Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and the Hague

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Elaborating Justice for Victims at the International Criminal Court

Beyond Rhetoric and the Hague

Luke Moffett*

Abstract

Justice for victims has often been invoked as the raison d'être of international criminal justice, by punishing perpetrators of international crimes. This article attempts to provide a more holistic account of justice for victims by examining victims' needs, interests, and rights. The International Criminal Court itself includes participation, protection and reparation for victims, indicating they are important stakeholders. This article also suggests that victims are integral to the purpose of the ICC in ending impunity by ensuring transparency of proceedings. However, there are limits to the resources and capacity of the ICC, which can only investigate and prosecute selected crimes. To overcome this justice gap, this article directs the debate towards a victim-orientated agenda to complementarity, where state parties and the Assembly of State Parties should play a greater role in implementing justice for victims domestically. This victim-orientated complementarity approach can be achieved through new ASP guidelines on complementarity, expanding universal jurisdiction, or seeking enforcement and cooperation through regional and international bodies and courts, such as Universal Periodic Review or the African Court's International Criminal Law Section. In the end, if we are serious about delivering justice for victims we need to move beyond the rhetoric, with realistic expectations of what the ICC can achieve, and concentrate our attention to what states should be doing to end impunity.

1. General Remarks

A statement on the International Criminal Court (ICC), whether by a prosecutor, the United Nations (UN) Security Council, or NGO, would be remiss without the ubiquitous invocation of doing justice for victims. Scenes of atrocities against civilian populations in Syria or Central African Republic leaves us, at least morally, believing that those responsible should be held to account. The Preamble of the Rome Statute of the ICC captures this moral indignation by acknowledging that victims of such atrocities 'deeply shock the conscience of humanity' and that such crimes should not go unpunished. Yet we take for granted what justice for victims actually pertains to when we call for it, in the sense of how it is legally constructed. This raises some critical questions as to what justice means to victims; who are the victims; and how can one court deliver justice to thousands or potentially millions of victims of international crimes when it has to protect other parties before it? The Rome Statute and its interpretation by the ICC provides a particular vision of what justice for victims is; this article hopes to broaden this conception by moving beyond the rhetoric and envisaging how it can be made into a reality. While examining the current work of the ICC in

delivering justice to victims before it, this article also hopes to locate the debate amongst the role of state parties to complement the work of the Court through domestic redress.

Historically the vision of justice for victims in international criminal tribunals has been assumed to coincide with the prosecution and punishment of those most responsible. At the International Military Tribunal in Nuremberg, the French Prosecutor Auguste Champetier De Ribes in his closing statement beseeched the judges to convict the defendants and 'to heed the voice of innocent blood crying for justice'.[1] This invocation of victims to equate justice for them with retribution, serves an expressive purpose in affirming the moral legitimacy of international criminal justice in using punishment to enforce international law.[2] This was followed in subsequent tribunals. As noted by Antonio Cassese as President of the International Criminal Tribunal for the former Yugoslavia (ICTY) in his first report to the UN Security Council and General Assembly,

> … from the victim's point of view, what matters is that there should be public disclosure of the inhuman acts from which he or she has suffered and that the actual perpetrator of the crime be tried and, if found guilty, punished. ... [T]he punishment of the authors of those barbarous acts by an impartial tribunal can be a means, at least in part, of alleviating their suffering and anguish.[3]

Since then, victims have been disappointed by their lack of input or tangible benefits from the ICTY and the ICTR.[4] Jorda and de Hemptinne sum up that victims in the ad hoc tribunals were treated as objects of moral concern, rather than subjects with any rights to present their own interests.[5] On the legacy of the ICTY, President Meron recognized that,

> The failure to properly address this issue [of reparations] constitutes a serious failing in the administration of justice to the victims of the former Yugoslavia. The Tribunal cannot, through the rendering of its judgements alone, bring peace and reconciliation

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[1] Nuremberg International Military Tribunal (IMT), Transcripts Vol. XIX, at 569.

[2] W. A. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2011), at 347; M. Elander, 'The Victim's Address: Expressivism and the Victim at the Extra-ordinary Chambers in the Courts of Cambodia', 7 *International Journal of Transitional Justice* (2013) 91–115.

[3] Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, A/49/342, S/1994/1007 (1994), §§ 50-51.

[4] See B. Nowrojee, ''Your Justice is Too Slow': Will the International Criminal Tribunal for Rwanda Fail Rwanda's Rape Victims?' in D. Pankhurst (ed.), *Gendered Peace: Women's Struggles for Post-War Justice and Reconciliation* (Routledge, 2007) 107–136.

[5] C, Jorda and J. de Hemptinne, 'The Status and Role of the Victim', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 1387–1419, at 1389.

> to the region: other remedies should complement the criminal trials if lasting peace is to be achieved, and one such remedy should be adequate reparations to the victims for their suffering.[6]

Thus given the mandate of the ad hoc tribunals to prosecute and punish perpetrators of international crimes, other processes outside of criminal proceedings are needed to provide a more comprehensive account of justice for victims. The ad hoc tribunals did not deny the customary nature of victims' right to reparations, particularly in light of the Rome Statute, finding that measures are necessary to provide redress directly to victims. That said the judges of the ICTY and ICTR deemed that given the multitude of victims and its impact on criminal proceedings, reparations and victim participation would be very difficult to implement and run the risk of being 'counter to its principal objective of prosecuting those responsible for the crimes'.[7] By broadening international criminal justice to be more responsive to victims it brings challenges of its own in reconciling the need to deliver justice to potential thousands of individuals, against the logistical and financial limits of a single international institution.

The inclusion of reparations, victim participation and a Trust Fund within the ICC are seen as a way to overcome the shortcomings of previous tribunals by delivering a more inclusive vision of justice for victims. This article explores the meaning of justice for victims and how it fits into the ICC as its *'raison d'être'*.[8] Instead of conceptualising justice for victims within retributive, restorative, or even transformational justice, this article situates justice within more procedural and corrective notions.[9] We begin by discussing the needs of victims of international crimes and what justice means for them. We then move onto to examine how justice for victims can be constructed in international criminal justice, drawing on discussions in victimology, restorative justice and human rights literature. This examination supports that justice for victims has both procedural and substantive dimensions, which are used in the second section to evaluate the practice of the Court itself as the internal

[6] Bi-Annual Completion Report to the UN Security Council, S/2010/588, 19 November 2010, § 78.
[7] Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General, S/2000/1063, 3 November 2000, §47. See also Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General, S/2000/1198, 15 December 2000.
[8] See French Justice Minister Elisabeth Guigou, Opening Speech, at the International Meeting on 'Access of Victims to the International Criminal Court', Paris, 27 April 1999, quoted in E. Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience', in D. McGoldrick (ed.), *The Permanent International Criminal Court* (Hart 2004) 315–334, at 325. Cassese also believed that victims where the *raison d'être* of the ICTY, see V. Spiga, 'No Redress without Justice Victims and International Criminal Law', *Journal of International Criminal Justice,* 10(5) (2012) 1377-1394.
[9] See C. Hoyle and L. Ullrich, 'New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court', 12 *Journal of International Criminal Justice* (2014), 681-703.

component, in contrast to expanding the debate to examine the external development of justice for victims through state parties.

The emphasis of this article is to convey that the ICC can only provide justice to very select groups of victims, given its resource and jurisdictional limits. For justice for victims to be realized within the Rome Statute system, it requires action by state parties, both in terms of domestic efforts to tackle impunity and diplomatic pressure to encourage mutual cooperation. This recasting of justice for victims as primarily a state party concern is discussed through the notion of victim-orientated complementarity explored in the final section. As such, this article suggests that attention of the ICC should be concentrated on maximising justice to those victims before it, rather than trying to meet expectations to do justice for all victims in a situation. State parties thus carry the burden of meeting their obligations to investigate, prosecute and remedy international crimes.

2. Conceptualizing Justice for Victims of International Crimes

The gradual change to recognising the subjectivity of victims in international criminal justice came from developments in domestic criminal justice systems, with greater understanding of victims from the fields of victimology and human rights. Improving the position of victims has long been a domestic criminal justice issue, given victims' dissatisfaction with their treatment within the adversarial criminal justice system.[10] Christie famously noted that criminal justice was historically a conflict between the perpetrator and the victim, which had been 'stolen' by the state to end blood feuds and to provide more objective justice.[11] While greater attention has been given to victims in criminal domestic proceedings, notions of 'rights' for them to avail of with regards to participation, protection and reparation, have not really emerged in many national criminal justice systems beyond services.[12]

Although domestic experiences of victimisation are useful in understanding how criminal justice can be made more responsive to victims, international crimes are distinct from domestic ones. International crimes generally involve: (1) mass victimisation; (2) large-scale organized participation; (3) ideologically driven perpetration; (4) state involvement; and

[10] See M. E. Brienen and Earnestine H. Hoegen, *Victims of Crime in 22 European Justice Systems* (Wolf Legal 2000).
[11] N. Christie, 'Conflicts as Property', *British Journal of Criminology* 17(1) (1977) 1-15.
[12] See J. Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart 2008).

(5) the crimes and impunity have a long-term impact on victims.[13] In light of the scale and gravity of international crimes Veitch suggests that the law is unable to capture the magnitude of victimisation and responsibility of perpetrators.[14] Instead there is an asymmetry between the accountability and victimisation. As noted by other commentators, it is almost impossible to deliver proportional punishments to international crimes due to their 'radical evil'.[15] To better understand this gargantuan challenge of delivering justice to victims of international crimes, it is worth first exploring victimological understandings of what such individuals' need.

A. Victims' Needs

Victimological studies of domestic victimisation have found that victims generally have emotional, informational and practical needs.[16] For international crimes, these needs can be more acute owing to the scale and gravity of the crimes committed.[17] Crimes and violations can also impact individuals and groups differently, due to their diverse social and cultural background and personal characteristics.[18] Victims are not homogenous, nor do they speak with one voice.[19] Their needs can change over time and can conflict with others, such as some preferring peace over accountability, or compensation instead of restitution. Instead of being prescriptive to respond to these general needs, which would be challenging given their broad and at times contradictory nature, justice should be responsive, as far as possible, to victims. This responsive approach enables victims to access and present their interests in judicial proceedings to inform appropriate outcomes.

As noted by Hoyle and Ullrich, there is a need for victimologists and criminologists to engage more with international criminal justice, rather than being reliant on drawing

[13] See M. S. Groenhuijsen and A. Pemberton, 'Genocide, Crimes Against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice', in R. Letschert, R. Haveman, A.M. de Brouwer, and A. Pemberton (eds.), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011); Luke Moffett, *Justice for Victims before the International Criminal Court*, (Routledge, 2014), at 10-12; and Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Muthaura and others* (ICC-01/09-02/11-382-Red), 26 January 2012, §277.

[14] S. Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering*, (Routledge-Cavendish, 2007), at 31.

[15] L. Kohler and H. Saner (eds.), *Hannah Arendt and Karl Jaspers: Correspondence: 1926–1969* (Harcourt Brace International, 1992), at 54; C. S. Nino, *Radical Evil on Trial* (Yale University Press, 1998), at 135–137.

[16] S. Walklate, *Victimology: The Victim and the Criminal Justice Process* (Unwin Hyman, 1989), at 133–136; and M. Maguire, 'The Needs and Rights of Victims of Crime', 14 *Crime and Justice* (1991) 363–433.

[17] See E. Kiza, C. Rathgeber, and H. Rohne, *Victims of War: War-Victimization and Victims' Attitudes towards Addressing Atrocities* (Hamburger Edition, 2006).

[18] H. Rombouts, 'Importance and Difficulties of Victim-based Research in Post-conflict Societies', 10 *European Journal of Crime, Criminal Law, and Criminal Justice* (2003) 216–232, at 220.

[19] See L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart, 2008), at 360–366.

comparisons to victims in domestic criminal justice systems.[20] Given the gulf of differences between domestic and international crimes, we cannot completely appreciate justice for victims of international crimes in terms of domestic experiences or theorisation, such as restorative justice. To fully understand justice for victims of international crimes we need greater research on their needs, expectations and frustrations to better realize the effectiveness of mechanisms such as the ICC. That said with the understanding we currently have we can construct processes which are responsive to victims' needs and interests by allowing them agency to help shape justice to their own ends.

B. Justice for Victims

Justice for victims before the ICC has often been portrayed as a 'fiction', 'illusory and elusive', owing to the rhetoric around the phrase and the disconnection felt by victims with the work of international criminal tribunals and courts.[21] The purpose of this section is flesh out a more meaningful way of conceptualising justice for victims to evaluate the work of the ICC and contribute to its future direction, drawing from victimology and human rights. In this author's view, justice for victims is 'the ability of victims to satisfy their procedural needs to inform outcomes that can fulfil their interests.'[22] Justice for victims can be seen as antithetical to impunity, which serves to deny victims' suffering and prevent their access to redress.[23] The Inter-American Court of Human Rights has found that impunity is the 'total lack of investigation, prosecution, capture, trial and conviction of those responsible'.[24] Such impunity 'fosters chronic recidivism' and leaves victims 'defenceless'.[25] Instead justice affirms victims' dignity, by acknowledging and remedying their harm. Accordingly facilitating justice for victims is vital in tackling impunity.

Justice for victims also engages with a rights-discourse, as it protects victims' agency through legal entitlement. A rights-discourse encourages the use of a common language to balance

[20] Hoyle and Ullrich *supra* note 9.
[21] See K. M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009); and P. Vinck and P. Pham, *Searching for Lasting Peace: Population-Based Survey on Perceptions and Attitudes about Peace, Security and Justice in Eastern Democratic Republic of the Congo*, Harvard Humanitarian Initiative and UN Development Programme (2014).
[22] Moffett *supra* note 13, at 29.
[23] Y. Danieli, 'Massive Trauma and the Healing Role of Reparative Justice', in C. Ferstman, M. Goetz, and A. Stephens (eds.), *Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 41–78, at 45; and J. O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims?' 46 *Harvard International Law Journal* (2005) 295–345, at 310.
[24] *Case of the "White Van" (Paniagua Morales et al.) v Guatemala*, Judgment of 8 March 1998. Series C No. 37, (Merits), §173.
[25] Ibid.

differing interests, rather than to trump others.[26] Justice for victims is comparable to an effective remedy in human rights law, albeit it also draws form victimological research, and recognizes that responsibility for violence can be attributed to non-state actors.[27] This rights and victimological-based approach helps to conceptualize justice for victims in procedural and substantive terms. Procedural justice for victims involves access to redress and fair treatment within proceedings, entailing due process concerns.[28] In order to protect victims' interests, procedural justice includes a number of provisions including protection measures, participation in proceedings which affect their interests, access to legal representation, assistance and support, and to claim reparations.[29] Importantly for victims recognising a role for them in judicial proceedings enables them to have the agency to help shape outcomes that can respond to their needs and interests.[30]

Substantive justice comprises the outcomes of judicial processes. For victims, substantive justice entails redress for the harm they have suffering and the causes of victimisation, evincing more corrective justice.[31] This coincides with an effective remedy in human rights law, which has developed three rights for victims of gross violations: truth; justice; and reparations.[32] The right to truth involves determining what international crimes occurred, the context and consequences, as well as the fate and whereabouts of those who died.[33] This is not an absolute right entitling victims to information on every detail or guaranteeing the unearthing the identity of every perpetrator. Instead the right to truth enables victims to affirm their suffering with a public historical account of the past. The right to justice entails of victims' procedural access to redress as well as to seek prosecution of those

[26] R.I. Mawby, 'Victims' Needs or Victims' Rights: Alternative Approaches to Policy Making', in M. Maguire and J. Pointing (eds), *Victims of Crime: A New Deal* (Oxford University Press, 1988) 127–137, at 133; and M. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2003), at 20–21.
[27] D. Shelton, *Remedies in International Human Rights Law* (2nd edn., Oxford University Press, 2005), at 7; and Moffett *supra* note 13, at 30 and 149-150.
[28] See J. Wemmers, *Victims in the Criminal Justice System,* (Kugler, 1996); and *Perez v France,* (Application no. 47287/99), 12 February 2004, §72.
[29] Principles 4–17, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985; Principles 12–14, UNBPG 2005; International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), A/61/488, 2 October 2008. See A-M. de Brouwer and M. Groenhuijsen, 'The Role of Victims in International Criminal Proceedings', in G. Sluiter and S. Vasiliev (eds.), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May, 2009) 149–204, at 153–154.
[30] K. McEvoy and K. McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame', 22 *Social and Legal Studies,* (2013) 489-513.
[31] J. Wemmers, 'Victims' Need for Justice: Individual versus Collective Justice', in Letschert et al. *supra* note 13, 145–152, at 148.
[32] See M. Cherif Bassiouni, 'International Recognition of Victims' Rights', 6 *Human Rights Law Review* (2006) 203–279.
[33] *Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights,* E/CN.4/2006/91, 8 February 2006.

responsible.[34] The right to justice does not grant victims' a particular outcome, such as a conviction, due to limitations in evidence or other public interest concerns, rather it is confined to pursuing criminal redress against a responsible actor.[35] The right to reparations allows victims to avail of appropriate remedial measures to alleviate their harm.[36] In comparison to the other two rights, reparations can provide more tangible measures to victims that can improve their quality of life, but is limited by economic resources.

Justice for victims comprises of both the procedural and substantive aspects, which complement each other as a means (procedural) and an end (substantive) to redress their harm. The purpose of justice for victims is to ensure that victims have some form of defined agency or role through presenting their interests in proceedings which affect them, in order to inform outcomes that can remedy their suffering, rather than being objects of moral concern. That said justice mechanisms, such as the ICC do not solely exist to respond to victims' interests, but have to balance other interests before it, such as the rights of the defendant and the prosecution. Moreover, the ICC has limited resources and jurisdictional bounds meaning it cannot provide a full account of justice to all victims of international crimes, but needs to be complemented with domestic processes. Accordingly, such courts are not victim-centred, but rather victim-orientated in the sense that they are responsive as far as possible to victims' interests in light of balancing other competing interests.[37]

3. Justice for Victims and the International Criminal Court

Doing justice under the Rome Statute was not conceived as simply the ICC and states prosecuting and punishing perpetrators of international crimes, but to also deliver justice to victims through participation and reparations.[38] This is the Court's *'raison d'être',* to redress international crimes for those most affected by them. This is apparent from the number of victim provisions within the Rome Statute and ICC Rules of Procedure and Evidence (RPE).

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[34] *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political),* Revised final report prepared by Mr Joinet Pursuant to Sub-Commission Decision 1996/119, E/CN.4/Sub.2/1997/20/Rev. 12 October 1997; and Principle 19, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/ CN.4/2005/102/Add.1, 8 February 2005.

[35] *Öneryildiz v Turkey*, App. no. 48939/99 (ECtHR, 30 November 2004), §96; *Arhuaco v Colombia*, Human Rights Committee, Views on Communication No. 612/1995, CCPR/ C/60/D/612/1995, 29 July 1997.

[36] See 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNBPG).

[37] See S. Vasiliev, 'Article 68(3) and personal interests of victims in the emerging practice of the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, (Brill, 2009) 635-690, at 677.

[38] C. Muttukumaru, 'Reparations to Victims', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results,* (Kluwer, 1999) 262–270, at 264.

The purpose of this section is to examine how the Court has developed justice for victims, as well as how situations under investigation are complementing the work of the ICC. These two parts are termed internal and external respectively, to reflect the capacity of the Court, in its proceedings and outcomes, and states, through domestic complementarity initiatives, to deliver justice to victims. This distinction appreciates that the ICC is a court of last resort. States have the primary responsibility to take the lead in ending impunity for international crimes.

This author is under no illusion that the Rome Statute imposes no explicit obligations on state parties of the Rome Statute to incorporate the victim participation or reparation regime of the ICC within their own domestic systems. However, the inclusion of justice for victims within national contexts can aid the legitimacy of such processes and their effectiveness in ending impunity. This position is based on the dearth of human rights jurisprudence in regional human rights courts, which holds that victims are important participants in investigative and judicial processes to ensure public transparency and accountability, as part of an effective remedy.[39] This human rights experience was not lost on the drafters of the Rome Statute and its interpretation by judges of the Court.[40]

A human rights discourse of victims' rights can be helpful here in recognising the important contribution of victims to accountability and in balancing competing interests. This perspective has been incorporated into the revised ICC Victim Strategy, which finds that on a rights-based approach victims are 'a vital actor in the justice process rather than a passive recipient of services and magnanimity.'[41] As such, to effectively consider victims' interests, it entails understanding their perspective, while not having the Court to adopt it as its own. In addition, it requires victims to voice their interests, so that their input adds or improves comprehension of their viewpoint so as to deliver appropriate and meaningful justice outcomes. Otherwise the ICC and future mechanisms reinforce the abstract paternalistic international justice, whereby victims are invoked symbolically so as to legitimize

[39] Particularly with gross violations of human rights, such as the right to life or prohibition on the use of torture, and inhumane and degrading treatment: *Kaya v Turkey*, App no 22535/93 (ECtHR 28 March 2000), §121-126; *Mapiripán Massacre v Colombia,* Merits, Reparations and Costs, Series C No 134 (IACtHR, 15 September 2005)*,* §§116 and 119; and *Al-Skeini v United Kingdom*, App. no. 55721/07 (ECtHR, 7 July 2011), §167. See also *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/ CN.4/2005/102/Add.1, 8 February 2005.

[40] See C. Stahn, H. Olásolo, and K. Gibson, 'Participating of Victims in pre-trial proceedings of the ICC', 4 *Journal of International Criminal Justice* (2006) 219-238, at 220-221; Spiga *supra* note 8; and S. Vasiliev, 'Victim Participation Revisited: What the ICC is Learning About Itself', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) (forthcoming).

[41] *Court's Revised strategy in relation to victims*, ICC-ASP/11/38, 5 November 2012, §6.

punishment of perpetrators, but without any long-term benefit for those most affected by such crimes.[42] With this in mind it is worth now turning to examine how the ICC has incorporated justice for victims within its internal proceedings, before evaluating how state parties have complemented the work of the Court.

A. Internal Limits of Justice for Victims at the ICC

The purpose of this section is to highlight the structural confines of justice the ICC can deliver to victims of international crimes. By concentrating on what the ICC can and cannot do, we can better discern what the Court can improve upon for those victims before it. The internal aspect of justice for victims within the ICC involves victims' role in proceedings and how their interests are taken into account in determining outcomes of the Court. This analysis hopes to realign attention of the ICC to enhance justice to those victims before it, rather than trying to meet expectation of all victims in a situation. Essentially we are highlighting the limitations of the ICC and refocusing on what state parties and other actors can do to deliver justice to victims, discussed in the next sub-section, beyond the constraints of the Court.

Victims are defined broadly in the Rules of Procedure and Evidence,[43] but those who can actually benefit from the ICC are somewhat narrower due to the selection of situations, perpetrators and charges by the prosecution, based on the 'interests of victims' and 'justice'.[44] The ICC is supposed to prosecute those perpetrators most responsible where a state is unwilling or unable to do so, making it a court of last resort.[45] However, the prosecution and conviction of perpetrators is dependent on prosecutorial selection, sufficient evidence and states transferring suspects to the Court. A more critical victimological reading of victim recognition would see such prioritisation of victims as creating a hierarchy with those most responsible before the ICC and the rest dependent on state action, with no enforcement or mechanism of redress to close the impunity gap between the two. While Aptel understandably calls for the ICC to prosecute more perpetrators and crimes to close this gap, really we need to be cultivating state responsibility to genuinely address such crimes.[46]

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[42] See S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', 76 *Law and Contemporary Problems* (2014), 235-262.
[43] Rule 85, ICC RPE.
[44] Articles 53(1)(c) and (2)(c), ICCSt.
[45] N. Waddell and P. Clark, *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, 2008), at 8.
[46] C. Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy Narrowing the Impunity Gap', 10 *Journal of International Criminal Justice* (2012) 1357-1375.

For those victims who are before the Court in terms of procedural justice, there is a substantive literature on the Rome Statute's victim provisions.[47] Rather than reiterate it here, it may be more useful to briefly discuss the challenges in the contentious provision of victim participation. The participation of victims at the ICC sets it apart from its predecessors, with the physical representation of victim through their legal representatives partaking in proceedings. That said, for a number of years since the global financial recession there have been serious concerns over rising costs of victim participation through assessing applications, funding for legal aid, and the time spent by the Chambers and parties on litigating participation.

Victim applications have been reduced from 17 pages to 7, to one-page in the *Ntaganda* case to minimize cost and make the system more efficient.[48] Victim representation has been organised into groups with common interests,[49] or according to geographical location.[50] The Court has been sensitive to victims' diverse interests, such as in Côte d'Ivoire situation ensuring that vulnerable groups were represented, after males and certain ethnic groups dominated participation applications.[51] However and more worryingly, in the past couple of years the Court has begun to collectivize applications.[52] This approach could potentially further dilute victims' role in proceedings, transforming it into a 'purely symbolic'[53] one and creating a hierarchy of participation.[55] While there are understandable reasons for 'organising' victim participation, given that in the *Bemba* case some 5,229 are participating, it raises trepidation about victims' agency and ownership of proceedings.

[47] There are a number of monographs on the subject: B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011); E. Dwertmann, *The Reparation System of the International Criminal Court,* (Martinus Nijhoff, 2010); C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012); and Moffett, *supra* note 13.
[48] Decision Establishing Principles on the Victims' Application Process, *Ntaganda* (ICC-01/04-02/06-67), 28 May 2013, §§17–25.
[49] Decision Concerning the Organisation of Common Legal Representation of Victims, *Ntaganda,* (ICC-01/04-02/06-160, 2 December 2013.
[50] Decision on Common Legal Representation of Victims for the Purpose of Trial, *Bemba* (ICC-01/05-01/08-1005), 10 November 2010, §§18–20.
[51] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in Republic of Côte d'Ivoire* (ICC-02/11-14), 3 October 2011, §211.
[52] See Organization of the Participation of Victims, *Gbagbo* (ICC-02/11-01/11-29-Red), 6 February 2012.
[53] Registry submission pursuant to "Order Scheduling a Status Conference and Setting a provisional Agenda", *Ntaganda* (ICC-01/04-02/06-350), 14 August 2014; and Joint submissions in accordance with the "Order Scheduling a Status Conference and Setting a Provisional Agenda" issued on 21 July 2014, *Ntaganda* (ICC-01/04-02/06-351), 14 August 2014, §31.
[55] Decision on Victims' Representation and Participation, *Muthaura and Kenyatta* (ICC-01/09-02/11-498), 3 October 2012.

Victim participation itself has been inconsistent and lacks clarity. There remains considerable differences in Chambers' interpretation of victim participation, with some ordering more participatory rights than others. For instance, VLRs were permitted to present evidence on the criminal responsibility of the accused in the *Bemba* case, but not in others.[56] This has the potential for inequality amongst victims participating in different cases, and risks undermining the rights of the defendant in terms of legal certainty.[57] This inconsistency stems from the differing personal views and experiences of the judges coming from backgrounds in common and civil legal jurisdictions or as defence lawyers.[58] Although much of jurisprudence of the Court and commentary have concentrated on the risks of victim participation to the right of the accused, there has been very little discussion or analysis of the deference to the discretion of the Prosecutor when it comes into conflict with victims' interests.[59] This has impeded victim participation during the crucial investigation stage.

There is a need to harmonize victim participation at the ICC to save time and cost in litigation. This echoes concerns by state parties who wish to see a more coherent victim participation regime emerge, but judges have defended such moves to protect their discretion in responding to the circumstances in each case.[60] Perhaps as a compromise judges should have some flexibility to determine exceptional rights for victims, such as anonymous participation, but that modalities of presenting evidence, etc., remain the same in each case. The annex of the revised ICC Victim Strategy to some extent outlines the 'rights or possibilities' of victim participation, a welcomed step towards making participation more harmonised.[61] Nonetheless, while participation can be made more effective, the impact of such participation through victims' input into decision-making in determining appropriate outcomes is insignificant.

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[56] Decision (i) Ruling on Legal Representatives' Applications to Question Witness 33 and (ii) Setting a Schedule for the Filing of Submissions in Relation to Future Applications to Question Witnesses, *Bemba* (ICC-01/05-01/08-1729), 9 September 2011; cf. Applications for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, *Katanga and Chui* (ICC-01/04-01/07-1665), 20 November 2009, §§90–91.

[57] S. Zappalà, 'The rights of victims v. the rights of the accused', 8 *Journal of International Criminal Justice* (2010) 137-164.

[58] See J. Wemmers, 'Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate', 23 *Leiden Journal of International Law* (2010) 629-643.

[59] Moffett *supra* note 13, at 115-120.

[60] ASP Resolution Victims and affected communities, reparations and Trust Fund for Victims, ICC-ASP/12/Res.5, §3.

[61] *Court's Revised strategy in relation to victims, Annex: Rights and Prerogatives of Victims in Proceedings before the ICC*, ICC-ASP/11/38, at 7-13.

With regards to substantive justice, the judges of the Court have recognised victims' rights to justice, truth and reparations as a basis for participation in proceedings.[62] There has been less attention by commentators in how these rights have realised substantive justice for victims, given that it is easier to discern procedural rules than to determine how much justice or truth victims have obtained. However, the way in which substantive victims' rights have been given effect provides a more accurate picture in how responsive the Court is to victims' interests.

With the right to justice, victims are unable to participate in the investigation. The Victims Legal Representatives (VLRs) attempted to change or expand the charges against different accused before the Court have been met with fierce resistance by the Prosecution, with the OTP's independence affirmed by the relevant Chamber.[63] There is no ability for victims to review the decisions of the Prosecutor if their interests are not taken into consideration, preventing accountability of prosecutorial decisions.[64] Moreover, victims have felt their interests have not been given sufficient weight in determinations of substantive justice, such as in the *Katanga* appeal proceedings.[65] Where both the defence and prosecution retracted their appeals, despite victims' protests, the Appeal Chamber found the issue was moot as there was no role for the Chamber as both parties had discontinued their appeal.[66]

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[62] This is apparent in the early jurisprudence of the Court, but referred to less in recent judgments. Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Katanga and Chui* (ICC-01/04-01/07-474), 13 May 2008, §§31–44; Decision on Applications a/0011/06 to a/0013/06, a/0015/06, and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, *Al Bashir* (ICC-02/05-01/09-62), 15 December 2009, §§4–5. Cf. Decision on victims' representation and participation, *Ruto and Sang* (ICC-01/09-01/11-460), 3 October 2012; and Decision on the participation of victims in the trial proceedings, *Banda* (ICC-02/05-03/09-545), 20 March 2014.

[63] Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', *Lubanga,* (ICC-01/04-01/06-2205), 8 December 2009; Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, *Situation in DRC,* ICC-01/04-582, 25 October 2010; and Decision on the "Request by the Victims' Representative for authorisation to make a further written submission on the views and concerns of the victims", *Ruto and others* (ICC-01/09-01/11-371), 9 December 2011, §§16-17.

[64] See *Oğur v Turkey*, App no 21594/93 (ECtHR, 20 May 1999), §92; *McKerr v the United Kingdom,* App no 28883/95, (ECtHR, 4 May 2001), §148; Article 11, EU Directive Establishing minimum standards on the rights, support and protection of victims of crime, 2012/29/EU, 25 October 2012; and *R v Killick*, [2011] EWCA Crim 1609, §§48-51. See Aptel *supra* note 46.

[65] Mr Katanga was convicted by the majority of judges for murder as a crime against humanity, and four counts of war crimes for murder, attacking a civilian population, destruction of property and pillaging as part of the attack on the village of Bogoro on 24 February 2003. He was sentenced to 12 years. Jugement rendu en application de l'article 74 du Statut, *Katanga* (ICC-01/04-01/07-3436), 8 March 2014.

[66] Observations des victimes sur le désistement d'appel du Procureur contre le jugement concernant G. Katanga, *Katanga* (ICC-01/04-01/07-3499), 26 June 2014; Prosecution's Response to the Observations of the Legal Representative of the main group of Victims filed on 26 June 2014, *Katanga* (ICC-01/04-01/07-3500, 27 June 2014, §8; Communication du Représentant légal des victimes enfants soldats relative au double désistement d'appel dans le dossier Le Procureur c. Germain Katanga et Annexe publique, *Katanga* (ICC-01/04-01/07-3501-

This decision exemplifies victims' symbolic position, the Prosecutor stating that she took their interests into account in decisions that affect them, yet according to the VLRs, without actually consulting them as to what their interests are. As the final say on Katanga's criminal responsibility, the judgment provides a very limited account in terms of truth and justice for victims of the attack on Bogoro.[67]

With regards to realising the right to truth, victims may be used by the Court as functional in helping the judges to understand the context in which these select crimes occurred. Such as the three victims who presented their views and concerns via video-link on the harm they suffered by Bemba's militia.[68] For victims the final judgment can help to acknowledge the wrongfulness of their suffering and an objective account of what occurred, but it is limited by the conviction of the perpetrator and the charges, requiring wider processes to complement it domestically, such as a truth commission.[69]

The constraints of the ICC are felt most acutely with reparations, which are intended to remedy victims' harm. While to date only one reparation decision on 'principles' in the *Lubanga* case has so far been delivered, it is indicative of the Court's approach in determining outcomes for victims in light of their representations.[70] In the *Lubanga* case, the Court found that as the convicted person was indigent, reparations should be facilitated through the Trust Fund for Victims, with reparations to be ordered collectively to the community, on the basis that they would be 'more beneficial and have greater utility than individual awards, given the limited funds available'.[71] Yet this approach dismissed the participating victims' representations, who wanted individual and collective reparations to alleviate their suffering, rather than the community awards, as it was community who supported and facilitated such crimes.[72] Consequently, some victims in the Kenyan case of

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Anx), 30 June 2014; and Decision on the victims' requests to participate in the appeal proceedings, *Katanga* (ICC-01/04-01/07-3505), 24 July 2014.

[67] See C. Stahn, 'Justice Delivered or Justice Denied? The Legacy of the *Katanga* Judgment', 12 *Journal of International Criminal Justice,* (2014) 809-834.

[68] *Prosecutor v Bemba*, Transcripts 25–26 July 2012, (ICC-01/05-01/08-T-227-Red-ENG and ICC-01/05-01/08-T-228-Red-ENG).

[69] See P. B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2010, 2nd edn.).

[70] Decision Establishing the Principles and Procedures to be Applied to Reparations, *Lubanga* (ICC-01/04-01/06-2904), 7 August 2012.

[71] Ibid. §274.

[72] Ibid. §220. Observations on the Sentence and Reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, and a/1622/10, *Lubanga* (ICC-01/04-01/06-2864-tENG), 18 April 2012; Observations du groupe de victimes VO2 concernant la fixation de la peine et des réparations, *Lubanga* (ICC-01/04-01/06-2869), 18 April 2012.

Ruto and Sang have ended their participation before the Court over distress that perpetrators could benefit from reparations ordered collectively.[73]

In all the experience of the ICC after ten years of practice has developed a corpus of decisions on victim participation, convicted two individuals, and is beginning to develop its reparation regime. Nonetheless, rather than being responsive to victims' interests in terms of procedural justice that can assist determination of substantive justice, judges and other institutions at the ICC can be patronising by devising justice for victims as what they think is best. This approach is in most part based on good intentions to widen the benefits of justice beyond the limits of criminal proceedings. However, it undermines victims' agency, as well as the purpose of participation, if their input is not going to be considered in determining outcomes that affect them. Edwards suggests that victim participation can be categories into four types: decision-making; consultation; information; or expressive.[74] The experience so far of the ICC signifies victims' role as more informational or expressive, facilitating the work of the Court through provision of information and its expressive goals of punishment, rather than as a consultee whose interests are consider in decision-making. For victims simply being a provider of information or opinion is unlikely to satisfy their needs, and could perhaps undermine future engagement with the ICC, as seen in the aftermath of the *Lubanga* reparation decision.

While there are shortcomings of delivering justice for victims within the ICC, there remain problems in the lack of management of victims' expectations. For instance in the *Bemba* proceedings with the three victims who spoke directly to the Court, they believed they would receive funding from the Trust Fund or a new prosthetic limb, but the judges failed to explain that such remedies are contingent on the defendant being convicted.[75] The TFV has suggested that reparations at the ICC can be a form of transformative justice through empowering victims and an opportunity to overcome inequality and exclusion, in particular for sexual violence.[76] However, such goals are beyond capacity and mandate of the ICC.

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[73] Though the VLR did cite concerns that some victims may have been intimidated, which could be discouraging them from participating. Common Legal Representative for Victims' Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013, *Ruto and Sang* (ICC-01/09-01/11-896-Corr-Red), 5 September 2013, §12.

[74] I. Edwards, 'An Ambiguous Participation: The Crime Victim and Criminal Justice Decision-Making', *British Journal of Criminology* (2004) 44, 967-982.

[75] Testimonies of Victims A/0394/08, A/0511/08, and A/0542/08, *Bemba* (ICC-01/05-01/08-T-227-Red-ENG and ICC-01/05-01/08-T-228-Red-ENG), 25–26 June 2012.

[76] Observations on Reparations in Response to the Scheduling Order of 14 March 2012, *Lubanga* (ICC-01/04-01/06-2872), 25 April 2012, §72.

These expectations risk undermining the legitimacy of the Court, as it has no democratic mandate to tackle distributive justice concerns of social inequality, which is the responsibility of the state. In facts its this 'bloating' of expectations of the ICC which risk undermining it from investigating and prosecuting those most responsible for international crimes.[77] This transformative justice argument by the TFV signifies a wider misconception of the ICC as justice for all victims, instead of concentrating of delivering justice to those individuals before the Court. In its place state parties should be redressing international crimes.

The limits of victims' role in the ICC reflect an inescapable challenge with international criminal justice, in that it cannot deliver justice to all victims of international crimes. At its heart the Court remains a retributive institution. Judge Wyngaert has suggested that 'it may be too much to expect from the ICC to be a retributive (fighting impunity) and a restorative mechanism at the same time.'[78] Thus there is a tension between what the ICC can do for victims within its capacity and what is expected of the Court, echoing concerns of Veitch and others that law cannot capture the responsibility of international crimes. Judge Wyngaert is somewhat correct that the ICC cannot deliver justice to all victims; however, it does not mean resorting to restorative justice or dissociating justice for victims from ending impunity. Reliance on the ICC to deliver justice to victims signifies that expectations of the Court are misplaced, compelling the actors within it and the stakeholders outside it to envisage how the ICC can do more. Instead we should be discussing how to improve justice for those victims before the ICC and concentrating attention on what states should be doing to redress international crimes.

B. External Factors Affecting Justice for Victims

If victims are a key part of the Rome Statute and the ICC in tackling impunity, what role should they have for state implementation of complementarity? The external aspect of justice for victims recognises that given the structural limitations of the ICC, it cannot on its own end impunity for international crimes or deliver redress to all victims. Instead under the principle of complementarity, whereby state parties have primary responsibility for prosecuting and punishing perpetrators of international crimes, the ICC acts as a court of last resort. As recognised by the Court and human rights jurisprudence, to effectively end impunity it requires victim participation and provision of effective remedies, which are

[77] F. Mégret and M. G. Samson, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials', 11 *Journal of International Criminal Justice* (2013) 571-589, at 580.
[78] C. Van den Wyngaert, 'Victims before International Criminal Courts: Some views and concerns of an ICC Trial Judge', 44 *Case Western Reserve Journal of International Law* (2012) 475-496, at 492.

'necessary to safeguard their legitimate interests'.[79] It necessarily follows that states in complementing the ICC should adopt such provisions domestically. This victim-orientated approach to complementarity suggests justice for victims can be better achieved where states take the initiative to provide redress to victims, rather than being dependent on the ICC.[80]

The Rome Statute itself makes no reference to victims or their interests in Article 17 on admissibility. Complementarity is rooted not only in Article 17, but also the Rome Statute Preamble. The Preamble notes the suffering of victims, recalls the 'duty of every State to exercise its criminal jurisdiction over those responsible' for such crimes and reaffirms that state parties are determined to end impunity for international crimes so as to contribute to their prevention.[81] The 1969 Vienna Convention on the Law of Treaties stipulates that a preamble is a fundamental part of a treaty, which usually comprises 'a statement of the motives or objects of the parties in making the treaty ... is a useful guide and aid in interpreting the operative provisions'.[82] In light of this, the Rome Statute at its outset implicitly accepts that the object and purpose of the ICC is, and state parties are also obliged, to end impunity through the investigation and prosecution of international crimes so as to deliver justice to victims.[83] As such, victim-orientated complementarity has a negative and positive side to its implementation.

1. Negative Victim-Orientated Complementarity

The negative aspect would allow the Court to take into account whether states are willing and able to protect victims' rights in determining admissibility of a situation and case.[84] The Court has itself rhetorically stated that a state's inactivity would be contrary to the object and purpose of the Rome Statute 'to put an end to impunity' by allowing it to 'persist unchecked and thousands of victims would be denied justice'.[85] More substantive victim-orientated

[79] *Shanaghan v the United Kingdom*, App. no. 37715/97 (ECtHR, 4 May 2001) §92; *McKerr v the United Kingdom,* App. no. 28883/95 (ECtHR, 4 May 2001), §115; *Mapiripán Massacre v Colombia*, Merits, Reparations and Costs, Series C No. 134 (IACtHR, 15 September 2005), §219.

[80] This includes reparative complementarity discussed elsewhere, but also encompasses procedural and substantive justice measures for victims. See Joint Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the gap between international and national justice, 31 January 2013, at 23-24; and ICC Revised Victim Strategy (2012).

[81] Paragraphs 2, 4-6, Preamble, ICCSt.

[82] Article 31(2), Vienna Convention on the Law of Treaties, UNTS Vol. 1155, §331 (1969); J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions,* (Oxford University Press, 2008), at 237, citing *Case Concerning Rights of Nationals of the United States in Morocco (France v United States)*, ICJ Reports (1952) 176, 196; *The Asylum Case (Colombia v Peru)* ICJ Reports (1950) 266, at 282.

[83] See Kleffner ibid. at 251.

[84] See Moffett *supra* note 13, at 235-6.

[85] Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga* (ICC-01/04- 01/07-1497), 25 September 2009, §79.

arguments have been raised in admissibility proceedings, but have not been taken into account by the Court in its decision, as they either were prospective proposals or did not add much to what the Prosecutor had already presented. In the Uganda situation victim submissions mostly discussed proposed provisions in the Juba Peace Agreement on Accountability and Reconciliation. They also highlighted the lack of access to justice for victims, non-existent witness protection and the Ugandan government's lack of sincerity in remedying victims' suffering.[86] The Court dismissed all their submissions as inappropriate as it entailed assessing future provisions. However, the Chamber should have considered the procedural problems victims face in accessing justice in Ugandan criminal proceedings and difficulties in seeking substantive redress for such crimes.[87] In the Libyan admissibility challenge, the OPCV voiced victims' concerns that they do not have access to criminal proceedings, including participation, protection and reparations, nor do they trust the Libyan government to provide impartial proceedings.[88] The Libyan government dismissed such claims, but explained that domestic proceedings would provide an important 'expressive value' in seeing justice done locally facilitating victim 'access' and 'ownership'.[89] Yet this misses the point that victim participation is not about promoting local ownership, but ensuring their interests are considered in determining effective justice outcomes in tackling impunity.

The Court has established clear admissibility standards in determining whether a case is admissible under Article 17, in particular whether conduct under question is being investigated and prosecuted by domestic authorities and whether such proceedings are genuine.[90] In relation to conduct over legal characterisation, there is an argument for considering that domestication of international crimes better characterise the seriousness of victims' suffering. For instance in Uganda Thomas Kwoyelo, a former LRA commander, was charged with kidnap with intent to murder for using child soldiers, instead of the more appropriate international crime of enlisting or conscripting children and civilians to

[86] Amicus Curiae submitted pursuant to the Pre-Trial Chamber II "Decision on application for leave to submit observations under Rule 103" dated 5 November 2008, *Kony and others* (ICC-02/04-01/05-353), 18 November 2008; and Observations on behalf of victims pursuant to article 19 1 of the Rome Statute with 55 Public Annexes and 45 Redacted Annexes, *Kony and others,* ICC-02/04-01/05-349, 2 January 2009.
[87] Decision on the Admissibility of the Case under Article 19(1) of the Statute, *Kony and others*, ICC-02/04-01/05-377, 10 March 2009, §47-51.
[88] Observations on Behalf of Victims on the Government of Libya's Application Pursuant to Article 19 of the Rome Statute, *Al-Islam Gaddafi* (ICC-01/11-01/11-166-Red-Corr), 5 June 2012, §§52–54.
[89] Libya's Reply, *Al-Islam Gaddafi* (ICC-01/11-01/11-293-Red), 4 March 2013, §§57–64.
[90] Article 17(2). Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, *Al-Islam Gaddafi* (ICC-01/11-01/11-344-Red), Pre-Trial Chamber I, 31 May 2013, §66.

participate in hostilities.[91] States should be encouraged to incorporate the Rome Statute into their domestic law to better capture the gravity of crimes committed against victims. However, this may be more appropriate for the Assembly of State Parties to foster than the Court.

In terms of genuine proceedings the ICC is not a human rights court to examine a state's compliance with human rights fair trial standards.[92] It is apparent that domestic criminal trials of international crimes need witness protection programmes to facilitate the prosecution of perpetrators as primary sources of evidence and can be an assessment of ability.[93] However, such considerations are just a factor in the assessment of a state's ability to conducted genuine proceedings. Other victim provisions, such as participation, are also important in improving victim satisfaction, perceptions of legitimacy of criminal proceedings and the effectiveness of accountability mechanisms in tackling impunity.

In determining whether a state is unwilling to investigate a case the Court can considered proceedings are not being conducted independent or impartially, and are inconsistent with bring the person to justice in light of 'principles of due process recognized by international law'.[94] Victim participation could be a significant factor here as part of victims' right to remedy.[95] Human rights courts have found that victim participation can help to ensure their right to due process and transparency of proceedings, as they are independently motivated to see those responsible brought to justice. Moreover, the Court is bound to apply and interpret the Rome Statute in light of internationally recognised human rights.[96] Victims can also provide an important bottom-up perspective of the local reality of the government's willingness and ability to conduct investigations and prosecutions. Accordingly, victim protection and participation should be considered as part of admissibility decisions.

Admissibility is a narrow construction of how complementarity should operate. The Court is trying to minimise its exposure to investigate and prosecute international crimes

[91] *Thomas Kwoyelo v Uganda*, Constitutional Petition No. 036/11, 22 September 2011.
[92] *Informal Experts Report: The principle of complementarity in practice*, OTP (2003), §49; and S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, (Cambridge University Press, 2014), at 67-8.
[93] See Decision on the admissibility of the case against Abdullah Al-Senussi, *Al-Senussi* (ICC-01/11-01/11-466-Red), 11 October 2013, §283-301.
[94] Article 17(2)(c).
[95] Mégret and Samson *supra* note 77, at 574.
[96] Article 21(3).

where states are unwilling or unable. Thus admissibility is a high bar for cases to be brought before the Court, otherwise it would be flood-gated making it a court of first resort, rather than last. However it means that admissibility criteria of same conduct and genuine proceedings provide minimal guidelines of what states should be doing to complement the Court.[97] This interpretation leaves out due process concerns for victims. A more prescriptive approach is needed to guide states in guaranteeing victims' rights are an integral part of investigating and prosecuting international crimes.

Before moving on to examine what a more prescriptive approach would look like under positive victim-orientated complementarity, it is worth mentioning preliminary examinations by the OTP, which can also be a catalyst for state action.[98] States are generally keen to avoid losing their sovereignty in investigating and prosecuting crimes within their jurisdiction by their situation being investigated before the Court. Preliminary examinations can enable the OTP to signal to states that there is evidence to suggest they are not effectively investigating and prosecuting international crimes, and need to take action.[99]

This examination incentive is apparent in Guinea, which has begun investigations into the Conakry stadium massacre where over 150 civilians were killed and numerous more raped. Victims can participate in proceedings, and nearly 400 are already doing so. However progress remains slow, with only eight individuals so far charged, despite dozens of members of the security forces involved in the massacre.[100] In another preliminary examination on-going into the Colombia situation, the government has been proactive in developing victim-orientated transitional justice measures, such as victim participation and reparations.[101] The latest rounds of peace talks with FARC and the Colombian government have placed victims' rights high on the agenda as part of accountability, though it remains to be seen what form investigations and prosecutions will be implemented for international crimes.[102] Perhaps the monitoring of the Inter-American Commission and Court of Human Rights in the Colombian situation is a more important stimulus in ensuring the protection of victims' rights, than the ICC. Nonetheless, preliminary examinations by the OTP may be an effective way of encouraging victim-orientated complementarity agenda, one to which the OTP can develop

[97] Nouwen *supra* note 92, at 70.
[98] See OTP, *Report on Preliminary Examination Activities 2014*, December 2014.
[99] See OTP, *Policy Paper on Preliminary Examinations*, (2013).
[100] *Guinea: 5 Years On, No Justice for Massacre*, HRW, 27 September 2014.
[101] See I. Bueno and A. D. Rozas, 'Which Approach to Justice in Colombia under the Era of the ICC?' 13 *International Criminal Law Review* (2013) 211–247.
[102] OTP Report 2014 *supra* note 97, §113.

guidelines for state parties in tackling impunity. It is worth turning to now explore what states are, can and should be doing in terms of positive victim-orientated complementarity.

2. Positive Victim-Orientated Complementarity

The positive aspect of victim-orientated complementarity involves states developing victim provisions to enable victims of international crimes to participate in criminal proceedings, avail of protection measures, and to claim reparations. States would have discretion in how to implement provisions for victims within their own legal systems and would not have to follow the scheme under the Rome Statute. This would take into account that in the aftermath of mass violence or conflict, a country's ability to try and prosecute every perpetrator, or provide redress to every victim, is limited by sufficient evidence and resources.[103]

Addressing international crimes can be resource intensive and politically contentious. Lafontaine highlights the challenges in Canada where even its modestly funded War Crimes Program has favoured extradition over trials, given that criminal proceedings cost over $4 million each.[104] Priority should be paid to ending impunity for such crimes by acknowledging victims' suffering, trying to prosecute those most responsible, disclosing the truth, and providing reparations to those who are harmed by international crimes. States are obliged to do so under international law. Victims are key stakeholders, and justice must be meaningful to them to end impunity for international crimes. Ideally justice has to be rooted and driven by the state, as 'any lasting solution must come from the nation itself.'[105] This realist perspective may require looking beyond criminal trials as the sole way to achieve accountability.

The current practice of victim-orientated complementarity in situations before the ICC does not paint an encouraging picture. Although many states, such as Uganda and Kenya, have created specialised chambers in their high courts to prosecute and punish perpetrators of international crimes, there has yet to be any convictions.[106] Moreover, there remains very

[103] See L. Mallinder and K. McEvoy, 'Rethinking Amnesties: Atrocity, Accountability and Impunity in Postconflict Societies', 6 *Contemporary Social Science* (2011) 107–128.
[104] F. Lafontaine, 'The Prosecute or Expel Dilemma in Far-Away Lands: Alternative Universal Justice for Victims of International Crimes', in J. Wemmers (ed.), *Reparation for Victims of Crimes against Humanity. The healing role of reparation*, (Routledge, 2014) 92-110.
[105] *Question of the impunity of perpetrators of human rights violations (civil and political), Revised final report prepared by Mr Joinet Pursuant to Sub-Commission Decision 1996/119*, E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, §28.
[106] The Ugandan case against Thomas Kwoyelo fell apart after the Constitutional Court dismissed the case, owing to the defendant having received an amnesty from the government. *Thomas Kwoyelo v Uganda*, Constitutional Petition No. 036/11, 22 September 2011.

little in the way for victims to participate in proceedings or to claim reparations, particularly for state violations.[107] There are also serious concerns for protection of victims and witnesses in domestic criminal proceedings in Kenya, where individuals have been intimidated, kidnapped and killed.[108]

More positive signs can be seen in Côte d'Ivoire, where a Special Investigative Cell, National Commission of Inquiry and a Dialogue, Truth and Reconciliation Commission have all been established to address the past and incorporate victim participation and provisions to claim reparations.[109] Similarly there have been innovations in countries such as the DRC, where mobile military courts have held the state and militias concurrently responsible for reparations and convicted others for sexual violence.[110] Even Kenya had a progressive Truth, Justice and Reconciliation Commission, which made extensive recommendations for accountability and reparations to victims, but the government has not yet implemented them.[111]

Challenges remain, beyond institution building, in developing domestic political will in investigating and prosecuting international crimes. This is particularly difficult where those responsible remain in power, undermining the impartiality of such courts and their ability to protect and provide for victims. In Kenya protests by the government to remove the ICC indictments of President Kenyatta and Vice-President Ruto at the African Union and UN Security Council, have heightened animosity with political interference in investigations and intimidation of witnesses and victims. This has prevented effective accountability for the post-election violence and seen the collapse of the case against President Kenyatta at the ICC.[112] The ICC itself has been politicised at the international and regional level.[113] President

[107] *The Accountability Gap on Sexual Violence in Kenya: Reforms and Initiatives Since the Post-Election Crisis,* ICTJ April 2014; and *Crying for Justice: Victims' Perspectives on Justice for the Post-Election Violence in Kenya,* Amnesty International (2014), AFR 32/001/2014.

[108] Claims of witnesses in Kenya ICC trial 'disappearing', *BBC News*, 8 February 2013; Victims' application relating to possible disclosure of confidential information, *Kenyatta* (ICC-01/09-02/11-789), 13 August 2013, §16; and Further Threats to ICC's Kenya Witnesses, *IWPR*, 28 February 2013.

[109] See *Ivory Coast: The Fight against Impunity at a Crossroad*, FIDH, October 2013.

[110] See *Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo*, Avocats Sans Frontières, 2009.

[111] See A. Ngari, *Reparative Justice in Kenya: Building Blocks for a Victim-Centered Framework*, The Institute for Justice and Reconciliation, October 2013.

[112] See Common Legal Representative for Victims' Observations in Relation to the 'Joint Defence Application for Change of Place Where the Court Shall Sit for Trial', *Ruto and Sang* (ICC-01/09-01/11-620), 25 February 2013; and Public Redacted Version of 'Victims' response to Prosecution notice regarding the provisional trial date ', with Public Annex, *Kenyatta* (ICC-01/09-02/11-946-Red), 11 September 2014; and Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, *Kenyatta* (ICC-01/09-02/11-983), 5 December 2014

[113] S. D. Mueller, 'Kenya and the International Criminal Court (ICC): politics, the election and the law', 8 *Journal of Eastern African Studies*, (2014) 25-42.

Kenyatta and Vice-President Ruto have portrayed themselves as 'victims' of neo-colonial interference by the ICC as 'a way of solidifying ethnic polarization'.[114] Such efforts hamper political will in tackling international crimes in domestic courts. Likewise in Côte d'Ivoire, despite the creation of accountability mechanisms, criminal investigations mostly focus on the crimes of the previous Gbagbo regime, with the former President's wife Simone Gbagbo and 82 other supporters currently on trial.[115] Similarly in Darfur investigations into international crimes committed by state and non-state armed groups have been tainted by political interference.[116] As such, the creation of institutions which on their face appear to complement the work of the ICC, represent more 'perverse' forms of complementarity which reinforce, rather than end, impunity.[117]

(a) What should states do?

There are three areas of concern to make complementarity victim-orientated and therefore more effective in tackling impunity: legislation; procedural rules; and substantive outcomes. With the first of these, legal characterisation of international crimes is important to reflect the gravity and suffering of victims. While the ICC in admissibility proceedings is concerned with conduct, rather than legal characterisation of crimes under domestic legislation, states should be proactive in implementing crimes under the Rome Statute into its domestic legal framework. Such domestic ratification can improve accountability. For instance the Ugandan ICC Act 2010 for the first times criminalises torture in its domestic legal regime, enabling victims to hold state and non-state actors responsible.[118] Moreover domestic implementation of the Rome Statute at the earliest possible stage can avoid problems in reconciling non-retroactivity in dualist states with Article 15(2) of the International Covenant on Civil and Political Rights.[119]

[114] Ibid. at 35.
[115] *Turning Rhetoric into Reality: Accountability for Serious International Crimes in Côte d'Ivoire*, Human Rights Watch, (2013), at 28; and *The Case of Simone Gbagbo - a Test for Domestic Jurisdiction*, Institute for Security Studies, 22 October 2014.
[116] See *19th Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005),* 23 June 2014.
[117] C.K. Hall, 'Positive Complementarity in Action', in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011) 1014–1051, at 1034.
[118] See *Torture in Uganda*, Redress (2007). Torture is prohibited under Article 24 of the Ugandan Constitution, but this can only give rise to a claim before the Ugandan Human Rights Commission, rather than a criminal prosecution.
[119] In that the principle of non-retroactivity is inapplicable for crimes recognized by the international community at the time it was committed.

In terms of procedural rules, a victim-orientated approach to complementarity would require states to provide for victim participation, protection, and access to information and to claim reparations. In addition, states should develop prosecutorial and remedial policies for vulnerable victims, such as children and those subjected to sexual and gender-based violence. Such provisions have been included in a number countries implementing domestic legislation of the Rome Statute. The Irish ICC Act 2006 includes witness and victim protection under Article 68(1) and (5) of the Rome Statute, and to take any measures in international criminal proceedings in relation to Article 68(3) on victim participation.[120] The UK ICC Act 2001 is more restrictive in its protection of witnesses and victims to include now out-dated domestic protection provisions.[121] The Ugandan and Australian ICC Acts are more concerned in their obligations to fulfil cooperation requests with the ICC, such as preserving witness testimony, than ensuring procedural protections in domestic trials.[122]

A more progressive approach is noted in Uruguay, which has introduced extensive victim provisions including being able to participate in all proceedings, present evidence, claim reparations, as well as protection measures, in particular specific protections for children and victims of sexual violence.[123] Canada has established a 'Crimes against Humanity Fund' to support the ICC Trust Fund for Victims as well as any victims and their families of international crimes prosecuted within Canadian jurisdiction.[124] Some good practice can be discerned from situations before the ICC, such as witness protection measures in the DRC of anonymity and confidentiality measures through the use of black head-to-toe robes and a microphone in an adjoining room. Thus creative ways can be engineered to overcome issues of cost to protect victims and witnesses' dignity and personal security. Nevertheless, there remains a patchwork of implementation of victims' rights under the Rome Statute into domestic legislation.

A more difficult task is incorporating victim participation into domestic proceedings. Victims should have access to all judicial proceedings and mechanisms that affect their

[120] The 'court concerned shall, where appropriate, take the measures specified in paragraphs 1 to 3 and 5 of that Article [68].' Section 14, International Criminal Court Act 2006.
[121] Current protection measures, including anonymity and confidentiality provisions, have been implemented through the Coroners and Justice Act 2009, which were absent or lacking in previous provisions referred to the ICC Act 2001.
[122] Article 58, Ugandan International Criminal Court Act 2010; and Article 80, Australian International Criminal Court Act 2002.
[123] Articles 13 and 14, Uruguayan Law on Cooperation with the ICC 2006. See Lafontaine *supra* note 104, at 105-6.
[124] Section 30, Crimes Against Humanity and War Crimes Act 2000.

interests. Victims' participation and interests should not be relegated to just compensation, as it insinuates that they are only motivated by money or profit, not justice. This assumption also suggests that justice for victims, and its antonym of impunity, can be bought off as 'blood money' without accountability. While many states allow victims to make a statement in sentencing or appear as a witness, such participation only serves expressive or informative engagement. It does not encourage victim ownership or freedom to present their interests in the justice process to redress their suffering. Civil and Islamic law countries already allow victim participation in criminal proceedings, such as *partie civile.* However, such individualised participation can be problematic for international crimes, and class actions may be more appropriate, requiring amendment of domestic rules.[125] Victim participation should include provision for them to present their interests and evidence in relevant proceedings, access to legal representation, and being able to review prosecutors' decisions not to prosecute. This participation will complement states obligations under Rome Statute to investigate and prosecute where there is sufficient evidence, by enabling public transparency of such proceedings.

In terms of substantive justice, investigations and prosecutions are important ways of establishing individual responsibility for international crimes. Moreover, criminal trials have well developed due process standards and evidential rules which aim to ensure a fair outcome based on verifiable evidence. Yet, international crimes are committed by organised, collective groups of individuals motivated by ideology to perpetrate crimes on a mass scale. In the aftermath of collective violence evidence can be destroyed and witnesses may be dead, criminal prosecutions are likely to hold only a few individuals responsible for specific crimes in particular areas. Criminal trials create asymmetrical accountability that only those most responsible can be held responsible where there is sufficient evidence, resources and political will. For victims this can be dissatisfying, as they are unlikely to receive tangible remedies or accountability for their suffering. In the nine situations before the ICC, none have yet implemented a comprehensive policy or mechanism to redress victims' suffering.[126]

Alternative measures of accountability, such as truth commissions, reparations mechanisms and traditional justice may be important to complement, not substitute, criminal justice so as to tackle the impunity gap and deliver justice to victims. Colombia has implemented such measures of reduced sentences for convicted paramilitaries who contribute

[125] Moffett *supra* note 13, at 246.
[126] See ibid., Chapter 6.

to truth and reparation processes.[127] The ICC Rules of Procedure and Evidence envisions that sentences can be mitigated on balance for compensation paid to victims.[128] Thus such alternative measures can be used to achieve some form of justice, without being contrary to the ICC. Importantly victims should be consulted and informed of alternative justice mechanisms to ensure it addresses their interests and remedies their suffering. Overall, complementarity and realising justice for victims of international crimes are better achieved where there is clear political will, criminal trials are accompanied by other transitional justice measures and are supported by international actors and civil society, such as the mobile courts in the DRC.

There remains a patchwork of provisions amongst states in implementing the Rome Statute and tackling international crimes. Some states have provided for victims' rights in procedural terms, but there has been little progress in realising these rights in proceedings or as substantive outcomes. Accordingly guidance on best practices of complementarity should be developed to guide states in tackling impunity. Such victim-orientated guidelines would include states to adopted domestic legislation which not only facilitates cooperation with the ICC, but also provides for domestic international criminal proceedings, including victim provisions, as well as wider accountability mechanisms to tackle responsibility beyond the narrow confines of criminal trials and individuals.

International criminal justice arose to prosecute and punish individuals that committed crimes of an international concern, where states themselves were unable in terms of capacity to do so or were politically unwilling. States cannot be relied on themselves to do justice effectively and impartially without international oversight. If complementarity is the way forward for international criminal justice, there is a need for monitoring and enforcement of state parties' compliance with international norms, as well as support in terms of domestic capacity building and diplomacy to promote justice for victims and to end impunity.

(b) Political engagement and oversight by the Assembly of State Parties

This may be the role for the Assembly of State Parties (ASP), which is set up to provide oversight of the work of the ICC, but can also consider questions of state non-cooperation.[129] The ASP could take the lead in monitoring compliance of states in developing effective

[127] Justice and Peace Law (975) 2005

[128] Rule 145(2)(a)(ii), ICC RPE. See also Informal Experts Report, *supra* note 93, at 23-24, who suggest considering victims' participation, interests and procedural sense of justice for other accountability measures.

[129] Section 64, International Criminal Court Act 2001. Under Article 87(5) and (5), Article 112(2)(f) ICCSt.

complementarity mechanisms with the ICC, including provisions for victim participation, protection and reparation, as part of effectively tackling impunity. Victim provisions are likely to be new to many states, requiring knowledge exchange between the ICC, civil society and states on best practices, as well as training for practitioners and legislators. The ASP should develop guidelines on what positive complementarity should look like with possible models or draft legislation, which include victim participation, protection and information, as well as substantive mechanisms for justice, truth and reparations.

The Kampala Review Conference of the Rome Statute in 2010 did 'encourage' governments, communities, and civil organisations at the national and local level to actively play a role in sensitising victims on their rights, to assist them in their social reintegration and participation in consultations 'to combat a culture of impunity for these crimes'.[130] However, in subsequent ASP sessions states have distanced themselves from adopting specific domestic provisions,

> certain States have expressed the need to be cautious with regard to the role that the Assembly can or should play vis- à-vis encouraging States to adopt victims' participation and reparation strategies at a domestic level; others have expressed concerns with regard to intermingling the notion of complementarity which has been the subject of judicial decisions, with the unique system of victims' participation under the Rome Statute.[131]

More recently the ASP has in undemanding terms called upon state parties, 'where crimes under the Court's jurisdiction have been committed, to adopt and implement victim-related provisions, as appropriate…' in light of the soft law guidelines 'to act in solidarity with victims'.[132] The ASP should provide more specific guidelines as to what positive victim-orientated complementarity should look like to steer states in developing effective domestic mechanisms.

The ASP resolutions on complementarity lack the bite to ensure enforcement of such norms. The absence of an enforcement mechanism is apparent in the *Kenyatta* case before the ICC where non-cooperation by the Kenyan government to deliver evidence to the Court has

[130] Resolution on the Impact of the Rome Statute System on Victims and Affected Communities, RC/Res.2, 2010, §4.
[131] Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims and Reparations, ASP, ICC-ASP/11/32, 2012, §33.
[132] 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Victims and affected communities, reparations and Trust Fund for Victims, ASP Resolution, ICC-ASP/12/Res.5, 27 November 2013, §7; reiterated in Resolution ICC-ASP/13/Res.4, 17 December 2014, §7.

brought the trial to a halt, with little pressure from state parties or the ASP to ensure Kenya's cooperation or to develop domestic accountability mechanisms.[133] The ASP currently has a procedure for non-cooperation; however, it is a soft touch, entailing public statements with political and diplomatic engagement.[134] A more vigorous approach would be for the ASP to create subsidiary bodies to provide independent oversight to monitor and evaluate the work of the Court, under its mandate to consider non-cooperation.[135] Such a body could be created to monitor and evaluate complementarity of state parties in cooperating with the ICC in tackling impunity for international crimes and delivering justice to victims. The ASP should develop such a robust cooperation mechanism and provide guidelines to states in how to implement effective complementarity mechanisms in tackling international crimes.

An alternative avenue may be through the Universal Periodic Review at the UN Human Rights Council. State Parties have already begun to recommend other states as part of their review to domestically implement the Rome Statute or cooperate with the ICC, with 95 recommendation made in 19th session (28 April - 9 May 2014). The Universal Period Review in 2010 of Kenya included recommendation to implement a domestic tribunal for international crimes and to cooperate with the ICC.[136] The UPR mechanism also seems to be an appropriate avenue to call upon states to meet their human rights obligations to provide remedies for victims of international crimes under human rights conventions and the Rome Statute. Regional pressure may be a further opportunity to bolster state willingness to address international crimes.

(c). Regional pressure

Regional systems can reflect common concerns and interests, while at the same time their political and geographic proximity can encourage compliance with international norms.[137] The Organisation of American States (OAS), the European Union, Council of Europe and the African Union have all passed resolutions on the ICC. Some of these have been victim-orientated. The OAS 2012 resolution on the Promotion of the ICC includes provisions reminding states to adopt national measures to include victim protection and reparations.[138] The Council of Europe Parliamentary Assembly 2009 resolution calls upon states to

[133] Prosecution notice regarding the provisional trial date, *Kenyatta,* (ICC-01/09-02/11-944), 5 September 2014.
[134] Assembly procedures relating to non-cooperation (ICC-ASP/10/Res.5, annex).
[135] Articles 121(2)(f) and 121(4), ICCSt.
[136] Report of the Working Group on the Universal Periodic Review: Kenya, A/HRC/15/8, 17 June 2010.
[137] See D. Shelton, 'The Promise of Regional Human Right Systems', in B. Weston and S. Marks (eds.), *The Future of Human Rights* (Transnational Press, 1999), 351-398.
[138] §2, AG/RES. 2728 (XLII-O/12).

'incorporate into their legal orders relevant standards on victims' rights', bearing in mind higher standards in domestic law.[139]

The African Union has gone further with the creation of an International Criminal Law Section (ICLS) to prosecute international crimes in the African Court of Justice and Human Rights. The Court includes a number of victim provisions, including protection, participation, a Trust Fund and reparations. However, it comes with the large caveat that heads of state and senior members of government are immune.[140] Moreover, it includes numerous other crimes, such as corruption and piracy, risking flood-gating the court. The ICLS will only have jurisdiction once 15 states ratify it, meaning it will not have retroactive jurisdiction.[141] While it may offer an additional avenue for victims of such crimes, it is currently limited to the 24 African states that have accepted the court's contentious jurisdiction, which will then have to sign this additional protocol. This is smaller jurisdiction than the 34 African state parties to the Rome Statute and two UN Security Council referrals to the ICC.

Although the ICLS does not affect the jurisdiction of the ICC, it represents a rollback by potentially denying justice for certain victims and promoting impunity for certain perpetrators, particularly where leaders remain in office for life.[142] It is likely that the ICLS will target non-state actors or members of the former regime, leaving current heads of state for the ICC. Perhaps a more appropriate role for the African Court could be facilitating victims to sue states for non-cooperation under human rights treaties and the Rome Statute, similar to International Court of Justice discussed below.[143] Nonetheless regional pressure and resolutions can contribute to the promotion of a victims' rights agenda within domestic complementarity mechanisms, and perhaps within regional courts as well.

(d) Proactive states – horizontal complementarity

If states are unwilling or unable to investigate or prosecute international crimes within their jurisdiction, there is growing practice of other states to do so. This application of universal jurisdiction as horizontal complementarity is being followed in Germany, Belgium and South

[139] §6.4, Co-operation with the International Criminal Court (ICC) and its universality, Resolution 1644 (2009).
[140] Article 46A *bis,* Draft Protocol on Amendments to the Protocol on the African Court of Justice and Human Rights, STC/Legal/Min/7(I) Rev. 1, May 2014.
[141] M. du Plessis, *Implications of the AU decision to give the African Court jurisdiction over international crimes,* Institute for Security Studies, (2012).
[142] One way to get round this could be sealed arrest warrant to be unsealed when such perpetrators resign from office.
[143] Article 28(h), Protocol on the Statute of the African Court of Justice and Human Rights.

Africa, to name a few, where perpetrators were apprehended when entering into the territory of a state party of the Rome Statute.[144] In a recent decision by the South African Constitutional Court on torture committed in neighbouring Zimbabwe, the Court found that South African police were obliged to investigate such crimes, even through Zimbabwe was not a state party to the Rome Statute. The basis of their decision was on the grounds of universal jurisdiction that to not investigate such crimes would allow impunity to persist. However, such exercise of jurisdiction is not absolute, but is limited by the principles of subsidiarity and complementarity, to only be exercised where a state is unwilling or unable to investigate and prosecute, and where this is geographical proximity to the crime and perpetrators are likely to enter the country.[145]

Although universal jurisdiction is to be welcomed, there are challenges in ensuring its effectiveness. The Rome Statute does not provide for reciprocal horizontal cooperation obligation amongst states, only a vertical dimension between the ICC and state parties. This means that requests for extradition and witness protection will be difficult, if not impossible. Efforts should be made to draft mutual cooperation agreements between state parties of the Rome Statute to facilitate such collaboration.[146] In addition, state parties will require additional resources to investigate and prosecute such crimes, as Lafontaine points out this can be a costly exercise, which requires political will.[147] Without access to the country where these crimes originate, it may be difficult to find sufficient evidence to have a reasonable prospect of securing a conviction. There is likely to be political and diplomatic fallout from prosecuting perpetrators from other jurisdictions. For victims there are logistical challenges in ensuring they are informed, can participate in any proceedings and receive reparations.[148] Given the limits of criminal trials, Lafontaine argues it may be worth state parties to also consider alternative justice mechanisms for horizontal complementarity, such as truth

[144] Kleffner *supra* note 82, at 284. Such as the FDLR trial in Germany against Ignace Murwanashyaka and Straton Musoni for war crimes and crimes against humanity committed in the DRC; and Belgian trial of Martina Johnson for war crimes committed in Liberia.
[145] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30. Based on s.5(3), Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
[146] See D. Tladi, *Complementarity and cooperation in international criminal justice: Assessing initiatives to fill the impunity gap*, Institute for Security Studies, November 2014.
[147] Lafontaine *supra* note 104.
[148] If it is in a neighbouring country there are likely to be a large refugee diaspora including victims that could access such mechanisms.

recovery process and reparations to victims, through seized assets of perpetrators or mediated processes, to overcome some of these problems.[149]

If states do not have 'proximity' to bring cases against perpetrators in other jurisdictions, but have victims living within their own jurisdiction, they may seek redress at the International Court of Justice for another state party's breach of their obligations under the Rome Statute.[150] The case of former Chadian dictator Hissène Habré and the commencement of investigation and proceedings in Senegal, represent the responsibility of states to fulfil their obligations under international law to tackle impunity for international crimes.[151] This enforcement model signifies an important caveat of the ICC: states are responsible under international law for investigating and prosecuting international crimes.

In all, there are a number of opportunities for justice for victims of international crimes to be achieved beyond the ICC. Really it boils down to states' responsibility under the Rome Statute and other international obligations to investigate, prosecute and remedy such atrocities. States should take the opportunity to address such crimes, with oversight and guidelines by the ASP and regional bodies on best practices, including victim provisions. Where states are unwilling or unable to investigate or prosecute international crimes, recourse to universal jurisdiction, or regional or international courts can be a means to enforce states' compliance under international law. Impunity for international crimes aggravates victims' suffering and corrodes the legitimacy of international institutions' ability to do justice for such atrocities. The best antidote to such situations is for states to fulfil their responsibility under international law to investigate, prosecute and remedy such crimes. A victim-orientated agenda is imperative in the Rome Statute's purpose of tackling impunity for international crimes.

4. Conclusion

The ICC is a retributive institution concerned with prosecuting and punishing those most responsible for international crimes. At its minimum holding those individuals most responsible for international crimes can offer some form of justice to victims. As Antonio Cassese stated over twenty years ago victims need 'public disclosure of inhuman acts' and

[149] Lafontaine *supra* note 104, at 102-3.
[150] On the basis of *erga omnes partes.* Article 28, Articles on State Responsibility. Article 36, Statute of the International Court of Justice, 18 April 1946. See Moffett *supra* note 13, at 149 and 188.
[151] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ Reports (2012) 422, 20 July 2012.

punishment of perpetrators, which can alleviate their suffering and anguish.[152] The ICC has expanded this understanding of justice to include victim participation, protection measures, assistance and reparations. A fuller account of justice for victims proposed in this article draws from the experience of human rights and victimology to provide a picture of how justice can be responsive to victims' needs and interests, and balanced with other interests by justice mechanisms.

The Court and state parties can do more to achieve more meaningful justice for victims. Within the Court victim participation needs to be harmonised, where there is conflict with the rights of the defendant, the prosecution and victims, the judges as professional objective arbiters can balance competing interests in determining justice. In addition, the ICC should ensure that victim participation is more meaningful by more carefully considering their interests as consultees in the decision making process in determining appropriate outcomes. It does not mean victims are sovereign or their rights absolute, but their interests should be given sufficient weight in decisions that affect them. In substantive terms, the ICC should concentrate on doing justice to those victims before it, rather than being concerned with those outside of the Court.

In terms of victim-orientated complementarity it remains a colossal task, and one that will take years to develop. There is incipient state practice to this effect, albeit in a haphazard fashion with Western governments funding the Ugandan International Crimes Division, and NGOs, such as Avocats Sans Frontier and the International Bar Association, supporting the mobile courts in the DRC. International Crimes Divisions are however window-dressing, the appearance of formal justice, but lack the political will or resources to tackle impunity. By not regulating and monitoring compliance with the Rome Statute system the alternative is that states will collude to define justice for victims on their own terms. Victim-orientated complementarity is about removing the burden from victims of seeking justice, without silencing them, by facilitating their access and participation in accountability mechanisms. Importantly victim-orientated complementarity is imperative in tackling the façade of complementarity, by ensuring state parties are effectively tackling impunity domestically.

By itself the Court cannot prosecute every perpetrator of international crimes, nor deliver justice to every victim. As Cassese famously stated, international criminal justice is 'a

[152] A/49/342, S/1994/1007 (1994), §§50-51.

giant without arms and legs' dependent on states to fulfil its functions.[153] So too is the ICC when it comes to achieving justice for victims, it is reliant on state parties to complement its work and deliver justice locally. There is also a need to manage expectations as to what the ICC can and cannot do, making the explicit link to the responsibility of states to develop their own justice mechanisms to offer effective remedies to victims of international crimes. The ASP and regional organisations may be able to play an important oversight and enforcement role to encourage state parties' development of victim-orientated justice mechanisms. Perhaps it may require not invoking justice for victims and the ICC as the battle cry against impunity, without qualifying the Court's application to certain victims and the role of states to complement it through delivering justice locally. That said the value of the ICC is that justice for victims is its '*raison d'être',* and can help to foster a victim-orientated agenda in domestic processes. Justice for victims of international crimes is a worthy goal, but we need to concentrate the discussion on how we can make it meaningful in reality in the Hague and on the ground.

[153] A. Cassese, 'On the Current Trend towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998) 2–17, at 13.