

UNCONDITIONAL INJUSTICES:
VICTIM PARTICIPATION AND EARLY RELEASE
IN INTERNATIONAL CRIMINAL LAW

ANIKA ADES*

I.	INTRODUCTION	594	R
II.	FRAMEWORKS FOR EARLY RELEASE IN INTERNATIONAL CRIMINAL LAW	597	R
	A. <i>The International Criminal Court</i>	599	R
	B. <i>The Special Court for Sierra Leone</i>	606	R
III.	ON THE FALSE EQUIVALENCY OF INTERNATIONAL AND NATIONAL CRIMINAL LAW	607	R
IV.	“REHABILITATION” OF PRISONERS	613	R
	A. <i>Good Behavior in Prison</i>	616	R
	B. <i>Remorse</i>	620	R
V.	VICTIM PARTICIPATION IN EARLY RELEASE PROCEEDINGS	625	R
	A. <i>Definitions of Victimhood</i>	626	R
	B. <i>History of Victim Participation in International Criminal Law</i>	627	R
	C. <i>Victims’ Right to Finality of Sentences</i>	630	R
	D. <i>Conclusions and Proposals for Victim Participation</i>	631	R
VI.	PROPOSALS FOR VICTIM PARTICIPATION AND CONDITIONAL EARLY RELEASE	632	R
VII.	CONCLUSION	640	R

* J.D. Candidate 2020; Tufts University, B.A. 2014. Deep thanks to Professor Pablo de Greiff for supervising this Note, to Christopher Owens, Sophia Stefanovic, Heather McAdams, and the Notes Committee of the *N.Y.U. Journal of International Law & Politics* for their editorial advice and comments, and for their steadfast support at every stage of the publication process, and to Katie Wightman and the Center for Human Rights and Global Justice for their support. All opinions and errors are my own.

“I trust you will not flinch from creating a court strong and independent enough to carry out its task. It must be an instrument of justice, not expediency. It must be able to protect the weak against the strong.”¹

—Kofi Annan, Former Secretary-General
of the United Nations

I. INTRODUCTION

In 1951, Gottlob Berger left Landsberg Prison in Bavaria as a free man.² Seven years earlier, he had been a Lieutenant General in the German Army and the Chief of the SS Office in Berlin. A fervent anti-Semite, Berger had advocated for the notorious Final Solution policy and had been a Nazi insider of the highest ranks.³ During the Nuremberg trials following World War II, he was sentenced to twenty-five years for war crimes and crimes against humanity, but was granted early release after serving only six years in prison.⁴ Berger never showed remorse for his crimes, and lived the remainder of his otherwise ordinary life in his hometown in West Germany, where he died peacefully in 1975.⁵

•••

Early release of international war criminals is not just a relic of Nuremberg. Emmanuel Rukundo, a Catholic priest who abused his trusted position as clergy by distributing names of Tutsi to the Interhamwe, and who murdered and sexually assaulted women seeking refuge at his seminary, was released early in 2016 after serving fifteen years of a twenty-three-year sentence.⁶ In 2009, Biljana Plavšić, the former President of the

1. Press Release, U.N. Secretary-General, UN Secretary-General Declares Overriding Interest of International Court Conference Must Be That of Victims and the World Community as a Whole, U.N. Press Release SG/SM/6597 L/2871 (June 15, 1998).

2. *Berger, Gottlob Christian*, LANDESKUNDE ENTDECKEN ONLINE, https://www.leo-bw.de/web/guest/detail/-/Detail/details/PERSON/kg1_biographie/118837419/biografie (last visited Oct. 18, 2019).

3. PETER MAGUIRE, *LAW AND WAR* 128 (rev. ed. 2010).

4. 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 308–09, 867 (1949); MAGUIRE, *supra* note 3, at 206.

5. *Berger, Gottlob Christian*, *supra* note 2.

6. Prosecutor v. Rukundo, Case No. MICT-13-35-ES, Public Redacted Version of the 19 July 2016 Decision of the President on the Early Release of

Republika Srpska who had famously been photographed embracing a colleague over the corpse of a Muslim civilian, was granted early release after serving only eight years of her eleven-year sentence.⁷ In 2015, Germain Katanga, a former leader of the Patriotic Resistance Force in Ituri in the Democratic Republic of the Congo, who had been convicted by the ICC on five counts of war crimes and crimes against humanity,⁸ was released early after eight years of imprisonment.⁹ Other persons convicted of international crimes have been granted early release as recently as January of 2019.¹⁰

Early release is an important tool of enforcement in domestic criminal jurisdictions, but it is controversial in the international criminal context. The root of the controversy over early release practices may be explained, in part, by competing theories on the purpose of international courts and other transitional justice mechanisms.

Some in the international public law community view international criminal courts as instruments for the development of international human rights law to deter wrongful behavior generally, rather than as a tool of justice for victims of

Emmanuel Rukundo, ¶¶ 4, 16 (Dec. 5, 2016), <http://jrad.unmict.org/view.htm?r=238975>.

7. *Biljana Plavsic: Serbian Iron Lady*, BBC NEWS (Feb. 27, 2003), <http://news.bbc.co.uk/2/hi/europe/1108604.stm>; Ian Traynor, *Leading Bosnian Serb War Criminal Released from Swedish Prison*, GUARDIAN (Oct. 27, 2009), <https://www.theguardian.com/world/2009/oct/27/bosnian-serb-war-criminal-freed>.

8. Prosecutor v. Katanga, ICC-01/04-01/07-3598, Prosecution's Submissions on Germain Katanga's Sentence Review, ¶¶ 1, 19 (Sept. 18, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_17905.pdf.

9. Prosecutor v. Katanga, ICC-01/04-01/07-3615, Decision on the Review Concerning Reduction of Sentence of Mr Germain Katanga, ¶ 116 (Nov. 13, 2015) [hereinafter Katanga Early Release Decision], https://www.icc-cpi.int/CourtRecords/CR2015_21153.pdf.

10. *See, e.g.*, Prosecutor v. Simba, Case No. MICT-14-62-ES.1, Public Redacted Version of the President's 7 January 2019 Decision on the Early Release of Aloys Simba, ¶ 82 (Jan. 7, 2019) [hereinafter Simba Early Release Decision], <http://jrad.unmict.org/view.htm?r=244273> (granting Aloys Simba early release); Prosecutor v. Pušić, Case No. MICT-17-112-ES.1, Public Redacted Version of the 20 April 2018 Decision of the President on the Early Release of Berislav Pušić, ¶ 67 (Apr. 24, 2018), <http://jrad.unmict.org/view.htm?r=241282> (granting early release to Berislav Pušić).

specific conflicts.¹¹ Under this theory of international criminal justice, developing and implementing well-established international principles over time will make societies more just and equitable in the long term. Others view international courts as forums for documenting mass atrocities and rendering justice to victims.¹² This note will adopt this latter rationale, and will thus emphasize the interests of justice for victims above the jurisprudential interests of international criminal law, generalized deterrence, and human rights legal development. The international human rights movement has tended to frame justice and peace as in conflict, but this note will take a more open approach that views justice for victims as a precondition for meaningful and lasting peace.

Victims groups and experts in international criminal law have been vocal opponents of early release practices, especially when early release is granted without consulting survivors.¹³

11. Compare Patrick J. Keenan, *The Problem of Purpose in International Criminal Law*, 37 MICH. J. INT'L L. 421, 449 (2016) (“[P]roponents of deterrence, another leading justification for criminal sanctions, argue that the law’s role in society is to reduce incidence of crime. On this approach, punishment is warranted for those who violate the law because of the effect that this punishment will have on others who will observe the punishment and decide not to similarly offend.”), with Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 807 (2006) (arguing that international criminal tribunals are not likely to deter humanitarian abuses).

12. See, e.g., Keenan, *supra* note 11, at 426 (“[T]he appropriate purposes for international criminal tribunals are to address widespread harms that affect many individuals as a way to ensure a full accounting of the atrocities, target those crimes that cause the greatest lingering social harm to victims, pursue other interests of victims in specific ways, including using the criminal process as a way to document the events that gave rise to the tribunal.”).

13. See, e.g., Prosecutor v. Ngeze, Case No. MICT 13-37-ES-2, Submission of Additional Information Relevant to the Request for Early Release of Hassan Ngeze, ¶¶ 5, 14 (May 30, 2018) [hereinafter Stephen Rapp Submission], <http://jrad.unmict.org/view.htm?r=241459> (letter from Stephen Rapp opposing Ngeze’s request for early release and pointing out that unlike the Special Court for Sierra Leone, the Mechanism lacks the safeguards and conditions for release, rehabilitation, and monitoring of convicts); see also Nasra Bishumba, *UN Prosecutor Wants Rwanda Involved in the Early Release of Genocide Convicts*, NEW TIMES (June 27, 2018), <https://www.newtimes.co.rw/news/un-rwanda-genocide-convicts> (reporting that the chief Prosecutor of the International Residual Mechanism for Criminal Tribunals believes that Rwanda should participate in the decision of whether to grant early release of genocide convicts).

When sentences are mitigated or reduced, victims may feel betrayed by the apparent leniency for offenders. Why, then, do international courts continue to follow practices that run counter to international rationales—such as punishment and the interests of justice for victims—for the existence of those very courts?

This note will explore the practice of early release and reduction or commutation of sentence in international penal law, and will suggest concrete ways that these procedures might be improved with an eye toward serving the interests of justice for victims in the future. Specifically, this note will argue that victim participation is essential at all phases of trial and during the post-trial phase, and that conditional early release best protects the interests of justice for victims.

This note will first outline the procedures for early release under two different early release regimes at international courts. Next, it will discuss how, at times, the procedures for early release constitute a misapplication of domestic law in light of the divergent aims of international criminal law. The note will ultimately propose a procedure for conditional early release modeled on that of the Special Court for Sierra Leone, which best accommodates victim participation, incentivizes reconciliation, and recognizes the capacity of convicted persons to undergo positive change.

II. FRAMEWORKS FOR EARLY RELEASE IN INTERNATIONAL CRIMINAL LAW

Every international court with jurisdiction over war crimes and crimes against humanity provides for the possibility of early release for convicted persons.¹⁴ This section will briefly

14. *E.g.*, Rome Statute of the International Criminal Court art. 110, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; U.N. Int'l Residual Mechanism for Crim. Tribs., Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY, or the Mechanism, ¶¶ 7, 10, U.N. Doc. MICT/3/Rev.2 (Feb. 20, 2019) ; U.N. Int'l Residual Mechanism for Crim. Tribs., Rules of Procedure and Evidence, r. 151, U.N. Doc. MICT/1/Rev.5 (Mar. 4, 2019) ; Residual Special Ct. for Sierra Leone, Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone art. 2(B), (Dec. 2, 2016) [hereinafter RSCSL Practice Direction]; Special Trib. for Leb., Rules of Procedure and Evidence, rs. 194–96, Doc. No. STL-BD-2009-01-Rev.10 (Apr. 10,

describe the justifications for early release in international criminal law, and then outline the two different approaches to early release currently in place at the International Criminal Court (ICC) and the Residual Special Court for Sierra Leone (RSCSL).

A primary purpose of rehabilitative detention of convicted persons in the international context is to facilitate their eventual return to society, and this purpose closely aligns with the rehabilitative principles of domestic jurisdictions.¹⁵ The prospect of early release serves this purpose by incentivizing rehabilitation and reconciliation. Early release is also justified on the grounds that providing for the possibility of early release is in accordance with basic human rights principles, according to which all prisoners have a right to the prospect of release prior to the completion of their sentence.¹⁶

This note does not dispute that incarcerated individuals in any context are entitled to early release or parole when they have established their eligibility or can demonstrate changed circumstances since their conviction. However, early release procedures should adequately balance the rights of convicted persons against the rights and interests of victims for whom international courts exist. The following procedures for early

2019) [hereinafter STL Rules of Procedure and Evidence]. It is worth noting that, although the International Military Tribunal for the Far East did not itself provide for early release of convicted persons, the United States established a parole board to advise the U.S. President on Japan's requests for early release or parole of convicted persons. Establishment of the Clemency and Parole Board for War Criminals, Exec. Order No. 10,393, 17 Fed. Reg. 8061 (Sept. 4, 1952).

15. See Thirteenth U.N. Congress on Crime Prevention and Criminal Justice, *Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation*, at 4 (Apr. 12–19, 2015); see also MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF CRIMINAL LAW* 83, 91 (1997) (discussing general theories of punishment).

16. See G.A. Res. 70/175, annex, United Nations Standard Minimum Rules for the Treatment of Prisoners, r. 4 (Jan. 8, 2016) [hereinafter *Mandela Rules*] (“The purposes of a sentence of imprisonment or similar measures deprivative of a person’s liberty are primarily to protect society against crime and to reduce recidivism. These purposes can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life.”).

release differ in significant ways, but each may be understood as a balance between the rights of convicted persons and the rights of victims to secure justice against the perpetrators of the crimes committed against them.

A. *The International Criminal Court*

The International Criminal Court’s early release procedures diverge significantly from the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY), which came before it. The Rome Statute mandates review of sentences “[w]hen the person has served two thirds of the sentence, or 25 years in the case of life imprisonment.”¹⁷ Early release at the ICC is determined by a panel of three judges of the Appeals Chamber, after inviting the prosecutor, the state of enforcement, and “the victims or their legal representatives . . . to participate in the hearing or to submit written observations.”¹⁸

The factors contemplated for early release by the Rome Statute are:

- (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
- (b) The voluntary assistance of the person in enabling the enforcement of the judgments and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
- (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence¹⁹

The “other factors” of Article 110(4)(c) of the Rome Statute “refer[] to those factors listed in rule 223 (a) – (e) of the Rules of Procedure and Evidence”²⁰:

17. Rome Statute, *supra* note 14, art. 110(3).

18. Int’l Crim. Ct., Rules of Procedure and Evidence, r. 224(1), ICC-PIDS-LT-02-002/13_Eng (2013) [hereinafter ICC Rules of Procedure and Evidence].

19. Rome Statute, *supra* note 14, art. 110(4).

20. Prosecutor v. Lubanga, ICC-01/04/01/06-3173, Decision on the Review Concerning Reduction of Sentence of Mr Thomas Lubanga Dyilo, ¶ 25

(a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime; (b) The prospect of the resocialization and successful resettlement of the sentenced person; (c) Whether the early release of the sentenced person would give rise to significant social instability; (d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release; (e) Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.²¹

These factors express some concern for the unique difficulties of early release in international criminal law, such as the potential for social unrest following the release of a political actor, and further consider reconciliation and restitution for victims. In particular, the requirement to consider whether the sentenced person has taken positive action for the benefit of victims is more inclusive of victims at the early release phase. However, as discussed in the next section, these factors err by accommodating predominantly domestic concerns for early release in lieu of international concerns, particularly the conduct of the sentenced person in detention and the likelihood of recidivism and resocialization upon reentry.

Given the relatively few convictions that the ICC has obtained, the Appeals Chamber has only rendered three decisions on early release, two of which it denied against the same convicted person,²² and only one of which it granted.²³ The Appeals Chamber's discussion of the two denied applications for reduction of sentence for Thomas Lubanga Dyilo, as well as its discussion of the one granted application for reduction of sentence for Germain Katanga, shed light on how the chamber may apply the aforementioned factors for future appli-

(Sept. 22, 2015) [hereinafter Lubanga Early Release Decision I], https://www.icc-cpi.int/CourtRecords/CR2015_18047.pdf.

21. ICC Rules of Procedure and Evidence, *supra* note 18, r. 223.

22. Prosecutor v. Lubanga, ICC-01/04/01/06-3375, Second Decision on the Review Concerning Reduction of Sentence of Mr Thomas Lubanga Dyilo, ¶ 94 (Nov. 3, 2017) [hereinafter Lubanga Early Release Decision II], https://www.icc-cpi.int/CourtRecords/CR2017_06594.pdf; Lubanga Early Release Decision I, *supra* note 20, ¶ 77.

23. Katanga Early Release Decision, *supra* note 9, ¶ 116.

cants, and how these procedures might better accommodate the interests of victims in the future. These decisions are discussed in more depth *infra*.

Because Article 110(4) of the Rome Statute stipulates that the decision to reduce a sentence is discretionary (“the Court may reduce”), the Appeals Chamber considers both positive and negative factors in its determination, and may freely decline to reduce a sentence even if factors in favor of sentence reduction are present.²⁴ In this evaluation, the chamber considers not only the submissions of the convicted person, but also submissions by the prosecutor, the registrar, the state of enforcement, and the victims or their legal representatives.²⁵ By expressly considering the submissions of victims and their legal representatives, the ICC early release procedure obliges the panel of reviewing judges to substantively engage with the recommendation of affected communities. The degree to which victims’ contributions are weighted is unclear, though based on Germain Katanga’s early release despite victims’ recommendation that he serve his full sentence,²⁶ it seems other factors may be weighted more heavily than the contributions of victims.

The ICC applies a “change of circumstances” standard to early release proceedings, requiring the panel of judges to find factors justifying early release to have emerged after final sentencing, and also declines to consider mitigating factors that were considered during the sentencing phase.²⁷ This standard

24. Lubanga Early Release Decision I, *supra* note 20, ¶ 21–22. According to the court, “the presence of a factor in favour of reduction does not in itself mean that a sentence will be reduced. Similarly, the presence of a factor militating against a reduction of sentence does not preclude the exercise of its discretion. Such factors must be weighed against factors in favour of reduction to determine whether a reduction of sentence is appropriate.” *Id.* at ¶ 22.

25. ICC Rules of Procedure and Evidence, *supra* note 18, r. 224(1).

26. Prosecutor v. Katanga, ICC-01/04/01/07-3597, Legal Representative’s Observations on the Reduction of Sentence of Germain Katanga, ¶ 58 (Sept. 18, 2015) [hereinafter Legal Representative’s Observations on Katanga], https://www.icc-cpi.int/CourtRecords/CR2015_18341.pdf.

27. Rome Statute, *supra* note 14, art. 110(4)(c); see Katanga Early Release Decision, *supra* note 9, ¶ 19 (“[I]t is necessary to find that there are changed circumstances in relation to the factors listed in rule 223 (a), (d) and (e) of the Rules of Procedure and Evidence from the time that the sentence was imposed.”).

understands that mitigating factors considered in the sentencing phase, such as expressions of remorse, cooperation with the prosecution, and attempts at restitution, should not be redundantly considered for further mitigation at the sentence reduction phase.

In fact, when Germain Katanga argued that his willingness to cooperate at trial should be considered during early release, the Appeals Chamber declined to do so. The Appeals Chamber commended his decision to withdraw his appeal and express remorse for his crimes, but noted that “cooperation, which does not continue post-conviction and which was taken into account in imposing the original sentence, will not generally be taken into account for purposes of reducing that same sentence,” though may sometimes be considered “on a case by case basis.”²⁸ Likewise, the Appeals Chamber found general cooperation with the prosecution is “merely what is to be expected” of the accused and, if taken into account at sentencing, should not be doubly considered at early release.²⁹ Indeed, in another case, the prosecutor of the ICC went so far as to assert that it would be “absurd” if every convicted person exhibiting good behavior during the court proceedings would be immediately eligible for a reduction of sentence at the two-thirds mark.³⁰

The ICC considers the behavior of convicted persons in prison, though qualifies this factor as tending to show “a genuine dissociation” from the crimes committed.³¹ It is unclear how the good behavior of detained persons in prison may tend to show their “dissociation” from the crimes committed. Based on the ICC’s early release decisions, it appears that the court considers whether there has been a “clear and significant change of circumstances” from the time the sentence was imposed.³² For instance, the court has considered the ability of a prisoner to cohabitate with individuals from other ethnic

28. Katanga Early Release Decision, *supra* note 9, ¶¶ 26, 50.

29. *Id.* ¶ 27.

30. Lubanga Early Release Decision I, *supra* note 20, ¶ 35.

31. ICC Rules of Procedure and Evidence, *supra* note 18, r. 223(a).

32. Lubanga Early Release Decision I, *supra* note 20, ¶ 28 (emphasis omitted).

groups if ethnic persecution was an element of their conviction.³³

Ultimately, in the early release decisions of both Thomas Lubanga Dyilo and Germain Katanga, the ICC declined to consider good conduct in prison as “sufficient on its own to establish the necessary connection between this conduct and a dissociation from the crimes [of conviction].”³⁴

The ICC also considers whether the early release of a convicted person would have a “significant” impact on social instability.³⁵ This factor rightly compels reviewing judges to consider the unique political and social elements attendant to international crimes that are not present in the domestic criminal context. This factor may be informed by, e.g., the timing of the person’s release, especially if close to a contested election;³⁶ the existence of local grievances and perceptions of the convicted person;³⁷ and the continued existence of militias or political groups with which the convicted person was allied.³⁸ This factor duly recognizes that while courts should be neutral and apolitical entities, where international crimes of the greatest magnitude are concerned, it is necessary to consider the geopolitical ramifications of early release, as well as the human impact on affected communities.

Unfortunately, the Appeals Chamber has never found that “significant” social instability would result from the release of prisoners, despite notice from the Democratic Republic of the Congo and the Legal Representatives for Victims that such instability would result.

This should be alarming, especially considering that “the state where the crimes took place and where the prisoner will be released is the best placed to provide evidence on the social

33. See Katanga Early Release Decision, *supra* note 9, ¶ 41 (noting that Katanga submitted that, while he was incarcerated and interacting with other detainees, there was never “any suggestion of any difficulties arising due to ethnic differences.”).

34. Katanga Early Release Decision, *supra* note 9, ¶ 47 (quoting Lubanga Early Release Decision I, *supra* note 20, ¶ 45); see Lubanga Early Release Decision I, *supra* note 20, ¶ 45.

35. ICC Rules of Procedure and Evidence, *supra* note 18, r. 223(c).

36. Katanga Early Release Decision, *supra* note 9, ¶ 63; Lubanga Early Release Decision I, *supra* note 20, ¶ 55.

37. Katanga Early Release Decision, *supra* note 9, ¶ 65.

38. *Id.* ¶ 67.

situation in the country, and the potential ramifications of early release.”³⁹ Moreover, especially when the aim of an international criminal trial is to foster reconciliation with victims and their families, victims’ submissions must be seriously considered to “ensure that the goal of reconciliation is not undermined by early release.”⁴⁰

Last, the ICC Rules of Procedure and Evidence require that convicted persons’ “significant action[s]” for the benefit of victims, as well as the impact of early release on the victims and their families, be considered in the evaluation of early release.⁴¹ This rule obliges the reviewing judges to consider any reconciliation or restitution that the convicted person attempted, as well as the effect of such efforts on the affected communities.⁴²

In Germain Katanga’s application for early release, the Appeals Chamber considered Katanga’s withdrawal of his appeal, public apologies, and efforts to assist in reparation efforts, against the victim’s submission that “early release . . . would relieve their trauma and their sense of impunity.”⁴³ In determining whether this factor had been met, the Appeals Chamber defined significant action through the lens of the victims’ perspective. It is up to the victims to determine “whether . . . the actions taken by the sentenced person have benefitted them and whether they consider those actions to have been significant.”⁴⁴ In view of this definition—and assenting with the submissions of victims, which generally undermine the sincerity and impact of Katanga’s actions for the benefits of victims—the Appeals Chamber determined that there had “not been a significant action taken by Mr Katanga for the benefit of Victims within the meaning of rule 223 (d).”⁴⁵ This determination reveals that the “significant action” criteria are genuinely determined by the victims’ subjective impression of the convicted person’s apologies and reconciliatory efforts,

39. Andrew Merrylees, *Two-Thirds and You’re Out? The Practice of Early Release at the ICTY and ICC, in Light of the Goals of International Criminal Justice*, 8 AMSTERDAM L.F. 69, 75 (2016).

40. *Id.*

41. ICC Rules of Procedure and Evidence, *supra* note 18, r. 223(d).

42. *Id.* r. 223.

43. Katanga Early Release Decision, *supra* note 9, ¶ 83.

44. *Id.* ¶ 90.

45. *Id.* ¶ 105.

and the Appeals Chamber defers to victims on whether the factor has been met. Such deference to victims is impressive, and represents a significant step toward accommodating the rights of victims to participate in proceedings directly affecting them; in fact, such deference should be included to the extent that it is fair and feasible in all other elements of the early release phase.

Further, the Appeals Chamber's evaluation of "significant action" and cooperation with the prosecution reveal a truly searching inquiry into whether the convicted person's efforts to rehabilitate themselves and reconcile with victims has been sincere and substantial. The ICC both considers the submissions of victims and defers to their determination of whether actions for the benefit of victims should weigh positively or negatively in the early release determination. While such inclusion is optimal, it should be noted that despite the Appeals Chamber's finding that Germain Katanga did not take significant action for the benefit of victims, his early release was nonetheless granted on other grounds.⁴⁶ Thus the degree to which the court will ultimately defer to victims on the question of release is uncertain.

The relative infancy of early release jurisprudence at the ICC means there is potential to continue expanding the role of victims. Only one person convicted by the ICC has been released early, largely on the basis of his continued efforts to apologize to victims and publicly express remorse,⁴⁷ as well as the fact that due to the death of his father and brother, he "was now the sole provider for his family."⁴⁸ Moreover, the factors least likely to serve the purposes of international criminal law, the conduct of prisoners in detention and the threat of recidivism, are contained only in the Rules of Procedure and Evidence, rather than in the Rome Statute itself, which suggests that they may be more readily modified before becoming regular practice.⁴⁹ The ICC retains flexibility in its approach,

46. *Id.* ¶ 116.

47. *Id.* ¶¶ 50, 114.

48. Merrylees, *supra* note 39, at 75 (citing Katanga Early Release Decision, *supra* note 9, ¶ 109).

49. See Jonathan H. Choi, Note, *Early Release in International Criminal Law*, 123 YALE L. J. 1784, 1807 (2014) ("Because these more problematic factors are articulated solely within the Rules and not by the Rome Statute, the ICC may still redraw them before they become entrenched by actual use.").

and should strive to increasingly accommodate the participation of victims in its procedures, as well as the possibility of conditional rather than unconditional early release, as discussed in the following part.

B. *The Special Court for Sierra Leone*

The RSCSL considers early release after the prisoner has served two-thirds of his or her sentence. The RSCSL requires the convicted person to meet seven pre-release conditions: participation in remedial, educational, moral, spiritual, or other programs to which the prisoner was referred within the prison; acknowledgement of and remorse for crimes for which he was convicted; evidence of renunciation of an ideology that is violent or contrary to peace and reconciliation; respect for the fairness of the process through which he was convicted; evidence of willingness to make restitution to victims individually and collectively; evidence of empathy towards victims; and positive contribution to peace and reconciliation, which may include apologies and victim restitution.⁵⁰

The responsibilities of the RSCSL registrar are also significantly different than those of the registrars of other international courts with regards to victim participation. The RSCSL registrar, upon receipt of requests for early release, must inform victims, witnesses, and victims' families of the request, and must "ensure their views are provided to the President" for his consideration.⁵¹ Such views may encapsulate well-being and safety concerns, risks associated with the release of the prisoner, and threats received or perceived by victims.⁵² Moreover, residents of the requested region where the prisoner will be released are invited to contribute information about their willingness to host the released individual and, in turn, to acknowledge the pain and suffering caused to the victims.⁵³ Finally, once the convicted person is released, an assigned monitor reviews the convicted person's compliance with their con-

50. RSCSL Practice Direction, *supra* note 14, arts. 2, 5(D) (ii); *see also* Stephen Rapp Submission, *supra* note 13, ¶ 14 (urging denial of a request for early release absent the kind of best practices outlined in the RSCSL Practice Direction).

51. RSCSL Practice Direction, *supra* note 14, art. 5(E).

52. *Id.* art. 5(F).

53. *Id.* arts. 5(F) (vii)–(x).

ditions of release and submits annual reports.⁵⁴ These conditions are not only specific, and thus easily measured and efficiently applied, but they also map neatly over the goals of international criminal courts. For instance, the educational purpose of international criminal law is fulfilled by the individual convicted person's own education and recognition of their crimes,⁵⁵ and also by the requirement that the community into which the convicted person is released also recognizes their wrongs to avoid collective denial of past crimes.⁵⁶

The potential and the drawbacks of the RSCSL approach for conditional early release in international criminal law are discussed in more depth in Section VI.

III. ON THE FALSE EQUIVALENCY OF INTERNATIONAL AND NATIONAL CRIMINAL LAW

Before this note addresses suggestions for improving early release procedures, this section will describe the divergent purposes and rationales of international and domestic criminal law, and why this divergence may explain victims' frustrations with current procedures for early release. In Section IV, this note will describe, in particular, the requirement that convicted persons be rehabilitated prior to early release to illustrate this divergence.

In order to understand why it is improper to apply domestic procedures for early release in the international context, it is first necessary to distinguish between domestic and international rationales for detention. Domestic courts tend to focus on punitive and pragmatic rationales for punishment, i.e. retribution,⁵⁷ utilitarianism,⁵⁸ rehabilitation,⁵⁹ and incapacita-

54. *Id.* art. 11.

55. *Id.* art. 5(D)(ii).

56. *Id.* art. 5(F)(x); see Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 *CHI-KENT L. REV.* 329, 335 (2008) ("Massive violations of human rights, including politically motivated violence, tend to be denied by the perpetrators and their sympathizers. The resulting desire to set the historical record straight, and to restore the integrity of human remembrance, is greatly strengthened by the belief that truth telling about the past is a necessary precondition for reconciliation and avoidance of future conflicts.").

57. See MOORE, *supra* note 15, at 91 ("We are justified in punishing because and only because offenders deserve it.").

tion,⁶⁰ whereas international criminal courts aspire to the more symbolic goals of general deterrence, expressive condemnation, and reconciliation.⁶¹

Recidivism is a leading concern in domestic criminal law, but less pressing in international criminal law.⁶² In domestic criminal enforcement, where recidivism rates can be very high, incarceration serves the practical interest of physically preventing dangerous individuals from reoffending.⁶³ In contrast, international crimes are necessarily context-dependent and closely tied to conditions of war, so international criminals are unlikely to have the motivation or ability to reoffend once the conflict ends.⁶⁴ Additionally, international defendants often

58. Or, in other words, deterrence. See JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* 41 (London, Robert Heward 1830) (“Each individual calculates with more or less correctness, according to the degrees of his information, and the power of the motives which actuate him, but all calculate.”).

59. See MOORE, *supra* note 15, at 85 (“The first sort of rehabilitative ideal is one that is achieved when we make criminals safe to return to the streets. . . . The second sort of rehabilitative ideal, by way of contrast, is a paternalistic theory. It seeks to rehabilitate the offender, not just so that he can be returned safe to the streets, but so that he can lead a flourishing and successful life.”).

60. Setting aside juvenile and low-level offenders, incarceration is good for the maintenance of the public order because it prevents career criminals from committing more crimes. See generally Anne Morrison Piehl & John J. Dilulio, Jr., “Does Prison Pay?” *Revisited: Returning to the Crime Scene*, 13 *BROOKINGS REV.* 20 (1995) (explaining the social benefits of incarceration).

61. David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT’L L.J.* 473, 473 & n.2 (1999) (citing Gerard E. O’Connor, Note, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 *HOFSTRA L. REV.* 927 (1999)).

62. See Piehl & Dilulio, *supra* note 60, at 24 (noting high rates of recidivism in the United States). The ICTY has stated that the two main purposes of sentencing are “deterrence and retribution.” *Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Judgment, ¶ 806 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

63. See Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, 15 *FED. SENT’G REP.* 58, 59 tbl.2 (2002) (roughly fifty percent of individuals in this study sample reoffended within three years of their release).

64. Choi, *supra* note 49, at 1811 (“Even with regard to rank-and-file international criminals, the conditions that initially motivated and permitted their crimes have almost always disappeared by the time of their trial, whether those conditions were concentration camps or oppressive military

commit their crimes from a position of ill-begotten authority that they have lost by the time they have been surrendered to an international tribunal, so recidivism is not generally a risk in international criminal law.⁶⁵ Granting freedom to an architect of the Rwandan genocide is not dangerous because he is likely to reoffend; his freedom is dangerous because it represents the tacit acceptance of his past crimes. However, the condemnation of genocide and crimes against humanity is not merely a symbolic goal. The risk of genocide denial, minimization of past crimes, and persistence of hateful rhetoric undergirding past crimes present concrete dangers that can result in very real psychiatric and physical harm to victims.⁶⁶

In these ways, international criminal law is primarily symbolic: It condemns past crimes to pave the way for reconciliation and peaceful cooperation.⁶⁷ Domestic law serves some

regimes. The rehabilitation of international convicts therefore does not affect public safety.”).

65. *Id.*

66. Prosecutor v. Semanza, Case No. MICT-13-36-ES.2, Opposition to Application for Early Release, at 6 (Aug. 29, 2018) [hereinafter Dr. Yael Danieli Statements], <https://jrad.irmct.org/view.htm?r=242069> (“Despite their attempts at healing and (re)building life anew, victim/survivors experience even the mere consideration of early release . . . as ominous, wounding and (re)traumatizing, and their barely mended scars at risk of being re-ruptured.”).

67. *See* Prosecutor v. Nikolic, Case No. IT-02-60/1-S, Sentencing Judgment, ¶¶ 86–87 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003) (Retribution is “the expression of condemnation and outrage of the international community at such grave violations of, and disregard for, fundamental human rights at a time that people may be at their most vulnerable, namely during armed conflict. It is also recognition of the harm and suffering caused to the victims. . . . Furthermore, within the context of international criminal justice, retribution is understood as a clear statement by the international community that crimes will be punished and impunity will not prevail.”); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 33 (2d ed. 2010) (“[P]roviding a sense of justice through prosecutions for international crimes can facilitate societal reconciliation and provide the preconditions for a durable peace.”); Antonio Casese, *Reflections on International Criminal Justice*, 9 J. INT’L CRIM. JUST. 271, 271 (2011) (“In the dark labyrinth of our lives, one of the few things of which we can be certain is the intolerable amount of suffering that human beings cause to one another through cruelty, armed clashes, and aggression. Criminal justice is among the most civilized responses to such violence. It channels the victims’ hatred and yearning for bloody revenge into collective institutions that are entrusted with even-handedly appraising the accusations. If well founded, they assuage the victims’ demands by punishing the culprit.

symbolic purposes, but condemnation and reconciliation are only collateral incidents of pragmatic law enforcement rationales, such as specific deterrence, reduction of recidivism, and maintenance of the rule of law.⁶⁸ While these differences in purpose would suggest a corresponding divergence in practice, international criminal procedure in fact often adopts domestic criminal procedure verbatim.⁶⁹ Though this approach of applying domestic criminal jurisprudence to the international criminal context is certainly convenient, direct application of domestic criminal law onto the problems that international criminal law will sometimes produce unnecessary tension.⁷⁰ In international criminal law, two of the rationales for detention are “deterrence and retribution.”⁷¹ Deterrence serves the dual aims of preventing convicted person from repeating their crimes and deterring others who might fear future accountability for crimes. Retribution, on the other hand,

Thus, criminal justice addresses the need to satisfy both private and collective interests. It merges the private desire for ‘an eye for an eye’ justice with the public need to prevent and repress any serious breach of public order and community values. In this way, criminal justice contributes potently to social peace.”)

68. See *supra* notes 57–60 and accompanying text.

69. See, e.g., Barbora Hola et al., *Effectiveness of International Criminal Tribunals: Empirical Assessment of Rehabilitation as Sentencing Goal*, in *THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS* 351, 362–63 (Nobuo Hayashi & Cecilia M. Bailliet eds., 2017) (“Note that the factors taken into account by the Presidents to a large extent reflect rehabilitation as operationalised in many domestic jurisdictions with respect to ordinary crimes, focusing on (i) rehabilitation processes in prison, such as vocational training and programmes, behaviour in prison, and reflection on crimes; and (ii) reintegration prospects of the prisoner, such as his/her family ties and prospects of employment.”); *infra* Section IV (discussing comparisons between domestic and international measures for the rehabilitation of prisoners).

70. In the context of this note, this tension is evidenced by the frustration of victims, advocates, and legal practitioners with the lenient domestic parole conditions applied to international war criminals. E.g., *IBUKA Condemns UN’s Early Release of Genocide Convicts*, *NEW TIMES* (Dec. 20, 2016), <https://www.newtimes.co.rw/section/read/206406> (reporting the IBUKA president’s condemnation of the release of Nahimana and Rukundo); Linda Melvern, *Who Will Bring UN Judge Theodor Meron to Account?*, *NEW TIMES* (Dec. 23, 2016), <https://www.newtimes.co.rw/section/read/206498> (discussing criticism over the early release of Nahimana).

71. Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgement, ¶ 806 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

is more malleable and symbolic. Retributive or “just desert” rationales involve the moral obligation to punish past crimes, both in the interests of justice for the victims and also out of a general obligation to avoid complicity through inaction.⁷² It is this second, fundamental desire to express condemnation of past crimes that animates the expressive function of international criminal courts.⁷³

Finally, international courts aim to reconcile victims with the associates of their former victimizers in order to pave the way for a productive and lasting peace. The transitional justice framework suggests implementing measures in the aftermath of massive human rights abuses, including criminal prosecutions, truth-telling, reparations, memorialization, and institutional reform.⁷⁴ Such reconciliatory measures are absent from most domestic jurisdictions.⁷⁵ Internationally, retribution and detention must go in tandem with reconciliation and truth-telling in order to both punish and heal from past crimes. Whereas retributive aims alone can look like vengeance, reconciliatory measures allow a tightly circumscribed group of the most culpable perpetrators to absorb liability for the crimes committed by a larger network of offenders.⁷⁶ For instance, in the aftermath of the Rwandan genocide, when seventy-seven percent of the nation’s Tutsi population had been murdered

72. Markus Dirk Dubber, *The Unprincipled Punishment of Repeat Offenders: A Critique of California’s Habitual Criminal Statute*, 43 STAN. L. REV. 193, 202 (1990).

73. Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77, 78–83 (2007).

74. Pablo de Greiff, *Theorizing Transitional Justice*, 51 NOMOS 31, 34 (2012) (Am. Soc’y for Political & Legal Philosophy).

75. *But see Brooklyn Restorative Justice Project*, BROOK. COMMUNITY FOUND., <https://www.brooklyncommunityfoundation.org/brooklyn-restorative-justice-project> (last visited Oct. 20, 2019) (detailing a restorative justice project in New York); Sarah Willets, *Durham Man Pleads Guilty in ‘Historic’ Restorative Justice Case*, INDY WK. (Apr. 5, 2018), <https://indyweek.com/news/archives/durham-man-pleads-guilty-historic-restorative-justice-case> (reporting a restorative justice case before a North Carolina court).

76. Damaška, *supra* note 56, at 332 (“[I]ndividualization is meant to emphasize avoidance of collective responsibility. It is believed that retribution exacted from a few individuals will promote group reconciliation, while the broader imputation of collective responsibility would produce the opposite effect.”).

by neighbors, friends, clergy, and police,⁷⁷ accounting for liability across a nation would not only have been impossible, but it may have been deeply damaging to the national cohesion and fabric of society. By identifying the perpetrators most responsible for suffering, international courts would ideally allow surviving parties to reconcile their differences and build a stable, productive, and lasting peace. As the ICTY Appeals Chamber wrote in *Aleksovski*, “a sentence of the International Tribunal should make plain the condemnation of the International community of the behaviour in question and show ‘that the international community was not ready to tolerate serious violations of international humanitarian law and human rights.’”⁷⁸ With this in mind, it is also important to recognize the tension that arises between retribution and reconciliation, especially where “the thirst for justice . . . may prove . . . disruptive to the restoration and maintenance of peace.”⁷⁹

The goals of domestic punishment and incarceration are thus more focused on specific deterrence and incapacitation in order to improve public safety, and less focused on symbolic or abstract expressive functions.⁸⁰ In contrast, international criminal law serves to condemn past crimes and help victims heal from past injury.⁸¹ While reconciliation and general deterrence are forward-looking aims of international criminal law, healing through reconciliation must first occur in order for victims to find a way forward. In these critical ways, the aims of domestic and international criminal law diverge

77. Marijke Verpoorten, *The Death Toll of the Rwandan Genocide: A Detailed Analysis for Gikongoro Province*, 60 *POPULATION* 331, 332 (2005).

78. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, ¶ 185 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), <http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>.

79. Stuart Beresford, *Unshackling the Paper Tiger - The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 *INT'L CRIM. L. REV.* 33, 41 (2001); see also María José Gueembe, *Economic Reparations for Grave Human Rights Violations: The Argentinean Experience*, in *THE HANDBOOK OF REPARATIONS* 21, 24–25 (Pablo de Greiff ed., 2006) (describing the tension between the desires of victims and societal reconciliation in the context of the Argentinean system of economic reparations).

80. See *supra* note 67–68 and accompanying text.

81. See *CRYER*, *supra* note 67, at 33 (noting that international criminal justice can set the stage for societal healing and long-term peace); Cassese, *supra* note 67, at 271 (framing criminal justice as a way to use victims' desire for revenge to support community values).

sharply, and inserting unexamined applications of domestic procedures aimed at reducing recidivism and incapacitation into international contexts, which call for symbolic condemnation and reconciliation, can accordingly lead to unwanted outcomes.

Some prison abolitionists have argued that it is more conducive to reconciliation for convicted persons to renounce their criminal role, cease denial of past crimes, and participate in reconciliation measures, than it is for them to be incarcerated.⁸² There are, however, certain necessities for incarceration in international criminal law—namely physically protecting victims—and these necessities need not come at the expense of reconciliatory measures. Indeed, imprisonment and the early release procedure should facilitate, rather than derogate from, rehabilitation and reconciliation of international criminals. In this way, adopting conditions for early release that are closely in line with the reconciliatory aims of international criminal law could incentivize convicted persons to take steps to make amends with their victims, pay reparations, and educate themselves on their offenses, to ensure that their detention is both utilitarian and symbolically meaningful. These transitional and restorative justice rationales for conditional early release are discussed in more detail in Section VI.

IV. “REHABILITATION” OF PRISONERS

The distinction between the different purposes of domestic and international criminal law bears heavily on why international courts’ efforts to determine the rehabilitation of convicted persons has been controversial. This section will first address how *rehabilitation of prisoners* has different meanings for persons convicted of domestic and international crimes, and will then turn to theoretical understandings of the purposes of rehabilitation. Lastly, this section considers how international courts borrow the domestic understanding of rehabilitation as a measure of future likelihood to reoffend, and argues that international criminal law should instead adopt a definition of rehabilitation in line with transitional justice rationales, which

82. See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 107 (2003) (“Rather, positing decarceration as our overarching strategy, we would try to envision a continuum of alternatives . . . [including] a justice system based on reparation and reconciliation rather than retribution and vengeance.”).

cover reconciliation, remorse, and reparation, and which may assist in the healing process for survivors of mass atrocities and genocide.⁸³ This model of rehabilitation is also more in line with the symbolic and expressive goals of the tribunals than a pure recidivist model.

International courts have tended to apply measures of rehabilitation borrowed from domestic jurisdictions to international crimes. However, due to the differences in the purposes and rationales of domestic and international crimes, blind application of domestic law to inform rehabilitation is misguided. In both domestic and international circumstances, it is widely accepted that the specific rehabilitation of the convicted person should be a primary rationale for his incarceration, though domestic law tends to conflate rehabilitation and recidivism.⁸⁴ As Article 10(3) of the International Covenant on Civil and Political Rights specifies, “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”⁸⁵ What constitutes *reformation* may be wildly different, depending on the conviction. It is common sense that rehabilitation should respond to the crime of conviction: For example, a war criminal’s rehabilitative process will look quite different than that of a gang member or petty thief. Accordingly, measuring rehabilitation for international crimes with a ruler borrowed from domestic criminal courts will lead to some absurd and unjust results.

There are many ways to define rehabilitation. Rehabilitation can be conceived as a commitment to avoid recidivism after release, or as a transformation of the perpetrator’s criminal inclinations through apology, remorse, treatment of

83. For a more complete overview of the modern transitional justice model, see de Greiff, *supra* note 74, at 34–39; see also U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004) (“The notion of ‘transitional justice’ discussed in the present report comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”).

84. See generally Mandela Rules, *supra* note 16 (promoting consideration of prisoners’ rehabilitation); International Covenant on Civil and Political Rights art. 10(3), Dec. 16, 1966, S. TREATY DOC. NO. 95-20 [hereinafter ICCPR] (describing rehabilitation as a central aim of incarceration).

85. ICCPR, *supra* note 84, art. 10(3).

mental illness, and engagement with professional training programs.⁸⁶ These two understandings of rehabilitation are not necessarily mutually exclusive: Representation of remorse is often used to indicate the likelihood of reoffending in the future.

The “rehabilitative ideal” suggests that the causes of criminal behavior, once identified, are “addressed through tailored rehabilitative interventions in order to reduce the risk of reoffending. By employing targeted interventions, rehabilitation can thus be distinguished from other forms of crime prevention—for example, (specific) deterrence.”⁸⁷ For rehabilitation to be theoretically complete, therefore, there must be both a rehabilitative process and a rehabilitative outcome, i.e., “participation in education, work and other activities with the ultimate aim of facilitating reintegration into society.”⁸⁸ Some considerations that inform the rehabilitative process may include specialized training of remedial, education, moral, or spiritual nature.⁸⁹

International courts have failed to interpret rehabilitation in line with the “rehabilitative ideal.” Instead, the courts have borrowed heavily from national jurisdictions’ understanding of criminal rehabilitation, which has resulted in an unpredictable set of factors that do not map well over the rationales for punishment in international law. Judges of the ICTY and ICTR have considered, for example, personality traits,⁹⁰ old age,⁹¹

86. Kathryn M. Campbell, *Rehabilitation Theory*, in 2 ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES 831, 834 (Mary Bosworth ed., 2005); see PETER RAYNOR & GWEN ROBINSON, REHABILITATION, CRIME AND JUSTICE 170 (2005) (arguing that rehabilitation is best understood as “the promotion of desistance from offending”).

87. Hola et al., *supra* note 69, at 354; see Frances Allen, *Legal Values and the Rehabilitative Ideal*, in WHY PUNISH? HOW MUCH? 97, 98 (Michael Tonry ed., 2011) (defining the rehabilitative ideal); Mirko Bagaric & John Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, 6 INT’L CRIM. L. REV. 191, 222–23 (2006) (describing the relationship between rehabilitation and specific deterrence).

88. Barbora Holá & Joris van Wijk, *Rehabilitating International Prisoners*, in RESEARCH HANDBOOK ON THE INTERNATIONAL PENAL SYSTEM 274, 280 (Róisín Mulgrew & Denis Abels eds., 2016).

89. For an example of a process that includes such considerations, see RSCSL Practice Direction, *supra* note 14, art. 2(B).

90. Hola et al., *supra* note 69, at 361.

91. See, e.g., Prosecutor v. Galic, Case No. MICT-14-83-ES, Decision on the Early Release of Stanislav Galic, ¶ 22 (June 26, 2019), <https://jrad.irmct>

compliance with the conditions of detention and provisional release,⁹² whether the prisoner has a family prepared to welcome the prisoner upon release,⁹³ and a statement of remorse for the crimes committed.⁹⁴ Today, one of the most problematic factors used at the ICC to measure rehabilitation is good behavior in prison.⁹⁵

A. *Good Behavior in Prison*

Although it may not seem facially absurd to consider an incarcerated person's behavior in prison as a measure for their capacity to reintegrate into society, this measure of rehabilitation for evaluating the likelihood of recidivism is far more appropriate for persons convicted of domestic crimes than for persons convicted of international ones.

Many early release decisions at international courts have considered whether the convicted person has demonstrated "good conduct" while serving their sentence.⁹⁶ Good behavior

.org/view.htm?r=245421 (considering the prisoner's "advanced age" in support of the early release application).

92. *See, e.g.*, Prosecutor v. Lukic, Case No. MICT-14-67-ES.4, Public Redacted Version of 30 May 2017 Decision of the President on the Early Release of Sreten Lukic, ¶ 41 (Aug. 11, 2017), <https://jrad.irmct.org/view.htm?r=239632> (considering the prisoner's behavior and lack of disciplinary complaints in detention).

93. *See, e.g.*, Simba Early Release Decision, *supra* note 10, ¶ 77 (noting that the availability of family to support Simba weighed in favor of his release).

94. *See, e.g., id.* ¶ 44 ("I do not consider that remorse should be treated as a determining factor in this case or in determining early release applications more generally."); Prosecutor v. Rutaganira, Case No. ICTR-95-IC-T, Decision on Request for Early Release, at 2 (June 2, 2006) <https://jrad.irmct.org/view.htm?r=221825> (considering the prisoner's "sincere expression of remorse and regret" in granting early release); Hola et al., *supra* note 69, at 362 (explaining that the President distinguishes between acceptance of responsibility and showing remorse).

95. ICC Rules of Procedure and Evidence, *supra* note 18, r. 223(a).

96. Hola et al., *supra* note 69, at 361; *see, e.g.*, Katanga Early Release Decision, *supra* note 9, ¶ 51 ("Mr Katanga's conduct while in detention shows a genuine dissociation from his crimes."); Lubanga Early Release Decision I, *supra* note 20, ¶ 47 ("[T]here is no indication that Mr Lubanga's conduct while in detention shows a genuine dissociation from his crimes within the meaning of rule 223 (a) of the Rules of Procedure and Evidence. . . ."); Lubanga Early Release Decision II, *supra* note 22, ¶ 57 ("[T]here is still no indication, at this stage, that Mr Lubanga's conduct while in detention shows a genuine dissociation from his crimes within the meaning of rule 223 (a) of

in prison may indicate the person's rehabilitation and the accompanying ability to reintegrate into society and live a life that will be functional, fulfilling, and meaningful.⁹⁷ Evidence of good behavior may include employment and leadership positions in prison, such as "taking full responsibility for [the convicted person's kitchen] duties and fulfilling his obligations very accurately."⁹⁸ In domestic prisons, evidence of a former gang member or fraudster's integration into a productive prison workplace may be strong evidence of their capacity to meaningfully reintegrate into society on the outside.⁹⁹ But in the international context, how kitchen chores "actually assist[] in rehabilitating [a] former military officer convicted of persecuting hundreds of civilians remains unclear."¹⁰⁰

In the ICC's limited jurisprudence on early release, the Appeals Chamber has likewise struggled with how to assign proper weight to good behavior in prison in view of the divergent natures of domestic and international crimes. While the ability to cohabitate with other ethnic groups may indeed tend to show personal growth and development relevant to the convicted offense, generalized good behavior does quite the opposite. Indeed, in the decision granting Germain Katanga early release, the Appeals Chamber considered his submission that "his conduct thus far in detention demonstrates that he 'now has no difficulties responding to authority', [and] he is capable of complying with demands and rules."¹⁰¹ As a former leader of an armed militia group responsible for indiscrimi-

the Rules for the purpose of determining whether it is appropriate to reduce his sentence.").

97. See Prosecutor v. Babic, Case No. IT-03-72-S, Sentencing Judgement, ¶ 46 (Int'l Crim. Trib. for the Former Yugoslavia June 29, 2004), <http://www.icty.org/x/cases/babic/tjug/en/bab-sj040629e.pdf> (noting that punishment serves a rehabilitative purpose and helps the reintegration of the person into society).

98. Prosecutor v. Obrenovic, Case No. IT-02-60/2-ES, Decision of President on Early Release of Dragan Obrenovic, ¶ 21 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 21, 2011), <http://www.icty.org/x/cases/obrenovic/presdec/en/110921.pdf>.

99. See Hola et al., *supra* note 69, at 363 (noting that rehabilitation in domestic jurisdictions for "ordinary crimes" focuses on "(i) rehabilitation processes in prison, such as vocational training and programmes, behaviour in prison, and reflection on crimes; and (ii) reintegration prospects of the prisoner, such as his/her family ties and prospects of employment.").

100. *Id.* at 368.

101. Katanga Early Release Decision, *supra* note 9, ¶ 41.

nate killing, sexual crimes, and enslavement, evidence showing Katanga's capacity for responding to authority and complying with rules does little to prove dissociation with past crimes. Critically, in their submissions opposing Germain Katanga's early release, his victims observe that the "conduct of the sentenced person in detention may be a simple survival strategy adopted in an environment where resocialization of some kind may be necessary."¹⁰² At best, good behavior in prison is a poor measure of rehabilitation, and at worst, it reinforces the very same character traits that enabled commission of the crimes in the first instance.

Of all the considerations used to inform the rehabilitation of the prisoner, the consideration of behavior in prison is the factor that best illustrates the distinctive purposes of domestic and international criminal law, and the ways in which a direct application of domestic law in an international context does not serve the rehabilitative purposes of international courts. For domestic offenders, good behavior in prison suggests traits that would allow the individual to be effectively reintegrated into society upon their release, such as the ability to respond well to authority, assume responsibility, and maintain a level mood and demeanor.¹⁰³ Using good behavior as a measure for early release is also cost effective because it encourages prisoners to be obedient and hard-working, and it is easy for parole boards to measure.¹⁰⁴ Where domestic jurisdictions may be constrained by resources, cost-effectiveness is critical.¹⁰⁵

Further, in domestic contexts, criminals are incarcerated for refusing to abide by the status quo of lawful behavior, and are thus deemed to pose a risk to the general public.¹⁰⁶ For international criminals, however, offenders are incarcerated *because* they were particularly adept at adhering to the status quo of the extraordinary realities in which they lived.¹⁰⁷ A military commander who has led his forces with precision to systematically carry out a mass killing should not be measured as

102. Legal Representative's Observations on Katanga, *supra* note 26, ¶ 33.

103. Hola et al., *supra* note 69, at 368.

104. See Choi, *supra* note 49, at 1820 ("Good behavior has an element of cost savings, insofar as including it as a factor encourages prisoners to behave themselves in prison . . .").

105. *Id.* at 1819–20.

106. See *supra* notes 61–63 and accompanying text.

107. See *supra* notes 64–65 and accompanying text.

rehabilitated for his ability to carry out responsibilities with precision in prison. In a sense, the very same character traits that may have made an individual predisposed to participate in the human rights violations for which they were convicted (e.g., opportunism, respect for superiors, and ambition) are the same characteristics that are considered in good prison behavior. So, while a behaved stint in prison after a standard domestic criminal offense may be evidence of a convicted person's moral rehabilitation and his capacity to reintegrate productively in society, in international contexts, the same rather suggests convicted persons persist in their capacity for blind obedience.

Sreten Lukic's case serves as a good illustration of the problems that arise in considering a war criminal's behavior in prison to determine his or her eligibility for early release. Lukic was the head of the Serbian Police during the Bosnian genocide and was convicted of the crimes against humanity of deportation, forcible transfer, murder, and persecutions on political, racial, or religious grounds,¹⁰⁸ and was sentenced to twenty-two years in prison.¹⁰⁹ In 2018, the decision granting him early release noted that he was "'duly respectful' towards superiors" while in prison, and deemed him to have shown signs of rehabilitation and capacity for reentry.¹¹⁰ Although Lukic did not participate in rehabilitative programs and was "'unwilling to talk' about his committed offenses,"¹¹¹ he nonetheless was found to have "demonstrated some signs of rehabilitation."¹¹² In the circumstances of the violent civil war that gave rise to Lukic's crimes, this respect for authority may have been a personality trait that led him to commit humanitarian violations because of orders from superiors.

108. Prosecutor v. Milutinovic et al., Case No. IT-05-87-T, Judgement, Volume 3 of 4, ¶¶ 1114–40 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009), <http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4.pdf> [hereinafter Lukic Judgement].

109. *Id.* ¶ 1212.

110. Prosecutor v. Lukic, Case No. MICT-14-67-ES.4, Decision of the President on the Early Release of Sreten Lukic, ¶ 26 (Sept. 17, 2018), <http://jrad.unmict.org/view.htm?r=242180>.

111. *Id.* In light of his good behavior and employment in prison, Lukic was found to have shown signs of rehabilitation and was granted early release despite his apparent lack of remorse and refusal to participate in rehabilitative programs. *Id.*

112. *Id.* ¶ 28.

Would the families of Lukic's sixteen murder victims find his adherence to rules of employment in prison to be evidence of his rehabilitation? Would his refusal to express remorse for having coordinated the forced displacement of the Kosovo Albanian population¹¹³ lead victims to feel reconciled with him and to the atrocities committed against them? When this benign misapplication of good behavior in prison as derived from domestic parole practices is multiplied across the many persons convicted by international courts, a clear pattern of injustice for victims emerges.

If the purpose of a tribunal is to serve the interests of justice, truth-telling, public education on the atrocity, rehabilitation of the culpable, and reconciliation between former enemies, then considering the good behavior of prisoners does little in the way of advancing these goals. If anything, the perceived leniency of the good behavior rehabilitative interpretation may retraumatize victims,¹¹⁴ especially in light of their total exclusion from the early release process.

B. *Remorse*

Remorse is considered to be a rehabilitative factor because it signifies that the "criminal feels the pain and reality of what has been done."¹¹⁵ The ICTY explains that "remorse . . . requires acceptance of some measure of moral blameworthiness for personal wrongdoing" and may include "sympathy, compassion or sorrow for the victims of the crimes with which he is charged."¹¹⁶ Remorse is also the element of rehabilitation that most directly affects the interests of justice for vic-

113. Lukic Judgement, *supra* note 108, ¶¶ 1086, 1097, 1128.

114. See Dr. Yael Danieli Statements, *supra* note 66, at 6 ("Psychologically, the possibility of early release of those unarguably responsible for their agonizing losses at best undermines, and at worst undoes, the reparative sense of vindication purported to be rendered by justice to victims. . . . It also virtually ensures reawakening of their own questionably dormant suffering, a new sense of betrayal and sorrow, and the transmission of genocide's multidimensional legacies to offspring.").

115. Emily P. Corwin et al., *Defendant Remorse, Need for Affect, and Juror Sentencing Decisions*, 40 J. AM. ACAD. PSYCHIATRY & L. 41, 42 (2012).

116. Prosecutor v. Strugar, Case No. IT-01-42-A, Appeal Judgement, ¶¶ 365–66 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008), <http://www.icty.org/x/cases/strugar/acjug/en/080717.pdf>.

tims, because it may include an understanding of the harm caused to victims as well as an apology.

While almost all of the international criminal tribunal early release decisions discuss behavior in prison, some judges have considered other retrospective factors, writing that rehabilitation can be “thought of broadly and can encompass all stages of the criminal proceedings, and not simply the post-conviction stage.”¹¹⁷ A statement of remorse can inform the rehabilitative process through recognition of past crimes, and may accordingly serve as a precondition for rehabilitation. Statements of remorse, while retrospective, may indicate a higher likelihood of reintegration in the future, as well as an avenue through which perpetrators can engage meaningfully with victims: “Particularly in cases where the crime was committed on a discriminatory basis . . . the process of coming face-to-face with the statements of victims . . . can inspire—if not reawaken—tolerance and understanding of ‘the other,’ thereby making it less likely that if given an opportunity to act in a discriminatory manner again, an accused would do so.”¹¹⁸ This understanding of statements of remorse as an indicator of rehabilitation paints a more nuanced conception of the assumption of responsibility by perpetrators. Even so, the perpetrator retains the agency either to grant or withhold her remorse, leaving victims once more in a relative position of powerlessness with little agency over the apology they deserve.

While reconciliation and condemnation are the overarching purposes of international courts, there are some good reasons to be wary of requiring a statement of remorse as a precondition for early release. This requirement may create an incentive for convicted persons to feign remorse for their crimes.¹¹⁹

117. Prosecutor v. Obrenovic, Case No. IT-02-60/2-S, Sentencing Judgement, ¶ 53 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003) [hereinafter Obrenovic Decision], <http://www.icty.org/x/cases/obrenovic/tjug/en/obr-sj031210e.pdf>; see also Prosecutor v. Nikolic, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, ¶¶ 46–47 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 8 2006), <http://www.icty.org/x/cases/nikolic/acjug/en/nik-aj060308-e.pdf> (following the Obrenovic Decision in considering retrospective factors in an early release decision).

118. Obrenovic Decision, *supra* note 117, ¶ 53.

119. See, e.g., Choi, *supra* note 49, at 1787 (discussing Biljana Plavšić’s rescission of her statement of remorse).

Biljana Plavšić, one of the highest-ranking officials convicted by the ICTY, participated in “a crime of utmost gravity, involving . . . a campaign of ethnic separation which resulted in the death of thousands and the expulsion of thousands more in circumstances of great brutality.”¹²⁰ At sentencing, Plavšić’s “[g]uilty plea (together with remorse and reconciliation); [v]oluntary surrender; [p]ost-conflict conduct; and [a]ge” were found to be substantial mitigating circumstances.¹²¹ She was sentenced to eleven years in prison.¹²² Taking into consideration Plavšić’s statement of remorse, as well as her good behavior in prison, the ICTY released her after she had served two-thirds of her sentence.¹²³ In deciding to grant early release to Plavšić, the court once again considered her statement of remorse (“I am responsible for such human suffering and for soiling the character of my people”) as a mitigating factor for her sentence.¹²⁴ Using this statement of remorse as a mitigating factor both at the sentencing phase and later at the early release phase proved to be a gross error of judgment. In an interview later that year, Plavšić recanted her statement of remorse.¹²⁵ Because she had already been unconditionally released, the court had no jurisdiction to re-detain her or to recant its decision granting her early release.¹²⁶

This example not only serves to illuminate the difficulty of determining whether a statement of remorse is sincere, but it also underlines that where shorter sentences are awarded for a

120. Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgment, ¶ 52 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003), <http://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf>.

121. *Id.* ¶ 110.

122. *Id.* ¶ 132.

123. Prosecutor v. Plavšić, Case No. IT-00-39&40/1-ES, Decision of the Tribunal on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić, ¶¶ 6, 8–9, 14 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 14, 2009), <http://www.icty.org/x/cases/plavsic/presdec/en/090914.pdf>.

124. *Id.* ¶ 8.

125. Choi, *supra* note 49, at 1787 (citing Daniel Uggelberg Goldberg, *Bosnian War Criminal: ‘I Did Nothing Wrong,’* LOCAL (Jan. 26, 2009), <https://www.thelocal.se/20090126/17162>; Simon Jennings, *Plavsic Reportedly Withdraws Guilty Plea*, INST. FOR WAR & PEACE REPORTING (Jan. 31, 2009), <http://iwpr.net/report-news/plavsic-reportedly-withdraws-guilty-plea>).

126. *But cf.* RSCSL Practice Direction, *supra* note 14, art. 12 (granting the Residual Special Court for Sierra Leone the ability to arrest released prisoners who violate conditions of release).

guilty plea at sentencing, the convicted person should not again enjoy this benefit as a mitigating factor at the early release phase.

Perhaps apologies can never be honest if they are exchanged for shorter sentences. Such efforts are transparent attempts to tip the scales in favor of early release, and may worsen, rather than alleviate, the negative perceptions of fairness at the tribunal for those victimized by the perpetrator's crimes.¹²⁷

Despite the risk of abusing statements of remorse for personal gain, honest expressions of remorse and apology can indeed add an important element to the transitional justice rationales for courts, in that they allow reconciliation to play a role in the early release process. Statements of remorse should be encouraged if properly designed to accommodate the aims of international criminal justice, such as education and reconciliation. If a convicted person expresses her understanding of the tragedies in which she was complicit, or offers a sincere apology to her victims, statements of remorse could be tools of understanding and reconciliation otherwise absent from traditional judicial procedures. While recidivism is the chief concern in domestic contexts, and evidence can suggest the perpetrator will not reoffend, it is unlikely that an international criminal will again commit crimes similar to the ones of which she was convicted, because she only committed those crimes due to the extenuating circumstances of power and violence at the time of commission. Accordingly, reconciliatory measures that go beyond merely pragmatic means of tempering recidivism must be considered in the international context. This procedural step could allow convicted persons to engage constructively with their past crimes, and permit victims to receive deserved apologies. Due to issues with determining sincerity of statements of remorse, perhaps convicted persons' future statements should include, first, a recognition that facts established at trial are true; second, an apology; third, a statement

127. For a compelling critique of the role of remorse and apology in reconciliation and criminal justice in transitional contexts, see generally Oliver Diggelmann, *International Criminal Tribunals and Reconciliation: Reflections on the Role of Remorse and Apology*, 14 J. INT'L CRIM. JUST. 1073 (2016). In this author's view, assuming that courts are one piece in a larger puzzle of transitional justice, the fact-finding, accountability, and public display of condemnation that take place in courtrooms should not be wholly discounted.

by a psychiatric professional testifying to the perpetrator's development in prison; and fourth, an opportunity for victims to file submissions on the record responding to statements of remorse. The first factor would fulfill the purposes of truth-telling and public education, both for the public as well as for the individual offender; the second factor would allow for reconciliation by recognizing past wrongs; the third factor would introduce a neutral third party's expert impressions of the offender's mental state, stability, and remorse; and the fourth factor would give an opportunity for victims to participate at the post-trial phase and to mirror their participation at earlier phases of fact-finding and sentencing.

Of course, in any system of incarceration, there will be those who serve their full sentences without ever recognizing or regretting their crimes. However, under a perfect system designed to require true rehabilitation in order for early release, these deniers will be paying in lost time. How international courts measure rehabilitation, and how they enforce it through procedural protections, can build incentives for convicted persons to take steps toward reconciliation. If one must choose between apology, reparation, and remorse on the one hand, and extra time in prison on the other, a properly designed early release regime has great potential as a tool that adds to, rather than derogates from, the transitional rationales for incarceration in international criminal law, while also making sure that any statements of remorse are in fact sincere. Assuming international tribunals hope to continue using detention as a tool of broader reconciliation, there should be greater attention paid to whether early release procedures are actually serving these ends.

Criminal sentences take on symbolic weight for survivors, who are often able to point to a length of time that corresponds to their suffering.¹²⁸ Even where convicted persons are not rehabilitated or remorseful, when they serve their full sentences, or are released early through a transparent and stringent process, victims may at least feel that justice has been done against their perpetrator.

128. See Dr. Yael Danieli Statements, *supra* note 66, at 7 ("By diminishing their losses and pain, thus undermining their sense of justice, this *second wound* is even greater than the first.").

In this way, the requests for early release could be transformed into a process that is inclusive of victims and conducive to healing, reconciliation, education, transparency, and participation. These aims are closely aligned with the aims of international criminal justice, and such a process would improve the procedures and legacies of tribunals in the eyes of the survivors they are meant to serve.

V. VICTIM PARTICIPATION IN EARLY RELEASE PROCEEDINGS

The preceding sections addressed certain problems that arise in the application of domestic measures of rehabilitation and procedures for parole. However, there are certain other issues that arise in the international context that never arise in domestic criminal contexts, such as how to facilitate the participation of the thousands of victims of mass atrocities. An increasingly uncontroversial position in the transitional justice field is that the participation of victims is necessary for justice to be realized.¹²⁹ The ways in which victims can best be integrated into opaque and procedurally complex criminal proceedings is an ongoing discourse, but little has been said on how and why victims should be included in post-trial enforcement of sentences and early release in the international context.

This section will examine definitions of *victim* in various international criminal forums and the historical context for victim participation, and will suggest new avenues for victims to participate in early release proceedings. It will also examine why victim participation in international courts trying crimes of the severest gravity—where there may be hundreds or thousands of victims—differs significantly from national models of victim participation, and why a more expansive avenue for victim participation is necessary in international criminal law.

129. The lack of controversy of this position is evident in the fact that it has consistently appeared in U.N. General Assembly resolutions separated by decades. For examples of such similar language across resolutions, see generally G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006); G.A. Res. 40/34, annex, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985) [hereinafter 1985 U.N. Declaration].

A. *Definitions of Victimhood*

The ICTY and the ICTR define victims as “person[s] against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.”¹³⁰ This definition necessarily restricts the pool of victims to individuals who were directly targeted by criminal acts, and does not include family members, dependents, or collateral victims. While this definition lends itself to goals of efficiency, since fewer individuals are eligible to bring cases and receive reparations, it limits the opportunity of secondary and collateral victims—who may have suffered very real physical, economic, or social harms—to seek justice.

The 1985 U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985 UN Declaration) adopts a far broader definition for victims, and accordingly indicates that the tribunals’ definition of victims is unnecessarily limited. Any individual or collection of persons who suffered “physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights” is considered a victim.¹³¹ The harm can be caused by either acts or omissions in violation of “internationally recognized norms relating to human rights.”¹³² The 1985 Declaration also includes “immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” and victims of crimes for which a perpetrator is not identified.¹³³ The regrettable reality is that many victims of international atrocities are deceased, and so creating a path for their families and communities to seek redress and be recognized as victims in their own right is both pragmatic and fair.

The ICC defines victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,” which may include “organizations or institutions that have sustained direct harm to any of

130. U.N. Int’l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, r. 2, U.N. Doc. IT/32/Rev.50 (July 8, 2015); Int’l Crim. Trib. for Rwanda, Rules of Procedure and Evidence, r. 2, U.N. Doc. ITR/3/Rev.1 (June 29, 1995).

131. 1985 U.N. Declaration, *supra* note 129, ¶ 1.

132. *Id.* ¶ 18.

133. *Id.* ¶ 2.

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.”¹³⁴ This definition is relatively broad, and “does not demand that the victim becomes the direct object of the criminal offense.”¹³⁵ Additionally, the Rome Statute permits victims to request reparation for any damage, loss, or injury in the form of restitution, compensation, or rehabilitation.¹³⁶ Because the jurisdiction of the Rome Statute covers victims of international crimes, Article 75 also accommodates reparations to the families of victims,¹³⁷ an innovative step toward realizing the communal and intergenerational harms suffered by survivors of massive human rights violations.

The Special Tribunal for Lebanon, on the other hand, considers a victim to be a “natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal’s jurisdiction.”¹³⁸ While this definition may contemplate relatives of affected or deceased victims, it does not explicitly account for third parties as victims in the same way as the Rome Statute. Similarly, the Special Court for Sierra Leone defined victims as only those “against whom a crime . . . has allegedly been committed,” rather than including third parties with ancillary harms stemming from primary victims.¹³⁹

B. *History of Victim Participation in International Criminal Law*

The path of victims’ groups to full participatory privileges in international criminal law is long and storied, and as of yet not fully realized. The Nuremberg and Tokyo Tribunals, and later the international criminal tribunals, only acknowledged victims as witnesses at trial.¹⁴⁰ The right of victims to partici-

134. ICC Rules of Procedure and Evidence, *supra* note 18, r. 85.

135. Carols Fernández de Casadevante Romani, *International Law of Victims*, 14 MAX PLANCK Y.B. U.N. L. 219, 246 (2010).

136. Rome Statute, *supra* note 14, art. 75.

137. *Id.*

138. STL Rules of Procedure and Evidence, *supra* note 14, r. 2.

139. Residual Special Ct. for Sierra Leone, Rules of Procedure and Evidence, r. 2 (Nov. 30, 2018).

140. See Luke Moffett, *The Role of Victims in the International Criminal Tribunals of the Second World War*, 12 INT’L CRIM. L. REV. 245, 247 (2012) (“For victims, by preventing them from participating, the adversarial trial limits

pate in criminal proceedings preceded the ICTY and ICTR, and was first recognized in the 1985 U.N. Declaration, which outlined the basic principles for victim participation.¹⁴¹ In 2006, the U.N. General Assembly introduced new guidelines to call on states to domestically guarantee the protections set forth in the 1985 U.N. Declaration and to adopt procedures conducive to victim participation.¹⁴²

Today, victims are generally recognized as independent participants in proceedings, and have been granted opportunities to participate in proceedings in the statutory documents of the ICC, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon, the extraordinary African Chambers in the Courts of Senegal, and the Kosovo Specialist Chambers, among others.¹⁴³ The avenues through which victims may access each court vary depending on the institution; for instance, at the ECCC, victims may file complaints with the prosecutor or may be joined as civil parties to the investigating judges,¹⁴⁴ while at the ICC, victims make representations during the opening of an investigation and may submit observations on questions as diverse as jurisdiction and admissibility of evidence throughout the course of the trial.¹⁴⁵ The drafters of the Rome Statute of the ICC were heavily influenced by the criticisms lodged against the ICTY and the ICTR with regard to limited victim represen-

their voices and ability to shape justice to serve their needs. Furthermore, the adversarial trial only recognises victims' suffering if the defendant is successfully punished. Until the conviction, they remain 'alleged victims.'"). Victims' rights at the international criminal tribunals were included in the context of legacy-building as the tribunals were closing their active operations. *See generally* VICTIMS OF INTERNATIONAL CRIMES (Thorsten Bonacker & Christoph Safferling eds., 2013) (discussing, among other themes, victim participation in criminal trials).

141. 1985 U.N. Declaration, *supra* note 129, ¶ 6.

142. G.A. Res. 60/147, *supra* note 129, pmbl.

143. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), r. 23 (Jan. 16, 2015), [hereinafter ECCC Internal Rules]; S.C. Res. 1757, attachment, art. 17 (May 30, 2007); Law on Specialist Chambers and Specialist Prosecutor's Office, art. 22, Law No. 05/L-053 (2015) (Kos.); Rome Statute, *supra* note 14, arts. 68(3), 110; RSCSL Practice Direction, *supra* note 14, art. 2(B).

144. Extraordinary Chambers in the Courts of Cambodia, Practice Direction on Victim Participation, arts. 2–3, 02/2007/Rev.1 (Oct. 27, 2008).

145. ICC Rules of Procedure and Evidence, *supra* note 18, r. 50; Rome Statute, *supra* note 14, arts. 15(3), 19(3).

tation and access, with one drafter stating that “the inclusion of norms on victims’ participation in the Court’s proceedings was the result of widespread and strong criticism against the lack of provisions of this kind in the Statutes and Rules of Procedure and Evidence of the ad hoc Tribunals.”¹⁴⁶

Victim participation improves the quality of proceedings by including those most affected by the crimes in question. Further, when victims are left out of proceedings, they may lose trust in the entity that purports to bring them justice. Victim participation at the trial, sentencing, and appellate phases gives victims the opportunity to seek justice for past crimes, uncover truth, claim ownership over narratives, educate the public, seek reparations and redress, and foster reconciliation.¹⁴⁷ It also allows a space for participation and recognition by perpetrators and affected third parties. Without the participation of victims, international criminal courts lose sight of the communities they are designed to aid. Accordingly, Rwandan victims’ associations eventually refused to cooperate with the ICTR, pointing to the facts that witness protection mechanisms were insufficient; that victims were retraumatized by harsh, adversarial interrogations by defense counsel; and that the ICTR provided no meaningful avenue for victim participation to fix these ills.¹⁴⁸

A similar controversy around victim participation has emerged at the ICC. When a pre-trial chamber declined to open an investigation into war crimes and crimes against humanity committed in Afghanistan, despite finding information that such crimes had been committed on the territory of a

146. Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT’L L. 777, 786 n.61 (2008) (quoting David Donat-Cattin, *Article 68 Protection of the Victims and Witnesses and Their Participation in the Proceedings*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 869, 871 (Otto Triffterer ed., 1999)); see Jean-Marie Kamatali, *From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans*, 12 NEW ENG. J. INT’L & COMP. L. 89, 96 (2005) (“[A]lthough the ICTR’s Rules of Procedure 105 and 106 provide victims’ rights to restitution and to claim compensation before competent national courts, the ICTR practices hinder the recourse to those options.”).

147. U.N. Off. for Drug Control & Crime Prevention, *Handbook on Justice for Victims* 46 (1999), https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf.

148. Trumbull, *supra* note 146, at 787.

state party to the Rome Statute,¹⁴⁹ victims and their advocates enthusiastically protested.¹⁵⁰ While the status of the investigation remains unresolved at time of publication, the groundswell of opposition from the international legal community against the decision indicates that victims and their allies will hold international institutions to account on their promises to bring the hope of justice to victims of massive human rights violations.

C. *Victims' Right to Finality of Sentences*

When victims and observers have no way to participate in or monitor the early release process, decisions can seem arbitrary and opaque. Survivors naturally ascribe symbolic meaning to the sentences of their perpetrators; when these sentences are shortened, a profound sense of injustice results.¹⁵¹

The right to finality requires that adjudication of criminal offenses reach its conclusion so that victims can have a final reckoning and offenders can understand their punishment.¹⁵² Finality is especially important in the international criminal context where the offenses in question are of such gravity that the structural and historical remnants of those crimes persist

149. Alex Whiting, *The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?*, JUST SECURITY (Apr. 12, 2019), <https://www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations>.

150. Situation in the Islamic Republic of Afghanistan, ICC-02/17-75-Corr, Corrigendum of Victims' Joint Appeal Brief Against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" of 30 September 2019, ICC-02/17-75, ¶¶ 2–5 (Oct. 1, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_05848.pdf.

151. Choi, *supra* note 49, at 1807 ("If the ICTY feels that a defendant deserves twenty years in prison, it should sentence her to twenty years—not sentence her to thirty years and then release her after two thirds of that time. . . . Perhaps Mlađo Radić deserved to have spent only thirteen years in prison, and early release at thirteen years was a fairer outcome than having him serve the twenty years to which he was originally sentenced. In such a case, the fairest and most transparent policy would have been to initially sentence him to thirteen years.")

152. "[I]n most matters it is more important that the applicable rule . . . be settled than that it be settled right." Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 65 (1956).

into the present.¹⁵³ While past trauma can never be erased, as survivors assimilate into their new post-conflict realities, a feeling of closure will allow victims to move forward.¹⁵⁴ Knowing that perpetrators are incapacitated can provide an opportunity to heal. Over time, revisiting final legal sanctions through early release may undermine this sense of security. In other words, the use of international criminal courts as a tool of transitional justice “may be undermined if . . . just punishment . . . can really never be finally imposed at all.”¹⁵⁵

D. *Conclusions and Proposals for Victim Participation*

Despite the profound entitlement of victims to participate in trials against their offenders, international courts must retain a degree of independence from victims’ groups to exact impartial and equitable decisions against criminal offenders. It is important to remember that international ad hoc judicial bodies are established for many reasons, including reparations, apology, condemnation, combat of impunity, and enforcement of the universality of crimes of highest gravity. International courts should not, however, lose sight of the fact that they should primarily exist to serve victims through public condemnation of crimes. If victims do not have the opportunity to meaningfully participate in the early release consideration process, then perhaps the court’s procedures do not serve the interests of justice for the victims.

153. For examples of the persistence of grave offenses in the affected societies, see Malcolm Brabant, *Shadow of Nationalism Raises Worries of War in Bosnia*, PBS NEWSHOUR (May 4, 2018), <https://www.pbs.org/newshour/show/shadow-of-nationalism-raises-worries-of-war-in-bosnia>; *New Seeds of Conflict: 20 Years Post-Genocide, There Are Fears That Rwandan Schools Ferment Hate*, NAT’L POST (Apr. 17, 2014), <https://nationalpost.com/news/new-seeds-of-conflict-20-years-post-genocide-there-are-fears-than-rwandan-schools-ferment-hate>; Sara Rakita, *Lasting Wounds: Consequences of Genocide and War for Rwanda’s Children*, HUM. RTS. WATCH (Apr. 3, 2003), <https://www.hrw.org/report/2003/04/03/lasting-wounds/consequences-genocide-and-war-rwandas-children>.

154. See Dr. Yael Danieli Statements, *supra* note 66, at 6 (observing that while survivors attempt to rebuild their lives, early release can deprive them of closure and reopen old wounds).

155. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963).

As the ICC has suggested,¹⁵⁶ considering factors such as cooperation with the prosecution and guilty pleas both at trial and again during early release is unfair. Some have argued that early release in international law should exist only “as a means to respond to changed circumstances” and should not consider the mitigating factors used at sentencing.¹⁵⁷ Considering factors already used to mitigate sentences during trial and on appeal in the context of early release is redundant, and also undermines the decision of the sentencing judge to assign a certain length of detention. A defendant who gains dual benefit from a factor—first at sentencing, and later at early release—is incentivized to engage in conduct that would twice mitigate their sentence.¹⁵⁸ This double consideration of factors favors the offender, whose sentence is shortened on two separate occasions for the same conduct, but it also leads victims to perceive the tribunal as “more interested in protecting Genocide perpetrators’ interests than considering survivors’ concerns.”¹⁵⁹

VI. PROPOSALS FOR VICTIM PARTICIPATION AND CONDITIONAL EARLY RELEASE

This section will first address the different methods of victim participation, then turn to the inherent danger of unreviewable early release decisions, and finally recommend that international criminal courts opt for conditional early release regimes in the future.

There are three traditional procedural avenues through which victims may participate in criminal proceedings: as *par-*

156. See *supra* notes 28–30 and accompanying text.

157. Choi, *supra* note 49, at 1807.

158. See, e.g., Prosecutor v. Došen, Case No. IT-95-8-S, Order of the President on the Early Release of Damir Došen, at 3–4 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2003), <https://www.icty.org/x/cases/sikirica/presord/en/030228.pdf> (discussing the procedural posture of the case).

159. Eugène Kwibuka, *IBUKA Condemns Judge Meron’s Decision To Deny Survivors a Voice*, NEW TIMES (Aug. 28, 2018), <https://www.newtimes.co.rw/news/ibuka-condemns-meron>. The largest Rwandan victims’ rights group, IBUKA, issued a press release on the topic of early release at the Mechanism, writing, “[we] find[] this decision as a deprivation of rights for Genocide survivors and victims by denying them a chance to present their ideas, arguments and requests on these cases which make a big portion of their history.” *Id.*

ties civiles in civil legal systems, as witnesses in common law systems, and as participants in a *sui generis* model. There is also a fourth avenue for victim participation to be integrated at the post-trial phase. Further details on these avenues follow.

First, the civil law tradition allows victims to form *parties civiles*. Though the extent of participation depends on the forum, *parties civiles* may, inter alia, lodge complaints, receive reparations, offer evidence and testimony, and otherwise participate as independent parties in court proceedings separate from the prosecution.¹⁶⁰ The inclusion of *parties civiles* requires a certain preexisting institutional framework to accommodate victims groups. For instance, in Argentina, victims may retain legal representation to make recommendations to investigators, review evidence, present new evidence, cross-examine witnesses, and make closing arguments.¹⁶¹ At the ECCC, which has historical roots in French civil law, civil parties can also support the prosecution in their investigations and may directly seek reparations.¹⁶²

Second, common law systems allow victims to participate as witnesses and to file statements on the record to be used for sentencing purposes.¹⁶³ This procedure is well-suited to the common law's adversarial model, which assumes "that judicial truth best emerges from a contest between two subjective parties."¹⁶⁴ The use of witness statements at the sentencing phase (rather than at the fact-finding phase or during parole proceedings) is in line with the adversarial nature of common law systems, and witnesses can accordingly only answer questions that are posed to them.¹⁶⁵ This form of victim participation can stifle the voice of the victim, taking his agency and narrative and conforming it to the legal arguments pursued by the prosecution and defense. In this environment, the individuals who are most directly affected by the criminal act and its pun-

160. See ECCC Internal Rules, *supra* note 143, r. 23(1) (discussing the participation of victims as civil parties before the ECCC).

161. Alejandro D. Carti6 & Alejandro M. Garro, *Argentina*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 40, 45 (Craig M. Bradley ed., 1st ed. 1999).

162. ECCC Internal Rules, *supra* note 143, r. 23(1).

163. Trumbull, *supra* note 146, at 781.

164. BRIANNE MCGONIGLE LEYH, *PROCEDURAL JUSTICE?: VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL PROCEEDINGS* 11 (2011).

165. Trumbull, *supra* note 146, at 781.

ishment “seem[] to have the least power.”¹⁶⁶ The ICTR and ICTY approaches are most analogous to this common law model, since victims’ statements are only permitted through witness testimony.

The third procedural framework for victim participation at trial is the ICC’s *sui generis* blended approach, which borrows from common and civil law traditions.¹⁶⁷ The ICC follows the 1985 U.N. Declaration’s recommendation to allow “the views and concerns of victims to be presented and considered at appropriate stages of the proceedings,” and accords a role for victims as participants rather than parties.¹⁶⁸ While this approach can limit victims in independent authority to bring appeals or open investigations,¹⁶⁹ it can also allow victims and their representatives to independently “[hold] the Prosecution accountable to the victims’ interests.”¹⁷⁰ The ICC also maintains a “trust fund for victims” that aims to pay monetary reparations to victims at the conclusion of criminal proceedings.¹⁷¹

Fourth, in addition to these three frameworks for victim inclusion in the trial and sentencing phases, victim participation may also be integrated into the post-trial enforcement stage, and, in particular, during early release proceedings. Conditional early release provides for the supervision of early release petitioners within a framework that allows for victims to, *inter alia*, accept or reject apologies and statements of remorse put forward by convicted persons, provide victims state-

166. Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT’L CRIM. L. REV. 345, 347–48 (2003).

167. See Fatou Bensouda, *The ICC Statute—An Insider’s Perspective on a Sui Generis System for Global Justice*, 36 N.C. J. INT’L L. & COM. REG. 277, 279 (2011) (“The pillars of the [ICC’s] criminal procedure reflect its unique nature as a blend of different legal traditions.”).

168. Rome Statute, *supra* note 14, arts. 15(3), 19(3); 1985 U.N. Declaration, *supra* note 129, ¶ 6(b).

169. The failure of the ICC to open an investigation into crimes in Afghanistan committed by the United States and its allies has been viewed as an example of the limitation to the ICC’s framework for victim participation. *ICC: Judges Reject Afghanistan Investigation*, HUM. RTS. WATCH (Apr. 12, 2019), <https://www.hrw.org/news/2019/04/12/icc-judges-reject-afghanistan-investigation>.

170. Kinga Tibori-Szabó & Megan Hirst, *Introduction: Victim Participation in International Criminal Justice*, in VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL JUSTICE 1, 4 (Kinga Tibori-Szabó & Megan Hirst eds., 2017).

171. Rome Statute, *supra* note 14, art. 79.

ments in favor of or against early release, and to petition the convicted person for reparations upon his or her release.

For the reasons outlined below, this fourth option is the best suited to enabling victim participation in early release deliberations while also ensuring equitable and fair treatment of convicted persons. Since victim participation in international criminal law remains in its relative legal infancy, the full potential for victim participation in pre- and post-trial proceedings has not yet been fully realized.¹⁷² However, the selection of cases and the enforcement of final convictions may be the two phases of trial that most directly affect victims' sense of safety and justice, first by recognizing a violation of humanitarian law as worthy of international attention and condemnation, and then by physically removing the perpetrators of this crime from the victims' environments.

The ICC grant of early release is unreviewable once granted, even in light of changed circumstances of the released person.¹⁷³ There is no recourse for released prisoners who, like Biljana Plavšić, recant their statement of remorse after release, or violate the basis of their early release. The moment that convicted persons are released from custody, the court loses jurisdiction, and there are no legal means to revoke the early release decision. Any new criminal activity would be subject to the enforcement of the domestic courts in their country of release. Even setting aside these deficiencies in early release, unconditional release damages the likelihood of reconciliation by allowing convicted persons to be released without consultation with the groups they have victimized. Indeed, properly designed early release procedures would build incentives for convicted persons to make reparations and express remorse for past wrongs.

Despite the controversial history of early release in international criminal law, early release proceedings have the po-

172. For instance, at the ICC, ECCC, and the Special Tribunal for Lebanon, victims have very limited ability to influence the selection of cases and the launch of investigations at the pre-trial phase. Tibori-Szabó & Hirst, *supra* note 166, at 5.

173. *But cf.* RSCSL Practice Direction, *supra* note 14, art. 12(A) ("In the event that the Monitoring Authority has reason to believe that the Convicted Person has violated a condition of the Conditional Early Release Agreement, the Convicted Person shall be arrested and transferred to the Special Court for detention . . .").

tential to be an opportunity for justice and resolution in the future. The framework that would best accommodate these incentives is *conditional* early release. Conditional early release is a framework for early release that sets out clear and specific conditions that must be met prior to early release from detention, as well as other conditions that must be followed for a set period of time following release.¹⁷⁴ Unless these pre- and post-release conditions are met, the prisoner may be re-detained at the relevant court's discretion. Pre-release conditions may include a statement of remorse, evidence of empathy towards victims, and participation in educational programs during detention, if available. Following release, the convicted person would be required to cooperate with enforcement and accede to periodic monitoring periods in order to evaluate whether released convicts remain capable of reintegration.¹⁷⁵

The theoretical model that best accommodates the interests of victims and the unique purposes of international law is the RSCSL practice direction for conditional early release.¹⁷⁶ The RSCSL practice for the consideration and supervision of early release of convicted persons is best suited to incentivize and measure true remorse and rehabilitation of convicted persons, accommodate the participation of victims, and meet the goals of healing and reconciliation at the heart of most tools of transitional justice. Further, because early release is contingent on continued compliance with conditions to be followed after release, the RSCSL can ensure the continued safety of victims after their offender has been released. Lastly, through the procedures and factors required for convicted persons to be released early, the RSCSL early release regime eschews the improper domestic parole procedures borrowed by the ICC, and best accommodates the unique concerns and goals of international criminal law.

174. *Id.* art. 11. The ICC does not use conditional early release. Instead, the Rome Statute applies a "changed circumstances" standard that seeks to enforce the sentence finalized on appeal unless there has been a "clear and significant change of circumstances sufficient to justify the reduction of sentence." Rome Statute, *supra* note 14, arts. 60(3), 110(4)(c).

175. *See* RSCSL Practice Direction, *supra* note 14, art. 11 (noting the reviewability of the released prisoner's status relevant to the conditions of release).

176. *Id.*

The RSCSL's requirement that communities welcoming convicted persons acknowledge their role in past suffering leads to broader societal education within the communities that may be most approving of these criminal acts. Because crimes that fall under the jurisdiction of international courts are, by definition, ideologically motivated, engaging communities that may still be sympathetic to these ideologies may mitigate the likelihood of their survival. The RSCSL early release practice direction also invites victims to contribute their views through its Witnesses and Victims Section or directly to the prosecutor throughout the course of conditional release enforcement.¹⁷⁷

A conditional early release model serves the educational and reconciliatory purposes of international criminal law, especially where it includes the contributions and concerns of victims. Unconditional early release does not meet these goals, and does not have a clear framework through which victims may participate, which causes institutional and psychological harm. When unconditional early release is granted, victims may feel that they have “not yet received the justice [they] expected,” and may feel a very real sense of danger and anxiety knowing that their offenders now walk free without accountability for their crimes.¹⁷⁸ Yael Danieli, a clinical psychologist who specializes in psychological trauma in victims of genocide, wrote with regards to early release of former ICTR convicts, “[p]sychologically, the possibility of early release . . . at best undermines, and at worst undoes, the reparative sense of vindication purported to be rendered by justice to the victims.”¹⁷⁹ She continues: “By diminishing their losses and pain . . . this second wound is even greater than the first.”¹⁸⁰ The President of IBUKA Europe, a prominent Rwandan victims group, wrote that unconditional early release for prisoners who do not regret their actions is “an insult to the memory of victims and an offence to survivors.”¹⁸¹

177. RSCSL Practice Direction, *supra* note 14, art. 5(E).

178. IBUKA Condemns UN's Early Release of Genocide Convicts, *supra* note 70.

179. Dr. Yael Danieli Statements, *supra* note 66, at 6.

180. *Id.* at 7 (emphasis removed).

181. *Id.* Survivors have also written that early release is like “killing us and continuing the original plan to completely wipe us out” and “would amount to ‘a second genocide and the promotion of genocide ideology.’” Barbara Hola, *Early Release of ICTR Convicts: The Practice Beyond the Outrage*, *JUS*

A conditional early release framework, like that of the RSCSL, best accommodates the individual rights of prisoners to the possibility of parole while easing the psychological and symbolic harm of unconditional early release procedures.¹⁸² The RSCSL recognizes that while it may be the case that convicted persons have truly transformed themselves through the strict pre-release requirements, they may change their outlook once released and living in freedom with their former social groups. In the absence of reporting and monitoring, there would be no way for a tribunal to assure compliance with the appropriately high bar set for such convicted persons. Thus, the conditional requirements for early release are conducive to the practical interests of physical safety of persecuted persons and to protection of victims from threats by released convicted persons.

It is important to note that the RSCSL conditional early release model depends, in part, on available funds for a responsible post-release monitor and the willingness of authorities to enforce the terms of provisional release.¹⁸³ Even the fairest procedures need resources to make them function properly. For instance, Moinina Fofana, a former military commander of the Civil Defense Forces during the Sierra Leonean Civil War, was initially released on a provisional basis after serving two-thirds of his sentence in August 2014 after undergoing specialized training with respect to his crimes.¹⁸⁴ In April 2016, he was arrested for having violated the terms of his release, and admitted to participating in political activities from which he was barred.¹⁸⁵ In this instance, the registrar had the

TICEINFO.NET (July 5, 2019), <https://www.justiceinfo.net/en/tribunals/ictr/41861-early-release-of-ictr-convicts-the-practice-beyond-the-outrage.html>.

182. See generally Stephen Rapp Submission, *supra* note 13 (explaining why the RSCSL safeguards are necessary for the early release of prisoners).

183. The requirement that the “Monitoring Authority shall submit an annual report . . . to the Registrar,” as well as the obligation to re-arrest and transfer the convicted person to the Special Court should they violate the terms of their release, are particularly burdensome. See RSCSL Practice Direction, *supra* note 14, arts. 11, 12(A).

184. Prosecutor v. Fofana et al., Case No. RSCSL-04-14-ES, Decision of the President on Application for Conditional Early Release, ¶¶ 1, 3, 19 (Residual Special Ct. for Sierra Leone Aug. 11, 2014), <http://www.rscsl.org/Documents/Decisions/CDF/836/SCSL-04-14-ES-836.pdf>.

185. Prosecutor v. Fofana, Case No. RSCSL-04-14-ES, Disposition on the Matter of Moinina Fofana’s Violations of the Terms of His Conditional Early

capacity to monitor Fofana's movements and activities, and the RSCSL retained sufficient resources to re-detain him.¹⁸⁶ In other instances, the capacity for how to manage early release may be more delicate or logistically impossible due to instability or lack of resources. It is nonetheless encouraging that the RSCSL procedures were more or less effective in this instance.

Another RSCSL convict, Allieu Kondewa, was granted conditional early release last year,¹⁸⁷ illustrating how conditional early release can effectively incorporate victims' submissions and incentivize reconciliation. Three years ago, Kondewa's application for early release was denied, despite having served two-thirds of his sentence. However, on the basis of victims' submissions to the RSCSL registrar and prosecutor, the sitting judge eventually granted early release, and ordered that Kondewa must publicly apologize, acknowledge his guilt, show remorse, refrain from incitement and politics, and report at least twice monthly to his monitoring authority.¹⁸⁸ Kondewa has thus far complied with these conditions, and has reintegrated successfully into a community in Sierra Leone.

However, the RSCSL has been criticized for limiting the participation of victims at the trial phase,¹⁸⁹ where victims can only enter testimony as witnesses rather than act as independent *parties civiles*. Further, Sierra Leonean victims are invited to submit testimony during trial, but there is no assurance these contributions will be used as factual bases on their own.¹⁹⁰ Although the RSCSL's rules of procedure are imperfect, the RSCSL post-conviction conditional framework lays the groundwork for fairer procedures for early release that better

Release, ¶ 80 (Residual Special Ct. for Sierra Leone Apr. 25, 2016), <http://www.rscsl.org/Documents/Decisions/CDF/847/RSCSL-04-14-ES-849.pdf>.

186. See Clarence Roy-Macaulay, *Authorities Re-Arrest Freed Sierra Leone War Crimes Convict*, ASSOCIATED PRESS, March 11, 2016, <https://www.apnews.com/b232e7d816ee43c295639eb9f8b20f0b> (discussing revocation of Fofana's provisional release).

187. Ophaniel Gooding, *Sierra Leone News: Kamajor Kondewa Back from Rwandan Jail*, AWOKO NEWSPAPER (July 10, 2018), <https://awoko.org/2018/08/08/sierra-leone-news-kamajor-kondewa-back-from-rwandan-jail-2>.

188. Press Release, Residual Special Court for Sierra Leone, Kondewa Granted Conditional Early Release as RSCSL Moves Forward on Completion Strategy (June 9, 2018), <http://www.rscsl.org/Documents/Press/2018/press-release-070918.pdf>.

189. MCGONIGLE LEYH, *supra* note 160, at 150.

190. *Id.* at 151.

serve the unique interests of international criminal law, elevate the voices of victims, and ensure safety and compliance through the use of conditional early release.

VII. CONCLUSION

This note has attempted to explain the existing framework of unconditional early release at international criminal legal institutions and argue that the voices of victims can be better integrated at the early release phase. The possibility for early release is a practical tool for incentivizing good behavior in prison and cooperation with the prosecution, but these practical enforcement rationales should not outweigh the interests of justice for victims. This note has also challenged whether it is appropriate to apply domestic criminal law in the international context, especially as it pertains to rehabilitation and early release, where domestic procedures are particularly inept at meeting the reconciliatory, educational, and symbolic purposes of international criminal law.