The local impact of a global court : assessing the impact of the International Criminal Court in situation countries

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Chapter 7: Conclusions: The Global Court Project after 15 Years

> *Law as a political instrument can play its most significant part in societies in which open group conflicts are accepted and which are sufficiently stable to be able to absorb them and settle them in terms of rules. As an instrument of terror, of coercive persuasion, and of revolutionary re-education, it is all but useless.* – Judith Skhlar, Legalism

> *"Justice? -- You get justice in the next world. In this one you have the law*. — William Gaddis

I. A Global Court

This year marked the 20th anniversary of the Rome Statute, an opportune time to assess what is its impact, particularly in countries affected by the world's worst crimes. Much of the current scholarship addresses the Court's contribution to development of law, procedure and jurisprudence. Since its establishment the Court is conducting numerous preliminary examinations, has opened investigations in around 10 situations, and has concluded 5 trials. A large number of States Parties (123) have signed up to the Rome Statute of the International Criminal Court, and the two Security Council referrals were made to the Court, on Sudan and Libya. In the words of Luis Moreno Ocampo:

> In 2003, there were doubts about the viability of the ICC. In 2017, the Court is in full motion and a consolidated piece of the international landscape. … The Court's existence is not at risk — the Rome Statute's relevance is in question as is the relevance of international law to manage conflicts. The Court is just the face of the Rome Statute system and the current challenge is how the rest of the system works.[1575]

This thesis instead concludes that there is more acceptance in situation-countries of the Rome Statute's norms than there is of the role of the ICC the enforcer of these norms. The normative contribution or "purposive legitimacy" of the Rome Statute is reflected in the acceptance of these norms in numerous situations outside the jurisdiction of the Court, including the establishment of hybrid tribunals in Sierra Leone, Lebanon, the Central African Republic, the proposal for an AU hybrid tribunal for South Sudan, and most recently, the creation of an International, Independent and Impartial Mechanism for Syria, or the trial of Hissan Habre by the Extraordinary African Chambers in the Senegalese Courts.

[1575] Ocampo, Luis Moreno. *Ocampo speaks out on leaked emails*. Journalists for Justice, 4 Dec. 2017.

However, the "performance legitimacy" of the Court has suffered, in comparison with other international tribunals including the ICTY. Many of its investigations and trials were hampered by difficulties, including interference with witnesses, and resulted in unsatisfactory outcomes. Powerful states did not ratify the Rome Statute, and for a long time the ICC avoided hard cases that would bring it into confrontation with these global powers. Some State Parties are now actively seeking to "unsign" the Rome Statute. At the local level, the "universal values" that the Court represents are in danger of remaining an abstraction, particularly for victims. And perceptions of the Court in very different contexts show negative trends.

The Court is cognizant of the need to measure its own impact, and has identified a series of performance indicators,[1576] but these deal mostly with internal rather than external factors. They leave open the broader questions of what are the desired outcomes or intended effects of the Court's interventions and how should these be assessed. This requires a discussion on the underlying assumptions of the ICC.

II. A World Free of Violence? Questioning Assumptions Behind the ICC

While since WWII the normative prohibition of the worlds worst crimes may be consolidating, until now it has not proved possible to prevent those crimes, as is the stated fundamental purpose of the ICC. The state of the world today in terms of violence is worryingly worse than at the time of the creation of the ICC twenty years ago. This casts further doubt on the goals of the ICC in terms of deterrence of the world's worst crimes.

A 2018 study by the UN and World Bank notes that while currently it is the most peaceful era of human history, there was a rapid increase in number and intensity of violent conflicts since 2010.[1577] In fact, 2015 saw more active conflicts, fifty-nine in total, than in the whole period since the end of the Cold War. At this moment in 2017, according to UNHCHR, up to 65 million people are displaced, including 20 million refugees, as a result of violent conflict. In recent years, the world has also become increasingly pre-occupied by the actions of extremist terrorist groups or networks, including ISIL, Al-Qaeda, Boko Haram, Al-Shabab, Taliban and others. Criminal networks and organized crime spread other social ills, such as human trafficking, smuggling of drugs or weapons, destabilizing neighboring states and causing untold human suffering.

The primary assumption underlying the ICC is that its establishment would lead to a reduction in the world's worst crimes. In over fifteen years, it not clear that the existence of ICC is contributing to reducing atrocities. In fact, most countries that

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[1576] Kotecha, Birju. *The ICC's Office of the Prosecutor and the Limits of Performance Indicators*, JICL Vol. 15 issue 3 (1July 2007) pp. 543-565.

[1577] United Nations/ World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (2017).

are under investigation have experienced further atrocities, sometimes even committed by the same actors. This, in combination with the low outputs of the ICC, generates skepticism about the International Criminal Court project and whether it is delivering as expected. These fundamental assumptions behind the creation of the Court, i.e. that it would deter crime, should continue to be questioned and tested.

On the other hand, it would be naïve to expect the ICC to constitute a shortcut to Utopia, in the form of a violence-free world. The ICC is not " a moral high ground floating somewhere above the earthly realm."[1578] In order to reduce violence, the ICC must be combined with interventions that seek to eradicate conflict and violence. Related strategies related to ending atrocities include the promotion of human rights, conflict prevention and mediation, and protection of civilians (including the Responsibility to Protect). The Sustainable Development Goals agenda, adopted by the General Assembly in 2016, commit to promoting "peaceful and inclusive societies" as articulated in Goal 16 (3), pledge to "promote the rule of law at the national and international levels, and to ensure equal access to justice for all" by 2030.

But while the Court cannot deter on its own, its impact should not be reduced to counting the number of investigations and trials held in The Hague. This approach misses the wider realms of normative and societal impact that could be ascribed to the Rome Statute and the Court.

This points to the importance of assessing the ground-level impact of the Court in situation-countries. The exercise of identifying a clear framework for this assessment is hindered by the breadth of aspirations attached to the ICC project articulated by its founders and supporters. These aspirations point to uncertainty about the identity of the Court. Is it a criminal justice institution, a transitional justice mechanism, or an instrument for peace building and reconciliation? As with deterrence, many of these aspirations rested on assumptions that were purely aspirational, and did not have an empirical basis. For instance, these assumptions included the hope that the Court would contribute to bringing peace and reconciliation, while neglecting the polarizing effects that trials can have on post-conflict societies. The ability of trials to contribute to the establishment of an uncontested historical record is further delimited by how the ICC is perceived. The articulation of a clear framework can help to bring into focus realistic assumptions for the ICC process, and to manage expectations around those goals.

This thesis does recognize that investigations and trials conducted by the Court can have an expressive value, an assumption that is increasingly reflected in the literature.[1579] In this respect, the Court has served to highlight conflicts in Northern

[1578] McCargo, Duncan. *Transitional Justice and its Discontents.* Journal of Democracy, Vol. 26 (April 2015) p. 11.
[1579] Aloisi, Rosa and James Meernik. *Judgement Day: Judicial Decision Making at the International Criminal Tribunals,* Cambridge University Press (2017).

Uganda, Colombia, Libya, Afghanistan and other places, which would have perhaps received less attention from international audiences and commentators otherwise. Its trials likewise have served to highlight types of violations, including the use of child soldiers, sexual violence, and attacks on cultural property. However, the expressive value of the ICC is indirect: as an external body it cannot itself contribute to rebuilding a social contract within a society. The Court's expressive impact has also been limited by other factors, such as the small number of accused and limited charges.

The experiences at Nuremberg, Tokyo, and the ICTY and ICTR strongly indicate that the normative messaging of international courts and tribunals is not always accepted by local audiences, who may view the Court's actions as external imposition and therefore illegitimate, politicized, and far from impartial. The challenge of the Court is to translate its global norms to the local level without levels of distortion that seek to dilute its demonstration effect.

III. More Normative than Societal Impact?

This thesis suggests a framework of indicators relating to normative and societal impact of the Rome Statute and the Court. The systemic and transformative effect of the Rome Statute and the ICC are indicative of a normative shift that increasingly, states around the world explicitly recognize that certain crimes should not go unpunished.

Process tracing suggests that the systemic effect of the Rome Statute and the ICC on national legal systems, including in Colombia, Uganda, Afghanistan and Libya is detectable and attributable. This goes beyond the notion of "complementarity", much heralded by the Court itself and by its supporters. Instead, process tracing should follow the more complex process of "internalization" of Rome Statute norms at the domestic level.

Evidence of systemic effect is found in the fact that many countries have implemented domestic laws covering Rome Statute crimes, even if they were not required to do so. States including Uganda, Kenya and Colombia have also adopted legislation based on Rome Statute norms, such as on victim participation. Colombia and Uganda have seen establishment of special investigative units to investigate or prosecute, or divisions of Courts to try Rome Statute crimes.

Domestic proceedings can be especially difficult to evaluate for their genuineness, as can be seen in the various domestic trials in Colombia, Libya and Uganda. At the same time, systemic effect at the national level is present in all the countries discussed in this thesis, and may contribute to the long-term desired outcome of preventing atrocities. Internalization in the domestic realm may become the primary realm where the preventive effect of the Rome Statute will manifest itself.

Transformative effect on political processes where Rome Statute norms are at stake, such as peace negotiations, is more ambiguous, but can still be found through process tracing. There is evidence of clear, attributable impact on peace negotiations in both Uganda and Colombia, both in terms of their content and their process. Crucially, both peace processes committed to the investigation and prosecution of persons responsible for Rome Statute crimes. In Uganda this was mainly focused on the LRA, whereas in Colombia trials may encompass not just former FARC but also state actors. In both situations, victims had a prominent role in the process that could be traced to their empowerment through the Rome Statute and the scrutiny of the ICC.

But transformative effect ought to also manifest itself in the passage of fewer amnesties. The Rome Statute and the Court have not been in existence long enough to be conclusive. Recent amnesties in Uganda and Colombia have excluded Rome Statute crimes. On the other hand, amnesties that included Rome Statute crimes, were passed in Afghanistan or Libya. Amnesties may remain on the table in resolving today's conflicts. In its announcement on withdrawal from the Rome Statute, South Africa indicated that it wanted to continue to play a role as a peace mediator on the African continent, and that it had learned from its own experience that the ICC "was not the only way to resolve disputes".[1580]

Furthermore, the normative impact of the Rome Statute is diminished by its limited reparative effect. Quantitative indicators such as numbers of victims participating, or the number of reparations claims awarded, may be relevant, but do not give insight into qualitative issues such as whether participation is perceived as meaningful. The bureaucracy surrounding participation casts doubt on its meaningfulness. Victims are not often included in key aspects of the OTP's decision-making on when to open an investigation, or when to exit a country, as is demonstrated in the case of Uganda. In Kenya, potential witnesses stood in harm's way, and victims suffered profound disappointment when the cases were discontinued.

The reparations phase of the Court's proceedings are just beginning and may have an important expressive function, but the limited resources available to the Trust Fund for Victims do not bode well for the Court's ability to provide anything beyond symbolic rather than meaningful relief for victims. Given the centrality of victims to the Court's mandate, the limited ability of the Court to yield a reparative effect through its legal processes is concerning. On the other hand, the work of the Trust Fund for Victims provides inspiration on achieving reparative effect for victims through non-legal approaches, even with limited resources. The expressive value of the Court's proceedings should not be overblown, as it will not be able to punish, nor to repair, in any proportion to the harms suffered.

[1580] Fabricuis, Peter. *South Africa confirms withdrawal from the ICC,* Daily Maverick, 7 Dec. 2017

Furthermore, limitations on the demonstration effect of the Court may further inhibit the societal impact of the Court. As an external actor, the Court's actions were not perceived as impartial in ongoing conflicts such as in Uganda and Libya. The arbitrariness associated with the Court's temporal jurisdiction reduced its relevance in the eyes of local populations, who often had other justice priorities. In some cases, the Court was suspected of serving a foreign agenda, or complicating peaceful solutions to conflict. Perceptions of the ICC are far from positive, even across four very different situations, thus further inhibiting the expressive value of the Court.

Perceptions in situations where the Court was in the shadows of the preliminary examination tended to be more positive and optimistic than in situations where the Court was in the spotlight of active investigations, and where its limitations became more obvious for all to see. Unless the ICC succeeds in being perceived as independent and impartial, and universal on the one hand but also responsive to local justice concerns on the other, its overall normative effect may be diminished.

IV. Complementarity or Internalization? Or Parallelism?

A. Does The Court Impact the Most Where it is Needed the Least?

The Prosecutor suggested in 2003 that the true measure of success of the Court ought to be measured by an absence of ICC proceedings. Complementarity therefore became increasingly defined as a vehicle through which to help domestic justice systems. Yet 15 years of experience show that conception of complementarity as an incubator of "systemic effect" may be flawed. The conception of complementarity from the outset was largely court-centric, and based on the notion that the Court, or the Assembly of States Parties would catalyze change at the domestic level through "positive complementarity". Instead, supporters of the Court conceived of complementarity as a Court-centric notion. In their conception, the Court remained the centerpiece of the international criminal justice architecture. The Court itself competed for cases, through applying an overly rigid definition of complementarity using the "same person, same conduct" test to admissibility questions. The relationship that developed between the Court and different states (Uganda, Kenya, Libya, Colombia) was often adversarial.

As addressed in Chapter 3, complementarity is not a concept that is designed to address systemic problems facing national legal systems after periods of extended conflict or mass atrocities. The focus of the Court gives rise to a distorting effect, focusing attention on only on a few cases (Ongwen, Al-Senussi and Saif Al-Islam) in a context of much broader challenges. Complementarity does not address fundamental human rights challenges facing domestic trials, in spite of their importance or centrality to rebuilding the rule of law during a period of transition– as demonstrated in Case 177 in Libya. Complementarity can even foster bias against domestic systems among international practitioners, who may presume there is no capacity to be found at that level.

Due to its lack of enforcement powers or state cooperation, the ICC often replicates challenges faced at the domestic level, therefore giving rise to parallelism rather than complementarity. For example, if the national authorities are not able to guarantee security for investigations (Afghanistan), arrest the accused (Uganda) or protect witnesses (Kenya), neither is the ICC.

It may be useful to reorient the discussion of systemic impact on domestic legal systems to internalization of the Rome Statute, through implementation of the crimes and norms of the Rome Statute in domestic law, the strengthening of domestic capacities and conducting domestic proceedings. But the impact of the Rome Statute on the motivation of States to conduct domestic proceedings seems to be higher in States that are more law-abiding and already have functional legal systems (in this case Colombia, and to some extent Uganda) rather than in states where the rule of law is weaker (Libya or Afghanistan). The high number of domestic proceedings in Colombia demonstrates that rather than catalyzing, the ICC may serve to perpetuate an already existing internal drive to abide by legal norms and standards. This again points to parallelism rather than to complementarity.

In this sense, the Court may have the most impact where it is needed the least, i.e. in states with domestic legal systems that are most able and willing to conduct their own investigation and trials, such as Colombia. Nonetheless, systemic effect through internalization remains a useful way by which to assess the impact of the Rome Statute and the International Criminal Court on the country level, as ultimately it will contribute to prevention.

B. Looking Forward: The Potential of Internalization

Internalization of the Rome Statute is the most promising avenue for prevention of Rome Statute crimes in the future. It is at the domestic level that a solution to impunity ought to be found. This would suggest a radical refocus, away from the ICC as a Hague-based mechanism, and onto the domestic level, beyond what the current framework of "complementarity" allows for.

The Rome Statute could be amended to explicitly require implementation of Rome Statute crimes in domestic law, as is the case in the Convention Against Torture or the Convention on Enforced Disappearances, which states in Article 4 that: "Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law." Considering the willingness currently demonstrated by States to implement the Rome Statute, this seems attainable.

Secondly, the Court should cease its practices of readily accepting state referrals or even competing for cases. The Court should make more effort to distinguish between cases of unwillingness and cases of inability, or use the thresholds of gravity, admissibility and the interests of justice to decline accepting jurisdictions in certain situations. It is not desirable that the Court should conduct cases that

conceivably could be investigated and tried on the national level. This deprives societies from the benefits of "internalization." In cases of inability, the Court should leave more room for states to conduct their own trials or promote assistance to be given through the United Nations and other actors. A good recent example is the Cour Special set up in the Central African Republic, with the assistance of the United Nations.[1581]

In some situations, countries will not be able to uphold international fair trial standards. However, the Court's ability to influence the fairness of trials is constrained by the Statute in any case, as recognized by the Appeals Chamber in the case of Abdullah Al-Senussi. Improving national proceedings can be an active focus of other organizations, including the United Nations. As more experience is accrued in conducting trials at the domestic level, indicia of genuineness will emerge more clearly, as has been the case with the Colombian cases. If the ICC continues its role as a Court of last resort in cases of unwillingness, it can still contribute to avoiding impunity.

Sustainable changes in domestic systems will not miraculously emerge due to pressure from The Hague. Internationalization requires a longer-term, developmental approach, including local ownership, promotion of bottom-up approaches, awareness raising, and capacity building over time. Internalization ought to be viewed as a domestic law reform process, with the same political hurdles and obstacles. Rather than seeking "hard mirror" replications of the Court's norms and procedures, a margin of appreciation should accompany domestic efforts, particularly on matters of procedure, rather than on fundamental issues that would allow loopholes for impunity, such as the definition of crimes, modes of responsibility, or barriers to prosecution.

VI. Transformative Effect: Is Peace With Punishment the Future?

A. Is there a Genuine Paradigm Shift in Peace Negotiations?

The peace versus justice is a dilemma as old as human history, and is likely to remain, in spite of the coming into force of the Rome Statute. More negotiations will take place in the shadow of the ICC in years to come. In the best-case scenario, future negotiations will follow the "peace with punishment" model that was tabled in Uganda and elaborated in the Havana peace accord. If states consistently follow that model, and seek to "achieve peace with the maximum justice", as stated by President Santos, it may be possible to talk about "transformative effect."

[1581] Labuda, Patrick. *The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?* Journal of International Criminal Justice, Vol. 15 Issue 1 (2007) pp. 175-206.

The first Prosecutor advanced the Court as a "game changer" in the world of peace negotiations, rendering an "amnesty for truth" settlement such as in post-apartheid South Africa impossible in the future, stating at Nuremberg in 2007: "If States Parties do not actively support the Court, in this area as in others, then they are actively undermining it … It is the lack of enforcement of the Court's decisions which is the real threat to enduring Peace." At the Review Conference in Kampala in 2010, a panel concluded that amnesties are "no longer an option". To date, Articles 16 and 53 of the Rome Statue have not been used to navigate peace versus justice tensions. The OTP's policy paper renders the "interests of justice" virtually unusable, resulting in a position akin to *fiat justitia ruat caelum*.

As already described, the Rome Statute and the ICC had a measurable transformative effect in peace negotiations in Uganda and Colombia. Involvement of the ICC resulted in more attention to accountability, the perspectives of victims, and humanitarian issues. It has also impacted on actors, including state actors and empowered victims during negotiations. In Uganda and Colombia, models of "peace with punishment" found their way into the agreements. The Juba Agreement contained strong justice provisions, including the establishment of a War Crimes Division, in part inspired by the ICC. In Colombia, the ICC prompted revisions to the Justice and Peace Law (975), and the Legal Framework for Peace by the Constitutional Court and has also resulted in the inclusion of a Special Jurisdiction for Peace in the Havana Peace Accord, including "a component of restriction of liberties and rights". These are important normative developments pointing to transformative effect.

So far, evidence on whether the Court either promotes or hinders negotiations is not conclusive. The argument that the ICC brought the LRA to the table is not proven. The peace talks at Juba ultimately failed, but on the other hand, peace talks in Colombia succeeded in spit of the shadow of the ICC. Experts are not agreed on whether the ICC was causal in the failure of the Juba peace talks.

In any case, it may be too optimistic to speak of a "paradigm shift." It is not clear that States Parties are prepared to take amnesties off the table. Several countries under ICC jurisdiction have continued to pass or renew amnesty laws in recent years. A paradigm shift would entail that even in countries with Western troops on the ground, such as Afghanistan, State Parties would insist on including accountability in negotiations with the Taliban. The recent agreement made with Hekmatyar points to the opposite. In Libya, some States Parties were open to allowing Qadhafi into exile and considered the arrest warrants a hindrance. The imperative to prevent future crimes will continue to weigh heavily against the need to punish the past. If the ICC is to contribute to prevention, it ought to heed this balance, and leave the door open to transitional justice options in peace agreements.

B. Looking Forward: Using Art. 53 as a Balancing Test in Dealing with Peace Processes

Currently, the Prosecutor's interpretation of Article 53 deprives it of its usability and utility. A different interpretation, equating the interests of justice with the national interest, could reintroduce a balancing test to be used in situations where robust peace processes seek to introduce comprehensive measures to deal with accountability and safeguard the interests of victims.[1582] The interests of victims go beyond criminal justice. Many victims emphasize reparations in particular, as they would like to return to a life of dignity. The experience in Colombia has demonstrated that the Court should not seek to ride roughshod over democratic processes that seek to promote peaceful solutions to conflict, but that the Court should exercise restraint in these situations. Opposition to these processes will diminish its legitimacy. The Court ought to tolerate innovative solutions and locally attuned solutions to accountability and punishment, such as those put forward in Colombia. It can afford flexibility, particularly on forms of punishment, better than it can afford rigidity.

The Colombia teaches the world that the broader concept of impunity is broader than that of punishment of perpetrators, and ought to include remedies for victims. There is after all no "universal formula" in deciding how to conclude conflicts. With the conduct of criminal trials, the expressive function that domestic courts are able to play will be largely fulfilled. Peace with alternative forms of punishment may be a model for the future.

VII. Reparative effect: Victims Rights but no Remedies?

A. Is the ICC Serving Victims?

The Rome Statute made a strong commitment to recognizing the rights of victims and providing them with a remedy. Certainly many victim communities put their hopes in the Court to lift them out of their (often miserable) circumstances.

Yet the concept of victimhood that prevails in practice before the Court is disassociated from notions of agency. First, the structures of the Court and its distance from the situations in which it operates do not allow for any significant direct connection and interaction with victims, much of which is handled through intermediaries, including common legal representatives seeking to represent victims. The Court's processes on participation and reparations, as currently being implemented, risk constituting mainly a nominal recognition of the rights of victims. Instead, victims face the prospects of lengthy bureaucratic processes, stretching into

[1582] Hayner, Priscilla. *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict.* Routledge (2018) pp. 105-106, pp. 108-110. Hayner suggest a more elaborate policy on behalf of the OTP on the "interests of justice", with advisors and guidelines.

decades. In some cases in Northern Uganda and CAR victims may not live to see the result. For these reasons it may be justified to reconsider the judicial reparations approach of the Court; to further focus victim participation on the most important stages of the trial; and to reallocate resources to the Trust Fund for Victims to ensure that broader ranges of victims can receive assistance sooner.

The narrow range of the criminal proceedings initiated by the ICC forms a further limitation on victims of mass atrocities being able to access their rights before the Court, and further limits the expressive function of the Court.

Genuine consultation of victims remains a big challenge. Victims and their views are frequently absent in key decisions made by the Court, such as when to enter or to exit a situation. In Northern Uganda this led to "survey wars", during which different opinions from victim populations were solicited by different organizations to promote their own views on whether victims supported the Court.

Victims have struggled to obtain real remedies in the context of the Rome Statute**.** An approach to reparations that takes proportionality as a central principle is simply not realistic considering the means available to the TFV. Even the standard of meaningful relief, set in the jurisprudence, may not be matched by resources. The limitations on reparations in individual cases also casts doubt on the purpose of victim participation.

In Uganda, prior to the arrest of Ongwen, after 10 years of investigations victims asked themselves what was the purpose of the ICC intervention. The case of Ongwen may not be able to reverse this perception. In Kenya, originally support for the ICC was high, but victims are deeply disillusioned with the withdrawal of charges against President Uhuru Kenyatta and other prominent accused. A number of potential and actual ICC witnesses were killed. Victims in the Rift Valley barely received any assistance from the government, and did not receive reparations. The TFV has not been able to deploy to Kenya pending a security assessment, due to the political tensions around the Court. In the Kenya case, even the minimalist do no harm principle was violated.

The limitations on reparative effect for victims, fifteen years into the lifespan of the ICC, should give rise to serious reflection on this aspect of the Court's mandate. The narrow lens of the Court also introduces new hierarchies of victims, and leaves many deserving victims out of its ambit. In contrast, the work of the Trust Fund for Victims receives positive reviews in the countries where it operates, precisely for its non-bureaucratic and non-judicial nature, and because it allows for more engagement, interaction and agency for victims.

B. Looking Forward: Achieving Acknowledgement and Maximizing the Role of the TFV

For many victims, an opportunity to engage with the outreach functions of the Court in their immediate environment may have more meaning than participation in the trials themselves. For instance, the victims that are facilitated to watch proceedings of the Dominic Ongwen trial on television screens in Northern Uganda, followed by genuine two-way discussions, may have as much sense of participation in the process as those who fill out the extensive victim participation forms. Consultation may mean more than participation. Consultation is defined by the UN as "a vigorous and respectful dialogue whereby the consulted parties are given the space to express themselves freely, in a secure environment, with a view to shaping or enhancing the design of transitional justice programs."[1583] Victims themselves highlighted that "justice itself is an experience and a process, and not simply an outcome."[1584]

In regard to participation in the proceedings, one option is to limit it to particularly decisive stages of t he proceedings, such as the confirmation of charges; the decision on a no-case-to-answer; the closing statements of the trial; the sentencing process; or crucial parts of the appeal insofar as they touch on the interests of victims. This would also free up funds from the victim participation function currently spent on legal representation and other costs that that could be reallocated to the Trust Fund for Victims.

Victims need timely and tangible solutions that seek to improve the quality of their l lives. Many of these may take local, culturally relevant forms that will differ per society. Real remedies will require more bottom-up approaches, such a microcredit schemes that seek to empower victims to move ahead. These options also break victims out of the "savages, victims and saviours" paradigm to become active agents in their own futures.

In this regard, the ICC would benefit from more learning from transitional justice systems in how the issues of participation and reparations have been approached. Pablo de Greiff has spelled out some of the challenges:

> Reparations programmes are meant to (partially) redress gross and systematic human rights violations, not sporadic or exceptional ones. This has far-reaching consequences. It implies that the universe of potential beneficiaries is large ad that they probably suffer various and multiple forms of abuse… The violations that reparations benefits are meant to address are frequently of the sort that is, strictly speaking, irreparable.[1585]

[1583] Office of the High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: National Consultations on Transitional Justice, 2009 (authored by Michael O'Flaherty).
[1584] ICTJ Briefing, *Reparations for Northern Uganda: Addressing the Needs of Victims and Affected Communities*, September 2012.
[1585] Office of the High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Reparations Programs, 2008 (authored by Pablo de Greiff).

All of these factors make it very challenging to address reparations effectively through judicial processes leading to proportionate reparations. De Greiff argues that recognition, or acknowledgement of the plight of victims should take a center stage in rebuilding civic trust between citizen and state, as should social solidarity.[1586] These are very important lessons for the ICC, which may face a similar shortage of resources. At the same time, the ICC should make efforts to connect with national programs, as acknowledgement at the national level will do more to restore civic trust than at the international level.

So far, the experience of the TFV, in positively impacting the lives of victims, even with relatively limited resources, is remarkable and hopeful. The TFV's approach avoids the pitfalls of "juridified victimhood." More can also be done is to insist on reparations at the domestic level by States themselves. What has been achieved by Colombia, under its Victims Law, is more significant than what the Court can possibly achieve in any given situation. In any case, ICC interventions ought to be more closely streamlined and coordinated with local justice initiatives, which are more likely to benefit victims directly.

VII. Demonstration Effect and the Challenge of Negative Perceptions

A. The Multifaceted Challenge of Perceptions

Perceptions, positive or negative, can serve to either amplify or reduce the Court's normative impact. Public perceptions are not necessarily a measure of the Court's effectiveness. In fact, the Court could be very effective in carrying out its mandate, but could still be negatively perceived. As is clear from the cases if Kenyatta and Ruto in Kenya, perceptions are time-sensitive, and can be manipulated by political actors. They are also time-sensitive. Even so, negative perceptions towards the ICC undermine its societal impact and its legitimacy.

Perceptions may be more positive in countries where the ICC is in the shadows, at the preliminary examination stage, rather than in the spotlight of investigation. Perhaps this is because the limitations of the Court process are not as clearly understood in those situations. In preliminary examination countries (Afghanistan, Colombia), the Court remains more abstract, and perhaps more feared, or revered, than in countries where the Court has shown the limitations of its actions (Uganda, Libya). Although knowledge of the Court in preliminary examination countries can be scant, in Afghanistan and Colombia victims or their representatives hope that the Court as a supranational mechanism will overrule their inept national authorities or eliminate challenges attached to domestic justice system. This can be contrasted

[1586] De Grieff, Pablo. *Justice & Reparations,* in *The Handbook of Reparations* (ed. Pablo de Greiff), Oxford University Press (2006).

with Uganda and Libya, where the small number of arrest warrants and their one-sided nature clearly showed the limitations of the ICC process.

The degree to which the Court is perceived as relevant among local actors varies. In Colombia, the ICC is seen is as a critical player, albeit as an unwelcome intrusion a national process of negotiations. In Libya, the ICC was seen as relevant during the overthrow of Qadhafi, but its relevance diminished in the post-Revolution period. In Uganda it was seen as relevant during the Juba peace process but less so in its aftermath, in spite of the Ongwen trial. The Kwoyelo trial will be more accessible to victims and affected communities… It has already yielded a certain "internalization" of Rome Statute norms.

It is too early to assess the consequences of the Court opening an investigation in Afghanistan. The Taliban or other groups such as the Haqqani network and ISIS, which widely practice suicide missions, are unlikely to fear the Court; and it will be difficult to investigate international forces in the coming years, particularly with the Trump administration. There are indications that the government will feel betrayed by its Western Allies if only it is investigated or prosecuted: after all, it has been conducting the international community's bidding in the war on terror. Nonetheless, the Court could not avoid taking on one of the "hard cases" without further undermining its legitimacy. As stated by Nader Nadery, Presidential Advisor on the ICC:

> We already took major steps to fulfill our obligation. Prosecutions were carried [out] on cases of torture. Afghanistan's Attorney General conducted a major criminal investigations on war crimes carried out by Taliban. The OTP pressure has only been on our government. The favorable condition we built to adopt complimentary laws is affected negatively by announcement of the OTP.[1587]

In general it has proved difficult for the ICC to align with local justice priorities. For instance, in Afghanistan and Colombia in particular, which are both protracted conflicts, many decades of the conflict are outside the ICC's temporal mandate. In Colombia local priorities have prompted discussions of "benefits" or lenience for paramilitaries and the FARC respectively. In Uganda, local populations tended to put a focus on traditional justice (and the Mato Oput), but also on truth telling and reparations. In Libya and Afghanistan, local priorities focused on various transitional justice measures, such as vetting of perpetrators from positions of power (or negative forms such as political isolation), documentation, and missing persons.

The perception that the Court as an external actor is "trumping" local justice priorities is prevalent in many countries. In Uganda, local religious and traditional leaders advanced the proposition that the ICC seeks to "trump" an indigenous,

[1587] Email to the author dated 15 June 2018.

restorative approach to justice. In Colombia, the Court is referred to as "El Coco", which is the equivalent of an imaginary monster used to scare children. In Libya, the new authorities had trouble understanding why the ICC insisted on contesting admissibility in the cases of Saif al-Islam and Abdullah al-Senussi even after national proceedings were initiated against them.

Limited and one-sided arrest warrants have bred a perception in Uganda and Libya that the Court is not impartial. Many years of local organizations lobbying the Court to open an investigation against the UPDF for its actions in Uganda or DRC have not borne fruit, and many in Uganda believe that the Court is manipulated by Museveni, particularly due to the fact that the referral was first announced in a joint press conference by Museveni and the Prosecutor in January 2004. Likewise, in Libya the rebels believed that the Prosecutor is "their" prosecutor and that the Court's mandate is restricted to Qadhafi-era crimes. This impression was reinforced by the Prosecutor's conduct when he visited Libya: he publicly congratulated the people of Misrata for their brave revolution, whereas the Commission of Inquiry accused the Misratans of a crime against humanity in the form of ethnic cleansing of a nearby town occupied by the Tawergha, dark-skinned Libyans. Similar accounts of the perception of one-sidedness or bias have emerged from other countries under investigation (DRC, Cote d'Ivoire).[1588]

In countries such as Libya and Afghanistan the Court is also perceived as subject to Western agendas. Its failure to get involved in investigating any Western powers for actions in Afghanistan and Iraq reinforces that view. In Libya, the perception of the ICC is an agent of foreign powers emerged both during the Abdullah al-Senussi extradition, and the detention of ICC staff member Melinda Taylor by a militia in Zintan in 2012. In Afghanistan, respondents expressed the view that the presence of American troops is the reason why the Court was seemingly reluctant to open an investigation. In all these situations, the Court is generally perceived of as aligning with military rather than negotiated solutions to conflict, thereby possibly prolonging conflicts, as demonstrated in the Kony 2012 saga.

B. Looking forward: A Case for Context-Sensitive Approaches in International Criminal Law

The Court, as essentially a "top-down" institution, is currently not adequately equipped to take into account the nuances of the local context of all the situations under its scrutiny. As stated by Mbeki and Mamdani: "Human rights maybe universal, but human wrongs are specific."[1589] This is particularly the case during preliminary examination, where the Court's involvement and resources that it can devote to a situation are limited. Yet more knowledge of local context may assist it

[1588] Rosenberg, Sophie. *The ICC in Cote d'Ivoire- Impartiality at Stake?* JICL Vol. 15 Issue 3 pp. 471-490.
[1589] Mbeki, Thabo and Mahmood Mamdani, *Courts Can't End Civil Wars*, Op-Ed, International New York Times, 4 Feb. 2014.

to make better tactical decisions, about whether and when to open investigations. A more careful context analysis in a number of situations could have led to more considered actions and better-timed actions by the Court.

It is sometimes tempting to conclude that lack of support for international criminal justice institutions stems from ignorance, and that winning support or building local ownership is a matter of simply divulging more information about the Court and its processes. However, as the examples above indicate, many of these perceptions were not necessarily founded in misunderstandings, but rather in a realistic appreciation of the limitations of the Court, or disagreements with its actions or non-alignment with local priorities. This indicates that negative perceptions cannot be tackled purely through increasing outreach activities.

Instead, it should involve the broader concept of engagement. In the words of the ICC President: "We must together ensure that the Court engages sufficiently the victims and communities affected by the crimes so that they can understand, participate in, and develop ownership of its proceedings."[1590] However, the key to "engagement" is that the learning process must be mutual, and that the Court on occasion will be called to adjust its policies and strategies, within its legal limitations. So far, this has often not been the case.

Increased local knowledge could be cultivated by more local presence and more engagement and consultation with local communities, which in turn could have cultivated more understanding of local context. Local staff can provide valuable knowledge and insight. In other cases, the Court has utilized the visiting professional program. These resources could be leveraged more strategically. A closer alignment with local justice priorities can increase the Court's expressive value within a particular context.

Resources are a definitive factor in how the Court is able to address perception issues. The Court should consider conducting outreach and encouraging more active engagement in countries that are under preliminary examinations, such as Colombia. Mere accessibility may assist the improvement of public perceptions. Preliminary examinations are in need of a clear communication strategy. The opportunity to of populations to exchange and dialogue with Court representatives, even in situations of preliminary examination, could yield improvements in perceptions, and may lead to more and earlier "internalization" of the Rome Statute norms in domestic contexts. It may also serve to empower victims.

[1590] ICC President's Remarks at Coalition for the ICC Launch Forum Commemorating the 20th Anniversary of the Adoption of the Rome Statute, 15 January 2018.

VIII. Reconsidering the Global Nature of the International Criminal Court

A. The ICC's Preventive Potential

It is still too early to judge whether the Court will be able to contribute to longer-term goals of prevention as opposed to shorter-term goals of deterrence. It is possible that over time the acceptance of the norms of the Rome Statute in different contexts, in the form of systemic or transformative effect, will have this result. Global norms can find unique expression in local contexts: only then will it contribute to long-term prevention:

> Thus, the prevention of future crimes is necessarily a long-term process of social and political transformation, entailing internalization of ideals in a particular context or "reality," or the gradual penetration of principles into given power realities.[1591]

On the other hand, as discussed above, different factors may also complicate the expressive function of the Court and the acceptance of its norms. The expressive value of the Court will not easily be realized through the Court's legal processes, but instead require a process of interaction and deliberation that may lead to internalization or acculturation.

A more active engagement with national stakeholders over time is needed to ensure true preventive impact. The extensive engagement of the ICC in Colombia vis-à-vis other contexts under preliminary examination is instructive in what the Court may be able to achieve in this regard. In Colombia, the Court was able to impact on the formation and implementation of Law 975: the Legal Framework for Peace and Havana Peace Process, and the investigations of false positive cases. The open-ended nature of the preliminary examination was an important asset. But this intervention required a true investment from the Court itself, including the devotion of resources and the gathering of extensive internal knowledge within the ICC. However, such a rebalancing of resources, which will otherwise be spent on investigations and trials in situation countries, may yield more impact in the long term and may enhance the preventive potential of the ICC. The expressive function of the Court may in fact become narrower, the more it becomes focused on its own processes, on individual accused and specific charges.

B. Should the Court Choose Deep Over Wide

The approach of the International Criminal Court in the last fifteen years was engage in a large number of situations where there is potential jurisdiction, largely as a

[1591] Akhavan, Payam. *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* The American Journal of International Law 95 (1) (2001) p. 11.

consequence of self-referrals. Perhaps there was an option earlier in the life of the Court to engage more deeply, but in fewer situations. This would require a departure from current practices in accepting self-referrals. This would also entail more investment in the preliminary examination stage in order to apply an extensive analysis to the question whether a situation should proceed to investigation. The notions of gravity, admissibility (if one departs from the same accused/ same conduct test), and the interests of justice could all be interpreted in ways that allow the Court to decline opening more investigations.

If the Court engaged in fewer situations, it would have been able to develop better in-depth analysis on particular situations. It could have pursued more thorough investigations and more arrest warrants per situation, and would be less susceptible to accusations of one-sidedness or bias. The risks of limited numbers of arrest warrants to the credibility of the Court, and the faith that victim communities have in it, are all too apparent in the recent acquittal of Jean-Pierre Bemba.

The creation of the International, Impartial and Independent Mechanism on international crimes committed in Syria provides an interesting model in this regard.[1592] Its tasks are two-fold: one is to collect, consolidate, preserve and analyse evidence; and second, to prepare files to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts, in accordance with international law. The primary task of the IIIM thus is to collect and analyse the evidence, whereas the question of a suitable venue for trial is to be addressed later on a case-by-case basis. If there were regime-change in Syria, the evidence may even be used in national trials one day. In its first report to the General Assembly, the IIIM pays specific credit to the role of civil society in documenting violations, and states that it will "seek to empower the affected Syrian communities through its work", that it will engage in "promoting effective exchanges so that the views and interests of the affected communities are canvassed and considered on an on-going basis", and that it will be "guided by a victim-centered approach throughout its work."[1593]

This new model has a historic precedent, the UN War Crimes Commission, established in 1942 by the Allied Powers to investigate war crimes committed by Axis war criminals. The Commission investigated and gathered testimony on those crimes, but had no powers of prosecution. It reported cases back to national jurisdictions, which could then initiate trials. The UNWCC listed over 36,000 individuals and units as indicted war crimes suspects at the time of its closure in 1949, resulting in at least two thousand trials conducted in Allied courts in Europe

[1592] Whiting, Alex. *An Investigative Mechanism for Syria: The General Assembly Steps into the Breach,* Journal of International Criminal Justice Vol. 15, Issue 2, 1 May 2017 pp. 231-237.
[1593] Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, A/72/764, 28 Feb. 2018, paras. 19-22.

and the Far East.[1594] Similar to the ICC, the UNWCC was a project in which many different states participated.

These two examples, one historic and one modern, speak to a different model of justice, one in an international mechanism focuses on investigation and where trials are left to the domestic level. The model is very different from the ICC, which has underemphasized investigations and put a premium on trials in The Hague. What if the ICC were to change approach, by putting more emphasis on investigation and on cooperation with national authorities to conduct trials? Would this reshaping have more impact than the current approach?

Some may argue this approach is inconsistent with the Assembly of States Parties' commitment to universality of the Rome Statute. It is difficult to argue that a global court should only be involved in a few situations. On the other hand, the current approach risks that the role of the Court in many situations becomes purely symbolic - if not shambolic. Instead of seeking to adjudicate in all situations, the Court should remain a lynchpin in promoting a global legal order.

C. Global Legal Order vs. Global Court?

The United Nations, a global organization with all its staff and resources, has often been criticized for its formulaic approaches and has been accused of not paying sufficient attention to context and to local ownership. The same was true for the ICTY and ICTR, although they engaged extensively with the domestic context. It is much more complex for the ICC.

The ICC is forced to act in the world's most ravaged societies, where conflicts have raged for decades, and to address the world's worst crimes. These are some of the most politically polarized and divided societies. The Court is called to do that with far less resources at its disposal than the United Nations. This fundamentally calls into question the realism of a global court for all situations. While the values underlying the Rome Statute system should be seen as universal, and a universal global legal order remains a lofty goal, the wisdom of propagating a single mechanism for all of the world's worst crimes is simply not realistic, and it will not yield justice for the victims of those crimes. In as far as possible, justice should continue to be pursued on the national level, through the internalization of international norms combined with strengthening national institutions and bottom-up approaches that empower justice-seekers.

In this respect, it is encouraging to note suggestions of the establishment of new hybrid models in a wide variety of places,[1595] including the CICIG in Guatemala, the

[1594] See the website www.unwcc.org, established by Dan Plesch, Director of the Center of International Studies and Diplomacy at SOAS.
[1595] Schaack, Beth van. *The Building Blocks of Hybrid Justice,* 44 Denver Journal of International Law and Policy (2016), p. 169.

Cour Special in the Central African Republic, the new EU Kosovo tribunal, a hybrid AU Tribunal suggested for South Sudan,[1596] and a International Team to Investigate crime of ISIL in Iraq.[1597] Some scholars are speaking of a resurgence of hybrid tribunals.[1598] Indeed, one of optimum ways to establish national capacities to try Rome Statute crimes in the future may be to combine them effectively with international assistance. Some have also argued for a "regionalization" of international criminal law.[1599]

D. From Law to Justice: The Need for Diverse, Pluralistic and Deliberative Approaches to Pursue Accountability for Mass Atrocity

The former Prosecutor of the ICC liked to refer to the ICC as the hub in a wheel of international criminal justice. Perhaps it is better seen as another spoke in that wheel than the hub itself: the hub is the normative prohibition on war crimes, crimes against humanity and genocide, and the ICC is an avenue to pursue accountability for those crimes. After all, as Drumbl argues, the core liberal concept of the centrality of the individual has led to the application of legal principles and values to societies "where such forms are neither innate nor indigenous."[1600] Goldstone has written: "transitional justice is ultimately about nations torn apart by gross violations of human rights learning to live together within a context of dignity, human rights and social justice."[1601] Global does not need to equate a "universal formula."

Since WWII, violence has evolved more and more to spill across state boundaries and involve many forms of non-state actors. Mass atrocities are sufficiently complex that they require multi-faceted, pluralistic approaches to come to terms with them. Just as societies have shown resilience through decades of conflict, they should also be trusted in proposing solutions to their own historical legacies of violence. Ideally, the involvement of the ICC will generate debate amongst various actors, whether they are proponents or opponents of the ICC process, that itself will contribute to a "norm-generating process".[1602] In fact, "when actors contribute to the creation of legal meaning, they will also feel more compelled to respect these legal norms and assume resulting obligations."[1603]

[1596] Voice of America, *South Sudan Inches Closer to Hybrid Tribunal on Conflict's Four Year Anniversary*, 17 Dec. 2017.
[1597] Schaack, Beth van. *UN Releases Guidelines for Team Investigating ISIS Crimes in Iraq,* Just Security, 18 Feb. 2018.
[1598] See the project of Mark Kersten and Kirsten Ainsley at https://hybridjustice.com/.
[1599] Jalloh, Charles. *Regionalizing International Criminal Law*, International Criminal Law Review 9 (2009), p. 224.
[1600] Drumbl, Mark. *Atrocity, Punishment and International Law,* Cambridge 2007, p. 5.
[1601] Goldstone, Richard, in Pieces of the Puzzle: Key words on Transitional Justice and Reconciliation, (Compress, http://www.oneworldbooks.com, South Africa) 2004.
[1602] Kastner, Philipp. *Armed Conflicts and Referrals to the ICC: From Measuring Impact to Emerging Legal Obligations,* 12 JICL (2014), pp.471-490, p. 487,
[1603] Ibid, p. 488.

A central motivation for the creation of the ICC was the desire not to create more ad hoc Tribunals, which were considered slow and inefficient, as well as enormously expensive. In this sense, the Court was intended as a "cost-saving" measure. Conflict situations are often underserved by an ICC intervention, which can only devote a fraction of its resources to any given situation. The question of who may be subject of ICC arrest warrants ultimately distracts from finding more extensive, context-specific solutions for mass atrocity. Indeed, ICC interventions in some situations may be absorbing valuable political space and resources which could perhaps be put to better and more sustainable use within a domestic transitional justice strategy which balances different approaches and mechanisms.

The trial of *Hissan Habre* by the Extraordinary African Chambers, established in Senegal with the involvement of the AU, based on universal jurisdiction, presents an interesting new model,[1604] and has been praised for extensive victim involvement in initiating the prosecution and eventually as parties civiles and witnesses in the trial, a labour of many decades.[1605] In the words of Brody: "It is unfortunately very rare for victims to play that role (in the center of the legal struggle), but they did so in the Habre case, and it proved as well to be a major factor in creating the political conditions to bring Habre to justice, as their stories captured the attention of the public and of policymakers."[1606] In addition, the trial only cost 8.6 million Euros.

As an external mechanism, the ICC contravenes widely accepted principles in the transitional justice and peace-building fields, about the importance of context-specific, no "one size fits all" solutions; and the importance of domestic ownership. It also contradicts a comprehensive approach and serves to focus attention on the prosecution of a few individuals, which serves as a "lightening rod" to attract attention away from other issues. The external nature of the ICC has contributed to a legitimacy deficit and poor perceptions of the Court in different situation-countries.

Part of the responsibility for the Court's limited impact lies with the Assembly of States Parties, and its decisions on resource allocation. The ICC should not be seen as *the* justice solution for any situation, but as an element of an overall strategy, better suited to some situations than to others. While the Court is global, it should seek to adapt to the local. Only when international justice actors deepen their understanding about what justice means for victims and affected populations, will their interventions have real and lasting impact, and can the ICC evolve from an instrument of law to one of justice.

[1604] Williams, Sarah. *The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem.* 11 Journal International Criminal Justice (2013) p. 1139.
[1605] For a detailed account of the trial see Brody, Reed. *Victims bring a Dictator to Justice: The Case of Hissene Habre,* Bread of the World (2017).
[1606] Brody, Reed. *Victims bring a Dictator to Justice: The Case of Hissene Habre,* Bread of the World (2017) p. 19.