

**“Victims: The International and Transitional Justice Niche.”**

**A Paper Presented by Joseph Akwenyu Manoba-Legal Advisor Uganda Victims Foundation at a Regional Forum on International and Transitional Justice organized by Avocats Sans Frontières-Uganda Mission and the Uganda Coalition of the International Criminal Court on 30<sup>th</sup> July, 2012 at Imperial Botanical Beach Hotel, Entebbe**

**Background:**

Today we sit in this hall and discuss victims and this is not the first time and will not be the last time we do so however in many parts of the greater north of Uganda as well as other parts of the country and the world over such as Syria, Dafur, the Kivus etc many are direct victims and perhaps survivors of atrocious crimes committed against them with impunity by individuals wielding power and or authority. In Uganda the guns may have gone silent while in others the guns are still belching smoke from the gun powder but do these individuals (victims) know that the world thinks about them? Do they instead feel the world has abandoned them or that they failed themselves and could have done something to avoid what happened to them (survivors' guilt) since no one was there to save them?

Approximately 25 years down the history path of Uganda, victims of gross violations of international human rights law and serious violations of international humanitarian law live in a pathetic state, inhuman and degrading situations and some in life threatening conditions but the will of the state will not promptly respond to the needs of these communities but will afford to focus attention on other issues in preference over persons victimised by individuals during conflict.

International and transitional justice is now reasonably established and we must celebrate these mechanisms because they offer our people a life time opportunity to confront the past. There is imperative as we sit here today that we must progressively take steps to ensure that either mechanism is effective in responding to the urgent needs and concerns of victims by being able to adopt itself to the situation without taking away from established guidelines and well defined international principles. The ICC Trust Fund for Victims for instance has been able to respond to victims life saving needs by undertaking projects which do not amount to reparations but in cognizance of the harms suffered and the need to repair some as the justice processes await hence giving hope to the very few who have been able to access the facilities from the projects.

## Introduction:

In ancient history and in radical victimology the victim was a party and therefore key player in conflict management before the birth of the modern state.<sup>1</sup> Upon the birth of the state, conflict management was usurped and taken over and the victim was rendered a passive participant without direct role as was the case previously.<sup>2</sup>

International criminal justice dating back to the military tribunals at Nuremberg and Tokyo focussed on establishing individual criminal responsibility arising from the commission of crimes against peace and crimes against humanity<sup>3</sup> and no specific role of the victim as an active participant in the management of this conflict. This position was not made better until the International Criminal Court was established and provided for the participation of victims in proceedings of the Court in an attempt to ensure the views and concerns of victims are taken account of while establishing the guilt or innocence of an accused person.

In the context of international criminal<sup>4</sup> and transitional justice<sup>5</sup> then, the term victim has been defined under international law to mean;

- 1) The Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power;

*persons who individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through*

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<sup>1</sup> See Joseph Akwenyu Manoba, "Victims Participation before the International Criminal Court: A satisfaction for Victims or Third Parties", LLM Thesis, Queens University Belfast, 2010, citing Nils Christie, *Conflicts as Property*, 17 British Journal of Criminology 1,2 (January 1977) republished in R.I. Mawby and S. Walklate, *Critical Victimology: International Perspectives* (Sage, 1994). See also Lucia Zedner, "Victims" 577,578, citing Ashworth A. *Punishment and Compensation: Victims, Offenders and the State*, Oxford Journal of Legal Studies, 6: 86-122(1992), London: Weidenfield and Nicholson and Wright, M., *Justice for Victims and Offenders* (1991) Buckingham: Open University Press, in Mike Maguire, Rod Morgan and Robert Reiner, *The Oxford Handbook of Criminology* (2<sup>nd</sup> edn., 1997) Clarendon Press. Oxford.

<sup>2</sup> Id citing in R.I. Mawby and S. Walklate, *Critical Victimology: International Perspectives* (Sage, 1994).

<sup>3</sup> See article 6, Charter establishing Military Tribunal.

<sup>4</sup> International criminal justice for this paper will refer justice as dispensed under the Rome Statute and the Rules of Procedure and Evidence made there under.

<sup>5</sup> The United Nations in its Guidance Notes to the Secretary General has defined transitional justice as;

*"..the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"* available at [http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010](http://www.unrol.org/files/TJ_Guidance_Note_March_2010).

*acts that are in violation of criminal laws operative within members states, including those laws proscribing criminal abuse of power.*<sup>6</sup>

2) The Rome Statute;

I) *“Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;*

II) *Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.*

3) The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violations of Humanitarian Law;

*Persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.*<sup>7</sup>

In all the three (above) definitions, the person considering him or herself victimized, must show that he/she has suffered harm arising out of a given violation. The Victims’ principles go a step further than the other two

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<sup>6</sup> Declaration of the Basic Principle of Justice for victims of crime and Abuse of power, Section 1, GA Res.40/43,29 November 1985. Section 2 of the said Declaration provides that a person is considered a victim under the Declaration notwithstanding that no perpetrator is identified, apprehended prosecuted, or convicted and without regard to the relationship between the perpetrator and the victim. It also adds to say that the term victim also includes the immediate family members or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

<sup>7</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/ L.10/Add.11 (19 April 2005).

instruments by broadening the term victim to include “immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims”.<sup>8</sup> The attempt to broaden the spectrum of the definition is a vital one as in so doing it embraces some persons who may have been victimized but may be left out under the definitions in the first two international law instruments.

The concept of harm has not been defined under the above three instruments however the ICC has defined harm to mean;

*[T]he harm suffered by a natural person is harm to that person, i.e. personal harm. Material, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim. Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between the victim such as the relationship between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child....the issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims. Whether or not a person has suffered harm as a result of a crime within the jurisdiction of the Court and is therefore a victim before the court would have to be determined in light of the particular circumstances.*<sup>9</sup>

The definition of a victim (above) may not be exhaustive and has been criticized for example Von Hentig who argues that a victim will not always be a passive player in the victimisation but will most probably have consented tacitly, cooperated, conspired or provoked the perpetrator.<sup>10</sup> Others argue that the term ‘victim’ is constructed by the criminal law or by the ‘self evident nature of the suffering of the victim’ which construction arguably ‘conceals an inherently static functionalist view of society, focusing on consensus and stability’ and in this

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<sup>8</sup> *Id.*

<sup>9</sup> Decision on Victims Participation of 18<sup>th</sup> January 2008, ICC-01/04-01/06 OA 9 OA 10 (Case of Thomas Lubanga Dyilo), 11 July 2008 at para. 31.

<sup>10</sup> See Joseph Akwenyu Manoba, “Victims Participation before the International Criminal Court: A satisfaction for Victims or Third Parties”, LLM Thesis, Queens University Belfast, 2010, citing Hans Von Hentig, *The Criminal and His Victim* (1948) New Haven, Conn. Yale University press cited by Lucia Zedner, *Victims in Mike Maguire, Rod Morgan and Robert Reiner*, cited by the *Oxford Handbook of criminology* 578, (Eds. 1997) Oxford University Press.

situation there is little information about how the 'state contributes to the construction of the victim'.<sup>11</sup>

Ultimately therefore, the present definition of a victim as provided in international law (indicated above) concentrates more at focusing at the relationship between the victimized person and the offender and ignores other actors such as the state which may be the more responsible source of victimization for its failure to respond to social and or economic injustices as has been seen in the case of the LRA.

This paper will discuss the position or role of the victim as presently envisioned under international and transitional justice but in doing so, i will restrict myself to the following areas of victim concern to wit; Access to information, Access to justice, Participation, Protection and Reparations.

### **Access to Information:**

Access to information has been recognised as paramount for victims of gross violations of international human rights law and serious violations of International Humanitarian law. The UN Principles mandate states to;

*Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;*<sup>12</sup>

Lack of information and adequate provisions to facilitate victims especially in cases where an accused person has been apprehended is particularly a major victims' concern for dissatisfaction with a criminal legal system.<sup>13</sup>

Under the ICC frame work, in addition to the Outreach Office, a victims' participation and reparations section has been established to inter alia provide information to victims on their rights in accordance with the Statute.<sup>14</sup> Similarly the Office of Public Counsel for Victims was appointed in the situation in Uganda involving Joseph Kony and his co indicted commanders to provide information about proceedings in the court for victims who have made contact with the Court.<sup>15</sup>

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<sup>11</sup> *Id.* citing Walklate. S., Understanding Criminology: current theoretical debates, 116,116 (1998) Open University press.

<sup>12</sup> See UN Basic principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of Humanitarian law, clause 12(a).

<sup>13</sup> *Id.* citing Joana, Shapland, *Victims: The Criminal Justice System and Compensation* (1984) citing Clarke, R.V.G and Hough, J.M (1980), *The Effectiveness of Policing*, London: Gower.

<sup>14</sup> See Article 43 (1) and (6).

<sup>15</sup> Situation in Uganda, Decision on Victim Participation, ICC-02/04, para.2, 9<sup>th</sup> march 2012.

In the transitional justice frame work and in accordance with the UN definition on transitional justice, the Government of Uganda is proceeding with the frame work of the Juba Peace agreement on Accountability and Reconciliation and its annexure by recognizing the wide range of measures including the use of an independent body to look into the past, establishment of a Special Division of the High Court of Uganda (now already established as the International Crimes Division) and use of Traditional justice Mechanisms that may be employed to address the issues of violence, ending impunity and accountability for serious crimes arising from the conflict perpetrated in the greater north of Uganda.<sup>16</sup>

The annexure also provides for use of internal mechanisms for protection of victims and ensuring participation of victims in the various proceedings<sup>17</sup> which may be read to include providing information on the range of mechanisms to be applied.

### **Access to Justice:**

Access to justice is equally recognised as instrumental for victims as states are obliged to ensure that;

Victims are provided with proper assistance to seek access to justice and measures are taken 'make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law'.<sup>18</sup>

In the ICC frame work, victims not participating as witnesses for the prosecution or the defence, are granted participatory rights in situations where their personal interests are likely to be affected in the proceedings but the participation will be determined by the Court although pre Trial Chamber II in the Ugandan case has held that a distinction must be made between "victims *applying* to participate and victims *recognised* as participants in the potential proceedings".<sup>19</sup>

In the context of transitional justice, The significant role of the victim as a witness in penal or criminal proceedings firmly anchors the victim as the backbone in the criminal process because without the participation of a victim as a witness then it is inconceivable how a criminal trial will proceed since the legal systems are constructed to establish culpability and or criminal liability on the basis of the evidence gathered from the testimonies of victims.<sup>20</sup>

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<sup>16</sup> See Annexure to the Agreement on Accountability and Reconciliation.

<sup>17</sup> Clause 24 of the annexure.

<sup>18</sup> UN Basic Principles, *supra*, clause 12 (c) and (d).

<sup>19</sup> Situation in Uganda, Decision on Victim Participation, ICC-02/04, para.13, 9<sup>th</sup> march 2012.

<sup>20</sup> See Manoba, *supra*

Under the Juba accountability and reconciliation framework, provision for victims to participate in proceedings in the special division of the High Court was envisioned under the agreement as well as under the traditional justice mechanisms.<sup>21</sup> Effectively, therefore the transitional justice mechanisms contemplated under the said agreement recognize the importance and role of victims in processes of conflict management.

### **Participation and Protection in Proceedings:**

Participation and protection have equally been recognized internationally and states are encouraged to ensure victims participate in seeking remedy and are provided with protection for themselves and their families.<sup>22</sup>

Article 68 (3) of the Rome Statute as noted above provides for victim participation in circumstances where their personal interests will be affected in the proceedings.<sup>23</sup> Victims may thus participate in the situation phase of investigation, pre-trial, trial and appellate stages as the court may determine from time to time.<sup>24</sup> 21 victims have so far been recognised and granted participatory rights in the situation phase and numerous others have participated in the cases presently proceeding under trial before the court. A number of victims participating in proceedings before the court have received a wide range of protection measures including relocation.

In similar breath, the wide range of transitional justice mechanisms in the context of the juba agreement recognize the role of the victim to participate as witnesses or victims in their own right. The right to protection is similarly defined. The enabling legislation is however still in draft form and therefore victims participating in any of the defined mechanisms may not enjoy any protection from threats arising from their participation.

### **Reparations:**

The UN Principles require states to ensure that victims of gross violations of IHRL and serious violations of IHL are provided with reparations. The principles additionally provide that;

*Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person,*

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<sup>21</sup> See clause 8 and 24 respectively.

<sup>22</sup> UN Basic Principles, *supra*, clauses 10 and 12.

<sup>23</sup> See further in Uganda, Decision on Victim Participation, ICC-02/04, para.8, 9<sup>th</sup> march 2012.

<sup>24</sup> *Id.*

*or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.*<sup>25</sup>

The scope of reparations may include compensation, rehabilitation, restitution, satisfaction<sup>26</sup> and guarantees of non repetition<sup>27</sup>

Article 75 of the Rome Statute echoes these provisions by providing for an avenue for victims to apply for reparations although the ultimate decision lies with the Court to define principles upon which reparations may be made.

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<sup>25</sup> UN Basic Principles, supra clause 15.

<sup>26</sup> Satisfaction under the said UN principles may include; Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

<sup>27</sup> UN Basic principles name the following as examples of guarantees of non repetition; (a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.



TJ processes are characterised by most if not all the reparation constituents. The examples of satisfaction and guarantees of non repetition are similarly constituents of TJ processes as may be drawn from the Juba peace process.

**Conclusion:**

The rights to access to information, justice, participation, protection and reparations for victims gross violations of IHRL and serious violations of IHL play an important role in the pillars of both international and TJ mechanisms. These enhance the various pillars and make practical the realisation of prosecutions, accountability, reconciliation and reparations.