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PART III

THE MECHANISMS OF TRANSITIONAL JUSTICE

15. The International Criminal Court: In the interests of transitional justice?

James Gallen

INTRODUCTION

The relationship of the International Criminal Court (ICC) to transitional justice remains controversial and contested. The Court has the potential not only to play a valuable role in transitional justice but also to compete with goals pursued in a broader transitional justice strategy. This chapter will first examine the claims of how prosecutions contribute to the pursuit of accountability under different conceptions of transitional justice. Second, the chapter will examine the Rome Statute of the ICC and the different evaluative frameworks that can be used to assess its function. Third, the chapter will review several aspects of the existing practice of the ICC, including the role of the Office of the Prosecutor (OTP), the Court's response to victims and its use of reparations. In particular, the chapter will examine the hostility to the Court shown by political elites in Kenya and Sudan, attempts to arrest Omar Al-Bashir and the associated claims that the OTP has unfairly targeted African states. The chapter will also argue that, while the Rome Statute contains innovative provisions for victim participation and reparations to victims, realizing the potential of these provisions remains contingent on efficient and responsive management by the Court of the needs of victims, and depends on alignment and political and financial support from the international community. A final section concludes by noting that, while the ICC is a critical part of the international legal architecture for transitional justice, its effective pursuit of values of international criminal law and transitional justice will be achieved not only through the development of its jurisprudence, but also through careful negotiation of and coordination with international and domestic politics.

CONCEPTUALIZING THE RELATIONSHIP BETWEEN TRANSITIONAL JUSTICE AND PROSECUTIONS

Transitional justice emerged through the coordination and collaboration of activists and scholars in the emergence from authoritarian dictatorships to democratic rule in Latin America, Eastern Europe and parts of sub-Saharan Africa and Asia.¹ The United Nations defines transitional justice as comprising:

¹ Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 *Human Rights Quarterly* 321.

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the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.²

Transitional justice thus typically pursues goals including truth, accountability, reparations and institutional reform. The goal of accountability was historically pursued through criminal prosecutions alone, as the primary means for responding to mass atrocity,³ and is reflected in a customary international law obligation on states to prosecute international crimes, especially genocide, war crimes or crimes against humanity.⁴ However, there is an increasing recognition that international criminal justice alone is an insufficient response to a legacy of gross violations of human rights. Where international crimes take place with thousands of perpetrators, and potentially hundreds of thousands of victims, it is impossible and undesirable to prosecute all perpetrators.⁵ Comprehensive prosecutions are also impossible because of scarce financial and human resources, limited political capacity and will, and the retention of political or military power by predecessor regimes.⁶ Aukerman concludes that traditional criminal law goals such as vengeance, deterrence and rehabilitation, 'none can blindly be transposed from the domestic context'.⁷ Thus several alternative goals for criminal prosecutions claim to contribute to transitional justice. Criminal prosecutions provide recognition to victims as rights holders,⁸ and provide an opportunity for the legal system to establish its trustworthiness.⁹ Where prosecutions are pursued in systems that respect due process, guarantees strengthen the rule of law, in particular, principles of equality and the supremacy of law.¹⁰ Finally, prosecutions can also

² UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies' (United Nations Security Council 2004) S/2004/616.

³ Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (CUP 2004) 1.

⁴ Kai Ambos, 'The Legal Framework of Transitional Justice' in K Ambos, J Large and M Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development* (Springer 2009) 19.

⁵ William Schabas, 'The Rwanda Case: Sometimes it's Impossible' in MC Bassiouni (ed.), *Post Conflict Justice* (Transnational 2002) 499.

⁶ Pablo de Greiff, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence', A/HRC/27/56, paras 18–26.

⁷ Miriam Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 39 *Harvard Human Rights Journal* 39, 45.

⁸ de Greiff (n 6) para 22.

⁹ Pablo de Greiff, 'Truth-telling and the Rule of Law,' in Tristan Anne Borer (ed.), *Telling the Truths: Truth Telling and Peace Building in Post-conflict Societies* (University of Notre Dame Press 2006) 181.

¹⁰ Pdraig McAuliffe 'The International Rule of Law as Trumps: Do Human Rights Prosecution Responsibilities Impair Domestic Rule of Law Reconstruction?' in Matt Saul and James Sweeney (eds), *Post-conflict Reconstruction and International Law*. (Routledge 2015) 141.

develop transferable skills and build domestic judicial capacity,¹¹ including the need for sequenced prosecution strategies to address these complex offences.¹²

Arising from the need for a distinctive response to mass atrocity, competing conceptions of transitional justice have emerged. For Teitel, transitional justice is a particular socially constructed form of justice, necessitated by the existence of radical social violence and distinct because institutions struggle between simultaneous adherence to established convention and radical transformation.¹³ On this account, transitional justice necessarily involves a trade-off between competing values of accountability, peace and reconciliation.¹⁴ In contrast, de Greiff contends that transitional justice concerns the *application* of justice, 'in the ... fundamental sense of coming to an understanding of what it is reasonable to expect the principles in question to imply under specific circumstances'.¹⁵ His approach can be preferred as it emphasizes that the goals of transitional justice, such as truth, criminal accountability, reparation or institutional reform, are inter-dependent and 'more likely to be interpreted as *justice* initiatives if they help to ground a reasonable perception that their coordinated implementation is a multi-pronged effort to restore or establish anew the force of fundamental norms'.¹⁶ Across a variety of these and other theoretical approaches, transitional justice has also prioritized the involvement and views of victims and survivors of international crimes in designing and implementing forms of accountability and redress.¹⁷

In contrast, a critical perspective on transitional justice suggests that the field can ignore the impact of structural violence and gender inequality on political conflict, violence and injustice.¹⁸ Koskenniemi argues that international criminal law oscillates between the wish to punish those individually responsible for international crimes and the danger of becoming a show trial, where the accused challenges the version of truth proposed by the prosecutor and the broader legitimacy of international criminal justice.¹⁹ Criminal trials in pursuit of individual accountability for international crimes thus play a key, but contested, role in transitional justice, with a need to either trade off their role against its other goals, or to conceive their role as operating as part of a larger attempt to apply a coherent conception of justice and remain subject to critical inquiry.

¹¹ de Greiff (n 6) para 23.

¹² *Ibid.* paras 33–98.

¹³ Ruti Teitel, *Transitional Justice* (OUP 2000) 19, 215.

¹⁴ *Ibid.* 54.

¹⁵ Pablo de Greiff, 'Theorizing Transitional Justice' in Melissa Williams, Rosemary Nagy and Jon Elster (eds), *Transitional Justice: Nomos LI* (New York University Press 2012) at 64.

¹⁶ Pablo de Greiff, 'A Normative Conception of Transitional Justice' (2010) 50(3) *Politorbis* 19, 20.

¹⁷ Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice Agency and Blame' (2013) 22(4) *Social & Legal Studies* 489.

¹⁸ Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29(2) *Third World Quarterly* 275, 287; Nicola Palmer, Phil Clark and Danielle Granville (eds), *Critical Perspectives in Transitional Justice* (Intersentia 2012).

¹⁹ Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1.

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It is with these components in mind that we can use transitional justice both substantively and as a framework for evaluation²⁰ in assessing its relationship with the ICC.

CONCEPTUALIZING THE RELATIONSHIP BETWEEN TRANSITIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT

The Rome Statute and the Challenges of Complementarity

War criminals have been prosecuted since antiquity.²¹ Historically the prosecution of war criminals was generally restricted to the vanquished and through prosecutions in national justice systems,²² although ineffective attempts to prosecute through international tribunals followed the end of the First World War in Leipzig and Sevres.²³ In contrast, the support of Allied powers after the Second World War led to the establishment of the International Military Tribunal in 1945.²⁴ The creation of the Tribunal was greatly enabled by the unconditional German surrender. Across the world, the Allies also established the International Military Tribunal for the Far East.²⁵ The emergence of the Cold War posture between the United States and Soviet Union ensured that the potential of the international community to pursue international criminal justice remained largely unfulfilled until new opportunities in the 1990s.

In 1993 and 1994 two ad hoc international criminal tribunals were established to prosecute genocide, war crimes and crimes against humanity in the former Yugoslavia and Rwanda.²⁶ Both bodies have generated extensive and important jurisprudence in the burgeoning body of international criminal law, but have been criticized for a failure to focus attention on the attitudes and behaviours of populations locally affected by the respective conflicts.²⁷ Also in 1994, the United Nations General Assembly began the process of establishing a permanent international criminal court, drawing from the draft

²⁰ Nicola Henry, 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies' (2015) 9(2) *International Journal of Transitional Justice* 199.

²¹ Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (CUP 2004).

²² William Schabas, *An Introduction to the International Criminal Court* (CUP 2007) 1.

²³ *Ibid.* 4.

²⁴ Agreement for the Prosecution and Punishment of Major war Criminals of the European Axis and Establishing the Charter of the International Military Tribunal (IMT), Annex (1951) 82 UNTS 279.

²⁵ Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal – A Re-appraisal* (OUP 2008).

²⁶ UN Doc S/Res/808 (1993); UN Doc S/Res/955 (1994); William Schabas, *The UN International Criminal Tribunals, Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006).

²⁷ Victor Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Program' (2005) 3 *Journal of International Criminal Justice* 950.

statute of the International Law Commission.²⁸ Negotiations ultimately led to a diplomatic conference to draft a statute for such a court in Rome in 1998, with more than 160 states involved and significant engagement from global civil society.²⁹ The drafting of the Rome Statute reflected a recognition by states and civil society alike that combatting impunity for gross violations of human rights remains a key priority for victims and survivors and a key challenge for international peace and security.³⁰ The establishment of a permanent international court with complementary jurisdiction to states' national prosecutions also reflects a reality that states emerging from armed conflict or authoritarian rule may be unwilling or unable to prosecute former combatants or former state officials, particularly where those actors remain politically or militarily powerful.

The Rome Statute of the International Criminal Court establishes a permanent court with the jurisdiction to try individuals accused of bearing responsibility for genocide, war crimes and crimes against humanity.³¹ It has the potential to exercise jurisdiction in all states that accept its authority through self-referral by a State Party, through the *propter motu* initiative of the OTP, or through referral from the United Nations Security Council.³² The Statute provides for several forms of responsibility for criminal offences, including through individual responsibility and through command and superior responsibility for offences.³³

The ICC admits cases based on the principle of complementarity, of which competing conceptions have emerged.³⁴ A narrow conception of complementarity, commonly called 'negative complementarity', addresses only whether a case is admissible to the ICC, assessing whether the State Party has undertaken appropriate 'action' and subsequently whether the State Party was 'unwilling' or 'unable' to prosecute the offence.³⁵ The 'action' component assesses whether a 'case' is being or

²⁸ M Cherif Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History* (Transnational 1998).

²⁹ William R Pace and Mark Thieroff, 'Participation of Non-governmental Organisations' in Roy Lee, *The International Criminal Court* (Martinus Nijhoff 1999) 391.

³⁰ Neil Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59 *Law and Contemporary Problems* 127.

³¹ Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force July 1 2002, arts 5–9 (Rome Statute).

³² Rome Statute, arts 11–19.

³³ Rome Statute, arts 25, 28; Schachar Eldar, 'Exploring International Criminal Law's Reluctance to Resort to Modalities of Group Responsibility: Five Challenges to International Prosecutions and their Impact on Broader Forms of Responsibility' (2013) 11(2) *Journal of International Criminal Justice* 331.

³⁴ Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87.

³⁵ *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497 Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009, Appeals Chamber 25 September 2009, paras 1 and 75–78.

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has been investigated or prosecuted by a state that has jurisdiction over it.³⁶ In *Lubanga*, the Court defined a ‘case’ to encompass ‘specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects’.³⁷ Subsequently in *Kenyatta*, the Court defined ‘case’ to mean proceedings against the ‘same person’ with whom the ICC prosecutor is concerned for ‘substantially the same conduct’ the prosecutor is seeking to charge.³⁸ As a result there is no obligation on states to prosecute the precise international criminal offence provided for in the Rome Statute domestically.³⁹ However, national investigations need to sufficiently mirror the ICC investigation to enable the Court to know the contours or parameters of the investigation being carried out both by the Prosecutor and by the state.⁴⁰

The challenges of the ‘substantially the same conduct’ approach emerged in the cases against former Ivorian President Laurent Gbagbo and his wife Simone Gbagbo, where the OTP argued that the domestic Ivorian conviction of Gbagbo for the ordinary domestic crimes of disturbing the peace, organizing armed gangs and undermining state security was not based on ‘substantially the same conduct’ as its own charges of the crimes against humanity of murder, rape, other inhumane acts and persecution.⁴¹ The Pre-Trial and Appeals Chambers agreed with the OTP, rejecting Côte d’Ivoire’s argument that as a post-conflict state it lacked the ‘considerable material and human resources’ required to more efficiently investigate a case as complex and politically charged as Gbagbo’s.⁴² Heller concluded that Côte d’Ivoire can be considered ‘inactive’

³⁶ Sarah MH Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (CUP 2013); Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Koninklijke Brill 2009).

³⁷ *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Application for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6 (the ‘Decision on Applications for Participation’), filed by PTC I on 18 January 2006, para 65; R Rastan, ‘What is a Case for the Purpose of the Rome Statute?’ (2008) 19 *Criminal Law Forum* 435, 436.

³⁸ Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, *Muthaura, Kenyatta, and Ali* (ICC-01/09-02/11 OA), Appeals Chamber, 30 August 2011, para 39 (Kenyatta Appeal).

³⁹ Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the Admissibility of the Case against Abdullah Al-Senussi’, *Gaddafi and Al-Senussi* (ICC-01/11-OI/II OA 6), Appeals Chamber, 24 July 2014, para 119.

⁴⁰ Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi’, *Gaddafi and Al-Senussi* (CC-01/11-01/11), Appeals Chamber, 21 May 2014, paras 85–86 (Gaddafi Appeal).

⁴¹ Warrant of Arrest for Simone Gbagbo, Simone Gbagbo (ICC-02/11-01/12), Pre-Trial Chamber III, 29 February 2012, para 7.

⁴² Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case against Simone Gbagbo’, *Simone Gbagbo* (ICC-02/11-01/12 OA), Appeals Chamber, 27 May 2015, para 14 (Gbagbo Appeal).

only because the Court limited the structure of national proceedings in a fashion inconsistent with the Rome Statute and counterproductive in practice, removing the possibility of pyramidal prosecution structures that proved effective at the ICTY, and privileging resource intensive prosecutions.⁴³ A strict approach to this ‘substantially the same conduct’ component for investigations can ‘impose unnecessarily high requirements on States with a legal and judicial system in transition and would unduly burden their transitional justice efforts’.⁴⁴

The Court has also concluded that no admissibility challenge can succeed unless the state is actively investigating the criminal responsibility of the ‘same suspect’ as the ICC.⁴⁵ This requires (a) a state to ‘provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case’ and (b) evidence of ‘concrete and progressive investigative steps’ is required.⁴⁶ In the case against Kenyan Vice-President William Samoei Ruto, Kenya argued that it could not be considered inactive because it had opened formal investigations intended to develop evidence by ‘building on the investigation and prosecution of lower level perpetrators’.⁴⁷ Both the Pre-Trial Chamber and the Appeals Chamber rejected this argument, concluding that ‘investigations have not yet extended to those at the highest level of the hierarchy’.⁴⁸ McAuliffe concludes that, because of this approach, ‘the watchdog function has slipped in the hierarchy as the Court rejects a monitoring role in favour of assuming the prosecutorial and judicial initiative in a manner characteristic of a more vertical relationship’.⁴⁹

If the state satisfies these ‘action’ criteria, the case is nonetheless admissible to the ICC if the state is ‘unwilling or unable’ to carry out the proceedings genuinely. The Rome Statute provides that ‘unwillingness’ includes whether the purpose of the national proceedings was to shield the person from liability, whether there has been an unjustified delay in the proceedings or whether the proceedings lacked independence or impartiality or were inconsistent with an intent to bring the person to justice.⁵⁰ This criterion involves an assessment of the political context of the state, including the extent of links and interference between perpetrators, national prosecutors and other

⁴³ Kevin Jon Heller, ‘Radical Complementarity’ (2016) 14 *Journal of International Criminal Justice* 3; C Del Ponte, ‘Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY’ (2006) 4 *JICJ* 539, 543.

⁴⁴ Dissenting Opinion of Judge Anita Ušacka (Gaddafi Appeal, n 28) para 62.

⁴⁵ Kenyatta Appeals (n 26) para 40.

⁴⁶ *Ibid.* paras 58–61, 81.

⁴⁷ ‘Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute’, *Ruto, Kosgey, and Sang & Muthaura, Kenyatta, and Ali* (ICC-01/09-01/11 and ICC-01/09-02/11), Pre-Trial Chamber II, 31 March 2011, para 61.

⁴⁸ *Ibid.* para 62; judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, *Ruto, Kosgey, and Sang* (ICC-01/09-01/11 OA), Appeals Chamber, 30 August 2011, para 83.

⁴⁹ Pdraig McAuliffe, ‘From Watchdog to Workhorse: Explaining the Emergence of the ICC’s Burden-sharing Policy as an Example of Creeping Cosmopolitanism’ (2014) 13 *Chinese Journal of International Law* 259, 261.

⁵⁰ Rome Statute, Article 17(2)

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state officials.⁵¹ In assessing ‘inability’, the Statute requires the Court to consider whether the state is ‘unable to obtain the accused or the necessary evidence or testimony’ owing to ‘a total or substantial collapse or unavailability of its national judicial system’.⁵² Others have argued that inability should extend failure to provide an internationally recognized standard of due process in domestic prosecution of international crimes,⁵³ which may be too exacting in post-conflict countries.⁵⁴

Complementarity has thus been a significantly challenging issue for the Court, but also one that is key to relating the ICC to broader questions of transitional justice. In this regard, academics have developed a variety of alternative conceptions of complementarity.⁵⁵ ‘Positive’ complementarity extends to encouraging states to incorporate the Rome Statute into domestic penal codes.⁵⁶ Robinson argues that the ICC should not have jurisdiction if the state is carrying out those prosecutions ‘genuinely’, i.e. sincerely and at least a rudimentary level of capacity.⁵⁷ Heller suggests that, as long as a state is making a genuine effort to bring a suspect to justice, the ICC should find his or her case inadmissible regardless of the prosecutorial strategy pursued or cases and crimes investigated.⁵⁸ Moffett proposes that, in developing a victim-orientated conception of complementarity, the Assembly of States Parties could draft guidance for victim participation, protection and information and monitor compliance of states in developing effective complementarity mechanisms with the ICC in investigating and prosecuting international crimes.⁵⁹ The variety of possible approaches to complementarity reveals a broader apparent tension in the role of the ICC: should it be understood primarily as a transitional justice institution or does the Court’s practice to date reveal other appropriate means to assess the Court?

⁵¹ International Criminal Court, Office of the Prosecutor, ‘Informal Expert Paper: The Principle of Complementarity in Practice’, ICC-OTP 2003, 28–32.

⁵² Rome Statute, Article 17(2).

⁵³ Federica Gioia, ‘State Sovereignty, Jurisdiction, and “Modern” International Law: The Principle of Complementarity in the International Criminal Court’ (2006) 19 *Leiden Journal of International Law* 1095, 1111.

⁵⁴ Marta Bo, ‘The Situation in Libya and the ICC’s Understanding of Complementarity in the context of UNSC Referred Cases’ (2014) 25 *Criminal Law Forum* 505, 537.

⁵⁵ Carsten Stahn and Mohamed El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011).

⁵⁶ JK Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’ (2003) 1 *Journal of International Criminal Justice* 86, 87.

⁵⁷ D Robinson, ‘Three Theories of Complementarity: Charge, Sentence or Process?’ (2012) 53 *Harvard International Law Journal* 165.

⁵⁸ Heller (n 43).

⁵⁹ Luke Moffett, ‘Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague’ (2015) 13 *Journal of International Criminal Justice* 281, 305.

The ICC and Conceptions of Justice

Several competing frameworks assess the relationship of the Court and transitional justice. First Teitel has conceived of the ICC as a global justice institution,⁶⁰ which can be seen to have the central aim ‘to establish international norms of criminal justice; repairing conflict-affected societies is a secondary goal’.⁶¹ This reflects a cosmopolitan view of the Court and transitional justice,⁶² which can be criticized as ‘frequently marked by disconnections between international legal norms and local priorities and practices’.⁶³ It is thus possible to critique the global justice account of the ICC and transitional justice as an elite institution and field of practice respectively, and to respond with a ‘bottom-up’ or ‘victim-centred’ conception of the institution and practice,⁶⁴ although there has been limited consideration of ‘the local’ in examining the ICC to date.⁶⁵

Second, Koller has adopted Simpson’s conception of ‘juridified diplomacy’ to argue that international criminal tribunals are more properly regarded as ‘instruments of a legitimized international politics’.⁶⁶ For Simpson, ‘juridified diplomacy’ is ‘[t]he phenomenon by which conflict about the purpose and shape of international political life is translated into legal doctrine or resolved in legal institutions’.⁶⁷ International criminal tribunals thus are primarily instruments of diplomacy and of politics, set up by states to achieve their political purposes rather than for the pursuit of an idealized notion of justice.⁶⁸ Some domestic political elites may instrumentally use international justice to distinguish themselves from other political groups, and to position themselves as internationalist and reformist forces for rewards of foreign aid and investment or membership of international organizations. Powerful states may support transitional justice and the ICC only to the extent that these advance the states’ priorities on questions of international peace and security.⁶⁹ Greater explicit emphasis on the

⁶⁰ Ruti Teitel, ‘Forward’ in Christian de Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015) xvi; Ruti Teitel, *Humanity’s Law* (OUP 2011).

⁶¹ Jaya Ramji-Nogales, ‘Bespoke Transitional Justice at the International Criminal Court’ in de Vos et al. (eds) (n 60) 106, 107.

⁶² Antonio Franceschet, ‘Four Cosmopolitan Projects: The International Criminal Court in Context’ in *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (OUP 2009) 179.

⁶³ Rosalind Shaw and Lars Waldorf with Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010) 3.

⁶⁴ Simon Robins, ‘Transitional Justice as an Elite Discourse: Human Rights Practice Where the Global Meets and the Local in Post-Conflict Nepal’ (2012) 44(1) *Critical Asian Studies* 3.

⁶⁵ Christian de Vos, Sara Kendall and Carsten Stahn, ‘Introduction’, in de Vos et al. (eds) (n 60) 7.

⁶⁶ David S Koller, ‘The Global as Local: The Limits and Possibilities of Integrating International and Transitional Justice’ in de Vos et al. (eds) (n 60) 85.

⁶⁷ G Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity Press 2007) 1.

⁶⁸ Koller (n 66) 89.

⁶⁹ David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (OUP 2014) 177.

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contribution of the ICC to transitional justice may impact on states' support to the Court, where states interests extend only to narrow concerns of international peace and security and exclude questions of transitional justice.⁷⁰

Third, the ICC can be viewed as primarily a transitional justice institution. Ramji-Nogales argues that, in a bespoke transitional justice approach, the ICC may not be appropriate in all contexts, and the views of members of conflict-affected societies, especially victims, should play a central role in determining whether or not the Court should intervene.⁷¹ However, the priorities of local elites, a general populace, and a victim/survivor population may all radically differ.⁷² While transitional justice claims to privilege the local ownership of its processes, it also exists as a transnational field of expertise and practice, thus completing the loop back to a component of 'global justice'.⁷³

While it is possible to view these conceptions of the ICC as competing, the better view is that they reflect mere components of the complex reality in which it operates. It is thus possible to position the relationship of the ICC and transitional justice at an abstract normative level on a 'global justice' account, as engaging with the political concerns of states and other concerned actors on the 'juridified diplomacy' account and finally, on a transitional justice account, as responding to mass atrocity in specific national contexts and engaging with specific individual perpetrators and victim populations. At present therefore the relationship between the ICC and transitional justice offers a clear signal of the necessary link between transitional justice and broader political, normative and legal frameworks in which the field operates. A key actor in increasing state support and financial investment to the Court needed to promote its involvement in comprehensive and long-term transitional justice strategies remains the OTP.

The Role of the Prosecutor and the Interests of Justice

Political, security and humanitarian concerns often form the context in which the Court operates.⁷⁴ Although there is a need to maintain impartiality, the OTP may benefit from greater engagement with the range of incentives, pressures and triggers that states and international organizations employ to achieve their goals.

Article 53 obliges the OTP to consider whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. Some have argued that

⁷⁰ Koller (n 66) 103.

⁷¹ Ramji-Nogales (n 61) 107.

⁷² Harvey M Weinstein, Laurel E Fletcher, Patrick Vinck and Phuong Pham, 'Stay the Hand of Justice: Whose Priorities Take Priority?' in Shaw et al. (n 63) 47.

⁷³ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton 2011).

⁷⁴ Carsten Stahn, 'Jus Post Bellum: Mapping the Disciplines' in Carsten Stahn and Jann Kleffner (eds), *Jus Post Bellum Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 105.

Article 53 cannot enable the Prosecutor to consider broader transitional justice issues.⁷⁵ Carsten Stahn has argued that the ‘interests of justice’ are linked to justice in a specific case and therefore preclude an assessment of more general transitional justice concerns.⁷⁶ An OTP policy paper notes the ‘complementary role that can be played by domestic prosecutions, truth seeking, reparations programmes, institutional reform and traditional justice mechanisms in the pursuit of a broader justice’, but omits any specific measures to accomplish this role.⁷⁷ Hence, while the OTP may consider questions of transitional justice, affected states and communities are left to guess what factors might or might not be determinative.⁷⁸

The OTP’s role in Colombia demonstrates its potential in facilitating transitional justice. In 2004 the OTP opened preliminary examinations into alleged crimes in Colombia, and has since issued two interim reports assessing Colombia’s efforts in addressing war crimes and crimes against humanity through national legislation and criminal proceedings.⁷⁹ In the 2012 assessment, the OTP reached no conclusion as to whether an investigation should be opened; preliminary examination of the situation continues. In 2015, the Prosecutor noted with optimism the agreement reached in Havana, Cuba between parties to the conflict, which excludes any amnesty for war crimes and crimes against humanity.⁸⁰ In the absence of a formal determination by the OTP, the ICC has worked as both leverage and a threat in Colombia.⁸¹ Those who critique existing transitional justice practices in Colombia as not going far enough, may employ the possibility of ICC involvement to leverage the government to provide better guarantees to victims or to deal with perpetrators more severely. In contrast, those who defend existing practices can employ the absence of formal ICC action as evidence to demonstrate that the government is taking purposive action in relation to the perpetrators of war crimes, which prevents the need for ICC involvement. Once the OTP files formal charges, this space of pressure and activism will disappear.⁸² This experience demonstrates the positive potential of the OTP to constructively engage with states who wish to pursue transitional justice mechanisms. The practice of the Court more generally, however, reveals the challenges in engaging with states who may be ambivalent or hostile to its work and transitional justice.

⁷⁵ Drazan Dukic, ‘Transitional Justice and the International Criminal Court – in the Interests of Justice?’ (2007) 89 *International Review of the Red Cross* 691.

⁷⁶ Carsten Stahn, ‘Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court’ (2005) 3 *Journal of International Criminal Justice* 695, 718.

⁷⁷ Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007, 8.

⁷⁸ Michael Newton, ‘A Synthesis of Community-based Justice and Complementarity’ in de Vos et al. (eds) (n 60) 122, 131.

⁷⁹ Office of the Prosecutor, Situation in Colombia Interim Report, November 2012.

⁸⁰ <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp_stat_24-09-2015.aspx>.

⁸¹ Diego Acosta Arcarazo, Russell Buchan and Rene Uruen, ‘Beyond Justice, Beyond Peace? Colombia, The Interests of Justice and the Limits of International Criminal Law’ (2015) 26 *Criminal Law Forum* 291, 306.

⁸² *Ibid.*

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THE INTERNATIONAL CRIMINAL COURT AND TRANSITIONAL JUSTICE IN PRACTICE

Office of the Prosecutor: Challenges in Strategy

The OTP is presently conducting investigations in 23 cases in 10 countries.⁸³ Yet its prosecutorial strategy to date has led to a limited conviction rate of two (Lubanga and Katanga), acquittal at trial of one (Ngudjolo), the dismissal of charges against three defendants at pre-trial confirmation of charges (Mbarushimana, Kosgey and Ali), charges withdrawn against two (Kenyatta and Muthaura) and suspension of the Sudan investigation because the targeted states refused to cooperate with it. These limitations in turn highlight the limits of the Court in broader transitional justice practices.

For instance, in 2013, in the Kenyan situation the ICC began the trial of Kenyan Deputy President William Ruto and broadcaster Joshua arap Sang for their role in 2007–2008 post-election violence in Kenya. They were accused of crimes against humanity including murder, forcible population transfer and persecution.⁸⁴ Political interference in investigations and intimidation of witnesses and victims led to the collapse of the case against President Kenyatta and threatens the Ruto and Sang trials.⁸⁵ This was recently illustrated when the Appeals Chamber determined that previously recorded statements of five prosecution witnesses who recanted those statements or failed to show up in court cannot be used as evidence in these trials.⁸⁶ Kenya has undertaken several transitional justice processes, but the outcome remains ineffective from a victim/survivor standpoint. The judicial system, the basis for any domestic prosecutions, has been criticized for a lack of independence.⁸⁷ In 2008 the Kenyan Government established a Commission of Inquiry to investigate post-election violence. In describing the domestic judicial system as weak and promoting impunity, the Commission recommended the establishment of a Special Tribunal to address the alleged crimes, which would be a hybrid of domestic law and international criminal

⁸³ Correct as of January 2016 <https://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx> accessed 6 January 2016.

⁸⁴ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-373.

⁸⁵ 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), Legal Representatives of Victims, 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), Legal Representatives of Victims, 11 September 2014; and Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta, Kenyatta (ICC-01/09-02/11-983), Office of the Prosecutor, 5 December 2014; SD Mueller, 'Kenya and the International Criminal Court (ICC): Politics, the Election and the Law' (2014) 8 *Journal of Eastern African Studies* 25.

⁸⁶ Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony' ICC-01/09-01/11-2024.

⁸⁷ Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 256.

law, staffed with both Kenyan and international staff.⁸⁸ This proposal was rejected owing to domestic political pressure and, instead, in 2012, the Kenyan Judicial Services Commission recommended the establishment of an International Crimes Division in the High Court of Kenya.⁸⁹ Such a division has failed to overcome existing concerns regarding domestic Kenyan courts over the impartiality and ability to guarantee witness protection.⁹⁰ The Kenyan case shows the limits of the ICC in what Robinson calls ‘pre-transitional justice circumstances’, situations where there has not yet been a transition from violence to relative order, where territories are not under control, the perpetrators are protected by armies and police powers are unavailable.⁹¹ Moreover it demonstrates the risk that states will introduce ‘sham’ transitional justice institutions to avoid the exercise of jurisdiction by the ICC.

Second, the potential contribution of the ICC to transitional justice has been threatened by the negative perception of OTP strategy in African States Parties. Scholars have criticized a perceived ‘transitional justice orthodoxy’, which insists on the frequent deployment of the ICC in Africa.⁹² This issue came into focus when a warrant was issued against the President of Sudan, Omar al-Bashir.⁹³ The Rome Statute obliges its contracting parties to cooperate with investigations, prosecutions and the enforcement of arrest warrants.⁹⁴ In 2010, the African Union decided that its members had no obligation to comply with the court’s arrest warrants.⁹⁵ There have been seven cases of non-execution of the ICC’s order for the arrest and surrender of Al-Bashir by Kenya, Djibouti, Chad (twice), Malawi, Nigeria the DRC and South Africa.⁹⁶ The ICC held that Chad and Malawi were non-cooperative by failing to arrest and surrender Bashir and as such had failed to comply with their obligations to cooperate with the ICC.⁹⁷ Article 27 provides that official capacity as a Head of State or Government shall

⁸⁸ The Commission of Inquiry into the Post-Election Violence, Final Report, October 2008 (‘Waki Report’) 469.

⁸⁹ Report of the Committee of the Judicial Service Commission on the Establishment of an International Crimes Division in the High Court of Kenya, October 2012.

⁹⁰ The International Crimes Division of the High Court of Kenya, ‘Kenyan for Peace with Truth and Justice, A Real Option for Justice?’ (2014).

⁹¹ Darryl Robinson, ‘Inescapable Dyads: Why the International Criminal Court Cannot Win’ (2016) 28 *Leiden Journal of International Law* 323, 333.

⁹² Obiora Chinedu Okafor and Uchechukwu Ngwaba, ‘The International Criminal Court as a “Transitional Justice” Mechanism in Africa: Some Critical Reflections’ (2015) 9 *International Journal of Transitional Justice* 90, 91.

⁹³ *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Warrant for the Arrest of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1; ICC-02/05-01/09-95.

⁹⁴ Rome Statute, arts 27 and 86.

⁹⁵ Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec 270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc Assembly/AU/10(XV) Assembly/AU/Dec 296(XV).

⁹⁶ Dire Taldi, ‘The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law’ (2015) 13 *Journal of International Criminal Justice* 1027, 1028.

⁹⁷ *The Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09 Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar

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not exempt a person from criminal responsibility. Article 98(1) provides that there is no obligation on the requested state to comply with the request of the ICC if acceding to the request would require violation of the immunities owed under customary international law. While the Court concluded that immunity for heads of state before international courts has been frequently rejected, it failed to address the interaction of the Statute with general international law on immunities. The Court noted that immunity for heads of state before international courts has been rejected repeatedly,⁹⁸ and concluded that to interpret Article 98(1) to justify failure to cooperate with the arrest and surrender of the Al Bashir ‘would disable the Court and the international criminal justice in ways completely contrary to the Statute’.⁹⁹ Tladi concludes that this reasoning is unsatisfactory, noting that the sources cited by the Court for the view that a state has an obligation to arrest and surrender a head of state of a non-state party to an international tribunal are primarily concerned with the exercise of jurisdiction over heads of state and not with the duty to cooperate for arrest and surrender purposes.¹⁰⁰ In contrast, the African Union has described the decisions as ‘ill-conceived’ and ‘self-serving’.¹⁰¹ Statements such as these from the African Union reflect the ability of states such as Kenya or Sudan to use international organizations, including the African Union but also the United Nations, especially the Human Rights Council and General Assembly, to criticize the ICC and seek to undermine its legitimacy.

In June 2015, South Africa hosted a meeting of the African Union with Al-Bashir attending. The South African High Court concluded that there was a duty to arrest Al-Bashir,¹⁰² but owing to government intervention, no arrest was made, leading to non-cooperation proceedings against South Africa at the ICC.¹⁰³ This decision was upheld by the Court of Appeal in March 2016.¹⁰⁴ What is notable about the Court of

Hassan Ahmad Al Bashir (Malawi Decision) para 43; Dire Tladi, ‘The ICC Decisions on Chad and Malawi on Cooperation, Immunities, and Article 98’ (2013) 11(1) *Journal of International Criminal Justice* 199; Decision rendue en application de l’article 87-7 de le Statut de Rome concernant le refus de la République du Tchad d’accéder aux demandes de coopération dé livrées par la Cour concernant l’arrestation et la remise d’Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 13 December 2011.

⁹⁸ Malawi Decision, paras 22–37.

⁹⁹ Ibid. para 41.

¹⁰⁰ Tladi (n 97) 206.

¹⁰¹ African Union Commission Press Release on the Decisions of the Pre-Trial Chamber of the ICC on the Alleged Failure by the Republics of Chad and Malawi to Comply with the Cooperation Request issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of Sudan, 9 January 2012.

¹⁰² *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015), High Court of South Africa, Gauteng Division, Pretoria, 24 June 2015; Manuel J Ventura, ‘Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in light of Al-Jedda’ (2015) 13 *Journal of International Criminal Justice* 995.

¹⁰³ Order Requesting Submissions from the Republic of South Africa for the Purposes of Proceedings under art 87(7) of the Rome Statute, Al Bashir (ICC-02/05-01/09-247), Pre-Trial Chamber II, 4 September 2015.

¹⁰⁴ *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016); Dapo Akande, ‘The Bashir

Appeal decision is that, in addition to affirming that South African law obliged the government arrest and surrender Al-Bashir to the ICC, the judgments conclude that foreign heads of state accused of international crimes committed abroad may be arrested and subject to domestic prosecution in South Africa. Wallis JA concluded that South Africa has removed immunity *ratione personae* of heads of states immunity under Section 4(2)(a) of the Implementation of the Rome Statute Act.¹⁰⁵ In light of this significant judgment, the Government has announced its intention at the time of writing to appeal to the Constitutional Court.¹⁰⁶ The issue is unlikely to be resolved soon, with ongoing African union hostility to the Court. Prosecutor Fatou Bensouda rejects the view that the court has been neo-colonial or anti-African:

With due respect, what offends me most when I hear criticisms about the so-called African bias is how quick we are to focus on the words and propaganda of a few powerful, influential individuals and to forget about the millions of anonymous people that suffer from these crimes ... because all the victims are African victims. Indeed, the greatest affront to victims of these brutal and unimaginable crimes ... is to see those powerful individuals responsible for their sufferings trying to portray themselves as the victims of a pro-western, anti-African court.¹⁰⁷

However accurate, the perception of the ICC as African centric may enable political elites targeted by the Court to attack the Court's legitimacy with popular traction, where victims and survivors lack political and popular support.¹⁰⁸ Moves by the OTP to open situations, such as Georgia, in non-African regions can diminish the effectiveness of the anti-African critique, while presenting their own geo-political challenges by involving the role of a permanent member of the UN Security Council, Russia.¹⁰⁹ While the ICC may be able to support pressure from domestic constituencies, including victims, for transitional justice, the Kenyan and Sudanese experiences demonstrate the limits of the Court's influence. In particular, in the absence of significant diplomatic financial and institutional pressure from the international community, the ability of the ICC to support transitional justice will always be limited. The international community, especially the UN Security Council, cannot outsource international justice to the ICC without further support. To do so threatens not only the legitimacy and effectiveness of the Court, but also its ability to support victims of international crimes.

Case: Has the South African Supreme Court Abolished Immunity for all Heads of States?' <<http://www.ejiltalk.org/the-bashir-case-has-the-south-african-supreme-court-abolished-immunity-for-all-heads-of-states/>>

¹⁰⁵ *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (n 104) para 95.

¹⁰⁶ South African government to appeal Bashir ruling at highest court, Reuters, 8 April 2016 <<http://www.reuters.com/article/us-safrica-bashir-idUSKCN0X51ED>>.

¹⁰⁷ 'New Chief Prosecutor Defends International Criminal Court', *The Guardian*, 23 May 2012 <<http://www.theguardian.com/law/2012/may/23/chief-prosecutor-international-criminal-court?newsfeed=true>>.

¹⁰⁸ Okafor and Ngwaba (n 92) 101.

¹⁰⁹ 'Georgia: A Test Case for the ICC's Future' <<https://ciccglobajjustice.wordpress.com/2016/02/23/georgia-a-test-case-for-the-iccs-future/>>.

Victims at the ICC and in Transitional Justice

The ICC Victim Strategy states victims are ‘a vital actor in the justice process rather than a passive recipient of services and magnanimity’.¹¹⁰ The introduction of the right to participation represents a major shift from victims’ former role solely as witnesses in international trials, where victims were a means to a conviction.¹¹¹ Combined with the establishment of a Victims and Witness Unit within the Registry,¹¹² ICC interventions can more readily form part of a broader protective movement geared at remedying harm and restoring the rights of victims of conflict.¹¹³

Where their personal interests are affected, Article 68(3) establishes a right of victims to present their ‘views and concerns’ at different stages of Court proceedings, provided this does not undermine a fair trial or the rights of the accused. Rule 85 of the ICC’s Rules of Procedure and Evidence defines victims as natural persons who have suffered harm but must be linked to one of the charges filed by the OTP and requires a potential victim to apply for recognition of that status.¹¹⁴ The Rules of Procedure and Evidence enable victims to make opening and closing statements, and through their legal representatives to attend and participate in the proceedings in accordance with the terms set by the chamber, including questions to witnesses, experts and the accused.¹¹⁵ Beyond these provisions, each chamber has the discretion to determine how the ‘views and concerns’ of victims are to be presented, including the exact scope and conditions of any intervention. The judges of the Court have recognized victims’ rights to justice, truth and reparations as a basis for participation in proceedings,¹¹⁶ thus linking their participation at the Court to rights in broader transitional justice.

Funk notes that these provisions, on their face, may lead to the reasonable belief that victim participation will be both substantive and widespread.¹¹⁷ There is a substantial

¹¹⁰ ‘Court’s Revised Strategy in Relation to Victims’, ICC-ASP/11/38, 5 November 2012, x 6.

¹¹¹ Mariana Pena and Gaelle Carayon, ‘Is the ICC Making the Most of Victim Participation?’ (2013) 7 *The International Journal of Transitional Justice* 518, 520; 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.

¹¹² Rome Statute, arts 43(6) and 68(4).

¹¹³ Carsten Stahn, ‘Justice Civilaistrice? The ICC Post-Colonial Theory and the Faces of “The Local”’ in de Vos et al. (eds) (n 60) 52.

¹¹⁴ Rules of Procedure and Evidence, ICC-ASP/1/3, at 10, and Corr 1 (2002), UN Doc PCNICC/2000/1/Add 1 (2000).

¹¹⁵ Rules 89(1); 91(2); 91(3)(a); Lubanga, ICC-01/04-01/06-1119; Katanga and Chui, ICC-01/04-01/07-474; Katanga and Chui, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788, 22 January 2010; Bemba, ICC-01/05-01/08-320.

¹¹⁶ 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), Pre-Trial Chamber I, 13 May 2008, paras 31–44.

¹¹⁷ T Markus Funk, *Victims’ Rights and Advocacy at the International Criminal Court* (OUP 2010) 119.

literature on these provisions.¹¹⁸ However, the ICC to date has not lived up to its high expectations. First to participate in proceedings, victims must complete a lengthy 17 page application process, which they may require assistance to complete.¹¹⁹ Conflict-affected individuals must first be informed of the possibility that they may seek recognition before the Court, which assumes prior interventions from the Court's outreach section or its Victim Participation and Reparations Section or their partners.¹²⁰

Second, in any situation of mass violence, there may be thousands of victims who suffered harm as a result of crimes and who cannot all personally participate in ICC proceedings. In *Kenyatta* the scale of potential victims led to the adoption of a two-tier approach: participation through a Common Legal Representative, for which only a simplified registration procedure is required; and personal participation by presenting views and concerns directly, entailing the requirement of full identification vis-à-vis the parties and a detailed application.¹²¹ In addition, there are a range of victims of crimes beyond those charged by the OTP who will be excluded from participation before the Court. These include victims of human rights violations not within the jurisdiction of the court, such as socio-economic or property-related harms and victims of offences within the Court's jurisdiction, but not charged in a particular case, such as victims of sexual violence in the *Lubanga* case, where the focus was on the recruitment of child soldiers.¹²² This selectivity therefore divides and classifies conflict-affected populations into groups with participatory rights at the ICC and those who fall outside its jurisdiction. Sara Kendall has argued that to overcome this requires a step towards a broader notion of equity and responsiveness to the relevant victim/survivor communities, which may not be possible for the ICC.¹²³

Third, the approach of the ICC to victim participation to date has been inconsistent, which has resulted in a lack of certainty for victims. In the absence of settled procedures, there is discretion for each Trial Chamber to determine the extent of victim participation. Some early decisions adopted a systematic approach to victims' participation, consisting of a clear determination of the set of procedural rights for those

¹¹⁸ 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* (CUP 2012); Moffett (n 87).

¹¹⁹ This has been reduced to seven pages and one page in Ntaganda and Ongwen cases. Mariana Pena, 'Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead' (2010) 16 *ILSA Journal of International and Comparative Law* 497. Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings, Doc No ICC-ASP/11/22, 5 November 2012.

¹²⁰ Sara Kendall, 'Beyond the Restorative Turn, The Limits of Legal Humanitarianism' in de Vos et al. (eds) (n 60) 352, 366.

¹²¹ Decision on Victims' Representation and Participation, Muthaura and Kenyatta (ICC-01/09-02/11-498), Trial Chamber V, 3 October 2012; Decision on Victims' Representation and Participation, Ruto and Sang (ICC-01/09-01/11-460), Trial Chamber V, 3 October 2012.

¹²² Pena and Carayon (n 112) 526.

¹²³ Kendall (n 121) 452, 376.

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victims participating at the particular stage of the proceedings in the case.¹²⁴ In *Bemba*, as the case with the highest numbers of participants so far, the Trial Chamber tried to address the high number of applications by introducing a final deadline for submissions for participation.¹²⁵ Other chambers of the Court have established in advance frameworks for victims' participation that ensure predictability and expeditiousness of proceedings.¹²⁶

Victims' rights to participate in the OTP's investigations at the ICC are narrow,¹²⁷ described by Moffett as being to 'inform rather than to participate', and unlike human rights law requirements to ensure transparency and effectiveness of prosecutors' investigations.¹²⁸ As a result, the potential pool of victims in a given case is structured without their active participation. In their participation at trial, victims have been allowed to tender evidence and challenge the admissibility of evidence introduced by the parties in a case, arising out of their right to truth.¹²⁹ In *Katanga and Ngudjolo*, the Court recognized that victims can assist the judges to 'better understand the contentious issues of the case in light of their local knowledge and socio-cultural background'.¹³⁰ The ICC allows victims some input into determining sentencing.¹³¹ As Moffett finds, victims' role remains symbolic, not meaningful, as their interests are only given weight in non-contentious areas like protection measures, and even in reparation proceedings order are made in their 'best interests', not necessarily their interests presented to the Court.¹³²

¹²⁴ *Prosecutor v Katanga and Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case ICC-01/04-01/07-474, 13 May 2008, para 49.

¹²⁵ Corrigendum to the Decision on 401 Applications by Victims to Participate in the Proceedings and Setting a Final Deadline for the Submission of New Victims' Applications to the Registry, *Bemba* (ICC-01/05-01/08-1590-Corr), Trial Chamber III, 21 July 2011, x 25.

¹²⁶ First Decision on Victims' Participation in the Case, *Ruto and Sang* (ICC 01/09-01/11-17), Pre-Trial Chamber II, 30 March 2011, x 1; Second Decision on Issues Related to the Victims' Application Process, *Gbagbo* (ICC-02/11-01/11-86), Pre-Trial Chamber I, 5 April 2012, x 37.

¹²⁷ 'Situation in the Democratic Republic of the Congo' (Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007) ICC-01/04-556 (19 December 2008), para 45; and 'Situation in the Republic of Kenya' (Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya) ICC-01/09-24 (3 November 2010) para 9.

¹²⁸ Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests through Participation at the International Criminal Court' (2015) 26 *Criminal Law Forum* 255, 271.

¹²⁹ *Prosecutor v Lubanga*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Doc No ICC-01/04-01/06-1432 (11 July 2008) paras 94–105.

¹³⁰ *Prosecutor v Katanga and Ngudjolo*, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, Doc No ICC-01/04-01/07-1665-Corr (9 December 2009) para 82.

¹³¹ Article 76 and Rule 143.

¹³² Moffett (n 87).

Owing to increased collectivization of victim participation, for the parties of the trial and the adjudicating Chamber, the individual victim will barely be noticed as a participant.¹³³ While common legal representation seems inevitable to make a criminal trial with thousands of participants work, victims are effectively reduced to an ‘abstract collective’.¹³⁴ The Court has acknowledged that, in these circumstances, common legal representation effectively excludes the presentation of personal views and concerns allowing only the presentation of general ‘shared legal and factual concerns’.¹³⁵ In the absence of meaningful consultation and participation, actual victims’ priorities may be obscured by the Court’s use of the ‘imagined victim’, which limits and renders suspect the particular meanings and desires of real victims for justice.¹³⁶ Haslam argues that the reliance on such transnational advocacy networks, including international non-governmental organizations loosely, but not legally, representing ‘victims’, has ironically helped to muzzle the voices of actual victims.¹³⁷

Edwards suggests that victim participation can be categorized into four types: decision-making, consultation, information and expressive.¹³⁸ In Wemmers’s empirical assessment, fewer than 10% of those interviewed, including judges and their legal advisers, members of the OTP and staff from within the Court’s Registry, viewed victim participation as involving a consultation process.¹³⁹ Consultation presents significant challenges given that victims of international crimes in post-conflict states may lack the means for legal representation, and there are limited means and capacity to the ICC’s legal aid programme. More generally there remain problems in the lack of management of victims’ expectations, with a risk that if victims are reduced to a role of providing information, not even reaching meaningful consultation, that their needs will remain unmet and they may become disenfranchised from the Court.¹⁴⁰

The challenge of participation is further complicated by legitimate forms of disagreement among victims themselves and between victims and other constituencies in the Court. Victims and the OTP could disagree on whether to prosecute or, even if in consensus on a decision to proceed with prosecution, could disagree about the focus of an investigation.¹⁴¹ For example, criticism regarding the absence of sexual violence in

¹³³ Anni Pues, ‘A Victim’s Right to a Fair Trial at the International Criminal Court: Reflections on 68(3)’ (2015) 13(5) *Journal of International Criminal Justice* (2015) 951, 960.

¹³⁴ Sara Kendall and Sarah Nouwen, ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’ (2013) 79 *Law and Contemporary Problems* 235, 250.

¹³⁵ *Prosecutor v Ruto and Sang*, (ICC-01/09-01/11-460) 3 October 2012, para 33.

¹³⁶ Laurel Fletcher, ‘Refracted Justice: The Imagined Victim and the International Criminal Court’ in De Vos et al. (n 121) 312.

¹³⁷ Emily Haslam, ‘Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society’ (2011) 5 *International Journal of Transitional Justice* 221.

¹³⁸ I Edwards, ‘An Ambiguous Participation: The Crime Victim and Criminal Justice Decision-Making’ (2004) 44 *British Journal of Criminology* 967.

¹³⁹ Jo-Anne Wemmers, ‘Victims’ Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims’ Rights to Participate’ (2010) 23 *Leiden Journal of International Law* 629.

¹⁴⁰ Moffett (n 59) 295.

¹⁴¹ Pena and Carayon (n 112) 525.

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the charges in *Lubanga* had an impact on subsequent investigations.¹⁴² Ferstman argues that, when victims disagree with the prosecutor, the ICC could play a more prominent role by allowing victims to question the prosecution's charging decisions.¹⁴³

The views and priorities of victims remain a key component of the legitimate design of any transitional justice practice. The ICC has sought to shepherd and organize the needs of potentially thousands of victims in conflict-affected countries through its case law, while still recognizing their rights to truth, accountability and reparation. In light of the Court's uneven approach to date and a high number of relevant victims, a key challenge to meaningfully support victims remains 'having an effective way for their interests to be presented and considered before the Court'.¹⁴⁴ Existing practices struggle to achieve this. One key component of this approach is effective reparations to victims.

Reparations at the ICC

Article 75 of the Rome Statute provides that Court shall establish principles relating to reparations to victims, including restitution, compensation and rehabilitation. The Rome Statute also established a Trust Fund for Victims (TFV), a non-judicial entity, funded separately by voluntary contributions, with a mandate to provide assistance to victims and to implement Court-ordered reparations.¹⁴⁵

The *Lubanga* case marked the first opportunity to clarify principles and procedures of reparation.¹⁴⁶ The Trial Chamber outsourced the reparation process to the TFV, considering it unnecessary for judges to 'remain seized throughout the reparations proceedings'¹⁴⁷ and suggesting that the Trust Fund should 'determine the appropriate forms of reparations and to implement them'.¹⁴⁸ Victims' legal representatives appealed, seeking express judicial recognition of accountability and harm and the provision of individual and collective reparations, rather than a community award to the same community that supported and facilitated international crimes.¹⁴⁹ The Appeals Chamber reversed the Trial Chamber decision and amended the Order for Reparations,

¹⁴² Ibid. 526.

¹⁴³ Carla Ferstman, *The Participation of Victims in International Criminal Court Proceedings: A Review of Practice and Consideration of Options for the Future* (Redress 2012).

¹⁴⁴ Moffett (n 129) 287.

¹⁴⁵ Rome Statute, art 79.

¹⁴⁶ Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012 with Amended order for reparations and public annexes 1 and 2, *Lubanga* (ICC-01/04-01/06-3129), Appeals Chamber, 3 March 2015 (*Lubanga Reparations Appeal*).

¹⁴⁷ Decision Establishing the Principles and Procedures to be Applied to Reparations, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 7 August 2012, para 261.

¹⁴⁸ Ibid. para 266.

¹⁴⁹ Appeal against Trial Chamber I's Decision Establishing the Principles and Procedures to Be Applied to Reparation of 7 August 2012, *Lubanga* (ICC-01/04-01/06), V01 team of legal representatives, 3 September 2012; Appeal against Trial Chamber I's Decision Establishing the Principles and Procedures to be Applied to Reparations of 7 August 2012, *Lubanga* (ICC-01/04-01/06), Office of Public Counsel for Victims/V02 team of legal representatives, 24 August 2012.

providing that any order for reparations must contain at least five essential elements.¹⁵⁰ First, the order must be directed against the convicted person, even when indigent, not the Trust Fund as originally directed. This approach prioritizes accountability over other societal concerns, such as relief of suffering, deterrence of future violations, societal reintegration and reconciliation, which are treated as secondary objectives that should be pursued ‘to the extent achievable’.¹⁵¹ Second, the order must inform the convicted person of his/her liability for the reparations awarded. Even when indigent, the convicted person remains liable and must reimburse the Trust Fund for reparations paid on his/her behalf.¹⁵² Third, the order must specify and provide reasons for the type of reparations ordered, whether collective, individual or both. The Appeals Chamber awarded collective reparations and instructed the TFV to consult with individual victims to incorporate them into collective reparations awards.¹⁵³

Fourth, the order must define the harm, whether direct or indirect, caused to victims as a result of the crimes for which the accused was convicted and the appropriate modalities of reparations in the circumstances of the case.¹⁵⁴ Indirect harm must be predicated on harm suffered by direct victims and that suffered by family members, and by individuals who intervened to help the victims or to prevent the crimes.¹⁵⁵ Finally, the order must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted. The Appeals Chamber held that the perpetrator’s liability must be proportionate to the harm caused and her or his participation in the commission of the crimes.¹⁵⁶ This assessment requires the Trial Chamber to enter into separate evidentiary analysis before making an Order for Reparations, which may entail specific reparations hearings to assess harm.¹⁵⁷ This approach might ultimately point towards the need for a specialized ‘Reparations Chamber’.¹⁵⁸ In *Lubanga*, the Appeals Chamber concluded that it was not possible for the court to award reparations for sexual and gender-based crimes suffered by the victims in the case at hand because those crimes were not charged by the prosecution.¹⁵⁹ However, as the Appeals Chamber noted, the Trust Fund can use its discretionary assistance mandate to provide assistance to victims of sexual and gender-based

¹⁵⁰ Lubanga Reparations Appeal (n 147) para 1.

¹⁵¹ Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA 03-03-2015, para 71.

¹⁵² Lubanga Reparations Appeal (n 147) para 104.

¹⁵³ Ibid. para 162.

¹⁵⁴ Ibid. para 211.

¹⁵⁵ Redacted version of ‘Decision on “Indirect Victims”, Lubanga (ICC-01/04-01/06-1813), Trial Chamber I, 8 April 2009, paras 49–51; Valentina Spiga, ‘Indirect Victims’ Participation in the *Lubanga* Trial’ (2010) 8(1) *Journal of International Criminal Justice* 183.

¹⁵⁶ Lubanga Reparations Appeal (n 147) para 118.

¹⁵⁷ Ibid. para 185.

¹⁵⁸ Carsten Stahn, ‘Reparative Justice after the *Lubanga* Appeal Judgment New Prospects for Expressivism and Participatory Justice or “Juridified Victimhood” by Other Means?’ (2015) 13(4) *Journal of International Criminal Justice* 801, 811.

¹⁵⁹ Lubanga Reparations Appeal (n 147) paras 192–199.

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violence.¹⁶⁰ The application of these five requirements cannot be delegated to non-judicial organs and will thus require intensive Trial Chamber scrutiny and expertise different from criminal adjudication,¹⁶¹ which may negatively impact victims if unduly prolonging the process.

This approach recognizes that in instances of physical and mental harm to individual victims, financial compensation cannot restore the victim to the situation she/he was in prior to the violation, but instead seeks to achieve a symbolic effect: to officially recognize the harm and suffering endured by the victim, to acknowledge the state's role in this act, whether active or acquiescence and to offer a solemn commitment to non-repetition. The role of reparations therefore in cases of gross violations of human rights acknowledges the inadequacy and limited scope of any monetary form of reparation, as well as the limited capacity to deliver reparative effects more generally through such legal apparatus.¹⁶² This new 'principle of liability to remedy harm' differs from purely civil forms of liability owing to its connection to criminal proceedings.¹⁶³

However the decision also pays limited attention to potential social frictions created through reparations. The *Lubanga* case involved predominantly perpetration and victimization within the Hema population.¹⁶⁴ The Reparation Order acknowledges that selectivity 'could give rise to a risk of resentment on the part of other victims and re-stigmatization of former child soldiers within their communities'.¹⁶⁵ Peter Dixon argues that international criminal reparations can 'mark' and stigmatize individuals,¹⁶⁶ potentially subjecting already vulnerable groups to hostile or dangerous social stigma. Second, there is a risk that the reparations process will be captured by elites within state parties and subsumed to local power struggles.¹⁶⁷ While the Appeals Chamber decision links individual accountability to an obligation to remedy harm caused through reparations, to effectively deliver justice to all victims beyond those eligible before the Court, ICC reparations need to be linked to reparations as developed as part of a comprehensive national transitional justice strategy. The role of the ICC in broader reparations policy should therefore be carefully positioned to avoid over-extension, especially in the context of recent claims of the TFV to provide transformative reparations.¹⁶⁸ If ICC reparations to victims are to be effective in meeting high victim expectations, their use must not only align with and foster national programmes of reparation and acknowledgment for affected communities, but also do so with the support of the international community, to maximize the Court's limited role in reparations without over extending it.

¹⁶⁰ Ibid. para 199.

¹⁶¹ Stahn (n 159) 809.

¹⁶² Richard Falk, 'Reparations, International Law, and Global Justice', in Pablo De Greiff (ed.), *The Handbook of Reparations* (OUP 2006) 485.

¹⁶³ Stahn (n 159).

¹⁶⁴ Ibid. 812.

¹⁶⁵ Amended Order for Reparations, ICC-01/04-01/06-3129-AnxA 03-03-2015 (n 152).

¹⁶⁶ Peter Dixon, 'Reparations and the Politics of Recognition' in de Vos et al. (eds) (n 60) 326.

¹⁶⁷ Ibid. 327.

¹⁶⁸ Observations on Reparations in Response to the Scheduling Order of 14 March 2012, *Lubanga* (ICC-01/04-01/06-2872), Trial Chamber I, 25 April 2012, x 73; Moffett (n 59) 295.

CONCLUSION

The ICC is a critical part of the international legal architecture for transitional justice, but it should not be expected to comprehensively pursue transitional justice on its own. This chapter has outlined the claimed contribution of international criminal justice, through the ICC, to transitional justice. It has examined the apparent tension between national and international approaches to dealing with the past through the principle of complementarity. It argued that the ICC must be viewed not only as a transitional justice institution, but also a global justice and juridified diplomatic actor, which results in inevitable but apparent value conflicts and tensions. A daunting challenge remains in envisaging and implementing a form of assessing and measuring the effectiveness of the Court in the overlapping but distinct frameworks and discourses in which it operates. Any such form of assessment must also remain of practical use to Court actors, civil society, and crucially, for victims and survivors. These challenges and tensions cohere around the OTP and were evidenced in hostility to the ICC among political elites in Kenya and Sudan. A major risk for the ICC remains that the international community 'outsources' transitional justice concerns to the Court and especially the OTP, but fails to offer it sufficient financial or political support, as evidenced in the Al-Bashir saga. The ICC's innovative provisions for victim participation and reparations to victims provide key mechanisms by which the Court can contribute to broader transitional justice practices, but remain contingent on efficient and responsive management by the Court of the needs of victims, and depend on alignment and political and financial support from the international community. To grow in legitimacy and effectiveness, the ICC will need to demonstrate the importance of international criminal justice and especially its trials through their impact in the communities where the crimes were committed and to the interests of its donor states and other constituencies. The Court's first decade or so has demonstrated that the values of international criminal law and transitional justice will be achieved not only through the development of international criminal law, but also through careful negotiation of and coordination with international and domestic politics.