UNESCO. See also *Al Mahdi*, Reparations Order (n 71) para 14 ('The international community has recognized ... the human right to cultural life and its physical embodiments').

<sup>116</sup> *Al Mahdi*, Judgment and Sentence (n 18) para 108.

<sup>117</sup> ICC, *Prosecutor v Ntaganda*, Public Redacted Version of Judgment on the Appeal of Mr Bosco Ntaganda against the Decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment', ICC-01/04-02/06-2667-Red, 30 March 2021; *Ntaganda*, Sentencing Judgment (n 9); *Ongwen*, Sentence (n 10).

<sup>118</sup> *Ntaganda*, Sentencing Judgment (n 9) para 44.

<sup>119</sup> *ibid* para 49.

<sup>120</sup> *ibid* para 52.

<sup>121</sup> *ibid* para 102.

enslavement.<sup>122</sup> Second, with regard to the crime of conscription of children under the age of 15, the Court remained ‘attentive to the emotional suffering that the abduction and integration into the LRA brought upon the direct victims, as well as their *families, who were separated from their children and left without any information about them for a long time, if not indefinitely*’.<sup>123</sup> Similar findings, however, were not made by the Court in determining the sentence for other offences previously attributed to Dominic Ongwen. It could be argued, therefore, that the case of *Ongwen* departs from an approach adopted by the ICC in earlier decided cases in terms of the weight assigned to harm suffered by indirect victims for sentencing purposes.

## 5. THE CONCEPT OF INDIRECT VICTIMHOOD BEFORE THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

### 5.1. FAMILY RELATIONS, INDIRECT VICTIMHOOD AND REPARATIVE JUSTICE BEFORE THE ECCC

The third way of understanding victimhood in the context of gross violations of international human rights and humanitarian law is represented by the framework established for the ECCC. It employs two different concepts of *victims* and *victims participating in the capacity of civil parties* to describe injured parties in the proceedings.<sup>124</sup> Acting as an appellate court, the Supreme Court of Cambodia (SC/ECCC) explained that the definition of a civil party is not premised on a ‘formal designation of a specific class of persons, but the substantive criterion of an actual injury resulting as a direct consequence of the crime’.<sup>125</sup> By adopting this broader perspective, the SC/ECCC pointed to the fact that:<sup>126</sup>

domestic legal systems which recognise victim participatory rights independent of a civil action may define the circle of authorised persons in a formal, more narrow sense by granting civil party status only to persons whose rights have been violated or endangered by the acts charged and to enumerated categories of immediate family in case of the death of the direct victim.

However, this model is not applicable before the ECCC, the framework of which operates on the basis of the distinction between *victims* and *civil parties*: although every civil party is most likely to be the crime victim given that a crime violates his or her rights, not every victim will also be a civil party.

In contrast to the ICC (Rule 85(a) RPE ICC), the SC/ECCC defines victims (but not civil parties) in substantive terms by drawing a normative nexus between specific protected interests and

<sup>122</sup> *Ongwen*, Sentence (n 10) para 165.

<sup>123</sup> *ibid* para 362 (emphasis added).

<sup>124</sup> For a detailed exposition of victim-related issues, see Rachel Killean, *Victims, Atrocity and International Criminal Justice: Lessons from Cambodia* (Routledge 2018); Maria Elander, *Figuring Victims in International Criminal Justice: The Case of the Khmer Rouge Tribunal* (Routledge 2018).

<sup>125</sup> ECCC, *Case against Kaing Guek Eav*, Appeal Judgment, 001/18-07-2007-ECCC/SC, Supreme Court Chamber, 3 February 2012, para 410.

<sup>126</sup> *ibid* para 411.

the crime committed. Accordingly, the word ‘victim’ refers in this legal regime to ‘a person whose *rights* were the object of the criminal attack in the act charged, in other words, “against whom the crimes were committed”’.<sup>127</sup> As a result of this criterion, this definition resembles the definition applicable before ad hoc tribunals. To be treated as a victim by the ECCC, an applicant must prove that they have been *wronged* (but not necessarily *harmfully wronged*) by a criminal act. To acquire the status of a civil party, on the other hand, it is neither sufficient nor legally required that a crime has been committed *against* an applicant’s protected interests.<sup>128</sup> It is an *injury* sustained by an applicant as a result of an international crime that determines who may or may not be a civil party according to the above definition.<sup>129</sup>

All the same, it would be a mistake to claim that an injury is totally detached from the normative sphere. The SC/ECCC noted in this respect that an ‘[i]njury is contingent, or more likely to come into being, where there is a violation of a right’.<sup>130</sup> That said, the Court further added that ‘a violation of a right does not in itself always presuppose or produce injury’.<sup>131</sup> In effect, while civil parties will normally encompass crime victims, this will be possible only when victims are capable of proving that they continue to suffer harm (‘injury’) resulting from the crime charged at the time when the case is brought to trial. The approach of the SC/ECCC thus reflected the following correlation: while one may be a victim even if no harm can (any longer) be detected provided that there has been a violation of one’s protected interests, for civil parties seeking compensation for the harm suffered it is essential that they are capable of demonstrating not the violation of their rights and interests as such, but injuries sustained as a direct consequence of the charged crime.<sup>132</sup> It may even be possible in some cases that no individual right has been violated, but an applicant will still be recognised as a civil party because they can prove an injury linked to the charged crime.<sup>133</sup> Both terms – the ‘civil party’ and the ‘victim’ – may therefore overlap and coincide, but they should not be considered identical in every case.<sup>134</sup>

<sup>127</sup> *ibid* para 416 (emphasis added).

<sup>128</sup> Internal Rules of the ECCC (IR ECCC), revised 16 January 2015, rule 23 *bis* (‘In order for Civil Party action to be admissible, the Civil Party applicant shall: a) be clearly identified; and b) demonstrate as a direct consequence of least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based’).

<sup>129</sup> *Kaing Guek Eav*, Appeal Judgment (n 125) para 416 (‘the term ‘direct victim’ [refers] to the category of persons whose rights were violated or endangered by the crime charged; this term is not coterminous with the category of persons who suffered injury as a “direct consequence” of the crime’). Following the Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict, the Court was also cautious against equating ‘substantial impairment of fundamental rights’ with ‘harm’ (*Kaing Guek Eav*, *ibid* fn 875).

<sup>130</sup> *ibid* para 416.

<sup>131</sup> *ibid* para 416.

<sup>132</sup> The condition of ‘directness’ notwithstanding, the definition of ‘civil parties’ before the ECCC is similar to the definition of ‘victims’ before the ICC. The definition of victims constructed by the ECCC, in turn, resembles that adopted by the ad hoc tribunals. While the former is premised on a factual (naturalistic) element of harm, the latter is strictly normative.

<sup>133</sup> *Kaing Guek Eav*, Appeal Judgment (n 125) para 416 (‘However, for legal standing as a civil party, it is necessary that such person sustained an injury’). Here, an injury corresponds to the concept of harm in Rule 85 RPE ICC (n 24).

<sup>134</sup> *ibid* para 416 (‘Pursuant to the criterion of injury, the term “civil party” will usually encompass what is commonly designated by the word “victim”, that is, a person whose rights were the object of the criminal attack in the

In relation to the direct/indirect victimhood distinction, the SC/ECCC further explained that while alleged direct victims ‘are only required to demonstrate the violation or endangerment of their rights’,<sup>135</sup> the definition of indirect victimhood is more strictly tied to the concept of an injury.<sup>136</sup> As indirect victims cannot claim that a crime has been committed against them (they are not victimised in that sense), their status, in practice, seems to resemble that of a civil party. The SC/ECCC adopted this idea by noting that ‘indirect victims encompass persons who actually suffered ... *injury*, for example, as a result of the injury, whether temporary or permanent, of their loved ones’.<sup>137</sup> It also further explained that ‘an indirect victim would need no less to have suffered injury as a direct consequence of the crimes committed against the direct victim(s)’.<sup>138</sup> It begs the question, however, whether by mentioning ‘injuries of direct victims’, the SC/ECCC opted to restrict the scope of indirect victimhood only to those potential applicants whose own personal suffering comes from injuries of direct victims (*harm of indirect victims – harmful wrongs of direct victims*), or whether it would be sufficient if direct victims were *wronged* as long as indirect victims have sustained an *injury* because of that (*harm of indirect victims – wrongs of direct victims*).

The Supreme Court’s reasoning presented above remains unclear in this respect for it seems to cover both correlations. However, given that in its further reasoning the Court reiterated that civil parties ‘also include indirect victims who personally suffered injury as a direct result of the crime committed against the direct victim’, it may be argued that the wrong-based correlation is the one applicable in proceedings before the SC/ECCC (*harm of indirect victims – wrongs of direct victims*).<sup>139</sup> Therefore, one can be an indirect victim even if a direct victim is not afforded the status of civil party during an ongoing trial before the ECCC. What matters, in turn, is whether a crime has been committed against protected interests of a direct victim, and whether an indirect victim-civil party can prove to have suffered some injury because of that.

Arguably the most far-reaching part of the SC/ECCC’s reasoning concerned the personal scope of indirect victimhood. In this respect the SC/ECCC made a decisive interpretative move by severing the link of family relations as a requisite nexus for establishing indirect victimhood. The Supreme Court stated:<sup>140</sup>

Absent any limiting provision, the category of indirect victims is not restricted to any specific class of persons such as family members. It may encompass common law spouses, distant relatives, friends, de facto adopters and adoptees, or other beneficiaries, provided that the injury on their part can be

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act charged, in other words, “against whom the crimes were committed”). Note that the definition included in the RPE of ad hoc tribunals also refers to the ‘against whom’ criterion.

<sup>135</sup> *ibid* paras 411, 416. This determination moves the scope of victimhood even further than the idea of ‘right violation’. According to the ECCC, not only the violation but also an endangerment may result in the status of victimhood (see also Section 2.1 above and the correlation between the wrong-based model of victimhood and acts of endangerment examined there).

<sup>136</sup> *ibid* para 417.

<sup>137</sup> *ibid* para 417 (emphasis added).

<sup>138</sup> *ibid* para 417.

<sup>139</sup> *ibid* para 418.

<sup>140</sup> *ibid* para 418 (emphasis added).

demonstrated. On the other hand, persons who did not suffer injury will not be considered indirect victims even if they were immediate family members of the direct victim. Moreover, the exercise of the rights of indirect victims is autonomous of the rights of the direct victims. *This means that indirect victims may be granted civil party status even where the direct victim is alive and does not pursue the civil party action him or herself.*

Nonetheless, the above determination should not be interpreted as a total rejection of the family-based notion of indirect victimhood in the ECCC system. Notably, in its subsequent remarks relating to various presumptions of an injury suffered by alleged indirect victims, the SC/ECCC noted that ‘bonds of affection and dependence are dynamics that usually exist among close family members’, and therefore it is correct to ‘relieve the class of immediate family from discharging the burden of proof of injury’.<sup>141</sup> Thus, while the Court decided not to preclude in advance any person from being recognised as an indirect victim, it nevertheless adopted the presumption of victimisation, which narrows the scope of indirect victimhood in relation to non-family members. This evidentiary differentiation provides grounds for a binary structure of indirect victimhood in terms of evidentiary conditions (family members versus others). Needless to say, those who do not belong to the immediate family of a direct victim will be required to meet more stringent criteria and a much higher threshold of proof than applicants who happen to be family members of a direct victim. The plausibility and persuasiveness of this approach is disputable (Section 6.3).

Further, in Case 002/01, the Chambers followed the testimonies of victims and concluded that ‘as a consequence of the crimes of which the Accused have been convicted, the Civil Parties and a very large number of additional victims, have suffered ... psychological trauma and grief arising from the loss of family members or close relations’.<sup>142</sup> The Chambers thus reaffirmed that the scope of indirect victimhood may also include non-family relations. In Case 002/02, the ECCC found in turn that ‘families were divided and children separated from their parents’.<sup>143</sup> This resulted in extreme physical, emotional and psychological harm sustained by both direct and indirect victims. The Chambers contended that ‘[t]ens of thousands of direct victims lost their lives. When victims’ families learned of the deaths of their loved ones, it caused them deep suffering’.<sup>144</sup> Similarly, arrests and disappearances of direct victims compounded ‘a sense of loss for their families with the uncertainty of their loved one’s fate’.<sup>145</sup> The Chambers also underlined that those persons whose relatives were killed ‘at security centres suffered long-term emotional suffering, loneliness and material harm’.<sup>146</sup> Moreover, they openly acknowledged that:<sup>147</sup>

<sup>141</sup> *ibid* para 448.

<sup>142</sup> ECCC, *Case against Nuon Chea and Kieu Samphan*, Case 002/01 Judgment, 002-19-09-2007/ECCC/TC, Trial Chamber, 7 August 2014, para 1150.

<sup>143</sup> ECCC, *Case against Nuon Chea and Khieu Samphan*, Case 002/02 Judgment, 002/19-09-2007/ECCC/TC, Trial Chamber, 16 November 2018, para 4369.

<sup>144</sup> *ibid* para 4372.

<sup>145</sup> *ibid*.

<sup>146</sup> *ibid* para 4374.

<sup>147</sup> *ibid* para 4442. See also *Chea and Samphan*, Case 002/01 Judgment (n 142) paras 1147–50; ECCC, *Case against Kaing Guek Eav*, Judgment, 001/18-07-2007/ECCC/TC, Trial Chamber, 26 July 2010, para 650 (list of family members who have demonstrated harm sustained as a result of the death of their next of kin).

Civil Parties described how the loss of their relatives made them suffer tremendously. Civil Parties also suffered as a result of the arrest and disappearance of family members, as they did not know the fate of their loved ones or thought they had died.

These excerpts demonstrate that in the Chambers' reasoning, the concept of indirect victimhood, despite its broader definitional scope, has been focused predominantly on family relations.<sup>148</sup>

## 5.2. FAMILY RELATIONS, INDIRECT VICTIMHOOD AND PUNITIVE JUSTICE BEFORE THE ECCC

As with the other tribunals examined in this article, negative consequences of international victimisation sustained by indirect victims have been viewed by the ECCC as relevant for determining the gravity of crimes. For instance, the SC/ECCC ruled that it is necessary to take note of 'the impact of the crimes upon them [direct victims] and their relatives' as well as the 'outrage these crimes caused in victims, their families and relatives'.<sup>149</sup> Further, it added that although the victimising events took place 30 years before the judgment, this fact alone 'does not weaken the necessity of a high punishment' as 'the sufferings of victims and *their families and relatives* are not in the past, but are continuing and will continue throughout their lives'.<sup>150</sup> In another case, the ECCC contended that '[m]any of those who survived suffered ongoing physical trauma, as well as mental and psychological disorders. The grave impact of these crimes on the victims and *their relatives* is both devastating and enduring'.<sup>151</sup>

## 6. INDIRECT VICTIMHOOD IN THE CONTEXT OF REPARATIVE AND PUNITIVE JUSTICE: A CRITICAL ASSESSMENT

Earlier sections have demonstrated that apart from direct victims, international victimhood may leave an impact on other subjects such as family members<sup>152</sup> and communities<sup>153</sup> who experience negative consequences as a result of the crimes committed against direct

<sup>148</sup> The role of victims in the context of reparative justice has been clarified in the Chambers' Internal Rules (IR ECCC). According to Rule 23(1)(b), '[t]he purpose of Civil Party action before the ECCC is to ... [s]eek collective and moral reparations, as provided in Rule 23 *quinquies*'. Rule 23(1) *quinquies* IR ECCC further stipulates that benefits afforded to the Civil Parties 'shall not take the form of monetary payments'. Rule 113(1) IR ECCC provides that 'enforcement of reparations granted under Rule 23 *quinquies* (3)(a) shall be done by appropriate national authorities in accordance with Cambodian law on the initiative of any member of the collective group, unless the verdict specifies that a particular award shall be granted in relation only to a specified group. In such case, any member of the specified group shall instead initiate enforcement of that award. Implementation of reparations described in Rule 23 *quinquies* (3)(b) does not fall within the scope of this Rule'.

<sup>149</sup> *Kaing Guek Eav*, Appeal Judgment (n 125) paras 375, 380.

<sup>150</sup> *ibid* para 381 (emphasis added).

<sup>151</sup> *Chea and Samphan*, Case 002/01 Judgment (n 142) para 1077; similarly *Chea and Samphan*, Case 002/02 Judgment (n 143) para 4362 (emphasis added).

<sup>152</sup> ICTY, *Prosecutor v Nikolić*, Sentencing Judgment, IT-02-60/1-S, Trial Chamber, 2 December 2003, paras 112–13 (the Srebrenica syndrome: one of the witnesses underscoring 'the particular effect of the crimes committed following the fall of Srebrenica on the women', eg, mothers, wives, sisters of murdered men); ICTY, *Prosecutor v Rajić et al.*, Sentencing Judgment, IT-95-12-S, Trial Chamber, 8 May 2006, para 95 (victims and their relatives).

<sup>153</sup> *Nikolić*, Sentencing Judgment (n 152) para 107.

victims.<sup>154</sup> It has been shown that this broadened form of victimisation and victimhood, even if irrelevant from the perspective of proving the offender's guilt beyond reasonable doubt, has been vital in determining the scope of their penal and reparative responsibility by IHCTs.<sup>155</sup> Bearing in mind this contention, this section sets out the normative claims of this article and reflects on conceptual aspects of indirect victimhood stemming from gross violations of international human rights and humanitarian law.

## 6.1. EXPLICIT AND IMPLICIT FORMS OF INDIRECT VICTIMHOOD IN INTERNATIONAL CRIMINAL LAW

As with direct victimhood, indirect victimhood was not designed as a uniform concept in international criminal law (Sections 3, 4 and 5). These divergences are discernible both in relation to its scope as well as its applicability before IHCTs.<sup>156</sup> For, apart from featuring various definitions of victimhood in their documents, some tribunals – such as the ICC and the ECCC – have also invoked indirect victimhood in their procedural decisions (on victim participation) as well as substantive decisions (on sentencing and reparation). Other tribunals (ICTY, ICTR), by contrast, have remained more constrained in this respect. However, even ad hoc tribunals which could not recognise victims as participants in criminal proceedings and award reparations for the harm suffered have made frequent references to the idea of indirect victimhood in their sentencing decisions. Finally, all IHCTs at least once have referred to indirect victims in their reasoning without naming them as such. The scope of indirect victimhood in international criminal law is therefore based not just on the lexical use of the term in question, but on the broader idea that underlies it. Consequently, indirect victimhood that can be derived from judicial practices of IHCTs is internally varied: in some respects it is defined (explicit), and in other respects it remains undefined (implicit). *De lege lata*, however, its normative relevance is indisputable.

## 6.2. AVOIDING ARBITRARINESS: INDIRECT VICTIMHOOD IN REPARATION AND SENTENCING DECISIONS

As alluded to above, there is a notable difference in the way in which the concept of indirect victimhood has been recognised in sentencing and reparations decisions of those tribunals

<sup>154</sup> *Ntaganda*, Sentencing Judgment (n 9) para 102; *Bemba*, Decision on Sentence (n 107) paras 29–30; ICTY, *Prosecutor v Mrksić et al.*, Judgment, IT-95-13/1-T, Trial Chamber, 27 September 2007, para 685 ('victims of the offences were all murdered on the day. The consequences for them were absolute. Close family members have been left without their loved ones').

<sup>155</sup> ICTY, *Prosecutor v Blagojević and Jokić*, Judgment, IT-02-60-T, Trial Chamber, 17 January 2005, para 814 (referring to direct and indirect victims whose calls for justice should be addressed by an appropriate punishment).

<sup>156</sup> In this respect it is notable, for example, that only the ICC has defined indirect victimhood by way of identifying four groups of indirect victims. Furthermore, this concept becomes even more homogeneous and less clear once it is viewed from the perspective of other branches of international law, such as human rights law. For instance, family members of a person who is killed (direct victim of a crime) may be considered *direct* victims of human rights abuses, eg, when the state does not conduct an effective investigation. This does not change the fact that they may also be seen as indirect victims of the said crime.



which can decide on both aspects of punitive and reparative justice (such as the ICC). The distinction stems from the fact that, in contrast to orders for reparations, sentencing decisions are usually devoid of the substantive reasoning that explains why the harm of those whom we are ready to call indirect victims should provide reasons for imposing a harsher sentence on an offender. IHCTs have followed an idea that the effects of victimisation cannot be confined only to those sustained by direct victims. While this might indeed be correct, on many occasions – regrettably – these findings have been entered by IHCTs with little or no additional explanation. Among others, this is clearly visualised by their continued references to an unspecified category of ‘direct victims and their relatives’. Indirect victimhood in international criminal law may thus first be criticised on account of its arbitrary character, given an insufficiently explained legal basis for its application in specific cases. This viewpoint is premised on the claim that decisions of IHCTs – especially those concerning the determination of punishment – provide insufficient information about the way in which the said concept becomes connected with the crime and its perpetrator.

This should not suggest, however, that indirect victimhood does not raise controversies in the field of reparative justice, especially as regards the conditions of causation. One may wish to argue in this respect that harm suffered by indirect victims is sometimes too remote from the victimising events in question to be recognised as foreseeable to an offender in accordance with binding standards, and in such a case that it should not be deemed reparable by a convicted perpetrator.<sup>157</sup> If that objection is indeed legitimate, then the whole concept of indirect victimhood – its components and current scope – could be effectively challenged.

Nevertheless, in their continued recognition of harm sustained by indirect victims, IHCTs have clearly espoused the famous phrase that ‘no man is an island’.<sup>158</sup> As virtually every international crime committed against another person’s protected interests is going to exert some negative consequences on those who were not directly targeted by it, it may be presumed – as IHCTs have repeatedly done – that every act of direct victimisation is also an act of indirect victimisation, and that behind every direct victim, there is at least one – but usually more – indirect victims.

All this may appear uncontroversial but, pursuant to this assumption, the resulting scope of reparative liability in the context of mass victimisation is inevitably going to be vast, if not totally

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<sup>157</sup> It is questionable, for example, whether transgenerational harm sustained by alleged indirect victims decades after acts of direct victimisation are sufficiently proximate. According to the ICC, this possibility cannot be excluded; see ICC, *Prosecutor v Katanga*, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, ICC-01/04-01/07-3804-Red, Trial Chamber, 19 July 2018, 31 (rejecting applications solely because ‘the Applicants concerned have not established, to the requisite standard of proof, the causal nexus between the psychological harm suffered and the crimes of which Mr Katanga was convicted’, and not as a result of the nature of transgenerational harm as such); Miriam Cohen, *Realizing Reparative Justice for International Crimes: From Theory to Practice* (Cambridge University Press 2020) 109; René Provost and Myriam Denov, ‘From Violence to Life: Children Born of War and Constructions of Victimhood’ (2020) 53 *New York University Journal of International Law and Politics* 1, 56–58; Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 409.

<sup>158</sup> An expression coined by John Donne in his 1624 work, *Devotions upon Emergent Occasions*.

limitless. Considering the personal scope of indirect victimhood, which no longer is limited only to family members (Section 6.3), it is therefore pertinent that before accepting claims for reparations, IHCTs verify (i) whether an offender could have foreseen that an act of direct victimisation may eventuate in the suffering of indirect victims, and (ii) whether family members and other potential indirect victims have indeed sustained some harm as a result of direct victimisation.

The case law analysis, however, reveals that according to IHCTs an attribution of negative consequences to perpetrators of international crimes will generally meet the condition of foreseeability (the proximate cause standard).<sup>159</sup> The ICC, for instance, has followed an approach whereby all harm sustained by indirect victims is potentially reparable under Article 75 of the ICC Statute. It remains debatable, however, whether all harm suffered by indirect victims can be seen as proximate consequences of direct victimisation in every case. To date, the burden of limiting the scope of recognised (indirect) victimhood has thus been put not so much on legal requirements (the but-for test and the proximate cause standard), but on evidentiary standards. While the latter condition has turned out to be effective in those cases in which the Court did not accept reparation claims submitted by indirect victims,<sup>160</sup> it would still be desirable for the Court to provide more detailed and explicit ways of reasoning not just in relation to evidentiary requirements as such, but also with regard to binding legal conditions of causation (the legal *Dogmatik*<sup>161</sup>).

As far as the sentencing regime is concerned, there are two claims – radical and constrained – that may be pressed as critical responses to the function of indirect victimhood in the punitive sphere of international criminal law.

The first claim provides that IHCTs should totally abandon the practice of affording any weight to the suffering of alleged indirect victims in their sentencing decisions. This idea had already been expressed in the case of *Krnojelac*, referred to above, with the Tribunal making it clear that the negative effects of direct victims' victimisation sustained by indirect victims 'are irrelevant to the culpability of the offender, and that it would be unfair to consider such effects in determining a sentence'.<sup>162</sup> Accordingly, instead of accepting every act of victimisation that results in a complex status of victimhood covering not just direct victims but also numerous indirect victims, communities and even the international community as a whole, an offender would be held responsible only for such harm that was *directly* caused by their acts.

<sup>159</sup> The Court verifies if 'it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm': *Ntaganda*, Reparations Order (n 13) para 133. It also notes that 'causation between an act and its result may be broken by a subsequent event which the person who committed the initial act could not have reasonably foreseen': *ibid* para 134.

<sup>160</sup> Such as *Katanga*, Decision on Transgenerational Harm (n 157) (rejection of claims based on transgenerational harm for evidentiary reasons).

<sup>161</sup> The need for a broadly conceived *Dogmatik* in international criminal law was underscored years ago by George P Fletcher, 'New Court, Old Dogmatik' (2011) 9 *Journal of International Criminal Justice* 179 ('The specific ideas that one needs to support a just system of criminal law are the building blocks of what the Germans call a *Dogmatik* of the criminal law').

<sup>162</sup> *Krnojelac*, Judgment (n 51) para 512.

All the same, this argument may justifiably be viewed as too limiting, and therefore unjust and unacceptable. This leads us directly to the second – more restrained – viewpoint, which stipulates that indirect victimhood should be considered not simply with regard to reparative justice but also in the domain of punitive justice. To counter the criticism elaborated above, however, IHCTs should explain in more detail why they are willing to recognise the suffering of alleged indirect victims as normatively relevant for these purposes. Further, one could also argue that they should conduct a more detailed examination of both substantive and evidentiary conditions providing for the nexus between offenders, their crimes and the suffering of indirect victims. I therefore claim that so long as sentencing decisions do not feature these additional components, references to indirect victimhood in sentencing practices of IHCTs will remain arbitrary and, in effect, not entirely convincing from a legal point of view.<sup>163</sup>

### 6.3. WHOSE AND WHICH TYPES OF HARM SHOULD MATTER? FAMILY RELATIONS AND SUBSTANTIVE BOUNDARIES OF INDIRECT VICTIMHOOD

The previous section advocated a more detailed exposition of the function of indirect victimhood against the backdrop of judicial reasoning, as well as factual and legal aspects of specific cases before IHCTs. This section, in turn, focuses on the substantive scope of indirect victimhood; for it is one thing to accept the concept of indirect victimhood in sentencing and reparative regimes (despite criticising its inadequate explication in practice), and another thing to identify and properly delineate the personal scope as well as legally relevant effects of indirect victimisation. As the latter context provides additional reasons for the recognition of the former, in what follows I reflect on the boundaries of indirect victimhood by pursuing two *prima facie* contradictory arguments (*too stringent* and *too broad*).

The concept of indirect victimhood in international criminal law is not constrained by the family criterion. Accordingly, both relatives and non-relatives in some circumstances may be recognised as indirect victims of international crimes in the sphere of punitive and reparative justice. This relaxed interpretation of the contours of indirect victimhood, in my view, merits a positive assessment. Indeed, it would seem rather difficult to defend the position that only family members may sustain such indirect injuries or losses.

In their sentencing decisions IHCTs have frequently made reference either to family members of direct victims (relatives) or some undefined collective victims (inhabitants, communities).<sup>164</sup> These decisions, however, do not mention other potential indirect victims, such as those who tried to prevent the victimisation of direct victims, even though they have been accepted by IHCTs (for instance, by the ICC) as a subcategory of indirect victimhood in reparation orders

<sup>163</sup> In all fairness, that criticism seems justified not just in relation to the place of indirect victimhood within sentencing regimes of IHCTs, but also with regard to other components of international sentencing. The haphazard character of these practices has already been captured by Barbora Holá in the title of her informative book: *International Sentencing: 'Game of Russian Roulette' or Consistent Practice?* (n 17).

<sup>164</sup> The latter category of collective victims is particularly controversial as it does not fit easily the definition of 'direct' or 'indirect' victimhood in international criminal law.

(Section 4.1). Consequently, it looks as if the concept of indirect victimhood has had a different scope and character depending on the context (punitive – narrower; reparative – broader) in which it has been invoked by IHCTs. It seems unfortunate that IHCTs have not explained this discrepancy, especially as it does not contribute to the value of conceptual consistency in their case law. Moreover, the phrasing espoused by IHCTs in their subsequent sentencing decisions (‘victims and their relatives’) is not convincing either. It arguably results in a *too stringent* understanding of indirect victimhood in the sphere of punitive justice in international criminal law.

A related objection, as far as the scope of indirect victimhood is concerned, may be pressed against reparation decisions as well. Its source lies in the fact that the family criterion, as well as harm sustained by such applicants, have been presumed by IHCTs (for instance, by the ECCC and the ICC<sup>165</sup>) for the purposes of establishing who may be considered an indirect victim in specific cases,<sup>166</sup> thereby creating a duality of victimhood – with family members viewed as typical indirect victims, and other applicants faced with a more demanding evidentiary burden before their status of indirect victims is recognised. This approach may be criticised as *too stringent* as well, although in a different – evidentiary – sense in that it pursues a very traditional and formalistic understanding of the sources of one’s indirect victimisation, with the family depicted as the paradigmatic indirect victim. That said, it is even more disputable whether any *presumption of victimisation* (family criterion, harm) is defensible in relation to *substantive* decisions from the perspective of the rights of the accused at all.<sup>167</sup> If the latter objection is justified, one may argue that an approach adopted by IHCTs has, in fact, been *too broad* because they should not have introduced such family- and harm-oriented presumptions in the first place.

Apart from probing into the personal scope of indirect victimhood, it is also necessary to inquire about an operative term of indirect victimisation, namely the concept of harm, and to ask which types of harm of alleged indirect victims should be recognised as legally relevant by IHCTs in their respective sentencing and reparation decisions. Unfortunately, in contrast to reparation orders, which cast light on specific types of injury, these conceptual issues have not

<sup>165</sup> *Kaing Guek Eav*, Appeal Judgment (n 125) para 448; *Katanga*, Judgment on the Appeals (n 80) para 113.

<sup>166</sup> Such a presumption is arguably in use also in sentencing decisions. This is demonstrated by an expression mentioned above: ‘direct victims and their relatives’. The difference lies in the fact that in the sentencing context this presumption has not been spelled out by IHCTs at all, whereas in reparation decisions it has been openly admitted by the ICC and the ECCC.

<sup>167</sup> The presumption of victimisation is obviously necessary for the purposes of victim participation in a criminal trial. It is accepted alongside the presumption of innocence on the part of the accused. For instance, Rule 2 RPE ICTY/ICTR defines victims as those persons ‘against whom a crime over which the Tribunal has jurisdiction *has allegedly been committed*’ (emphasis added). However, the aforementioned presumption relates to the *procedural* context. On the other hand, one may argue that an analogous presumption of victimisation with regard to *substantive* decisions (eg, granting reparations to indirect victims) cannot be defended in the same way as it remains far more intrusive from the perspective of the general idea underpinning rights of the accused (despite their conviction). In other words, from the fact that a direct victim has been harmed by a convicted offender, it does not follow that the court should be allowed to presume that family members of a direct victim are indirect victims simply because they are related in a formal sense. This determination should be entered only after proving so following all substantive and evidentiary conditions and criteria. Otherwise, an offender may bear responsibility for some (alleged but unverified) harm sustained by remote relatives of a direct victim. This would be unjust. For this reason, the latter presumption would necessitate an additional and different explanation. Unfortunately, to date, IHCTs have not clarified why their use of this presumption should be accepted as correct.

been addressed by IHCTs in their sentencing decisions to date. What has been taken for granted in the case law of IHCTs instead is that most – proximate and remote – effects of international crimes should be weighed and assessed in the context of both punitive and reparative justice.

Sections 3, 4 and 5 have demonstrated that a great number of types of harm suffered even by remote subjects, including the international community as a whole, have been taken into account by IHCTs in their decision-making processes. I argue that this is what makes an approach adopted by IHCTs conceptually too broad. To substantiate this position, it is first useful to look at the substantive relationship between *harm* and *victimhood*. If one examines the nature of criminal responsibility and reparative liability more closely, nine options seem logically conceivable as far as the recognition of harm and victimhood is concerned:

- (1) all harm of direct victims and all harm of indirect victims;
- (2) all harm of direct victims and some harm of indirect victims;
- (3) all harm of direct victims and no harm of indirect victims;
- (4) some harm of direct victims and all harm of indirect victims;
- (5) some harm of direct victims and some harm of indirect victims;
- (6) some harm of direct victims and no harm of indirect victims;
- (7) no harm of direct victims and all harm of indirect victims;
- (8) no harm of direct victims and some harm of indirect victims;
- (9) no harm of direct victims and no harm of indirect victims.

In as much as these options exclude each other, only one may be applicable to each model of victimisation. In this respect it is worth mentioning that the currently employed unrestricted harm-based model of victimhood is premised on the first formula (victim – Rule 85(a) RPE ICC, civil party – the ECCC), whereas the wrong-based model corresponds with the sixth model (victim – Rule 85(b) RPE ICC, victim – ad hoc tribunals, victim – the ECCC).<sup>168</sup> From this it does not follow, however, that other correlations could not be used in practice as well, depending on the elements of the adopted definition of victimhood (for instance, through an exclusion of certain types of harm).

To further visualise this issue in relation to indirect victimhood, suppose that XYZ becomes a victim of rape (war crime). XYZ will most likely suffer from physical and psychological harm as these types of harm are closely related to the nature of rape (consequences – direct victimhood). Further, psychological harm is most likely to be sustained by their family members and other people who remain connected with a direct victim in one way or another (consequences – indirect victimhood). Nevertheless, apart from such proximate consequences of this crime, there may be other repercussions of their victimisation, such as material losses (such as, loss of income). What remains contentious as far as the substantive dimension of indirect victimhood is concerned is whether all such – proximate and remote – negative effects sustained by (direct and) indirect

<sup>168</sup> In practice, however, as far as victimhood enshrined in Rule 85(a) RPE ICC is concerned, the Court's decisions point to certain causal limitations, which bring its decisions closer to the second model.

victims should be recognised as sufficient bases for granting reparations and imposing harsher sentences on guilty offenders. The answer to this query inevitably lies in the specific policy of victimhood espoused in international criminal law,<sup>169</sup> and only secondarily in the legal requirements of causation and attribution applied by IHCTs.

Against this backdrop, the normative position pursued in this article provides that some but not all types of harm of both direct and indirect victims should be treated as reparable and relevant for sentencing purposes in international criminal law. As such, this proposition is premised on the fifth configuration mentioned above, according to which ‘some harm of direct victims and some harm of indirect victims’ should be given weight in the field of international criminal law. This approach is based on two separate – *ex ante* and *ex post* – arguments.

The former *ex ante* perspective revolves around policy reasons.<sup>170</sup> Accordingly, I argue that because of their specific character, some *prima facie* types of harm (such as transgenerational harm), which underpin the concept of indirect victimhood should be considered *ab initio* as legally irrelevant in punitive and reparative regimes of international criminal law.<sup>171</sup> This argument directly limits the scope of indirect victimhood in that it precludes recognition of indirect victims who claim to have sustained, for instance, the aforementioned transgenerational harm. Such an undertaking would need to be completed at the legislative stage through limiting the scope of recognised types of harm in the adopted definition of victimhood (as in Rule 85(b) RPE ICC: material types of harm).

The latter *ex post* perspective refers, in turn, to causal considerations as well as the character of specific international crimes. As such, it does not narrow the conceptual scope of direct and indirect victimhood *ex ante*. Instead, it suggests that some types of harm (for instance, monetary losses) could be treated as (i) reparable or non-reparable (reparation orders), or as (ii) relevant or irrelevant (sentencing decisions), and that the answer to this query lies in the circumstances of a particular case as well as adopted normative criteria of responsibility (causation). For instance, although monetary harm may be recognised as a legally material ground of victimhood in a general sense (rejection of an *ex ante* limitation), especially in relation to offences such as pillaging, when the crime in question is directed at interests unrelated to material goods (for instance, an act of rape), it may be argued that such losses should be excluded because of their remoteness from the offender and their crime (material losses – rape). If so, they should also not be considered in

<sup>169</sup> Jules L Coleman, *Risks and Wrongs* (Oxford University Press 2002) 271 (‘Proximate cause picks out from the set of necessary conditions, or but-for causes, that event that liability can be legitimately grounded on. Determining which activity is the proximate cause of an event’s occurrence will depend on considerations of policy and principle’).

<sup>170</sup> Many different policies are conceivable in this respect, some of which will be accused-centred; others will be more victim-friendly. In this respect one may note that all IHCTs seem to have adopted the victim-centred approach. This is arguably one of the reasons for their continued acceptance of presumptions of victimisation as well as relaxed criteria of attribution. See also George P Fletcher, ‘From *Rethinking* to *Internationalizing Criminal Law*’ (2004) 39 *Tulsa Law Review* 979, 992 (‘This bias toward victims makes the ICC different from other systems of criminal law that typically begin with a commitment to the rights of the accused and then struggle to accommodate the interests of victim’).

<sup>171</sup> For a view advocating the recognition and compensation of transgenerational harm in international criminal law see n 157.

sentencing and reparation decisions. In this case, therefore, the limitation on the scope of indirect victimhood comes *ex post*, following an examination of the correlation between the specific type of crime and the harm allegedly stemming from it.<sup>172</sup>

## 7. CONCLUSIONS

The fact that most human beings are not individualised and detached entities but have families and other close relationships, and are therefore linked in specific and more intimate ways to other people, is not just a socially relevant fact, for family relations and other close relationships are factors of normative significance in the field of international criminal law. Through acts of interpretation, indirect victimhood – under which such family and other close relations remain normatively relevant – can now be discerned in various modalities in the case law of IHCTs and may even leave an impact on specific decision-making processes undertaken by these tribunals.

All the same, this article demonstrates that the concept of victimhood in international criminal law is not uniform but possesses a different scope in specific legal regimes created for IHCTs. Depending on which of the two theoretical models of victimhood – harm-based or wrong-based – is selected, the scope of legally recognised victimisation and victimhood will differ, sometimes markedly. The recognition of indirect victimhood may, in fact, be provided only by the former harm-based model of victimhood, which has been applied in practice not just by the ICC and the ECCC, but also by tribunals such as the ICTY and the ICTR, the legal frameworks of which provided solely for the wrong-based definition of victimhood (Rule 2 RPE ICTY/ICTR).

The article also argues that it remains highly doubtful whether the formalistic criterion concerning family relations properly reflects actual victimisation stemming from the suffering of direct victims. It is possible, after all, for one to share closer bonds of friendship or even love with those who are not family members of a direct victim in a formal sense. If indirect victimhood is indeed justified as a concept, it would seem unfair to preclude or make it more difficult in an evidentiary sense (presumptions and their absence) for such persons to be recognised as indirect victims on account of some additional subject-related criteria. It is therefore commendable that

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<sup>172</sup> To show how this *ex post* perspective would work in relation to the concept of indirect victimhood, it could be argued that, for instance, psychological harm of indirect victims stemming from material harm sustained by direct victims (eg pillaging) is *too remote* from the crime in question; in effect, it should be deemed irreparable (reparative justice) and irrelevant (punitive justice) in contrast to material harm sustained by direct victims, which would be material in both spheres of reparative and punitive justice. However, it should be underscored that this suggestion is not merely normative (*de lege ferenda*) in its nature, for it also finds some support in the case law of IHCTs (*de lege lata*). As an example, note that in the 2009 Decision on Indirect Victims (discussed at Section 4.1), the ICC made it clear that ‘the person attacked by a child soldier is not an indirect victim ... because his or her loss is not linked to the *harm* inflicted on the child when the offence was committed’: *Lubanga*, Decision on ‘Indirect Victims’ (n 62) para 52. This absence of a link corresponds with my claim that some types of harm are simply too remote from initial negative effects of direct victimisation to be deemed material for reparative and punitive purposes. Therefore, one cannot claim to be an indirect victim of the war crime of unlawful conscription of child soldiers simply because, as a result of this unlawful action, the victim has sustained harm stemming from the child soldiers’ subsequent actions. It could thus be said that the ICC has adopted analogous reasoning in this case to the one presented above. My claim, however, is that this limiting reasoning should be applied to all crimes falling within the jurisdiction of IHCTs.



IHCTs (the ICC, the ECCC) have decided to follow a more relaxed approach to the family criterion in their case law, thereby positively addressing the *too narrow* claim. Nevertheless, there is still room for further improvement. It would arguably be better if they, first, referred equally to all such indirect victims in their future sentencing decisions (not just to 'direct victims and their relatives', but also to people with no formal relationships with direct victims), and, second, if they reoriented their reasoning by equating the standing of all potential indirect victims in terms of evidentiary conditions and quite controversial presumptions of victimisation.

Following the distinction between punitive and reparative justice, the article further puts into question some practices of affording weight to indirect victimhood in both spheres. In the former context, criticism was voiced in relation to causal requirements and the recognition of all harm of indirect victims as potentially reparable. In the latter context, the criticism was based on stronger grounds concerning the substantive and evidentiary specification that remains absent in sentencing decisions of IHCTs. It was thus argued that in their respective sentencing decisions IHCTs should follow a model of detailed and explicit reasoning that characterises most reparation orders.

Finally, IHCTs seem to have premised their reasoning on an assumption that harm is the natural effect of mass victimisation, and that all types of harm may be treated as material in the process of determining sentences and reparations. To counter this practice, the article formulated an argument that not all types of harm that potentially underpin the concept of (indirect) victimhood should be accepted for judicial purposes in both punitive and reparative contexts. While some types of harm should thus be excluded *ex ante* as potential grounds of (indirect) victimhood, others should be categorised as non-reparable and irrelevant for sentencing only *ex post*, given the circumstances of concrete cases tried before IHCTs.