

## ELEMENTS OF AGGRAVATION IN ICC SENTENCING: VICTIM CENTRED PERSPECTIVES

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### ABSTRACT

The article examines whether the ICC's jurisprudence on sentencing subverts or adopts a victim-oriented justice and whether the Chambers' discourses are consistent with the Rome Statute's legislative history. It argues that this legislative history is an instructive reflection of the drafters' goals regarding victims' rights and justice. A doctrinal review of the court's Preparatory Works and sentencing jurisprudence reveals a potential for a victim-oriented approach to justice. This article thus advances a theory of justice for victims during the court's sentencing practice. Ultimately, it has implications for our understanding of substantive rights of victims, beyond the procedural notions of international criminal justice.

Keywords: Victims; International Criminal Court; sentencing; aggravating factors; international criminal law

### I. Introduction

Victims' rights and their participation in international criminal prosecution has received growing attention in international criminal law scholarship.<sup>1</sup> While these victims' rights approaches have proliferated, there is a lack of attention to the context of sentencing, as a plausible avenue for victims' justice. Yet, proper sentencing has the potential to enhance restorative justice and the legitimacy of the judicial institutions.<sup>2</sup> This article offers some reflections on how to advance victims' justice during the process of sentencing.

The article explores normative and historical grounds that might reasonably justify the expansive rights of victims during sentencing. Glickman explores the nexus between sentencing and justice for victims, using the paradigm of retribution as a theoretical orientation.<sup>3</sup> Ohlin's work addresses the inconsistency in the sentencing procedures of international criminal tribunals, by presenting

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<sup>1</sup> C. S. Patel, 'The "Ideal" Victim of International Criminal Law', *European Journal of International Law* 2018-29, p.703; A. Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the Kenyatta Case' *Journal of International Criminal Justice* 2018-16, p. 571.

<sup>2</sup> R. Henham, 'Evaluating the Contribution of Sentencing to Social Justice: Some Conceptual Problems', *International Criminal Law Review* 2012-12, p. 361; R. Henham, 'Theorising Law and Legitimacy in International Criminal Justice', *International Journal of Law in Context* 2007-3, p. 257.

<sup>3</sup> S. Glickman, 'Victims' Justice: Legitimizing the Sentencing Regime of the International Criminal Court' *Columbia Journal of Transnational Law* 2004-43, p. 229.

a retributive approach.<sup>4</sup> Similarly, Combs' work explores the inconsistencies in the sentence practices across international and internationalised tribunals.<sup>5</sup> To deGuzman, the narratives that portray offenders as 'good or evil' also 'create risks of overpunishment'.<sup>6</sup> She thus warns of the risk of international courts exaggerating culpability and issuing excessive sentences.<sup>7</sup> However, besides the defendants' rights, it is crucial to explore the rights of victims within the sentencing practices.

Harmon and Gaynor argue for the clarification and re-evaluation of sentencing practices, giving substantial weight to the goal of deterrence.<sup>8</sup> It is important to note that inconsistent practices, including sentencing can affect a court's legitimacy in the eyes of its constituencies, including victims.<sup>9</sup> Combs recommends increased local influence over sentencing practices, in order to promote the legitimacy of the court before such people.<sup>10</sup> The article centralizes the role of victims as key constituencies within the Rome regime, thus meriting substantial consideration during the sentencing process.

Analysis of the international criminal law sentencing jurisprudence reveals that judges have a high degree of discretion, which has led to the expansion of both aggravating and mitigating factors.<sup>11</sup> In his argument for the application of human rights principles in international criminal sentencing, Schabas makes empirical observations regarding sentencing practices at the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).<sup>12</sup> He is sceptical about the relevance of the tribunals' sentencing practices, regarding the fundamental aggravating circumstances of crimes against humanity and war crimes.<sup>13</sup> In light of such critical arguments, is it important to evaluate the sentencing practices of the ICC. This article examines whether an expansive interpretation of aggravating factors reflects a victim-centred approach to justice.

The article partly builds on Schabas's human rights approach, but narrows the analysis to victims' justice. Using a conceptual framework of victim-oriented justice, the article takes a theoretical departure from the existing scholarship. A key question here could be: is there a normative or historical ground that might reasonably justify the expansive rights of victims during sentencing? The key differential factors in the determination of sentences are the mitigating and aggravating circumstances. The article will thus make an intuitive connection between aggravating

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<sup>4</sup> J.D. Ohlin, 'Towards a Unique Theory of International Criminal Sentencing' *Cornell Law Faculty Publications* 2009, Paper 23, pp. 373-404.

<sup>5</sup> N.A. Combs, 'Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing' *Yale Journal of International Law* 2016-41, p. 3.

<sup>6</sup> M. M. deGuzman, 'Harsh Justice for International Crimes?' *Yale Journal of International Law* 2014-39, p. 24.

<sup>7</sup> *Ibid.*

<sup>8</sup> M. B. Harmon & F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes' *Journal of International Criminal Justice* 2007-5, pp. 688-712.

<sup>9</sup> M. M. deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' *Fordham International Law Journal* 2008-32, p. 1422.

<sup>10</sup> Combs, *supra* note 5.

<sup>11</sup> M. Bagaric and J. Morss, 'International Sentencing Law: In Search of a Justification and Coherent Framework' *International Criminal Law Review* 2006-6, p. 225.

<sup>12</sup> W. A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' *Duke Journal of Comparative & International Law* 1997-7, p. 477.

<sup>13</sup> *Ibid.*

circumstances and victims' justice, asking a second question; does an expansive interpretation of aggravating factors reflect a victim-centred approach to justice?

Aggravating factors are the 'additional factors attending the commission of a crime, not part of the criminal act per se, which ought to influence the decision to impose a lighter or a heavier sentence, as the case might be'.<sup>14</sup> While deGuzman advances a normative account of the role of gravity in international criminal law,<sup>15</sup> this article attempts to reframe the concept of aggravating factors to justify a victim-oriented approach to sentencing. It traces the victims' discourse from the ICC's legislative history in order to delineate the Chambers' sentencing practice. As deGuzman explains, sentencing decisions have an impact on the legitimacy of the courts.<sup>16</sup>

The article thus seeks to illustrate that a victim-oriented approach to sentencing has the potential to enhance the ICC's legitimacy before its vital constituency. As argued by Marieke de Hoon, discrepancies between victims' justice needs and the courts' practices affect the legitimacy of the international criminal tribunals.<sup>17</sup> This article takes a narrative that views victims as the central actors within the Rome regime and the ICC.<sup>18</sup> Scholarship within the field of victimology reveals that while victims' justice is a multi-faceted concept, criminal trials provide vital symbolic recognition of victims and victimization.<sup>19</sup> However, by situating justice for victims within the sentencing regime, this article departs from contemporary scholarship that conceptualizes victims within procedural and transformational notions.<sup>20</sup>

In theory, the article provides an interpretative framework for the future sentencing practices at the International Criminal Court (ICC). The ICC is viewed as a multifaceted institution, serving interests of both domestic and international communities.<sup>21</sup> In the sentencing context, an exploration of the court's assessment of aggravating factors would be of particular importance to the most affected people – the victims.

The article examines whether the ICC's jurisprudence on sentencing subverts or adapts a victim-oriented justice and whether the Chambers' discourses are consistent with the Rome Statute's legislative history. It argues that this legislative history is an instructive reflection of the drafters' goals regarding victims' rights and justice.

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<sup>14</sup> J. D. van der Vyver, 'International Directives Relating to Sentencing' *Emory International Law Review* 2019-33, p. 535.

<sup>15</sup> deGuzman, *supra* note 6.

<sup>16</sup> M. M. deGuzman, *Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law*, Oxford: Oxford University Press, 2020.

<sup>17</sup> M. de Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC'S Legitimacy' *International Criminal Law Review* 2017-17, p. 593.

<sup>18</sup> M. deGuzman, 'Mission Uncertain: What Communities Does the ICC Serve?' in M. deGuzman and V. Oosterveld (eds), *The Elgar Companion to the International Criminal Court*, Cheltenham: Edward Elgar Publishing 2020, p. 339.

<sup>19</sup> J. Wemmers and A. Manirabona, 'Regaining Trust: The Importance of Justice for Victims of Crimes against Humanity' *International Review of Victimology* 2014-20, p. 106.

<sup>20</sup> L. Moffett, 'Elaborating Justice for Victims at the International Criminal Court' *Journal of International Criminal Justice* 2015-,13 pp.281-311; C. Hoyle & L. Ullrich, 'New Court, New Justice - The Evolution of Justice for Victims at Domestic Courts and at the International Criminal Court' *Journal of International Criminal Justice* 2014-,12, pp. 681-703; R. Killean, 'From Ecocide to Eco-Sensitivity: "Greening" Reparations at the International Criminal Court' *The International Journal of Human Rights* 2021-, 25, pp. 323-347.

<sup>21</sup> deGuzman, *supra* note 6.

Methodologically, the article makes a critical analysis of and a reflection upon the Rome Statute's legislative history and case law, in light of the theoretical framework of victims' justice. It makes a critical assessment of ICC's sentencing practice, focusing on the discourses on aggravating factors. As the court's jurisprudence is still developing, the decisions are reviewed one-by-one, in chronological order. This approach allows for the identification of common trends in regards to analysis of victims' justice. In line with the theoretical framework of this article, the Chambers' approach to victims' justice is best exemplified in cases where the chambers made elaborate discussions on aggravating factors. This analysis is supplemented with insights gained from the author's work as a Visiting Professional in the Office of Public Counsel for Victims (OPCV) at the ICC.

The article proceeds in three sections after the Introduction. Section 2 makes a case for a theoretical framework of victims' justice. First, it situates victims' justice within the Rome regime, which includes substantial rights during sentencing. The article next asks whether an expansive interpretation of aggravating factors reflects a victim-centred approach to justice? Section 3 critically analyses the ICC's legislative history. It argues that the drafters' discourses are key guides for incorporating victims' justice into the court's sentencing jurisprudence. Section 4 examines selected jurisprudence of the ICC on sentencing – more specifically, where the Chambers interpreted the salient elements of aggravation. The author posits that the Chambers' discourses on aggravating factors articulate key elements of victims' justice, albeit without a uniform normative approach due to the lack of clarity in the Courts Rules of Procedure. The section closes with a brief reference to the jurisprudence of international tribunals in order to provide additional guidance for the ICC on the interpretation of aggravating factors. Finally, the article concludes with suggestions for how the Chambers can further assess aggravating factors, in line with a victim centred approach to justice.

## II. Theoretical Framework for Victims' Justice During the Sentencing

### II.1 Victims' Rights in the Rome Regime

The fundamental element of victims as key constituencies goes to the heart of the Rome Regime. Victims' rights are well articulated in the 1998 Rome Statute of the International Criminal Court (Rome Statute), in addition to receiving considerable attention in court's practice and jurisprudence. There are explicit references to victims' interests in the normative contexts. For example, the Rome Statute states that trials must be 'conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.<sup>22</sup> Regarding the application and interpretation of the ICC law under Article 21(3) of the Rome Statute, scholars argue that the wording of internationally recognised human rights includes victims' rights.<sup>23</sup>

Another victim-centred approach to justice can be illustrated in the Rome Statute's provisions on victims' compensation, and Trust Fund for Victims (TFV), which are also guided by theories from the Victims Declaration and the van Boven Principles.<sup>24</sup> In terms of normative scope, the

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<sup>22</sup> 1998, Rome Statute of the International Criminal Court 2187 UNTS 90(2002), article 64.

<sup>23</sup> L. Moffett, 'Meaningful and Effective? - Considering Victims' Interests Through Participation at the International Criminal Court', *Criminal Law Forum* 2015-26, p. 273.; L. Zegveld, 'Victims as a Third Party-empowerment of Victims?', *International Criminal Law Review* 2019-19, p. 328.

<sup>24</sup> *Ibid.*; M. Bachrach, 'The Protection and Rights of Victims under International Criminal Law', *The International Lawyer* 2000-34, p. 17.

Chamber provides an expansive definition of victims, as ‘someone who experienced personal harm, individually or collectively with others, directly or indirectly, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss’.<sup>25</sup>

The court’s procedural and substantive regime on victims is widely regarded as the ‘gold standard’ for jurisdictions with mixed legal systems and common law.<sup>26</sup> Nonetheless, this novel regime was also viewed with some scepticism, with concerns that it could ‘render the landscape of international criminal trials irreconizable’.<sup>27</sup> At both investigations and prosecution stages, the Prosecutor is obliged to respect the interests and circumstances of the victims.<sup>28</sup>

Similarly, the Statute provides for procedural protection for victims during trial, to protect their safety, well-being, dignity, and privacy.<sup>29</sup> More importantly, the Trial Chamber is required to take into consideration a host of factors, ‘including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children’.<sup>30</sup>

In addition to the protections, the Statute allows victims to make representations and observations at all phases of the proceedings, where their personal interests are affected.<sup>31</sup> In this context, the term “victim” refers to both applicants and those that already have a right to participate in the Court’s proceedings.<sup>32</sup>

The Court’s Rules of Procedure and Evidence (the Rules) also allow victims to choose their legal representatives.<sup>33</sup> For this reason, the common legal representatives who work as points of contact for the victims, appear in the court on their behalf and generally provide justice to their needs.<sup>34</sup> They work closely with the Office of Public Counsel for Victims (OPCV) in order to provide support and advice on both procedural and substantive issues.<sup>35</sup>

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<sup>25</sup> *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC01/04-01/06-2842, T.Ch. I, Trial Chamber I, 14 March 2012, para. 14 (ii). See also rule 85 of the ICC’s Rules of Procedure and Evidence (RPE).

<sup>26</sup> C. Mbazira & J. C Mubangizi, ‘The Victim-Centred Approach in Criminal Prosecutions and the Need for Compensation: Reflections on International Approaches and the Legislative and Policy Frameworks in Uganda and South Africa’, *The Comparative and International Law Journal of Southern Africa* 2014-47, p. 221.

<sup>27</sup> S. Vasiliev, ‘Article 68 (3) And Personal Interests Of Victims In The Emerging Practice Of The ICC’ in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court*, Leiden; Boston: Martinus Nijhoff Publishers 2009, p. 636.

<sup>28</sup> Rome Statute, *supra* note 25, article 54(1)(b).

<sup>29</sup> *Idem*, article 68(1).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Idem.* article 68(3).

<sup>32</sup> P. Massidda & S. Pellet, ‘Chapter 34. Role And Practice Of The Office Of Public Counsel For Victims’ in C. Stahn & G. Sluiter (eds), *The Emerging Practice of the International Criminal Court*, Leiden; Boston: Martinus Nijhoff Publishers 2009, p. 692.

<sup>33</sup> Rule 90(1) of RPE, *supra* note 28.

<sup>34</sup> T. M. Funk, *Victims’ Rights and Advocacy at the International Criminal Court*, Oxford: Oxford University Press 2015, p. 95.

<sup>35</sup> F. Baetens & R. Bismuth, ‘Face à Face: Interview with Paolina Massidda – Principal Counsel of the Independent Office of Public Counsel for Victims at the ICC’ *The Law & Practice of International Courts and Tribunals* 2020-19, p. 138

In addition to making oral submissions at the sentencing, the victims' legal representatives also submit written observations about the nature of the sentences.<sup>36</sup> According to Funk, there is a big opportunity for the victims' representatives to elucidate the victim's interests during the process of summation or closing arguments.<sup>37</sup> Moreover, the submissions of the victims' representatives have an influence on the court's assessment of the primary sentencing factors: gravity, elements of aggravation and mitigation.<sup>38</sup> In line with this dimension, the next section situates victims' justice within the ambit of sentencing. More specifically, it will analyse the court's assessment of aggravating factors, linking it to the victims' experiences.

A novel victim-centred approach to justice is illustrated through the Appeal Chambers interpretation of Article 8 of the Rome Statute on War Crimes in the *Ntaganda* Appeal case.<sup>39</sup> The Appeals Chamber confirmed the Trial Chambers position that the protection against sexual violence includes members of the same armed forces. In effect, this expansive interpretation extends protection to a wide range of victims within the armed groups, including former child soldiers.<sup>40</sup>

An important aspect in this case relates to the persuasive nature of the ICC's legislative history. The Appeal Chamber endorsed the Trial Chambers reference to the drafting history, noting that 'the drafters intended these crimes [war crimes of rape and sexual slavery] to be "distinct war crimes", as opposed to merely illustrations of grave breaches of the Geneva Conventions or violations of Common Article 3'.<sup>41</sup>

While some scholars are critical of this expansive interpretation of war crimes basing on the principle of legality,<sup>42</sup> it can be argued that the protection of multiple categories of victims of the war crimes is an essential element under the Rome regime, thus justifying the use of victim-oriented approaches in the ICC's practices.

In line with this dimension, the next section situates victims' justice within the ambit of sentencing. More specifically, it will analyse the court's assessment of aggravating factors, linking it to the victims' experiences.

## II.2 Victims' Rights in Relation to Sentencing

Against the background of the protections and rights afforded to victims under Rome Regime, this sub section situates victims' justice in the ICC's sentencing practice. A critical assessment of the ICC's sentencing practice is relevant, owing to the scholarly criticism against the international criminal sentencing regime.<sup>43</sup> Ohlin's justification for retributive justice is based on the victims'

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<sup>36</sup> FIDH, *Enhancing Victims' Rights Before the ICC - A View from Situation Countries on Victims' Rights at the International Criminal Court*, International Federation for Human Rights 2013, p. 17.

<sup>37</sup> Funk, *supra* note 34, p. 223.

<sup>38</sup> P. Leon-Acevedo, 'Assessing Victim Participation during Sentencing at the International Criminal Court', *Journal of International Criminal Justice* 2019-17, p. 431.

<sup>39</sup> *Prosecutor v Ntaganda*, Judgment on the appeal of Mr Ntaganda against the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, No. ICC-01/04-02/06-196, Appeals Chamber, 15 June 2017 ('Ntaganda Appeals Chamber decision').

<sup>40</sup> *Idem*, para. 46.

<sup>41</sup> *Idem*, para. 48.

<sup>42</sup> C. Kenny & Y. McDermott, 'The expanding protection of members of a party's own armed forces under international criminal law', *International and Comparative Law Quarterly* 2019- 68, p. 950

<sup>43</sup> Harmon & Gaynor, *supra* note 8, p. 711.

beliefs in the inherent retributive goals of the criminal process.<sup>44</sup> Combs notes that the incorporation of domestic sentencing norms into international sentencing would secure the support of victims and other key constituencies of the international criminal courts.<sup>45</sup>

A key initiative for victims' justice is exemplified during the sentencing proceedings. The ICC conducts a distinct sentencing phase, where aggravating and mitigating factors are considered.<sup>46</sup> Scholars consider this 'bifurcation' as a ground for the development of jurisprudence.<sup>47</sup> To Sloane, a distinct sentencing phase allows the development of 'mature jurisprudence' and 'the expressive value of sentencing'.<sup>48</sup> As argued by Ohlin:

'If litigants are given the opportunity to present arguments specifically tailored to the question of sentencing, the court will be more likely to respond with a decision that not only carefully considers those arguments, but also presents a coherent vision and detailed rationale for the handing down of a specific sentence'.<sup>49</sup>

Similarly, scholars empathize the evidentiary role that victims play during these critical sentencing phase.<sup>50</sup> Logan notes that 'evidence relating to victims' personal traits, harm (to the direct victim, certainly), the number of persons a defendant has killed, and any particular cruelty shown bear obvious importance in both criminal culpability and punishment assessments'.<sup>51</sup> In sum, it can be argued that there is an intuitive connection between sentencing phase and the desire to encourage detailed deliberation by the court on sentencing matters.

This article lends support to the scholarly connections that make an intricate link between the ICC practice of a separate sentencing phase and the judge's discourses in the sentences. Therefore, it undertakes an analysis of the Rome Statute's provisions on aggravating and mitigating circumstances in order to explore whether a case can be made for a victim-oriented approach to justice. This invites a critical analysis of and a reflection upon the relevant laws on aggravating factors.

As was highlighted in the introduction, aggravating factors are the 'additional factors attending the commission of a crime, not part of the criminal act per se, which ought to influence the decision to impose a lighter or a heavier sentence, as the case might be'.<sup>52</sup> Article 78(1) of the Rome Statute provides a non-exhaustive list of factors to be considered when determining sentences: the gravity of the crime, aggravating and mitigating factors.<sup>53</sup> It can be assumed that the drafters envisioned a more elaborate guidance on sentencing under the Rules of Procedure and Evidence.

Rule 145(2)(b) lists a range of aggravating circumstances; prior criminal convictions, abuse of power or official capacity, commission crimes where the victims are particularly defenceless,

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<sup>44</sup> Ohlin, *supra* note 4, p. 391.

<sup>45</sup> Combs, *supra* note 5, p. 8.

<sup>46</sup> See RPE, *supra* note 25, Rule 145(1)(C).

<sup>47</sup> W. A. Logan, 'Confronting Evil: Victims' Rights in an Age of Terror' *Georgetown Law Journal* 2008-96, p. 773.

<sup>48</sup> R. D. Sloane, 'Sentencing for the 'Crime of Crimes': The Evolving 'Common Law' of Sentencing of the International Criminal Tribunal for Rwanda', *Journal of International Criminal Justice* 2007-5, p. 734.

<sup>49</sup> Ohlin, *supra* note 4, p. 394.

<sup>50</sup> J. Leon-Acevedo, 'Victims and appeals at the International Criminal Court (ICC): evaluation under international human rights standards', *The International Journal of Human Rights* 2021, p. 9. (ahead of print).

<sup>51</sup> Logan, *supra* note 47, pp. 772-773.

<sup>52</sup> van der Vyver, *supra* note 14, p. 567.

<sup>53</sup> Rome Statute, *supra* note 25.

commission of the crimes with cruelty, multiple victims and commission of the crimes with discriminatory motives.<sup>54</sup>

According to Rule 145(2)(b)(vi), the Chamber may consider as aggravating circumstances ‘other circumstances which, although not enumerated [in the same Rule], by virtue of their nature are similar to those mentioned’. Rule 145(2)(b)(vi) can thus be interpreted to mean that the Chambers have discretion to determine individual circumstances that are relevant in the sentencing process. This begs an inquiry into the interpretation of the ‘other circumstances’ in sentencing. In light of the theoretical framework of this article, a key question relates to; whether a legislative interpretation of aggravating factors reflects a victim-centred approach to justice?

### III. Legislative History of the Rome Regime as a Foundation for Victims’ Justice

This section makes a critical analysis of the Rome regime’s legislative proposals and preparatory documents. Due to the ambiguity within the Statute and Rules, reference to the Preparatory Works of the Rome Statute is important, as a source of law to the court.<sup>55</sup> More importantly, the discussions amongst the drafters will provide an elaborate guide on the issue of aggravating factors in sentencing, in light of the theoretical framework of victims’ justice.

The First Preparatory Committee did not make a full concrete discussion on issues relating to penalties.<sup>56</sup> However, during the discussions on penalties, a reference was made to the law of the state where the crime is committed. In theory, this reference to the law of the state where the crime is committed, reference could suggest that the drafters were mindful of the contextual nature in which atrocities are committed against victims.

During the Second Preparatory Committee in August 1996, the delegations from Australia and the Netherlands submitted a Working Paper on a Draft Set of Rules of Procedure and Evidence for The International Criminal Court. Regarding penalties, Rule 119(B)(i) provided for aggravating circumstances regarding the impact of the crime on the victims and the extent of damage caused by the convicted person’s conduct.<sup>57</sup>

During the Fifth Preparatory Committee in December 1997, the Working Group on Penalties made a blanket recommendation concerning sentences; ‘In determining the sentence, the Court shall, in accordance with the Rules of the Court, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person’.<sup>58</sup> It listed an expansive but non-exclusive list of aggravating factors, including the impact of the crime on the victims and their families and the extent of harm.<sup>59</sup> This broad approach to sentencing could suggest that the

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<sup>54</sup> RPE, *supra* note 25, Rule 145(2)(b).

<sup>55</sup> *Prosecutor v Jean-Pierre Bemba Gombo et al*, Appeal Judgement, Case No. ICC-01/05-01/13 A6 A7 A8 A9, Appeals Chamber, 8 March 2018, para. 154. See also D. Akande, ‘Sources of International Criminal Law’ in A. Cassese et al. (eds), *Oxford Companion to International Criminal Justice*, Oxford: Oxford University Press 2009, p.44.

<sup>56</sup> See Summary of the proceedings of the Preparatory Committee during the period 25 March-12 April 1996, A/AC.249/1, 7 May 1996, para. 107.

<sup>57</sup> See Draft Set of Rules of Procedure and Evidence for The International Criminal Court - Working Paper Submitted by Australia and The Netherlands, A/AC.249/L.2, 26 July 1996, Rule 119(B)(i).

<sup>58</sup> See Decisions by the Preparatory Committee at its Session held from 1 to 12 December 1997, A/AC.249/1997/L.9/Rev.1, 18 December 1997, p. 70.

<sup>59</sup> *Idem*, footnote 11.



drafters were mindful of the potential expansion of victimhood, that would necessitate expansive interpretations by the Chambers.

It is important to note that the Rule 145(1)(c) factors were originally considered as a non-exhaustive list of aggravating and mitigating circumstances. A verbatim outline of the discussions is relevant in order to make a case for victims' approach to justice.<sup>60</sup> This text also helps to show what 'other aggravating circumstances' might look like. It was reported that:

'Among the factors suggested by various delegations as having relevance were: the impact of the crime on the victims and their families; the extent of damage caused or the danger posed by the convicted person's conduct; the degree of participation of the convicted person in the commission of the crime; the circumstances falling short of exclusion of criminal responsibility such as substantially diminished mental capacity or, as appropriate, duress; the age of the convicted person; the social and economic condition of the convicted person; the motive for the commission of the crime; the subsequent conduct of the person who committed the crime; superior orders; the use of minors in the commission of the crime.'<sup>61</sup>

The same factors were emphasized in the Report of the Inter-sessional meeting from 19 to 30 January 1998 in Zutphen, the Netherlands.<sup>62</sup> It can thus be assumed that the drafters were mindful of the importance of addressing the justice needs of a broad range of victims. Similarly, we can argue that the drafters were cautious not to limit the protective scope of the Rome regime, since it also addresses crimes committed under the Geneva Conventions of 12 August 1949 like forced pregnancy and sexual slavery.

Another important forum was the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome, 15 June - 17 July 1998. Ms. Boenders, an observer for a Non-Governmental Organization (NGO), Children's Caucus International, suggested an aggravating circumstance in regard to adults who use children to commit crimes.<sup>63</sup> She noted that; 'Where adults deliberately used children to commit crimes within the jurisdiction of the Court, or targeted them as victims, that should be considered an aggravating factor in passing sentence'.<sup>64</sup>

The delegate from New Zealand also suggested that: 'Using children should be an aggravating circumstance for those sentenced for having committed a core crime'.<sup>65</sup> Core crime can be assumed to mean war crimes like conscription of children under the age of fifteen years. From a victim-oriented approach to justice, the aggravating factor relating to the involvement of children in the commission of crimes can be considered as relevant within the context of former child soldiers.

In addition to the situations involving children, pregnancy was also suggested as an aggravating factor to the crime of rape. The delegate from Kuwait observed that: 'The term "enforced pregnancy" in subparagraph (p)\s), should be reconsidered because rape was in any case

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<sup>60</sup> See Report of the Working Group on Penalties, A/Conf.183/C.1/WGP/L.14, 4 July 1998, p.3, footnote 3, as amended by Corrigendum to the Report of the Working Group on Penalties, A/Conf.183/C.1/WGP/L.14/Corr.1, 6 July 1998, para. 2.

<sup>61</sup> *Ibid.*

<sup>62</sup> See Report of the inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13, 4 February 1998, p. 130, footnote 247.

<sup>63</sup> See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume II, p. 72.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Idem*, p. 100.

criminalized and it might be considered that pregnancy was an aggravating circumstance of rape'.<sup>66</sup> These are crucial factors in the prosecution of crimes related to forced marriages.

The delegations noted that it was impossible to foresee all of the relevant aggravating and mitigating circumstances at that stage. They thus reserved these for the Rules.<sup>67</sup> This proposal implies that the delegates envisioned that the Rules would provide a more nuanced position regarding the Chambers sentencing practice.

During the drafting of the Rules, the First Preparatory Commission for the ICC reproduced the texts in the report of the Working Group on Penalties, indicating that it was impossible to exhaust all the aggravating circumstances.<sup>68</sup> This normative flexibility can be regarded as a prism through which to advance victims' justice, by considering multiple forms of aggravation and harm to victims.

Another approach consistent with the victim-centred approach is illustrated during the discussions by the Working Group on Rules of Procedure and Evidence held in 1999. In particular, the proposals raise an important issue regarding the vulnerability of particular categories of victims. The Spanish delegation made a proposal on the Rules, relating to part 7 of the Rome Statute (Penalties). They suggested a range of aggravating circumstances including the commission of a crime for reward, discriminatory motives, deliberately and inhumane increasing of the pain of victim, abuse of power and repetition of crimes.<sup>69</sup>

There were suggestions for aggravating factors to include situations where the victims are defending themselves against the perpetrators, circumstances of location, time or assistance from other persons which weaken the victim's defence.<sup>70</sup> These suggestions can be assumed to illustrate a victim-oriented approach to justice, that resonates with multiple humanitarian contexts where victims may engage in self-defence.

Finally, the draft text of the Rules that was considered by the Preparatory Commission at its first to fifth sessions in 2000, adopted the current Rule 145(2)(b)(vi) which allows for an expansive interpretation of aggravating factors beyond those enumerated in the Rules of Procedure and Evidence (RPE).<sup>71</sup> It can also be argued that the final text in the RPE did not make expansive provisions regarding the mitigating and aggravating circumstances due to the presence of delegates from civil law and common law traditions.<sup>72</sup> Nonetheless, the flexible approach taken by the drafters may also suggest an awareness of the evolving nature of international crimes with nuanced experiences of victims.

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<sup>66</sup> *Idem*, p. 162.

<sup>67</sup> See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume III, Reports and other documents, p. 317.

<sup>68</sup> See References to Rules of Procedure and Evidence found in the Rome Statute of the International Criminal Court and in relevant documents of the United Nations Diplomatic Conference of Plenipotentiaries for the Establishment of an International Criminal Court, PCNICC/1999/L.2, 26 January 1999, p. 11.

<sup>69</sup> See Preparatory Commission-Working Group on Rules of Procedure and Evidence, PCNICC/1999/WGRPE(7)/DP.2, 23 November 1999, p. 2.

<sup>70</sup> *Ibid.*

<sup>71</sup> See Report of the Preparatory Commission for the International Criminal Court Addendum, Part I, Finalised draft text of the Rules of Procedure and Evidence, PCNICC/2000/1/Add.1,2 November 2000, p. 72.

<sup>72</sup> S. A. F. de Gurmendi & H. Friman, 'The Rules of Procedure and Evidence of the International Criminal Court', *Yearbook of International Humanitarian Law* 2000-3, p. 331.

A victim-oriented approach to justice can be observed during the discussions on the Draft code of crimes against the peace and security of mankind (Part II) – including the draft statute for an international criminal court.<sup>73</sup> Within the discussions on the rules for the protection of the accused, victims and witnesses, the drafters made explicit reference to and included the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration).<sup>74</sup> It should be noted that this Declaration provides an expansive meaning of victims that envisions both direct and indirect harm.<sup>75</sup> However, the final text of the Draft Rules of Procedure and Evidence definition victims under Rule 85 did not include a reference to the Victims Declaration due to divisions between states, on whether the definition of victims should include legal entities and indirect harm.<sup>76</sup>

Furthermore, the delegates proposed to extend the jurisdiction of court to include categories of crimes under the Geneva Conventions of 12 August 1949 on the Protection of Victims of War and the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>77</sup> This expanded jurisdiction illustrates an understanding of a wide range of victims during mass atrocities and armed conflict.

Finally, another notable victim-oriented approach to justice is reflected in the wording of the Rule 70 and 71, on evidence of sexual conduct.<sup>78</sup> The drafters adopted special evidential principles that would allow for the prosecution of sexual violence committed during armed conflict.<sup>79</sup> This flexible approach to prosecution is attributed to the drafters' desire to circumvent the challenges faced at the ICTY and ICTR regarding the prosecution of sexual violence crimes.<sup>80</sup>

In conclusion, the legislative history provides a key starting point for the use of a victim-oriented approach to justice during sentencing. The flexibility also allows the Chambers to exercise discretion in the assessment of aggravating factors, to include context related nuances of both direct and indirect harm to victims. As an example, the Preparatory Commission's Working Group on Rules of Procedure and Evidence of 1999, highlighted some factors that guided the Appeals Chamber in the *Bemba et al Appeal*.<sup>81</sup>

In addition, the explicit reference by the drafters and delegates to normative frameworks of international human rights and humanitarian law standards is instructive for the Chambers sentencing practice, in line with a victim-oriented approach to justice. According to Bachrach, 'the abundance of references in the Rome Statute to the protection and rights of victims indicates that their concerns may finally be taken seriously on an international plane'.<sup>82</sup>

In this regard, the next section analyses the jurisprudence of the court, to further exemplify the use of victims-oriented approaches to justice during the discourses on aggravating factors.

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<sup>73</sup> Observations of Governments on the report of the Working Group on a draft statute for an international criminal court, A/CN.4/458 and Add. 1-8, Extract from the Yearbook of the International Law Commission. 1994, vol. II (1).

<sup>74</sup> *Idem*, p. 65.

<sup>75</sup> General Assembly resolution 40/34 of 29 November 1985.

<sup>76</sup> de Gurmendi & Friman, *supra* note 72, p.313.

<sup>77</sup> Observations of Governments on the report of the Working Group on a draft statute for an international criminal court, *supra* note 73, p. 39.

<sup>78</sup> RPE, *supra* note 25.

<sup>79</sup> C. Byron, D. Turns, C. Warbrick & D. McGoldrick, 'The preparatory Commission for the International Criminal Court', *The International and Comparative Law Quarterly* 2001-50, p. 432.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Prosecutor v Jean-Pierre Bemba Gombo et al.*, *supra* note 55, para. 156.

<sup>82</sup> Bachrach, *supra* note 24, p. 20.

#### IV. Courts' Assessment of Aggravating Circumstances: Victims Oriented Approach to Sentencing

The following sentencing decisions of the court have been selected as they explore the element of aggravating factors in detail. The lack of an exhaustive list of aggravating circumstances within the Statute and Rules gives the chambers an opportunity to exercise wide discretion.<sup>83</sup> The discussion of the chambers in these cases is vital, as it touches upon elements of victimhood like harm and vulnerability.<sup>84</sup> The key question is: does an expansive interpretation of aggravating factors reflect a victim-centered approach to justice?

The *Lubanga* case was the first judgement of the court,<sup>85</sup> and the prosecution submitted the following as aggravating factors: harsh conditions and treatment in the camps, and the commission of sexual violence and rape, within the meaning of Rule 145(2)(b)(iii) of the Rules.<sup>86</sup> The rationale was that '*the harms committed were gender based*'. In addition, they argued that he abused his power or official capacity since the victims were particularly defenseless (in this case due to very young age) and affected the broader social impact of the crimes on the families and communities.

Furthermore, the prosecution submitted a separate aggravating factor of discriminative motive, within the meaning of Rule 145(2)(b)(v), arguing that sexual violence was committed in a deliberately discriminative manner. This was however rejected by Trial Chamber I.<sup>87</sup> The Chamber did not make any other finding on this factor. As regards to sexual violence as an aggravating factor, the Trial Chamber noted that:

‘The Chamber is entitled to consider sexual violence under Rule 145(1)(c) of the Rules as part of: (i) the harm suffered by the victims; (ii) the nature of the unlawful behaviour; and (iii) the circumstances of manner in which the crime was committed; additionally, this can be considered under Rule 145(2)(b)(iv) as showing the crime was committed with particular cruelty’<sup>88</sup>.

In terms of interpretation, the Chamber did not consider the above elements of aggravation to be ‘other circumstances’ under Rule 145(2) (b) (vi).<sup>89</sup> However, the recognition of extensive harm to victims of sexual violence is plausible, in light of a victim-centred approach to justice.

With regards to the harsh conditions and treatment in the camps, the Chamber rejected the Prosecution’s arguments and did not take these into account as aggravating factors in the determination of the sentence.<sup>90</sup> The Trial Chamber rejected the factor regarding the age of the children as an aggravating factor.<sup>91</sup> As for the Prosecution’s submission that the crimes were committed against young children, the Trial Chamber held that the age of the children did not

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<sup>83</sup> D. Radosavljevic, ‘Restorative Justice under the ICC Penalty Regime’, *The Law and Practice of International Courts and Tribunals* 2008-7, p. 235.

<sup>84</sup> R. Killean, ‘Selective Justice and Constructions of Victimhood at the Khmer Rouge Tribunal’ in M. Evans (ed), *Transitional and transformative justice: critical and international perspectives*, London: Routledge 2019); J. Wemmers and A. Manirabona, ‘Regaining Trust: The Importance of Justice for Victims of Crimes against Humanity’, *International Review of Victimology* 2014-20, p. 105.

<sup>85</sup> *Prosecutor v Lubanga*, Decision on Sentence pursuant to Article 76 of the Statute, No. ICC-01/04-01/06-2901, Trial Chamber I, 10 July 2012.

<sup>86</sup> *Idem*, para. 61.

<sup>87</sup> *Idem*, paras. 79,81.

<sup>88</sup> *Idem*, para. 67.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Idem*, para. 59.

<sup>91</sup> *Ibid.*

constitute an aggravating factor. The reasoning was that this factor was already relevant for determining the gravity of the crimes.<sup>92</sup> Generally, the Trial Chamber's assessment of evidence was a subject of scholarly criticism.<sup>93</sup>

Nonetheless, the reasoning with regards to the age of children presents a foundation for future analysis of aggravating elements where child victims are involved. The Appeals Chamber dismissed all the grounds of appeal put forward by the Prosecution and the Defence and confirmed the Trial Chamber's sentencing decision.<sup>94</sup> In sum, the *Lubanga* case did not make an expansive interpretation of aggravating factors, due to the limited scope of the Rules. This normative limitation suggests a need to consider the Rome Regime's legislative history as a way of achieving victims' justice.

In the *Bemba* case of 2016, the Prosecution put forward two aggravating circumstances that; the crimes were committed against particularly defenceless victims and with particular cruelty.<sup>95</sup> The Chamber's decision is similar to that in the *Lubanga* sentencing case, where sexual violence was not considered as an independent aggravating factor. In considering the alleged aggravating circumstances relevant to the crimes of rape and pillaging, the Trial Chamber considered Rule 145(2)(b)(iii) provisions, while adopting ICTY jurisprudence to include situations like the location of crime, for example, places of worship, hospitals, and the victims' homes.<sup>96</sup>

The aggravating factors also included the victims' ages, 'the duration and repeated nature of the acts, the perpetrators' motives, and the violent and humiliating nature of the acts, including their public nature, and any verbal, physical, or other abuse or threats accompanying the crime'.<sup>97</sup> The Trial Chamber upheld the aggravating circumstances related to the vulnerability and defencelessness of the crimes of rape by Bemba's soldiers.<sup>98</sup>

The second aggravating circumstance, pursuant to Rule 145(2)(b)(iv), was related to the 'particular cruelty' with which Bemba's soldiers committed the crimes of rape and pillaging.<sup>99</sup> While acknowledging the *ad hoc* tribunals' position that a superior's direct contribution to the crimes may be considered as an aggravating circumstance, the Trial Chamber did not consider the accused's superior authority as an aggravating factor to his sentence. Instead, it was considered as an increase to the gravity of his culpable conduct.<sup>100</sup> Nonetheless, the Chamber's recognition of inherent vulnerabilities of defenceless victims in armed conflicts reflects a victim-oriented approach to justice.

The appeal of *Bemba et al.* against the decision of Trial Chamber VII entitled 'Decision on Sentence pursuant to Article 76 of the Statute' of 22 March 2017', demonstrates an expansive interpretation of aggravating factors.<sup>101</sup> According to the Appeals Chamber, Bemba's arguments

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<sup>92</sup> *Idem*, para. 78.

<sup>93</sup> K. Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues', *International Criminal Law Review*, 2012-12, p. 151.

<sup>94</sup> *Prosecutor v Thomas Lubanga Dyilo*, Appeal Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the Decision on Sentence pursuant to Article 76 of the Statute, No. ICC-01/04-01/06-3122, Appeals Chamber, 1 December 2014.

<sup>95</sup> *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Sentence pursuant to Article 76 of the Statute, Case No. ICC-01/05-01/08-3399, Trial Chamber III, 21 June 2016, para. 13.

<sup>96</sup> *Idem*, para. 25.

<sup>97</sup> *Idem*, para. 25.

<sup>98</sup> *Idem*, para. 43.

<sup>99</sup> *Idem*, paras. 47,57.

<sup>100</sup> *Idem*, para. 67.

<sup>101</sup> *Prosecutor v Jean-Pierre Bemba Gombo et al.*, *supra* note 58, para. 154.

concerned the interpretation of rule 145(2)(b)(vi) of the Rules.<sup>102</sup> In interpreting the scope of ‘other circumstances’, the Appeals Chamber referred to the Preparatory works of the court, noting that:

‘Indeed, the language of rule 145 (2) (b) (vi) of the Rules seems to reflect a compromise between opposing views of States during the Rome conference, where some States advocated that considerable flexibility should be given to the Court, while other States argued for an exhaustive list to ensure more legal certainty and predictability.’<sup>103</sup>

It can be argued that the explicit reference to the Rome Statute’s legislative history and Preparatory Works highlights a progressive approach of the Chamber towards the recognition of victims’ justice.

In addition to offences against the administration of justice, abuse of privilege as an aggravating factor, was a key determinant in the sentencing. According to the Appeals Chamber, the Trial Chamber correctly determined that Bemba’s abuse of his privileged communications ‘by virtue of [its] nature’, was similar’ to the factors in rule 145(2)(b)(i) to (v), and hence constitutes an aggravating circumstance.<sup>104</sup>

Wrongful conduct both before and after charges, can also be considered as an aggravating factor under Rule 145(2)(b)(vi). According to the Appeals Chamber, conduct can give rise to an aggravating circumstance.<sup>105</sup> Although offences relating to the administration of justice do not have an explicit connection with victims, the Chamber’s discourse in the *Bemba* case illustrates the value of the Preparatory Works of the court as key aids in the sentencing process. Crucially, the legislative history of the Rome regime provides a gateway for the recognition of nuanced forms of harm to victims, that are relevant in the sentencing process.

The *Katanga* case highlights the nexus between the gravity of the crimes and aggravating factors. After underscoring the gravity of the crimes in the light of both article 78 of the Statute and Rule 145(1)(c), the Prosecution listed the following four aggravating circumstances: (1) particularly defenceless victims; (2) particular cruelty of the commission of the crime; (3) motive involving discrimination; and (4) abuse of power or official capacity.<sup>106</sup>

The Chamber discussed only the fourth aggravating factor: whether Katanga abused his authority. The other factors submitted by the Prosecution had already been considered in determining the gravity of the crimes.<sup>107</sup> In this case, the Chamber judged that the one aggravating factor had not been proven beyond a reasonable doubt.<sup>108</sup> This reasoning was premised on the absence of evidence to show that Katanga actually abused his position of power or that he used his influence to promote the commission of crimes.<sup>109</sup> Perhaps the reasoning would have been different, if acts of sexual violence had been proven to be widespread and systematic. The limited scope of this

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<sup>102</sup> *Idem*, para. 154.

<sup>103</sup> *Idem*, para. 156.

<sup>104</sup> *Idem*, paras. 68, 118.

<sup>105</sup> *Idem*, para. 114.

<sup>106</sup> *Prosecutor v Katanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/07-3484, Trial Chamber II, 23 May 2014, para. 70.

<sup>107</sup> *Idem*, para. 35.

<sup>108</sup> *Idem*, para. 75.

<sup>109</sup> *Ibid.*

article doesn't allow for a critique of this decision. This is addressed in the scholarship on sexual violence and the various modes of liability.<sup>110</sup>

In the *Ntaganda* case, the Chamber expressly acknowledged the distinction of Rule 145(1)(b)(vi) factors from other aggravating circumstances, noting that: 'The list of aggravating circumstances in Rule 145(2)(b) of the Rules is not exhaustive, rather, as indicated by Rule 145(1)(b)(vi), circumstances other than those explicitly provided in Rule 145(2)(b) (i) to (v) of the Rules may be considered if they are similar to them by virtue of their nature. Rule 145(2)(b)(vi) of the Rules does not set forth a lower threshold for seriousness.'<sup>111</sup> From a victims' justice perspective, the above reasoning illustrates a clear application of the Chamber's discretion, as envisioned under the Rome regime's legislative framework. This discretion also allows for an expansive interpretation of aggravating factors during sentencing, to include the victims' nuanced experiences.

Taking a similar approach to that of the Appeals Chamber in the *Bemba et al.* Sentencing Appeal Judgment, it was noted that the key element for aggravating factors is the presence of 'sufficiently proximate link between the factor and the crime or crimes that form the basis of the conviction'.<sup>112</sup> However, the Chamber observed that legal elements of the crimes cannot be framed as separate aggravating factors. In this case, the fact that Ntaganda's 'victims were under 15 cannot, as such, be considered an aggravating circumstance'.<sup>113</sup>

More specifically, the Chamber's reasoning is quite instructive in exploring Rule 145(2)(b)(vi) factors, that was identified as an expansive avenue for victims' rights. Although the Chamber did not explicitly frame its reasoning under Rule 145(2), it listed an expansive list of aggravating factors.<sup>114</sup> More notably, situations where victims were defenceless, for example those that had been previously captured or detained, pregnant women, babies, young children, sick and disabled persons unable to flee.<sup>115</sup>

The conduct of a commander in the presence of subordinates can also be perceived as an aggravating factor. Ntaganda's individual criminal conduct amongst his juniors was an aggravating factor. The Chamber's analysis emphasizes the fact that Ntaganda committed the crimes in an individual capacity.<sup>116</sup> It can be argued that individual conduct as an aggravating factor offers a potential for the recognition of multiple forms of victims, for example, former child soldiers under the custody of armed groups.

In addition, the targeting of victims on ethnic grounds is also considered as an aggravating factor. The Chamber considered the fact that 'Ntaganda intentionally targeted the victim on ethnic grounds, namely by reason of his identity as a Lendu, to constitute an aggravating circumstance'.<sup>117</sup> The Chamber further identified the following factors in aggravation: the particularly harsh

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<sup>110</sup> See, for example, C. Stahn, 'Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment', *Journal of International Criminal Justice* 2014-12, pp. 809-834; L. Kortfält, 'Sexual Violence and the Relevance of the Doctrine of Superior Responsibility in the Light of the Katanga Judgment at the International Criminal Court', *Nordic Journal of International Law* 2015-84, pp. 533-579.

<sup>111</sup> *Prosecutor v Bosco Ntaganda*, Sentencing Judgment, ICC-01/04-02/06, Trial Chamber VI, 07 November 2019, para. 17.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Idem*, para. 20.

<sup>114</sup> *Idem*, para. 82.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Idem*, para. 83.

<sup>117</sup> *Idem*, para. 84.

treatment of some of the victims, the fact that at least one of the victims was very young and the intentional attack on civilians.<sup>118</sup>

With regards to sexual violence crimes, re-victimization was also considered as an aggravating factor. The Chamber found that: '[T]he repeated victimisation of some of the victims, namely the fact that some victims were raped more than once by the same perpetrator, or were raped by different perpetrators, is also considered to be an aggravating circumstance.'<sup>119</sup>

The foregoing discussion is persuasive in light of a victim-centred approach to justice, as it allows for the recognition of victims of sexual violence under the custody of armed groups.

Attacks on protected facilities like health facilities and the subsequent harm to victims is also considered as an aggravating factor. In this case, the Chamber noted the 'aggravating circumstance that the patients present in the centre were left without medical care as a result of the attack'.<sup>120</sup> Another unique aggravating circumstance relates to the recruitment and active use in hostilities of children under the age of fifteen. A third novel factor relates to the living conditions of the training camps. In this case, the treatment to which the children were incorporated into the military was considered as an aggravating factor.<sup>121</sup>

From a victim-centred approach to justice, the Chamber's discourse in the *Ntaganda* case resonates with the Rome Statute and its foundational aspirations regarding the goal of ending impunity. Specifically, the discourse on aggravating factors engages a wide spectrum of the ICC's constituencies, as it recognizes a multitude of victim categories, beyond those directly affected by Ntaganda's actions.

The *Al-Mahdi* case differs from the earlier jurisprudence of the court, as it involved prosecution of war crimes against cultural property.<sup>122</sup> The Chamber rejected the Prosecution's argument that Al Mahdi abused his power and official capacity as head of the *Hesbah* and that it was an aggravating circumstance.<sup>123</sup> In its submissions, the Prosecution presented an additional aggravating factor; the fact that the crime affected multiple victims, under rule 145(2)(b)(iv). This was also rejected because it had already been taken into account by the Chamber in its assessment of gravity.<sup>124</sup>

Similarly, the Chamber rejected the aggravating factor regarding the religious nature of the attack, since it was already considered during the assessment of the gravity of the crime.<sup>125</sup> Nonetheless, the religious nature of attacks could be considered as a Rule 145(2)(b)(vi) factor, if not argued within the ambit of the element of gravity. Overall, the Chamber did not find any aggravating circumstances in the *Al-Mahdi* case.

From a victim-oriented approach to justice, the reparations order in the *Al-Mahdi* case presented a key question regarding who can be considered as a victim of cultural heritage destruction.<sup>126</sup> The Chamber identified three categories of victims: the local community of Timbuktu, the

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<sup>118</sup> *Idem*, paras. 197, 85.

<sup>119</sup> *Idem*, para. 122.

<sup>120</sup> *Idem*, para. 156.

<sup>121</sup> *Idem*, para. 193.

<sup>122</sup> *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15, Trial Chamber VIII, 27 September 2016.

<sup>123</sup> *Idem*, para. 86.

<sup>124</sup> *Idem*, para. 87.

<sup>125</sup> *Idem*, para. 88.

<sup>126</sup> *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, ICC-01/12-01/15-236 Trial Chamber VIII, 17 August 2017.



population of Mali and the international community.<sup>127</sup> Furthermore, this expansive recognition of victims suggests that the Chambers are willing to make a broad interpretation of the Rome Statute, in line with the emerging nuanced nature of crimes and victimization.

The *Dominic Ongwen* presents an elaborate assessment of aggravating factors in line with a victim-centred approach to justice.<sup>128</sup> The aggravating circumstances considered by the Trial Chamber were; particular cruelty, multiplicity of victims, the victims being particularly defenceless, and discrimination on political grounds and discrimination against women.<sup>129</sup> The Chamber rejected the aggravating factor of abuse of power that was submitted by the legal representatives of the participating victims, due to the absence of a special lawful relationship between Ongwen and his victims.<sup>130</sup> In sum, the three aggravating factors weighted heavily against Ongwen's mitigating factor of his personal history, in relation to the crime against humanity of murder and the war crime of murder, triggering a term of 20 years of imprisonment.<sup>131</sup>

Ongwen's crimes of murder in the context of the attack on IDP camps were also aggravated by circumstances of the victims that were killed as they tried to escape or refused to carry looted goods.<sup>132</sup> Under such circumstances, the Chamber reasoned that the victims of murder were particularly defenceless, constituting an aggravating factor.<sup>133</sup>

While analyzing the aggravating circumstance of the multiplicity of victims, the Chamber paid attention to the vulnerability of victims within Ongwen's captivity. More notably, the difficult process of reintegration of victims into their communities and psychological harm, noting that, 'In the assessment of the Chamber, it is important to pay sufficient attention also to the psychological harm done to the victims and their family members'.<sup>134</sup> From a victim-centred approach to justice, the expansive analysis of the aggravating circumstance of multiplicity of victims under Rule 145(2)(b)(iv) was a key recognition of the extent of victimisation, beyond the physical harm.

The Chamber's reasoning regarding the aggravating factor of commission of the crime of pillaging with particular cruelty illustrates a clear understanding of the context in which victims were harmed.<sup>135</sup> It is important to note that rather than considering cruelty as a constitutive element of the crime of pillaging, the Chamber considered it as an aggravating factor, in light of the fact that victims were killed and abducted.<sup>136</sup>

Finally, the Chamber's reasoning in relation to Ongwen's crime of conscription of children under the age of 15 is particularly instructive for a victim-centred approach to sentencing. The Chamber followed the decision in the *Ntaganda* case, considering the harsh treatment of the conscripted children as an aggravating factor.<sup>137</sup> More notably, the Chamber's consideration of the emotional suffering of the children as well as their families illustrates an expansive recognition

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<sup>127</sup> *Idem*, paras. 52-53.

<sup>128</sup> *Prosecutor v Dominic Ongwen*, Sentence, ICC-02/04-01/15, Trial Chamber IX, 6 May 2021, paras. 131-177.

<sup>129</sup> *Idem*, paras. 131-177.

<sup>130</sup> *Idem*, para. 134.

<sup>131</sup> *Idem*, para. 165.

<sup>132</sup> *Idem*, para. 155.

<sup>133</sup> *Idem*, paras. 155, 190, 288, 264.

<sup>134</sup> *Idem*, paras. 165-166.

<sup>135</sup> *Idem*, para. 172.

<sup>136</sup> *Idem*, paras. 172, 203, 275.

<sup>137</sup> *Idem*, para. 361; See also *Ntaganda* Sentencing Judgement, *supra* note 111, para. 193.

of victims.<sup>138</sup> In sum, the *Ongwen* case highlights the need to expand the meaning and scope of aggravating factors in order to address the particular vulnerability of victims within specific humanitarian situations. The Chambers analysis also reflects a consideration for the human dignity of victims. Harmon and Gaynor argue that ‘the first aim of punishment must be to restore and reinforce respect for human dignity’, due to the dehumanizing nature of mass atrocities against target populations.<sup>139</sup>

## V. Conclusion

This Article has made a case for substantive justice for victims at the ICC, through the sentencing framework. First, it has sought to examine whether there is a normative ground that might reasonably justify the expansive rights of victims during sentencing. An analysis of the Rome regime’s normative framework has shown that the sentencing process is a vital forum for the advancement of a victim-oriented approach to justice.

Second, the article has made a critical analysis of, and a reflection upon, the Rome regime’s legislative history, in light of the theoretical framework of victims’ justice. The overall goal was to offer a realistic account of the drafters’ deliberations and reasoning, in order to make a case for an expansive interpretation of aggravating factors under the Rules of Procedure and Evidence.

While the Preparatory Works do not provide elaborate discussions on the issue of aggravating factors in sentencing, the discourses highlight a great significance the drafters placed on justice for victims. In addition, the article has shown that the drafters left Rule 145(2)(b)(iv) open ended as a way of granting the Chambers discretion in the assessment of sentences. The article has considered this flexibility as a key entry point for the inclusion of a wider range of aggravating factors in line with the victims’ contextual situations.

Finally, the article has analyzed the courts’ sentencing jurisprudence to answer the question whether an expansive interpretation of aggravating factors reflect a victim-centered approach to justice. The article has revealed some wide-ranging interpretations of aggravating factors that could guide future sentencing practices. Most notably, the *Ntaganda* case highlights critical elements of aggravation related to the particular vulnerability of victims that are ‘defenceless’, namely, detainees, pregnant women, babies, very young children, the sick and disabled persons. The *Ongwen* case is equally instructive in the consideration of aggravating elements concerning victims’ psychological harm and societal impact of crimes.

In concurrence with Harmon and Gaynor, the element of human dignity should be considered when punishing perpetrators of mass atrocities.<sup>140</sup> The author posits that in determining sentences involving gross human rights violations and mass atrocities, the judges should endeavor to align their discourses with the wider goals of the Rome Statute and victims’ priorities. More generally, it is important that international criminal courts do not obscure the multi-faceted forms of victims’ vulnerabilities while making their decisions.<sup>141</sup> Crucially, a liberal interpretation of aggravating factors can have a very real impact on substantive justice for victims, while expanding the extent to which they are visualized within the criminal justice system.

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<sup>138</sup> *Idem*, para. 362.

<sup>139</sup> Harmon & Gaynor, *supra* note 8, p. 698.

<sup>140</sup> *Ibid.*

<sup>141</sup> See, A. M. Beringola, ‘Intersectionality: A Tool for the Gender Analysis of Sexual Violence at the ICC’, *Amsterdam Law Forum* 2017-9, pp. 84-109.