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Megumi Ochi, Renata Barbosa, Luyuan Bai *(Eds.)*

Victim-Centred Criminal Justice

(XIth AIDP International Symposium for Young Penalists,
Kyoto, Japan, 14-15 September 2023)

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Summary

PREFACE

John A.E. Vervaele[*]

The classic criminal justice system, be it under the classic penal thought of the founding fathers of the criminal codes of procedure in the Enlightenment or even in the neo-classic schools in the late 19th century, did not provide any relevant or substantial role for the victim. They are just ignored. The criminal justice system was based on the protection of public safety interests and a public demand for retributive justice. At the end of the 19th century, criminology and sociological positivism did shift the main attention from the criminal act to the criminal actor. The related discussion on punishment and rehabilitation, beside or even in place of retribution, did not change the conceptual approach of the renewed criminal justice approach in relation to the victim. I would even say that the classic civil law vs. common law divide is not crucial here either. Both systems do deny the victim to a large extent. The common law systems are theoretically, even in criminal law, party-driven systems, but the victim as a party has mainly been taken over by the police. The result is that the common law criminal justice system is as state- and offender-oriented as the civil criminal justice system. In the civil justice system, there are even more possibilities for the victim to play a certain role. In some countries, the victim can request the judicial authorities to trigger investigative acts, can stand as a party within the criminal proceedings for their civil claims, and can use remedies against decisions of non-prosecution. However, even in these countries, the victim remains an outsider and has very few rights. At most, they are considered a privileged witness who can contribute to the discovery of the truth and be a useful tool in the process of evidence gathering. The absence of a victim approach is clearly related to the theoretical and conceptual foundations of criminal justice (its goals, its legitimacy), which is reflected in the structure and functioning of the criminal procedure. Even when, in the 1960s, the first victim surveys came to light, they were mainly driven by the state's interest in discovering the dark figure of unreported crime.

The real paradigm change came (too) late, namely in the 1970s, mainly under the pressure of the victimology and victim rights movements, with early grassroots in the civil rights movement of the 1960s. Victimology, as part of criminology, did not only put the study of victimization at the centre, but also the relationship between victims and offenders, as well as the interactions between victims and the criminal justice system. The impact of both movements upon the criminal justice systems has been quite impressive. It led to many initiatives at the international, regional, and domestic levels to reform the criminal justice system with the aim of a) increasing the rights of victims as participants or parties in the procedure; b) providing new mechanisms to protect victims, particularly in areas of serious or organized crime; and c) foreseeing better mechanisms for harm compensation. Besides that, there has also been increasing interest in forms of restorative

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justice, inside or outside the classic justice system. As restorative justice focuses mainly on the harm caused by criminal or deviant behaviour, it provides a framework for addressing and preventing harm that moves beyond punishment toward healing. Mediation and conflict resolution between offenders and victims play a central role in that approach.

Although the impact has been impressive, it varies a lot from one jurisdiction to another, and the reform is still ongoing. In some jurisdictions, even today, the victims remain quite outsiders in the criminal justice system. In other jurisdictions, the victim-driven interest, combined with a strong procedural position, has led to new problems, such as strong delays, more limited defence rights for the offenders, and disproportionate involvement of victims in the decision on penalties or at the level of execution of the punishment. At the international level, specific bills of criminal procedure have been elaborated for the new international criminal courts, with a lot of interest for the victims. This is, of course, also related to the nature of the crimes, mostly atrocity crimes, but also the combined function of these courts (truth finding, punishment, harm compensation).

In light of these findings, the Young Penalists Committee of the AIDP has made a wise decision to organise its 11th Symposium on the topic of "Victim-Centred Criminal Justice" and to focus especially on the area of sexual offences and on the atrocity crimes dealt with by the international criminal courts. These are indeed the fields where we see today a significant societal and scientific debate on the position of the victim in the criminal justice system, but also on the goals of the criminal justice system and thus on its legitimacy.

In these debates, there are a series of dimensions that I would like to mention briefly. First of all, the typology of victims in relation to victimization is no longer limited to natural persons. Besides them, there is also an increasing interest in issues of legal persons as victims and even for collectives of systemic victims, as, for instance, in relation to genocide or ecocide. Related questions are, of course, to what extent the criminal justice system is the most appropriate tool to deal with these societal expectations and, if so, whether it is able to fulfill the expectations of truth finding, justice, and reparation/compensation.

Second, there is a lot of debate on the importance of the criminal justice system for the victims and, related to that, for the place of the victim in the criminal justice system (from the opening of the investigations until the phase of enforcement or execution). Related to the former is, of course, the relationship between restorative justice outside the criminal justice system and forms of transitional justice (from truth commissions to alternative forms of criminal justice) in relation to atrocity crimes. As to the latter, this contains many dimensions. First of all, the victim's interest is more and more present in the substantive criminal law, of course related to the protected legal interest and/or harm. In the field of terrorism, human trafficking, and sexual offences, we clearly see this approach. The expansion of new offences is not always self-evident. Let me give an example in the field of image-based sexual abuse. Non-consensual disclosure of images converts them into

"pornography," which can also be "revenge porn" and result in sextortion, depending on the specific motives of the perpetrators in question. Given the devastating harm that this entails for the victims and society, affecting legal interests such as privacy and intimacy, sexual identity, autonomy and privacy, moral freedom, and leading in some cases to the suicide of the victim, it has become clear that the existing criminal law framework, aiming at protecting privacy and combating the sexual exploitation of children and child pornography, as well as violence against women or cybercrime, falls short when it comes to this specific reality. However, when considering an appropriate criminal law solution as part of a general policy to prevent, protect and repress, considerable problems do arise. First of all, there is no clear typology or conceptual definition of the phenomenon, which is also illustrated by the variety of definitions involved. Second, adults have a right to sexual freedom and identity and criminal law should not intervene as a moral agent in the essence of sexual freedom. Third, the non-consensual use of sexual images is also a difficult issue as the lack of consent is, in many cases, not related to the production of these images and even not to their disclosure in an intimate setting, but to their further or extended disclosure. Must those who further disclose or distribute always ask for affirmative consent or can this consent also be deduced from the facts in the intimate setting? Does the behaviour of the victim play a role in this, or would this always result in victim-blaming? And what type of legal interest should be protected by criminal law? Should the criminal law intervention aim at protecting sexual privacy as such?

Besides the substantive dimension, there is, of course, also a very important procedural dimension, dealing with access to fair justice, participation and related victim rights in the full range of criminal proceedings (pre-trial, at trial, post-trial), issues of victim protection and victim assistance, issues of victim compensation, etc. The debate behind these reforms is, of course, related to both the definition of "victim needs" and the goals of criminal justice. If one looks at, for example, the actual case law of the European Court of Human Rights on victims' rights in criminal proceedings, there is a very important caseload on victim-related human rights:

-What are the standards for granting a person victim status?

- Right of the victim to know the essence of the case, to what extent the victim shall enjoy the right to know the case materials, grounds for limitations, and stages.

- Right of a victim to make a copy of case files, exceptions, stages;

- Right of a victim to receive compensation and the role of the prosecutor in this regard;

- Right of a victim to file a motion against the decision of prosecutor;

- Right of a victim to appeal court decisions;

- What are the standards for considering a victim's position during the conclusion of a plea bargain and the application of discretionary power by the prosecutor?

Even then, there is also a clear demand for further strengthening of these rights. The Council of Europe recently took the decision to update its famous 2006 Recommendation on victims' rights and protection, as it is no longer in line with recent developments in victimological research and more sophisticated international victims' rights instruments, such as the Council of Europe's own Istanbul Convention and the EU Victims' Rights Directive (Directive 2012/29/EU of 2012). An expert committee has elaborated an interesting proposal[1] in that sense.

A less visible and underestimated dimension of the victim-centred approach in criminal justice is certainly the field of mutual legal assistance or judicial cooperation in criminal matters. This field is the monopoly of the state authorities (central units) and judicial authorities, although there has been some opening towards suspects, giving them the possibility to require the judicial authority's transnational gathering of evidence. However, even in the most recent treaties or regional instruments (such as the European Investigation Order in the EU), the victim is largely neglected. Exceptions to that are the fields of confiscation of criminal assets of organized crime and the use of those assets for victim compensation and related societal goals. Additionally, in the field of mutual legal assistance, there are interesting discussions ongoing to increase victims' rights, for instance, in the areas of organized crime and human trafficking.

In the field of international criminal justice, the debate on its goals is intrinsically related to the role and position of victims, both in relation to participation and reparation. The ICC has been pivotal in that respect. The debates are also related to the impact of this increased victim approach on the defence rights of offenders, procedural efficiency and even victim satisfaction. In the field of transitional criminal justice, with the key example of the Colombian peace agreement and Special Jurisdiction for Peace in mind, the victim-centred approach is even stronger. This is, of course, clearly related to the immense need for truth-finding and victim compensation in this context.

To conclude, criminal justice has been reshaped in order to fulfil the victims' needs. For sure, in some jurisdictions, it falls short. However, in other jurisdictions, questions arise in relation to an overemphasis on the victim approach, with debates on the interaction with offenders' rights and the goals of criminal justice, on the efficiency of proceedings, on the role of victims as enforcers of criminal justice and even on victim satisfaction as an outcome.

These debates show that the topic of "Victim-Centred Criminal Justice" is extremely relevant and current. So, once again, my congratulations to Megumi Ochi of

[1] European Committee on Crime Problems, Proposal for an Update of CM Recommendation Rec (2006)8 to Member States on Assistance to Crime Victims, CDPC (2021)1, Strasbourg, 8 February 2021.

Ritsumeikan University in Kyoto and Kanako Takayama of Kyoto University for the organisation of the event and for the editing of this interesting and extremely relevant volume of the YP AIDP Community.

PREFACE

Makoto Ida[*]

The theme of this year's symposium is Victim-Centred Criminal Justice, a topic that is also very close to my heart and has always been on my mind. In Japan, the era of revitalization of criminal legislation began around the year 2000, and the most important idea that supported this era was undoubtedly the idea of victim protection. I believe that victim protection and measures to ensure it were undeniably important from a legal policy perspective, and that the traditional criminal justice system left victims cold. I also believe that there are still areas that needed to be improved. Japan has made the quality of the criminal justice system as a whole better in this sense and should continue to do so.

However, there is a major problem here. In Japan, consideration for the victim's situation is directly linked to a worsening of the offender's situation. This has encouraged the trend toward harsher sentences over the past 30 years and more. I believe that it is the important task of criminal lawyers to stop this. One of my teachers, Koichi Miyazawa, was a pioneer of victimology in Japan and one of the first to recognize the problem of victims, but he himself was against the protection of victims. He believed that it would jeopardize the position of those who have committed or are suspected of having committed a crime.

Despite the principle of the presumption of innocence and the principle of "in dubio pro reo", we are relatively naïve when we believe someone who claims to be a victim. Indeed, it would be terrible if we told the victim that we will not believe that you are the real victim until the facts are fully established in court. However, the presumption of innocence is shaken when we readily assume that the story told from the victim's point of view is accurate, when we empathize with that point of view, and when we immediately direct our anger at the alleged perpetrator.

Victim protection must indeed be further advanced, but it must not go in the direction of worsening the position of the accused and defendant, for example, by making the punishment more severe. The issue of victim-centred criminal justice cannot be addressed without raising the fundamental question of the nature of punishment and its justification. I have high hopes that Young Penalists will use their flexible thinking to address this issue and move the discussion forward a step or two.

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VICTIM-CENTRED CRIMINAL JUSTICE: AN INTRODUCTION TO THE XIth AIDP SYMPOSIUM FOR YOUNG PENALISTS

Megumi Ochi, Renata Barbosa** and Luyuan Bai****

This volume of the RIDP consolidates the proceedings that were presented at the XIth AIDP International Symposium for Young Penalists, held at Ritsumeikan University in Kyoto, Japan, on 14-15 September 2023, titled *Victim-Centred Criminal Justice*.[1]

A victim-centred approach urges institutional guarantees to minimize the re-traumatization of victims in criminal investigations and empowers victims as participants and beneficiaries in the criminal procedure. It brings new perspectives to the criminal justice process and transformation to the affected community and the entire society. Such a new approach in criminal justice is becoming a trend in the investigation and reparation phases at both domestic and international legal discourses.

Victim-centred approach is especially important in relation to investigations of sexual crimes, particularly when the victims are children. In December 2020, the United Nations High Commissioner for Refugees issued a policy on a victim-centred approach in its response to sexual misconduct. Criminal investigations and information gathering into war crimes allegedly being committed in Ukraine have created a new dimension in criminal investigations, where repeated interviews by multinational investigators, journalists and human rights reporters from all over the world may overburden victims and thus undermine the credibility of their testimony. Against this background, the International Criminal Court (ICC) and Eurojust published practical guidelines for documenting and preserving information on international crimes in September 2022.

The victim-centred approach may bring dramatic changes in determining the forms of sanction and reparation. The concept of restorative justice has evolved into an innovative means to bring peace and forgiveness to the community harmed by crimes. Reconciliation programs are now incorporated in many countries' justice systems and comparative research in this field is ever-increasingly encouraged. Regional human rights mechanisms accelerate the promotion of norms and the practice of States' duty to enhance the right to remedy. At the international level, the Trial Chamber VI of the ICC declared in the 2021 Ntaganda reparation decision that a victim-centred approach should guide its reparations proceedings. Victims are now invited to community talks to discuss what they really want and what would work for future generations to overcome the past.

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[1] The event page is here: https://ochmgm.wixsite.com/megumiochi/general-8-1.

While the victim-centred approach appears to be an important value in various criminal process steps compared to the traditional crime-centred (or perpetrator-centred) approach, the impact that this concept may bring to fair trials needs to be treated with caution. Cherry-picking incriminating evidence and limiting investigations to avoid re-traumatization require appropriate safeguards to maintain effective investigation. The balance between the rights of the accused and the victims' rights requires an institutional guarantee of procedural justice for both parties.

The aim of this symposium is to discuss the prospects and problems of this new approach of victim-centering in criminal law. It pays special attention to the global issues of the current era, such as the increase in domestic violence cases during the lockdown, the escalation of sexual trafficking following the reopening of State borders at the end of the pandemic and the multinational investigatory efforts against war crimes that have been reported one after another following Russia's invasion of Ukraine. The need for information sharing and the promotion and management of evidence collection through international cooperation is significantly increasing, and theoretical and practical problems require new ideas to bring about fair and just criminal proceedings and their outcomes.

This volume is a collection of the selected eight contributions. They are divided into three thematic parts.

Part 1: Theoretical issues

Part 1 contains three stimulating theoretical discussions on the position and roles of victims in criminal proceedings. 'Making Victims Relevant: Republican Freedom and the Justification of Criminal Punishment' by Alexandra Giannidi explores how Braithwaite and Pettit's republican theory integrates victims' rights into punishment theory, viewing crime as a compromise of the victim's 'dominion', or freedom as non-domination. It argues that restoring the victim's dominion through restorative justice is crucial for a victim-oriented punishment framework, without turning the criminal justice system into tort law. The author contends that the caveat of this approach is that it may conflict with offenders' rights and suggests combining republicanism with backward-looking justifications to balance the interests of both victims and offenders.

In 'Respect for Victims as a Justification for Criminal Punishment' by Valerij Zisman, the author examines expressivist justifications for criminal punishment, which claim that punishment is necessary to show respect for victims. The focus is on two versions of this argument: the retributivist version, which sees punishment as inherently necessary and sufficient to express respect, and the conventionalist version, which views punishment as the best way to convincingly express respect. The author argues that both versions fail: the retributivist version does not establish an intrinsic link between punishment and respect, while the conventionalist version is empirically unsupported by recent research. Instead, the author suggests that expressivism is best justified through corrective sanctions such as restitution orders and restorative approaches where feasible.

'Reframing Criminal Justice with a Gender Perspective: Reshaping the Role of the Victim in Cases of Gender Violence' by Bruna Rachel de Paula Diniz traces the evolution of gender-based violence victims' roles within the criminal justice system. Initially considered almost irrelevant, victims have gained renewed attention through the feminist political agenda. Using a Marxist critique of law, the article analyses the victim's position from early criminal justice forms to modern law, highlighting changes during the late 20th century's punitive turn. Feminist scholars and activists have proposed two measures for a victim-centred justice model: reforms to prevent institutional victimization and an abolitionist approach advocating restorative justice practices. These feminist efforts reflect the dual challenge of reforming existing systems while simultaneously building revolutionary alternatives.

Part 2: Investigative phase

Both articles in this part illustrate the civil society's engagement in criminal investigation regarding war crimes and seek implications of/for victim-centred ways of criminal investigation.

'Heightened Risk of Revictimization as a Challenge Stemming from Digitalization and Democratization of International Criminal Justice Efforts: Case Study of Polish Civil Society Organizations in the Aftermath of the Russian Aggression on Ukraine' by Kaja Kowalczewska discusses how digital technologies are transforming international criminal justice by highlighting the human factor, especially emotions and psychological impacts. This chapter examines the role of Polish Civil Society Organizations (CSOs) in managing revictimization risks during the prosecution of international crimes after the Russian invasion of Ukraine. Using early 2023 case studies and interviews, the findings are compared with Eurojust and ICC-OTP Guidelines to understand the impact of digitalization on revictimization and justice, offering recommendations for future CSO practices and international criminal justice.

'Crowdsourcing 'Citizen Digital Evidence': Participation of Civilian Population during the Armed Conflict between Russia and Ukraine' by Artem Galushko illustrates that the proliferation of armed conflicts and international crimes worldwide highlights the need for civilian participation in collecting digital evidence (e-evidence) of crimes such as genocide and war crimes. This article shows that cooperation between individual documenters, government institutions, civil society, and international organizations in Ukraine has strengthened the role of witnesses and victims in legal proceedings. The widespread use of digital documentation in conflicts requires careful examination of its risks and benefits for international criminal justice.

Part 3: Trial and reparation phase

This part discusses the issues related to the issues before the judges. How a victim-centred approach is incorporated and practiced during the trial and deliberation of decisions is the common question. Three articles deal with different issues, shedding light on the

variety of opportunities and challenges to reflect victims' views on criminal facts and legal findings.

Many jurisdictions have integrated forensic interview methods into their criminal justice systems, especially for child victims, but the admissibility of these statements remains underexplored. 'The Admissibility of Evidence Collected through Forensic Interviews with Child Victims in the U.S. and Japan' by Yuto Yokoyama focuses on the admissibility of forensic interviews, refining the Daubert standard to assess their reliability in the U.S. and Japan. It finds forensic interview evidence generally admissible in the U.S., while Japan faces several challenges, and proposes recommendations to improve admissibility in Japan.

'Private Accessory Prosecutors and their Influence on German Criminal Proceeding' by Maria Gahn indicates that victim protection and rights lack a globally binding solution, but the EU Victims' Rights Directive aims for harmonization among Member States and can serve as a model for other countries. Its implementation varies by national law, leading to different regulatory regimes, such as in Germany, where the rights of private accessory prosecutors exceed those of other victims. This creates practical challenges, particularly concerning the extent of file inspection rights, balancing victim protection with concerns about credibility in word-against-word situations.

'Towards a Transformative Reparation Process: The Communication Practice by the International Criminal Court' by Megumi Ochi sheds light on the ICC's reparation process. The ICC adopts a transformative approach to address the needs and rights of victims of mass atrocities, aiming to change underlying social conditions that perpetuate injustice. This article examines how the ICC integrates transformative justice into its reparation process. Using the ICC's outreach and reparation practice in the situation in Uganda as a case study, it explores the challenges of communicating the Court's proceedings to local communities and underscores the importance of effective communication for a transformative impact.

PART 1: THEORETICAL ISSUES

MAKING VICTIMS RELEVANT: REPUBLICAN FREEDOM AND THE JUSTIFICATION OF CRIMINAL PUNISHMENT

Alexandra Giannidi[*]

Abstract

Although punishment theories have been slow to incorporate the move towards victims' rights, Braithwaite & Pettit's republican theory has been a notable exception. This paper is concerned with identifying the ways in which it urges us to rethink punishment, and its evaluation. According to republican theory, crime compromises the victim's 'dominion', a type of freedom as non-domination, thicker than freedom as non-interference. In this context, punishment is justified as the rectification of the victims' diminished dominion primarily through restorative justice processes. It is argued that republicanism reveals the concept of 'dominion' as indispensable to the development of a normative framework for victim-focused punishment, without reducing the criminal justice system to a system of tort law. But does this turn to victims come at a cost for offenders? Although the republican conception of punishment successfully integrates a principle of parsimony, it's purely consequentialist character, reflected in the penal practices it envisions, is unreconcilable with the mandate for a stable protection of offenders' rights and proportionate sentencing. It is suggested that the way forward requires a theoretical synthesis between republicanism and backward-looking justifications of punishment, corresponding to criminal justice practices which do not set up victims and offenders for a zero-sum game.

1 Introduction

Recent years have witnessed increasing attention to the insecurity felt both by real and potential victims of crime,[1] which is reflected in the movement towards victims' rights. In this context, one of the main things to ask of any penal theory is how seriously it takes the freedom of victims and how well it does in restoring it.[2] Nevertheless, theories of punishment have mostly failed to incorporate the movement towards victims' rights[3] with the notable exception of Braithwaite & Pettit's republican theory.

The purpose of this paper is (i) to identify the ways in which Braithwaite & Pettit's republican theory urges us to rethink the philosophy and practice of punishment and criminal justice,[4] positioning victims at its centre, (ii) to examine whether this comes at the

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[1] See further Lucia Zedner, *Security* (Routledge, 2009).

[2] Victoria McGeer and Philip Pettit, 'The desirability and feasibility of restorative justice' (2015) 3 Restorative Justice 325.

[3] Tim Newborn, *Criminology* (3rd Edition, Routledge, 2017) ch.18.

[4] Braithwaite and Pettit's theory is a theory of criminal justice aiming to identify a single target for the criminal justice system as a whole. Nevertheless, their focus of this paper is in showing the advantages of

expense of offenders, and (iii) to determine how the evaluation of republican theory can guide future attempts of developing a more complete victim-focused theory of criminal justice.

In Part 2, I outline the structure and content of republican theory. In Part 3, I explain how republican theory places victims at the centre of the theory and practice of punishment. I argue that its major contribution amounts to bridging the gap between a victim-focused justification of punishment and a victim-focused practice of punishment, thus providing a normative framework for the practice of victim-focused punishment, without collapsing the criminal justice system into other systems of the law. In Part 4 I evaluate republican theory from the perspective of offenders. The upshot of my analysis is that, although republicanism is the most convincing amongst the consequentialist theories, its purely consequentialist character does not allow it to guarantee a stable allocation of offenders' rights and thus, a mixed theory should be preferred. However, the republican contribution to developing such a mixed theory is significant not only for victims, but also from the perspective of offenders, because it indicates how penal parsimony can be grounded within the philosophy of punishment, rather than merely on broader liberal considerations. Finally, in part (5) I conclude with some suggestions about how to move forward, making the most out of the strengths of republican theory, while adjusting for its weaknesses.

2 Braithwaite & Pettit's republican theory

In this part, I outline the structure and content of republican theory. I begin with an overview of the theory before delving into each of its central components.

2.1 Overview

Braithwaite & Pettit's republican theory is the result of an unusual and enlightening cooperation between a philosopher and a criminologist. It is ambitious in its scope as it offers insight on the whole spectrum of normative thinking about criminal justice policy, from the purely philosophical to the practical and directly applicable. In combining Braithwaite & Pettit's initial statement of their theory[5] and their multiple subsequent publications,[6] their insights can be summed up as follows:

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their theory as a theory of punishment and locating it in the broader debate about the justification of punishment. I have, therefore, chosen to focus on the implications of their theory for punishment, while keeping in mind its wider application.

[5] John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press, 1990).

[6] See further: Philipp Pettit and John Braithwaite, 'Not Just Deserts, Even in Sentencing (1993a) 4 Current Issues in Criminal Justice 225; Philipp Pettit and John Braithwaite, 'The three Rs of Republican Sentencing' (1993b) 5 Current Issues in Criminal Justice 318; John Braithwaite and Philip Pettit, 'Republican Criminology and Victim Advocacy: Comment' (1994) 28 Law & Society Review 765; John Braithwaite & Christine Parker, 'Restorative Justice is Republican Justice: Repairing the harm of youth crime' in Bazemore G. & Walgrave L. (eds), *Restorative Juvenile Justice: Repairing the harm of youth crime* (Criminal Justice Press,

(a) The character of a theory of punishment should be comprehensive (linking punishment to criminal justice policy as a whole) and consequentialist;

(b) The target of punishment should be the restoration of dominion, a form of negative liberty which does not amount to being left alone, but to being given equal protection before a suitable law and thereby avoiding any structural dependence or domination;

(c) The method for restoring dominion involves primarily reintegrative reprobation exercised through reintegrative shaming and incapacitation as a last resort. Therefore, the practical implications of the theory amount to the preference for restorative justice and the use of fines and to the use of long prison sentences as a last resort.

Braithwaite & Pettit's first two claims, (a) and (b), are purely philosophical. In arguing for them the authors aim to prove the superiority of their theory against its main consequentialist rival in the field of criminal justice, *preventionism*, as well as against deontological and mixed theories of punishment, especially von Hirsch's *theory of 'just deserts'*. So central is the juxtaposition with von Hirsch throughout their argument that they named the book introducing their republican theory 'Not Just Deserts'. The authors' latter claim (c) takes for granted the correctness of the preceding philosophical arguments, further develops them, and combines them with theoretical and empirical criminological insights to inform practice.[7] These claims can be deduced primarily from the several publications that the authors' made jointly or independently after developing their republican theory in 'Not Just Deserts'.

In what follows, I will address the merits of the rationale and implications of these republican commitments. My first criterion of evaluation (examined in Part 3) is whether a solid connection between victims and punishment is inherent in these statements. My second criterion of evaluation, (examined in Part 4), is how well the target and method of republican theory fare with regards to the protection of offenders. Before proceeding,

1999); Philip Pettit and John Braithwaite, 'Republicanism and Restorative Justice: An Explanatory and Normative Connection' in Strang H. & Braithwaite J. (eds.), *Restorative Justice: Philosophy to Practice* (Routledge, 2000); John Braithwaite, 'Deliberative Republican hybridity through restorative justice' (2015) 59 Raisons politiques 33; Victoria McGeer and Philip Pettit 2015 (n2).

[7] Their theory is informed by the different strands of Braithwaite's criminology, including Braithwaite's theory of reintegrative shaming (see further: John Braithwaite, *Crime, shame, and reintegration* (Cambridge University Press, 2007); Eliza Ahmed and others, *Shame management through* reintegration (Cambridge University Press, 2001); John Braithwaite, Eliza Ahmed, and Valerie Braithwaite, 'Shame, Restorative Justice and Crime' in Cullen F., Wright J. & Belvins K. (eds.), *Taking Stock: The Status of Criminological Theory* (Transaction Publishers, 2008)), Braithwaite's grounding of restorative justice in re-integrative shaming (see further: John Braithwaite, *Restorative Justice and Responsive Regulation* (Cambridge, 2002a); John Braithwaite, 'Setting Standards for Restorative Justice' (2002b) 42 British Journal of Criminology 563), and Braithwaite's account of regulation (see further: John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 British Journal of Criminology 222)).

a few words should be said about the nature of the character, target, and method of republican freedom.

2.2 The character of republican theory

The character of republican theory is unique amongst theories of punishment both with regards to the type of consequentialism it endorses, and with regards to its scope; it is a comprehensive theory of criminal justice, not just a theory of punishment.

Republican theory is purely consequentialist, that is, its criterion for ranking alternative systems of punishment in order of merit is the extent to which they maximize a particular *target.* In this way republican theory can be clearly distinguished from deontological theories of punishment which rank alternative systems in order of merit based on the extent to which they operate within deontological constraints, that is rights and/or deserts. Moreover, Braithwaite & Pettit choose to develop a consequentialist theory, unique in its choice of target: *dominion*. In this way republican theory can be clearly distinguished from the tradition in consequentialist criminology which replaces the utilitarian target of happiness with the more restricted good of crime prevention.[8]

With regards to its comprehensiveness republican theory is also unique amongst penal theories. Most theories of punishment assume that there is a need for principled continuity between the justification of punishment, sentencing, and the structure and operation of our penal institutions.[9] Thus, traditional penal theory is concerned with linking the General Justifying Aim of punishment to the following questions (a) to whom may punishment justifiably be applied (the *distribution* of punishment); (b) what principles should determine the *amount* of punishment to be received by each offender; and, in some more ambitious theories, (c) how should the sentence be administered by prison, probation, and parole authorities? In contrast, a *comprehensive theory of the criminal justice system* aspires to link the justifying aim *of the criminal justice system* to seven *additional* questions, namely: (a) what kind of behaviours should be criminalized by the system; (b) how should resources be allocated to the system, amongst each part and within each subsystem; (c) what kind of intensity of surveillance should be tolerated; (d) what cases should be targeted by investigations and how should these investigations be conducted; (e) what cases should be selected for prosecution; (f) how should pre-trial decisions be made; and (g) what adjudication procedures should be used to determine guilt? By addressing all these questions simultaneously, a comprehensive theory attempts to build a

[8] Consequentialist theories of punishment other than republican theory can only be distinguished with regards to their choice of *method* for achieving crime-prevention (incapacitation, negative and positive general deterrence, specific deterrence, or rehabilitation).

[9] I am following Bottoms here in assuming that Hart's three famous questions, which relate to punishment's general justifying aim, its distribution, and its amount, should be supplemented by a fourth: 'the mode of punishment'. See Anthony Bottoms, 'Penal Censure, Repentance and Desistance' in du Bois-Pedain A. & Bottoms A. (eds.), *Penal Censure: Engagements within and Beyond Desert Theory* (Hart Publishing, 2020).

net of closely connected sub-systems coordinating with each other to maximise the same targeted value.

Thus, Braithwaite & Pettit build a comprehensive, consequentialist theory or, in other words, envision one target for the whole criminal justice system.

2.3 The target of republican theory

What exactly is dominion? Pettit, as one of the main representatives of modern civic republicanism,[10] conceptualises liberty as non-domination or as independence from arbitrary power. 'Dominion' is a type of freedom with the following characteristics:

a) Dominion is an individual-centred, agency value, in that it refers to a conception of personal liberty rather than one of the liberty of groups or nations.

b) It is a form of negative liberty. Following Berlin, negative liberty can be understood as a form of non-interference and as opposed to positive liberty, that is the ability to exercise self-control or self-mastery. Negative liberals differ amongst themselves on their understandings of 'interference'. [11]

c) It is a form of social liberty which, according to republicans, is only possible when there are others around— as opposed to classical liberalism which is exemplified when one is left alone. [12] Dominion is thus closely linked to the condition of citizenship in a free society, in which everyone is safeguarded by the law against the predations of others.

d) It is formally egalitarian because the only way to promote dominion is by increasing equality. Someone who has better or equal prospects to others already enjoys dominion in the fullest measure possible. Yet, the equality required is not maximal: citizens do not need to have the same actual prospects, but the same prospects within suitably variable circumstances, that is circumstances within the agent's control. This excludes circumstances of economic inequality.

e) It imposes objective and subjective requirements: non-interference must be enjoyed objectively and acknowledged subjectively by the individual.[13]

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[10] Contemporary civic republicanism, which emerged as a philosophical movement during the 80s, has its origins in Roman jurisprudence and its categorical distinction between citizens and dependent slaves. See further: Frank Lovett, 'Republicanism', *The Stanford Encyclopedia of Philosophy* (2022).
[11] Ian Carter, 'Positive and Negative Liberty', *The Stanford Encyclopedia of Philosophy* (2022).
[12] Braithwaite and Pettit 1990 (n5) assume that classical liberalism follows the Hobbesian tradition and is thus exemplified in the absence of a society when one is completely alone. This link and interpretation of classical liberalism are, however, controversial (see further: Chin Liew Ten, 'Review essay / Dominion as the target of criminal justice' (1991) 10 Criminal Justice Ethics 40). What matters in this context is the juxtaposition of republican freedom with freedom as non-interference independently of whether the latter is appropriately characterised as classical liberalism.
[13] Philip Pettit and John Braithwaite 1993a (n6); Philip Pettit and John Braithwaite 1993b (n6).

It follows that maximizing dominion does not require avoiding interference in every instance, but it does require that in addition to 'non-interference' two further conditions are met. *First,* that the non-interference is not enjoyed merely as a matter of luck, but in virtue of the protection of everyone to the highest possible degree by the law and the institutions related to it. *Secondly*, that it is clear to each person in society that her dominion, and the dominion of others, is of this resilient nature. This becomes apparent when imagining a master who treats his slaves better than he is entitled to and does not intervene with their lives, as opposed to an oppressive master who abuses them. The slaves of the former master enjoy a better quality of life and if they manage to figure out ways to keep their master satisfied, they will be reaping the benefits of his good side most of the time. But could one assert that the slaves are free? Is it not counterintuitive to claim that a slave's condition may involve any degree of freedom? For republicans the condition of slavery is opposed to freedom, irrespective of the incidents that occur in its context.

But it is not immediately obvious why the rectification of dominion is an appropriate target of punishment. Pettit & Braithwaite built their argument on three assumptions, namely (a) that crime represents a damage to dominion; (b) that this damage is at least partly redeemable; and (c) that the task of the criminal justice system as a whole is to promote dominion, in order to argue that the target of punishment (and the job of the sentencing judge) is *to rectify the loss in dominion* caused by the crime.[14]

The authors provide a detailed account of the nature of the target of rectifying dominion by linking it to the following ways in which crime challenges dominion:

1. Crime involves the disregard of the victim's dominion flouting her status as a citizen protected against interference. Punishment must aim to persuade the offender to withdraw her implicit claim that the victim did not enjoy the dominion challenged by the crime, to recognise her wrongdoing, and experience **remorse**.

2. If successful, the criminal attempt diminishes the victim's dominion by reducing the range of activities over which her dominion is exercised. Punishment must, therefore, involve **recompense** through restitution, compensation, or reparation.

3. Crime furthermore damages the overall dispensation of dominion in the community because the enjoyment of dominion by anyone in society is highly sensitive to its enjoyment by others. With every crime committed it becomes less clear to each member of the community that they really do enjoy non-interference in a resilient manner. The sentence should seek to elicit from the offender such a response as will provide general **reassurance** to those whose enjoyment of dominion may have been reduced by his crime. This will be achieved ideally through dialogue, with the options of deterrent and incapacitative punishments operating as backups.

[14] Ibid.

This account of the target of punishment—which the authors name the 'three R's of sentencing', — has important implications for policy, outlined below.

2.4. The method of republican theory

Perhaps unsurprisingly given that Braithwaite's work has had the greatest influence on restorative justice, from the perspective of republican theory the primary way of rectifying the dominion of the victim while safeguarding the dominion of the broader community and the offender herself, is restorative justice. This position is implicit in the authors' earlier work[15] and explicit in their latter work.[16] Broadly, restorative justice aims at the restoration of victims, offenders, and the community and the establishment of harmony based on the feeling that 'justice has been done.' This is achieved through criminal justice conferences in the context of which reprobation for the offender's conduct is expressed, the offender takes responsibility for her act expressing remorse and apology, and a plan for the victim's recompense is discussed. The police as well as 'the community of care' subsequently monitor the implementation of the plan. If the plan fails, the parties reconvene. [17]

Reprobation expressed in the context of restorative justice aims to bring home to offenders the shamefulness of crime by presenting crime as a wrong that people ought to be ashamed of, and as an activity that is actually disapproved of in society. Communication of social disapproval, however, cannot take just any form. Braithwaite's reintegrative shaming theory, on which the republican account of reprobation relies, takes as its starting point the proposition that the communication of disapproval will have a contrasting effect on offending depending on whether it is *stigmatizing* or *reintegrative*. Reintegrative shaming, which according to the authors should always be preferred, amounts to shaming accompanied by an attempt to preserve the (principally) virtuous identity of the offender. Irrespective of its severity, reintegrative shaming takes place in a context of love and respect towards the offender and is limited in time, as it is intended to culminate in forgiveness. The desired outcome of reintegrative shaming is the acknowledgment of the wrong by the offender, which leads her to recognize her shame, accept disapproval of her actions as justified, feel greater empathy for victims, and apologize.[18]

In deciding the amount and form of hard treatment that the offender will be required to undertake as recompense for the victim, the parties partaking in the restorative justice conference must consider primarily what is appropriate for the rectification of the victim, while backward-looking considerations are deemed irrelevant. Braithwaite & Pettit completely reject any role for the principle of proportionality in restorative justice. This is a radical move; even amongst advocates of restorative justice proportionality constraints

[15] John Braithwaite and Philip Pettit 1990 (n5).
[16] Philip Pettit and John Braithwaite 2000 (n6); Victoria McGeer and Philip Pettit 2015 (n2); John Braithwaite 2015 (n6).
[17] John Braithwaite and Christine Parker 1999 (n6).
[18] Eliza Ahmed and others 2001 (n7).

are often, in some form, part of the equation.[19] Interestingly, despite their account being otherwise well-developed, Braithwaite & Pettit do not defend this move — just like they do not defend their disregard of the principle of proportionality at a philosophical level (see, part 4 below).

This complete rejection of proportionality constraints is also integral to the authors' views about incapacitation. According to republican theory, where reprobation and recompense in the context of restorative justice are considered insufficient for bringing about the public's reassurance, other solutions must be found. The logic of punishment follows the logic of Braithwaite's regulatory framework.[20] According to this framework, to achieve compliance we must start with deliberative regulation addressed to the virtuous actor, and if this fails engage in deterrent regulation aimed at the rational actor, and, finally, if this also fails incapacitative regulation aimed at the incompetent actor. The effectiveness of deliberative regulation is, in fact, enhanced if coercive regulation stands as background threat, although *'the challenge is to have the Sword of Damocles always threatening in the background but never threatened in the foreground.'*[21]

3 The contribution of republican theory to victim-focused punishment

I begin this part of the paper by explaining how republican theory makes victims relevant to the theory and practice of punishment and the criminal justice system (Part 3.1). Next, I argue that the distinctive contribution of republican theory to penal theory is that it makes victims relevant to punishment *without doing too much* – that is effectively collapsing the criminal justice system into a system of tort law (Part 3.2) – *nor doing too little* -- by falling short of linking theory to practice and thereby providing a normative framework for victim-focused practice (Part 3.3).

3.1 Making victims relevant to punishment

Based on the preceding discussion, it becomes apparent that republican theory makes victims relevant to punishment and criminal justice more broadly in three interconnected ways.

First, it captures the problem of crime from the perspective of victims. For victims the problem of crime is a problem of harm of a special nature. Victims seem to care more about the harm which they suffer at the hands of an offender than about suffering because of a natural disaster, because the harm they experience in the former case amounts to much more than a material loss. Braithwaite & Pettit conceptualise this additional harm experienced by victims of crime as a *diminishment of their dominion* resulting from a

[19] See, for example, Daniel Van Ness, 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' in Roche D. (ed), *Restorative Justice* (Routledge, 2004).
[20] For an analysis of his regulatory framework see John Braithwaite 2000 (n7).
[21] Ibid 64.

reduction of the activities over which their dominion can be exercised, and, more fundamentally perhaps, as *a disregard for their dominion* by the offender, flouting their status as a free and equal citizen.

Secondly, it places victims at the centre of the justification of punishment. By conceptualising the target of punishment as the rectification of dominion diminished and disregarded because of crime, republican theory, renders victims, whose dominion is compromised by crime to a higher degree than the dominion of the rest of the community, the main beneficiaries of criminal punishment. Punishment is justified primarily because it rectifies the dominion on victims.

Thirdly, republican theory makes victims relevant to the practice of punishment and criminal justice. Victim-focused processes, that is restorative justice conferences and victim compensation become the central components of criminal punishment. Moreover, by providing a comprehensive account of the criminal justice system, republican theory creates the normative foundations for allocating state resources to victims outside the narrow context of punishment. Although this has not been proposed by Braithwaite & Pettit, it is possible to argue that where the rectification of offenders at the level of sentencing is impossible, undesirable, or insufficient, the responsibility for restoring the victims' dominion should be transferred to other institutions in the criminal justice system. Efforts to restore the dominion of victims might involve establishing a system of state compensation to victims and a system of support for the victims' emotional and practical needs. In addition to the practical significance of such interventions, they can operate at a symbolic level, signifying that despite the disregard of the victim's dominion by the offender, her status as a citizen of equal freedom remains intact.

3.2 Republican theory and the distinctive character of criminal justice

There are two main reasons why the victim- account of criminal justice risks blurring the distinction between the criminal law and criminal punishment on the one hand, and tort law and compensation on the other. *First*, it is possible to deduce from the fact that victims are central to criminal justice that the appropriate response to crime by the criminal law is victim reparation for harm as opposed to punishment for a wrong. *Secondly* and relatedly, an emphasis on victims can effectively side-line two central aspects of the criminal law: (i) its emphasis on the substantive and procedural protections of offenders who are threatened by punishment rather than mere compensation, and (ii) the public character of the criminal law, understood as its function in protecting our independence from the power of others in our community.[22] In what follows I will argue that the way in which republican theory makes victims relevant to criminal justice, to a large extent avoids both these risks.

[22] James Edwards, 'Theories of Criminal Law', *The Stanford Encyclopedia of Philosophy* (2021).

Regarding the former risk of reducing criminal punishment to civil compensation, Braithwaite & Pettit's rich conception of the harm involved in crime as disregard for dominion distinguishes it from the conception of harm as injury or material loss characteristic of tort law. This richer conception of harm resembles, and perhaps should be linked, to the conception of the harm of crime as expressive, that is as involving an insult to the victim's moral self-worth and a compromise of her trust in the justice system.[23] These richer, republican or expressive, conceptions of the harm involved in crime, are reflected in richer and more complex methodologies for restoring the victims of crime to a prior state, as opposed to the material compensation involved in restoring claimants in civil proceedings.

But how exactly can the harm of crime be repaired? Theorists who perceive the criminal harm in expressive terms maintain that such harm can best be restored through punishment traditionally construed.[24] Yet, the republican position is more subtle because restorative justice combines elements of both compensation and punishment traditionally construed. On the one hand, restorative justice resembles compensation because it directly addresses the symbolic and material harm done to the victim. On the other hand, it resembles punishment, because it involves the expression of censure as well as significant hard treatment. If the rich harms of crime are to be repaired, material compensation carried out by an insurance company is clearly insufficient. The offender must instead accept responsibility for her actions, suffer remorse, and personally take on the burden of restoring the victim.

Does that entail that participation in restorative conferences and the obligations of reparation that the offender consequently takes on constitute punishment? Many proponents of restorative justice refer to it as an alternative to punishment and contrast the constructive impact of restorative justice to the unacceptable pain of punishment, thereby underlining its attractiveness.[25] But not calling a punishment by its name is dangerous because it risks that practice not being taken seriously enough. It is thus important to establish whether restorative justice as conceived by republican theorists meets the criteria for punishment. This seems to depend on the definition of punishment. Some claim that the hard treatment and reprobation inherent in restorative justice are insufficient to render it a form of punishment. For these theorists a sanction counts as punishment only if the

[23] Valerij Zisman, 'Criminal law without punishment' in Pauer-Studer H. and others (eds.), *Practical Philosophy Volume 25* (De Gruyter, 2023).

[24] See, for example, Jean Hampton, 'An Expressive Theory of Retribution' in Cragg W. (ed.), Retributivism and Its Critics (Steiner, 1992); Tatjana Hörnle, 'The Role of Victims' Rights in Punishment Theory' in du Bois-Pedain A. & Bottoms A. (eds.), *Penal Censure: Engagements within and Beyond Desert Theory* (Hart Publishing, 2020); Joshua Glasgow, 'The Expressivist Theory of Punishment Defended' (2015) 34 Law and Philosophy 601; Bill Wringe, An Expressive Theory of Punishment (Palgrave Macmillan, 2016).

[25] Paul Robinson, 'The Virtues of Restorative Processes, the Vices of Restorative Justice' (2003) Utah Law Review 375.; Kathleen Daly, 'Restorative justice: The real story' (2002) 4 Punishment & Society 55; Kathleen Daly, 'Mind the Gap: Restorative Justice in Theory and Practice' in von Hirsch A., Roberts J., & Bottoms A. (eds.), *Restorative Justice and Criminal Justice* (Hart, 2003).

intention of the decision maker is not constructive but to inflict pain.[26] But even granting such a demanding definition of punishment, restorative justice is punishment. In establishing restorative justice as a central mechanism of the criminal law, lawmakers possess an oblique intent to inflict pain to the offender because, at least under a republican understanding, the offender's suffering is integral to the reparation of a victim of crime.

In Duff's words '*we should recognize criminal mediation and reparation as punitive, indeed as a paradigm of retributive justice… as a burden undertaken by the wrongdoer, which aims to induce and express her repentant and apologetic understanding of the wrong she has done.*'[27] By developing an account of criminal harm and punishment in terms of republican freedom, Braithwaite & Pettit succeed in making victims central both to the theory and practice of criminal punishment without challenging its distinctive character.

The nature of republican freedom furthermore eliminates the risk that the emphasis on victims might effectively side-line the criminal law's emphasis on the protection of offenders and the public. Although, as I will argue in section 4.1, the purely consequentialist character of republican theory does somewhat compromise its ability to provide a stable allocation of offender's rights, the theory's focus on victims does not entail that it is unconcerned with the interests of offenders. Neither the interests of offenders, nor those of the broader community, are neglected by regulating the criminal justice system around the pursuit of republican freedom, integral to which is the idea that everyone's freedom matters equally. From the perspective of republicans, the freedom of victims, rectified through the offenders' remorse and recompense, must be balanced against the rectification of the freedom of potential victims, through reassurance that the offender will not reoffend, and the protection of the dominion of offenders through a parsimonious system of punishment. Different stages of the criminal justice process, different offenders, and different types of crimes, require the prioritisation of the dominion of different parties.

Hörnle points out that victim-related arguments for the justification of punishment apply to a subset of criminal offences and therefore a theory of punishment which appeals to the interests of victims cannot be holistic.[28] Nevertheless, it seems that Braithwaite & Pettit have achieved exactly that: they have provided a holistic theory organised around the principle of dominion which makes victims relevant to the criminal justice system as a whole, without necessarily giving them priority in the context of responding to each individual crime or in each stage of the criminal process. For republican theorists, the criminal law, like tort law, is very much concerned with victims, but unlike tort law it is also concerned with public protection and the rights of offenders facing the prospect of censure and punishment.

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[26] Valerij Zisman 2023 (n23).

[27] Antony Duff, 'Restoration and retribution' in A. von Hirsch and others (eds), *Restorative Justice and Criminal Justice* (Hart Publishing, 2003), 53.

[28] Tatjana Hörnle 2020 (n24).

3.3 A normative framework for victim-focused practise of punishment

Most proponents of restorative justice are not concerned with questions about the justification of punishment. As a result, they lack a normative framework for its practice, and a clear picture regarding which goals should be prioritised in the context of restorative justice conferences. In fact, restorative justice has been advertised for its capacity to advance many different objectives, such as restoring victims, effectively communicating blame to the offender, assisting offenders to construct redemption narratives and turn their lives around, reducing recidivism, norm re-enforcement and positive general deterrence, legitimising criminal justice and thereby encouraging compliance, contributing to reconciliation and sustainable communities, or moderating punitiveness. These are all noble objectives, but they can conflict. Depending on which objective is prioritised it is possible that the victim, the offender, or both are instrumentalised in the process. Moreover, in the absence of a normative framework it remains unclear whether sentencing decisions should be delegated to restorative justice conferences, whether considerations of the offender's culpability and proportionality should be considered in the context of such decisions, as well as what happens when the offender or victim fail to cooperate.

It follows that embedding victims in the justification of punishment is of great importance for principled victim-focused policy. Nevertheless, the most notable efforts to integrate victims in the theory of punishment have placed victims at the centre of the justification of punishment, while keeping them at the margins of punishment in practice.[29] In this context, republican theory is unique in linking a victim focused justification and a victim-focused practice and thereby providing a normative framework for its operation. By employing dominion as the organising principle of punishment, Braithwaite & Pettit can provide guidelines regarding when restorative justice is appropriate and how it should be carried out.

The function of republican theory in providing practical guidance is implicit in republican reasoning and – with the risk of oversimplification -- can be summarised as follows: Given that it is integral to the concept of dominion that everyone's freedom matters equally, the priority for republican theorists is to propose a system of punishment in the context of which the dominion of victims, potential victims, and offenders does not conflict. Empirical work has indicated that restorative justice conferences lead to the empowerment of victims, and when this reprobation is expressed in the form of re-integrative shaming they also lead to the reduction of recidivism.[30] Moreover, reprobation requires that the offender understands *why* the criminal justice system reacts to her behaviour. Understanding is a requirement for avoiding serious threat to the dominion of the offender: if she does not understand she will see herself as subject to randomly imposed

[29] See Jean Hampton 1992 (n24); Tatjana Hörnle 2020 (n24); Victor Tadros, *The ends of harm: The Moral Foundations of Criminal Law* (Oxford University Press, 2011).
[30] John Braithwaite 2007 (n7).

coercive power. Thus, for republicans re-integrative shaming in the context of restorative justice conferences should be the default response to crime.

Where reprobation is incapable of providing the simultaneous restoration and protection of the dominion of the victim, potential victims, and the offender, republicans must prioritise one or more of the parties involved. Given that the function of punishment is defined as the rectification of dominion compromised by crime, the interests of the party whose dominion has mostly been undermined should be prioritised. Where the direct victim of crime is in great need for restoration, then reprobation must be followed by compensation to the victim. The extent and form of compensation must be decided with regards to the interests of the victim, while criteria of proportionality and public protection become secondary and even irrelevant. However, it is possible that the risk of re-offending and the seriousness of the threatened harm are so grave that they significantly undermine the subjective perception of dominion of the community at large. In such cases incapacitation should be preferred to improve public confidence.

In section 5, I will explain the reasons why I do not fully endorse Braithwaite & Pettit's normative framework for victim-focused punishment. My reasons can be traced back to republican theory's commitment to pure consequentialism. Nevertheless, Braithwaite & Pettit's theory illustrates how normative theorisation can guide and structure victim-focused penal policy, and, more specifically, how the concept of 'dominion' can contribute to constructing a multifaceted, yet coherent normative framework for such policy.

4 Republican theory and the protection of offenders

Having established the contribution of republican theory to victim-focused punishment, the purpose of this part of the paper is to examine whether this comes at the expense of the rights and interests of offenders. In what follows, I examine how 'dominion' fares with regards to the criteria of *stability* and *satiability.* According to the authors, a *stable* target of punishment secures a stable allocation of the rights which are uncontroversial in the relevant communities. A target is *satiable* if it guarantees that certain uncontroversial limits which do not necessarily constitute rights are not transgressed. Examples of transgressing such limits include putting a police officer in every corner, prosecuting based on possible rather than probable guilt, allowing prison overpopulation, or—significantly in this context— drastically increasing the severity of punishment. Satiability is thus closely linked to moderation.

I have chosen to focus on stability and satiability as the two most important factors from the perspective of offenders, since both are identified by Braithwaite & Pettit as being especially significant advantages of their theory. My evaluation will focus on the concept of dominion as a target of punishment, but I will also attempt to illustrate how its conceptual strengths and limitations with regards to stability and satiability trickle down throughout the practice of restorative justice which is employed in the pursuit of dominion.

It should be noted that a discussion of proportionality does not enter the discussion for satiability; a target can be satiable in the absence of proportionality constraints if there are clear upper limits for sentencing. Moreover, despite the link between human rights and proportionality, even von Hirsch, the greatest proponent of the principle of proportionality, admits that arguing for a right of proportionate punishment would blur the distinction between criminal and constitutional law. Instead, we should aim for a limited constitutional protection against grossly disproportionate punishment.[31] Thus, by focusing on stability and satiability the authors make discussions of proportionality irrelevant to an evaluation of their theory of punishment, which seems apt given their radical assertion that sentencers should completely ignore the principle of proportionality. Even though a full account of the significance of proportionality in punishment is beyond the scope of this paper, as von Hirsch & Ashworth point out, to reject an intuition as basic as the principle of proportionality, strong reasons are called for.[32]

4.1 Is dominion a stabilizing target?

To recognise a right must be to do more than just to happen, accidentally, to respect it. The right must be respected *because* it is a right. The consequentialist who claims to recognise a right must not just behave appropriately—she must behave appropriately *because* she reasons appropriately. This is the greatest challenge for any consequentialist theory of punishment. Braithwaite & Pettit's account, especially when viewed in the context of Pettit's philosophy of consequentialism, provides an especially subtle attempt to link a purely consequentialist theory of punishment with a stable allocation of rights.[33] But is it enough?

Before proceeding it is important to note that the authors' partially backward-looking conceptualisation of the purpose of punishment as a rectification of the damage caused by crime does indeed protect against one type of right violation: punishing the innocent. Nevertheless, since rectification goes further than mere compensation of the victim and includes reassurance of the public that the crime will not be repeated, the backward-looking element that the authors introduce seems insufficient in itself to protect against interfering with the rights of the guilty.

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[31] Antje du Bois-Pedain, 'The place of criminal law theory in the constitutional state' in du Bois-Pedain A. and Neumann U. (eds.), *Liberal criminal theory: essays for Andreas von Hirsch* (Bloomsbury Publishing, 2014).

[32] Andrew von Hirsch and Andrew Ashworth, 'Not Not Just Deserts: A Response to Braithwaite and Pettit' (1992) 12 Oxford Journal of Legal Studies 83; Andrew von Hirsch and Andrew Ashworth, Desert and the Three Rs'(1993) 5 Current Issues in Criminal Justice 9.

[33] For an overview of Pettit's position see: Philip Pettit, 'The Consequentialist Can Recognise Rights' (1988) 38 The Philosophical Quarterly 42; Philip Pettit, 'The Consequentialist Perspective' in Baron M., Pettit P. & Slote M. (eds.), *Three Methods of Ethics* (Wiley-Blackwell, 2017).

4.1.1 How can consequentialists protect human rights?

There have been several attempts to show that consequentialism can accommodate rights, an analysis of which is far beyond the scope of this essay. [34] It is helpful, however, to briefly mention them in order to locate Braithwaite & Pettit's approach in this broader discussion.

The *first* way to link consequentialism to rights is by adopting a 'consequentialism of rights' according to which an act is best if it respects certain rights. Rights could either be ranked with other goals such as happiness or, to ensure stability, the disvalue of rights violations could be ranked prior to any other harm.[35] Such an approach would be linked to a mixed theory of punishment and is not the approach adopted by Braithwaite & Pettit.

Secondly, one could adopt the agent relative consequentialism proposed by Sen, according to which there is a different ranking of outcomes for each agent.[36] Even if under a standard consequentialist account, the doctor should kill an innocent bystander to use her organs to save five others, under Sen's account she should refrain because what matters is that this is not the best outcome from the perspective of the doctor. However, as Dreier points out, this amounts to 'consequentialising' deontology, as, arguably, the agent-relative / agent-neutral distinction is even more fundamental than the distinction between consequentialism and deontology.[37] This is, therefore, not an approach that pure consequentialists such as Braithwaite & Pettit can adopt.

A *third* approach would be to accept rule-consequentialism and argue that an act is morally wrong if and only if it is forbidden by rules justified by their consequences.[38] Yet, this amounts to rejecting the fundamental consequentialist principle that *'there is nothing compelling about the right option unless the right option is that which produces the goods'*.[39] A pure consequentialist cannot accept this.

The *final* option is to accept partial rule consequentialism according to which wrongfulness is determined by the consequences of the act itself but hold that it is an empirical fact that our decision-making will be improved if it proceeds by reference to rules justified by their consequences. In essence, this amounts to a separation between the criterion

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[34] For the relationship between consequentialism and rights see: Thomas Michael Scanlon, 'Rights, Goals, and Fairness' (1977) Public and Private Morality 93; Hare R., 'Utility and Rights: Comment on David Lyons's Essay' (1982) 24 Nomos 24, 148; Richard Brandt, 'Utilitarianism and Moral Rights' (1984) 14 Canadian Journal of Philosophy 1; Allan Gibbard, 'Inchoately Utilitarian Common Sense: The Bearing of a Thesis of Sidgwick's on Moral Theory' in Miller H. and Williams W. (eds.), *The Limits of Utilitarianism*, (University of Minnesota Press, 1982).

[35] Walter Sinnott-Armstrong, 'Consequentialism', *The Stanford Encyclopedia of Philosophy* (2021).

[36] Amartya Sen, 'Evaluator relativity and consequential evaluation' (1983) 12 Philosophy and Public Affairs 113.

[37] James Dreier, 'In Defense of Consequentializing' in M. Timmons (ed.), *Oxford Studies in Normative Ethics* (Oxford University Press, 2011).

[38] Brad Hooker, 'Rule Consequentialism', *The Stanford Encyclopedia of Philosophy* (2016).

[39] Philip Pettit 1988 (n33) 44.

for rightness and the criterion for decision making. This separation is implicit throughout 'Not Just Deserts' and was explicitly embraced by Pettit two years previously, under the term **'restrictive consequentialism'**. [40]

The upshot is that the authors are not only consequentialists, but they also stand clearly against incorporating constraints at any level that is more fundamental than the empirically contingent. The significance they seem to place on rights throughout their book does not sit comfortably with their willingness to ground rights on a mere empirical assumption.

4.1.2 How does Pettit defend 'restrictive consequentialism'?

The standard objection against restrictive consequentialism is that if a consequentialist chooses to go rights-restrictive in her decision making, there will be some occasions on which this strategy selects a non-optimal option which, as a consistent consequentialist, she cannot accept. Thus, for any consequence C that seems to motivate a restrictive strategy, the appropriate response is instead to internalize C in one's deliberations rather than referring to a general rule.

Pettit's reply is that it is possible to imagine some consequence C which is 'calculatively elusive' and 'calculatively vulnerable' in such a way that it cannot be internalised into one's deliberation without a self-defeating effect. A characteristic example is spontaneity: to be spontaneous is to be non-calculating.

Moreover, he argues that it is possible to identify a consequence or benefit C which is calculatively elusive and vulnerable because knowledge on the part of a right holder that the agent was calculating over the benefit C would undermine the possibility of attaining it. Pettit identifies 'dignity' as such a benefit, and he asserts that a person retains dignity in his treatment only if she preserves a certain *dominion* over how she fares at the other's hands, that is if the other agent is not free to do to her whatever she wishes. Dominion is a calculatively elusive and vulnerable benefit because of its subjective element. You cannot enjoy dominion unless you believe that you are in a position to enjoy it, and you will cease to believe this as soon as you realise that someone who has power over you is a non-restrictive consequentialist.

4.1.3 Four challenges for 'restrictive consequentialism'

I will discuss four challenges that the commitment to restrictive consequentialism poses for republican theory. The first two arise specifically in the context of penal theory, while the latter two constitute broader difficulties of restrictive consequentialism.

1. **The vulnerability of the 'balancing' exercise:** Punishment interferes with the rights of the punished, but also—to the extent of its preventive efficacy— it fosters other persons' dominion by safeguarding them from unwanted victimization.

[40] Philip Pettit 1988 (n33).

Thus, if the target of punishment is maximizing dominion (or symbolically making up for the damage to dominion that resulted from crime), policy makers and sentencers must engage in two types of balancing exercise. First, they must balance the offenders' dominion against the dominion of victims or potential victims—since potential victims are more numerous their dominion will usually prevail. Secondly, they must judge whether the possibility of becoming a victim of crime is more, or less threatening to the dominion of potential victims than the possibility of becoming the subjects of arbitrary state power.

As restrictive consequentialists, Braithwaite & Pettit insist that the balance will always lie against the use of arbitrary state power. Yet, this conclusion rests on the unexamined assumption that the state represents the greatest threat to dominion.[41] It could be the case that the compromise to the victims' dominion when they find out that the state is 'calculating their dignity', is relatively less severe than the compromise brought about by potential victimization. Thus, as Noordhof explains, where the fear of crime is extreme, dominion might be increased by prospects of potential prevention even where this involves rights violations.[42] Moreover, this is not merely a matter of subjective fear. Where groups, such as women or racial minorities, have been systematically denied their full citizenship because of traditional power imbalances, the republican calculation might favour rights' violations in punishment that could alter the cultural and institutional climate of victimization, and thus expand the dominion of the powerless. In fact, there are some, such as Currie,[43] who seem to see this as an argument in favour of republicanism!

2. **The non-interchangeability of citizens:** What if state authorities decided to torture a group of offenders (e.g., terrorists) after 'calculating over their dignity'? Would that affect the dominion of all citizens? The authorities could explicitly avoid choosing their 'victims' from the whole class of citizens and even the whole class of offenders. Torturing convicted terrorists would not undermine the dominion of the majority of citizens who do not see themselves as potential terrorists and so are assured that they are not the kind of people to be interfered with.

   Does this offend against the republican requirement for formal equality? As explained above, the authors' 'dominion' is only a 'formally' egalitarian ideal which does not require that people should have the same actual liberty prospects. It is enough that they have the same prospects in the same suitably variable circumstances, that is in the circumstances that are within the agent's control. By this criterion, the fact of having committed a crime is a variable circumstance. So, while the actual liberty prospects of offenders, whose rights are violated, are less

[41] Elliott Currie, 'Not Just Parsimony: Some Comments on Braithwaite and Pettit's Not Just Deserts' (1992) 8 Australian Journal of Law and Society 112.
[42] Paul Noordhof, 'Not Just Deserts: A Republican Theory of Criminal Justice Book Review' (1991) 8 Journal of Applied Philosophy 127.
[43] Currie 1992 (n41).

than those of other law-abiding citizens, this inequality does not violate the authors' formally egalitarian ideal of dominion.[44]

Pettit & Braithwaite do recognize this difficulty: '*the distribution-sensitivity of dominion'*, they observe, *'obtains with regards to groups of individuals who see themselves as relevantly interchangeable with others. It must be the case with any one of them that, seeing another in difficulty he can think: it could just as well have been me.*'[45] Unfortunately, however, they do not address the difficulty but merely assert that this condition of interchangeability does obtain in modern democratic societies.

3. **Secret human rights abuses:** Why should we assume that the state cannot simply hide from citizens the fact that, occasionally, offenders are tortured to provide information useful for the prevention of crime and the protection of the public's opinion? After all, following Pettit's analysis about restrictive consequentialism, rights violations and dominion are not incompatible if the agent does not find out about the rights violations. Both Pettit[46] and Braithwaite & Pettit[47] address this question and the essence of their response seems to be that it is not worth the risk. In a democratic society it is likely that knowledge about rights violations will eventually be acquired by the public and the consequences are too grave: once citizens find out that the state has been calculating over some citizens' dignity, *everyone's* dominion will be diminished. But is there a guarantee that the risk will never be worth it?

4. **Bad reasons for good actions:** Pettit states: '*The proper course for a consequentialist concerned with dignity is to continue to calculate over it but to try to convince rightholders that he is not doing so. Here I must concede that were such a dissemblance possible then the considerations which I have brought forward would make it look optimal'*.[48] In other words, it seems that in Pettit's view the reason to respect dignity and rights is that it is impossible to lie about it without getting caught. Does this entail that a consistent policy of concealing violations of rights through bureaucratic deception and effective propaganda would be an acceptable choice, if only it were possible?

There is a lot that can be learned from the republican theory of criminal justice, but it cannot be accepted without important adjustments. As Duff explains *'the interesting aspects of this account must be founded on a richer and less purely consequentialist theoretical framework'*.[49]

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[44] Ten 1991 (n12).
[45] Philip Pettit and John Braithwaite 1993a (n6) 230.
[46] Philip Pettit 1988 (n33).
[47] John Braithwaite and Philip Pettit 1990 (n5).
[48] Philip Pettit 1988 (n33) 54.
[49] Duff Antony, 'Not Just Deserts: A Republican Theory of Criminal Justice Book Review' (1993) 102 The Philosophical Review 439.

4.2 Is dominion a satiable target?

As pointed out earlier, a satiable target is one that is unlikely to make voracious demands and call for the excessive punishment of the guilty. A target's satiability does not always go hand in hand with its stability. It is possible for a penal system to be especially punitive while remaining within constitutional limits. It is also possible for a system which allows occasional violations of rights to remain overall parsimonious and humane. Despite its inability to guarantee a stable allocation of rights, republican theory seems to be the most thoroughly and pragmatically parsimonious amongst the dominant penal theories.

The republican target influences both the costs and the benefits of punishment, in such a way that it usually indicates against excessive punishment. In punishing, the benefit to the dominion of victims and potential victims must exceed the cost to dominion involved in punishing the offender, jeopardising the security and welfare of her dependants, and putting before all potential offenders the possibility of suffering. Moreover, for excessive punishments to be justified, it is not sufficient that the benefit marginally exceeds the cost. It must be significantly greater than the cost to weigh against the fact that the cost is certain but the benefit, at best, probable. Thus, the burden of proof in the debate about excessive punishments is firmly placed on the side arguing for more rather than less.

Von Hirsch & Ashworth challenge this reasoning.[50] Given that dominion is sensitive to the fear of crime and that reassurance is one of the three republican R's of sentencing, Dahrendorf's observation that increases in sanction levels do reassure the public and reduce fear — even if they do not actually affect crime rates, could instead, they argue, ground republican punitiveness. Nevertheless, given that for republicans the gains in dominion achieved by reassurance will always need to be balanced against the costs to dominion inherent in the method used to achieve such reassurance, increasing sentences, or freezing the decremental strategy should not be *preferred* as a method for tackling the fear of crime. Given the republican preference for grassroots activism,[51] Maruna's suggestion to encourage 'desistance as a social movement'[52] is just one alternative method that republicans could choose to convince the public that the terrifying 'otherness' of offenders is, to some extent at least, fictional.

This does not entail that those favouring excessive punishments, and (as argued in section 4.1 above) those favouring rights-violating punishments, will never win the debate. But republican considerations are likely to amount to an aggregately parsimonious system. It is, therefore, unsurprising that Braithwaite & Pettit consider the presumption of

[50] Andrew von Hirsch and Andrew Ashworth 1992 (n32); Andrew von Hirsch and Andrew Ashworth 1993 (n32).

[51] See, for example: Stuart Scheingold, Toska Olson, and Jana Pershing, 'Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State's Community Protection Act' (1994) vol. 28 Law & Society Review 729; John Braithwaite & Philip Pettit (1994, n6).

[52] Shadd Maruna, 'Desistance as a Social Movement' (2017) 14 Irish Probation Journal 5.

parsimony as the most important master presumption of their theory. Moreover, consideration of the after-effects of punishment for the offender's dominion, leads them to embrace the closely related presumption for the re-integration of offenders. In practice, the presumption for parsimony, along with the rejection of any proportionality requirements precluding partial downward derivations, lays the foundations for a pragmatic decremental strategy— which is not, as is the case for 'just deserts' theorists, derived from the broader and contingent liberal commitments of the community, but from the justification of punishment itself.[53]

If I am right this entails that republicanism covers ground which none of the other prominent penal theories cover, and which *needs to be covered* — especially if we take seriously the suggestion that there is a constitutional requirement for inclusive punishment.[54] Unlike its rival theories —that is preventionism and retributivism—republicanism incorporates within the theoretical justification of punishment an account of the 'evil' of punishment, while, unlike traditional utilitarianism, it captures the deeper nature of this evil. As a result of this, republicanism —unlike preventionism and retributivism— is well placed to resist excessive punitiveness, while its target is subtle enough to avoid the utilitarian trap pictured so well in Kubrick's 'Clockwork Orange.' In the context of the dramatic increase in punitiveness during the last half century, especially in the Anglosaxon world, the sophisticated consequentialism proposed by republicans is revolutionary and invaluable.

4.3 Practice mirroring theory

I have argued so far that dominion as a target of punishment is, at the level of theory, satiable but somewhat unstable. These traits are mirrored in the practice of restorative justice backed by deterrence and incapacitation as a last resort, which Braithwaite & Pettit have selected as the optimal method for achieving dominion.

In particular, empirical research indicates that the use of restorative justice leads to overall parsimonious punishment.[55] Moreover, making amends is perhaps the most important element of the offenders' efforts for desistance, redemption and the pursuit of a good life.[56] In fact, Walgrave and colleagues have envisioned a reconciliation between restorative justice and the Good Lives Model of offender rehabilitation as the basis for

[53] Matt Matravers, 'Rootless Desert and Unanchored Censure' in: du Bois-Pedain A. and Bottoms A. (eds), *Penal Censure: Engagements Within and Beyond Desert Theory* (Bloomsbury Publishing, 2019).
[54] See Antje du Bois-Pedain, 'Punishment as an Inclusionary Practice: Sentencing in a Liberal Constitutional State' in du Bois-Pedain A., Ulväng M. & Asp P. (eds.), *Criminal Law and the Authority of the State* (Bloomsbury Publishing, 2017).
[55] John Braithwaite 2015 (n6).
[56] Shadd Maruna, 'Desistance and restorative justice: it's now or never' (2016) 4 Restorative Justice 289.

the development of a 'criminology of trust' towards offenders.[57] Thus, just like the theoretical target of 'dominion', the practice of restorative justice seems integral to efforts to tackle punitiveness and re-integrate offenders.

Nevertheless, just like the target of 'dominion', the method of restorative justice backed by the threat of a more punitive responce, falls short of providing a stable allocation of rights and proportionate punishment. This is primarily because of the obvious tensions between indeterminate incapacitative sentences and human rights, as well as between restorative justice and proportionality. But it is also because, unless in some way constrained, restorative justice has the potential to compromise offenders' rights in the various, more subtle, ways.

First, it has been observed that societal contexts of domination and structural inequality affect the balance of power between victims and offenders. The communitarianism of restorative justice might drag domination into the justice process without a possibility for accountability.[58] Thus, offenders or victims who are weak in power or status may not have their rights adequately protected. At its worse, the philosophy of empowering victims can legitimize the justice of mobs and the tyranny of the majority.

Secondly and relatedly, the decision makers in the restorative justice conferences are neither impartial, nor trained for applying the relevant fairness standards.[59] This problem cannot be solved by saying that impartiality is not a requirement because the sanction is negotiated in a process in which the offender is a participant. Especially where restorative justice conferences are part of a system of regulation such as the one proposed by Braithwaite, where the alternative to the restorative justice conference (if one opts for leaving) is particularly severe,[60] the offender has no option but to participate.

Thirdly, in privatising the response to crime, restorative justice often disguises the distinction between *wrongdoing* and *harming*.[61] Even if theoretical clarifications are made, if the decision is left primarily to the victim and offender, the focus can very easily shift from wrongdoing to harm, ignoring considerations of mens rea when deciding the severity of the hard treatment imposed on the offender.

Finally, in the restorative justice process the police is given extensive discretion. Where the criminal justice process already fails to adequately supervise the culture of police

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[57] Lode Walgrave, Tone Ward and Estelle Zinsstag, 'When restorative justice meets the Good Lives Model: Contributing to a criminology of trust' (2021) 18 European Journal of Criminology 444.

[58] Julie Stubbs, 'Communitarian conferencing and violence against women: A cautionary note' in Valverde M. and others (eds.), *Wife Assault and the Canadian Criminal Justice System: Issues and Policies* (Centre of Criminology University of Toronto, 1995).

[59] Andrew von Hirsch, Andrew Ashworth, and Clifford Shearing., 'Specifying Aims and Limits for Restorative Justice' in von Hirsch A., Roberts J., & Bottoms A. (eds.), *Restorative Justice and Criminal Justice* (Hart, 2004).

[60] John Braithwaite 2000 (n7).

[61] Andrew von Hirsch and others 2004 (n59).

violence, restorative justice might encourage further rights violations, for example in the form of coercive confessions.

5 The way forward

In this final part of the paper, I suggest that the way forward at the level of theory consists in embedding the concept of dominion in a mixed theory of punishment and the criminal justice system; while at the level of practice, it consists in envisioning a victim-oriented criminal justice which extends further than a victim oriented criminal punishment.

5.1 Not just just deserts?

The preceding analysis highlights the following strengths of republican theory:

a) The republican account of how crime undermines victims' dominion and the penal system's obligation to rectify it, makes a significant contribution to penal theory. It provides a normative framework for the practice of victim-focused punishment, without collapsing the criminal justice system into a system of tort law.

b) 'Dominion' is an invaluable concept which covers ground that needs to be covered by providing reasons —internal to penal theory— for restraining penal power.

The analysis also underlines the following weaknesses of republican theory:

c) Republican theory is an unsatisfactory theory of punishment because, as a purely consequentialist theory, it fails to account for a stable allocation of rights.

d) Denying any role to the principle of proportionality, without developing a justification for such a bold move, is a weakness of republican theory. A satisfactory theory will carve out some space for proportionality, even if its role is less central than what retributivists hope for.

The preceding observations indicate that the development of a theoretical schema that incorporates republican as well as retributive commitments could be a valuable endeavour for penal theorists. Perhaps, Breathwaite and Pettit should not be talking about 'not just deserts', but about '**not *just* just deserts'**.

5.2 A zero sum game?

'Constraining' republican theory to guarantee a stable allocation of rights paves the way towards a rights-based normative framework for restorative justice, which would determine when and how restorative justice can be employed in ways compatible with human rights and proportionate punishment. Von Hirsch and colleagues have already made a

start in this direction, by sketching a model for restorative justice which respects rights; they call it 'making amends.'[62]

Their model represents a compromise: although the authors do allow some space for restorative justice, the protection of rights is seen as substantially limiting the use of restorative justice processes and thus, in republican terms, the protection of the victim's dominion. Does this entail that there is a necessary unresolvable tension between the victims' dominion and offenders' rights? Are victims and offenders playing a zero-sum-game? If this is the case, then embedding republican freedom in a mixed theory might defeat its purpose.

Yet, as Lacey & Pickard point out, the zero-sum-game between victims and offenders is not conceptually necessary but historically contingent.[63] Historically, they argue, our system of centralized, state-initiated criminalisation emerged from a system that was originally controlled by victims. The emergence of state punishment thus eroded the power of victims, without consistently addressing the appropriate role for victims within state-controlled penal policy. As a result, we turn to the system of state punishment to find justice for victims and when we don't find it, we feel that the conflicts of victims have been 'stolen' by the state. This could explain why the political agenda since the 70s can be described as 'victims in the service of severity' and why penal practices are dominated by *'affective blame'* — that is blame expressed in a form that is stigmatising, exclusionary, and merciless, and is accompanied by a range of vindictive, hostile emotions and attitudes — as well as a perception of these emotions and attitudes as reactions which are *deserved*.

In this context, Lacey & Pickard propose a way in which we can move on from the understanding of criminal justice as a 'zero-sum game'. They argue that instead of perceiving criminal justice as a single process it is possible to conceptualise a 'dual process approach' to criminal justice, which separates conceptually and, in so far as possible, in practice, the victim and the offender. This would involve creating a victim track — with designated government funds to address the service needs and expressive needs of victims. This would not only entail that victims' needs and rights are better protected by a system specifically designed to protect them, but also that victims' expectations and experiences would change, as they would be less dependent on the offenders' punishment to feel that justice has been done. It is thus suggested that victims' needs can be met in ways that do not challenge the rights of offenders.

This analysis however does not undermine the claim that in the context of restorative justice the rights of offenders and the victims' dominion can pull to different directions.

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[62] Andrew von Hirsch and others 2004 (n59); Andrew von Hirsch and others, 'Restorative Justice: A 'Making Amends' Model' in von Hirsch A. and Ashworth A., *Proportionate Sentencing* (Oxford University Press, 2005).

[63] Lacey N. & Pickard H., 'A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame' (2019) 27 Journal of Political Philosophy 229.

This is because restorative justice privatises the response to crime, exemplifying thus the 'single system approach' to criminal justice. Therefore, instead of alleviating the conflict between offender's rights and victims' dominion in the context of restorative justice, Lacey & Pickard's analysis seems to add two further obstacles to embracing a restorative justice system.

First, it indicates that the dual-process approach and restorative justice constitute opposite ends in the spectrum of the evolution of criminal justice. This evolution can be conceived as (i) having started from criminal justice as a private dispute, having subsequently (ii) evolved to state punishment as a single process approach in the context of which justice for victims is identified with justice for offenders, and could further (iii) evolve to a dual process approach to criminal justice in the context of which justice for victims and justice of offenders are conceptually distinct. In this context, restorative justice appears like taking a step backwards. *Secondly*, it suggests that the pursuit of the victim's dominion in the context of restorative justice might undermine not only the stability of the system of criminal punishment, but also its satiability, that is, not only the offenders' rights but also the offenders' dominion. Although sentencing decisions made in the context of restorative justice do tend to be moderate in comparison to sentencing decisions reached by the criminal courts, at a macro-level, the increased use of restorative justice arguably enhances the perception of criminal justice as a private dispute between victim and offender, and of criminal punishment as a zero-sum-game. This might further encourage affective blame and punitiveness.

5.3 From victim-focused punishment to victim-focused criminal justice

Nevertheless, there is hope for victims of crime. Despite the challenges integral to restorative justice conferences, Lacey & Pickard,[64] just like von Hirsch and colleagues[65] do envision some limited role for restorative justice operating within rights and proportionality constraints, due to its great potential of benefiting both victims and offenders. A more extensive role could perhaps be given to restorative justice if it were used merely as an instrument of communication between victim and offender, rather than an instrument for sentencing decisions. More importantly, however, Lacey & Pickard's analysis reveals that the limited use of restorative justice is not necessarily a compromise from the victims' perspective because the victims' dominion can also be rectified by victim-focused criminal justice institutions which do not obviously impact on offenders. That is, the difficulty can be resolved if the rectification of victims' dominion is prioritised by the criminal justice system but located mostly outside the system of punishment. This would entail a move from victim-focused punishment to victim-focused criminal justice.

Given its character as a comprehensive theory of the criminal justice system, in addition to its multiple other benefits outlined above, (a mixed version of) republican theory can provide an ideal normative framework for such a victim-oriented criminal justice system.

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[64] Ibid.

[65] Andrew von Hirsch and others 2004 (n59).

Although republican theory sets the rectification of dominion, and especially the victims' dominion, as the target of the criminal justice system, this does not entail that rectifying the victim's dominion should be the primary concern of every part of the criminal justice system. A mixed republican theory of criminal justice would be consistent with a system of punishment which emphasises proportionate punishment and the rights of offenders. It seems thus that the republican theory of criminal justice and the just deserts theory of punishment can be viewed as complementary not only at the level of theory but also at the level of practice. The former commits us to a broad concern with victims, and penal parsimony in all aspects of criminal justice, the latter guarantees a stable allocation of rights and proportionality in punishment.

6 Conclusion

The preceding analysis leads to the following conclusions. *First,* republican theory makes victims relevant to punishment by interpreting the problem of crime from their perspective and giving victims a central role in both the justification and practice of punishment. In linking the levels of justification and practice, the concept of 'dominion' becomes indispensable to a normative framework for the practice of victim-focused punishment, which avoids collapsing the criminal justice system into a system of tort law.

Secondly, from the perspective of offenders, republican theory is both desirable and dangerous. On the one hand, it is unique amongst penal theories in making the inherently 'evil' of punishment salient, and grounding penal parsimony on reasons 'internal' to penal theory. On the other hand, as a purely consequentialist theory, it fails to account for a stable allocation of rights and proportionate punishment. This mixed picture is reflected in the practice of restorative justice backed by deterrence and incapacitation as a last resort, which the authors have selected as the optimal method for achieving dominion. For the majority of offenders restorative justice leads to lenient treatment and an approach sensitive to their own freedom. Nevertheless, for those deemed especially risky and subjected to incapacitation or those who are simply unlucky in the context of the restorative justice process, there are no guarantees. Re-focusing punishment on victims could come at the expense of offenders.

Thirdly, the evaluation of republican theory has revealed a way forward for future attempts of developing victim-focused theory of criminal justice. At the level of theory, it has been suggested that the concept of 'dominion' makes a distinctive contribution. Nevertheless, dominion should be embedded in a mixed theory which guarantees a stable allocation of rights. Taking another page out of Braithwaite & Pettit's book, it is furthermore suggested that a victim-focused theory should be comprehensive; it should be a theory of criminal justice rather than a theory of punishment. As such it can lay the foundations for a novel normative framework of victim-focused practice which purports to rectify the dominion of victims without threatening the rights of offenders. Arguably the victim's dominion could be rectified through the development of institutions of criminal justice that are concerned with victims rather than offenders, while punishment remains

focused on offenders. Fleshing out these ideas is, of course, well beyond the scope of this paper.

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RESPECT FOR VICTIMS AS A JUSTIFICATION FOR CRIMINAL PUNISHMENT

Valerij Zisman[*]

Abstract

Expressivist justifications for criminal punishment claim that punishment is necessary in order to express respect for the victim in the face of criminal wrongdoing. I distinguish two versions of this argument. The retributivist version claims that punishment is a necessary and sufficient part of expressing respect for the victim. The conventionalist version claims that punishment is factually the best means of convincingly expressing respect for the victim. In this chapter, I argue that both versions of the expressivist's argument fail to justify criminal punishment. The retributivist version fails to show the intrinsic connection between punishment and expressing respect for the victim. The conventionalist argument fails on empirical grounds: recent research in social psychology and victimology does not support the claim that punishment best expresses respect for victims. Instead, I argue that the most plausible version of expressivism justifies imposing corrective sanctions on offenders, such as restitution orders, and using restorative approaches to criminal procedure where these are feasible.

1 Introduction

Recently, philosophers and legal scholars have emphasized the importance of the victim for the justification for criminal punishment. Criminal punishment—as I want to understand it here—is defined as the intentional infliction of harm on offenders for their wrongdoings. Punishment is unique in that the state typically has no right to intentionally harm its citizens. This is what philosophers and legal scholars have dubbed the problem of punishment.[1] How can it be morally justifiable for the state to intentionally harm its citizens?

This chapter focuses on attempts to justify the imposition of criminal punishment based on the rights, interests, or the moral status of the victim. While the talk of rights can take many different forms, and is differently treated in philosophy, criminal law, and international law, I want to focus on a group of arguments that follow a strategy prominently defended by Jean Hampton which can be called expressivist arguments for punishment.[2]

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[1] David Boonin, *The Problem of Punishment* (Cambridge University Press 2008) ch 1.

[2] While these different perspectives often are discussed independently of each other, what is discussed in the philosophy of expressive retributivism nicely fits with the discussion of the victim's right to remedy in international law and human rights law. There, too, the question what type of state action best serves as a remedy to the rights violation that the victim suffered is raised and discussed. For an example of a

As different arguments have different theoretical assumptions, I will mostly talk about punishment expressing respect for the victim or affirming the victim's moral status as a way of summarizing the different views that will be discussed. I will divide the arguments that have been offered in the recent literature into two camps.

The first are retributive arguments. The central claim of such arguments is that there is an intrinsic connection between expressing respect for victims and the infliction of deserved proportional punishment on offenders. Inflicting such punishment is not only sufficient to express respect for the victim, but also necessary, as no other state action can achieve the same goal. If we assume that the state has a moral or legal duty to express respect for victims of criminal wrongdoing, and if only inflicting retributive punishment can do so, the state should inflict retributive punishment on offenders.

The second type of argument is what I want to call conventionalist arguments (or epistemic arguments, as other authors have labelled them). According to this type of argument, there is no intrinsic connection between punishment and expressing respect towards the victim. Punishment might be a particularly good way of communicating the state's concern for the victims' rights, interests, and moral status. But there might also be other, non-punitive ways of doing so—though these are worse according to the punishment theorist, as non-punitive actions do not get the respect across as well as punishment does, or because these actions are not seen as honest signals of concern by the victim. Again, assuming that the state ought to express respect for the victim and given that as a matter of convention in most societies, punishment is the best means of expressing respect towards the victim, the state ought to inflict punishment on offenders.

In this chapter, I want to argue that both the retributive and the conventionalist or epistemic argument fail to convincingly justify the imposition of criminal punishment. The retributivist strategy fails to explain the necessary connection between inflicting punishment and expressing respect towards the victim. The conventionalist or epistemic strategy fails because the current empirical evidence does not support the claim that punishment is the best means of expressing respect towards victims of wrongdoing. I will discuss these two strategies in turn.

2 The retributive argument

2.1 Victims in retributive arguments

In this section I will discuss some of the attempts to explain the intrinsic connection between punishing offenders and expressing respect for the victims of wrongdoing. I will point to two main difficulties for all such attempts. Either the retributive argument is question-begging, that is, it presupposes a premise that is in need of justification; or it

related discussion as I am having it, but in the context of human rights law, see Krešimir Kamber, *Prosecuting Human Rights Offences* (Brill 2017) 56–64.

inadvertently results in a conventionalist or epistemic view regarding the effects of punishment on victims. Both are problematic for the retributive view. The first problem shows that the retributive arguments lack a proper justification; the second problem shows that the supposedly retributive argument is not genuinely retributive.

I will start with arguments offered by Jean Hampton, who is seen as a prominent proponent of victim-based expressive retributivism. But before that, some remarks regarding the notion of "victim" might be helpful to better frame the debate.

When criminal law theorists talk about victims of wrongdoing, they can refer to different things. Often times, victims are referred to in an abstract sense. When general deterrence theory argues that punishment has the aim to prevent future victimization, it does not have any concrete victims in mind, but a class of abstract people that might be victims of wrongdoing in the future.

The sense of "victims" in this chapter is more concrete and individualized, even though the notion is often discussed in its plural or generic form. When theorists argue that the rights of victims matter, or that the state ought to express respect towards victims, they have in mind individuals or groups that have been victimizes, rather than people that could be potentially victimized in the future.

I should also note that the notion of "victim" is not uncontested. I will use it here in this chapter, following most of the theoretical literature, but some authors prefer to use the term "victim/survivor" or other terms, each of which has specific connotations.

2.2 Jean Hampton

Jean Hampton's publications on the expressive dimension of punishment and its importance for the value of the victim have been impactful for the recent discussion on different types of justifications for criminal punishment.[3,4] The basic idea of Hampton's expressive theory of retribution is that moral and criminal wrongdoing expresses disrespect towards the victim. She writes that "diminishment is the normal result of an immoral action and that which constitutes the moral injury inflicted by a wrongdoing."[5]

The argument starts with the assumption that all people have intrinsic moral value, and then continues to claim that wrongdoing, which constitutes an action that goes against this moral value, expresses disregard for that value. Wrongdoing expresses the message that the victim is not worthy of moral consideration—consideration that they ought to be worthy of according to their intrinsic value. This rationale can be summarized as stating that wrongdoing expresses disrespect towards the victim's moral value.

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[3] Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution" (1991) 39 UCLA Law Review 1659.

[4] Jean Hampton, "An Expressive Theory of Retribution" in Wesley Cragg (ed), *Retributivism and Its Critics* (Franz Steiner Verlag 1992).

[5] Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution" 1673.

What ought to be done about this expression of disrespect? First off, Hampton claims that the state cannot stand idle in the face of such expression of disrespect, as "a decision not to punish wrongdoers […] is also expressive: it communicates to the victim and to the wider society the idea that such treatment, and the status it attributes the victim, are appropriate […]."[6]

The state ought to do something about the disrespect that wrongdoing expresses, on pain of communicating to the victim (and arguably the broader society) that committing such wrongdoing is acceptable. We also already see in the quote above how the state should respond to wrongdoing: It should punish the perpetrator of said wrongdoing. More specifically, Hampton argues that "retribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action."[7]

But why does it have to be retributive punishment? Let us grant the claim that doing nothing in the face of criminal wrongdoing would disrespect the victim in addition to the disrespect already entailed in the wrongdoing. If the wrong consists in the expression of disrespect regarding the victim's moral value, why can't the state simply respond by publicly expressing its concern for the victim's moral value? Or why can't it simply offer various kinds of assistance for dealing with the repercussions of the wrongdoing to the victim? What is the argument for intentionally harming the offender? Hampton's response to these questions has different layers.

First, she argues that a simple verbal act is not good enough in terms of actually re-establishing the victim's moral value. That is so, she claims, because the wrongdoer similarly did not simply express verbally that the victim is worthy of less moral consideration but expressed it through their wrongdoing. Similarly, then, the state needs to express respect through more substantive action. Note, however, that Hampton explicitly says that mere verbal acknowledgment "normally"[8] is not enough to express respect towards the victim. Her use of that qualification indicates that this is not categorically the case, but that it depends on the circumstances. This limitation will be important later in the argument.

Second, she argues that "[p]unishment is a particularly good technique for doing so, insofar as it shows that the victim can succeed, either directly or indirectly (through her agent, e.g., the state) in resubjugating the subjugator."[9] Hampton's use of the metaphor of 'resubjugating the subjugator' will be treated in this chapter as equivalent to the other formulations that I used, which I want to summarize with the phrase "expressing respect towards the victim."

Note, here as well, that Hampton does not say that punishment is necessary to express respect. She merely claims that it is a good method of expressing respect, because of the

[6] ibid 1684.
[7] ibid 1686.
[8] ibid.
[9] Hampton, "An Expressive Theory of Retribution" 16.

symmetry between the wrongdoing and the response to the wrongdoing. She explicitly acknowledges that non-punitive actions can also in principle be retributive in her framework. Specifically, she says that the Christian notion of turning the other cheek, even though it is not punitive, can (in principle) be an instance of a retributive response to wrongdoing. Turning the other cheek can be a retributive response insofar as "[s]uch treatment startles us, prompts us to rethink how our own responses to our benefactor have been so much uglier than our victim's behavior towards us, and (assuming we have a decent conscience) makes us ashamed of what we have done. […] We are chastened, just as surely as if we had been punished."[10]

Both these claims of Hampton point to what I want to call a conventionalist (or epistemic) argument for punishment. It is a conventionalist argument in the sense that whether or not a response to wrongdoing fits the bill depends on its meaning in a given culture. The way I want to discuss the term "retribution" in this chapter is such that it entails a stronger connection to the expression of respect for the victim. According to the retributive picture, punishment is necessary to express respect (that is, no other action can do so), and it is sufficient (that is to say, no other response is needed next to it). Even though Hampton uses the term "retribution," the quotes above show that she does not hold that there is such a strong connection between punishment and the expression of respect towards the victim. Rather, retributive punishment is simply a very powerful means of expressing respect. And it is so because of its symmetry to the wrongdoing. But such a position does not suffice for the retributive argument as it is typically understood.

But there are also passages in Hampton's text that seem to have a stronger retributive commitment, which are picked up by other authors as we will see later. Hampton responds to the objection that coercing the offender to provide compensation to the victim can just as well be seen as a subjugation of the offender, and thus as expressing adequate respect towards the victim. She rejects this idea by claiming that compensation and retribution respond to different kind of effects on the victim: "Corrective justice compensates victims for harms, whereas retributive justice compensates victims for moral injuries."[11]

But this response just begs the question why compensation can only deal with harm, rather than wrong. Why couldn't compensation respond to moral injury, that is, express adequate respect towards the victim? After all, taking something from the offender and giving it back to the victim can in some cases be a very symmetrical response to wrongdoing, especially in cases of theft. When the state response should be about "resubjugating the subjugator"[12], as she puts it a bit metaphorically, it is unclear why coerced compensation would not do the job, at least in principle. Imagine an offender who stole $1,000 from me. If the state now coerces the offender to give the same amount (and

[10] Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution" 1695.
[11] ibid 1698.
[12] Hampton, "An Expressive Theory of Retribution" 16.

maybe some on top for additional harm in relation to the theft) back to me, has the subjugator not been resubjugated? Hampton does seem to admit as much, when she writes that "in fact any *non-painful method*, so long as it was still a method of *defeating* the wrongdoer, *can still count as retributive punishment*."[13]

It is a bit unfortunate that Hampton calls such responses retributive, even though she includes non-painful responses within this notion. Even though Hampton is seen by many as the starting point of expressive retributivism, she does not hold the view that there is an intrinsic connection between punishment and expressing respect for the victim. And her claim that compensation cannot account for moral injury remains unsupported.

Let us therefore turn to Farnham's account of expressive retributivism, as he criticizes Hampton exactly for her lack of commitment to a stronger retributive position.

2.3 Daniel Farnham

Farnham follows much of Hampton's account, though when he sees her drifting to a conventionalist argument, he wants to maintain that a more plausible expressivist position would have to be properly retributive. Farnham claims against Hampton that the state's denial of the degradation *realized* by the offender needs to take the material form of proportionate retributive punishment to give "concrete expression through the use of social conventions that mediate our lives together."[14]

But if, as he says, it is a matter of social convention, why is it that punishment is intrinsically connected to such a denial of degradation? Farnham sees the "worry about diminishment being a function of convention"[15], but implying that we could just change the convention of experiencing diminishment in the face of severe wrongdoings such as robbery, rape, or murder, "would be to underestimate the depth of the convention."[16] So even though the retributivist might also use the term "convention" here, these are "conventions so deep they are constitutive of human society, and may be regarded as natural in that sense."[17]

I now want to argue that this response does not help the retributivist make their case for the necessity of retributive punishment.

First, we should note that Farnham's response concerns the nature of the wrongdoing, not the nature of the response to wrongdoing. Maybe it is not a matter of convention to perceive certain wrongdoings as deeply disrespectful, but what about our responses to the wrongdoing? The closest remark to that specific question we get from Farnham points to the Hegelian view that "our abstract ideas […] need concrete expression

[13] ibid emphasis in original.
[14] Daniel Farnham, "A Hegelian Theory of Retribution" (2008) 39 Journal of Social Philosophy 606, 610.
[15] ibid 615.
[16] ibid.
[17] ibid.

through the use of social conventions that mediate our lives together."[18] The argument of the supposed retributivist thus claims that the diminishment involved in the wrongdoing is conventional, and that our response is similarly based on conventions.

To be fair, Farnham thinks that these conventions are deeply ingrained into our practice, but still, they are conventions. They are modes of how we live together. And because they are just that, I think it is important and even indispensable to better understand the conventions involved in this discussion. That is, we need to better understand both the impact that wrongdoing has on victims, and the impact that different responses to wrongdoing have on them. I will take a closer look at these two questions in the next section of this chapter, as such an argument leaves itself open to empirical investigation of the nature of our conventions, which is exactly what a retributive argument as I want to understand it does not claim. Farnham thus similarly fails to defend a strongly retributive argument, at least in the sense that I want to understand it.

Secondly, though maybe less important in this context, we should note that even if Farnham was right in his observation regarding our social conventions, he does not show that a retributive response is necessary in all (or even most) cases of wrongdoing. After all, luckily most crimes are not murder, rape and assault. Maybe Farnham is correct in his observation that the nature of such wrongdoings and our responses to them are deeply ingrained into our culture and are such that they warrant a retributive response. But what about all other cases of wrongdoing? What about theft, tax evasion, drug offenses, insults, embezzlement, and so on? It is unclear whether the nature of such wrongs and the perceived adequacy of different responses is similarly deeply ingrained into our culture. So even if Farnham's argument were to apply to serious wrongdoing, it might not apply to most cases of criminal wrongdoing.

2.4 George Fletcher and Leora Dahan Katz

We might be able to find better formulations of the purely retributive version of the expressivist argument in the works of Fletcher and Dahan Katz. Both roughly adopt the idea of subjugation that is also offered in Hampton's expressivist account. In Fletcher's work we find the now familiar idea that "acts of criminal violence establish a form of domination over the victim. The function of punishment is to counteract this domination and reestablish equality between the victim and the offender."[19] Dahan Katz, similarly, claims that "[t]he reason to punish introduced by subjection is thus a substantive, moral reason […] to punish."[20]

These formulations, as far as I can see, do not make any ostensible references to how society or the victim would perceive different sanctions as relating to their moral status

[18] ibid 610.
[19] George P Fletcher, "The Place of Victims in the Theory of Retribution" (1999) 3 Buffalo Criminal Law Review 51, 63.
[20] Leora Dahan Katz, "How Victims Matter: Rethinking the Significance of the Victim in Criminal Theory" (2023) 73 University of Toronto Law Journal 263.

or the subjugation. Rather, there is supposed to be an intrinsic connection between countering subjugation and criminal punishment. If that is so, we need to ask for an argument why there is this deep connection between the victim's moral worth and the punishment of the offender. Fletcher argues to this point that "[t]he corrective dimension consists in seeking equality between offender and victim by subjecting the offender to punishment and communicating to the victim a concern for her antecedent suffering."[21]

Here, the idea of equality is doing the heavy lifting; similarly, as we have seen with Hampton's notion of the symmetry between the wrongdoing and our responses to wrongdoing. But again, we need to ask, first, why there needs to be equality in order to counteract the subjugation, and even if we need equality, why coerced compensation (or similar actions for that matter) by the offender is not an adequate response.

As far as I can see the need for an equal response is not explained. But Dahan Katz offers a reason why compensation is not enough to break the subjugation:

> Further, Hampton argues […] that corrective justice is concerned with addressing the losses generated by such wrongful conduct rather than with addressing the wrongfulness itself. Its purpose is to correct harms rather than to address wrongs. Overall, correction and repair, while perhaps demanded and appropriate, appear to be inadequate to the task of addressing the moral significance of the victim in the case of robustly culpable wrongdoing – that is, in a case in which there is not only a loss caused by the violation of a norm but also subjection to a devaluative, culpable action. The retributive response is alone adequate to this task.[22]

It is worth quoting Dahan Katz in length here, because we see similar ideas as Hampton presented, but also, I think, inadequately justified. Hampton also made the point that compensation is for harm, and retribution for wrong. But she did not offer us an explanation as to why that is the case. Similarly, Dahan Katz says that corrective justice approaches "appear to be inadequate" and that retribution "is alone adequate to this task." But this is simply restating the retributive position without justifying it. What is the appearance that corrective approaches are inadequate based on?

One argument Dahan Katz offers is that there are many cases of corrective action (in tort law) that do not require there to be any subjugation involved. When I break open the door of a shed because I got lost in a forest on a cold night, I might owe compensation to the owner of the shed, but I have hardly subjugated them or expressed disrespect. Based on such examples, Dahan Katz argues that "[t]his may be taken as evidence that what the tort remedy addresses is at most the failure to meet a duty to refrain (owed to the right-holder), which requires meeting a minimal standard of fault, but which does not

[21] Fletcher 58.
[22] Dahan Katz 89.

and need not involve any subjective culpability or objectionable devaluation that lie at the heart of action that calls for a retributive response."[23]

This observation is correct but does not support the retributive argument. The fact that there are cases of corrective actions that have nothing to do with breaking the subjugation does not show that corrective actions cannot be used to break subjugation. At best it shows that corrective actions cover a wider range of actions than the expressivist is interested in. But corrective theorists are fine with that, as long as there is no reason to think that corrective action in principle cannot break subjugation. The example only shows that corrective action is used beyond expressing respect, not that it is not used for that also.

What we see from this discussion, I think, is that expressive retributivism leads to one of two problems. Either it gives up its retributive position by justifying punishment based on the meaning of social conventions; or it fails to offer a convincing argument as to why retributive punishment is in principle a better way of expressing respect towards victims than are non-punitive actions. To be fair, the corrective theorists also did not offer an explicit argument why compensation, apology, or turning the other cheek might be able to do that. At this point of the argument, I do not claim to have shown that compensation expresses respect towards victims or does so uniquely well. I only tried to show that retributivists fail to show why punishment is in any sense special in that regard.

Let us thus, as for a last retributive argument, turn away from the prominent idea of resubjugating the subjugator and focus on fairness-based arguments for justifying retributive punishment based on the victim's rights.

2.5 Fairness-based retributivism

One of the more prominent versions of the retributive argument during the resurgence of retributivism in the 60's and 70's of the last century was the fair-play argument, or fairness-based retributivism. The argument starts by accepting a picture of society as one of a cooperative venture, often times based on Rawls' broader political philosophy.[24] When a community establishes laws that regulate cooperation in their society, everyone agrees to limit their freedom to some degree in order to benefit from such cooperation. Whoever breaks these laws thereby gains more freedom than they ought to have according to the fair distribution of benefits and burdens. Punishment, in turn, is a means of re-establishing the fair distribution of benefits and burdens by imposing additional burdens on the offender.

The more prominent versions of this theory had no special place for the concrete victim and have received a fair amount of criticism.[25] The most common objections to fairness-

[23] ibid 88–89.
[24] John Rawls, *A Theory of Justice. Revised Edition* (Harvard University Press 1999).
[25] Antony Duff, *Punishment, Communication, and Community* (Oxford University Press 2001) 22.

based retributivism are that it does not offer a comprehensive theory of criminalization, and that it deeply mischaracterizes the nature of some offenses.

The first objection points to the problem that the notion of unfairness might only work for some criminal wrongdoings. Tax fraud is nicely captured by the fairness theory, but *mala in se* wrongs such as assault, rape and murder are not well described if we label them as unfair actions. There does not seem to be an unfair advantage in murdering unless we expect people to be disadvantaged by the laws prohibiting murder.

The second objection states that even if we assume all crimes to be crimes of unfairness, it does not capture the nature of the more severe wrongdoings. Even if murder is also wrong because murderers free themselves from the burden not to kill other people, this does not seem to capture the nature of the wrong of murder really well. Murder is not one of the most severe wrongdoings because of the unfair advantage it gives murderers, if it gives them any unfair advantage at all, but because of the wrong that it imposes on the victim.

Partially in response to these problems, Duus-Otterström[26,27], amongst others, has proposed that we should understand the fairness framework as not (only) relying on unfair advantages of offenders, but rather on unfair disadvantages to victims. The fairness framework not only says that everyone ought to adhere to the law in order not to gain an unfair advantage, but it also entails that people should not be disproportionately burdened. But this is exactly what is happening in the case of (most) wrongdoing. People who accept restrictions on their freedom in order to enjoy property rights, just to mention one example, are disadvantaged when they are robbed and no longer enjoy their right to bodily integrity and their physical property. What punishment ought to do is to re-balance the unfair disadvantage that the victim suffered.

The victim-centred perspective of the fairness theory fares better regarding the two objections we have discussed. It gets the nature of wrongdoing better in the sense that it can explain why the unfairness is at the core of the wrongdoing, even with severe crimes such as assault, rape, and murder. The wrong consists in violating the right of the victim and putting them in a disadvantaged position in terms of their legal protections.

The other problem I mentioned was that not all crimes are crimes of unfairness. With murder, for example, there does not seem to be a sense in which the offender is advantaged over other law-abiding citizens, given that most citizens are not burdened by the law not to kill others. With the victim-centred perspective, the fairness theory has the tools to describe at least all those crimes as unfair that involve victims. Serious wrongdoings are not wrong because they give offenders more freedom than other citizens, but

[26] Göran Duus-Otterström, "Fairness-Based Retributivism Reconsidered" (2017) 11 Criminal Law and Philosophy 481.
[27] Göran Duus-Otterström, "Fair Play Theories of Punishment" in Matthew C Altman (ed), *The Palgrave Handbook on the Philosophy of Punishment* (Palgrave Macmillan 2023).

because they violate the rights of victims which ought to be respected given the fair balance of benefits and burdens in society.

But even assuming that the victim-focused fairness theory improves the fairness theory's response to some of the objections, it needs to answer in what sense punishment helps with the unfair disadvantage of victims. Duus-Otterström's own account runs into problems here, and he has by now offered some responses to the charge that fairness theories might prefer compensatory responses to punitive ones.

Why do punishment theories have a problem within the victim-centred perspective? If what we care about in our theory of criminalization is the rights-disadvantage that the victim experiences, how does punishing the offender help remedy this disadvantage? Punishment would at best bring the offender down to a similar disadvantage by intentionally harming them, but that would be a levelling down response, not one that does anything about the disadvantage imposed on the victim. Duus-Otterström anticipates this problem:

> The response is that punishment is arguably always about levelling down on a retributive account. […] So there is nothing special about punishment of merely harmful crime, and to the extent we find it pointless is because we assume that punishment must produce instrumental benefits such as crime prevention in order to be justified.[28]

But the response fails here, not because we simply assume that retributivists owe us a non-retributive answer, but because retributivists owe us an answer in relation to their own argument. Why is retributive punishment a good response to wrongdoing within a victim-based fairness theory? Corrective sanctions, for example, at least help with the unfair disadvantage of the victim. In that sense, it re-establishes the fair distribution of benefits and burdens. But punishment, where it does not have an unfair advantage for offenders, does not seem to do that. We cannot simply assume that levelling-down is an adequate response, as this would simply assume what the retributivist has to show.

In his most recent publication on this topic, Duus-Otterström accepts that there might be a significant role for compensation to play in the fairness-theory.[29] But he also hints at a different response in order to evade accepting compensation as part of the fairness-theory.[30] In that version of the argument, "it would be unfair if people who violated the rights of other members of society would themselves have intact rights."[31] But the argument he offers for this claim is not convincing. Building on work by Westen, he argues that people benefit from the laws in general, and that thus them not adhering to the laws expresses a kind of disrespect for the reciprocal respect they should have towards these

[28] Duus-Otterström, "Fairness-Based Retributivism Reconsidered" 11.
[29] Duus-Otterström, "Fair Play Theories of Punishment" 304.
[30] ibid 305–7.
[31] ibid 307.

laws.[32] And because people who break the law lack this kind of respect, "it is no longer fair for them to retain all the benefits provided by the legal order."[33] This response, however, presupposes a rights-forfeiture theory which is neither argued for in that passage, nor independently plausible.[34] The attractive part of the fairness-theory in the first place was not to insist on people losing rights, but them having more rights than they should have according to a fair distribution of benefits and burdens. This response now is changing the fairness theory to a different kind of theory by claiming that people who do not adhere to laws thereby forsake some right not to be punished. But this is another justification altogether, even if it is supposed to be built on the fairness rationale. For our purposes, it is none that uses the victim to justify criminal punishment; and in principle, it is none that is being argued for in the paper.

3 The argument from conventionality

3.1 The basic idea of the argument

Retributivism has failed to make a good case as to why respecting the victim's moral worth necessarily requires imposing retributive punishment on offenders. In the discussion above, we have seen that some arguments in defense of the necessity of punishment rely not on an intrinsic connection between punishment and expressing respect towards the victim, but on a contingent one. That is to say, punishment is—as a matter of fact—the best means to express respect towards the victim, honour her moral status, or break the subjugation, as Hampton put it. This fact might depend on the culture or other contingent circumstances of the situation.

But if that is the argument that the defendant of punishment here takes, they have to answer the conventionality objection.[35,36] The conventionality objection holds that there are many different ways in which we can try to express respect to the victim, honour their moral status, or break the subjugation of the offender. Instead of punishing offenders, we can simply express our care for the victim, make offenders provide compensation to the victim, use restorative justice, or offer other forms of support to the victim of the wrongdoing.

The punishment proponent—in order to make their case convincingly—has to show that punishment is a particularly good means of achieving exactly that goal. Hörnle, in her defense of punishment from a victim's perspective, hints at such an argument:

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[32] ibid 306.
[33] ibid.
[34] Boonin ch 3.2.
[35] Klaus Günther, "Criminal Law, Crime and Punishment as Communication" in AP Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing 2014).
[36] Nathan Hanna, "Say What? A Critique of Expressive Retributivism" (2008) 27 Law and Philosophy 123.

> Secondly, in order for merely verbal censure to be taken seriously, one would require a high degree of authority and standing of those who express censure. This might work if offender, victim and the general audience share a high degree of respect for the institution expressing it (imagine a 'high priest' in religious environments), but in our contemporary secular and egalitarian states, judges cannot be expected to have this kind of authority *qua* their office […].*They need to be accompanied by some kind of token in the form of unpleasant treatment to underline the message. This does not mean that the strong expression 'suffering' is appropriate in all cases, but the unpleasant treatment must go beyond the demand to pay financial compensation for the costs the victim had due to the crime*.[37]

The argument states that because of contingent circumstances (here, because of a lack of a common symbolic language), punishment as hard treatment will be particularly helpful in expressing to the victim that the state and the community respect their moral status. It is not that the other things that we could do are in principle inadequate, it is just that the victim will not feel that the response by the state sufficiently expresses moral regard for them.

Because of the nature of this argument, we need to look at empirical research in order to examine its merit. But what are the criteria for when an action expresses enough respect for the victim? As far as I can see, I do not think that any of the authors discussed in this chapter offer clear advice on how to measure that.

I want to propose two ways that punishment proponents might be able to make their case. First—with an indirect argument—they could show that people generally, and victims specifically, care about revenge as a response to wrongdoing. Second—as a more direct response—they could cite research in victimology that supports their claim that victims benefit most (in ways that will have to be specified) from offenders being punished. For that, we would need a good account of the expressive harm done to the victim that is in principle measurable. I will discuss these two arguments in turn in the next two subsections.

3.2 The nature of revenge

It is common to hear from both public and philosophical debates that people in general are vengeful. This notion is reflected in our taste for revenge stories in media, and the idea that criminal law as an institution is necessary to curb the victim's and the public's desire for vengeance in an orderly fashion.

[37] Tatjana Hörnle, "The Role of Victims' Rights in Punishment Theory" in Antje du Bois-Pedain and Anthony E Bottoms (eds), *Penal Censure. Engagements Within and Beyond Desert Theory* (Hart Publishing 2019) 219 my emphasis.

And indeed revenge-taking is well-documented, both in our everyday lives as well as in laboratory research.[38] What I want to suggest in this subsection is that we should be careful not to mistake these observations with the claim that the retributivists make. For their argument that the public and/or victims care about revenge in a retributive manner, they would not only have to show that there is a desire to take revenge, but also that there is a desire to take revenge for the revenge's sake.

This is an important difference. We can for example see that participants in economic games will punish transgressors if they are given the chance to do so. But they can do so for varying reasons. They can do so because they feel disrespected and want to re-establish their sense of moral worth—as the expressive retributivist might say. Or they might punish transgressors in order to change the transgressors' behavior in the future. Only the former finding would help the retributivists make their case.

Recent research in social psychology started to investigate what makes revenge 'taste sweet'. One line of research was motivated by a somewhat surprising finding by Carlsmith and colleagues who found that people who took revenge in response to transgressions in small stakes economic games reported to be more frustrated than a control group that did not take revenge on transgressors.[39] The researchers called this finding the "paradox of revenge". Normally we expect revenge to be sweet, as the saying goes, but these small studies suggest that revenge tastes bitter to many.

Several researchers in the last decade investigated this phenomenon in order to solve this apparent paradox. Why do we expect revenge to be satisfying, even though it is not (always) so? The answer seems to be that taking revenge is crucially about sending a message and bringing about moral change in the offender. Not only from a first-person perspective (the victim), but also from a third-person perspective (an observer).[40,41] Punishment, or taking revenge, appears to be most satisfying when two conditions are met. First, the offender acknowledges the wrongdoing. And second, the offender promises to change their behavior in the future.[42]

These findings, I think, are at odds with the retributive view of revenge. If revenge were only about the offender receiving the proportionate harm that they deserve, we would expect people to be satisfied with such an infliction of harm irrespective of any acknowledgement or change in behavior. But that is not what people find satisfying, or at least

[38] Paul Deutchman and others, "Punishment Is Strongly Motivated by Revenge and Weakly Motivated by Inequity Aversion" (2021) 42 Evolution and Human Behavior 12.
[39] Kevin M Carlsmith, Timothy D Wilson and Daniel T Gilbert, "The Paradoxical Consequences of Revenge" (2008) 95 Journal of Personality and Social Psychology 1316.
[40] Mario Gollwitzer and Markus Denzler, "What Makes Revenge Sweet: Seeing the Offender Suffer or Delivering a Message?" (2009) 45 Journal of Experimental Social Psychology 840.
[41] Mario Gollwitzer, Milena Meder and Manfred Schmitt, "What Gives Victims Satisfaction When They Seek Revenge?" (2011) 41 European Journal of Social Psychology 364.
[42] Friederike Funk, Victoria McGeer and Mario Gollwitzer, "Get the Message: Punishment Is Satisfying If the Transgressor Responds to Its Communicative Intent" (2014) 40 Personality and Social Psychology Bulletin 986.

most satisfying. The better interpretation of these data, I think, is that the purely retributivist account of revenge is wrong. Thus, solely inflicting retributive punishment does not do a good job of expressing respect for the victim, as this is not what the public and the victim might find ultimately satisfying as a response to wrongdoing.

3.3 Victimological research

The research I just talked about focuses on studies in social psychology that mostly use vignettes that describe cases of wrongdoing, or economic games where participants experience some minor forms of transgressions. This is of course not the ideal kind of data to talk about the needs of the victim, though looking at this research helped us to get a better understanding of what people seem to care about when they care about taking revenge.

More direct evidence would be to research how actual victims of wrongdoing experience crime, and what kind of actions help them with the effects that crime has on them. Such experiences can depend on many circumstances, and we need to be careful not to make sweeping generalizations without adequate data. But such data might at least allow us to take the first steps at finding justified answers to the questions at hand.

Uli Orth attempts to summarize the experience of victims as we have talked about them in the following way:

> Feelings of revenge among crime victims have another quality compared to empathetic feelings of revenge among observers. Important motives for feelings of revenge among victims are reequilibration of power in relation to the offender, restoration of self-esteem, and escape from psychological pain.[43]

The ideas of the re-equilibration of power and the restoration of self-esteem, in my view, nicely converge with the philosophical literature we have talked about in the context of retributive arguments. Philosophers emphasized the importance of 'breaking the subjugation' and expressing respect for the victim, and indeed, if we follow the line of victimological research presented and summarized by Orth, these aspects are what is important to victims in the face of wrongdoing.

With this, we can try to operationalize the philosophical idea of expressing respect for the victim more concretely in empirical terms. A reaction to wrongdoing does a good job of expressing respect for the victim if it helps with the feeling of power of the victim, their self-esteem, or psychological pain. Some studies are looking at exactly these dimensions in their study design.

[43] Uli Orth, "Punishment Goals of Crime Victims" (2003) 27 Law and Human Behavior 173.

Laxminarayan and colleagues analyzed the then available studies on victim satisfaction regarding different aspects of criminal wrongdoing such as the interaction with police, having their voice heard, the criminal process, and different sanction outcomes.[44]

Their main takeaway is that the findings paint a complicated picture, which suggests that many victims (depending on the crime) care about different things, which the researchers call "differential victimology."[45] Some findings that do seem reliable in their analysis is that retribution helped with victim satisfaction, and that compensation only sometimes helped. Note, however, that the notion of retribution here is different from what philosophers have in mind. Retribution can merely mean the arrest of the offender, or sanctions that are perceived as severe. Compensation, similarly, can mean simple payment by the state or third-party institutions, or compensation offered by the offender (when the compensation was offered by the offender, victims were more satisfied with the outcome than when it was provided by a third party).

Beyond the outcome regarding the sanction, procedural aspects also play a role for the victim. Most important was what the researchers call "[i]nterpersonal treatment and fairness"[46] which was unambiguously important for the satisfaction of victims. Having their voice heard, such as in victim impact statements, was less reliably correlated with satisfaction. Restorative justice as a means of having the victim voice their concern was not part of the analysis (we will come back to this later).

A different study by Laxminarayan from the same year (that does not seem to be part of the review just presented) paints a somewhat different picture with regards to the sanction outcomes. Regarding the procedure, Laxminarayan similarly found that satisfaction with the criminal process correlates with several psychological benefits for the victims, such as a stronger feeling of restoration of justice, and feeling of self-worth. Regarding the sanction outcome, however, she found that "only receiving compensation from the offender was significantly associated with psychological effects."[47] It is important to stress that compensation only had this effect when it was provided by the offender, but not when it was provided by the state. One possible interpretation is that compensation from the offender makes the action appear like a sanction that takes what happened seriously as a wrongdoing, rather than merely harm, as was differentiated in the philosophical literature.

Restorative justice, which was excluded in the analysis by Laxminarayan and colleagues, was found to be helpful in terms of victim satisfaction in a meta-analysis by Latimer and

[44] Malini Laxminarayan and others, "Victim Satisfaction with Criminal Justice: A Systematic Review" (2013) 8 Victims & Offenders 119.
[45] ibid 143.
[46] ibid 141.
[47] Malini Laxminarayan, "The Effect of Retributive and Restorative Sentencing on Psychological Effects of Criminal Proceedings" (2013) 28 Journal of Interpersonal Violence 938, 949.

colleagues.[48] Here, it is important to emphasize the limits of restorative justice. Such conferences are typically only used when all stakeholders agree to the procedure, which might be an important confound in explaining the effectiveness of restorative justice, as it presupposes a commitment to talking to each other about the wrongdoing. Its use is thus limited to cases of wrongdoing where stakeholders agree to the process.

As far as I can see, the tentative conclusion that justice restoration and expressing respect is multifaceted and complicated is also echoed in more recent studies. Hester and colleagues paint a similar picture regarding victims of gender-based violence, where procedural aspects, recognition, empowerment, prevention, reparation, and revenge all are part of the interests of victims.[49]

Remember that Farnham took it to be obvious that our responses to severe wrongdoing are not malleable in the sense that other actions than punishment might adequately express respect for the victim. The data does not clearly support such a claim. Research on hate crimes suggests that restorative justice, for example, is an important (additional) feature that we ought to use in order to properly attend to the interests of victims of wrongdoing[50] and restorative justice proponents, researchers and practitioners are optimistic with regards to its use in sexual offenses.[51]

What this overview suggests, I think, is that the empirical literature on the effects that wrongdoing has on victims, and the different responses to wrongdoing that the state may take to help victims, is inconclusive with regard to the debate between retributivists and, for example, non-retributivists. There are some clear benefits to procedural fairness and respect during the criminal trial on the perceived respect towards the victim, which neither speaks for nor against a retributive view. Then there is some evidence that the action in the face of wrongdoing has to be clearly framed as a sanction in response to said wrongdoing. But sanctions can be either punitive or corrective. There is no clear evidence that punitive reactions are in principle better in order to express respect to the victim than corrective sanctions. In some cases, corrective sanctions even have better effects on victim satisfaction.[52] This is true for many different kinds of wrongdoing, especially when restorative justice processes are used.

So, the conventionalist argument does not support either side clearly. But there is a moral argument with which the critic of retribution could defend a slight edge for non-punitive responses to wrongdoing from the perspective of an expressivist theorist. I will conclude

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[48] Jeff Latimer, Craig Dowden and Danielle Muise, "The Effectiveness of Restorative Justice Practices: A Meta-Analysis" (2005) 85 The Prison Journal 127.

[49] Marianne Hester and others, "What Is Justice? Perspectives of Victims-Survivors of Gender-Based Violence" [2023] Violence Against Women 1.

[50] Mark A Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms* (Oxford University Press 2014).

[51] James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press 2009).

[52] Ulrich Orth, "Does Perpetrator Punishment Satisfy Victims' Feelings of Revenge?" (2004) 30 Aggressive Behavior 62.

the criticism of the retributive position in the next section with this moral argument against retribution.

4 The moral limits of the conventional argument

I have argued that a retributive justification for punishment which builds on the victim's perspective fails to convincingly justify criminal punishment. The conventional argument is more convincing in its attempt to justify punishment, but in the previous section, I have argued that this strategy relies on empirical claims regarding the effects of wrongdoing on victims, the effects of punishment on victims, and the interests that many victims appear to have in the face of wrongdoing.

Looking at the empirical data that is available to date does not seem to support the claim that punishment is a particularly good technique to express respect for victims, at least if we measure doing so with the satisfaction that victims get from different responses to wrongdoing, and how it helps them deal with the effects of wrongdoing.

Rather, the results are somewhat mixed. Compensation, being granted procedural rights, and being taken seriously during the process (from start to finish) matter greatly for the satisfaction of victims and their perceived self-worth as well as their feeling that justice has been restored. But the findings are not clear cut either way. That is to say, some studies also find that punishment helps to reach these aims. On average, non-punitive methods might do a better job, but neither option appears to be a perfect solution.

Coming to the moral problem, the sole fact that there are means of addressing the expressive harm done to victims does not in itself justify doing so. After all, the conventionalist argument rejects retributivism. Therefore, the harm that is imposed on the offender is not strictly speaking deserved in a retributivist's sense of the term. If it is not strictly speaking imposed simply because it is deserved, the harm of the sanction—be it punishment or a corrective sanction—is a *pro tanto* moral wrong and needs to be justified.

We thus have to answer two important moral questions. First, should we opt for punishment or corrective sanctions as a means to express respect for the victim? Second, is the harm that is imposed on the offender justified by the value of expressing respect for the victim?

To address the first question, we should note that, all else being equal, if there are different means of achieving a certain aim, we should prefer the means that is least burdensome to offenders. In most discussions on punishment theory, punishment is typically seen as having a higher justificatory burden than corrective approaches, as punishment involves the intentional infliction of harm, while corrective approaches do not. So in principle, if corrective approaches (on average) do a better job at expressing respect towards the victim, we have an additional moral reason to opt for these, as these are also morally more parsimonious.

But there are more morally relevant considerations than the difference between intending harm and merely foreseeing it. Restorative processes, for example, might be distressful for offenders. You might think that this should not be of moral relevance, as, after all, they committed the wrongdoing in the first place. But the conventionalist argument does not accept any of these retributive ideas of deserving harm for wrongdoing. Therefore, all the burdens that are imposed on offenders should be balanced against the benefits that the victims get from the imposed burdens.

If proponents of punishment can make the case that corrective approaches and especially restorative justice are much more burdensome to offenders even if they do not intent the harm they impose on them, the argument I just made in defense of corrective sanctions turns on its head. If punishment is less burdensome even though it involves intentional harm—for example simply because restorative justice procedures are so distressful—then we should opt for punishment all else being equal. But as I know of no explicit argument showing that corrective sanctions are indeed more burdensome to offenders than punitive sanctions, I remain agnostic on this point at this moment in the discussion.

A last point regarding the question whether we should punish or compensate concerns other aims that we have when sanctioning offenders. Expressivism might be just one concern amongst others, such as deterrence or rehabilitation. With these, we also have to ask whether punishment or corrective sanctions best achieve these aims. I have argued elsewhere that corrective approaches are not only a good means of expressing respect, but also help to achieve other aims in criminal law that we ought to care about.[53] If that is true, this would give us additional reasons to endorse corrective sanctions beyond the tentative conclusions drawn from expressivism.

Now regarding the second moral challenge for the conventionalist expressivist. Assume that corrective sanctions and restorative justice are the best means of expressing respect for the victim. But is the moral status of the victim important enough to warrant the imposition of harm on the offender—and having the institution of criminal sanctions in the first place? After all, having the criminal law is morally and financially costly. Morally, because the authority to impose harm on people might be misused and should only be carefully granted. Also, the harm is seen as *pro tanto* morally bad amongst non-retributivists. Financially, because having such institutions takes a toll on taxpayers, and we always have to ask ourselves whether the money we put into criminal law could be more effectively used elsewhere.

I cannot offer a comprehensive response to the second moral challenge in this chapter. As mentioned above, I have argued elsewhere that corrective sanctions are useful to reach several aims that criminal law has, amongst them expressing respect for the victim, re-establishing fairness, communicating censure, and ensuring law-abidingness. This, I think, justifies the moral and financial costs of having the institution in the first place.

[53] Valerij Zisman, *Criminal Law Without Punishment. How Our Society Might Benefit From Abolishing Punitive Sanctions* (De Gruyter 2023).

But such an argument cannot be convincingly made in the context of such a chapter—if it can be done so at all.

For the purpose of the chapter in this volume, I only claim to have argued that centering the victim in criminal law theory does not obviously lead to the endorsement of criminal punishment. Rather, taking the victim's perspective seriously might lead to a more comprehensive endorsement of corrective sanctions, granting procedural rights to victims, being careful to respect them before, during, and after the criminal trial, and using restorative procedures where possible.

5 Conclusion

In this chapter, I have discussed two types of arguments in defense of punishment based on the rights or moral status of the victim: a retributive and a conventionalist argument.

With regard to the retributive argument, I tried to defend two claims. First, that many current arguments that carry the label are not properly retributive as they presuppose in their arguments how victims or the society factually reacts to or understands wrongdoing. Arguments with such assumptions are not properly retributive and should rather be discussed as conventionalist arguments—which requires us to explicitly acknowledge and discuss the empirical commitments of such an argument.

Second, those arguments that are properly retributive do not provide a plausible justification for the intrinsic connection between punishment and affirming the victim's moral value. One claim that came up repeatedly is that punishment is needed to account for the moral wrongfulness of the crime, whereas correction is only aimed at the harm that was imposed. If affirming the moral status of the victim requires taking the wrong seriously, and if only punishment can address this dimension of the crime, then indeed punishment is necessary. But as I have argued, there is no convincing argument for the claim that only punishment can address moral wrongfulness.

The conventionalist justification for expressive punishment is more promising in my view. It holds that proportionate punishment is the best means of convincingly communicating to the victim that the state and society care for their moral status, and thus address the expressive dimension of wrongdoing successfully. *If* we assume that the state should care about the expressive dimension of criminal wrongdoing, then the state has *pro tanto* reason to impose criminal punishment on the offender.

This argument in defence of punishment has to answer to (at least) two challenges. First, it needs to show that punishment is in fact the best means of expressing respect for the victim and affirming their moral status. If it is, second, it needs to show that expressing respect for victims is important enough that it justifies the imposition of sanctions on offenders.

I have argued that we should be cautious with regards to the first point. Both research in social psychology and in victimology seem to suggest that people care less about getting

even in a broadly retributive manner, but rather are interested in receiving acknowledgment from the offender and initiating moral change in them. Paradigmatic punishment in the form of fines paid to the state and imprisonment do not seem to be the most promising means of reaching the expressivist's aim. Rather, corrective sanctions—that is, restitution paid to the victim by the offender—and some form of granting procedural rights to victims (for example by using restorative justice procedures where possible) are much more promising to satisfy the interests of the victims and thereby express respect for the victim.

Is this enough to justify the institution of criminal sanctions—be it in the form of punishment or the form of corrective sanctions? That depends on how much value we put on expressing respect for the victim and on the other reasons that there might be to impose such sanctions.

In this chapter, I have not offered a full defense of sanctions based on the expressive rationale. This has two reasons. First, the data on what helps victims best deal with the expressive harm of criminal wrongdoing is still insufficient to draw clear conclusions. I have argued that corrective and restorative approaches are at least as suitable as are punitive sanctions, if not preferable from the expressivist's point of view. But we require a greater quantity of good quality data to derive more robust and reliable conclusions. Second, the harm we impose on offenders has to be balanced against the value of expressing respect for victims. Maybe the victim's moral status alone does not justify the moral and financial costs that are involved in having a system of criminal punishment and corrective sanctioning.

A full defense of expressive corrective sanctions, as I envision them, go beyond what I can achieve in this chapter. But with the arguments defended here, I hope to have taken a step in that direction.

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REFRAMING CRIMINAL JUSTICE WITH A GENDER PERSPECTIVE: RESHAPING THE ROLE OF THE VICTIM IN CASES OF GENDER VIOLENCE

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Abstract

This paper presents the history of the gender-based violence victims within the criminal justice system, addressing the arch that starts with them being an almost dispensable third party and ends with them getting a renewed attention embraced by the feminist political agenda. By adopting a theoretical perspective aligned with the Marxist critique of Law the victim is here analysed as part of the changes undergone by the criminal justice system, from its embryonic forms to the modern criminal law and lastly to the transformations caused by the punitive turn experienced in the late XX century. In this process, the historically established place for gender-based violence victims has been challenged in the last decades by feminist scholars and activists who have proposed two sets of distinct measures to design an victim-centred justice model. The first one consists of reforms to avoid institutional victimization, while the second is affiliated with an abolitionist perspective and centred on a replacement of the current criminal justice mechanisms with restorative justice practices. In conclusion, both these paths taken by feminists show the duality of the challenges faced by those who view society critically, meaning that what exists today must be reformed while the work of constructing a revolutionary alternative must be simultaneously in motion.

1 Introduction

The modern criminal justice system is centred on the idea of a judicial conflict established between an accusatory institution, normally the public prosecutor, and a defendant, technically assisted by a private lawyer or public defendant. In this paradigm, the victim is usually relegated to play a secondary role, being promised that an impartial and proportional sentence will be delivered. This transference of the previous role of the victim to the State in the conflict established with her offender may seem like a natural and adequate choice, but its roots can be historically placed and have much to do with the development of the criminal justice system and the modern state.

The promises of impartiality and efficiency in providing justice to victims have for centuries enforced judicial practices that did not consider victims' needs and their opinions regarding adequate punishment. It is not until the late 1970s that this consensus begins to be questioned. Among the various changes that started to take place is the emergence of the victim's movements that argued for the inclusion of the victim as an active actor

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in the criminal justice system. Simultaneously the feminist movement also experienced the birth of a new "wave", embracing discussions regarding domestic abuse and sexual assault and arguing for changes in the criminal justice system. From then on, a feminist framework also started to be developed regarding criminal law, with authors arguing that one of the many changes needed to avoid institutional gender violence would be to reinsert gender-based violence victims as central actors in the judicial process.

This paper aims to address this arch experienced by the victim in the history of the criminal justice system, from being an active negotiator of sanctions to becoming an almost dispensable third party and lastly getting renewed attention embraced by the feminist agenda. By doing that, it will be possible to demonstrate how the distinct forms of inclusion of the victim in the decision processes triggered by a violent offense are not natural but derive from the structural and historical aspects that shape criminal justice. This choice to unravel the reasons why the victim has been approached in very distinct ways can be unsettling since it challenges the assumption that the criminal justice system is in constant improvement, but it is also a necessary step to envision possible alternatives and evaluate the ones already available.

To achieve the kind of analysis here intended, it is crucial to bring to the debate criminological contributions, especially the ones from the field of critical criminology that combine historical and structural aspects to understand how criminal law itself and the criminal justice system are shaped. This methodological approach merges intakes from sociological research with legal studies and may seem unorthodox since the fields are normally dealt with separately, yet it will be useful to understand the reasons behind the victims' comeback in the last decades and whether this is a shift that has brought more attention and satisfaction to victims in general and especially to victims of gender crimes.

The following sections are organized into two main parts. The first one addresses the different paradigms of the victim within criminal justice, describing the changes that occurred in the 1980s. The second brings the discussion to gender-crime victims presenting how the feminist movement has on one hand induced reforms in criminal justice to include victims' needs and on the other has also criticized the way women have been revictimized, leaning towards a restorative and (or) abolitionist approach. The final remarks elaborate on the possibilities and limitations of feminist initiatives to include the victims in criminal justice and on the broader political motivations that have led to their acceptance in the last decades.

2 The classical victim-paradigm

The history of the victim within criminal law is deeply connected to the origins of the entire criminal justice system and the transformations that it suffered throughout the centuries. To make sense of these changes, it is crucial to take a brief step back and look at which tools victims had to deal with their offenders before criminal justice and its institutions existed.

In archaic forms of criminal law encountered in ancient Rome, victim and offender negotiated among themselves sanctions to be imposed, reaching for an equivalent that satisfied both parties. Both physical punishment or the financial restitutions could be established as sufficient and just, without any necessary correlation between the harm suffered and the nature of the punishment chosen. It was the pact itself that determined what was equivalent, making it possible, for example, to equate patrimonial damage to some form of corporal punishment or, a severe form of bodily injury to a financial compensation[1].

This form of composition after harmful acts continued for a considerable part of the Middle Ages. Rusche and Kirschheimer describe that medieval criminal punishment was based on agreements to avoid social conflicts, through fines, which were arbitrated according to the status of the person who caused the damage and that of the victim. As a result, social hierarchy was preserved, as well as pure private revenge was avoided [2].

Corporal punishment was at that point an exception, existing merely as a substitute for bails that were not paid. Nonetheless, that soon began to change as the centralized political forces, typical of the Lower Middle Ages, started to take over private conflicts, imposing financial penalties with a primarily revenue-raising function. Beside them figured the organized apparatus of the Catholic Church, which also took the victim's place in determining the penalties, on the grounds that the crime was not an injury to a private interest, but an affront to God himself.

The amalgam of the catholic church institutions, with the ones associated with feudal lords and later monarchies, established a system of punishment for crimes that were presented an attack on God or on society as a whole, rather than a private issue. This led to the prevalence of corporal punishment, which was cruel and intended to intimidate. As a result, the nature of the penalties changed, shifting towards more severe forms of physical degradation such as mutilation, beatings, and death. This type of punishment, which was deemed necessary to protect society from dangerous individuals, became increasingly prevalent in the 16th century. This period also marked the formation of institutions like the police and investigative apparatus, which were integral to the implementation of these forms of sanction[3].

These early state forms of handling conflicts associated with a crime represent the first stages of replacing the victims with institutional actors and their private interests with public or heavenly ones. With the formation of the actual criminal justice system in the late 16th century, some of the embryonic institutions that previously existed assumed their modern configuration giving birth to the Accusatory System, in which the holder

[1] Evgeny Pashukanis, *Law and Marxism: A General Theory* (Pluto Press 1989).
[2] Georg Rusche and Otto Kirchheimer. *Punishment And Social Structure* (Columbia Morningside Heights University Press 1939).
[3] Georg Rusche Otto Kirchheimer. *Punishment And Social Structure* (Columbia Morningside Heights University Press 1939).

of the punitive interest is the Public Prosecutor's Office, that takes the place of the victim, representing the entire public interest[4].

At the core of all changes brought to punishment by modern criminal law is the notion of culpability. It becomes the indicator of the extension of the sanction to the established. If previous punishment was measured according to the amount of damage inflicted on the victim, now it is fixed by the intention of the agent at the time when the crime was committed. Presuming a free individual, understood as completely accountable for his actions, the main task of the criminal investigation is to determine the degree of intent and to translate it into a period to be served in prison. In the words of Evgeny Pashukanis:

> If the punishment functions as a settlement of accounts, the notion of responsibility is indispensable. The offender answers for his offence with his freedom, in fact with a portion of his freedom corresponding to the gravity of his action. This conception of liability would be quite superfluous in a situation where punishment has lost the character of an equivalent. Were there really no trace of the principle of equivalence remaining, then punishment would entirely cease to be punishment in the juridical sense of the word[5].

In short words, the degree of intent showed by the free agent when committing a crime will equate to the period in which his freedom will be limited. As damage becomes secondary, it is logical that the victim also becomes less relevant.

However, the victim still has a role. As described, the prosecution (and the various other related institutions of the criminal justice system) act in the name of the public interest deprived of any concreteness. Beside them still stands the victim and their suffering that are still present to remind all parties that a *reward* is required for the harm they have suffered. This does not mean that the victim will be questioned as to what they actually want as reparation, only that a *high price* must be demanded by the Public Prosecutor's Office, *i.e*. a severe penalty, which would bring collective satisfaction which should be enough to make victims content. In this sense, the victim's satisfaction is presumed with harsh punishment, the desired *reward* for the harm suffered, which explains why judgments of acquittal or the imposition of alternative forms of punishment are viewed as a defeat[6]. Seen from a different angle, this also explains why victims who do not want their aggressors to be punished or just expect an apology or financial reparation are viewed with astonishment.

Thus, criminal justice adheres to a form of negotiation, in which the prosecution and defence request different degrees of punishment, with the judge deciding, in the end, the equivalent of freedom that is owed by the defendant. The victim is there to witness and symbolically endorse this transaction.

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[4] Evgeny Pashukanis, *Law and Marxism: A General Theory* (Pluto Press 1989).
[5] Ibid.
[6] Evgeny Pashukanis, *Law and Marxism: A General Theory* (Pluto Press 1989).

After this historical overview, the classical victim paradigm becomes clearer, with the previous power held by the victim to argue for a rightful reparation and punishment being transferred to the institutions that emerge with the modern state and later develop with the birth of criminal law itself. The terminology *classic* is due to the intrinsic relation of the classical crime theory to the development of the autonomous criminal justice system with its functioning institutions that work as a replacement for the victims.

It is crucial to point out that the classical paradigm does not exclude entirely the possibility of allowing the victim more power over the outcome of the rulings and to consider the damage inflicted as an element to determine adequate punishment. These possibilities are however the exception that confirms the general outline of the way the victim is perceived.

This minor and symbolic role given to the victim does not always translate into a respectful and considerate approach. Especially when the victims belong to social minorities that experience prejudice and lack of recognition. This is the case of victims of gender crimes, which has been denounced thoroughly by the feminist movement and feminist scholars.

To make sense of why some victims are denied their already residual participation in criminal justice we must once again distance ourselves from criminal law and bring the contribution of criminology. In the field of critical victimology, the contribution of the abolitionist criminologist Nils Christie has been recognized as an undeniable starting point to understand why some victims are more valued than others.

Christie shares the analysis presented, describing in his works how "*The victim has lost the case to the state*"[7]. His contribution further elaborates on this assumption, describing how the victim sees herself as a client who expects her aggressor to be punished, viewing this process as a service to be provided by the criminal justice system. The following excerpt details his argument:

> Our society is a Society of clients, one where we are represented by others, one where others investigate, debate and decide. Why should we not be clients as victims when we are clients in so many life spheres? Why should we let other people receive both money and gratitude on the wrongdoer when we do not really know him and probably never will. Why should we buy punishment when we buy health and happiness[8].

However, for the victim, to count on the criminal justice system to provide the *service* desired, she needs to come as close as possible to an ideal constructed around the individual who could legitimately suffer some sort of violence. In outlining this figure of the

[7] Christie Nils, The ideal victim. in EA Fattah (ed), From Crime Policy to Victim Policy (Palgrave Macmillan 1986) 17.
[8] Christie Nils, The ideal victim. in EA Fattah (ed), From Crime Policy to Victim Policy (Palgrave Macmillan 1986) 19.

ideal victim, Christie first brings up an illustrative hypothetical situation in which an elderly woman is robbed by a young, strong man on her way to her sick sister's house, illustrating the traits that make her an ideal victim. In his description:

> (1) The victim is weak. Sick, old or very young people are particularly well suited as ideal victims.
>
> (2) The victim was carrying out a respectable project - caring for her sister.
>
> (3) She was where she could not possibly be blamed for being there - in the street during the daytime.
>
> (4) The offender was big and bad.
>
> (5) The offender was unknown and in no personal relationship to her[9].

Although these five characteristics were based on the example given, they can be generalized to create a complete idealization of the victim and, at the other extreme, a picture of someone who does not meet any of the requirements and will not be considered a rightful victim. All the other possibilities between these two extremes belong to a grey zone, which places a burden on victims to prove that they are worthy of criminal protection and that the violence they have suffered is a crime.

That becomes more evident when two other features are subsequently included to describe the so-called "ideal victim". Christie argues that even after meeting all the criteria presented, the victim must have resisted (or at least tried to resist) the aggression experienced and, above all, must have sufficient social recognition to have their claim known by the criminal justice system, otherwise even their perfect victim *status* will not be sufficient.

Christie does not ignore the fact that this ideal has been defied, giving the example of the feminist movement's efforts to reject these requirements in cases of gender violence, in which the victim does not always meet the perfect victim criteria. To illustrate, he references situations in which women are not automatically placed in the victim category by criminal justice institutions, such as cases of domestic violence in which the aggressor is known by the victim (challenging the need that the crime perpetrator should be previously unknown and cases of rape suffered by prostitutes whose previous behaviour was not considered "respectable" enough to allow victimization to occur.

However, at this point, he offers a warning, while stressing his total agreement with feminist demands for recognition and protection. Christie describes that the gain of equality experienced by some women will allow them to become known as valid victims by the criminal justice system[10]. At the same time, paradoxically, the more social recognition

[9] Ibid.

[10] Christie Nils, The ideal victim. in EA Fattah (ed), From Crime Policy to Victim Policy (Palgrave Macmillan 1986) 17.

and power women gain, the further they move away from the ideal of the victim, running the risk of being discredited. To envision this apparent contradiction, we can imagine the case of a woman in a situation of domestic abuse who is well-educated and financially independent to whom it is asked why she simply did not leave home before her situation became violent rather than asking for the criminal justice remedies. Women thus walk a tightrope. They have to be strong *enough* to make themselves heard, but not *too* strong that they lose their status as victims.

3 The victim in the late-modernity

The social perceptions of victims have historically supported the classical victim paradigm by picturing them as defenceless subjects who did not have any strong political desire. In a broader sense, crime and punishment were not a topic usually discussed in the public arena, being a theme restricted to the realm of experts and criminal justice professionals. This scenario shifted drastically in the 1980s when a so-called punitive turn happened in countries such as the United States[11] and United Kingdom[12] also resonating in many other western nations across Europe[13] and in Latin America[14].

There is a considerable volume of authors who have dedicated their work over the last three decades to explain how this punitive turn occurred, while describing the changes in the figure of the victim within this process. Among this group of authors, David Garland's contribution bears the greatest resonance being a mandatory citation in works dealing with the subject[15]. Although Garland's analysis is dedicated to the United States and Britain its depth allows for the recognition of key analytical elements, which can be valuable for reflections on other countries.

In order to understand this change in punitivity, it is first necessary to describe what existed before it in terms of criminal punishment, that is, what the typical punitive model of the welfare state was like since the 1950s. The financial strength gained by the United States after the Second World War allowed for an intense growth in the productive sectors that boosted employment and consumption levels, as well as public funding for a broad set of social rights. That was coupled with progressive political gains in civil rights driven by the actions of the black and the feminist movements.

Within the criminal justice system, this is reflected in the fusion of criminological correctionalism with proposals for rehabilitation based on what Garland calls classical penology, which is much in tune with the classical crime theory presented in the last section[16].

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[11] David Garland, The Culture of Control (Chicago University Press 2002) 36.

[12] Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' [2004] 44(6) The British Journal of Criminology 972.

[13] Elena Piojan, 'La Economía Política Del Castigo' [2009] 1(11) Revista Electrónica de Ciencia Penaly Criminología 6.

[14] Maximo Sozzo, Postneoliberalismo y penalidad en América del Sur (CLACSO 2016).

[15] David Garland, The Culture of Control (Chicago University Press 2002).

[16] David Garland, The Culture of Control (Chicago University Press 2002).

At its foundation, correctionalism aims to determine what makes the delinquent different from the rest of "non-criminal" society, applying measures that would promote recovery and the elimination of deviant characteristics.

This punitive model began to lose its character with the collapse of the welfare state, which began gradually in the 1970s, driven by the oil crisis that hit the US economy. In the 1980s neoliberalism was presented as an alternative to overcome the economic problems, by advocating for a maximum reduction in government expenditures, especially with regard to social policies.

As part of the late modernity, the idea of rehabilitation, which grounded punishment in the logic of the welfare state, becomes secondary. Replacing rehabilitation, discourses of *expressive justice* surface, giving room to open demonstrations of support for severe punishment that leaving behind its former facet of a social taboo and become recurrent in the rhetoric of politicians[17]. Along with that, a support for harsher criminal legislation and severer sentences reappears as a respectable opinion shared by a population described as angry and tired of living in fear.

If before there was a consensus that criminal measures should be based on expert opinions far from political disagreements, now the debates are loaded with emotional appeal. Instead of the opinions of professionals, it is the victims (who no longer play a marginalized and invisible role) who now know what is needed. Figures such as children, victimized women and family members of victims come to embody the desires and fears of an entire society that sees them as the materialization of what anyone could go through.

> When introducing new measures of punitive segregation, elected officials now routinely invoke the feelings of 'the victim' as a source of support and legitimacy. The need to reduce the present or future suffering of victims functions today as an all-purpose justification for measures of penal repression, and the political imperative of being responsive to victims' feelings now serves to reinforce the retributive sentiments that increasingly inform penal legislation.[18]

What might seem positive at first, considering all the problems inherent in the way the criminal justice system treats victims, as seen in the last section was actually a trap. Although apparently more attention was paid to victims, no policies were designed to assist them. Therefore, nothing was gained after seeing their suffering being politically used as justification for the idea that the correct way to bring justice to victims had to be to punish their aggressors as cruelly as possible within legal boundaries.

A clear illustration of these changes is the recurring practice of calling criminal laws with the name of victims as a form of homage and to provide public visibility to the issue criminalized. However, Garland describes this *baptism* as a clever political ploy that un-

[17] Ibid.
[18] Ibid.

dermines any possibility of opposition to measures to toughen criminal sanctions, placing them as an attack on victims themselves, who attain the status of a sanctified figure in public opinion[19]. With this, the previous notion, typical of *classic* criminal law, that criminal issues need to be discussed with the utmost caution, becomes an all-or-nothing political game, in which any intention to humanize punishment, no matter how small, is interpreted as an attack on the victims or their memory.

Furthermore, this form of visibility and "sanctification" of the victims cancel out any concern that might appear in public debates regarding the rights of offenders. As a result, any initiative that recalls the existence of said rights is interpreted as an insult to the victim or their relatives.

Even though there is a line that can be drawn separating the general victim's movement and feminism, it is undeniable that the feminist agenda regarding gender violence benefited from the increased visibility gained by victims. In this political environment dedicated to passing bills that create new crimes and increased penalties as a solution to fight complex social problems, such as domestic abuse, sexual assault, rape and many other sorts of gender violence, the feminist movement found itself siding with conservative political forces and falling pray of the traps that the criminal justice lays for victims who are not ideal.

4 Feminism and victimization: From feminist legal reforms and to a feminist abolitionist critique

4.1 Feminist reforms: Reimagining the criminal justice system with a gender perspective

The partial conclusions presented in the last topics tend to bring discomfort to criminal law scholars, practitioners and feminist activists who deal with gender violence with the legal tools available. If trusting the criminal justice system means accepting all limitations it brings to victims, what alternatives are available to deal with such serious matters? What can be done with the legal provisions and institutions already available to help women in violent situations?

The first set of proposals that answer these questions can be described as *feminist reforms* to the current criminal justice system and are based on a diagnosis that when institutions ignore power inequalities that derive from gender, they are prone to reproduce harmful gender stereotypes[20]. With that in mind, feminist legal scholars developed a set of principles to be used by judges and law practitioners in general to ensure victims a righteous treatment such as (i) the special relevance of the words of women in situations of violence, (ii) the vehement rejection of gender stereotypes in all institutions of the criminal justice system and (iii) legal and isonomic parameters in sentencing, not imposing on the

[19] David Garland, The Culture of Control (Chicago University Press 2002).

[20] Erika Rackley, 'Why Feminist Legal Scholars Should Write Judgments: Reflections on the Feminist Judgments Project in England and Wales' [2012] 24(2) Canadian Journal of Women and the Law.

victim the requirement of specific behaviours of the woman in to be considered a victim worthy of protection[21].

The exposure of victims to traumatic experiences when resorting to the institutions of the criminal justice system is a recurring complaint of activists in the field of gender violence. These experiences can be referred to as institutional victimization, re-victimization or secondary victimization, representing a continuation of the manifestations of violence now perpetrated by state agents who should be dedicated to assisting victims.

> Secondary victimization refers to the treatment given by the criminal justice system to victims. It is also known as "indirect" or "collateral" victimization, related to the notion of deprivation or "bereavement", because victims end up becoming suspicious of what happened to them at the same time as they don't know why this is happening, much like Kafkaesque aesthetics. The idea of indirect victimization as a result of crime has some resonance not only because it takes into account new perceptions, such as cultural and ethnic diversity, but also because it makes it possible to share the experiences of crime and victimization processes[22].

There is also a production that describes a peak of seriousness that the forms of revictimization can take, when there is a real criminalization of the victims of violence. This is what Leigh Goodmark calls a *criminalized survivor*[23]. They are women, trans and non-binary people whose punishment by the criminal justice system is directly related to the violence they have previously suffered, such as rape, forms of domestic violence and attempted femicide. As an example, a survey carried out in 2020 with women imprisoned for homicide in the United States found that thirty percent of these women were convicted in episodes in which they were trying to defend themselves or a third party in a violent situation.

These degrading forms of treatment, when identified and understood as troublesome, can be tackled in the form of institutional adjustments of various kinds, such as guidance for professionals, the use of sanctions of various kinds or reformulation of institutional practices. In this process, collaboration with the feminist movements is also productive in identifying how institutional sexism occur and how practices can be adjusted.

Another feminist reform already anticipated is the prohibition of stereotypes as defence arguments and as valid grounds for judicial decisions. This proposal has been developed by feminist authors since the 1970s in the United States, when they began to demonstrate how the behaviours expected of women were a byproduct of sexist social conventions and not natural feminine impulses.

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[21] Miranda Fricker, 'Testimonial Injustice', Epistemic Injustice: Power and the Ethics of Knowing (Oxford Academic 2007).

[22] Eduardo Saad-Diniz, Vitimologia corporativa (Tirant lo Branch 2019) 132.

[23] Leigh Goodmark, Imperfect Victims (University of California Press 2003) 13.

It is clear that it is not only gender stereotypes that should be banned. Even feminist theoretical contributions have improved to integrate issues of race, sexuality, class and, more recently, ableism into their arguments, in order to guarantee an intersectional analysis in legal cases and ensure that the victims' interests are not harmed. Efforts in the same direction have been made in works that discuss the issue of the victim from a racial perspective, which analyse it considering 'the racist hetero-cisnormativity gaze of the justice system'. These studies identify the strategies used to deal with black victims, which are used to discredit their narrative of the crime, using data about their biography such as where they live, their social behaviour (if they work, if they are mothers, if they deviate from hegemonic gender and sexual identities) and their network of relationships (if they have relatives in prison, for example).

The rejection of gender stereotypes is sometimes read as a threat to the right of defence, under the justification that it would represent a limitation of possible defence theses to be presented in court[24]. Debates of this nature took place in the Brazilian Supreme Court which ruled the use of the argument of *self-defence of honour*[25] unconstitutional in cases of femicide.

It is possible to find authors who raise the argument that this sort of *feminist limitation to the defendant's rights* is dangerous. Although they are a minority in the debate, what is key to dismantling this assumption is that it ignores the inherent limitations of fundamental procedural rights when in conflict with the dignity of the human person. They also lay on a false sense of harm. Recent studies show that the use of gender stereotypes does not translate into acquittals and lower penalties. Thus, there is no real limitation on the right to defence, but the imposition of a qualified exercise of the right to defence, by prohibiting shortcuts based on disparities in power derived from race, sexuality and gender. The rejection of such prejudiced and victim-damaging practices within criminal justice does not promote any increase in punitive power or any naive repair of the way it operates, since there is a real gain in reducing the suffering of victims who can be less exposed to degrading forms of treatment.

Among other recent efforts in Brazil to avoid court decisions based on gender stereotypes figures the *Protocol for Judgments with a Gender Perspective* issued by the National Council of Justice following Brazil's condemnation by the Inter-American Court of Human Rights in the case of Márcia Barbosa de Souza et al. vs. Brazil. The Protocol consists of guidelines for court practice and sentencing in cases in which gender issues are present. It was written in collaboration with feminist legal scholars, bringing gender studies contributions

[24] Alexandra Carvalho and Rejane Arruda, 'Os reflexos do princípio da plenitude de defesa nas características e formalidades do procedimento do Tribunal do Júri' [2023] 2(3) Revista Contemporânea.
[25] The defensive argument known in Brazil as the *right of self-defense of honor* is a misuse of the right of self-defense, by justifying the murder of a wife or partner that previously cheated or somehow publicly humiliated her husband. Despite it being a vulgar interpretation of self-defense, not fulfilling properly any of the legal requirements present in the Brazilian Criminal Code, it was accepted as a valid defensive thesis and could be found in sentences until the 1990s.

to practical issues faced in court decisions. While recognizing the potential of the initiative, it does confirm that the Brazilian judiciary has historically not been welcoming of feminist theoretical contributions.

The challenge of applying this set of new practices is faced closely by feminist authors in the field of law who decided to adopt an innovative approach in terms providing a new kind of theoretical contribution envisioning new possible ways of dealing with cases in which issues of race, gender and sexuality are central. This project of creative imagination has been organized in various countries in the last decade in the form of rewriting judicial decisions[26], becoming a powerful method of analysis and critique of the law.

By putting themselves in the shoes of judges and other authorities, the authors deal closely with the concrete possibilities available for caring for victims while also sentencing aggressors within legal boundaries. The project does not mean a refusal of new public policies for vulnerable women but intends to show some powerful possibilities that exist within what is already legally available. This includes achieving more protection (or less harm to victims) without expanding the criminal justice system or making defendant's rights more flexible.

As thoroughly anticipated in the first two sections, all of these proposals of feminist reform do not make up for the fact that criminal sanctions do not respond satisfactorily to the conflicts originating from gender power disparities, on the other hand, they allow some possibility of caring and respecting the victim. In other ways of establishing responsibility and reparation, alternatives to criminal sanction could be discussed between the offender, the victim, and the community, but it is crucial not to lose sight of the urgent need for rescue and care of victims in cases of gender violence.

4.2 Feminist abolitionism: Dismantling the criminal justice system with a gender perspective

Besides the feminist agenda, dedicated to legal reforms, lays a rich universe of activists who have embraced a different path, more critical of the alternatives provided by the criminal justice system and much more in tune with the theoretical background here previously underlined. In this direction, Wendy Brown argues that even the most progressive legal reforms fail to deal with the different forms of identity that a concrete female victim can assume. Responses within the law, and even more so within criminal law, require that the violence suffered by the victim to be catalogued within the list of existing crimes so that the corresponding sanction can be applied.

> We appear not only in the law but in the courts and public policy either as (undifferentiated) women, or as economically deprived, or as lesbians, or as racially stigmatized, but never as the complex compound, and internally diverse subjects that

[26] For considerations on the Brazilian Feminist Rewriting Project see: Fabiana Severi and Júlia Silva, 'Reescrevendo decisões judiciais em perspectivas feministas' [2022] 1(117) Lua Nova.

we are. This feature of rights discourse impedes the politically nuanced, socially inclusive project to which feminism has aspired in the past decade[27].

This path of building feminist alternatives to the criminal justice encounters that of penal abolitionism bringing together the experiences of victims and the ones of prisoners. Abolitionism is a theoretical and political approach that combines the critique of the criminal justice system with strategies to reduce or, in some perspectives, dismantle prison in its entirety and the institutions related to it[28]. In its origins, it has been conceptually developed by Thomas Matthiessen[29], Nils Christie[30] and Louk Hulsman[31], but has been appropriated and adapted by other authors, such as Angela Davis[32] to include in the analysis of racial aspects of criminalization.

Since its origins, abolitionist authors have combined theory with political actions, developing a close relationship with social activists. As a result of this collaboration an abolitionist feminism emerges denouncing the limitations of criminal justice and the need for alternatives and not just legal reforms.

As Angela Davis describes in her most recent publication *Abolition Feminism,* now there are a limited number of operating organizations that have brought together the feminist and abolitionist struggles to care for victims of racial, gender-based and LGBT+phobic violence[33]. Despite operating locally and with few resources, they have been developing strategies to protect victims at risk and refuse to reinforce police action and imprisonment. Among some examples, figures campaigns such as *She Safe, We Safe* in the United States, which seeks to reallocate public resources allocated for the police to fund programs that use restorative practices in cases of gender-based violence in black communities.

4.3 Restorative justice and gender violence

The abolitionist contributions face the challenge of proposing alternatives to criminal law and imprisonment in different ways, offering various forms of solutions. In this search for another approach, there is a sister field of study, restorative justice. Here we will present the premises of restorative justice, discussing its relationship with penal abolitionism and with the interests of victims of crimes associated with gender violence.

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[27] Brown Wendy, *Suffering the Paradoxes of Rights*. in Janet Halley and Wendy Brown (eds), Left Legalism, Left Critique (Duke University Press 2002) 492.
[28] Sebastian Scheerer, 'Towards abolitionism' [1986] Contemporary Crises 10.
[29] Thomas Mathiesen, *Das Recht in der Gesellschaft* (Votum-Verlag 1996).
[30] Nils Christie, *Grenzen des Leids* (AJZ-Verlag 1986).
[31] Louk Hulsman, *Afscheid van het strafrecht* (Unieboek BV 1986).
[32] Angela Davis, *Are Prisons Obsolete* (Seven Stories Press 2003).
[33] Angela Davis, *Abolition Feminism. Now* (Haymarket Books, 2022).

The term *restorative justice* is attributed to Albert Eglash, who presented it for the first time in 1977, in an article entitled *Beyond Restitution: Creative Restitution*[34], in which he proposed overcoming the retributive and rehabilitative conceptions of criminal justice, in order to establish a way of resolving criminal conflicts based on the participation of the victim, the offender and the community, to restore affected social relations, repair and care for the victim, mainly through victim-offender mediation. However, as Carolyne Boyes-Watson describes the most robust theoretical formulations on the issue only came in the 1990s[35].

It is practically a consensus among authors in the field that there is no single definition that would bring together all the peculiarities touched on in each of the theoretical contributions offered. In the search for one that could be useful, comprehensive and precise, the one proposed by Gerry Johnstone and Daniel Van Ness fulfils this task:

> the restorative justice movement is a global social movement with huge internal diversity. Its broad goal is to transform the way contemporary societies view and respond to crime and related forms of troublesome behaviour. More specifically, it seeks to replace our existing highly professionalized systems of punitive justice and control (and their analogues in other settings) with community-based reparative justice and moralizing social control. Through such practices, it is claimed, we can not only control crime more effectively, we can also accomplish a host of other desirable goals: a meaningful experience of justice for victims of crime and healing of trauma which they tend to suffer; genuine accountability for offenders and their reintegration into law-abiding society; recovery of the social capital that tends to be lost when we hand our problems over to professionals to solve; and significant fiscal savings, which can be diverted towards more constructive projects, including projects of crime prevention and community regeneration. However, there is no agreement on the actual nature of the transformation sought by the restorative justice movement[36].

Along the same path of looking for outlines applicable to all restorative justice procedures, its main premise is non-domination, which consists of refusing to allow disparities of power to be used to subject the subjects involved to new episodes of abuse.

> I have argued that the key value of restorative justice is non-domination. The active part of this value is empowerment. Empowerment means preventing the state from 'stealing conflicts' from people who want to hang on to those conflicts and learn from working them through in their own way. Empowerment should trump other restorative justice values like forgiveness, healing and apology, important

[34]Debra Health-Thorntown, Restorative Justice. in David Levinson (ed), Encyclopedia of Crime and Punishment (SAGE Publications 2002) 1398.

[35] Carolyne Boyes-Watson, Looking at the past of restorative justice: Normative reflections on its future. in: Theo Gavrielide (ed.) Routledge International Handbook of Restorative Justice (Routledge, 2018) 7.

[36] Gerry Johnstone, The meaning of restorative justice. in G Johnstone and D Van ness (eds), Handbook of Restorative Justice (Willian Publishing 2007) 5.

> as they are. […] This is what restorative justice is about: the deadly simple empowerment that comes from creating pacified spaces where we listen to those, we feel have wronged us and those we think we may have wronged[37].

Two other presuppositions derive from this: *empowerment*, based on the reappropriation of conflicts by the parties involved; and *respectful listening*, which guides the dialog between those involved. For the dialog to be successful a normative minimum should be followed, on which one could work creatively depending on the situation. Other principles, such as the *search for forgiveness* and *regretting the damage caused*, are subsidiary and not obligatory.

The broad scope of restorative justice and the need for creative solutions in conflict resolution, although necessary, also creates the risk of its co-optation by the criminal justice system, which would use supposedly "participatory" alternatives to provide even more legitimacy to its actions. Allied with this, there is also the risk of restorative mechanisms being applied to conflicts that previously would not have received any attention from criminal institutions, widening punitive instances.

In this way, although there is not necessarily a shared set of premises between criminal abolitionists and restorative justice theorists, caution is always needed in the practical application of restorative justice. As possibilities for practices that meet the minimum requirements to be considered restorative, there are three models usually referred to: mediation, restorative circles, and restorative conferences.

In the first model, mediation, there is an independent third party with the appropriate training to help the victim and perpetrator establish a dialogue to discuss how the crime committed has affected them and what a possible restitution for the damage suffered might look like and to help them set a plan for the reparation established. Within this possibility, there are other subspecies: community mediation, carried out to promote justice in neighbourhood centres, in which conflicts are mediated to obtain clear reparation for the injured victim; reconciliation programs between victim and offender, in which the aim is to re-establish the pre-existing bonds between those involved; and, finally, mediation between victim and offender, in which the emphasis is placed on the mediation process as an instrument for the recovery of those involved, rather than on a clear result of reparation.

Restorative circles are a model found in indigenous communities in various parts of the world and involve the participation of various members of a community, without any one person being in charge of a specific task. In addition, they can deal not only with a

[37] John Braithwaite, A Kind of Mending: Restorative Justice in the Pacific Islands (ANU Press, 2010) 35-36.

specific violent episode, but also with the issues of several victims or shared social problems[38].

Finally, the restorative conferences are related to the solution of conflicts through a facilitator, in established social institutions, such as within families, schools and even in conflicts perceived as crimes that would be intermediated by the police. In this case, the main idea is to integrate restorative practices into everyday life as much as possible[39].

The success of these various forms of restorative justice practices is not consensual. There is an undeniable body of empirical evidence that proved them to be successful in cases of gender-based violence (domestic violence and sexual crimes). To reach this conclusion the studies normally take into account the satisfaction of victims with the emotional or material reparation received and the gain in their sense of personal security[40]. To illustrate this finding, Jo-Anne Wemmers describes those victims of sexual violence who had participated in restorative conferencing experiences felt empowered, rather than traumatized. Many other empirical studies that focused on the victim's well-being after the restorative practices also conclude that they end up gaining acknowledgment of the harm done, which enables them to switch their narrative of victims to survivors[41].

Some critics point out that the empirical data collected is solely based on local experiences and that there is a lack of comparative studies between judicial practices and restorative ones.

In this sense, the case for restorative justice is controversial among feminist activists and scholars who see these practices as potentially harmful or (at least) as not viable to be executed in all the cases that criminal courts have to deal with daily. In this feud, it is crucial to remind ourselves of the premises discussed in the previous sections, in which it became clear how the criminal justice system has failed to integrate victims and care for their needs. As Lewis *et al.* argues, the critics of restorative practices usually condemn

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[38] Some works mention of a controversial version of restorative sentencing circles, in which the actors involved in a criminal case (judge, prosecutor, victim, accused and his or her defender, and possibly members of the community would discuss in parity an appropriate solution to the case, defining the sentence to be applied). See: Paul Mccold, The Recent History of Restorative Justice: Mediation, circles and conferencing. in Carolyn Hoyle (ed), Restorative Justice: Critical concepts on criminology (Routledge 2019) 144.

[39] On restorative conferencing: "The family group conferencing process has been implemented in schools, police departments, probation offices, residential programs, community mediation programs, and neighborhood groups. Conferencing is most often used as diversion from the court process for juveniles but can also be used after adjudication and disposition to address unresolved issues or determine specific terms of restitution. Conferencing programs have been implemented within single agencies and developed collaboratively among several agencies. After completing a training course, either volunteers or paid employees can serve as conference facilitators.". Gordon Bazemor, 'Comparison of Four Restorative Conferencing Models' [2001] 1(1) Juvenile Justice Bulletin.

[40] See: Mary Koss [2014] The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process and Outcomes. Journal of Interpersonal Violence, 29 (9) 1623.

[41] Jo-Anne Wemmers 'Judging victims: Restorative choices for victims of sexual violence' Victims of Crime Research Digest [2017] 10 14.

alternatives to the current criminal justice system based on the flaws shown *in practice* and defend current criminal law institutions by describing how they work *in theory*[42].

So, when supporting restorative justice, it is crucial not to fall prey to the simplistic argumentative path in which solely theoretical aspects are discussed. Nonetheless, empirical evidence on restorative practices must be confronted with an equivalent set of empirical data on the effects that current criminal procedures have on victims. When that happens, authors such as Barbara Hudson clear that "what cannot be denied is that formal criminal justice has had its chance; it has been the dominant form of justice for a very long time but has not proved effective for these sorts of crime [domestic and sexual violence]"[43].

The same conclusion is encountered in the works many other of feminist legal scholars in the field of criminal law, who have explored theoretically the permanent issues that the criminal justice system has when dealing with victims of gender violence. Among those, Elena Larrauri addresses these so-called *flaws*, that produce revictimization and more suffering to victims, arguing that they are not dysfunctional outcomes of an ideal system, but inherent issues that will never be fully repaired[44]. All of this is to say that restorative justice provides possibilities that may reproduce unwanted social power imbalances, but it also contains in its foundations a visible and central role for victims. In this sense, it is more than an alternative form of criminal justice, because victims are not being reinserted. They have always figured among the main concerns of restorative practices.

Bringing back the centrality of gender in the discussion, some contributions also associate restorative justice with the *ethic of care*, a notion proposed by Carol Gilligan, as a form of ethical orientation that seeks collective well-being and the understanding that an ideal of justice requires equal consideration of the interests of all those involved. In opposition to restorative justice's feminine facet, there would be ordinary, retributive criminal justice, associated with the masculine, named the ethics of justice that values hierarchy and the imposition of individual and rational solutions[45].

Aside from this contribution, other authors reject this automatic association of restorative justice with women, even rejecting this category as essential and unique, bringing into the debate the concrete needs of gender violence victims who are affected by other sources of inequality, such as race and class. On this point, authors such as Annalise Acron advocate a retributive model of criminal justice, as being more suitable for preserving the interests of diverse victims. In this model, no form of forgiveness is expected

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[42] Lewis, R. et. al. [2001] `Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence`. Social & Legal Studies, 10(1) 108.

[43] Barbara Hudson 'Restorative Justice and Gendered Violence: Diversion of Effective Justice?' [2002] The British Journal of Criminology (42) 3 623.

[44] Elena Larrauri 'Justicia Restauradora y Violencia Doméstica` [2022] Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián (22) 12.

[45] On the notion of ethics of care See: Carol Gilligan, A Different Voice (Harvard University Press 1982).

from the parties, especially from victims and defendants, who would be provided with clear guidelines for their punishment determined previously by the State[46].

In the works that bring racial aspects into the restorative justice debates on gender violence, there is a greater emphasis on recognizing it as a positive tool to avoid the criminal justice system taking action in conflicts in which the perpetrator is black. Fania Davis describes the special importance of restorative justice programs in schools, as they manage to retain and resolve issues that could be referred to as the gateways of the criminal justice system, such as the police or the judiciary.

However, returning to the possible black victims, what is described is the need to make gender and race inequalities explicit in debates held in the restorative processes preventing the facilitator from relying on a performance free of prejudices. Martha Minow brings this warning by saying that the idea of restoration presupposes the re-establishment of social conditions that probably never existed[47]. In the same sense, David Hooker criticizes the notion of restoration indicating that it presumes the re-establishment of 'better days when the relationships between different groups were at some point positive, inclusive, respectful, and equitable'[48].

As argued before, it is crucial to be always aware of gender and racial disparities in the realm of restorative justice, nonetheless, the above-mentioned authors detach the notion of restoration to the meaning it truly has in the field. The restoration here desired has nothing to do with a reconstruction of a previous state of the relationships between victim, offender and community, but with the restoration of a common set of emancipatory values that circle the idea of non-domination.

In the end, the most powerful restorative justice alternatives (and abolitionist practices in a broader scenario) are those that manage to bring together both critical action and repulsion towards the criminal justice system, as well as personal attention for the victims. In this respect, both prisons must be perceived as harmful in personal terms, causing suffering based on highly controversial justifications, and victims must be understood as subjects who carry within them social traces of inequality that cannot be ignored in the search for new ways of achieving justice. In short, we cannot look at those who are being punished in a purely structural manner and at the victim from a personal perspective.

5 Conclusions

Criminal justice brings to victims a tempting promise of protection and retribution. Crystallized for centuries as an alternative that channels the most vengeful desires of victims

[46] Annalise Acorn, Compulsory Compassion: A Critique of Restorative Justice. Vancouver (UBC Press, 2004).
[47] Martha Minow, 'Restorative Justice and Anti-Racism' [2021] 1(8) Nevada Law Journal 10.
[48] David Anderson Hooker, The Little Book of Transformative Community Conferencing 26 (2016).

in the form of an impartial judicial apparatus, the criminal justice system offers an apparently fair and serious solution, corresponding to the dimension of the pain experienced. As a counterpart, it demands that victims surrender their position in the conflict and take the place of spectators, in the belief that their interests will be protected. When the feminist movement demands the criminalization of gender violence, it asks for women to be considered recipients of the promises that criminal law represents.

As discussed in the first section, it is impossible to conceive of modern criminal justice outside of the negotiating logic established between the offender and the state in the form of the prosecutor. The victim is given a secondary place, albeit an important one from a symbolic point of view. Within this logic, it is difficult for the conflict that arose from the situation of violence to have any kind of transformation after the intervention of the criminal justice system.

Alongside these limitations, there is also the problem of individuals who do not fit the standards of the ideal victim and therefore do not have their interests met by criminal justice. This is the case of victims of gender-based violence. If women are already expected to behave according to a series of social norms based on gender inequality, this level of expectation becomes even more pronounced for female victims.

Even with the transformations undergone since the so-called *punitive turn*, there has only been a solely an apparent inclusion of the victim. The structure of the conflict remains in place, without new forms of reparation or even attentive and respectful participation being considered. Meanwhile, the increase in penalties for crimes of gender-based violence has not led to a significant reduction in this type of occurrence, making feminist activists, as well as allied academics in the fight against gender violence, start to propose new ways of dealing with the issue both within the criminal justice system and outside it.

Within the boundaries of criminal justice, a set of feminist legal reforms has been developed to avoid situations of institutional victimization experienced. These measures have worked as effective ways of reducing the institutional damage previously caused to women victims, guaranteeing them minimally respectful treatment. On the other side are the feminists who advocate more radical proposals found a place a space for their desires within penal abolitionism, yet they soon realized that for their proposals not to be merely idealistic and become discredited, they needed to come up with possible alternatives for dealing with cases of gender violence.

This is how restorative justice comes into play. With its potential to bring together the refusal of the penal system and to care for victims through specialized hearing, it has come to be referred to within feminist abolitionism as the great solution to the questions of what could be done to replace what already exists in terms of punishment. However, like any complex social issue, gender-based violence also requires several precautions when dealt with through restorative justice practices so that the same power disparities that exist in society, which are so criticized when practiced by the ordinary justice system, are not reproduced. It is, therefore, crucial that the professionals involved take great

precautions and that the parties voluntarily participate in the process of achieving a satisfactory outcome.

Ultimately, it has to be considered that there are distinct natures of challenges to creating a justice system that deals satisfactorily with victims. It is essential, however, to make an in-depth diagnosis of what being a victim today represents within modern criminal justice before considering possible alternatives. You can't assume that what exists today is the best you can do, nor can you fail to do something to improve the institutions in place today simply because they need a more profound transformation. What feminism and feminist scholars have presented as possibilities shows the duality of the challenges faced by those who view society critically. In the end, what exists today must be reformed while the work of constructing a revolutionary alternative is simultaneously in motion.

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PART 2: INVESTIGATIVE PHASE

HEIGHTENED RISK OF REVICTIMIZATION AS A CHALLENGE STEMMING FROM DIGITALIZATION AND DEMOCRATIZATION OF INTERNATIONAL CRIMINAL JUSTICE EFFORTS: CASE STUDY OF POLISH CIVIL SOCIETY ORGANIZATIONS IN THE AFTERMATH OF THE RUSSIAN AGGRESSION ON UKRAINE

Kaja Kowalczewska[*]

Abstract

Advancements in digital technologies are catalysing transformative changes in international criminal justice. This shift emphasizes the importance of understanding the human factor in legal proceedings, particularly emotions and their psychological impacts. This chapter investigates the impact of CSOs on the risk of revictimization during the documentation and prosecution of core international crimes. Focusing on Polish CSO activities following the Russian invasion of Ukraine on 24 February 2022, the study examines their efforts within Poland, a neighbouring country that at one point hosted over three million Ukrainian refugees. The analysis focuses on Polish CSOs because of Poland's limited experience with international humanitarian law violations. This focus provides a potential reference point for other states and CSOs in similar circumstances. Using qualitative analysis of case studies and interviews conducted in early 2023, the chapter cross-references findings with the Guidelines formulated by Eurojust and the ICC-OTP. The goal is to contribute to the discourse on victim/survivor-centred justice by examining how digitalization influences the risks of revictimization and the broader quest for justice. Conclusions and recommendations aim to guide future CSO practices and international criminal justice efforts.

1 Introduction

In an era dominated by emerging technologies, exemplified by the ubiquitous smartphone, our daily routines and activities are undergoing a transformation. The ongoing digitalization trend is also reaching the realm of international criminal justice. This shift is gradually highlighting the necessity to focus on the aspects relating to human

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factors such as emotions.[1] The widespread use of technology, with its still unverified commitment to enhancing, expediting, and improving the efficacy of justice, prompts us to focus on the human element in legal proceedings and the resultant psychological implications.[2] One of the established perspectives in this regard in international criminal justice is the concern of revictimization, whereby individuals may endure further harm, abuse, and trauma through their involvement in justice-seeking procedures. Nevertheless, further research is needed to develop strategies for mitigating this risk (trauma-informed approach), particularly as new methods for documenting and prosecuting core international crimes[3] continue to evolve, thereby influencing this risk.

This edited volume focuses on victim/survivor-centred justice, marking a departure from a solely legal positivist approach to adopting a more emotionally sensitive perspective in seeking justice. This chapter contributes to this discourse by analysing existing practices of documentation of core international crimes performed by civil society organizations (CSOs) and their impact on the risk of revictimization. Through the broad accessibility of new technologies, creating opportunities previously out of reach, CSOs can inadvertently amplify the risk of victimization. The emergence of low-cost digital tools may tempt CSOs to integrate them into their activities, sometimes without awareness of potential impacts. Instances exist where actors are hastily created for such purposes, driven by funding calls and a desire for immediate reaction, which can harm rather than benefit international criminal justice efforts. By placing this research in the context of digitalization and democratization, it aims to contribute to the discourse on the influence of new technologies on more emotionally sensitive justice.

Accordingly, this chapter will explore how the activities of Polish CSOs undertaken in the aftermath of the Russian invasion of Ukraine on 24 February 2022 sit against this backdrop. The study is situated in the context of activities conducted on the territory of Poland, a neighbouring state of Ukraine that received over three million Ukrainian refugees. Despite the presence of diverse international and national Ukrainian and Polish organizations in Poland since the onset of the aggression, the analysis primarily focuses on the latter. Poland, which is considered a country without a sufficient institutional base for prosecuting core international crimes, and where its CSO sector typically does not deal with international humanitarian law (IHL) violations, may offer insights beneficial to actors operating in similar settings. This chapter provides a qualitative analysis of case studies and interviews conducted in the first half of 2023. The benchmark used for this

[1] As in the case of the discussions on the processes that can be transferred to artificial intelligence-based systems, like in the case of lethal autonomous weapons or issuing judicial decisions. Mary Ellen O'Connell, 'Banning Autonomous Weapons: A Legal and Ethical Mandate' (2023) 37 Ethics & International Affairs 287; Zichun Xu, 'Human Judges in the Era of Artificial Intelligence: Challenges and Opportunities' (2022) 36 Applied Artificial Intelligence 2013652.

[2] Deyaa Alrwishdi, 'Reconsidering the Digitalization of International Criminal Justice' (*Just Security*, 19 January 2021) <https://www.justsecurity.org/74166/reconsidering-the-digitalization-of-international-criminal-justice/> accessed 3 March 2024.

[3] The author refers to war crimes, crimes against humanity, genocide, and the crime of aggression.

analysis is the set of guidelines prepared by Eurojust, the Office of the Prosecutor of the International Criminal Court (OTP-ICC), and the Genocide Network (Guidelines).[4]

The text begins by contextualizing the research within digitalization and democratization phenomena and the socio-political landscape. Then it outlines the methodology, including entities examined and resulting research limitations, with victim/survivor-centred principles from the Guidelines. Research findings from cross-referencing benchmarks are presented, concluding with derived recommendations.

2 Research context

2.1 Digitalization and democratization of international criminal justice

In a world saturated with digital solutions, our society grapples with both the advantages and risks they entail. This commonplace observation is increasingly scrutinized within the context of the justice system's usability. On the one hand, there is a trend towards the digitalization of court proceedings, encompassing remote hearings and witness testimonies and the digitalization of evidence.[5] On the other hand, the judicial process is susceptible to digital attacks exploiting the near-total anonymity inherent in this domain. Examples include propaganda and disinformation in the digital space or cyberattacks targeting the digital infrastructure of institutions like the International Criminal Court (ICC). In response to the utilization of digital domains by both private and public entities, actors within the field of international criminal justice must formulate novel approaches while they confront the challenge of novel offences and evidentiary considerations.[6] Despite these challenges, it is acknowledged that the digital space can also be leveraged to serve the interests of justice.

In times of armed conflict, a novel arena emerges not only for states to conduct hostilities but also for ordinary citizens, who can actively contribute to their government's efforts by directly transmitting militarily pertinent information to official platforms.[7] They can

[4] Eurojust, OTP-ICC and Genocide Network, 'Documenting International Crimes and Human Rights Violations for Accountability Purposes: Guidelines for Civil Society Organisations' <https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-icc-csos-guidelines.pdf>.

[5] DLF De Vocht, 'Trials by Video Link after the Pandemic: The Pros and Cons of the Expansion of Virtual Justice' (2022) 8 China-EU Law Journal 33.

[6] Eian Katz, 'Liar's War: Protecting Civilians from Disinformation during Armed Conflict' (2020) 102 International Review of the Red Cross 659; Christa M Miller, 'A Survey of Prosecutors and Investigators Using Digital Evidence: A Starting Point' (2023) 6 Forensic Science International: Synergy 100296; International Criminal Court, 'Measures Taken Following the Unprecedented Cyber-Attack on the ICC | International Criminal Court' (20 October 2023) <https://www.icc-cpi.int/news/measures-taken-following-unprecedented-cyber-attack-icc> accessed 3 March 2024.

[7] Tilman Rodenhäuser and Samit D'Cunha, 'Foghorns of War: IHL and Information Operations during Armed Conflict' (*Humanitarian Law & Policy Blog*, 12 October 2023) <https://blogs.icrc.org/law-and-policy/2023/10/12/foghorns-of-war-ihl-and-information-operations-during-armed-conflict/> accessed 3

also document law violations and losses incurred, enabling the pursuit of accountability for perpetrators. This phenomenon arguably contributes to the democratization of activities that were traditionally exclusive to state entities, namely the military and law enforcement agencies.[8] The term 'democratization' is employed to denote widespread and relatively equal access to information and digital analysis tools. This inclusivity extends to resources such as smartphones, the internet, and open-access platforms, ultimately creating new areas of support and contributing to the shift of power dynamics in international efforts focused on justice and truth establishment.[9] Consequently, the democratization leads to a heightened authority and involvement of non-state actors in criminal trials across various stages. Melinda Rankin terms this phenomenon the 'cooperative criminal accountability community'.[10]

The support from CSOs becomes especially pertinent in two sets of scenarios: in states marked by systemic inefficiencies and where the government itself is a major offender. Examples of the former include the situation in Ukraine, where the justice system grapples with the dual challenges of an ongoing armed conflict and intense public pressure to hold perpetrators accountable before the conflict concludes.[11] This may also happen in instances where there is a lack of political will to allocate substantial resources for addressing international crimes, or a dearth of prior experience and requisite knowledge and skills (a category to which Poland can be attributed). In the second category of scenarios, I encompass situations of non-international armed conflict, wherein a government is in conflict with a segment of its population (as seen in the case of Syria), or occupation, where the legitimate authority is incapacitated, and the occupier controls the narrative (as observed in the Palestinian territories occupied by Israel). In these cases, the democratization of international criminal justice efforts is crucial yet fraught with risks.[12]

March 2024; Michael N Schmitt, 'Using Cellphones to Gather and Transmit Military Information, A Postscript' (*Lieber Institute West Point*, 4 November 2022) <https://lieber.westpoint.edu/civilians-using-cellphones-gather-transmit-military-information-postscript/> accessed 3 March 2024.

[8] Brianne McGonigle Leyh, 'Changing Landscapes in Documentation Efforts: Civil Society Documentation of Serious Human Rights Violations' (2017) 33 Utrecht Journal of International and European Law 44.

[9] Emma Irving, 'Capture, Tweet, Repeat: Communication Technology and the Democratisation of International Criminal Justice' (Florence Conference on Power in International Criminal Justice, Florence, 29 October 2017) <https://www.cilrap.org/cilrap-podcast>; Yvonne McDermott, Alexa Koenig and Daragh Murray, 'Open Source Information's Blind Spot: Human and Machine Bias in International Criminal' (2021) 19 Journal of International Criminal Justice 85.

[10] Melinda Rankin, *De Facto International Prosecutors in a Global Era: With My Own Eyes* (1st edn, Cambridge University Press 2022) 16.

[11] Nadiya Volkova, Maksym Yeligulashvili and Daria Svyrydova, 'Justice for International Crimes as a Result of Aggression' (Ukrainian Legal Advisory Group 2023) <https://drive.google.com/file/d/1CAyeS5adPCc_L_k5z3TZfFW5CGRQMsGt/view> accessed 3 March 2024.

[12] The United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association and others, 'Joint Declaration on Protecting and Supporting Civil Society At-Risk' (2021) <https://www.ohchr.org/sites/default/files/2021-12/newpage_jointdeclaration_9dec2021_en.pdf>.

The engagement of CSOs in offering support amid and following mass atrocities is a well-entrenched practice. This is also shown by the number of guidelines developed for activities such as humanitarian assistance and the resolution of conflict-related matters, including sexual violence, torture, and extrajudicial executions.[13] Nevertheless, the advent of digitalized avenues of support requires parallel developments in the field of collection and storage of the information on core international crimes. The first step has already been taken with the formulation of the Berkeley Protocol.[14] This set of recommendations articulates professional standards and guidelines for methodological and holistic approaches to open source intelligence (OSINT) investigations that aim at producing knowledge to be effectively used in international criminal and human rights investigations. OSINT is a domain that vividly underscores the existence of the democratization and digitalization of these endeavours.

Originally limited to military use for analysing classified data, OSINT now extends to private analysis firms and a growing group of volunteer investigators. Motivated by personal convictions, these volunteers contribute time and expertise. They utilize publicly available information, often sourced from social media platforms to support plausible hypotheses.[15] In consequence, various digital platforms designed to facilitate the exchange, collection, storage, and analysis of criminally relevant information have emerged.[16]

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[13] 'The Code of Conduct for the International Red Cross and Red Crescent Movement and Non Governmental Organisations (NGOs) in Disaster Relief' (International Federation of Red Cross and Red Crescent Societies and the ICRC 1994) <https://www.ifrc.org/sites/default/files/2021-07/code-of-conduct-movement-ngos-english.pdf>; 'Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (Office of the United Nations High Commissioner for Human Rights 2004) <https://www.ohchr.org/sites/default/files/documents/publications/training8rev1en.pdf>; 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)' (Office of the United Nations High Commissioner for Human Rights 2017) <https://www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf>; 'Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence' (2022) <https://www.murad-code.com/murad-code>.

[14] 'Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source and Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law' (Office of the United Nations High Commissioner for Human Rights 2022) <https://www.ohchr.org/en/publications/policy-and-methodological-publications/berkeley-protocol-digital-open-source>.

[15] Eurojust, OTP-ICC and Genocide Network (no. 5); Federica D'Alessandra and Kirsty Sutherland, 'The Promise and Challenges of New Actors and New Technologies in International Justice' (2021) 19 Journal of International Criminal Justice 9; Daragh Murray, Yvonne McDermott and K Alexa Koenig, 'Mapping the Use of Open Source Research in UN Human Rights Investigations' (2022) 14 Journal of Human Rights Practice 554.

[16] International organizations and institutions-based: Case Matrix Network with I-DOC, Eyewitness to Atrocities, OTPLink with the Harmony project at the ICC, CICED of Eurojust, or the Register of Damage established by the Council of Europe. State: Warcrimes.gov.ua, childrenofwar.gov.ua, the eEnemy Telegram chatbot.

The digitalization and democratization of international criminal justice efforts entail both advantages and risks that remain relatively under-researched and not fully understood. Digitalization offers benefits like secure data storage and the streamlined sharing of evidence and documentation.[17] However, it also introduces risks such as information overload, duplication, manipulation, and concerns regarding its credibility.[18] Conversely, democratization presents advantages such as rapid response capabilities, increased human resources, on-the-ground access, and sometimes better preparedness than public authorities. The 'collaborative community of criminal accountability' is a nascent phenomenon lacking widely accepted international or national standards, with more unknowns than knowns in its developmental stages. Challenges faced by CSOs in realizing criminal justice objectives include selective funding, intermittent expertise gaps, over-documentation risks, the potential undermining of accountability mechanisms, declining evidence quality, lack of coordination with public authorities, and an elevated risk of revictimization.[19] By focusing on the latter, this study aims to demonstrate how CSOs can better achieve the overarching objective of contributing to the well-being of victims/survivors and increasing the likelihood of achieving expedited justice.

2.2 Polish socio-political landscape

Poland's geographical and historical context has entangled it within the power dynamics of the Russian Federation, offering a tangible opportunity for its involvement in international criminal justice efforts after 24 February 2022. The initial two months saw border guards processing three million arrivals from Ukraine, a remarkable situation where Polish society generously opened its doors.[20] As of December 2023, the country continued to host nearly one million refugees,[21] stemming from factors such as geographical proximity, European Union (EU) membership and North Atlantic Treaty Organization (NATO) membership, shared cultural ties, and economic opportunities. The predominantly women and family-oriented demographic among war refugees challenged political stereotypes, fostering greater trust and openness among Poles.

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[17] Hayley Evans Hazim Mahir, 'Digital Evidence Collection at the Int'l Criminal Court: Promises and Pitfalls' (*Just Security*, 5 July 2023) <https://www.justsecurity.org/87149/digital-evidence-collection-at-the-intl-criminal-court-promises-and-pitfalls/> accessed 3 March 2024.

[18] Lindsay Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials' (2018) 41 Fordham International Law Journal 283, 333.

[19] Kingsley Abbott, 'Myanmar: Documentation Practices May Raise Challenges for Accountability - Opinio Juris' (*OpinioJuris*, 24 January 2019) <https://opiniojuris.org/2019/01/24/myanmar-documentation-practices-may-raise-challenges-for-accountability/> accessed 3 March 2024.

[20] Kamil Luczaj, 'Multifaceted Hospitality. The Micro-Dynamics of Host–Guest Relations in Polish Homes after 24 February 2022' [2023] Central and Eastern European Migration Review 1.

[21] 'Wzrosła liczba ukraińskich uchodźców w Polsce. Oto najnowsze dane Eurostatu' (12 December 2023) <https://forsal.pl/swiat/ukraina/artykuly/9378287,wzrosla-liczba-ukrainskich-uchodzcow-w-polsce-oto-najnowsze-dane-eurostatu.html> accessed 3 March 2024.

In light of institutional shortcomings supporting war refugees, a significant space emerged for CSOs and independent volunteers to fill the gaps. Despite widespread volunteerism, the challenges in effectively leveraging volunteer movements were underscored by a lack of coordination, constrained by time and overwhelming workload. Worldwide and in Poland, CSOs responded with a significant political and moral imperative to support Ukrainians, addressing immediate needs and assisting in their quest for truth and justice. This sentiment was particularly pronounced as the government at the time lacked the CSOs' trust, raising concerns about the effectiveness and the ability of Polish investigators to collect evidence in an appropriate and, above all, victim/survivor-centred way.

Against this backdrop, bottom-up initiatives unfolded, forming the focus of this analysis: the development of CSOs engaged in collecting war testimonies from individuals arriving from Ukraine. To contextualize this activity, it is crucial to underscore certain pertinent characteristics. Polish CSOs have historically possessed minimal or no experience in dealing with IHL violations or supporting the demands of international criminal justice. Their predominant focus lies in peacetime human rights justice activities, with limited engagement in assisting migrants and refugees. Despite the formal possibility of core international crimes proceedings and the exercise of universal jurisdiction, [22] in the modern history of Poland, these proceedings are practically non-existent.[23] Knowledge of IHL and international criminal law (ICL) falls under highly specialized expertise. These topics are not included in the mandatory training of lawyers, judges, and prosecutors. As a result, there are deficiencies in both institutionalized and non-institutionalized responses. Ultimately, due to the lack of a practical demand for such activities prior to 24 February 2022, initiatives were primarily focused on providing assistance based on the CSOs' expertise. They either leveraged pre-existing digital solutions or committed to developing such tools, immersing themselves in a field that was significantly novel and distinct from their prior experiences. This led to a fragmentation of service delivery, where the support provided to victims/survivors depended on the priorities and ultimate goals of the respective organizations.

3 Methodology

3.1 General characteristics of investigated entities

As part of the research, interviews were conducted with representatives from three entities: the Lemkin Center, Testimonies from the War project, and Project Sunflowers. Commencing their initiatives as early as spring 2022, these organizations sought to document

[22] 'Poland' (*Justice Beyond Borders: A Global Mapping Tool*) <https://justicebeyondborders.com/country/poland/> accessed 3 March 2024.

[23] With one modest exception. Adam Strobeyko, 'Poland, Supreme Court, Nangar Khel Incident, the Judgment of the Supreme Court of Poland of 17 February 2016' (*ICRC Casebook*) <https://casebook.icrc.org/case-study/poland-supreme-court-nangar-khel-incident-judgment-supreme-court-poland-17-february-2016> accessed 3 March 2024.

the experiences of individuals fleeing Ukraine. The selection of these entities was guided by considerations such as their size, the extent of their activities, and their outreach. Nevertheless, variations in institutional underpinnings and the specific goals driving information-gathering endeavours among these entities introduce constraints on the generalizability of the research findings. To mitigate this limitation, the study concentrated on specific principles derived from the Guidelines, specifically those pertinent to the practical implementation of measures aimed at minimizing the risk of revictimization. Given the different degrees to which the chosen entities implement these measures, the analysis exhibits uneven referencing across the entities. Subsequent concise delineations of these entities are provided to present the factors influencing the methodological approaches employed in their activities.

3.1.1 The Raphael Lemkin Center for Documenting Russian Crimes in Ukraine

The creation of the Lemkin Center within the Pilecki Institute was driven by the Russian attack on Ukraine and reports of Russian military actions against civilians.[24] The Pilecki Institute, operating as a government-sponsored institution established under the Pilecki Institute Act, primarily focuses on documenting and narrating the history of the two totalitarianisms – Soviet and German. Putin's speech denying Ukrainians the right to exist as a nation served as a catalyst for a project on Ukrainians, drawing parallels with similar historical experiences.[25]

In light of the prolonged confidentiality of sworn statements in criminal proceedings, the Lemkin Center, in its inception, aimed to concurrently engage in investigative procedures while gathering documentation within a historical investigation framework. The intent was to build a comprehensive digital database of testimonies and information, drawing inspiration from the Pilecki Institute's expertise in compiling testimonies related to the two totalitarianisms. This strategic approach sought to create a continuous and recurring narrative that, following appropriate processing, could be disseminated globally, contributing to public discourse and political deliberations. This initiative addressed the challenge posed by the secrecy of certain testimonies in criminal proceedings due to procedural constraints.

The second objective involved the establishment of a digital archive that Ukrainians could consult and revisit. This archive is envisioned to serve researchers, journalists, and, in the years to come, Ukrainian families seeking information about their kin. Recognizing the significance of constructing historical memory through first-hand testimonies, the

[24] 'Raphael Lemkin Center for Documenting Russian Crimes in Ukraine' (*Pilecki Institute*) <https://instytutpileckiego.pl/en/instytut/aktualnosci/centrum-dokumentowania-zbrodni-rosyjskich-w-ukrainie-im> accessed 3 March 2024.

[25] 'A stable statehood has never developed in Ukraine; its electoral and other political procedures just serve as a cover, a screen for the redistribution of power and property between various oligarchic clans.' Address by the President of the Russian Federation (*President of Russia*, 23 February 2022) <http://en.kremlin.ru/events/president/news/67828> accessed 3 March 2024.

Lemkin Center committed to assisting Ukrainians in a manner analogous to the initiatives undertaken for the benefit of Poles.

Thirdly, the Lemkin Center aimed to bolster the efforts of investigators by establishing a database that could serve as a resource or reference for connecting with individuals possessing potential information about the crimes committed. Polish investigators engaged in the investigation of the aggressive war approached the Lemkin Center and noted that the testimonies, lacking the formality of being under oath, held limited intrinsic value. However, the database proved more valuable to them in terms of reaching out to witnesses and identifying locations based on the information contained within it.

3.1.2 Testimonies from the War

The Testimonies from the War project is a collaborative research endeavour involving various stakeholders.[26] It was initiated by the Centre for Urban History of East Central Europe in Lviv and was responsible for recording interviews in Ukraine. In Poland, the project is being executed by the Institute of Philosophy and Sociology of the Polish Academy of Sciences, where interviews are archived. The Polish Oral History Association provides advisory support, and the Mieroszewski Centre is a partner in the initiative. Methodological and technical assistance is extended by partners from Luxembourg (the Luxembourg Centre for Contemporary and Digital History) and the United Kingdom (University of St Andrews). The interviews conducted for the purpose of the author's research involved the project leader from the Polish Academy of Sciences.

Despite the project's title, its primary objective is not to document crimes committed during the armed conflict in Ukraine for judicial purposes. Instead, it primarily focuses on interviewing individuals, predominantly women with children, larger families, and occasionally single minors, as part of an international research-documentation project in the field of sociology. This initiative involves a digital database of audio interviews to reconstruct and document the entire experience of the interviewees. The content and scope of the interviews vary depending on the country of the interview. In the Polish component, the emphasis is on the oral history of migrants, covering their experiences from leaving home in Ukraine to the moment of the interview in Poland. This includes potential encounters with the effects of war, though most respondents fled before the war reached their homes, making them non-eyewitnesses to IHL violations. The interviews also capture experiences of travel and acclimatization in their new environment (Poland).

Initially, the objective of the project was to provide a platform for individuals fleeing Ukraine to share their experiences. While the Centre for Urban History of East Central Europe in Lviv hosted internally displaced persons, it was observed that, in addition to safety and sustenance, these individuals expressed a desire to share their stories. In a

[26] '24.02.2022, 5 Am: Testimonies from the War' <https://swiadectwawojny2022.org/en/> accessed 3 March 2024.

subsequent phase, the project organizers recognized that the dissemination of these materials could have broader societal benefits in various ways. Testimonies from the War could serve as a valuable source of knowledge and inspiration for those addressing refugee adaptation in the labour market. It could also be utilized by educators preparing educational materials for Polish or Ukrainian children and by artists seeking to create theatrical performances. Notably, the project's authors did not initially consider the documentation of war experiences for the purpose of legal justice.[27]

3.1.3 Project Sunflowers

Project Sunflowers is an initiative led by Polish and international lawyers specializing in IHL, ICL, and human rights.[28] To facilitate its objectives, the Sunflowers Foundation was established. This foundation, leveraging a global network of volunteers, is dedicated to collecting and documenting information in a legally substantiated manner, with a specific focus on crimes committed in Ukraine. The information gathered is stored in a secure cloud-based database specially designed for this purpose, relying on voluntary testimonies from potential witnesses and victims/survivors. Furthermore, Project Sunflowers actively engages in various awareness-raising activities pertaining to IHL, ICL, human rights, and victims/survivors' rights.

The primary objective of Project Sunflowers is to provide national and international authorities with evidence of international crimes and other severe human rights violations, along with the resulting damage. Unlike the other investigated entities, Project Sunflowers is narrowly focused on this specific mission, which gave rise to its establishment. Additionally, it stands out as the only entity without prior experience, requiring the simultaneous development of structures, technological solutions, and organizational principles alongside addressing methodological concerns.

3.2 Three victim/survivors-centred perspectives applied

All three actors can be classified as CSO entities, though not strictly as non-governmental organizations. They differ in their experience and perspectives, involving historians, sociologists, and lawyers. These variations have had a discernible impact on the types of victim/survivors-centred perspectives applied.

The Lemkin Center, in addition to the criminal justice approach, viewed its interlocutors as citizen victims/survivors whose state was being destroyed by a hostile neighbour and former imperialist colonizer. Ukrainians, from this perspective, were seen as victims/survivors of state power politics, facing the threat of genocide and denial of their existence as a nation.[29] Therefore, this approach was directed at Ukrainians not only as individuals

[27] However, some respondents articulated the need for their story to serve as court material.
[28] 'Project Sunflowers - Enabling Information, Enabling Justice' (*Project Sunflowers*) <https://www.projectsunflowers.org/> accessed 3 March 2024.
[29] Denys Azarov et al., 'Understanding Russia's Actions in Ukraine as the Crime of Genocide' (2023) 21 Journal of International Criminal Justice 233.

but also as a collective under threat. Moreover, it had a solidarityist underpinning from another collective of victims/survivors that had lived through similar experiences in their collective history and memory (Poles).

The Polish component of Testimonies from the War, on the other hand, perceived its respondents mainly as migrants who had lost their sense of security and everyday stability in their society, resulting in forced international displacement. Therefore, their victim/survivor approach was focused on the experience of travel and the period of acclimatization in Poland.

Finally, Project Sunflowers adopted a purely criminal justice perspective, where respondents are considered solely as victims and witnesses.

What they have in common is that all of them, with the use of digital solutions, document histories or aspects of histories that describe war-related suffering, encompassing a broader perspective than the legal considerations of core international crimes.[30] As a result, all these entities contribute to victim/survivor-centred justice efforts, and as such, their activities may entail the risk of revictimization. Hence, validating their activities against guidelines established in this field provides valuable insights into the practical implementation of a victim/survivor-centred approach in the documentation of core international crimes.

3.3 Research benchmark for minimizing the risk of revictimization

To achieve a thorough grasp of existing practices that could serve as reference point for a more emotionally centred approach in documentation activities, I am cross-referencing benchmarks with case studies. The focus of this analysis is to pinpoint areas where the risk of victimization often materializes.

3.3.1 Victim/survivor-centred approach

The guidelines developed for the purposes of international justice primarily adhere to the human-rights-based model in victimology, prioritizing the safeguarding of core rights for victims.[31] According to Goodey, this model is grounded in compassion and respect,[32] and encompasses elements such as providing information on proceedings and

[30] It is essential to note that the adopted methodological approach does not negate the possibility that numerous other victims may remain invisible.

[31] Walklate identifies various approaches to victim-centred policy interventions, including the welfare model, good practice model, therapeutic model, and victim/survivor voice model. It is important to note that these models are not mutually exclusive and often overlap and complement each other. The distinction is primarily made for analytical purposes to facilitate a better understanding of the diverse approaches employed. Sandra Walklate, *Advanced Introduction to Victimology* (Edward Elgar Publishing Limited 2023) 55. Waller refers to these as 'the inalienable' rights for victims of crimes. Irvin Waller, *Rights for Victims of Crime: Rebalancing Justice* (Rowman & Littlefield Publishers 2011) 154.

[32] Jo Goodey, *Victims and Victimology: Research, Policy and Practice* (Pearson Education 2005) 130.

rights, presenting victims' views, offering legal aid, ensuring swift case processing, protecting privacy and identity, safeguarding against retaliation and intimidation, securing compensation from both the offender and the state, and acknowledging the rights of victims/survivors with special needs. Consequently, as Walklate highlights, this model constrains the understanding of victims/survivors to the perspective of a criminal justice system where victims are synonymous with complainants.[33] Nevertheless, documents like the Minnesota Protocol, Murad Code, and Berkeley Protocol extend beyond addressing victims/survivors solely in the context of criminal justice. They embrace a broader perspective that includes other stakeholders, such as bystanders who may transition into the role of witnesses,[34] and they encompass the pursuit of justice for entire societies or affected groups.[35] In doing so, they demonstrate a clear inclination towards embracing a more comprehensive victim/survivor-centred approach.

In the digitalization of testimonies collection, where human factors are gradually being supplemented or replaced by digital solutions, it becomes even more crucial to discern the precise role played by the human factor. This becomes especially emphasized in scenarios requiring human cognitive skills, particularly during activities involving interpersonal interactions, such as interviewing victims/survivors and witnesses, as opposed to mere data analysis, which pertains to various types of documentation. The rapid and convenient extraction of information from personal sources through apps or remote measures should not overshadow the primary objective of prioritizing justice, and consequently respecting the dignity of the victim/survivor. Therefore, from a victim/survivor-centred justice perspective, when formulating guidelines, it is imperative not only to concentrate on the technical and legal aspects but also to incorporate an emotionally sensitive perspective (as part of the 'do no harm' principle[36]), considering the wants and needs of the victim/survivor. Given their classification as soft-law regulations designed to complement legal frameworks, there are no formal limitations preventing them from incorporating extra-legal considerations aimed at the well-being of the victim/survivor.

In this specific context, the benchmark chosen for this analysis is the set of guidelines collaboratively developed by Eurojust, OTP-ICC, and the Genocide Network.[37] These Guidelines specifically address the heightened involvement of CSOs in documenting core international crimes while mitigating risks of revictimization. The document consolidates best practices derived from the collective experience of its institutional authors,

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[33] Walklate (no. 32) 61.

[34] 'Witnessing and Victimhood', in Sandra Walklate, *Oxford Research Encyclopedia of Criminology and Criminal Justice* (Oxford University Press 2017) <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-207> accessed 3 March 2024.

[35] John D Brewer and others, 'Victims as Moral Beacons of Humanitarianism in Post-conflict Societies' (2014) 65 International Social Science Journal 37.

[36] Adrian Di Giovanni, 'A Pebble in the Shoe: Assessing the Uses of Do No Harm in International Assistance' (2014) 47 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 198.

[37] The Guidelines were published in September 2022, several months after the initiation of the researched activities. However, during interviews conducted in March 2023, the entities were still unaware of them.

formulated in response to the CSOs' needs. It is designed as a continually evolving and dynamic tool, exemplifying a mutual, two-way dialogue effort.[38]

The work of the Genocide Network, which functions as a collaborative network among the national authorities of the EU for investigating and prosecuting core international crimes, assumes particular significance in the context of the democratization of international criminal justice. Serving as a regional community with a specialized focus on such crimes, the Genocide Network concurrently offers a platform for the discussion and exchange of experiences among authorities from EU member states and partner states,[39] international institutions,[40] and CSOs.[41] The Genocide Network actively promotes the opening of dialogues between national authorities and CSOs, viewing it as advantageous for the efficacy of prosecuting complex core international crimes.[42]

The Guidelines were formulated and published in response to a recognized demand, particularly within the context of collecting and preserving information and evidence related to core international crimes committed in Ukraine. Despite their origin, these guidelines possess universal applicability, offering good practices for any entity and situation. Their primary aim is to provide clear guidance on effective documentation approaches that may lead to actions before national and international courts while concurrently prioritizing the protection of vulnerable individuals involved in such efforts.[43]

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[38] Despite formal declarations, the failure to implement this approach has faced prolonged criticism from CSOs, challenging the democratization of criminal justice efforts. However, the ICC has engaged with CSOs in similar exercises, like formulating policies on children or gender-based crimes. Jennifer Easterday, 'Transforming Outreach and Engagement with Local Stakeholders' (*International Justice Monitor*, 15 July 2020) <https://www.ijmonitor.org/2020/07/transforming-outreach-and-engagement-with-local-stakeholders/> accessed 3 March 2024; 'Policy on Children' (Office of the Prosecutor 2023) <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-children-en-web.pdf>; 'Policy on Gender-Based Crimes' (The Office of the Prosecutor 2023) <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>.

[39] Bosnia and Hercegovina, Canada, UK, Norway, Switzerland, and the United States.

[40] Eurojust, Europol, OTP-ICC.

[41] The Genocide Network comprises six major NGOs, namely AI, HRW, Redress, FIDH, TRIAL International, and Coalition for the ICC, operating on a permanent invitation basis. While these NGOs function within their respective networks and represent their interests, smaller NGOs have the opportunity to participate through these networks or present their work on an ad hoc basis. The Genocide Network is designed to maintain a majority as a public authority body.

[42] 'National authorities may consider setting up "community involvement panels" at national level to ensure the coordination of activities between relevant national authorities and representatives of civil society. Such panels facilitate open information exchange and discussion of cooperation issues, allow national authorities closer contact with NGOs working with victims and witnesses and allow exploration of remedies as well as outreach to communities on activities and results.' 'Strategy of the EU Genocide Network to Combat Impunity for the Crime of Genocide, Crimes against Humanity and War Crimes within the European Union and Its Member States' (Genocide Network 2014) 40 <https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/Strategy-Genocide-Network-2014-11-EN.pdf>.

[43] They indicate that authorities should consistently consider factors such as age, gender, health status, and the nature of the crime in all situations.

Simultaneously, the same authors have issued a document titled 'Guidance on the identification of victims and witnesses of core international crimes' (Guidance), specifically tailored for national authorities, including law enforcement and border guards. However, apart from the annex with a template for reporting core international crimes committed in Ukraine, the contents of this Guidance are not publicly accessible.[44]

3.3.2 'First general account' approach

Both the Guidelines and the Guidance advocate for what could be termed a 'first general account' approach. This involves the initial mapping or scanning of metadata as a foundational step. In essence, during the initial contact with an individual possessing information relevant to establishing the individual criminal responsibility of a perpetrator of core international crimes, it is crucial to collect data that facilitates subsequent contact and location of that individual. This approach is grounded in the understanding that the potential weight and relevance of the asylum seeker's account may not be immediately apparent during the initial interview with authorities. The data collected in this manner is intended to be directed to the Core International Crimes Evidence Database (CICED). In the subsequent stage, when an inquiry is underway, the relevant public authority has the prerogative to request contact with the respective witness or victim/survivor from CICED, thereby enabling a more nuanced and thorough examination of the matter under investigation.

By postponing the in-depth interview to the second stage, this approach is intended to underscore the significance of avoiding multiple interviews with the same individuals to safeguard their well-being and foster their willingness to contribute to accountability processes. Certainly, there are instances where individuals may be interviewed by national authorities of different countries while simultaneously undergoing interviews by the ICC Prosecutor or other entities, including CSOs or the media. This situation not only results in over-documentation and poses a risk of compromising the quality of the evidence collected, especially in cases of discrepancies in accounts provided to different actors, but it also exposes these individuals to a re-experiencing of the events that caused their suffering, thereby contributing to their revictimization. Therefore, 'first general account' marks a novel operational approach to the collection of evidence and information, aiming to facilitate the flow of information between different jurisdictions while ensuring the safety and well-being of persons providing information.

3.3.3 Minimizing the risk of victimization approach

Safeguards against the revictimization of victims/survivors and witnesses are inherent in a broader 'do no harm' principle, well-established in humanitarian action and foundational in the Guidelines. This principle dictates that all undertakings should prioritize the best interests of individuals involved. Actors should strive to prevent or minimize

[44] Eurojust, *Guidance on the Identification of Victims and Witnesses of Core International Crimes.* (Publications Office 2022) <https://data.europa.eu/doi/10.2812/217661> accessed 3 March 2024.

any unintended negative effects, addressing risks not only for others (such as revictimization) but also for themselves (such as vicarious trauma).

Revictimization occurs when individuals who have already endured a traumatic event face additional harm, abuse, or trauma. This phenomenon can manifest in various contexts, such as legal proceedings, interpersonal relationships, or systemic failures, exacerbating the emotional, psychological, and physical consequences of the initial victimization.[45] In contrast, vicarious trauma poses an occupational threat to the psychological well-being of those engaged in victim/survivors services, law enforcement, and related professions. This work-related trauma, also known as 'secondary traumatization', stems from continual exposure to victims/survivors of trauma and violence. This exposure includes activities like listening to individuals recount their victimization, viewing videos of atrocities, reviewing case files, dealing with the aftermath of violence and traumatic events on a daily basis, and responding to mass violence incidents involving numerous injuries and deaths.

Both the Guidelines and the Guidance acknowledge these risks in collection and documentation activities and emphasize the need for trauma-informed approach, constant care, appropriate selection, and training of individuals engaged in such activities to uphold professional standards of conduct. The obligation of constant care encompasses the application of professional standards not only before and during documentation but also afterwards. It encompasses essential elements that should be integrated into the CSOs' work methodology: conducting risk assessments, obtaining informed consent, protecting sources, respecting confidentiality, setting up referral support systems, paying particular attention to and applying specific measures when dealing with vulnerable persons, and avoiding taking detailed accounts from individuals about their knowledge of crimes (applying the 'first general account'). While certain activities align with common sense and current legislation on data protection (such as cybersecurity, ensuring informed consent and confidentiality), others may not be as evident (conducting constant risk assessments and applying 'first general account') or may pose organizational challenges (providing a referral support system or developing a new digital tool).

Section 4 will present the conclusions drawn from the benchmark analysis of empirical data against identified principles.

4 Research findings

'Even well-intentioned efforts to collect information for use in accountability processes have the potential to detrimentally affect the usability of the information as evidence in future proceedings. This applies, in particular, to the questioning of persons.'[46] This crucial phrase underscores the primary motivation behind this research. While this chapter

[45] Uli Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15 Social Justice Research 313.
[46] Eurojust, OTP-ICC and Genocide Network (no. 5) 5.

focuses on the risk of victimization, it should be noted that contamination of evidence quality, among other factors, may have also occurred in other domains, even though those aspects are not explored in detail.

All three entities operate within the territorial jurisdiction of Poland, thereby mitigating security risks associated with armed conflict on the ground, except for potential cyber-threats and hostile intelligence activities. Their risk considerations primarily focus on the potential adverse effects of documentation activities, such as security risks related to information and the risk of revictimization and vicarious trauma. To adhere to professional standards, each entity sought guidance from legal, ethical, and technical experts, including scientific councils, ethics committees, and internal experts. In terms of coordination and cooperation, they contacted existing networks and endeavoured to expand these networks for coordinated efforts. Despite these efforts, minimal methods were employed to map similar initiatives outside their networks and cross-check project content with other databases. Importantly, none of the entities engaged in case analysis; their activities were strictly confined to the collection, labelling, and storage of information. Finally, the risk assessment conducted by the surveyed entities was incomplete. According to the Guidelines, entities should perform risk assessments before commencing the documentation process and continuously thereafter. This assessment should focus on identifying threats and risks, developing preventive and reactive mitigating measures, and evaluating acceptable risk levels.[47] While each entity established its own boundary conditions and employed distinct methodologies, the risk assessment was not consistently and comprehensively conducted. This was evident, for instance, in deviations from established procedures (e.g. interviews with children) or a lack of procedures in specific situations (e.g. re-questioning).

For this analysis, benchmark principles are divided into two categories guiding the qualitative examination of the entities' activities concerning the prevention of revictimization. The first category centres on an information acquisition methodology, covering privacy concerns and the 'first general account' approach. The second category explores psychological dimensions, including the approach to vulnerable persons, measures to prepare staff and volunteers for vicarious trauma, and the modalities of referral support systems.

4.1 Methodology for obtaining information

4.1.1 Privacy and cybersecurity

All three entities avowed their commitment to conducting interviews with a paramount emphasis on security and privacy, underscoring compliance with the General Data Protection Regulation (GDPR) as a foundational principle.[48] In practice, they endeavoured

[47] ibid. 9–10.

[48] 'Interview with the Representative of the Lemkin Center' (Warsaw, Poland, 21 March 2023); 'Interview with the Representative of Project Sunflowers' (Warsaw, Poland, 21 March 2023); 'Interview with the Representative of Testimonies from the War' (Warsaw, Poland, 22 March 2023).

to ensure the utmost degree of privacy and security by conducting interviews in an individual manner, in secluded locations, such as away from border crossings, and ensuring respondents' basic needs. A trained individual was consistently present during the information collection process, either guiding the interview and recording it[49] or addressing queries about the self-completion of forms.[50] Methodologies adopted by these entities encompassed obtaining informed, contemporaneous, voluntary, and explicit consent and providing comprehensive disclosure regarding the fate of shared information.

For the Lemkin Center and Project Sunflowers, as part of the training, it was advised to apprise respondents about potential communication from national authorities and the potential for legal proceedings.[51] It was consistently underscored, however, that this was a possibility, and no assurances could be provided in this regard. This consideration did not apply to Testimonies from the War, given the specific aim of their project.[52] All three entities were explicit about the voluntary and non-compensated nature of their activities. They made it clear that they could not guarantee anything in exchange, and efforts were made to emphasize the organization's limited capacity to provide additional assistance (aside from the referral support system discussed below).

Each entity underscored the use of various tools to restrict access to records (such as a hierarchy of access, sharing on-site or upon specific request) and employed secure storage, meticulously tracking existing copies to ensure the confidentiality and integrity of the collected and stored information. Additionally, all entities expressed a commitment to maintaining data storage in the long term. This aspect posed a significant challenge for Testimonies from the War and Project Sunflowers, as unlike the Lemkin Center, they had no or limited capacity to rely on existing technical infrastructure and robust storage facilities.[53] In the case of Project Sunflowers, the creation of an online database was a major obstacle that hindered the initiation of account collection.[54] This underscores the practical challenges of resource scarcity, which could potentially undermine well-intentioned efforts and jeopardize the security and safety of the information and, consequently, the respondents. Although certain digital tools are readily accessible, creating and maintaining an entire digital ecosystem is a distinct matter that demands financial, technological, and personnel resources.

4.1.2 'First general account' approach

In accordance with the Guidelines, entities engaged in the documentation of core international crimes are advised to collect a 'first general account' for the reasons explained earlier. It states that the entity should only collect the pertinent information, keep ques-

[49] 'LC Interview' (no. 49); 'TW Interview' (no. 49).
[50] 'PS Interview' (no. 49).
[51] 'LC Interview' (no. 49); 'PS Interview' (no. 49).
[52] 'TW Interview' (no. 49).
[53] 'PS Interview' (no. 49); 'TW Interview' (no. 49).
[54] 'PS Interview' (no. 49).

tioning to the minimum required level of detail, and finish when a good general understanding of what happened to the respondent has been achieved.[55] The relevant information is confined to the identity, position, and role of the person, details of relevant events and victimization (including geographic and temporal information of relevant incidents), and identification of the different actors involved, including the alleged perpetrator. It results from the fact that in the ideal situation, a person should be interviewed only once with the level of detail required for judicial proceedings. Such interviews should be conducted by the competent investigative authorities and not by a CSO.[56]

The surveyed entities did not fully incorporate the 'first general account' methodology. This omission was not an intentional decision but, as revealed during interviews, rather a consequence of insufficient awareness of such a recommendation. The following description highlights critical aspects where the approach of surveyed entities deviated from the 'first general account', potentially increasing the risk of revictimization.

Regarding the nature of the collected data, there were some divergent approaches.[57] The Lemkin Center collected accounts through a written form, which was then sealed and sent to the headquarters for pseudonymization, digitalization, and entry into the database.[58] This process also involved the submission of shared photos, videos, and the location of the reported event. In contrast, Testimonies from the War, focusing on oral history, exclusively compiled audio recordings of conducted interviews.[59] However, all documentation on the processing of data was stored in a written form. Project Sunflowers developed an online application comprising a multipart form for self-completion by the respondent.[60] The application facilitated the digital sharing of written information, video, audio, and location data. Therefore, each entity prioritized acquiring comprehensive accounts accompanied by diverse visual data.

Furthermore, the Guidelines underscore the recommendation to abstain from soliciting additional accounts from an individual who has previously been interrogated on the same subject.[61] The Lemkin Center inquired about this aspect but did not systematically record such information.[62] Testimonies from the War did not explicitly solicit such information; however, it may have surfaced spontaneously (respondents recounted prior unpleasant interactions with the media, but none reported being contacted by national authorities).[63] Project Sunflowers, in contrast, explicitly asked about and recorded information concerning potential overlapping interviews; however, there was no policy to

[55] Eurojust, OTP-ICC and Genocide Network (no. 5) 14.
[56] ibid.
[57] As of March 2023, the projects amassed 1,200 records (Lemkin Center), 300 records (Testimonies from the War), while Project Sunflowers had not yet commenced its operations.
[58] 'LC Interview' (no. 49).
[59] 'TW Interview' (no. 49).
[60] 'PS Interview' (no. 49).
[61] Eurojust, OTP-ICC and Genocide Network (no. 5) 15.
[62] 'LC Interview' (no. 49).
[63] 'TW Interview' (no. 49).

refrain from collecting such information if the answer was affirmative.[64] This highlights the need for improvement, indicating that this aspect of information collection is not self-evident and requires further consideration. In all three entities, there are no established assumptions or procedures addressing the scenario where a person has already been interviewed, and only Project Sunflowers systematically records such information.[65] This scenario exemplifies the consequences arising from the absence of coordination in the preparatory phase of documenting activities. Such coordination not only serves the best interests of the respondents by minimizing the risk of potential revictimization but also alleviates the operational burden on entities initiating documentation efforts, particularly those required to establish comprehensive methodological and technical frameworks.

The surveyed entities did not fully embrace the 'first general account' methodology, primarily due to a lack of awareness rather than a deliberate decision. This underscores the necessity for broader dissemination and promotion of the 'first general account' concept to avert potential negative effects. Experiences of re-questioning from entities involved in information collection during other armed conflicts vary, suggesting an opportunity for improvement in this area. Consequently, a key conclusion emerges: greater awareness and adoption of this approach are necessary to prevent adverse effects in documentation activities, particularly within the scope of the CICED jurisdiction.

This observation also highlights that entities with criminal justice goals may face the challenge of compromising or adapting other priorities, such as historical investigation (as evidenced with the Lemkin Center), to align with standards that do not jeopardize their primary objective. In essence, these entities are compelled to prioritize, recognizing that certain goals may be challenging to reconcile.

4.2 Psychological dimensions

4.2.1 Vulnerable persons approach

Vulnerability, contingent upon various factors, necessitates individual assessment. Categories of vulnerable persons encompass children (under 18 years of age), the elderly, victims of sexual and gender-based crimes (SGBC), torture, or other violent offences, individuals with disabilities or displaying signs of psychological trauma, and individuals in detention.[66] The determination of vulnerability should be conducted on a case-by-case basis through a vulnerability assessment, consulting qualified professionals as needed.

In line with the Guidelines, CSOs must exercise caution when seeking accounts from vulnerable individuals, particularly children and those who have experienced trauma.[67]

[64] 'PS Interview' (no. 49).
[65] ibid.
[66] Eurojust, OTP-ICC and Genocide Network (no. 5) 11.
[67] ibid. 20.

Interactions with such individuals should be minimized to the extent necessary for fulfilling organizational mandates. Traumatized persons and children, being particularly vulnerable, should undergo interviews only once, conducted by investigators with specialized training and experience affiliated with competent investigative authorities. In exceptional circumstances where CSOs consider obtaining a 'first general account' from a traumatized person or a child, adherence to the do-no-harm principle is imperative.[68] CSOs should be well-prepared and capable of following recommended best practices, especially when the individual is traumatized, a SGBC victim, or a child, or when competent investigative authorities are actively engaged in ongoing investigations. Documenting activities involving vulnerable persons should only occur when it is in their best interest and when they possess the capacity to fully comprehend the implications and provide informed consent for their participation. After finalizing the engagement, it is important to assess the need for follow-up and, where possible, explore the potential for referring individuals to pre-identified support services.

All three entities declared that they were implementing a trauma-informed approach. However, when asked about specific measures, it became evident that there was no consistent and overarching policy towards vulnerable persons. Nevertheless, they emphasized that volunteers or interviewers were sensitized to maintain mindfulness, empathy, and supportive behaviour towards respondents. In practical terms, this might involve interrupting interviews when signs of fatigue or instability become apparent and sharing a contact to a vetted professional who could provide psychological support.

Testimonies from the War demonstrated the most comprehensive approach to vulnerable persons.[69] They adhered to the principle of engaging respondents who were not under pressure, ensuring that individuals voluntarily and consciously chose to share their experiences. This approach manifested in their decision not to engage dependents or individuals lacking a stable situation, with stability defined by the Ethics Committee at the Polish Academy of Sciences as the moment when a person acquires a number from the Universal Electronic System for Registration of the Population (PESEL). As a response to their experience in collecting accounts of war, Testimonies from the War published their own guidelines on methodology, ethics, and safety in projects documenting the war and refugee experience following Russia's invasion of Ukraine.[70]

Regarding the conduct of interactions with respondents, the Lemkin Center concluded the data collection in a single meeting, which could extend over several hours.[71] In contrast, the Project Sunflowers application allowed for the saving of partially completed forms and subsequent editing.[72] The approach employed by Testimonies from the War

[68] ibid.
[69] 'TW Interview' (no. 49).
[70] Anna Wylegała, 'Methodology, Ethics and Safety in Projects Documenting the War and Refugee Experience after Russia's Invasion of Ukraine on 24/02/2022' (Polish Oral History Association 2022) <https://pthm.pl/recommendations/war-testimony/>.
[71] 'LC Interview' (no. 49).
[72] 'PS Interview' (no. 49).

differed, following the guidelines of the Ethics Committee. Their collection of oral accounts involved multiple stages, spanning at least three meetings (the first to introduce the project, the second to conduct the interview, and the third for follow-up and checking on the respondent).[73] This third approach aligns closely with the Guidelines, particularly in situations where the risk of retraumatization is evident.

In line with the Guidelines, CSOs are encouraged, if applicable, to collect biographical and contact information of children.[74] This involves engaging with individuals around them, such as parents, caregivers, and doctors, to obtain a 'first general account' of their experiences or observations. Subsequently, this information should be transmitted to the competent investigative authorities. It is underscored, however, that engagement with children should be minimized. The practices observed among the three entities within this framework exhibited diversity. The Lemkin Center and Testimonies from the War generally avoided involving minors (under the age of 18). However, the Lemkin Center acknowledged two exceptions where minors provided accounts in the presence of legal representatives.[75] As a matter of principle, Project Sunflowers abstains from involving children under the age of 13 in the information collection process. If an account is to be collected from a minor who was a victim/survivor or a witness, it should be conducted in the presence of a child psychologist.[76]

Both the Lemkin Center and Testimonies from the War acknowledged that some of their respondents were SGBC victims/survivors, underscoring the necessity of incorporating this possibility into risk assessments and implementing specialized procedures and training.[77]

4.2.2 Psychological training of staff members

In accordance with the Guidelines, CSOs are urged to consistently exhibit professionalism, integrity, respect, and empathy to augment the effectiveness of the information collected in their initiatives.[78] It is essential for these organizations to be mindful of cultural sensitivities and vulnerabilities, recognizing the potential impact of their interactions on those engaged. Furthermore, organizations should acknowledge that individuals exposed to violence, suffering, and trauma may experience distress. It is advisable to research and comprehend signs and symptoms of vicarious trauma in both oneself and colleagues. Additionally, they should institute strategies to manage stress within the

[73] 'TW Interview' (no. 49).
[74] Eurojust, OTP-ICC and Genocide Network (no. 5) 23.
[75] 'LC Interview' (no. 49).
[76] 'PS Interview' (no. 49).
[77] Ellie Smith, Farah Mahmood and Josephine Ndagire, 'Cooperation between Civil Society Actors and Judicial Mechanisms in the Prosecution of Conflict Related Sexual Violence: Guiding Principles and Recommendations' (International Nuremberg Principles Academy 2017) <https://www.nurembergacademy.org/fileadmin/media/pdf/projects/improving_cooperation_sexual_violence/Guiding_Principles_And_Recommendations_CRSV.pdf>.
[78] Eurojust, OTP-ICC and Genocide Network (no. 5) 7.

team and identify accessible services and professionals capable of providing support when needed.[79]

All three entities recognized the importance of training their staff members and volunteers on the risks of revictimization and vicarious trauma. While the commencement of training was not initially included in the original plans for all projects (except for Testimonies from the War), it soon became evident that prioritizing the emotional and psychological well-being of the team was crucial, leading to the prompt organization of training sessions. This in turn led to the recognition of the necessity for a dedicated and trained permanent team, moving away from reliance on a network of volunteers with varying approaches, as was primarily the case in the initial stages of the projects. All three entities opted to establish specialized teams; however, only the Lemkin Center and Testimonies from the War were able to provide salaries for their team members.[80] In all three cases, a crucial aspect was the inclusion of Ukrainians in these teams, chosen not only for their language proficiency but also for their ability to educate the entire team on cultural nuances essential for their activities. The experience of Testimonies from the War in this regard illustrates that the mentioned aspects include variations in child upbringing practices and stigmatizing attitudes towards psychological support.[81]

In addressing the risk of vicarious trauma, each of the three entities implemented specific measures. Testimonies from the War project collaborated with a professional supervisor, a psychotraumatologist with prior experience in Rwanda. The team engaged in twice-monthly online supervision sessions conducted in small groups (six to eight people). Additionally, discussions took place during on-site team meetings, providing an opportunity for team members to address challenges, share concerns, clarify doubts, and collectively develop solutions. In the context of Project Sunflowers, the utilization of an online form for information collection played a significant role in minimizing the risk of vicarious trauma. Nonetheless, a comprehensive training programme was implemented, requiring each new volunteer to undergo organizational and psychological training.

4.2.3 Referral support systems offered

According to the Guidelines, CSOs are instructed to identify safe and suitable operational options to assist and support vulnerable individuals throughout the documentation process.[82] Various forms of support, including medical, psychological, legal, and informal services may be required. Organizations should evaluate the existence of sufficient support mechanisms for vulnerable individuals, refraining from approaching them if such support is lacking.[83] The establishment of referral support systems should be

[79] ibid. 12.
[80] 'LC Interview' (no. 49); 'TW Interview' (no. 49).
[81] 'TW Interview' (no. 49).
[82] Eurojust, OTP-ICC and Genocide Network (no. 5) 13.
[83] ibid. 14.

acknowledged within the risk assessment conducted prior to engagement with the respondent.

This standard posed significant challenges in terms of resources and organization. Each of the three entities disclosed that they had compiled an internal list of vetted professionals and support centres capable of providing psychological support to respondents in need. However, the Lemkin Center was unique in its capacity to offer financial assistance for such therapy.[84] The entities also underscored the difficulty posed by the language barrier, particularly in accessing Ukrainian-speaking professionals who were in high demand.[85] What is more, all of them acknowledged that they did not view this as the primary objective within their mandate and, consequently, did not plan to assume this responsibility. However, upon identifying signs of trauma during interviews, proactive measures were taken to link individuals with professional support. Specifically, Testimonies from the War, at the conclusion of each interview, provided written information to interviewees, including contact details for psychologists, doctors, or social care professionals.[86] Project Sunflowers undertook a thorough mapping of psychological support centres in the countries covered by the project (as of March 2023, encompassing Poland, Ukraine, Hungary, and the Netherlands).[87]

5 Recommendations

The chapter at hand provides a comprehensive overview of the efforts of several Polish entities involved in the collection of war testimonies, with a specific emphasis on the risk of revictimization during these processes. It contributes to the discourse on the relevance of law and emotions in victim/survivor-centred justice by introducing a fresh layer. Advancing digitalization propels democratization, which in turn suffers from a lack of widespread implementation of professional standards. This deficiency may lead to increased revictimization, consequently producing negative effects at the investigation and trial stages.[88] This emphasizes how the treatment of victims/survivors and witnesses becomes legally significant, particularly in light of advancements in technologies that afford increased accessibility to them. Considering that one of the risks associated with democratization of international criminal justice efforts is the inadequate preparation and awareness of the multifaceted consequences of one's actions, this analysis emphasizes the necessity for CSOs to enhance their professionalization. This involves addressing identified gaps and aligning with emerging standards, as exemplified by the scrutinized Guidelines. This is particularly pertinent with the advent of digitalization, where human involvement is gradually diminishing in favour of technological solutions. While

[84] 'LC Interview' (no. 49).
[85] 'TW Interview' (no. 49); 'LC Interview' (no. 49).
[86] 'TW Interview' (no. 49).
[87] 'PS Interview' (no. 49).
[88] Laura Marschner, 'Implications of Trauma on Testimonial Evidence in International Criminal Trials' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016) <https://academic.oup.com/book/27350/chapter/197097957> accessed 3 March 2024.

streamlining documentation activities and facilitating transfer to respective authorities are important, they should not overshadow the fundamental aim of international criminal justice. To truly uphold the commitment of 'never again', all involved actors must remain vigilant against the potential for inadvertently inflicting harm or exacerbating trauma through their well-intentioned activities.

However, it should be considered that CSOs involved in grassroots initiatives face the delicate balance between preserving their autonomy and freedom and adhering to a system of coordination and harmonization. While the diversity of approaches contributes to the richness of victim/survivor-centred justice, there exists a potential challenge of succumbing to one-size-fits-all methodologies that may not necessarily cater to the unique needs of victims/survivors. The crucial element in a victim/survivor-centred approach lies in comprehending and addressing the specific desires of the victim/survivor, whether it is merely to be heard or to be heard prominently in the courtroom. It's important to remember that an approach solely focused on achieving criminal justice is just one of many potential avenues. As demonstrated by the case of Testimonies from the War, recounting one's experiences can, in itself, serve as a response to the needs of victims/survivors. The examined activities collectively illustrate that similar endeavours with disparate ultimate goals can coexist, emphasizing the acceptability of diverse methodologies as long as they align with trauma-informed and victim/survivor-centred principles. The analysis revealed varied approaches to victims/survivors, with the risk of revictimization being more apparent for these organisations which have sociologists and academics among them. Consequently, under the supervision of the Ethics Committee, more robust provisions were introduced.

In summary, across all three cases, the implementation of the 'do no harm' principle, a fundamental consideration of victim/survivor-centred justice, was only partial and, at times, lacked proactive measures. While some caution and preparation were evident, there was a notable absence of the incorporation of international standards, despite consultation with experts. Interestingly, the implementation of GDPR was much more robust, driven by an existing normative framework and associated sanctions. This highlights the influence of binding norms, especially those introduced alongside extensive awareness-raising campaigns. While there are no legal consequences for revictimization akin to the penalties for GDPR violations, the effectiveness of a victim-centred policy should aim at least for a comparable level of public awareness.

This underscores the imperative for widespread dissemination of these standards, as their applicability extends beyond nations directly engaged in armed conflicts, as illustrated by the case of Poland. The widespread impact of the ICC's jurisdiction and universal jurisdiction emphasizes the crucial necessity of globally disseminating these principles. Although the approach may carry more regional significance, particularly in Europe, where the authors of the Guidelines operate and possess pertinent infrastructure, the global ramifications mandate a comprehensive dissemination effort to address challenges linked to armed conflicts on a worldwide scale. Adhering to the commitment of

the Guidelines to be a living tool, it is fitting to encourage the authors to embark on intensive dissemination efforts. These efforts should not solely rely on translation and online publication but should also include extensive training offered to interested stakeholders.

The overarching concern identified pertains to the potential deficit in know-how and resources, encompassing financial, human (including emotional), and technological aspects. This poses a threat to the sustainability of CSO activities, thereby jeopardizing the entire process. Among the specific issues identified are the lack of comprehensive risk assessment and mapping of similar activities, the use of detailed questions for collecting accounts, the absence of checks for overlapping accounts, and the existence of a provisional support system. These issues result in a limited chain of custody and lower due diligence. Consequently, there is an associated risk of revictimization, compounded by varying levels of awareness and preparation for documenting activities. These conclusions align with the context provided regarding the maturity of the Polish CSOs concerning IHL, ICL, and victim/survivor-centred justice. They also support the main argument that, with the advent of digitalization and democratization in international criminal justice efforts, there is an increased imperative to prioritize human factors in these proceedings. This opposes the ambiguous promise of solving all issues solely through technology.

Based on the findings from this limited analysis, one can formulate the following recommendations aimed at enhancing the victim/survivor-centredness of the CSOs' documentation activities:

1. Sincere and conscious adoption of the 'do no harm' principle. CSOs can only prevent the potential harm when comprehensive risk assessment is conducted at various stages and is coupled with mitigation planning. When lack of know-how is identified, CSOs should seek external training and expertise.

2. Engagement in the two-way dialogue with international and national institutions and alignment with the 'first general account' methodology. CSOs should implement international standards, including verification protocols for overlapping testimonies and a specialized approach for vulnerable individuals.

3. Mapping and coordination of similar CSO activities. The best synergies in terms of effectiveness and resourcefulness can be obtained by creating coalitions and conducting constructive (horizontal and vertical) dialogue with partners.

6 Conclusions

In conclusion, while the formal impediment to admitting evidence obtained during revictimization may be absent, there exists a scope for improvement for CSOs concerning the issues of revictimization and the relevance of collected information. Implementing the 'do no harm' principle and 'first general account' approach enhances the relevance of the collected information. Adhering to these standards builds trust and reliability

among information providers, fostering a cooperative and open interaction during documentation. By doing so, it mitigates the risk of revictimization, facilitates consistent and accurate information provision, all the while bolstering the legitimacy and ethical integrity of information collection for international criminal justice purposes. Consequently, it proves beneficial for accountability efforts, advocating for its adoption as a standard, not only for international and national authorities but also for CSOs supporting their efforts.

Building on these practical implications, this case study contributes to the dynamic discourse surrounding democratization efforts within the sphere of international criminal justice. The accelerated advancement of digital tools and technologies has empowered CSOs to partake in accountability processes from diverse locations. However, the lack of essential expertise among many organizations suggests the need for universal procedural standards and robust digital infrastructure. This need also unveils a myriad of avenues for further scholarly inquiry. This research prompts the evaluation of harmonizing documentation and accountability efforts at an international level, potentially within the ICC or the United Nations framework. The goal is to support and sustain these endeavours, paving the way for a coordinated and standardized approach to international criminal justice democratization.

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CROWDSOURCING 'CITIZEN DIGITAL EVIDENCE': PARTICIPATION OF CIVILIAN POPULATION DURING THE ARMED CONFLICT BETWEEN RUSSIA AND UKRAINE

Artem Galushko[*]

Abstract

There is an ongoing proliferation of armed conflicts and international crimes around the world. While states and multinational organisations often fail to resolve these conflicts through traditional channels of diplomacy and mediation, more active participation of the civilian population in the collection, verification, and preservation of digital evidence (e-evidence) on core international crimes such as genocide, crimes against humanity, war crimes and the crime of aggression can magnify voices of affected communities and highlight the human dimension of crimes which is often missing in official criminal proceedings. Although the process of 'crowdsourcing citizen digital evidence' is a relatively new phenomenon, this article will demonstrate how close cooperation between individual documenters, government institutions, civil society, and international organisations in Ukraine contributed to a stronger standing of witnesses, victims, and other representatives of affected communities in national and international criminal proceedings. The abundance and ubiquitous use of these novel forms of digital documentation by various actors during ongoing armed conflicts necessitates a rigorous examination of potential risks and advantages of collecting, processing, and using new digital evidence in international criminal justice.

1 Introduction

This article addresses the current phenomenon of involving the civilian population as the 'first responders' in the process of collecting 'new digital evidence'[1] for war crimes documentation during the armed conflict between the Russian Federation and Ukraine. The evidence discussed in this paper is new due to the novel sources, devices, and methods for collecting digital materials. Satellite images, GPS data, footage from CCTV cameras and drones, as well as evidence scraped from a variety of new social media networks like Instagram and Telegram are different from 'traditional digital evidence', because they encompass a multitude of digital platforms and actors involved in the custody, control, analysis, and disclosure of this new type of evidence. Characteristics of this evidence

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[1] Such new digital evidence may include photos, videos, GPS locations, footage of security cameras, satellite images, footage of drones, cyber event data recorders etc. See types of digital evidence at Forensic Focus, 'Types Of Devices Examined In Digital Forensics Investigations' (Forensic Focus, 28 June 2023) <https://www.forensicfocus.com/articles/types-of-devices-examined-in-digital-forensics-investigations/> accessed 23 February 2024.

include, among other things, the possibility of making copies that would be similar to the original source, a risk of tampering with and destroying the evidence, and the relatively easy way of storing and sharing it. Another important characteristic of new digital evidence is that it is often openly available online and does not require a court decision to access it, which accelerates the process of evidence collection and pre-trial investigation. Considering that digital materials have been 'recognised as evidence in the decisions of the European Court of Human Rights'[2] and the International Criminal Court (ICC),[3] collecting new digital evidence during ongoing conflicts becomes an essential element of present and future accountability efforts initiated by domestic and international actors.

The background of this research is the war in Ukraine with its unprecedented number of atrocity crimes, which raises the question of effective documentation and investigation activities during an ongoing international conflict. Many domestic and international investigators are involved, which poses the challenges of potential duplication of work, overdocumentation, and timely coordination. As crimes committed in Ukraine potentially constitute such international core crimes as genocide, crimes against humanity, war crimes, and aggression, it is the responsibility of the international community to support Ukraine in its current accountability efforts.

Although the previous research has already addressed the topic of digital evidence and cyber investigations from the perspectives of plaintiffs, defence, and prosecution, the novel character of digital investigation initiatives requires a more nuanced approach that will take into consideration the standing of witnesses, victims, and other vulnerable groups, whose voices have been often disregarded in criminal proceedings. Therefore, the purpose of this research is not to criticise ongoing digital efforts to document war crimes in Ukraine, but rather to find potential weaknesses and risks of using new types of digital evidence in criminal proceedings from the perspective of vulnerable groups directly affected by armed conflicts. This, in turn, will help identify the advantages of using new digital evidence that could mitigate the risks and strengthen the position of witnesses, victims, and other affected communities.

The analysis of applicable norms of international law, decisions of international tribunals, and first war crime trials in Ukraine will be instrumental in answering a research question about the rationale for involving civilians in virtually all ongoing war crime documentation efforts in Ukraine and its potential significance for the transformation of

[2] The cases of 'P. and S. v. Poland' (2002), 'Eon v. Poland' (2013), 'Shuman v. Poland' (2014). See in Blahuta, Roman & Movchan, Anatolii & Movchan, Maksym. (2021). Use of Electronic Evidence in Criminal Proceedings in Ukraine. Proceedings of the International Conference on Social Science, Psychology and Legal Regulation (SPL 2021), available at <https://dspace.lvduvs.edu.ua/bitstream/1234567890/4808/1/%D0%BC%D0%BE%D0%B2%D1%87%D0%B0%D0%BD.pdf>, accessed 14 June 2024.

[3] For instance, Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence (27 September 2016) and in other cases addressed in the next sections.

international criminal justice towards a stronger victim-centred approach, which is becoming a trend in a domestic and international context.[4] This research outlines a list of factors applicable to new digital evidence that can either strengthen or weaken the standing of witnesses and victims as participants and beneficiaries in national and international criminal proceedings.

After the introduction, the second section presents the research question and outlines possible reasons for involving civilians in war crimes documentation efforts in Ukraine. The third section provides an overview of risks associated with the misuse of new digital evidence, which could have a negative impact on the standing of victims and witnesses in criminal proceedings during the Russia-Ukraine war. The fourth section enumerates the advantages of the new digital evidence that could potentially mitigate the risks of using this type of evidence. The fifth section proposes how to overcome the risks and amplify the advantages of the new digital evidence. The concluding section summarises the recent trends of digital initiatives and explains why they could further strengthen a 'victim-centred' and 'victim-narrated' approach in international criminal justice.

2 Engaging civilians in war crime documentation efforts

2.1 New digital evidence as a key component of the war crimes documentation effort in Ukraine

Digital evidence collected by civilians has become an integral part of both national and international initiatives to document war crimes in Ukraine.[5] The fact that a great variety of non-institutional investigators such as investigative journalists[6] civil society organisations[7] and open-source intelligence (OSINT) groups[8] started considering and reviewing this new 'grass-roots' digital evidence collected by civilians in Ukraine could also mark a significant shift towards a 'victim-centred' and 'victim-narrated' approach in the criminal justice process. This research is also necessitated by the growing field of digital forensic intelligence and its specialists that can help with the investigation of war crimes by using modern digital analysis of behaviour, developing new AI-enabled facial recognition systems, and using 'Big Data' analysis to process the multitude of photos and videos available in public access.

[4] Avril Mcdonald, 'Chapter 9. The Development of a Victim-Centered Approach To International Criminal Justice For Serious Violations Of International Humanitarian Law', *International Humanitarian Law: Prospects* (Brill Nijhoff 2006).

[5] Alexa Koenig, 'From "Capture to Courtroom": Collaboration and the Digital Documentation of International Crimes in Ukraine' (2022) 20 Journal of International Criminal Justice 829.

[6] 'War Crimes Investigation Unit' (*The Kyiv Independent*) <https://kyivindependent.com/war-crimes/> accessed 26 February 2024.

[7] 'Truth Hounds – Truth-Hounds' <https://truth-hounds.org/en/homepage/> accessed 26 February 2024.

[8] 'Molfar OSINT Agency (Open Source Intelligence)' <https://molfar.com/en> accessed 26 February 2024.

The growing use of digital evidence and OSINT explains the necessity to address the Research Question about the rationale for involving civilians in war crime documentation efforts in Ukraine. The reasons for involving civilians in documentation initiatives can explain why civilian participation is not just a temporary phenomenon but rather a systemic change leading to the lasting and profound transformation of international criminal justice with regard to its new victim-centred approach. In terms of national documentation efforts by the third (civic) sector in Ukraine, both the association of civil society organisations known as the 5 AM Coalition, which includes more than thirty human rights NGOs,[9] and the office of the Prosecutor General of Ukraine with the civic group 'IT Defenders' draw upon 'citizen evidence'[10] submitted by civilians to collect, verify, and preserve digital materials on war crimes and crimes against humanity committed by Russia in Ukraine[11] The 5 AM Coalition relies on digital tools for collecting digital evidence[12] while actively cooperating with OSINT groups in other countries.

Furthermore, the unprecedented accountability initiatives[13] launched by non-governmental organisations to support Ukraine in its documentation efforts rely on using photo, audio, and video materials scraped from social media or obtained with the help of digital 'first responders' trained or instructed by NGOs. Among the documentation initiatives launched by civic organisations, the most noticeable initiative in this regard is the Public International Law and Policy Group[14] with its Ukraine Memorialization and Accountability Initiative.[15] It is also possible to observe a movement towards systematization and collaboration among organisations that work with OSINT. The most prominent collaborative project in the field is the 'Investigative Commons', established by the Dutch investigative journalist group Bellingcat, German NGO Mnemonic, a research group 'Forensic Architecture', and other organisations specializing in OSINT to avoid

[9] The 5AM Coalition, available at <https://www.5am.in.ua/en>, accessed 4 February 2024.

[10] RWC App and WarCrimes.gov.ua — a platform developed by the Office of the Prosecutor General of Ukraine and the civic group "IT Defenders" to document war crimes and crimes against humanity committed by Russia in Ukraine, available at <https://warcrimes.gov.ua/>, accessed 4 February 2024.

[11] Natalie Huet, 'A Race against Time to Collect Digital Evidence of Ukraine War Crimes' (*euronews*, 6 April 2022) <https://www.euronews.com/next/2022/04/06/how-digital-evidence-of-war-crimes-in-ukraine-is-being-collected-verified-and-stored> accessed 9 February 2024.

[12] According to its most recent report d.d. 31 January 2024, the 5AM Coalition works with a number of databases such as the Cloud environment of the eyeWitness to Atrocities application created in 2015 by the International Bar Association (IBA); the 'Ukrainian Archive' by the Berlin-based NGO Mnemonic with its more than 6 million open source files and the joint database of the Coalition in I-DOC with profiles of more than 4.3 thousand victims. See 'Ukraine 5 AM Coalition Summed up the Results of 2023 and Decided on Further priorities. Human Rights Centre Zmina. Centr Prav Ludyny ZMINA' (31 January 2024) <https://zmina.ua/en/event-en/ukraine-5-am-coalition-summed-up-the-results-of-2023-and-decided-on-further-priorities/> accessed 8 February 2024.

[13] 'Helping Ukraine to Bring the War Criminals to Account | EEAS' <https://www.eeas.europa.eu/eeas/helping-ukraine-bring-war-criminals-account_en?s=167> accessed 9 February 2024.

[14] See the Public International Law and Policy Group, <https://www.publicinternationallawandpolicygroup.org/policy-planning-ukraine>, accessed 4 February 2024.

[15] See the Ukraine Accountability Initiative at <https://www.ukrainetjdoc.org/ukraine-accountability-initiative-information-page-en>, accessed 4 February 2024.

the duplication of work and overdocumentation by organisations dealing with international crimes committed in the course of several ongoing conflicts including the war between Russia and Ukraine.[16] Besides a more significant role played by the new digital evidence in the accountability efforts for war crimes committed in Ukraine, it appears that there is an emerging agreement[17] among international organisations and main stakeholders in the field of criminal justice in Europe,[18] and internationally that digital evidence and OSINT are already an indispensable element of all international investigations.[19] International organisations and investigators in Ukraine, such as the Joint Investigative Team (JIT) under Eurojust and the Atrocity Crimes Advisory Group (ACA) for Ukraine,[20] often use and refer to digital evidence in their reports and briefings.[21] Furthermore, ICC and Eurojust have cooperated to produce the Guidelines for civil society organisations that document international crimes and human rights violations.[22] It is also hardly a coincidence that the Office of the Prosecutor[23] at the ICC and Eurojust have recently almost synchronically introduced their platforms for the collection and preservation of digital evidence on international crimes (the OTPLink[24] and the Core International Crimes Evidence Database,[25] respectively).

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[16] See the Investigative Commons, <https://investigative-commons.org/>, accessed 04 February 2024.

[17] Ronald Niezen, 'Open-Source Justice: Digital Archives and the Criminal State' in Ronald Niezen and Sarah Federman (eds), *Narratives of Mass Atrocity: Victims and Perpetrators in the Aftermath* (Cambridge University Press 2022).

[18] Stanisław Tosza, 'European Union · The E-Evidence Package Is Adopted: End of a Saga or Beginning of a New One?' (2023) 9 European Data Protection Law Review 163.

[19] Paul R Williams and Nicole Carle, 'The War in Ukraine: A Case Study in Modern Atrocity Crime Documentation International Law and the New Cold War: Role of International Law in the Russia-Ukraine Conflict' (2023) 55 Case Western Reserve Journal of International Law 7.

[20] See the Atrocity Crimes Advisory Group (ACA) for Ukraine, at <https://www.eeas.europa.eu/eeas/questions-and-answers-atrocity-crimes-advisory-group-aca-ukraine_en>, last accessed on 04.02.2024.

[21] I.e., see a set of guidelines to assist civil society organisations to collect and preserve information related to international crimes and human rights violations developed by Eurojust together with the EU Network for investigation and prosecution of genocide, crimes against humanity and war crimes ('Genocide Network') and the Office of the Prosecutor of the ICC, 'Joint Investigation Team into Alleged Core International Crimes in Ukraine: One Year of International Collaboration | Eurojust | European Union Agency for Criminal Justice Cooperation' <https://www.eurojust.europa.eu/news/joint-investigation-team-alleged-core-international-crimes-ukraine-one-year-international accessed 6 February 2024.

[22] 'Documenting International Crimes and Human Rights Violations for Criminal Accountability Purposes: Guidelines for Civil Society Organisations | Eurojust | European Union Agency for Criminal Justice Cooperation' <https://www.eurojust.europa.eu/publication/documenting-international-crimes-and-human-rights-violations> accessed 28 February 2024.

[23] Karim A.A. Khan, 'Technology Will Not Exceed Our Humanity - Digital Front Lines' <https://digitalfrontlines.io/2023/08/20/technology-will-not-exceed-our-humanity/> accessed 8 February 2024.

[24] 'ICC Prosecutor Karim A.A. Khan KC Announces Launch of Advanced Evidence Submission Platform: OTPLink | International Criminal Court' <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-kc-announces-launch-advanced-evidence-submission-platform-otplink> accessed 7 February 2024.

[25] 'Start of Operations of Core International Crimes Evidence Database and New International Centre for Prosecution of the Crime of Aggression to Be Based at Agency | Eurojust | European Union Agency for

Considering that in Ukraine and other countries affected by conflicts, a significant part of such digital evidence comes from victims and witnesses, who are, as a rule, the first to document crimes, the greater prominence of digital evidence is also a tribute to the 'first responders', whose voices and stories are magnified and finally heard in the global digital community. The growing trend towards a pervasive and prevalent use of 'citizen digital evidence' by a great variety of domestic and international actors at a pre-trial stage during armed conflicts raises the question of risks and advantages of working with this new type of evidence. While other authors have already addressed various strengths and weaknesses of digital evidence and OSINT from the perspective of a plaintiff, prosecution, or defence,[26] the goal of this research is to understand how new methods of digital investigations and digital forensics can either elevate or undermine the role played by victims and witnesses in criminal trials.

2.2 Rationale for using new digital evidence collected by civilians in the documentation of war crimes

This section will address the reasons behind the active and direct participation of civilians in the efforts to collect and preserve digital evidence and OSINT during armed conflicts. While the scope and intensity of crimes remain, an important factor justifying the civilian engagement in the crimes documentation, the section explains why the institutional co-optation of grass-roots level investigative activities initiated by civil society actors is probably the only efficient way to avoid confusion and ensure a higher level of coordination among numerous investigators working in Ukraine. The reasoning behind the growing involvement of the civilian population in the war crimes documentation efforts can shed light on some of the risks and advantages such increased civilian participation could potentially bring along. First and foremost, in Ukraine, the process of 'citizen evidence' crowdsourcing became necessary due to the scope and intensity of atrocities committed on the territory of the country within a relatively short time. For instance, during the first three months of the full-scale invasion, '[a] website set up by the office of Ukraine's Prosecutor General, warcrimes.gov.ua, has received more than 10,000 submissions of detailed evidence from citizens…The government's efforts are supported by a legion of outside human-rights groups, citizen sleuths, cyber-volunteers, retired military officials, journalists, and open-source analysts with experience documenting this kind of proof in previous conflicts.'[27] After the full-scale invasion launched by Russia on 24 February 2022, the Ukrainian law-enforcement agencies, investigators, and the national system of criminal justice, which had no prior experience in war crimes investigations,[28]

Criminal Justice Cooperation' <https://www.eurojust.europa.eu/news/start-operations-core-international-crimes-evidence-database-and-new-international-centre> accessed 7 February 2024.

[26] Alexa Koenig and Lindsay Freeman, 'Cutting-Edge Evidence: Strengths and Weaknesses of New Digital Investigation Methods in Litigation' (2022) 73 UC Law Journal 1233.

[27] Vera Bergengruen, 'How Ukraine Is Crowdsourcing Digital Evidence of War Crimes' (*TIME*, 18 April 2022) <https://time.com/6166781/ukraine-crowdsourcing-war-crimes/> accessed 8 February 2024.

[28] Gyunduz Mamedov, 'Institutionalization of Justice in Ukraine' (*Ukrainska Pravda*) <https://www.pravda.com.ua/eng/columns/2022/12/1/7378856/> accessed 9 February 2024.

have 'faced an unprecedented surge in the numbers of alleged mass atrocity crimes committed in the areas of hostilities and parts of Ukraine's (de)occupied territories. Eight months into the war, the Office of the Prosecutor General of Ukraine has already registered over 47,000 instances of alleged crimes, including war crimes and the crime of aggression.'[29] While at the time of the preparation of this publication, the Office of the Prosecutor General has registered more than 136,000 war crimes and the crime of aggression,[30] the frequency of registered cases depends on the current situation on the frontline (i.e., de-occupation of previously occupied territories, where new atrocity crimes could be uncovered) and the intensity of attacks launched by Russia against civilian infrastructure in Ukraine.

Another reason for involving civilian documenters of war crimes is the impossibility of assessing the situation on the territories that are currently not under the control of the Ukrainian government. According to the Global Conflict Tracker by the Centre of Preventive Studies, although Ukraine has managed to recapture 54 percent of the occupied territory, Russian forces still occupy 18 percent of the country (appr. 100,000 square kilometres).[31] The civilian population is often the only source of information about crimes perpetrated on the occupied territories, which is one of the reasons why the Russian occupation authorities usually dismantle telecommunication equipment[32] and jam or reroute the Internet[33] on the territories captured by them in their attempt to isolate residents of the occupied territories. While it is now hard to estimate how long the process of de-occupation would take, the thorough verification and authentication of reports and digital materials provided by the civilian population could be a source of invaluable scene-of-crime evidence[34] that otherwise would be destroyed or manipulated by the alleged perpetrators. For instance, the documentation of the destruction in the city of Mariupol[35] became possible thanks to city residents whose photo and video materials contain evidence subsequently erased and hidden by the Russian occupation authorities.

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[29] Iryna Marchuk, 'Domestic Accountability Efforts in Response to the Russia–Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine' (2022) 20 Journal of International Criminal Justice 787.

[30] See the website of the Office of the Prosecutor General of Ukraine 'Офіс Генерального Прокурора' <https://www.gp.gov.ua/> accessed 10 February 2024.

[31] See 'War in Ukraine' (*Global Conflict Tracker*) <https://cfr.org/global-conflict-tracker/conflict/conflict-ukraine> accessed 23 February 2024.

[32] 'Russian Occupiers Cut Internet, Mobile Connection in Kherson to "isolate" City' (*The Kyiv Independent*, 23 October 2022) <https://kyivindependent.com/russian-occupiers-cut-internet-mobile-connection-in-kherson-to-isolate-city/> accessed 10 February 2024.

[33] Adam Satariano and Scott Reinhard, 'How Russia Took Over Ukraine's Internet in Occupied Territories' *The New York Times* (9 August 2022) <https://www.nytimes.com/interactive/2022/08/09/technology/ukraine-internet-russia-censorship.html> accessed 10 February 2024.

[34] Laura King, 'Tymophiy's Diary: A Boy Orphaned by War Chronicles His Fury and Grief' (*Los Angeles Times*, 5 August 2022) <https://www.latimes.com/world-nation/story/2022-08-05/dreams-do-not-come-true-in-ukrainian-boys-wartime-diary-lament-and-loss> accessed 26 February 2024.

[35] 'Beneath the Rubble: Documenting Devastation and Loss in Mariupol' (*Human Rights Watch*, 8 February 2024) <https://www.hrw.org/feature/russia-ukraine-war-mariupol> accessed 11 February 2024.

Finally, the main reason behind the increasing engagement of civilians and non-institutional investigators, such as NGOs, in the systematic process of war crimes documentation is that spontaneous investigation activities at the grassroots level urgently require institutional coordination and assistance from law enforcement agencies. Without such coordination, necessary training, and technical support, numerous investigations into international crimes initiated by the media, the OSINT community, civil society, and 'first responders' could potentially cause more damage to pre-trial proceedings and confusion among the public due to conflicting information coming from multiple 'investigators'. To ensure clarity and more effective use of available resources required for the investigation of a continuously growing number of registered criminal cases, the chief prosecutor of the ICC, Karim Khan, is right to call 'for an international 'overarching' strategy' to coordinate efforts' around documentation related to Ukraine to strengthen efficiencies and avoid causing inadvertent problems for each other's investigations.'[36] The need to achieve a higher level of coordination has also received broad support among the participants of the Ukraine Accountability Conference, which aims to facilitate cooperation and map existing investigation activities conducted in Ukraine.[37] Most importantly, such a unique model of collaboration between global and domestic actors documenting crimes in Ukraine 'is going to result in a big shift for international justice',[38] which could potentially change the documentation of international crimes both in Ukraine and in many countries affected by armed conflicts.

3 Risks of new digital evidence – implications for victim-centred criminal justice

This section will address various risks associated with the use of digital evidence, especially in relation to their possible negative impact on the standing of victims and witnesses in criminal proceedings during the ongoing Russia-Ukraine war. The purpose of this analysis is twofold. On the one hand, due to the growing reliance of national and international actors on grass-roots digital evidence and OSINT, it is important to highlight relevant weaknesses and limitations to avoid the potential misuse of such digital materials while documenting international crimes during armed conflicts. On the other hand, a thorough analysis of risks and pitfalls associated with the documentation of war crimes in Ukraine could contribute to a larger effort to develop clear standards and procedures for scrutinizing the integrity of digital evidence in international criminal justice. The safety and security of digital documenters, as well as risks of overdocumentation,

[36] Alexa Koenig, 'From "Capture to Courtroom": Collaboration and the Digital Documentation of International Crimes in Ukraine' (2022) 20 Journal of International Criminal Justice, p. 840.

[37] In particular, "[t]he promoted measures aim at aligning and combining interventions from national authorities and all relevant national and international organisations, in order to strengthen and expand the capacity and resources available for investigations in Ukraine." Ministerie van Buitenlandse Zaken, 'Ukraine Accountability Conference: A Step towards Justice - News Item - Government.Nl' (14 July 2022) <https://www.government.nl/latest/news/2022/07/14/ukraine-accountability-conference> accessed 11 February 2024.

[38] Priyanka Shankar 'Going after War Crime Perpetrators – DW – 07/14/2022' <https://www.dw.com/en/icc-chief-calls-for-overarching-strategy-to-probe-war-crimes-in-ukraine/a-62476910> accessed 11 February 2024.

disinformation, and violence escalation, will be instrumental in forging an understanding of the potential implications digital evidence and OSINT may have for victim-centred justice.

The growing importance and dependence on grass-roots digital evidence among the global and domestic actors involved in the international initiatives on war crimes documentation is the main reason why this new type of evidence should be subjected to thorough scrutiny in line with clear standards agreed by all stakeholders in the field of international criminal justice. In case the new digital evidence manifestly fails to meet the admissibility standards due to the manipulation and fabrication techniques used by malicious actors who want to compromise the credibility of digital evidence,[39] there must be a procedure in place to 'red flag' such compromised evidence before it misleads investigators, prosecutors, and courts that often do not have the required expertise or knowledge of digital forensic tools.

This will significantly help all actors involved in the documentation process agree on 'the limits of such information's potential use as evidence, including how to challenge the authenticity and reliability of that information.'[40] Other points of concern are related to the process of collecting digital evidence and potential risks to civilians who might be caught in actual physical hostilities and suffer harm while documenting war crimes.[41] While many experts mention overdocumentation as one of the risks that can potentially lead to the re-traumatization of victims interviewed by multiple investigators, [42] the uncontrolled dissemination of alleged 'war crimes evidence' and 'self-incriminatory videos' online could also lead to the escalation of violence, fuel conflicts through disinformation and compromise the safety of people who collected the digital evidence.[43]

These and other risks deserve serious consideration in light of the growing international importance of the new digital evidence. On the one hand, novel techniques such as a digital reconstruction of a crime scene[44] developed in line with clear principles of digital war crimes investigation and documentation could potentially address some of the challenges inherent in digital documentation. On the other hand, the rapidly evolving threat

[39] Eliot Higgins, 'How Open Source Evidence Was Upheld in a Human Rights Court' (*bellingcat*, 28 March 2023) <https://www.bellingcat.com/resources/2023/03/28/how-open-source-evidence-was-upheld-in-a-human-rights-court/> accessed 25 February 2024.

[40] Koenig (n 1), p. 836. See also Koenig and Freeman (n 23).

[41] 'Global Advisory Board on Digital Threats during Conflict' <https://www.icrc.org/en/document/global-advisory-board-digital-threats> accessed 15 February 2024.

[42] Williams and Carle (n 16); Koenig, 'From "Capture to Courtroom"' (n 3).

[43] 'Global Advisory Board on Digital Threats during Conflict' (n 38).

[44] 'SITU – Crime Scene: Bucha' <https://situ.nyc/research/projects/crime-scene-bucha> accessed 23 February 2024.

of 'deep-fake technology'[45] and the growing role of AI in warfare[46] could pose new theoretical and practical problems[47] in both domestic and international legal discourse.

3.1 New digital evidence as a potential source of disinformation and conflict

Among the most serious potential risks of new digital evidence vis-à-vis the standing of victims and witnesses in criminal proceedings is its highly sensitive content that could spread disinformation, cause public outrage, and further escalate the conflict. This is the nature of evidence in any atrocity crimes investigation that it, as a rule, contains graphic content depicting torture, murder, and other forms of extreme violence that can shock and put under significant psychological stress even professional investigators trained to deal with such type of materials.[48] If the general public is exposed to such graphic content without any explanation of its context and the meaning of events depicted in publicized digital materials, the exposed digital content could undermine investigation efforts. In simple terms, any investigation into atrocities or war crimes documentation effort would be counterproductive if the discovered evidence provokes even more atrocities, the proliferation of conflict, and, thus, a higher number of victims affected by the conflict. Furthermore, digital evidence, which leads to further violence and conflict, will certainly undermine the credibility of those who collected it. Cyber materials with witness and victims' testimonies that could fuel war hostilities pose a question of whether the true intention of war crimes documenters is to ensure accountability for perpetrated crimes or rather to increase animosity between the two sides of the conflict.

The ICRC Global Advisory Board elaborates on this risk in its final report on digital threats during armed conflicts where '[t]he malicious use of digital technologies and the spreading of harmful information is increasingly destabilizing societies and aggravates vulnerabilities among the civilian population…far beyond the theatre of conflict, directly or indirectly causing damage, injury, or death to civilians, and further escalating conflicts…Civilians may unknowingly amplify harmful content.'[49] The spread of harmful information becomes especially relevant in the context of crimes related to sexual violence. Ukraine's Prosecutor General Andriy Kostin confirmed 'the…focus [of his office] on such crimes and the setting up of a specialized unit [of well-trained prosecutors] within the War Crimes Department to deal with war-related sexual violence', as quoted

[45] Asher Flynn, Jonathan Clough and Talani Cooke, 'Disrupting and Preventing Deepfake Abuse: Exploring Criminal Law Responses to AI-Facilitated Abuse' in Anastasia Powell, Asher Flynn and Lisa Sugiura (eds), *The Palgrave Handbook of Gendered Violence and Technology* (Springer International Publishing 2021) <https://doi.org/10.1007/978-3-030-83734-1_29> accessed 15 February 2024.

[46] Guido Acquaviva, 'Crimes without Humanity?: Artificial Intelligence, Meaningful Human Control, and International Criminal Law' [2023] Journal of International Criminal Justice mqad024.

[47] Yvonne McDermott, Alexa Koenig and Daragh Murray, 'Open Source Information's Blind Spot: Human and Machine Bias in International Criminal Investigations' (2021) 19 Journal of International Criminal Justice 85.

[48] Henk Sollie, Nicolien Kop and Martin C Euwema, 'Mental Resilience of Crime Scene Investigators: How Police Officers Perceive and Cope With the Impact of Demanding Work Situations' (2017) 44 Criminal Justice and Behavior 1580.

[49] 'Global Advisory Board on Digital Threats during Conflict' (n 38).

in Marchuk.[50] Because of the great public attention and importance of investigations and evidence about crimes related to sexual violence, attempts to disclose incomplete information about these crimes during the pre-trial stage could trigger disinformation campaigns aimed at undermining the credibility of ongoing criminal proceedings.

Furthermore, disclosing sensitive evidence to third parties without a court's authorization in pending cases could call into question the fairness of proceedings and integrity of ongoing investigations. An example of such pre-trial miscommunication on available evidence was the dismissal of Ukraine's Ombudswoman Lyudmila Denisova one year before the end of her term amid allegations that she 'had focused too much on graphically outlining cases of sexual violence for which she did not provide any evidence.'[51] While Denisova's dismissal has been followed by a disinformation campaign on several German and Russian websites claiming that Ukrainian officials merely invented cases of sexual violence perpetrated by Russian soldiers,[52] public disclosure of highly sensitive information about alleged crimes at the pre-trial stage could cast doubts on the efficiency of investigations, further traumatize victims, as well as set the ground for the dissemination of harmful information that can compromise the standing of victims and witnesses as participants and beneficiaries of criminal proceedings.

3.2 War crimes documentation and security of digital 'first responders'

The story of cyber documentation of war crimes is essentially a story of 'digital first-responders', victims and witnesses, who are willing to collect evidence in the epicentre of military hostilities and provide testimonies that could potentially put their safety and security at risk. While this research focuses on the collection process of digital materials for war crimes documentation, the Ukrainian government has used various digital platforms to collect intelligence on the movement of Russian troops to improve Ukrainian air defence capabilities.[53] Although both forms of collecting digital intelligence for military and civilian purposes (war crimes documentation) may entail considerable risks for the involved civilian population, in the context of the International Humanitarian Law (IHL), 'civilians do not lose protection against attack if they are using digital means for any reason other than a direct participation in hostilities, such as in a personal capacity, as journalists, or for documenting crimes.'[54] This means that victims and witnesses as

[50] Marchuk (n 24), p.793. "Face the Nation with Margaret Brennan," September 18, 2022: Cuellar, Kostin, Johnson, Pape - CBS News' (16 September 2022) <https://www.cbsnews.com/news/face-the-nation-with-margaret-brennan-september-18-2022-cuellar-kostin-johnson-pape/> accessed 26 February 2024.

[51] Sophie Timmermann, 'Reports of Sexual Violence in the War: Why the Ukrainian Parliament Dismissed Human Rights Chief Denisova' (*correctiv.org*, 11 August 2022) <https://correctiv.org/fact-checking-en/2022/08/11/reports-of-sexual-violence-in-the-war-why-the-ukrainian-parliament-dismissed-human-rights-chief-denisova/?lang=en> accessed 26 February 2024.

[52] ibid.

[53] 'ePPO - a Mobile Application for Informing about Cruise Missiles and Kamikaze Drones • Mezha.Media' (14 October 2022) <https://mezha.media/en/2022/10/14/eppo-a-mobile-application-for-informing-about-cruise-missiles-and-kamikaze-drones/> accessed 26 February 2024.

[54] See 'the final report of the ICRC Global Advisory Board on Digital Threats during Conflict' (n 35), p.11.

'digital first responders' should not become a target of a military attack when they collect digital materials on alleged war crimes. However, the reality of warfare on the ground often diverges from the requirements of international law.

In particular, the UN Human Rights Monitoring Mission in Ukraine 'continued to document additional cases of serious human rights violations from before the reporting period, confirming patterns previously identified, including killings of civilians, enforced disappearances and torture of civilians.'[55] According to independent reports, civilians, among whom were minors, became victims of enforced disappearances and torture in Ukraine, because Russian forces had a suspicion that the civilians were filming them and transmitting information to the Ukrainian authorities.[56] In an early war crimes case adjudicated by a Ukrainian court, Vadim Shishimarin[57] and four other Russian soldiers have been found guilty of the murder of an unarmed elderly civilian man who was talking on his phone on 28 February 2022. Marchuk mentions in her appraisal of the case that, although Shishimarin's 'life imprisonment was reduced to 15 years of imprisonment…[on appeal,] the Ukrainian judiciary has signalled that convicted war criminals would receive lengthy imprisonment terms.'[58] Although the Ukrainian court has not checked the victim's call log, which could have confirmed that he had a protected 'civilian status' and was not transmitting information to the Ukrainian army as the defendants in the case suspected, this case confirmed that a mere allegation of recording or sharing information was a sufficient reason for Russian troops to attack unarmed civilians in the area of military hostilities. Williams and Carle also indicate in their case study on modern atrocity crime documentation in Ukraine that '[the threat of] enforced disappearances and arbitrary detentions of [Ukrainian] civilians by Russia…would initially discourage victims and witnesses from coming forward in this context [of remote war crimes documentation].'[59] Even though Ukrainian authorities and NGOs provide security warnings and safety tips to civilians who decide to use their digital devices for the documentation of war crimes, additional consideration and analysis would be necessary to ascertain that the documentation effort does not put victims and witnesses' safety and security in a position of unnecessary or increased personal risk.

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[55] 'Head of UN Human Rights Monitoring Mission in Ukraine Presents the Latest Human Rights Report | United Nations in Ukraine' <https://ukraine.un.org/en/248423-head-un-human-rights-monitoring-mission-ukraine-presents-latest-human-rights-report, https://ukraine.un.org/en/248423-head-un-human-rights-monitoring-mission-ukraine-presents-latest-human-rights-report> accessed 26 February 2024.

[56] Daria Shulzhenko, "Torturing People Is Fun for Them." 16-Year-Old Ukrainian Recalls His 3 Months in Russian Captivity' (*The Kyiv Independent*, 5 August 2022) <https://kyivindependent.com/torturing-people-is-fun-for-them-16-year-old-ukrainian-recalls-his-3-months-in-russian-captivity/> accessed 26 February 2024. See similar cases of abducted minors accused of filming Russian troops in Halya Coynash, 'Russians Imprisoned 14-Year-Old Boy and Girls in Kherson and Mykolaiv Oblasts' (Human Rights in Ukraine) <https://khpg.org//en/1608811472> accessed 26 February 2024.

[57] See materials of the Vadim Shishimarin case in English available at "Ukraine War Crimes Trial Database by Megumi Ochi, at https://alkaline-lantana-adf.notion.site/Ukraine-War-Crimes-Trial-Database-66fada9c1e9f416185ac180562814e86?pvs=4 (as of 26.02.2024)."

[58] Marchuk (n 27), p. 797.

[59] Williams and Carle (n 20), p.38.

3.3 Duplication of efforts and a risk of overdocumentation

Multiple investigators and documentation initiatives create confusion about cases that have been overdocumented and could also mislead investigators, prosecutors, and judges concerning actual evidence and witness statements available. Alexa Koenig mentions, for example, in her evaluation of the digital documentation of international crimes in Ukraine that the risk of overdocumentation could lead 'to disclosure challenges (if prosecution teams don't know what, exactly, they are holding) to logistical challenges related to being able to locate relevant pieces of data when needed…Overdocumentation can also create potential problems for privacy and legal process — for example, when competing stories enter the public record, or when prosecutors are unaware of the full scope of data they possess and thus struggle to meet disclosure obligations.'[60] The overdocumentation-related problems of disclosure, privacy, and competing testimonies could weaken the standing of witnesses and victims, whose voices could be lost in the 'flood of evidence'.

At the same time, the ensuing 'information noise' could distract and mislead all participants in criminal proceedings. In other words, if malicious actors want to compromise a given pre-trial investigation of alleged war crimes, they can try to 'overwhelm' the court with alternative testimonies, witness statements, and evidence that would contradict each other and create an appearance of 'plausible deniability' for those who perpetrated the crimes. Representatives of Russia have employed a similar strategy in the case of Ukraine and The Netherlands vs Russia[61] before the European Court of Human Rights. In particular, lawyers representing the government of Russia attempted to undermine the credibility of the open-source evidence by presenting various contradicting versions of the same image.[62] While the Court has rejected the arguments presented by the representatives of Russia that judges relied in their conclusions on evidence purposely manipulated by the OSINT community, the 'gaslighting' approach used by Russia in this particular case to cause self-doubt and confusion among trial participants demonstrates that similar tactics can be employed in future trials that will involve a plethora of digital materials and sources of evidence.

4 Advantages of new digital evidence – implications for victim-centred criminal justice

The advantages of the new digital evidence could mitigate the above-mentioned risks of using this type of evidence. While it is necessary to determine the limits of using digital

[60] Koenig (n 3), pp. 839-840. See also Jennifer Easterday, Jacqueline Geis, and Alexa Koenig. 'Seven Essential Questions for Ethical War Crimes Documentation' (*Human Rights Center*, 1 June 2022) <https://medium.com/humanrightscenter/seven-essential-questions-for-ethical-war-crimes-documentation-6e891f498da6> accessed 27 February 2024.

[61] Ukraine and The Netherlands vs Russia App nos. 8019/16, 43800/14 and 28525/20.

[62] An image of a Russian soldier and his military unit at the border with Ukraine. See detailed information in Higgins (n 36).

evidence in the documentation and prosecution of international crimes, digital evidence and OSINT could also strengthen the standing of victims and witnesses in criminal proceedings, due to the advantages they offer. The widespread availability and diversity of these digital materials could contribute to the establishment of a broad network of digital repositories that would increase accessibility, safety, and public visibility of evidence collected by victims and affected communities. A resulting virtual forum of evidence on core international crimes committed during various conflicts is, in turn, an important step toward public awareness, commemoration of victims, and non-repetition of past crimes. Documenters of international crimes eventually form their international digital communities to share information and best practices on using digital evidence at both the pre-trial and trial stages. Whether this cooperation continues in the form of training or standard setting, it contributes to the much-needed professionalization of grass-roots documentation communities and the harmonization of digital investigation strategies. Finally, regardless of its probative value and admissibility as evidence in court, digital materials empower victims and affected communities by magnifying their voices and describing the human dimension of crimes, which is often missing in official statistics and reports of public officials in charge of criminal proceedings.

4.1 A network of digital repositories to strengthen accountability efforts

Unlike physical evidence, with its limited accessibility and visibility to the public, digital evidence provided by witnesses and victims will be available indefinitely in digital space to anyone who would like to access it. Similar investigative initiatives in the past have created a digital track record of core international crimes that would be impossible to deny or relativize in the future. These digital archives set the record straight and 'bring the [digital reconstruction of] crime scene to national courtrooms globally.'[63] An example of such clear and convincing evidence would be visual investigation practices[64] used by the Investigative Team to Promote Accountability for Crimes Committed in Da'esh/ISIL (UNITAD).

According to Karim Asad Ahmad Khan, the Special Adviser Head of UNITAD to the Security Council in 2021, the investigative team has used "modern technology 3d laser scanners, pictures, photographs, and videos, so that a record can be created that will stand the test of time." "The greater challenge, the greater imperative…is we do not forget, next week or next month."'[65] In a landmark decision of 'The Prosecutor v. Ahmad Al Faqi Al Mahdi',[66] the ICC has also relied on self-incriminatory statements, videos, and

[63] 'UNITAD Launches Multimedia Video Demonstrating Evidence of Crimes against Yazidi Community | Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD)' <https://www.unitad.un.org/news/unitad-launches-multimedia-video-demonstrating-evidence-crimes-against-yazidi-community> accessed 27 February 2024.
[64] ibid.
[65] 'UNITAD Launches Multimedia Video Demonstrating Evidence of Crimes against Yazidi Community | Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD)' (n 61).
[66] Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence (27 September 2016).

other digital evidence that proved the involvement of jihadist Al Mahdi in the destruction of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) heritage sites in Mali in 2012-2013.[67] In a similar case related to the conflict in Darfur 'The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus',[68] the ICC has indicted two military commanders based on satellite images from Google Earth and other open-source digital evidence.[69] At the national level, in the so-called Al-Khatib trial,[70] the Koblenz Higher Court in Germany has made a significant contribution to the international accountability for serious crimes committed in Syria by relying on photos and other open-source materials collected and authenticated by various civil society organisations with the help of witnesses.[71] These national and international efforts to strengthen accountability for international crimes can contribute to the ongoing expansion of a network of interconnected digital repositories of victims' and witnesses' testimonies that can set an example for future digital documentation initiatives.

4.2 A network of documenters to support international criminal justice

We can now see an emerging network of institutional and non-institutional documenters and investigators that cooperate and learn from each other in the context of the war in Ukraine and armed conflicts in other countries. This is quite a transformative process for the system of international criminal justice because, for the first time in its history, institutional actors such as national law enforcement agencies, courts, and International Non-Governmental Organisations (iNGOs) are attempting to engage non-institutional actors in joint efforts to document international crimes. This cooperation occurs in the form of training like in the case of '[t]he NGO Witness [which] helps turn citizens into *de facto* reporters by teaching them how to film in a way that is more likely to be trusted by news media and judicial investigators',[72] or the guidelines developed as a result of cooperation between Eurojust and the office of the ICC Prosecutor 'to assist civil society organisations

[67] See Harvard Law Review, Comment on 'Prosecutor v. Ahmad Al Faqi Al Mahdi' (*Harvard Law Review*, 10 May 2017) <https://harvardlawreview.org/print/vol-130/prosecutor-v-ahmad-al-faqi-al-mahdi/> accessed 27 February 2024.

[68] Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Case no. ICC-02/05-03/09-124 (16 March 2011).

[69] 'The Prosecutor v. Banda' (*International Criminal Court Project*, 15 February 2024) <https://www.aba-icc.org/cases/case/the-prosecutor-v-banda/> accessed 27 February 2024.

[70] See the verdict in the al-Khatib trial before the Koblenz Higher Court. „Al-Khatib"-Verfahren vor dem OLG Koblenz (2020/21)' (*Philipps-Universität Marburg*) <https://www.uni-marburg.de/de/icwc/dokumentation/monitoring/verfahren/syrien/verfahren-vor-dem-olg-koblenz-al-khatib-2020-21> accessed 27 February 2024.

[71] 'Q&A: First Syria State Torture Trial in Germany | Human Rights Watch' (6 January 2022) <https://www.hrw.org/news/2022/01/06/qa-first-syria-state-torture-trial-germany> accessed 27 February 2024.

[72] Huet, 'A Race against Time to Collect Digital Evidence of Ukraine War Crimes' (n 9).

to collect and preserve information related to international crimes and human rights violations, which may become admissible evidence in court.'[73] At the national level in Ukraine, the 5 AM Coalition is expanding its network of OSINT communities. It also develops a joint platform for Ukrainian and international organisations to access the results of collaborative documentation efforts.[74] Regardless of the mode of cooperation chosen between institutional actors, civil society, and first responders, these diverse initiatives contribute to the creation of a broader network of 'citizen documenters' who are highly motivated, ready to learn, and share the same goal with their institutional counterparts, namely to ensure accountability for grave international crimes.

The emergence of such alliances and networks can ultimately advance the cause of bringing perpetrators of international crimes to justice. This cooperation can be state-driven and voluntary in the format of continuous data collection through the e-governance App 'Diia', which was developed by the government of Ukraine and used by Ukrainian citizens to crowdsource evidence on crimes committed by Russian troops.[75] The networks of citizen documenters could also emerge thanks to specialised mobile Apps like the 'EyeWitness to Atrocities' application developed by LexisNexis Rule of Law Foundation for the secure transmission of verifiable footage of atrocities from eyewitnesses to experts who can categorize, index, verify and share it with responsible institutional investigative authorities.[76] The EyeWitness has contributed to expanding the network of non-institutional documenters in Ukraine when, during the first months of Russia's full-scale invasion, its application 'has seen a surge in use and has been used over 31,000 times to upload footage of potential war crimes from Ukraine since February 2022'.[77] Documentation networks can also facilitate cross-sectoral cooperation with tech companies like in the case of Meta (Facebook), which is developing a protocol to preserve conflict-related content with potential evidence of international crimes.[78] The Starling Lab, a research centre of Stanford University, which uses blockchain technology and cryptographic methods to document international crimes, is another example of an interdisciplinary academic re-

[73] 'Documenting International Crimes and Human Rights Violations for Criminal Accountability Purposes: Guidelines for Civil Society Organisations | Eurojust | European Union Agency for Criminal Justice Cooperation' <https://www.eurojust.europa.eu/publication/documenting-international-crimes-and-human-rights-violations> accessed 28 February 2024.

[74] See 'Ukraine 5 AM Coalition Summed up the Results of 2023 and Decided on Further priorities. Human Rights Centre Zmina. Centr Prav Ludyny ZMINA' (31 January 2024) <https://zmina.ua/en/event-en/ukraine-5-am-coalition-summed-up-the-results-of-2023-and-decided-on-further-priorities/> accessed 8 February 2024.

[75] See the mobile App Diia,<https://go.diia.app/> accessed 8 February 2024.

[76] EyeWitness, 'eyeWitness to Atrocities App' <https://www.eyewitness.global/our-work.html> accessed 28 February 2024.

[77] Dylan Carter, the Brussels Times, 'Mobile App Helps Lawyers Prosecute War Crimes' <https://www.brusselstimes.com/world-all-news/413308/mobile-app-helps-lawyers-prosecute-war-crimes?utm_source=pocket_reader> accessed 14 June 2023.

[78] Alexa Koenig, 'Meta's Oversight Board Recommends Major Advance in International Accountability' (*Just Security*, 22 June 2023) <https://www.justsecurity.org/87015/metas-oversight-board-recommends-major-advance-in-international-accountability/> accessed 28 February 2024.

search initiative tapping into a global network of non-institutional actors involved in accountability initiatives based on the active integration of victims and witnesses into international criminal justice processes.

4.3 Digital evidence and empowerment of affected communities

It is rather unfair that both national and international criminal justice systems sometimes disregard and downplay original stories narrated by victims and witnesses who seek justice with the help of institutional actors such as police, prosecutors, and judges. At the pre-trial stage, the dry language of police, investigative, and forensic reports provide a detailed technical account of perpetrated crimes. Still, it often fails to include the human dimension of a tragedy caused by a criminal act. It is especially true in the context of war crimes and crimes against humanity. No formal language, forensic technique, or thorough legal analysis of the elements of war crimes could ever deliver the dismay, horror, and despair of civilians who witnessed atrocities and survived military hostilities. At the same time, the rational, emotionally detached, and systemic approach of institutional investigators inadvertently normalizes crimes that eventually fall under standard crime categories and become mere figures in official crime statistics. Similar to a domestic criminal justice system, where conflict is a prerogative and 'property' of state institutions,[79] international armed conflicts, whose devastating impact mainly falls on the affected civilian population, become a property and exclusive responsibility of international organisations and diplomatic missions.

After an initial shock, the news of war crimes, atrocities, and the severity of armed conflicts do not necessarily cause wide moral outrage and condemnation. These crimes become a part of daily news reports on yet another human tragedy in a long list of previous wars and atrocities.[80] The direct involvement of victims and witnesses in the criminal justice process could change the usual state-driven institutional dynamics of resolving conflicts. Audio-visual materials on alleged war crimes collected with the help of communities affected by armed conflicts have the potential to bring these conflicts beyond constrained legal narratives and definitions by situating grave human rights violations within a broader context of human emotional expressions comprehensible for all. As we could observe in the grass-roots documentation conducted '[i]n Ukraine, both the testimony and the images we see of war crimes are powerful and persuasive.'[81] Koenig further explains the numerous advantages provided by the digital reconstruction of crime

[79] Nils Christie, 'Conflicts as Property' (1977) 17 The British Journal of Criminology 1.

[80] Ronald C Kramer, 'Chapter 8 From Guernica to Hiroshima to Baghdad: The Normalization of the Terror Bombing of Civilians', *State Crime in the Global Age* (Willan 2010) 8.

[81] Ronald Niezen, 'Using Digital Evidence to Prosecute War Crimes' <https://www.nationalmagazine.ca/en-ca/articles/law/opinion/2023/using-digital-evidence-to-prosecute-war-crimes> accessed 28 February 2024.

scenes in the Al Mahdi[82] and Al Hasan[83] cases before ICC, as well as the latest technological break-through, which 'now includes the possibility of introducing virtual reality, placing judges and other legal actors at the (simulated) centre of an atrocity.'[84] The possibility of seeing and experiencing (literally) the crime scene through the eyes of victims and witnesses who collected digital evidence would, hopefully, bring the exact technological change to domestic courtrooms globally. Marchuk mentions that in the war crime case of Aleksandr Bobykin and Aleksandr Ivanov,[85] sentenced by a Ukrainian court for shelling residential areas and destroying civilian infrastructure in the Kharkiv region of Ukraine, constant military hostilities in the affected settlements obstructed the investigation, and 'no evidence was presented on the civilian casualties (if any) that ensued as a result of the attacks.'[86] An opportunity to use an interactive digital platform or a map of war crimes[87] created with the help of visual materials and testimonies from the affected civilian population could allow Ukrainian courts to assess crime scenes in the territories that are either occupied or affected by military operations.

5 Overcoming risks and amplifying advantages of new digital evidence

While there are justified concerns about some vulnerabilities of using new digital evidence, this research argues that it is possible to strengthen the standing of victims and witnesses in criminal proceedings by building upon strengths and learning from previous experiences of digital documentation initiatives. With regard to the risk of digital evidence as a potential source of harmful information, it is essential to consider that freedom of expression plays a vital role during ongoing armed conflicts. In its recommendation on societal resilience against harmful information, the ICRC Global Advisory Board advises to 'uphold the right to freedom of expression…[d]uring armed conflict…[when] derogations and restrictions of this right must be narrowly construed and comply strictly with the principle of legality, necessity, and proportionality to protect legitimate objectives set out in international human rights law.'[88] At the same time, it is equally important to adhere to procedural rules and discovery procedures to avoid unauthorized disclosure of sensitive information about the pre-trial investigation, which can trigger the dissemination of information harmful to victims and witnesses. As digital initiatives for documenting war crimes in Ukraine and other countries teach us, the usual procedure[89] is to

[82] Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence (27 September 2016).
[83] Prosecutor v. Al Hassan Ag Abdoul Aziz, Case no. ICC-01/12-01/18.
[84] Koenig, 'From "Capture to Courtroom"' (n 3), p. 839.
[85] Aleksandr Bobykin and Aleksandr Ivanov, Kotelevskyy District Court in the Poltava Oblast, Case No. 535/244/22, 31 May 2022. See materials of the Bobykin and Ivanov case in English at "Ukraine War Crimes Trial Database by Megumi Ochi, at https://alkaline-lantana-adf.notion.site/Ukraine-War-Crimes-Trial-Database-66fada9c1e9f416185ac180562814e86?pvs=4 (as of 26.02.2024)."
[86] Marchuk (n 27), p. 798.
[87] See 'A map of Russian War Crimes' (*Russian War Crimes*) <https://www.russianwarcrimeshouse.org> accessed 29 February 2024.
[88] 'Global Advisory Board on Digital Threats during Conflict' (n 39), p. 12.
[89] Koenig and Freeman (n 23).

cross-check and verify digital materials before building a case and engaging prosecution authorities and courts that can decide whether, when, and how to disclose the information. Unauthorized disclosure of unverified and contradictory information could be, on the contrary, a sign of disinformation campaigns, whose goal is to sow doubt, confuse the public, and undermine the credibility of evidence provided by witnesses and victims.

Although victims, witnesses, and civic documenters have different perspectives on the process of collecting digital evidence, all these groups belong to the same category of the so-called 'first responders', i.e., individuals who are often the first ones to access a crime scene during or moments after a crime happened. They also collect materials that could be further used by investigators, prosecutors, and judges. This research investigates the possibilities to strengthen the standing of both victims and witnesses in criminal proceedings. In this context, while various digital investigators naturally have different roles to play in the system of criminal justice, this paper asserts that all groups of digital documenters can be empowered through their more proactive participation in the investigation of crimes. At the same time, civic digital initiatives to document crimes are essential for victim-centred justice, because they present often-discarded views and experiences of communities directly affected by a conflict.

The security of digital documenters in the war zone must be at the forefront of any war crime documentation initiative if it wants to maintain the moral high ground of fighting international crimes without putting the lives of those who document them at unnecessary risk. In this context, it does not matter whether digital documenters are institutional or non-institutional (victims, witnesses, and other individual 'first responders'), they all face the risk of emotional burn-out and re-traumatization because of their experiences of documenting atrocity crimes. In the same vein, the risk of re-traumatization is higher for all these categories of documenters if they are subjected to repeated interviews where, on multiple occasions, they must explain evidence collected by them. While under the current rules of international law, civilians do not lose protection against military attack if they use digital means for documenting crimes,[90] state and non-state actors that engage the civilian population in documentation efforts are obliged to develop additional safeguards and security procedures that will protect such civilians during ongoing military hostilities. The risk of overdocumentation comes along with a potential risk of re-traumatization if multiple documenters interview the same victims and witnesses repeatedly.

To amplify the advantages of new digital evidence and to overcome the risks associated with its use, one can rely on the emerging international and domestic networks of non-institutional documenters, whose increasing coordination and cooperation with institutional actors could minimise the risk of re-traumatization through the shared access to common databases of testimonies available also to law enforcement, prosecutorial, and judicial authorities. Therefore, the main advantage of new digital evidence manifests itself in numerous networks that use and rely on it across various disciplines, professions,

[90] 'Global Advisory Board on Digital Threats during Conflict' (n 39), p. 11.

and institutions. To amplify the advantages of digital evidence means to amplify the voices of people who joined these networks and devoted themselves to the documentation of international crimes. Because the involvement in such digital documentation efforts is based on a shared understanding of the importance and urgency of addressing core international crimes, the broad international networks of digital documenters already have sufficient knowledge, motivation, and diverse expertise necessary to overcome challenges, maximise the impact of e-evidence and empower those who use it in their work. The key is to support the proliferation of networks dealing with international crimes and their further integration into the existing mechanisms of collaboration among all actors in the field of international criminal justice.

The Ukrainian NGO 'Truth Hounds', for instance, has created a backup mirror database to share testimonies and materials of documented cases with the investigating authorities in real time.[91] I also entirely agree with Williams and Carle in their assessment that some risks associated with overdocumentation, i.e., 'witness impeachment' over contradicting testimonies, are exaggerated due to 'the very high number of perpetrators and victims…[and] the magnitude of atrocities…[which] has spurred the need for capable and knowledgeable documenters to fill the gaps left by the ICC and Ukrainian Office of the Prosecutor."[92] Furthermore, as Williams and Carle point out, 'there are also other reasons to document atrocity crimes outside of preparing for trial, such as for creating a historical record, or providing a space for victim catharsis.'[93] Even if the probative value of potentially 'over-collected' evidence is not sufficient, it will remain a significant contribution to victim-centred criminal justice, because it can allow addressing issues of transitional justice, truth, and reconciliation[94] that cannot be immediately resolved within the ongoing trials on war crimes committed in Ukraine.

6 Conclusions

Considering the growing significance of digital evidence collected by 'digital first responders', victims, and witnesses, during the ongoing armed conflicts, the victim-centred approach is expected to play a more important role in domestic and international criminal proceedings. After analysing practices of domestic and international accountability efforts, applicable law, and relevant decisions of national and international tribunals, this research concludes that there is a strong rationale for involving the civilian population in the systemic efforts to document international crimes committed on the territory of Ukraine since the full-scale military invasion launched by Russia on 24 February 2022. First, the scope and intensity of crimes committed by Russian troops have overwhelmed Ukrainian authorities to the extent that the help of civil society and citizen

[91] See 'Truth-Hounds' <https://truth-hounds.org/en/homepage/> accessed 28 February 2024.
[92] Williams and Carle (n 20), pp. 33, 34.
[93] Williams and Carle (n 20), pp. 33, 34.
[94] For the multitude of roles played by transitional criminal justice see Nandor Knust, 'Strafrecht Und Gacaca | Duncker & Humblot' <https://www.duncker-humblot.de/buch/strafrecht-und-gacaca-9783428142392/?page_id=1> accessed 29 February 2024.

documenters was welcomed and appreciated by a great variety of actors involved in the accountability initiatives in Ukraine. Second, digital evidence 'crowdsourced' from citizens via specialised Apps and platforms was often the only effective way to learn about crimes committed in the areas of military hostilities and (de)-occupied territories. Finally, leaving multiple grass-roots documenters without institutional support and coordination could have jeopardised ongoing pre-trial proceedings and dispersed valuable resources necessary to deal with the continuously growing number of registered war crime cases in Ukraine.

All these considerations, combined with the increasing need for information-sharing between global and domestic actors documenting crimes in Ukraine, could mark a major shift towards a 'victim-centred' and 'victim-narrated' approach in international criminal justice. The need for greater involvement of victims and witnesses in international accountability efforts is especially relevant now in response to insecurities induced by the ongoing proliferation of armed conflicts.[95] There is a risk of unintentional 'normalization' of war and mass atrocity crimes through at times an overly formalistic approach in state-led criminal investigations and information gathering into war crimes. Furthermore, the unauthorised disclosure of sensitive evidence at a pre-trial stage can contribute to disseminating harmful information via disinformation campaigns that could undermine the credibility of testimony and evidence provided by victims and witnesses. This risk could be addressed by strict adherence to procedural rules and discovery procedures counterbalanced by the need to uphold the right to freedom of expression even during an armed conflict. At the same time, the personal security and safety of civilians documenting crimes in a war zone or occupied territories must become the highest priority for both state and non-state actors, whose accountability efforts could be compromised by the excessive risks imposed on non-institutional documenters. The possible overdocumentation and the associated risk of victims' re-traumatization in criminal investigations could also be mitigated through new techniques like digital reconstruction of crime scenes as well as active information sharing between institutional and non-institutional stakeholders involved in the war crimes documentation. These and other steps towards victim-centred criminal justice could strengthen the standing of victims and witnesses as participants and beneficiaries in the criminal procedure.

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PART 3: TRIAL AND REPARATION PHASE

THE ADMISSIBILITY OF EVIDENCE COLLECTED THROUGH FORENSIC INTERVIEWS WITH CHILD VICTIMS IN THE U.S. AND JAPAN

Yuto Yokoyama[*]

Abstract

In recent years, many jurisdictions have integrated forensic interview methods into their criminal justice systems to gain accurate information on cases, especially from child victims. However, the admissibility of statements obtained through forensic interviews still needs to be fully explored. Then, this chapter focuses on their admissibility, particularly in the context of the rules of evidence concerning expert evidence. In the United States of America (U.S.), the Daubert decision has shaped the legal framework for assessing the reliability of expert evidence, providing a foundation for scholarly and legal debate. This chapter refines the Daubert standard to make it appropriate for determining the admissibility of forensic interview evidence. Based on this standard, it then examines the admissibility in the U.S. and Japan. Forensic interview evidence basically seems to be admissible in the U.S. In comparison, there are several challenges in Japan. This chapter proposes two recommendations aimed at enhancing the admitting of forensic interview statements in Japan.

1 Introduction

In cases of child abuse, it is crucial to obtain statements from child victims. However, as children are known as 'vulnerable witnesses', they can easily have their memories altered, be influenced by suggestive and leading questions, and suffer psychological strain in investigative interrogations. Hence, interviewing them while accounting for these vulnerabilities is necessary to obtain accurate information and statements regarding the facts of the cases. The 'forensic interview' method has been adopted in response to this challenge across various criminal justice settings.

Accordingly, evidence collected through forensic interviews has been increasingly presented to the trial court. This raises questions regarding the admissibility of such evidence. One issue regarding the admissibility has been whether allowing this evidence violates the defendant's right to confrontation or the hearsay rule. Alternatively, this chapter argues that the admissibility of such evidence can also be examined through the lens of the rule for expert opinion. This is because the person conducting the forensic

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interview (Forensic Interviewer) can be considered an expert with knowledge of psychology and training in forensic interviewing. As noted below, a person with knowledge, skill, experience, training, or education is considered an expert.

The degree of development of the legal frameworks for the use of expert witnesses varies depending on jurisdictions. For example, the United States (U.S.) has established rules for expert opinion, which outline the requirements for the expert to be admitted to trials. In contrast, Japan's rule for expert witnesses remains unsettled.

This chapter aims to obtain suggestions for improving domestic systems with limited rules and practice, namely the Japanese system, through a comparative legal analysis with the rules and jurisprudence of a system that has sophisticated rules: the U.S.'s Federal Rules of Evidence (FRE), Supreme Court precedents, and academic scholarship.[1]

There are several specificities and reasons for comparing the U.S. system and the Japanese system among other jurisdictions. Firstly, as outlined below, the U.S. has developed forensic interview practice and accumulated discussions on the admissibility of expert evidence. Secondly, the Japanese Criminal Procedure Law (CCP) was amended after World War II by introducing American law. On the other hand, since Japanese criminal proceedings were based on the inquisitorial system before the war, some systems representative of American criminal procedure, such as the jury system and plea bargaining, were not adopted in Japan. Therefore, decades after the CCP was amended, Japanese criminal procedure law was described as a 'combination of continental law and common law'.[2] However, in 2009, Japan introduced a lay judge (*Saibanin*) system, similar to the jury. In addition, in 2018, Procedures of Consultation and Agreement (known as the Japanese version of plea bargaining) was introduced. It should be said that Japan is now accepting fundamental factors of U.S. law into its legal system.[3]

This chapter is structured as follows. It overviews forensic interview practices in the U.S. and Japan in Part 2. Then, it considers the admissibility of forensic interview evidence and points out the evidentiary problems of Japanese practice in Parts 3 and 4. Finally, it

[1] In the U.S. jurisdiction, evidence obtained by specialised methods such as DNA typing, toxicology, or forensic interviews is usually brought into court by the expert who examines it. Indeed, FRE 702 is a provision for expert 'witnesses'. In Japan, on the other hand, written reports by experts as well as witnesses are often employed. The standard of admissibility for scientific evidence examined in this chapter does not only apply expert testimony but also reports or other types of expert evidence (see G Naruse 'Kagakuteki shokono kyoyousei (1)-(5) (The Admissibility of Scientific Evidence)' 130 (1)-(5) Hougaku kyoukai zasshi (the Journal of the Jurisprudence Association) (2) 434).

Thus, the standard applies to expert evidence in general, including testimony, written reports, and audio and video recordings of examinations by experts. Hence, this chapter interchangeably uses the words 'expert witness', 'expert testimony', 'expert opinion' and 'expert evidence'.

[2] S Dando 'Keijisoshoho no 40 nen (40 Years after the Amendment of Criminal Procedure Law)' (1989) 930 Juristo (Monthly Jurist) 5.

[3] T Kawaide, 'Gaikokuho no keiju toiu kantenkara mita nihon no keijisoshoho to keijitetsuduki (Japanese Criminal Procedure Law and Criminal Process in the Light of Reception of Law)' in Waseda University Comparative Law Research Centre ed, *Nihonho no naka no gaikokuho (Foreign Law in Japanese Law) (Seibundo 2014)* 291.

proposes solutions to the problems of Japanese forensic interviews in order to improve practice and have the forensic interview statements admitted at trial.

The discussion in this chapter clarifies the requirements for forensic interview statements and highlights key points that lawyers should focus on when scrutinising the admissibility of forensic interviews. It addresses the problems within Japanese practice and proposes solutions. Additionally, it offers guidance for jurisdictions that are just beginning to introduce forensic interviews, like Japan, to consider their admissibility as evidence. This contributes to improved practices that prevent invasive interviews with victims and ultimately support 'Victim-Centred Criminal Justice'.

2 Overview of forensic interview and its implementation in Japan

2.1 Forensic interview

Forensic interviewing is an interviewing technique whose necessity began to be recognised around 1980 in the United Kingdom, the U.S., and other countries and whose methods began to be developed and used around 1990.[4] Forensic interviewing is defined as follows:

> A forensic interview of a child is a developmentally sensitive and legally sound method of gathering factual information regarding allegations of abuse or exposure to violence. This interview is conducted by a competently trained, neutral professional utilising research and practice-informed techniques as part of a more extensive investigative process.[5]

There are 961 accredited Children's Advocacy Centres (CAC) in the U.S., and forensic interviewers usually conduct interviews in forensic interview rooms located at the centres. CACs are accredited organisations if they meet the standards set forth by the National Children's Alliance (NCA), which include primary and advanced training and ongoing peer review required of those conducting forensic interviews.

Guidelines delineating the protocols for conducting forensic interviews have been established across diverse jurisdictions, exhibiting variations in their content. Nevertheless, these guidelines share several common attributes, including[6]:

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[4] VI Vieth, 'The Forensic Interviewer at Trial: Guidelines for the Admission and Scope of Expert Testimony Concerning a Forensic Interview in a Case of Child Abuse (Revised and Expanded)' (2021) 47 Mitchell Hamline L Rev 847, M Naka, 'Kodomo heno shihoumensetsu (Forensic Interview of Children)' (2023) 896 Kenshu 3.

[5] C Newlin and others, *Child Forensic Interviewing: Best Practices* (U.S. Department of Justice 2015) 3. It should be noted that forensic interviews are not only conducted with children. They are also conducted with adults, e.g., victims of sexual offences, victims with mental disorders, etc.

[6] Ministry of Justice, 'Facts on Efforts to Hold Representative Interviews' (Handout from the fifth meeting of the Criminal Law (Sexual Offences) Subcommittee of the Legislative Council) 10 <https://www.moj.go.jp/content/001331469.pdf.> accessed 1 Jun 2024

- Adherence to the prohibition of guided questioning, emphasising the utilisation of open-ended inquiries over closed-ended ones;
- Emphasis on collaborative efforts among multiple agencies, comprehensive documentation, early intervention, and concise interview durations (approximately age x 5 minutes);
- Recognition of the significance of establishing rapport with the child and ensuring compatibility with the interviewer; and
- Recognition of the importance of peer review mechanisms for mutual evaluation and continuous professional development.

Collectively, these components strive to elicit the maximum extent of spontaneous disclosure from the interviewee.

2.2 The situation in Japan

In Japan, forensic interview practice began just in 2015. This initiative is in response to a significant increase in the number of child abuse cases since 2014.[7] Along with this situation, there has been a corresponding uptake in the application of forensic interviewing techniques[8] in investigations of such cases. The prevalence of cases subjected to forensic interviews has exhibited a consistent upward trajectory.[9]

Most forensic interviews in Japan are conducted using foreign protocols as a guide. The primary protocols are the National Institute of Child Health and Human Development (NICHD) protocol and the Childfirst protocol.[10]

Forensic interviews in Japan are typically conducted collaboratively and coordinatedly involving multiple agencies. Principal entities involved include the Child Guidance Centres, police, and prosecutorial authorities. A notable characteristic of forensic interviews in Japan is that investigative authorities mainly conduct interviews: of the forensic interviews conducted in 2020, a substantial majority of 1971 cases (92.79%) were overseen by police (364 cases, 18.93%) and prosecutors (1566 cases, 73.21%).

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[7] 740 cases were cleared in 2014, 822 in 2015, 1081 in 2016, 1138 in 2017, 1380 in 2018, 1972 in 2019, 2133 in 2020, 2174 cases in 2021, and 2181 in 2022 (Ministry of Justice, *White Paper on Crime 2023* (2023) 80 < https://hakusyo1.moj.go.jp/en/nendo_nfm.html> accessed 25 May 2024).

[8] Ministry of Justice (n 6) 11. Forensic interviews in Japan are called 'collaborative interviewing（協同面接）' or 'representative hearing（代表者聴取）'. This designation reflects that the interviews in Japan differ from those in the U.S. and other countries in that investigating agencies such as police and prosecutors 'collaborate' and 'represent' other agencies in conducting interviews.

[9] ibid 10. This is because they can easily have their memories altered, be influenced by suggestive and leading questions, and suffer psychological strain as a result of being subjected to investigative interrogations. As forensic interview initiatives have only recently started in Japan, the number of cases conducted has only been recorded since 2015: 39 in 2015, 306 in 2016, 767 in 2017, 1529 in 2018, 2076 in 2019, and 2124 in 2020. And the number after 2021 is not open to the public.

[10] ibid 7.

Prosecutors mainly take the lead in conducting forensic interviews for reasons of application of the rule against hearsay. 321(1)(ii) of the CCP provides a laxer exception to hearsay evidence of documents prepared by prosecutors compared to those by others (CCP 321(1)(iii)). Thus, under the provision of CCP, it is more advantageous for the prosecutor to conduct a forensic interview, prepare a report, and submit it to the trial court.[11] As will be further elaborated, this practice may pose challenges in determining the admissibility of a forensic interview.

Furthermore, the CCP was amended to adopt recorded media of forensic interviews as evidence in 2023.[12] The new provision states that recording media that capture a person's statements listed in CCP 321-3(a)[13] during the interviews shall be admitted into evidence notwithstanding the provisions of 321(1). To have the media admitted, it is required that 'necessary measures are taken to ensure that the deponent makes a sufficient statement' or 'necessary measures are taken to ensure that the content of the statement is not unduly influenced' (CCP 321-3(b)).

This new provision provides an exception to the hearsay rule and is not the direct subject of this chapter's discussion. However, as discussed in part 4, it has been noted that the enactment of these hearsay exceptions has led to a relatively low evidentiary benefit for prosecutors to conduct forensic interviews. This amendment is also essential when considering the further development of this chapter's discussion (see part 5 below).[14]

3 Rules for expert evidence

3.1 Forensic interview evidence as expert evidence

The result of forensic interviews would be produced to court mainly in three ways: the testimony of the expert who conducted the forensic interview, the audio/visual recording of the forensic interview, and expert testimony that impeaches or reinforces the testimony and the recording. The admissibility of these three types of forensic interview evidence is usually discussed in relation to the right to confrontation[15] or the hearsay rule.[16]

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[11] A Kida, 'Sihoumensetsuno genjouto kadai (Current Situation and Challenges of Forensic Interview)' (2023) 76 Keijihou janaru (Criminal law journal) 48.

[12] The amended legislation does not consider the scenario where an expert witness who conducted a forensic interview may appear to testify in the trial court. Nevertheless, the possibility of utilising expert witness testimony remains conceivable. Indeed, one commentator has proposed the potential regulation of the admissibility of expert testimonies concerning forensic interviews in accordance with the expert evidence rule. A Uemiya and others, 'Rokugasareta kodomo heno mensetsu (Recorded Interviews with Children: Their Value as Evidence and Problems in Court)' (2011), 10 (1) Houtoshinri (Law and Psychology) 104 [E Okada].

[13] Victims of a sexual offence, child victims, or persons who, due to other circumstances, is found to be likely to be seriously disturbed in his/her peace of mind when making a statement in court.

[14] ibid 48.

[15] U.S. CONST amend VI cl 3.

[16] FRE 802

When a forensic interviewer's testimony or recording of the interview replaces the in-court testimony of a child who is considered to be a victim, the opponent cannot subject the child to cross-examination. Also, when the child states about the abuse out of court, he/she is considered the declarant. A written statement of the declarant (including audio or video recording) or a person who has heard directly from the declarant is presented in court. This constitutes the very type of evidence that the hearsay rule seeks to exclude. However, statements obtained during forensic interviews entail a relatively lower inherent risk associated with hearsay evidence because they are obtained through a psychologically structured interviewing process. Therefore, a body of research and cases has accumulated in the U.S. and Japan to establish theories that allow forensic interview evidence to be admitted as exceptions to the Confrontation Clause and the hearsay rule.[17]

On the other hand, the admissibility of statements obtained in forensic interviews could also be examined under other rules of evidence: rules for expert evidence. The persons conducting forensic interviews are mainly psychologists or practitioners trained in forensic interviewing. They can be included among the 'experts' that rules on expert evidence have aimed to control. There has long been a discussion in the U.S. and a body of case law on the requirements to decide whether expert evidence is admissible or inadmissible.

Therefore, this chapter provides an overview of expert evidence rules in the U.S. and examines how the admissibility of forensic interviewing evidence in the U.S. and Japan is analysed from this perspective.

3.2 The framework of the rules of expert evidence in the U.S.

3.2.1 FRE and case law

The FRE provides for testimony by expert witnesses in 702. According to the provision, a person with knowledge, skill, experience, training, or education is qualified as an expert and may testify his/her opinion in court. The proponent of expert should demonstrate that the expert's scientific, technical, or other specialised knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and

[17] For example, in the Japanese literature, see D Midori, 'Shihoumensetsukekka no kouhantei heno kenshutsu no kanousei (Digital Media Recording of Forensic Interview and its Admissibility)' (2016) 16(1) Houtoshinri (Law and Psychology) 36-42; M Nakamura , 'Shihoumensetsu ni okeru jido no kyoujutsu no shoukonouryoku (The Admissibility of Children's Statements in Forensic Interviews)' (2021) 62 (1) Tokyotoritsudaigaku hougaku (Tokyo Metropolitan University Law Review) 381; T Kawaide, 'Shihoumensetsu no kiroku no shoukoriyou (The Use of Forensic Interview Records as Evidence) in Goto A (ed) *Saibaninzidai no keijishoukohou (Criminal Evidence Law in the Age of Saibanin)* (Nihonhyoronsha, 2021) 263. As for literature in the U.S., KY Chin, 'Minute and Separate: Considering the Admissibility of Videotaped Forensic Interviews in Child Sexual Abuse Cases after Crawford and Davis' 30 BC Third World LJ 67. As for cases, see Davis v Washington 547 U.S. 813 (2006); Bobadilla v Carlson 575 F 3d 785 791-792 (8th Cir 2009); Ohio v Clark 576 U.S. 237 (2015); Grose v Streeter 2016 WL 4996530 (ND Miss Sept 19, 2016).

methods; and the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

The last two requirements are relevant to this chapter. These encompass the 'reliability of the underlying scientific theories and methods' and the 'proper application of these to the case in question' stipulation, codified subsequent to the Daubert decision by the U.S. Supreme Court.[18]

The Daubert concerned civil litigation in which the plaintiffs, parents of infants born with limb impairments, alleged damages against a pharmaceutical company for the impairments having been caused by the use of Bendectin, a morning sickness medication, during pregnancy. The district court dismissed the expert testimonies, which reevaluated epidemiological evidence presented by the defendant, citing a lack of meeting the general acceptance standard.[19]

The Supreme Court overturned the initial decision, remanding the case to the lower court. In its ruling, the Court delineated the standards for the admissibility of expert testimony. According to the Court, two requirements must be met for the admission of expert evidence:

(1) The reliability of the underlying scientific theories and methods (FRE 702(c));

(2) The proper application of these to the case in question (FRE 702(d))

A substantial portion of the Daubert ruling delved into (1). Daubert outlined five factors for assessing the reliability of the underlying scientific theories and methods, namely: (a) testability of the theory or method, (b) peer review and publication, (c) error rate and its likelihood, (d) existence of standards, and (e) general acceptance.

On the other hand, the court's opinion remains somewhat opaque regarding (2) the proper application of principles and methods to the case in question.

FRE articulated the Daubert standard in Rule 702 in 2000. The standard is widely accepted throughout the U.S. now. However, Daubert was unclear in several respects. One question that arose immediately after the decision was whether the Daubert standard should apply to 'technical or other specialised knowledge' expert evidence (namely, non-scientific expert evidence).

[18] Daubert v Merrell Dow Pharmaceuticals Inc 509 U.S. 579 (1993).

[19] The admissibility standard of general acceptance was set forth by the Supreme Court prior to the enactment of the FRE and the Daubert decision (Frye v U.S. 293 F 1013 (DC Cir 1923). It required that a scientific technique on which expert opinion was based should have been 'generally accepted' as reliable in the relevant scientific community. The Daubert explicitly stated that it would abrogate the Frye, and that standard has been absorbed into the Daubert standard in part.

In Kumho Tire, the Court addressed this question.[20] The plaintiffs, who suffered death or injury due to a tyre rupture, initiated a damages lawsuit and produced an expert witness, who was a tyre engineer with over ten years of experience, to testify about a defect in the tyre's manufacture or design. The district court dismissed the expert witness because the expert did not meet the Daubert standard. However, the Eleventh Circuit court held that when an expert relied 'on skill- or experience-based observations', the court may not apply the Daubert standard and remanded.

The Supreme Court reversed the Circuit's judgment and held that 'any … knowledge might become the subject of expert testimony'[21]. Namely, it broadened the scope of the Daubert standard by asserting its applicability to all forms of expert evidence delineated in FRE 702, not solely limited to scientific evidence. Also, the Court held that not all of the Daubert factors must be satisfied by every single expert evidence but that they should be applied flexibly depending on the nature of the expertise.[22] Moreover, it is at the discretion of the judge, as the 'gatekeeper', to determine which admissibility factors apply to the facts of the case.

Following the Kumho ruling, it became clear that the Daubert standard could apply to all types of expert evidence. On the other hand, Kumho left the major parts of the job of scrutinising the admissibility to judges and did not provide guidance to lower courts on the proper approach to assessing the reliability of non-scientific expertise. [23] The Kumho decision increased the judge's role as a 'gatekeeper'. After Kumho, judges tasked with finding facts face the significant challenge of determining and judging the reliability of each piece of expert evidence individually, without clear guidance or expertise outside of their legal knowledge.[24]

It also should be noted that Daubert and Kumho were originally civil cases concerning the admissibility of expert evidence. This chapter, however, addresses forensic interview evidence in criminal cases. While the FRE applies to both civil and criminal cases (Rule 101), it has been noted that Daubert and Kumho led to a stricter standard only in civil cases and that the Daubert standard is ineffective in criminal cases.[25] However, in 2009, the National Research Council published a comprehensive report, 'Strengthening Forensic Science in the United States: A Path Forward.' [26] This report was highly critical of the reliability of scientific evidence that had previously been accepted without question in

[20] Kumho Tire Co v Carmichael 526 U.S. 137 (1999).
[21] 526 U.S. 138.
[22] 526 U.S. 151.
[23] Imwinkelried EJ, 'Evaluating the Reliability of Nonscientific Expert Testimony: A Partial Answer to the Questions Left Unresolved by Kumho Tire Co. v. Carmichael' 52 Me L Rev 41.
[24] Naruse (2) (n 1) 468.
[25] L Dixon and B Gill, 'Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases since the Daubert Decision' (2002) 8 Psychology, Public Policy, and Law 251; PC Giannelli, 'The Supreme Court's "Criminal" Daubert Cases' (2002) 33 Seton Hall L Rev 1071.
[26] National Research Council, *Strengthening Forensic Science in the United States: a Path forward* (National Research Council 2009).

criminal trials. Consequently, the admissibility of expert evidence in both criminal and civil trials has been called into question. Therefore, the admissibility standard outlined in this chapter is also applicable to criminal trials.

On the other hand, even before the Kumho decision was ruled, a theory proposed a classification of scientific and non-scientific expert evidence and a standard of admissibility applicable to each.[27] Imwinkelried distinguishes between scientific expert evidence and evidence involving technical or other specialised knowledge (non-scientific expert evidence), according to the language of FRE 702.

He recognised that some of the Daubert factors are inapplicable to non-scientific expert evidence. This is because much non-scientific expert evidence does not rely on replicable experiments and cannot be tested by a third party. Because it cannot be tested, it is also impossible to calculate error rates. He then established a standard of reliability that is consistent with these characteristics.

According to Imwinkelried, for scientific expert evidence, the Daubert standard is applied. In determining the reliability of non-scientific expert evidence, he argues that the quantity (how often the experience was repeated)[28] and quality (how many similar experiences were had)[29] of the experience on which the evidence relies should be taken into account.

This theory is notable in that it accurately captures the nature of expert evidence and attempts to refine the Daubert/Kumho criteria and guide judges. However, Imwinkelried also does not clarify the content of the proper application of principles and methods to the case in question.

Then, Naruse developed Imwinkelried's view through comparative legal research of common law jurisprudence and established the admissibility standard (Hereinafter referred to as the Naruse standard).[30] Naruse distinguishes expert evidence according to whether its meaning is almost incomprehensible without the underlying scientific theory or whether it is based on specialised experience developed from general empirical rules.[31] DNA evidence is a prime example of the former because we cannot understand the implications of DNA analysis without understanding what DNA is. Police dog sniffing is a prime example of the latter because this expertise has developed from the rule of thumb that dogs have a much better sense of smell than humans.

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[27] Imwinkelried EJ, 'The Next Step after Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony' (1993) 15 Cardozo L Rev 2271, Imwinkelried (n 23). See also Naruse (2) (n 1) 468.
[28] ibid [The Next Step] 2290.
[29] ibid 2294
[30] Naruse (4) (n 1) 803. The expressions 'scientific expert evidence' and 'non-scientific expert evidence' (Imwinkelried) are interchangeable with 'expert evidence based on scientific theory' and 'expert evidence based on experience' (Naruse) in this chapter.
[31] ibid (5) 1059.

According to Naruse, the admissibility standard set forth by Daubert applies to the expert evidence based on scientific theory: (1) The reliability of the underlying scientific theories and methods and (2) The proper application of these to the case in question. On the other hand, for non-scientific expert evidence, there is often no 'underlying scientific theories and methods'. Rather, non-scientific expert evidence is often based on rules and methods which are constructed through the expert's experiences. So, the requirements are: (1) The reliability of principles and methods based on experiences and (2) The proper application of these to the case in question. Naruse indicated five factors should be considered regarding (1)[32]:

> (a') Accumulation of experience: how much experience of the examination method has been accumulated in that field;
>
> (b') Track record: whether there are track records (e.g. percentage of correct evaluations) of judgments based on that method;
>
> (c') Explanation of the examination: whether the method and criteria of examination can be explained in a way that the judge/juror can fully understand them;
>
> (d') Knowledge and experience of the expert: how much knowledge and experience the expert in question possesses and
>
> (e') Review and acceptance by other experts: how well the method has been accepted in the field in question.

Furthermore, Naruse also clarifies the requirement of (2) the proper application of theories/principles and methods to the case in question, which the Daubert/Kumho decision or Imwinkelried did not make clear. According to Naruse, this requirement is common to scientific expert evidence and non-scientific expert evidence and is a specific requirement that must be met after the reliability of the underlying scientific theories or methods/the principles and methods based on experiences is recognised as a general requirement.[33]

For the decision on whether the application of theories/principles and methods is proper or not, four requirements were indicated[34]:

> (i) Knowledge and experience of the expert: how much knowledge and experience the expert in question has;
>
> (ii) Accuracy of the examination equipment: whether the instrument utilised in the case maintained its precision;

[32] ibid 1062.
[33] ibid 1062.
[34] ibid 1062.

(iii) Adequacy of the specific examination procedure: whether prescribed protocols, if applicable, were adhered to, and

(iv) Authenticity and identity of the examination material: whether the examination material is not counterfeit or has actually been collected from the crime scene.

Naruse's approach refines Imwinkelried's perspective, which adapted the Daubert/Kumho standard in consideration of the uniqueness of the non-scientific expert evidence. This adaptation should be regarded as a valuable standard for helpful guidance for judges in deciding admissibility.

Nevertheless, this chapter suggests a modest amendment to the Naruse standard. Naruse says that the assessment of expert knowledge and experience in the case in question is a factor in determining both the reliability of the underlying scientific theories and methods and the proper application of these to the case. Naruse's framework implies that (d') and (i) are common requirements.[35] However, this makes the reason for the existence of either of them doubtful.[36] Because if (d') is satisfied, (i) would be automatically fulfilled as well, blurring their roles as independent requirements. Also, according to Naruse, factors (a')-(e') are general requirements. However, only (d') refers to the specific knowledge and experience of the expert in the case in question. This seems inconsistent. Given that the decision on the theories/principles and methods is a general evaluation, (d') should also be considered a general factor.

Thus, this chapter proposes redefining (d') to specify that it concerns the knowledge and experience expected of a standard expert in the relevant field (as for forensic interviews, forensic interviewers). The revised factor (d') would be articulated as follows[37]:

(d') Expert knowledge and experience: whether experts *in the relevant field generally* possess sufficient knowledge and experience.

3.2.2 Summary

To summarise, the Daubert/Kumho framework does not differentiate between scientific and non-scientific expert evidence, applying a unified standard admissibility ((1)(a) -(e) and (2) above). Judges have the discretion to decide which factors of the Dauber/Kumho standards are necessary for the specific expert evidence being considered. Although the

[35] ibid 1075 note 78.

[36] If either factor were to be discarded without amending the Naruse standard, (d') would be the one. Because the factors that assess the proper application of theories/principles and methods are a shared prerequisite for both scientific and non-scientific expert evidence, as noted above. If (i) were to be discarded, there would consequently be no means to evaluate the expertise and experience of the expert in the specific case when determining the admissibility of scientific expert evidence.

[37] If understood as above, the distinction between (a') and (d') may be unclear because both include 'experience'. However, (a') refers to the accumulation of knowledge in the field itself (e.g. development of previous research), whereas (d') refers to the knowledge and experience of experts in the field (e.g. content of training or education).

proper application of principles and methods to the case in question must be assessed, its concrete content remains undefined.

Conversely, the (refined) Naruse approach initially separates the types of expert evidence derived from scientific theories and non-scientific expertise. For the former, the Daubert/Kumho criteria ((1) (a) -(e) and (2) above) are utilised to scrutinise the reliability of the principles and methods. For the latter, the focus shifts to evaluating the experience's quality and quantity ((1) (a') -(e') and (2) (i) -(iv) above).

3.3 The admissibility of forensic interview evidence

3.3.1 The choice of the standard

This part specifically examines the admissibility of standards collected through forensic interviews. Forensic interviewing evidence falls into the category of non-scientific expert evidence. While forensic interviews draw on principles of psychology that are typically aligned with scientific methodologies, psychology is commonly considered a 'soft science'. This distinguishes it from disciplines such as those that underpin DNA evidence, which are typically considered 'hard sciences.'[38]

Then, which standard should be applied, the Daubert/Kumho standard or the Naruse standard, when discussing the admissibility of evidence from forensic interviewing, which is non-scientific expert evidence? A study has taken the view that the Daubert/Kumho standard is directly applicable.[39] However, this chapter advocates the Naruse standard for the following reasons.

Some elements of the Daubert/Kumho criteria are clearly inapplicable to expert evidence in the area of psychology, which forensic interviews encompass. For example, error rates cannot be applied to forensic interviews. This is because, on the one hand, a forensic interview conducted incorrectly may elicit accurate statements of fact, and on the other hand, it is also true that a properly conducted interview may elicit inaccurate statements.[40] Therefore, assuming an error rate for forensic interviews is not reasonable.

The Kumho decision recognises that there are factors that do not apply to some types of expert evidence and that the standard of admissibility should vary depending on the nature of the expertise.[41] In this sense, the inapplicability of the error rates factor does not seem to influence the standard's choice. However, as noted above, the Daubert/Kumho standard places a problematic task on judges by giving them the broad discretion to select the factors of admissibility standard without guidance. Judges who are not experts

[38] S Shapin, 'Hard Science, Soft Science: A Political History of a Disciplinary Array' (2022) 60 History of Science 288 (including psychology as one of the areas of soft science).
[39] Vieth (n 4) 851.
[40] ibid 860.
[41] Kumho Tire Co v Carmichael 526 U.S. 151.

in science or other technology have difficulty correctly applying the standard to different experts.

Instead, the Naruse standard, which divides expert evidence into two categories and provides applicable standards for determining the reliability of each, would facilitate the judge's determination of the admissibility of evidence and contribute to the proper admission or exclusion of evidence.[42] Accordingly, this chapter adopts the Naruse standard and applies it to forensic interviews.

3.3.2 Application of the standard: The reliability of principles and methods based on experiences

For forensic interviews to be considered reliable in their principles and methods based on experiences, they need to have five key factors: (a') accumulation of experience, (b') track record, (c') clarity in explaining examination, (d') knowledge and experience, and (e') review and acceptance from other experts.

Starting with (a') accumulation of experiences: Forensic interviewing has built up a considerable body of research and experience in the field of psychology.[43] Since being developed around the 1990s, various protocols/guidelines for conducting interviews have been introduced and refined over time. Notably, the NICHD and ChildFirst protocols stand as prominent examples. These are widely used in the U.S. and internationally, and forensic interviewers receive regular training and practice based on these protocols. The knowledge and experience of forensic interviewing are built up through daily practice and research.

(b') Track record: The application of forensic interviews in deciding cases has been notably widespread. While their use as evidence in Japanese criminal trials has been limited to a few dozen cases,[44] the U.S. has seen a significant accumulation of precedents regarding the admissibility and credibility of forensic interviews.[45]

In addition, psychological studies have shown that forensic interviews are particularly effective in minimising stress for children compared to other interrogation methods. For example, a survey by Landström et al. compared children aged 10-11 years who were interviewed in different settings: in a courtroom with a mock judge and observer, via video link, and through a forensic interview (audio/visual recording). The results

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[42] Naruse (5) (n 1) 1062.

[43] KC Faller, 'Forty years of forensic interviewing of children suspected of sexual abuse, 1974-2014: Historical benchmarks' 4 Social Sciences 34. For example, Hershkowitz and others continually offer suggestions for improving the NICHD protocol through research (Hershkowitz, I and others, 'Dynamics of Forensic Interviews with Suspected Abuse Victims Who Do Not Disclose Abuse' 30 (7) Child Abuse & Neglect 753).

[44] 24 cases as of 2020 (Ministry of Justice (n 8) 34). The number of cases adopted into evidence is expected to increase following the amendment to the CCP.

[45] M Nakamura, 'Amerika ni okeru shihoumensetsu (Forensic Interviewing in the U.S.)' (2023) 76 Keijihou janaru (Criminal Law Journal) 54 (discussing many important U.S. case law); Vieth (n 2).

showed that 56% of the children felt nervous in the courtroom, 47% via video link, and only 19% during the audio/visual recording. This suggests that courtroom questioning is perceived as more challenging, whereas forensic interviews tend to be less intimidating.[46] Additionally, research by Lamb et al. references studies from Israel, the U.S., the United Kingdom, and Canada, indicating an increase in both the quantity and accuracy of children's testimonies following the implementation of forensic interviews in their legal system.[47]

(c') Clarity in explaining the examination: Forensic interviewers can usually explain the procedures and results of their interview in a clear and coherent manner. In addition, (d') Knowledge and experience: Their professional knowledge and experience are considered to be of a sufficient standard. This is because forensic interviewers in the U.S. receive ongoing, systematic training from the CACs. The NCA, which accredits CACs, outlines the essential elements of forensic interviewer training.[48] These elements include completing specific training content[49] and undertaking at least eight hours of continuing education every two years.[50]

In general, interviewers who undergo this ongoing training and regularly conduct forensic interviews are well-equipped to articulate their methods and findings effectively in court and have the necessary expertise.

In addition, (e') review or acceptance by other experts: The practice of forensic interviewing is highly regarded and established in the field of psychology, as evidenced by the extensive literature on the subject. Significantly, NICHD researchers have contributed to the field with approximately 100 peer-reviewed articles and five books by 2014,[51] positioning the NICHD as a central figure in forensic interviewing. These contributions have profoundly influenced the development of other forensic interview protocols.[52] Given the global adoption and advancement of forensic interviewing methods, it's clear that the technique has been thoroughly vetted and widely accepted.

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[46] S Landström and PA Granhag, 'In-Court Versus Out-of-Court Testimonies: Children's Experiences and Adults' Assessments' 24 Applied Cognitive Psychology 941.

[47] ME Lamb and others, *Tell Me What Happened: Questioning Children about Abuse* (John Wiley & Sons 2018).

[48] National Children's Alliance, *Standards for Accredited Members 2017 Edition* 21 (NCA 2017), Vieth (n 4) 857.

[49] The six elements of training contents are: 1. Minimum of 32 hours of instruction and practice; 2. Evidence-supported interview protocol; 3. Pre- and post-testing that reflects understanding the principles of legally sound interviewing; 4. Content that includes child development, question design, implementation of a protocol, dynamics of abuse, disclosure process, cultural competency, and suggestibility; 5. Practice component with a standardised review process; 6. Required reading of current articles specific to the practice of forensic interviewing. NCA ibid 21.

[50] ibid 21.

[51] Faller (n 43) 52.

[52] ibid 52.

Taking into account the above factors, it can be affirmed that forensic interviewing has acquired a sufficient level of experience, both in terms of quantity and quality. This ensures the reliability of its basic principles and methods, which are based on general judgements. The next step is to examine the proper application of principles and methods to the case in question, which is an individual and specific determination.

3.3.3 Application of the standard: The proper application of principles and methods

In assessing the proper application in the particular case, these four factors must be met: (i) the knowledge and experience of the expert; (ii) the accuracy of the testing equipment; (iii) the appropriateness of the specific examination procedure; and (iv) the authenticity and identity of the testing material. As for forensic interviews, the reliability of principles and methods based on experiences as a general requirement tends to be admitted in the U.S. So, the requirement of proper application is more likely to be disputed in cases.

Among these factors, (ii) the accuracy of testing equipment and (iv) the authenticity and identification of test materials usually do not pose concerns in forensic interviews. The reason is that forensic interviews do not rely on specialised testing apparatus,[53] and the verification of the examination subjects' (the interviewees, typically child victims) identity and authenticity generally remains unquestioned, barring extraordinary circumstances.[54]

The main concerns about the proper application of principles and methods in the specific case relate to (i) the expertise and experience of the expert involved. Forensic interviews are usually conducted by specialists affiliated with the CACs. When such specialists testify in court, their qualifications are often not questioned. This confidence stems from the NCA's minimum training requirements for forensic interviewers,[55] which, when adhered to, generally ensure their recognition as experts.

However, issues arise when the testimony comes from someone who is not a trained forensic interviewer. For example, if a prosecutor introduces a recording of a forensic interview during a trial, the defence may counter with the testimony of a psychological expert who has no or little experience of forensic interviewing to challenge the recording's content.

Indeed, the State of South Dakota v. Jonathan Charles Wills[56] highlighted this contentious issue of the admissibility of expert testimony. The prosecution presented a video of a forensic interview with the alleged victim, in which the CornerHouse protocol was used.

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[53] Tools such as anatomically collected dolls (dolls with genitalia) and body diagrams are sometimes used, but their accuracy is usually not an issue.

[54] An extraordinary situation would be, for example, if a child who reported being sexually victimised and his or her siblings were mistakenly interviewed. In practice, however, such cases are unlikely to occur.

[55] NCA (n 48) 21.

[56] State of South Dakota v. Jonathan Charles Wills, 908 N.W.2d 757 (SD 2018)

In an attempt to challenge the video's credibility, the defence tried to call upon a psychiatrist to provide testimony. Despite being a board-certified child and adolescent psychiatrist with some training in forensic interviewing of the NICHD protocol, her practical experience was limited to a single child victim interview, and her knowledge primarily came from literature and study.

The circuit court initially dismissed the psychiatrist's testimony based on South Dakota statute, which was in line with FRE 702. However, upon appeal, the South Dakota Supreme Court held that she had 'extensive education, training, knowledge, and experience in child psychiatry and forensic interviewing'[57] and overturned the circuit court decision, ruling that it had made an error in excluding the testimony.

This decision illustrates that an expert need not be familiar with every detail of the protocols relating to the area in which they are giving evidence.[58] Given the variety and specificity of forensic interview protocols, it is impractical to expect comprehensive knowledge of all protocols, so the court's decision would be thought as reasonable.

Next, (iii) the adequacy of the specific examination procedure comes into question. In the context of forensic interviews, this may be relatively straightforward to determine, as under this factor, if the interview follows a forensic interview protocol, the method is likely to be considered appropriate.

The issue arises when the interview does not follow the protocol. For example, protocols generally recommend limiting the number of interviews to one or two times.[59] This recommendation is based on the desire to minimise stress to the child and the potential for altering memories, suggesting that fewer interviews are preferable. Indeed, considering the burden placed on the child and the potential for trauma, it is desirable to have as few interviews as possible.

Nonetheless, several scenarios necessitate multiple interviews, including instances where a child hesitates to reveal details about a case when building rapport requires ad-

[57] 908 N.W.2d 769

[58] J Griffiths and R Martinez, 'Forensic Expert Witness Testimony Admissibility' (2018) 46 Journal of the American Academy of Psychiatry and the Law Online 537.

[59] M Naka. *Hokudai shihoumensetsu gaidorain (Hokkaido University Guideline for Forensic Interviews)* (2010) < https://forensic-interviews.jp/_obj/_modrewrite/doc/fi-20240609_276_2.pdf> accessed 2 Jun 2024. In 2019, forensic interviews conducted in Japan saw 91.45% of all cases concluded within a single session (Ministry of Justice (n 8) 20).

ditional time or when further investigation following a forensic interview prompts another session.[60] Moreover, a study examining the effects of multiple interviews on children's recall accuracy has revealed that the quantity of interviews does not affect the overall accuracy of recollections.[61]

Conducting multiple interviews, while mindful of the psychological impact on the child, can itself be beneficial for gathering information. As such, the admissibility of evidence should not be outright dismissed simply because the interview method deviates from the standard protocol. This factor must be assessed with careful consideration of the child's situation and the case's complexity.

If it can be demonstrated that the examination process of the forensic interview in the specific case was proper, then the forensic interview would be considered admissible as evidence.

3.4 Summary

This section has reviewed the rule of expert evidence and theory on it in the U.S. and applied it to the admissibility of forensic interviews. To summarise, the requirements of (1) reliability of the principles and methods, which are based on experiences, will usually be met without problems for the admissibility of forensic interviews. (2) the proper application of principles and methods to the case in question is also likely to be met in cases where the interview is given by a forensic interviewer who has undergone forensic interview training and complies with the protocol. However, since there are several possible problematic cases regarding the latter requirement, it will be necessary to consider it on a case-by-case basis.

4 The admissibility of forensic interviews in Japan

4.1 The rules on expert evidence in Japan

This section explores how the rule for expert witnesses is applied to forensic interviews in Japan. In Japan, the rules for expert witnesses are not settled, and two principal perspectives conflict: the lax view and the strict view.

4.1.1 The lax view

A crucial difference to note is the absence of a Japanese equivalent to 702 of FRE. That is, it seems that Japan has little need to control expert evidence as strictly at the stage of

[60] M Naka 'Jitsumu ni okeru shihoumensetsu no kadai (The Challenges of Forensic Interview in Practice)' (2017) 60 (4) Shinrigaku Hyoron (Japanese Psychological Review) 411.
[61] K Hubbard and others, 'Children's Recall Accuracy for Repeated Events over Multiple Interviews: Comparing Information Types' 23 Psychiatry, Psychology and Law 849.

determining the admissibility of evidence as the U.S. does. As a result, a perspective has emerged in Japan that advocates a laxer standard of admissibility for expert evidence.[62]

According to this viewpoint, expert evidence (both scientific and non-scientific expert evidence) does not necessarily have to meet strict criteria regarding the reliability of the underlying scientific theories and methods. Instead, their admissibility is generally accepted unless there are glaring flaws or significant doubts in the testing or evaluation processes relevant to the specific case. Typical examples involve contradictions or clear irrationalities in the test content or pronounced gaps in the examiner's qualifications.[63]

Subsequently, the reliability of the underlying principles and methods and the proper application of principles and methods in the specific case will not be examined when determining the admissibility but rather when assessing the probative value or credibility. This approach is significantly laxer than the strict standards set out in the Daubert/Kumho and Naruse frameworks.

4.1.2 The strict view

However, Naruse highlights a significant challenge: judges and lay judges often lack the scientific or other specialised knowledge necessary to accurately assess the credibility of expert evidence.[64] Moreover, given the need to evaluate all evidence comprehensively and swiftly at the stage of probative value, there is limited time to focus exclusively on expert evidence. On the other hand, demanding a strict examination of evidence at the admissibility stage has a practical advantage, ensuring a thorough assessment before determining credibility or probative value.[65]

The Japanese Supreme Court precedents can also be interpreted (although not explicitly) as establishing special requirements for expert evidence. The Supreme Court gave a decision on DNA typing, which is scientific expert evidence, holding that 'the MCT118 DNA typing has theoretical accuracy in its scientific principles and was carried out in a scientifically reliable manner by a person whose specific methods of implementation are mastered'.[66] This precedent considered similar requirements as the Daubert/Kumho or Naruse standards, namely (i) the theoretical accuracy of the scientific principle and (ii) the method of its implementation.

On the other hand, the admissibility of police dog odour evidence, which is non-scientific expert evidence, was admitted on the basis of the following points[67]: that the sniffing was carried out by a trainer with expert knowledge and experience, using a police dog with

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[62] The Training and Research Institute for Court Officials (ed), *Kagakutekishoko to kore wo mochiita saiban no arikata (Scientific Evidence and its Use in Criminal Trial)* (Housoukai, 2013) 37.
[63] ibid 37. Indeed, in most cases where expert evidence is presented, its admissibility of evidence is expected to be accepted.
[64] Naruse (1) (n 1) 51.
[65] ibid (5) 1052.
[66] Judgement of 7. 17, 2000, 54 (6) Keishu (Criminal Judgement of Supreme Court of Japan) 550.
[67] Judgement of 3. 3, 1987, 41 (2) Keishu (Criminal Judgement of Supreme Court of Japan) 60.

excellent sniffing abilities and in good physical condition; there was nothing improper in the process of collecting and storing the scents or in the manner in which the sniffing process was carried out. This case mainly concerned whether the process of the examination in the case in question was proper or not. It did not concern the reliability of the principles and methods underlying the expert evidence.

Considering these precedents, the Japanese Supreme Court appears to distinguish between scientific expert evidence and non-scientific expert evidence, requiring theoretical accuracy and the adequacy of the examination process for the former and only the adequacy of the examination process for the latter. This seems to be similar to the attitude of U.S. rules. In other words, Japanese supreme court tries to impose strict admissibility standards on expert evidence.[68]

On the other hand, however, the Supreme Court has not clarified what specific factors are required for each expert evidence. Thus, in the Japanese context, adopting the Naruse standard is adequate, as it establishes a strict and specified admissibility standard. This chapter will then discuss the admissibility of forensic interviews that apply this standard. To conclude, there are several grounds on which the admissibility of forensic interview evidence in Japan could be questioned or denied.

4.2 The admissibility standards and Japanese forensic interview

4.2.1 Application of the standard: The reliability of principles and methods based on experiences

First, the reliability of principles and methods based on experiences ((1) (a')- (e')) is likely to be considered as reliable in Japan as it is in the U.S. Many forensic interviews in Japan are based on U.S. methodologies. If the reliability of these underlying principles and methods for forensic interviews is accepted in the U.S., a similar acceptance is plausible in Japan. Therefore, this requirement is unlikely to pose a significant issue when determining the admissibility of forensic interview evidence.

In the past, forensic interviews could be excluded for not meeting this requirement because Japan did not have its own protocols. The forensic interview protocol currently introduced and practised in Japan was originally part of a series of child abuse response systems based on foreign child abuse legislation and sociocultural situations. Those pro-

[68] However, the Training and Research Institute for Court Officials does not share the above understanding of the Supreme Court's jurisprudence on DNA typing in particular. It argues that the theoretical correctness and the method of implementation held by the Supreme Court were only exemplified as natural elements underlying the absence of serious flaws or major doubts in the DNA typing in question. The Training and Research Institute for Court Officials (n 62) 27.
As the Supreme Court did not explicitly state that it would strictly examine expert evidence, the interpretation of the precedents is divided.

tocols have so far been understood and accepted as appropriate in Japan. Thus, if interviews are conducted by applying these protocols appropriately, there should be no problem with their admissibility.

However, there are several major problems with forensic interviewing practice in Japan. For example, as mentioned earlier, forensic interviews are almost always conducted by prosecutors or police officers. In addition, as there is no organisation such as the CACs in Japan, it often takes some time after an incident of suspected abuse occurs before a forensic interview is conducted. It was, therefore, necessary to create a protocol that would address these characteristics and enable forensic interviews to be as neutral and stress-free as possible.

In the absence of such protocols, the practice of forensic interviewing could be seen as not being thoroughly institutionalised in Japan.[69] In other words, it could be considered that (a') the method did not have a sufficient accumulation of knowledge and experiences, and (e') the method had not been well accepted in the field of Japanese forensic interviewing.

However, a non-profit organisation recently developed and published a 'Japanese version of the Guidelines'.[70] Recognising the need for forensic interviews to align better with Japan's legal and socio-cultural environment, the NPO created a set of guidelines that are user-friendly for those involved in the interviews, neutral, and less distressing for the child. This is a notable development. As such protocols are published and refined, forensic interviewing in Japan will gain recognition for the reliability of the principles and methods on which it is firmly based. This progress will ensure that forensic interviews are conducted appropriately and enhance their acceptance and admissibility in legal contexts.

4.2.2 Application of the standard: The proper application of principles and methods

The next requirement to address is the proper application of principles and methods to the case ((2)(i)-(iv) above), which involves a specific assessment. There are several concerns in this area as for Japanese practice.

First, there is the question of who conducts the forensic interview. As noted above, forensic interviews in Japan are predominantly conducted by prosecutors and police officers. While they are trained in forensic interview techniques and usually follow protocols, the ideal scenario is for forensic interviews to be conducted by neutral experts. In the

[69] In practice, a decision to exclude evidence is unlikely to be made solely on the grounds that the Japanese version of the forensic interview protocol does not exist. However, the fact that the reliability of the underlying principles and methods has not been established could be one decent basis for the exclusion of evidence.

[70] Tsunagg, *Nihonban shihoumensetsu gaidoraine (Japanese Version of Forensic Interview Guideline)* (Tsunagg 2023) <https://drive.google.com/file/d/1AT2gHPEfYANC3amaBAUtOs3fylwHzVEX/view> accessed 10 Jun 2024

U.S., for example, trained forensic interviewers at the CACs, who operate independently of investigative agencies, typically conduct these interviews.

This contrasts with the inherent bias of investigative authorities, whose primary interest may lie in gathering evidence to support a prosecution. Thus, this could potentially compromise the interview's neutrality, which is aimed at avoiding leading questions and suggestions, minimising questioning, and eliciting uninfluenced narratives.[71] In connection with the requirements for the proper application of principles and methods, a forensic interview conducted by an entity with a vested interest in the investigation's outcome could undermine the validity of (iii) the specific examination procedure by introducing the risk of bias or misguidance.

Furthermore, since prosecutors and police officers are not psychology experts and do not routinely engage in forensic interviewing, the (i) expertise and experience of the individual conducting the interview could also be grounds for questioning the admissibility of the evidence.

Secondly, issues also arise regarding the training for forensic interviews. While forensic interview training in Japan is acknowledged for its quality,[72] participation in ongoing training is left to individual practitioners. In contrast, in the U.S., the NCA imposes a minimum condition, including eight hours of continuing education every two years for forensic interviewers. Moreover, a national survey shows frontline forensic interviewers engage in an average of 5.12 hours of peer review monthly.[73]

This highlights a significant concern with Japanese practice, where the provision for continuous training and peer review is not guaranteed. Furthermore, various studies have underscored that the impact of forensic interview training may diminish over time, emphasising the importance of ongoing supervision and feedback.[74] This point relates to (i): an investigator who was only trained once a few years ago does not have sufficient knowledge and experience to be considered an acceptable expert.

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[71] Midori (n 17) 44; Kawaide (n 17) 277.

[72] Y Takeda and others, 'Kakukikan ni okeru NICHD protocol ni motoduku shihoumensetsu kenshu no genjou to kadai (Current Situation and Challenges of Forensic Interview Training Based on the NICHD Protocol at Institutions)' 23 (1) Houtoshinri (Japanse Journal of Law and Psychology) 36 [A Uemiya].

[73] MB Fessinger and BD McAuliff, 'A National Survey of Child Forensic Interviewers: Implications for Research, Practice, and Law' 44 Law Hum Behav 123.

[74] I Hershkowitz and others, 'The Effects of Mental Context Reinstatement on Children's Accounts of Sexual Abuse' (2001) 15 Applied Cognitive Psychology: The Official Journal of the Society for Applied Research in Memory and Cognition 235, ME Lamb and others, 'Is Ongoing Feedback Necessary to Maintain the Quality of Investigative Interviews with Allegedly Abused Children?' (2002) 6 Applied Developmental Science 35, RM Smith and others, 'The Relationship between Job Status, Interviewing Experience, Gender, and Police Officers' (2009) Adherence to Open-ended Questions' 14(1) Legal and Criminological Psychology 51, Lamb (n 47) 202.

As has been discussed, there are some issues in Japanese forensic interview practice, and these could influence the decision on the requirement of proper application of principles and methods to the case in question.

4.2.3 Recommendations for Japanese practice: Preventing the exclusion of evidence

The discussion so far has explored the admissibility of evidence from forensic interviews within the framework of the expert evidence rules. To summarise, in the U.S., the Daubert decision and FRE 702, shaped by Daubert, dictate the admissibility of expert witness evidence. However, this chapter has adopted the Naruse standard, an advanced adaptation of these rules.

According to the Naruse standard, forensic interviews are typically admitted if they meet two essential requirements: (1) the reliability of the foundational principles and methods and (2) the proper application of these to the case in question**.** Thus, a forensic interview's primary area of contention often pertains to its credibility or evidential value. Conversely, in Japan, there exists potential for challenging the admissibility of forensic interview evidence.

Thus, proposing measures to minimise the chances of evidence being excluded would be helpful. First, forensic interviewers need to be neutral experts. Currently, investigative bodies such as prosecutors and police officers are responsible for most forensic interviews. However, as already pointed out, this practice is problematic. Therefore, it is conceivable to increase the number of neutral experts, such as forensic interviewers in the U.S., and have them conduct forensic interviews. This direction needs to be taken now that the statutory reasons for prosecutors to perform them have faded, as noted above.

To increase the number of neutral experts, it is necessary to increase the number of organisations serving as parent organisations. Currently, One-Stop Centres for counselling on sexual crimes and violence have been established in various parts of Japan. However, there is currently only one centre per prefecture. Expanding centres provide prompt protection for children in cases where forensic interviews need to be conducted[75]. Also, there could be a possibility of establishing new institutions, such as Child Rights Advocacy Centres, which specialise in forensic interviewing and its training.[76]

Alternatively, ICT/AI technology could be used instead of neutral experts (or as a supplementary tool). For example, a computer-based interview method called In My Shoes has been shown to be as effective as interviews conducted by forensic interviewers[77]; developments such as AI and machine learning could further develop these interview

[75] Naka (n 4) 13.
[76] Kida (n 11) 53.
[77] K Fängström and others, 'In My Shoes–Validation of a computer assisted approach for interviewing children' (2016) 58 Child abuse & neglect 160.

methods.[78] From a cost perspective, this may be more realistic than establishing One-Stop Centres or Child Rights Advocacy Centres.

5 Conclusion

Forensic interviewing in Japan has just begun and may be subject to various reforms. For future development, this chapter examines the admissibility of forensic interview evidence from the perspective of expert witnesses, identifies areas in which Japanese forensic interviews need to be improved, and proposes measures to address these issues.

Before concluding the discussion, it is worth considering the criticisms that this chapter can expect. This chapter considers the admissibility of forensic interview evidence in Japan with reference to U.S. law and theory on expert evidence. However, its position could still be criticised as unacceptable in that there are no provisions or rules on expert evidence, and therefore, it is impossible to adopt the rules into Japanese law.

Certainly, one could think in this way.[79] However, even in this case, there is a possibility that the analysis in this chapter contributes to another area other than the rules on expert evidence: interpretation of the amendment to the CCP adopted in 2023. As mentioned above, the new provision stipulates that recorded media of forensic interviews in which 'necessary measures are taken to ensure that the deponent makes a sufficient statement' or 'necessary measures are taken to ensure that the content of the statement is not unduly influenced' may be admitted into evidence as a hearsay exception (**CCP 321-3(2)**). So far, what necessary measures mean is not clear in the interpretation of the provision.

The analysis in this chapter can be applied to this new provision. Namely, the specific content of these 'necessary measures' can be defined as 'the appointment of an expert who meets the standard of expert evidence, which is required to meet in criminal cases'. This would reflect the considerations of this chapter as one of the requirements of the hearsay exception without having to rely on the expert evidence rule, which (according to an anticipated criticism) is not adoptable in Japan. If such an interpretation is possible, this chapter's consideration of the admissibility of forensic interview evidence from the perspective of expert evidence rules may be helpful in the future when considering the hearsay exception.

[78] Z Durante and others, 'Causal Indicators for Assessing the Truthfulness of Child Speech in Forensic Interviews' (2022) 71 Computer Speech & Language 101263 (identifying patterns of intonation, speech, and response can reveal what the child cannot say).

[79] Many Japanese scholars position the admissibility of expert evidence as a matter of 'relevancy of evidence' (expressed in 317 of CCP or 199-14 of the Rules of Criminal Procedure) (Naruse (5) (n 1) 1042). This article also takes this position. According to this, the rules have a statutory foundation. But here, as the supposed criticism says, the argument proceeds as if there were no basis in statute law.

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PRIVATE ACCESSORY PROSECUTORS AND THEIR INFLUENCE ON GERMAN CRIMINAL PROCEEDING

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Abstract

Insufficient victim protection and, consequently, ineffective victims' rights are a global issue without a globally binding and final solution. The EU Victims' Rights Directive, however, strives for harmonisation within the Member States and may act as a role model, albeit not all-encompassing, to other countries. The implementation of the Directive offers opportunities to expand these requirements. The wording 'shall be determined by national law' plays an essential role in the implementation, which in Germany leads to a graduated regulatory regime. Specifically, the rights of private accessory prosecutors – in short, a person who joins the criminal proceedings brought by the public prosecutor without replacing them – go well beyond the rights of other victims. There is, therefore, also a gradation of rights within Germany instead of a completely uniform picture. However, if and insofar as rights go further than EU minimum standards, practical problems also arise. In particular, the extent of the right to inspect files is the subject of controversial debate. On the one hand, the victim should be given protective mechanisms. On the other hand, extensive victims' rights generate criticism regarding the rights of the accused. These conflicting rights are especially crucial in word-against-word situations when too much information on the victims' side leads to questions regarding their credibility.

1 Introduction

The victim and their testimony often are crucial for criminal proceedings. Conversely, there is no victim protection without proper criminal proceedings.[1] In older publications, one reads, for example, 'the accused is a subject of the proceedings with rights and obligations at all stages of the criminal proceedings. The victim, on the other hand, is primarily an object of investigation'.[2] Nevertheless, at least in most legal systems, victims are granted rights. Hence, they are not only subjects or witnesses but parties of the proceeding. Partly far-reaching rights also ensure that they are not 'a largely functionless process figure'[3] anymore. However, as no globally binding human rights exist, the derivation and concrete formulation of victims' rights vary and are sometimes tricky.

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[1] See the highly problematic example *Navalnyy v. Russia No. 3* App No. 36418/20 (6 Jun 2023), para 113; *Yengibaryan and Simonyan v. Armenia* App No. 2186/12 (ECtHR 20 Sep 2023), para 78.

[2] Martin Heger, 'Die Rolle des Opfers im Strafverfahren' [2007] JA 244 [translated from German].

[3] From the perspective of legal history Heike Jung, 'Die Stellung des Verletzten im Strafprozeß' [1981] ZStW 1147, 1160 [translated from German].

The binding European Union (EU) Victims' Rights Directive[4] (hereinafter: Directive) sets minimum standards for EU Member States. These are now to be expanded further. According to a proposal from 12 July 2023, the EU Commission seeks to strengthen the rights of victims of crime.[5] This involves strengthening access rights and practical considerations like establishing a universal victims' helpline in the EU area.

The EU minimum standard already intends to provide basic protection throughout the EU and can serve as a model for international standards. This paper intends to provide a comparative overview of various minimum standards of the EU on the one hand and certain aspects of German law on the other hand, as an example of domestic implementation. The focus is on the current status of opportunities for victims in Germany to influence criminal proceedings. As specific rights of action remain fruitless in practice if there is a lack of essential measures – such as information about rights or, if necessary, a translator – influence is not only understood to refer to active procedural rights but in a broader sense. If the increased requirements prove to be reasonable and practicable, it is recommended that they be adopted as a standard, at least on a European scale. Moreover, discussions about European standards can offer valuable insights and benchmarks for non-EU countries seeking to improve their legal frameworks. By studying the EU's approach, non-EU countries can identify best practices and potential enhancements to better protect victims' rights.

In Germany, private accessory prosecutors (Nebenkläger) have significantly more extensive rights than other victims. In practice, the involvement of private accessory prosecutors and their lawyers corresponds to fewer acquittals and harsher penalties.[6] Accordingly, the private accessory prosecution is declared to be the 'most important instrument for the protection of victims in criminal proceedings'[7]. In order to demonstrate this, their specific rights are to be emphasised.

Firstly, the fundamental terms are explained below. The focus will then be on the discussion of specific rights of the Directive and their German implementation as well as the specifics on private accessory prosecutors.

[4] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57.

[5] Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

[6] Stephan Barthon and Christian Flotho, *Opferanwälte im Strafverfahren* (Nomos 2010) 87 ff.

[7] Stephan Barton, '§ 19 Das Opfer' in Eric Hilgendorf and Hans Kudlich and Brian Valerius (eds) *Handbuch des Strafrechts: Band 7 Grundlagen des Strafverfahrensrechts* (C.F. Müller 2020) para 131 [translated from German].

2 Terminology and differentiation between victims, the right to join as a private accessory prosecutor and private accessory prosecutors

The EU Directive uses the term 'victim'. In contrast, the German Criminal Procedural Code (Strafprozeßordnung / StPO) uses the term 'aggrieved person'. In addition, under German law there are differentiated rights for victims in general and for those who are entitled to join as a private accessory prosecutor as well as those who actually joined in particular. These different terms are described in this section.

2.1 Victim and aggrieved person

According to Art. 2 No. 1 lit. a of the Directive, 'victim' means a natural person who *has suffered* harm (i) and, under certain circumstances, their family members (ii). However, the Directive does not refer to the phase after the conviction but is effective from the first contact with the competent authority; see, for example, Art. 3 para 1, Art. 4 para 1 Directive. Since the phrase *has suffered* assumes that the victim-testimony is truthful, it is in tension with the presumption of innocence (Art. 48 para 1 Charter of Fundamental Rights of the European Union).

The term 'aggrieved person' is widely used in German criminal procedure law. According to § 373b para 1 StPO, this term includes a person whose legally protected interests were interfered with or who incurred direct harm on account of an act *assuming* or having finally established said act's commission. The wording indicates that the actual existence of a violation cannot be assumed at every stage of the criminal proceedings (presumption of innocence!) but that victims' rights already exist beforehand.[8] The German concept of 'aggrieved person' includes both natural and legal persons.[9] The concept of the aggrieved person is, therefore, more extensive than that of the victim within the meaning of the Directive. The same applies to certain related parties of a person whose death was directly caused by a criminal, as stated in Art. 2 No. 1 lit. a, ii Directive and (the same) in § 373b para 2 StPO.[10]

[8] Detlef Burhoff, 'Der (neue) Begriff des Verletzten in § 373b StPO – Voraussetzungen und Auswirkungen' [2022] StRR 5, 7; Julius Hagen, *Die Nebenklage im Gefüge Strafprozessualer Verletztenbeteiligung: Der Weg in die Viktimäre Gesellschaft. Gesetzgebung und Reformdiskurs seit 1870*, (De Gruyter 2021) 359; Brian Valerius, '§ 64 Privatklage und Nebenklage' in Eric Hilgendorf and Hans Kudlich and Brian Valerius (eds) *Handbuch des Strafrechts: Band 7 Grundlagen des Strafverfahrensrechts* (C.F. Müller 2020) para 73; Bernhard Weiner '§ 373b' in Jürgen Graf (ed) *BeckOK StPO mit RiStBV und MiStra* (50th edn, C.H. Beck 2024) para 17; before the implementation of the legal definition Rita Haverkamp, 'Im Labyrinth des Opferschutzes – Zum Entwurf eines Dritten Opferrechtsreformgesetzes' [2015] ZRP 53, 55.

[9] More detailed Stephan Barton, '§ 19 Das Opfer' in Eric Hilgendorf and Hans Kudlich and Brian Valerius (eds) *Handbuch des Strafrechts: Band 7 Grundlagen des Strafverfahrensrechts* (C.F. Müller 2020) para 15, 32.

[10] Bernhard Weiner '§ 373b' in Jürgen Graf (ed) *BeckOK StPO mit RiStBV und MiStra* (50th edn, C.H. Beck 2024) paras 39–51.

2.2 The right to join as a private accessory prosecutor

Further rights are granted to those victims who are entitled to join as private accessory prosecutors. Not every 'normal'[11] victim has the right to join. In principle, this specific right is reserved[12] for certain offences; see the catalogue of § 395 para 1 StPO. These offences[13] mainly encompass homicide, sexual offences, false imprisonment, and assault. The law explicitly lists them, and for the victim to be a private accessory prosecutor, it suffices – according to the view expressed here – if the subsequent conviction is possible;[14] others require probable cause.[15] For offences that are not listed (see § 395 para 3 StPO), such as hate speech, there must be specific reasons that enable the victim to act as a private accessory prosecutor. That will be examined based on the offences' consequences for the victim. If the law only refers to the *right to join*, the actual joining is irrelevant.

Even more rights exist exclusively for private accessory prosecutors, ie those who actually joined. The declaration of the private accessory prosecutor takes effect with the public charge, § 396 para 1 sentence 2 StPO.[16] This gives them the legal status of a party to the proceedings.[17] In proceedings involving penal orders, where legal consequences of less serious criminal offences are imposed upon written application by the public prosecution office, see § 407 para 1 StPO, this takes effect when a date for the main hearing has been set down or an application for issuance of a penal order has been refused. Despite the additional rights, the responsibility for investigating the facts remains with the

[11] On the categorisation Klaus Schroth and Marvin Schroth, *Die Rechte des Verletzten im Strafprozess* (3rd edn, C.F. Müller 2018) para 137.

[12] Angelika Allgayer, '§ 395 StPO' in Christoph Barthe and Jan Gericke (eds) Karlsruher Kommentar zur Strafprozessordnung (9th edn, C.H. Beck 2023) para 5; Brian Valerius '§ 397a StPO' in Christoph Knauer and Hans Kudlich and Hartmut Schneider (eds) Münchener Kommentar zur StPO (C.H. Beck 2018) para 40 'abschließend'.

[13] On the frequency of private accessory prosecutor prosecutors in main hearings Heinz Schöch, 'Opferrechte im Strafprozess in Deutschland' in Lyane Sautner and Udo Jesionek (eds), *Opferrechte in europäischer, rechtsvergleichender und österreichischer Perspektive* (Studienverlag 2017) 119, 136.

[14] See BGH order of 20.5.2008 – 5 StR 15/08, BeckRS 2008, 19238 para 1.

[15] Reasonable suspicion [hinreichender Tatverdacht]: OLG (Higher Regional Court) Hamburg order of 10.05.2005 – 2 Ws 28/05, BeckRS 2005, 7419; OLG Oldenburg order of 25.2.2009 – 1 Ws 120/09, NStZ 2011, 117, 118; Marc Wenske, 'Vor § 395' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO*: *Band 9/2 §§ 373b–406l* (27th edn, De Gruyter 2022) para 21.

[16] See also Bernhard Weiner '§ 395' in Jürgen Graf (ed) *BeckOK StPO mit RiStBV und MiStra* (50th edn, C.H. Beck 2024) para 37; Marc Wenske, '§ 395' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO*: *Band 9/2 §§ 373b–406l* (27th edn, De Gruyter 2022) para 74.

[17] Marc Wenske, '§ 395' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO*: *Band 9/2 §§ 373b–406l* (27th edn, De Gruyter 2022) para 74.

courts, and in particular there is no conversion into a party process.[18] The private accessory prosecutor is not an assistant to the public prosecutor but an individual party to the proceedings.[19]

3 Specific rights of the Directive and their German implementation

3.1 Significance of EU directives for the Member States

European directives do not apply directly to the Member States of the European Union but must be implemented into national law. The objectives set by the directives must not only be formally achieved, but the goal is to 'ensure its application in full'.[20] The fact that these are only minimum standards that can be overstepped is already apparent from the title of the Directive. Unlike an EU Regulation, the Directive is neither conclusive nor does it lead to full harmonisation within the EU.

3.2 Individual rights of victims and traceability to the Directive

In order to simplify a comparison of the requirements, it is useful to group the rights. Various approaches are taken in the literature here. A chronological grouping according to the different phases of the proceeding is not helpful since since some rights exist in several of those phases. Since even a differentiation[21] between negative rights against procedural impairments on the one hand and possibilities to actively influence the process on the other hand does not provide a clear distinction,[22] the groups should be more defined to give an overview.

[18] Stephan Barton, '§ 19 Das Opfer' in Eric Hilgendorf and Hans Kudlich and Brian Valerius (eds) Handbuch des Strafrechts: Band 7 Grundlagen des Strafverfahrensrechts (C.F. Müller 2020) para 163.

[19] Brian Valerius, '§ 64 Privatklage und Nebenklage' in Eric Hilgendorf and Hans Kudlich and Brian Valerius (eds) Handbuch des Strafrechts: Band 9 Strafprozessuale Rechtsmittel, besondere Verfahrensarten, Strafvollstreckung und internationale Bezüge (C.F. Müller 2020) para 37.

[20] Case C-62/00 Marks & Spencer plc and Commissioners of Customs & Excise (ECJ 11 July 2002) para 26; Matthias Ruffert 'Art. 288 AEUV' in Christian Calliess and Matthias Ruffert (eds) EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharter, (6th edn, C.H. Beck 2022) para 28.

[21] Peter Rieß, *Die Rechtsstellung des Verletzten im Strafverfahren: Gutachten C zum 55. Deutschen Juristentag* (C.H. Beck 1984) para 86; following 'status aktivus' and 'status passivus' Thomas Weigend, *Deliktsopfer und Strafverfahren* (Duncker&Humblot 1989) 423; see also 'Schutz- und Abwehrregelungen' and 'aktive Beteiligung' Stravroula N. Patsourakou, *Die Stellung des Verletzten im Strafrechtssystem* (Forum Verlag Godesberg 1994) 56, 75.

[22] Marius Endler, Die Doppelstellung des Opferzeugen: Zur Vereinbarkeit der Informations-, Offensiv- und Beistandsrechte des Opfers mit dessen Zeugenstellung (Nomos 2019) 56.

Schünemann has elaborated a nuanced differentiation on the 'typology of victims' rights': authority of disposition, monitoring rights, offensive rights, information rights, defensive rights and restoration rights.[23] *Kölbel/Bork*[24] added the right to assistance.[25] In order to make an explicit comparison possible, an even more detailed categorisation based more closely on the Directive seems appropriate here.

The right to be heard is separated as a fundamental right on which the majority of other rights are logically based. *Authority of disposition* (such as the right to lodge and withdraw a criminal complaint or to conduct a private prosecution) is not included in the specifications of the Directive, so this group is not included here. Monitoring rights are included here under *offensive rights.* In contrast, the information rights are divided here into *information about rights* and *information about the case*. Instead of categorising defensive rights, *protection from perpetrators and third parties* on the one hand and *protection rights against re-victimisation* on the other are chosen due to the often different direction of protection needs. The latter includes any state mechanisms that are likely to deprive the victim of their subject status or further endanger their psychological situation.[26] The group of *restoration rights* is sufficiently limited to enable a comparison. The rights of assistance vary not only in terms of the different directions of protection but also in terms of the different people involved. Accordingly, there is a split between *legal assistance, including legal aid*, on the one hand, and *other assistance* on the other. The boundaries are not seamless, even in this categorisation.

3.2.1 Right to be heard

Art. 10 para 1 sentence 1 Directive requires to ensure that victims may be heard during criminal proceedings and may provide evidence. According to para 2, the procedural rules shall be determined by national law**.** It is thus up to the Member States, in particular, to determine when this hearing is to take place in the course of the proceedings and to determine its extent.

According to § 69 para 2 sentence 2 StPO, witnesses who have been *aggrieved* by the offence are, in particular to be given the opportunity to make submissions *concerning the effects* which it had on them. Therefore, the right to be heard only extends to the effects, not the legal judgement or other circumstances.

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[23] Bernd Schünemann, 'Zur Stellung des Opfers im System der Strafrechtspflege' [1986] NStZ 193 (196).
[24] Ralf Kölbel and Lena Bork, Sekundäre Viktimisierung als Legitimationsformel (Duncker&Humblot 2012) 16 f.
[25] Detailed on the individual categories also in Marius Endler, Die Doppelstellung des Opferzeugen: Zur Vereinbarkeit der Informations-, Offensiv- und Beistandsrechte des Opfers mit dessen Zeugenstellung (Nomos 2019) 57; Petra Velten, '§§ 374–406h' in Jürgen Wolter (ed), *Systematischer Kommentar zur Strafprozessorndnung: Mit GVG und EMRK* (Heymanns 2020) para 36 ff.
[26] The Directive uses the wording secondary and repeat victimisation in the context of act of the offender.

In contrast, the private accessory prosecutor is an actor in the process[27] and is not limited to statements concerning the effects the offence had on them. Private accessory prosecutors are also entitled to be present at the main hearing even if they are examined as witnesses.[28] § 69 StPO does not specify when the aggrieved person is to be heard. In any case, this must be possible before the proceedings are concluded. It is, therefore, correct to demand that the aggrieved person is instructed even if they are not needed in court as a witness, so that they are nonetheless able to execute their right to be heard.[29]

Therefore, Germany makes use here of the reference to the national law in so far as a gradation is made between aggrieved person and private accessory prosecutor with regard to the extent of the statement and the presence in court.

3.2.2 Legal assistance including legal aid

According to Art. 13 Directive, Member States shall ensure that victims have access to legal aid, *where they have the status of parties* to criminal proceedings. However, the conditions or procedural rules shall – as is often the case – be determined by national law; see also recital 20 Directive.

The requirements for legal aid are graded according to German law. According to § 406f para 1 sentence 1 StPO, *aggrieved persons* may avail themselves of the assistance of a lawyer or may be represented by such lawyer. However, as they do not generally have the status of a party, the costs are to be borne by themselves.[30] This applies even in the event of a conviction.[31]

In contrast, the private accessory prosecutors (and those entitled to join, see the reference in § 406h para 3 StPO) must be granted a lawyer as counsel free of charge and irrespective of income in relation to the offences listed enumeratively in § 397a para 1 StPO.[32] The intention is to prevent the latter from the risks of having to bear the costs.[33] The general public bears the cost risk regarding the victim's lawyer.[34] However, this transfer of the

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[27] BT-Drucks. 10/5305, 14; Angelika Allgayer, '§ 395 StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 1.

[28] At the same time 'monitoring right' but categorised here because of the close connection.

[29] Stefan Maier '§ 69 StPO' in Christoph Knauer and Hans Kudlich and Hartmut Schneider (eds) Münchener Kommentar zur StPO (2nd edn, C.H. Beck 2023) para 30.

[30] Anna Zabeck, '§ 406f StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 6.

[31] Carsten Grau '§ 406f StPO' in Christoph Knauer and Hans Kudlich and Hartmut Schneider (eds) *Münchener Kommentar zur StPO* (C.H. Beck 2019) para 1; Marc Wenske, '§ 406f' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO*: *Band 9/2 §§ 373b–406l* (27th edn, De Gruyter 2022) para 9.

[32] For criticism in this regard, see Brian Valerius '§ 397a StPO' in Christoph Knauer and Hans Kudlich and Hartmut Schneider (eds) *Münchener Kommentar zur StPO* (C.H. Beck 2018) para 5.

[33] Angelika Allgayer, '§ 397a StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 1.

[34] Angelika Allgayer, '§ 397a StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 1.

cost risk does not apply to the compensation of other necessary expenses incurred by the private accessory prosecutor, like travelling expenses.[35]

The catalogue includes a range of offences that are directed against life, physical integrity, personal freedom or sexual self-determination. However, it excludes not only pure property offences but also sexual offences that only constitute a misdemeanour (eg forced marriage in § 237 para 1 of the German Criminal Code (Strafgesetzbuch / StGB) or deprivation of liberty in § 239 para 1 StGB), as well as minor offences against physical integrity and negligence offences in general. If, for special reasons, an aggrieved person is exceptionally allowed to join as a private accessory prosecutor for other offences, they bear the litigation risk.

If the accused is convicted, they must bear the costs of the private accessory prosecutor.[36] Generally, this also applies if the proceedings are dismissed with conditions under § 153a StPO; see § 172 para 2 sentence 2 StPO. In case the court terminates the proceedings under a provision permitting this at the court's discretion, it *may* charge the necessary expenses, in whole or in part, to the indicted accused *insofar as this is equitable for particular reasons*. In principle, therefore, the costs of the private accessory prosecution remain with the private accessory prosecutor if the prosecution is dismissed.[37] Whether the costs incurred by the private accessory prosecutor in such cases can never[38] be charged to the state budget or whether this must be possible in exceptional[39] cases is controversial. In practice, this will generally not be the case.

§ 153a para 1 sentence 2 No. 1 StPO includes the rendering of a specified service to make reparations for damages caused by the offence as a possible condition for dismissing the proceedings. However, the costs of the private accessory prosecutor are not a possible

[35] BGH judgement of 5.11.2014 – 1 StR 394/14, NStZ-RR 2015, 44, 45.

[36] Georg Gieg, '§ 472 StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 2.

[37] Further on §§ 153, 154 and 170 para 2 StPO David Rieks, 'Die Nebenklage – Terra Incognita des Wirtschaftsstrafverfahrens' [2019] NStZ, 643, 645; on §§ 206a, 206 b and 260 para 3 StGB see Bertram Schmitt '§ 154a StPO' in Bertram Schmitt and Marcus Köhler (eds) *Meyer-Goßner/Schmitt Strafprozessordnung mit GVG und Nebengesetzen* (66th ed, C.H. Beck 2023) para 2.

[38] Georg Gieg, '§ 472 StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 2; Bertram Schmitt '§ 472 StPO' in Bertram Schmitt and Marcus Köhler (eds) *Meyer-Goßner/Schmitt Strafprozessordnung mit GVG und Nebengesetzen* (66th ed, C.H. Beck 2023) para 3.

[39] Accepted, for example, in the case of withdrawal of request after a diagnosis of schizophrenia OLG Düsseldorf order of 18.11.2013 – III-2 Ws 545/13, NStZ 2014, 424.

reparation.[40] This is justified by the fact that these costs are also not refundable as damages under civil law.[41] In addition, according to § 470 StPO, the entire costs of the proceedings, including expenses, must be borne by the injured party (in this case, the applicant) if the criminal complaint is withdrawn. Such a withdrawal can, for example, result from a civil settlement. However, the costs could also be imposed on the accused or a secondary party per sentence 2 if the latter agrees to this – at least implicitly.[42]

Therefore, private accessory prosecutors generally face a risk of having to bear the costs concerning other expenses. For those private accessory prosecutors and aggrieved persons not charged with a catalogue offence, there is also an increased cost risk concerning assistance. Accordingly, it is sometimes considered that the claim for reimbursement of costs against the offender should be claimed by the state together with the other costs of the proceedings, as this does not represent a significant additional expense for the state.[43] Of course, this only applies if such a claim for reimbursement exists and the convicted person is solvent. Particularly in the case of minor offences, a cost risk that exceeds the damage does not appear reasonable and should not be imposed on the state. However, an exception seems appropriate if a conviction fails due to the exclusion of evidence based on state failures.

3.2.3 Other assistance

Other assistance includes all types of support that lawyers do not provide. As not every victim has the same needs, the EU has also recognised the necessity to identify such. Specifically, translation and interpreting services and representatives for a child should be considered in this context. Psychological support and support from trusted persons also fall into this group but are not considered in more detail.

Identify specific protection needs

Art. 22 Directive states that the Member States must identify specific protection needs. § 48a para 1 sentence 2 StPO explicitly mentions categories for vulnerable *witnesses who are also aggrieved persons*: 1. imminent risk of serious detriment to their wellbeing, 2. whether overriding interests meriting protection require that the public be excluded and

[40] OLG Frankfurt order of 27.9.1979 – 3 Ws 740/79, MDR 1980 515 f; Herbert Diemer '§ 153a StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 14; Bertram Schmitt '§ 153a StPO' in Bertram Schmitt and Marcus Köhler (eds) *Meyer-Goßner/Schmitt Strafprozessordnung mit GVG und Nebengesetzen* (66th ed, C.H. Beck 2023) para 16; Markus Mavany, '§ 153a' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO: Band 5/1 §§ 151–157* (27th edn, De Gruyter 2018) para 60.

[41] Markus Mavany, '§ 153a' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO: Band 5/1 §§ 151–157* (27th edn, De Gruyter 2018) para 60 with further references.

[42] Affirmed, for example, in connection with the declaration of an apology LG (regional court) Potsdam order of 2.3.2006 – 21 Qs 27/06, NStZ 2006, 655.

[43] In that sense Kai Helmken, Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum (Peter Lang 2020) 440.

3. possibility to refrain from asking non-essential questions concerning the witness's personal sphere of life. Protection seems, therefore, to be limited to the witness situation. According to § 48a para 2 StPO, concerning a minor aggrieved person, it must be conducted in a particularly expedited manner insofar as necessary. Offers for additional sorts of support take place in Germany via the German federal states ('Länder').[44] The police are in close contact with victim protection organisations in this regard.[45]

Right to understand and to be understood

According to Art. 3 para 1 Directive, Member States shall take appropriate measures to assist victims to understand and to be understood from the first contact. In its para 2, 'simple and accessible language, orally or in writing' is explicitly named. In order to ensure this, in particular, the rights to which they are entitled, the wording must first be formulated in a way that is understandable to legal laypersons.[46] Special precautions must also be taken for victims with a language barrier. § 185 para 1 sentence 1 of the Courts Constitution Act (Gerichtsverfassungsgesetz / GVG) applies: If persons participating in the hearing do not have a command of the German language, an interpreter shall be called in. According to § 186 para 1 sentence 1 GVG, communication with a hearing-impaired or speech-impaired person during the hearing shall, *at his choice*, take place orally, in writing or with the assistance of a communication facilitator to be called in by the court. Due to the right to choose, the German implementation goes beyond the minimum EU requirement.[47] The fact that non-impairment-related communication problems are not explicitly mentioned (eg non-medically related illiteracy)[48] can – as assumed here – be solved by an analogy due to the comparable interests involved.

However, it is noticeable that the wording 'in the hearing' in § 185 GVG only refers to court hearings, *judicial hearings*, and interrogations, but not police questioning.[49] The directive states to ensure these provisions in 'accordance with their role […] at least during

[44] In this regard, see for instance: Bayerisches Staatsministerium der Justiz, 'Opferschutz in Bayern' <https://www.justiz.bayern.de/service/opferschutz/> (Justiz Bayern); Kompetenzzentrum für ambulante Resozialisierung und Opferhilfe Saarland, 'Zeugenbetreuung' (Saarland) <https://www.saarland.de/karo/DE/themen-aufgaben/zeugenbetreuung/zeugenbetreuung_node.html> accessed 26 May 2024.

[45] Franz Kirchberger, Informiertheit über Opferrechte aus der Sicht der Polizei in Weisser Ring *Opferschutz – unbekannt: Aktuelle Entwicklungen bei Opferschutz und Opferrechten* (Nomos 2006) 37, 41.

[46] Kai Helmken, *Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum* (Peter Lang 2020) 224; Klaus Puderbach, Informiertheit über Opferrechte aus der Sicht der Justiz in Weisser Ring *Opferschutz – unbekannt: Aktuelle Entwicklungen bei Opferschutz und Opferrechten* (Nomos 2006) 43 f.

[47] Kai Helmken, Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum (Peter Lang 2020) 243.

[48] Kai Helmken, Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum (Peter Lang 2020) 243.

[49] Angelika Allgayer, '§ 185 GVG' in Jürgen Graf (ed) *BeckOK GVG* (21st edn, 2023) para 1; Herbert Diemer '§ 185 GVG' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 1; Mustafa Temmuz Oğlakcıoğlu, '§ 185 GVG' in Christoph Knauer and Hans Kudlich and Hartmut Schneider (eds) *Münchener Kommentar zur StPO* (C.H. Beck 2018) para 32.

any interviews or questioning of the victim during criminal proceedings before investigative and judicial authorities', see Art. 7 Directive. If victims are involved in the process, interpretation should also be possible during police questioning. This right is explicitly guaranteed for persons who have the right to join as private accessory prosecutors (§ 187 para 4 GVG in conjunction with 395 StPO). It is rightly criticised that the applicant for adhesion proceedings is not named here, although they can also be a party to the proceedings in the preliminary proceedings.[50]

Representatives for a child

According to Art. 24 para 1 lit. b Directive, competent authorities have to appoint a special representative for child victims where, according to national law, the holders of parental responsibility are precluded from representing the child victim due to a conflict of interest between them and the child victim. In § 52 para 2 sentence 2 StPO, this is only stated for the refusal of testimony; if the statutory representative is himself or herself accused, said representative may not decide on exercising the right of refusal to testify. A reference to this is contained in the examination of the minor in § 81c para 3 sentence 2 StPO. Nevertheless, there is no explicit provision in the StPO exercising other rights, as other measures can replace parental custody in these cases.

In combination with the withdrawal of parental custody (§§ 1629 para 2, 1789 para 2 sentence 3 and 4 German Civil Code (Bügerliches Gesetzbuch / BGB)), a supplementary guardianship can be appointed following §§ 1629 para 2, 1824 para 1 No. 3, § 1809 para 1 BGB. Such guardianship can be appointed by the youth welfare office, not only for the right to refuse to testify but also to release treating doctors from their duty of confidentiality, to consent to a physical examination of the child, to file a criminal complaint, to file an application for accessory prosecution and to arrange other assistance.[51]

Therefore, regarding specific protection needs the German law refers not exclusively to private accessory prosecutors but also to all vulnerable witnesses. Related to the right to be heard the wording of German procedural law is related to hearing-impaired or speech-impaired. This shortening of the Directive's provision must at least be revised through interpretation. Lastly, appointing a special representative for child victims in Germany is far-reaching a matter of civil law. This is in line with the Directive, as the reference is only to national law, not specifically criminal law.

3.2.4 Information about rights

Member States shall ensure that victims are offered information listed there, *without unnecessary delay* [German translation of the Directive 'unverzüglich'], from their first contact with a competent authority in order to enable them to access the rights set out in this

[50] Kai Helmken, Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum (Peter Lang 2020) 244.
[51] For example, in the case of AG (county court) Dieburg order of 23.3.2023 – 53 F 763/22 PF, BeckRS 2023, 12383.

Directive, Art. 4 Directive. In German law, this was implemented in §§ 406i ff StPO. While is the different wording 'as early as possible' [German 'möglichst frühzeitig'] in noteworthy, there is no differing practice since information sheets[52] are handed out upon first contact. In addition, an instruction according to § 170 para 2 StPO is given with submitting the indictment. Thus, German law closely mirrors the Directive regarding this right.

3.2.5 Information about the case

According to Art. 6 para 1 Directive, the Member States shall ensure that victims are notified without unnecessary delay of their right to receive information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and, upon request information about any decision not to proceed with or to end an investigation or not to prosecute the offender (lit a), the time and place of the trial, and the nature of the charges against the offender. Para 2 adds information about any final judgement in a trial (lit. a) and information about the state of the criminal proceedings (lit. b).

According to § 158 para 1 StPO, the aggrieved person is to be provided with a written confirmation of the report. However, it may not be issued if that would affect the investigation. The victim may request information about 1. the termination of the proceedings, 2. the place and time of the main hearing, charges against the defendant, and 3. the outcome of court proceedings. In that regard, the StPO closely mirrors the Directive.

In contrast, information enabling them to know about *the state* of the criminal proceedings is phrased in very general terms in the Directive. The status of the proceedings could – interpreted narrowly – also be read as only concerning the question of the stage of the investigation, for example, whether investigations are still ongoing or files have already been submitted to the court. According to § 406e para 1 sentence 1 StPO, a lawyer may, on the aggrieved person's behalf, *inspect the files* which are available to the court or the files which would need to be submitted if public charges were preferred and may view items of evidence in official custody if they can show a legitimate interest therein. The assertion of further rights – such as admission of evidence or rights of refusal – may depend on the inspection of files, so this is of crucial importance.[53] The term case file (§§ 147, 199 para 2 sentence 2 StPO) includes the original (analogue or digital)[54] medium.

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[52] Kai Helmken, *Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum* (Peter Lang 2020) 244; Gisela Frederking, Informiertheit über Opferrechte aus der Sicht des Opferanwalts in Weisser Ring *Opferschutz – unbekannt: Aktuelle Entwicklungen bei Opferschutz und Opferrechten* (Nomos 2006) 33; Klaus Puderbach, Informiertheit über Opferrechte aus der Sicht der Justiz in Weisser Ring *Opferschutz – unbekannt: Aktuelle Entwicklungen bei Opferschutz und Opferrechten* (Nomos 2006) 43.

[53] Anja Riemann-Uwer, 'Das Akteneinsichtsrecht des Nebenklägers unter Berücksichtigung von § 19 Abs. 2 S. 2 BORA' [2021] StraFo 414.

[54] Bertram Schmitt '§ 406e StPO' in Bertram Schmitt and Marcus Köhler (eds) *Meyer-Goßner/Schmitt Strafprozessordnung mit GVG und Nebengesetzen* (66th ed, C.H. Beck 2023) para 4.

A legitimate interest may be of an actual, economic or idealistic nature.[55] Recognised are, for example, the examination of remedies against decisions to not prosecute the case (§ 172 StPO) and civil[56] law claims.[57] The private accessory prosecutor is privileged in this respect. According to § 406e para 1 sentence 2 StPO, he does not need to justify a legitimate interest.[58]

This far-reaching right has been widely criticised in the literature. One argument in this context is the so-called constancy analysis.[59] This is used to analyse similarities or differences between several statements made by the same person at different times.[60]

Some argue that discretion would generally be reduced to zero in word-against-word constellations.[61] This cannot be accepted in this absolute sense. One argument against denying the right to inspect files is that the consistency of testimony is, per se, prone to

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[55] Georg Gieg, '§ 475 StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) paras 4 f.

[56] BVerfG order of 24. 9. 2002 – 2 BvR 742/02, NJW 2003, 501, 503; BVerfG order of 5.12.2006 – 2 BvR 2388/06, NJW 2007, 1052, 1053; BVerfG order of 4.12.2008 – 2 BvR 1043/08, BeckRS 2009, 18693; but see on the necessity of justifying the need for evidence BVerfG order of 9.12.2015 – 1 BvR 2449/14, BeckRS 2016, 40532 para 6; differing view Daniel M. Krause 'Das Akteneinsichtsrecht (§ 406e StPO) von Kapitalanlegern in Strafverfahren wegen verbotener Marktmanipulation (§§ 38 Abs. 2, 20a WpHG)' in Heinz Schöch and others (eds), *Strafverteidigung, Revision und die gesamte Strafrechtswissenschaft: Festschrift für Gunter Widmair zum 70. Geburtstag* (Carl Heymann 2008) 639, 655–657.

[57] Kai Helmken, Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum (Peter Lang 2020) 239; Bertram Schmitt '§ 406e StPO' in Bertram Schmitt and Marcus Köhler (eds) Meyer-Goßner/Schmitt Strafprozessordnung mit GVG und Nebengesetzen (66th ed, C.H. Beck 2023) para 4.

[58] David Rieks, 'Die Nebenklage – Terra Incognita des Wirtschaftsstrafverfahrens' [2019] NStZ, 643, 644.

[59] Ulrich Eisenberg, 'Zwei Entscheidungen des 5. Strafsenats des BGH zur Würdigung der in Kenntnis der Verfahrensakten erfolgten Aussage eines Nebenklägers' [2017] JR 390, 394; Kai Helmken, *Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum* (Peter Lang 2020) 236; also preparation of the statement Marc Wenske, '§ 406e' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO*: *Band 9/2 §§ 373b–406l* (27th edn, De Gruyter 2022) para 28, similar Bernd Schünemann, 'Der Ausbau der Opferstellung im Strafprozeß – Fluch oder Segen?' in Regina Michalke and others *Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008* (De Gruyter. 2008) 693.

[60] Jesko Baumhöfener and Beate Daber and Marc Wenske, 'Die Aktenkenntnis des Verletzten in der Konstellation Aussage-gegen-Aussage' [2017] NStZ 562, 564; Daniel Effer-Uhe and Alica Mohnert, *Psychologie für Juristen* (Nomos 2019) paras 277–279; Günter Köhnken, 'Fehlerquellen in aussagepsychologischen Gutachten' in Günter Köhnken and Rüdiger Deckers (eds), *Die Erhebung und Bewertung von Zeugenaussagen im Strafprozess: Juristische, aussagepsychologische und psychiatrische Aspekte | 3. Band* (BWV 2019) 44; Wolfgang Steffen, Opferschutz vs. Wahrheitsfindung – das betreute Opfer als Störfaktor? (aus Sicht der Justiz) in Weisser Ring *Opferschutz – unbekannt: Aktuelle Entwicklungen bei Opferschutz und Opferrechten* (Nomos 2006) 111, 115; Renate Volbert and Max Steller 'Glaubhaftigkeit' in Thomas Bliesener and Friedrich Lösel and Günter Köhnken (eds) Lehrbuch Rechtspsychologie (Verlag Hans Huber 2014) 391, 396; varying the expected constancy depending on the event Robert Häcker 'C. Die Lüge' in Rolf Bender and Robert Häcker and Volker Schwarz (eds), *Tatsachenfeststellung vor Gericht* (5th edn, C.H. Beck 2021) paras 499 ff.

[61] OLG Hamburg order of 22.07.2015 – 1 Ws 88/15 – juris; Marc Wenske, 'Vor § 406e' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO*: *Band 9/2 §§ 373b–406l* (27th edn, De Gruyter 2022) para 29 with further references.

error. A factually experienced event is supposed to be more memorable than an invented one.[62] However, there is also a natural inconsistency in factually experienced events.[63] The memory can also be refreshed using personal notes[64] and by conversations.[65] Multi-page police reports can also contain memory-based errors, which undermine analysis.[66] The questioning technique itself can also play a significant role. [67]

Finally, the victim's statement may be influenced by other factors – such as therapy or severe traumatisation – and thus complicate the truth-finding process.[68] The constancy of the statements, therefore, is 'not as predictive as we might expect'[69].

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[62] Kai Helmken, Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum (Peter Lang 2020) 241; Jennifer von Buch and Romina Müller and Denis Köhler, Einführung in die Rechtspsychologie Grundlagen und Praxis der Forensischen und Kriminalpsychologie (Springer 2022) 99; See the different study results in relation to the influence of stress and trauma Mark L. Howe and Lauren M. Knott and Martin A. Conway, Memory and Miscarriages of Justice (Routledge 2018) 79 ff.

[63] Deborah A. Connolly and Heather L. Price 'Repeated Interviews About Repeated Trauma from the Distant Past: A Study of Report Consistency' in Barry S. Cooper and Dorothee Griesel and Marguerite Ternes (eds), *Applied Issues in Investigative Interviewing, Eyewitness Memory, and Credibility Assessmen*t (Springer 2013) 191; accordingly, a certain degree of inconsistency is a sign of credibility: OLG Braunschweig order of 3.12.2015 – 1 Ws 309/15, BeckRS 2015, 20532, para 10; Heinz Schöch, 'Das Akteneinsichtsrecht des Verletzten bei Sexualdelikten' in Christoph Safferling and others *Festschrift für Franz Streng zum 70. Geburtstag* 747.

[64] Weißer Ring BaWü, 'Zeugenbegleitung und Zeugenbetreuung' even recommends taking notes <https://schwarzwald-baar-kreis-baden-wuerttemberg.weisser-ring.de/zeugenbegleitung-und-zeugenbetreuung> point 5 accessed 26 May 2024.

[65] Gabriele Jansen, *Zeuge und Aussagepsychologie* (3rd eds, C.F. Müller 2022) para 124; Günter Köhnken, 'Fehlerquellen in aussagepsychologischen Gutachten' in Günter Köhnken and Rüdiger Deckers (eds), *Die Erhebung und Bewertung von Zeugenaussagen im Strafprozess: Juristische, aussagepsychologische und psychiatrische Aspekte | 3. Band* (BWV 2019) 44.

[66] Rüdiger Deckers, 'Aussagekonstanz aus juristischer und aussagepsychologischer Sicht' [2017] StV 50, 51.

[67] Ronald P. Fisher and Aldert Vrij and Drew A. Leins 'Does Testimonial Inconsistency Indicate Memory Inaccuracy and Deception? Beliefs, Emperical Research, and Theory' in Barry S. Cooper and Dorothee Griesel and Marguerite Ternes (eds), Applied Issues in Investigative Interviewing, Eyewitness Memory, and Credibility Assessment (Springer 2013) 173, 183.

[68] Bernd Schünemann, 'Der Ausbau der Opferstellung im Strafprozeß – Fluch oder Segen?' in Regina Michalke and others Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008 (De Gruyter. 2008) 694 even speaks of ruining his function as witness [original 'Ruinierung seiner Zeugenfunktion']; Wolfgang Steffen, Opferschutz vs. Wahrheitsfindung – das betreute Opfer als Störfaktor? (aus Sicht der Justiz) in Weisser Ring *Opferschutz – unbekannt: Aktuelle Entwicklungen bei Opferschutz und Opferrechten* (Nomos 2006) 111 ff; Critical on delay from a psychological point of view Günter H. Seidler, Opferschutz vs. Wahrheitsfindung – das betreute Opfer als Störfaktor? (aus Sicht des Therapeuten) in Weisser Ring *Opferschutz – unbekannt: Aktuelle Entwicklungen bei Opferschutz und Opferrechten* (Nomos 2006) 119, 122.

[69] Ronald P. Fisher and Aldert Vrij and Drew A. Leins 'Does Testimonial Inconsistency Indicate Memory Inaccuracy and Deception? Beliefs, Emperical Research, and Theory' in Barry S. Cooper and Dorothee Griesel and Marguerite Ternes (eds), *Applied Issues in Investigative Interviewing, Eyewitness Memory, and Credibility Assessmen*t (Springer 2013) 173, 187.

Consequently, the German Federal Supreme Court (BGH) decided that exercising the right to inspect files does not typically result in a devaluation of the consistency of the testimony.[70] The argument put forward by the BGH in this decision is that the free decision to request access to the files would otherwise be jeopardised and the BGH uses the right to refuse to testify under § 52 StPO as a reference.[71] In this context, it is generally recognised that no conclusions to the detriment of the accused may be drawn when assessing the evidence.[72] However, this comparison is misguided in several respects: On the one hand, the right to refuse to testify is guaranteed unconditionally. On the other hand, the right to inspect files is already subject to the normative restriction of the legitimate interests of the accused or third parties. In addition, the victim is not deprived of any rights if their statement is not utilised (no right to conviction!);[73] it is merely not utilised for their benefit.

It is correct that access to files is not excluded from the outset if there is a word-against-word situation. A different rule applies if there are indications of false testimony, deviating statements or other specific reasons in the specific case.[74] However, the extent of the inspection must be carefully weighed up. Depending on the case, a restriction is conceivable with regard to witness statements by third parties, for example. It also makes sense to strike a balance by involving the lawyer. In this case, the lawyer submits a declaration to the effect that they will not disclose the files to the client and assures that they will not disclose the specific content to the client.[75] However, this is also criticised as not being equally effective.[76] In practice, nevertheless, this often proves to be an effective means. Firstly, lawyers in Germany are regarded as trustworthy, independent agents of the administration of justice, see § 1 Federal Code for Lawyers (Bundesrechtsanwaltsordnung / BRAO). Secondly, it is not in their interest to reduce the evidential value of the statement.[77] Correspondingly, it is sometimes recommended for practical implementation that the private accessory prosecutor should not take part in the main hearing

[70] BGH order of 5.4.2016 − 5 StR 40/16, NStZ 2016, 367.
[71] BGH order of 5.4.2016 − 5 StR 40/16, NStZ 2016, 367.
[72] Instead of all Matthias Huber '§ 52 StPO' in Jürgen Graf (ed) *BeckOK StPO mit RiStBV und MiStra* (50th edn, C.H. Beck 2024) para 29; Alexander Ignor and Camilla Bertheau, '§ 52 StPO' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO: Band 2 §§ 48–93* (27th edn, De Gruyter 2018) para 40; Helmut Kreicker '§ 52 StPO' in Christoph Knauer and Hans Kudlich and Hartmut Schneider (eds) *Münchener Kommentar zur StPO* (2nd edn, C.H. Beck 2023) para 74.
[73] The right to effective prosecution does not imply a specific result, see BVerfG judgement of 31.10.2023 – 2 BvR 900/22, NJW 2023, 3698 para 133 and particularly cannot override the in dubio pro reo principle.
[74] Heinz Schöch, 'Das Akteneinsichtsrecht des Verletzten bei Sexualdelikten' in Christoph Safferling and others Festschrift für Franz Streng zum 70. Geburtstag 747.
[75] Heinz Schöch, 'Praxishinweis zu OLG Braunschweig, Beschl. v. 3.12.2015 − 1 Ws 309/15' [2016] NStZ 631, 632.
[76] Jesko Baumhöfener and Beate Daber and Marc Wenske, 'Die Aktenkenntnis des Verletzten in der Konstellation Aussage-gegen-Aussage' [2017] NStZ 562, 565.
[77] Anja Riemann-Uwer, 'Das Akteneinsichtsrecht des Nebenklägers unter Berücksichtigung von § 19 Abs. 2 S. 2 BORA' [2021] StraFo 414 with further references.

until their examination as a witness has been completed,[78] or the court should hear them first.[79] If the handling in the specific procedure is different, a careful and unbiased examination of the statement must take place,[80] and all possible influencing factors must be recognised and included in the decision.[81]

Therefore, in German law, the victim's right to receive information about the case goes beyond the EU Directive concerning the extent of the information and the early timing of the access. However, this is criticised on the one hand and, on the other, practical approaches are put forward to do justice to both the victims' interests and the practical problems.

3.2.6 Monitoring rights

Victims should be able to provide evidence in accordance with national law, see Art. 10 Directive. In Germany, this right is, in turn, bound to the private accessory prosecution, see § 397 StPO. Private accessory prosecutors are entitled to ask questions, to apply for evidence to be taken and to make statements. In case of multiple offences the right to apply for evidence is not limited to those offences entitling the private accessory prosecutor as such.[82]

According to Art. 11 No. 1 Directive, victims shall, in accordance with their role in the criminal justice system, have the right to a review of a decision *not to prosecute*. According to No. 2, this should at least apply to victims of serious crimes. There is no such requirement as far as other decisions are concerned – such as the sentencing decision.

In general, according to § 172 para 2 sentence 1 StPO, a victim is entitled to lodge a complaint against the notification made pursuant to § 171 StPO with the official with supervisory authority over the public prosecution office. They can apply for a court decision regarding the dismissal of the complaint according to para 2. This possibility is referred to as a dead end [original: 'Sackgasse']83, as it is no longer possible to appeal against this

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[78] Bernhard Weiner '§ 395' in Jürgen Graf (ed) *BeckOK StPO mit RiStBV und MiStra* (50th edn, C.H. Beck 2024) para 16.

[79] Brian Valerius, '§ 64 Privatklage und Nebenklage' in Eric Hilgendorf and Hans Kudlich and Brian Valerius (eds) Handbuch des Strafrechts: Band 9 Strafprozessuale Rechtsmittel, besondere Verfahrensarten, Strafvollstreckung und internationale Bezüge (C.F. Müller 2020) para 78.

[80] BGH judgement of 13.10.2020 – 1 StR 299/20, BeckRS 2020, 34098 para 8; LG Landshut judgement of 17.3.2021 – 4 KLs 404 Js 23832/20, BeckRS 2021, 32667, para 107 more pronounced 'critical' [original: 'kritische'].

[81] BGH order of 7.4.2020 – 4 StR 622/19, BeckRS 2020, 12250 para 10; BGH order of 28.4.2022 – 4 StR 299/21, BeckRS 2022, 14134; para 8; BGH order of. v. 11.01.2023 – 6 StR 448/22, BeckRS 2023, 1696 para 5.

[82] Against the restriction BGH judgement of 7.4.2011 – 3 StR 497/10, NStZ 2011, 713, 714; Stefanie Bock, 'Das Beweisantragsrecht des Nebenklägers – ein Recht zweiter Klasse? Anmerkung zu BGH 5 StR 547/09 vom 28. April 2010' [2011] HRRS 119, 220; but in favour of a restriction BGH order of 28.4.2010 – 5 StR 487/09, BeckRS 2010, 13675 para 5; David Rieks, 'Die Nebenklage – Terra Incognita des Wirtschaftsstrafverfahrens' [2019] NStZ, 643, 644; Bernhard Weiner '§ 397' in Jürgen Graf (ed) *BeckOK StPO mit RiStBV und MiStra* (50th edn, C.H. Beck 2024) para 8.

[83] Thomas Feltes, 'Der Strafverfolgungs-Verhinderungs-Paragraf § 172 StPO' [2022] StraFO 178.

decision. However, the Directive only requires the right to *a* review, ie in the singular. An infringement is, therefore, not apparent.

Private accessory prosecutors can also appeal insofar as they are adversely affected (§§ 400 f StPO). According to § 400 para 2 StPO, in the case of a termination according to §§ 206a and 206b StPO, the private accessory prosecutor has the right of immediate complaint. The same applies to the refusal to issue a penal order in accordance with § 408 para 2 sentence 2 StPO. This is also assumed for dismissal by judgement in accordance with § 260 para 3 StPO.[84]

In this context, it appears problematic that missed deadlines due to breaches of the duty to inform under § 406i ff StPO cannot be reinstated in the status quo ante in accordance with § 44 StPO.[85] This can have considerable consequences particularly if the information about the connection as a private accessory prosecutor has not been provided (clearly enough).[86]

Thus, German national law, again, differentiates rights between victims on the one hand and private accessory prosecutors on the other. Meanwhile, the minimum requirements of the Directive are generally fulfilled. However, one particular point of criticism must be emphasised in the case of absence of information.

3.2.7 Protection from perpetrator and third parties

According to the categorisation used here, protection from the perpetrator and third parties does not only relate directly to physical protection. The mere sense of security is also essential – especially in court proceedings. The victim's privacy must also be protected in order to prevent long-term repression. The latter two will be focussed on here.

Avoiding visual contact

Art. 23 para 3 Directive aims to avoid visual contact including during the giving of evidence between victims and offenders using communication technology. This is implemented in Germany through the possibility of audio-visual questioning (§ 247a StPO). The possibility of removing the accused according to § 247 StPO is also a suitable method in principle, even if the explanatory memorandum to the law does not explicitly refer to

[84] Angelika Allgayer, '§ 400 StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 8.

[85] Dismissive BGH order of 10.7.1996 – 2 StR 295/96, NStZ-RR 1997, 136; Reinhard Böttcher 'Unterlassener Hinweis auf die Nebenklagebefugnis – folgenlos' in Heinz Schöch and others, *Strafverteidigung, Revision und die gesamten Strafrechtswissenschaften: Festschrift für Gunter Widmaier zum 70. Geburtstag* 81, 92, on the contrary, describes this as an appropriate measure to avoid errors.

[86] In more detail Reinhard Böttcher 'Unterlassener Hinweis auf die Nebenklagebefugnis – folgenlos?' in Heinz Schöch and others (eds), *Strafverteidigung, Revision und die gesamte Strafrechtswissenschaft: Festschrift für Gunter Widmair zum 70. Geburtstag* (Carl Heymann 2008) 81, 84 ff with further references.

this.[87] With regard to the latter, however, it is emphasised that this only refers to the victim's statement, not the entire interrogation situation; therefore, eye contact is not entirely avoided.[88] The wording of the Directive 'including' is wider, but not very precise.

Private sphere

Pursuant to Art. 23 para 3 lit. d Directive, for victims with specific protection needs, there shall be measures allowing a hearing to take place without the presence of the public. According to § 171b para 1 sentence 1 GVG, the public may be excluded if circumstances from the private sphere[89] of a participant, a witness or an aggrieved person mentioned would violate interests meriting protection. Sentence 3 and para 2 guarantee even greater protection for minors. However, concerns are expressed with regard to the principle of publicity and a relativisation is demanded in this respect by 'outweighing the private interest over the general interest'[90]. A consideration of the circumstances in each individual case is suitable to fulfil the needs of the specific case.

According to § 68 para 1 sentence 1 StPO, the *witness* is not even asked to give his full address in the presence of the defendant and in the main hearing as long as there is no doubt about the witness's identity. If there is well-founded reason to fear that revealing the identity or the place of residence or whereabouts of a witness would endanger that witness's or another person's life, limb or liberty, the witness may according to para 3, be permitted not to provide personal identification data or to provide such data only in respect of an earlier identity. There is thus also protection here that is not explicitly required by the Directive.

Therefore, the protection from perpetrators is not fully utilised regarding the visual contact interpreting the Directive in a broad sense. Preventing eye contact is not always guaranteed. The specific cases in which the public is to be excluded are subject to interpretation under both the Directive and German law. However, it is also noteworthy here that German law includes witnesses in this protection.

3.2.8 Protection from secondary victimisation

The term victimisation refers to the harm caused by the act itself; secondary victimisation means an inappropriate reaction of the environment, which presents further disadvantages for the victim.[91] In this subsection, the focus should not be on perpetrators and third parties but on criminal justice itself, as the latter can also cause disadvantages for

[87] See BT-Drucks. 18/4621, 18.

[88] Kai Helmken, Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum (Peter Lang 2020) 342.

[89] For the protection of company secrets, see David Rieks, 'Die Nebenklage – Terra Incognita des Wirtschaftsstrafverfahrens' [2019] NStZ, 643, 644.

[90] Kai Helmken, Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum (Peter Lang 2020) 252.

[91] Susanne Niemz, Resozialisierung und Partizipation im Strafrechtssystem: Urteilsabsprachen und Opferinteressen in Verfahren mit Nebenklagebeteiligung (Beltz Juventa 2016) 94.

victims through incorrect or insensitive behaviour by law enforcement authorities. There are also various mechanisms by which this can be avoided.[92] One important factor is the aggrieved person's sense of shame. According to Art. 23 para 3 lit. c, the Directive aims to avoid unnecessary questioning concerning the *victim's* private life unrelated to the criminal offence. German law is more far-reaching in this respect, as according to § 68a para 1 StPO, facts which may dishonour *the witness* or a *relative of the witness* or *concern their personal sphere of life* are, as a rule, to be asked only if they cannot be dispensed. 'Cannot be dispensed' here means *necessary* for investigating the truth.[93] This section will examine in more detail the need for questioning and investigation by the same sex on the one hand and the number of interviews on the other.

Measures by the same sex

According to Art. 23 para 2 lit. d Directive, all *interviews* with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, are *being conducted by a person of the same sex* as the victim, *if the victim so wishes*. The StPO is silent concerning the interview itself. In contrast, the Directive does not comment on other measures. However, Number 220 Instructions on Criminal Procedure and Administrative Fines Procedure (Richtlinien für das Strafverfahren und das Bußgeldverfahren/ RiStBV) even states regarding physical examinations that they should be assigned to a person of the same sex 'if possible' [original 'möglichst']. A similar principle can be found at the level of the German federal states. According to a decree in North Rhine Westphalia, the victim's wishes regarding the sex of the interrogator must be taken into account as far as possible.[94] While the wording initially appears to be more limited, the point of reference here is broader. According to the wording, it is not only a wish to be questioned by one's own gender that is covered but also a general wish regarding gender. However, there is a lack of a clear demand. Overall, the German regulations regarding interviews are, therefore, limited compared to the Directive. This is justified with the reservation of practical realisation.[95]

In contrast, there are more specific requirements for the physical examination (§ 81d StPO), which is to be performed by a person of the same sex or by a physician (of the

[92] Comments on other stress factors caused by criminal proceedings for the victim Susanne Niemz, Resozialisierung und Partizipation im Strafrechtssystem: Urteilsabsprachen und Opferinteressen in Verfahren mit Nebenklagebeteiligung (Beltz Juventa 2016) 100 ff.

[93] BGH judgement of 29.9.1959 – 1 StR 375/59, NJW 1959, 2075; BGH judgement of 10.11.1967 – 4 StR 512/66, NJW 1968, 710, 713; criticising the core area of a person's private life that is not explicitly protected according to this wording Kai Helmken, *Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum* (Peter Lang 2020) 324.

[94] See 4.5 sentence 2 NRW, 'Bearbeitung von Straftaten gegen die sexuelle Selbstbestimmung, RdErl. d. Innenministeriums v. 3.2.2004 – 42 – 6503' (Recht NRW, 3 February 2004) <https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=1&bes_id=3264&aufgehoben=N> accessed 26 May 2024.

[95] BT-Drucks. 18/4621, 18.

same or another sex). Whether an exception to this rule can be considered if an immediate examination is necessary (in particular for fleeting traces) and its implementation cannot otherwise be guaranteed is controversial.[96] Firstly, it is not evident why it should be of relevance for, eg, a woman's sense of shame whether the man examining her is a medical professional or not. Secondly, the existence of mixed saunas and nudist beaches in Germany speaks against the need for strict sex separation. Therefore, the person concerned must have the right to choose in urgent cases. The free will must be ensured. According to the view expressed here, such an exception can only be considered if the victim expressly requests it.

A particular problem arises in relation to the so-called third sex. In Germany, it has been possible to register as diverse since 2018. However, this depends on physical characteristics.[97] In the first two years after the change in the law, less than 400 people in Germany registered as diverse.[98] Some criticise also the definition based solely on physical characteristics.[99] However, this is de lege lata in line with the explanatory memorandum to the law. The commentary literature even ignores the physical characteristics of diverse people. For example, the current editions still limit the protective concept of § 81e StPO to two sexes without making a separate reference to diverse persons.[100] Here – concerning practicability – a right to choose between a man and a woman is demanded for affected persons.[101]

Therefore, in German law avoiding unnecessary questioning includes more people in the scope. Physical examinations, in contrast, are subject to the reservation of practical possibility.

Number of interviews

Secondary victimisation can also be a threat during the proceedings due to the number of interviews. According to Art. 20 lit. b Directive, the number of interviews of victims is to be kept to a minimum and they are to be carried out only where strictly necessary. If

[96] For an exception in urgent cases Thomas Trück, '§ 81d StPO' in Christoph Knauer and Hans Kudlich and Hartmut Schneider (eds) *Münchener Kommentar zur StPO* (2nd edn, C.H. Beck 2023) para 6; against Schmitt '§ 81d StPO' in *Meyer-Goßner/Schmitt Strafprozessordnung mit GVG und Nebengesetzen* (66th ed, C.H. Beck 2023) para 3.

[97] BT-Drucks. 19/4669, 7.

[98] Birte Bredow and Jean-Pierre Ziegler, 'Knapp 1600 Menschen ändern ihren Geschlechtseintrag' (Spiegel, 02 February 2021) <https://www.spiegel.de/politik/deutschland/maennlich-weiblich-divers-knapp-1600-menschen-aendern-geschlechtseintrag-a-af9159d2-bbd1-4dde-ae45-13ae68248856> accessed 26 May 2024.

[99] Jeja Klein, 'Diverse Menschen: Sächsische Polizei bestimmt Geschlecht einfach selbst' (Queer, 17. July 2021) <https://www.queer.de/detail.php?article_id=39479> accessed 26 May 2024.

[100] Anke Hadamitzky, '§ 81d StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 1 both [original 'beiderlei']; Bertram Schmitt '§ 81d StPO' in Bertram Schmitt and Marcus Köhler (eds) *Meyer-Goßner/Schmitt Strafprozessordnung mit GVG und Nebengesetzen* (66th ed, C.H. Beck 2023) para 1 of the opposite sex [original 'des anderen Geschlechts'].

[101] For example, in general for trans and intersex people during searches of a person Bayerischer Landtag Drucks. 18/15041, 3.

there is a high level of suspicion based on the case file, attempts are made in practice to avoid re-interviewing the victim in court, particularly in the case of sexual offences, due to the risk of re-traumatisation[102].

Additionally, all interviews with a child victim may be audiovisually recorded, and such recorded interviews may be used as evidence in criminal proceedings, Art. 24 No. 1 lit. 1 Directive. This was implemented in Germany by §§ 58a and 255a StPO. According to § 58a para 1 sentence 1 StPO, a video and audio recording *may* be made of the examination of *a witness*. Regarding the *recording* itself are, therefore, no restrictions regarding the age of the victim or the offence, but it is also not a binding provision. The use of such recordings contradicts the principle of immediacy (§ 250 StPO) in criminal proceedings, which in some cases must be accepted for reasons of victim protection.[103] Concerning persons under 18, there is a mandatory provision if a catalogue offence pursuant to the *use* of the recording in § 255a para 2 StPO exists. Only in proceedings relating to offences against sexual self-determination or life or to ill-treatment of persons in one's charge or relating to offences against personal liberty under §§ 232 to 233a StPO, the examination of the child may be substituted, § 255a para 2 StPO.

Thus, as the Directive states that the procedural rules for recording and its use shall be determined by national law, there is no infringement in this respect. However, this should only fulfil the minimum standard. If it is assumed that the victim does not have to be summoned at all if there is a high level of suspicion of an offence, this appears to be softened in practice. However, the catalogue should be formulated as a principle in order to take exceptional cases into account.

3.2.9 Restoration

Finally, the circumstances under which the aggrieved person can obtain compensation in the broader sense will be examined. Adhesion and civil law compensation proceedings can be considered for compensation in a narrower sense. But the latter is not considered in detail here. As the victim-offender mediation also[104] serves the purpose of restitution, it is also included in this context.

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[102] Axel Wendler and Helmut Hoffmann, Technik und Taktik der Befragung: Prüfung von Angaben. Gespräche, Interviews und Vernehmungen zielorientiert vorbereiten und führen. Urteile richtig begründen, Fehler in Urteilen aufdecken. Lüge und Irrtum erkennen (2nd edn, Kohlhammer 2015) I.4 para 16.

[103] Herbert Diemer '§ 155a StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 3.

[104] There has been a change in focus from the rehabilitation of the offender and the purposes of punishment to victims' rights, see Klaus Schroth, 'Der Täter-Opfer-Ausgleich: Eine Zwischenbilanz in Regina Michalke and others Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008 (De Gruyter. 2008) 678 f.

Adhesion proceedings

In addition to the right to return property under Art. 15 Directive, Art. 16 para 1 Directive ensures that, *in the course of criminal proceedings*, victims are entitled to obtain a decision on compensation by the offender within a reasonable time, *except where national law provides for such a decision to be made in other legal proceedings*.

According to § 403 StPO, the aggrieved person may, in the criminal proceedings, bring a property claim against the accused arising out of the offence. However, there are constellations in which this is not possible. Adhesion proceedings do not take place in summary proceedings without a trial due to the lack of a main hearing.[105] In this respect, the explanatory memorandum refers to the opening clause of Art. 16 para 1 Directive 'except where national law provides for such a decision to be made in other legal proceedings'. It is criticised that the Directive only differentiates according to the type of procedure.[106] The penal order is precisely the path of criminal proceedings, particularly a guilty verdict – a decision in the course of criminal proceedings. Nevertheless, the victim is effectively referred to the civil courts for their compensation. Accordingly, *Helmken* demands that at least a decision on compensation for pain and suffering should be made ex officio, while reference should be made to the civil courts with regard to any other existing claims under civil law.[107]

Consequently, depending on the interpretation, there could be a contradiction with the requirements of the Directive in German law. According to the view expressed here, a submission should be made to the ECJ with the question of whether the term decision within the meaning of Art. 16 para 1 Directive is to be understood in such a way that the type of order – here in the form of the penal order – can constitute a different type of decision, although it is equivalent to a criminal judgement. Additionally, the lack of state support regarding victims' access to compensation is criticised through the EU Proposal for amending the Directive.[108]

Victim-offender mediation

According to Art. 12 para 1 Directive, Member States shall take measures to *safeguard* the victim from secondary and repeat victimisation, intimidation and retaliation, to be ap-

[105] Ken Eckstein '§ 407 StPO' in Christoph Knauer and Hans Kudlich and Hartmut Schneider (eds) Münchener Kommentar zur StPO (C.H. Beck 2019) para 23; Lothar Maur '§ 407 StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para with further references.

[106] Kai Helmken, Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum (Peter Lang 2020) 423.

[107] Kai Helmken, Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum (Peter Lang 2020) 425.

[108] Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2.

plied *when providing any restorative justice services*. According to Art. 2 para 1 lit. d, 'restorative justice' means *any process* whereby the victim and the offender are enabled, if they *freely consent*, to participate actively in resolving matters arising from the criminal offence *through the help of an impartial third party*. According to Art. 12 para 1 lit. a Directive, restorative justice services are used only if based on the victim's free and informed *consent*.

In Germany, victim-offender mediation is under substantive law set out in § 46a StGB and impacts sentencing. Procedural law (§ 155a and 155b StPO) instructs the public prosecutor's office and the court to examine the possibility of implementation and to work towards this with the involvement of public institutions[109].

Whether § 46a StGB falls under the Directive is questionable. According to current practice, proceedings can be initiated via a neutral authority (court or public prosecutor's office) as well as in purely private settings.[110] However, this does not fall under the definition, as it is not through the help of an impartial third party.[111] However, it cannot be excluded that the regulation contradicts the basic idea of the Directive. The protective intention expressed particularly in Art. 12 para 1 lit. a Directive 'restorative justice services are used *only* if they are in the interest of the victim, subject to any safety considerations [...]' speaks against the promotion of such legal institutions which create or intensify dangers for the victim. The BGH has recognised the danger of the offender exerting pressure on the victim in order to be able to present a victim-offender mediation.[112] In addition, victims regularly want to avoid testifying in proceedings or, in the case of minors, parents want to protect their children from doing so. [113] For reasons of victim protection, it was demanded that the victim-offender mediation procedure be referred to a specialised mediation centre.[114] This must be expressly agreed with in relation to violent

[109] For various specialist advisory centres, see Servicebüro für Täter-Opfer-Ausgleich und Konfliktschlichtung, 'Fachstellensuche' (Toa Servicebuero) <https://www.toa-servicebuero.de/service/fachstellen/konfliktschlichter> accessed 26 May 2024.

[110] Explicitly in favour Johannes Kaspar, Wiedergutmachung und Mediation im Strafrecht: Rechtliche Grundlagen und Ergebnisse eines Modellprojekts zur anwaltlichen Schlichtung (LIT 2004) 111; Dieter Rössner and Thomas Klaus 'Rechtsgrundlagen und Rechtspraxis' in Bundesministerium der Justiz, Täter-Opfer-Ausgleich in Deutschland: Bestandsaufnahme und Perspektiven (Forum-Verlag 1998) 50; Fritz Loos, 'Bemerkungen zu § 46a StGB' in Thomas Weigend und Georg Küpper (eds) Festschrift für Hans Joachim Hirsch zum 70. Geburtstag am 11. April 1999 (de Gruyter 1999) 852, 861; Stefanie Mühlfeld, Mediation im Strafrecht: Unter besonderer Berücksichtigung von Gewalt in Schule und Strafvollzug (Peter Lang 2002) 196; Susanne Pielsticker, § 46a StGB – Revisionsfalle oder sinnvolle Bereicherung des Sanktionenrechts? (Duncker&Humblot 2004) 134: the same pacifying effect [original: 'den gleichen befriedenden Effekt']; Natalie Richter, Täter-Opfer-Ausgleich und Schadenswiedergutmachung im Rahmen von § 46a StGB: Eine Problemanalyse unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung seit 1995 (Duncker&Humblot 2014) 197 f.

[111] See also the comparison of Kai Helmken, Das Opfer im Strafverfahrensrecht: Zwischen europäischem Mindestschutz und deutschem Gestaltungsspielraum (Peter Lang 2020) 421.

[112] BGH judgement of 19.12.2002 – 1 StR 405/02, NStZ 2003, 365, 366.

[113] Dagmar Oberlies, 'Kommentar zu BGH Urt. v. 14. Dezember 1999 – 4 StR 554/99' [2000] NJ 550.

[114] Bernd-Dieter Meier, 'Täter-Opfer-Ausgleich und Schadenswiedergutmachung im Strafrecht

and sexual offences, especially those that have taken place in close social proximity between perpetrator and victim. To illustrate: In the case of shoplifting, it may be entirely sufficient if the perpetrator makes financial restitution 'unbureaucratically', which is perceived as sufficient by the victim. However, if sexual offences or domestic violence take place, purely private compensation may not be sufficient to mitigate the offender's sentence for the reasons mentioned above.

Concerning the procedural provision of § 155a StPO, the wording *not to be assumed appropriate against the aggrieved person's expressed will*[115] already stands out. The phrasing seems to contradict the Directive that requires *consent*. For practical implementation, however, it is recommended that this consent is obtained in advance due to the otherwise invalid remarks.[116]

In a comparison between the Directive and German law, it is therefore particularly questionable whether mediation in purely private exchanges should be excluded.

Non-prosecution subject to the imposition of a victim-offender mediation

In addition to voluntary victim-offender mediation, there is also the possibility of non-prosecution that is subject to the imposition of conditions and directions in the case of less serious criminal offences according to § 153a para 1 sentence 2 No. 5 StPO. Here, the public prosecution office may decide to dispense with the preferment of public charges with the consent of the accused and the competent court. This is combined with imposing conditions on issuing directions to the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle to it. This possibility is excluded for crimes, while no offence-specific exceptions are assumed for misdemeanours.[117] § 153a StPO is not only applicable if just a fine would be considered in the event of a conviction.[118] However, a line must be drawn if a prison sentence is considered that can no longer be suspended.[119]

Bestandsaufnahme zwanzig Jahre nach der Einführung von § 46a StGB' [2015] JZ 488, 490; Peter König, 'Zur Anwendung von § 46a StGB bei Zusammentreffen von Täter-Opfer-Ausgleich und Schadenswiedergutmachung: Anmerkung zu BGH Urt. v. 25. 5. 2001 – 2 StR 78/01' [2002] JR 251, 253.

[115] See further Stephan Beukelmann '§ 153a' in Jürgen Graf (ed) *BeckOK StPO mit RiStBV und MiStra* (50th edn, C.H. Beck 2024) para 34, Herbert Diemer '§ 153a StPO' in Christoph Barthe and Jan Gericke (eds) *Karlsruher Kommentar zur Strafprozessordnung* (9th edn, C.H. Beck 2023) para 20; Bertram Schmitt '§ 153a' in Bertram Schmitt and Marcus Köhler (eds) *Meyer-Goßner/Schmitt Strafprozessordnung mit GVG und Nebengesetzen* (66th ed, C.H. Beck 2023) para 22a.

[116] Christian Monka '§ 155a' in Jürgen Graf (ed) *BeckOK StPO mit RiStBV und MiStra* (50th edn, C.H. Beck 2024) para 2.

[117] Markus Mavany, '§ 153a' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO: Band 5/1 §§ 151–157* (27th edn, De Gruyter 2018) para 19.

[118] Markus Mavany, '§ 153a' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO: Band 5/1 §§ 151–157* (27th edn, De Gruyter 2018) para 36.

[119] Markus Mavany, '§ 153a' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO: Band 5/1 §§ 151–157* (27th edn, De Gruyter 2018) para 37.

There is an apparent contradiction[120] between the standards here. According to the obligation[121] of § 153a para 1 sentence 2 No. 5 StPO, a *serious attempt to reach a mediated agreement with the aggrieved person* is sufficient. This is to ensure that the victim cannot 'block' the setting.[122] This seems problematic given § 155a sentence 3 StPO, which claims that the victim-offender mediation is not assumed to be appropriate against the express will of the aggrieved person.[123] It is appropriate to distinguish here: The option of a victim-offender mediation may not be considered as an obligation if the victim does not agree to this. However, if the victim is willing to do so in the first instance but refuses to accept the offered compensation, the court must decide whether the attempt had been seriously considered for termination.

4 Conclusion

The specific form of provisions and requirements of individual rights of victims still depends heavily on national law – even within the EU. All in all, it is clear that the transposition of the Directive has not been exact in all respects in the German implementation. Whilst minor wording deviations do not collide with the protective direction of the Directive, there are, however, difficulties in interpretation. Problems arise here, as seen for adhesion proceedings, with the summary proceedings without a trial, which is not treated in the same way as other judgements. Insofar as the Directive refers to national provisions for certain rights, this regularly correlates with the requirements for accessory prosecution. In individual cases, a referral procedure may be necessary to clarify the Interpretation of EU law so that a review of conformity regarding German standards of this interpretation is possible in a second step.

Where the German procedural law exeeds the provisions of the Directive, it might serve as a role model. Overall, the right to be heard is more strongly organised for the private accessory prosecutors, and the monitoring rights depend on this. The right to legal aid is even more restricted than the right to join as a private access prosecutor. There is a risk of having to bear the costs in exceptional cases. The right to inspect files can be asserted without presenting specific interests and is, therefore, subject to simplified conditions. The latter goes particularly far beyond the minimum requirements of the EU. This is partly harshly criticised in the literature. In practice, however, this cannot always be granted or cannot be granted in its entirety. Nevertheless, a balance between the rights of the private accessory prosecutors and those of the accused can be found by means of

[120] See Markus Mavany, '§ 153a' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO: Band 5/1 §§ 151–157* (27th edn, De Gruyter 2018) para 72.

[121] On the classification Markus Mavany, '§ 153a' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO: Band 5/1 §§ 151–157* (27th edn, De Gruyter 2018) para 70 with further references for both opinions.

[122] Markus Mavany, '§ 153a' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO: Band 5/1 §§ 151–157* (27th edn, De Gruyter 2018) para 71.

[123] See also Markus Mavany, '§ 153a' in Jörg-Peter Becker and others *Löwe-Rosenberg StPO: Band 5/1 §§ 151–157* (27th edn, De Gruyter 2018) para 72.

individual restrictions. German law is therefore a prime example of a possible clarification of the unclear wording of the Directive and shows a possibility of expanding victims' rights.

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TOWARDS A TRANSFORMATIVE REPARATION PROCESS: THE COMMUNICATION PRACTICE BY THE INTERNATIONAL CRIMINAL COURT

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Abstract

The International Criminal Court (ICC or the Court) plays a crucial role in addressing the needs and rights of victims of mass atrocities through its unique transformative approach. Unlike traditional retributive and restorative justice models, this approach not only seeks to address harm but aims to fundamentally alter the underlying social conditions that perpetuate injustice. This article explores how transformative approaches are being integrated into the ICC's reparation process, emphasising the potential for victims to be active participants in the justice process. It first provides an overview of the development and essence of transformative justice by revisiting relevant literature and cases. The second section examines how the ICC has incorporated transformative justice into its reparation orders, proposing a transformative reparation process that actively involves victims. The third section uses the communication practices in Uganda as a case study, employing a qualitative approach and highlighting the challenges of explaining the Court's proceedings to local communities. Semi-structured interviews conducted with ICC personnel in June 2023 provide insights into these challenges. The conclusion underscores the importance of effective communication with victims to ensure the reparation process holds a transformative impact.

1 Introduction

The International Criminal Court (ICC or the Court) plays a pivotal role in addressing the needs and rights of victims of mass atrocities. The transformative approach, which had been introduced to the Court during the first reparation orders, distinct from traditional retributive and restorative justice models, seeks not only to address harm but to fundamentally alter the underlying social conditions that perpetuate injustice. This approach critiques conventional criminal justice practices and explores alternative methods. In the context of the ICC, transformative justice concepts suggest that it might be the key to include victims in the reparation process, not just as passive recipients of reparations but as active agents in the justice process.

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Previous research has highlighted the restorative impact of the ICC proceedings.[1] However, limited attention has been given to the transformative impact of the victims' involvement into the ICC proceedings.[2] Reports on grassroots and civil societies' efforts to address local needs to change and rehabilitate were continuously informed, especially from the perspectives of under representation of women and children in the transitional justice attempts.[3] The effectiveness of transformative reparation is being suggested and claimed in the context of domestic reparations in some Latin-American societies,[4] or African countries.[5] Meanwhile, some scholars posit critical comments that this concept may undermine reparative justice[6] or that false expectation should be avoided.[7]

Against these backdrops, this article attempts to highlight how the transformative approach is being integrated into the ICC reparation process. It illustrates that the ICC's evolving practices to communicate with the victims for the purpose of reparation proceedings have the potential to make its reparative mechanism have a more transformative impact.

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[1] See e.g., Cuppini A, 'A Restorative Response to Victims in Proceedings before the International Criminal Court: Reality or Chimaera?' [2021] International Criminal Law Review; Garbett C, 'The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice' (2017) 5 Restorative Justice 198; Pena M and Carayon G, 'Is the ICC Making the Most of Victim Participation?' (2013) 7 International Journal of Transitional Justice 518; Ferstman C and Goetz M, 'Reparations Before The International Criminal Court: The Early Jurisprudence On Victim Participation And Its Impact On Future Reparations Proceedings' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds) (Brill | Nijhoff 2009); Kendall S, 'Restorative Justice at the International Criminal Court Section II: Forum: 20th Aniversario Del Estatuto de Roma' (2018) 70 Revista Espanola de Derecho Internacional 217.

[2] Some articles on transformative justice referred by the ICC: Hoyle C and Ullrich L, 'New Court, New Justice - The Evolution of Justice for Victims at Domestic Courts and at the International Criminal Court' (2014) 12 Journal of International Criminal Justice 681, 690-699; Moffet L, 'Elaborating Justice for Victims at the International Criminal Court' (2015) 13 Journal of International Criminal Justice 281, 295.

[3] Baines E and Oliveira C, 'Securing the Future: Transformative Justice and Children "Born of War"' (2021) 30 Social & Legal Studies 341; Boesten J and Wilding P, 'Transformative Gender Justice: Setting an Agenda' (2015) 51 Women's Studies International Forum 75; Chappell L, 'The Gender Injustice Cascade: "Transformative" Reparations for Victims of Sexual and Gender-Based Crimes in the Lubanga Case at the International Criminal Court' (2017) 21 The International Journal of Human Rights 1223; Ni Aolain FD, O'Rourke C and Swaine A, 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice' (2 March 2015) <https://papers.ssrn.com/abstract=2572540> accessed 11 June 2024.

[4] Yepes RU, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice Part C: Appendices' (2009) 27 Netherlands Quarterly of Human Rights 625; Impunity Watch, 'Guidelines on Transformative Reparations for Survivors of Sexual Violence: Research Report' (*Impunity Watch*, 17 December 2019) <https://www.impunitywatch.org/guidelines-transformative-reparatio/> accessed 11 June 2024.

[5] Gready S, 'The Case for Transformative Reparations: In Pursuit of Structural Socio-Economic Reform in Post-Conflict Societies' (2022) 16 Journal of Intervention and Statebuilding 182.

[6] Urban Walker M, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108.

[7] Leyh BM and Fraser J, 'Transformative Reparations: Changing the Game or More of the Same?' (2019) 8 Cambridge International Law Journal, 39.

In the first section, I overview the development and essence of the concept of transformative justice through revisiting relevant literature and judicial cases and illustrate how this concept finds its way to improve the current discourse on transitional justice in the post-conflict/atrocity situation.

In the second section, I first highlight how the concept of transformative justice has been installed into the ICC's reparation orders through reviewing the relevant ICC orders that referred to the concept. It then proposes the concept of a transformative reparation process and discusses the potential of the ICC's reparation process that involves victims.

In the third section, after introducing the ICC's multiple departments involved in the communication with the victims, I identify specific ICC practices and local initiatives to have transformative impacts using the communication practice in the situation in Uganda as a case study. This research employs a qualitative approach to explore the transformative justice implications in the context of the Ongwen case, with a specific focus on the ICC outreach activities. The primary objective is to gather professional and practical views on the challenges associated with explaining the Court's proceedings and the meanings of criminal justice to local communities and victims. To achieve this, a series of semi-structured interviews were conducted in June 2023 with members of the ICC personnel, as per the request submitted to the ICC on 25 April 2023.[8]

In conclusion, this chapter discusses how communication with the victim is the key to making the reparation process hold a transformative impact.

2 The concept of transformative justice

2.1 Historical development

2.1.1 Original concept in critical criminology in the United States

The concept of transformative justice emerged within the realm of critical criminology in the United States.[9] Traditionally, deterrence was central to criminal justice, focusing on removing offenders from society and signalling consequences to potential wrongdoers.

[8] The researcher obtained official authorization to access the Court's premises and to interview Court's personnel, with the authorization request submitted and granted according to the format provided by the Court Registry. The selection of interviewees was purposive, targeting individuals directly involved in outreach activities and those with substantial experience in engaging with local populations and victims. The data collected from these interviews were transcribed and subjected to thematic analysis to identify recurring themes and insights related to the challenges and strategies in effectively communicating the Court's work. Ethical considerations, including informed consent and confidentiality, were adhered to throughout the research process to ensure the integrity and ethical soundness of the study. The draft of this article has been checked by the ICC registry and received admission for publication of the contents that were provided in the interviews on 13 July 2024 via email.

[9] Nocella A, 'An Overview of the History and Theory of Transformative Justice' (2011) 6 Peace and Conflict Review 1.

However, critical criminology challenges this paradigm, advocating for innovative alternatives.[10] This includes exploring different forms of punishment and incorporating diverse perspectives into understanding crime and criminals.

Various philosophies have shaped the landscape of criminal justice over time. Initially, retribution, or the act of punishing offenders in proportion to their crimes, was predominant. However, an early departure from this punitive approach came with a shift towards restoration. This perspective views crime as a rupture in the relationship between the offender and the victim. Martin Wright and Howard Zehr introduced the concept of restorative justice, drawing inspiration from reconciliation practices found in Japan and Africa.[11]

Despite receiving acclaim, this notion faced criticism from Ruth Morris, a Quaker scholar. Morris questioned the concept of restoration, offering her critique in the following manner:

> It is for this reason that I have real difficulty with the phrase restorative justice and prefer transformative justice. Restoration implies that I had justice, peace, equality, and a caring society, and lost it. The fact is that a root cause of crime is an attempt to find power by the powerless and a negative response to pain by those in pain. Is our goal to restore injustice, powerlessness, and pain to them? I do not believe so. Many of the words of restorative justice, used in both books, are valid, many of the ideas are invaluable, and much of the vision is truly of the promised land. But I cannot get there without transformation. I cannot get there without recognizing the prominent role of racial, ethnic, and socioeconomic discrimination in our existing injustice system.[12]

In her book review titled 'Not Enough', Morris expresses the notion that while restoration is a commendable concept, it alone falls short. She argues that without addressing and transforming the underlying social structures, simply restoring relationships will perpetuate existing patterns. Morris contends that true progress towards a more just society necessitates a deeper transformation of the prevailing social order.

2.1.2 Common core principles of transformative justice initiatives

In this evolution, retribution yielded ground to the concept of restorative justice, marking a significant shift. However, recognising the limitations of this approach, the pursuit of

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[10] See e.g., DeKeseredy WS, 'Contemporary Critical Criminology' (Routledge & CRC Press); Welch M, 'Critical Criminology, Social Justice, and an Alternative View of Incarceration' (1996) 7 Critical Criminology 43; Winlow S and Hall S, 'Realist Criminology and Its Discontents' (2016) 5 International Journal for Crime, Justice and Social Democracy 80; Bell E, 'There Is an Alternative: Challenging the Logic of Neoliberal Penalty' (2014) 18 Theoretical Criminology 489.

[11] Wright M, *Justice for Victims and Offenders: A Restorative Response to Crime* (Open University Press 1991); Zehr H, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990).

[12] Morris R, 'Not Enough Reviews' (1994) 12 Mediation Quarterly 285.

transformation emerged as the next logical step. This historical trajectory underscores the anticipation for a more progressive discourse beyond mere restoration.

Nocella identified four core principles central to transformative justice initiatives.[13] These principles were derived from various groups such as ABP, Save the Kids, and Generation 5, organisations actively engaged in implementing transformative ideas within the United States.

Among these shared principles, the rejection of violence and punishment stands out as a cornerstone.[14] Transformative justice initiatives claims that institutionalization and imprisonment are fundamentally opposed to the principles of justice.

Secondly, the focus should be on addressing crime as a manifestation of community-based conflicts.[15] Crime should not be viewed solely as a personal issue, but rather as a reflection of community dynamics, including its formation, structure, and the burdens—whether mental or physical—imposed on individuals who commit crimes. Therefore, it is essential to recognise that crime stems from community-based conflicts, emphasising the need to address underlying issues rather than resorting to incarceration.

Thirdly, a core principle in this context is the acknowledgment of identity-related factors such as ethnicity, race, gender, and sexual orientation within the realm of justice.[16] These aspects should be central in discussions surrounding criminal justice discourse.

Fourthly, there is significant value in promoting mediation, negotiation, and community-driven approaches to conflict resolution.[17] These alternative methods are believed to facilitate the transformation of conflicts that contribute to criminal behaviour.

2.1.3 Transformative justice in sexual violence cases in the Americas

The concept of transformative justice was integrated into transitional justice and international law perspectives through notable cases, one of which is the Inter-American Court of Human Rights (IntACHR) case known as *Gonzales et al. v. Mexico*, or commonly referred to as the *Cotton Field* case. This case revolved around the abduction, rape, and murder of girls in the suburbs, where the local police and criminal justice authorities failed to pursue the truth. It exemplified a stark case of institutional inaction. In its ruling, the IntACHR declared this inaction a violation of rights and emphasized the need for remedy. A pivotal excerpt from the ruling captures this sentiment succinctly:

> The Court recalls that the concept of "integral reparation" (restitutio in integrum) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the

[13] Nocella (n 9) 6.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.

> damage caused. However, bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State (…), the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable. (…)[18]

The IntACHR's assertion highlights that the inaction by police officers stemmed from gender discrimination against female or sexual violence victims. It underscores that for effective human rights protection, understanding the structural discrimination context is imperative. Mere restitution, although provided to the victims, falls short of being fully effective. To truly combat crime and police inaction, systemic changes within the criminal justice system are necessary. This indicates that while compensating victims is a step, genuine transformation must occur within the justice system itself to address and prevent such injustices in the future.

2.1.4 Installation into Transitional Justice discourse

Since the *Cotton Field* case in 2009, numerous scholars have been intrigued by the notion of integrating this concept into transitional justice discourse. Transitional justice further encompasses this field of inquiry.

Transitional Justice represents a modified understanding of justice tailored to periods of transition, typically from conflict to peace or from dictatorship to democracy.[19] The United Nations explains that it 'covers the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past conflict, repression, violations and abuses, in order to ensure accountability, serve justice and achieve reconciliation.'[20] For the International Centre for Transitional Justice, 'transitional justice refers to how societies respond to the legacies of massive and serious human rights violations.'[21] Such transitions are often marked by violence and social upheaval, making it challenging to apply conventional legal frameworks. In response, transitional justice offers alternative approaches to address these complexities.

In essence, transitional justice is not solely about implementing existing laws; it also encompasses considerations for peacebuilding. For instance, when dealing with perpetrators of crimes during transitional periods, it prompts questions about how best to reintegrate them into society. Instead of simply apprehending and isolating them, there is a

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[18] Case of González et al. ("Cotton Field") v. Mexico, Judgment 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs), IACtHR Series C.205, para. 450; For case analysis, see e.g.: Rubio-Marín R and Sandoval C, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment' (2011) 33 Human Rights Quarterly 1062.

[19] Teitel R, *Transitional Justice* (Oxford University Press 2000).

[20] 'OHCHR: Transitional Justice and Human Rights' (OHCHR) <https://www.ohchr.org/en/transitional-justice> accessed 4 June 2024; UN Doc. S/2004/616.

[21] 'What Is Transitional Justice? | International Center for Transitional Justice' <https://www.ictj.org/what-transitional-justice> accessed 4 June 2024.

need to explore more nuanced approaches. For instance, should there be opportunities for rehabilitation or community reintegration? These are crucial questions addressed in the seminal article by Lambourne, which highlights the intersection between transitional justice and peacebuilding.[22]

Building upon these principles, Gready embarked on a pioneering project known as transformative justice.[23] They introduced this concept via a detailed concept note posted online, which later evolved into a comprehensive book published in 2019.[24] The book garnered widespread attention, eliciting both positive acclaim and nuanced critiques from a diverse audience.[25] Central to the book's discourse is the exploration of whether transformative justice could supplant or complement transitional justice. It seeks to delineate a dichotomy between the traditional approach of transitional justice and the innovative perspective of transformative justice.

To initiate this discussion effectively, the authors first delve into a conceptualisation of traditional transitional justice. Recognising the multifaceted nature of transitional justice, they dissect its various aspects. While some instances, like Afghanistan, have witnessed relative success, others, such as the aftermath of the United States withdrawal from the region, have revealed its limitations. For instance, in regions like Uganda, transitional justice efforts have shown some signs of progress, albeit with challenges still prevalent.

According to their perspective, traditional transitional justice operates in a top-down manner, largely influenced by the agendas and priorities of global donors. Moreover, traditional transitional justice predominantly focuses on civil and political rights, such as the freedom to vote, freedom of speech, political participation, and protection from torture, imprisonment, and unfair trials. This emphasis on freedom from state oppression is partly attributed to the predominant influence of Western donors, who prioritise civil and political rights. However, this approach often neglects the complexities of reconstructing social structures, thereby failing to address the broader societal impacts of transitional justice initiatives.

Indeed, the traditional transitional approach often aims to restore what has been broken by dictatorship or conflict, striving to recreate an idealised past where peace prevailed. This approach tends to prioritise the restoration of societal structures to their pre-conflict state, envisioning a return to a perceived state of tranquillity.

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[22] Lambourne W, 'Transitional Justice and Peacebuilding after Mass Violence' (2008) 3 International Journal of Transitional Justice 28.

[23] Gready P and others, 'Transformative Justice – A Concept Note' (October 2010) <https://wun.ac.uk/files/transformative_justice_-_concept_note_web_version.pdf>.

[24] Gready P and Robins S, *From Transitional to Transformative Justice* (Cambridge University Press 2019).

[25] Walsh B, 'From Transitional to Transformative Justice Book Review' (2022) 13 International Journal for Court Administration [i]; McGill D, 'From Transitional to Transformative Justice Book Reviews' (2020) 29 Social & Legal Studies 925.

2.2 Transformative approach in the post-atrocity community

According to Robins and Gready, transformative justice, instead, is defined as 'transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes, and the challenging of unequal and intersecting power relationships and structure of exclusion at both local and global levels'.[26] Despite the original confrontation, various researchers have highlighted that transformative practice 'is not an effort to replace or deny transitional justice, but something…that can unfold in parallel.'[27]

In contrast to the transitional justice attempts, the transformative approach advocates for a bottom-up perspective, recognising the importance of local actors in shaping the trajectory of societal change.[28] It emphasizes the need for transformation at a fundamental level, challenging existing power dynamics and social structures.[29] Rather than imposing solutions from external sources, the transformative approach values the agency of local communities in defining the future they aspire to build.[30]

By empowering local actors and fostering grassroots initiatives, transformative justice endeavours to catalyse meaningful societal change that reflects the aspirations and needs of those directly affected by conflict or oppression.[31] This shift from a top-down to a bottom-up approach underscores the belief that true societal transformation can only be achieved through inclusive and participatory processes led by those who intimately understand the complexities of their own contexts.[32]

The transformative approach places greater emphasis on social rights, recognising that many individuals continue to endure economic hardships and social inequalities long after the cessation of conflict or dictatorship.[33] In many cases, people's daily struggles and anxieties about their livelihoods overshadow their ability to enjoy peace of mind or envision a better future. While civil and political rights such as freedom of speech and the right to vote are undoubtedly important, addressing social rights becomes paramount in addressing the genuine needs of victims and those grappling with the aftermath of transition. By prioritising social rights, transformative justice endeavours to tackle systemic inequalities and create a more equitable society where all individuals have access to essential resources and opportunities for a dignified life. This shift in focus acknowledges the interconnectedness of political, economic, and social dimensions of justice, underscoring the importance of addressing underlying structural injustices to truly promote sustainable peace and societal well-being.

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[26] Gready P, "Introduction," in Gready (n 24) 3.
[27] Robins S, "Conclusion", in ibid, 299.
[28] Gready (n 26).
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Ibid.

Transformation of the social structure is evident in many cases. In the old, traditional, peaceful rural areas, control is often dominated by elderly men, leaving women and children marginalised in decision-making processes. If we aim to restore the peaceful times prior to the conflict, it implies a potential regression where women and children may lose their voices once more. Thus, the transformation of the social structure encompasses various facets, such as emphasising identity and communication, along with the fundamental principles of the common cores of transformative approaches. These elements are poised to emerge prominently in the novel concept of transformative justice during the transition.

To achieve this, legal empowerment provides basic infrastructure. The simplest definition of legal empowerment would be the movement to let people "know, use, and shape law".[34] The concept of legal empowerment emerged in the context of economic development in the global south. The most well-known definition of legal empowerment is the one provided by the Centre for Legal Empowerment of the Poor (CLEP) which states that it is 'a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors.'[35] It takes a bottom-up, rights-based, pragmatic legal pluralistic approach, and engages often with civil society.[36] 'Legal' aspect of empowerment had been said to include legal awareness-raising, legal service provision, dispute resolution and law reform initiatives.[37]

During or aftermath of an armed conflict and massive war crimes, the importance of legal empowerment in criminal justice issues has also been recognised. Waldorf argued that it is desirable and reasonable to link legal empowerment and transitional justice.[38] While the focus of transitional justice was to face and find the past abuses and seek accountability, linking transitional justice to rights-based development through legal empowerment is another solution to overcome the problem that transitional justice mechanisms are not designed to address the basic needs of people.[39] Legal empowerment would support victims through providing awareness, education and assistance to claim their rights

[34] The phrase is part of the slogan of Namati. https://namati.org/. Namati is the world's largest network of legal empowerment practitioners. Keith L and O'Brien M, 'Connecting Access to Advocacy: A Role for Technology in Legal Empowerment' (2021) 5 Georgetown Law Technology Review 127, 128.
[35] The Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone, Vol. 1 (New York: UNDP, 2008), 3. UN Secretary General report in 2009 adopted similar definition and UNGA endorsed it. A/64/133 (2009), para. 3; UN Doc. A/C.2/64/L.4/Rev.2 (3 December 2009), paras 1, 5–7.
[36] Waldorf L, 'Introduction: Legal Empowerment in Transitions' (2015) 19 The International Journal of Human Rights 229, 230.
[37] Asian Development Bank, Legal Empowerment for Women and Disadvantaged Groups,40–9
[38] Waldorf (n 36) 235.
[39] Ibid.

to reparation, information, and legal rehabilitation.[40] This claim is supported by historical events of the South African Truth and Reconciliation Commission where community-based paralegals played significant roles.[41]

3 Transformative reparation process as the realisation of transformative justice

The ICC, as a criminal court and an international organisation, acts as a global actor. Subsequently, the judges determine the required reparations using a top-down approach, primarily emphasising freedom and civil rights. While they favour internationally recognised human rights and frequently reference international human rights conventions, there is a plenty of legal and political reasons for emphasising global actors, stressing civil and political freedom, and refraining from providing guidance on societal structural changes. How can we imbue ICC reparation orders with greater transformative potential?

Ullrich demonstrated, through the observation of the ICC's assistance programmes in Northern Uganda, that, 'instead of tackling structural causes, the concept ends up shifting the responsibility for 'transformation' not only to local stakeholders but also to the individual victim–survivor.'[42] Ullrich cited ethnographic fieldwork and criticised that the ICC victim participation transforms victims in the Global South into 'labouring subjects' from the perspectives of critical ideology theory and Marxist-Feminism.[43]

Even though subjecting victims may have negative impacts from the ideological perspective, it is also true that such involvement brought something to the victims. Such 'something' may be a seed for future transformation, and such impact may be regarded as the transformative impact that the ICC has brought to the victims. This hypothesis requires long-term follow-up field research. However, in the following, I attempt to highlight how the ICC has attempted to integrate the concept of transformative justice into its reparation decisions and in the practice of communication with the victims at the various levels of involvement.

3.1 The concept in the ICC reparation orders

The ICC is indeed exerting considerable effort to include the transformative essence into its judicial decisions, particularly in relation to the orders on victim reparation. The court actively solicits input from its other departments and the *amicus curiae*, including experts

[40] Ibid.

[41] Jackie Dugard & Katherine Drage, 'To Whom Do the People Take Their Issues?' The Contribution of Community-Based Paralegals to Access to Justice in South Africa 11, 14 (Just. and Dev. Working Paper, Paper No. 21, 2013)

[42] Ullrich L, *Victims and the Labour of Justice at the International Criminal Court: The Blame Cascade* (Oxford University Press 2024), 188.

[43] Ibid.

and academics in transitional justice, local culture and customs, gathering insights and opinions during its decision-making processes.[44]

3.1.1 The Lubanga case

The initial reparation order in the *Lubanga* case, emphasised restorative justice, with a certain attention to transformation. It was the ICC's Trust Fund for Victims (TFV) that brought the concept of transformation.[45] TFV suggested that 'reparations should bring about transformation, in the sense that they provide an opportunity to overcome imbedded inequality and exclusion'.[46] Women's Initiative joined in this claim underlying the importance of an approach to reparations that seeks to transform communal and gender relations.[47] Citing these external inputs, the Trial Chamber confirmed that:

> Although Article 75 of the Statute lists restitution, compensation and rehabilitation as forms of reparations, this list is not exclusive. Other types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate.[48]

This decision was challenged by the accused, but the Appeals Chamber confirmed no error but only indicated that the reparation must be ordered to only address the harm resulted from the crimes for which the accused has been convicted.[49]

Between the trial chamber's decision and the appeals judgment, the UN Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence (June 2014) was issued. Since then, transformative reparations, particularly for sexual violence, have become mainstream.

3.1.2 The Ntaganda case

In the *Ntaganda* case of 2022, the ICC notably embraced a transformative approach. Dr. Gilmore's expert report, among others, was referenced in the final orders, and became

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[44] An overview of the earlier inputs, see, Hoyle C and Ullrich L, 'New Court, New Justice - The Evolution of Justice for Victims at Domestic Courts and at the International Criminal Court' (2014) 12 Journal of International Criminal Justice 681, 692-699.

[45] *Prosecutor v. Lubanga*, Decision establishing the principles and procedures to be applied to reparations (ICC-01/04-01/06-2904) Trial Chamber I (7 August 2012), para .57.

[46] *Prosecutor v. Lubanga*, Observations on Reparations in Response to the Scheduling Order of 14 March 2012 (ICC-01/04-01/06-2872) Trust Fund for Victims (25 April 2012), paras 72-77.

[47] *Prosecutor v. Lubanga*, Observations of the Women's Initiatives for Gender Justice on Reparations (ICC-01/04-01/06-2876) Other participants (10 May 2012), para. 13.

[48] *Lubanga* (n 45) para. 222.

[49] *Prosecutor v. Lubanga*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2 (ICC-01/04-01/06-3129) Appeals Chamber (3 March 2015), para. 202.

the cornerstone for the ICC to incorporate the concept of transformative justice, by stating:[50]

> Transformative reparations have emerged as a broader and more complex vision of redress that does not simply return victims to their position before the harm, but also addresses the structures of discrimination, marginalisation and the root causes of injustice. Transformative reparations have often been invoked when responding to sexual violence. It is well documented that the stigma of sexual violence can impinge on individual development and erode social fabric by creating new tensions and means for exclusion. Accordingly, a number of commentators and judgments have called for transformative reparations to tackle the structural, cultural and social drivers of exclusion that manifest itself in the stigmatisation of victims of sexual violence. (footnotes omitted)[51]

It is essential to distinguish this as transformative reparation, not transformative justice *per se*. Specifically, in paragraph 94 of the Ntaganda reparation order issued by the Trial Chamber, the concept of transformative reparations is articulated.

> In general terms, the transformative purpose of reparations aims at producing both a restorative and a corrective effect and to promote structural changes, dismantling discriminations, stereotypes, and practices that may have contributed to create the conditions for the crime to occur. Reparations should thus strive to be transformative in their design, implementation, and impact, and to have a rectification effect. (footnotes omitted)[52]

Here, the ICC acknowledged the presence of a transformative purpose in the context of reparations, while still upholding the importance of restorative justice. Importantly, it emphasised the necessity of fostering structural change. This order was issued in March 2021 but was subsequently appealed, leading to a new judgment in 2022, without touching the parts about the transformative approach.[53]

3.1.3 The Ongwen case

Transformative reparation was referred to in the most recent reparation order in the case of *Ongwen* within the situation of Uganda. It confirmed that transformative reparation is

[50] *The Prosecutor v Bosco Ntaganda,* Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare Dr Sunneva Gilmore October 2020 (ICC-01/04-02/06-2623-Anx2-Red2) Registry (3 November 2020).
[51] Ibid, para. 13.
[52] *Prosecutor v. Bosco Ntaganda*, Reparation Order (ICC-01/04-02/06-2659) Trial Chamber VI (8 March 2021), para. 94.
[53] *Prosecutor v. Ntaganda*, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order" (ICC-01/04-02/06-2782) Appeals Chamber (12 September 2022).

included in the principles of reparation that were established in the *Ntaganda* reparation order and referred to them as *Ntaganda* Principles.[54]

The practical use of transformative approach appeared as justification of its decision. The Chamber relied on the concept to justify its decision to order a collective community-based reparations. It stated, 'collective community-based reparations awarded to victims in the present case have a transformative value.'[55]

In this decision, certain aspects of the *Ntaganda* Principles were amended for the purpose of granting transformative effect. The Chamber determined to change the scope of 'rehabilitation' as a form of reparation. It stated that:

> rehabilitation measures may not only be aimed at addressing the medical and psychological conditions of the victims. They can also be aimed at improving the socio-economic conditions of victims, seeking to enable the maximum possible self-sufficiency and to restore, as much as possible, victims' independence and vocational ability, facilitating their inclusion and participation in society.[56] (footnotes omitted)

Moreover, particularly in relation to the child victims, the Chamber declared that:

> Reparation orders and programmes in favour of child victims, should guarantee the development of the victims' personalities, talents, and abilities fully and, more broadly, they should ensure the development of respect for human rights and fundamental freedoms.[57] (footnote omitted)

The Chamber further referred to specific modalities of the rehabilitation measures to include: 'a wide array of inter-disciplinary activities, including, inter alia, housing, social services, vocational training and education, micro-credits, income generating opportunities, or sustainable work that promote a meaningful role in society.'[58]

3.2 Transformative reparation process

Although the ICC has declared its willingness to incorporate transformative approach in relation to its reparation, it is unclear, from the expressions in the ICC reparation orders, that how transformative reparation looks like. Still, such normative endorsement opened the door for massive potential. If integrated properly and effectively, the concept of transformative justice has the potential to shift our focus on the new value of transformative reparation process.

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[54] *Prosecutor v. Ongwen*, Reparations Order (ICC-02/04-01/15-2074) Trial Chamber IX (28 February 2024), para. 57.
[55] Ibid, para. 637.
[56] Ibid, para. 78.
[57] Ibid, para. 83.
[58] Ibid.

Victim participation in the international justice procedure will become one of the opportunities to implement the concept. Victim participation at the ICC allows victims to actively engage in trials through legal representatives who present their views, access evidence, and question witnesses.[59] Additionally, victims can submit application to request reparations for the harm suffered.[60]

If such a victim's participation process, which has been originally designed as a top-down, expert-leading procedure, can be owned and organised bottom-up by local participants including the actual victims, such process will become a cornerstone for other potential cases of transitional justice and reparation.

In the following section, I focus on the reparation procedure and examine the ICC's practice to find if any aspects of the ICC's involvement with victim communities had a transformative effect.

4 Transformative Essence in the ICC's Reparation Process

4.1 Relevant ICC departments

The ICC involves numerous stakeholders in victim interaction across various departments, rendering the process intricate. Additionally, depending on the case's chronological progression, different departments handle victim communication, further complicating matters. Table 1 provides a summary.

Table 1: The ICC department and local actors involved in the communication with the victims

Stage	**Investigation**	**Pre-trial**	**Trial**	**Reparation**
ICC Department	Public Outreach and Information Section (PIOS)			
	Trust Fund for Victims (TFV) – Assistance mandate			
	Office of the Prosecutor (OTP)	Victims Participation and Reparations Section (VPRS)	Office of Public Counsel for Victims (OPCV), Legal Representative	Trust Fund for Victims (TFV) – Reparation mandate
Local actors	Intermediaries	Intermediaries	Intermediaries	Intermediaries, Local NGOs

[59] ICC Rules of Procedure and Evidence, rules 85 and 86.
[60] ICC Statute, Article 75.

At the apex is the Public Information and Outreach Section (PIOS), serving as the initial outreach platform, and Trust Fund for Victims (TFV) for implementing its assistance mandate. Functioning independently from court proceedings, this department primarily focuses on educating the public about ICC procedures while also fulfilling a media role, disseminating information to the broader audience regarding ongoing ICC proceedings.

The initial stage, denoted as the leftmost one, is the investigation stage. Here, the suspect remains unidentified, and the specific crime is yet to be determined. During this phase, the Office of the Prosecutor communicates with the victim. In the evidence and testimony collection stage, the primary objective is to ascertain witnesses or victims of the crime.

The decision on whom gets indicted at the ICC and what charges are brought forth when an arrest warrant is issued is made during the pre-trial phase, specifically in the aftermath of the investigation stage. However, opting for this approach significantly narrows down the scope of victims. Subsequently, the Victims' Participation and Reparation Section (VPRS) assumes control of the process. During this phase, the Office of the Prosecutor discreetly provides a list of victims, including their respective village affiliations, under stringent confidentiality measures.

Once the suspect is apprehended and brought to the ICC court, the trial commences. During this phase, the Office of Public Counsel for Victims (OPCV) and the legal representatives, representing the victims, actively participate in court proceedings, with victim representatives, often legal professionals, assuming the role of communication intermediaries.

Following the conclusion of the trial and the pronouncement of a guilty verdict followed by a reparation order, the TFV assumes responsibility for creating a draft implementation plan. At this juncture, the TFV engages in communication with the victims to formulate a compensation plan and implement the compensation orders effectively.

Intermediaries often occupy a crucial role at the bottom level of the ICC process. Direct communication with everyone on-site proves challenging for any department, necessitating the employment of local interpreters. Consequently, different departments may enlist various intermediaries, although there might be instances of consistency where the same intermediary is engaged repeatedly. Notably, in the realm of the TFV, local NGOs frequently emerge. These NGOs sometimes serve as intermediaries, particularly in cases where they represent specific victim groups, such as women who have experienced sexual assault or victims from particular villages. These organisations identify the needs of victims and engage in negotiations or communication with the TFV on their behalf.

4.2 ICC Practice on Communication with the Victim: The case in Uganda

4.2.1 Prepare the victims to litigate

Raising awareness about the ICC

The ICC implemented a proactive approach to engagement in Uganda, spurred by Judge Trendafilova's emphasis on the necessity of local comprehension, including technical terminology.[61] This concerted effort reflects a distinct approach tailored to the Ugandan context. Despite the ICC's involvement in various other regions such as Central Africa, Mali, Libya, and Sudan, the Ugandan case stands out for its relatively higher familiarity among the local population.[62] This heightened awareness underscores the significance of localised engagement strategies in facilitating understanding and participation in ICC proceedings across different contexts.

Teaching victims with legal language

The challenge of communication is further compounded by language barriers and legal terminology complexities. In the context of the ICC proceedings, the local language spoken was Acholi, for which there were no fluent ICC staff members available.[63] Moreover, diverse linguistic variations exist among different villages, necessitating the involvement of linguists and anthropologists to address the issue of multilingualism.[64] These experts played a crucial role in facilitating effective communication and comprehension across various linguistic and cultural contexts during ICC proceedings.

One of the resources developed is the Victims booklet, aimed at clarifying the concept of victim participation for those directly affected.[65] This booklet serves as a guide, both for victims and staff members involved in the ICC process. Within the booklet, key terms are defined to enhance understanding. For instance, at the outset, the term 'accused' is defined as 'an individual person accused before the ICC; a person against whom one or more charges have been confirmed by ICC judges.'[66] This approach extends to other legal terminologies used throughout the booklet, ensuring clarity and comprehension among all stakeholders.

Translating legal and procedural documents poses challenges beyond linguistic barriers, especially when certain concepts lack direct equivalents in local languages. This issue becomes apparent with terms like 'reparations,' where finding an exact equivalent

[61] Interview with Senior Officials, VPRS.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Victim's booklet. Victims before the International Criminal Court A guide for the participation of victims in the proceedings of the ICC <https://www.icc-cpi.int/sites/default/files/itemsDocuments/vprs/VPRS-Victims-booklet-format-ENG.pdf>
[66] Ibid, 33.

proves elusive.[67] While similar words may exist, they often carry traditional connotations or slightly different meanings, complicating the translation process. Thus, it is essential to approach translation with sensitivity to cultural nuances and to engage in careful explanation and contextualization to convey the intended meaning accurately.

Finding the correct translation is just one part of the equation; ensuring that the translated term accurately reflects the legal concept intended is equally crucial. Legal terminology often carries specific meanings and implications that may not be fully captured by everyday language or approximate translations. For example, when discussing reparations, various terms such as general compensation and guarantee may arise, each with its own legal connotations.[68] Clarifying these distinctions and emphasising that legal terminology holds particular significance beyond mere linguistic translation is crucial. Additionally, distinguishing between court-ordered compensation and lifting bans on settlement payments further underscores the importance of precise legal terminology in conveying the intended meaning accurately.

Instructing victims to apply for reparation

Navigating the victim application process can indeed be challenging, particularly in areas with low literacy rates. Understanding legal terminology adds another layer of difficulty, potentially leading to misunderstandings or incomplete applications. Recognizing these challenges, the ICC has adopted a hands-on approach by deploying personnel to assist individuals directly at the site.[69] This hands-on approach ensures that victims receive the support they need to complete their applications accurately, thereby enhancing accessibility and inclusivity in the application process. By being physically present and providing guidance, the ICC facilitates greater understanding and participation among those affected by conflict.

There is a victim application form that can be completed either manually or online.[70] Afterward, ICC staff visit the site, sitting with applicants to guide them on what to include. However, many individuals may not know their exact birthdates or lack identification.[71] Additionally, some may struggle to recall the date of the incident. Thus, it was necessary to provide explanations for completing these sections, considering various factors to articulate the damages.

Finally, the discussions within that group have proven highly effective. This holds particularly true within the community of sexual violence victims, where the intermediary plays a crucial role. However, if, for instance, the intermediary happens to be male, it can pose challenges for women within the victim community to communicate directly

[67] Interview with Senior Officials, VPRS.
[68] Ibid.
[69] Ibid.
[70] The ICC Application form for individuals can be observed online. < https://www.icc-cpi.int/sites/default/files/2022-07/2019JointApplicationForm-L-V02ENG.pdf >
[71] Interview with Senior Officials, VPRS.

through him.[72] Consequently, the victim community has initiated discussions within the group itself to share their experiences and articulate their needs for compensation.[73]

4.1.2 Recruiting locally

Giving opportunities for intermediaries

Selecting intermediaries to represent victims is indeed a crucial decision,[74] and several factors come into play in the selection process. In the case of Uganda, recommendations from local groups or individuals within the community often play a significant role.[75] This may involve considering the reputation of potential intermediaries, such as their perceived integrity, competence, and empathy. Word of mouth within the community can also influence the selection, as individuals who are known for their fairness, intelligence, and sensitivity may be preferred choices. Ultimately, the goal is to appoint intermediaries who can effectively advocate for the victims' interests while fostering trust and communication between the victims and relevant stakeholders.[76]

During the selection and interview process, ICC staff engage with potential intermediaries, while individuals, the candidate for the intermediary, express their willingness to volunteer. Typically, these individuals offer their services without financial compensation, driven by a strong sense of motivation and altruism.[77] In interviews, many candidates express a deep desire to contribute to conflict resolution efforts, gain insight into human experiences, and make a positive impact on others' lives. This high level of motivation underscores the profound commitment of volunteers to engage in meaningful work aimed at promoting peace and justice within their communities.

The strong motivation and dedication of intermediaries often result in spontaneous and proactive efforts to fulfil their responsibilities. For instance, when faced with the task of interviewing a disabled elderly person, intermediaries took it upon themselves to organise visits to the individual's home, ensuring accessibility and comfort during the interview process.[78] Such initiatives demonstrate a genuine commitment to serving the needs of all individuals involved and reflect the intermediaries' willingness to go above and beyond their formal duties to ensure effective communication and engagement.

Sophistication of partner NGOs

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[72] Ibid.

[73] Ibid.

[74] On the issue of intermediaries, see e.g. Haslam E and Edmunds R, 'Managing a New "Partnership": "Professionalization", Intermediaries and the International Criminal Court' (2013) 24 Criminal Law Forum 49; Ullrich L, 'Beyond the Global-Local Divide: Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court' (2016) 14 Journal of International Criminal Justice 543.

[75] Interview with Senior Officials, VPRS.

[76] Ibid.

[77] Ibid.

[78] Ibid.

TFV worked with local and international partner NGOs to implement actual reparation modalities including rehabilitation in general assistance missions in Uganda. Over the years, the TFV has collaborated with approximately 25 to 30 different implementing partners.[79] Currently, it has one partner who has been with TFV since the inception, while others have changed based on the objectives of TFV's activities and reparations.[80] These changes are also influenced by performance metrics. Some partners have been removed due to non-compliance with reporting and accounting requirements.[81] Throughout the TFV's history, it has engaged with a diverse range of partners, including NGOs, faith-based organizations, cultural institutions, academic organisations, international NGOs, and local NGOs in Uganda.

All partnered organisations are required to adhere to a standard code of conduct and performance criteria.[82] Partner selection involves navigating a complex and extensive tender process, beginning with what the TFV terms an 'expression of interest'. Organisations must demonstrate three key criteria: (i) proper registration status; (ii) recent audit reports reflecting positive outcomes; (iii) relevant experience within the past two years, meeting or exceeding a certain funding threshold.[83] Upon meeting these minimal pre-qualifications, organisations may proceed in the selection process.

Once organisations pass the initial pre-qualification stage, they are invited to submit proposals.[84] These proposals must demonstrate the technical expertise, operational capacity, and community presence necessary for the effective implementation of activities. If the TFV is seeking five organisations, it might receive upwards of 25 or more applications.[85] During the evaluation process, the TFV staff scrutinise each proposal's merits. This involves assessing budget allocations for reasonableness, evaluating the organisation's relevant experience, and reviewing the proposed activities and methodologies.[86] For example, the TFV staff examine their plans for medical treatment, counselling programs, and livelihood support. In assessing medical provisions, the TFV scrutinises whether they employ accredited doctors, both locally and internationally, with suitable experience in the field.[87] Similarly, the TFV evaluates the credentials and experience of counsellors to ensure they meet the necessary standards for effective service delivery.[88]

The TFV also verifies if they are properly accredited counsellors and if they possess relevant experience in conducting livelihood activities of this nature.[89] The proposal they

[79] Interview with Senior Official, TFV in Uganda.
[80] The TFV homepage provides the list of implementing partner NGOs: 'Uganda | The Trust Fund for Victims' <https://www.trustfundforvictims.org/en/locations/uganda> accessed 11 June 2024
[81] Interview with Senior Official, TFV in Uganda.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.

submit is extensive, typically consisting of a 10-page template covering various aspects.[90] This includes a narrative proposal, detailed budget breakdowns, CVs of project personnel, and a logical framework, among other requirements. After receiving proposals, each organisation undergoes a thorough evaluation to assess its capabilities and capacity. Those scoring the highest are selected as partners. The TFV prioritises well-organised and established NGOs in this selection process.[91]

Initially, there were more organisations available for partnerships due to the higher number of NGOs operating at that time.[92] Since the TFV's proposal review process began in 2007, there has been a decline in the number of organisations operating in Northern Uganda.[93] Over time, many organisations have ceased operations, resulting in a reduced pool of potential partners and implementing organisations. Furthermore, there has been a shift in the level of administrative sophistication expected from the partners. The TFV has consistently raised the standards of performance and professionalism over the past 17 years.[94] This includes enhancements in monetary management, programmatic oversight, managerial expertise, proposal development, and reporting, as well as monitoring and evaluation processes. As a result, smaller local organisations may find it challenging to meet these heightened requirements. They often lack the necessary scale and sophistication to manage complex financial reporting and monitoring and evaluation demands.[95]

Small local organisations often struggle to meet the rigorous demands of reporting, auditing, monitoring and evaluation, as well as proposal development and managerial skills required for partnership.[96] While some of these organisations evolve and expand their capacities over time, others may choose to maintain a more informal structure. However, as organisations grow, the need for professionalisation becomes imperative. Merely having friends, colleagues, or family members managing financial matters may no longer suffice. Proper financial management necessitates individuals with relevant qualifications, such as accounting degrees or Certified Public Accountant (CPA) experience, to ensure compliance with financial procedures and regulations.[97] In essence, while some organisations adapt and improve to meet evolving requirements, others may opt to remain as Community-Based Organisations (CBOs) due to their chosen structure or limitations in capacity.

[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Ibid.

4.3 Findings and recommendations

4.3.1 Transformative practice

To summarise, the transformative practice of the ICC in communication with the victims in Uganda is twofold. First, it conducted several legal empowerments attempts to prepare victims to litigate. The ICC adopted a proactive engagement strategy in Uganda, driven the emphasis on local understanding, including technical terminology. To overcome language barriers, the ICC involved linguists and anthropologists to address multilingualism. To aid victims in applying for reparations, the ICC deploys personnel to assist at the site, ensuring applications are completed accurately despite literacy challenges. Additionally, the ICC facilitates group discussions within the victim community, especially among sexual violence victims, allowing them to share experiences and articulate compensation needs effectively.

Secondly, The ICC's initiative to recruit local intermediaries in Uganda has had a transformative impact, providing critical opportunities for individuals to represent victims and advocate for their interests. Recommendations from local communities play a significant role in selecting intermediaries known for their integrity and empathy. These intermediaries, motivated by altruism and a desire to promote justice, often volunteer without financial compensation. Their dedication is evident in their proactive efforts. Partner NGOs, crucial for implementing reparation modalities, undergo a rigorous selection process by the TFV, which evaluates their technical expertise, operational capacity, and community presence. Over the years, TFV's collaboration with diverse partners has enhanced the sophistication of administrative and programmatic standards, although smaller local organisations may struggle to meet these heightened demands.

4.3.2 Challenges: Victims' expectations

One of the biggest challenges in relation to communication with the victims is that engaging in this process raises the expectations of the victims. Clarifying from the outset is important but difficult that while efforts are made to provide reparation, it may not always fully meet their needs. The Trial Chamber XI in the *Ongwen* case clearly declared this after declaring that only those victims who can pass the eligibility criteria can receive the symbolic monetary reparation:

> The Chamber does, however, wish to briefly address those individuals who have experienced harm as a result of the conflict in Northern Uganda but who do not qualify as victims in this case. The Chamber understands that individuals who have experienced harm as a result of the same conflict but are not entitled to reparations in this case may be confused, frustrated and disappointed. The Chamber recognises these individuals and acknowledges their suffering. However, as discussed above, the Court's reparations proceedings are not designed to rectify all harm suffered throughout the conflict in Northern Uganda reparations in this case must be tied to the specific harm caused by Mr Ongwen. The Chamber therefore considers that clear communication and outreach is essential for communities to

understand the limited scope of reparations in this case as compared to the widespread harm caused by the entire conflict.[98]

Reparation is not inherently designed to fulfil all needs. However, it is also a duty of the ICC to inform that there is a possibility of receiving some form of restitution in the end. This could include monetary reparation or the establishment of rehabilitation facilities within the community. It is crucial to communicate that such reparations have been provided in the past and that there are individuals who have indeed received financial support.

In such cases, it is crucial to communicate effectively without overly inflating expectations, which can be quite challenging. The ability of local individuals to assert their rights through information garnered from discussions is a tremendously transformative outcome. However, it is equally important to manage these expectations. While it is ideal to meet expectations fully, limitations due to funding constraints often make this difficult. It is essentially a process of reclaiming what has been lost. Balancing the obligation to explain reparation with the expectations of the victim is indeed challenging, especially without active support from external sources.

4.3.3 Practical potential: Rediscovery of transformative reparation "process"

The practical potential of transformative reparations encompasses various strategies, such as repositioning communication channels, reaffirming the significance of victim participation, and reforming community discussion formats. These are just a few examples. Transformative justice prioritises communication and inclusive decision-making processes. By focusing on these aspects, meaningful engagement and foster transformative outcomes in the reparations process can be facilitated.

Firstly, repositioning communication aims to redesign the channels of communication between various stakeholders, including victims, their families, victim communities or groups, the ICC as a global donor, and other local actors. Improving communication pathways may enhance understanding, trust, and collaboration among all involved parties, ultimately contributing to more effective and inclusive reparations processes.

Secondly, I aim to reaffirm the significance of victim participation. While the ICC has established a structured participation system, it tends to be legally focused and limited in scope. To make it more transformative, I propose a balanced approach that combines legal rigor with enhanced outreach efforts. Strengthening outreach initiatives will amplify the transformative impact of victim participation by ensuring broader community engagement. By reforming the format of community discussions, more inclusive platforms for victims to voice their experiences can be created and contribute to decision-making processes regarding reparations.

[98] *Ongwen* (n 54) para. 51.

For instance, when ICC prosecutors or investigators visit villages to collect testimonies, they often encounter the breadwinners first. Unfortunately, this means that the voices of other family members, particularly those who are marginalised or voiceless, may go unheard. To address this issue, a potentially effective approach is to facilitate group discussions. Groups can consist of women with experiences of sexual violence, parents who lost their children or children whose parent is suffering war trauma to share their perspectives and needs. By creating these community forums, marginalised voices can be elevated, allowing them to directly communicate their needs and concerns to relevant ICC divisions, including global donors. This approach aims to maximise the transformative impact of the ICC's reparations process, not only through financial compensation but also through the empowerment and inclusion of marginalized communities throughout the entire process.

5 Conclusion

The transformative approach to justice, as adopted by the ICC, represents a significant shift in how justice is conceptualised and practised in the context of mass atrocities. By focusing on the root causes of crime and addressing the systemic inequities that perpetuate injustice, the ICC is moving beyond traditional models of retributive and restorative justice.

This article has traced the historical development of transformative justice, highlighting its origins in critical criminology and its evolution through key contributions by scholars. Their work has laid the foundation for a justice model that not only repairs harm but also seeks to transform societal structures that contribute to prevent crime and victimisation. Through an analysis of the ICC's reparation orders in landmark cases, it is evident that the court is progressively incorporating transformative principles into its practices. These cases illustrate the potential for reparations to go beyond compensation, aiming to address underlying social issues and promote long-term change through the entire transformative reparation process.

The ICC's approach to victim communication is crucial in this transformative process. By involving victims in a meaningful way, providing learning opportunities about their rights, and using intermediaries to bridge cultural and linguistic gaps, the ICC enhances the legitimacy and impact of its efforts. The practical challenges of this approach, as seen in the case study of Uganda, underscore the importance of context-specific strategies and the need for continuous improvement in communication practices.

The ICC's commitment to transformative justice holds the promise of a more inclusive and equitable global justice system. By prioritising inclusion of victims in the process and addressing structural injustices, the ICC is setting a precedent for how international justice can contribute to societal transformation. As the ICC continues to refine its practices, the lessons learned from these cases will be invaluable in shaping a future where justice not only heals but also fundamentally changes the conditions that lead to conflict and harm.

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A victim-centred approach urges institutional guarantees to minimize the re-traumatization of victims in criminal investigations and empowers victims as participants and beneficiaries in the criminal procedure. It brings new views to the criminal justice process and transformation to the affected community and the entire society. Such a new approach in criminal law is becoming a trend in investigation and reparation phases in both domestic and international legal discourse.

This RIDP *libri* issue consolidates the proceedings that were presented at the XIth AIDP International Symposium for Young Penalists, held at Ritsumeikan University in Kyoto, Japan on 14-15 September 2023, titled: Victim-Centred Criminal Justice. The aim of the symposium was to discuss the prospects and problems of this new approach of victim-centring in criminal law. It paid special attention to global issues of the current era, such as the increase in domestic violence under the lockdown, the escalation of sexual trafficking after the reopening of state borders at the end of the pandemic, and the multi-national investigatory effort into war crimes reported following Russia's invasion of Ukraine. The need for information sharing and the promotion and management of evidence collection through international cooperation are significantly increasing, and theoretical and practical problems need new ideas to ensure fair and just criminal proceedings and criminal justice outcomes.

This volume comprises eight selected contributions, some of which are theoretical, others applied to the phases of investigation, trial and reparation.

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