

From Domestic Application to ICC: Analysing the Integration of ‘Restorative Justice’ in International Criminal Law

Saheli Chakrabarty* & Nirbindu Banerjee**

Abstract

Restorative Justice ideology has emerged in the last three decades as a process indistinguishable from our justice systems’ humane identity. Reliability, healing, and community involvement are the cornerstones of restorative justice, which provides an alternative to conventional punitive justice systems. Applying this versatile process has not only improved the idea of justice in terms of criminal cases but has also led to the restoration of environments in many other settings where ‘justice’ might not be involved in the literal sense. The flexibility and flow of restorative justice ideology are thus essential parts of modern criminal justice and are signs of a paradigm shift. This paper thoroughly examines the conceptual flexibility of restorative justice and its implementation in diverse cultural settings, highlighting different models that adapt to the cultural and social milieu. Thereon, the paper analyses the convergence of this principle of justice outside national borders into international legal frameworks. Lastly, the paper, in its fundamental quest of analysing the ‘Restorative Justice’ models that have been metamorphosed by diverse municipal laws in the realm of International Criminal Law. The paper critically investigates the possibility of successfully integrating restorative justice, which has traditionally been used in national contexts, into the international criminal justice system, especially in the International Criminal Court (ICC).

Keywords: *Restorative Justice, International Criminal Law, ICC.*

I. Introduction

‘Restorative Justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.’¹

The concept of restorative justice² is derived from the sociological conflict against crime and

* Saheli Chakrabarty is an Assistant Professor, The West Bengal National University of Juridical Sciences, India. The author can be reached at saheliphd202206@nujs.edu

** Nirbindu Banerjee is a University Research Fellow, The West Bengal National University of Juridical Sciences, India. The author can be reached at nirbinduphd2023@nujs.edu

¹ Howard Zehr, *The Little Book of Restorative Justice*, Good Books, New York, Revised and Updated Edition, 2014, p. 40.

² The term ‘restorative justice’ was supposedly first used by Albert Eglash in an article. See Albert Eglash, ‘Creative Restitution: A Broader Meaning for an Old Term’, *The Journal of Criminal Law, Criminology, and Police Science* p. 619,

criminals in the quest for reparation. The ideology stems from questions like who has been damaged by an unlawful act and how that can be restored to its original condition. It views any crime as more than a crime against an individual or the state. It is a crime against the social psyche and community. Epiphanies ascertain that damage to these must be repaired as well. Restorative Justice may be categorically divided into three prominent tenets based on such underlying purpose. First, the purpose is to identify the harm and needs of the victim and how they can be fulfilled and repaired.³ Secondly, it is necessary to recognise that any damage to the victim transforms into duty or obligation for the offender once he is identified and should be treated as such. Retribution is not the end goal of restorative justice. Finally, victims should be directly or indirectly involved in the justice process.

Howard Zehr⁴ opines that restorative justice is a 'community responsibility' where the members of such a community look after the well-being of its members, their social and psychological welfare, and relationships that promote community peace while trying to reduce crime by accepting their mistakes. However, the focus of restorative justice principles is not entirely based on restoring the victim and its surroundings. It is the interpersonal healing of the societal environment itself, which must include the perpetrators themselves. It means the reintegration of the offender into established societal norms, which mostly happens through the use of rehabilitation and correction principles⁵. The restorative justice concept strongly emphasises efforts for rehabilitation and reintegration following a criminal offence. Restorative justice's reintegration and rehabilitation procedures in criminal law aim to protect society. Scholars like Barda Nawawi Arief have mooted such contentions⁶, who suggest that punishment greatly protects society and offers advice and protection to individual criminals. On the other hand, a societal analysis of the restorative justice system also explores the sociological intricacies of various community structures and their inner relation.⁷

Diverse schools of thinkers have made a substantial attempt to draw the definition of what 'Restorative Justice' stands for. Nevertheless, such attempts were made with a deep-rooted outlook on what they believed it to be. Tony F. Marshall gave the functional definition of restorative justice, most commonly used to explain the intricacies of the process. Tony F. Marshall defines restorative justice as 'a process whereby parties with a stake in a specific offence collectively resolve to deal with the aftermath of the offence and its implications for the future.'⁸ This definition engulfs the essence of the ideology as it presents participation and communication as the central tenets, also establishing it as a tangible procedure. However, the ideology and

volume 48:6, 1958, pp. 619–22, available at <https://doi.org/10.2307/1140258>, accessed on 16th December 2024.

³ Meredith Rossner & Jasmine Bruce, 'Community Participation in Restorative Justice: Rituals, Reintegration, and Quasi-Professionalization' *Victims & Offenders* p. 107, volume 11:1, 2016, p. 108.

⁴ Howard Zehr, 'Restorative Justice and the Gandhian Tradition', *International Journal on Responsibility* p. 5, volume 1:2, 2017, p. 6-7.

⁵ Mark B. Scholl & Christopher B. Townsend, 'Restorative Justice: A Humanistic Paradigm for Addressing the Needs of Victims, Offenders, and Communities', *The Journal of Humanistic Counselling* p. 184, volume 63:3, 2023, p.186, available at <https://doi.org/10.1002/johc.12204>, accessed on 10 December 2024.

⁶ Barda Nawawi Arief, *Bunga Rampai Policy of Criminal Law*, Aditya Bakti, Bandung, 2002, pp. 88; Muhammad Shobirin et al., 'Concept of Protection for Victims of Narcotics Abuse in Indonesia Fairly Based on Pancasila', *Journal of Law & Sustainable Development* p. 1, volume 12:1, 2024, p.5, available at <https://doi.org/10.55908/sdgs.v12i1.2445>, accessed on 16 December 2024.

⁷ Caroline Levine, *Forms: Whole, Rhythm, Hierarchy, Network*, Princeton University Press, New Jersey, 2017.

⁸ Tony F. Marshall, 'Restorative Justice: An Overview', *Home Office: Research Development and Statistics Directorate*, 1999, p. 5.

its definition remain contested as the area of application broadens.⁹ While the nature of the concept and its flexibility almost guarantee its application across a broader spectrum than just the criminal justice system, attempting to define it solely within the boundaries of the criminal justice system would be futile. The idea of restorative justice is an amalgamation of its application, as restoration can be paramount to any damaged environment and not only a criminal case of any varying degree.

Restorative justice approaches differ significantly from retributive justice models because they have been established to achieve diverse objectives¹⁰. Repairing harm has been the edifice of restorative justice, while retributive justice verbalizes its focus on punishing offenders. This conceptual framework affects how the process starts, as well as the responsibilities that the individuals play. Since retributive justice is used in Western countries to handle criminal activity, restoration frequently conjures up ideas of compensating victims and the impacted community for their losses.¹¹ Restorative practices, however, also consider the harm that the offender endured from the offence. By handling crime in a less punishing, inexpensive, and non-stigmatising way than retributive justice, restorative methods and results are proposed to further the goals of the restorative justice ideology¹². It is also asserted that these methods are superior in terms of rehabilitation and reintegrating criminals into society.

As W.R. Wood expertly proclaims¹³, the ideology has evolved in a branched non-linear form and has created a multiplicity of hybrid applications in different environments¹⁴. However, as one analyses the criminal justice system followed in most municipal jurisdictions, a re-sounding difference would be visible in what it is and what it is anticipated to be in the conventional application of the provisions of restorative justice. The overwhelming positive analysis of numerous models involving restorative justice and its usage has meant that it has been accepted internationally by administrative organisations and international entities like the ICC in adjudicating matters. The ICC has always taken the stance that its justice model aims to create a perfect balance between the two systems of retribution and restoration.¹⁵ However, can restorative justice be as 'successful' in the context of international criminal justice as it is in minor crimes, social disturbances, and domestic non-convoluted matters like juvenile delinquency? Or do the ideologies and practicality drift apart too much for an international organisation to integrate this approach seamlessly into

⁹ Carolyn Hoyle, 'Victims, the Criminal Process and Restorative Justice', in Mike Maguire, Rod Morgan & Robert Reiner (eds.), *The Oxford Handbook of Criminology*, Oxford University Press, 2012, p. 398.

¹⁰ Donald H.J. Hermann, 'Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice', *Seattle Journal for Social Justice* p. 71, volume 16:1, 2017, pp. 72-73, available at <https://digitalcommons.law.seattleu.edu/sjsj/vol16/iss1/11>, accessed on 10 December 2024.

¹¹ Kathleen Bergseth & Jeff Bouffard, 'The Long-Term Impact of Restorative Justice Programming for Juvenile Offenders', *Journal of Criminal Justice* p. 433, volume 35:4, 2007, p. 434, *Journal of Criminal Justice*, available at <https://doi.org/10.1016/j.jcrimjus.2007.05.006>, accessed on 10 December 2024.

¹² Gordon Bazemore & Mark Umbreit, 'Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Response to Youth Crime', *Crime & Delinquency* p. 296, volume 41:3, 1995, p. 300, available at <https://doi.org/10.1177/0011128795041003002>, accessed on 10 December 2024.

¹³ W.R. Wood, 'Editor's Introduction: The Future of Restorative Justice?', *Victims & Offenders* p. 1, volume 11:1, 2016, available at <https://doi.org/10.1080/15564886.2016.1149750>, accessed on 10 December 2024.

¹⁴ William Danaher, 'Towards a Paschal Theology of Restorative Justice', *Anglican Theological Review* p. 359, volume 89:3, 2007.

¹⁵ Catherine Gregoire, 'The ICC: A (Continued) Space for Restorative Justice Exploration', *European Forum for Restorative Justice (EUFJR) 2022 Sassari Conference*, Sassari, Italy, 2022, available at <https://www.euforumrj.org/icc-continued-space-restorative-justice-exploration>, accessed on 10 December 2024.

its adjudication procedure?

This article discusses the different models of restorative justice and how they have been successfully applied in transnational and domestic matters, analysing the growing trend of foreign criminal adjudication moving towards such integration while also discussing the challenges the ideology faces and will face for a seamless integration into the field of international organisations. It attempts to assess restorative justice's success in domestic and transnational settings and the procedural tenets which it leads to. In the latter part of the article, the article examines if similar outcomes can be expected and if attempts have been made to integrate the models of the restorative justice system used in the domestic application into the realm of International Criminal Law. This piece also aims to clarify the circumstances under which restorative justice can be applied internationally, the possible advantages and disadvantages of doing so, and the implications for advancing global justice projects. In the modern international setting of complicated geopolitical dynamics, cultural diversity, and the goal of global justice, this article explores the practicality of the restorative justice model alongside its potential and problems. The topic of discussion is whether the principles of restorative justice, historically applied only at the domestic level, can be successfully incorporated into international legal frameworks or whether they must remain confined within national borders. With its foundations in community involvement, accountability, and healing, restorative justice has gained much attention as a potential replacement for traditional punitive judicial systems. The limitations of restorative justice in international law are highlighted when discussing the difficulties of applying the procedure in situations involving serious crimes. The article concludes that although it has potential in some local and global contexts, procedural, logistical, and cultural obstacles prevent its complete incorporation into the international criminal justice system. The critical analysis shows that rather than trying to implement restorative principles in their entirety on the world stage, the best practical course of action may be domestic modifications of these concepts, bolstered by international legal frameworks.

II. Diverse Models of Restorative Justice and Variance in Area of Effect

Restorative Justice, as the principle of the justice system, stands on the tenets of introducing reforms in the criminal justice system that encourage flexibility. Understanding the factors that contribute to these processes' success, identifying the people for whom they work best, and figuring out whether their effects differ for various demographic groups are all essential steps in applying the ideas of restorative justice to a broader range of situations.¹⁶ To achieve this goal, it is essential to quantify what is to be considered successful in applying this model and the expected outcomes. The answer to these questions often lies in the reintegration of offenders into society, the increased positive influence on the evaluation of well-being for both victims and offenders, and the gradual shift in public perception of justice. It is the third factor that is almost always challenging to measure. Restorative justice is still considered a new concept compared to the ancient traditions of penal justice system. Some of the conventionally accepted processes of restorative justice that various municipal jurisdictions have incorporated include:

¹⁶ Alana Saulnier & Diane Sivasubramaniam, 'Restorative Justice: Underlying Mechanisms and Future Directions' *New Criminal Law Review: An International and Interdisciplinary Journal* p. 510, volume 18:4, 2015, pp. 514–530, available at <https://doi.org/10.1525/nclr.2015.18.4.510>, accessed on 31 July 2024.

A. Victim-Offender Mediation

The most historically used method to approach restorative justice is victim-offender mediation, which establishes a connection between the involved parties and focuses on giving partial control to the victim while offering the offender a probable opportunity for redemption and reconciliation.¹⁷ However, it is crucial to understand that the term mediation only automatically adheres to the existing means of civil mediation and others that are otherwise used in any legal system. Victim-offender mediation is essentially a meeting between the victim and offender that ekes out the possible consequences of the offence in question and effects thereof with the final goal of restoration of the status quo. An expert third party often facilitates these meetings, dealing with the nuances and discussions of face-to-face or indirect encounters. A third-party-facilitated victim-offender mediation is directly applied in Germany, where this process is incorporated into its Code of Criminal Procedure¹⁸. Articles 155A and 136 in the German Code of Criminal Procedure (also known as *Strafprozeßordnung – StPO*) recognise the importance of victim-offender mediation and the necessity of early integration¹⁹ of such a process.

The Articles in the code itself leave enough room for discussion on what should or should not be an appropriate case and consideration of the express will of the aggrieved party. Roseborough²⁰ explains in his article that victim-offender mediation has existed in rudimentary local forms for centuries, where he exemplifies New Zealand and US family dispute solving as an example. Victim-offender mediation is, of course, an extension and upgradation of this basic ideology, not to mention that a more diverse, antiquated and detailed structure has existed in southern countries like India and Nepal for even longer. In Nepal, studies have been published to show the effectiveness of the overall restorative justice model and its application in cases of serious offences of sexual nature against women.²¹ In India, contemporary scholars²² have argued for applying restorative mediation to counter cyberspace issues and cyber-crimes. However, even if successful, the evolution of domestic restorative models does not inherently assure their relevance in international scenarios. The dimension of international criminal justice systems lends itself to far greater stratified consequences.²³ The number of victims, the legal and democratic status of alleged offenders and victims, and other additional circumstances can significantly influence the outcomes of restorative justice processes. In many scenarios, establishing a direct

¹⁷ William Bradshaw & David Roseborough, 'Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism', *Federal Probation* p. 15, volume 69:2, 2005, pp. 15-16.

¹⁸ *Code of Criminal Procedure*, 1987, Germany, Federal Law Gazette I, 1074, 1319, as amended by Article 2 of the Act of Mar. 25, 2022, Federal Law Gazette I, 571.

¹⁹ *German Code of Criminal Procedure*, 1987, Germany, s. 155a, states "At every stage of the proceedings the public prosecution office and the court are, as a rule, to examine whether it is possible to reach a mediated agreement between the accused and the aggrieved person. In appropriate cases, they are to work towards such mediation. A case may not be assumed to be appropriate against the express will of the aggrieved person".

²⁰ Ibid (n. 16).

²¹ Tobias Volz, *Restorative Justice in Nepal: An Analysis of the Approach's Potential in Cases of Sexual Violence Against Women*, Degree of Doctorate of Philosophy, Euclid University, 2021, available at <http://dx.doi.org/10.13140/RG.2.2.22311.01448>, accessed on 10 December 2024.

²² Samrat Bandopadhyay & Amar Mallick, 'Victim-Offender Mediation: Challenges and Its Importance as 'Alternate Dispute Resolution for Cyberspace Issues'', *International Journal of Law, Management & Humanities* p. 708, 2022, pp. 708-715.

²³ Kenneth Anderson, 'The Rise of International Criminal Law: Intended and Unintended Consequences', *European Journal of International Law* p. 331, volume 20:2, 2009, p. 332, available at <https://doi.org/10.1093/ejil/chp030>, accessed on 10 December 2024.

interlink between the accused and the aggrieved may be a more abstract and non-viable practice, particularly in international contexts.

B. Conferencing

Conferencing is another restorative justice process that could be classified differently from the existing mediation method. Initially used in the juvenile justice system, it tries to involve related stakeholders more broadly. Instead of only the victim and offender, this process includes family or relatives, community members, friends, etc. This arguably also achieves the extended goal of making the offender realize the impact of their actions that has extended to the victim and their own friends, family, and others.²⁴ The origin of this process is traced back to New Zealand in 1989²⁵, where it was used in juvenile delinquency cases under the Children, Young Persons, and their Families Act (*Oranga Tamariki Act*, 1989)²⁶. Interestingly, the Family Group Conferencing (FGC model) established in this Act borrows ideas from the traditions of the *Maori* (Indigenous tribe) in the country. This does not mean that the traditional residents design the process, but it helps inclusivity by design.²⁷

Conferencing involves a more holistic number of people around the victims and the offenders, which, in reality, is a more practical sample for the restoration of the disrupted environment.²⁸ Mark Umbreit, in his study²⁹, refers to family conferencing as a lesser yet satisfactory restorative programme that has had complex effects on restoring the pre-offence environment. However, these exhaustive studies have always focused on national implications, trends, and historical development of these restorative programmes. The extensiveness of positive effects might or might not translate at any stage to international settings for factorials discussed in this article and other literature.

C. Circle Processes

Circle Processes also have the same concept of a conference but are almost more inclusive of the community itself. Sentencing Circles or Peace-making Circles³⁰ originated in Canada in 1991 and have been relatively reliable in discussing the underlying causes of any particular crime and its implications. The circle emphasises the equality of all participants, and it might include the victim

²⁴ Gordon Bazemore & Mark Umbreit, 'A Comparison of Four Restorative Conferencing Models', *Juvenile Justice Bulletin*, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 2001, p. 5.

²⁵ Sarah Mikva Pfander, 'Evaluating New Zealand's Restorative Promise: The Impact of Legislative Design on the Practice of Restorative Justice', *Kōtuitui: New Zealand Journal of Social Sciences Online* p. 1, 2019, p. 6, available at <https://doi.org/10.1080/1177083X.2019.1678492>, accessed on 10 December 2024.

²⁶ *Oranga Tamariki Act*, 1989, New Zealand.

²⁷ 'Module 8: Restorative Justice', *E4J University Module Series: Crime Prevention and Criminal Justice*, UNODC, 2019, available at <https://unodc.org/e4j/en/crime-prevention-criminal-justice/module-8/index.html>, accessed on 16 December 2024.

²⁸ Mark Umbreit, Robert Coates & Betty Vos, 'The Impact of Restorative Justice Conferencing: A Review of 63 Empirical Studies in 5 Countries', *Center for Restorative Justice & Peacemaking*, 2002, University of Minnesota, p. 2.

²⁹ *Ibid.*

³⁰ Christina Parker & Kathy Bickmore, 'Classroom Peace Circles: Teachers' Professional Learning and Implementation of Restorative Dialogue', *Teaching and Teacher Education*, volume 95, 2020, available at <https://doi.org/10.1016/j.tate.2020.103129>, accessed on 15 December 2024.

or offender of a crime to allow perspectives to prevail. Zinsstag³¹ expresses the nuances of the circle processes in 2011 very famously, although not counting the use of circle processes outside North America. Circle processes have existed in various renditions throughout South Asian rural areas, and the subconscious goal of restoring harmony has remained the same. The community involvement aspect has often overshadowed the circle processes, to be fair, and the involvement of victims and offenders has been neglected without a streamlined and underdeveloped process. However, it has been considered an exemplary process where broader thinking can restore damages³² caused by behaviour that might be unacceptable in society. It also has the prowess to run parallel to established sentencing methods, giving a much clearer idea about the community's consciousness and the established legislation or the gap in between. Boards and panels are also procedures that result in a plan for the person causing harm to rectify damages incurred and involve the community through discourse. The person causing harm may meet with the chosen board to discuss the behaviour, any fallout, and how it has impacted others.

D. Victim Surrogacy

Victim surrogacy programmes are also a new trend internationally where offenders meet victims of other unrelated crimes to understand better the implications of actions committed by them, have sympathy for victims and human beings and have a better understanding of the community. The Sycamore Tree programme is an example of this, where prisoners in more than thirty different countries often meet victims of unrelated crimes to understand the perspectives of victims and have an open communication channel. The surrogacy programme usually stems from the primary idea that in place of the victim, a chosen representative would talk with the offender to open a line of communication. This type of communication can be established to use restorative justice processes where using standard methods of victim-offender mediation would be considered insensitive or improbable under specific circumstances, often dictated by the degree and type of crime in question. A detailed participant observation study that goes into the nuances of the program was conducted in 2018³³, which provides validity behind the ideals of the program itself. The study is limited to its usage in England, with eight prisons becoming part of the report, showing promising success for the nuanced restorative justice process.

The various models used to impart Restorative Justice have been catalysed based on the cultural milieu of the state. The usage of restorative ideology in the criminal justice system, even rudimentary, runs parallel to overall societal development. As such, it is often mistakenly perceived as being too lenient on criminals and wrongdoers without genuine reasons when put up against overwhelming ideas about deterrence of crimes and revenge. The courts and the existing justice system are deeply ingrained in the minds of the general public. Consequently, restorative justice is frequently regarded as a more lenient approach toward offenders and a

³¹ Estelle Zinsstag, Marlies Teunkens & Brunilda Pali, 'Conferencing: A Way Forward for Restorative Justice in Europe', *European Forum for Restorative Justice*, 2011, Leuven, p. 62-64.

³² Jeff Bouffard, Melissa Cooper & Kathleen Bergseth, 'The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders', *Youth Violence & Juvenile Justice* p. 465, volume 15:4, 2017, p. 47, available at <https://doi.org/10.1177/1541204016647428>, accessed on 10 December 2024.

³³ Margaret Sybil Mullett, *Conducting a Randomised Experiment in Eight English Prisons: A Participant Observation Study of Testing the Sycamore Tree Programme*, Degree of Doctoral of Philosophy in Criminology, University of Cambridge, 2015, available at <https://www.repository.cam.ac.uk/bitstreams/ab545b72-cabc-490e-b503-34ab02c1fd61/download>, accessed on 10 December 2024.

softer response to crimes.

III. Convergence of International Restorative Justice with Application in Domestic Scenarios

More than two decades back, the impact of Restorative Justice was vocalised by the United Nations through the United Nations Congress on Crime Prevention in 2000³⁴. It drafted a proposal for the United Nations Basic Principles on Restorative Justice Programs in Criminal Matters³⁵. The United Nations Economic and Social Council approved Basic Principles on the Use of Restorative Justice Programs in Criminal Matters in 2002³⁶. The resolution encourages the development of national schemes for restorative justice programs and victim compensation, rehabilitation of victims, and practical application in immediate law enforcement.³⁷ The document states that Member States should explore creating norms and criteria to govern the use of restorative justice programs, including legislative authority if necessary. Furthermore, Principles 9 and 10 discuss the parties' safety as the primary requirement before any restorative method. It elaborates that administrative and judicial authorities should consider the differences between the parties by economic or religious class division, which may lead to power imbalances³⁸. Incorporating victims' representation into the International Criminal Court (hereafter referred to as ICC) seems to agree with the restorative justice paradigm, which aims to connect international criminal justice with the restorative justice paradigm's social reconciliation process.

Following mass murders, victims not only endure their own pain but also participate in the process of community healing that encompasses everyone affected by the tragedy.³⁹ John Kiess, in 2016, profoundly says that the shift in ideology itself shows the profound growth over the last few decades that has been prominent in the overall international psyche about offences and changed criminological beliefs and perceptions.⁴⁰ However, the convergence of restorative justice and international crimes is always questioned because of the magnanimous nature of these trials, their practical and logistical challenges and the nature of offences and the consequences thereafter. Scholars have argued that the ICC or any international organisation must focus on victim's interests rather than retribution for more than a decade.⁴¹ While some emphasize the

³⁴ *Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, 10-17 April 2000, Vienna, available at https://digitallibrary.un.org/record/432663/files/A_CONF187_15-EN.pdf, accessed on 10 December 2024.

³⁵ R. Thilagaraj & Jianhong Liu (eds.), *Restorative Justice in India: Traditional Practice and Contemporary Applications*, Springer International Publishing, Switzerland, 2017, p. xiv.

³⁶ *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, 24 July 2002, UNEcoSoc Res. 2002/12.

³⁷ *Ibid*, principle 22 proposes that states are encouraged to evaluate and research restorative justice programmes; principle 21 elucidates the integration of criminal justice authorities into the know-how about restorative justice implementation.

³⁸ *Ibid*, principle 9-10.

³⁹ Mina Rauschenbach & Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?', *International Review of Red Cross* p. 441, volume 90:870, 2008, p. 451.

⁴⁰ John Kiess, 'Restorative Justice and the International Criminal Court', *Journal of Moral Theology* p. 116, volume 5:2, 2016, pp. 116-117, available at <https://jmt.scholasticahq.com/article/11320.pdf>, accessed on 10 December 2024.

⁴¹ Brian McGonigle, 'Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court', *Florida Journal of International Law* p. 95, volume 21:1, 2009, p. 96.

importance of addressing internationally adjudicated offenses, many have argued for restorative punishment to bridge the gap between practical realities and ideological principles⁴².

The United Nations Office on Drugs and Crimes (hereinafter referred to as UNODC) released its second, considerably updated edition of the Handbook in May 2020⁴³, one year after an expert group meeting was held to examine a draft. The Handbook advises member states to increase the availability of restorative justice services, just like the Recommendation does. However, regarding accessibility, the most significant advancement may have to do with major offences. While the first edition somewhat sidesteps the implementation of restorative justice processes integration in more severe or heinous offences, the second edition dedicates considerable thinking and discourse. The handbook discusses the practical, cautious and expertly regulated implementation of restorative justice processes in more serious offences, often parallel to existing criminal justice administrative methods.

In 2018, the Council of Europe also recommended incorporating restorative justice ideals⁴⁴. The goals of this programme are also supposedly diverse. They claim to broaden the awareness regarding the concept of restorative justice in the media, along with creating certain set standards for using restorative justice methods in the fray of every country and their criminal justice systems. According to this framework recommendation, the uniform integration of restorative justice ideals in prison systems in terms of probation or reduced sentencing might also be one of the achievable goals to look forward to. These recommendations themselves strive to make restorative justice equally accessible to every person.

Rule 18 of the framework recommendation provides that it should be a generally available service. Rule 19 states “sufficient information to determine whether or not they wish to participate” and that victims and offenders should have access to restorative justice “at all stages of the criminal justice process.” The recommendations also provide a general rule to the scope of restorative justice by mentioning that it can be within the criminal justice system but outside the criminal justice procedure.⁴⁵ Although the framework provided by the Council of Europe is not binding on its member states, the recommendation opens possibilities for applying restorative justice and awareness of different legislative systems of different countries⁴⁶.

The European Commission, on the other hand, has failed to incorporate the process of restorative justice in its recent instrumentations or intentionally chosen not to have a detailed procedure incorporating the ideology. The recently released Strategy on Victim’s Rights for the Period of 2020–2025⁴⁷ does not encourage Member States to enhance their capacity to deliver

⁴² Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation*, Oxford University Press, 1st Edition, 2012, pp. 6-7.

⁴³ Yvon Dandurand & Annette Vogt, *Handbook on Restorative Justice Programmes*, U.N. Office on Drugs & Crime, 2nd Edition, 2020.

⁴⁴ 'The 2018 Council of Europe Recommendation Concerning Restorative Justice in Criminal Matters: A Briefing for Europe', *Council of Europe*, 2018, Belgium, available at https://www.euforumrj.org/sites/default/files/2020-01/pb_on_coe_rec_general.pdf, accessed on 10 December 2024.

⁴⁵ *Recommendation CM/Rec(2018) of the Committee of Ministers to member States concerning restorative justice in criminal matters*, 3 October 2018, CM/Rec(2018), rule 60.

⁴⁶ Ian Marder, 'The New International Restorative Justice Framework: Reviewing Three Years of Progress and Efforts to Promote Access to Services and Cultural Change', *The International Journal of Restorative Justice* p. 395, volume 3:3, 2020, p. 397, available at <https://doi.org/10.5553/IJRJ.000048>, accessed on 10 December 2024.

⁴⁷ *EU Strategy on victims' rights (2020-2025)*, 2020, European Commission, available at <https://eur-lex.europa.eu/legal->

restorative justice, despite acknowledging that the benefits of these services depend on their availability and accessibility. In 2021, the Venice Declaration⁴⁸ was introduced, recognizing the growing importance of restorative justice in international contexts. It emphasizes the need to study restorative models across various European nations to understand, recognize, and develop these models. The objective of the uniform international implementation of restorative justice by encouraging and studying national implementation is probably a much more achievable possibility, but it still differs from the international criminal prosecution and application of restorative justice. While the Venice Declaration here lays out the above-mentioned objectives transparently through points 15 and 16⁴⁹, it might differ from what would be considered a successful implementation of the ideology in the case of ICC.

As the first step towards restoration, victim participation raises questions in the context of what can be considered as participation without reshaping justice and proportionality of criminal actions while still being perceived as participation for the victim⁵⁰. The ideology correctly recognises the victim as a stakeholder⁵¹ in judicial proceedings but cannot quantify the degree of participation a victim should have in this process. Some scholars have bifurcated participation into active and passive, where the degree of participation varies. However, this might not work in a national or international context if the victims are not satisfied with a lower degree of participation, which might be necessary to maintain a uniformity of procedure and judgment⁵².

On the other hand, as pointed out by Groaning and Jacobsen⁵³, the principle of restorative justice may sometimes adopt a communitarian view, wherein an action might harm the attached community or society more significantly than a specific individual. In such cases, the participation of the individual victim alone may not achieve the objective of the ideology, which is holistic healing of the interpersonal relationship. The involvement of the international context further broadens the scope of the parties involved. That is the sole reason why some scholars do not agree with the restorative justice approach by international judicial organisations like the ICC, where they often opine that the tight-knit restoration objective is bound to fail in a larger setting and may be somewhat unnecessary.⁵⁴ Yet, international courts, tribunals, and national systems incorporating principles of restorative justice have struggled to synthesise these various forms into a procedural structure that can be readily integrated. Restorative Justice calls for seasoned mediators, law enforcement fact overseers and other expert figures to pursue both parties and promise proper estimation and penitentiary mediation. They are responsible for making sure that victims are safer, and they disclose non-confidentially informed consent with the appropriate stakeholders in attendance.

content/EN/TXT/?uri=CELEX%3A52020DC0258, accessed on 10 December 2024.

⁴⁸ 'Declaration of the Ministers of Justice of the Council of Europe Member States on the Role of Restorative Justice in Criminal Matters', *Conference of the Ministers of Justice of the Council of Europe*, Venice, Italy, 2021.

⁴⁹ Ibid.

⁵⁰ Valentina Spiga, 'No Redress Without Justice: Victims and International Criminal Law', *Journal of International Criminal Justice* p. 1377, volume 10:5, 2012, p. 1389.

⁵¹ Ibid (n. 9), p. 407-410.

⁵² Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory', *International Journal of Transitional Justice* p. 250, volume 3:2, 2009.

⁵³ Jørn Jacobsen & Linda Gröning, *Restorative Justice and Criminal Law*, Santerus Academic Press, 2012, p. 12.

⁵⁴ Sergey Vasiliev, 'Victim Participation Revisited: What the ICC Is Learning About Itself', in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, United Kingdom, 2015, p. 1136-1137.

At this point, victim participation under Article 68 of the ICC statute has been discussed in detail by many scholars⁵⁵. However, even during the inception of this idea, the balance between victim participation and executing justice in a fair procedure for the accused has been questioned by many international legislators and experts. The basic discussion on this was that victim participation might endanger the objectivity of the trial and shift the burden of proof or presumption of innocence⁵⁶. The introduction of victim representatives under the article is meant to counter this concern in two ways. Firstly, it assists in cases involving international crimes, where numerous victims are involved, and ensuring equal participation for each would be impractical, time-consuming, or even unfair. Secondly, it renders the procedure more 'passive,' thereby lowering the chances of affecting unbiased decision-making⁵⁷.

According to Article 65(4)⁵⁸, the victims may petition for more information or offer additional evidence during the trial. Establishing an independent trust fund for victims under Article 79, which offers reparations and other types of assistance, and the reparations provisions are entrenched means of restitution through Article 75. Despite being distinct, these clauses are part of a longer history of efforts to formalise victims' rights in the context of international criminal justice.⁵⁹ International organisations understand the need for the above-mentioned procedures, and all these auxiliary support structures are provided in cases where it is possible to do so. Restorative justice has been successfully implemented in Germany's criminal court system⁶⁰. Victim-Offender Mediation Programmes (VOMPs) were among the first few programs to ensure the offender is accountable for his acts and is obliged to restore the damage and community relationships. In New Zealand, restorative justice methods have heavily influenced the program for child offenders or juveniles⁶¹. The Children, Young Persons, and Their Families Act of 1989 incorporated family welfare group conferences into New Zealand's justice system. Restorative justice has been introduced in Canada to address juvenile and minor transgressions. It is organised by the prosecution and probation officers, besides juvenile and petty crimes for more serious offences like murder or manslaughter.

In New South Wales, Australia, Circle sentencing⁶² has seen far more impact than it was touted for. The population of Indigenous people in jails has been severely decreased by implementing this method, where people of a designated committee decide on the punishment for many offenders, which does not include jail time. It has reduced racial bias imprisonment in the area while simultaneously providing community and victim involvement in the decision-making

⁵⁵ Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?', in Dominic McGoldrick, Peter Rowe & Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, USA, 2004, pp. 315-334.

⁵⁶ T. Markus Funk, 'Victim' Rights and Advocacy at the International Criminal Court', Oxford University Press, New York, 2010, p. 86.

⁵⁷ Salvatore Zappalà, 'The Rights of Victims v. The Rights of the Accused', *Journal of International Criminal Justice* p. 137, volume 8:1, 2010, pp. 145-146.

⁵⁸ *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 90, Rome, 17 July 1998, art. 65(4).

⁵⁹ Sara Kendall, 'Restorative Justice at the International Criminal Court', *Revista Española de Derecho Internacional* p. 217, volume 70:2, 2018, p. 219, available at <http://www.jstor.org/stable/26486620>, accessed on 11 December 2204.

⁶⁰ Matthew Gunawan, Pujijono Suwadi & Muhammad Rustamaji, 'Comparison of Restorative Justice Implementation in Indonesia, USA, Germany, Poland and Switzerland', *Revista de Gestão Social e Ambiental* e04677 p. 1, volume 18:1, 2024, p. 7, available at <https://doi.org/10.24857/rgsa.v18n1-055>, accessed on 11 December 2024.

⁶¹ Scholl (n. 5), p. 6.

⁶² Ivan Potas et al., 'Circle Sentencing in New South Wales: A Review and Evaluation', *Australian Indigenous Law Reporter* p. 73, volume 8:4, 2004, p. 79, available at <https://www.jstor.org/stable/26452472>, accessed on 11 December 2024.

process.⁶³ The implications of these processes in national settings have been much more fruitful and straightforward in balancing victims' participation. However, that is due to the nature and quantification of crimes locally or nationally, under a much more controllable environment present in a national or municipal judicial procedure. Restorative Justice, as an ideology, adapts to its cultural responses and situational context. However, different approaches to achieving restoration can be classified in a broader sense of the work, depending on the continuity of the existing process and the degree of restoration possible through such processes.

A survey completed by the Restorative Justice Council in 2014⁶⁴ has revealed that 85 per cent of the victims who went through with the restorative justice method were satisfied with the impact they arrived at. However, only 33 per cent of the victims who went through the conventional criminal justice system were happy with the result and duration of the process. In the case of India, the National Crimes Record Bureau (NCRB) report of 2020⁶⁵ shows an increase in the recidivism rate from 4.2% to 4.8%, and the conviction rate is only 45%. This shows that the effectiveness of the restorative justice system, although undeniable to victims of crimes, is yet to become a norm in the consensus. As long as it is considered weak in the community's eyes, it cannot achieve its full potential in improving societal well-being and efficiency. To enlighten the common people's consciousness is the way forward. The community requires an enhanced comprehension of restorative justice among its police force, prosecutors, and magistrates, plus increased knowledge and skills. Criminal administrators must grasp restorative justice initiatives and core restorative justice ideas. Citizens need to be more informed about their options in resolving their disputes or conflicts.

The flexibility of the ideology renders itself transportable to other avenues of administration like higher education or school settings across a wide range of demographics. A study in Brazilian school systems in 2012 confirmed that the restorative practice contributed towards the overall betterment of the educational environment in these schools.⁶⁶ Various studies have also shown that in terms of juvenile offences, the use of restorative justice processes helps create a better system that could rival the traditionally established retributive system and tackle recidivism at its roots⁶⁷. Even in studies where adult offenders fall into the trap of recidivism, it is clearly shown that recidivism is not nearly as prevalent where the restorative justice process has been applied, even briefly⁶⁸. Indonesia deals with restorative justice equitably to India, where penal mediation has taken off as the flagbearer of restorative ideology⁶⁹. A study in the country of defamation

⁶³ Suneeti Rekhari, 'People's Law and Restorative Justice: The Success of Circle Sentencing in New South Wales', 2006.

⁶⁴ 'Restorative Justice Victim Satisfaction Survey: Research Report', *Ministry of Justice*, 2016, New Zealand, available at <https://victimsinfo.govt.nz/assets/Publications/RJ-Victim-Satisfaction-Survey-2016.pdf>, accessed on 11 December 2024.

⁶⁵ 'Crime in India, Statistics Volume-III', *National Crime Record Bureau*, 2020, India, p. 1287, available at <https://www.ncrb.gov.in/uploads/files/CII-2020Volume3.pdf>, accessed on 16 December 2024.

⁶⁶ Patricia Krieger Grossi & Andréia Mendes dos Santos, 'Bullying in Brazilian Schools and Restorative Practices', *Canadian Journal of Education* p. 120, volume 35:1, 2012, p. 134, available at <https://journals.sfu.ca/cje/index.php/cje-rce/article/view/697>, accessed on 11 December 2024.

⁶⁷ Kathleen J. Bergseth & Jeffrey A. Bouffard, 'Examining the Effectiveness of a Restorative Justice Program for Various Types of Juvenile Offenders', *International Journal of Offender Therapy & Comparative Criminology* p. 1054, volume 57:9, 2013, p. 1070, available at <https://doi.org/10.1177/0306624X12453551>, accessed on 11 December 2024.

⁶⁸ JLD Kennedy et al., 'Long-Term Effectiveness of a Brief Restorative Justice Intervention', *International Journal of Offender Therapy & Comparative Criminology* p. 1, 2018, p. 13, available at <https://doi.org/10.1177/0306624X18779202>, accessed on 11 December 2024.

⁶⁹ Yaris Fajrin & Ach Triwijaya, 'The Concept of Penal Mediation for Defamation Delict in the Indonesia ITE Law as

cases shows that penal mediation is extremely useful and is a success for alternative dispute resolution methods. A more diverse range of penal mediation is supported in Germany through criminal acts, allowing mediation to be applied in many more criminal offences. The idea of penal mediation and letting go of some of the administrative control over matters of law and justice where community or victim-offender participation might be allowed has been explored before, even in United Nations conferences.

IV. Challenges of Restorative Justice Integration in the International Criminal Justice System

Taking cue from the above-mentioned discussion, it can be ascertained that diverse international legal instruments suggest that restorative Justice, as a standard principle, is incorporated in the respective municipal laws. However, the preliminary inquest of these instruments concludes that they have ceased to act as guidelines for the domestic criminal justice system and have not been considered in the broad ambit of International Criminal Law.

In December 2012, Judge Sang-Hyun Song, the President of International Criminal Court (ICC), while addressing the World Parliamentary Conference on Human Rights in Rome, mentioned, “Rome Statute and the ICC bring retributive and restorative justice together with preventing future crimes”.⁷⁰ According to the International Criminal Court, restorative justice introduces victim participation in judicial cases. The legal system structure of the International Criminal Court incorporates three essential characteristics of restorative justice that Van Ness and Heetderks Strong propound⁷¹, namely encounter, amends and reintegration into the manifold of international judgments⁷².

As a field of legal exploration, International Criminal Law has been one of the youngest progenies of International Law. Contemporary upheaval in the capacity of atrocities, mass crime, and crimes that shook the globe has been the fundamental genesis of the discourse finding its establishment today. The development of this discourse suggests that trials have been conducted and liability held for crimes that were not well defined. The contentious crimes, like ‘genocide’, were tried under the garb of other conspicuous crimes like ‘Crimes Against Humanity’⁷³. Hence, it can be ascertained that there are indelible roadblocks to integrating the restorative justice system into the scope of International Criminal Law.

Primarily, restorative justice, yielded by the ‘Western justice system’, has a long-lasting impact

a Manifestation of Restorative Justice', *Yustisia Jurnal Hukum* p. 362, volume 9:3, 2020, p. 363, available at <https://doi.org/10.20961/yustisia.v9i3.36167>, accessed on 11 December 2024.

⁷⁰ Claire Garbett, 'The International Criminal Court and restorative justice: Victims, Participation and the Processes of Justice', *Restorative Justice: An International Journal* p. 198, volume 5:2, 2017, pp. 198-199, available at <https://doi.org/10.1080/20504721.2017.1339953>, accessed on 11 December 2024.

⁷¹ Daniel W. Van Ness et al., *Restoring Justice: An Introduction to Restorative Justice*, 6th edition, Routledge, New York, 2022, p. 31.

⁷² Garbett (n. 70), pp. 203-211.

⁷³ *Nuremberg Judgment, France and ors v Göring (Hermann) and ors*, International Military Tribunal (IMT), Judgment and Sentence, 1946, 22 IMT 203, 1946.

on low-lying crimes, elemental or first-time offenders⁷⁴, or juveniles to mould and shape rehabilitation. On the contrary, international criminal law lies on the foundation of ascertaining individual liability for people who are accused of heinous crimes.⁷⁵ The international crimes that courts and tribunals have consistently tried have seen gruesome, mass-inflicting, and hideous in nature that leave a long-lasting impact on the victim, just as much on the witnesses⁷⁶. The assimilation of a principle like Restorative Justice in the International Criminal Justice System poses invigorating challenges due to the multi-faceted complexities. One such landmark instance in the development of the International Criminal Justice system is the Rwandan Genocide⁷⁷. The onslaught of Hutus on Tutsis, which saw the horrific door-to-door crimes, where the perpetrators and the victims were neighbours, and the onslaught continued over the ethnic differences⁷⁸. The Principle of Restorative Justice may not be the ideal alternative in such cases. Despite taking into account the potential for their statutes to be changed to permit the payment of compensation to victims, the judges of the ICTY and ICTR ultimately rejected such a change⁷⁹. Several NGOs established the Victims' Rights Working Group in anticipation of the Rome Conference, which ultimately drafted the International Criminal Court's statute and pushed for the inclusion of stronger restorative measures for victims. The drafters ultimately incorporated three restorative elements: reparations, protection, and participation⁸⁰.

The school of thinkers who advocate for the deterrent theory of punishment would not suggest the Principle of Restorative Justice, as it dilutes the foundational basis of the discourse. The classical deterrent theory of crime has found its analytical examination even in recent times through different empirical studies⁸¹. International Criminal Law started as a regime to hold individuals liable for a heinous crime that has shaken the international community. It is the only regime that holds individuals liable, penetrating the state veil well-preserved by Public International Law⁸². Considering the calibration of the crimes, it is not advisable to include restorative justice in the International Criminal Justice system. The restorative justice mechanisms are not immediately conducive to the international criminal justice system and ICC. It is possible to misjudge the success of the ICC's justice approach in putting restorative techniques into practice if one ignores the differing histories, presumptions, and paradigms of domestic and international criminal justice systems.

⁷⁴ Funk (n. 56), p. 24-25.

⁷⁵ Bartram S. Brown, 'International Criminal Law: Nature, Origins, and a Few Key Issues', in Bartram S. Brown (ed), *Research Handbook on International Criminal Law*, Edward Elgar Publishing, Cheltenham, 2011, p. 3.

⁷⁶ Edoardo Greppi, 'The Evolution of Individual Criminal Responsibility under International Law', *International Review of the Red Cross* p. 531, volume 81:835, 1999, pp. 536-540.

⁷⁷ *Genocide in Rwanda April-May 1994*, Human Rights Watch, 1994, available at <https://www.refworld.org/reference/countryrep/hrw/1994/en/21916>, accessed 13 December 2024.

⁷⁸ Heide Rieder & Thomas Elbert, 'Rwanda-Lasting Imprints of a Genocide: Trauma, Mental Health and Psychosocial Conditions in Survivors, Former Prisoners and Their Children', *Conflict and Health* p. 1, volume 7:6, 2013, p. 2, available at <https://doi.org/10.1186/1752-1505-7-6>, accessed 13 December 2024.

⁷⁹ 'Victim Participation Before the International Criminal Court', *War Crimes Research Office: International Criminal Court*, 2007, American University Washington College of Law, pp. 11-14.

⁸⁰ Fanny Benedetti, Karine Bonneau & John Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998*, Martinus Nijhoff Publishers, Leiden, 2014, pp. 152-160.

⁸¹ Juste Abramovaite et. al, 'Classical Deterrence Theory Revisited: An Empirical Analysis of Police Force Areas in England and Wales', *European Journal of Criminology* p. 1663, volume 20:5, 2023, pp. 1663-1680, available at <https://doi.org/10.1177/14773708211072415>, accessed on 13 December 2024.

⁸² Marco Sassoli, 'Humanitarian Law and International Criminal Law', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, p. 113.

The primary issue stems from ambiguous procedural impediments of the International Criminal Court (ICC) and its effort to embrace the restorative justice principles. The court has acknowledged the significance of the principle of restoration. However, no attempt has been made to recognise any model that incorporates restorative justice in the ICC judgment procedure⁸³. Or, to be more accurate, the existing models have not been discussed outside their nomenclature. The most notable models that have impacted diverse domestic criminal justice systems are Circle Sentencing, Boards and Panels, and Conference Mediation. These are no-shows on the model procedure followed by the ICC, and it might be because of the non-transposition of exact existing models in international law.

Irrespective of myriad challenges, Restorative Justice is not an unacknowledged principle in the International Criminal Justice System. Judge Eboe-Osuji, in their dissenting opinion in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*⁸⁴ recognised the development of restorative justice principles as a relevant part of international criminal law. Judge Osuji extended the discussion regarding satisfaction (of the victim) as a necessary element of this ideology⁸⁵. However, this remains as a foot at the door. This view doesn't take into account the holistic approach of the principles of restorative justice.

The stance of stakeholders like the victim and offenders and their integration and environmental restoration, which forms an integral crevice of the principle, has not been re-affirmed. Significant procedural impediments are required at the preliminary inquest level at the ICC to apply and fulfil these foundational elements⁸⁶. This is more of an approach that is lenient towards the victim for obvious and justified reasons, which, despite being morally upstanding, cannot be conclusive to be the restorative justice that we learn from the definition analysis. The ICC newsletter⁸⁷ describes its process as a balance between restorative and retributive models, which might be technically and philosophically correct rather than incorporating restorative justice. Basic acknowledgement highlights the position of accepting the principle as part of the International criminal justice system. The lack of substantial effort to include procedures and models to embrace the principle leaves an ambiguous state of affairs.

The method applied through restorative justice processes is often less formal and eventually depends on victim-offender mediation and participation at some stage. However, in international criminal cases, the trial process is formal, based on evidentiary values and much more streamlined due to the serious nature of the cases, where states and a country's administration might be involved⁸⁸. Active victim participation is limited in cases under ICC or other international adjudication bodies, where direct participation might even be restricted, using common legal

⁸³ Vasiliev (n. 54), pp. 1138-1139.

⁸⁴ *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC, Decision on the Withdrawal of Charges, Dissenting Opinion of Judge Eboe-Osuji, 2015, Case no. ICC-01/09-02/11-1005.

⁸⁵ Ibid, para. 61.

⁸⁶ Yidou Yang, 'The Gap between the International Criminal Court and Victims: Criminal Trial Reparations as a Case Study', *Laws* p. 1, 12:4, 72, 2023, pp. 4-5, available at <https://doi.org/10.3390/laws12040072>, accessed on 14 December 2024.

⁸⁷ 'Newsletter December 2007/January 2008 #18', *International Criminal Court Newsletter*, Hague, January 2008, available at https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/33DA9BA7-2454-4D46-B134-990069F0A04F/278446/ICCNL18200801_En.pdf, accessed on 14 December 2024.

⁸⁸ Nao Shimoyachi, 'Between Accountability and Reconciliation: The Making of "the Victim-Centered Approach" at the International Criminal Court', *Global Studies Quarterly* p. 1, 2024, p. 2, available at <https://doi.org/10.1093/isagsq/ksae014>, accessed on 14 December 2024.

representation as a preferred mechanism⁸⁹. However, this forgoes some of the essence of restoration and the mechanism around it.⁹⁰ Over ten thousand victim applications for participation or restitution were received by the ICC in 2011. In June 2011, the Pre-Trial Chamber of the ECCC reversed the ruling of the co-investigating judges and accepted the 1,728 Civil Party applications that had previously been denied.⁹¹ The ECCC only accepted 94 civil parties in its initial case, which is negligible compared to the volume of requests both organisations would receive in the future or have already received.

Additionally, the prerequisites for a restorative process are non-existent in most international cases, where the scope and implications of being adjudged responsible might be too high⁹². The restorative process begins when the offender acknowledges their responsibility. The initial part of the process depends on how well the offender can express their regret and how much they truly regret what they did. However, obtaining a full admission of guilt and a heartfelt apology within the framework of international criminal justice organisations is frequently improbable. That means any kind of mediation would not be able to be achieved and certainly cannot run parallel to the traditional criminal justice system. With restorative justice and its application, there can be no reliance on the traditional methods of imprisonment or punishment, and there is no singular authority to provide judgment. Rather than that, acknowledgement, consensus and balance restoration are given focus. This viewpoint contradicts the preamble of the Rome Statute, which states that even the most egregious crimes must have consequences. Consequently, the ICC must pursue justice through adjudication and punishment rather than through agreements between victims and criminals⁹³.

The International Federation of Human Rights reports suggest otherwise regarding the current scenario or conflict proposed here. According to the report, the victim participation itself would not cause a burden on the prosecutor or the structure of the ICC.⁹⁴ The cost and work duplication aspects are discussed in this report, presenting them as not entirely grounded in factual experiences or practical applications of international law. However, this report also refers only to the existing legal representative method of passive victim participation, which might not be the 'pure' form of restorative justice we know of. In that instance, the report discusses the direct imprint a legal representative might have left on the case proceedings and judgements. It says that "legal representatives do not generally have the capacity or expertise to conduct investigations. While they have the ability to tender evidence and call witnesses, that serves the purpose of supporting specific arguments that they may be making."⁹⁵ While this might be the case, the half nature of victim participation under ICC cannot be said to be the equal implementation of restorative justice as it is in the national or local judiciary⁹⁶. It might be a simulacrum of it, where

⁸⁹ Garbett (n. 70).

⁹⁰ Shimoyachi (n. 88), p. 4.

⁹¹ Raquel Vazquez Llorente, 'Striking a Balance Between Restorative and Retributive Justice: A New Challenge for International Prosecutors', 2013, p. 2, available at <https://www.semanticscholar.org/paper/1-striking-a-balance-between-restorative-and-%3a-a-llorente/2bab8e6953dad08316046c02dc8ecd546ed285f>, accessed on 14 December 2024.

⁹² Garbett (n. 70)

⁹³ 'Five Myths About Victim Participation in ICC Proceedings', *International Federation for Human Rights (FIDH), Report No. 649a*, 2014, Paris, available at <https://www.fidh.org/IMG/pdf/cpi649a.pdf>, accessed 14 December 2024.

⁹⁴ *Ibid.*, pp. 6-12.

⁹⁵ *Ibid.*, p. 9.

⁹⁶ Mariana Pena & Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation?', *International Journal of*

the top-down perspective and certain amenities available to the victim might be similar to the original ideology, differing in details and nuances or lacking in them.

The ICC has also considered the possibility of facilitating the healing of victims and impacted communities by having them participate in ICC proceedings⁹⁷. The International Criminal Court acknowledged the serious effects of crimes on victims and the possibility that constructive involvement could aid in their recovery in both the Strategy and the Revised Strategy. However, the truth is that victim participation itself is not a seamlessly compatible idea in the case of international criminal justice itself, and often, the definition of victim itself changes in international cases depending on the circumstances, without mentioning the challenges discussed above. That is why international uniform principles of restorative justice are mostly viable for assimilation into domestic legislation and not for international cases of criminality, which often involve a mass of victims or sovereign states. Thus, the outcomes and expected results discussed beforehand might not always apply to the international criminal justice system. The scale of success or its definition in international crimes might not be similar to the restorative model's normal usage in juvenile delinquency or adult offender cases in a domestic setting. The same objectives are hardly applicable, and certainly not to a degree we have come to expect from crimes of an individualistic nature.

V. Balancing Act: The Heinous Nature of Crimes and the Challenges of Restorative Justice

The well-accepted tenet worldwide is applying the restorative justice system in minor or juvenile delinquency-related offences, especially in domestic or local legislative systems. Vasisht and Dudeja, in their article, clearly explain how restorative justice the definitive procedure in the case of juvenile offences is by putting up examples from India and Latin America⁹⁸. However, the restorative justice system is rarely practised in cases involving more serious crimes.⁹⁹ Offences such as rape or molestation, as well as other crimes such as manslaughter, murder, and terrorism, are usually always prosecuted through the criminal justice system in courts¹⁰⁰. The conflict in this method arises out of two questions. First, who decides what case can be handled with the restorative justice system and which case cannot be 'dealt with' through the same techniques? The severity of the crime serves as the primary 'scale' or one of the two important factors for this determination¹⁰¹. Second, where does the balance between the adversarial criminal justice

Transitional Justice p. 518, volume 7:3, 2013, pp. 533-534, available at <https://doi.org/10.1093/ijtj/ijt021>, accessed on 14 December 2024.

⁹⁷ Ibid, pp. 520-524.

⁹⁸ Archana Vashishth, Sakshi Dudeja & Teena., 'System of Restorative Justice and Juvenile Justice in India: A Brief Comparative Study with Latin American System', *Mexican Law Review* p. 131, volume 16:2, 2024, pp. 138-142, available at <https://revistas.juridicas.unam.mx/index.php/mexican-law-review/article/view/18895/19124>, accessed on 14 December 2024.

⁹⁹ Joanna Shapland, Gwen Robinson & Angela Sorsby. *Restorative Justice in Practice: Evaluating What Works for Victims and Offenders*, Routledge, New York, 1st edition, 2011, p. 127.

¹⁰⁰ Ligi TK, 'Introduction of Restorative Justice Practices in Criminal Justice System: An Overview', *International Journal of Criminal, Common and Statutory Law* p. 132, volume 4:1, pp. 132-133, 2024, available at <https://doi.org/10.22271/27899497.2024.v4.i1b.77>, accessed on 14 December 2024.

¹⁰¹ Dena M. Gromet & John M. Darley, 'Retributive and Restorative Justice: Importance of Crime Severity and Shared

system based on retribution and the restorative justice system based on practical rectification lie?

There is certainly a divide between where restorative justice can be applied and where it fails to justify¹⁰². The benefits of restorative justice for cases of major crimes, such as gendered violence, domestic abuse, and violence against children, have been discussed by both academics and practitioners. On the one hand, it is frequently asserted that "the sensation of empowerment linked to restorative justice may offset the stigma, disempowerment, and loss of control that the criminal justice system frequently brings about"¹⁰³.

It is worthwhile to consider the possible advantages of restorative justice procedures in cases of gender-based crimes, child abuse, and domestic violence. However, some contend that restorative justice initiatives' use of restorative justice ideas in difficult areas has been overly hopeful. The applicability and hazards of restorative justice in these situations remain contentious¹⁰⁴.

The application of the restorative justice process itself is questionable when it comes to heinous crimes, and it is much more of a contextually dependent scenario than it might appear at first glance. Although we are taking international crimes as the focus of this article, let us see if the integration has been better in municipal law circles, where it is theoretically supposed to be much more streamlined and relatively easy to implement. To better understand this, we might take the domestic law example of India, where certain compoundable offences can possibly be dealt with outside the court in a much more alternative dispute resolution adjacent system. Alternative punishments or sentences have also been tried in the country's penal system in the hopes that Indian courts will embrace restorative justice and amalgamate restorative justice components into the criminal justice system. The 1978 draft amendment to the IPC did just that, although it never passed through the parliament then. Unlike the Indian Penal Code's traditional forms of punishment, the 2015 law¹⁰⁵ enables alternative punishments such as advice or admonition by an appropriate authority, psychotherapy, community service, financial penalties, release on good-conduct probation, and confinement to a home for supervising reformatory services.

However, there are few measures where the offender can be pushed to have an obligation and restore the victim to their original position. The *Bharatiya Nyaya Sanhita (BNS)*, the recent IPC reformation, has introduced community service¹⁰⁶ as a suitable form of punishment, but only in smaller offences. Even section 290 of the *Bharatiya Nagarik Suraksha Sanhita (BNSS)* keeps the way open for plea bargaining to be an effective solution in case of some offences¹⁰⁷. We can see

Identity in People's Justice Responses', *Australian Journal of Psychology* p. 50, volume 61:1, pp. 51–52, 2009, available at <https://doi.org/10.1080/00049530802607662>, accessed on 14 December 2024.

¹⁰² Chris Cunneen & Carolyn Hoyle, *Debating Restorative Justice*, Bloomsbury Publishing, United Kingdom, 1st Edition, 2010.

¹⁰³ Annette Vogt & Yvon Dandurand, 'Restorative Justice in Matters Involving Serious Crimes', *Restorative Justice Note 4*, International Centre for Criminal Law Reform and Criminal Justice Policy, 2018, p. 2, available at https://www.researchgate.net/publication/329882019_Restorative_Justice_in_Matters_Involving_Serious_Crimes, accessed on 14 December 2024.

¹⁰⁴ Vince Mercer & Karin Sten Madsen, *Sexual Violence and Restorative Justice: A Practice Guide*, Leuven Institute of Criminology (LINC), Leuven, 2015, pp. 13-15.

¹⁰⁵ *The Juvenile Justice (Care and Protection of Children Act*, 2015, India, s. 18.

¹⁰⁶ *Bharatiya Nyaya Sanhita (BNS)*, 2023, India, s. 4; *Bharatiya Nagarik Suraksha Sanhita (BNSS)*, 2023, India, s. 23, explanation clause states "Community service shall mean the work which the Court may order a convict to perform as a form of punishment that benefits the community, for which he shall not be entitled to any remuneration."

¹⁰⁷ *Bharatiya Nagarik Suraksha Sanhita (BNSS)*, 2023, India, s. 290 states "application for plea bargaining may be filed by the accused within 30 days of framing of the charge and 60 days, a mutually satisfactory disposition is to be worked

that the application is stunted when it comes to heinous crimes at large, and non-compounding offences of a more serious nature would never be considered for such an approach. Though the local Indian governance deals with fundamental restorative justice, it is still laced with the idea of ADR and is not an independent process or phenomenon. In reality, though, it is a separate entity and focuses more on social and psychological relationships between parties and between parties and the society.

In countries like Nepal, there has been a certain social transformation when it comes to the application of restorative justice in more serious crimes like sexual violence¹⁰⁸. Victim restoration, conferences, meetings, etc, are held to facilitate these ventures, often through national and international NGOs and charity institutions¹⁰⁹. However, the lack of legal acknowledgement is apparent even in a domestic setting, which is supposed to be much more conducive to integration. Even programmes outside the traditional legislative practices with a sociological viewpoint fail to raise funding when specifying restorative principle as one of the goals.¹¹⁰

This problem is amplified when considered in an international law fabric of space, especially when most of the alleged crimes are bound to have considerably more severe ramifications. As discussed earlier in this article, the success of a restorative justice model may have certain basic logistical requirements that are not possibly transportable to international criminal laws. This does not point to the ineptitude or inefficiency of the ideology so much but mostly points out that these spaces are not exactly compatible with each other to efficiently co-exist. Although the ICC partially supports restorative justice principles through hearing victim perspectives, regaining lost dignity, healing, and mending communities, trials before the ICC are not the right setting for implementing restorative practices in its holistic reality.

The Rome Statute foreshadows victim participation and reparations, which is a component of restorative practice, but the ICC is not set up to follow the standard restorative justice procedures. The most renowned institutions of the criminal justice system internationally are the International Criminal Tribunal of Former Yugoslavia and the International Criminal Tribunal of Rwanda, both of which rely heavily on the punitive objectives of establishing a criminal system to punish serious violations of humanitarian rights. Both ICTY and ICTR do not include much in the way of victim participation itself, as the scope of the incidents does not make it possible to do so, and the ultimate goal being set has always been the punishment of the alleged offenders.

While the sections of the ICC statute¹¹¹ have discussed victim participation inclusion and the dynamic shift of defining 'victim justice' is visible, does that mean it is a shift towards the holistic acceptance of restorative justice?¹¹² Many scholars agree that the ICC has recently leaned towards a restorative justice approach, highlighted by the strategy and revised strategy enumerated by the

out between the public prosecutor/complainant and the accused?.

¹⁰⁸ Ramkanta Tiwari, 'Restorative Justice: Moving Beyond the Silos', *Nepal Journal of Legal Studies* p.168, volume 1:1, 2016, pp.168-171, available at <https://ssrn.com/abstract=3340302>, accessed on 14 December 2024.

¹⁰⁹ Tobias Volz, *Restorative Justice in Nepal: An Analysis of the Approach's Potential in Cases of Sexual Violence Against Women*, Doctor of Philosophy, Mediation and Conflict Resolution, EUCLID University, 2021, pp.53-56.

¹¹⁰ Ibid, p. 166.

¹¹¹ *Rome Statute of the International Criminal Court*, 1 July 2002, 2187 UNTS 3, Rome, 17 July 1998, art. 68(3).

¹¹² Alessandra Cuppini, 'A Restorative Response to Victims in Proceedings before the International Criminal Court: Reality or Chimaera?', *International Criminal Law Review* p.313, volume 21:2, 2021, pp.313-341, available at <https://doi.org/10.1163/15718123-bja10041>, accessed on 14 December 2024.

ICC itself, along with statements from various ICC judges in different instances. It is important to note that the ICC does not use core techniques such as mediation, circles, and conferencing, which bring offenders and victims together in in-person meetings to decide how best to address the pain caused by the alleged crime. It is simply not logistically feasible to do such integration as is needed to state that ICC has accepted the restorative justice principles; it starkly contrasts the nature of the political dilemma that a tribunal like the ICTY or any institution of similar magnitude will face. Even in cases where the ICC or its trial chambers can think of restorative justice integration, its limitations are so severe that the application of this principle is hardly recognisable. In the case of *Thomas Lubanga*¹¹³, The ICC trial chamber states clearly that joint legal representation should have been used to present the viewpoints of the victim. This trend continues throughout the discourse of ICC, as common legal representation is assumed to fill in instead of victim participation. Even then, victim participation is more of a way towards transparency of procedures and less of a restorative justice integration.

All of this stem from the nature or scale of the crimes that an international criminal court is dealing with, which is always considerably more complex and ‘heinous’ in nature, with ramifications that impact many of the population and violation of international law. Restoration of all this may not be possible through mediation, legal representation or victim participation. The question that arises here is whether there should be an acceptance of the realistic facts that restorative justice is not applicable in this specific scenario and whether there will always be a dominance of retributive theory while international criminal law and judicial proceedings are discussed or would it be prudent actually to reimagine the ‘success’ of restorative justice itself, and put forward the fact that this very abstract rendition of the ideology is the total integration that is possible, and the institutions like ICC have achieved so?

VI. Analysis and Conclusion

“The end of penal laws is that they are not to be applied.” -Fichte.

Globalisation and the modern wave of intellectual awareness have seen countries steadily embracing the restorative justice system to its full potential, transcending its often-touted indigenous origin¹¹⁴. However, it still needs to be satisfactory as there are issues or challenges in implementing restoration procedures, where the sociological standpoint of the members of civilised society often becomes the main hurdle in restoration. As previously discussed, the total incorporation of the restorative process in international crimes and adjudications is incapacitated due to the nature of the crimes¹¹⁵. In that case, integrating internationally set standards into domestic legislation is the way forward for the uniformity and application of restorative justice principles. Community services are not prevalent in many countries, like the US or other Western countries. With the change in social circumstances and economic advancements, the restorative system is becoming outdated for many countries, and it needs to cope with the paradigm shift to work with the theory’s principles effectively. The legislation needs to make space for the

¹¹³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Trial Chamber I, 2012, Case no. ICC-01/04-01/06.

¹¹⁴ Juan Marcellus Tauri, ‘Indigenous Peoples and the Globalization of Restorative Justice’, *Social Justice* p.46, volume 43:3, 2016, pp.59-60, <http://www.jstor.org/stable/26405722>, accessed on 12 December 2024.

¹¹⁵ Cuppini (n. 112).

restorative justice system in most criminal laws to work parallelly with the criminal justice system. In that context, the international integration of restorative justice processes and application thereof through legal instruments and recommendations come as a confirmation and viability of the ideology itself, which might push the national administrations towards seamless integration of restorative justice¹¹⁶.

The clarification on setting up standards and clear methods of application provided through research, such as the UNODC handbooks, form a crucial part of the overall strategy to incorporate a more humane process in the form of restorative justice uniformly throughout the regions. The examples of restorative models achieving success in reducing recidivism, strengthening victim participation, and reducing criminality overall have meant that transposing these models across countries would be a viable option for the administrative parts of different governments to consider. That entails supporters of restorative justice need to become knowledgeable about pertinent international legal frameworks and principles. A deep conceptual understanding is even more necessary for key policymakers and legislators in different countries. They can use their content and validity to negotiate, support, or advocate change. The international restorative justice framework incorporates a variety of actions and innovations that can be implemented domestically, ranging from strong statements in favour of accessible and comprehensive services to appeals for cultural change and the laying out of ways through which this can be uniformly achieved in the future. That being said, domestic uniformity and establishing standards might be the more realistic goals for the ideology when it comes to international instrumentation, as the assimilation of the restorative justice process into the international criminal justice framework in the context of adjudicating international trials by ICC or any other organisation with similar scope, might not be logistically expectable, or realistically suitable.



¹¹⁶ George Mousourakis, 'Restorative Justice: Domestic and International Perspectives', *Ritsumeikan International Studies* p. 55, volume 33:1, 2023, pp. 68-70, available at https://www.researchgate.net/publication/368988178_Restorative_Justice_Domestic_and_International_Perspectives, accessed on 14 December 2024.