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**Schizophrenic Justice: Exploring 'Justice for Victims' at the International
Criminal Court (ICC)**

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Abstract

This thesis examines how the promise and institutionalization of ‘justice for victims’ has shaped the ICC’s justice vision and identity. Drawing on interviews with 90 practitioners in The Hague, Kenya and Uganda, it undertakes a sociological and institutional analysis of how ‘justice for victims’ has evolved in the Court’s first two decades through the definitions and redefinitions, pushes and pulls, strategies and miscalculations of the Court’s diverse actors both in The Hague and in the field. It argues that the introduction of ‘justice for victims’ has led to a rift within the Court between those who embrace a narrow understanding of justice as ‘fair trials’ and those who see the ICC as an opening for broader justice processes.

These rifts and gaps are reinforced by the Court’s actors in the field such as victims’ lawyers and intermediaries who sometimes assume political advocacy roles beyond what the Court’s judges envisaged or follow their parochial interests on the ground. While the ICC’s judges have increasingly curtailed victim participation and reparation in the court room, the Court’s practices on the ground reflect an uneasy fusion of legal justice, development, local and national politics with a proliferation of new justice concepts including ‘transformative justice’ and ‘gender justice’. So far, these justice contestations have not chipped away, much less undermined, the Court’s legitimacy. Rather, the Court has thrived on its justice contradictions; its failure to commit to any particular justice vision while loosely relating to all possible visions, has made the Court impervious to critique. But the thesis will also show that ‘justice for victims’ at the ICC is schizophrenic: it is inherently unstable and its contradictory dynamics may at some point rip the concept apart - and with it the Court’s legitimacy.

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Abbreviations

AU	African Union
AMICC	American NGO Coalition for the International Criminal Court
ASF	Avocats Sans Frontières
ASP	Assembly of States Parties
ARLPI	Acholi Religious Leaders Peace Initiative
AU	African Union
CAR	Central African Republic
CBO	Community-Based Organizations
CICC	Coalition for the International Criminal Court
CSO	Civil Society Organization
CUP	Cambridge University Press
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
FIDH	International Federation for Human Rights
HRW	Human Rights Watch
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda

IDP	Internally Displaced Person
KHRC	Kenyan Human Rights Commission
LRA	Lord's Resistance Army
LRV	Legal Representative of Victims
NGO	Non-Governmental Organization
OPCD	Office of the Public Counsel for the Defence
OPCV	Office of the Public Counsel for Victims
OTP	Office of the Prosecutor
OUP	Oxford University Press
PEV	Post-Election Violence
RLP	Refugee Law Project
RS	Rome Statute
SGBV	Sexual and Gender-Based Violence
STL	Special Tribunal for Lebanon
TJ	Transitional Justice
TFV	Trust Fund for Victims
UN	United Nations
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit

Maps of Research Sites



Figure 1: Research Sites in Uganda



Figure 2: Research Sites in Kenya

Introduction

‘Let me read it to you from our Statute’ – I’m sitting in the office of an ICC staff member who flips through the pages of the Rome Statute.¹ I had come to the Court to explore what is meant by its ubiquitous promise to deliver ‘justice for victims’. The International Criminal Court (ICC) has been widely celebrated as a ‘victims’ court’, as it provides them with extensive rights to participate in the proceedings and to receive reparations. But when I asked the Court’s practitioners what ‘justice for victims’ meant, their responses were ambiguous and conflicting. On the one hand, many officials emphasized that the ICC’s core justice business is ‘to investigate, arrest and try alleged criminals’.² On the other hand, broader concepts of justice including ideas of ‘transformative justice’, ‘gender justice’, and ‘social justice’ were voiced by my interlocutors. Even more curiously, many ICC practitioners did not have a ready-made answer to my question and instead referred me back to the ICC’s founding document, the Rome Statute (RS). Some of them then literally started to fumble for their copy on their desk to find the relevant provisions. Yet that reach for legal certainty often led to disappointment. The Rome Statute’s provisions on victims and justice are very vague, leaving it to the Court’s practitioners, especially its judges, to give shape to the ICC’s victims’ engagement.

In the literature, the ICC is often portrayed as a Court caught between law and politics, justice and power, norms and interests. The former are virtues; the latter are vices. The former are solid as rocks, the latter are fickle and treacherous. The biggest

¹ Interview with Counsel, OTP, 13 November 2013.

² A. Fulford, ‘The Reflections of a Trial Judge’, 22 *Criminal Law Forum* (2011) 215, at 216; C.H. Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?’ 6 *Northwestern Journal of International Human Rights* (2008) 459, at 522; ICC, ‘Understanding the International Criminal Court’, available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (visited 24 July 2016), at 1.

problem for the ICC, according to the literature, is that justice and law are constantly intruded, limited and even defined by power and politics. Many ICC practitioners and NGO advocates see it as their mission to strengthen the former and keep in check the latter. The implication of this binary scheme is that the power and politics of the Court are well researched while justice has not received much attention as an object of study in its own right.

Justice is simultaneously treated as the essence and a footnote of the international criminal process. There have been few attempts to interrogate its meaning and practice more closely in international criminal justice in general and at the ICC in particular. Part of the reason for this neglect is that justice is assumed to be made of other 'stuff' (principles, maxims) than politics or power. It is considered to be beyond the fray of an institution mired in conflict; it hovers apart from the social relationships and networks inside and outside the Court. One of the main goals of this thesis is to demystify 'justice', to treat it in the same way constructivists treat other concepts such as 'nation', 'memory' and 'family', namely as ideational construct whose meaning is shaped and shifted to serve different social and political purposes.

The point here is not simply to say that justice is not objective or that people have different ideas about justice. This is widely accepted. The point is also not to argue that justice is purely relativistic. It is quite the contrary. Justice is a very powerful concept precisely because its boundaries are well policed; precisely because not everyone can authoritatively say what it is. Justice is a concept that in and of itself exerts power. Justice can be quite oppressive. It is hard to escape that conclusion when you see at what length people are willing to go to get 'justice'. When I asked a victim of post-election violence in

Kenya why he was working for free for the Court, going on his bicycle from village to village to persuade victims to come to a meeting with the ICC's lawyers, he said 'because I want justice to prevail'.³ Justice is thus also a means of social control, a powerful instrument to get people to do things, and of keeping them in line.

Given how powerful 'justice' is, it is important to ask, 'who constructs it, for what purpose, and how does it function?' These questions cannot be answered in the abstract but need to be studied in an empirical context. This thesis explores how 'justice for victims' is constructed, used and implemented at the ICC. The idea that 'justice for victims' means more than simply bringing the perpetrator to justice is relatively new in international criminal justice. The ICC is the first international criminal court to institutionalize it through victim participation, reparation, assistance and outreach. The Court itself acknowledges that its promise of doing 'justice for victims' has become so inextricably interwoven with its legitimacy that its failure may 'place the credibility of the entire Rome Statute system and the Court's work at risk...'.⁴

This thesis examines how this new promise and its institutionalization have shaped justice ideas and practices at the Court. By applying the conceptual lens of 'interactional justice', it traces how 'justice for victims' has evolved in the Court's first two decades through the definitions and redefinitions, pushes and pulls, strategies and miscalculations of the Court's diverse institutional actors both in The Hague and in the field. Drawing on interviews with 90 practitioners in The Hague, in Kenya and in Uganda, my research reveals that the ICC is a much more divided institution than both the ICC literature and

³ Interview with Victim-Intermediary, Western Kenya, 19 August 2014.

⁴ *Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims and Reparations*, ICC-ASP/11/32, 23 October 2012, §24.

the Court's self-representation would have us believe. In fact, after more than a decade of operations the meaning of 'justice for victims' is still unsettled as the judges have failed to develop a common justice vision and practice.⁵ This has left a justice vacuum at the Court that different practitioners within the court room, but also in the field, have filled with different meanings, giving rise to conflicting and even contradictory victims' practices.

More specifically, I argue that the introduction of 'justice for victims' has created a rift within the Court between those who embrace a narrow understanding of justice as 'fair trial' and 'just punishment' and those who see the ICC as an opening for broader justice processes including truth-seeking and reparative justice. These rifts and gaps are reinforced by the Court's actors in the field such as victims' lawyers and intermediaries who sometimes assume political advocacy roles beyond what the Court's judges envisaged or follow their parochial interests on the ground. While the ICC's judges have increasingly curtailed victim participation and reparation in the court room, the Court's practices on the ground reflect an uneasy fusion of legal justice, development, local and national politics with a proliferation of new justice concepts including 'transformative justice', 'gender justice' and 'social justice'.

What are the implications of these contradictory justice claims and practices for the Court's legitimacy? The thesis' initial hypothesis was that such a disintegration of 'justice' as the Court's main currency would further undermine its legitimacy at a time when the ICC is already under challenge from several corners for its 'slow', 'selective', 'biased' or 'paltry' justice record. Yet, my research suggests otherwise that, if anything,

⁵ Of course, 'the judges' are not a monolith but this constitutes a shared tendency among them.

justice contestations have strengthened the Court. The ICC emerges from this analysis as an actor in international politics that flexibly draws on different rationales for justifying its existence at different times while evading any clear goals, purposes or yardsticks. From 'fair trials' to 'no trials', from 'the virtues of ICC intervention' to the 'virtues of non-ICC intervention', from 'comprehensive justice' to 'expressiveness', from 'retributive' to 'restorative', to 'transformative', to 'gender' justice - the Court's actors have promised everything and nothing. Rather than representing a particular Transitional Justice (TJ) model ('international criminal trials'), the ICC has swallowed all possible TJ discourses including even the philosophy of local justice rituals. In this disjointed, contradictory way, the Court has operated rather successfully, persuading states and civil society that it is 'the only game in town' and at the same time 'complementary' to and even 'supportive' of other justice mechanisms. A malleable organization that casts itself into multiple and contradictory justice roles, the Court nonetheless never loses sight of the soft fall-back position of 'only' being a criminal court that does 'fair trials', nothing more, nothing less.

In this way, my thesis aims to make four contributions to the literature on criminology, transitional justice and international criminal justice. First, it produces a thoroughly constructivist analysis of justice through the concept of 'interactional justice'. 'Interactional justice' is a sociological lens that makes the empirical process through which justice concepts and practices evolve at the ICC analytically visible. As such, it aims to break the deadlock between two justice paradigms that have dominated the international criminal justice literature: 'legalism' and 'justice relativism'. The legalist paradigm sees justice as an objective and self-evident concept derived from legal principles such as due process and retributive justice, while 'justice relativists' claim that international courts

impose a Western understanding of justice onto affected communities whose justice ideas are relative to their local culture and personal ideas. Both paradigms sustain the myth that justice ideas at the ICC are narrow and uniform; they neatly represent either an 'objective' or a 'Western' concept of justice. Interactional justice, on the other hand, reveals that the meaning of justice at the ICC is in flux. It is constantly shaped and shifted through the everyday interactions, discourses and activities of practitioners within and outside the institution. Justice at the ICC is not simply made by following the legal script of a fair trial within the court room; it is also made outside the court room in the interactions and contestations between ICC lawyers, bureaucrats, NGOs, local intermediaries and victims.

Second, the thesis provides an integrated, empirical study of the evolution of justice at the headquarters in The Hague and in the field through an innovative methodological approach: a non-local ethnography. A non-local ethnography uses ethnographic observations but instead of focusing on specific places or communities, it *follows* concepts by studying the discourses and networks through which they evolve.⁶ By combining ethnographic fieldwork in The Hague, Kenya and Uganda, the thesis traces how justice concepts 'travel' from the headquarters to the Court's situation countries undergoing re-interpretations and distortions on the way and meeting with resistance and changes at different levels of the implementation process. In this way, the thesis

⁶ G. Feldman, 'If ethnography is more than participant-observation, then relations are more than connections: The case for nonlocal ethnography in a world of apparatuses', 11 *Anthropological Theory* (2011) 375; G. Feldman, 'Illuminating the Apparatus: Steps toward a Nonlocal Ethnography of Global Governance', in C. Shore, S. Wright and D. Però (eds), *Policy Worlds: Anthropology and the Analysis of Contemporary Power* (New York; Oxford: Berghahn, 2011).

connects justice processes that are often artificially separated as ‘global’ and ‘local’ and shows how they mutually shape each other.

Such an analysis also brings to the fore institutional actors at the periphery of the Court’s bureaucracy, especially in the field, whose job it is to identify victims, inform them about the process, organize their representation and administer assistance to them. These actors are either ignored in the literature or alternatively, their influence on the Court’s work is trivialized. This thesis, on the other hand, concludes that these ‘field practitioners’ such as victims’ lawyers, bureaucrats and intermediaries often have different, broader and more political ideas of the Court’s justice mandate and have significant leeway in promoting and implementing them on the ground. As the ‘face of the Court’ in its situation countries, their activities greatly shape the ICC’s legitimacy in the eyes of victims and affected communities.

Third, the thesis contributes an institutional and ideational history of the Court’s first two decades through the lens of ‘justice for victims’. It does so by interweaving a constructivist interpretation of ‘justice’ with an institutional analysis of the ICC as a *sui generis* court with ‘new’ and ‘old’ actors that push for different justice visions. ‘Justice for victims’ was introduced at the ICC to legitimise a particular justice system, retributive justice, and to police its meaning and boundaries. Yet, it did not fit neatly into the Court’s institutional procedure – pushes and pulls began: the judges tried to contain ‘justice for victims’, but new actors at the Court’s periphery pushed it forward. Justice contestations ensued. Yet, while ‘justice for victims’ is used strategically at the Court, its introduction has also created cracks, leaks and backlashes in the system that may foster broader justice visions. Such institutional dynamics are often overlooked in the legal analysis of courts,

but in a young and complex institution that operates in nine different countries at the same time they matter greatly. While lofty ideas such as ‘justice for victims’ are often side-lined, misused and transmuted, it is difficult to control them in a diverse institution such as the ICC where ‘outside the court room’ practitioners can act as powerful ‘norm entrepreneurs’. For instance, victims’ lawyers and intermediaries can translate these justice ideas into new victims’ practices on the ground which over time may become normalized in an institution that is still unsure of the type of justice it wants to, and is able to, achieve.

Fourth, the thesis offers a fresh normative perspective on the implications of ‘justice contestations’ for the ICC. Justice contestations at the Court have been either ignored in the literature or reduced to bureaucratic competition or clashes between ‘civil law’ and ‘common law’ lawyers.⁷ To the extent that justice contestations at the ICC are acknowledged, they are seen as ‘bad for justice’.⁸ Yet, justice contestations can be ‘good for justice’ in two ways. First, they help to debunk the myth of the moral certainty of law. The idea that one can impose an impartial and rational justice structure on complex and protracted conflicts has always been a dangerous illusion of international criminal justice. It threatens to misrepresent international conflicts, their causes and remedies. Justice contestations reflect the reality that there will always be competing ideas of what ‘justice

⁷ D. Kaye, ‘Who’s Afraid of the International Criminal Court? Finding the Prosecutor Who Can Set It Straight’, 90 *Foreign Affairs* (2011) 118, at 123; B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Cambridge: Intersentia, 2011), at 10, 234.

⁸ *Independent Panel of Experts Report on Victim Participation at the International Criminal Court*, July 2013, available at <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf> (visited 29 October 2015), § 4; De Vos, Kendall and Stahn, for example, claim that ‘the practice of the Court suffers from its own contradictions’. See C. De Vos, S. Kendall and C. Stahn, ‘Introduction’, in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* [e-book] (Cambridge: Cambridge University Press (CUP), 2015), at 19.

for victims’ means in a particular case. Second, justice contestations unsettle the ritualistic fashion in which legal practitioners apply justice procedures and may thereby open up deliberative spaces for more reflective justice-making at international criminal justice institutions.

The thesis’ argument will be developed through seven chapters that follow ‘justice’ from The Hague to the field. Chapter I situates my research at the intersection of three bodies of literature: criminology, transitional justice and international criminal justice. It identifies as their common blind spot the lack of a rigorously, constructivist analysis of justice and addresses this gap through the concept of interactional justice. Chapter II explains the methodological approach of the thesis and provides background to its research sites in The Hague, Kenya and Uganda.

Chapter III opens the empirical part of the thesis. It explores the meaning and practice of justice at the ICC’s headquarters. The Chapter reveals that practitioners’ justice ideas are much more diverse and conflicting than the literature suggests and cannot be fully explained through Bourdieu’s lens of ‘legal culture’. Building on these insights, the Chapter traces the evolution of ‘justice for victims’ since the Court’s inception in 2002. It dissects the three main critiques of the Court’s victims’ engagement and demonstrates that they share an important blind spot: even when ideas of justice for victims are (mis-) used to justify flawed victims’ practices, they can still have knock-on effects on broader conceptual and procedural developments in the field of international criminal justice.

Chapter IV makes the transition from The Hague to the field by looking at a new category of actors which connects a ‘global’ Court to ‘local’ communities and victims: the

ICC's intermediaries.⁹ Intermediaries are diverse actors, such as community leaders and national NGOs, who help the Court with evidence collection and victims' engagement in its situation countries. Drawing on fieldwork in Kenya and in Uganda, I will argue that the 'global' vs. 'local' framework obscures more than it illuminates about the Court's victims' engagement through intermediaries. An interactional justice analysis reveals that some of the most important justice contestations happen within the ICC and in the field rather than between the 'global Court' and 'local communities'. In fact, the ICC's internal contradictions, rather than the much vaunted 'mischievousness' of intermediaries, explain much of the Court's ambiguous victims' engagement.

Chapter V explores what 'victimhood' and 'justice for victims' mean in the Court's victims' engagement. It looks more closely at the 'cogs and wheels' of victim participation in Kenya and victim assistance in Northern Uganda - from the field office to the victim - identifying the leaps, disconnections and misinterpretations between the Court's staff, intermediaries, partners and victims. Ultimately, the Chapter suggests that the ICC's victims' engagement in Kenya and Uganda oscillates between irrelevance and divisiveness. By creating 'categories of victimhood', the Court's staff and intermediaries not only turn victims who do not fit their categories into 'cheaters', but also hand a ready-made tool for dividing and ruling them to powerful actors such as states.

Chapter VI focuses on a new concept that has emerged within the Court's justice discourse: transformative justice.¹⁰ The aim of 'transformative justice' is to use the Court's

⁹ A version of Chapter IV has been published as an article. See L. Ullrich, 'Beyond the "Global-Local Divide": Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', 14 *Journal of International Criminal Justice (JICJ)* (2016) 543.

¹⁰ Parts of this Chapter have been published in an article. See C. Hoyle and L. Ullrich, 'New Court, New Justice?: The Evolution of Justice for Victims at Domestic Courts and the International Criminal Court', 12 *JICJ* (2014) 681.

reparation and assistance mandate to address the root causes of conflict, gender discrimination and inequality in the Court's situation countries. While the critique of transformative justice has focused on the ICC's limited capacity and the question of whether 'transforming societies' is or should be part of the ICC's mandate or not, I will argue that there are more fundamental problems characterizing its practice on the ground: first, it ignores that there are very different visions of how a transformed society should look like in Northern Uganda and second, even though transformative justice sets out to address structural causes, in practice, it shifts the responsibility of 'transformation' from the state to the individual: in the final analysis, it is the victim who has to do the transformation.

Chapter VII explores the interplay between notions of 'gender justice' in the Court's Statute and prosecutorial strategy and the reaction from the field. It traces how the ambiguous gender definition of the Rome Statute has given rise to different interpretations, but also to resistance both within the Court and in the field. The Chapter reads the interpretive battle around 'gender justice' through the lens of a broader 'but what about men?' backlash which has been levelled at international organizations focusing on sexual and gender-based violence (SGBV) victims and women's empowerment in post-conflict Uganda. I explore how these organizations including the Court's Trust Fund for Victims (TFV) have accommodated this 'backlash' and will argue that the accommodation has often come at the price of a structural approach to 'women's empowerment' and gender justice in Uganda.

The conclusion draws together this diverse empirical material to provide a more nuanced account of the interplay between justice, victims and legitimacy at the ICC. Such an analysis shows that justice at the Court is schizophrenic: the ICC is an ideologically divided institution that has nonetheless been able to use 'justice for victims' to manage its different constituencies, especially victims. Yet, these ideological divisions within the Court threaten to upset its careful management system; 'justice for victims' and legitimacy may become a bridge too far for the ICC.

Chapter I - Making Sense of ‘Justice for Victims’ at the ICC

Chapter I contextualizes the ICC’s victims’ rights regime within the historical trajectory of international criminal justice – a field marked for the most part by the absence of victims. It then situates this thesis’ research at the intersection of three bodies of scholarship: criminology, transitional justice and international criminal justice. It identifies and challenges the two dominant models of justice underlying these three bodies: first, ‘legalism’ which derives justice concepts deductively from philosophical maxims or legal principles, and second ‘justice relativism’ which interprets justice through the lens of culture or individual beliefs. In response to the shortcomings identified, the Chapter develops an alternative way of studying justice as an interactional process.

1. The Rise of ‘Victims’ in International Criminal Justice

The ICC’s provisions for victim participation and reparation are often said to add a ‘restorative justice’ component to the Court’s retributive justice mandate.¹¹ Regarding victim participation, Article 68 (3) of the Rome Statute stipulates that:

where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

On reparations, Article 75 provides that ‘the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation’. Article 79 establishes the Trust Fund for Victims (TFV) which is endowed with two mandates: reparation and assistance. Under its reparation mandate, the TFV

¹¹ *Court’s Revised Strategy in Relation to Victims*, ICC-ASP/11/38, 5 November 2012, at 2.

implements the reparation orders of the Court against a convicted person if the Court directs it to do so.¹² Under its assistance mandate, the TFV uses voluntary contributions it receives from donors ‘to provide victims and their families in situations where the Court is active with physical rehabilitation, material support, and/or psychological rehabilitation’ independent of convictions or even trial proceedings.¹³

In practice, 13,000 victims have so far participated in the Court’s cases.¹⁴ The Chambers have granted rights to participation for 56,4% of the applications they received.¹⁵ These victims can through their legal representatives attend and participate in hearings before the Court, make opening and closing statements, present their views and concerns, access the case index, make written submissions, request the Chamber to order specific measures such as protection, question witnesses and present evidence.¹⁶ However, these rights are not absolute. Rather, the respective Chamber has the discretion to determine the modalities of victim participation in the proceedings before it.¹⁷ Meanwhile, the TFV has assisted up to 59,695 direct beneficiaries and 126,703 indirect beneficiaries in Uganda and the Democratic Republic of Congo (DRC) by providing them with reconstructive surgery, psycho-social counselling and educational support amongst

¹² TFV, ‘The Two Roles of the TFV’ [online], available at <http://www.trustfundforvictims.org/two-roles-tfv> (visited 13 August 2016).

¹³ Ibid.

¹⁴ S. Fernández de Gurmendi, ‘Preventing Crimes and Suffering through Justice’, The World Post, 15 July 2016, available at http://www.huffingtonpost.com/silvia-fernandez-de-gurmendi/preventing-crimes-and-suf_b_11015622.html (visited 5 August 2016).

¹⁵ This percentage is as of August 2014. Women’s Initiatives for Gender Justice, *Gender Report Card* (2014), available at <http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf> (visited 29 May 2016), at 244.

¹⁶ OPCV, *Representing Victims before the International Criminal Court: A Manual for Legal Representatives*, December 2014, available at <https://www.icc-cpi.int/iccdocs/opcv/OPCVManual-4-Eng.pdf> (visited 5 August 2016), at 28/29, 150- 157.

¹⁷ REDRESS, *The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future*, October 2012, available at http://www.redress.org/downloads/publications/121030participation_report.pdf (visited 13 August 2016), at 49-51; See also RS, Art.68(3).

others.¹⁸ For these purposes the TFFV has raised €22 million in total, from member states as well as private donations.¹⁹

The much vaunted ‘ground-breaking’ nature of these victims’ rights becomes clear when contextualized in the historical trajectory of international criminal justice.²⁰ Emerging after the end of the Second World War, international criminal justice institutions initially ignored the victim, recognizing him or her only in the role of the witness.²¹ The Statute of the Nuremberg Tribunal, for example, did not include any reference to victims, not to mention their rights or interests in criminal proceedings.²² Indeed, ‘the very concept of a “victim” in the sense of a private individual with a legal status under international law by virtue of having suffered injury or harm in consequence of a violation of its rules’ had been alien to international criminal law for much of the 20th century.²³

The gradual move of the victim from the margin to the centre of international criminal justice discourse unfolded in the context of three overlapping developments.

¹⁸ TFFV, *Assistance & Reparations: Achievements, Lessons Learned, and Transitioning* (2015), available at http://www.trustfundforvictims.org/sites/default/files/media_library/documents/FinalTFFVPPR2015.pdf (visited 13 August 2016), at 16. These are the figures for the reporting period, October 2015-June 2015. They should be treated with caution as it is the TFFV’s partners on the ground who do the counting with little independent oversight. For example, you may be counted as a ‘beneficiary’ if you attended a town hall meeting that informed affected communities about the TFFV’s activities. One beneficiary may be counted as three if they received three different services.

¹⁹ *Ibid.*, 57.

²⁰ S. Arbia, Speech by the ICC Registrar at the Conference ‘Justice for all? The International Criminal Court - 10 year review of the ICC’, 14 February 2012, available at https://www.icc-cpi.int/NR/rdonlyres/8C6B4B5B-D854-4F18-BA76-E0F687F2D60C/284274/Speech_10anniversary_Australia.pdf (visited 13 August 2016), at 4.

²¹ C. Jorda and J. De Hemptinne, ‘The Status and Role of the Victim’, in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002).

²² S. Garkawe, ‘Victims and the International Criminal Court: Three Major Issues’, 3 *International Criminal Law Review* (2013) 345, at 347.

²³ C. McCarthy, ‘Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?’, 10 *Journal of International Criminal Justice (JICJ)* (2012) 351, at 354; C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge: CUP, 2012).

Most fundamentally, the 1960s witnessed the emergence of victims' rights movements in many countries whose advocates decried the 'secondary victimization' victims allegedly experienced at the hands of the criminal justice system not only due to their marginalization but also due to the traumatic experiences of cross-examination at court.²⁴ Drawing inspiration from civil law countries' extensive victims' rights to participation and reparation as *partie civile*, they demanded a greater role for victims in the criminal justice process. Their advocacy also gained traction at the international level, culminating in two UN General Assembly resolutions that enshrine the rights of victims to access justice and reparation.²⁵ The shift towards victims' needs and interests can also be attributed to the ascent of restorative justice theories and institutions such as truth and reparation commissions in Transitional Justice (TJ) after the end of the Cold War.²⁶ Restorative justice theories make the recognition of, consultation with and redress of victims the centre-piece of TJ processes.²⁷ Finally, the idea of 'justice for victims' became salient in the wake of the legitimacy crisis of international criminal justice in the 1990s as the societal impact of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) was increasingly found wanting, especially because they failed to resonate with the needs and interests of victims and

²⁴ M. Rauschenbach and D. Scalia, 'Victims and International Criminal Justice: A Vexed Question?', 90 *International Review of the Red Cross* (2008) 441, at 442; C. Trumbull, 'The Victims of Victim Participation in International Criminal Proceedings', 29 *Michigan Journal of International Law* (2007) 777, at 782.

²⁵ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. A/Res/40/34, 29 November 1985 (hereinafter 'Basic Principles of Justice for Victims'); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 21 March 2006 (hereinafter 'Basic Principles of Reparations').

²⁶ R. Teitel, 'Transitional Justice Genealogy', 16 *Harvard Humanitarian Rights Journal* (2003) 69, at 78.

²⁷ C. Hoyle, 'Can International Justice be Restorative Justice? The Role of Reparations', in N. Palmer, P. Clark and D. Granville (eds), *Critical Perspectives in Transitional Justice* (Cambridge: Intersentia, 2012) 189, at 194/195; H. Strang and L. Sherman, 'Repairing the Harm: Victims and Restorative Justice', 15 *Utah Law Review* (2003) 15.

affected communities.²⁸ Against this backdrop, the ICC's victims' rights provisions were heralded as a way of overcoming the alienation experienced by victims at previous tribunals.²⁹ This sentiment was well expressed by an NGO representative during the Rome negotiations:

...Punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs.³⁰

Despite this trend, the inclusion of victims' rights in the ICC's Rome Statute was anything but a foregone conclusion. The original draft statute prepared in 1994 by the International Law Commission did not entail any provision on victim participation and reparation.³¹ When the Rome negotiations began in 1998, the paragraphs on victim participation and reparation were all bracketed indicating the failure of the negotiators to reach agreement on them during the Preparatory Committees (PrepCom).³² It has been argued that NGO pressure and the advocacy of like-minded states especially France drawing on 'restorative justice' ideas were the driving force behind the eventual inclusion of victims' provisions

²⁸ M. Goetz, 'The International Criminal Court and its Relevance to Affected Communities' in N. Waddell and P. Clark (eds) *Courting Conflict : Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008) 65, at 65; E. Haslam, 'Law, Civil Society and Contested Justice at the International Criminal Tribunal for Rwanda', in M-B. Dembour and T. Kelly (eds.) *Paths to International Justice* (Cambridge: Cambridge University Press, 2007), at 68/69; M. Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia', 7 *JICJ* (2009) 89.

²⁹ F. McKay, 'Victim Participation in Proceedings before the International Criminal Court', 15 *Human Rights Brief* (2008) 2, at 2; M. Pena, 'Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead', 16 *ILSA Journal of International and Comparative Law* (2009) 497, at 499.

³⁰ Victims' Rights Working Group, 'Speech by Fiona McKay on behalf of the Victims' Rights Working Group', 16 June 1998, available at http://www.vrwg.org/VRWG_DOC/1998_Flyer_speech.pdf (visited 10 August 2016).

³¹ Draft Statute for an International Criminal Court with commentaries (1994), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf (visited 10 August 2016).

³² C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge: Cambridge University Press, 2012), at 99/100.

in the Statute.³³ Muttukumar, for example, recalled that while many delegations initially insisted that victims' rights were already recognized through the Court's 'retributive and deterring functions', they came to accept that victims' interests in restorative justice are distinct and should be integrated into the Statute.³⁴ Yet, others have pointed out that reparations were envisaged as a further penalty for the perpetrator rather than as redress for victims at the early stages of the negotiations.³⁵ One ICC judge who participated in the negotiations remembered:

It [justice for victims] moved from a vague reminder that the Court is there for victims to a fairly detailed regulation. When 'justice for victims' was introduced, it was the idea of adding compensation as a further penalty for the perpetrator; that was the original idea. Ideas of rehabilitation and restorative justice came in later especially when drafting the Rules and Regulations.³⁶

Thus, both the status of victims at the ICC and the rationale of victim participation and reparations were far from settled when the Court was conceived in Rome.

2. Three Perspectives on Victims and the ICC

2.1. Criminological Insights: Similar Debates, Different Justice Implications

While criminological insights have informed the debate on the victim's role at the ICC, they still largely remain at its margins.³⁷ Scholars have drawn on criminological research

³³ G. Bitti and H. Friman, 'Participation of Victims in the Proceedings', in R.S. Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers, 2001), at 457.

³⁴ C. Muttukumar, 'Reparations to Victims', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), at 264.

³⁵ F. McKay, 'Are Reparations Appropriately Addressed in the ICC Statute?' in D. Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley, NY: Transnational Publishers, 2000), at 168-169.

³⁶ Interview with Judge, The Hague, 17 December 2013 (based on my notes).

³⁷ For a recent effort to develop criminological approaches to International Criminal Law, see I. Bantekas and E. Mylonaki (ed.), *Criminological Approaches to International Criminal Law* (Cambridge: Cambridge University Press, 2014).

to explore the constructions of victimhood in international criminal justice and how these feed into hierarchies of victimhood based on notions of ‘ideal victims’ that use similar tropes of ‘blameless’, ‘innocent’ victims as in the domestic discourse.³⁸ Attention has also been paid to criminological studies of victims’ needs and justice priorities as well as to the question of the psychological impact of criminal proceedings on victims.³⁹ While the ICC literature has only recently begun to grapple with the Court’s victims’ provisions, the role of victims in the criminal justice system is an old debate in criminology and its sub-field victimology.⁴⁰ Since the 1980s, scholars and victims’ practitioners have advocated for more procedural standing for victims in criminal trials as well as for the provision of better victims’ support services and reparations.⁴¹ Prima facie, the institutionalization of victims’ rights has produced similar debates at the domestic and international level. At both, the notion that ‘justice for victims’ does not only mean to bring the perpetrator to justice but also to provide victims with rights to participation and reparations has become a matter of controversy.

Many ICC practitioners and scholars argue that this *justice experiment* of combining ‘retributive’ and ‘restorative’ justice threatens to hollow out the key norms of

³⁸ K. McEvoy and K. McConnachie, ‘Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy’, 9 *European Journal of Criminology* (2012) 527; M. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford: Oxford University Press (OUP), 2012); E. Haslam and R. Edmunds, ‘Victim Participation, Politics and the Construction of Victims at the International Criminal Court: Reflections on Proceedings in Banda and Jerbo’, 14 *Melbourne Journal of International Law* (2014) 727.

³⁹ J. Wemmers (ed.), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Abingdon, Oxon: Routledge, 2014); E. Erez, M. Kilchling and J. Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice. International Perspectives* (Durham, N.C.: Carolina Academic Press, 2011).

⁴⁰ L. Zedner, ‘Reparation and Retribution: Are They Reconcilable?’ 57 *Modern Law Review* (1994) 228; R. Young and C. Hoyle, ‘Restorative Justice and Punishment’, in S. McConville (ed.), *The Use of Punishment* (Cullompton: Willan Publishing, 2003) 199; J. Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford: Hart, 2008).

⁴¹ J. Dignan, *Understanding Victims and Restorative Justice* (Maidenhead: Open University Press, 2005) 17; C. Hoyle and L. Ullrich, ‘New Court, New Justice?: The Evolution of Justice for Victims at Domestic Courts and the International Criminal Court’, 12 *JICJ* (2014) 681.

international criminal justice: impartiality, due process and the equality of arms. They are particularly concerned that victim participation will undermine the defendant's fair trial rights.⁴² By pursuing both retributive and restorative justice in the face of scarce resources, the ICC may fail in its 'primary mandate' of achieving expeditious, retributive justice. ICC Judge Christine Van den Wyngaert, for example, recalled the 'countless hours spent on determining the victim status of hundreds and in the future perhaps thousands of applicants' and purports that the Court's victims' engagement has considerably lengthened its judicial proceedings.⁴³ On this basis, critics contend that retributive and restorative justice should be re-separated, by conducting trials, on the one hand, and channelling 'justice for victims' through separate restorative institutions, such as truth and reparations commissions, on the other.⁴⁴

Yet, there are also important differences between victims' involvement in domestic and international criminal justice that have been neglected in the ICC literature. Indeed, a comparative perspective is a notable absentee in a highly legalistic literature that mainly focuses on the Court's jurisprudence on victim participation and reparation. When scholars do apply a comparative perspective, their analysis usually centres on the differences between domestic and international crimes.⁴⁵ Moffett, for example, notes that 'international crimes generally involve: (i) mass victimization; (ii) large-scale

⁴² M. Jouet, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court', 26 *Saint Louis University Public Law Review* (2007) 249; S. Zappala, 'The Rights of Victims v. the Rights of the Accused', 8 *JICJ* (2010) 137.

⁴³ C. Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', 44 *Case Western Reserve Journal of International Law* (2012) 475, at 493.

⁴⁴ B. McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls', 12 *International Criminal Law Review* (2012) 375, at 407; Chung, at 542; M.R. Damaska, 'What Is the Point of International Criminal Justice?' 83 *Chicago-Kent Law Review* (2008) 329, at 342-343.

⁴⁵ I. Bantekas, 'Introduction: An Interdisciplinary Criminology of International Criminal Law', in I. Bantekas and E. Mylonaki (ed.), *Criminological Approaches to International Criminal Law* (Cambridge: Cambridge University Press, 2014) 1.

organized participation; (iii) ideologically driven perpetration; (iv) state involvement; and (v) the crimes and impunity that have a long-term impact on victims'.⁴⁶ 'Mass victimization' in particular is often invoked by critics of victim participation to illustrate why such procedural inclusion of victims is impracticable in international criminal trials (as opposed to domestic trials with few victims).⁴⁷ In the words of an ICC Judge:

Why does it not really work? If you have a murder case in the UK or France where one or two people are murdered, it is possible [for victims] to see justice being done. Their lawyer is with them. They are part of the process of justice. I will now sit again in confirmation of charges proceedings in the Gbagbo and the Ntaganda cases. The number of victims is already abstract.⁴⁸

Such a 'crime-focused' perspective neglects other crucial differences between domestic and international criminal justice such as those relating to legitimacy and institutional composition. What is missing from the literature is a comparative, sociological analysis of domestic and international criminal justice institutions. According to Max Weber, legal institutions derive their legitimacy from their rationality.⁴⁹ Two ways of understanding legal rationality can be distinguished: substantive rationality and formal rationality.⁵⁰ Legal institutions, such as criminal courts, are substantively rational because they aim to achieve substantive ideas of justice including deterrence, accountability, victims' satisfaction and the rule of law. These institutions are formally rational as they operate in

⁴⁶ L. Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague', 13 *JICJ* (2015) 281, at 285; L. Moffett, *Justice for Victims before the International Criminal Court* (Abingdon, Oxon: Routledge, 2014).

⁴⁷ McGonigle Leyh (2011); H-P. Kaul, 'Victims' Rights and Peace', in T. Bonacker and C. Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (The Hague: T.M.C Asser Press, 2013), at 225.

⁴⁸ Interview with Judge, The Hague, 19 December 2013.

⁴⁹ M. Weber, *The Theory of Social and Economic Organization: Being Part I of Wirtschaft und Gesellschaft*, trans. A.M. Henderson and T. Parsons (London: W. Hodge, 1947), at 120.

⁵⁰ M.E. Spencer, 'Weber on Legitimate Norms and Authority', 21 *British Journal of Sociology* (1970) 123, at 128; D.L. D'Avray, *Rationalities in History: A Weberian Essay in Comparison* (Cambridge: CUP, 2010).

accordance with procedural principles, such as due process, impartiality and the expeditiousness of trials. When a justice system is unchallenged, formal rationality ('due process') is the main standard according to which criminal processes are judged. Domestic criminal courts with established procedures, for example, are rarely challenged on substantive grounds. It is not questioned whether these institutions should exist in the first place and what type of justice, if any, they bring to victims or society at large. Even if the lawyers and judges at domestic criminal courts have different substantive ideas about justice, these ideas presumably do not have much influence on the well-oiled machinery of established justice procedures.

Yet, as a new and *sui generis* institution in the international arena, the ICC lacks the habitual legitimacy and established procedures of domestic criminal courts. The Court's victims' rights regime is a case in point. It is not only characterized by a mixture of common and civil law elements but also by 'constructive ambiguity', a concept which describes the drafting strategy of settling for vague treaty principles as a way of reaching agreement between negotiators at the Rome Conference.⁵¹ This essentially left it to the Chambers to hammer out the ICC's principles and procedures regarding victims - an ongoing task even after more than 10 years of operation.⁵² As former ICC Judge Sir Adrian Fulford expressed,

this process of working out how we run this court has meant - still means - that there are great successes and not a few problems, and the unexpected occurs almost on a daily basis. But that state of affairs pre-

⁵¹ Wyngaert (2012), at 478.

⁵² War Crimes Research Office, *Victim Participation at the Case Stage of Proceedings*, February 2009, available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonVictimParticipationattheCaseStageofProceedingsFebruary2009.pdf> (visited 25 March 2014), at 30; Jouet (2007), at 268; E. Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?' in D. McGoldrick, P. Rowe and E. Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart, 2004) 315, at 323.

eminently requires that everyone involved is open to new ideas and to change where it is necessary.⁵³

When justice procedures are new and ambiguous as is the case with the ICC's victims' rights regime, the ideas of different practitioners are much more important in shaping the Court's justice practices than in domestic courts.

Unlike domestic courts, the ICC thus has to invoke rationales beyond 'fair trials' to justify and secure its existence. According to Douglas, 'the entrenchment of an institution is essentially an intellectual process as much as an economic and political one ... [E]very kind of institution needs a formula that founds its rightness in reason and in nature'.⁵⁴ This thesis will tease out the ICC's formula and argue that it is intrinsically linked to its promise of delivering 'justice for victims'. Institutional sociologists have argued that conformity to the existing normative and regulative environment is the best way for institutions to establish their legitimacy.⁵⁵ Pursuit of legitimacy thus leads to homogeneity and 'herd-like conformity' among institutional actors as well as between the institution and its societal environment.⁵⁶ While this suggests that institutions tighten their identity around shared beliefs and values in their quest for survival, the opposite can be found at the ICC. The ICC has become home to a proliferation of justice promises that often pull the institution in different directions. These justice contestations relate to the Court's unique institutional set-up.

⁵³ Fulford (2011), at 215.

⁵⁴ Douglas in K. McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', 34 *Journal of Law and Society* (2007) 411, at 423.

⁵⁵ M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches', 20 (3) *Academy of Management Review* (1995) 571, at 587.

⁵⁶ D.L. Deephouse and M. Suchman, 'Legitimacy in Organizational Institutionalism', in R. Greenwood, C. Oliver, K. Sahlin and R. Suddaby (eds), *The SAGE Handbook of Organizational Institutionalism* (London: SAGE Publications, 2008) 49, at 61.

Establishing which kind of justice an international criminal court should and can deliver is difficult in its own right. This task is even more challenging for the ICC given that it is much more than a normal court. As the ICC's Registrar pointed out, '...the ICC is a jurisdiction on its own. In a national legal system, you have a police department, you have the justice department, you have the judiciary, you have the detention facilities, and these types of things. Over here [at the ICC], everything is part of one organization...'.⁵⁷ The Court engages in a much broader range of activities than its domestic counterparts. This includes not merely investigations, trials, and detention but also community outreach, witness protection, victim participation, reparation and assistance, in diverse and complex countries, which are often scarred by on-going conflict. Yet, due to its focus on the Court's jurisprudence, the ICC literature tends to neglect the institutional implications of the Court's victims' rights regime. The Court's victims' provisions have opened the ICC's justice process to a plethora of new actors such as the TFV, the Victims Participation and Reparations Section (VPRS), the Office of the Public Counsel for Victims (OPCV), victims' lawyers, field staff, local intermediaries and partners that give life to these new provisions. How do these diverse stakeholders interpret 'justice for victims' at the ICC and how do their ideas influence the Court's justice practices? How has the promise of 'justice for victims' shaped the Court's institutional identity and ultimately its legitimacy?

These and other questions are not usually addressed in the ICC literature but take centre stage once we consider the Court from a sociological and criminological perspective. This thesis contributes such a perspective in two ways: first, by integrating

⁵⁷ T. Stevenson, 'Q & A with International Criminal Court Registrar Herman von Hebel: Part I', The Lubanga Trial at the International Criminal Court, Blog of the Open Society Justice Initiative, 21 August 2013, available at <http://www.lubangatrial.org/2013/08/21/q-a-with-international-criminal-court-registrar-herman-von-hebel-part-i/> (visited 25 March 2014).

an institutional analysis of the Court with a sociological analysis of how the concept of justice has evolved in the Court's first two decades; and second, by employing a comparative lens to flesh out the differences and similarities between domestic and international criminal justice institutions. Such an analysis suggests that, unlike domestic courts, the institutionalization of 'justice for victims' at the ICC has led to deeper contestations and redefinitions of the very meaning of justice.

Of course, there is a danger of simplifying and homogenizing domestic criminal justice in an attempt to show the complexity and contestations within international criminal justice. Posner and Vermeule, for example, have made a powerful argument for treating 'transitional justice' more like 'ordinary justice'.⁵⁸ Rather than extraordinary, regime transitions are 'merely an endpoint' in the various political and legal transitions that create ruptures and discontinuities in consolidated democracies such as constitutional amendments.⁵⁹ The state's monopoly of justice itself has fractured in recent decades through developments as diverse as civil society-led restorative justice initiatives on the one hand, and the privatization of prisons on the other.⁶⁰

Nonetheless, this thesis is based on the assumption that there is still a qualitative difference in the way practitioners at international criminal justice institutions are confronted not only with regime change but also with on-going conflict and massacres, international power politics, humanitarian crises and peace negotiations. While constitutional amendments are part of the regulated change within a sovereign state, the ICC orbits in a world in which there is no 'ultimate sovereign' to lean on and multiple

⁵⁸ E. Posner and A. Vermeule, 'Transitional Justice as Ordinary Justice', 117 *Harvard Law Review* (2003) 761.

⁵⁹ *Ibid*, at 763.

⁶⁰ McEvoy, 'Beyond Legalism' (2007), at 434.

constituencies to satisfy at the same time: states, victims, NGOs and international public opinion.⁶¹ Even within these constituencies, there are fundamental disagreements regarding the Court's rationale, as manifested in the challenge of many African States Parties to the ICC, not to speak of disagreements between these constituencies.⁶² In such an unstable environment, the Court's practitioners themselves are involved in the constant exercise of self-legitimation.⁶³

2.2. The ICC as a Transitional Justice Mechanism?

This thesis is also situated in and aims to contribute to the Transitional Justice (TJ) literature. While the TJ literature conceptualizes the ICC as a 'TJ mechanism', this is not the way many ICC practitioners make sense of it. My interviewees at the Court hardly used the terminology of 'transitional justice' and many were not even familiar with the concept. It seemed more natural for them to compare the ICC to the domestic courts they knew from their home jurisdictions rather than with a Truth and Reconciliation Commission. Nonetheless, they were keenly aware that the ICC's legitimacy is precarious precisely because 'Hague Justice'⁶⁴ competes with alternative values and institutions.

The TJ literature supplies the conceptual apparatus for such a debate about alternatives. In her *Transitional Justice genealogy*, Teitel identifies three phases of TJ: the first phase saw the emergence of international trials as a new way of dealing with the

⁶¹ G. Schwarzenberger, 'The Problem of an International Criminal Law', 3 *Current Legal Problems* (1950) 263, at 296; F. Mégret, 'In whose Name? The ICC and the Search for Constituency', in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* [e-book] (Cambridge: CUP, 2015) 23.

⁶² T. Obel Hansen, 'Africa and the International Criminal Court', in T. Murithi (ed.), *Handbook of Africa's International Relations* (London: Routledge, 2014) 165.

⁶³ R. Barker, *Legitimizing Identities: The Self-Representations of Rulers and Subjects* (Cambridge: CUP, 2001), at 14-15.

⁶⁴ C. Stahn, 'Introduction: More than a Court, Less than a Court, Several Courts in One?: The International Criminal Court in Perspective', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* [e-book] (Oxford: OUP, 2016), at lxxxvi.

crimes of defeated powers in the immediate aftermath of the Second World War.⁶⁵ As such, the phase marked the shift from the collective punishment model enshrined in the Treaty of Versailles after the First World War to individual criminality and punishment through trials in Nuremberg and Tokyo.⁶⁶ The first TJ phase was short-lived and its intervention surgical; it was exclusively applied to the transitions in Germany and Japan and was contingent on the political condition of their complete defeat and loss of national sovereignty.⁶⁷

The second TJ phase has been associated with the ‘third wave’ of transitions: the transitions in South America in the early 1980s after military rule and the post-1989 transitions in Eastern Europe, Africa and Central America. Difficult choices between providing ‘justice’ through criminal trials and ensuring peace and stability through amnesties became characteristic of this phase. It also spurred the development of alternative justice conceptions and mechanisms, especially truth commissions, to produce a historical record of past abuses and to foster reconciliation. In fact, Paige Arthur identified the transitions of the 1980s in Latin America and the practical dilemmas they posed as the historical and political context in which ‘Transitional Justice’ was forged as a field premised on a distinct understanding of transition:

An international web of individuals and institutions whose internal coherence is held together by common concepts, practical aims, and distinctive claims for legitimacy—began to emerge as a response to these new practical dilemmas and as an attempt to systematize knowledge deemed useful to resolving them. The field of transitional justice, so defined, came directly out of a set of interactions among human rights activists, lawyers and legal scholars, policymakers, journalists, donors, and

⁶⁵ Teitel (2003).

⁶⁶ Ibid.

⁶⁷ Ibid.

comparative politics experts concerned with human rights and the dynamics of “transitions to democracy,” beginning in the late 1980s.⁶⁸

This focus on ‘democratic’ transition also foreclosed alternative concepts of transition – for example ‘transition towards social justice’ through socio-economic transformation and redistribution.⁶⁹ By the end of the 20th century, transitional justice had entered its ‘third’ phase: ‘transitional justice without transition’.⁷⁰ TJ discourse and mechanisms have become normalized and are often used when there is neither a transition from war to peace, nor from authoritarianism to democracy. The normalization is also reflected in the establishment of a permanent ICC that replaces the ad-hoc tribunals for Rwanda and the former Yugoslavia of the 1990s, whose jurisdictions were limited to specific episodes in particular countries or regions.

The broadening and normalization of TJ has gone hand in hand with the rise of ‘holism’ as the dominant TJ paradigm.⁷¹ According to Phil Clark,

a holistic approach to transitional justice provides that multiple political, social, and legal institutions, operating concurrently in a system maximizing the capabilities of each, can contribute more effectively to the reconstruction of the entire society than a single institution. Holistic approaches cater to the various physical, psychological, and psychosocial needs of individuals and groups during, as well as after conflict.⁷²

⁶⁸ P. Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’, 11 *Human Rights Quarterly* (2009) 321, at 324.

⁶⁹ Ibid, at 395; M. Mamdani, ‘The Truth According to the TRC’, in I. Amadiume and A. An-Na’im (ed.), *The Politics of Memory: Truth, Healing and Social Justice* (London: Zed, 2000) 176, at 182/183.

⁷⁰ See ‘Pursuing transitional justice without transition?’, Online Debate, available at <https://www.newtactics.org/transitional-justice-practice/pursuing-transitional-justice-without-transition> (visited 13 August 2016).

D. N. Sharp, ‘Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition’, 9 *IJTJ* (2015) 150.

⁷¹ P. Gready and S. Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’, 8 (3) *IJTJ* (2014) 339, at 344/45; N. Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (Oxford: OUP, 2015), at 7.

⁷² P. Clark, ‘Hybridity, Holism, and “Traditional” Justice: The Case of *Gacaca* Courts in Post-Genocide Rwanda’, 39 *George Washington International Review* (2007) 765, at 765.

As such, holism is a response to the ‘dichotomization’ of TJ that had dominated academic and policy debate: peace versus justice, truth versus justice, international versus local solutions, legal justice versus socio-economic justice. Holism rejects these as ‘false dichotomies’ and advocates for an ‘integrated approach’ to TJ that combines different ways of dealing with the past. Yet, in doing so, it creates three blind spots which have thwarted its ambition to furnish a more nuanced understanding of TJ. First, holism obfuscates real tensions and power differentials in TJ, particularly the continued dominance of legalism. Second, despite its vision of moving beyond dichotomies, holism has effectively reified TJ’s conceptual divisions such as the ‘global’ versus the ‘local’. Lastly, its focus on integrating different TJ mechanisms has led to a de facto ‘monolithization’ of justice institutions like the ICC, which overlooks justice contestations within these institutions.

To begin with, the sensible formula ‘complex responses to complex violence’ that inspired holism has effectively been replaced by the ‘combination of mechanisms’ approach.⁷³ Its rationale is that various TJ mechanisms such as international and domestic trials, truth-telling processes and community rituals can be combined in ways that foster comprehensive justice.⁷⁴ The problem with this approach is that it has reinforced the depoliticization of TJ mechanisms by decoupling them from their justice ontology and epistemology. Holism ignores that each mechanism is tied to a particular conflict narrative and justice vision, which sit uneasily with the narratives epitomized by other mechanisms.

⁷³ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, §§8, 26.

⁷⁴ Avocats sans Frontières (ASF), *Towards a Comprehensive & Holistic Transitional Justice Policy for Uganda: Exploring Linkages between Transitional Justice Mechanisms*, August 2013, available at http://www.asf.be/wp-content/uploads/2014/05/ASF_UG_TJ-Linkages-Paper_201308.pdf (visited 13 August 2016), at 12/13.

For example, the function of a trial is not only to establish the guilt of particular individuals, but also to reproduce and legitimate a state-centric political order that treats conflict as ‘crime’ and individualizes responsibility for it.⁷⁵ Traditional justice rituals do not merely reconcile clans or reintegrate former offenders but also (re-) establish a moral and political order at the local level where particular people can decide what socially relevant ‘crimes’ are and how to deal with them. In other words, each mechanism is weaved into a different conception of political and moral order and the distribution of power within it. Tensions in TJ are about power, wealth and politics and will not simply dissolve by combining mechanisms.

While ignoring political tensions, holism readily accepts the conceptual divisions entrenched in TJ dichotomies. For example, it has become a mantra to insist that the ‘global’ and the ‘local’ of transitional justice need to be better bridged or integrated in a holistic TJ model.⁷⁶ Even ICC advocates speak of the need for ‘local translation’ or adaptation of international accountability norms and legal standards.⁷⁷ Yet, in doing so, they reaffirm and reinforce three assumptions underlying the global-local divide: first, that the ‘global’ and the ‘local’ are real things rather than normative claims to different types of legitimacy, second, that the global-local divide is a sound analytical framework for analyzing the ICC’s relationship with its situation countries and third, that the most important justice contestations happen between the ‘global Court’ and ‘local communities’ rather than elsewhere. In this thesis, I will challenge those assumptions by

⁷⁵ N. Christie, ‘Conflicts as Property’, 17 (1) *The British Journal of Criminology* (1977) 1; K. Ainley, ‘Individual Agency and Responsibility for Atrocity’, in J. Renee (ed.), *Confronting Evil in International Relations: Ethical Responses to Problems of Moral Agency* (Basingstoke: Palgrave Macmillan, 2008) 37.

⁷⁶ Gready and Robins (2014), at 344/45; D.N. Sharp, ‘Addressing Dilemmas of the Global and the Local in Transitional Justice’, 29 *Emory International Law Review* (2014-2015) 72, at 74.

⁷⁷ C. Stahn, ‘Between “Faith” and “Facts”: By What Measure Should We Assess International Criminal Justice?’, 25 *Leiden Journal of International Law* (2012) 251, at 277.

applying the conceptual lens of interactional justice to trace how ideas of the ‘global’ and the ‘local’ are constructed in the ICC’s discourse and practice.

Holism has also obscured the continued dominance of legalism in TJ. This is reflected in the way the ICC’s complementarity system is often understood as an expression of holism. Complementarity has different meanings at the ICC.⁷⁸ Most prominent among those is the notion of the ICC as a ‘court of last resort’ that only steps in if domestic jurisdictions fail to genuinely investigate and prosecute international crimes. In theory, complementarity creates an opening for the coexistence between the ICC and alternative justice mechanisms such as truth commissions at least for lower-level offenders.⁷⁹ This possibility has been discussed in the Colombian case, where the ICC has signalled ‘flexibility’ in light of Colombia’s proposal of offering reduced or alternative sentences as part of its attempt to end its civil war.⁸⁰ Yet, in a speech in 2015 on TJ in Colombia, the ICC’s Deputy Prosecutor proclaimed:

Notwithstanding continuing academic interest in the interface between ‘peace and justice’, the relationship between peace and justice is a settled issue under the Rome Statute. Once a State joins the Rome Statute system, it accepts that justice is an integral part of conflict resolution and the creation of a sustainable peace.⁸¹

This quote illustrates the continued dominance of legalism. It claims that an inherently political debate about the relationship between justice and peace has been ‘resolved’

⁷⁸ S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: CUP, 2013).

⁷⁹ D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, 14 *European Journal of International Law* (2003) 481.

⁸⁰ M. Dancis, ‘ICC to be “flexible” but to disallow FARC impunity’, Colombia Reports, 14 May 2015, available at <http://colombiareports.com/icc-to-be-flexible-but-to-disallow-farc-impunity/> (visited 20 June 2016); See also J. Easterday, ‘Beyond the “Shadow” of the ICC: Struggles over Control of the Conflict Narrative in Colombia’, in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: CUP, 2015) 275.

⁸¹ J. Stewart, ‘Transitional Justice in Colombia and the Role of the International Criminal Court’, 13 May 2015, available at <https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf> (visited 20 June 2016), at 1.

through the legal instrument of the Rome Statute. In fact, many critical scholars have argued that the ICC de facto takes up more and more transitional justice space despite ostensibly being ‘a court of last resort’.⁸² Nouwen and Werner, for example, have demonstrated how international criminal law and its institutions have monopolized the ‘global justice’ discourse thereby marginalizing alternative justice conceptions.⁸³ A case in point is the dominance of the complementarity discourse, which forces those who do not want their cases to come before the ICC to create justice institutions in its image. Even resistance to the Court is framed in the language of international criminal law. For example, the Lord’s Resistance Army (LRA) delegation insisted during the Juba Peace Process in Uganda that traditional justice mechanisms would be described as furnishing ‘accountability’ in the peace agreement to keep the ICC at bay.⁸⁴

Yet, the focus in the literature on holism on the one hand and legalism on the other has meant that another way in which the ICC makes itself the bulwark of ‘global justice’ has largely gone unnoticed: ‘holism within one institution’. The ICC has not only forced a narrow legal form on other TJ mechanisms, it has also absorbed alternative justice conceptions within its own institutional framework, in the process turning them into something quite different. Its claim to ‘holism in one institution’ is reflected in the reiteration that there is a ‘Rome Statute system of justice’ that combines the efforts of

⁸² P. Clark cited in J. Viebach, L. Ullrich, M. Gawronski and C. Hoyle, ‘Innovative Media for Change: Opportunities and Challenges of Media Cooperation in Transitional Justice’, available at https://www.law.ox.ac.uk/sites/files/oxlaw/innovative_media_for_change_full_report.pdf (visited 21 June 2016), at 28/29.

⁸³ S. Nouwen and W. Werner, ‘Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity’, 13 *JICJ* (2015) 157, at 163.

⁸⁴ *Ibid*, at 167/168.

the ICC, the TFV, states and civil society.⁸⁵ The TFV's Senior Programme Officer explained this holistic approach as follows:

Issues of peacebuilding, humanitarian relief, reconstruction, justice, reconciliation and peace are inescapably intertwined... This is why in any post-conflict situations economic and social rights must not be overlooked by reparative and transitional justice systems because redressing their socio-economic imbalances empowers and protects women from being exposed to widespread violence.⁸⁶

Most interestingly, the Trust Fund has embraced the concept of 'transformative justice' which aims at moving the Rome Statute system beyond mere restoration by addressing the structural conditions of inequality, violence and exclusion that are part of the reason why conflicts and crimes occur in the first place.⁸⁷ Thus, by treating the ICC as a one-dimensional institution, the TJ literature misses the Court's attempts to fashion itself as a holistic justice system.

In this thesis, I will shed light on these three blind spots through the conceptual lens of interactional justice, which makes the empirical process through which justice concepts and practices evolve and change at the ICC analytically visible. Against the 'all good things go together' approach that holism has effectively become, interactional justice helps to unravel the layers of justice contestations both within and without the Court by following the interpretation and implementation of justice concepts from the court room to the field. Rather than taking for granted the existence of the 'local' and the 'global' as real places, interactional justice helps us to explore how ideas of the 'local' and

⁸⁵ *Court's Revised Strategy in Relation to Victims* (2012), §§ 6, 12; CICC, 'Complementarity', available at <http://www.iccnw.org/?mod=complementarity> (visited 17 August 2016).

⁸⁶ K. Kalla, Speech at the International Gender Justice Dialogue, 20/21 April 2010, available at <https://vimeo.com/11119150> (visited 13 August 2016).

⁸⁷ TFV Strategic Plan 2014-2017, available at <http://www.trustfundforvictims.org/> (visited 15 August 2016), at 25.

the 'global' are constructed and then deliberately conflated in the production of international criminal justice for victims. In this way, this thesis aims to nuance our understanding of how the concept of justice functions within the Rome Statute system.

2.3. International Criminal Justice: Pragmatic Solutions for the ICC's 'Victims Problem'?

Unlike the TJ literature, scholars specializing in international criminal justice have begun to recognize that the ICC is not a monolith and that its problems are not purely procedural.⁸⁸ Instead there is increasing suspicion that the Court's 'victims' problem' is at heart an identity problem. As Stahn observes,

from the outside, the Court is often viewed as a unitary entity; it is seen as one voice (i.e. Hague Justice), although it encompasses a spectrum of voices with partly competing interests. This unified makes the Court an easy target of criticism and vulnerable to unfair claims. The ICC is a highly diverse entity, with multiple identities.⁸⁹

At the heart of this literature is the question of how the ICC's various dilemmas can be resolved. Many of these dilemmas are rooted in the structure of international criminal justice more generally which is situated

...between politics and law, between local justice and cosmopolitan reckoning; between collective guilt and individual responsibility; between making history and performing justice; between legitimating dominant political forces and permitting the expression of dissident views; between the idea of impartial and honourable justice, and the spectre of the war crimes trial as a show trial....⁹⁰

The ICC epitomizes these tensions and they have also translated into the Court's institutional design. On the one hand, the ICC was designed as a Court with a limited

⁸⁸ G.P. Fletcher and J.D. Ohlin, 'The ICC – Two Courts in One?', 4 *JICJ* (2006) 428.

⁸⁹ See Stahn (2016), at lxxxvi.

⁹⁰ G.J. Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), Preface.

mandate and little power: it can only prosecute the perpetrators of the ‘most serious crimes’ in states that accepted its jurisdiction and with no police power of its own. On the other hand, the ICC was always conceptualized as something bigger; a harbinger of a new moral order in which the downtrodden could get justice from the powerful.⁹¹ The Court has an independent prosecutor; it does not recognize immunities of political office and it grants victims rights to participation and reparation. It also promises justice, truth, local ownership and peace.⁹²

In light of these tensions, the dominant response in the international criminal justice literature has been to call on the Court to assume a more limited role and focus on its ‘core justice’ mandate: retributive justice.⁹³ This is understood to be a plea for ‘realism’ or ‘pragmatism’.⁹⁴ Three threads hold together the ‘pragmatic’ response. First, pragmatists regard the purpose of their scholarship as helping the ICC to work better. They assist the Court with ‘constructive critique’ while shielding it from ‘unfair critique’.⁹⁵ Second, in the spirit of a concerned parent, they assume that ‘the ICC’s identity crisis’ is resolvable and temporary; it will dissolve once the Court ‘grows up’ and gets its priorities right.⁹⁶ Finally, pragmatist scholarship is premised on a conflation of international criminal

⁹¹ S. Moyn, ‘Of Deserts and Promised Lands: On International Courts’, in S. Moyn, *Human Rights and the Uses of History* (London: Verso, 2014), at 53; M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005).

⁹² D. Donat-Cattin, ‘Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (München: C.H. Beck, 2008) 1275, at 1280.

⁹³ Damaska (2008).

⁹⁴ Stahn, ‘Between “Faith” and “Facts” (2012); F. Jessberger and J. Geneuss, ‘Down the Drain or Down to Earth? International Criminal Justice under Pressure’, 11 *JICJ* (2013) 501.

⁹⁵ Stahn (2016), at lxxxvi.

⁹⁶ F. Jessberger, ‘From Rome to Reality: Introductory Observations’, 22 *Criminal Law Forum* (2011) 171, at 171; A Cassese, ‘Is the ICC Still Having Teething Problems?’ 4 *JICJ* (2006) 434; S. Vasiliev, ‘Victim Participation Revisited – What the ICC is Learning about Itself’, in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* [e-book] (Oxford: OUP, 2016).

law and justice.⁹⁷ While the concept of law is well theorized, the concept of justice is only an afterthought. It is simply assumed that justice should obey the same principles as law: predictability, consistency and fairness. Justice is understood as the correct application of the law.

The 'pragmatic response' can be illustrated through the lens of the restorative vs. retributive justice debate which has become the established framework for discussing the Court's victims' rights regime. The ICC's website reads:

The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is this balance between retributive and restorative justice that will enable the ICC to not only bring criminals to justice but also to help the victims themselves rebuild their lives.⁹⁸

Criminologists have long doubted whether victim participation in international criminal justice can be restorative given the absence of meaningful dialogue between the victim and the offender and the tight, legal regulation of victims' expression.⁹⁹ As Braithwaite put it:

Restorative justice is deliberative justice; it is about people deliberating over the consequences of crimes, and how to deal with them and prevent their recurrence. This contrasts with the professional justice of lawyers deciding which rules to apply to a case and then constraining their deliberation within a technical discourse about that rule application.¹⁰⁰

⁹⁷ D. Robinson, 'International Criminal Law as Justice', 11 *JICJ* (2013) 699; K.M. Clarke, 'We ask for Justice, You Give us Law': The Rule of Law, Economic Markets and the Reconfiguration of Victimhood', in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: CUP, 2015) 272; D. Kennedy, 'The International Human Rights Movement: Part of the Problem?', *Harvard Human Rights Journal* (2002) 101, at 116.

⁹⁸ Please note that this was the old website text before the ICC overhauled its website in 2016. The new website text reads: 'The ICC thus not only seeks to bring criminals to justice but also to help the victims themselves rebuild their lives', available at <https://www.icc-cpi.int/about/victims?ln=en> (visited 20 June 2016).

⁹⁹ Hoyle (2012).

¹⁰⁰ J. Braithwaite, 'Restorative Justice', in Michael H. Tonry (ed.), *The Handbook of Crime and Punishment* (Cary, NC, USA: OUP USA, 2000), at 329.

Pragmatists, on the other hand, have identified what they see as the conflation of retributive and restorative justice as the Court's problem. As Vasiliev argues, 'the scaling down of the grand restorative ambitions in developing the participatory scheme is the most affordable of the sacrifices for the Court; this is a key lesson that the ICC must have learnt after the protracted journey of rediscovering itself as a primarily retributive justice institution.'¹⁰¹ In other words, pragmatists posit that once the ICC excises its 'restorative justice complex' much of the Court's 'identity anxiety' and justice contestations will be gone.¹⁰² This, of course, assumes that retributive justice is the natural foil of international criminal justice. But is it?

A closer look reveals that the concept of retributive justice is also treated ambiguously in the literature. For example, Stahn claims that 'retribution is *typically* the most convincing argument to defend the cause of criminal proceedings'.¹⁰³ Koller, on the other hand, makes the opposite argument, insisting that 'the retributive theory of punishment largely has been discredited in domestic criminal justice since the very beginnings of modern criminology. As a result, arguments from retribution have made little headway in international criminal law....'¹⁰⁴ Already in 1946, Prosecutor Robert H. Jackson made the following statement in the context of the Nuremberg Tribunal that was otherwise awash with retributive justice language: 'Punishment of war criminals should be motivated primarily by its deterrent effect...The satisfaction of instincts of revenge and

¹⁰¹ Vasiliev (2016), at 1137.

¹⁰² Ibid, at 1136.

¹⁰³ C. Stahn, 'How is the Water? Light and Shadow in the First Years of the ICC', 22 *Criminal Law Forum* (2011) 175, at 190 (emphasis added).

¹⁰⁴ D.S. Koller, 'The Faith of the International Criminal Lawyer', 40 *International Law and Politics* (2008) 1019, at 1025/1026.

retribution for the sake of retribution are *obviously* the least sound basis of punishment'.¹⁰⁵

Part of the problem seems to be that widely accepted principles such as 'accountability' and 'fighting impunity' are still enmeshed with the concept of 'retributive justice' which also entails more contentious ideas of 'just desert' and 'an eye for an eye'.¹⁰⁶ This will be further analyzed in Chapter III but here suffice to say that the pragmatists' call for a re-separation of 'restorative' and 'retributive' justice is unlikely to give the ICC a more coherent justice identity. The ambiguous treatment of 'retributive justice' suggests that the meaning and relevance of the concept is far from settled. Justice contestations at the ICC reach deeper than its 'restorative justice' complex.

3. What's in Justice? Legalism vs. Justice Relativism

Despite their different perspectives on the ICC's engagement with victims, the three bodies of scholarship reviewed here (criminology, transitional justice and legal ICC scholarship) share one important gap; they fail to engage systematically with the question of how the concept of justice functions in international criminal justice. Instead, their justice premises have to be filtered out of their texts. These premises can then be pieced together into two dominant justice paradigms that underlie these different strands of the literature: 'legalism' and 'justice relativism'. Legalists tie the meaning of justice to substantive and procedural legal principles such as retributive justice and due process, thereby making it possible and desirable for one institution such as the ICC to dispense

¹⁰⁵ W. Schabas, *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability* (London: Cameron May, 2008), at 236/237 (emphasis added).

¹⁰⁶ Rachels in S.P. Wang, 'Transitional Justice as Retribution: Revisiting its Kantian Roots', in N. Palmer, P. Clark and D. Granville (eds), *Critical Perspectives in Transitional Justice* (Cambridge: Intersentia, 2012) 31, at 36.

justice to different countries, conflicts and contexts.¹⁰⁷ Legal justice is ‘rational justice’. It is produced by a rational method, criminal trials, where trained professionals apply rules, hear arguments and present evidence. The outcome is presumed to be objective and universally acceptable; rational human beings everywhere can agree that it is ‘just’ or ‘fair’.¹⁰⁸ The Court’s ‘NGO advocates’ often embrace a weak form of legalism. While they subscribe to the importance of universal, legal justice, they still believe that the Court’s justice needs to be culturally translated and discussed with affected communities.¹⁰⁹ A stronger form of legalism permeates the position presented in the Court’s documents that its lawyers are better placed than intermediaries or local lawyers to explain the Court’s work and to represent victims’ interests.¹¹⁰

The Court’s critics, on the other hand, often engage in various degrees of ‘justice relativism’. They challenge the legalistic justice paradigm by arguing that it reflects a particular cultural idea, ‘Western justice’, which is imposed on affected communities whose justice ideas are very contextual: they depend on their local culture, personal beliefs, gender, age or the injury they suffered. As a counter-vision, they propose a more

¹⁰⁷ On legalism, see McEvoy (2007).

¹⁰⁸ See F. Bensouda, ‘Lecture: Reflections from the International Criminal Court Prosecutor’, 45 *Vanderbilt Journal of Transnational Law* (2012) 955. For literature which problematizes a rationalist understanding of justice see M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: CUP, 2009); T. Kelsall, *Culture under Cross-examination: International Justice and the Special Court for Sierra Leone* (Cambridge: CUP, 2009).

¹⁰⁹ My Justice, ‘Mariana Pena of OSJI: Bridging the Gap between the Courts and the Victims’, Justice Hub, 27 February 2015, available at <https://justicehub.org/article/my-justice-mariana-pena> (visited 13 June 2015)

¹¹⁰ See for example REDRESS, *Representing Victims before the ICC: Recommendations on the Legal Representation System*, April 2015, available at <http://www.redress.org/downloads/publications/1504representingvictims.pdf> (visited 23 August 2016), at 9; Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights, *Ongwen* (ICC-02/04-01/15-350), Pre-Trial Chamber II, 27 November 2015, §§19-24; ASF, *Modes of Participation and Legal Representation*, November 2013, available at http://www.asf.be/wp-content/uploads/2013/11/ASF_IJ_Modes-of-participation-and-legal-representation.pdf (visited 13 June 2015), at 27.

deliberative justice-making process in which victims and affected communities decide what justice means and how it can be achieved. As Branch argues,

the legitimacy of any specific model of justice for dealing with legacies of extreme violence will not come from putatively absolute, unquestionable sources, whether human rights or tradition, but only through autonomous, democratic processes of deliberation, organization, and action within the community, including those who have been subject to violence themselves.¹¹¹

Scholars like Branch work with a deliberative concept of justice originating in the Habermasian tradition.¹¹² Others argue that justice ideas are very personal and psychological; they are produced and have to be studied in the ‘hearts and minds’ of affected communities. While many ‘justice relativists’ see the ICC as part of the problem, some interpret the Court’s victims’ rights provisions as a starting point for making international criminal justice more victim-centred.¹¹³

In this way, the two justice paradigms create both conceptual and empirical blinders. Conceptually, they ignore or even deny the linkage between the ICC’s justice concept and the Court’s institutional rationale and dynamics. Rather than rational, innate or psychological, the meaning of justice at the Court is socially constructed not least to fit the needs of an institution vying for legitimacy. Much of the ICC’s construction effort has gone into the concept of ‘justice for victims’. Empirically, they sustain the myth that justice

¹¹¹ A. Branch, ‘Uganda’s Civil War and the Politics of ICC Intervention’, 21(2) *Ethics and International Affairs* (2007) 179, at 193/94.

¹¹² It has to be noted that Habermas envisaged an important role for deliberative democracy in law-making but not necessarily in the implementation of laws (see Glasius, 2012). P.D. Greiff, ‘Deliberative Democracy and Punishment’, 5 *Buffalo Criminal Law Review* (2002) 373, at 403; M. Glasius, ‘Do International Criminal Courts Require Democratic Legitimacy’, 23 *The European Journal of International Law* (2012) 43, at 60/61; H. Rombouts and S. Parmentier, ‘The International Criminal Court and its Trust Fund are coming of age: Towards a Process Approach for the Reparation of Victims’, 16 *International Review of Victimology* (2009) 149.

¹¹³ T. Antkowiak, ‘An Emerging Mandate for International Courts: Victim-Centred Remedies and Restorative Justice’, 47 *Stanford Journal of International Law* (2011) 279; M.C. Bassiouni, ‘International Recognition of Victims’ Rights’, 6 *Human Rights Law Review* (2006) 203; M. Findlay and R. Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Cullompton: Willan, 2005).

ideas at the ICC are narrow and uniform, either being synonymous with legal procedure or corresponding to a 'Western concept' of justice. This overlooks how justice concepts and practices at the ICC are often conflicting and even contradictory particularly with regard to victims. Applying the conceptual lens of interactional justice, my thesis traces how 'justice for victims' has evolved in the Court's first two decades not only in the court room, but also in the interactions of ICC bureaucrats, victims' lawyers, local intermediaries, NGOs and victims outside the court room. In this way, interactional justice fills an important conceptual and empirical gap in criminological, TJ and legal analysis of the ICC's victims' engagement.

4. Moving towards 'Interactional Justice'

For developing the concept of interactional justice, we can draw on concepts in philosophy and sociology. In philosophy, justice has been characterized as an 'essentially contested concept'.¹¹⁴ These are 'concepts the proper use of which inevitably involves endless disputes....'¹¹⁵ Yet, is justice really endlessly contested? In my interviews at the Court, I encountered recurrent and overlapping ideas, which suggest that while justice is neither self-evident nor purely relative, there are inter-subjective agreements on its meaning(s) that are more or less stable. David Hume already claimed that justice is an 'artificial virtue' constructed to justify particular organizations of social life.¹¹⁶ Ideas of justice change when these organizations of social life change. Rather than being objectively true or corresponding to natural instincts, the 'matter-of-factness' of justice is inter-subjectively established over time through habit, tradition and shared norms.¹¹⁷ As

¹¹⁴ W.B. Gallie, 'Essentially Contested Concepts', 56 *Proceedings of the Aristotelian Society* (1955-56) 167.

¹¹⁵ Ibid, at 169.

¹¹⁶ M. Douglas, *How Institutions Think* (London: Routledge & Kegan Paul, 1986), at 113.

¹¹⁷ Inter-subjectivity is understood as an ongoing process of interactions and contestations between

Douglas argues, 'justice is a more or less satisfactory intellectual system designed to secure the coordination of a particular set of institutions.'¹¹⁸ Thus, for understanding how the concept of 'justice' functions in international criminal justice, we need to study the social institutions that create and mould it not least to make themselves appear indispensable and 'naturally just'.

From such an institutional perspective, 'justice for victims', the demand to go beyond 'punishing the perpetrator', is a relatively new idea that sits somewhat uneasily with the conventional justice rationales of criminal courts.¹¹⁹ The institutionalization of 'justice for victims' in international criminal justice can be seen as what Bourdieu called 'hysteresis' in his theory of practice: a break with the way things are done. The starting point of Bourdieu's theory is the delineation of society into different social 'fields' such as education, the economy and the juridical field. As actors of the 'juridical field', the ICC's lawyers and bureaucrats are guided by their habitus, a 'scheme...of perception, thought and action [that] tend[s] to guarantee the "correctness" of practices and their constancy over time, more reliably than all formal rules and explicit norms'.¹²⁰

The concept of habitus helps to explain the unreflecting and ritualistic way in which practitioners talk about and implement international criminal justice despite the significant gap between the domestic context from which the methodology derives and the international context to which it is applied.¹²¹ 'If we learned anything from history, it

social actors that produces shared meaning and practices. See N. Crossley, *Key Concepts in Critical Social Theory* (London: SAGE, 2005), at 176; Weber, *The Theory of Social and Economic Organization: Being* 1947), at 120; Glasius (2012), at 60/61.

¹¹⁸ Douglas (1986), at 114.

¹¹⁹ Retribution, deterrence, protection and prevention.

¹²⁰ P. Bourdieu, *The Logic of Practice*, trans. R. Nice (Cambridge: Polity Press, 1990), at 54.

¹²¹ For critiques of the retribution and deterrence theories of international criminal justice, see I. Tallgren, 'The Sensibility and Sense of International Criminal Law', 13 *European Journal of International Law* (2002) 561.

is that accountability and the rule of law have been recognized as fundamental preconditions...to promote peace and international security, and to manage conflicts', the ICC's Prosecutor Fatou Bensouda claimed in an article in 2013.¹²² Such statements are commonplace in the field even though it is unclear from what evidence or logical principles they derive their 'matter-of-factness'.¹²³ Rather than a rational procedure, international criminal trials more often resemble a ritual: every situation of mass atrocity is interpreted through the lens of a 'role play' of the 'victim', the 'perpetrator', the 'witness' and the 'judge' and is subjected to repeating cycles of arrest, trial and appeal.¹²⁴ Like rituals, trials are often considered to have an expressive function: punishment, for example, is said to convey a social message of disapproval 'which helps to reconstitute the solidarity of a moral community'.¹²⁵

However, the habitus can break down and be disrupted when 'there is a cultural lag or mismatch between habitus and the changing "rules" and regularities of a field' as happens in situations of social and institutional change.¹²⁶ Bourdieu uses the concept of hysteresis to describe these 'critical moments when it [the habitus] misfires or is out of phase: the relationship of immediate adaptation is suspended, an instant hesitation into which may slip a form of reflection...'.¹²⁷ The institutionalization of 'justice for victims' at the ICC can be understood as a challenge to the justice habitus of the field. New

¹²² F. Bensouda, 'International Justice and Diplomacy', *The New York Times*, 19 March 2013, available at http://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html?_r=0 (visited 12 August 2016).

¹²³ G. Dancy, 'Impact Assessment, Not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice', 4 *IJTJ* (2010) 355, at 358.

¹²⁴ M. Glasius and T. Meijers, 'Constructions of Legitimacy: The Charles Taylor Trial', 6 *IJTJ* (2012) 229;

¹²⁵ Greiff (2002): 373, at 389. On the expressivist functions of trials see Drumbl (2009); M. Glasius, 'It Sends a Message': Liberian Opinion Leaders' Responses to the Trial of Charles Taylor', 13 *JICJ* (2015) 419.

¹²⁶ P. McDonough and J. Polzer, 'Habitus, Hysteresis and Organizational Change in the Public Sector', 37 *Canadian Journal of Sociology* (2012) 357, at 359.

¹²⁷ P. Bourdieu, *Pascalian Meditations*, trans. R. Nice, (Stanford: Stanford University Press, 2000), at 162.

institutions have emerged such as the VPRS and the TFV, while the necessity of ‘giving a voice to victims’ has become a mainstay of the discourse.¹²⁸ How do actors react when frictions and ambiguity mount between old and new justice concepts and practices? To what extent does the introduction of ‘justice for victims’ create openings for re-imagining justice at the Court? Whose discourse and interests prevail in justice contestations and whose are marginalized and by whom?

Bourdieu’s concepts of habitus and hysteresis give little insight into how we can study these questions empirically. While his theory of practice helps to disentangle the institutional interests that explain which justice concepts are taken up, promoted or stifled by different stakeholders, it is less helpful for analyzing normative contestations or gradual shifts in meaning. Unlike conventional negotiations, justice contestations unfold incrementally in the Court’s discourses and practices and may often have unintended consequences. While some ICC practitioners strategically participate in justice contestations, others may not even be aware that by using the justice terminology in a particular way and context, they unwittingly exercise influence in these contestations. To remedy these shortcomings, this thesis proposes the concept of interactional justice.

Interactional justice epitomizes the idea that the meaning of justice is inter-subjectively negotiated: it is produced through the social discourses and interactions of different ‘justice stakeholders’. As such, the meaning of justice is never stable; it is in a constant process of redefinition and thus always contingent and contestable. On the institutional level, such a sociological understanding of justice implies that justice at the ICC is not simply made by following the legal script of a fair trial within the court room; it

¹²⁸ *Report of the Court on the Revised Strategy in Relation to Victims: Past, Present and Future*, ICC-ASP/11/40, 5 November 2012, §1.

is also continuously shifted and redefined through the mundane institutional discourses, every-day practices and communicative interactions of the Court's practitioners outside the court room. As Dembour and Kelly argue, justice 'is as much a social and cultural process as it is a legal and political one, and it takes place at the intersection of the often contradictory practices of petitioners, litigants, bureaucrats, lawyers, victims, witnesses, accused, judges and third parties'.¹²⁹ Such an interactional justice analysis foregrounds actors who are often omitted in the ICC literature such as victims' lawyers, local intermediaries and the Court's bureaucrats in the field. In this way, the thesis situates a constructivist interpretation of 'justice' within an institutional analysis of the ICC as a *sui generis* Court with 'new' and 'old' actors that push for different justice visions.

Interactional justice also implies that the boundaries of who can and who cannot influence the ICC's justice concepts and practices are porous and do not neatly fall along 'inside'/'outside' lines. The term 'Rome Statute system' is widely used at the Court to refer to all the actors that aim at implementing the Rome Statute which includes the ICC, States Parties, the TFV, international NGOs and local intermediaries.¹³⁰ Yet, scholars rarely think through the implications of it being a system, a shared ideational space, in which the boundaries between 'inside' and 'outside' the Court are fluid. Once we look at the Court's relationship with affected communities from an interactional justice perspective, the categories of the 'global' and the 'local' almost disappear behind a network of cross-cutting and overlapping relationships that includes local intermediaries, international NGOs, national and local governments. The implication is that ideas travel between the

¹²⁹ Dembour and Kelly (2007), at 2.

¹³⁰ Telephone Interview with CICC Member, 3 July 2013; Telephone Interview with REDRESS Member, 19 July 2013.

‘inside’ and ‘outside’ and even though these ideas are often misused or side-lined, they influence how the Court works.

Is the idea that justice concepts and practices evolve through an inter-subjective process really new? It may seem obvious that justice like every other concept is socially constructed and that those people who interpret and implement it, the Court’s practitioners inside and outside the court room, play a central role in its construction. Besides, in a new and diverse institution we can expect this construction process to be messy, dynamic and contested. Yet, my reading of the literature suggests that the field of international criminal justice has been largely insulated from constructivist analysis of justice processes.¹³¹ As Douglas argues, when it comes to ‘justice’ our resistance against social constructivism is at its strongest:

We cannot allow our precepts of justice to depend on artifice. Such teaching is immoral, a threat to our social system with all its values and classifications. Justice is the point that seals legitimacy...In spite of a wide belief in the modern loss of mystery, the idea of justice remains to this day obstinately mystified and recalcitrant to analysis.¹³²

This is not to say that constructivist concepts of justice have been completely absent from the literature. In her seminal book ‘Transitional Justice’, Ruti Teitel wrote:

The thesis of this book is that the conception of justice in periods of political change is extraordinary and constructivist: It is alternately constituted, and constitutive of, the transition. The conception of justice that emerges is contextualized and partial: What is deemed just is contingent and informed by prior injustice.¹³³

¹³¹ A notable exception is Palmer (2015); For an exciting, new book on the ICC that pushes in the direction of a more constructivist analysis, see C. De Vos, S. Kendall and C. Stahn (2015).

¹³² Douglas (1986), at 113.

¹³³ R. Teitel, *Transitional Justice* (Oxford: OUP, 2000), at 6. See also C. Brants, K. Brants and L. Gould, ‘Communicating the ICC: Imagery and Image-Building in Uganda’, in C. Brants, A. Hol and D. Siegel, *Advances in Criminology: Transitional Justice: Images and Memories*, (Farnham: Ashgate, 2013) 143.

Yet, despite her constructivist outlook, Teitel's conception of justice is narrowly defined in terms of legal responses to transitional periods. She regularly conflates law and justice, and thus stands in the legalistic tradition of the field.¹³⁴ Yet, what does it mean for justice to be contingent and constructed outside of strictly legal discourse and procedure? Who gets to decide how justice is constructed within the ICC? How does court room justice interact with justice constructions in the Court's situation countries?

An interactional justice analysis reveals that the concept of justice functions differently at different institutions. In her research on the ICTR, Palmer found that its judges and lawyers embraced a relatively homogenous justice vision that was substantively narrower than the one set out in the ICTR's Statute.¹³⁵ While Security Council Resolution 955, which established the ICTR, lists national reconciliation, peace, justice and deterrence amongst its goals, most of her interviewees asserted that the ICTR's main goal was to develop international case law. Drawing on Beetham's theory of legitimacy, Palmer argues that 'the ICTR has attempted to establish its legitimacy through focusing on the acquisition and exercise of its power in accordance with established rules. This is evident in the ICTR judges' and lawyers' clear and consistent focus on the case law.'¹³⁶ Thus, narrowly tying the Court's justice vision around case law was the ICTR's strategy to build legitimacy in the contested environment of post-genocide Rwanda.¹³⁷ This is in line with sociological theories that posit that organizations will try to conform to a pre-existing institutional regime to build their legitimacy.¹³⁸ A rather different trend can

¹³⁴ McEvoy (2007)

¹³⁵ Palmer (2015), at 55.

¹³⁶ Ibid, at 181. See also K. McEvoy, 'Commentary on Locality and Legitimacy', in N. Palmer, P. Clark and D. Granville (eds), *Critical Perspectives in Transitional Justice* (Cambridge: Intersentia, 2012).

¹³⁷ According to Suchman (1995), most organizations build their legitimacy by conforming to the rules of their environment.

¹³⁸ Ibid, at 587.

be observed at the ICC. As my research reveals, the ICC has witnessed a proliferation of different and conflicting justice concepts and practices among its diverse practitioners over the last two decades.

Chapter II - The Story behind the Story

Fieldwork Diary, Tuesday, 29 October 2013, 9.00 am, Regulusweg, The Hague, The Netherlands

Ramming my bike into the shed at the ICC's side entrance, I hurriedly put my wet hair in order. Jealously, I glance at the lawyers around me who swiftly remove their sophisticated rain gear to appear in perfect office outfit. I, on the other hand, am soaking in wet clothes. Passing by the electric fence that surrounds the Court, I go through the side entrance and arrive at the end of a long queue of staff members waiting to go through security.

An elderly man comes through the entrance. The security officer sees him and waves to him, shouting, 'Your Honour, please come to the front of the queue'. The Judge nods solemnly and passes the queue, slides through the security detector and waits for the security officer to hand him his briefcase. Institutional hierarchies are clearly expressed at the ICC from the security procedure in the morning to the organization of the building which finds the offices of the Judges and the President on the top floors. Once through security, I briefly glance to the left: there is an elongated lobby that leads to the two court rooms. The lobby's walls display the portraits of the Court's eighteen judges. One of my informants told me that the ICC's judges act like 'kings' and that they protested when the big portraits in the lobby were replaced by slightly smaller ones. I hardly ever go to the left. Like most of the Court's staff, I turn to the right where a glass door leads to the Court's offices.

Once you go through the glass door, the ICC looks like a big office building: the Registry's offices occupy the first four floors; then come the Prosecutor's offices, the Judges and eventually the Presidency. Unlike the office building which is heavily securitized, the court rooms are open to the general public. There is a small public gallery overseeing each court room. While I was interning at the ICC from October 2013 to February 2014, I went as often as I could to watch the Ruto and Sang trial from the public gallery. On normal days, the public gallery was rather empty. Apart from Ruto's entourage of dignitaries, flown in from Kenya to support 'their' vice-president in the court room, there were not many people. Sometimes, they cheered when there was a ruling that was considered favourable to their leader. Most of the time, there was not much occasion for cheering as legal technicalities were being litigated. The court often goes into 'private session', especially when witnesses testify, which means that you can still see but not hear the court room proceedings from the public gallery. With all those interruptions, it becomes difficult to follow the trial. No wonder that even Ruto's loyal supporters cannot help but look bored. Like school kids they wait to take breaks from the hours-long ordeal to check their mobile phones outside. Mobile phones and any other devices apart from a pen and a piece of paper are not allowed in the public gallery.

To the casual observer on the public gallery, court room proceedings often look banal. There are long exchanges between judges, defence, prosecution and victims' lawyers on what it means for Ruto to be excused from presence at trial in 'exceptional circumstances'. There are drawn-out interrogations of pixilated witnesses who speak with distorted voices to avoid recognition. The parties exchange ironic comments and even little jokes from time to time and the accused often has an expression of boredom or even indifference on his face. And yet, the sum of all these exchanges in this room, the computer-typing and monitor-watching over the years will decide on whether the accused will spend a substantial part of his or her life time in prison or not.

One day, I came in earlier to watch an important decision in the Gbagbo case being read out by the judges. Many of the ICC's staff members do not directly work on the cases that proceed in the court rooms close to their offices. Some may not even be aware that there will be a judgment today by the Appeals Chamber on whether Laurent Gbagbo, ex-president of the Ivory Coast, has to remain in detention until the beginning of his trial. At the same time, their everyday activities in their offices and in the field are as much part of international criminal justice, as real or as unreal, as the court room setting. Rushing in among the Court's staff members I tried to cross the boundaries between these two realities. At the entrance to the court rooms, I proudly showed my ICC staff badge to the receptionist but she politely told me that 'ICC staff' are advised to watch the decision on their office screens, due to the large number of people expected to attend, especially from the press. I hurried to my office on 4th floor and went to the Court's website. The ICC prides itself on providing online streaming of all its proceedings with only 30 minutes' delay. But on this day, the streaming did not work properly. I could hardly hear the judge reading the decision, let alone see anything. I sighed and put down my earphones. It was frustrating to be so close to an institution but always with limited access.

What I did hear however was a group of protesters who sang, chanted and danced at the corner of Regulusweg and Maanweg in good view from my office window. They were supporters of Laurent Gbagbo. The Court's staff members had been informed about the protest the day before in an email: 'Around 200 persons representing the CODESCI Group (Côte d'Ivoire) will gather to show support for Mr. Laurent Gbagbo...At this time, there are no expectations of malfeasance, however the taking of basic security precautions in relation to avoiding large groups and guarding information/not openly showing ICC affiliation is advised...'. The group appeared to be less than 200 people, more like 50 to 100; they wore orange clothes and stood out among the business people hastily passing them on the way to work. 'Libéré Gbagbo' and 'Gbagbo- Presidente', thus it went all day. In regular intervals, the chanting and dancing was interrupted by speeches. The protests continued until the late afternoon and even with closed windows on the fourth floor, they were clearly audible. I could not help feeling a sense of relief when the chanting stopped just before the end of office hours.

Fieldwork Diary, Wednesday, 16 July 2014, Gulu, Northern Uganda

I'm at the bus station in Gulu, suspiciously peering at the bus that will take me on a two-hour journey from Gulu to Lira. It says Gateway bus in big, colourful letters on the side. I

sigh as I recall the advice provided by the author of my tourist guidebook in light of the accident rate of this bus company: 'Personally, I would rather walk than board a Gateway bus.' But I can't walk all the way to Lira and there is no other bus available so I board. With harrowing speed and several bundles of live chickens squeezed between the passengers, we then drive on Northern Uganda's dilapidated roads. I'm sitting next to a middle-aged man who tells me he works as a clerk for the Uganda Human Rights Commission (UHRC). We talk a bit about the UHRC's work and about the ICC.

Later, we talk about women's rights. Both he and his wife work, 'of course'. His wife sells fruits and vegetables on the market. 'Are they equal?' He laughs: 'Of course not. I don't think equality is good for relationships. Inequality between men and women, poor and rich is important for social harmony and progress.' He adds, 'and of course, it says so in the bible. Eva was made of Adam's rib.' At this point, a woman in the row in front of us turns around and says emphatically: 'It does not say that in the bible.' A loud but cheerful exchange of different bible quotes follows. Knowing very little about the bible, I'm silent and listen to the exchange. More people in the bus have now shown an active interest in the argument between the two. Many root for the woman. I do too.

Fieldwork Diary, Monday, 25 August 2014, Kisumu, Western Kenya

I'm waiting at Imperial Hotel, Kisumu - one of the best hotels in town - for my next interview. My interview partner had asked to meet here. He is the leader of the regional IDP network and has helped the Court, particularly VPRS and outreach, to engage with those victims who were displaced by the post-election violence (PEV) in Kenya in 2007/2008. I had already interviewed a few people who were PEV victims but also acted as 'intermediaries' for the Court or the victims' lawyers. I was very interested in who these people were and how they became ICC intermediaries. Many of these victim-intermediaries have a certain standing in the community as priest, politician or business person. In an interview with a victims' lawyer, I referred to them as 'privileged' victims. He didn't like that expression:

Personally, I prefer some victims that are more independent. They have their cell phone you can call them on. They can send an email from an internet café and contact their lawyer. You will say that these are 'privileged victims', but those victims have a real contact with their lawyers and can have a real influence in the proceedings...¹³⁹

Most of the interviews I had done so far fall into the category of 'elite interviews' but the category gets blurry. Does an interview with a 'privileged victim' qualify as an 'elite interview' or as an interview with a vulnerable person? I already knew a bit about the person I'm waiting for. A few days earlier I was 'on mission' with one of the victims' lawyers and his team who were registering victims for participation in Nyanza and Western provinces. At the first scheduled meeting only half of the expected victims showed up, apparently due to leadership conflicts in the local IDP network. I then tried to find out more

¹³⁹ Telephone Interview with Victims' Lawyer, 15 January 2014.

about these conflicts and the name of my interviewee came up in the context of accusations of embezzlement.¹⁴⁰

He entered the hotel lobby, a man in his 50s or 60s wearing a suit. We introduced ourselves and he started talking about how onerous and long the journey here had been. I knew what that meant. He wanted me to reimburse his transport costs. I responded weakly that I had thought he was based in Kisumu and apologized for the trouble he had taken to travel here. Sure enough, he then asked for some money and I gave it to him with some unease. The interview began: 'I'm a victim of post-election violence, myself as you are seeing me here; I am a victim of PEV, and that is why we created in Nyanza region the IDP network to bring all the integrated IDPs together....'¹⁴¹ He is a victim of displacement along with more than 600,000 IDPs who were uprooted by the violence in 2007/8 and have not been able to return out of fear or because their homes were burnt down. He flew with his family from Central Province to Nyanza, where he lives now. He told me how he lost his business and investments worth 2.5 million Kenyan Shillings (roughly 17,000 Pounds Sterling).

I found it difficult to empathize with him. He is the chairman of a network of 18,000 victims and here he was in his suit in the lobby of an upscale hotel only talking about himself. He compared unfavourably to George, another victim-intermediary, who I had interviewed a couple of days earlier in a much more modest setting in the village of Kolweny. George is a priest. The back of his head, his ears and arms were visibly scarred by the knife attacks he endured during PEV. He explained to me the importance of ending impunity in Kenya and how collective rather than individual reparations were the best way to foster reconciliation in the communities.

I realized that I was being unfair. As a criminologist, I knew how misleading and dangerous conceptions of 'ideal victims' are. Ideal victims are 'female, sick, very old or very young'.¹⁴² They are virtuous, 'blameless for what happened' and have 'the right combination of power, influence or sympathy to successfully elicit victim status...'.¹⁴³ Of course, few victims are like that and the Kenyan PEV with its series of revenge attacks saw a good number of people assuming dual roles of victim and perpetrator. Besides, the man sitting next to me wasn't exactly the opposite of an ideal victim either. He didn't do anything wrong. He was maybe a bit more powerful than other victims but much less powerful than many of the NGO representatives and ICC lawyers that I had interviewed in Nairobi. Maybe he sensed my aloofness, because suddenly he exclaimed: 'We are suffering. You can look at me; I put on a tie and I also did that during the time, but I'm telling you, if at all we can be assisted by the Trust Fund...'¹⁴⁴ He then talked about the

¹⁴⁰ M. Odeny, 'Migori, Nyanza IDPs differ over Sh3.4 million', The Star, 18 January 2014, available at http://www.the-star.co.ke/news/2014/06/18/migori-nyanza-idps-differ-over-sh34-million_c956355 (visited 13 August 2016).

¹⁴¹ Interview with Intermediary, Kisumu, 25 August 2014.

¹⁴² N. Christie (1986) cited in Dignan (2005), at 17.

¹⁴³ Ibid.

¹⁴⁴ Interview with Intermediary, Kisumu, 25 August 2014.

‘real victims’ of PEV – an expression that I came across a lot in Kenya. He and the victims he represents are the ‘real victims’...

These three excerpts from my fieldwork diary show parallel realities of international criminal justice. Some of them unfold in the same physical space, others far away from each other. Understanding the relationship between these different realities and how they produce or claim to produce ‘justice for victims’ has been a key motivation of this project. Yet, these excerpts also provide snapshots of my experiences as a researcher trying to navigate not only the multiple sites of international criminal justice but also my own prejudices and insecurities. They also shed light on some of the frustrations of doing research, the perils, the missteps and the confusion that are part and parcel of this thesis and its findings. The major themes I discuss in this chapter are already foreshadowed in these three snippets: i) my research sites, ii) data, iii) the ethical questions involved in my relationship with informants, iv) the epistemological question of what type of knowledge comes out of ‘talking’ about and ‘observing’ justice and finally, v) the process of interpretation, translation and sometimes distortion that turned all these different threads into the story that is this thesis.

1. Choosing Sites: The Hague, Kenya and Uganda

The Hague, Kenya and Uganda are the research sites of this project. They are not case studies, strictly speaking. I did not do a comprehensive study of the ICC’s victims’ engagement in Kenya and Uganda.¹⁴⁵ Instead, my objective was to closely follow the

¹⁴⁵ I will provide background to the post-election violence (PEV) in Kenya and the civil war in Uganda that are at the heart of the ICC’s cases but for a more comprehensive analysis of these two countries and their justice dilemmas and processes, see for example A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: OUP, 2011); L. Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer, 2015); D. Branch, *Kenya: Between Hope and Despair, 1963-2012* (London: Yale University Press, 2012).

concept of ‘justice for victims’, tracing how it changes once it travels within the Court, from institutions at the periphery such as the TFV to the court room and then to the field. I wanted to grasp how the diverse court actors fill the concept with ideas and mould it into practices and policies on the ground. I have found Marcus’ notion of ‘multi-sited ethnography’ and Feldman’s ‘non-local ethnography’ helpful for developing my methodological approach.¹⁴⁶ Complex concepts or policies such as ‘justice for victims’ are constituted by a network of actors, institutions, discourses, policy decisions, laws, administrative measures, scientific statements and moral propositions.¹⁴⁷ As such, these concepts are best studied by *following* them through this network rather than by dividing them into separate cases as in case study methodology.¹⁴⁸ As Marcus explains, ‘strategies of quite literally following connections, associations, and putative relationships are thus at the very heart of designing multi-sited ethnographic research’.¹⁴⁹ Multi-sited or non-local ethnography also helps to destabilize simple dichotomies such as ‘global’ and ‘local’ by exploring how these different ‘sites’ are connected and mutually constitute each other.¹⁵⁰

Thus, instead of immersing myself in communities, I immersed myself in the ‘conceptual thicket’ of interviews, informal conversations, observations, court filings and policy documents. Such ‘mobile’ ethnography comes at a price. It is difficult (perhaps impossible) to achieve the depth and rigour of a single-sited ethnography in each location.¹⁵¹ Besides, there is also a political concern that ‘multi-sited ethnography’ de-

¹⁴⁶ G. E. Marcus, ‘Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography’ 24 *Annual Review of Anthropology* (1995): 95-117; Feldman (2011a), Feldman (2011b).

¹⁴⁷ Foucault cited in Feldman (2011a), at 380.

¹⁴⁸ Feldman (2011b), at 33.

¹⁴⁹ Marcus (1995), at 97.

¹⁵⁰ Ibid, at 95, 99.

¹⁵¹ Ibid, at 100.

centres the subaltern – the traditional subject of ethnography – while foregrounding the voices of metropolitan elites.¹⁵² This thesis is a case in point. While ‘justice for victims’ is its focal point, ‘victims’ perspectives’ are a notable absentee. While I believe that this choice of focus is well-founded due to security concerns, it is politically problematic to provide so much space to the ‘elite’. Yet, ‘elite’ is a relative term and while many local NGOs and victim-intermediaries I interviewed were more powerful than victims, they did not belong to the elite globally or nationally speaking.

The Hague is an obvious research site for learning more about ‘justice for victims’ at the ICC, but I chose a particular type of engagement with the Court: I applied for an internship at the Court’s Registry. My original plan was to work at one of the victims’ offices such as the VPRS or the TFV to become embedded in the institutional discourses and practices around victims. I was thus disappointed, when I was offered an internship at the Immediate Office of the Registrar to work on state cooperation and external relations. Yet, this position brought an unexpected advantage: I had more access to other organs and sections of the Court and in the end interviewed a wide variety of ICC staff members and not only those directly working on victims.

Kenya and Uganda are at opposite ends of the spectrum of how states become ICC ‘situation countries’. The Ugandan cases were one of the Court’s first cases after its establishment in 2002. Keen to get its first cases and to show the world its might, the ICC’s first Prosecutor Louis Moreno Ocampo encouraged Uganda’s government to refer its ‘situation’ to the ICC. In December 2003, the Ugandan government referred ‘the situation concerning the Lord’s Resistance Army (LRA)’ to the Court. The LRA, a rebel group

¹⁵² Ibid, at 101-102.

operating in Northern Uganda between 1987 and 2006, had been accused of abject atrocities and was notorious for child abductions and mutilations of anyone who was suspected of collaborating with the government.¹⁵³ Yet, these atrocities took place in the context of a civil war with the Ugandan government. The government forcibly displaced around 1.7 million people in Northern Uganda and its soldiers have also been accused of committing atrocities against civilians. The Prosecutor's decision to hold a joint press conference in January 2004 with Uganda's President Museveni was widely perceived as an indication that the ICC was doing the government's bidding.¹⁵⁴ In 2005, the Court's Prosecutor issued arrest warrants for five LRA commanders. To this day, the ICC has not indicted any member of the Ugandan government or its army.

If the Ugandan situation became paradigmatic of the Court's early tendency to pursue cases where it could count on state cooperation even at the risk of appearing biased, its seizure of the Kenyan situation in 2010 epitomized a much bolder Court. Violence had erupted in Kenya following the disputed election of incumbent President Mwai Kibaki on 27 December 2007 and lasted for two months. After several attempts at establishing a special tribunal in Kenya to investigate the violence failed, the ICC's Prosecutor, using his *proprio motu* (on his own initiative) powers under RS Article 15, requested Pre-Trial Chamber II to authorize an investigation into the situation of Kenya.¹⁵⁵ On 31 March 2010, he indicted Kenya's Deputy Prime Minister Uhuru Kenyatta, Industrialisation Minister Henry Kosgey, Education Minister William Ruto, Cabinet

¹⁵³ For a nuanced portrayal of the LRA, see T. Allen and K. Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality* (London: Zed, 2010).

¹⁵⁴ P. Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo', in N. Waddell and P. Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008) 37.

¹⁵⁵ Nichols (2015), at 133.

Secretary Francis Muthaura, radio executive Joshua Arap Sang and former police commissioner Mohammed Hussein Ali for crimes against humanity. They became known as the 'Ocampo six'. No one could accuse the Prosecutor of sparing the powerful in the Kenyan cases, but the backlash was swift. After charges were confirmed against Uhuru Kenyatta, William Ruto and Joshua Arap Sang on 23 January 2012, Kenyatta and Ruto, former political opponents, joined forces and their 'Jubilee Alliance' secured victory in Kenya's election in March 2013, making them President and Vice-President of Kenya.¹⁵⁶

I chose Kenya and Uganda as research sites for two reasons. First, they are easily accessible for research: they are both English speaking, relatively secure environments and geographically close to each other, thereby making a combined research trip feasible. Second, the Court's victims' engagement in Kenya and Uganda had taken on different shapes. In Uganda, at the time of research (summer 2014), there were no judicial proceedings in the Ugandan cases and thus no victim participation activities to speak of. Instead the Court's victims' engagement was defined by the TFV's assistance programmes in Northern Uganda. In Kenya, on the other hand, victim participation was the essence of the Court's victims' engagement, while the TFV has been a notable absentee to this day. As the relative merits and demerits of 'procedural' versus 'service' rights for victims continue to be discussed in the victimology literature, selecting two situations that corresponded to one model but not the other should provide interesting insight into the relevance of those two 'models' at the international level.¹⁵⁷ Yet, given that the ICC is a

¹⁵⁶ G. Lynch, 'Electing the 'Alliance of the Accused': The Success of the Jubilee Alliance in Kenya's Rift Valley', 8 *Journal of Eastern African Studies* (2014) 93.

¹⁵⁷ Hoyle and Ullrich (2014), at 6.

‘moving target’, I always knew that these are not fixed variables and in fact much has changed in the Kenyan and Ugandan cases.

When I started this research in 2012, the ICC’s cases against the five LRA commanders had been dormant for seven years since none of the accused could be apprehended. The Kenyan cases, on the other hand, were awash with judicial developments and in the limelight of media attention. Three and a half years later, the situation is almost reversed. In December 2014, the case against Uhuru Kenyatta collapsed and on 5 April 2016, the Chamber ‘declared a mistrial due to a troubling incidence of witness interference and intolerable political meddling’ and vacated the charges against Ruto and Sang without entering a judgment of acquittal.¹⁵⁸ The termination of the cases also means the end of ICC victim participation and reparations in Kenya at least for now. 839 victims had participated in the Kenyatta case and 954 in the Ruto and Sang trial.¹⁵⁹

Meanwhile, Dominic Ongwen, one of the indicted LRA commanders, was captured by Seleka rebels in the Central African Republic (CAR) in January 2015, and was then surrendered to the Court by the Ugandan government.¹⁶⁰ After his transfer to the ICC, its prosecutor Fatou Bensouda extended the charges against him from three counts of crimes against humanity and four counts of war crimes to a total of 70 counts, the highest number of charges faced by any ICC defendant so far. Crucially, the new charges also

¹⁵⁸ Decision on Defence Applications for Judgments of Acquittal, *Ruto and Sang* (ICC-01/09-01/11-2027-Red), 5 April 2016, §464.

¹⁵⁹ Human Rights Watch, ‘ICC: Kenya Deputy President’s Case Ends: Witness Interference undermined Trial’, 5 April 2016, available at <https://www.hrw.org/news/2016/04/05/icc-kenya-deputy-presidents-case-ends> (visited 13 August 2016).

¹⁶⁰ BBC News, ‘LRA rebel Dominic Ongwen surrenders to US forces in CAR’, 7 January 2015, available at <http://www.bbc.co.uk/news/world-africa-30705649> (visited 13 August 2016).

include eight counts of SGBV including rape, torture, sexual slavery, forced marriage and enslavement. As such, the case against Ongwen is also the case with the highest number of SGBV charges. The charge of ‘forced marriage’ in particular has drawn attention as it is the first time ever this crime (which is not listed in the Statute) has been charged before the Court. On 23 March 2016, the Chamber confirmed all 70 charges against Ongwen committing him to trial.¹⁶¹ This ‘revival’ of the Ugandan situation has led to a plethora of new victims’ related decisions and activities that contrast with my experience while I was doing research in Northern Uganda. This change was visibly manifested in photos from Lukodi, a village in Northern Uganda and a key site of the atrocities alleged in the Ongwen case, where around 1000 people had assembled to watch the confirmation of charges on a big screen.¹⁶²

2. Negotiating Roles: Researcher, Intern or ‘ICC Staff’?

My main motivation for joining the ICC as an intern was access to practitioners. I had tried to get in touch with ICC officials before but received few replies. I calculated that as an intern of the institution it would be easier for me to interview staff. This turned out to be only partly true. It is easier to persuade people to agree to interviews when you can approach (ambush?) them in the cafeteria or knock on their office door. But I also had to assert my role as a researcher in an institution used to a never-ending supply of unpaid interns (around 10% of the Court’s work force). My Court supervisor expected me to work

¹⁶¹ Decision on the confirmation of charges against Dominic Ongwen, *Ongwen* (ICC-02/04-01/15-422-Red), Pre-Trial Chamber II, 23 March 2016.

¹⁶² L. Ogora, ‘Live Screening of Ongwen Hearing in Northern Uganda: Lessons Learned’, International Justice Monitor, 25 January 2016, available at <http://www.ijmonitor.org/2016/01/live-screening-of-ongwen-hearing-in-northern-uganda-lessons-learned/> (visited 13 August 2016).

rather than to do interviews and my interviewees would sometimes start the conversation with, ‘so how do you like your internship here?’.¹⁶³

To escape a role that automatically put me at the bottom of the Court’s hierarchy, I tried to ‘establish’ my authority in my interviews. In retrospect, it is clear that I made great efforts at demonstrating my competence as a researcher who can speak the language of law. Sometimes my insecurity led me to interrupt my informants to show that I already knew the legal details of the matter discussed. To make sure that I was the one ‘in charge’ when dealing with (over-)confident, (often male) lawyers, I was sometimes too rigid in directing the interview along prepared questions rather than following up on ‘new leads’ emerging from the discussion. In time however, I grew more confident and my later interviews are richer in data and ideas than my earlier ones.

My engagement in Kenya and Uganda was very different. Following my experience at the ICC, I decided to avoid any institutional affiliation (apart from a loose association with the British Institute in Eastern Africa). Instead, I focused on arranging as many interviews as possible with the Court’s field staff, legal representatives of victims (LRVs), their field assistants, intermediaries and NGOs working on the ICC, victims and gender justice. As such, the data I collected in Uganda and Kenya comprises primarily interviews (50 altogether), rather than ethnographic observations. The exception is a victims’ registration mission that I observed in Western Kenya from 18 to 22 August 2014. I was lucky that one of the victims’ lawyers agreed to take me on his field mission to meet victims at different locations in Western and Nyanza Provinces. This allowed me to

¹⁶³ I usually contacted or followed up with court actors through the internal email system which clearly marked my position as ‘intern’.

observe first-hand how victim participation works in practice. I took detailed field notes of the trip and conducted interviews with the intermediaries who had organized the meetings. Yet, this close association with the Court's personnel brought its own problems.

'I'm not from the ICC', I exclaimed desperately. 'I only want to talk to you. Please do not invite anyone else'. I'm on the phone with an intermediary from Kisumu whose contact I had received from an ICC outreach officer. I had called him to ask, whether I could interview him regarding his work with victims when I come to Kisumu. The phone connection was bad and when he called me back a day later, I realized there had been a misunderstanding. He said he had already begun to make arrangements and asked me about the budget, venue and number of invitees. He probably thought I was with the Court's outreach section and had asked him to organize a meeting with people from his area. The confusion became even more pronounced when I accompanied the victims' lawyer and his team on field mission. He had asked me beforehand to be 'as invisible as possible' so as not to interfere with his work or make victims feel uneasy. Naturally, as I had come in the car with them, people had the impression that I was with the ICC. When I interviewed the intermediaries at the venue, I tried to explain that I am an independent researcher who is not affiliated with the Court. It reassured me that many intermediaries were still fairly critical of the Court in our interview. Less reassuring was that one of them charged the LRV for my interview with him. To my embarrassment, they had already paid before I could intervene. In the end, these were small sums of money (500 Kenyan Shillings, which is 3.50 Pounds Sterling) and the greater embarrassment, of course, was that the Court does not properly compensate intermediaries for their work.

3. Security

I had planned to first visit Kenya and then Uganda in a joint research trip from June to September 2014. A colleague, who also did research on the ICC in Kenya, had given me his contacts and so I already tried to arrange interviews for my first fieldwork location: Nairobi. I was advised to take some time to get used to the city, but I ignored it and scheduled the first interview for the day after my arrival. I was worried because I had not received many replies to my email enquiries and once in Nairobi, I immediately started to call people on their mobile phones to arrange further interviews. On the 5th day of my stay in Nairobi, I was robbed at gunpoint in broad daylight close to my home. Fortunately, I was unharmed but the event did bring home to me the question of security in the field.

It was not as if I had not thought about security before coming to Kenya. Nairobi, or 'Nairobbery' as expats like to call it, is notorious for its high crime rates. I had attended a fieldwork safety course in Oxford and created various safety back-up plans. Yet, some security developments were difficult to predict. My arrival in Nairobi on 16 June 2014 was overshadowed by the Mpeketoni attacks, a series of coordinated attacks close to Lamu at the coast, which killed more than sixty people. While Al Shabaab claimed responsibility, President Kenyatta began to accuse 'local politicians' (understood by many to mean the opposition) of orchestrating the attack, thereby unleashing a political crisis in Kenya.¹⁶⁴ Many of the people I talked to feared another eruption of violence, similar to the one that broke out after the election in 2007/2008. As then, 'hate leaflets' began to circulate in the

¹⁶⁴ C. Wambua-Soi, 'Kenya Mpeketoni attack: Who is fooling who?', Aljazeera, 23 July 2014, available at <http://www.aljazeera.com/blogs/africa/2014/06/99121.html> (visited 13 August 2016); D.M. Anderson and J. McKnight, 'Kenya at War: Al Shabaab and its Enemies in Eastern Africa', 114 *African Affairs* (2015) 1, at 23.

Rift Valley threatening certain communities with violence if they did not leave within a week.¹⁶⁵

I felt that I was caught up in events that looked rather similar to the ones I had come to study. When political tensions built up in the lead up to a big opposition rally, I followed the advice of my informants and left for Uganda to do my research there until the situation in Kenya had calmed down. This violation of my personal security coupled with the sudden unravelling of political stability in Kenya influenced my engagement with the country. While I had been eager to explore Kenya and immerse myself in its different social and cultural contexts, after these incidents I began to limit my engagement to what was necessary for data collection. I felt much safer in Uganda and the time there helped me to recover my sense of ease for my return to Kenya in August.

Another security aspect in Kenya was specific to research on the ICC. The victims' lawyer I had contacted before coming to Kenya advised me not to volunteer the fact that I was doing research on the ICC to people I met. It would be safer to tell people (other than my interviewees) that I was conducting research on something more generic such as the situation of IDPs. The ICC has been referred to as a 'silent killer' in Kenya as witnesses and journalists reporting on the cases have allegedly been killed due to their ICC association.¹⁶⁶ Court staff members have also received death threats.¹⁶⁷ Since I only interviewed people who had been working with the Court for some time, such as NGOs

¹⁶⁵ R. Kamau, 'Here are Those Hate Leaflets Being Circulated in Rift Valley,' Nairobi Wire, 23 June 2014, available at <http://nairobiwire.com/2014/06/threatening-leaflets-circulated-riftvalley.html> (visited 24 July 2016).

¹⁶⁶ J. W. Rosen, 'Reporters, witnesses silenced "one by one" with ICC link deadly in Kenya', Aljazeera, 24 August 2015, available at <http://america.aljazeera.com/articles/2015/8/24/kenyas-dark-path-to-justice.html> (visited 10 August 2016).

¹⁶⁷ J. Verini, 'The Prosecutor and the President', The New York Times Magazine, 22 June 2016, available at <http://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html> (visited 24 July 2016).

and intermediaries, I calculated an interview with me would not pose any additional security risks to them. While many intermediaries complained about the lack of security provided by the Court, my impression was that they were at ease and quite frank in our conversations.

Initially, I had also planned to do research in the Rift Valley where some of the major flashpoints of the election violence such as Eldoret, Nakuru and Naivasha are located. Once I was in Nairobi, however, my informants advised against the trip. An NGO representative told me that colleagues of his who were involved in justice outreach and advocacy had recently been detained there. Around the same time, a scheduled ICC outreach event in Eldoret was cancelled allegedly because the governor argued that it would incite further tensions in the region.¹⁶⁸ Personally, I never experienced any problems or interferences with my research.

4. Observing 'Justice' in The Hague

Despite the drawbacks of being an 'unpaid intern', my position at the Court also meant that I had access to more data. Being an 'embedded researcher' allowed me to triangulate my interview data and the Court's public documentation with 'court observations' and informal conversations. I attended internal coordination meetings, video conferences between the ICC's Registry and the United Nations (UN), consultations between the Court's staff and NGOs as well as the Assembly of States Parties (ASP) in 2013. Sipping mediocre coffee in the Court's cafeteria was one of the best ways to learn about the Court's institutional dynamics: 'Who meets whom and how often?'; 'which judges always

¹⁶⁸K. Tunoi, 'Uasin Gishu Governor Jackson Mandago bans ICC outreach meeting in Eldoret', Standard Digital, 12 June 2014, available at <http://www.standardmedia.co.ke/article/2000124490/uasin-gishu-governor-jackson-mandago-bans-icc-outreach-meeting-in-eldoret> (visited 10 August 2016).

sit alone?'; and 'why does nobody talk to the defence lawyers?'. I also experienced first-hand the coordination efforts between the Court's four organs¹⁶⁹ which were beset by tensions sometimes leading to angry email exchanges to which I was copied in.

Contestations about victim participation also sometimes took shape in email exchanges. Once I tried to arrange an interview with an ICC judge through 'his' intern. She then confirmed the interview with me, copying in not only the judge but also other senior officials of his division, and added: 'Judge x also would like to refer you to the award-winning manuscript by Brianne McGonigle Leyh with the title "Procedural Justice? Victim Participation in International Criminal Proceedings" with the hope that it will be useful for your research.'¹⁷⁰ Before I had the chance to reply, one of the senior officials copied in had replied to all of us:

Maybe you [the judge's intern] should underline that this is a study made by a common law lawyer who received an award by common law lawyers who generally are not very favourable to victims' participation because they do not know it in their system and common law lawyers tend to not like, and very often not to understand, what is not in their national system. This is particularly true for lawyers from the USA (the award was given by the American branch of the AIDP which is not a good sign). By referring this student [me] to such a book, you obviously do not want to give the impression that Judge x is sharing the partial view of a common law lawyer on victims' participation.¹⁷¹

This reaction is instructive for three reasons. First, the position of the Court's senior officials, especially the judges, on victim participation is well known at the Court.¹⁷² The judge I had contacted was known to be 'against' victim participation. One of his colleagues

¹⁶⁹ The four organs are Presidency, the Judicial Divisions (Pre-Trial Division, Trial Division and Appeals Division), the Office of the Prosecutor (OTP) and the Registry.

¹⁷⁰ Email communication, 'Forschungsanfrage', 4 December 2013 (translated from German).

¹⁷¹ Ibid.

¹⁷² Some sitting judges have even published their concerns in academic articles. See Wyngaert (2012).

had told me earlier, ‘Judge x is against victim participation; he is concerned that it will destroy the Court.’¹⁷³ The senior official who replied so promptly, on the other hand, was well known as a ‘victims’ supporter’. The exchange also underscores that victim participation is not a side issue at the Court:

“Victims” is a very touchy issue because you touch the balance of power and where this institution could go. You don’t joke with that and the judges know very well that you don’t joke with it. They say ‘this is where we want to go’ and your legal influence [as a legal adviser] may become zero [if you try to go against their ideas].¹⁷⁴

Finally, it suggests that the immediate framework for discussing victim participation is ‘common law’ versus ‘civil law’. Chapter III will show that this framework can be misleading for understanding who supports and who opposes victim participation at the Court and why. Nonetheless, the discursive omnipresence of ‘common vs. civil law’ does attest to ‘factionalism’ within the court that is assumed to map neatly onto legal traditions. Apart from being a witness to such internal skirmishes, I also had many informal chats with ‘my colleagues’ about victim participation and reparation which were often more frank than the interviews and also revealed the different biases of the Court’s personnel.

4.1. The Court’s Culture: Divided, Shrewd and Special?

As such, my engagement with the Court comes close to a ‘court ethnography’. As Paik and Harries argue,

only by staying in the field long enough to see or hear the same issues repeatedly – as Glasser and Strauss (1967) call it, “saturation” – will the researcher start to see nuances, patterns, and differences in the court

¹⁷³ Interview with Judge, The Hague, 17 December 2013.

¹⁷⁴ Interview with Senior Official, Chambers, The Hague, 8 January 2014.

actors' work, the organizational context of the court, and the contingencies stemming from particular court cases.¹⁷⁵

A 'court ethnography' enables the researcher to discover ideas and practices that court actors take for granted and which therefore are never revealed in interviews.¹⁷⁶ It can also unearth an underlying 'court culture', which reflects the norms, ideas and informal rules that shape how court actors think, act and run the institution.¹⁷⁷ The concept of 'court culture' has become prominent in criminological research to make sense of the gap between the 'high legal principle and the daily reality of the administration of justice in the courts'.¹⁷⁸ Yet, the concept begs the question of whether the ICC is a court in the first place. My interviewees often talked about the Court's 'identity crisis' which some of them viewed as directly linked to the Court's promise to bring 'justice for victims':

And this often causes a bit of a tension to my mind with the expectations that were raised with including this victims' component more strongly in the Statute. Because I sometimes have the impression - I don't have any empirical proof for that - but sometimes people tend to forget that this is primarily a criminal court and that certain decisions may be made to ensure the necessity of a fair trial but that are not easily understandable or may actually go against the interests of victims.¹⁷⁹

Some interviewees described the ICC as 'an international organization' that may have more in common with the UN than with a domestic criminal court:

When you come to an international organization, especially one where there is this fight for power and influence, at one point you need to realize that there are things that you cannot do otherwise you will be beaten

¹⁷⁵ L. Paik and A. Harris, 'Court Ethnographies' in H. Copes and J.M. Miller (eds), *The Routledge Handbook of Qualitative Criminology* (London: Routledge, 2015), at 284.

¹⁷⁶ Ibid, at 287.

¹⁷⁷ O. Smith and T. Skinner, 'Observing Court Responses to Victims of Rape and Sexual Assault', 7 *Feminist Criminology* (2012) 298.

¹⁷⁸ J. Baldwin, 'Research on the Criminal Courts', in R. King and E. Wincup (eds), *Doing Research on Crime and Justice* (Oxford: OUP, 2007), at 378, 381.

¹⁷⁹ Interview with Legal Adviser, Chambers, The Hague, 10 January 2014.

severely or you will have to leave. At some point, you will have to choose between 'I leave' or 'I stay but accept the logic'.¹⁸⁰

Nonetheless, the concept of 'court culture' is useful and my observations over five months (October 2013 to February 2014) helped to identify the tenets of such a culture. Recurrent themes in interviews, meetings and informal conversations were i) a 'personalized' understanding of what is wrong with the Court, ii) a strong sense that the ICC operates in an increasingly 'hostile environment' and, iii) a conception of the ICC as a 'sui generis' institution.

Are the Court's troubles due to 'bad people'?

The thread of personal hostilities and infighting ran through my experiences at the Court. Starting my work in what from the outside looks like a formalistic and secretive institution, I was surprised by the relentless stream of personal animosities traded within the Court and people's willingness to share them with an outsider. I should clarify that I never solicited any such information and also made no secret out of the fact that I was doing research there. Practitioners would nonetheless tell me how this or that person was 'an idiot', 'incompetent' or 'power-seeking'. These tensions were both personal and institutional and the two often overlap in what is still a fairly young institution. Many of the Court's organs, sections and offices have been heavily shaped by one or two personalities or at the very least this is how the Court's stakeholders perceive it. When I asked about the role of this or that organ or office my informants' answers were strewn with references to particular people:

What the first president wanted to achieve was to limit all that [victim participation] to make the OTP [Office of the Prosecutor] free. Because

¹⁸⁰ Interview with Senior Official, Chambers, The Hague, 8 January 2014.

what he was afraid of is that the pre-trial chamber would use victims to gain control over the OTP. And that is the big fight.¹⁸¹

One judge explained how ‘victim participation’ was conducted in the early days of the Court: ‘Registrar Bruno Cathala was dropping leaflets from a helicopter in Africa that victims can participate and receive reparations. Luis [Moreno-Ocampo – the former prosecutor] complained about that.’¹⁸²

A ‘personalized’ understanding of how the Court works is surely not unique to the ICC even though its prevalence was striking. Yet, it also influences how ‘problem-solving’ is understood. The ‘bad people’ hypothesis of what is wrong with the ICC often leads to the ‘solution’ of removing or exchanging particular people. A case in point is the Registry’s *Revision* project which aims at simplifying the Registry’s structure to ensure that all its sections will ‘work as one to achieve the Registry’s mission and objectives’.¹⁸³ One central proposal of the *Revision* project, which began in January 2014, is to merge all victims’ functions which are currently performed by VPRS, OPCV, CSS (Counsel Support Section) and the LRVs into one victims’ office.¹⁸⁴ In theory, the project focuses on institutional structures and ‘reporting lines’, in practice it is understood as a way of getting rid of particular people. One victims’ lawyer commented on the project in the following terms:

You can read this draft [of the *Revision* project] as a Shakespeare drama with an open end...We have a new young king [the Registrar] and we have barons, earls or ladies, governing big parts of his country for more than 10 years, the heads of OPCD [Office of the Public Counsel for the Defence], OPCV, VPRS and CSS. They have been there for more than 10 years and they know how to run the Court without Mr Hebel. So what does a new

¹⁸¹ Ibid.

¹⁸² Interview with Judge, The Hague, 17 December 2013.

¹⁸³ *Report on the Review of the Organizational Structure of the Registry Outcomes of Phase 4 of the ReVision Project Decisions on the Structure of the Registry*, ICC-ASP/14/18, 4 May 2015, §6.

¹⁸⁴ The East African, ‘ReVision project aims at ‘coherent’ Registry’ (Interview with Registrar Herman von Hebel), available at <https://appablog.wordpress.com/2014/12/08/revision-project-aims-at-a-coherent-icc-registry/> (visited 13 August 2016).

king do to get authority? He destroys the old system and builds up new loyalties....¹⁸⁵

A similar tendency marks conversations about victim participation. Some Court practitioners argue that the concept as such is flawed. Yet, more often than not, the conversation runs into allegations that particular people or particular institutions do a bad job:

It [victim participation] has led to the emergence of a new caste of lawyers who make big money out of the suffering of the people...To be a legal representative of victims is a relatively easy job. It is not the same as being a defence counsel of an accused, because the Prosecutor does all the work...They get a mandate of the victims and otherwise they don't care about them. It's just a piece of paper they care about. I have a mandate of 100 victims in the DRC, in Ivory Coast and this allows me to sit in the court room to earn 30,000 or 20,000 Euros a month for this 'work'. They do not even report back. There is no dialogue and no ongoing communication with the victims which in my view is a disaster.¹⁸⁶

The judges are not exempted from the 'bad people' analysis. At the Court, I often heard that the ICC's judges are not 'real' judges. Many are academics and diplomats and never sat in a court room before.¹⁸⁷ One ICC judge does not even have a law degree.¹⁸⁸ Yet, my informants had different ideas of what 'bad judges' meant for the Court's proceedings. One legal officer claimed that 'bad judges' go too easy on the defence. They are readily

¹⁸⁵ J. Dieckmann, 'The Participation of Victims in Proceedings of the International Criminal Court – Observations from a Counsel's Perspective', Speech at the University of Oxford, 2 March 2015.

¹⁸⁶ Interview with Judge, The Hague, 19 December 2013; Elisa Hoven's interviews with practitioners at the ECCC also revealed that they blamed the problems of the system to a large extent on the victims' lawyers or the failure of the judges to better manage them. See E. Hoven, 'Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia', 12 *JICJ* (2014) 81.

¹⁸⁷ Judges are elected through two lists: List A and List B, where List A candidates have 'established competence in criminal law and procedure...' (judges, prosecutors, advocates) while List B candidates have 'established competence in relevant areas of international law such as international humanitarian law and the law of human rights...' (i.e. they don't need to be practitioners). See Rome Statute, Article 36, Paragraph 3 (a), (b), (c) and Paragraph 5.

¹⁸⁸ See Profile of Judge Kuniko Ozaki (Second Vice President), available at <https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Kuniko%20Ozaki> (visited 12 August 2016); T. Funk, *Victims' Rights and Advocacy at the International Criminal Court* [e-book] (Oxford: OUP, 2012), at 72-76.

intimidated by defence lawyers who are often Queen's Counsel from the United Kingdom and have a superior command of English than the judges. They are also afraid of being seen as unfair to the defence.¹⁸⁹ Yet, the 'judges at the ICC are diplomats and academics' argument was also used to make exactly the opposite point. Defence counsel often assert that the Court's judges do not take defence rights sufficiently seriously.¹⁹⁰ In this way, conceptual and institutional problems at the Court get buried beneath the power games and mutual accusations of the Court's 'movers and shakers'.

How to 'survive' in a hostile environment?

Another common thread was a sense of anxiety or at least weariness about the Court's future. One interviewee even claimed that 'the Court is struggling to survive' citing negative perceptions of the Court 'around the world' and particularly the challenges to the Court launched by the African Union (AU).¹⁹¹ When I came to the ICC, the Court's employees were busy preparing for the ASP, which saw efforts by the Kenyan government and their allies to undermine the Rome Statute's non-recognition of immunities and official capacity (Art. 27), a cornerstone of the Rome Statute System. Court officials were particularly dismayed about the rather lukewarm support by European states, the Court's traditional champions, and their willingness to accommodate Kenya's request to change the Court's Rules of Procedure and Evidence.¹⁹² While many informants insisted that 'the ICC was here to stay' at least for now, there was no doubt that the 'honeymoon was

¹⁸⁹ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

¹⁹⁰ Interview with Victims' and Defence Counsel, 4 November 2013. My notes from the ICC Seminar of Counsel, The Hague, 21 and 22 October 2013.

¹⁹¹ Interview with Legal Officer, Registry, The Hague, 4 February 2014.

¹⁹² FIDH, 'Justice at Risk: States Parties Concede to Political Pressure', Press Release, 28 November 2011, available at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/14308-justice-at-risk-states-parties-to-the-icc-statute-concede-to-political> (visited 12 August 2016).

over’¹⁹³. I often heard that the ICC was established because a ‘window of opportunity’ had opened in the 1990s after the end of the Cold War which then closed promptly after 9/11. One judge, who also participated in the Rome negotiations, put it as follows:

The 1990s was the peak of idealism in the rule of law through courts. There was more trust in these institutions. I always thought that if we had waited three or four years more the Court maybe would not have been created. After 9/11 the trust in the rule of law really declined...And then the Court started. In 2003, there was still some enthusiasm but we were already in the declining phase. And the Court also showed that it was not so easy. People had different ideas of what they expected from the Court. It is difficult to please all constituencies at the same time. The Court made a lot of mistakes...The Court had to work in a less benign environment...¹⁹⁴

Rather than the logical end point in the relentless institutionalization of international criminal justice, the ICC was often portrayed as a very contingent and fragile achievement: ‘Everything seemed possible at the end of the Cold War. [Then] we realized that we had to go for the good rather than the perfect. It all took very long and we already thought that it might be an imaginary exercise’, another judge recalled from the Rome negotiations.¹⁹⁵ Several ICC judges are not just the interpreters of the law but also were intimately involved in the creation of the Court and thus have a strong sense of ownership.¹⁹⁶ Younger ICC members, on the other hand, felt that these existential anxieties were overblown. They have also stifled a more critical and creative engagement with and within the Court:

And I think civil society outside has been really kind of bad about this. They don’t ask problematic questions. They are too kind of embedded with this Court. I think in the very beginning they were very worried that if they were too critical that it may cease to exist or something. So they always have

¹⁹³ See also D. Luban, ‘After the Honeymoon: Reflections on the Current State of International Criminal Justice’, 11 *JICJ* (2013) 505.

¹⁹⁴ Interview with Judge, The Hague, 30 January 2014.

¹⁹⁵ Interview with Judge, The Hague, 17 December 2013.

¹⁹⁶ It has to be said that the make-up of the judges is changing and many of the newly elected judges were not involved in the Rome negotiations.

been like ‘we love the Court, we love the Court. It is doing such a great job’. But I think, now, we are building permanent premises, we are going to be here...¹⁹⁷

He was also frustrated with how senior members tried to nip any change in the bud:

Cynicism has a certain currency at the Court...well, it’s like ‘you don’t present ideas because they were presented before in 2002 and it did not work. Don’t ever come to me with any fresh ideas because they won’t work because I have been around....’¹⁹⁸

Not like anyone else: The Court’s Specialness

The idea of the ICC’s specialness permeated my interviews even though my informants filled that concept with different ideas. The Court is ‘special’ or ‘different’ when compared to the domestic criminal courts they know from their home jurisdictions:

It is exactly the same when it comes to the tools you apply on the operational side, but different philosophically...where the [ICC’s] President often has to talk about these issues: Does it make sense? Do we need an international justice mechanism? Can we do it nationally? Does transitional justice make sense? Is it helpful? Was it good that the ICC indicted Bashir?... In the national system, you don’t ask yourself the question why it is there. While at the international justice level, in any institution I have worked in, the ICC, ICTR, ICTY, you always have to ask the question: why should the institution exist in the first place?¹⁹⁹

But the Court is also different from its predecessors, the ICTY and the ICTR, as a permanent institution that is not tied to a particular post-conflict situation. This idea of being a ‘sui generis’ Court also allowed practitioners to argue that the ‘lessons learnt’ from the ad hoc tribunals and other institutions cannot really be applied to the Court.²⁰⁰

¹⁹⁷ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

¹⁹⁸ Ibid.

¹⁹⁹ Interview with Legal Adviser, Presidency, The Hague, 8 January 2014.

²⁰⁰ Ibid; C. Stahn, ‘Introduction: More than a Court, Less than a Court, Several Courts in One?: The International Criminal Court in Perspective’, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* [e-book] (Oxford: OUP, 2016), at lxxxvii; C Kress, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’ (2003) 1 *JICJ* (2003) 603.

What are the implications of the ICC as a 'special court' driven by internal divisions that has to operate in a more difficult international climate than the one it was conceived into? The argument I will develop throughout the following chapters is that the confluence of these factors has made the ICC a shrewd, postmodern actor in international politics that flexibly draws on different rationales for justifying its existence at different times while evading any clear goals, purposes or yardsticks.

5. Data Use and Research Ethics

At the ICC, my concerns about research ethics were focused on my institutional relationship with the Court. All of my interviews in The Hague were unambiguously 'elite interviews' and I had no concern that they could cause security, personal or professional harm to my interviewees. Almost all of my interviewees specified on the consent form I had prepared that I can only use quotes with their names upon their explicit agreement. To avoid cumbersome negotiations on 'what was really said or meant' I decided to anonymize my interview material.²⁰¹ The problem with that decision was that for an institutional analysis of the Court, it matters whether an interviewee is a judge, defence counsel or prosecutor. It also matters whether she is an employee on a temporary contract or a senior official that has shaped the Court's policies for more than ten years. Yet, to provide information about the particular office/section the individual works in or the exact job title may already give away their identity as these offices often have less than ten employees. Besides, my interviewees often had to ask for permission from the head of their section or organ to participate in the interview thus making our encounter

²⁰¹ K. Borland (1991), "'That's not what I said': Interpreting Conflict in Oral Narrative Research' in S.B. Gluck and D. Patai (eds), *Women's Words* (London: Routledge, 1991).

institutionally known. I am therefore careful to provide sufficient institutional information to contextualize the data without running the risk of revealing the identity of my informants. I distinguish between ‘senior officials’ (P5, D1, D2), legal advisers and counsels (P4 and P5) and legal officers (P2 or P3).²⁰² I also indicate whether a person is field or headquarters staff, their institutional affiliation (e.g. ‘Registry’ or ‘OTP’) and their role in the proceedings (e.g. ‘victims’ lawyer’).

Apart from the protection of informants’ identities, there was also the broader question of how I can use the information that I gathered while working at the Court. I was lucky to join the Registry while it was undergoing a transition in leadership which meant that the rules for researchers were ambiguous. At the beginning of my internship, my Court supervisor asked me to sign a confidentiality agreement stipulating that I cannot divulge any information that related to my work at the ICC. But she forgot about it and in the end I never saw or signed any such document. At a later stage, she asked me to provide a list with the names of all the people I had interviewed at the Court. I explained to her that I would first have to solicit the consent of my interviewees. I also argued that many of my interviewees were not affiliated with the Registry and presumably not comfortable with such Registry oversight. Hence, I did not provide this list. A senior Registry official advised me ‘not to contact the judges’ but others encouraged me to contact whoever I would like to talk to: ‘people can say no, after all’. In fact, one judge expressed his annoyance to me with ‘certain people’ in the bureaucracy who tried to ‘gate-keep’ access to him by journalists and researchers. Yet, apart from a few half-

²⁰² See UN professional categories, available at <https://careers.un.org/lbw/home.aspx?viewtype=SC> (visited 21 August 2016).

hearted attempts to control or limit access, I did not experience any interference with my research.

‘Academics’ and ‘academia’ were viewed with suspicion at the Court. One interviewee complained that sweeping critique of the Court was a means for academics to build a career. At the ASP, diplomats would often say ‘this is not an academic proposal’ to convey that this is a ‘real’, practical solution to the Court’s problems. ‘Academic’ was used as synonymous with ‘unreal’ or ‘irrelevant’. Even those who were more interested in academic research granted me (‘a student’) access as a personal favour rather than as an institutional obligation or interest. My Court supervisor saw it more as a ‘deal’: I work for them and can do interviews at the Court in return. From my point of view, the ICC is a public institution, funded by public money and as such should be open to public research.²⁰³ There is also no point in me doing research at the ICC, if I then cannot use any of that data for publication. My ‘court diary’ and non-confidential information that I came across while working at the Court thus form part of this thesis’ data.

My ethical concerns in Kenya and Uganda were very different from those I had about my work at the ICC. In these jurisdictions, my relationship with my informants was at the core of my methodological and ethical reflections. I had secured ethics approval for my CUREC1A application (‘straightforward ethical issues application form’²⁰⁴) and had not applied for CUREC2 (‘complex ethical issues application form’²⁰⁵) as I planned to conduct

²⁰³ This is also a position embraced by many criminologists and socio-legal researchers. See M. Israel, ‘Strictly Confidential? Integrity and the Disclosure of Criminological and Socio-Legal Research’, 44 *British Journal of Criminology* (2004) 715.

²⁰⁴ See CUREC, ‘SSH IDREC application process’, available at <https://www.admin.ox.ac.uk/curec/apply/ssh-idrec-process/> (visited 12 August 2016).

²⁰⁵ Ibid.

‘elite interviews’ with the Court’s field staff, victims’ lawyers, national and local NGOs.²⁰⁶

The Court’s and NGO staff in Kenya and Uganda usually have university degrees and competitive jobs. Their education and professional position make them at least equal to, and more often senior to my position as a PhD researcher. I did not try to obtain sensitive information about victims, their legal cases or any other information that could cause security or employment risks for the persons interviewed. At an early stage of my project I decided against interviewing victims in part due to ethical concerns about research with vulnerable groups, particularly in Kenya.²⁰⁷ Victims in Kenya told their lawyer that ‘they lived in constant fear’.²⁰⁸ Many were traumatized and few had received psychological support.²⁰⁹ Besides, colleagues had alerted me to the potential security risks for victims, if they are seen to communicate with ‘someone from the ICC’. The concept of ‘an independent researcher’ who studies the ICC without being in any way affiliated with the Court is not always understood or accepted by victims or the people who threaten them.

I find it difficult to come up with a clear-cut characterization of my power relationship with the people I interviewed. I had often read in the theses of fellow PhD researchers working in post-colonial countries that they were ‘aware’ of their power position as ‘young, white women or men from the West with an elite university affiliation’

²⁰⁶ A. Kezar, ‘Transformational Elite Interviews: Principles and Problems’, 9 *Qualitative Inquiry* (2003) 395.

²⁰⁷ For a systematic study of victims’ perspectives on participation at the ICC, see Human Rights Center, *The Victims’ Court?: A Study of 622 Victim Participants at the International Criminal Court*, UC Berkeley School of Law, 2015, available at https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf (visited 21 January 2016) (hereafter *Berkeley Victim Participation Study*); C. Tenove, ‘International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda’, *Africa Portal*, September 2013, available at <https://www.africaportal.org/dspace/articles/international-criminal-court-challenges-victim-assistance-participations-and> (visited 12 August 2016).

²⁰⁸ Twelfth Periodic Report on the general situation of victims in the case of *The Prosecutor v. Uhuru Muigai Kenyatta* and the activities of the VPRS and the Common Legal Representative in the field (ICC-01/09-02/11-978-AnxA), 21 November 2014, at 4.

²⁰⁹ Ibid.

- as if that cements a static inequality between the researcher and her informants. My sense of power vis-à-vis the people I engaged with fluctuated. Of course, I was constantly reminded that I was a 'mzungu' (white person) which surprised me as I have never quite felt 'white' at home in Germany, given my Iranian descent. Of course, I chose to be there and could leave any time with my German passport, a freedom that even relatively privileged Kenyans and Ugandans do not enjoy. And yet, the sense of inequality varied dramatically from interview to interview. The Court's field staff, victims' lawyers and NGO representatives in Kampala and especially Nairobi are the 'human rights elite' of these countries. Even the ICC's staff in The Hague were pretty impressed by them:

When we first came to Kenya we were met by all these civil society organizations based in Nairobi that have like hundred thousands of Euros annual budgets and they have meetings in safari parks and stuff like that, really well-resourced civil society organizations...²¹⁰

This was very different to my interviews with NGO representatives and intermediaries in smaller towns and rural areas. Many of those 'organizations' were made up of just one or two persons.²¹¹ Often, they were simply a group of victims that had been encouraged by bigger NGOs or the Court's staff to 'organize'.²¹² They lack the resources to cover transport costs and basic compensation for the work of their members. A psychologist in Gulu told me that he had worked with counsellors from small organizations that 'had such minimal economic rewards that they boycott field activities because if they go to the field, they will not eat. Their organization does not facilitate them.'²¹³ In these interviews, I was perceived as a person with important connections and networks. When interrupted by

²¹⁰ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

²¹¹ Interview with Legal Officer, Registry, The Hague, 21 January 2014.

²¹² Interview with Intermediary, Kisumu, 26 August 2014; Interview with Legal Officer, Registry, The Hague, 4 February 2014.

²¹³ Interview with TFV Local Partner, Gulu, 9 July 2014.

their mobile phones during interviews my informants would tell their caller: 'I'm being interviewed by a researcher from the University of Oxford. I really can't speak right now.' Further, they had clear expectations of my power and influence, demonstrated by their requests: 'what can you do for us and for the victims?'; 'Can you connect us to donors?'; 'Could you read and revise this grant proposal?'; 'Can you tell the ICC that transport costs are not enough to cover for the activities of intermediaries?' I tried to help where I could but I also did not want to raise false expectations. These demands also spilled over into my private life and were psychologically draining. Once in my room, exhausted after a day of interviews and research, the cleaning lady of my hostel knocked on my door and asked if I could pay the school fees for her little brother.

Some scholars argue that qualitative research should live up to principles of 'fair exchange' or reciprocity.²¹⁴ Due to my prior decision not to interview victims and the perhaps misleading notion of 'elite interviews' I initially did not concern myself with the difficult question of what I can give back to the people who shared their stories, time, knowledge and ideas with me. I also fear that the demand of reciprocity has induced researchers to overpromise. I remember my unease reading in the 'ethics section' of a fellow PhD student that her interviews will have a 'cathartic effect' on the vulnerable people she intended to work with (she did not have any psychological training to back up that claim). Unless a research project is explicitly designed to empower the people who are researched (e.g. participatory action research), I believe that claims of reciprocity should only be made with caution in contexts of significant power and wealth inequality. As Nouwen argues, 'the real issue is the inequality in opportunities to set the research

²¹⁴ V. Dickson-Swift, E. L. James, S. Kippen and P. Liamputtong, 'Doing Sensitive Research: What Challenges do Qualitative Researchers face?', 7 *Qualitative Research* (2007) 327, at 334.

agenda, analyse the data, and tell the story’.²¹⁵ This is an inequality that ‘gestures of reciprocity’ cannot resolve and may unduly obscure. When I came to Northern Uganda, I was told that ‘victims do not want to talk to researchers unless you pay them money’. I think that is fair.²¹⁶ People should be compensated for taking time off to do a research interview. Of course, it is important to consider the methodological implications such as the ‘routinisation of participation’ and ‘the commodification of participant’s knowledge’ but I do not think they weigh more heavily than other distortions inherent in the interview encounter such as ‘social desirability’.²¹⁷ Such compensation is more honest than promising some obscure benefits of the research for victims or sending them your book or report later. Nonetheless, ‘paying or not paying’ is a contextual, negotiated decision.²¹⁸ I offered ‘transport reimbursement’ to intermediaries and representatives from smaller NGOs or when my interviewees asked me for it.

Yet, the question of power also has another dimension. I often felt pretty helpless and powerless as a lone, young, female researcher in Kenya and Uganda. I felt incredibly dependent on my informants and many other people I met for navigating a research terrain that was unfamiliar to me and sometimes seemed dangerous. My informants gave me security advice, contacts for further interviews and social company. They reassured me after I was robbed in Nairobi; they gave me rides in their cars and took me with them on field trips so that I could observe their work with victims. One victims’ lawyer was particularly supportive throughout the trip. This dependence on my informants made it

²¹⁵ S. Nouwen, “‘As You Set out for Ithaka’: Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Research in Conflict’, 27 *Leiden Journal of International Law* (2014) 227, at 257.

²¹⁶ Ibid, at 244.

²¹⁷ Cook and Nunkoosing (2008) cited in D. Hammett and D. Sporton, ‘Paying for Interviews?: Negotiating Ethics, Power and Expectation’, 44 *Area* (2012) 496, at 498.

²¹⁸ Hammett and Sporton (2012).

difficult to be too critical of their work and I needed the distance from the field to thoroughly analyze my data.

6. How can we know about Justice?

The Hague: 'Your questions are very abstract'

While the more ethnographic parts of my research helped to inform my thinking about the Court and its situation countries, my richest and most important source of data are my interviews. During my internship at the Court, I conducted 27 formal interviews and four informal interviews with the Court's practitioners. Overall, I interviewed five ICC judges, 11 Registry staff members (VPRS [4], VWU [1], OPCV [2], OPCD [2] and TFV [2]), three employees of the Office of the Prosecutor (OTP), one of the Presidency and two of the Chambers, as well as five victims' lawyers. In Kenya and in Uganda, I interviewed over 50 local ICC staff members, intermediaries, local partners and civil society representatives from June to September 2014. Interviewee selection focused on those practitioners involved in the Court's victims' and intermediary engagement, which means that the sections of the Registry are overrepresented in the data. I also used snowball sampling, asking interviewees for further contacts which may have created selection biases.²¹⁹

I used a semi-structured interview technique that combined open questions with probing questions about particular justice concepts. At first I did not ask questions about 'justice' directly but rather about the purpose of victim participation and reparations more generally hoping that this would then lead to a discussion about 'justice for victims'. This interview material was rather vague and I thus began to ask about the meaning of

²¹⁹ C. Noy, 'Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research', 11 *International Journal of Social Research Methodology* (2008) 327.

different justice expressions at the Court more directly. The advantage was that I gathered more focused and dense material that helped me to map justice discourses at the ICC more thoroughly. As such, my interviews are the product of an interactive process in which I challenged my interviewees' conceptions of justice and also introduced them to other justice concepts. This 'confrontational' approach helped me to distinguish between their core justice ideas (those that would be defended when challenged) and the more fluid, malleable ideas, where stakeholders were willing to experiment with new ideas.

It could be argued that the material is 'tainted' by my interventions and gives 'justice' an artificial prominence that it may not have in the Court's every-day institutional practice. In fact, many interviewees found my questions rather abstract or philosophical and did not feel they were relevant to their daily work. One ICC official even asked his colleague from the same office to participate in the interview to 'help' him with my 'difficult' questions. Our interview started as follows:

Me: When I read the Court's documents or speeches of ICC officials, I often come across expressions like 'to render justice to the accused', 'to bring the perpetrator to justice', and 'to provide justice for victims'. I want to get a better understanding of what people who work here mean when they use these expressions or what you have in mind when you read them in the Court's documents.

Him: It's a court where we may understand terms differently but when the concept comes to the Court, the different parties or participants will debate it, but the final interpretation is with the judges. Sometimes in working groups here we realize that even OTP, VPRS, my office, we do not have the same understanding of what can be 'an intermediary' so you may have different concepts of justice.

Me: But in a sense, justice is not a legal concept. It is a concept that the judges have not defined. So there may be some room for different interpretations?

Him: But the ICC is a court. Justice means something. If somebody has to face justice because something occurred against global law and ICC text; justice is having a whole process with all the actors respecting the highest

standards. Justice, for me, is not 'fighting against impunity'. It's only a part. The ICC was celebrating 10 years of ICC, saying '10 years of fighting against impunity' whereas for me, I'm not fighting against impunity.

Me: What are you fighting for?

Him: Justice

Me: And what do you mean by that?

Him: Justice is a global process. It's a whole structure and 'fighting against impunity' is just a part. I think it's the role of the prosecutor. But the judges' role is not to fight against impunity. Their role is to say 'this is justice; he or she is innocent.'

Me: And what is your role in this justice process?

Him: To accompany the defendant and to ensure that the trial is really fair.²²⁰

This excerpt is rather typical of my interviews. At the beginning there is a sense that 'justice does not really matter' and that my interviewees do not spend their time thinking about what it means. But when I probed further, they would usually defend the idea that the 'ICC does justice' and that 'justice means something'. This would then lead to a discussion that produced rather diverse ideas of what 'justice means' or 'doesn't mean'. Yet, we should not read such an interview snippet as mirroring what that person 'really' thinks about justice. Instead, it reflects what was possible and appropriate to say within the discursive boundaries of 'an interview' with a researcher/intern, in the presence of another colleague in his office and after he just got off the phone with a counsel from Senegal.

One common thread in my interviews was the claim that justice is intimately linked to practice. My interviewees felt that it was somewhat futile to talk about justice and that I should rather learn from the Court's practices. When I asked how comfortable the ICC's

²²⁰ The excerpt is from an interview with a defence counsel, The Hague, 4 December 2013.

practitioners are with notions of 'retributive justice', a senior official pondered: 'You don't really hear that type of discussion around here. People are trying to apply [the Statute] ...I suppose questions of "what makes a fair trial?" or "how do the judges handle it?" are not necessarily relevant on a day to day basis...'²²¹ One legal adviser put it more bluntly:

I have a clearly predetermined set of tasks and obviously I perform them with the concept of what I think the ICC should stand for. I don't think that there is room for us employees here to think lofty thoughts about what our personal definition of justice for this institution is because we have operational tasks to perform. And I really want to boil this down to what we are. We are nothing else but a court and in a court people do what they are supposed to be doing according to specific tasks that are assigned to them. The great thoughts that I think, once I leave this place, I will have regarding my definitions of justice, which may differ from yours, which is completely legitimate, normal and inevitable, but this is nothing that will have an effect on the every-day working structure of the Court.²²²

These reactions tell us at least three important things. First, they are often self-contradictory. The legal adviser who insists that his role is merely to perform the tasks assigned to him still does his job 'with the concept of what I think the ICC should stand for'²²³. And this takes us back to the question of what 'that concept' is and how it shapes his interpretation and implementation of the Court's practices. Second, the interview situation 'forces' people to talk about something which for many is enmeshed with and inseparable from practices. It compels them to come up with a definition, 'fixing' a concept that is always and some would say inevitably elusive. What Jenkins remarks about knowledge obtained through ethnography is also applicable to 'talking about justice':

The indigenous account introduces distortions through what might be called the 'desire to explain'. It generalizes, leaving out mention of particular examples and names...they 'freeze the picture' and create images simple enough to be handled in conversation...an informant's

²²¹ Interview with Senior Official, The Hague, 16 December 2013.

²²² Interview with Legal Adviser, Presidency, The Hague, 8 January 2014.

²²³ Ibid.

account is oriented towards the presumed expectations of the enquirer...it concentrates upon exceptional events, upon the most remarkable moves...This sequence of distortion performed by the native account, through leaving out the obvious, objectifying, and concentrating upon the exceptional, lends itself not only to academic accounts...²²⁴

Justice ideas are very contextual. I discovered that when I tried to answer my own interview questions in different contexts (before I joined the Court, at the Court, in Kenya, in Uganda, back home, while writing up the thesis): ‘what does “justice for victims” mean at the ICC?’ I gave different answers at different times. Nonetheless, ideas such as ‘fair trial’, ‘the importance of the process’ and that it is ultimately the judges who ‘speak justice’ were an integral part of practitioners’ justice vocabulary. Another important reason for my interviewees’ reaction is that it may have been a way of establishing hierarchies of knowledge. Practice (what they do) trumps ‘academic knowledge’ (what I do). Academia needs to learn from practice. Practice decides what the relevant questions are and academics should then figure out a solution. A lawyer at the Special Tribunal for Lebanon (STL) once told me that what he expects from academia is ‘constructive critique’, i.e. knowledge that helps these courts and not knowledge that points to ‘inevitable’ structural flaws of these institutions.

Kenya and Uganda: ‘Am I asking the wrong questions?’

In Kenya and Uganda, my interviews became less structured and each interview conditioned and shaped the next. I became more open to ‘where the interview would carry me’, and less concerned with covering all of my preconceived questions. In Uganda, in particular, many people were not that interested in talking about the ICC.²²⁵ As the LRA

²²⁴ T. Jenkins, ‘Fieldwork and the Perception of Everyday Life’, 29 *Man* (1994) 433, at 438.

²²⁵ See also Nouwen, ‘As You Set out for Ithaka’ (2014), at 253.

had left Northern Uganda in 2006-8 and with no proceedings underway at the ICC, it was considered an old debate. Instead, they wanted to talk about land conflicts, domestic violence and social justice. My conversations in Uganda inspired me to refocus on the question of 'gender justice', a question that was part of my initial research design but then slipped into the background while I was at the Court. Listening to my interview recordings, I was dismayed to discover that I had sometimes dropped the question of 'gender justice' in my The Hague interviews. Was I just sloppy? Was it my own biases that subconsciously made me decide in interviews with senior officials (where time was always pressing) that that question is somehow less relevant than the others? Or were there communicative and social constraints in these encounters that made me uneasy about the question? The fact that questions of 'gender justice' came up more often in interviews in Northern Uganda also reflected the TFV's focus on SGBV and women's empowerment there. I then chose to interview more women's rights organizations and engaged more closely with the work and ideas of my interviewees. If I heard something interesting or unexpected in an interview, I would ask my next interviewee about it: 'I heard that Did you have a similar experience or perception?'.

7. Interpretation, Language and Biases

My research approach thus became more inductive over time and I ended up with very rich and diverse interview material. To reassemble my analytical framework, I interpreted my data through an 'iterative approach' where concepts and analytical themes emerge from the data and are then mapped across the interview transcripts and fieldwork diaries. I found 'intertextuality' a helpful concept for identifying conceptual shifts in the ICC's justice discourses. Intertextuality describes the ways in which different texts such as court

decisions, speeches by ICC officials and NGO papers draw on and appropriate each other's concepts and change their meaning in the process.²²⁶ Who or what is quoted or referred to in these different texts and with what purpose is a crucial question for studying how justice concepts shift and influence practice.

Language is also a crucial factor in this interpretive process. I'm not a native English speaker and neither were most of my interviewees in The Hague. In Kenya and Uganda, English is one of the official languages and the language of instruction in schools. Yet, in many rural areas, English is the second or even third language people speak (if at all) and thus their command of it varies. Since all interviews were conducted in English, grammatical mistakes, guesswork and misunderstandings were part and parcel of the interpretation.

There are (at least) two sets of biases that inform this thesis: normative biases and prejudices. TJ is a very normative field in which advocacy and analysis are often conflated.²²⁷ Research on victims at the ICC is imbued with (at least) two conflicting normative commitments: first, a commitment to the project of international criminal justice and its culmination, the ICC²²⁸, and second a commitment to 'making justice work for victims' which then raises the question of whether the Court is part of the problem or part of the solution.²²⁹ Scholars often take one position or the other. These well-

²²⁶ J.P. Gee, *An Introduction to Discourse Analysis: Theory and Method* (New York, NY ; London, Routledge, 2011), at 29.

²²⁷ P.Clark and N. Palmer, 'Challenging Transitional Justice', in N. Palmer, P. Clark and D. Granville (eds.), *Critical perspectives in Transitional Justice* (Cambridge: Intersentia, 2012), at 5.

²²⁸ On the missionary zeal of the 'ICC movement' see F. Mégret, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project', 7 *Finnish Yearbook of International Law* (2001) 193.

²²⁹ See S. Robins, 'Towards Victims-Centered Transitional Justice: Understanding the Needs of Families of the Disappeared in Post conflict Nepal', 5 *IJTJ* (2011) 75.

established normative trenches meant that my informants often tried to convince me that they were on the 'right' side, as if they suspected that behind all my 'abstract queries' lurked the question of 'who is really serious about the victims?'

I have tried to stay clear from either of those two commitments.²³⁰ I did not write this thesis to help the Court to better engage with victims nor do I think that the best thing for victims would be to shut the ICC tomorrow and focus on domestic or local processes instead. I also do not know what the victims really want and while this is an important question, it is not the question of this thesis. Instead, I was interested in how those who have the power to apply the label of 'victims' and who promise to bring justice to them construct the victim, his or her needs and ideas and then develop policies, rules and practices on that basis. While I am neither a feverish ICC fan nor a boots-on-the-ground victims' activist, I do have normative commitments that shape this thesis. I am a feminist, democratic socialist and critical theorist. The thesis does not claim (or aim) to be objective or dispassionate but it does try to avoid falling into ready-made normative camps in TJ.

The second type of bias is stereotypes and prejudices that linger on and cloud the perspective of even the most committed constructivist. While I was interviewing people, I couldn't help feeling that the more educated a person and the better their English, the more 'interesting' the interview material seemed to me. I also dismissed certain interviewees as 'less interesting' in my field notes. After reflecting on my notes while back in Oxford, to my great shock I found that many of them were women. Recording, transcribing and re-listening to my interviews helped to keep those biases in check. I

²³⁰ For a debate on 'taking sides', see H. Becker, 'Whose Side are we on?' 14 *Social Problems* (1967) 239.

transcribed or at least partially transcribed all 79 recorded interviews.²³¹ As I engaged in an ongoing process of listening and re-listening to interviews until the last day of submission, I have developed an intimate knowledge of even those interviews that were not fully transcribed. The comparison between field notes I jotted down after an interview and my later analysis following transcription reveals that many initial intuitions of which interview was more or less relevant were contradicted after thorough analysis. I have tried to be as honest as possible in laying bare the story behind the story that follows. Retrospectively, I am glad that many things went wrong or at least not as planned. I think they made this a more interesting journey.

²³¹ Two interviewees in The Hague and one in Kenya asked for the interview not to be recorded.

Chapter III – What’s in a Justice Mandate?: The Rome Statute and its Masterminds

Chapter III examines the interplay between justice concepts and practices at the ICC’s headquarters in The Hague. It begins the conceptual analysis of justice with the Rome Statute, showing that its text is both authoritative and obscure: while the Court’s practitioners habitually refer to the Rome Statute for guidance on justice, their justice ideas only bear a tenuous relationship with its text. This Chapter reveals that practitioners’ justice ideas are much more diverse and conflicting than the literature suggests and can also not be fully explained through Bourdieu’s lens of ‘legal culture’. Instead, it argues that we need to grasp the Court’s peculiar institutional dynamics for making sense of its justice concepts. It then situates its justice analysis within a broader institutional analysis of the ICC as a *sui generis* Court with new actors that push for different justice visions. Building on these insights, the second part of this Chapter traces the evolution of ‘justice for victims’ since the Court’s inception in 2002. It dissects the three main critiques of the Court’s victims’ engagement and demonstrates that they share an important blind spot: even when ideas of justice for victims are (mis-)used to justify flawed victims’ practices, they can still have knock-on effects on broader conceptual and procedural developments in the field of international criminal justice.

1. The Statute and Practitioners’ Justice Ideas

Reflecting upon my interviews with ICC practitioners on their justice ideas, it is helpful to make an initial distinction between a purely subjective and substantive justice concept (‘What is justice? It is so many things. It is like love’²³²) and an institutionally defined,

²³² Interview with Defence Counsel, The Hague, 4 December 2013.

procedural concept (Justice is what the ICC ‘does’, that is investigating and prosecuting international crimes). The views of my interviewees fell on the continuum between these two extremes. Most of them felt that the concept of justice cannot simply be derived from the Court’s practices but neither did they think that justice is a purely relativistic concept contingent on culture, personal beliefs or politics.²³³ Rather, they sought guidance on the meaning of justice in the Court’s founding document, the Rome Statute. Most of them began their ‘search for justice’ in the preamble, as it is ‘the place where the kind of values behind the Statute are supposed to come through’.²³⁴ When asked whether the Court pursues ‘retributive justice’ and if so, what ‘retributive justice’ means, an OTP counsel replied:

I think I agree with Justice Jackson that retribution cannot be the basis of punishment for international crimes...I don’t think that this is really the objective. Our preamble says that the Court, through its investigations and prosecutions, contributes to preventing crimes in the future. And I think that goes to the core of the vision that states had when setting up the ICC. What is the basis of punishment? It is deterrence...Our statute is clear...I can read it for you in the preamble.²³⁵

But when actually reading the preamble, it turned out that this was much less clear than expected. The preamble ‘affirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.’ It is also ‘determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.’²³⁶

²³³ Interview with Legal Adviser, Chambers, The Hague, 10 January 2014; Interview with Legal Coordinator, Registry, The Hague, 6 February 2014.

²³⁴ Interview with Senior Official, Registry, The Hague, 16 December 2013.

²³⁵ Interview with Counsel, OTP, The Hague, 13 November 2013.

²³⁶ Preamble, Rome Statute.

The Chamber in the Bemba sentencing decision concluded on the basis of these two sentences ‘that the Preamble establishes retribution and deterrence as the primary objectives of punishment at the ICC’.²³⁷ One judge I interviewed even contended that the preamble is used by the Court’s judges to justify punitive and illiberal decisions. Overall, she felt that retributive justice is still the dominant paradigm at the Court.²³⁸ Another judge I interviewed unsuccessfully tried to find clues on why the Court punishes in the sentencing and penalties section of the Statute.

These consultations of the Rome Statute suggest that its text is at the same time authoritative and obscure for the Court’s practitioners. They expect to find some explanation of the ICC’s justice mandate in the Statute and are surprised to learn that there are only vague statements that can be interpreted differently. This reaction is curious given that it is widely acknowledged that the Rome Statute’s provisions are vague and require substantive interpretation by the Chambers. As one ICC judge observed, ‘when they see the Statute, lawyers ask “but where is the criminal code?”’.²³⁹ The obscurity of the Statute is not accidental; its ambiguity was a deliberate strategy of diplomats during the Rome negotiations in 1998 to forge consensus among states in the wake of substantive disagreements.²⁴⁰

These confused searches for meanings of justice in the Statute and the bewilderment at the lack of statutory guidance reflect how practitioners operate as if these second-order questions of justice have already been settled. While they do not

²³⁷ Decision on Sentence pursuant to Article 76 of the Statute, *Bemba* (ICC-01/05-01/08-3399), Trial Chamber III, 21 June 2016, §10.

²³⁸ Interview with Judge, The Hague, 16 January 2014 (based on my notes).

²³⁹ Interview with Judge, The Hague, 17 December 2013.

²⁴⁰ Wyngaert (2012), at 478.

perceive ‘thinking about justice’ as part of their jobs, they assume that ‘justice’ as the ICC’s core concept is surely defined somewhere in the Statute or in the Court’s jurisprudence. When I asked her, what the concept of ‘gender justice’ means at the ICC, a legal coordinator at the Registry replied, ‘the first thing I was thinking is that I am not aware of any legal definition of this concept...when you have a specific concept about gender justice you should have a definition that explains it’.²⁴¹

The Statute is not only ambiguous about the type of justice the ICC should pursue but also about the Court’s objectives more generally. Reflecting on the mandates of international criminal courts, Teitel and Rangelov observe that they ‘now routinely include “political” aims such as peacemaking, reconciliation, and security, as declared in both the ICTY and ICC preambles’.²⁴² Interestingly though, the ICC’s Statute has avoided the language used by the ICTY’s and ICTR’s Statutes that call on the tribunals to ‘contribute to the restoration and maintenance of peace’ and even to a ‘process of national reconciliation’ in the ICTR’s case.²⁴³ Nonetheless, suggestions that the ICC should contribute to reconciliation and sustainable peace did inform the discussions in Rome.²⁴⁴ For some ICC employees, it was less clear whether such political aims are part of the Court’s mandate. When asked to what extent the Court has a role beyond conducting trials, a legal adviser of the Chambers replied:

I would say this is unclear, for instance: does the Rome Statute propagate a democratic organization of politics? I don’t know. It is not in the text. And

²⁴¹ Interview with Legal Coordinator, Registry, 6 February 2014.

²⁴² I. Rangelov and R. Teitel, ‘Global Civil Society and Transitional Justice’, in M. Albrow et al., *Global Civil Society 2011: Globality and the Absence of Justice* (New York: Palgrave Macmillan, 2011), at 164.

²⁴³ Security Council (SC) Resolution 827, S/RES/827, 25 May 1993; SC Resolution 955, S/RES/955, 8 November 1994, at 1.

²⁴⁴ Muttukumaru (1999), at 264; F. Benedetti, K. Bonneau and J. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Leiden: Brill Nijhoff, 2013), at 159/160.

if you look at the States Parties it is not necessarily a priority for each and every one of them. If you say that this Court is essentially a common denominator but a relatively low common denominator, where people say: well, these are just outrageous crimes where irrespective of your political ideology, your organization of society or whatever, pretty much every human being in the world can agree that you must not rape, you must not kill innocent civilians in times of war, but then most of the people here probably think that this is not enough, but it is the lowest standard on which everybody could agree and that also needs to be respected. But sometimes you obviously feel you want to do a little bit more.²⁴⁵

This statement suggests that even when practitioners interpret the Statute as embodying a narrow justice mandate, they do not necessarily feel bound by it and may look for ways to slip more ambitious political goals into the Court's work.

Contrary to practitioners' expectations, the Rome Statute is thus not the best guide for arriving at a better understanding of what justice means at the ICC. Yet, it is not a document set in stone. Rather, the Court's States Parties come together every year at the ASP to revisit and update the ICC's objectives in light of their changing priorities and upcoming challenges. The ASP is the Court's 'legislative body' and the ICC's mandate evolves through its amendments and annual resolutions. A more explicit articulation of how the ICC's work relates to peace, security and reconciliation can be found in an ASP resolution in 2011:

Convinced that the International Criminal Court ("the Court") is an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law, as well as to the prevention of armed conflicts, the preservation of peace and the strengthening of international security and the advancement of post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, in accordance with the purposes and principles of the Charter of the United Nations...²⁴⁶

²⁴⁵ Interview with Legal Adviser, Chambers, The Hague, 10 January 2014.

²⁴⁶ ICC-ASP/10/Res.5, 21 December 2011.

And further that:

Convinced also that there can be no lasting peace without justice and that peace and justice are thus complementary requirements...²⁴⁷

The ASP resolutions are also more explicit on the relationship between victim participation and reparations and the promise of ‘justice for victims’. A resolution passed in 2013 for example,

reiterates that victims’ equal rights to present their views and concerns in the proceedings where their personal interests are affected, under article 68 of the Rome Statute, and to expeditious and effective access to justice, protection and support, adequate and prompt reparation for harm suffered, and access to relevant information concerning violations and redress mechanisms are essential components of justice...²⁴⁸

Yet, it is not clear to what extent ASP resolutions inform practitioners’ thinking about the Court’s justice mandate. They tend to regard them as diplomatic statements by states rather than as legal texts.²⁴⁹ None of my interviewees referred me to ASP resolutions as a guide to the ICC’s justice vision. After studying the Court’s documents and my interviews for some time, I increasingly felt that the latter is a more important source than the former.

Indeed, a crucial if underappreciated mechanism through which the Court’s justice mandate evolves is the discourses and practices of its ‘justice stakeholders’. I will use the term ‘justice stakeholders’ to refer to the people who work in or with the ICC on a daily basis. Due to the Statute’s obscurity, these stakeholders have to make ‘interpretative leaps’ when talking about and implementing the Court’s mandate. They often put

²⁴⁷ Ibid.

²⁴⁸ ICC-ASP/12/Res.5, 27 November 2013.

²⁴⁹ I attended the ASP in The Hague in November 2013 and this observation is based on informal conversations I had with ICC practitioners during that time.

concepts and ideas into the 'ICC's mandate' that either are not in the Statute or only expressed in rudimentary form. They routinely refer to the ICC's 'retributive' and 'restorative justice' mandate, even though none of these concepts is entailed in the Statute. For example, in a report to the ASP, the Court explained the Rome Statute's vision as follows: 'that vision is of justice in the broadest sense, an end to impunity for the perpetrators of mass atrocities, and the notion that justice is not just punitive but restorative – and hopefully preventative.'²⁵⁰

Another example of 'interpretative leaps' is how the ICC's practitioners draw inferences about the Court's justice rationale from its penalties. When asked whether retributive justice means 'retaliation', one of my interviewees reasoned:

I don't think the ICC was created with this [retributive justice] in mind because if you look at the maximum sentence that is possible it is 30 years. When you think that we are talking about people - if they are convicted - who have participated in genocide, crimes against humanity - thirty years' imprisonment, you think, this is not retributive justice. Retributive justice would be that they would have life imprisonment. So clearly the people who conceived the system did not have this in mind.²⁵¹

Other interviewees made the same argument using the fact that the ICC cannot apply the death penalty: If the ICC was aimed at retributive justice, it would have the death penalty. The ICC does not have the death penalty, ergo it does not aim at retributive justice.²⁵²

The Court's practitioners and NGOs also often read the ICC's contingent policy choices into its mandate. A good example of this is the reiteration that the ICC's mandate

²⁵⁰ *Report of the Court on the Revised strategy in relation to Victims* (2012), §14; *Report of the Court on the Strategy in Relation to Victims*, ICC-ASP/8/45, 10 November 2006, §3.

²⁵¹ Interview with Legal Coordinator, Registry, The Hague, 6 February 2014.

²⁵² Interview with Legal Officer, Registry, The Hague, 4 February 2014.

is to focus on ‘the most responsible perpetrators’ of international crimes. As the NGO Avocats Sans Frontières (ASF) claimed in a report on the ICC in 2012:

it is important for African leaders to understand the mandate of the Court so as not to create antagonism. The Court only exercises its mandate against those who are ‘most responsible’ for committing international crimes and therefore States still have the opportunity to try other suspects who are ‘less responsible’.²⁵³

More recently, a group of African experts including Richard Goldstone and Navi Pillay reassured their readers in a guardian article that ‘[the ICC] can only prosecute those most responsible for mass atrocities’.²⁵⁴ Yet, the Rome Statute does not say anything like that. Rather the ICC’s OTP decided to focus its investigations and prosecutions on those who bear the greatest responsibility in a policy paper in 2003.²⁵⁵ Unlike the Statute, policy papers can be revised with ease. In fact, the OTP has partially revised its ‘most responsible perpetrators’ approach in its most recent strategic plans, stating it will also consider prosecuting mid-level and even lower level perpetrators.²⁵⁶

In discussing the Court’s victims’ engagement, a legal adviser of the Chambers emphasized the element of choice the Court’s stakeholders have in interpreting its mandate:

²⁵³ ASF, *Africa and the International Criminal Court: Mending Fences*, July 2012, available at http://www.asf.be/wp-content/uploads/2012/08/ASF_UG_Africa-and-the-ICC.pdf (visited 12 August 2016), at 16.

²⁵⁴ African Group for Justice and Accountability, ‘The International Criminal Court is Vital to our Fight against Impunity in Africa’, *The Guardian*, 17 July 2016, available at <https://www.theguardian.com/global-development/2016/jul/17/international-criminal-court-vital-fight-against-impunity-africa-group-for-justice-accountability> (visited 12 August 2016).

²⁵⁵ OTP, *Paper on some Policy Issues before the Office of the Prosecutor*, September 2003, available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (visited 12 August 2016), at 7.

²⁵⁶ OTP, *Strategic Plan June 2012-2015*, 11 October 2013, available at <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> (visited 12 August 2016), at 6; OTP, *Strategic Plan 2016-2018*, 6 July 2015, available at https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf (visited 12 August 2016), §34.

I have been disagreeing with members of the Presidency in meetings before NGOs. They say that we have to concentrate on criminal law; we have to concentrate on our trials. And I said that this is not the only mandate of the ICC. And it is not that we have to. It is a choice. Basically, if you choose that you only have to convict people or to acquit them, then this is your choice. But don't tell me that this is the Statute. It is just your choice. You can do more than that. But there is no political will for the moment to do more than that.²⁵⁷

This suggests that for understanding the meaning of justice at the Court we have to study how and why certain justice ideas make their way into the authoritative role of being considered as part of the ICC's 'mandate', and why others do not.

Lawyers' Justice?: The Juridical Field

An important explanatory framework for making sense of this interpretative process is Bourdieu's concept of the 'juridical field'. Bourdieu identified the 'juridical field' as a particularly powerful social field, both in terms of the internal influence it exerts on its members and in terms of the external influence it exercises on society at large.²⁵⁸ The juridical field is 'organized around a body of internal protocols and assumptions, characteristic behaviours and self-sustaining values—what we might informally term a “legal culture”'.²⁵⁹ The juridical field is an important interpretative lens not least because most of the Court's stakeholders are lawyers; they are trained in legal doctrines and interact mainly with other lawyers in their professional networks. In my interviews, I often heard the phrase 'as a lawyer, my understanding of justice is x/y/z' or 'as a criminal court, the Court's justice mandate is x/y/z.' A legal officer at the Registry told me:

²⁵⁷ Interview with Adviser to the Chamber, The Hague, 8 January 2014.

²⁵⁸ P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', 38 *The Hastings Law Journal*, (1987) 814.

²⁵⁹ R. Terdiman, 'Translator's Introduction' in P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', 38 *The Hastings Law Journal* (1987) 805, at 806.

I think what you will find the more you dig into this topic is that there is a huge divide between lawyers and everyone else on what is meaningful for victims...Especially in-house lawyers like the OPCV would claim ‘my client cares about procedural rights...they want access to the confidential case file, that is what justice means for my victims or my clients.’ It is very legal. I don’t think anyone cares whether their lawyers have access to the confidential case file...²⁶⁰

In fact, my interviewees widely shared the idea that justice means fair legal procedure or procedural justice. As a LRV and defence counsel explained to me:

The procedure itself must contain several elements and finally if these elements are respected we have a chance to get a decision that is accepted as a just decision by...all parties of the proceedings...In an open society with a high level of tolerance [regarding] different concepts of life, values and religion, these basic values like dignity and justice must be understood not in a material way but rather in a procedural way...this is my understanding being a lawyer and a criminal counsel in this system...²⁶¹

Some ICC lawyers also interpreted ‘justice for victims’ as a purely procedural concept; ‘justice for victims’ is victim participation and reparations. One interviewee put it like this:

the same goes for ‘justice to victims’ because it is not a flowery concept that is in our head, it is a down-to-earth concept that is foreseen in the Statute, that there is a possibility of victim participation in the proceedings and that there is a possibility of reparations.²⁶²

Yet, my interviews also suggest that the ‘juridical field’ paradigm overstates the uniformity of justice ideas within legal institutions, especially the ICC. While Bourdieu acknowledges interpretive struggles over legal texts within the legal profession, he argues that ‘divergences between “authorized interpreters” are necessarily limited, and the coexistence of a multitude of juridical norms in competition with each other is by

²⁶⁰ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

²⁶¹ Telephone Interview with LRV, 4 November 2013.

²⁶² Interview with Adviser, Presidency, The Hague, 8 January 2014.

definition excluded from the juridical order'.²⁶³ In focusing on the power of the 'juridical field' vis-à-vis other social fields, social theorists like Bourdieu have neglected its internal diversity and tensions. Besides, Bourdieu's analysis of the juridical field is based on the example of France. Yet, the 'international juridical field' is much more diverse than its domestic counterparts. To begin with, the ICC's lawyers have rather different backgrounds. They were trained in different countries; they have practiced different types of law in different institutions including domestic courts, international courts, international organizations and NGOs. These diverse legal experiences can translate into different justice ideas. For example, one interviewee observed that 'generally, there might be a difference between the human rights lawyer that talks about justice and the hard core criminal lawyer that talks about justice'.²⁶⁴ With regard to reparations, an adviser to the Chambers claimed that many ICC judges and legal officers are neither interested in nor knowledgeable about reparations: 'You need people with knowledge. And criminal law lawyers do not know about that. It is a completely different issue for them, a completely different field.'²⁶⁵

To the extent that the legal literature acknowledges a diversity of perspectives at the ICC, these are almost exclusively attributed to the two legal traditions at the Court: the common and the civil law tradition.²⁶⁶ It is often claimed that these legal traditions have an enormous hold on the imagination of practitioners.²⁶⁷ This can lead to tensions in international courts when their lawyers continue to evaluate the Court's ideas and

²⁶³ Bourdieu (1987), at 818.

²⁶⁴ Interview with Adviser, Presidency, The Hague, 8 January 2014. See also D. Robinson, 'The Identity Crisis of International Criminal Law', 21 *Leiden Journal of International Law* (2008) 925.

²⁶⁵ Interview with Adviser, Chamber, The Hague, 8 January 2014.

²⁶⁶ McGonigle Leyh (2011), at 10, 234; Moffett (2015).

²⁶⁷ *Ibid.*, at 226.

practices in terms of ‘how things are done at home’. For example, many common law lawyers felt uncomfortable with the ICC’s motto, ‘10 Years of Fighting Impunity’ for celebrating the Court’s 10th anniversary.²⁶⁸ As a senior Registry official expressed:

And I have to say, as a common law lawyer, I don’t feel that comfortable with this sort of language of ‘fighting against impunity’ ...for me, it is more, you are looking for justice. Because, otherwise, that makes it sound as if you already decided that people are guilty... I think this could be a legal cultural thing because I have had other common law lawyers who agree with me. Somehow it offends my sense of...but of course in civil law cultures you also have the concept of ‘innocent until proven guilty’, so I don’t know why. But somehow, for me, I prefer to talk about the importance of accountability, the importance of justice.²⁶⁹

As this quote indicates, there is no straightforward alignment between your legal tradition and your understanding of justice. This is not surprising given the manifold variations that exist between domestic legal systems that share the same legal tradition. In fact, ideas of what ‘common law’ and ‘civil law’ lawyers think are often rather stereotypical. For example, conventional wisdom suggests that civil law lawyers are more supportive of victim participation at the ICC than common law lawyers because victim participation as *partie civile* is an established feature of criminal trials in many civil law systems.²⁷⁰ In my interviews and informal conversations at the Court, I did not find such a neat correspondence. On the contrary, many civil law lawyers were sceptical of ICC victim participation precisely because they argued that it is only meaningful and feasible in ordinary, domestic trials that involve few victims. Some common law lawyers, on the other hand, expressed interest in victim participation due to its potential to address an important gap in their system. Indeed, while common and civil law countries were divided

²⁶⁸ ICC Weekly Update #135, 9 July 2012, available at https://www.icc-cpi.int/nr/rdonlyres/e6d289bc-9672-4304-bc32-79bd024d1e07/284716/ed135_eng.pdf (visited 12 August 2016).

²⁶⁹ Interview with Senior Official, Registry, The Hague, 16 December 2013.

²⁷⁰ Jouet (2007), at 253.

on victim participation during the Rome negotiations, the original article on participation that eventually became Art. 68.3 was taken up and promoted by two common law countries, New Zealand and Ireland. One of the most vocal NGOs advocating for victims' rights in Rome was REDRESS, a London-based NGO that employs many common law lawyers. A key negotiator at Rome felt that the proximity between delegates and NGOs often mattered more than legal traditions:

But it is not true that all civil law countries were interested in victim participation and all common law countries were not. That is stupid. It does not correspond to reality. It depends sometimes on the proximity between the delegates and the NGOs, so simply because there was a delegate in the New Zealand delegation that had a very close relationship with NGOs and listened a lot to them.²⁷¹

In addition, while the design of the Court's victims' rights regime reflects a compromise between common and civil law proponents in Rome, its underlying rationale was different. One judge explained it as follows:

Well, of course, for those who have *partie civile*, it is easier for them to understand how victims can be part of the process. But the system that we created, well, it was very much pushed by the French, but of course the system we have is not necessarily the French system at all. I think it was more based on this idea that this court needed to be more accessible to victims than the other tribunals. So it is more based on ideology, I would say, than based on any system with this idea that making them more visible would also give more impact to the work of the Court.²⁷²

Thus, differences between civil and common law background do not translate neatly into different justice ideas.

Apart from flattening the ideational diversity at the ICC, the prism of the 'juridical field' also exaggerates the influence of the 'legal' on practitioners' notions of justice.

²⁷¹ Interview with Adviser, Chamber, The Hague, 8 January 2014.

²⁷² Interview with Judge, The Hague, 30 January 2014.

Many of the lawyers I interviewed were not ‘blinded’ by legal doctrines and practice. Even practitioners who explicitly framed their justice ideas ‘as those of a lawyer’ often expressed rather diverse ideas. Some articulated substantive rather than procedural ideas of justice. In a speech, former ICC President Song expressed,

justice is not only about retribution. Justice must also be restorative and reparative. Justice must respond to the needs of communities and societies that it concerns the most – and criminal proceedings alone would not suffice for that purpose.²⁷³

Some practitioners explicitly referred to ‘confrontations’ at the Court regarding the meaning of justice:

Yes, [ending impunity] is part of the goal of access to justice and establishing the truth. Because for me, what matters is not to convict a person but to establish what happened. And that is where my confrontation with many of my colleagues is extremely strong. Basically, for them the goal is to say whether that person is guilty or not. For me, it is just a tool.²⁷⁴

Confronted with particular justice concepts, the ICC’s justice stakeholders even expressed conflicting and contradictory ideas. NGOs and the TFV have introduced the concept of ‘transformative justice’ into the Court’s discourse that projects a vision of justice in which the ICC also addresses the underlying structural causes of conflict and crimes in its situation countries.²⁷⁵ Practitioners’ views about transformative justice were more polarized than when they were talking about justice in general terms. While their views on ‘justice’ were diverse but not necessarily mutually exclusive, their views on

²⁷³ S.-H. Song, ‘Speech: Remarks to the Board of Directors of the Trust Fund for Victims’, 18 March 2014, available at http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/140318_ICC_President_Remarks_to_11th_TFV_Board_of_Directors_Meeting_for_web_1.pdf (visited 12 August 2016).

²⁷⁴ Interview with Adviser, Chamber, The Hague, 8 January 2014.

²⁷⁵ Trust Fund for Victims’ First Report on Reparations, *Lubanga Dyllo* (ICC-01/04-01/06-2803-Red), Trial Chamber I, 1 September 2011, §34; Observations of the Women’s Initiatives for Gender Justice on Reparations, *Lubanga Dyllo* (ICC-01/04-01/06-2876), Trial Chamber I, 10 May 2012, §§ 12, 13, 17.

‘transformative justice’ were divisive. Some stakeholders embraced the concept and expressed that it was the way forward for ‘meaningful’ justice at the Court. Others found it ‘arrogant’, ‘interventionist’, or ‘utopian.’²⁷⁶ Many argued that the concept is interesting in theory but unrealistic in practice. Some tried to demarcate how much and what kind of ‘transformative justice’ was possible and desirable for the Court and how much and what kind was not. Ultimately, this discussion implies that a purely legal perspective is insufficient for comprehending the complexity of justice perspectives at the ICC. What is missing from the literature is an analysis of the ICC’s peculiar institutional dynamics which play a key role in moulding its justice concepts and practices.

2. Institutional Dynamics at a Sui Generis Court: ‘New’ and ‘Traditional’ Justice Actors

My theory of interactional justice suggests that the institutional discourses, every-day work experiences and communicative interactions of the Court’s practitioners crucially shape the ICC’s justice concepts and practices. These institutional experiences are omitted in the conventional justice analysis which either studies legal doctrines or personal and cultural beliefs as sources of justice. Interactional justice, on the other hand, postulates that the meaning of justice is not fixed; rather justice at the Court is an on-going conversation; different practitioners slip in, adapt, promote or marginalize different justice ideas through their texts, practices and utterances. To map interactional justice at the ICC, we first have to unpack the institutional dynamics in which this process unfolds. Such an analysis has to start with the insight that the ICC is much more than a normal court. It combines many institutions, which would be separate domestically, rendering the Court a uniquely diverse bureaucracy. This also means that some non-lawyers such as

²⁷⁶ Interview with H.-P. Kaul, ICC Judge, 19 December 2013; Interview with Legal Officer, The Hague, 12 November 2013.

investigators, psychologists, public health anthropologists, media and outreach experts have entered the Court's justice-making process.

This institutional diversity combined with the Court's ambiguous law and procedures creates a dynamic and even chaotic space for the proliferation of diverse justice ideas. Late Judge Hans-Peter Kaul referred to the Court as a 'construction site for more justice'.²⁷⁷ A good example of the Court's predicament of 'having to make it up as it goes along' is that it had to establish its own reparation principles at the same time as it was supposed to issue its first reparation order. For devising them, the Chamber invited the parties to the proceedings as well as the Registry, the TFV and LRVs but also external stakeholders such as NGOs to present their views and ideas on reparations. In its Decision, the Chamber then borrowed extensively their diverse ideas including 'transformative justice', 'community reparations' and a 'gender-sensitive approach' to develop its reparation regime.²⁷⁸

To unpick how the Court's diverse actors push for and implement their justice ideas, a useful distinction is between the ICC's 'new' and 'traditional' justice actors. I use the expression 'traditional actors' to refer to those that would be part of most domestic criminal courts and international criminal tribunals such as the Chambers, the Prosecutor and the Defence. The 'new actors' are those that are specific to the ICC. Given my interest in 'justice for victims', I focus on the institutions that implement the Court's victims' mandate, especially the VPRS, the TFV, the OPCV, the LRVs and the Outreach section.

²⁷⁷ H.-P. Kaul, 'Construction Site for More Justice: The International Criminal Court after Two Years', 99 *American Journal of International Law* (2005) 370, at 371.

²⁷⁸ Decision Establishing the Principles and Procedures to be Applied to Reparations, *Lubanga* (ICC-01/04-01/06-2904), Trial Chamber I, 7 August 2012, §§189, 200, 222, 274 (hereinafter 'Reparation Decision in Lubanga').

‘New’ justice stakeholders engage in different activities and networks than ‘traditional’ stakeholders which inspires different justice ideas. A legal officer explained his role at the VPRS to me as follows: ‘we have a bit of a mixed role because the issue of victim participation cannot be only legal; it also has to be linked to the beneficiaries and the beneficiaries are in the field.’²⁷⁹ His work as a ‘focal point’ includes regular field trips to the situation countries where he engages with the government, community leaders, LRVs, local intermediaries, NGOs and victims. These different interactions and activities shape practitioners’ interpretations of justice. For example, another VPRS officer explained to me that the countries in which the ICC works are so different that it is impossible to operate with a single concept of justice in all of them:

Everything when it comes to the ICC is contextual...There are so many different backgrounds. For instance, my office mate is the focal point for the Central African Republic. He tells me about his experiences there going meet with people and have to explain what a Court is, what a lawyer is. And I have meetings [in Kenya] where people are waving the Rome Statute and ask ‘You know, I really can’t get my mind around what is the difference between Article 79 and Article 75; what is this second mandate of the Trust Fund?’ People are really confronting with information. They are watching the proceedings live on TV with a 30 minutes’ delay every day. It is just night and day. You cannot compare concepts of justice between two societies that are so different.²⁸⁰

When asked what ‘justice for victims’ means in the context of the ICC, his colleague at the VPRS presented the following idea:

I guess to make the Court closer, to reduce the gap, having a respectful interaction...making the Court closer to them, explaining the realities of the Court on the one hand, and also to the Court and the Chamber to explain the realities of victims on the other hand.²⁸¹

²⁷⁹ Interview with Legal Officer, Registry, The Hague, 21 January 2014.

²⁸⁰ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

²⁸¹ Interview with Legal Officer, Registry, The Hague, 21 January 2014.

When I then observed that this is a very communicative concept of justice, he explained it in light of his ‘professional deformation’ as someone who regularly communicates the Court’s work to affected communities:

Where we operate - and I think this is also why my first instinct was more into the communicative idea - I think it is about people. I guess they need to see that something is done. And I guess, they may also have had experiences in the past that different ideas of justice have been brought to them but it might not have satisfied them. So, there are certain developed expectations about what the Court will be able to provide. Regardless of what the result is going to be and I guess this is where my professional deformation is, my first aim when I do this job is not necessarily thinking that these people need to get reparations, but that they need to be treated [well] during the process.²⁸²

Another ‘new’ institution is the legal representatives of victims (LRVs) or victims’ lawyers. The Court has an internal office, OPCV, which exercises two mandates: to assist external LRVs and to act itself as LRV. The ICC operates different models of victims’ representation in its different cases. In the Kenyan cases, the Chambers appointed an external LRV based in the field as the lead counsel and the OPCV as in-court room representative of victims. This implied that the external LRV met and consulted with victims on the ground, decided the legal strategy and instructed OPCV on how to conduct the day-to-day court room representation. In the Gbagbo case (situation of Côte d’Ivoire), the Chambers appointed the OPCV as the lead counsel and an external LRV as ‘legal assistant’ who gathers victims’ views in the field.

The external LRVs are particularly interesting for this study as they play multiple roles at the same time. Many have legal practices in their home country which means that they often practice before domestic and international criminal courts at the same time.

²⁸² Ibid.

They also act simultaneously as both LRV and defence counsel in different cases. For most of them, defence counsel is their 'natural' role given the relative paucity of victim participation both at the international level and in many domestic systems. Their status within the Rome Statute system is also unique. On the one hand, LRVs are part of the system; they appear in the ICC's court rooms and are usually paid by the Court. On the other hand, they are independent and only accountable to their clients. As such, they are institutionally much less constrained in articulating and practicing their justice visions. In my interviews, external LRVs expressed rather complex and diverse justice ideas. Asked whether there are differences in the way the concept of justice is understood in the domestic system they work in and the international criminal justice system represented by the ICC, one LRV replied:

And, indeed there is a difference between the domestic level and the international. On the domestic level, justice is mainly there to maintain the society as a whole and the different balances in that society. It is much more an arbiter. And, of course the criminal aspect is important also, but even in the criminal aspect the purpose of the domestic is...not accountability but mainly the reintegration of the offender in the society. And this is quite different on the international level, so international justice is not really concerned with the reintegration of the perpetrators, also because those perpetrators are prosecuted or convicted for such heinous crimes that such a reintegration is generally not a good idea. So the accent is really put on accountability and on penal justice for victims. Let's say, it is closer to revenge than to reconciliation.²⁸³

A TFV legal adviser and former LRV at the Extraordinary Chambers in the Courts of Cambodia (ECCC) had the following to say about this difference:

In a national context, justice is not much a topic or an issue. It is a term that is much more used...in all these contexts of international criminal cases or courts, where it is discussed under broader conceptions such as transitional justice for example...and of course, people in the national jurisdictions also...expect a just judgment...but it is really very rare that I

²⁸³ Telephone Interview with LRV, 15 January 2014.

discuss [justice] in a national context. And of course, they are more right[s]-centred, let's say, than centred on this concept of justice. In addition, in an international context with regard to courts for example or other transitional justice measures, it is also more in a context where war and conflict took place...where also other concepts are mixed with this concept of justice. And you have overlaps for example with regard to reconciliation, with regard to truth-finding²⁸⁴

One explanation for the diversity of justice perspectives among victims' lawyers and bureaucrats who work in the field is 'cause lawyering'. According to McEvoy, 'cause lawyering is a form of "moral activism" wherein committed lawyers "do more" than simply deploy their technical services on behalf of their client.'²⁸⁵ These lawyers often embrace a more political understanding of the 'rule of law' and are swayed into 'cause lawyering' by their political beliefs like the lawyers involved in the anti-apartheid struggle in South Africa. Alternatively, they may be nudged into becoming more politically vocal by 'critical junctures' such as the murder of two well-known solicitors in the case of Northern Ireland.²⁸⁶ At the ICC, on the other hand, some lawyers have taken on more 'activist' roles due to pressure exerted by their clients. These lawyers were not necessarily predisposed for 'cause lawyering'; many worked as defence counsel or prosecutors before and only developed more interest in victims' causes through their engagement with them. One victims' lawyer told me:

It is also very important that the person should feel like they have been listened to. That is why I think victim participation is such a great idea. I was personally involved in making decisions at the prosecution of the ICTY to not prosecute entire municipalities in certain cases without ever picking up the phone to speak to a single victim.²⁸⁷

²⁸⁴ Interview with Legal Adviser, Registry, The Hague, 23 October 2013.

²⁸⁵ K. McEvoy, 'What Did the Lawyers Do During the 'War'? Neutrality, Conflict and the Culture of Quietism', 74 *The Modern Law Review* (2011) 350, at 354.

²⁸⁶ K. McEvoy and R. Rebouche, 'Mobilising the Professions?: Lawyers, Politics and the Collective Legal Conscience', in J. Morison, K. McEvoy and G. Anthony (eds) *Judges, Human Rights and Transition* (Oxford: OUP, 2007) 275.

²⁸⁷ Interview with LRV, The Hague, 24 November 2013.

Another victims' lawyer working at the OPCV professed:

So the idea of justice changed very much depending on when I was at the OTP when my main concern of justice was retribution and punishment to where I'm now where my main concern of justice is restoration of rights.²⁸⁸

Some of these lawyers actively use the court room as a political platform to convey victims' interests beyond criminal proceedings. Others also use their profile as victims' lawyer to engage in broader victims' advocacy through TV and radio broadcasts as well as by lobbying politicians. One LRV assistant explained:

You know the mandate as defined by the Court is extremely legalistic. Of course, they are going to put [victims' engagement] into legal limits because they have to cover their ass... [Yet] after interacting with the victims you literally have to push the boundaries of your mandate. You have to, because the expectations of these victims are really high. We try to manage them but it is something that you could do. It is strictly not within your mandate to look for assistance for these victims; it is not. But every time you go and meet them that is a demand. And when you look at their impoverished circumstances; they live lives which you would not even wish on your worst enemies.²⁸⁹

Some ICC practitioners think that this 'outside the court room' activism is the whole point of having victims' lawyers. Explaining to me why national lawyers are often less suited than international lawyers for the role of the LRV, a VPRS officer observed:

And plus they [the national lawyers] are also very reluctant to engage on the political aspects, which is part and parcel of this job. In fact, this is the way we are going...Because these lawyers [LRVs] can say things that we cannot say. But they are true obviously. And they are doing it in the interests of their clients...And then you have this dynamic where the legal representative is using the international podium that is the International Criminal Court to project messages back to the national system, for instance on IDP issues.²⁹⁰

²⁸⁸ Interview with Legal Officer, Registry, The Hague, 4 February 2014.

²⁸⁹ Interview with Intermediary, Nairobi, 30 June 2014.

²⁹⁰ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

LRVs may be freer in promoting their justice ideas but they are still lawyers. Yet, there is one institution among these new justice actors that looks decisively less legal: the Trust Fund for Victims (TFV). The TFV was established in accordance with Art. 79 of the Rome Statute and exercises two mandates: victim reparations and assistance.²⁹¹ The TFV works with a broad justice concept that goes beyond what courts usually consider as their ‘justice business’. Its first strategic plan identified ‘its freedom from narrowly-defined legal principles and decision-making’ as an asset in providing reparations for a large number of victims.²⁹² It also claims that ‘by assisting victims to return to a dignified and contributory life within their communities, the TFV contributes to the realization of sustainable and long-lasting peace through the promotion of restorative justice and reconciliation.’²⁹³

But how do justice ideas that circulate at the Court’s ‘new’ institutions travel from the periphery of the Rome Statute system to its judicial core – the Chambers? The ICC literature has largely failed to analyze the dissemination of justice ideas within the Court, as they read the Court’s justice concepts exclusively through its jurisprudence and the OTP’s policies. Yet, beyond official communication through legal filings, OTP strategies or ASP reports, informal interactions between justice stakeholders from different sections and organs help to diffuse ideas and inform the Court’s decision-making. One judge described how she makes decisions on the Court’s victims’ engagement as follows:

Maybe you have been told about a number of meetings that I had with Miss Fiona McKay [head of VPRS], five or six meetings, either with her team or just the two of us, because if I would come across something, I would

²⁹¹ See Art. 79 ICC St; Rule 98 ICC RPE; *Regulations of the Trust Fund for Victims*, ICC-ASP/4/Res.3, 3 December 2005.

²⁹² TFV, *Global Strategic Plan 2009-2012*, at 5. The strategic plan was extended until the year 2014. A copy is with the author.

²⁹³ TFV Website, available at <http://www.trustfundforvictims.org/trust-fund-victims> (visited 22 June 2016).

call her and she would immediately join me, I had [meetings] with Paolina Massidda [head of OPCV], I had [meetings] with Mr. Pieter de Baan [executive director of TVF]...And even the legal officers were telling me when we prepared for the Ntaganda case, 'oh Judge, we have a very established approach in the Kenyan cases we shall follow.' I told them 'no', we must improve constantly our approach. And what we did, and this is what I will try to get the feedback from Miss Fiona McKay and Miss Paolina Massidda, because I tried to, based on the developments of other Chambers, I tried to find the most workable approach. Ah, of course, something was missing, I met also Sonya Robbler of the outreach section, because everything has to start [in the field]. It is a whole system...²⁹⁴

External actors such as NGOs also have important access to the ICC's decision-making both formally and informally. Formally, NGOs can request leave to submit *amicus curiae* observations to the Chambers. *Amicus curiae* is a 'friend of the court' who 'makes suggestion[s] on a point of law or fact for the information of the presiding judge'.²⁹⁵ NGOs have submitted such observations on issues of reparations, victim participation and SGBV which have been taken into account by the Chambers.²⁹⁶ Informally, NGOs have unique access to the Court's practitioners for two reasons. First, they are well organized under the umbrella of the Coalition for the International Criminal Court (CICC) based in The Hague. Second, they have played a crucial advocacy role for the ICC during and since the Rome negotiations and the Court therefore holds regular meetings to consult and coordinate its strategies with them. The judges are also receptive to the NGOs' positions and ideas. One judge recalled:

In the beginning there was a huge fight about reparations. The Prosecutor said that the only possibility they see is 'collective reparations'. We should give the money to the community chiefs and they distribute it. Next day a big delegation of women's organizations arrived and said that giving

²⁹⁴ Interview with Judge, The Hague, 13 February 2014.

²⁹⁵ S. Williams and H. Woolaver, 'The Role of the *Amicus curiae* before International Criminal Courts', 6 *International Criminal Law Review* (2006) 151, at 151.

²⁹⁶ Reparation Decision in Lubanga, 7 August 2012, §§185, 192, 202, 209.

money to these old community chiefs means that women will not get anything...²⁹⁷

The Court organizes regular workshops and informal seminars for officials to exchange ideas with external actors. When asked whether she is familiar with the concept of ‘transformative justice’, a senior Registry official replied,

we actually had a seminar - about three years ago I think - on reparations; particularly it was in the context of reparations for crimes of sexual violence. It was an internal seminar of the Court but it involved different parts of the Court. And there was an expert there who came and talked about this [transformative justice] which I have also seen in the literature.²⁹⁸

These diverse institutional activities and contexts have prompted some ICC stakeholders to adopt more holistic and complex justice visions. Such visions can then spread with the help of formal and informal channels throughout the Rome Statute System. The next step is to flesh out how these diverse justice concepts shape the Court’s practices.

3. Ideas Die Hard: The Evolution of ‘Justice for Victims’ at the ICC

To illustrate the interplay between justice concepts and practices, we will look at the evolution of ‘justice for victims’ at the Court. ‘Justice for victims’ has become heavily associated with practices of victim participation and reparation. Tracing the relationship between ideas of ‘justice’ and ‘victimhood’ and practices of participation and reparation will give us a better idea of how interactional justice plays out at the ICC.

It is often said that the Court’s provisions for victim participation and reparation are one of its most innovative features.²⁹⁹ Yet, while the ICC’s victims’ mandate was

²⁹⁷ Interview with Judge, The Hague, 17 December 2013.

²⁹⁸ Interview with Senior Official, Registry, The Hague, 16 December 2013.

²⁹⁹ OTP, *Policy Paper on Victims’ Participation*, April 2010, available at https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Victims_Participation_April_2010.pdf (visited 14 August 2016), at .5; S-H. Song, ‘Speech: From Punishment to Prevention on the Future of International Criminal Justice’,

initially greeted with lots of enthusiasm, such sentiments have largely turned into disillusionment a decade after the ICC began its work. The various critiques of the Court's jurisprudence on and implementation of victims' rights can be divided into three strands: the 'activist' strand, the 'legalist' strand and the 'critical' strand. Activists claim that the Court's victims' engagement suffers from the fact that its lawyers and policymakers do not understand the complexity of victimhood; they oversimplify and bureaucratize victimhood by recognizing them only through the prism of narrow legal categories.³⁰⁰ Activists assume that if only the Court consulted more with victims and other stakeholders, its victims' engagement would become more meaningful and context-sensitive.³⁰¹ Legalists retort that victim participation poses significant practical and normative challenges to the Court's legal integrity and therefore has to be carefully circumscribed.³⁰² Critical scholars, on the other hand, claim that the Court's victims' engagement is simply cynical. While the Court constantly uses the promise of 'bringing justice to innocent victims' rhetorically to legitimate its international justice business, in reality it tries to undercut victim participation, where possible.³⁰³

While there is merit to all three critiques, they only provide a partial picture of how justice for victims has evolved at the Court. Contrary to the activist claim, many ICC practitioners entertain rather complex understandings of 'victimhood' and 'justice for

Wallace Wurth Memorial Lecture, 14 February 2012, available at <https://www.icc-cpi.int/Pages/item.aspx?name=14022012lecture> (visited 14 August 2016), at 8.

³⁰⁰ Kendall and Nouwen (2014).

³⁰¹ My Justice (2015).

³⁰² Wyngaert (2012), at 493; Jouet (2007); Zappala (2010); AMICC, *Victims' Participation at the ICC: Purpose, Early Development and Lessons*, Institute for the Study of Human Rights, Columbia University, 25 March, 2013, at 6.

³⁰³ Kendall and Nouwen (2014); A. Sagan, 'African Criminals/African Victims: The Institutionalised Production of Cultural Narratives in International Criminal Law', 39 *Millenium* (2010) 3, at 9; K.M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: CUP, 2009), at 109.

victims’ but this does not necessarily translate into ‘better’ victims’ practices. In fact, the ‘complexity of victimhood’ is used by some ICC officials to justify the Court’s disengagement from victims. While the argument that victim participation needs to be limited to safeguard the defendant’s fair trial rights resonates with the legal community, it is not clear whether it is the primary motivation behind opposition to victim participation at the ICC. Yet, this does not mean that promises of ‘justice for victims’ are purely cynical and do not influence the Court’s practices. There is a limit to which the Court can stake its legitimacy on bringing ‘justice to victims’ while shutting them out of the legal process. There is also a limit to which judges can control ideas in a complex and diverse institution like the ICC whose activities extend far beyond the courtroom. In the following sections, I will show how ‘justice for victims’ has shaped the Court’s practices once it became part of the ICC’s institutional framework, but often in unintended and unexpected ways.

3.1. Challenging the Activist Lens: More Complexity may not help

NGOs often point out that the ICC’s understanding of ‘justice for victims’ is rather blunt. The Court underestimates the relevance of victim participation not only to affected communities but also to the quality of its proceedings. This is reflected in the common claim that ‘victim participation does not add anything to the proceedings nor helps victims’.³⁰⁴ NGOs which advocate for victim participation at the ICC such as the International Federation for Human Rights (FIDH) and the Victims’ Rights Working Group challenge such ‘myths’.³⁰⁵ They argue that participation can add important ‘factual and

³⁰⁴ FIDH, *Five Myths about Victim Participation in ICC Proceedings*, December 2014, available at <https://www.fidh.org/IMG/pdf/cpi649a.pdf> (visited 12 August 2016), at 14.

³⁰⁵ Ibid.

cultural information’ to the proceedings, for example by clarifying the use of local names, thereby helping a physically and culturally removed Court to establish a more nuanced narrative of the crimes.³⁰⁶ They also assert that participation can have an ‘empowering effect’ on victims and ‘ensure[s] that victims feel that they have been treated with dignity and respect’.³⁰⁷ They complain that the Court’s decisions on victim participation are often made without proper consultation reinforcing the idea that ‘discussions on victim participation are a matter for experts in court proceedings and States’ not for victims or their advocates.³⁰⁸ They therefore urge the Court to consult more with local stakeholders including victims to make sure that its victims’ practices ‘give[] full effect to the rights enshrined in the Statute’.³⁰⁹

While much of the activists’ critique and concerns are valid, they misread the relationship between justice concepts and practices. The ICC’s jurisprudence has seen a gradual backpedalling on victim participation in its first two decades.³¹⁰ NGO advocates often see this development as indicative of the judiciary’s lack of understanding of the complexity of victimhood; they do not understand that bringing ‘justice for victims’ requires more than ‘bringing the perpetrator to justice’. Yet, a closer look at the judicial discourse suggests that rather than simplifying or ignoring victimhood, the judges and

³⁰⁶ Ibid, at 14.

³⁰⁷ F. Gaynor cited in FIDH, *Five Myths about Victim Participation* (2014), at 17.

³⁰⁸ Ibid, at 26.

³⁰⁹ Victims’ Rights Working Group, *Making Victim Participation Effective and Meaningful*, June 2014, available at <http://www.redress.org/downloads/publications/EnglishVRWGPaperMakingVictimParticipationEffectiveAndMeaningful-June2014%20%282%29.pdf> (visited 12 August 2016), at 3.

³¹⁰ M. Pena and G. Carayon, ‘Is the ICC Making the Most of Victim Participation?’, 7 *IJTJ* (2013) 518, at 531/532; E. Haslam and R. Edmunds, ‘Common Legal Representation at the International Criminal Court: More Symbolic than Real?’, 12 *International Criminal Law Review* (2012) 871.

prosecutors precisely use the idea of ‘complex victimhood’ to justify the limitation of victims’ rights.³¹¹ Christine Chung, a former ICC Senior Trial Attorney, has argued that,

it is logical that ICC prosecutions will remain extremely narrow in scope, in relation to the underlying conflicts, criminality and victimization, and therefore that victims may continue to find participation in ICC proceedings a blunt instrument for fully vindicating their interests.³¹²

On this basis, she proposes a more limited participation regime for the Court.

Some ICC judges have effectively tried to sever the link between ‘justice for victims’ and victim participation and reparation. Late Judge Hans-Peter Kaul (re-)defined ‘justice for victims’ as peace and reconciliation.³¹³ This allowed him to argue that while victim participation and reparation may contribute to peace and reconciliation, there are more important ways in which the Court can achieve these goals, especially through successful and swift prosecutions of international crimes. In an interview, he pushed this logic further claiming that ‘in reality it [the system of victim participation] does not really work and it renders the task to provide justice, in the sense that the perpetrators are punished, much more complex and much more time-consuming and costly’.³¹⁴ ICC Judge van den Wyngaert has suggested that the inevitable limitations of victim participation at the ICC may ‘even be a new cause of secondary victimization for victims’.³¹⁵

While applying different discursive strategies, the underlying argument is similar: victimhood in the ICC’s situation countries is massive and complex, while the ICC’s capacities to address it via victim participation and reparations are very limited.³¹⁶ The

³¹¹ I use the term ‘judicial staff’ to refer to the judges and the prosecutors.

³¹² Chung, at 462.

³¹³ Kaul (2013).

³¹⁴ Interview with H.-P. Kaul, Judge of the ICC, 19 December 2013.

³¹⁵ Wyngaert (2012), at 495.

³¹⁶ My Justice (2015).

result is ‘symbolic’ victims’ engagement which may cause more harm than good for victims. There are better ways for the ICC to contribute to ‘justice for victims’ especially through successful and prompt prosecutions. Effectively, these practitioners turn the argument of ‘justice for victims’ upside down; the exclusion of victims from the judicial process rather than their inclusion may be in their best interest. While activists still urge ICC officials to adopt more complex ideas of the Court’s relation with victims, the latter have already adapted the language of complexity to curtail victim participation. More complex ideas do not necessarily lead to more and better victims’ engagement.

3.2. Challenging the Legalist Lens: Is it all about the defendant’s rights?

Why do the ICC’s judges and prosecutors want to limit victims’ rights? The accepted view in the legal literature is that such restrictions are necessary since victim participation threatens to undermine the rights of the defendant to an expeditious, fair and impartial trial. In the face of mass victimization, victim participation allegedly slows down trial proceedings, which is particularly problematic if the defendant is imprisoned for the duration of the trial.³¹⁷ A related concern is that victim participation shifts the balance of power in the proceedings towards the prosecutor thereby undermining the principle of the equality of arms. The ICC’s system is based on the adversarial model of trials, in which the prosecution is pitted against the defence and both parties try to convince the judges of their case theory. If the victim also enters the picture and the assumption is that the victim is on the side of the prosecutor, this delicate balance may be disrupted.³¹⁸ The legal literature offers two rationales for limiting victim participation: the ‘primacy of the

³¹⁷ Jouet (2007)

³¹⁸ Ibid; Zappala (2010); AMICC (2013), at 6.

defendant's rights approach' and the 'balancing approach'. The former claims that the defendant's minimal rights to a fair trial are absolute and take precedence over victims' participatory rights.³¹⁹ While the 'balancing approach' assumes no such *a priori* hierarchy of rights, it does accept that there is a zero sum relationship between these rights.³²⁰ The more participatory rights are afforded to victims, the more the defendant's fair trials rights are undercut.

While the challenges of victim participation to the defendant's rights are widely accepted, argumentative inconsistencies characterize the 'fair trial position'. First, the 'primacy of the defendant's rights' argument is based on a liberal theory of the state in which weak individuals have to be protected against a powerful state especially in the realm of criminal law.³²¹ Yet, the underlying design and rationale of international criminal law is such that we should expect a reversal of this balance of power. The ICC is designed as a weak court that does not have its own police forces and thus is entirely dependent on state cooperation for all of its work.³²² Furthermore, the Court's Prosecution has decided to focus on the 'most responsible perpetrators' who are usually powerful individuals in leadership positions. The Court also has the ambition to try these people while they are still in power to exert a deterrent effect on 'ongoing conflicts'.³²³ In fact, in the Kenyan and Darfur cases before the Court the balance of power is reversed. In the Kenyan cases, a weak ICC faced very powerful defendants, the President and the Deputy President of Kenya, who control the Kenyan state and therefore the access to evidence in

³¹⁹ Zappala (2010); McGonigle Leyh (2011), at 10, 361.

³²⁰ Damaska (2008), at 333/334.

³²¹ McGonigle Leyh (2011), at 10.

³²² H-P. Kaul, 'Ten Years International Criminal Court', 2 October 2012, available at https://www.icc-cpi.int/NR/rdonlyres/FB16B529-3A60-441D-8DBE-5D6A768CA6FF/284995/02102012_Berlin_DGAP_THEICCcatTen_Final.pdf (visited 14 August 2016), at 5.

³²³ Song (2012), at 6/7.

the cases. Both cases collapsed due to lack of evidence which has been widely attributed to witness intimidation and the failure of the Kenyan state to cooperate with the prosecution.³²⁴ In practice, the Court often goes after relatively 'weak individuals' such as rebel leaders, opposition figures or former power-holders where it can count on the respective state's cooperation for trying its 'enemies'. Nevertheless, the Court's design and rationale would suggest a re-evaluation of fair trial rights in a changed power environment where the assumptions of the liberal theory of powerful state versus weak individual do not always apply.³²⁵ Interestingly, while the 'fallacy of the domestic analogy' is routinely used to argue that victims' rights in international criminal trials cannot be the same as in domestic jurisdictions, it is never used to reconsider the defendant's rights.³²⁶ It is simply assumed that they should be the same as in domestic trials.

Second, the advocates of the 'balancing approach' often advance two somewhat conflicting arguments. On the one hand, the concern is that victims will assist the prosecution in the proceedings, thereby undermining the equality of arms between defence and prosecution. On the other hand, the concern is that victims will argue a separate case, thereby undermining the prosecutor's case theory. If the latter happens this presumably works in favour of the defence which can use the inconsistencies of the different theories to its own advantage.³²⁷ Besides, it is not given that victims always support the prosecutor. In the Kenyan and Darfur cases, victim participants have challenged the Prosecutor's case or even the Court's authority. The victims' lawyer in the

³²⁴ ICC, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta', Press Release, 5 December 2014, available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2> (visited 14 August 2016).

³²⁵ Drumbl (2009), at 7.

³²⁶ Trumbull (2007-2008), at 804; McGonigle Leyh (2011), at 10, 342. For the fallacy of the domestic analogy see Tallgren (2002) 561.

³²⁷ Jouet (2007), at 276.

Kenyatta case, for example, accused the ICC's prosecutor of 'prosecutorial surrender and inaction' in light of her 'ineffective' handling of the case.³²⁸ In the Ruto and Sang case, 93 victim participants sent a letter to the Court through an intermediary 'withdrawing' their participation to engage in Kenya's peace process instead.³²⁹ In the Banda and Jerbo case, victim participation was allegedly used to promote the political agenda of the Sudanese government.³³⁰ Thus, it is not clear whether victims' inclusion in international criminal proceedings primarily poses a threat to the position of the defence. It is also not clear whether this it is the main driving force behind the opposition to victim participation at the ICC.

In fact, it is arguable that the main concern lies with the victim/prosecutor relationship rather than the victim/defence relationship. We have to recall that the ICC and its laws were created by states in the name of the 'international community'. Many powerful states, especially the United States, were opposed to victim participation and reparation in the first place. It was only due to the pressure of NGOs and like-minded states that the victims' provisions made their way into the Statute regardless.³³¹ During the Rome negotiations, the main controversy focused not on participation in trial proceedings but on the question of what role victims should play in case selection. As one negotiator claimed:

³²⁸ I. Bundi, 'Victims' lawyer turns the heat up on Bensouda and Uhuru', *The Hague Trials Kenya*, 12 August 2015, available at <https://thehaguetrials.co.ke/article/victims-lawyer-turns-heat-bensouda-and-uhuru> (visited 14 August 2016).

³²⁹ Common Legal Representative for Victims' Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013, *Ruto and Sang* (ICC-01/09-01/11-896-Corr-Red), Trial Chamber V(A), 5 September 2013, §§12-13.

³³⁰ Haslam and Edmunds (2014)

³³¹ M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (London: Routledge, 2006).

The common law [countries] used a lot as a tool against victim participation, the rights of the accused - a lot - and they used that routinely. To be frank, I don't think this is exactly the problem. I think the problem is somewhere else. The problem is mainly the control of the institution, the control of the selection of situation and cases and the fact that the powerful common law countries did not want the victims to interfere with the choices of the Prosecutor. That's the key issue. Of course, you cannot say it like that because it is a little bit touchy. It's much easier, especially for lawyers, to say 'it's the rights of the defence'.³³²

From the perspective of states, victims pose as much a threat as the defence to the narrative the 'international community' constructs about the Court's 'situations': a narrative in which complex conflicts are reduced to the criminal acts of a few individuals. In the same way that defendants can challenge the legitimacy of international criminal courts through a 'trial of rupture', victims can highlight that their perpetrators and their suffering has not been part of this narrative.³³³ Eventually, it was agreed that the power to bring cases at the ICC would reside solely with the prosecutor. Apart from that, the provisions on victim participation were deliberately framed vaguely to reach compromise and it was left to the judges to flesh out how the victims' regime would function in practice.³³⁴ But the judges are elected by states and many of them owe their careers to 'their' states as they worked in the diplomatic service or at the Ministry of Justice before joining the Court. Research has shown that such bureaucrats often internalize the interests and norms of 'their' states. For example, Liesbet Hooghe has argued that the norms of top officials at the European Commission are shaped primarily by 'national

³³² Interview with Adviser, Chamber, The Hague, 8 January 2014.

³³³ Koskeniemi defines a 'trial of rupture' as a trial 'in which the defence is conducted entirely as an attack on the system represented by the prosecution case'. See M. Koskeniemi, 'Between Impunity and Show Trials', 6 *Max Planck UNYB* (2002) 1, at 26; J. Rozenberg, 'Delay in Lubanga Judgment demonstrates ICC Weaknesses', *The Guardian*, 14 March 2012, available at <http://www.theguardian.com/law/2012/mar/14/delay-lubanga-weaknesses-icc-model> (visited 22 June 2016).

³³⁴ Wyngaert (2012), at 478.

norms, originating in prior experiences in national ministries, loyalty to national political parties, or experience with one's country's organization of authority....'³³⁵ This conservative tendency among ICC judges is reinforced by the fact that even states which originally supported the victims' provisions have become more lukewarm in the face of their expenses.³³⁶ The judges are therefore not inclined to challenge the Court's founders and paymasters.

There are also institutional reasons for ICC officials to be cautious about victim participation: 'there is this kind of behaviour typical of international organizations: How do I limit what I have to do. So people are going to say: Well I don't disagree that victims should know the truth but maybe they will not get the truth here; go somewhere else.'³³⁷ Institutions prefer to do what is easy and conventional for them namely, 'conducting trials' to what is difficult and new for them, victim participation and reparation. These institutional interests are reinforced by the legitimacy and budgetary challenges the Court has faced by its member states and the international community at large.³³⁸ As a legal adviser to the Chambers observed, 'I think people do not want to be criticized. And the criticism is easy; if you say, "I want to compensate victims and establish the truth", people are going to say: "well, finish your trial first".'³³⁹

Using the argument of complexity allows ICC officials to protect their institutional interests and the political interests of states while claiming the moral and intellectual high

³³⁵ L. Hooghe, 'Several Roads lead to International Norms, but Few Via International Socialization: A Case Study of the European Commission', 59 *International Organization* (2005) 861.

³³⁶ REDRESS, 'Hundreds of Victims Prevented from Participating in Crucial Court Hearings Due to Lack of Resources at the International Criminal Court', July 2011, available at <http://www.redress.org/downloads/StatementVictimParticipation15July2011.pdf> (visited 14 August 2016).

³³⁷ Interview with Adviser, Chamber, The Hague, 8 January 2014.

³³⁸ W. Schabas, 'The Banality of International Justice', 11 *JICJ* (2013) 545.

³³⁹ Interview with Adviser, Chamber, The Hague, 8 January 2014.

ground. The judges limit victims' rights not because they do not care about victims but because the sheer complexity of victimhood makes the ICC's victims' rights regime inadequate, simplistic and even potentially harmful to victims.

3.3. Challenging the Critical Lens: Even if cynical, 'justice for victims' still matters

Critical scholars and practitioners argue that the Court's victims' engagement is largely an exercise in self-legitimation while offering very little for victims. Few victims gain recognition at the Court and those who do find their opportunities to present views and concerns very limited. Participation at the Court is usually collective, meaning that large groups of victims are represented by one lawyer. The assumption of collective participation is that victims have sufficiently similar interests, yet this is often not the case. The victims' lawyer in the case against Ruto and Sang, for example, pointed out that representing his victims' interests is difficult as they often have diametrically opposed views.³⁴⁰ Besides, only those victims' interests and concerns that can be framed in legal terms and are pertinent to the narrow charges advanced by the Prosecutor will ever find the judges' ears.

Some practitioners within the Court agree with the critical perspective. A Registry officer told me,

so, if you want to know how the Court uses victim participation, this is precisely how it does it... I think if you did a survey - and surveys have been done - about what the Court thinks internally about victim participation, you would get a resoundingly negative opinion. But they still love the window-dressing of victim participation. They still love to say, 'we do it for the victims'...While internally they try to strangle it and put it in a box.³⁴¹

³⁴⁰ Interview with Victims' Lawyer, Nairobi, 1 July 2014.

³⁴¹ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

He attributes these negative attitudes to initial blunders in the regime's implementation, especially regarding the role played by LRVs. In the Kenyan cases, the lawyers who began submitting victims' applications to the Court were the 'first ones to have their foot in the door'.³⁴² They claimed to have the victims' mandate but some of them were allegedly associated with the accused and tried to use their position as victims' lawyers to promote 'the narrative of the accused', that victims want reconciliation, not trials.³⁴³ Besides, they were accused of incompetence. As the Registry's officer claimed:

These lawyers also started filling out application forms before they have ever been trained...and they were a disaster. One of these lawyers organized a meeting with 1800 people, promised them the world and then submitted to us 1800 incomplete applications. We spent a full year trying to track these people down and complete their forms.³⁴⁴

Once the judges had made up their mind, they were not willing to reconsider even though the victim participation regime improved over time.³⁴⁵ Yet, other critics claim that better practices at the beginning would not have saved the regime. It was designed to fail in the first place. A legal adviser to the Chamber asserted:

All the hopes of Rome are failures. But those who were against the victims did not want to be too clear...Don't be too clear and then we can delete that in a few years demonstrating that it does not work. Of course, with the usual hypocrisy you make everything complex so that it does not work in order to prove that it does not work in order to take it out.³⁴⁶

A similar 'designed to fail' critique has been made by REDRESS:

With ever shrinking budgets, ever expanding tasks dictated by the different and often inconsistent Chamber rulings and little remit of their own to re-structure the work more efficiently, Registry officials are put in a position

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Interview with Adviser, Chamber, The Hague, 8 January 2014.

where they are destined to fail, which simply fuels the sceptics and contributes to the calls to further shrink the budget.³⁴⁷

However, such arguments overestimate the power of the ‘designer’ to control the interpretation and implementation of ‘justice for victims’ over a long period of time. Putting the ‘right people’ in place at the top of a complex and diverse institution does not guarantee ideological continuity over time. Whether designed to fail or not, the ICC’s victims’ rights regime is still up and running even though it has occasionally taken on unexpected forms and found unlikely advocates.

The problem with the critical perspective is not that it is wrong but that it misses the point. While it successfully unmask the ICC’s politics of victimhood, it overlooks that these victims’ practices, however flawed, drive broader conceptual developments in the field of international criminal justice. When lofty ideas such as ‘justice for victims’ enter the discourses and practices of an institution, practitioners have to deal with them and this can play out differently. Dismissing ideas and rhetoric as irrelevant - as critical scholars do - is unhelpful reductionism. While ideas are often side-lined, misused and transmuted, they die hard. In fact, despite attempts to remove it from the court room, ‘justice for victims’ has often made it back into the Court’s process through the backdoor.

4. ‘Justice for victims’ through the backdoor

While the judges have tried to retrench victim participation, they have not developed a common approach to victims. Every Chamber develops a different model of victim participation for every case which has caused much confusion both inside and outside the

³⁴⁷ REDRESS, *The Participation of Victims in International Criminal Court Proceedings* (2012), at 8.

Court.³⁴⁸ Most importantly, this has left a justice vacuum that different people at the Court fill with different meanings. While the overall trend has been to water down victim participation, some ICC practitioners have appropriated the idea and integrated it into their work.³⁴⁹ Even among the judges, there are strong supporters of the victims' principles.³⁵⁰ Yet, even those judges who are adamant that victims have no place in the court room have not tried to completely rid the Court of them. There is a limit to which the Court can frame its *raison d'être* around 'doing justice for victims' and at the same time cut them completely out of the process. Once the promise of 'justice for victims' was out there, a certain accommodation had to be found between the Court's procedural preferences and more substantive ideas of justice for victims.

The judges have tried to balance procedural and substantive concerns by outsourcing or recycling 'justice for victims' to non-judicial and field-based processes. An example of this practice is the Court's seemingly contradictory approach to the victims of child soldiers in the Lubanga case. On 21 November 2008, the Registry sought guidance by the Trial Chamber on whether those people who allege to have suffered crimes at the hands of child soldiers in the DRC can be considered to be 'indirect victims' of the crimes before the Court.³⁵¹ As 'indirect victims', they would have rights to participation and reparation. The Chamber decided that such victims have to be 'excluded' from the Court's process as only those, who suffered harm as a consequence of the harm suffered by

³⁴⁸ *Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims, including Reparations and Intermediaries*, ICC-ASP/12/38, 15 October 2013, § 10.

³⁴⁹ This is especially obvious in the work some of the Registry's offices and the LRVs

³⁵⁰ In my interviews I was told that Judge Song and Judge Trendafilova are supportive of victim participation. In the past, Judge Jorda was very supportive of victim participation. See Jorda and Hemptinne (2002).

³⁵¹ Redacted version of "Decision on 'indirect victims'", *Lubanga Dylio* (ICC-01/04-01/06-1813), Trial Chamber I, 8 April 2009, §2.

‘direct victims’ can qualify as ‘indirect victims’ at the ICC. Given that the child soldiers are the ‘direct victims’ in the Lubanga case this means that their parents, close relatives or people who were harmed while trying to help them are ‘indirect victims – but not those who were killed, raped or otherwise harmed by the child soldiers themselves.’³⁵² This judgment flies in the face of what most people would think is just in this particular case. It is especially problematic because it closed another door for SGBV victims to be recognized in the Lubanga trial. The Prosecutor had been widely criticized by NGOs for not including SGBV crimes in the charges against Lubanga despite evidence suggesting that Lubanga’s troops had committed such crimes, including against child soldiers.³⁵³ Spiga, for example, has argued that:

the Court should be alert to the risks of granting access to justice only to a limited group of victims, while leaving without standing a large number of persons who cannot meet the strict requirements set by the Trial Chamber. This is especially true when the charges against the accused may not reflect the complexity of the crimes actually committed.³⁵⁴

But the Court appears to be sensitive to these risks. In its submission to the Chamber on the principles and procedures of reparations in the Lubanga case, the Registry effectively attempted to bring these ‘excluded victims’ back into the Court’s reparation process through the backdoor. It argued that these victims could and should benefit from collective reparations by the Court and that this would be a way of avoiding discrimination among victims in the DRC.³⁵⁵ The Chamber seems to have followed this line of reasoning. In its reparation decision of 7 August 2012, Trial Chamber I included a much broader

³⁵² Ibid, §52.

³⁵³ ICC Women, ‘ICC Judges uphold conviction of Lubanga: *The Prosecutor v. Thomas Lubanga Dyilo*’, available at <http://www.iccwomen.org/documents/First-conviction-and-sentence-upheld-on-appeal-at-the-ICC-REVISED-April-2015.pdf> (visited 14 August 2016)

³⁵⁴ V. Spiga, ‘Indirect Victims’ Participation in the Lubanga Trial’, 8 *JICJ* (2010) 183, at 198.

³⁵⁵ Second Report of the Registry on Reparations, *Lubanga Dyilo* (ICC-01/04-01/06-2806), Trial Chamber I, 1st September 2011, §6, §159.

category of victims as beneficiaries of reparations. It held that ‘the Court should formulate and implement reparation awards for victims of sexual and gender-based violence’ even though Lubanga was not convicted for SGBV crimes.³⁵⁶ The Trial Chamber also determined that not only victims and their families but also ‘broader communities’ can benefit from collective reparations.³⁵⁷ Legally speaking, this argument is dubious: if you are not a victim for purposes of participation how can you be a victim for purposes of reparation? But the rationale seems to be that the Court has to give something to these victims and they rather involve them in a collective reparation process administered by the TFV than in the Court’s criminal proceedings. While the Appeals Chamber reversed this broad inclusion of SGBV victims and communities in the reparation order against Lubanga, it also felt the need ‘to give them something’, namely TFV assistance and referrals to other NGOs.³⁵⁸ As an adviser to the Chambers reasoned:

And I think this is perhaps an explanation for what we have seen so far...this thought ‘ok we need to broaden this slightly because otherwise it is just not understandable that these victims that were “lucky” enough to be selected by the prosecutor for her case get reparations while others don’t’...You would then rely on the Trust Fund. The victim doesn’t really care whether she gets money or access to health care because of reparations or assistance.³⁵⁹

More recently, when the last Kenyan case collapsed depriving victims of any hope of reparations, Presiding Judge Eboe-Osuji asserted that ‘there is no general principle of law that requires conviction as a prerequisite to reparation’ and wondered whether the ICC

³⁵⁶ Reparation Decision in Lubanga, 7 August 2012, §207.

³⁵⁷ Ibid., §206. REDRESS, ‘At Long Last: Reparations for Victims can now proceed in the ICC’s first case’, 3 March 2015, available at <http://www.redress.org/downloads/pr-lubanga-reparations-appeals-decision030315.pdf> (visited 14 August 2016).

³⁵⁸ 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 (Annex A) and public annexes 1 and 2, *Lubanga Dyllo* (ICC-01/04-01/06-3129), The Appeals Chamber, 3 March 2015, §199 (hereinafter ‘Appeals Chamber Decision on Reparations in Lubanga’).

³⁵⁹ Interview with Adviser, Chambers, The Hague, 10 January 2015.

could require the Kenyan government to make adequate reparations to PEV victims especially in light of the government's political meddling with the case.³⁶⁰ This is interesting because RS Article 75 only provides for reparation orders against convicted individuals but it suggests that some judges at the Court are willing to think creatively to open up avenues for reparations.

Another example of 'justice for victims through the backdoor' can be found in Trial Chamber V's Decision of 3 October 2012 on victims' representation and participation. This decision has been widely interpreted as a setback for victims' rights as it shifted victim participation from individual to collective participation.³⁶¹ James Gondi, for example, has described it as 'the least victim-friendly decision that the ICC Chambers have ever issued'.³⁶² Yet, less attention has been paid to the fact that the decision also required the victims' lawyers to be based in Kenya with a team of in-country assistants.³⁶³ In this way, the decision gave the Court's field staff and the victims' lawyers more room to engage with victims. For example, a LRV assistant in Kenya claimed that they have conducted twice as many missions to meet victims since the changes brought about by the decision:

Of course, victim participation has become more involving. We can feel more of an effect and I can't help but have the feeling that this is because the Chamber made the decision to have the common legal representative

³⁶⁰ Decision on Defence Applications for Judgments of Acquittal, *Ruto and Sang* (ICC-01/09-01/11-2027-Red-Corr), Trial Chamber V(A), 5 April 2016, §§201-208.

³⁶¹ See for example former Judge Fulford's critique in S. Linehan, 'International Criminal Courts: Progress Made, Progress Needed', *iLawyer*, 1 November 2014, available at <http://ilawyerblog.com/international-criminal-courts-progress-made-progress-needed/> (visited 14 August 2016); Moffett (2015), at 11. The critique has also focused on the way the Chamber's decision splits the role of legal representation between the CLR in Kenya (the lead counsel) and the OPCV in The Hague. The concern is that much nuance of victims' views is lost because it is OPCV rather than the CLR that represents victims in the court room on a daily basis. See Kendall and Nouwen (2014), at 16; Amicus Curiae Observations of Kituo Cha Sheria pursuant to Rule 103 of the Rules of Procedure and Evidence, *Ruto and Sang* (ICC-01/09-01/11-478), 23 November 2012, §§22-23, 27.

³⁶² J. Gondi, 'Victim Participation in ICC Case is Crucial', *the Star*, available at http://www.the-star.co.ke/news/2012/10/15/victims-participation-in-icc-case-is-crucial_c691602 (visited 16 August 2016).

³⁶³ Decision on victims' representation and participation, *Ruto and Sang* (ICC-01/09-01/11-460), Trial Chamber V, 3 October 2012, §60.

based in the field. This makes him more accessible to the victims; it makes him more accessible to the assistants.³⁶⁴

As a Registry staff member commented:

And if we don't have structures in place like a legal representative with a complementary team to facilitate consistent interaction with the victims, we don't have participation. I would argue that we did not have participation ever at the ICC until Kenya because you have a common legal representative on the ground with a team.³⁶⁵

Yet, 'justice for victims through the backdoor' can also have unintended consequences.

Once ideas are out there, they are difficult to control. This can be illustrated with the example of victims' representation that I observed in Kenya. The Court's field-based staff and the victims' lawyers have come to practice a broader and more political vision of victims' engagement than envisaged by the Chamber. Examples of this are the CLR in the Kenyatta case, who wrote a letter to the UN Special Rapporteur on the human rights of internally displaced persons (IDPs), calling on him to put more pressure on the Kenyan government to end the discrimination in the government's compensation of victims.³⁶⁶

He also wrote a letter to the Security Council to express the victims' opposition to the suspension of the case.³⁶⁷ Besides, he has actively engaged with the Kenyan media advocating for his clients' interests for assistance and recognition outside of the court room. He has also tried to persuade EU and US representatives in Nairobi to impose sanctions on Kenya for its failure to honour its legal obligations to compensate all victims in a non-discriminatory fashion. Some NGOs have explicitly advocated for appointing

³⁶⁴ Interview with CLR field assistant, Nairobi, 30 June 2014. The victims' lawyers are called Common Legal Representatives (CLRs) in the Kenyan cases.

³⁶⁵ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

³⁶⁶ F. Gaynor, Letter to the Special Rapporteur on the Human Rights of IDPs Dr. Chaloka Beyani, 22 May 2014 (on file with the author).

³⁶⁷ F. Gaynor, Letter to the Security Council, 3 November 2013 (on file with the author).

external lawyers as victims' counsel as they may then choose to take on broader advocacy roles beyond 'their strict legal representation mandate'.³⁶⁸

One Registry officer claimed that this advocacy and the Court's involvement more generally has influenced the government's policy vis-à-vis victims in Kenya:

And this has been very successful in my view...we have seen for instance a few months ago, the national government came forward with this multi-billion-shilling project to resettle all the IDPs that were still in camps and they would never acknowledge that this was as a result of the pressure put on them by the lawyers and the Court...but the timing was the day the Ruto trial started. It was a clear [connection] between the pressure exerted by the Court and the response by the national system.³⁶⁹

Less openly, the Court's field staff have also broadened their victims' engagement. One intermediary told me:

We have a lot of discussion about socio-economic needs alongside justice with VPRS. VPRS has begun to understand the importance of addressing socio-economic needs and this is why they try to link up victims with other institutions that can provide that. They realized that in the absence of dealing with those needs, justice will never be a priority for them.³⁷⁰

Another intermediary confirmed:

So you find individuals working within the VPRS; they do stick to their mandate but above and beyond that, because they do care for all the victims independent of which category they belong to, to help them get some sort of tangible benefit...assistance, livelihood....³⁷¹

³⁶⁸ FIDH, 'FIDH Comments on the Registrar's ReVision proposals in relation to victims', 18 November 2014, available at https://www.fidh.org/IMG/pdf/letter_registar_icc.pdf (visited 14 August 2016), at 6.

³⁶⁹ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

³⁷⁰ Interview with Intermediary, Kisumu, 26 August 2014.

³⁷¹ Interview with Intermediary, Nairobi, 2 July 2014.

For example, VPRS has written reference letters for its intermediary organizations to help them to acquire funding for victims that fall outside of the Court's cases such as rape victims of the Kenyan police.³⁷²

Thus, at the same time that victims have lost procedural rights in the court room, they have gained somewhat more substantive representation in the field. While these field actors and their activities may be regarded as of marginal importance from the judges' perspective in The Hague, they are the 'face of the Court'³⁷³ in its situation countries. What the victims' lawyer said often made it to the front page of the main Kenyan newspapers.³⁷⁴ As such, their activities greatly shape the Court's imagery in the field.

5. Conclusion

What can we infer from this analysis for the theory of interactional justice? Once the idea of 'justice for victims' became part of the Court's institutional framework, it gave rise to two dynamics: first, the judges modified justice procedures at the margins of the judicial process and second, these marginal changes bred new justice practices over time. The judges have tried to contain 'justice for victims' by adjusting practices at the periphery of the Rome Statute system while shielding the Court's judicial proceedings as much as possible from victims' involvement. Yet, it is difficult to control the dissemination of ideas and how they shape justice practices in a complex institution where the question of 'who

³⁷² Ibid.

³⁷³ *Report of the Court on Complementarity: Completion of ICC activities in a situation country* (ICC-ASP/12/32), 15 October 2013.

³⁷⁴ N. Musau, 'ICC Victims' Lawyer now goes for Prosecutor's Jugular', Standard Digital, 9 August 2015, available at <http://www.standardmedia.co.ke/article/2000172153/icc-victims-lawyer-now-goes-for-prosecutor-s-jugular> (visited 14 August 2016); J. Wanga, 'Anger for Victims as Trial is delayed', Daily Nation, 4 October 2014, available at <http://mobile.nation.co.ke/news/International-Criminal-Court-Victims-Trial/-/1950946/2475584/-/format/xhtml/-/7whm7iz/-/index.html> (visited 14 August 2016).

is in?’ and ‘who is out?’ is far from resolved. In fact, many actors that influence the Court’s victims’ engagement, such as the LRVs, the TFV and local intermediaries, are neither properly within the institution nor outside. As ‘independent’ actors within the Rome Statute System, these ‘new’ practitioners enjoy significant leeway in promoting and implementing ‘justice for victims’ on the ground. In these circumstances, outsourcing ‘justice for victims’ to field-based activities such as outreach, victims’ representation, assistance and collective reparation can give rise to new justice practices beyond what the judges intended. ‘Activist’ individuals among the Court’s new practitioners can pick up these justice ideas, reinterpret them and translate them into new practices which may become normalized at the Court. An example of such new practices is the victims’ lawyer’s political engagement in Kenya.

This Chapter has shed light on the interpretation, use and implementation of ‘justice’ by the Court’s practitioners in The Hague. By analyzing the development of ‘justice for victims’ through the lens of interactional justice, it produced a more nuanced account of the interplay between justice ideas and practices at the Court. It also challenged the three main perspectives on the Court’s victims’ engagement: the activist, legal and critical perspective. In focusing their critique on the Court’s victims’ practices, these perspectives ignore that the introduction of ‘justice for victims’ at the Court can create an opening for more extensive justice visions. Even if they face strong opposition at the Court, ideas still influence justice practices not least because the ICC still lacks established justice procedures and a common justice vision. More than a decade into its work, the ICC is still in the midst of ongoing negotiations of what ‘justice for victims’ means with often unintended consequences for its justice practices.

Chapter IV - Beyond the 'Global-Local Divide': The ICC and its Intermediaries

Chapter IV examines the role of a new category of actors in the ICC's justice process, so-called 'local intermediaries', who have largely been ignored in the research on the Court's work. Intermediaries are diverse actors, such as community leaders and grassroots organizations, who help the Court with evidence collection and victims' engagement in its situation countries. While much controversy surrounds the ICC's engagement with intermediaries, there is a shared analytical framework for making sense of this relationship: the 'global-local divide'. While many scholars advocate for a combination or even integration of 'global' and 'local' justice processes, the premise that the important misunderstandings and contestations in international criminal justice happen between the 'global Court' and 'local communities' is hardly put in doubt. Drawing on fieldwork at the ICC in The Hague, in Kenya and in Uganda, I will argue that the global vs. local framework obscures more than it illuminates about the Court's victims' engagement through intermediaries. An interactional justice analysis reveals that some of the most important justice contestations happen within the ICC and in the field rather than between the 'global Court' and 'local communities'. In fact, the ICC's internal contradictions, rather than the much vaunted 'mischievousness' of intermediaries, explain much of the Court's ambiguous victims' engagement. Ultimately, the Chapter aims to close the empirical gap in research on the ICC's intermediaries by releasing them from the analytical confines of the global vs. local conceptual framework.

1. Introduction

It has become commonplace to point out that there is an important distance and even mismatch between the ICC's abstract international justice bureaucracy and the cultural understandings and justice ideas of affected communities and victims in the Court's situation countries.³⁷⁵ This distance - or misfit - is often visualized through sterile images of the Court's building on the one hand and colourful, rural images of people gathering under trees in the Court's situation countries on the other hand. This idea of a 'global-local divide' is pervasive in scholarship and commentary on the ICC and is embraced by different actors for different purposes.³⁷⁶ NGOs such as FIDH that support the ICC have emphasized this 'global-local divide' to push the Court to improve its engagement with affected communities as a way of enhancing its local legitimacy.³⁷⁷ Yet, others think that the ICC should not be in these countries in the first place. They use the idea of an inherent cultural mismatch between global and local justice ideas to denounce the ICC's 'top-down justice' all together and instead advocate for 'bottom-up' approaches that are culturally more embedded, such as community-based justice mechanisms.³⁷⁸ For example, Abdullahi Ahmed An-Na'im laments that 'preference is always given to a standard of justice that is mandated by the international community over indigenous or 'traditional' practices that are unacceptable because they are inconsistent with 'universal' human rights norms'.³⁷⁹ AU Heads of States have joined the chorus with President Museveni of

³⁷⁵ Moffett (2015), at 6; My Justice (2015).

³⁷⁶ The pervasiveness of the global/local divide in human rights studies has been analyzed by M. Goodale, 'Locating Rights, Envisioning Law Between the Global and the Local' in M. Goodale and S.E. Merry, *The Practice of Human Rights: Tracking Law between the Global and the Local*, (Cambridge: CUP, 2007).

³⁷⁷ FIDH, *Five Myths about Victim Participation in ICC Proceedings* (2014), at 19.

³⁷⁸ Branch (2007); K. McEvoy and L. McGregor, *Transitional justice from below: Grassroots activism and the Struggle for Change* (Oxford: Hart, 2008).

³⁷⁹ A.A. An-Na'im, 'Editorial Note: From the Neocolonial "Transitional" to Indigenous Formations of Justice', (7) *IJTJ* (2013), at 197.

Uganda announcing that ‘at the next summit African countries should review their membership of the ICC treaty. The ICC is turning out to be... a biased tool of postcolonial hegemony.’³⁸⁰ While this debate on the divisions between global and local transitional justice mechanisms is well-rehearsed, one category of actors has been overlooked in this debate: the ICC’s local intermediaries.

Intermediaries are actors ranging from individuals such as family members of victims and community leaders to grassroots organizations and national NGOs in the Court’s situation countries. They help the Court with evidence collection, victim identification, community outreach and victim assistance. The ICC has constructed this new institution of ‘intermediaries’ for which there is no legal framework or basis in the Court’s core texts.³⁸¹ Curiously, the ICC uses the concept of intermediaries only to designate ‘local actors’ but not the various international NGOs that fulfil intermediary functions for the Court.³⁸²

Some scholars and activists see ‘intermediaries’ as part of the solution to the Court’s problem of seeming to be ‘aloof’. Intermediaries can bridge the cultural and knowledge gaps between an international court in – somewhat distant – The Hague and affected communities in the different African countries in which the Court works.³⁸³ Yet,

³⁸⁰ R. Wanambwa, ‘Museveni attack on ICC dominates Independence Celebrations’, *Daily Monitor*, 10 October 2014, available at <http://www.monitor.co.ug/News/National/Museveni-attack-on-ICC-dominates-independence-celebrations/-/688334/2480406/-/nffcmx/-/index.html> (visited 14 August 2016).

³⁸¹ *Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries*, March 2014, available at <https://www.icc-cpi.int/iccdocs/lt/GRCI-Eng.pdf> (visited 14 August 2016), at 3.

³⁸² *Ibid.*, at 6.

³⁸³ Open Society Justice Initiative, ‘Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties’ (2011), available at <http://www.opensocietyfoundations.org/sites/default/files/intermediaries-20111212.pdf> (visited 14 August 2016).

the ICC's perspective on intermediaries is very different. The Court sees intermediaries as part of the problem rather than part of the solution to its legitimacy problem in its situation countries. It claims that intermediaries distort the Court's field work by sending mixed and even wrong messages to affected communities and victims. According to the Court, 'direct engagement' between the ICC and victims would be preferable to the 'indirect engagement' facilitated by intermediaries.

But this claim is based on the premise that the ICC brings one clear justice vision and practice to its situation countries. Yet, as soon as we examine 'the Court' more closely, it rapidly dissolves into different actors and institutions that pursue different justice agendas. My fieldwork in The Hague, in Kenya and in Uganda reveals a picture of a divided institution in which we find conflicting and even contradictory justice ideas and practices. In other words, the Court does not need intermediaries to introduce confusion into its justice process; its own justice ambivalence goes a long way in explaining the tensions between the Court and affected communities.

But studying the ICC's engagement with intermediaries helps not only to challenge the Court's self-representation as a coherent justice actor but also to refine two paradigms in the TJ literature through which the ICC's relationship with affected communities is often explored: 'transitional justice from below' and the 'global-local divide'. By conceptualizing the gap between the 'top' and the 'bottom', the 'global' and the 'local' as the crucial difference, these paradigms tend to flatten the diversity within these categories. Ultimately, the analysis suggests that the way our thinking about international criminal justice is habitually structured through meta categories of 'global', 'local', 'top' and 'bottom' creates many blind spots such as justice contestations within the

ICC. Once we explore the Court's victims' engagement through a more nuanced theory of justice as an interactional process, it emerges that the fault lines of justice contestations run not only between the ICC and affected communities, but also through the Court and victim communities. Intermediaries are simply one more category of actors in this interactional process with substantial power to label victims and define their justice interests for the Court on the one hand, but with contestable claims to 'local legitimacy' on the other. In this way, the Chapter uses an empirical discussion of the intermediaries' roles in the Court's victims' engagement as an entry point into a broader conceptual rethinking of the global-local divide.

2. Challenging the 'Top-Down' and 'Global-Local' Binaries

While the Court's intermediaries have received scant attention in ICC scholarship,³⁸⁴ the TJ literature offers two related analytical frameworks for exploring the role of such local actors: 'transitional justice from below' and the 'global-local divide'. The underlying idea of the former is that the meaning and practice of justice is too often dictated by the powerful with little consideration of the justice ideas of affected communities. As McEvoy and McGregor observe 'the term "from below" is increasingly used to denote a "resistant" or "mobilising" character to the actions of community, civil society and other non-state actors in their opposition to powerful hegemonic political, social or economic forces'.³⁸⁵ Haslam and Edmunds, for example, frame the relationship between the Court and

³⁸⁴ One notable exception is E. Haslam and R. Edmunds, 'Managing a New Partnership: Professionalization, Intermediaries and the International Criminal Court,' 12 *Criminal Law Forum* (2012) 871. See also C. De Vos, "'Someone Who Comes between One Person and Another': Lubanga, Local Cooperation and the Right to a Fair Trial,' 12 *Melbourne Journal of International Law* (2011) 217; E. Baylis, 'Outsourcing Investigations', 14 *Los Angeles Journal of International Law and Foreign Affairs* (2009) 121.

³⁸⁵ McEvoy and McGregor (2008), at 3.

intermediaries as potential medium for 'transitional justice from below'.³⁸⁶ They criticize the ICC's recent attempts to enhance its selection, training and control of intermediaries, arguing that this 'professionalization is problematic to the extent to which it creates obstacles for the involvement of counter-hegemonic voices in international criminal law'.³⁸⁷ From a 'transitional justice from below' perspective, the Court's professionalization agenda hollows out the space for local contestations of the ICC's justice intervention.

A related prism for exploring the role of local intermediaries is the 'global-local divide'. While the 'top-down' lens focuses our attention on the power differences between the 'top' and the 'bottom', the 'global-local divide' alerts us to the cultural differences between the 'global' and the 'local'.³⁸⁸ The idea that 'culture is the sole source of the validity of a moral right or rule' has driven the cultural relativist challenge to the universal human rights regime for decades.³⁸⁹ However, since then, many anthropologists have begun to promote a more dynamic and differentiated understanding of cultures as 'complex repertoires of systems of meanings extracted from myriad sources and reinterpreted through local understandings and interests'.³⁹⁰ This idea of the relative fluidity of culture has led to a new consensus in the studies of human rights and transitional justice: cross-cultural communication about human rights and transitional

³⁸⁶ Haslam and Edmunds (2012), at 66, 70.

³⁸⁷ Ibid, at 49.

³⁸⁸ Culture is broadly understood as 'those abilities, notions and forms of behaviour persons have acquired as members of society'. See T.H. Eriksen, *Small places, large issues: an introduction to social and cultural anthropology* (London: Pluto, 2010), 3.

³⁸⁹ J. Donnelly quoted in R. Wilson (ed.), *Human Rights, Culture and Context: An Introduction* (London: Pluto Press, 1997), at 3.

³⁹⁰ S.E. Merry, 'Legal Pluralism and Transnational Culture: The *Ka Ho'okolokolonui Kanaka Maoli* Tribunal, Hawai'i, 1993', in R. Wilson (ed.), *Human Rights, Culture and Context* (London: Pluto Press, 1997) 28, at 30.

justice is possible but it requires mediation and translation between the global and the local.³⁹¹

In this context, the institution of ‘intermediary’ has become salient for studying the relationship between international and local norms.³⁹² Anthropologists have identified community leaders and grassroots organizations as ‘intermediaries’ that can help to ‘translate’ or ‘vernacularize’ international norms such as human rights and accountability into local norms and practices and vice versa.³⁹³ Acharya developed the concept of ‘norm localization’ to analyze this process of translation: ‘it may start with a reinterpretation and re-representation of the outside norm, including framing and grafting, but may extend into more complex processes of reconstitution to make an outside norm congruent with a pre-existing local normative order.’³⁹⁴ Boesenecker and Vinjamuri have explored the different roles that civil society actors play in navigating between international and local practice in TJ. They show that local civil society’s engagement ranges from active support for and dissemination of global norms, to more complex forms of adaptation and negotiation, to outright normative contestation and rejection of ‘foreign’ norms.³⁹⁵

2.1. Where is the ‘Global’ and the ‘Local’ in International Criminal Justice?

³⁹¹ S.E. Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’, 108 *American Anthropologist* (2006) 38.

³⁹² Ibid; S.E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago, IL: University of Chicago Press, 2005); A.P. Boesenecker and L. Vinjamuri, ‘Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms’ 5 *IJTJ* (2011) 345; A. Acharya, ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism,’ 58 *International Organization* (2004) 239.

³⁹³ Merry, ‘Transnational Human Rights and Local Activism’ (2006), at 38.

³⁹⁴ Acharya, ‘How Ideas Spread: Whose Norms Matter?’ (2004), at 244.

³⁹⁵ Boesenecker and Vinjamuri, ‘Lost in Translation?’ (2011), at 345.

While these two frameworks reveal the normative tendency underlying TJ scholarship of either promoting ‘global’ or ‘local’ justice practices, they are analytically problematic as they tend to reify the ‘global’ and the ‘local’ as self-evident categories for making sense of the ICC’s relationship with affected communities. Yet, where exactly the ‘global’ and the ‘local’ are, is far from clear. In his seminal article, Acharya designates the regional and domestic norms of ASEAN (Association of Southeast Asian Nations) as ‘local beliefs and practices’.³⁹⁶ Boesenecker and Vinjamuri, on the other hand, distinguish the ‘local level’ from the ‘national’ and the ‘regional’ level.³⁹⁷ When I conducted my ‘field’ research in Uganda, finding the ‘local level’ was not that easy. The ICC has its field office in Kampala, hundreds of kilometres away from the places in Northern Uganda, where the violence underlying the ICC’s cases unfolded. Still, many NGO representatives that I interviewed in Kampala saw themselves as part of the ‘local’, if only because they were not part of the ‘global’ or ‘international’.

When I went to Gulu and Lira, the largest and second largest towns in Northern Uganda, I thought I had arrived ‘at the local level’. Most NGOs based in Gulu and Lira claim to be ‘local’ or ‘grassroots’. And yet, the conflict-affected communities with which they work and who make them the bearers of ‘local perspectives’ are elsewhere: in the ‘villages’ and the ‘rural areas’. This ambiguity is also manifested in a recent article by Phil Clark on civil society engagement with TJ in Uganda. He quotes an NGO leader in Gulu complaining about the lack of local ownership of TJ policies: ‘At Juba, our situation got hijacked by all these foreign groups like Amnesty [International] and ICTJ [International Center for Transitional Justice], using our case to support the ICC and say that there should

³⁹⁶ Acharya (2004), at 241.

³⁹⁷ Boesenecker and Vinjamuri (2011), at 347.

always be international trials. But what about the voices of local people...?'.³⁹⁸ Yet, is he actually part of the 'local'? For his civil society colleague from a 'rural community-based' organisation in Lango sub-region, he is not. Instead, he is part of 'those big NGOs in Gulu [who] now just do what the government tells them'³⁹⁹

This suggests that the 'global' and the 'local' are not self-evident spaces or levels but claims that different actors make to particular forms of legitimacy. As Stahn argues, the local is an ambiguous category: 'it provides a discursive space to accommodate the divide between "inside" and "outside" in the struggle over political authority and legitimacy'.⁴⁰⁰ In this struggle, the 'global' stands for power, expertise and international networks, while the 'local' stands for 'understanding', grounded-ness and community support. This is reflected in the way many TJ actors claim to be part of both the 'global' and the 'local'.⁴⁰¹ Nonetheless, the 'global' and the 'local' are usually presented as mutually exclusive categories and are used without further explanation.

2.2. Who is Controlling Whom? Powerful Court vs. Weak Intermediaries?

Both 'transitional justice from below' and the 'global-local divide' rely on a simplified understanding of how power and ideas operate in international criminal justice and

³⁹⁸ P. Clark, "'All these Outsiders Shouted Louder Than Us": Civil Society Engagement with Transitional Justice in Uganda', Working Paper SiT/WP/03/15, Security in Transition, available at http://www.securityintransition.org/wp-content/uploads/2015/11/CS-and-TJ-working-paper_Uganda.pdf (visited 14 August 2016), at 8.

³⁹⁹ Ibid., at 9.

⁴⁰⁰ C. Stahn, 'Justice Civilisatrice? The ICC, Post-colonial Theory, and Faces of "the Local"', in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* [e-book] (Cambridge: CUP, 2015) 46, at 47.

⁴⁰¹ A good example is the Justice and Reconciliation Project (JRP) in Gulu. It claims to represent the local by 'working with grassroots communities' and 'bringing local voices to the table'. Yet, JRP was also founded through a partnership with the Liu Institute for Global Issues based in Canada, has international as well as local staff and is funded mainly by foreign sources. It also has become a TJ 'expert' that participates in national and international debates. Justice and Reconciliation Project (JRP), 'History', available at <http://justiceandreconciliation.com/about/history/> (visited 14 August 2016).

thereby obscure more than they illuminate about the ICC's relationship with intermediaries. In a complex and diverse institution that works in nine different countries at the same time with limited staff and resources, power does not only 'sit' at the 'top'.⁴⁰² Rather, power is relational and contextual as the Court depends on local intermediaries for its field engagement. The OTP has admitted that 'it is not an exaggeration to say that the prosecutions themselves are impossible without the assistance of intermediaries'.⁴⁰³ In situation countries such as Kenya and Sudan, where the government is hostile to the ICC's involvement and state cooperation is often wanting, the Court heavily depends on the help of in-country actors for nearly all of its operations. The Court's dependence on local support, knowledge and access means that intermediaries have considerable power to influence the ICC's victims' engagement. A Registry official told me:

We have a new situation or case somewhere, we have to immediately, sometimes very quickly for us ... but even quicker, of course, for the prosecutor, we have to be able to work there. We can't just walk into the places, where we think that the victims are and say 'hi, here we are'. We have to rely on local people to lead us to the victims and especially local people who potentially have the trust of and the knowledge of the victims.⁴⁰⁴

Yet, victims and witnesses are often widely dispersed in rural areas across the country in places that are difficult and dangerous to access for the Court's personnel.⁴⁰⁵ This means that there are often only one or two organizations that can act as intermediaries, leaving the ICC little choice in selecting them.⁴⁰⁶ As a LRV explained, 'they are in a situation where others are dependent on them, lawyers, victims, everybody is dependent on those

⁴⁰² 18 countries if we include preliminary examinations.

⁴⁰³ Prosecution's Submissions in Response to Trial Chamber's Oral Request of 10 February 2010, *Lubanga Dyilo* (ICC-01/04-01/06-2310-Red), Trial Chamber I, 25 February 2010, §12.

⁴⁰⁴ Interview with Senior Official, Registry, The Hague, 16 December 2013.

⁴⁰⁵ *Report of the Court on the Revised Strategy in relation to Victims* (2012), at footnote 19.

⁴⁰⁶ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

intermediaries'.⁴⁰⁷ Lack of field staff also implies that the Court cannot control how intermediaries such as community leaders or relatives engage with victims. A Registry official pointed out, 'because we have to rely on them and we are not always there when they talk to the victims, we cannot control what they say ...'.⁴⁰⁸

The Court has published guidelines on the use of intermediaries to alleviate some of these concerns.⁴⁰⁹ Yet, it is unlikely that the guidelines will increase the Court's control over intermediaries. They are not only vague on the question of their implementation, but also leave the relationship between the Court and many of its intermediaries unclear. In fact, the guidelines are deliberately vague to accommodate the different ways the Court's organs and units conceptualize and use intermediaries. An OTP official explained to me, 'that was one of the difficulties to draft one protocol on intermediaries whereby everyone understands something completely different'.⁴¹⁰ The guidelines only apply to intermediaries working under a contractual relationship with an organ or unit of the Court or Counsel. Their application to intermediaries without contract, including the significant number of intermediaries that are 'self-appointed' or chosen by victims or witnesses, will be determined on a case-by-case basis.⁴¹¹ It is noteworthy that none of the intermediaries interviewed for this research in Kenya and Uganda indicated that they had a contract with the Court.

⁴⁰⁷ Telephone Interview with LRV, 15 January 2014.

⁴⁰⁸ Interview with Senior Official, Registry, The Hague, 16 December 2013.

⁴⁰⁹ *Guidelines on Intermediaries* (2014), at 7.

⁴¹⁰ Interview with Counsel, OTP, The Hague, 13 November 2013. See also *Guidelines on Intermediaries* (2014), at 2-3.

⁴¹¹ *Guidelines on Intermediaries* (2014), at 5-6, 10. In their recommendations to the ASP in November 2015, the Victims' Rights Working Group also asked the Court to address unresolved questions such as how the guidelines are used and how many intermediaries actually benefit from a contract. See Victims' Rights Working Group, 'Recommendations to the 14th Session of the Assembly of States Parties', November 2015, available at <http://www.vrwg.org/downloads/2015asp14vrwgfinal.pdf> (visited 14 August 2016).

Indeed, official contracts would put into law an arrangement where de facto only one party, the intermediaries, bears obligations. As a Registry officer observed, ‘we can have contracts. The thing is you have to be careful because we don’t offer much. Normally in Kenya, we do not offer anything which has been a problem. It is hard to say, “we don’t offer you anything, but this is what you are going to do for us and then sign here”’.⁴¹² Not surprisingly, some intermediaries in Kenya have become frustrated with the Court’s approach towards them. One interviewee put it like this: ‘The intermediary question is one of those which make me extremely angry. With the Court, we have had discussions since 2011 and what do they come up with? Some bloody guidelines which intermediaries are supposed to sign...What for? You don’t offer us security ... Literally, nothing of that [their work] is compensated by the Court.’⁴¹³ Another intermediary complained, ‘when you are reading the newspaper, the cases are not going well ... I feel that if anything happens to that case, let the prosecutor come herself to the victims and tell them. I’m done with being the bearer of bad news.’⁴¹⁴ The case she referred to, the Kenyatta case, indeed collapsed a few months after the interview, in December 2014.

While ICC practitioners often try to downplay the involvement of intermediaries in the Court’s work, these actors crucially shape its victims’ engagement on the ground. Some of the victims’ lawyers and Court officials I talked to were quick to emphasize that

⁴¹² Interview with Legal Officer, Registry, The Hague, 12 November 2013.

⁴¹³ Interview with former Intermediary, Nairobi, 30 June 2014. Drawing on the Court’s case law, the Guidelines on Intermediaries state that intermediaries ‘may fall within the broader category of persons “at risk on account of the activities of the Court”, thereby qualifying for protection’. Yet, decisions on protection needs and arrangements will be made on a case-to-case basis. NGOs have long argued that the Court’s protection of intermediaries is inadequate. See *Guidelines on Intermediaries* (2014) at 4; Open Society Justice Initiative (2011) at 4.

⁴¹⁴ Interview with Intermediary, Nairobi, 2 July 2014.

they *only* use intermediaries for very limited tasks, for example, to identify victims.⁴¹⁵ Yet, victim identification is neither a limited nor a simple, technical task; rather it potentially gives intermediaries substantial power in deciding who is recognized as a victim before the ICC and who is not. In many ICC cases, victim identification is more akin to looking for a needle in a haystack. An intermediary in Western Kenya told me, ‘the biggest problem was that we have never had a documentation, or let’s say a mapping of victims, we never know who we talk about when we are talking about victims....’⁴¹⁶ The LRV in one of the Kenyan cases was able to identify only several hundred out of the 20,000 victims he was supposed to represent with the help of local intermediaries. He observed, ‘we know they exist but we are dealing with a territory of 4 or 5 million people ... how do we find the 20,000 people within the 4 or 5 million?’⁴¹⁷

The difficulty of victim identification suggests that it can act as a mechanism of the exclusion or inclusion of victims on the basis of the political, ideological or ethnic biases of intermediaries. Intermediaries may, wittingly or unwittingly, lead the Court to certain groups of victims more than to other groups. A Kenyan civil society representative pointed out, ‘that has definitely happened here. There are certain intermediaries that work only with certain victims ... they make the claim that they work with all victims but in truth they work with only a particular type of victim and they... recognize [only] a particular type of victimhood.’⁴¹⁸ Intermediaries may not only influence who is identified as a victim but

⁴¹⁵ Interview with ICC Field Staff, Nairobi, 23 June 2014; Interview with LRV, The Hague, 24 November 2013; Interview with Counsel, OTP, The Hague, 13 November 2013. See also FIDH, *Five Myths about Victim Participation in ICC Proceedings* (2014) at 25; ASF, *Modes of Participation* (2013), at 18.

⁴¹⁶ Interview with Intermediary, Western Kenya, 22 August 2014.

⁴¹⁷ Interview with LRV, The Hague, 24 November 2013; The Hague Trials, ‘Fergal Gaynor, the man who speaks for 20,000 Kenyatta case victims at the ICC’, 26 February 2014, available at <https://thehaguetrials.co.ke/article/fergal-gaynor-man-who-speaks-20000-kenyatta-case-victims-icc> (visited 14 August 2016).

⁴¹⁸ Interview with CSO Representative, Nairobi, 19 June 2014.

also how and which ‘victims’ interests’ are conveyed in the court room. Limited resources, security concerns and court deadlines mean that victims’ lawyers and the Court’s staff do not always consult directly with victims. A LRV told me,

if you are a legal representative of 3000 victims and you have ten representatives [intermediaries] each of them is in contact with 300 victims, if you have to answer to the Court what the interests are of these victims, you will ask those representatives [intermediaries] because you cannot personally contact all of your clients. So you are not sure that the answer you will have is really the common answer of all those victims or whether it is indeed the idea of the intermediary⁴¹⁹

VPRS also often consults with intermediaries ‘on issues pertaining to the security and well-being of victims’ rather than with victims themselves.⁴²⁰ This suggests that ‘outside the Court’ actors such as intermediaries can influence not only the selection of victims for the Court’s participation and reparation processes, but also the representation of their interests in the court room.

2.3. Intermediaries Between or Beyond the ‘Global’ and the ‘Local’?

From a ‘global-local perspective’, intermediaries either help to translate the Court’s justice norms into local norms or they reinforce the pre-existing gap between the global and the local. While some scholars and advocates see the ICC’s intermediaries as justice translators, the Court’s discourse on intermediaries is very different.⁴²¹ Despite the fact that the Court established the category of intermediaries and actively solicits their help usually without compensating them, intermediaries are portrayed as a liability for the

⁴¹⁹ Interview with Victims’ Lawyer, Telephone Interview, 15 January 2014.

⁴²⁰ Annex A of Thirteenth Periodic Report on the general situation of victims, *Ruto and Sang* (ICC-01/09-01/11-1792-AnxA), Trial Chamber V(A), 23 January 2015, §2. See also the Registrar’s Tenth Period Report and its Fourteenth Periodic Report.

⁴²¹ On the ICC’s role as translators or interpreters, see D. Clancy, “‘They told us we would be part of history’: Reflections on the Civil Society Intermediary Experience in the Great Lakes Region’, in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* [e-book] (Cambridge: CUP, 2015) 219, at 219, 247.

Court. Part of the reason for this ‘intermediaries as liability’ discourse can be found in the ICC’s first trial, the Lubanga trial, where the first prosecution witness suddenly interrupted his testimony and said, that it was all false and that he had been coached by intermediaries to lie to the Court.⁴²² Since then, defence counsel have on numerous occasions challenged the Court’s use of intermediaries and demanded the disclosure of their identities, alleging that they have tampered with witnesses and unduly influenced victims.⁴²³ In its ‘Decision on Intermediaries’ of 31 May 2010, Trial Chamber I noted that ‘the precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in this trial’.⁴²⁴ When asked about intermediaries, my interviewees at the OTP became reticent: ‘Intermediaries is a very crucial and sensitive thing for us, so I would not like to go into detail’, one said.⁴²⁵

Yet, this ‘intermediaries as liability’ discourse is not limited to court room allegations; it also permeates the Court’s engagement with affected communities. The Court has a special regime of victim participation, reparation and outreach and the Court’s Registry needs intermediaries to identify victims and to assist them with filling out victim participation and reparation forms. Many people I talked to at the Registry claimed that intermediaries have caused problems for the Court’s field work. They are said to make unwarranted promises of assistance to victims, and to misrepresent the Court’s work. Some have even bribed witnesses or demanded money from victims. A Registry officer

⁴²² Transcript, *Lubanga Dyilo* (ICC-01/04-01/06-T-236-Red2-ENG), 27 January 2010, at 20/21.

⁴²³ See for example Defence Application to restrain legal representatives for the victims a/1646/10 & a/1647/10 from acting in proceedings and for an order excluding the involvement of specified intermediaries, *Banda and Jerbo* (ICC-02/05-03/09-113), Pre-Trial Chamber I, 6 December 2010, §§ 14-20; Judgment pursuant to Article 74 of the Statute, *Lubanga Dyilo* (ICC-01/04-01/06-2842), Trial Chamber I, 14 March 2012, §§ 178-182; Public redacted version of “Ruto defence request to appoint an amicus prosecutor”, *Ruto and Sang* (ICC-01/09-01/11-2028-Red), Trial Chamber V(A), 2 May 2016, §§ 1-4.

⁴²⁴ Redacted Decision on Intermediaries, *Lubanga Dyilo* (ICC-01/04-01/06-2434-Red2), Trial Chamber I, 31 May 2010, § 135.

⁴²⁵ Interview with Attorney, OTP, The Hague, 29 November 2013.

contended, 'and we also have to worry that by kind of legitimating the work of a grassroots intermediary, they may take that document and wave it around in their home town or village and become gatekeepers and little emperors, which we have also seen happening'.⁴²⁶ Many ICC officials expressed that if the Court had more resources and field staff, 'direct engagement' with affected communities would be preferable to the indirect contact arranged through intermediaries.⁴²⁷

But this claim is based on the assumption that the Court is a homogenous actor that brings one clear justice vision and practice to its situation countries that intermediaries can subsequently distort. That the Court tries to portray itself in that way is not surprising.⁴²⁸ More surprising is that much of the ICC literature, including critical scholars, simply accepts the Court's self-representation. Many ICC scholars and commentators confidently talk about the 'Court's agenda' and the 'Court's strategy', thereby presuming that the Court is a coherent and unitary actor in its own right. Admittedly, the 'unitary actor' assumption is not omnipresent.⁴²⁹ Some scholars have portrayed the Court as torn by bureaucratic competition and conflicting interests between its different organs and units.⁴³⁰ Kaye, for example, claimed that 'Moreno-Ocampo [the former prosecutor], interpreting the independence of the OTP broadly, challenged the registrar not to raid his bailiwick and continually picked battles with the registrar's staff on everything from human resources to witness protection'.⁴³¹ Yet, this

⁴²⁶ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

⁴²⁷ Interview with Senior Official, Registry, The Hague, 16 December 2013; Registry Observations in compliance with the Decision ICC-01/04-02/06-54-Conf, *Ntaganda* (ICC-01/04-02/06-57), Registry, 6 May 2013, §§3, 11-13.

⁴²⁸ *Report of the Court on the Public Information Strategy 2011-2013*, ICC-ASP/9/29, 22 November 2010, §§ 8, 12-14.

⁴²⁹ Stahn (2016)

⁴³⁰ B.J. Schiff, *Building the International Criminal Court* (Cambridge: CUP, 2008), at 149.

⁴³¹ Kaye (2011), at 123.

analysis usually stops at the level of bureaucratic politics and does not really investigate what such conflicts mean for the integrity of the Court's justice vision and practice. The following section, on the other hand, will show that once we examine 'the Court' more thoroughly, its promise to bring 'justice to victims' disintegrates into diverse and conflicting justice claims pursued by its various practitioners including intermediaries.

3. The ICC's Victims' Engagement through an Interactional Justice Lens

An interactional justice approach helps to challenge the assumption that justice ideas and practices at the Court are uniform and neatly correspond to a 'global' or 'Western' notion of justice. Much ICC scholarship is premised on a stable notion of justice – the meaning of justice may be the product of legal doctrine, professional training, culture or personal belief — but once established the essence of justice is relatively stable and bounded. Interactional justice, on the other hand, claims that the meaning of justice is in flux. It puts the Court's bureaucrats, lawyers and intermediaries at the centre of the justice analysis. In other words, the meaning of 'ICC justice' is neither written in the Court's legal statutes or in philosophical treatises nor in the hearts and minds of affected communities, rather it is continuously shifted and redefined through the mundane institutional discourses, every-day practices and communicative interactions of the Court's practitioners.

Viewed through an interactional justice lens, intermediaries neither look like 'translators' nor 'distorters' that stand 'in-between' the Court and affected communities. Rather, they are simply another category of actors within the Rome Statute system. Once we look at the Court's relationship with affected communities from a 'Rome Statute system' perspective, the boundaries between 'inside' and 'outside' the Court become

more fluid as debates about the 'global' and 'local' are reproduced and refracted within the Court.

3.1. *Dissecting 'ICC Justice': 'Local Ownership', 'Neutral Victims' Engagement' and other Justice Contestations*

In fact, a closer analysis of the Court's victims' engagement reveals that it works precisely through the conflation of the 'global' and the 'local'. For example, contradictory claims to 'local ownership' and 'impartial, global justice' imbue the Court's outreach strategy and create a lot of confusion for victims on the ground. Indeed, from the perspective of affected communities and intermediaries, the ICC often looks like an internally fragmented institution. These internal divisions can cause more problems in the field than the supposedly inherent divisions between the Court and local communities or the distortions and misunderstandings allegedly introduced by intermediaries. This can be illustrated with the example of its outreach programme. The Court acknowledges that 'lack of understanding and misperceptions of the Court's purpose and activities among affected communities can undermine the ICC's legitimacy'.⁴³² A study on public perceptions in the DRC in 2014 showed that while awareness of the ICC's presence has increased in recent years (52% of respondents had heard about the ICC in 2014 compared to 28% in 2008), knowledge about the Court's work is still poor (only nine percent of respondents described their knowledge as good or very good).⁴³³ In addition, 27% said

⁴³² *Report of the Court on the Public Information Strategy 2011-2013*, ICC-ASP/9/29, 22 November 2010, §8c; *Integrated Strategy for External Relations, Public Information and Outreach*, available at http://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf (visited 14 August 2016) (hereafter *Integrated Strategy for External Relations*).

⁴³³ P. Vinck and P. Pham, *Searching for Lasting Peace: Population-Based Survey on Perceptions and Attitudes about Peace, Security and Justice in the Democratic Republic of Congo* (2014) available at

the ICC had a negative impact on justice, while 51% said the impact was neutral.⁴³⁴ In the Central African Republic only one third of respondents indicated having heard about the Court's work with as few as seven percent in some rural areas.⁴³⁵ The Court conducts community outreach 'to clarify misperceptions and misunderstandings and to enable affected communities to follow trials'.⁴³⁶

Yet, this often looks rather differently from the perspectives of the intermediaries whom I interviewed in Kenya and Uganda. An intermediary in Uganda, who participated in several outreach sessions observed:

In all these outreach sessions where people raise questions about the Office of the Prosecutor, the PIDS [outreach] people would not respond ... So many times it is us from the civil society who would respond to the questions from our own understanding of how the Prosecutor's office works ... All these different sections and departments operate like this. They look at themselves as independent of each other, notwithstanding that they sit in the same building, share the same office space ... For heaven's sake, if you are going to do an outreach session perhaps they need to sit down and agree. And say 'for purposes of field outreach this should be our strategy'. So that you don't leave people's minds lingering about whether this is the same Court or not.⁴³⁷

One ICC field personnel in Uganda expressed,

when I go to the field, when they ask questions about OTP [Office of the Prosecutor], ideally because I'm from the Registry, I am not supposed to answer. But for an ordinary person, you come all the way from Kampala to the deep village to say that you don't have an answer. It does not make any sense. It is very confusing for them and you feel it.⁴³⁸

http://www.peacebuildingdata.org/sites/m/pdf/DRC2014_Searching_for_Lastning_Peace.pdf (visited 14 August 2016), at 72.

⁴³⁴ Ibid.

⁴³⁵ P. Vinck and P. Pham, *Building Peace, Seeking Justice: A Population-Based Survey on Attitudes about Accountability and Social Reconstruction in the Central African Republic*, Human Rights Center, University of California, August 2010, at 1, 32.

⁴³⁶ ICC Website, 'Outreach', available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/Pages/outreach.aspx (visited 14 August 2016).

⁴³⁷ Interview with CSO Representative, Kampala, 28 July 2014.

⁴³⁸ Interview with ICC Field Staff, Registry, Kampala, 22 July 2014.

But there are not only divisions between different field sections, or between the headquarters and the field; there are also conflicting ideas about outreach within the ‘Court proper’. As an NGO officer lamented, ‘there are a lot of people within the Court who do not conceive the Court as being something in the field. They think that the important stuff is happening in The Hague’.⁴³⁹ Initially, the OTP was even opposed to community outreach *per se*, interpreting it as an obstacle to its desired ‘low-profile’ approach in the Court’s situation countries.⁴⁴⁰ By definition, outreach activities such as town hall meetings interfered with the prosecutor’s preference for discreet investigations and minimal visibility in the field.⁴⁴¹ Field activities such as outreach have even been discursively framed as *non-core* mandate in the Court’s budget negotiations.⁴⁴² During the 2012 budget negotiations, proposals demanding that *non-core* activities such as outreach and the TFV’s field work should be funded by voluntary contributions rather than the Court’s regular budget were floated.⁴⁴³

Yet, this preference for ‘removed justice’ collides with other voices at the Court that insist on the importance of ‘local engagement’. ‘Local justice’ is usually considered to be ‘the other’ of international criminal justice as the latter follows a very different

⁴³⁹ Interview with A. Smith, Legal Counsel at the NGO No Peace without Justice, 30 March 2012.

⁴⁴⁰ S. Darehshori, ‘Lessons for Outreach from the Ad Hoc Tribunals, the Special Court for Sierra Leone, and the International Criminal Court’, 14 *New England Journal of International and Comparative Law* (2008) 299.

⁴⁴¹ Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years*, July 2008, available at http://www.hrw.org/sites/default/files/reports/icc0708_1.pdf (visited 15 June 2015), at 118.

⁴⁴² CICC, Letter to States Parties on the 2012 budget, 6 July 2012, available at http://www.iccnw.org/documents/CICC_Letter_on_the_2012_ICC_Budget_-_6_July_2011.pdf (visited 14 August 2015). The Court’s Guidelines on Intermediaries also state that it is not always that clear what the ‘core functions’ of the Court are and that perceptions thereof may vary across the Court’s organs and units. *Guidelines on Intermediaries* (2014), at 2.

⁴⁴³ Victims’ Rights Working Group, *The Implementation of Victims’ Rights before the ICC* (2011), available at http://www.vrwg.org/VRWG_DOC/2011_VRWG_ASP10.pdf (visited 14 August 2016), at 4, 5; *Report of the Committee on Budget and Finance on the Work of its Seventeenth Session*, ICC-ASP/10/15, 12-21 December 2011, §25.

rationale than the former: its legitimacy derives precisely from its distance to and rationalization of the horrors of crime.⁴⁴⁴ But the ICC or at least the Registry is also consumed by the ideology of 'local ownership'. As an ICC field staff member told me, 'the idea is ownership. In each community in which you go, you involve the local actors to be part of the process. This is the only way they will own what you are bringing; they will own the message; they will own the programme.'⁴⁴⁵ A legal officer at the Registry contended, 'in my experience, I don't think the legal process in and of itself is meaningful for victims. I think it is really about the engagement with a legal representative, consistently not one off, and the concept of being treated [well] is important, maybe for the first time ever.'⁴⁴⁶ Once we acknowledge that the 'global' and the 'local' are claims rather than spaces, we also find them playing out within the Court.

But even those who champion the 'local' within the Court find themselves caught in contradictory claims: they want a two-way engagement with victims that is nonetheless neutral and detached. While the head of the outreach unit insists that community outreach is 'strictly neutral' and only provides information to local communities,⁴⁴⁷ the Court's website and reports also claim that outreach aims 'to promote understanding and *support* ... of the ICC' and to create local ownership.⁴⁴⁸ It is questionable whether

⁴⁴⁴ P. Clark, 'Distant Justice: The Politics of the International Criminal Court in Africa', Oxford Transitional Justice Research Seminar Series, 27 October 2014, available at <https://podcasts.ox.ac.uk/distant-justice-politics-international-criminal-court-africa> (visited 21 January 2016); P. Gready, 'Reconceptualising Transitional Justice: Embedded and Distanced Justice', 5 *Conflict, Security & Development* (2005) 3.

⁴⁴⁵ Interview with ICC Field Staff, Nairobi, 23 June 2014.

⁴⁴⁶ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

⁴⁴⁷ Email Communication with Head of Outreach Unit, 1 May 2012; See also Regulations of the Registry, Regulation 5bis, 5 December 2013.

⁴⁴⁸ ICC Website, 'Outreach' (emphasis added), available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/Pages/outreach.aspx (visited 15 June 2015); ICC, *Outreach Report 2010*, available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/OUR2010Eng.pdf> (visited 14 August 2016), at 25; Interview with ICC Field Staff, Nairobi, 23 June 2014.

‘neutrally engaging’ with local communities is possible and whether it will go a long way towards creating local support for the Court. In our interview, a senior Registry official acknowledged that victims’ engagement cannot be ‘strictly neutral’. Nevertheless, she emphasized that the role of outreach is not to ‘win over’ affected communities: ‘we always say we are not trying to persuade individual victims to apply for participation or reparations. Our role is to explain and facilitate’⁴⁴⁹ Yet, one victims’ lawyer had a different impression of the Court’s victims’ engagement in the field:

NGOs say, ‘you should do more for victims. You should improve the current situation of intermediaries’ and so on ... So for the Court, if only 20 victims show up [to a meeting], they feel it is a failure. I think the organization of the Court, of the Registry and so on and a lot of NGOs feel that there is a problem, if only a small group of victims comes to the Court. They think it is a success if 5000 victims sign a statement that they want to participate’⁴⁵⁰

In practice, the Court is walking a fine line between ‘neutral outreach’ and ‘advocacy’. Especially in situation countries that lack judicial developments, the Court’s staff and intermediaries are under pressure to offer a vision of what the ICC can do for victims in the absence of trials. It is difficult to keep affected communities interested in the ICC when there are no proceedings for years or when the Court cannot answer the questions that people find most pressing. An intermediary in Kenya complained,

the Court’s message is boring. Key messages have never changed: what is the Court? What is the mandate of the Court? What does the VPRS do? What does the Trust Fund do? They are not willing to engage with all the questions they [the affected communities] have ... ‘What happens to other perpetrators? What’s going on with the compulsion of witnesses?’.⁴⁵¹

⁴⁴⁹ Interview with Senior Official, Registry, The Hague, 16 December 2013.

⁴⁵⁰ Telephone Interview with LRV, 15 January 2014.

⁴⁵¹ Interview with Intermediary, Nairobi, 30 June 2014.

One ‘hook’ for keeping people engaged in the process is to refer to the TFV’s assistance programmes: ‘When we go to do outreach, we explain, “even if there is no guilty verdict, there is no trial, there is nothing ... there is something being done in Northern Uganda. The Trust Fund is already implementing 18 projects in Northern Uganda”.’⁴⁵² But, of course, statements like this raise victims’ expectations. Some victims have even claimed that the Court’s staff promised them assistance and reparations for participating in the process.⁴⁵³

Beyond these ambiguities between ‘local ownership’ and ‘neutral justice’, the Court’s internal divisions also reflect more fundamental contestations on what type of justice the ICC can and should deliver in its situation countries. I should clarify though that the meaning of justice is usually not openly discussed at the Court or litigated on in the court room. Many of the Court’s practitioners are not even aware that their colleagues have rather different justice ideas. For example, one senior Registry official told me,

for me, there are no different meanings of justice. Justice is justice. Justice means conformity to the moralities and the law. The meaning of justice per se is always the same and it cannot be changed ... If you are a practitioner, the notion of justice is quite clear; what is right and what is fair ... to be simple.⁴⁵⁴

However, as soon as we introduce the idea that justice does not only mean conformity to the law but also to morality, the practitioners I interviewed often did not find it that ‘simple’ to settle what is ‘right and fair’ in international criminal justice. In fact, another senior Registry official presented exactly the opposite idea of how the concept of justice

⁴⁵² Interview with ICC Field Staff, Kampala, 22 July 2014.

⁴⁵³ *Berkeley Victim Participation Study* (2015), at 44.

⁴⁵⁴ Interview with Senior Official, ICC Registry, The Hague, 10 January 2014.

functions at the Court: 'It does not mean one thing. It means different things to different people ... Talking about justice for victims is soft if you like, it is how different people see it but it does not say that in the Statute. In a way, it does not mean anything.'⁴⁵⁵

Another colleague pondered:

I don't know to what extent the idea of justice that this Court is applying can be called 'international concept of justice'. Article 21.3, for example, speaks about internationally recognized human rights, something that is supposed to be recognized all over the world, and the Court has used that article many times to find that there are some rights that are internationally recognized. But a concept of justice that is internationally recognized, I don't know which one it is.⁴⁵⁶

This suggests that the concept of justice at the Court is rather fluid and unstable. The Court itself does not provide any policy or legal definition of justice. The consequence is that different ICC practitioners embrace rather different justice visions. For some, justice is a narrow concept tied to the judicial process in the court room: court room justice. As one ICC lawyer emphasized:

If I take the hard core criminal lawyer to which I would count myself, my concept of justice is, in the context of the ICC, in the context of what I am doing, to look at the crimes that have been committed. I look at the evidence in front of me and I look whether I can connect the crimes, the evidence and the perpetrator. If that is the case, I will seek a conviction for the perpetrator for these crimes and whatever comes out of that is for me justice, because this is what this institution is bound to be doing.⁴⁵⁷

His colleague at the OTP disagreed:

Justice is not a legally defined concept. It's a very broad concept. I have noticed in my years of experience that judges often say, 'it's in the interest of justice to do one thing or the other' and I also more and more got the impression that they do that when there is no other legal basis to do so ...

⁴⁵⁵ Interview with Senior Official, ICC Registry, The Hague, 16 December 2013.

⁴⁵⁶ Interview with Legal Officer, ICC Registry, The Hague, 4 February 2014.

⁴⁵⁷ Interview with Lawyer, ICC Presidency, The Hague, 8 January 2014.

It's very difficult to define it. I don't think there is any reason why it should be limited to any procedural function.⁴⁵⁸

Other Court officials also felt that such a narrow concept of justice is not enough. Former ICC Judge Elizabeth Odio-Benito, for example, argued that there is a disconnect between 'court room justice' and the lived realities and justice needs of victims: 'Our notions of judicial justice are incomprehensible for those who are unable to survive without a permanent place to live in, without enough money to take care of their families' basic needs and without full recognition of the atrocities committed against them.'⁴⁵⁹ Some Court practitioners also articulated justice visions for the ICC's victims' engagement that were somewhat independent of court room proceedings: 'Now in terms of concepts of justice, what we are trying to do, at least in Kenya where we have more resources than in other situations, we are trying to do this civic engagement, this civic development, this civic education.'⁴⁶⁰

The TFV even aims at 'transformative justice' in the Court's situation countries.⁴⁶¹

As it notes in its submission on the Court's reparation principles:

In the aftermath of war crimes, crimes against humanity and genocide, it will often not be appropriate to restore the *status quo ante* that gave rise to such crimes, in particular because the majority of victims of such crimes will likely have been the powerless and dispossessed at the time the conflict erupted.⁴⁶²

The TFV therefore suggests that the Chamber explicitly addresses 'transformative reparations' in its reparation principles: 'Reparations that support women's economic

⁴⁵⁸ Interview with Counsel, OTP, The Hague, 13 November 2013.

⁴⁵⁹ E. Odio Benito, 'Foreword' in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nuhoff Publishers, 2009).

⁴⁶⁰ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

⁴⁶¹ For a more thorough analysis of the 'transformative justice' concept at the ICC, see Hoyle and Ullrich (2014).

⁴⁶² Observations on Reparations in Response to the Scheduling Order of 14 March 2012, *Lubanga Dylio* (ICC-01/04-01/06-2872), Trial Chamber I, 25 April 2012, §73.

empowerment can contribute to transformative justice by placing them in a better position to break with historic patterns of subordination and social exclusion.’⁴⁶³

An image of a rather divided institution emerges from this analysis: local ownership, civic education, transformative justice or detached court room justice? The Court’s justice goals are far from clear. This is reflected in the observation of one interviewee: ‘We are one institution but we are many different voices within one institution with different objectives and different priorities.’⁴⁶⁴ In a talk at the University of Oxford, ICC Judge Cuno Tarfusser expressed, ‘I feel we have no identity: Are we an international organization? An NGO? A human rights court? An academic institution? I think we are first and foremost a criminal court. But this is a minority perception at the Court’.⁴⁶⁵ In a nutshell, the Court does not need intermediaries to introduce misunderstandings into its justice process or ‘local perspectives’ to warp its global justice mission; its own justice ambivalence goes a long way in explaining the tensions between the Court and affected communities.

Instead, the Court appears to create a convenient scapegoat. It outsources its mandatory responsibilities of victims’ engagement to intermediaries, for which it does not provide adequate compensation much less security. It confuses them with ever changing participation regimes and conflicting justice visions emanating from the different sections they work with and then blames them for failing to achieve the

⁴⁶³ Trust Fund for Victims’ First Report on Reparations, *Lubanga Dyllo* (ICC-01/04-01/06-2803-Red), Trial Chamber I, 1 September 2011, §34; UN Women, *Progress of the World’s Women: In Pursuit of Justice* (2011), available at <http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2011/progressoftheworldswomen-2011-en.pdf> (visited 16 June 2015), at 98.

⁴⁶⁴ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

⁴⁶⁵ C. Tarfusser, ‘The ICC Today: Achievements, Strengths, Weaknesses, Challenges – A Critical Insight’, Oxford Transitional Justice Research Seminar Series, available at <https://www.law.ox.ac.uk/events/icc-today-achievements-strengths-weaknesses-challenges-critical-insight> (visited 21 January 2016).

impossible, ‘managing expectations’ of a victim population that often has no other avenue to seek redress.⁴⁶⁶ It is hard to escape the impression that intermediaries are set up to fail and serve as a convenient buffer for a Court which does not know what exactly the purpose of its victims’ engagement is.⁴⁶⁷

3.2. *Problematizing the Local: ‘Non-Local’ Victims and Victim-Intermediaries*

An interactional justice analysis suggests that the ‘global’ as represented by the ICC is much more internally contested and complex than the meta-categories of ‘global’ and ‘local’, ‘top’ and ‘bottom’ indicate. What about the ‘local’? Claims to ‘care about the local’ not only imbue the Registry’s victims’ engagement, they have also come to shape the Court’s work more generally as reflected in the debates on whether or not the Court should hold at least parts of its trials ‘in situ’ (‘on site’).⁴⁶⁸ In the Ruto and Sang case, nine out of 14 judges voted in favour of holding the opening statements in Kenya (Nairobi) or Tanzania (Arusha), thereby only narrowly missing the two-third majority required for changing the seat of the Court.⁴⁶⁹ It is noteworthy that all the judges present supported

⁴⁶⁶ ‘Expectation Management’ has become the new buzzword among civil society, academics and the Court’s practitioners as the way to improve the ICC’s victims’ engagement. See *Independent Panel of Experts Report on Victim Participation at the International Criminal Court*, July 2013, §§60, 73; Queen’s University Belfast’s Human Rights Centre (HRC) and University of Ulster’s Transitional Justice Institute (TJI) Submission on Reparations Issues pursuant to Article 75 of the Statute, *Katanga* (ICC-01/04-01/07-3551), Trial Chamber II, 15 May 2015, §§ 2-3 (hereinafter ‘Queen’s and Ulster University Submission on Reparations in Katanga’); *Integrated Strategy for External Relations*.

⁴⁶⁷ In theory, the different organs and units at the Court and Counsel should use different intermediaries to avoid conflicts of interests. Yet, my interviewees at the Registry claimed that this is not always possible as some intermediaries are gatekeepers of particular communities, leaving them with not much choice. The organs and units do not share the lists of intermediaries they use but sometimes they ‘warn’ each other of particular intermediaries.

⁴⁶⁸ Recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda, *Ongwen* (ICC-02/04-01/15-300), Pre-Trial Chamber II, 10 September 2015; Prosecution’s submissions on conducting the confirmation of charges hearing *in situ*, *Ongwen* (ICC-02/04-01/15-264), Pre-Trial Chamber II, 10 July 2015, §§ 3, 7.

⁴⁶⁹ Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11-875-Anx), 26 August 2013.

the principle of 'bringing the proceedings of the Court closer to the affected communities and to where the alleged events occurred'.⁴⁷⁰

Yet, once we unpack this principle, it becomes clear that the concept of the 'local' can be misleading. Most obviously, neither 'Arusha' nor 'Nairobi' represents 'the local' in the ICC's victims' engagement. A victim participation study by the University of Berkeley, for example, found that 'few [victims] knew the location of the court's headquarters'.⁴⁷¹ In Kenya, many 'believe the ICC is headquartered in the United States or the Kenyan capital, Nairobi'.⁴⁷² This already suggests that for some victims in Kenya, trials in Nairobi are almost as abstract as in the United States or in The Hague. Second, international crimes often involve mass population displacement which means that 'affected communities' are often widely dispersed and far away from where the 'alleged events occurred'. Thus, the 'local' is often different places at the same time. In other words, if ever there was a relatively coherent 'local' in the first place, the type of crimes that the ICC pursues tends to destroy it.

Finally, in Kenya, the idea of the 'local' may have contributed to the marginalization of 'non-local' victim groups such as 'integrated IDPs'. 'Integrated IDPs' are Internally Displaced Persons who live outside of IDP camps.⁴⁷³ They live 'dispersed among communities – whether with relatives and friends or in rented accommodation usually in

⁴⁷⁰ *Ibid.*, §10.

⁴⁷¹ *Berkeley Victim Participation Study* (2015) at 3.

⁴⁷² *Ibid.*, at 59.

⁴⁷³ The Kenyan IDP act defines IDPs as follows: "'internally displaced person" means a person or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, large scale development projects, situations of generalized violence, violations of human rights or natural or human — made disasters, and who have not crossed an internationally recognized State border', *Kenya: Act No. 56 of 2012, The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012* [Kenya], 4 January 2013, available online at <http://www.refworld.org/docid/511219962.html> (visited 16 June 2015), at 2204/2205.

urban and peri-urban areas'.⁴⁷⁴ Many 'integrated IDPs' are 'integrated' in name only as they have not found a durable solution to their displacement. The loss of their assets, employment and social networks has pushed many into abject poverty.⁴⁷⁵ There has been widespread neglect of these 'outside of the camps' IDPs both in international humanitarian efforts and in the Kenyan government's assistance and compensation programmes.⁴⁷⁶ Part of this neglect is due to the way the idea of the 'local' glosses over their precarious 'non-local' status. For example, the plight of 'integrated IDPs' in Western Kenya (formerly Western and Nyanza Provinces) has been ignored at least in part because the assumption is that these people 'returned' to their 'ancestral' homeland in Western Kenya. Yet, as the victims' lawyer in the Kenyatta case remarked, 'a significant number of these victims had few genuine links there, and were left with a feeling that they were unwanted intruders into the lives of others'.⁴⁷⁷ Fear has prevented them from going back to where the crimes displaced them. There are many tensions between 'integrated IDPs' and their 'host communities' but the idea of the 'local' and 'ancestral' subsumes them all into one organic whole and has allowed the Kenyan government to get away with failing to help its citizens.⁴⁷⁸

⁴⁷⁴ P. Kamungi, 'Municipalities and IDPs Outside Camps: The Case of Kenya's "Integrated" Displaced Persons"', The Brookings Institution, May 2013, available at <https://www.brookings.edu/wp-content/uploads/2016/06/IDP-Municipal-Authorities-Kenya-May-2013-FINAL.pdf> (visited 13 August 2016), at i.

⁴⁷⁵ Ibid.

⁴⁷⁶ Kenyan Human Rights Commission, *A Tale of Force, Threats and Lies: 'Operation Rudi Nyumbani' in Perspective*, 28 October 2008, available at <http://resource.khrc.or.ke:8181/khrc/bitstream/handle/123456789/58/IDP%27s%20Resettlement%20Monitoring%20Report-%20DRAFT%20OCT%2028.pdf?sequence=1> (visited 14 August 2016).

⁴⁷⁷ Victims' response to the Prosecution's notice of withdrawal of the charges against Uhuru Muigai Kenyatta, *Kenyatta* (ICC-01/09-02/11-984), Trial Chamber V (B), 9 December 2014, §§ 15-16.

⁴⁷⁸ Despite various promises, the Kenyan government has failed to provide comprehensive compensation to victims. See Human Rights Watch, Letter to the Board of Directors of the ICC Trust Fund for Victims, 'Victims of Kenya's Post-Election Violence in Urgent Need for Assistance', 25 April 2016, available at <https://www.hrw.org/news/2016/04/25/letter-board-directors-icc-trust-fund-victims> (visited 18 May 2016).

Another good example for elucidating how misleading the ‘local’ can be is the Court’s use of victim-intermediaries. As the Court does not have the resources and staff for its preferred ‘direct engagement’ with victims, some of its officers and LRVs have opted for another strategy to deal with the perceived problem of intermediaries: using victims rather than civil society organizations (CSOs) as intermediaries. A LRV assistant in Kenya explained: ‘Rule number one is to kill gate keeping as much as possible so that the people you identify to play a role ... they have to be our clients; they are victims; so you do not have an outsider engage in affairs of participation.’⁴⁷⁹

Underlying this preference for victims as intermediaries is the premise that the more local the Court goes, the more legitimate it will be, a premise that is also integral to the ‘global-local divide’.⁴⁸⁰ In practice, the Court works as if involving ‘those vested with leading roles in the affected communities ... for example ... community leaders, chefs de village, or staff members of local NGOs’ will by definition legitimate its process.⁴⁸¹ Late ICC Judge Hans Peter-Kaul even suggested that ‘elders or self-chosen representatives of African villages affected by the crimes in question’ rather than lawyers should represent victims’ interests before the Court.⁴⁸² The notion that institutions are perceived as more legitimate, if they correspond to local values and beliefs is part of many sociological definitions of legitimacy.⁴⁸³ However, this sociological perspective is often conflated with

⁴⁷⁹ Interview with Legal Assistant, Nairobi, 25 June 2014.

⁴⁸⁰ Interview with ICC Field Staff, Nairobi, 23 June 2014.

⁴⁸¹ Decision Establishing Principles on the Victims’ Application Process, *Ntaganda* (ICC-01/04-02/06-67), Pre-Trial Chamber II, 28 May 2013, §27; FIDH, *Five Myths about Victim Participation in ICC Proceedings* (2014), at 25; ASF, *Modes of Participation* (2013), at 17.

⁴⁸² Kaul (2013), at 226.

⁴⁸³ Suchman, for example, defines legitimacy as ‘a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions’. See Suchman (1995), at 574.

the idea that involving 'local actors' per se makes justice initiatives more democratic.⁴⁸⁴

While the participation of victims in justice initiatives can be seen as a 'democratic' or rather 'deliberative' element, de facto representation of victims through victim-intermediaries is more problematic. After all, many victim-intermediaries such as priests, community leaders and elders are not democratically elected. Rather, their legitimacy often derives from traditional power structures that are often contested especially in transitional periods.⁴⁸⁵ My interviews revealed different perceptions on the relevance of traditional authorities to justice processes in Kenya. As one intermediary in Western Kenya asserted:

With Kenya, we embraced the Western system wholeheartedly. Our traditional structure? Is there any community in Kenya that still has the traditional kings? You hardly find that. Because of corruption and materialism, the issue of our community elders is not very valid maybe except only ... among the Kalenjin. That's the only community ... I can think of that has respect for the elders irrespective of whether the elder has money or power.⁴⁸⁶

Yet, another intermediary told me:

They can do that reconciliation through the national media or they can hold meetings with the traditional men, the elders, the village elders, like we have the Kisii council of elders. The President and the Deputy President can come and sit with the council of elders and say, 'we are sorry for what we did to your people and we beg for your forgiveness'... The Kisii people are good in forgiving, so are the Luos.⁴⁸⁷

Whether victim-intermediaries hold more legitimacy than CSOs or the Court's officials is thus often not clear.

⁴⁸⁴ Glasius (2012)

⁴⁸⁵ A.R. Iliff, 'Root and Branch: "Tradition" in Grassroots Transitional Justice', 6 *IJTJ* (2012) 253, at 256.

⁴⁸⁶ Interview with Intermediary, Western Kenya, 22 August 2014.

⁴⁸⁷ Interview with Intermediary, Western Kenya, 23 August 2014.

What is clear is that the opportunities associated with ‘intermediary status’ at the Court have reproduced many of the same dynamics that the Court alleged with regard to CSOs. In Western Kenya, victim-intermediaries were encouraged to organize themselves in IDP networks as a way of building their capacity to mobilize victims and to inform them about the ICC. These victim-intermediaries have benefitted from their role as leaders of IDP networks in ways that other victims have not. One NGO representative explained, ‘the Court does not give anybody money so we had numerous programmes where we would include them [intermediaries] ... So we looked at it in terms of building their capacity but also ... in terms of an opportunity [for them] to get some little money’.⁴⁸⁸ These opportunities have led to infighting in IDP networks between different intermediaries and a ‘scramble for victims’ to sustain their intermediary status and the benefits associated with it.⁴⁸⁹ As the NGO representative confided in me, ‘people are beginning to realize that case two will collapse. There is a scramble for victims so everyone wants to grab them to do this and that and the next pet project is SGBV [Sexual and Gender-Based Violence].’⁴⁹⁰ When I went to a scheduled meeting between the LRV and victims in a small town in Western Kenya, half of the expected victims did not show up due to leadership challenges in the local IDP network.⁴⁹¹

By becoming intermediaries, these victims join the class of ‘victims’ experts’ and consequently become more similar to the Court’s staff and international NGOs. As one victims’ lawyers observed:

⁴⁸⁸ Interview with NGO representative, Kisumu, 26 August 2014.

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

⁴⁹¹ Field Research Notes, 18 August 2014, Western Kenya; See also The Star, ‘Migori, Nyanza IDPs differ over Sh3.4 million, 18 June 2014, available at http://www.ipsos.co.ke/NEWDATABASE_EXPORTS/USAID/140618_The%20Star%20-%20Wednesday_18_7820f.pdf (visited 14 August 2016).

The policy of the Court with intermediaries is to train intermediaries, to organize them, in fact to make them almost agents of the Court. This is a complex development because on the one hand, you can say it is a good thing that intermediaries are trained and so on, but it is also creating much more distance between the intermediaries and the victims by narrowing the distance between the intermediaries and the Court.⁴⁹²

The 'local' in international criminal justice thus takes on quite particular forms as the Court tries to absorb 'its other'. Whether this makes the ICC's justice more meaningful to victims is, of course, an entirely different question.

To sum up, the 'global-local divide' is not only predicated on a simplified image of the 'global' as represented by the ICC, but also of the 'local', as we can see once we examine the role of victim-intermediaries more closely. The Court assumes that using victims as intermediaries is more legitimate because victims share the same interests with regard to the proceedings. My research on victim-intermediaries in Western Kenya suggests that these actors are not necessarily more legitimate given the disunity of the victim population; they have also reproduced similar problems which have accrued from working with civil society actors such as gate-keeping and competition for resources.

4. Conclusion

This Chapter has tried to destabilize the notion of the 'global-local divide' in international criminal justice by introducing a new figure into the debate: the ICC's local intermediaries. Once we situate the ICC's victims' engagement through intermediaries within a broader interactional justice analysis, it transpires that intermediaries are simply another player within the Rome Statute System. Ultimately, the Chapter tried to break the deadlock in what is often at heart a debate between advocates of 'global, Western justice' and 'local,

⁴⁹² Interview with Victims' Lawyer, Telephone Interview, 15 January 2014; See also Haslam and Edmunds (2012).

customary justice' by showing that it is built on false premises. Neither paradigm reflects how justice is actually interpreted, used and implemented within global institutions such as the ICC or within affected communities. An interactional justice analysis, on the other hand, alerts us to the fact that the ICC is a diverse institution in which the concept and practice of justice is still evolving. The Court is still unsure and divided about the kind of justice it can and should promote in the countries it works in. 'Local justice' is also complex, because 'the local', a contentious category in the first place, further fragments through mass crimes as illustrated by the precarious position of the 'non-local' victim and the contested authority of victim-intermediaries. It is thus not clear, whether the ICC becomes more legitimate in the eyes of affected communities by turning selected victims into intermediaries, thereby making them actors within the Rome Statute System.

Chapter V - Who is the ‘Victim’ in Victims’ Justice in Kenya and Uganda?

Chapter V explores what ‘victimhood’ and ‘justice for victims’ mean in the Court’s victims’ engagement. It first looks more closely at the ‘cogs and wheels’ of the Court’s victims’ engagement in Kenya and Uganda, from the field office to the victim, identifying the leaps, disconnections and misinterpretations between the Court’s staff, local intermediaries, partners and victims. The Chapter then examines the Court’s victims’ engagement through three analytical lenses: the victim as constituency, the victim as label and the victim as expertise. Such an analysis first reveals that capturing victims’ assessment of the ICC through the victimological lens of ‘outcome’ versus ‘process’ can be misleading. Victims also evaluate the Court in terms of its ability to act as a ‘justice amplifier’ that fuels broader peace and justice processes which can improve their livelihood. This perspective contrasts starkly not only with the perspective of those ICC lawyers who interpret ‘justice for victims’ in terms of legal procedure but also with victims’ experts in the field such as intermediaries and NGOs who rationalize victimhood by categorizing them according to the harm they suffered. The Chapter then explores how the labels of ‘victimhood’ and ‘victim’ function in Kenya and Uganda, who has the power to apply them and with what policy implications for those designated as ‘victims’ or ‘non-victims’. Ultimately, the Chapter suggests that the ICC’s victims’ engagement in Kenya and Uganda oscillates between irrelevance and divisiveness. By categorizing victims, victims’ experts not only turn victims who do not fit their categories into ‘cheaters’ but also hand a ready-made tool for dividing and ruling victims to powerful actors such as states.

1. Participation in Kenya vs. Assistance in Uganda

The ICC's victims' engagement in Kenya and Uganda at first sight looks quite different. In Uganda, it has centred around the TFP's assistance programmes. With no accused in the dock, victim participation and outreach practically lay dormant from 2010 onwards. The ICC moved much of its field staff from Uganda to Kenya where the Prosecutor opened an investigation in 2010. In Kenya, on the other hand, the TFP has been a notable absentee. The Court's victims' engagement in Kenya has been largely characterized by victim participation and outreach in the two Kenyan cases: The Prosecutor vs. Ruto and Sang and the Prosecutor vs. Kenyatta. This situation has almost completely reversed in the last two years. The Kenyan cases collapsed in December 2014 and April 2016 respectively, while Dominic Ongwen, one of the indicted LRA commanders, suddenly appeared before the ICC in January 2015 after surrendering to the Seleka rebels in the Central African Republic. There are still no traces of the TFP in Kenya, however.

In theory, these divergent models of victims' engagement in Kenya and Uganda (until 2015) should offer a good comparative basis for putting to the test some of the claims that are frequently made about the meaning of 'justice for victims'. Some scholars and practitioners claim that victims primarily want assistance and livelihood; others insist that victims want their voices to be heard in the proceedings. In practice, it is difficult to draw inferences from the case studies regarding the comparative relevance of the 'assistance/reparation' and the 'participation' model. There are simply too many intervening variables and differences between the two contexts that likely shape victims' perceptions: In Uganda, the ICC pursued only the rebels even though government forces were also implicated in the violence, while in Kenya it pursued political leaders who

eventually were elected as President and Deputy President in 2013. In Uganda, there had been no trial proceedings until Ongwen's appearance before the Court, while in Kenya the ICC cases had been a media spectacle for many years until their collapse. In Uganda, the public discourse on the ICC shifted from hostility to indifference to cautious engagement⁴⁹³, while in Kenya, it changed from public support to active mobilization against and vilification of the Court.

And yet despite these differences, it is striking how similar the Court's victims' engagement has been in both countries especially if you look at it through the eyes of victims, intermediaries and civil society. In both countries, a sense of frustration has befallen their relationship with the Court. CSOs have largely reoriented their work away from the ICC and towards domestic transitional justice processes. Many complain that the Court outsources much of its victims' engagement to CSOs and local individuals without compensating their work as 'intermediaries'. Whether 'victim-beneficiary' of the TFV in Uganda or 'victim participant' in Kenya, most victims across both jurisdictions know very little about either the ICC or the TFV. They feel that their expectations have not been met. In both contexts, the question arises of who is really calling the shots as governments and intermediaries use the ICC in their political struggles in ways the Court often does not understand.

Criticizing the predominantly legal analysis of participation and reparation at the Court, advocates regularly point out that 'justice must not only be done but seen to be

⁴⁹³ CSO Statement, 'Applauding the Decision Confirming Charges and Committing Dominic Ongwen to Trial & Calling Upon the Court to Strengthen Legal Representation for Victims, available at <https://drive.google.com/file/d/0B8mSmNvPrstMQWUtSW0zQnczc28/view?pref=2&pli=1> (visited 14 August 2016).

done’ and that ‘victim participation happens in the field’.⁴⁹⁴ Yet, so far, we know very little about the Court’s relationship with victims on the ground. This chapter will shed light on the theory and practice of the Court’s victims’ engagement in Kenya and Uganda by addressing three questions: how do victims evaluate the Court’s engagement with them? How do the labels of ‘victimhood’ and ‘victim’ function in the Court’s situation countries? And how do victims’ practitioners make sense of ‘justice for victims’? Yet, before these questions can be tackled, we first need to uncover the practices of victim participation and assistance on the ground. How do they work in practice?

1.1. *The TFV, Local Partners and Victim Assistance in Northern Uganda*

To find out, my entry point was the ICC’s ‘field office’ in Kampala. Kampala, Uganda’s capital, is located 340 kilometres by road from the places in Northern Uganda, which were the focal point of the civil war. The ICC and the TFV share a ‘field office’ in Kololo, an upscale neighbourhood in Kampala littered with NGOs and international organizations, each tucked away behind a guarded gate and the lush green of exotic plants, but most of them prominently displaying their ‘brand’: UNICEF, Red Cross, Amnesty International. Not so the ICC. It took me some time to find Plot 5 on Baskerville Avenue.

The field office’s location in the capital and its relative invisibility have been justified with reference to the ICC’s special security needs. It is true that the Court was met with hostility when it first set foot into Uganda. Two of my informants told me the story of Chairman Norbert Mao who used to be LC1 (Local Council) of Gulu and now is LC5 of Gulu district and the president of the Democratic Party, an opposition party. In 2007,

⁴⁹⁴ Human Rights Watch, *Making Justice Count: Lessons from the ICC’s Work in Côte d’Ivoire*, August 2015, available at <https://www.hrw.org/report/2015/08/04/making-justice-count/lessons-iccs-work-cote-divoire> (visited 14 August 2016).

Chairman Mao went on MEGA FM, a popular radio station in the North, and called on the people to resist the ICC: ‘If you see those people with this licence [and he gives the number plates of the ICC’s cars], don’t help them, keep them away.’⁴⁹⁵ In another version of the same story, Chairman Mao even called on people to burn the ICC’s vehicles down which ‘indirectly meant killing those in the car’.⁴⁹⁶ During that period, the identity of many ICC intermediaries and the TFV’s local partners was kept confidential so as to minimize security risks for them.

Yet, the ICC’s security situation in Northern Uganda has improved significantly since the LRA effectively ceased operating in the country between 2006 and 2008. In fact, the TFV’s coordinator told me the story of Chairman Mao to illustrate the changes in perceptions towards the ICC in Northern Uganda over time. In 2010, he met Chairman Mao again and at that point he was very positive about the Court. While the Court’s security situation has changed, its visibility has not. On the contrary, it paled further due to the lack of judicial developments in the Ugandan cases. With the Ongwen trial scheduled to start in December 2016, interest in the Court has reawakened. It remains to be seen though how this renewed interest will translate into the Court’s presence on the ground and how it will influence attitudes towards the Court in Northern Uganda.

Victims’ engagement in Northern Uganda at the time of research (July to September 2014) was largely limited to the TFV’s assistance programmes. The TFV has two mandates: reparations and assistance. For its reparation mandate, the TFV is bound to the Court’s narrow definition of ‘case victims’, which are only those victims of crimes a

⁴⁹⁵ Interview with TFV Coordinator, Kampala, 7 July 2014.

⁴⁹⁶ Interview with former TFV Partner, Kampala, 7 July 2014.

defendant has been convicted for. For its assistance mandate, the TFV has much more discretion. Under the latter, the TFV provides physical and psychological rehabilitation as well as material support to victims by funding local and international partner organizations to implement such programmes in Northern Uganda. In the early years, the TFV gave money to local organizations directly but then changed its strategy and channelled more funds to international organizations based in Uganda such as Care International. They would then sub-grant to local organizations to implement assistance projects on the TFV's behalf. Many local partners were dissatisfied with that system. One partner, whose contract with the Trust Fund was not renewed, complained:

The biggest challenge was when they changed their strategy towards funding international organizations, CARE International and AVSI. They spend 70% on administration. By the time it gets to the victims' organizations and victims, there is no money left ... Why are they changing the strategy in a way that benefits the international community more than victims? It kicked most of the direct victims' organizations out of the process.⁴⁹⁷

In 2014, the Trust Fund selected six new partner organizations. Some of these were local organizations which were previously sub-granted by Care International. From June 2015, they began working as the TFV's direct partners.⁴⁹⁸ This suggests that the TFV has at least partially reverted to its initial strategy of supporting local organizations.

Working through international or local partners has both advantages and disadvantages. International organizations have more capacity and diversity of funding. If the limited TFV funding dries up, these organizations continue to operate and they may even be able to absorb victims who do not qualify for TFV assistance into their other programmes. They are also able to comply with the TFV's monitoring and reporting

⁴⁹⁷ Ibid.

⁴⁹⁸ TFV, *Assistance & Reparations* (2015), at 38, 39.

requirements. Yet, operating through international organizations who then sub-grant to local organizations creates waste of resources. It also means that the Court's 'justice message' especially the acknowledgment of harm that reparations and assistance supposedly convey, is likely to get lost. An NGO officer in Gulu remarked,

I think the main problem is the lack of touch between the primary beneficiaries and the Trust Fund for Victims. I think that is the biggest problem. Because the TFV interprets what it wants, it passes it on to international organizations who interpret what they want, who also pass it on to the local organizations who interpret what they want and by the time that trickles down to the primary beneficiaries I think there has been an alteration in what needs to be done.⁴⁹⁹

Local partners are usually more embedded in the communities they work in but they often lack resources to continuously and comprehensively engage with victims. They do not have the means to pay for transport costs or airtime to follow up with victims in the field. The dependence of local NGOs on funding also means that they may be more susceptible to donor agendas and pressure. One NGO officer in Nairobi explained:

It is an NGO syndrome. If I am a local CBO (Community-Based Organization) on the ground and I will try to make money to survive and an NGO comes in and wants to give money to forestry, I will shift my mandate to forestry ... If you are coming and tell me, 'ok next year I will be giving money to women and culture', I'll say 'ok I will do women and culture'.⁵⁰⁰

While my interviewees talked a lot about the differences between local and international NGOs, they are actually similar in many ways. To begin with, most NGOs whether designated as 'local' or 'international' rely on external funding and are therefore dependent on international donors and privy to the language of international development. Everyone, from international to grassroots organization, claims to

⁴⁹⁹ Interview with NGO officer, Gulu, 15 July 2014.

⁵⁰⁰ Interview with NGO officer, Nairobi, 2 July 2014.

‘mainstream gender’ in their activities and to apply ‘best practices’ and ‘monitoring tools’. Many ‘local’ organizations based in Gulu or Lira also have international staff. International organizations, on the other hand, are often staffed with national and local staff on the ground. This means that both local and international organizations are caught in a complex amalgam of international donor pressure, national constraints and local politics.

In both Kenya and Uganda, my informants felt that international and local NGOs had fallen prey to ethnic politics. One former TFV partner claimed, ‘all the programme managers of Care International are Acholi, out of the 11 organizations sub-granted only 3 are remaining and they were all three Acholi. It became ethnic actually’.⁵⁰¹ In Kenya, a civil society representative lamented:

Civil society became a mirror of the collapsed political system ... Even with Red Cross which is supposed to be neutral, I heard that they were supporting certain groups rather than others ... There are some organizations where 75% of people came from one [ethnic] community and the perception from the public was ‘they will never help us because they come from there’.⁵⁰²

As an ICC field staff member told me, ‘it also has to do with the credibility of the NGOs, their interests, their agendas. They are political ... you can’t run away from that’.⁵⁰³

When I asked the TFV’s local partners whether victims understand that the assistance they receive comes from the TFV, I received mixed responses. Some partners were quick to ‘reassure’ me that victims not only understand the TFV’s mandate but also its relationship with the Court. Yet, most partners admitted that it was difficult for victims

⁵⁰¹ Interview with former TFV Partner, Kampala, 7 July 2014. The ‘Acholi’ are an ethnic group in Northern Uganda which has borne the brunt of the conflict with the Lord Resistance Army (LRA).

⁵⁰² Interview with CSO Representative, Kisumu, 26 August 2014.

⁵⁰³ Interview with ICC Field Staff, Registry, Kampala, 22 July 2014.

to understand this relationship. It is not even clear victims understand that the assistance they receive has anything to do with the ICC. A TFV evaluator observed,

most of the victims I spoke to did not know that it was the Trust Fund who was supporting them. They knew the local partners; they would say the name of the local partner. Whenever we went to a site, the Trust Fund's staff introduced themselves: 'we are the Trust Fund. We fund this NGO that supports you'.⁵⁰⁴

In many cases, victims only know the name of the person from the organization they engage with: 'Jennifer' rather than 'AVSI'. One TFV partner told me,

we explain that the ICC and the Trust Fund are like 'brothers'. The ICC is looking at the law, taking the perpetrators to be accountable for what they did to you. But the Trust Fund is saying, 'I am going to support you who was injured during the war'... They are like brothers. There is no way you can separate them.⁵⁰⁵

According to her, 'ICC' is a reference point for people even though they do not know much about its mandate but 'Trust Fund' is very difficult to even pronounce in the local language. Besides, some local partners actively disguised the connection between the ICC and the TFV when hostility and fear of the ICC abounded. When they went into the communities to identify victims for physical rehabilitation in 2009, they would not mention the Trust Fund's association with the ICC: 'we thought it would scare them off.'⁵⁰⁶

1.2. *Victims' Lawyers, Local Intermediaries and Victim Participation in Kenya*

If the Court's field office in Kampala was not exactly visible, its office in Nairobi is exceptionally well hidden within the UN complex. Security is tighter than at the ICC in The Hague which is partly due to the threats of terrorism and high crime in Nairobi and partly due to the particular threats the ICC is facing in Kenya.⁵⁰⁷ On arrival in Nairobi, I had to

⁵⁰⁴ Telephone interview with TFV evaluator, 3 January 2015.

⁵⁰⁵ Interview with TFV Local Partner, Gulu, 10 July 2014.

⁵⁰⁶ Ibid.

⁵⁰⁷ See Chapter II for more information about the ICC's security situation in Kenya.

think back to what some of the Registry's staff in The Hague had told me about their first attempts to engage victims in Kenya:

We find in most places that we start off in the capital city with the sophisticated human rights groups, wherever they are, and we realize pretty quickly that, despite what they say, they are not the ones that actually have the links with the victims and that they are in no better place than we are to identify the victims. But they are helpful, of course, in many ways including in helping us to find the more grassroots organizations closer to the victim communities, which on the one hand is much more difficult, because they usually don't have lawyers working there. They don't have the knowledge of any legal proceedings, let alone international criminal ones. But they are the ones that actually have that contact with the victims.⁵⁰⁸

My own experience was similar to that. CSOs in Nairobi were very sophisticated, which did not always facilitate their victims' engagement. There is a disconnect between their focus on legal analysis, political advocacy and technical support and victims' concerns with basic needs. Victims would tell them, 'this information you are sharing doesn't bring me food on the table'.⁵⁰⁹ Few Kenyan CSOs are service-oriented and those who are do not specifically focus on post-election violence (PEV) victims.⁵¹⁰ In an early report on victims' representation in Kenya, the VPRS stated that 'just as the victim population is complex, so too is its relationship with civil society'.⁵¹¹ An important aspect of this complexity is that 'civil society' is perceived to be politicized and/or corrupt by many Kenyans. One Kenyan lawyer claimed:

Most civil societies started as an alternative to the government, as an opposition to the government. People who started an NGO are the most affluent in the city, because they began the same as the government bureaucrats that used to take money from the donor community. Instead

⁵⁰⁸ Interview with Senior Official, Registry, The Hague, 16 December 2013.

⁵⁰⁹ Interview with CSO Representative, Nairobi, 4 July 2014; Interview with CSO Representative, Nairobi, 2 July 2014.

⁵¹⁰ Interview with CSO Representative, Nairobi, 2 July 2014.

⁵¹¹ Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and annexes 2 to 10, *Situation in the Republic of Kenya* (ICC-01/09-6-Red), Pre-Trial Chamber II, 29 March 2010, §23.

of taking it to the grassroots it was stolen by civil servants and now it was actually stolen by civil society.⁵¹²

Local organizations have faced similar accusations. One CBO representative self-critically reflected on how her own thinking evolved during the PEV crisis:

Tribe has a sense in which it creates affiliational alliances and I would say that, because whereas before I was working with all the victims who came in, after listening to their stories for two and a half months, I was asking myself ‘why it was that I was supporting these “other victims”?’ You start questioning a lot of issues because everybody around you categorizes whether or not they are victims.⁵¹³

The Court arguably needs CSOs in Kenya more than in many other situation countries. In Kenya, the ICC works in a hostile environment in which political leaders at all levels are actively obstructing the Court’s work. The help of civil society and local informants is thus crucial for navigating a highly politicized and fast-changing Kenyan justice landscape. As one CSO representative explained:

If you come as a foreigner you meet people, they impress you. One of our roles has been explaining relationships. Inevitably we had to quickly build trusting relationships and to build trusting relationships takes long. But our own track record of standing up to the Kenyan government gives them [the ICC] confidence that maybe they can work with us.⁵¹⁴

While the ICC was prominently discussed in Kenyan media when I arrived, ‘victim participation’ was much more dispersed. It consists of victims’ lawyers’ submissions to the Court, their interviews with the national and local media, phone calls between their field assistants and victims and, finally, meetings between victims’ lawyers and their clients. The latter in Kenya are divided into registration and participation missions. Registration missions identify victims for participation, while participation missions

⁵¹² Interview with former ICC Victim’s Lawyer, The Hague, 28 October 2013.

⁵¹³ Interview with Intermediary, Kisumu, 26 August 2014.

⁵¹⁴ Interview with Civil Society Representative, Nairobi, 19 June 2014.

inform already registered victims of ongoing case developments. While I was in Western Kenya, I had the opportunity of accompanying one victims' lawyer and his field assistants on registration mission. The first meeting was scheduled at 9am in a conference hall in Migori, a small town in Western Kenya. When we arrived at 9am, six victims were already waiting in the room, yet the victims' lawyer had expected close to 40 victims. His field assistants began a discussion with the intermediary, who was waiting outside the venue to greet the victims. Apparently, there had been leadership challenges in the Migori IDP network with some of the IDP leaders telling 'their' victims not to attend the meeting. Eventually, 20 victims were present and the meeting started.

Meetings start with a prayer. Then all victims were asked to briefly introduce themselves. This is when I left the room so as not to overhear their names, which was a precondition for allowing me to observe the meeting. One of the field assistants then began to explain the ICC's mandate in the local language, 'Luo'. The victims' lawyer had so far mainly registered victims of Luo and Luya ethnicity even though Kalenjin victims were also part of the case. This may have been due to the fact that his field assistants were 'Luo' and 'Luya' and therefore could more easily establish contact with these victims. In fact, one field assistant told me that he was initially asked to be on the team for the case against Ruto and Sang. He declined the offer because 'the conflict took an ethnic angle'.⁵¹⁵ He felt that it would be difficult to bridge the ethnic divide, to develop that trust with Kikuyu victims 'if they perceive you to be pro-ODM'.⁵¹⁶ Another reason for the ethnic make-up of the registered victims may have been that Kalenjin victims are assumed to be

⁵¹⁵ Interview with LRV Assistant, Nairobi, 25 June 2014.

⁵¹⁶ Ibid. ODM (Orange Democratic Movement) was the name of the opposition party that ran against President Mwai Kibaki's Party of National Unity (PNU) during the 2007/8 election.

more hostile towards the Court as they are ‘ethnically allied’ to the Deputy President, William Ruto, who was one of the accused in the Kenyan cases.

‘Ethnicity’ permeates everything in Kenya in the sense that people regularly make claims about ethnic groups and their supposed characteristics: ‘Luos seek luxurious lives; Kikuyu are money-oriented. Reconciliation with Kalenjin is not possible.’⁵¹⁷ Yet, the functioning of ethnicity in the Kenyan context is complex.⁵¹⁸ Ethnicity matters more for the poor than for the rich: ‘What I mean is when you have resources, the issue of which tribe you come from is secondary. When you have no resources, the issue of which tribe you come from is primary.’⁵¹⁹ Besides ‘ethnicity’ is not the only or even the primary identity. Many Kenyans see their identity as ‘Kenyan’ and as ‘African’ on par with their identity as ‘Kikuyu’ or ‘Luo’. These identities often reinforce each other rather than being mutually exclusive. When I asked one victim-intermediary why he helps the Court to mobilize victims, he replied: ‘I want justice to prevail. I’m a Kenyan and I live in Kenya. I work in Kenya and all of my life depends on Kenya. And if all my life collapses it is because of Kenya.’⁵²⁰ Ethnicity may also matter more to the old than to the young: ‘It’s a generational issue. In my parents’ generation, tribal issues are deep-seated.’⁵²¹ The violence that followed the 2007/2008 election arguably followed the logic of political alliances more than ethnicity. For example, the initial attacks of ‘Kalenjin’ against ‘Kikuyu’ in Central Province led to ‘retaliatory attacks’ by ‘Kikuyu’ against ‘Luo’ in the Rift Valley.

⁵¹⁷ Interview with Intermediary, Kisumu, 30 August 2014.

⁵¹⁸ For a nuanced analysis of the construction of ethnic groups in Kenya, see G. Lynch, *I Say to You: Ethnic Politics and the Kalenjin in Kenya* (Chicago: University of Chicago Press, 2011).

⁵¹⁹ Interview with Intermediary, Nairobi, 2 July 2014.

⁵²⁰ Interview with Intermediary, Western Kenya, 19 August 2014.

⁵²¹ Interview with former Intermediary, Nairobi, 30 June 2014.

The retaliation thus did not target the ethnic group that was associated with the initial attacks but those ethnic groups that were seen as supporting the opposition.

I did not understand much of George's⁵²² ICC introduction in Luo but his style reminded me of a teacher trying to engage his pupils in a new topic. He first asked the victims what they already knew about the Court and some of them raised their hands to present some ideas. Some were rather shy, others much more vocal. He then talked them through the ICC's mandate relating it to examples from Kenyan courts. Eventually, it was the turn of the victims' lawyer to explain his work to them. He began:

We are not an NGO. We do not have a mandate to give school fees, hospital fees or land but I know that many of you have not received any assistance or compensation by the government. So we do pressurize different groups to give assistance to victims. We have written to donors but again, I want to emphasize that this is not our mandate. Our mandate is to defend the legal interests of the victims in the case.⁵²³

And what is the role of victims in this? 'We seek your views on questions like "should the trials be held in Nairobi, Arusha or The Hague? Should the accused be present at trial?" On technical issues, we just defend your interests.' In reality, very few questions in ICC proceedings are like the former while most are so-called technical questions where the victims' lawyer defends what is presumed to be in the victims' interests. After his presentation, victims can ask questions. Some victims were very outspoken: 'Why does the case only cover Nakuru and Naivasha? What about the victims in Nairobi, Kisumu, Mombasa and Busia?' Many victims nodded and clapped in support. The victims' lawyer tried to reassure them; he wrote a letter to the Prosecutor urging her to investigate

⁵²² Not his real name.

⁵²³ This quote and those that follow were taken from my field notes taken during the registration mission in what was formerly Western and Nyanza Provinces (Migori, Kolweny, Ahero, Vihiga) from 18 August to 22 August 2014.

further crimes. Other victims were keen to provide evidence: 'What evidence do you need? What do you want to know?' One woman insisted that she saw a photo of President Kenyatta giving money to the Mungiki gangs that she can give to the prosecutor. Many wondered, 'how are we going to benefit from the process?'

A break with tea and lunch followed. The atmosphere was chatty. Observing the people, the LRV told me with indignation that the Court's Counsel Support Section had suggested that food should only be given to those victims who travelled from afar: 'They want as few victims as possible to attend. They see victim participation as a favour not a right.' In addition to food and tea, victims also receive 500 Kenyan Shillings, roughly three British Pounds, to cover their transport costs to the venue. Victims who travel from very far may receive a bit more. One field assistant was convinced that transport reimbursement plays a big role in victims' decision to attend the meetings. According to her, some victims don't make this in a month: 'Victims come to get reimbursement, tea and lunch and see some friends.' During one of the breaks, a woman came to me and explained that the transport reimbursement is not enough to feed her children.

After lunch the victims' lawyer and his assistants began to interview victims individually to determine whether they fall within the scope of the case. George explained the process: victims can choose to go to the victims' lawyer (if they feel confident speaking English) or to the three field assistants (who offered interviews in Luo, Luya and Kiswahili). Many victims chose the field assistants maybe due to the language barrier. They waited for their interview in queues and chatted with others in the meantime. In the course of an interview that lasts for 15 to 20 minutes, the lawyer and his assistants establish whether a person qualifies as 'case victim' and therefore has rights to participation. The

case only covered attacks from 24 to 28 January 2008 perpetrated by the Mungiki gangs against people perceived as 'non-Kikuyu' in Nakuru and Naivasha. This information is publicly available. One victims' lawyer told me that in his experience victims sometimes fit too neatly into the parameters of the case.⁵²⁴ He had encountered situations where one victim after the other began their story with 'it happened on the...' and then said the same date. He suspected that the intermediary may have told them in advance what they should say.

Some field assistants tested the victims' stories: 'you said that you came from this area, can you tell me the name of the local hospital? How far was your place from the local police station?' Those who are caught lying are told off. The victims' lawyer himself did not interrogate the victims' stories too closely. He thought it was better to include 10 'fraudulent' victims in the proceedings than to exclude one 'genuine' victim. Besides, the chances of victims receiving anything substantive out of these proceedings such as reparations are slim in that case. There is no point in poking holes into their stories. Those victims who do not fall within the case's parameters are told so immediately after the interview.

Even though unintentional, there is something disturbing about this procedure: victims are turned into 'cheaters' because they do not fit the narrow and ultimately arbitrary delimitation of the case. One victims' lawyer told me:

One of my field staff was talking to this woman; she had been raped six times, house burnt down - extremely egregious crimes and then my field staff said: 'what day was that?' and the woman said, 'it was on 6 January 2008' and my field assistant said 'Oh my God, I wished she would just say 26 [January].' Because 26 is within the temporal scope of the charges but 6 is outside. And on the same day I spoke to a man and I said: 'Did you lose

⁵²⁴ Interview with Victims' Lawyer, Nairobi, 1 July 2014.

any family?’ ‘No, no’, ‘Was your house burnt down?’ ‘No, no’... then he said ‘but they did take a hundred loads of bread from me’... Now this falls within the scope of the charges. So this man was not particularly complaining about his condition in life but he becomes a victim and the lady who was raped six times on the wrong day is not a victim.⁵²⁵

It is also not clear whether victims fully understand the process or the criteria for inclusion and exclusion. One interview I observed was between the victims’ lawyer and a young man. When asked about his age, the man stated that he was 27. The lawyer pointed out that his ID said that he was 17. The man explained that there was a mistake with his ID. Later during the interview, he claimed that he was 37. This left me and the lawyer rather confused. There are many possible explanations for this story and perhaps the language barrier is the most obvious. But I could not help feeling that the young man had understood that there was an exclusionary mechanism but wrongly assumed that it was age rather than the date and place of the attack. He seemed quite anxious in his attempts to persuade the victims’ lawyer that he was older than he looked and than his documents claimed. Perhaps he thought that one had to be older than 18 to participate in the case.

2. The Victim as Constituency

This experience of confusion and mutual misunderstanding epitomizes victim participation. When I was at the Court, some officials were confident that victim participation in Kenya differed from that in other situation countries. A Registry officer insisted that you cannot compare victim participation between countries like the Central African Republic and Kenya.⁵²⁶ In the former illiteracy rates are high and people lack basic knowledge about legal processes, while in the latter, people are very well informed; ‘they

⁵²⁵ Interview with LRV, The Hague, 24 November 2013.

⁵²⁶ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

are watching the proceedings live on TV at a 30 minutes delay every day.’⁵²⁷ One ICC judge had heard that the Court’s proceedings were transmitted in supermarkets, almost like public viewings.⁵²⁸ Another judge recalled:

When I was a Single Judge in the Kenyan cases, I was very much astonished to find out - the young people here on the floor told me - that there was a muppet show with me and Mr. Ocampo. Girls were named after me...For them [Kenyan victims] the ICC is a legitimate and highly reliable institution. For example, ordinary citizens from this same country did not want to hold in situ trials because they wanted the suspects to come to the Court, to face justice here.⁵²⁹

These ideas were only partially borne out by a study of 622 ICC victim participants in Uganda, the DRC, Kenya and Côte d’Ivoire published by the University of Berkeley in 2015.⁵³⁰ The study showed that victims in Kenya do not necessarily have a better understanding of the Court’s processes than victims in Côte d’Ivoire or the DRC.⁵³¹ The more important knowledge divide exists between well-informed victims in capital cities and poorly-informed victims in rural areas.⁵³² Crucially, most victims did not regard the ICC as independent and had little trust in the institution (though they trusted domestic/regional courts even less).⁵³³ The Berkeley study quotes a victim as saying, ‘the ICC is a biased court. They’re looking after big money. If you have money, you’re protected; there’s no justice that will occur.’⁵³⁴ A victim-intermediary I interviewed in Western Kenya shared this view:

We are afraid that the ICC is not working. It is favouring Uhuru [Kenya’s President]. They told us that there were 32 witnesses and now you are telling me that there are no witnesses ... Today, you are telling me that

⁵²⁷ Ibid.

⁵²⁸ Interview with Judge, The Hague, 19 December 2013.

⁵²⁹ Interview with ICC Judge, The Hague, 13 February 2014.

⁵³⁰ *Berkeley Victim Participation Study* (2015).

⁵³¹ Ibid, at 3, 59.

⁵³² Ibid.

⁵³³ Ibid, 53.

⁵³⁴ Ibid, 53.

there is no case to answer for them? You are favouring them! Why don't you take the action in a proper way?⁵³⁵

These examples give rise to the question of how victims make sense of the ICC and how their perspectives compare with those of practitioners inside and outside the Court.

The literature on victims' perspectives of the criminal justice process is characterized by two competing theories, 'distributive justice' and 'procedural justice', which have also entered the ICC's discourse.⁵³⁶ Distributive justice theories posit that victims' satisfaction with criminal justice depends on the trial outcome: the conviction and punishment of the offender and the award of reparations and assistance for the victim. In recent decades, several studies in the domestic context have shown that 'procedural justice' matters too: victims do not only care about the outcome but also about the fairness of the process.⁵³⁷ Tyler identified neutrality, trust, respect and voice as key determinants of victims' judgment of procedural justice.⁵³⁸ The more victims perceive decision-makers as impartial and objective ('neutrality'), the more they trust their intentions ('trust'), the more they feel they are treated with respect ('respect') and have the opportunity to voice their concerns ('voice'), the more they are satisfied with the criminal justice system even independently of its outcomes.⁵³⁹

⁵³⁵ Interview with Intermediary, Western Kenya, 22 August 2014.

⁵³⁶ T. Van Camp & J. Wemmers, 'Victim satisfaction with Restorative Justice: More than Simply Procedural Justice', 19 *International Review of Victimology* (2013) 117.

⁵³⁷ B. Bradford, 'Voice, Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System', 11 *Criminology & Criminal Justice* (2011) 345; J-A. Wemmers, R. van der Leeden and H. Steensma, 'What is Procedural Justice: Criteria used by Dutch Victims to Assess the Fairness of Criminal Justice Procedures', 8 *Social Justice Research* (1995) 329; I. Elliott, S. D. M. Thomas and J. Ogloff, 'Procedural Justice in Contacts with the Police: Testing a Relational Model of Authority in a Mixed Methods Study', 17 *Psychology, Public Policy, and Law* (2011) 592.

⁵³⁸ T.R. Tyler, 'Social Justice: Outcome and Procedure', 35 *International Journal of Psychology* (2000) 117.

⁵³⁹ Ibid.

The Berkeley study on victim participation even built the importance of ‘procedural justice’ into its theoretical premises even though the theory has hardly been tested in the context of international crimes. Victims were asked whether ‘they felt they had a voice in ICC proceedings; viewed the ICC as a neutral arbitrator; felt respected by court staff; trusted the ICC; felt safe being associated with the court; and wished to receive reparations by way of the ICC.’⁵⁴⁰ The OPCV’s guide for LRVs also takes the importance of procedural justice for granted.⁵⁴¹ So do some of the Court’s staff members.⁵⁴² One senior Registry official insisted: ‘We have since 2005 assisted a little bit more than 15000 people, out of them not even 10% have requested reparations. I would say in our experience that they attach the concept of justice to participation rather than reparations.’⁵⁴³

Yet, others were convinced that what really mattered to victims was the outcome of the trial. Her colleague at the Registry pointed out:

So for me, reparations have to come first. Because what victims want - I mean, I am sure that they care and that they are happy to give their views and concerns, but I am sure that they do so because they believe that this is important for them to receive reparations.⁵⁴⁴

For an OTP staff member, justice for victims was first and foremost about accountability and punishment:

Look, justice, impunity, you know all these terms which are kind of now being overused. But even then they have a very, very strong meaning and after a conflict in a country justice is a very strong thing. And from the perspective of the victims and how I understand it, it means only one thing: to make the perpetrators responsible for what they have done, so that’s justice.⁵⁴⁵

⁵⁴⁰ *Berkeley Victim Participation Study* (2015), at 32.

⁵⁴¹ OPCV (2014), at 8.

⁵⁴² Interview with Senior Official, Registry, The Hague, 16 December 2013.

⁵⁴³ Interview with Senior Official, Registry, The Hague, 10 January 2014.

⁵⁴⁴ Interview with Legal Coordinator, Registry, 6 February 2014.

⁵⁴⁵ Interview with OTP staff member, The Hague, 22 January 2014.

Overall, the Berkeley study rather confirmed the importance of distributive justice. Victims expect convictions and reparations and their assessment of the Court depends on the delivery of these outcomes.⁵⁴⁶ They also care about the personal dimension of procedural justice: they find value in filling out individual applications and their satisfaction with the ICC ‘depend[ed] largely on their personal interactions with ICC staff and their legal representatives’.⁵⁴⁷ Yet, ‘most victim participants ha[d] insufficient knowledge to make informed decisions about their participation in ICC cases’.⁵⁴⁸ They did not know where the Court was based, whom it could try and for what crimes.⁵⁴⁹ One may wonder how much role ‘procedural justice’ can play if victim participants do not understand how the procedure works. It was also not always easy for victims to grasp the meaning of ‘voice’ or ‘respect’ in that context. One of the study’s investigators told me that victims would frequently ask questions like ‘what do you mean by saying, “do I feel that I have voice in the proceedings?”’.⁵⁵⁰ Besides, an important difference between victims of domestic and international crimes is that the latter often still struggle to meet their basic needs. Psychological studies suggest it is difficult for people to care about the legal procedure of a Court if their basic needs are not met.⁵⁵¹

In my own interviews with victim-intermediaries, another justice conception emerged which defies both the procedural and the distributive logic. Some of my interviewees made sense of the Court as an amplifier of their voices. The Court brings media attention; it can exert pressure on the government; it unleashes a whole

⁵⁴⁶ *Berkeley Victim Participation Study* (2015), at 3.

⁵⁴⁷ *Ibid*, at 4.

⁵⁴⁸ *Ibid*, at 3.

⁵⁴⁹ *Ibid*, at 3.

⁵⁵⁰ Informal conversation with Study Investigator, Berkeley, August 2015.

⁵⁵¹ Wemmers (2014).

international justice industry that can potentially connect affected communities and victims to donors. In this conception, the ICC is evaluated and appreciated to the extent that it acts as a ‘justice amplifier’: does it manage to kick-start broader justice and peace processes in the country? Does the ICC’s ‘limelight effect’ bring tangible benefits to victims and intermediaries? One victim-intermediary in Western Kenya explained:

We know that assistance is not part of the ICC but we have requested that if we can get a donor from anywhere. They can help us. We know that they [the ICC] know donors. We have the victims here and they are not helped by the Kenyan government. And we are helping them with the case. You can give them something for their household or assistance. You can give them something to start.⁵⁵²

This idea was also expressed in Chris Tenove’s study with 84 victims of violence in Kenya and Uganda:

There were also frequent calls for the ICC to take on further roles. For instance, many participants did not see the ICC as simply a judicial body, but as a new ally to improve long-standing political problems, either of recurring factionalism and electoral violence (Kenya) or civil strife between regions (Uganda). Some participants wished the ICC would deliver a range of material goods, from new roads to funds for new businesses, which go well beyond its capacities.⁵⁵³

Rather than narrowly judging the Court in terms of outcomes (most ICC cases are not at the conviction and reparation stage yet) or procedure (most victim participants do not know enough about the Court to judge if they are being treated in a procedurally just way), they see the ICC’s role as a victims’ advocate. Its legitimacy depends on its ability to improve the lot of victims through ‘outside the court room’ pressure and networks.

This speaks to a larger gap between how victims make sense of the ICC and how the Court makes sense of them. Many victims thought the ICC was an aid organization

⁵⁵² Interview with Intermediary, Western Kenya, 22 August 2014.

⁵⁵³ Tenove (2013), at 34/35.

rather than a criminal court⁵⁵⁴, while the ICC primarily sees victims as a way of validating their proceedings.⁵⁵⁵ As one civil society representative in Western Kenya complained:

Because the way the Court understands what justice is for victims and how victims think of justice ... There is a complete disconnect. The impression is that the Court looks at victims to be able to justify the conviction of the perpetrator. The focus on victims is more in terms of validation of the case. And even the units of the Court also treat the victims as such. You want to protect them to make sure the case is valid. You want to understand, 'is the story accurate?'. You are screening people. At no point are we starting to look at victims as human beings within the context of what else can we do for them.⁵⁵⁶

3. The Victim as Label

Victimologists have long argued that 'victim' is not simply a descriptive term and much less a self-evident identity for those who suffered crimes; it is also a social and political construction.⁵⁵⁷ For critical victimologists, the key questions have been 'who has the power to apply the label?', 'whose claims to victimhood are accepted and why?' and 'what are the policy implications for those labelled as victims and non-victims?'.⁵⁵⁸

There has been extensive research on the way victims are conceptualized and treated within domestic criminal justice systems. This research revealed that victims' policies are often based on rather stereotypical assumptions about victimhood.⁵⁵⁹ These

⁵⁵⁴ *Berkeley Victim Participation Study* (2015), at 32.

⁵⁵⁵ Vasiliev (2016), at 1137.

⁵⁵⁶ Interview with Intermediary, Kisumu, 26 August 2014.

⁵⁵⁷ R. Condry, 'Appreciating the Broad Reach of Serious Crime and the Interpretive Power of Claims to Secondary Victimization', in D. Downes, D. Hobbs and T. Newburn (eds), *The Eternal Recurrence of Crime and Control: Essays in Honour of Paul Rock* (Clarendon: Oxford, 2010); C. Hoyle, M. Bosworth and M. Dempsey, 'Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality', 20 *Social & Legal Studies* (2011) 313; S. Walklate, *Imagining the Victim of Crime* (McGraw Hill: OUP Press, 2007).

⁵⁵⁸ D. Miers in Dignan (2005).

⁵⁵⁹ E. A. Fattah, 'Victimology: Past, Present and Future', 33 *Criminologie* (2000) 17, at 39; E. A. Fattah, 'The Evolution of a Young and Promising Discipline: Sixty Years of Victimology, a Retrospective and Prospective Look', in S. G. Shoham, P. Knepper and M. Kett (eds), *International Handbook of Victimology* (Boca Raton, FL: CRC Press, 2010) 43, at 57.

include that victims and perpetrators are distinct categories with diametrically opposed needs, that only ‘innocent’ victims are ‘true’ victims and that justice for victims requires punishing the perpetrator.⁵⁶⁰ The idea of ‘innocent victimhood’ in particular tends to create a ‘hierarchy of victimhood’ that considers some victims to be more ‘deserving’ of compassion, assistance and reparation than others. These assumptions not only threaten to entrench discriminatory policies, they also fly in the face of much empirical research that indicates that ‘victims’ and ‘perpetrators’ are fluid and overlapping categories with members of socially vulnerable groups, for example the homeless, often having daily experiences of both roles.⁵⁶¹ Victimologists have also studied how the trope of ‘innocent victims’ is used politically. ‘Right wing, law and order’ activists, for example, have used the language of ‘innocent victims’ to push for more punitive criminal justice responses, while victims’ advocates use it to achieve better victims’ services and compensation.

In international criminal justice, critical scholarship has focused on the ICC’s power to define the victims’ label. As Nouwen and Kendall have argued, ‘seeking redress through recognition by an entity such as the Court is beset by the limitations and exclusions illustrated through the narrowing of the pyramid of juridified victimhood’.⁵⁶² ‘Juridified victimhood’ refers to the ways in which the recognition of victimhood at the ICC is made conditional on victims fulfilling certain legal criteria.⁵⁶³ An important distinction in this regard is between ‘case victims’, those who are victims of crimes charged by the

⁵⁶⁰ McEvoy and McConnachie (2012), at 531/532; K. McEvoy and K. McConnachie, ‘Victims and Transitional Justice: Voice, Agency and Blame’, 22 *Social & Legal Studies* (2013) 489. See also A-M. McAlinden, ‘Deconstructing Victim and Offender Identities in Discourses on Child Sexual Abuse’, 54 *British Journal of Criminology* (2014) 180; A. Heber, ‘Good versus Bad?: Victims, Offenders and Victim-Offenders in Swedish Crime Policy’, 11 *European Journal of Criminology* (2014) 410.

⁵⁶¹ Ibid, at 531; See also W.G. Jennings, A.R Piquero and J. Reingle Gonzalez, ‘On the Overlap between Victimization and Offending: A Review of the Literature’, 17 *Aggression and Violent Behavior* (2012) 16.

⁵⁶² Kendall and Nouwen (2014), at 261.

⁵⁶³ Ibid.

Prosecutor and ‘situation victims’, those who fall outside the scope of the ICC’s cases. The former have rights to participation and reparation while the latter do not. This legal distinction has often caused dismay and confusion among victims as most of them are ‘situation victims’ due to the narrow charges pursued by the Prosecutor. Amnesty International, for example, lamented in a publication on Kenyan victims that the “‘situation” victims - those who fall outside the scope of the two cases but who suffered violations during the post-election violence - also wanted to engage with the Court’.⁵⁶⁴ They quote a ‘situation victim’ as saying, ‘if the ICC involved us in those cases, we would feel more part of Kenya’.⁵⁶⁵

But it is not only the Court who has the power to extend or withhold the victim’s label. The Court’s intermediaries and local partners, as well as the situation countries’ governments, also have that power and their labels, for better or worse, often trump the Court’s labels in terms of policy implications. In fact, it has been largely ignored how little control the ICC exerts over the meaning of ‘victims’ and ‘victimhood’ in the field. Once these categories travel to the field new actors with different claims to expertise (e.g. development, psychology, community mediation) enter the Court’s victims’ engagement, shaping and shifting these concepts.

4. The Victim as Expertise

Me: The ICC and the TFV often talk about bringing ‘justice’ to victims. What does ‘justice for victims’ mean to you? When you hear ‘justice for victims’ what do you have in mind?

Tom: We interacted with quite a number of them. To the victims, they look at justice as first, restoring me back to the situation before the war; second,

⁵⁶⁴ Amnesty International, *Crying for Justice: Victims’ Perspectives on Justice for the Post-Election Violence in Kenya* (2014), available at <http://www.amnesty.org/en/library/asset/AFR32/001/2014/en/e40c1e83-af11-4443-8a70-7f46a833b21b/afr320012014en.pdf> (visited 18 September 2014), at 9.

⁵⁶⁵ Ibid, at 58.

compensating me for the losses I incurred during the war; third, arresting the culprits and putting them into prison, others even say killing them; fourth, getting their lost dear ones, the children who are still in captivity, back. That's justice for them⁵⁶⁶

This is a rather typical excerpt from my interviews with victims' practitioners. Whether based in Kenya, Uganda or The Hague, whether local partners, intermediaries, national NGOs or ICC staff members – they would respond in a similar way when asked what 'justice for victims' means to them. Most of them would provide me with a list of things that *they* think justice means for victims.

There is a growing literature on what we may call the role of the 'victims' expert' in TJ. Madlingozi, for example, has described the role of 'transitional justice entrepreneurs' who speak about or for the victim 'through fact finding reports, conference papers [and] academic articles'.⁵⁶⁷ In doing so, they not only represent but 'produce' *the victim* ... thereby 're-enact[ing] and perpetuat[ing] the civilizing mission of the past centuries'.⁵⁶⁸ Mégrét speaks of the 'expert in horror', who 'ideally combines a technocratic mind, with a (genuine) liberal bleeding heart, and a casual cosmopolitan veneer (English required, other languages a plus)'.⁵⁶⁹ The corollary of the rise of the victims' expert is victims' fatigue and even resistance. One civil society worker in Kampala observed:

One thing which has also happened because of frequent research, frequent visits, frequent studies, people in Northern Uganda, some of them have fatigue. They are kind of tired of telling their story without anything coming out of it, because they are so expectant when they see someone: they are going to help. Somebody comes, gets all the

⁵⁶⁶ Interview with TFV Local Partner, Lira, 21 July 2014.

⁵⁶⁷ T. Madlingozi, 'On Transitional Justice Entrepreneurs and the Production of Victims', 2 *Journal of Human Rights Practice* (2010) 208, at 210.

⁵⁶⁸ *Ibid*, at 225.

⁵⁶⁹ F. Mégrét, 'Three Dangers for the International Criminal Court' (2001), at 243.

information and then ‘bye, bye’ and you will never see them again. Right now, there is resistance.⁵⁷⁰

Many victims’ practitioners I interviewed were torn between the complexity and simplicity of what justice means for victims. On the one hand, most of them insisted that victims’ demands are complex and changing. There is no one ‘victim’s view’. A CSO practitioner in Kampala remarked, ‘victims’ sense of justice does evolve over time. They [their justice ideas] are multiple but they are also very fluid in terms of their circumstances. How we perceive justice depends largely on the situation we are in and how we experience the violation.’⁵⁷¹ On the other hand, victims’ experts claimed that ‘justice for victims’ is very simple. Victims want compensation, livelihood, health and education. They want back what they lost: if I lost a cow, I want my cow back. If I lost a leg, I want my leg back.

The majority of my interviewees managed this tension by categorizing victims according to the harm they suffered. As one practitioner expressed:

We get all these divided opinions. I’m not in that school of thought that tries to prescribe: ‘this is what people want.’ People want a whole lot of things. It only makes sense to categorize them, ok, what is justice for those whose children are missing....⁵⁷²

One victims’ lawyer in the DRC told me:

So what the Court wants is that the common legal representative of victims represents what is common to each victim. What is the common interest of 3000 victims? These victims are very different. You can have child soldiers that committed crimes themselves, you can have victims because their property or their village was assaulted, you have victims of rape and sexual violence...so it is not easy indeed to bring justice to all these groups

⁵⁷⁰ Interview with CSO Representative, Kampala, 22 July 2014.

⁵⁷¹ Interview with CSO Representative, Kampala, 7 August 2014.

⁵⁷² Ibid.

of victims certainly not if you put everybody in the same box and ask one lawyer to represent everybody.⁵⁷³

Categorizing victims according to the violation they suffered (loss of property, displacement, SGBV) is a compromise between treating victims as homogeneous group on the one hand and as individuals with incommensurable ideas and wants on the other. While this seems *prima facie* a sensible approach, it is not clear why we should accept the assumption that having suffered a similar crime (as defined by international criminal law) creates shared justice ideas. In fact, victims' experts often presented diametrically opposed ideas of what victims that are ostensibly in the same category want. A case in point is victims of SGBV. Many interviewees expressed the idea that SGBV victims primarily want prosecutions and punishment. An intermediary in Western Kenya told me:

Justice for victims means largely restoration of livelihood. Their livelihoods were disrupted, their ability to feed themselves, their ability to educate their children. And that is for most victims who lost their property. For victims of police and sexual crimes, it is prosecution of the perpetrators. Different categories prioritize justice in different ways.⁵⁷⁴

Yet, other practitioners made exactly the opposite claim. One CSO representative who has worked extensively with SGBV victims claimed:

Even if we do legal representation for rape victims, it's not that we just work for the prosecution of the perpetrators, we go through medical treatment, we do psycho-social support, we try to put them through economic empowerment programmes, we try to resettle them ... It's very simple. And without all these other parts of justice, they couldn't care less about punitive justice.⁵⁷⁵

Through their categories of harm, victims' experts turn justice into a surgical intervention into victims' lives: 'justice for victims' is to have their specific, crime-related needs

⁵⁷³ Interview with LRV, Telephone Interview, 15 January 2014.

⁵⁷⁴ Interview with Intermediary, Western Kenya, 22 August 2014.

⁵⁷⁵ Interview with Intermediary, Nairobi, 30 June 2014.

addressed. In this analysis, people's needs, wants and justice ideas become the same. If I have a bullet in my body, I need that bullet to be removed and that then determines my concept of justice. Yet, defining justice in terms of harm suffered also has the effect of removing the discussion about 'justice for victims' from broader justice claims and the rights of citizens to a dignified life.

The categorization of victims also raises the question of what it means for victims to be in one category or the other and on what basis such categories are constructed by different experts on the ground. For example, the ICC's local intermediaries and partners often have rather different ideas of victimhood than the Court's lawyers as I discovered when I interviewed the TFV's local partners in Northern Uganda.

4.1. *What Victimhood counts?: Negotiating Victimhood in Northern Uganda*

For its assistance programmes, the TFV is bound to the two-part definition of victims entailed in Rule 85 of the Court's Rules of Procedure and Evidence:

- (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

An important limitation of this definition is that the TFV can only provide assistance to victims who have been victimized after 2002 when the Rome Statute entered into force. This is problematic in the context of most ICC situation countries as conflict and human rights abuses which amount to crimes under the Court's jurisdiction have unfolded for decades. In the DRC, the conflict dubbed 'Africa's First World War' began in 1994 and

lasted until 2003 with instabilities continuing in the east of the country. In Uganda, the LRA's insurgency began in 1986 and lasted until 2006-2008. Against the backdrop of continuous, protracted conflicts, selecting only those victims who have been harmed after 1 July 2002 seems arbitrary but also practically difficult. How does the TFV select those victims?

The TFV's regional coordinator in Kampala described the process as follows: the TFV selects and trains 'local partners' who then go into the communities to identify 'victim-beneficiaries' of the programme. They talk to youth associations, women's groups, traditional and cultural leaders and local governments to guide them to victim communities. Eventually, they conduct interviews with potential victims to determine whether they are victims of crimes that fall within the Court's jurisdiction:

In the course of the conversation [a person tells them that], 'my ear was cut off in 2003 when the LRA came into our communities'. They [the local partners] will understand this is a conflict-related injury and the person should be a beneficiary of the programme. They may conduct an interview with someone next door who says, 'I suffered burns in 1998 in a taxi accident driving from A to B'. And then it will become quite clear that this is an automobile accident; it is a tragic thing but it is not a conflict-related injury as a consequence of a crime and it is also outside the temporal limitation of the jurisdiction.⁵⁷⁶

Some of the partners I interviewed claimed that this is exactly how they identify victims for TFV funded programmes. Other partners were not even aware of this distinction before/after 2002. Yet other partners tried to negotiate the definition of victimhood in the field as they are confronted with daily clashes between 'substantive' and 'formal' understandings of justice: between what seems 'just' and with what the Court's rules say. And they negotiate these clashes differently. One partner told me that they had

⁵⁷⁶ See also TFV, *Assistance & Reparations* (2015), at 13/14.

arguments with the TFV about who can become a 'victim-beneficiary' of their rehabilitation programme.⁵⁷⁷ She explained that her organization works with a broader category of victims than the TFV and tries to assist all victims of conflict-related injuries. In her eyes, a person who suffered burns from unsafe stoves in IDP camps qualifies as a victim of the conflict, because the conditions of life within IDP camps were a product of the conflict: 'we don't care whether someone stepped on a land mine in 2001 or 2003. We try to include them in the programme.'⁵⁷⁸

A psychologist who counsels victims with TFV support made clear that the distinction between harms incurred before or after 2002, by international crimes or not, does not make much sense in the context of his work. He said:

So for me if there are people who are affected psychologically and who feel that they want to get a change of their condition - and they are Acholi, they have been in a camp, they have been affected by the war - I don't care if they are affected by beating up by their husband today and there is no way for me to know whether the wounds, the suffering that they present is coming from the current situation, or has been influenced as well by witnessing certain events before ... for me, I'm there for what the client is interested in.⁵⁷⁹

An anthropologist based in Gulu observed that one of the NGOs the TFV has been supporting ran a programme that assisted victims of rape perpetrated by civilians rather than LRA-related crimes after 2002.⁵⁸⁰ This is in violation of the Court's mandate but corresponds to our common-sense of the indivisibility of justice: remedy and assistance should be available to anyone who suffered harms from crimes whether perpetrated during or after conflict, whether victimized by a 'crime against humanity' or 'everyday

⁵⁷⁷ Informal Conversation with TFV Local Partner, Gulu, 9 July 2014.

⁵⁷⁸ Ibid.

⁵⁷⁹ Interview with TFV Local Partner, Gulu, 9 July 2014.

⁵⁸⁰ H. E. Porter, 'After Rape: Justice and Social Harmony in Northern Uganda', April 2013, E-Thesis, available at http://etheses.lse.ac.uk/717/1/Porter_After_rape_2013.pdf, at 150.

rape'. As she points out, 'it would be a shame for the NGO to lose funding'.⁵⁸¹ In its latest progress report, the Trust Fund acknowledged that its identification and selection process 'may lead to new tensions or jealousy against victims'⁵⁸². To avoid further discrimination and stigmatization, it may be necessary to include community members beyond those who qualify as victims under the Court's definition in the assistance programmes.⁵⁸³

This suggests that legal categories of victimhood become blurry in the field, where different pressures including victims' expectations, the priorities of local NGOs and the ethics and logics of other disciplines (e.g. psychology) take over. It also underscores the importance of looking beyond the Court's victims' label to explore what happens to it in the field. Of course, victimhood means different things in different contexts. In some contexts, calling somebody a 'victim' is stigmatizing, in other contexts the 'victim label' is sought because it gives access to acknowledgment and rights such as reparation. By creating victims' categories, the victims' expert may not only misrepresent victims' experiences but also hand a ready-made tool for excluding victims to powerful actors such as governments. The Kenyan government, for example, has written many victims out of the narrative of what happened in Kenya after the election in 2007/8 by substituting the concept of 'victims' with the language of IDPs.

4.2. The Kenyan Government's Construction of Victimhood: IDPs, not Victims?

In fact, no one talks about victims in Kenya anymore. The language of victimhood has all but been replaced by the language of IDPs. This has created new dynamics of inclusion

⁵⁸¹ Ibid.

⁵⁸² TFV Progress Report 2015, at 16.

⁵⁸³ Ibid.

and exclusion of victims. As a report by the International Commission of Jurists (ICJ Kenya) and the Kenyan Human Rights Commission (KHRC) in 2012 observed, ‘while victims of the post-election violence experienced killings, grievous injury, sexual and gender based violence, as well as forced displacement, the Government of Kenya’s efforts to address the needs of victims have focused almost exclusively on displacement’.⁵⁸⁴ Shortly after the 2007/2008 post-election violence (PEV) crisis gripped Kenya, the government started reframing the PEV as an ‘IDP crisis’ and PEV victims as IDPs.

Prima facie, the language of IDPs is not surprising given that more than 600,000 people were displaced within Kenya by the PEV. A CSO representative in Kenya claimed that ‘the government has tended to conflate victims and IDPs and in my view there are two reasons for this: convenience and embarrassment’.⁵⁸⁵ Focusing on IDPs was convenient because the demographics of displacement meant that the ethnic composition of the IDP camps was predominantly ‘Kikuyu’. People from the ‘Luo’ ethnic group, who are associated with the political opposition in Kenya, ‘returned’ in the wake of the violence to what is considered to be their ‘ancestral’ homeland in Western Kenya (formerly Nyanza and Western Provinces).⁵⁸⁶ There, they were gradually absorbed by local communities and their wider families. The CSO representative added, ‘the Kikuyu were more visible and therefore the government could resettle them and score political

⁵⁸⁴ Kenyan Section of the International Commission of Jurists and Kenya Human Rights Commission, *Elusive Justice: A Status Report on Victims of 2007-2008 Post-Election Violence in Kenya*, 2012, available at <http://resource.khrc.or.ke:8181/khrc/bitstream/handle/123456789/43/ELUSIVE%20JUSTICE.pdf?sequence=1> (last visited 16 June 2015), at iv.

⁵⁸⁵ Interview with Consultant, Africog, Nairobi, 4 July 2014.

⁵⁸⁶ Gaynor Letter to Dr. Chaloka Beyani, 22 May 2014, §4; Kamungi (2013), at 16.

points but also the government - both Kibaki's and Uhuru's are Kikuyu-led - could ignore Raila's people at the other side of the country'.⁵⁸⁷

Unlike other types of victimization, IDPs and the dismal conditions of their encampment are embarrassing as they visibly expose the government's failure to address PEV victimization. Emptying IDP camps and resettling a significant number of victims on new land was thus a priority and helped to boost the government's credibility in a country in which access to land is perceived to be economically and culturally critical. As a Kenyan victims' lawyer expressed:

I think the issue of resettlement is at the heart of the government because politically it gives them more mileage than providing assistance. It sounds like you are doing more. I mean in Kenya, and this is basically why we went into violence, it is a question about land ownership and land use. Assistance has next to zero use in terms of land ownership and use. But if you resettle people they will feel that their dignity is restored.⁵⁸⁸

One of the Court's field assistants suggested, 'so when you talk about a huge number it would be easier to go to IDPs because you can say, "we resettled 350,000 people". That sounds very impressive as opposed to, "we have offered psycho-social support to 8000 victims of sexual violence"'.⁵⁸⁹

An interesting example of how the appropriation of labels has real consequences for Kenyan victims is the distinction between 'camp IDPs' and 'integrated IDPs'. 'Integrated IDPs' are IDPs who live outside of the camps. There have been allegations of systematic discrimination against 'integrated IDPs' in the government's compensation and resettlement programmes. KHRC, for example, alleged that 'the Administration

⁵⁸⁷ Ibid. To clarify, both Mwai Kibaki's government and the succeeding government of Uhuru Kenyatta are associated with the ethnic group of the 'Kikuyu', while the 'Luo' ethnic group is associated with the opposition. Raila Odinga is widely regarded as the political mouthpiece of the 'Luo'.

⁵⁸⁸ Interview with Victims' Lawyer, Nairobi, 1 July 2014.

⁵⁸⁹ Interview with Field Assistant, Nairobi, 30 June 2014.

denied them letters recognizing them as IDPs, subjecting them to constant harassment and suspicion'.⁵⁹⁰ While the use of the term 'integrated IDP' is common in Kenya, it comes with different meanings and implications for those designated as such. An intermediary in Kisumu claimed that the distinction between 'IDPs' and 'integrated IDPs' originated with the UN system.⁵⁹¹ She recalled a meeting with UN representatives in Kenya:

When the question was 'why are you choosing victims differently?', and we were told that the victims in Nakuru were IDPs and the victims that came to this region were integrated IDPs and at that point I did not even know that there was a distinction and then I said: 'what does that mean?' [They replied], 'when you are called "integrated" you went back where you came from and therefore...' - and I said "and therefore?" - and therefore you didn't suffer, you don't need to be compensated. The international UN language that determines who is an IDP and who is an integrated IDP and what that means for them and the fact that they were saying, 'please do not call them so, because according to the UN language "integrated" does not necessarily need the support that we are giving elsewhere'.⁵⁹²

In common parlance, the terms 'integrated IDPs', 'PEV victims' and 'displaced people' are used loosely and interchangeably. Many affected people are not aware of the policy implications of using one term rather than the other. The NGO representative in Kisumu complained, 'and we had no idea that there was a need for us to use the right terminology. We shall forever have "integrated IDPs" affected on account of the name, the word.'⁵⁹³ The government readily picked up on this distinction emanating from the UN system: '... the government started calling them "integrated IDPs" and I think the government deliberately used that because ... it was easy for them to say "they are integrated. How can we do anything for them?"'⁵⁹⁴

⁵⁹⁰ KHRC (2008), at 25.

⁵⁹¹ Interview with NGO representative, Kisumu, 26 August 2014.

⁵⁹² Ibid.

⁵⁹³ Ibid.

⁵⁹⁴ Ibid.

Yet, there is also a subtler political logic at work in reframing PEV victims into IDPs in Kenya. Using the category of 'IDPs' rather than 'victims' helped the government to depoliticize the PEV. While the concept of victim presupposes a perpetrator and a crime, there are many possible causes, both man-made and natural, for internal displacement. During his trip to Kenya in 2014, the UN Special Rapporteur on the human rights of IDPs, Chaloka Beyani, identified PEV, inter-communal clashes, evictions and natural disasters as major causes of displacement in Kenya.⁵⁹⁵ As an ICC intermediary pointed out, 'the relationship between IDPs and PEV victims becomes tricky because PEV victims are IDPs. But they are not the only IDPs; that's the thing.'⁵⁹⁶ In fact, the government has been accused of focusing on 'other IDPs' especially forest evictees rather than PEV IDPs in its resettlement programmes.⁵⁹⁷

However, blending PEV victims with other IDPs has not only allowed the government to focus on 'other IDPs' that fit better with its political agenda; it is also part of a broader strategy of changing the narrative of what happened after the election in 2007/8. One leading civil society representative summarized the government's new narrative as follows: 'There are no victims. Post-election violence did not happen in this country. There is no reason for Kenyan cases; there is no reason for the Trust Fund to come; there are no victims in Kenya. We did not fight; we are ok and always have been.'⁵⁹⁸ By re-inventing victims as IDPs the government is 'slowly trying to erase from the memory

⁵⁹⁵ OHCHR, 'Solutions for Kenya's displaced require urgent action determined by reality – UN expert', 7 May 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14575&LangID=E> (last visited 16 June 2015); *Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, A/HRC/19/54/Add2*, 6 February 2012, at 6-8.

⁵⁹⁶ Interview with Intermediary, Nairobi, 2 July 2015.

⁵⁹⁷ Gaynor Letter to Dr. Chaloka Beyani, 22 May 2014.

⁵⁹⁸ Interview with CSO Representative, Nairobi, 19 June 2014.

of Kenyans that there was ever someone called a post-election violence victim of 2007/2008'.⁵⁹⁹ This strategy of denial is also reflected in the lack of memorials or remembrance days for the victims of PEV in Kenya.⁶⁰⁰ The ICC trials were one of the last reminders of the PEV and the government was working hard to put an end to them, too. When the ICC's charges against him were dropped on 5 December 2014, President Kenyatta remarked: 'one case down, two more to go.'⁶⁰¹ Sure enough, in April 2016, the Chamber in the Ruto and Sang case 'declared a mistrial due to a troubling incidence of witness interference and intolerable political meddling...'.⁶⁰²

How did the conceptual shift from victims to IDPs help the government to rewrite the narrative of what happened after the elections in 2007/2008? An important difference between the categories of IDPs and victims is that you lose the former status more quickly than the latter. Once you are resettled, you are by definition no longer an IDP. The status of victim, on the other hand, is more 'sticky'; you do not simply forfeit it because you have received victim assistance. A NGO representative observed, 'they [the government] understand that when you are victim of sexual violence and contracted HIV, you are a victim for life'.⁶⁰³ A Court intermediary recalled, 'there was that question asked by a government official: "when do you stop being a victim and when do you stop being an IDP? We resettled them; they are still calling themselves IDPs, why? We have given

⁵⁹⁹ Interview with Intermediary, Nairobi, 2 July 2015.

⁶⁰⁰ Bill, 'Westgate Memorial organized within one year, yet PEV victims continue to wait', The Hague Trials Kenya, 30 September 2014, available at <https://thehaguetrials.co.ke/article/westgate-memorial-organised-within-one-year-yet-pev-victims-continue-wait> (visited 16 June 2015).

⁶⁰¹ BBC News, 'Uhuru Kenyatta denounces ICC as Kenya charges dropped', 5 December 2014, available at <http://www.bbc.com/news/world-africa-30344320> (visited 16 June 2015); Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, *Kenyatta* (ICC-01/09-02/11-982), Trial Chamber V(B), 3 December 2014, §79; ICC Press Release, 5 December 2015.

⁶⁰² Decision on Defence Applications for Judgments of Acquittal, *Ruto and Sang* (ICC-01/09-01/11-2027-Red), 5 April, 2016, § 464.

⁶⁰³ Interview with Field Assistant, Nairobi, 30 June, 2014.

them money, why are they still calling themselves victims”?’⁶⁰⁴ The government’s discursive strategy has been very successful. In a report in 2013, the Brookings Institute documented a ‘widespread public perception that persons still claiming to be displaced are imposters or ‘fake IDPs’ after the formal closure of camps in 2010’.⁶⁰⁵ Thus, while ICC scholars and commentators are concerned about the exclusionary mechanisms of the ICC’s legal definition of victims, the Kenyan government has in the meantime hollowed out the category of victimhood altogether.

To the extent that the ‘victim label’ is still used in Kenya, it tends to conflate the victims and accused of the PEV in the joint category, ‘victims of the ICC’. When his case was terminated, President Kenyatta commented, ‘just as the ICC failed me, it has also failed the victims of the 2007-2008 post-election violence ... they were killed, maimed, displaced, dispossessed and utterly traumatised. I have been victimised, libelled and senselessly profiled by the same defective process.’⁶⁰⁶ This is in line with the general impression that in the course of the ICC trials the discursive focus in Kenya shifted from the victims to the suspects.⁶⁰⁷ While PEV victims have been dissolved in the category of ‘IDPs’, the accused have appropriated the victim label for themselves: they are the victims of the ICC.

⁶⁰⁴ Interview with Intermediary, Nairobi, 2 July 2014.

⁶⁰⁵ Kamungi (2013), at ii.

⁶⁰⁶ BBC News, ‘Uhuru Kenyatta denounces ICC as Kenya charges dropped’, 5 December 2014; Clarke (2015), at 272/273.

⁶⁰⁷ The Hague Trials Kenya, ‘Maina Kiai: “We are slowly laying the building blocks for a very hectic 2017”’, 26 June 2014, available at <https://thehaguetrials.co.ke/article/maina-kiai-we-are-slowly-laying-building-blocks-very-hectic-2017> (last visited 16 June 2015).

The language of IDPs has also fed back into the Court's discourse with some LRVs using 'IDPs' interchangeably with victims in their legal filings to the Court.⁶⁰⁸ Furthermore, 'IDP networks' are at the centre of the Court's infrastructure of victim identification in Western Kenya. In the Kenyan cases, the Court may have unwittingly become part of the government's reinvention of the post-election violence in Kenya.

5. Conclusion: Between Irrelevance and Divisiveness

Scholars have mainly focused on the legal and administrative questions on ICC victim participation, reparation and assistance: who becomes a 'victim participant' at the ICC and who is entitled to receive assistance or reparations? What is the relationship between the Court and the TFV? These questions, while important, may have the side effect of distracting from the bigger picture, namely that the ICC's victims' engagement, whether in the form of participation or assistance, oscillates between irrelevance and divisiveness. This can be illustrated with the example of the TFV's assistance programmes in Northern Uganda. These programmes are close to being irrelevant because not many people know about the TFV's existence and because it has too few resources for too many people. Even those victims who benefit from TFV assistance usually do not understand the connection between the assistance they receive and the ICC's work. The justice message, if there is one, gets lost.

Nonetheless, these programmes have the potential of creating further communal divisions. People may hear that 'other' victims have benefitted: 'Why has he benefitted and not me? Am I not a victim?' As there is not much information, rumours can spread

⁶⁰⁸ Victims' response to the 'Prosecution's notice of withdrawal of the charges against Uhuru Muigai Kenyatta, *Kenyatta* (ICC-01/09-02/11-984), Trial Chamber V (B), 9 December 2014, §§15, 16, 19 (see also footnote 5).

easily. The TFV's local partners actively participate in this struggle for competitive victimhood. The partners in Lango subregion claim that victim support has focused too much on Acholi communities. Others say that 'Langi' have disproportionately benefitted from the TFV's involvement. One of my informants captured this paradox of irrelevance and divisiveness rather well: 'Those peanuts that are dropped with lots of hype is what undermines reconciliation in post-conflict societies....'⁶⁰⁹

The relevance of victim participation, on the other hand, depends on victims' lawyers' willingness to go beyond their job description and politically engage as victims' advocates. Some victims' lawyers are swayed into political action by victims' pressure, others feel they have no choice but to stick to their narrow mandate.⁶¹⁰ In any case, such victims' advocacy taps into and depends on the legal process. When the Kenyan cases collapsed, the limelight of the ICC's involvement extinguished, the international justice industry withdrew and nothing was left for victims. 'Expectation management' is increasingly commended as the solution to the predicament of large-scale victimization on the one hand and the Court's surgical intervention and limited resources on the other. As the Independent Expert Panel recommends, 'providing accurate information at an early stage will build knowledge and trust in the ICC, which is essential for victims to engage, and manage expectations. It is also essential to prevent frustration if progress in a situation or case is slow'.⁶¹¹

⁶⁰⁹ Interview with CSO Representative, Kampala, 7 August 2014.

⁶¹⁰ Interview with LRV, Nairobi, 1 July 2014.

⁶¹¹ *Independent Panel of Experts Report on Victim Participation at the International Criminal Court*, July 2013, §60, §73; Queen's and Ulster University Submission on Reparations in Katanga, 15 May 2015, §2-3; See also *Integrated Strategy for External Relations*.

Yet, expectation management may be an impossible task. When I accompanied the victims' lawyer in Kenya on mission, I was surprised by how blunt he was with the victims. He told them, 'I want you to have a realistic understanding of what is happening. The chances of the trial starting on 7 October are rather zero. The chances that the trial starts at all are very low... Because this case is very sad you may decide not to participate.'⁶¹² He also spoke about the 'theory' and the 'reality' of reparations. The reality is 'forget about reparations, the case is too weak'.⁶¹³ But when I talked to victim-intermediaries after the sessions they insisted that despite the bleak prospects, the ICC was their only hope. The idea that you can manage expectations through 'accurate messages' misreads the context in which the Court works, a context in which many victims have not received any assistance and struggle to meet their daily needs.

At the same time, other risks inherent in the 'international justice industry' have been underappreciated. Victims' experts create categories of victims on the basis of supposedly rational principles, such as grouping together victims that suffered the 'same crime' and those living in 'similar circumstances' ('camp IDPs'/'integrated IDPs'). On that basis, they make decisions on what victims want, need and deserve. What starts as an exercise in management can end up as a mechanism for changing the underlying narrative of the conflict and who its 'real victims' were. Governments are in a particularly powerful position to exploit or recalibrate categories of victimhood that advance their political agenda. As one CSO representative in Western Kenya pointed out:

I think the complexity lies in the fact that we created distinctions around victims. We called them IDPs then we called the others integrated, after that we politicized them so we had victims who were from the PNU and others that were from CORD, after that we ethnicized them so we had tribe

⁶¹² Field Notes, Registration Mission, Western Kenya, 18-22 August 2014.

⁶¹³ Ibid.

as a key factor and element. And all of these three different categories helped to determine whether you got support or not.⁶¹⁴

The Chapter has turned the spotlight on institutional actors at the Court's periphery, especially in the field, who identify victims, inform them about the process, organize victim representation and administer assistance to them. It demonstrated that 'outside the Court' actors have significant influence on which victims are selected for participation and assistance and what victims' interests are conveyed in the court room. More fundamentally, they can shift or even replace the ICC's legal category of victimhood with other concepts such as IDPs which are weaved into a broader reconstruction of the conflict narratives that underlie the ICC's cases.

⁶¹⁴ Interview with NGO representative, Kisumu, 26 August 2014.

Chapter VI - The Journey of ‘Transformative Justice’: From The Hague to the Field

Chapter VI focuses on a new concept that has emerged within the Court’s justice discourse: transformative justice. The aim of ‘transformative justice’ is to use the Court’s reparation and assistance mandate not only to restore victims to the status quo ante but to address the root causes of conflict, gender discrimination and inequality that made their victimization possible in the first place. The Chapter first traces the conceptual origins of transformative justice; analyzes how institutions at the Court’s margins such as the TFV appropriated the concept and how it eventually became part of the ICC’s first reparation decision. The remainder of the Chapter follows ‘transformative justice’ from the headquarters to the field, exploring how the Court’s staff and local partners make sense of its meaning in the context of the TFV’s assistance programmes in Northern Uganda. While the critique of transformative justice has focused on the ICC’s limited capacity and the question of whether ‘transforming societies’ is or should be part of the ICC’s mandate or not, I will argue that more fundamental problems characterize its practice on the ground. First, it ignores that there are very different visions of how a transformed society should look in Northern Uganda. Second, even though transformative justice sets out to address structural causes, in practice it shifts the responsibility of ‘transformation’ from the state to the individual. In the final analysis, it is the victim and not the state, the community, the economy or the international community that has to do the transformation.

1. Transformative Justice at the ICC

You can’t take people back to where they were in 1984 and say that’s sufficient and that’s it. And everybody starts from that socio-economic

situation and the governing relationship between the North and the South... That won't work... If you proceed on that basis, things will repeat themselves, problems will re-emerge... You have to have a transformative approach.⁶¹⁵

I'm talking to the Trust Fund's regional coordinator in Kampala. According to him, transformative justice logically follows from well-established reparation principles in international law, especially 'guarantees of non-repetition' and 'satisfaction for victims'. When I ask him whether he is not concerned that a 'transformative justice' approach might politicize the Court and the TFV, he laughs: 'The Court is in that situation already. This is nothing it can avoid.'⁶¹⁶ He points out that the Court was established by political actors, its cases are referred by political actors and it works in very political environments for example in Kenya: 'You can't put your head into the sand and say, "it doesn't affect us, it doesn't affect us".'⁶¹⁷

Nonetheless, transformative justice is still a rather new and daring concept. In fact, it is essentially a challenge to the conventional understanding of reparations in international law: full restitution. This is the idea that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed' established in the Chorzow Factory case in 1928.⁶¹⁸ Since then, the concept of reparation has developed further particularly through the adoption of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* by the UN General

⁶¹⁵ Interview with TFV Coordinator, Kampala, 7 July 2014.

⁶¹⁶ Ibid.

⁶¹⁷ Ibid.

⁶¹⁸ *Factory at Chorzow (Germ. v. Pol.)*, 1928 PCIJ Series A, No.13 (Sept. 13), §125.

Assembly in 2005. The Guidelines list restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as ‘full and effective’ forms of reparations. Parallel to these developments, Article 75 of the Rome Statute tasked the ICC with establishing reparation principles which include but are not limited to restitution, compensation and rehabilitation.

On 16 March 2011, Trial Chamber I asked the TFV and the Registry to write a joint report on reparations to help the Chamber to create the principles and procedures of reparations in the *Lubanga* case. Yet, after a period of consultations, the Registry and the TFV decided to submit separate reports due to differences in their views.⁶¹⁹ A closer reading of the two documents suggests that they embrace somewhat different ideas of ‘reparative justice’. Citing a report by UN Women, the TFV notes in its separate submission that ‘reparations that support women's economic empowerment can contribute to transformative justice by placing them in a better position to break with historic patterns of subordination and social exclusion’.⁶²⁰ In a subsequent report to the Chamber, the TFV elaborates on ‘transformative justice’ and explains why it should be part of the Court’s reparation principles. It notes that,

in the aftermath of war crimes, crimes against humanity and genocide, it will often not be appropriate to restore the *status quo ante* that gave rise to such crimes, in particular because the majority of victims of such crimes will likely have been the powerless and dispossessed at the time the conflict erupted.⁶²¹

⁶¹⁹ They especially differed on whether the TFV is obliged to complement reparation awards with the voluntary contributions it receives. See Second Report of the Registry on Reparations, *Lubanga Dylio* (ICC-01/04-01/06-2806), Trial Chamber I, 1 September 2011, §2.

⁶²⁰ Trust Fund for Victims' First Report on Reparations, 1 September 2011, §34; UN Women, *Progress of the World's Women: In Pursuit of Justice* (2011), at 98.

⁶²¹ Observations on Reparations in Response to the Scheduling Order of 14 March 2012, *Lubanga Dylio* (ICC-01/04-01/06-2872), Trial Chamber I, 25 April 2012, §73.

It therefore recommends that the Chamber explicitly addresses ‘transformative reparations’ in its reparation principles ‘with a view to eliminating the pre-existing structural inequalities that have led to or encouraged the violence’.⁶²²

The idea of ‘transformative reparations’ is contentious. In its separate report to Trial Chamber I, the Registry makes no mention of the idea. While the Registry’s staff members I interviewed agreed that reparations should not reinforce different types of discrimination especially gender discrimination, they were more cautious about the use of reparations to achieve broader societal transformations. As a senior Registry official put it:

We are not trying to come in and transform a society as such. We are trying to come in and see what the impact of these crimes was and what we can do about them and then the transformation element would be relevant when we are looking at how we can do that... and I suppose the Trust Fund because they have their broader assistance mandate may be inclined to take a broader view.⁶²³

In its report, the Registry distinguishes between the societal ills predating the crime and the societal ills that were caused by the crime and argues that reparations should only address the latter.⁶²⁴

Yet, the TFV’s idea of transformative justice does not exist in a conceptual vacuum. On the contrary, it draws heavily on the reparation principles developed in civil society documents, the jurisprudence of the Inter-American Court of Human Rights and UN documents.⁶²⁵ Most importantly, the TFV refers to the *Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation*, a civil society document that was created by

⁶²² Ibid, §77.

⁶²³ Interview with Senior Official, Registry, 16 December 2013.

⁶²⁴ Second Report of the Registry on Reparations, 1 September 2011, §42.

⁶²⁵ Observations on Reparations in Response to the Scheduling Order, 25 April 2012, §§10-11.

women's rights advocates and activists in 2007.⁶²⁶ The Nairobi Declaration claims 'that reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls'.⁶²⁷ In the *Cotton Field* case, the Inter-American Court of Human Rights argued that 'bearing in mind the context of structural discrimination in which the facts of this case occurred... the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification'.⁶²⁸ In a similar vein, the UN Special Rapporteur on violence against women stressed that 'since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation'.⁶²⁹ It is noteworthy that these documents discuss 'transformative reparations' particularly in the context of SGBV: it is not enough to try to restore a SGBV victim to the situation that prevailed before the crime happened. We also need to address the structural conditions of marginalization and gender discrimination that made women particularly vulnerable to these crimes.

The goal of transformative justice is not merely rhetorical; it is reflected in how the TFV makes sense of its mandates of victim assistance and reparations. The TFV has

⁶²⁶ V. Couillard, 'The Nairobi Declaration: Redefining Reparation for Women Victims of Sexual Violence', 1 *IJTJ* (2007) 444.

⁶²⁷ *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation* (2007), available at http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf (visited 25 March 2014), at 2.

⁶²⁸ See *Gonzalez et al. ('Cotton Field') v. Mexico*, Inter-Am. Ct. H.R. (ser. C) No. 205, 16 Nov 2009, §450; See also R. Rubio-Marín and C. Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment', 33 *Human Rights Quarterly* (2011) 1062; Consultant's report on reparations in the Inter-American Human Rights System, Annex to the Second Report of the Registry on Reparations, *Lubanga Dylio* (ICC-01/04-01/06-2806-Anx), Trial Chamber I, reclassified as PUBLIC 19 March 2012, §11.

⁶²⁹ *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo*, A/HRC/14/22, 19 April 2010, §24.

been implementing assistance programmes in Northern Uganda and the DRC since 2008. Reparation programmes, on the other hand, have not been launched yet and it will likely take another few months until the TFV will start implementing them in the *Lubanga* case. Both the TFV's reparation and assistance mandates are part of reparative justice at the ICC. Even though the TFV is in theory an independent institution within the Rome Statute system, in practice, it is part of the ICC.⁶³⁰ It can only operate in situations in which the Court is active and only for the benefit of victims of crimes that fall within the ICC's jurisdiction.⁶³¹ In ICC documents, the TFV is often referred to as part of the Court.⁶³² More importantly, victims on the ground usually perceive the Court and the TFV as part of one institution. As one former TFV partner observed, 'they use the same cars, the same drivers, the same translators. It is difficult to tell them apart.'⁶³³

It has been argued that the reparation mandate is the TFV's 'justice component', while its assistance mandate is its 'humanitarian component'.⁶³⁴ In practice, it is unlikely that assistance and reparations will be perceived as different by victims at least in the *Lubanga* case.⁶³⁵ Admittedly, the Appeals Chamber in *Lubanga* tried to reaffirm the distinction between reparations and assistance by narrowing the category of victims eligible to receive reparations to only those who have been harmed as a consequence of

⁶³⁰ See Dissenting Opinion of Judge Eboe-Osuji, *Kenyatta* (ICC-01/09-01/11-2038-Anx), 1 July 2016, §§31-33.

⁶³¹ See Rome Statute, Art. 79; TFV Regulations.

⁶³² *Guidelines on Intermediaries* (2014=, at 2, footnote 1; *Court's Revised Strategy in Relation to Victims* (2012), at 3, footnote 6.

⁶³³ Telephone Interview with former TFV partner, 26 April 2013.

⁶³⁴ E. Kristjánsdóttir, 'International Mass Claims Processes and the ICC Trust Fund For Victims', in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Leiden: Martinus Nijhoff, 2009) 167, at 168, 174-175.

⁶³⁵ P. Dixon has argued for the merits of 'intentionally and carefully blur[ing] the distinction' between assistance and reparations. See P. Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of Congo (DRC)', 10 *IJTJ* (2016) 88, at 88.

the crimes that Lubanga was convicted for.⁶³⁶ Nonetheless, both reparations and assistance will be implemented by the TFV; they will both be collective, and people who receive them will receive them as ‘victims’. The Trust Fund itself in its draft implementation plan for reparations of 3 November 2015 has suggested very similar programmes of physical and psychological rehabilitation and material support for reparations which it has already been implementing under its assistance mandate.⁶³⁷ According to the TFV, both reparations and assistance are informed by a ‘transformative justice’ approach.⁶³⁸

Besides, the Court may have all these complicated distinctions between different institutions and mandates but the level of understanding on the ground is very basic. The bigger picture is one in which the distinctness of the ICC’s reparation and assistance programmes will likely disappear in the broader development efforts of the TFV’s implementing partners. The TFV works ‘through’ local and international NGOs which are often development actors and have been running these types of programmes for many years. They were there before the TFV came and they will be there after it leaves. As a TFV evaluator put it, ‘the train is already moving and they [the TFV] are adding some additional funding onto it’.⁶³⁹ For many implementing partners, the TFV is one of many donors and the ‘recognition’ that reparations and assistance supposedly convey is understood as a demand for ‘donor visibility’. This suggests that we can learn a lot from

⁶³⁶ Appeals Chamber Decision on Reparations in Lubanga, 3 March 2015, §198.

⁶³⁷ Draft Implementation Plan for collective reparations to victims, *Lubanga Dyilo* (ICC-01/04-01/06-3177-AnxA), Trust Fund for Victims, 3 November 2015; TFV Strategic Plan 2014-2017, at 25.

⁶³⁸ Observations on Reparations in Response to the Scheduling Order of 14 March 2012, *Lubanga Dyilo* (ICC-01/04-01/06-2872), Trial Chamber I, 25 April 2012, §73.

⁶³⁹ Telephone Interview with TFV evaluator, 3 January 2014.

the TFV's assistance mandate regarding the challenges that the ICC's reparation programmes will likely encounter in the near future.

Under its assistance mandate, the Trust Fund has supported initiatives such as the 'peace school', the 'peace caravans' and the 'system of mutual solidarity' that may not have been traditionally understood as part of the 'necessary' victim assistance the TFV was mandated to provide.⁶⁴⁰ The peace caravans are platforms for community dialogue and reconciliation, while the system of mutual solidarity, a village savings and loan scheme, is designed 'to creat[e] strong social ties among the members, as well as, rebuild trust'.⁶⁴¹ The TFV claims that 'by assisting victims to return to a dignified and contributory life within their communities, [it] contributes to the realization of sustainable and long-lasting peace through the promotion of restorative justice and reconciliation'.⁶⁴² As such, the TFV's understanding of reparative justice goes beyond what criminal justice institutions would usually consider their 'business'. It has even been criticized by NGOs that usually advocate for more victims' engagement rather than less. The CICC, for example, has argued that the Trust Fund's adoption of 'reconciliation' as one of its goals goes beyond its mandate.⁶⁴³

⁶⁴⁰ TFV, *Empowering Victims and Communities towards Social Change* (2012), available at http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20PPR%20Summer%202012%20ENG%20Final_.pdf (visited 15 August 2016), at 6, 23-27; Article 50 (a) (i) of the TFV Regulations states 'that the Trust Fund shall be considered to be seized when the Board of Directors considers it *necessary* to provide physical or psychological rehabilitation or material support for the benefit of victims and their families' (emphasis added).

⁶⁴¹ TFV, *Mobilising Resources and Supporting the Most Vulnerable Victims through Earmarked Funding, Programme Progress Report Winter* (2012), available at http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFV%20Programme%20Progress%20Report%20Winter%202012Finalcompressed.pdf (visited 15 August 2016), at 9.

⁶⁴² TFV Website, available at <http://www.trustfundforvictims.org/> (visited 2 July 2016).

⁶⁴³ CICC, 'Comments on the Trust Fund for Victims' Global Strategic Plan for 2009-2011' (2009), available at http://www.iccnw.org/documents/CICC_TFV_Team__Comments_on_TFV_Strategic_Plan_2009-2011_March_2009.pdf (visited 15 August 2016), at 2; In its first Strategic Plan, the TFV frames its work as akin to local, restorative justice mechanisms such as traditional justice rituals, cleansing and healing

The concept of transformative justice has also gained traction in the ICC's discourse beyond the TFV and NGOs like the Women's Initiatives for Gender Justice.⁶⁴⁴ They have travelled from the periphery to the judicial core, the Chambers. In its *Decision establishing the principles and procedures to be applied to reparations* of 7th August 2012, Trial Chamber I observed that reparations with transformative objectives may be appropriate and 'can help prevent future victimization...'.⁶⁴⁵ The TFV recognized transformative justice as a key goal in its Strategic Plan 2014-2017 and the Appeals Chamber in *Lubanga* held that reparations with symbolic, transformative and preventative value are part of the Court's reparation modalities.⁶⁴⁶

2. Reactions from The Hague and the Field: No Money, No Mandate, No Rationale

When I interviewed ICC practitioners in The Hague including the judges it transpired that most of them had never heard of 'transformative justice' not to mention the TFV's ambition to contribute to it through reparations and assistance. Once I explained the concept, many interviewees were sceptical. Their critique centred around three 'No's': 'No Money for Transformation', 'No Mandate for Transformation', 'No Reparation Rationale for Transformation'. Late ICC Judge Hans-Peter Kaul, for example, observed:

I am not sure whether I entirely understand this idea of transformative reparations. The task to make our societies fairer, more just and less discriminatory is an eternal task which has to be addressed by the communities and the political systems of the world. To expect that a society can be transformed through the necessarily limited reparations system of the International Criminal Court is, in my view, just a little bit too much.⁶⁴⁷

ceremonies that aim at community reconciliation and social reintegration. See TFV, *Global Strategic Plan 2009-2012* (2008), at 23.

⁶⁴⁴ Observations of the Women's Initiatives for Gender Justice on Reparations, *Lubanga Dyilo* (ICC-01/04-01/06-2876), Trial Chamber I, 10 May 2012, §12, §13, §17.

⁶⁴⁵ Reparation Decision in *Lubanga*, 7 August 2012, §222, §236.

⁶⁴⁶ TFV Strategic Plan 2014-2017, at 25; Appeals Chamber Decision on Reparations in *Lubanga*, 3 March 2015, §202.

⁶⁴⁷ Interview with Judge, The Hague, 19 December 2013.

No money

The TFV's 2015 portfolio for its projects in Northern Uganda amounted to 735,000 Euros and the total sum of donations received to this date, 22 million Euros, have to be spread to deliver assistance and reparations to victims in all of the Court's situation countries.⁶⁴⁸ These sums pale into insignificance in the face of the mammoth task of transforming societies emerging from decades of conflict. A former TFV local partner in Gulu reckoned:

The war was here for 20 years, and when you come and say you are transforming our people and you are working for 5 years and the war was here for 20 years, do you think you will succeed? There is already a generation gap... If it is a long-term thing, like 30 years... I can assure you can transform the people....⁶⁴⁹

A CSO representative in Kampala described the impact of the TFV's assistance programmes as follows: 'What came out of that was a few 20,000, 60,000, 80,000 Euro projects that never had any substantive impact on the number of victims we are talking about....'⁶⁵⁰

No mandate

Apart from lack of money, many interviewees in The Hague insisted that the Court had no mandate to be involved in 'transforming societies'. A legal officer at the Registry pondered:

Of course, I would love this. The concept of transformative justice, it is a beautiful concept. But thinking with a legal mind, I don't know to what extent this concept falls squarely within the scope of the Court's mandate... I don't know to what extent States Parties would be willing to go along with

⁶⁴⁸ In theory, the convicted perpetrator is responsible to pay for reparations. In practice, many defendants before the ICC have been declared indigent and are unlikely to ever be able to pay for the reparations the Court awards. In those cases, the TFV 'advances' money that it receives for its assistance mandate to pay for reparations.

⁶⁴⁹ Interview with Priest, Gulu, 10 July 2014.

⁶⁵⁰ Interview with CSO Representative, Kampala, 7 August 2014.

it. Because everything that is transformative, states are normally reluctant about.⁶⁵¹

Besides, it is arguable that only states can bring about structural transformation as it requires the power to make laws and enforce them. Gender equality, for example, can hardly be achieved without changing and enforcing inheritance laws and legislation on matters such as equal pay, divorce and domestic violence. Many ICC practitioners argued that the Court as a judicial organization should not be engaged in what ultimately looks like political activities. As one judge observed:

I have not been aware of the concept of transformative justice. It is difficult for the Chambers to do much about reparations. I am not sure about the concept of transformative justice; it seems to turn reparations into a political process.⁶⁵²

Yet, the focus on the ICC's lack of capacity and mandate begs the question of whether an external institution tied to an international criminal court *should* be 'transforming structures' at all in the Court's situation countries. Some interviewees felt that this smacks of the neo-colonialism and interventionism that the ICC has been accused of with regard to its 'African situations'. A lawyer at the Registry told me:

And [transformative justice] may change one or two mindsets but I can also see it being very donor report friendly. I certainly would not use the word 'transformative' for a society because it is one, very arrogant and second, because they will never be there long enough to do anything that is substantive.⁶⁵³

No rationale

A further concern was that the rationale of reparations conflicts with the goal of broader societal change. This echoes an argument made in the literature that blurring the boundaries between reparations and development deprives victims of recognition as it

⁶⁵¹ Interview with Legal Officer, Registry, The Hague, 4 February 2014.

⁶⁵² Interview with Judge, The Hague, 16 January 2014 (quote based on my notes).

⁶⁵³ Interview with Legal Officer, Registry, The Hague, 12 November 2013.

fails to convey the acknowledgment that victims have been wronged and thus deserve reparations. Pablo De Greiff, for example, contends that ‘development programs have a very low reparative capacity, for they do not target victims specifically’ and that reparations should not be turned ‘into the means of solving structural problems of poverty and inequality’.⁶⁵⁴ In a recent article, Urban Walker specifically criticizes the concept of ‘transformative reparations’ because ‘it threatens to bypass or aims to displace reparative justice as a distinct and distinctly victim-centred imperative’.⁶⁵⁵ A Registry lawyer also expressed that reparations were ill-suited for achieving structural transformation:

You can talk to defence counsel, but I am pretty sure that they would tell you: ‘I don’t see why my client, who was convicted for enlisting children in this part of Ituri, has to pay to transform the whole region of Ituri because my client is not responsible for that’.⁶⁵⁶

In fact, the academic literature considers reparation as only one component in a larger transformative justice effort.⁶⁵⁷ Some at the Court even voiced the suspicion that the TFV deliberately immerses itself in a big, ‘utopian’ concept to mask its failure to deliver on its narrower mandate of meaningful assistance and reparations for victims:

Instead of focusing on what we can do now, what is really the core mandate of the Court, we are going to forget that, accept that this is not fulfilled and try to fight for something that we know we will never achieve to say that we are doing something but we are not doing anything that is meaningful. It has to be meaningful for victims.⁶⁵⁸

⁶⁵⁴ P. De Greiff, ‘Justice and Reparations’, in P. De Greiff (ed.), *The Handbook of Reparations* (Oxford: OUP, 2006) 451, at 470.

⁶⁵⁵ M. Urban Walker, ‘Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations’, 10 *IJTJ* (2016) 108, at 108.

⁶⁵⁶ Interview with Legal Officer, Registry, The Hague, 4 February 2014.

⁶⁵⁷ Gready and Robins (2014); W. Lambourne, ‘Transitional Justice and Peacebuilding after Mass Violence’, 3 *IJTJ* (2009) 28, at 46; E. Daly, ‘Transformative Justice: Charting a Path to Reconciliation’, 12 *International Legal Perspectives* (2001) 73, at 74.

⁶⁵⁸ Interview with Legal Coordinator, Registry, The Hague, 6 February 2014.

Many practitioners in Kenya and Uganda shared this suspicion. One NGO worker in Kisumu put it in no uncertain terms:

First of all, they are joking, they have absolutely no power or influence - certainly not the Trust Fund. You cannot start assuming... that by looking at the structural causes you therefore have transformed the victims in your work... The original intention of the Trust Fund was very clear. They need to go back to that... and not talk about changing systems... they don't even have the resources. It is political and entrenched and they don't understand that and will never understand that.⁶⁵⁹

Yet, there were also differences between the 'three No's' in The Hague and the perspectives I encountered in Kenya and Uganda. In their submission on the ICC's reparation principles, academics of Queen's University Belfast and Ulster University argued against the Court's transformative justice ambitions, pointing out that 'the state has the mandate, responsibility and legitimacy to engage in national reparations that promote reconciliation, tackle underlying causes of victimisation, prevent further violence, and are transformative'.⁶⁶⁰ Yet, this was not self-evident to some of my interviewees.

In Northern Uganda, in particular, there was little concern that the ICC would infringe a legitimate state's mandate by contributing to transformative justice. After all, governance is not exclusively and not even primarily associated with the nation state. Countless institutions such as elders, churches, cultural institutions, local councillors, international and local NGOs have played governance roles for many years.⁶⁶¹ Besides, deep distrust of the central government shapes the attitudes of people in Northern Uganda as the latter suffered immensely at the hands of the government's forcible

⁶⁵⁹ Interview with NGO Worker, Kisumu, 26 August 2014.

⁶⁶⁰ Queen's and Ulster University Submission on Reparations in Katanga, 15 May 2015, §6.

⁶⁶¹ See Porter (2013), at 97.

displacement policies, uprooting over 1.7 million people during the LRA's insurgency.⁶⁶² Transformative justice is thus not necessarily viewed as the prerogative of the government in Northern Uganda. In any case, governments in the Court's situation countries have often not been particularly forthcoming with transformative reparations. After years and decades of unfulfilled promises of reparations and assistance, many people in Kenya and Uganda see the ICC effectively as a 'reparation institution of last resort'.⁶⁶³

The question of the purpose of reparations and its relationship to development also presents itself in a rather different light in the field. Admittedly, many practitioners complained about the Ugandan government's conflation of development and reparations.⁶⁶⁴ The government presents development programmes such as the Northern Ugandan Social Action Fund (NUSF) and the Peace, Recovery and Development Plan (PRDP) as reparations. These programmes have been heavily criticized for corruption, lack of local participation and for prioritizing infrastructure development and the consolidation of state authority over peace building and reconciliation.⁶⁶⁵ An ICC field

⁶⁶² E. Laruni, 'Regional and Ethnic Identities: The Acholi of Northern Uganda, 1950-68', 9 *Journal of Eastern African Studies* (2015) 212.

⁶⁶³ Victims' Views and Concerns on the Issue of Reparation or Assistance in Lieu of Reparation Pursuant to the Trial Chamber Decision of 5 April 2016 on the Defence Motions on 'No Case to Answer', plus 3 Annexes, *Ruto and Sang* (ICC-01/09-01/11-2035), Trial Chamber V (A), 15 June 2016, §16.

⁶⁶⁴ M. Otim and K.S. Kihika, *On the Path to Vindicate Victims' Rights in Uganda: Reflections on the Transitional Justice Process since Juba*, ICTJ Briefing, June 2015, available at https://www.ictj.org/sites/default/files/ICTJ-Briefing-Uganda-TJProcess-2015_0.pdf (visited 15 August 2016), at 9.

⁶⁶⁵ RLP, *Are we there yet? Brainstorming the Successor Programme to Peace Recovery Development Plan (PRDP2) for Post Conflict Northern Uganda*, Policy Brief, February 2015, available at http://www.refugeelawproject.org/files/ACCS_activity_briefs/Are_We_There_Yet_%20ACCS_PRDP_III_Briefing.pdf (visited 15 August 2016), at 3, 4.

officer sighed, 'there has been really nothing very concrete for victims... we hear about PRDP but it gets lost; it is too big. It doesn't really target these victims who suffered.'⁶⁶⁶

Nonetheless, insisting on the distinction between 'reparations' and 'development' is problematic in a context in which the vast majority of people define themselves as victims. In a population-based survey in Northern Uganda in 2010, 97 % of respondents said that they considered themselves victims of the conflict.⁶⁶⁷ This is understandable given that most people in Northern Uganda were heavily affected by a war that ravaged the region for two decades: they were abducted, they lost loved ones, they were displaced, they lost livelihood and they missed out on opportunities of education and employment. The real danger may therefore not be lack of recognition but highly selective and arbitrary recognition which writes most victims out of narrative of victimhood in Northern Uganda. One CSO representative complained about the TFV's programmes in the following terms:

the few programmes that are implemented by CARE, for example, was to get particular individuals and reinforcing that identity among them, as victims. That does not transform a society, because the society all felt victimized. Suddenly you are recreating or exalting some forms of victims. What identity are you giving the others, whose violations or whose experiences were not acknowledged?⁶⁶⁸

When the vast majority of people in a region claim victim status, development rather than reparations may be the best way of recognizing systematic and widespread victimhood.

⁶⁶⁶ Interview with ICC Field Staff, Kampala, 22 July 2014.

⁶⁶⁷ P. Pham and P. Vinck, *Transitioning to Peace: A Population-Based Survey on Attitudes about Social Reconstruction and Justice in Northern Uganda*, December 2010, available at https://www.law.berkeley.edu/files/HRC/Publications_Transitioning-to-Peace_12-2010.pdf (visited 15 August 2016), at 44.

⁶⁶⁸ Interview with CSO Representative, Kampala, 7 August 2014.

In Kenya, some of my interviewees emphatically expressed that while ‘transformative justice’ may be appropriate for ‘failed states’ such as the DRC or CAR, it is beside the point in Kenya. One Kenyan lawyer exclaimed:

The Kenyan situation is not anywhere near what was happening in Northern Uganda, in the DRC, or the Sudan. There is absolutely no relationship. These are communities [in Kenya] who led absolutely normal lives at the time the violence happened. These were not people who were living in the jungle; they were not destitute. We are talking about people who were economically empowered... It should be approached differently. All the Kenyan victims ask for is ‘take us back where we were before’.⁶⁶⁹

While other CSO actors were also sceptical about the TFV’s transformative justice ambitions, they did believe that societal and political change was necessary to foil the pattern of recurrent election violence in Kenya. One said: ‘But I do believe transformative justice is the future, that’s the only way we can avoid violence.’⁶⁷⁰

Ultimately, however, the similarities between ‘The Hague’ and ‘field perspective’ were more striking than the differences. Despite critique and concerns, perspectives often coalesced around the idea that transformative justice is needed and that the TFV should contribute to it to the extent possible together with other actors such as states and NGOs. As one ICC judge expressed, ‘it [transformative justice] is very ambitious because it ends up with the tradition, with the culture in these societies but this does not mean that we should not try to change something’.⁶⁷¹ Another judge observed:

I think that is extremely useful. I think, of course, this exceeds the powers of the Court. The Court is not a human rights court. And I don’t think we could be involved in ordering measures of these types of things to the states. Remember that reparations for us are ordered from the convicted person. But through the Trust Fund you can do things that go a little beyond the single case of the Court. So I think it is a good idea and if they

⁶⁶⁹ Interview with Kenyan Lawyer, The Hague, 28 October 2013.

⁶⁷⁰ Interview with Intermediary, Nairobi, 30 June 2014.

⁶⁷¹ Interview with Judge, The Hague, 13 February 2014.

can provoke these things together with other organizations, I think it is a very good idea.⁶⁷²

There was also substantial agreement in Kenya and Uganda that transforming structures of violence and poverty was necessary and that the Court could support such efforts. The real cleavages only emerged when it came to unpacking the concept of transformative justice: Who should be transformed, what should be transformed and how? One noticeable commonality among my interviewees in The Hague was that they were interested in a rather specific meaning of 'transformative justice' as addressing gender discrimination and injustice. They were less comfortable when it came to addressing broader socio-economic injustices driving conflicts. It is probably no coincidence that the key documents that developed and invoked the concept have focused on gender discrimination and SGBV prevention. In Northern Uganda, a rather different picture presented itself. My interviewees widely supported the idea of transformative justice as addressing poverty and socio-economic injustice but were much more ambivalent about the question of gender justice.

3. What Transformation and of Whom?

As in The Hague, most local partners and intermediaries I interviewed in Uganda were not familiar with the concept of transformative justice. Once I explained it, their reaction was supportive but cautious. Many felt that doing 'transformative justice' in Northern Uganda requires sensitivity towards the changing character of conflict. It is not sufficient to address the structural causes of its 20-year-war which are often linked to the north-south divide of the country and the neglect of Northern Uganda in the development strategy of

⁶⁷² Interview with Judge, The Hague, 30 January 2014.

the central government. The conflict has since then evolved; it has eaten itself into the social fabric of communities and families. A local TFV partner lamented, 'they talk about the silence of guns; we talk about relative peace, but to me there is no peace. When people are conflicting over land within families, neighbours and clans... People are dying. People are struggling over land... There is a silent war in the communities.'⁶⁷³ An Oxfam study in 2014 found that approximately 50% of the population in Northern Uganda has experienced land conflict and 72% of these conflicts have unfolded within the household, family or clan.⁶⁷⁴ In response, many local NGOs that used to work on 'transitional justice' have now shifted their agenda to 'land conflicts' and 'domestic violence'.

Yet, while my informants agreed that there are new conflicts haunting communities which relate to the unresolved issues of the war in Northern Uganda, they drew very different conclusions as to what transformative justice means and requires in these circumstances. In fact, my fieldwork revealed that the underlying questions of what and who should be transformed in Northern Uganda and how are far from resolved. The TFV's Strategic Plan suggests that it mainly relies on so-called 'local change agents' for achieving transformative justice. It argues that 'local change agents' play a crucial role in bringing about transformation. For this reason, 'the TFV aims to build the capacity of community-based change agents - including traditional and faith leaders, women's grassroots organizations, educators, local government authorities and the media...'.⁶⁷⁵ Yet, while many of the TFV's 'change agents' want change, a closer analysis of their

⁶⁷³ Interview with TFV's Local Partner, Gulu, 10 July 2014.

⁶⁷⁴ C. Burke and D. Kobusingye, *Women's Land Rights in Northern Uganda*, Oxfam Study, February 2014, available at http://www.landcoalition.org/sites/default/files/documents/resources/Securing%20Women%20Land%20Rights%20Report_with%20covers%20_0.pdf (visited 15 August), at 10.

⁶⁷⁵ TFV Strategic Plan 2014-2017, at 25.

argumentation reveals that they express conflicting and even contradictory ideas of transformative justice.

For one thing, there is little agreement in Northern Uganda on what the ‘society’ is that needs to be transformed. After all, societal structures eroded in the course of 20 years of war. In addition to horrific crimes perpetrated by the LRA, the majority of the population was displaced by the government’s military strategy and spent years in displacement camps. These cramped camps nurtured new socialization dynamics that alienated people from their communities and also unleashed new gender dynamics:

During the war, gender roles shifted. Women were more active within the camps. Even if it was only a small garden, they would plant something. Men were just there to wait for people to bring food and they got used to it. And now, they are back and are still waiting for food. Women have taken up this strong role of providing food for the family but now the men are starting to question this power that the women have.⁶⁷⁶

‘Post-conflict situations’ often entail contradictory consequences, especially for women. On the one hand, it is often claimed that war creates ‘a gender dividend’ as women take on more responsibilities during wars as providers for their families, as workers and even as warriors thereby destabilizing traditional gender roles.⁶⁷⁷ On the other hand, research suggests that women’s experiences of SGBV are frequently continuous: while violence against women peaks during times of conflict, it persists after conflict, especially in the form of domestic violence.⁶⁷⁸ In a recent study on female survivors of conflict-related SGBV in Northern Uganda, 90 out of the 97 SGBV survivors interviewed said that they still

⁶⁷⁶ Interview with NGO Officer, Kampala, 30 July 2014.

⁶⁷⁷ Machanda cited in C. Duggan and A.M. Abusharaf, ‘Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice’, in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford: OUP, 2006), at 629.

⁶⁷⁸ C. Cockburn, ‘Don’t talk to me about war. My life’s a battlefield’, open democracy 25 November 2012, available at <https://www.opendemocracy.net/5050/cynthia-cockburn/%E2%80%9Cdon%E2%80%99t-talk-to-me-about-war-my-life%E2%80%99s-battlefield%E2%80%9D> (visited 24 October 2014).

face the same threats of sexual violence as in the past.⁶⁷⁹ In the literature, this phenomenon has been referred to as the 'post-war backlash' against women as men return home after the war and try to reassert their power.⁶⁸⁰ Domestic violence is prevalent today in Northern Uganda possibly because of these changing power dynamics and what has been referred to as the 'identity crisis' of men.⁶⁸¹

Yet, many people in Northern Uganda see the high rate of violence against women as part of a bigger social order problem rather than the result of changing gender roles.⁶⁸² They blame the erosion of community structures during the war and the weakening of traditional authority, for crime and the rise in land conflicts. A priest I met suggested that one of the main challenges for the community is that young people do not respect their elders anymore.⁶⁸³ Before the war, elders knew the boundaries of the land but many died in the IDP camps during the war and those who returned after years of displacement either did not know the boundaries or could not find them anymore due to changes in the natural geography.⁶⁸⁴ Many of the young people, who suffer from unemployment and failed reintegration, see the land as a commercial source and sell it to start a 'boda-boda'

⁶⁷⁹ Justice and Reconciliation Project, *Establishing the Extent of SGBV Revictimisation among Female Survivors of Conflict SGBV in Northern Uganda*, November 2014, available at [http://justiceandreconciliation.com/wp-content/uploads/2014/11/SGBV-Baseline-Report-Summary-
WEB.pdf](http://justiceandreconciliation.com/wp-content/uploads/2014/11/SGBV-Baseline-Report-Summary-WEB.pdf) (visited 24 January 2015).

⁶⁸⁰ Turshen cited in D. Pankhurst, 'Introduction: Gendered War and Peace', in Donna Pankhurst (ed.), *Gendered Peace. Women's Struggles for Reconciliation and Justice* (London: Routledge, 2008), at 4.

⁶⁸¹ M. Chrispus Okello and L. Hovil, 'Confronting the Reality of Gender-Based Violence in Northern Uganda', 1 *IJTJ* (2007) 433.

⁶⁸² For the importance of social harmony in Northern Uganda see H. Porter, 'Justice and Rape on the Periphery: The Supremacy of Social Harmony in the Space between Local Solutions and Formal Judicial Systems in Northern Uganda', 6 *Journal of Eastern African Studies* (2012) 81.

⁶⁸³ Interview with Priest, Gulu, 10 July 2014.

⁶⁸⁴ IRIN, 'Uganda: Land Disputes threaten Northern Peace', 19 April 2012, available at <http://www.irinnews.org/report/95322/uganda-land-disputes-threaten-northern-peace> (visited 19 August 2016).

(motorbike) business often without consulting the elders.⁶⁸⁵ There are reports of communities arming themselves in the face of ongoing land disputes, for example in the Adjumani and Amuri districts.⁶⁸⁶ Women have particularly lost out amidst rising community and family disputes about land as their property rights are the least secure.⁶⁸⁷ After our interview the priest confided in me, with some distress, that he was not even sure the young women trained at his church would still kneel down in his presence. He then waved a young woman over to demonstrate this 'degeneration of morals' to me but to my embarrassment the young woman immediately knelt down.

Indeed, many of the TFV's 'change agents' long for the old order that supposedly afforded more protection for women. A representative of the Acholi Religious Leaders Peace Initiative (ARLPI), an organization that seeks to 'mainstream the empowerment of women' in all of its activities, complained that nowadays, women who return to their father's house after a failed marriage or their husband's death are often chased away with their children.⁶⁸⁸ This was very different in the 'good old times': 'if you are my sister and you went to your home but your marriage did not work, and then you came back home, my father would say, "you are also our daughter... we, as your brothers, will construct a hut for you. This is where you will stay; this is where your death will find you"'.⁶⁸⁹ From

⁶⁸⁵ Saferworld, 'Promoting Conflict-Sensitive Approaches in Amuru District, Northern Uganda', 22 March 2013, available at <http://www.saferworld.org.uk/news-and-views/case-study/40-promoting-conflict-sensitive-approaches-in-amuru-district-northern-uganda> (visited 19 August 2016).

⁶⁸⁶ RLP, 'Shoot us all Down: The Lakang & Apaa Land Conflict', Video, available at <https://www.youtube.com/watch?v=2IJUP4xuHp8> (visited 19 August 2016).

⁶⁸⁷ Burke and Kobusingye (2014).

⁶⁸⁸ Acholi Religious Leaders Peace Initiative Website, 'Women Empowerment,' available at <http://www.arlpi.org/women-empowerment> (visited 25 January 2015); Interview with Officer of a Faith-based NGO, Gulu, 13 July 2014.

⁶⁸⁹ Ibid.

this perspective, a ‘transformative’ Northern Uganda has to go backwards in order to go forward.

3.1. Traditional Justice: Part of the Problem or Part of the Solution?

Here, my analysis intersects with another debate in the TJ literature which has been particularly polarizing and emotional in Northern Uganda: the role of ‘traditional justice’ rituals in dealing with the past. On the one hand, there are those who celebrate ‘traditional justice’ as a more authentic and often more humane alternative to the ‘Western’ model of retributive justice.⁶⁹⁰ Some, though by no means all, justice practices in Northern Uganda are ‘restorative’; rather than punishing the perpetrator, a ritual is performed and compensation is paid to reconcile clans or community members.⁶⁹¹ On the other hand, there are those who decry ‘traditional justice’ either as a sham or as falling short of victims’ rights to justice and defendants’ rights to a fair trial.⁶⁹² Yet, what role, if any, can traditional justice play in achieving transformative justice?

For some of my informants, this was a non-question. A CSO representative exclaimed:

Transformative justice?... You cannot do it without engaging the traditional justice systems... Only 33% of all Ugandans have ever engaged with any of the justice, law and order sectors, ministries or departments, courts, police, prison... That means that about 70% are in the alternative justice system and many of them in the traditional justice system.⁶⁹³

⁶⁹⁰ B. Afako, ‘Reconciliation and Justice: “Mato Oput” and the Amnesty Act’, 11 *Accord* (2002) 64; E. Baines, ‘Spirits and Social Reconstruction: Rethinking Transitional Justice’, 109 *African Affairs* (2010) 409.

⁶⁹¹ For a good overview of the debate on traditional justice, see A. Macdonald and T. Allen, ‘Post-Conflict Traditional Justice: A Critical Overview’, 3 *Justice and Security Research Programme Working Paper* (2013), available at <http://www.lse.ac.uk/internationalDevelopment/research/JSRP/downloads/JSRP3.AllenMacdonald.pdf> (visited 19 August 2016).

⁶⁹² Human Rights Watch, *The Lack of Accountability* (2005), available at <http://www.hrw.org/reports/2005/uganda0905/6.htm> (visited 19 August 2016).

⁶⁹³ Interview with CSO Representative, Kampala, 7 August 2014.

These practices are seen as legitimate to the extent that they help to resolve local conflicts.⁶⁹⁴ For many people in rural areas, the formal criminal justice system is simply not accessible. Besides, the court and police system are seen as expensive and corrupt: 'When I have money, the case is gone. So money speaks really much louder.'⁶⁹⁵ For many of my informants, there was no way around the traditional justice system.

Yet, other local and international actors want none of that. They see 'culture' and 'tradition' rather than the war and its consequences as the biggest problem for women. In their eyes, traditional justice rituals look more like mechanisms for reproducing patriarchy and male power rather than mechanisms for creating social order. They criticize the way these traditional justice mechanisms deal with rape as a 'pollution of the spirits' rather than as a crime. Perpetrators are 'cleansed' in the course of a public ritual rather than punished. The rituals are usually performed by male elders with women performing 'highly valued' but nonetheless supplementary roles such as preparing ceremony requirements and the food.⁶⁹⁶ A psychologist who is working with victims of the conflict in the villages of Northern Uganda insisted:

From my point of view, there is no justice for women [in Northern Uganda]. The lack of justice is not because of the war but because of the culture. Culturally, when you marry you go the clan of the husband where you count [for] nothing. Justice you can only have if you have the capacity to bribe the police... It is not a war issue.⁶⁹⁷

⁶⁹⁴ See also Porter (2013), at 59; P. Clark, 'Bringing the Peasants back in, again: State Power and Local Agency in Rwanda's Gacaca Courts', 8 *Journal of Eastern African Studies* (2014) 193.

⁶⁹⁵ Interview with TFV Local Partner, Lira, 18 July 2014.

⁶⁹⁶ Justice and Reconciliation Project, *Gender and Generation in Acholi Traditional Justice Mechanisms*, November 2012, available at <http://justiceandreconciliation.com/wp-content/uploads/2012/11/Gender-and-Generations-in-Acholi-Traditional-Mechanisms-Web.pdf> (visited 25 January 2015), at 6/7.

⁶⁹⁷ Interview with Psychologist, Gulu, 9 July 2014.

3.2. Different Priorities

Even those ‘change agents’ who explicitly embrace women’s empowerment as one of their goals may have different priorities. After our interview, one of the TFV’s former partners, a priest in Gulu, gave me a booklet of his Church. Some passages of the booklet made for uncomfortable reading. There is the story of Esther, an orphan, whose uncle offered to pay for her education in return for sexual services. The booklet comments:

The good news is that Esther is a Born Anglican Christian. Her love for the Lord has made her determined to live a sexually pure life - even when it meant being uneducated. She could not trade the Temple of the Holy Spirit for a mere 500,000 shillings for school fees.⁶⁹⁸

The ‘good news’ is not that Esther will be protected from her uncle or that she is provided with free schooling, but that she managed to preserve her sexual purity in difficult circumstances.

But even the women themselves may have different priorities. Some women activists told me that their work of ‘empowering women’ is difficult because many female victims of SGBV primarily want communal acceptance and reintegration. An NGO worker told me, ‘and in any event, most women will be reluctant for that [transformative] approach. They tell you: “what do you want from me? I’m already a pariah. Now you want to add another burden?”’⁶⁹⁹ A young woman who volunteered for one of the TFV’s former partners in Lira explained to me:

look, we feel that the most we can do here is to enable women to play their traditional roles again because they have lost community standing due to their physical injuries. We know it is not much, but if we rehabilitate them physically, we can help them to perform their traditional roles again and this gives them community acceptance. We don’t quite see how we can transform societies. Obviously we talk to men and we try to sensitize them

⁶⁹⁸ Field notes, Gulu, 10 July 2014.

⁶⁹⁹ Interview with NGO Officer, Kampala, 30 July 2014.

to gender rights but essentially we help women to become the types of women that are accepted by their communities.⁷⁰⁰

The TFV's local change agents do not share the same vision of transformative justice. Indeed, transformative justice by definition challenges the power of many traditional stakeholders such as religious leaders. By enlisting them as 'change agents' in their transformative effort, the TFV runs the risk of making their assistance programmes part of a more conservative agenda that pushes for the return to a pre-war order in which women often had even fewer rights.

4. Transformative Justice: Transform yourself into someone more productive and beautiful?

Of course, 'transformative justice' is a tall order for an organization that has only a few million Euros at its disposal which have to be spread across all the Court's situation countries. Transforming societal structures is painstaking; it takes a lot of time and money. It is also difficult to deal with 'traditional stakeholders' in that struggle. Yet, the TFV never claimed to actually 'transform societies'. They want to use their programmes to contribute and move towards that goal. They also do not work alone but through local partners and government structures where possible. So we should try to evaluate the TFV's programmes in light of a more modest aim: is the TFV using its programmes to push towards structural transformation?

I think this is far from clear at this point. Listening to my interviews, I found it striking that there was an almost seamless shift from the idea of transformative justice as

⁷⁰⁰ I'm paraphrasing here an informal conversation held on 19 July 2014 in Lira, Northern Uganda.

‘addressing structures’ to transformative justice as ‘transforming people’. I explained the concept in terms of the former, but my interviewees talked about it in terms of the latter: it is the people who need to be ‘transformed’. One local partner in Lira elaborated:

The most important thing the Trust Fund has ever tried to support is ‘transforming somebody’, so that he or she cannot reflect back to the other situation he or she went through or the situation that she was in before the war. For example, the Trust Fund has been trying to provide artificial limbs to people who were amputated during the war... now he or she has an artificial limb, he or she can walk, can work, and participate in economic activities.⁷⁰¹

At first, I thought the local partners had misunderstood the concept of transformative justice. Yet, a closer reading of the TFV’s activities, its methodology and the evidence it uses to illustrate the success of its programmes suggest that the TFV, in practice, does aim at transforming people, not structures.

First, the TFV puts a lot of emphasis on psycho-social support in its activities. It has for example supported ‘Healing of Memories’ workshops facilitated by the Anglican Diocese of Northern Uganda which aim at ‘spiritual healing, reconciliation, and peace-building...’.⁷⁰² These sessions aim at individual transformation through forgetting and accepting. One workshop participant reflected on her experiences as follows, ‘I learned to acknowledge the past and accept it’.⁷⁰³ A psychologist told me that many organizations in Northern Uganda claim to do ‘counselling’. Yet, according to him, ‘what they were [really] doing is giving advice according to the cultural manner, “stop crying, be strong, forget it”’.⁷⁰⁴ Even more collective activities such as community therapy or the peace

⁷⁰¹ Interview with TFV’s Local Partner, Lira, 21 July 2014.

⁷⁰² TFV, *Programme Progress Report Summer* (2014), available at <http://www.trustfundforvictims.org/> (visited 19 August 2016), at 29.

⁷⁰³ Ibid.

⁷⁰⁴ Interview with Psychologist, Gulu, 9 July 2014.

school are designed to make people function better within existing structures rather than changing them. Ultimately, the therapeutic approach to transitional justice is restorative but not transformative; it treats suffering as an inherently personal or communal experience rather than as the product of violent structures.

This focus on individual transformation is also reflected in the TFV's methodology. The TFV's external evaluation report, for example, recommended that it should use a 'positive deviant' approach for its programmes.⁷⁰⁵ The idea is that you select people who made it against the odds, for instance, a former child soldier who successfully reintegrated into his community and now has a livelihood, and make them role models for your programmes.⁷⁰⁶ So instead of trying to change the odds, you make victims learn from 'exceptional examples' of people who made it nonetheless.

Lastly, the victim survivor stories that the TFV narrates to illustrate its success indicate that it ultimately aims at individual transformation and a rather limited one for that matter. On its website, the TFV tells the story of Mary, a LRA abductee and former 'wife' of Kony who was abused and tortured by the LRA and then later raped by the Uganda People's Defence Force. Mary's history made her 'un-marriageable'. She tried to report the rape to the police but was not given a hearing. With the psychological help of the TFV's partner, she learned to express her anger and sadness in a healthy way and her relationships with others improved, too.⁷⁰⁷ This story suggests that the TFV does not really

⁷⁰⁵ International Center for Research on Women, *External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions*, November 2013, available at http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/ICRWTFVExternalPr ogEvaluation2013Final.pdf (visited 24 October 2014), at 45.

⁷⁰⁶ Telephone interview with TFV Evaluator, 3 January 2014.

⁷⁰⁷ TFV, 'Victim Survivor Stories', available at <http://www.trustfundforvictims.org/victim-survivor-stories>.

tamper with the structural conditions that constrain Mary's life such as patriarchy, marriage customs and police power. Instead, it helps her to deal a bit better with them.

You may argue now that 'transforming people' is good enough and it may be more realistic. Yet, I see two problems with this approach. First, it suggests that there is something wrong with the 'people' that requires treatment. In Uganda, such a discourse plays into widespread stereotypes that portray the Acholi as 'innately violent and primitive'.⁷⁰⁸ One of the initiatives that the TFV has supported is the 'peace school' whose rationale it explains as follows:

"L'école de la Paix" implemented by the Missionnaires d'Afrique is a good example of *shifting the mindset of young people*. Actually, formal and non-formal education remains a cornerstone for empowerment and *behaviour change*. Through their activities outside and inside the formal education system, thousands of teenagers have received training dealing with everyday matters regarding peace, passive cohabitation, social cohesion, accepting differences and diversities. *Transforming the culture of those young people could have a long term positive effect*.⁷⁰⁹

Yet, by focusing on the behavioural change of young people, the TFV may unwittingly contribute to an understanding of conflicts as caused by 'violent youngsters', thereby glossing over legitimate grievances and structural causes of war. In Northern Uganda, for example, the economic and political marginalization of the region by the central government and the repression of its people have been major drivers of successive rebellions and civil war.

Another problem I see is that 'transforming people' often becomes the demand on victims to essentially transform themselves into more productive members of society as soon as possible and with very little in terms of assistance. The TFV, for example,

⁷⁰⁸ T. Allen, 'Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda', in N. Waddell and P. Clark, *Courting Conflict: Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008) 47.

⁷⁰⁹ TFV, *Empowering Victims* (2012), at 24 (emphasis added).

defines its physical rehabilitation work as ‘supporting victims who have suffered physical injury in order to recover and resume their roles as productive and contributing members of their societies’.⁷¹⁰ But this is not only about the TFV. We also have to contextualize the TFV’s activities within two prevailing discourses: the ‘survivor discourse’ that celebrates victims’ resilience and agency by calling them ‘survivors’ rather than ‘victims’ and the development discourse that is based on the philosophy of self-help. The TFV’s activities are steeped in both discourses. For example, the TFV has introduced the term ‘victim survivor’ to conform both to the Court’s legal texts, which tie the TFV to the terminology of victims, and to accepted discourse among academics and activists that insists on calling victims ‘survivors’.⁷¹¹ A TFV evaluator applauded this creativity. She told me, ‘my training is in public health so I always would say “survivor”. To see particularly women who suffered from sexual violence as victims goes against my approach to that work.’⁷¹² When I asked her, how the people, who had received TFV assistance, would identify themselves, she replied:

We have an issue of translation. A lot of the beneficiaries would refer to themselves as victims, and I don’t know whether this is how they view themselves with everything this implies in English: “I’m a victim”; it is such a passive state or whether it does not carry the same weight in their language or because they know the programme that they are benefitting from calls them victims.⁷¹³

Another possibility is that it may be difficult for people to see themselves as survivors when they continue to struggle to meet their basic needs. In his research with victims’ focus groups in Kenya and Uganda, Tenove found that all participants ‘agreed that the

⁷¹⁰ TFV, *A Road to Recovery: Healing, Empowerment and Reconciliation*, Winter 2014, available at http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFVPPRWinter2014_final-For_Print.pdf (visited at 20 August 2016), at vii.

⁷¹¹ TFV Strategic Plan 2014-2017, at 7 (footnote 4).

⁷¹² Telephone interview with TFV’s evaluator, 3 January 2014.

⁷¹³ Ibid.

term “victim” was appropriate for them... Many discussants linked victim status to a moral and social claim for redress.’⁷¹⁴ In fact, the term ‘survivor’ may be problematic as it carries normative expectations: you are expected to stop crying, move on, build a new life, be a compliant citizen and a self-sufficient economic actor. As Gupta argues, the concept ‘survivor’ ‘underplay[s] the oppressive power of the system’ and thereby decreases the pressure on the state to ‘transform’ itself and provide its citizens with the support they need to ‘build a new life’.⁷¹⁵

Furthermore, the TFV’s assistance programmes are informed by development methodology and its emphasis on self-help, as reflected in the use of microcredit and saving and loans associations. The rationale is that through access to credit, people can become entrepreneurs and set up their own business. One SGBV victim expressed her gratitude about this development assistance in the following terms:

The microcredit was the biggest benefit I received. It gave me dignity and made me respectable. I can even afford to make myself beautiful. Without that, I couldn’t have found a husband. Nobody wants to marry a woman who was raped, but he finds me beautiful because I can take care of myself.⁷¹⁶

Through this focus on survivors’ agency and self-help, the TFV’s assistance programmes contribute to normative expectations of ‘individual betterment’ while undermining the case for structural change and comprehensive victims’ support from the state and the international community. Ultimately it is the victim who has to do the transformation and not the state, the community, the society or the international community. Logically, this emphasis on ‘exceptional individuals’ and self-help leads to frustration with those victims

⁷¹⁴ Tenove (2013), at 11.

⁷¹⁵ R. Gupta, “‘Victim’ vs ‘Survivor’: Feminism and Language”, open democracy, 16 June 2014, available at <https://www.opendemocracy.net/5050/rahila-gupta/victim-vs-survivor-feminism-and-language> (visited 20 August 2016).

⁷¹⁶ *External Evaluation of the Trust Fund for Victims Programmes* (2013), at 34.

who don't make it against the odds, who are the 'norm' if you want. A women's activist talked about female victims who had benefited from vocational training in sewing in the following terms:

It takes them so long to learn how to sew. They end up not being able to produce anything so fantastic apart from bags, and then the production is not so huge... how do we enlarge the production and push them away from the present so that they can produce for export? But honestly, they are very happy to sew two dresses, hang it in front of their shops and then go to their garden (laughs)... Women are usually tailors and hairdressers. And then you want to tell them: 'Why can't you be a designer? Why can't you think about producing?'⁷¹⁷

Thus, the expectation is that after six months or a year of vocational training you should be a designer producing for export. In practice, transformative justice thus shifts the responsibility of transformation from the state to the individual 'victim survivor'. It comes down to assisting people in better performing the societal and economic roles assigned to them by the existing system, the same system in which terrible crimes were committed against them. With the help of institutions such as the TFV, victims become survivors: they become better wives and better workers.

5. Conclusion

To the extent that ICC practitioners in The Hague know about 'transformative justice', their concerns focus on the ICC's lack of money, mandate and reparation rationale. Many were sceptical whether the ICC and TFV can achieve anything substantive. Some even suspected that 'transformative justice' was a strategy of distracting from the TFV's inability to fulfil its much more limited mandate of giving meaningful assistance to victims. Yet, the real sticking point in my interviews was not whether the ICC and the TFV should be involved in transformative justice. Many practitioners both in The Hague and in the

⁷¹⁷ Interview with CSO Representative, Kampala, 30 July 2014.

field believed that the TFV could contribute to such efforts albeit in a very limited way. Contestations only surfaced once the concept of transformative justice unravelled. The Court's practitioners focused on the idea of transformative justice as addressing gender discrimination which also reflects the more general prioritization of political and civil rights over social and economic rights in international human rights discourse. In Northern Uganda, the situation was reversed. While the TFV's local partners paid lip service to the importance of 'gender justice' rather different conceptions of women and social order lurked behind that generic term.

In this way, the analysis revealed not only conflicting ideas about *how* transformative justice should be done and *by whom*, but also more fundamental disagreements on what the 'society' is that needs to be transformed. The TFV's transformative justice approach in Northern Uganda ignores these divisions. It assumes that traditional power-holders such as elders and religious leaders can be turned into 'local change agents' that will push ahead a transformative agenda. In doing so, the Trust Fund may end up reinforcing the gender discrimination that it set out to address as so-called 'change agents' promote their own ideas of social transformation. Transforming societies may require acknowledging that all good things: tradition and reform, victims' aspirations and transformation, a victims-centred approach and a human rights-based approach, order and justice, do not always go together. There are tough trade-offs and inconvenient choices to be made and not everyone will be a genuine 'change agent' in transformative justice.

In practice, though, it is not clear whether the TFV is really pushing into a transformative direction. Part of the problem may be that the development methodology

that underlies the TFV's programmes is inherently status quo oriented. It helps victims to function better within existing power structures. It may also be that reparation's focus on an individualized conception of harm pulls the TFV away from structural change. The danger is that through the focus on individual transformation, the demand on the state, the society, the economy and the community to undergo transformation in order to prevent conflict and crime in the future falls by the sideways. Transformative justice is still an interesting concept as it pushes practitioners to think beyond and question the ideal of 'full restitution' in transitional justice contexts. But theory and practice need to be better aligned. There is a real risk that the practice not only does not achieve 'structural transformation' but actually works against it.

An interactional approach to analyzing justice concepts not only reveals that concepts such as 'transformative justice' mean different things to different people and change when new actors such as local intermediaries and partners become involved in the process. It also suggests that by analyzing practices we can unlock the de facto meaning of justice concepts which, as in the case of the TFV's assistance in Northern Uganda, may directly contradict their stated policy rationale.

Chapter VII - Gender Justice at the ICC: Too much, too little or just the wrong kind?

Chapter VII explores the interplay between notions of ‘gender justice’ in the Court’s Statute and prosecutorial strategy and the reactions from the field. While ‘gender’ is narrowly defined in the Statute reflecting a hard-fought compromise between ‘progressives’ and ‘traditionalists’ during the Rome negotiations, different meanings of ‘gender justice’ have proliferated within the institution since 2002. One of the most notable and noted developments in this regard was the publication of the OTP’s Policy Paper on Sexual and Gender-Based Crimes in 2014. The policy paper has been widely celebrated as a concrete step towards ending impunity for SGBV crimes through more and better SGBV prosecutions at the ICC. Yet, it has also re-opened earlier debates about the concepts of gender and gender justice underlying the ICC’s approach. A new question has surfaced in this debate: ‘but what about men?’. The Refugee Law Project (RLP), a Ugandan NGO, has become a prominent mouthpiece for that question. It has argued that the OTP’s policy paper ‘fails to address the historical exclusion of male victims from international conceptions of conflict-related sexual violence...’⁷¹⁸

This Chapter will situate that critique within a broader backlash against the focus on SGBV victims and women’s empowerment in post-conflict Uganda. Drawing on my fieldwork in Northern Uganda, it explores how international and local organizations including the TFV have accommodated this backlash. Such an analysis suggests that the accommodation has often come at the price of a structural approach to women’s

⁷¹⁸ RLP, *Comments on the ICC Draft Policy Paper on Sexual and Gender Based Crimes*, 23 February 2014, available at https://www.law.berkeley.edu/files/RLP_Commentary_on_ICC_Policy_Paper_FINAL_140226.pdf (visited 20 August 2016) §14.

empowerment in Uganda: women's empowerment has to be negotiated in the communities and not imposed from outside. It can be therapeutic and economic but not political and structural. Most importantly, it cannot come at the expense of male power.

This will be shown by first tracing how the Rome Statute's ambiguous gender definition gave rise to different interpretations, but also to resistance both within the Court and in the field. The Chapter then maps more closely the interpretive battle around 'gender justice' in Northern Uganda, reading the debate through the lens of the 'new' focus on male victims of SGBV. Finally, it looks at three different ways in which women-focused organizations have tried to accommodate the 'but what about men?' backlash and what they mean for gender justice both at the ICC and in Northern Uganda.

1. Is the ICC at the Forefront of 'Gender Justice'?

'The ICC is at the forefront of gender justice', the President of the ASP, Tiina Intelmann, proudly proclaimed in 2013.⁷¹⁹ At the heart of this claim are multiple, innovative gender provisions that shape the Court's substantive jurisdiction, its procedures and institutional make-up. For the first time in international criminal law, the Rome Statute explicitly recognizes sexual and gender-based crimes as separate war crimes and crimes against humanity. It specifically enumerates 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other grave forms of sexual violence' as distinct international crimes.⁷²⁰ 'Gender' is further included as a ground for the crime of persecution.⁷²¹ Gender provisions also made inroads into the Court's procedures as

⁷¹⁹ T. Intelmann, 'Gender Justice and the International Criminal Court', *The World Post*, 13 August 2013, available at http://www.huffingtonpost.com/tiina-intelmann/gender-justice-and-the-in_b_3431280.html (visited 20 August 2016).

⁷²⁰ RS articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi)

⁷²¹ RS article 7(1)(h)

reflected in Article 68 (1), which establishes the Court’s responsibility to protect victims and witnesses, taking into account all relevant factors including gender.⁷²² According to the Rome Statute, the Court’s institutional make-up shall be characterized by a ‘fair representation of female and male judges’, a provision that equally applies to the staff composition of the OTP and the Registry.⁷²³ Another important gender provision is the integration of SGBV expertise into the Court’s work. Article 42(9), for example, requires the Prosecutor to appoint advisers with legal expertise on sexual and gender violence. To make sure that a gender perspective would also infuse those provisions that do not explicitly mention ‘gender’, Article 21 (3) requires ‘that the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender....’⁷²⁴

To understand how these unprecedented gender provisions made their way into the Rome Statute, we have to return to a claim that has almost become a mantra in ICC scholarship: that the ICC is a ‘global civil society achievement’.⁷²⁵ In 1998, several NGO coalitions travelled to Rome to participate in the treaty negotiations, using their legal expertise to draft treaty proposals, to influence state delegations, and to build coalitions with ‘like-minded’ states. Their motivation was to build a Court that was as independent, effective and accessible as possible and they managed to secure important victories such as ‘an independent prosecutor’ and broad victims’ rights to participation and

⁷²² RS article 68 (1)

⁷²³ RS articles 36(8)(a)(iii), 44(2))

⁷²⁴ RS article 21 (3)

⁷²⁵ Glasius (2006); N. Deitelhoff, ‘The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case’, 63 *International Organization* (2009) 33; M.J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse and Agency* (New York; Palgrave Macmillan, 2008); S. Fernandez de Gurmendi, President of the International Criminal Court, ‘Keynote Speech at Event marking Day of International Criminal Justice’, The Hague, 26 June 2015, available at https://www.icc-cpi.int/iccdocs/presidency/150626_Remarks_at_event_marking_International_Justice_Day.pdf (visited 16 August 2016), at 5.

reparation.⁷²⁶ Many CSOs also wanted to make sure that gender awareness would permeate all aspects of the Court's work. The Women's Caucus of Gender Justice, a broad coalition of hundreds of women's rights organizations around the world, came to embody this civil society push for gender justice.

2. The Feminist Literature: 'Flawed Concept' versus 'Flawed Implementation' of Gender Justice

Beyond the celebratory statements made by civil society and the press, various strands of the feminist literature have more critically engaged with the ICC's 'gender justice' provisions. The critique within the literature can be roughly divided into two positions: the 'flawed gender concept' and the 'flawed implementation' position. The 'flawed concept' position focuses on the definitional and conceptual battles fought at Rome and is divided between those who would have liked to see more comprehensive criminalization of 'gender violence' under the Rome Statute and those who are ideologically opposed to the very attempt to achieve feminist aims through international criminalization. The 'more criminalization is better' camp is still licking its wounds inflicted by the 'lost battles' of the Women's Caucus for Gender Justice. These entail the failure to criminalize 'gender violence' and 'peacetime violence' more broadly under the Rome Statute.⁷²⁷ Another focal point of their critique has been the Statute's definition of 'gender' which they dismiss as 'stunningly narrow,' a 'failure,' 'puzzling and bizarre' and 'a setback' when compared to preceding definitions of gender in other UN documents.⁷²⁸

⁷²⁶ Deitelhoff (2009)

⁷²⁷ J. Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', 30 *Michigan Journal of International Law* (2008-2009) 1-124, at 112/113.

⁷²⁸ V. Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice', 18 *Harvard Human Rights Journal* (2005) 55, at 55/56.

RS Article 7 (3) defines gender as follows: ‘for the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.’

This ‘circular’ definition has to be read in the context of the contestations between the ‘women’s movement’ and the ‘pro-family movement’ at Rome.⁷²⁹ The former camp comprising the Women’s Caucus and ‘like-minded’ states pushed for defining gender as the social construction of what it means to be a ‘woman’ and a ‘man’ in society. The latter camp comprising the Holy See and several Islamic states advocated for treating ‘gender’ as a synonym for ‘men’ and ‘women’.⁷³⁰ The ensuing definition was a compromise between these two positions. As with many other provisions of the Statute, it reflects the diplomatic strategy of ‘constructive ambiguity’: framing provisions vaguely enough to reach agreement while leaving it to the Court’s judges to figure out what these provisions mean in practice.⁷³¹

While many feminists felt that the Rome Statute’s gender definition and provisions reached too short, others found the whole feminist enterprise at Rome problematic. Scholars such as Janet Halley have criticized feminists at Rome for their focus on more criminalization of SGBV through the ICC. This criminalization zeal has not only side-lined alternative, national or local justice responses but also narrowed and compromised the feminist project at large. She attributes the success of the Women’s Caucus of Gender Justice in 1998 to a phenomenon she calls, ‘Governance Feminism’ (GFeminism). GFeminism describes how feminists in the 1990s began ‘to walk the halls of power’ as

⁷²⁹ Glasius (2006), at 77.

⁷³⁰ Ibid.

⁷³¹ Oosterveld (2005), at 55/56.

diplomats, NGO activists and lawyers, building coalitions with private and state actors, with the aim of weaving gender-sensitive provisions into the existing body of international law.⁷³² While GFeminism has been very successful in Rome, this success has come at the price of diversity in both feminist thinking and advocacy. According to Halley, GFeminists silenced internal dissent during the negotiations and only put up fights for positions that were achievable, thereby leaving many feminist concerns and ideas behind.⁷³³ For example, none of the audible voices at Rome suggested a definition of gender which breaks with hetero-normativity and recognizes a plethora of gender and sexual identities such as LGBT and third gender.

In fact, some critiques see the very construction of SGBV as the ‘ultimate crime’ that drove feminist advocacy in Rome as part of the problem. Vasuki Nesiah, for example, has expressed concern that this focus on sexual violence crowds out other women’s human rights issues in transitional justice such as the gendered aspects of displacement and socio-economic inequalities.⁷³⁴ She argues that ‘feminist transitional justice stripped away other structural and ideological effects of power to focus on the woman who suffered sexual injury’.⁷³⁵ Thus, instead of abolishing the hierarchy of victimhood that often placed SGBV victims at the bottom, feminists in Rome tried to reverse it. This elevation of sexual violence as the ‘ultimate crime’ is often imbued with a subtle or not

⁷³² J. Halley, P. Kotiswaran, R. Rebouché, H. Shamir and C. Thomas, ‘From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism’, 29 *Harvard Journal of Law & Gender* (2006) 336.

⁷³³ *Ibid*, at 122.

⁷³⁴ V. Nesiah, ‘Discussion Lines on Gender and Transitional Justice’, 15 *Columbian Journal of Gender and Law* (2006) 799, at 805.

⁷³⁵ V. Nesiah, ‘Missionary Zeal for a Secular Mission: Bringing Gender to Transitional Justice and Redemption to Feminism’, in S. Kouvu and Z. Pearson, *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Oxford: Hart Publishing, 2011), at 143.

so subtle sexual morality.⁷³⁶ Speaking to the ICC's judges at the sentencing hearing of Bemba, the victims' lawyer remarked, 'you heard about young girls losing their virginity, their lives being lost thereafter'.⁷³⁷ Bemba eventually received a higher sentence for rape than for murder.⁷³⁸

Sexual violence as the 'ultimate crime' also does not necessarily reflect victims' experiences of these crimes.⁷³⁹ In her analysis of the diary, 'A woman in Berlin', written during the Soviet occupation of Germany in 1945, Halley problematizes the old adage that 'rape is a fate worse than death'.⁷⁴⁰ This idea is still prevalent. The ICC's President opened a recent speech as follows:

We heard about victims whose only choice was between rape and death, and about those who would have rather chosen death than to go through the horror of sexual violence again and again, but were not allowed to die even if they wanted to.⁷⁴¹

Halley, on the other hand, shows how some women in Berlin 'chose' and negotiated particular types of 'rape' to ward off other harms.⁷⁴² Thus, feminists are divided on what went wrong in Rome: many think the gender concept is too narrow and does not reflect the myriad ways in which women and men are harmed by gender violence. For others, the very methodology of trying to realize gender justice through international

⁷³⁶ Nesiah (2006), at 806.

⁷³⁷ Transcript, Sentencing Hearing, *Bemba* (ICC-01/05-01/08-T-370-ENG ET WT), Trial Chamber III, 18 May 2016, at 34, line 10.

⁷³⁸ Decision on Sentence Pursuant to Article 76 of the Statute, *Bemba* (ICC-01/05-01/08-3399), Trial Chamber III, 21 June 2016.

⁷³⁹ Nesiah (2006), at 806.

⁷⁴⁰ J. Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict', 9 *Melbourne Journal of International Law* (2008) 2.

⁷⁴¹ Fernandez de Gurmendi (2015), at 1.

⁷⁴² *Ibid.*

criminalization is flawed. Nonetheless, ‘flawed concept’ feminists are united in arguing that things already went terribly wrong in Rome in 1998.

The ‘flawed implementation’ position, on the other hand, sees the integration of SGBV crimes as distinct war crimes and crimes against humanity in the Statute as a victory. They also think that a narrow and confusing gender concept in the Statute is better than none. Many of the ‘flawed implementation’ feminists regard themselves as ‘critical friends’ of international organizations such as the ICC.⁷⁴³ Their scholarship and advocacy is geared towards holding those institutions to their statues and promises. A good example is the Women’s Initiatives for Gender Justice, an NGO based in The Hague that originated from the Women’s Caucus of Gender Justice. It is devoted to monitoring the ICC’s implementation of its ‘gender justice’ provisions. As critical friends, these feminists have special access to and insight into these institutions. Many have worked as their consultants or have participated in state or NGO delegations at the Rome negotiations.⁷⁴⁴ Yet, there are also things that critical friends do not say. They challenge the Court’s practices but not its underlying premises and power hierarchies. Their critique is also somewhat blunted due to their heavy investment in the Court. NGOs such as the Women’s Initiatives for Gender Justice owe their very existence to the ICC. They pursue gender justice ‘through’ the ICC which may come at the expense of alternative avenues.⁷⁴⁵

⁷⁴³ L. Chappell and F. Mackay, ‘Critical friends and De(con)structive Critics: Dilemmas of Feminist Engagement with Global Governance and Gender Reform Agendas’, Paper presented at ECPR Conference, 11-13 June 2015, abstract available at

<http://ecpr.eu/Events/PaperDetails.aspx?PaperID=23059&EventID=100> (visited 21 August 2016).

⁷⁴⁴ Scholar Valerie Oosterveld for example was part of the Canadian delegation to the Rome negotiations.

⁷⁴⁵ Women’s Initiatives for Gender Justice, ‘Who we are’, available at <http://4genderjustice.org/about-us/> (visited 21 August 2016).

For critical friends, the ICC as an institution is always part of the solution and not part of the problem.

Nonetheless, implementation critiques argue that the ICC's promise of 'gender justice' has at least in part been betrayed.⁷⁴⁶ They have become particularly concerned with the OTP's failure to secure convictions for SGBV charges. Despite the fact that SGBV charges constituted 74% of all the charges sought, it was only on 23 March 2016 that the ICC convicted an accused, Jean-Pierre Bemba Gombo, for SGBV crimes.⁷⁴⁷ This paltry record is due to a high 'attrition rate' of SGBV charges with 50% (16 of 32 charges) dismissed at the confirmation stage of trials.⁷⁴⁸ Looking at gender representation, recognition and redistribution at the ICC, Chappell concludes that the ICC's record on gender justice has been 'partial' and 'inconsistent'.⁷⁴⁹ These feminists speak of 'sliding back into old habits', 'subconscious bias' or the influence of 'old informal gender legacies' to explain the Court's disappointing gender record.⁷⁵⁰

The premise of the 'flawed implementation position' is that gender biases relate to structural legacies and informal rules rather than to the agency and conscious decision-making of the ICC's practitioners. Chappell, in particular, points out that the gendered legacies of law have often infused the interpretation of the Statute's progressive provisions: 'at the ICC, older informal rules have slipped through via inappropriate questioning of sexual violence victims; difficulties in addressing the stigma related to

⁷⁴⁶ L. Chappell, *The Politics of Gender Justice at the International Criminal Court* (Oxford: OUP, 2015), at 192.

⁷⁴⁷ *Gender Report Card* (2014), at 104; Judgment pursuant to Article 74 of the Statute, *Bemba* (ICC-01/05-01/08-3343), Trial Chamber III, 21 March 2016.

⁷⁴⁸ *Ibid.*, at 112.

⁷⁴⁹ Chappell (2015), at 2.

⁷⁵⁰ *Ibid.*

sexual and gender based crimes; and underrepresentation of women across all activities'.⁷⁵¹ The Court's practitioners have too often 'remembered the old while forgetting the new', effectively 'unlearning' their gender awareness.⁷⁵² Brigid Inder, the Executive Director of the Women's Initiatives for Gender Justice, for example, lamented that 'systemic blind spots resulting in both direct and indirect gender-discrimination persist amongst investigators, prosecutors and judges' and that judgments such as the Katanga Judgment are emblematic of 'a perhaps subconscious but clear bias regarding sexual violence'.⁷⁵³ According to this line of thought, gender biases persist, hollowing out progressive gender provisions, but they are subconscious and unintended.

3. Gender Justice through the Lens of the ICC's Practitioners

My interviews and informal conversations at the Court, on the other hand, suggest that the implementation problem runs deeper. In many cases, it is not only an issue of 'unintended neglect' or 'remembering the old' but also of deliberate resistance. Some ICC practitioners felt that the whole 'gender issue' has gone too far. One Registry official cautioned:

But I also think we should be careful. It [gender] should not become something that we are obsessed with... For example, when we were to decide the groups that we were going to create for applications in the Ntaganda case, there was somebody in the legal team who raised this issue: 'Are we also going to create groups based on gender?' But this really didn't have any relevance. For example, [with regard to forming victims'] groups for sexual crimes, you also had men who suffered sexual crimes. So if there is a gender issue to be brought up, it has to have a meaning and to be based on a real difference. If there is no difference, if the two genders

⁷⁵¹ L. Chappell, "'New", "Old" and "Nested" Institutions and Gender Justice Outcomes: A View from the International Criminal Court', 10 *Politics & Gender* (2014) 572, at 590.

⁷⁵² Mackay in Chappell (2015), at 28.

⁷⁵³ B. Inder, 'A Critique of the Katanga Judgment', Global Summit to end Sexual Violence in Conflict, 11 June 2014, available at <http://iccwomen.org/documents/Global-Summit-Speech.pdf> (visited 21 August 2016).

have suffered the same crimes, why should we separate them? It's a little bit artificial sometimes. So we have to be careful that it is meaningful.⁷⁵⁴

This comment is noteworthy for two reasons: first, it reflects a widespread perception at the ICC that the Court's discourse is saturated with 'gender talk'. 'Gender' is a 'really overused' term at the Court, according to one OTP staff member.⁷⁵⁵ This sentiment was also captured in a blog post on the ASP in 2014:

Nearly every state mentioned sexual and gender-based crimes (SGBV) when they made their statement to the assembly. SGBV is definitely the new buzz term in international fora. You can't afford to go against the likes of Angelina Jolie in your efforts to support prosecution of these crimes when they occur in the context of conflict....⁷⁵⁶

Yet, the quote by the Registry official also suggests that the meaning of 'gender' is often not well understood at the ICC. This is not to say that there is one correct definition of gender, but only that they are some ideas which are simply beside the point. In this case, the Registry official uses 'gender' as synonym for 'sex'. According to her, if both women and men suffered sexual crimes, there is no 'gender issue' involved. This, of course, ignores that even when suffering the 'same crime' as defined by international criminal law, men and women may experience them differently. They may suffer the same crime but not the same harm. Besides, there are good reasons for taking 'gender' into consideration when setting up victim groups for participation independent of whether they suffered the same crimes or not. Gender norms may mean that 'female victims' and 'male victims' feel more comfortable talking about their experiences and views in a female only/male only group. Yet, while some take 'gender' as simply a reference to the two

⁷⁵⁴ Interview with Legal Coordinator, Registry, The Hague, 6 February 2014.

⁷⁵⁵ Interview with OTP Psychologist, The Hague, 22 January 2014.

⁷⁵⁶ J. Anderson, 'Does Gender Matter at the ASP?', justicehub, 18 December 2014, available at <https://justicehub.org/article/does-gender-matter-asp> (visited 21 August 2016).

‘sexes’, others think that gender really means ‘women’. For example, one OTP psychologist expressed concern that ‘gender justice’ may come at the expense of ‘male victims’: ‘We are also empowering men, not only women. I think this is one of the biggest mistakes that we do when we talk about gender, we talk about women.’⁷⁵⁷ Thus, the alleged omnipresence of gender in the Court’s discourse does not necessarily go hand in hand with a nuanced idea of what it means to take ‘gender’ into account.

Rather than subconscious or unintended, some informants actively resisted what they saw as an ‘overemphasis’ on ‘gender issues’ at the Court. The backlash often took the following form: ‘Of course, gender matters but it doesn’t matter all the time and in each and every circumstance. There is too much emphasis on gender which comes at the expense of other important issues’. A legal officer at the ICTY told me with considerable indignation, ‘can you believe that some people at the Court think that rape is a more important crime than murder?’⁷⁵⁸ There was also a perception that the ‘gender justice’ agenda was largely driven from outside. One judge told me how the ICC’s Prosecutor in the Court’s early days proposed that reparations should simply be given to community leaders for distribution. The ‘next day’, a women’s delegations arrived at the Court and insisted that if reparations are given to those old men, women won’t get anything. The judge pondered, ‘I am totally for gender issues but I wonder whether we have not gone too far; you probably do have to work somehow with community leaders’.⁷⁵⁹

Another judge I interviewed in January 2014 was rather pessimistic about the Court’s record on gender justice while also emphasizing ‘external pressure’:

⁷⁵⁷ Interview with OTP Psychologist, The Hague, 22 January 2014.

⁷⁵⁸ Informal conversation with a legal officer who works at the ICTY, Oxford, 1 December 2014.

⁷⁵⁹ Interview with Judge, The Hague, 17 December 2013.

so far the Court has not done much for gender justice. I think it is a bit exaggerated to say that the Court is at the forefront of gender justice. In the Lubanga case, there were no charges of gender crimes, in the Katanga case the charges were not prominent. The new provisions of gender crimes have not been used yet. But there are many lobbies behind the Court that press this agenda.⁷⁶⁰

With the conviction of Jean-Pierre Bemba on 21 March 2016 as military commander for charges of rape, murder and pillaging committed by his troops in the Central African Republic, the ICC has now secured its first conviction for SGBV crimes. Importantly, Bemba was convicted for SGBV crimes against both women and men, with rape against men explicitly categorized as sexual violence.⁷⁶¹

As with justice developments at the Court in general, the evolution of gender justice is best understood as a dialectic process, where internal or external pushes towards broader visions of gender justice create ‘backlashes’. The ‘resistance’ against ‘too much gender’ outlined above is best understood in this context. It is a reaction to staunch support for ‘gender justice’ within the Court but especially within its NGO community. Just what exactly ‘gender justice’ means and how much of it the Court can and should deliver is less clear.

In some ways, the debates within the Court mirror the ‘non-discrimination’ versus ‘structural change’ debate that informs policy debates on gender equality in many countries. Many people within and outside the Court understand ‘gender justice’ as ensuring that men and women have equal access to justice, reparations and information. As a NGO officer expressed,

⁷⁶⁰ Interview with Judge, The Hague, 16 January 2014.

⁷⁶¹ Judgment pursuant to Article 74 of the Statute, *Bemba* (ICC-01/05-01/08-3343), Trial Chamber III, 21 March 2016; D. de Vos, ‘A Week of Firsts at the ICC’, *IntLawGrrs*, 25 March 2016, available at <http://ilg2.org/2016/03/25/a-week-of-firsts-at-the-icc/> (visited 21 August 2016).

you do have lots of definitions out there as to what [gender justice] means and the way I would understand it is making sure that the gender elements are taken into account in the justice and the reparation process. For example, if you are trying to assess the harm to decide on reparations, it means to go beyond the obvious and look at the consequences on that person because of that person's position in society as a man or a woman....⁷⁶²

An OTP official gave the following example of what 'gender justice' means at the ICC:

before a Court makes a reparation decision, a lot of research has to be done. You need to understand the culture etc., before you can deliver meaningful reparations...You cannot set up a tailoring school when in reality in that community all the tailors are male and 80% of victims are female so they are not going to benefit from that.⁷⁶³

Yet, there are also court actors who think that the ICC and the TFFV can and should work towards structural gender change. One OTP counsel insisted, 'what is good for example, if there is a systemic problem of sexual and gender-based violence, is to help the victims by establishing a rehabilitation centre but also by removing or contribute to removing the causes of gender inequality and violence [in society]. We can contribute to it.'⁷⁶⁴ As

Elisabeth Rehn, former member of the TFFV's Board of Directors said in a speech:

The Trust Fund for Victims is aware that a root cause of violence against women, particularly sexualized violence, is based on the historically unequal power relations between men and women, which have led to domination over, and discrimination against women by men.... Therefore, our approach is to pay high and critical attention to avoid restoring societal inequalities between women and men. Rather, we aim to encourage and empower women and girls to overcome their situation of being victims.⁷⁶⁵

Yet, gender sensitivity has not always characterized the ICC's work. For example, in 2013, the VPRS's data indicated that the gender of 28.5% of applicants for victim participation

⁷⁶² Telephone Interview with NGO Officer, The Hague, 19 July 2013.

⁷⁶³ Interview with OTP Official, The Hague, 29 November 2013.

⁷⁶⁴ Interview with OTP Counsel, The Hague, 13 November 2013.

⁷⁶⁵ E. Rehn, 'Speech: Achieving Gender Justice: The Case for Reparations', 7 March 2013, available at <http://www.trustfundforvictims.org/library> (visited 25 March 2014), at 3 (emphasis in original).

and 33.4% of applicants for reparations was unknown.⁷⁶⁶ This made it difficult to ascertain the gender break-down of victim applicants and participants before the Court. The VPRS explained that this data is missing either because of a failure to enter that information into their data base (yet) or because victims or intermediaries failed to indicate that information on the application form.⁷⁶⁷ A year later the number of ‘unknown’ gender had dropped to around 5% reflecting an improvement in gender-sensitive data collection. Nonetheless, this suggests that information on gender was not always a priority either for the Court’s staff or local intermediaries on the ground.

To the extent that the gender breakdown of victims is known, there are somewhat more male (54.4%) than female applicants (45.6%) at the ICC.⁷⁶⁸ A similar gender ratio also applies to the TFV’s beneficiaries despite allegations that the TFV focuses ‘too much’ on ‘women and SGBV’.⁷⁶⁹ In the Hague working groups in 2014, some States Parties expressed their discomfort with what they perceived as a heavy focus on SGBV victims in the TFV’s new Strategic Plan: ‘some delegations, while understanding that needs of sexual and gender-based violence (SGBV) victims should be tackled and constitute a cross-cutting issue, mentioned that any message that could be interpreted as the establishment of a hierarchy among victims should be avoided’.⁷⁷⁰ Yet, in 2015, 52% of all the TFV’s direct beneficiaries were men and 48% were women.⁷⁷¹ If the TFV really focuses ‘too

⁷⁶⁶ *Gender Report Card* (2014), at 241.

⁷⁶⁷ *Ibid.*

⁷⁶⁸ *Ibid.* This is the gender ratio of the 2792 applications received by the Court between 1 September 2013 and 31 August 2014.

⁷⁶⁹ Out of the TFV’s 59,695 direct beneficiaries between October 2014 and June 2015, 48% (28,509) were women and 52% (31,186) were men. See TFV, *Assistance & Reparations* (2015), at 17.

⁷⁷⁰ *Report of the Bureau on victims and affected communities, Trust Fund for Victims and reparations*, ICC-ASP/13/32, 28 November 2014, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-32-ENG.pdf (visited 16 August 2016), at §13.

⁷⁷¹ TFV, *Assistance & Reparations* (2015), at 17.

much' on 'women and SGBV', this does not translate into more female than male beneficiaries of victim assistance.

This gap between gender discourse and reality is not unique to the ICC. A TFV evaluator felt that it was part of a broader failure of international organizations to live up to the credo of 'gender mainstreaming': 'Gender mainstreaming, a concept that is still loose for many people who think "yes we just heard men and women, so we integrated gender". Unfortunately, that is what it means for so many agencies. It is there in the design but not the implementation.'⁷⁷² Her impression was that a lot of the misunderstandings happen between the headquarters and the field: while the staff in The Hague understand the nuances of what it means to apply a 'gender analysis', the implementing partners on the ground often do not. This is largely due to the Court's failure to communicate a clear vision of gender justice to local partners: 'If you want to do that type of work well, you have to take that leap and define it and give your local partners some guidance on what "it" is and how to measure it.'⁷⁷³

4. Contextualizing the OTP's SGBV Policy Paper

For those disheartened by the Court's inchoate realization of gender justice, the Prosecutor's Policy Paper on Sexual and Gender-Based Crimes published in June 2014 stands out as a beacon of hope amidst other setbacks and disappointments.⁷⁷⁴ It suggests that the 'constructive ambiguity' of the Rome Statute not only creates leakages for the

⁷⁷² Telephone interview with TFV Evaluator, 3 January 2014.

⁷⁷³ Ibid.

⁷⁷⁴ OTP, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, available at <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> (visited 21 August 2016).

gendered legacy of law but also spaces for more progressive gender interpretations.⁷⁷⁵

The policy paper explicitly interprets the Rome Statute's definition of gender as acknowledging 'the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys'.⁷⁷⁶ This is exactly the gender concept that the conservative stakeholders tried to foreclose during the Rome negotiations. The OTP also recognizes that SGBV crimes are 'amongst the gravest of the Statute' and elevates their prosecution to a key strategic goal of its 2012-2015 Strategic Plan:

The Office has committed to integrating a gender perspective and analysis into all of its work, being innovative in the investigation and prosecution of these crimes, providing adequate training for staff, adopting a victim-responsive approach in its work, and paying special attention to staff interaction with victims and witnesses, and their families and communities.⁷⁷⁷

Besides, the paper emphasizes the OTP's intention to bring charges for SGBV crimes whenever the evidence allows it, to charge them as SGBV crimes per se as well as other forms of crimes (e.g. rape as torture), and to bring cumulative charges under different modes of liability 'to reflect the severity and multifaceted character of these crimes fairly'.⁷⁷⁸ A gender perspective will also inform the Prosecutor's admissibility assessment. When deciding on whether or not a national jurisdiction is unable or unwilling to investigate and prosecute international crimes, the OTP will consider amongst others discriminatory attitudes and gender stereotypes in domestic law, the absence of protective measures for victims of sexual violence, the national trivialization of such

⁷⁷⁵ Oosterveld (2005), at 55/56; Chappell (2014).

⁷⁷⁶ *OTP Policy Paper on SGBV* (2014), at 3.

⁷⁷⁷ *Ibid*, at 5.

⁷⁷⁸ *Ibid*, at 6.

crimes and manifestly insufficient investigations and prosecutions of SGBV.⁷⁷⁹ The Women's Initiative for Gender Justice has hailed the policy paper and in particular its recognition of SGBV crimes as 'amongst the gravest of the Statute'.⁷⁸⁰

Yet, the reaction has not been unanimously positive. REDRESS, while generally positive, echoed the concern about the ICC's 'prioritization of SGBV crimes' arguing that 'there is potentially a risk that this kind of policy might have the unintended result of privileging the prosecution of sexual and gender based violence to the exclusion or detriment of other crimes'.⁷⁸¹ The Refugee Law Project (RLP) in collaboration with the International Human Rights Law Clinic, University of California, Berkeley, struck a more critical tone. RLP is a prominent Ugandan NGO and research institution which is part of the School of Law, Makerere University in Kampala. Its research, advocacy and support have focused on refugees and IDPs in the Great Lakes region. In their comments on the OTP's draft policy paper they commend the Prosecutor for applying an 'intersectional analysis to better understand the "multi-faceted" nature of sexual and gender-based violence'.⁷⁸² Yet, they also point out that the OTP fails to challenge the 'over-arching male-female binary' in international criminal law by ignoring other gender identities such as 'third sex, intersex and transgendered persons'.⁷⁸³ Most importantly, RLP argues that the policy paper 'fails to address the historical exclusion of male victims from international conceptions of conflict-related sexual violence....'⁷⁸⁴

⁷⁷⁹ Ibid, at 23.

⁷⁸⁰ *Gender Report Card* (2014), at 109.

⁷⁸¹ REDRESS, *Comments on the OTP Draft Policy Paper on Sexual and Gender Based Crimes*, February 2014, available at <http://www.redress.org/downloads/publications/redress-comments-on-otp-draft-policy-paper-on-sexual-and-gender-based-crimes-24february2014.pdf> (visited 21 August 2016), at 2.

⁷⁸² RLP, *Comments on the ICC Draft Policy Paper on SGBV* (2014) §§6, 19.

⁷⁸³ Ibid, §11.

⁷⁸⁴ Ibid, §14.

4.1. *Gender Justice Backlash: 'But what about men?'*

RLP is one of very few NGOs that has worked for many years to bring male victims of SGBV in from the cold both through support services and advocacy. Their work was at the centre of an article published in *The Guardian* on 'the rape of men: the darkest secret of war' and has become more widely known through their documentary 'Gender against Men' released in 2009 in Uganda.⁷⁸⁵ The documentary begins with an important insight: male victims of SGBV have been neglected in the international depiction of and engagement with the conflicts of the Great Lakes Region. In a study with male refugees from the DRC, the RLP and the John Hopkins University found that '13.4% had experienced an incident of sexual violence in the preceding 12 months rising to 38.5% if looking at their whole lives'.⁷⁸⁶ Refugees and ex-combatants are particularly at risk of sexual violence against men.⁷⁸⁷

Men also face specific challenges in reporting SGBV, receiving medical treatment and seeking legal recourse. First, there is not only little awareness of SGBV against men among the public at large, but also among the very 'protection officials' such as medical, police, legal and aid personnel who are part of SGBV interventions. One male victim who tried to report the crime was dismissed: 'You are a man; you can't be raped.'⁷⁸⁸ Second, the Ugandan penal code defines rape and sexual or 'indecent' assault explicitly as crimes

⁷⁸⁵ W. Storr, 'The Rape of Men: the Darkest Secret of War', *The Guardian*, 17 July 2011, available at <http://www.theguardian.com/society/2011/jul/17/the-rape-of-men> (visited 21 August 2016); RLP, 'Gender against Men', Documentary, 2009, available at <https://www.youtube.com/watch?v=mJSI99HQYXc> (visited 21 August 2016).

⁷⁸⁶ C. Dolan, 'Into the Mainstream: Addressing Sexual Violence against Men and Boys in Conflict', Briefing Paper, 14 May 2014, available at http://www.refugeelawproject.org/files/briefing_papers/Into_The_Mainstream-Addressing_Sexual_Violence_against_Men_and_Boys_in_Conflict.pdf (visited 21 August 2016), at 2.

⁷⁸⁷ Ibid, at 3.

⁷⁸⁸ RLP, 'Gender against Men' (2009).

against women, thereby making it almost impossible for men to seek legal recourse. Uganda is not alone in applying such an exclusionary definition of SGBV. There are 62 countries in the world which recognize rape only against women and in 28 countries perpetrators of SGBV are by definition male.⁷⁸⁹ Finally, grave stigmatization and even criminalization of homosexuality in Uganda and other countries mean that men who report sexual violence may be accused of and even charged with ‘homosexual offenses’.⁷⁹⁰

RLP’s intervention is part of a growing academic and activist critique of the international community’s neglect of male victims of SGBV. Academics have begun to criticize this lacuna in international criminal law and to investigate why, how and where men become victims of SGBV. The dominant way of making sense of this phenomenon is through what I will dub the ‘feminization theory’. Sandesh Sivakumaran, for example, has argued that sexual violence against men in armed conflict is enacted through ‘emasculatation’, ‘feminization’ and ‘homosexualization’.⁷⁹¹ Emasculation means depriving men of their ‘masculinity’, which is constructed as ‘the ability to exert power over others, particularly by means of the use of force’.⁷⁹² ‘Feminization’ goes further: the intention is to ‘lower the social status of the male survivor’ by making him a woman.⁷⁹³ ‘Homosexualization’ functions in a similar way. Since ‘masculinity’ is associated with ‘heterosexuality’, sexual abuse of men (by men) is interpreted as a ‘homosexual’ act which

⁷⁸⁹ Dolan (2014), at.6.

⁷⁹⁰ Ibid.

⁷⁹¹ S. Sivakumaran, ‘Sexual Violence against Men in Armed Conflict’, 18 *The European Journal of International Law* (2007) 253.

⁷⁹² Ibid, at 268.

⁷⁹³ Ibid, at 271.

‘feminizes’ the victim; he becomes a woman: weak and unable to protect himself.⁷⁹⁴ The masculinity of the perpetrator, on the other hand, is confirmed: he is a ‘real’ man.

It is undisputable that sexual violence is also perpetrated against men and that international law and humanitarian responses have paid insufficient attention to this crime. Statistics on sexual violence against men and boys are scarce which makes it difficult to estimate the magnitude of the phenomenon. Gross underreporting and ‘misleading’ categorization (e.g. rape against men is often [only] categorized as torture and not [also] as sexual violence) exacerbate the problem.⁷⁹⁵ Despite the lack of data and research, there is much confidence in the literature that the ‘feminization’ theory is an accurate explanation of the phenomenon.⁷⁹⁶ Feminization theory presumes that both the intent of the perpetrator and the experience of the victim is one of ‘feminization’. Yet, such a uniform understanding of sexual violence against men seems unlikely especially against the backdrop of recent research, which suggests that conflict-related SGBV is a ‘very diverse, complex phenomenon’.⁷⁹⁷ It occurs in some contexts and conflicts more than in others.

Using cross-national evidence, Dara Kay Cohen, for example, argues that rape in conflict is primarily motivated by the need to forge ‘combatant socialization’ within armed groups.⁷⁹⁸ The ‘combatant socialization’ theory can explain variations in the magnitude of SGBV across conflicts and armed groups that conventional theories which emphasize

⁷⁹⁴ Ibid, at 272.

⁷⁹⁵ Ibid, at 254.

⁷⁹⁶ See also A. Jones, ‘Straight as a Rule: Heteronormativity, Gendercide and the Noncombatant Male, 18 *Men and Masculinities* (2006) 451.

⁷⁹⁷ P. Schulz, ‘The ICC and Crimes of Sexual and Gender-Based Violence (SGBV)’, Justice Hub, 25 March 2014, available at <https://justicehub.org/article/icc-and-crimes-sexual-and-gender-based-violence-sgbv> (visited 21 August 2016).

⁷⁹⁸ D.K. Cohen, ‘Explaining Rape during Civil War: Cross-National Evidence (1980-2009)’, 107 *American Political Science Review* (2013) 461.

‘opportunism/greed’, ‘ethnic hatred’ or ‘gender inequality’ cannot explain.⁷⁹⁹ Armed groups which recruit by force – through abduction and pressganging – are more concerned with forging social cohesion among fighters and thus perpetrate more SGBV than those which rely on voluntary recruitment.⁸⁰⁰ This suggests that war-time rape may be more about sending a ‘message’ within armed groups rather than to the victim and his or her community as the ‘feminization’ theory presumes. Rather than being either an ‘inevitable by-product’ or a ‘strategic weapon’ of war, it is likely that SGBV has diverse meanings and intentions and is experienced differently in different circumstances.

4.2. *More than ‘Normal’ Rape?: The Extra Harm of SGBV Against Men*

Another problem with the ‘feminization’ theory is that its representation often blurs from an explanatory theory (‘feminization’ as defining both the motive for and the experience of rape) into a normative theory (‘feminization’ is what makes rape of men particularly wrong). This sense of being ‘wronged’ through feminization is reflected in some of the statements recounted by male victims of SGBV. One victim said:

It is a sort of vengeance, a sort of humiliation, a way of attacking our identity so that they could diminish us in society. They wanted to show that they are superior to us, that we are worth nothing, that this time around they were putting us in the place of women. You know that in society they say that men dominate and women are inferior. So they said to us that ‘we are going to show you that you are women that you are not men like us’.⁸⁰¹

Another victim explained: ‘They made me as if I were a woman... My bitterness is that this is not a natural illness but a result of the sodomy inflicted on me which is not normal for

⁷⁹⁹ Ibid.

⁸⁰⁰ Ibid.

⁸⁰¹ RLP, ‘Gender against Men’ (2009).

us as men.’⁸⁰² Sivakumaran quotes a victim as saying, ‘[t]hey wanted us to feel as though we were women and this is the worst insult, to feel like a woman’.⁸⁰³ Chris Dolan from the RLP puts it as follows:

When sexual violence is meted out against men, it’s often seen in terms of essentially a message. As a man who has been sexually violated, you are no longer a man. You have been made into a woman by the sexual act. In a very gendered, very patriarchal setting, this is probably the most fundamental way in which you can attack a man by saying, ‘you are not a man’.⁸⁰⁴

The idea expressed here is that men are victims of the crime through an attack on their ‘masculinity’. Yet, the notion that male victims are wronged by SGBV because it ‘lowers’ their social status to that of a woman is problematic not only because it normalizes the rape of women, but also because it legitimizes men’s superior status in society. Indeed, the quotes by male victims of SGBV reveal that ‘masculinity’ is precisely understood as the superiority and dominance of men over women. While the academic literature on ‘masculinity’ is more nuanced, showing that there are multiple masculinities, the concept of hierarchy is still crucial to understanding masculinity.⁸⁰⁵ An illegitimate hierarchy between men and women is thus inscribed in the concept of ‘masculinity’ and hence ‘masculinity’ is nothing the law (or society) ought to protect.

Nonetheless, this violation of ‘masculinity’ is often portrayed as an ‘extra harm’ for male victims of SGBV. In a recent book chapter on male victims of SGBV in the Bosnian war, Simic claims that gendered assumptions of women as eternal victims and men as

⁸⁰² RLP, ‘They Slept with Me’, 10 December 2011, Documentary, available at <https://www.youtube.com/watch?v=6dxaFgezrXg> (visited 21 August 2016).

⁸⁰³ Sivakumaran (2007), at 271.

⁸⁰⁴ RLP, ‘Gender against Men’ (2009).

⁸⁰⁵ O. Simic, ‘Wartime Rape and its Shunned Victims’, in A. Randall (ed.), *Genocide and Gender in the Twentieth Century: A Comparative Survey* (London: Bloomsbury, 2015) 241; R.W. Connell and James W. Messerschmidt, ‘Hegemonic Masculinity: Rethinking the Concept’, 19 *Gender & Society* (2005) 829.

eternal perpetrators mean that SGBV against men is often seen as ‘less of a crime’.⁸⁰⁶ On the contrary, I would argue that the literature often portrays SGBV against men as ‘more of a crime’. Simic herself concludes that ‘sexual torture leaves males, as is the case with female victims, with lifelong trauma. However, it triggers some specific gender traumas that are unique to men, such as feeling emasculated, feminized, and stripped of their sense of manhood’.⁸⁰⁷ Apart from the ‘normal’ physical, psychological and social harm that both men and women suffer from sexual violence, the literature implies or in some cases explicitly states that men suffer ‘extra harms’: they suffer a loss to their masculinity (‘emasculatation’) and a violation of their sexual identity (‘homosexualization’). Women, on the other hand, supposedly suffer no such ‘extra harms’. Rape does not ‘defeminize’ them because it is ‘ordinary’ that rape happens to women. Rape by men also does not violate ‘women’s sexual identity’ which is presumed to be uniformly heterosexual. In this way, ‘feminization’ theory creates an absurd normative logic: precisely that which makes rape of women possible and normal, namely men’s dominance over women, suddenly becomes part of men’s rightful identity, their ‘masculinity’, whose deprivation through rape makes rape of men even worse than rape of women.

4.3. *Gender Roles in Northern Uganda: Gender Switch or Glitch?*

This blurring of ‘feminization’ theory from an explanatory into a normative theory, which may well be unintentional, is also reflected in the RLP’s documentary, ‘Gender against men’. After illustrating the neglect of SGBV against men in conflict, the documentary begins to link the issue of ‘male victims of SGBV’ to a broader attack on masculinity in

⁸⁰⁶ Ibid, at 249.

⁸⁰⁷ Ibid.

Ugandan society. It asks, 'what happens in a patriarchal society in which men are not permitted to be vulnerable and where at the same time their masculine identities are clearly under attack?'⁸⁰⁸ The 'male victims of SGBV' then coalesce with a broader depiction of 'men as victims' of changing gender roles spurred by the war and international aid organizations asserting 'their vision of gender equality'.⁸⁰⁹ The documentary makes this transition from 'male victims of SGBV' to 'men as victims' by telling the story of the 'gender effects' of encampment and war in Acholiland that I heard from many NGO workers in Uganda. As a women's rights civil society representative explained:

During the war, gender roles shifted. Women were more active within the camps. Even if it was only a small garden, they would plant something. Men were just there to wait for people to bring food and they got used to it. And now, they are back and are still waiting for food. Women have taken up this strong role of providing food for the family but now the men are starting to question this power that the women have.⁸¹⁰

In another version of the same story, the role of humanitarian agencies is emphasized:

During the conflict, gender roles had been distorted. Women stayed in the camps; men stayed in the camps. These humanitarian agencies came and said, 'if you give food to a woman, she will cater to the whole family, if you give it to a man, he will probably sell it and get alcohol'. So women were empowered, ironically, for those who stayed in camps.⁸¹¹

'Gender against men' particularly stresses the interventionist role played by international organizations: 'The aid agencies were now complicit in de-emphasizing the role of the man in the family and the community and by now the community looked very

⁸⁰⁸ RLP, 'Gender against Men' (2009).

⁸⁰⁹ Ibid.

⁸¹⁰ Interview with Women's Rights Activist, Kampala, 30 July 2014.

⁸¹¹ Interview with NGO Representative, Kampala, 23 July 2014.

unhealthy.’⁸¹² Men started to drink, became idle and violent towards women.⁸¹³ Some committed suicide, others joined the army.⁸¹⁴ The dependence on foreign agencies for food and the deliberate efforts of these organizations to empower women are depicted as an ‘attack’ on their masculinity, leaving them vulnerable and lost with many looking to the military or militias as a way to recover their ‘masculinity’.⁸¹⁵

This narrative of the ‘gender effects’ of camp life is misleading for two reasons. First, the notion of an ‘attack on masculinity’ obscures structural inequality between men and women as it makes ‘power’ and ‘dominance’ part of a man’s identity. Masculinity is portrayed as part of ‘who he is’ and thus as rightfully belonging to him. Women’s empowerment is only legitimate if it does not disempower men. As one leading civil society figure put it, ‘so a transformative programme would try to empower both men and women... Treat both men and women as a victim in every situation, not what has happened in many post-conflict situations, where men are predominantly taken to be perpetrators and women are taken to be victims’.⁸¹⁶ Yet, such an approach eviscerates power hierarchies between men and women as purely situational. They dissolve in the bigger picture in which both men and women in Northern Uganda are oppressed by poverty and violence. This is also where the ‘but what about men?’ backlash meets the critique of scholars such as Janet Halley. Halley argues that a particular strand of feminism dominated at the Rome negotiations: structural feminism. Structural feminists regard rape not only as a crime but as part of a broader ‘male war against women going on all

⁸¹² RLP, ‘Gender against Men’ (2009).

⁸¹³ Ibid.

⁸¹⁴ Ibid.

⁸¹⁵ Ibid.

⁸¹⁶ Interview with CSO Representative, Kampala, 7 August 2014.

the time and everywhere'.⁸¹⁷ Halley opposes this 'war-against-women understanding of conflicts'.⁸¹⁸ As she puts it, 'it [structural feminism] is completely inattentive to the possibility that women have been instigators or perpetrators of war. Worse, it involves a – to me absolutely chilling – indifference to the suffering of men.'⁸¹⁹

Of course, in defending structural feminism, I am neither saying that all men dominate and oppress women nor that women and men cannot both be victims of war and oppression. War and forcible displacement did make communities in Northern Uganda dependent on a state that not only failed to provide security but also perpetrated atrocities against civilians. NGOs and international organizations are not beyond critique either: they may have legitimated or at least facilitated the government's forcible displacement strategy and in any case were unaccountable to the people they engaged with.⁸²⁰ This is especially problematic given that the poor conditions and protection of the camps allegedly caused an excess mortality of 1000 people each week.⁸²¹ But turning this into an 'attack on masculinity' or the emasculation of communities legitimates patriarchy and the way it limits women's access to political decision-making, economic power and personal self-determination.

A related idea expressed in the documentary and in some of my interviews is that 'women's empowerment' excludes men. Of course, men need to be included in gender training and sensitization to change gender norms. Yet, it is wrong to assume that whenever a women-only workshop is held, or a women-only support group is set up, that

⁸¹⁷ Halley (2008-2009), at 100.

⁸¹⁸ Halley, 'Rape at Rome' (2008-2009) at 123.

⁸¹⁹ Ibid.

⁸²⁰ A. Branch, 'Humanitarianism, Violence and the Camp in Northern Uganda', 11 *Civil Wars* (2009) 477.

⁸²¹ Ibid.

men are by definition absent. They are not. Many of these groups, despite helping women to become more economically independent, firmly operate within patriarchal norms. For example, an NGO representative told me that women's support groups in Teso, Northern Uganda, made the consent of the husband a precondition for a woman's participation in loan and trade groups. She had her reservations about this practice, but the women in Teso insisted that this was necessary for ensuring the viability of their groups. They had experienced problems in the past with loan repayment as husbands simply took the money from their wives: 'Getting permission from the husband means that he knows she has to pay back the loan.'⁸²² This suggests that men are never really absent in such women's empowerment efforts.

Second, the documentary's claim that a 'gender switch' occurred during the war where women became the breadwinners and men the caretakers exaggerates the role and power changes that have unfolded in Northern Ugandan society. If such a role and power turnaround ever took place, it has been all but reversed by now. It also never substantially challenged gender inequality in land ownership and other property. In a survey in 2011, only 11% of Ugandan women indicated that they were the sole owners of land compared to 46% of men.⁸²³ Gender inequality is also entrenched in marriage customs, where a woman joins her husband's clan in return for customary payments *luk* to her family.⁸²⁴ These women are then often considered 'guests' or even 'aliens' in their husbands' clan which makes their land rights insecure once their husbands die or take

⁸²² Interview with Women's Rights Activist, Kampala, 30 July 2014.

⁸²³ C. Doss, 'Killer Fact-check: "Women own only 2% of Land" = not true. What do we really know about Women and Land', Oxfam blogs, 21 March 2014, available at <https://oxfamblogs.org/fp2p/killer-factcheck-women-own-2-of-land-not-true-what-do-we-really-know-about-women-and-land/> (visited 21 August 2016).

⁸²⁴ Porter (2013), at 191-194.

another wife. A local women's rights activist from Gulu even claimed: 'If a traditional Acholi man would be asked, "if you had to kill someone from your family, who would it be?". He would say, "my wife, of course, because she is an alien." Women are like visitors. If they chase them, they chase them violently.'⁸²⁵ This insecurity of rights goes hand in hand with women's lack of access to decision-making. The same activist pointed out, 'women are not given a platform at the cultural level. They are not allowed to attend community or family meetings. You are only reported as an "issue".'⁸²⁶

Indeed, for many women, the experiences of pre-war, war and post-war life are in many ways continuous. In the words of an NGO representative in Kampala: 'The normalization of sexual violence before the conflict makes it more acceptable, more pronounced during the conflict... women are looked like as cattle not as human beings or even as combatants. They are just collateral damage of the conflict.'⁸²⁷ How deeply ingrained the subordination of women still is in Acholi society can be seen in the politics of the female body. A representative of the Acholi Religious Leaders' Peace Initiative (ARLPI) in Gulu gave the following example:

Normally, women cannot determine how many children she can have. That is the monopoly of men... There might be birth-related complications. The doctors would say 'no, you should not conceive anymore' but the husband would say, 'if you don't conceive anymore, you leave' so she ends up conceiving to protect her marriage but at the end the problem goes back to the woman. Sometimes they die.⁸²⁸

Whatever role changes have taken place during encampment, they have not penetrated the thicket of norms and rules that govern women and their bodies.

⁸²⁵ Interview with NGO Representative, Gulu, 11 July 2014.

⁸²⁶ Ibid.

⁸²⁷ Interview with NGO Representative, Kampala, 23 July 2014.

⁸²⁸ Interview with ARLPI Representative, Gulu, 13 July 2014.

5. Accommodating the ‘Backlash’

Some of those NGOs and traditional stakeholders that are critical of ‘women’s empowerment’ advocate for a return to the pre-war, strong patriarchal structures that supposedly also afforded more protection for women (see Chapter VI). One of my interviewees summarized the ‘return argument’ as follows:

Some people argue, probably, if the men could assert their responsibility and go back to begin to provide for their families, maybe things could begin to change and the women could look at them again as a man, because now women look down. They don’t have that respect that they had before because for a woman, why should she respect you if you do not provide for her... She could even tell you, ‘you are a useless man’ and this brings out the domestic violence.⁸²⁹

Yet, most reactions that I encountered in Uganda have been more nuanced aiming at some form of accommodation between the ‘women’s empowerment agenda’ and the ‘but what about men?’ backlash.⁸³⁰ In practical terms, the critique levelled at NGOs’ ‘women only’⁸³¹ approach to gender justice in post-war Uganda has been very successful. One NGO representative told me, ‘people accuse development aid organizations of focusing on women and empower them to the detriment of men... Men would say: “But we also have problems, why are you only talking to the women?”’⁸³² Men also increasingly used physical violence against women in response to their perceived loss of social status. In the camps, sexual abuse of women became notorious with one study indicating that around 60% of women were sexually abused in one of the largest camps.⁸³³ Thus,

⁸²⁹ Interview with Women’s Rights Activist, Kampala, 30 July 2014.

⁸³⁰ See also F. Cleaver (ed.), *Masculinities Matter!: Men, Gender and Development* (London: Zed, 2002).

⁸³¹ Ibid, at 4.

⁸³² Interview with Women’s Rights Activist, Kampala, 30 July 2014.

⁸³³ RLP, ‘Gender against Men’ (2009); S.H. Patel et al., *In the Face of War: Examining Sexual Vulnerabilities of Acholi Adolescent Girls living in Displacement Camps in Conflict-Affected Northern Uganda*, BMC International Health and Human Rights, 2002, available at

integrating men in their activities became a practical necessity for many women's rights and development organizations. It helped to ward off critique as well as to fight the levels of sexual and domestic violence perpetrated against women.⁸³⁴

There have been various 'methods of accommodation' utilized by NGOs and international organizations in meeting the 'but what about men?' backlash. Conceptually, they can be divided into three approaches which are not mutually exclusive but differ in their emphasis: first, 'gender justice through internal balancing', second, 'men as partners for gender justice' and third, 'gender justice through depoliticizing women's empowerment'. To connect these three accommodations back to the ICC it is noteworthy that they share at least one commonality; they go against the grain of 'structural feminism' that underlies the Rome Statute.

5.1. Gender Justice through Internal Balancing

'Internal balancing' is often cited as a way of achieving more gender equality without upsetting societal and family equilibriums.⁸³⁵ A balancing act is required between improving the position of women on the one hand and preserving communal structures and traditions on the other. As one of my interviewees pondered, 'how can society negotiate, discuss and compromise on some of these very archaic values which do inform and reinforce some patterns of violence?'⁸³⁶ He proposed that a gender transformative approach should 'deal with the parties within their context' and that 'the compromise

<http://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/1472-698X-12-38> (visited 21 August 2016).

⁸³⁴ Interview with Women's Rights Activist, Kampala, 30 July 2014.

⁸³⁵ Cleaver (2002), at 4.

⁸³⁶ Interview with CSO Representative, Kampala, 7 August 2014.

needs to be societal'.⁸³⁷ Absolute human rights are not part of this equation and neither are international NGOs. According to this argument, local customs are sufficiently flexible and open to change so as to strengthen women's rights in the existing cultural framework. An ARLPI representative assured me that local leaders protect and promote the interests of 'vulnerable people' such as women in land conflicts and have worked to reduce domestic violence.⁸³⁸ Some progress has been made. Hopwood, for example, argued in a recent study that 'custom appears to be becoming more responsive to the needs of women, including those who are divorced or separated'.⁸³⁹ In particular, his research suggests that - at least according to the self-reporting of community leaders - women's claims to land were generally respected and supported by them and the communities in cases of land disputes.⁸⁴⁰

Yet, these claims beg obvious questions: how much can we trust the self-reporting of local leaders who have an interest in portraying their land conflict mediation as successful and gender-sensitive? Hopwood's research also does not tell us how many of the disputed land cases actually reach the community leaders. In cases of sexual violence, Porter's research with female victims of SGBV suggests that reporting of rape to community leaders is rare.⁸⁴¹ Most cases are dealt with by family members with women's claims to justice being secondary to considerations of social harmony.⁸⁴² It may well be the same with land rights disputes. Of course, this does not make local communities any worse as a locus for gender justice than other patriarchal institutions such as the state or,

⁸³⁷ Ibid.

⁸³⁸ Interview with ARLPI Representative, Gulu, 13 July 2014.

⁸³⁹ J. Hopwood, 'Women's Land Claims in the Acholi Region of Northern Uganda: What Can be Learned from What is Contested', 22 *International Journal on Minority and Group Rights* (2015) 387, at 387.

⁸⁴⁰ Ibid.

⁸⁴¹ Porter (2013).

⁸⁴² Ibid, at 40.

for that matter, the Court, whose practitioners still cannot get their heads around the gender concept. Nonetheless, it does caution against expectations of ‘organic change’ emanating from within the ‘local’ status quo towards gender justice.

5.2. *Men as Partners for Gender Justice*

The second approach conceptualizes ‘men as partners for gender justice’ and has become very popular at the international level.⁸⁴³ The UN Women’s ‘He-For-She’ solidarity campaign that became widely known through Emma Watson’s speech at the UN claims that ‘when women are empowered, the whole of humanity benefits. Gender equality liberates not only women but also men, from prescribed social roles and gender stereotypes.’⁸⁴⁴ The rationale of the campaign is that if only we enlisted men and boys as ‘advocates and agents of change’ in this common struggle against gender stereotypes, gender equality would be well within our reach. The main obstacle for gender equality is that people do not understand that we are all victims of gender roles constructed by an unspecified society. Indeed, the UN gender discourse is awash with the societal benefits that gender equality brings for everyone. There is, after all, a ‘business case for gender equality’.⁸⁴⁵

At the local level, the ‘men as partners’ approach translates into the practice of using men as ‘role models’ in the community:

So we have men who have been selected from the community, we call them role model men... They don’t hate women, they don’t fight women, so we use them to teach other men. So that other men can see and

⁸⁴³ Cleaver (2002), at 4.

⁸⁴⁴ UN Women, ‘HeForShe Action Kit’, available at http://az668017.vo.msecnd.net/sitestorage/dist/content/uploads/2014/08/HeForShe_ActionKit_English.pdf (visited 23 August 2016), at 3.

⁸⁴⁵ UN Women, *The Gender Dividend: A Business Case for Gender Equality* (2011), available at <http://www.unwomen.org/en/digital-library/publications/2011/12/the-gender-dividend-a-business-case-for-gender-equality> (visited 23 August 2016), at 3.

understand that the woman is not something to be beaten. The woman is a human being like other people.⁸⁴⁶

It is both necessary and desirable to integrate men as partners in gender justice efforts. It is necessary because men can obstruct gender justice through physical force against women and through their continued hold on political power. But it is also desirable as gender relationships can only be changed if both men and women undergo changes in the ideas, claims and expectations that they have of themselves and each other.

Nonetheless, this ‘men as partners’ approach masks the extent to which gender inequality is not simply the result of ignorance and lack of understanding. It is also the result of deliberate oppression of women by some men and the fact that the majority of men has vested interest in perpetuating gender roles and their inscribed inequality. For example, many elders, community leaders and male family members in Northern Uganda see their power and access to land threatened by measures to achieve gender justice. A psychologist in Gulu told me about the violence his female clients face when they try to challenge the status quo: ‘A woman who is beaten up with *panga*⁸⁴⁷, if she reports it she may risk to be killed. Even the NGOs that defend women’s rights for example FIDA, they have to assess the situation to consider if their intervention can put in further danger the woman.’⁸⁴⁸ In other words, the ‘men as partners’ approach removes male agency and responsibility in existing gender inequality by ominously turning both men and women into victims of gender norms that are imposed by ‘society’.

⁸⁴⁶ Interview with ARLPI Representative, Gulu, 13 July 2014.

⁸⁴⁷ Panga is a type of machete.

⁸⁴⁸ Interview with Psychologist, Gulu, 9 July 2014.

An important if less clearly articulated conceptual relative of the ‘men as partners’ approach is the ‘we need heroes’ premise of gender justice efforts. Gender justice at the ICC, for example, has become the story of courageous individuals such as Brigid Inder, the Director of Women’s Initiatives of Gender Justice, Fatou Bensouda, the ICC’s prosecutor and former ICC Judge Elizabeth Odio-Benito. Male heroes are celebrated, too. One figure who has become particularly prominent as the ‘saviour’ of women in the DRC is Dr. Denis Mukwege. Dr. Mukwege is a gynaecologist in the South Kivu city of Bukavu, where he has run Panzi Hospital since 1999, a facility in which ten thousands of rape victims have been treated. A documentary on Dr. Mukwege’s work called ‘The Man Who Mends Women’, which has won international acclaim, shows masses of ‘African women’ jubilantly celebrating his arrival.⁸⁴⁹ In a similar vein, Eve Ensler, a feminist and playwright behind the *Vagina Monologues*, published an article in *The Guardian* titled, ‘Dr Denis Mukwege: we have few heroes. He is one’.⁸⁵⁰ In her words:

Everything he does, he does with dignity, kindness and composure. He is beloved. In any village in South Kivu, his arrival is much like the arrival of the pope – throngs of people greet him, thousands of women whose lives he has saved or healed or touched celebrate him. We have few heroes in this world, few who have given their lives and souls for the safety and health of their people.⁸⁵¹

While an undoubtedly commendable and courageous effort, the hero cult that has formed around Dr. Mukwege is disconcerting for two reasons. First, it makes individuals and their creative and courageous efforts, rather than good institutions, the focal point

⁸⁴⁹ T. Michel and C. Braeckman, ‘The Man who mends Women’, Documentary, available at <http://mukwege-themovie.com/> (visited 21 August 2016).

⁸⁵⁰ E. Ensler, ‘Dr. Denis Mukwege: we have few heroes in this world. He is one’, *the guardian*, 26 October 2012, available at <http://www.theguardian.com/commentisfree/2012/oct/26/dr-denis-mukwege-heroes> (visited 21 August 2016).

⁸⁵¹ Ibid.

of gender justice and second, it resurrects and legitimizes the trope of ‘the strong man saving weak women’.

5.3. Gender Justice through Depoliticizing Women’s Empowerment

The last approach, ‘gender justice through depoliticizing women’s empowerment’ is not explicitly promoted by anyone. That this is nonetheless an approach to women’s empowerment only becomes clear once we look at what many organizations that claim to empower women actually do. Looking at the programmes that the TFV supports in the name of ‘women’s empowerment’, two ‘models’ stand out: first, the therapeutic model and second the neoliberal model.⁸⁵² The therapeutic model is epitomized by all those programmes that are geared towards ‘restoring’ women to society through medical treatment, counselling and psycho-social support.⁸⁵³ These activities fall within the TFV’s psychological and physical rehabilitation mandate. The ‘neoliberal model’ underlies all those economic programmes that aim at turning women into ‘entrepreneurs’ through ‘vocational training’ and savings, loan and trade groups.⁸⁵⁴ What is often missing from the development and justice portfolio are programmes that aim at the political empowerment of women. Rather than protesting in their thousands in front of police stations or the parliament, women’s agency is channelled into learning how to better fit into society (the therapeutic model) and into becoming small-scale entrepreneurs (the neoliberal model).

⁸⁵² The TFV’s Programme Progress Reports emphasize the goal of ‘empowerment’ and more specifically the empowerment of women and girls. See TFV, *Empowering Victims* (2012); TFV, *A Road to Recovery* (2014).

⁸⁵³ TFV Strategic Plan 2014-2017.

⁸⁵⁴ TFV, *Assistance & Reparations* (2015).

I will illustrate this argument with the example of vocational training in Uganda. The Diocese of Northern Uganda, a former TFV partner and one of the organizations I visited in Gulu, hosts a Women Development Centre to ‘empower women’ especially former girl abductees by offering them vocational training. Women can choose between becoming ‘tailors’ or ‘hairstylists’. They have to pay fees for these vocational courses ‘to avoid the spirit of getting free things inculcated by the war in northern Uganda’.⁸⁵⁵ It was difficult for me to reconcile this type of vocational training with my understanding of empowerment. I was not quite sure whether it was the vocational training per se or that the choice was restricted to what I felt were stereotypical female professions. I have learnt to think about women’s empowerment in terms of formal education; giving women the intellectual tools to analyze and criticize their condition and to formulate and assert different life concepts. I am not the only one: ‘Everybody thinks the best for the war affected and former child soldier is vocational education, train to be a tailor; but we want to be in the office and be driven; meaning victims too need formal and better education.’⁸⁵⁶ This statement was made by Susan Acan, the Director of ‘Empowering Hands’ in Gulu, at the National War Victims’ Conference in Kampala in May, 2014. ‘Empowering Hands’ is a group of young women affected by the war in Northern Uganda, including many girl abductees, who support their peers with counselling and community reintegration.

⁸⁵⁵ The Diocese of Northern Uganda, ‘From State of Hopelessness to Joy and Celebration’, 29 June 2014, available at <http://dioceseofnorthernuganda.blogspot.co.uk/2014/06/normal-0-false-false-false-en-us-x-none.html> (visited 22 August 2016).

⁸⁵⁶ AYINET, ‘War Victims’ Voices on Transitional Justice’, available at <http://www.africanyouthinitiative.org/war-victims-voices-on-transitional-justice.html> (visited 21 August 2016).

On the other hand, a civil society representative told me that the ‘economic independence’ that vocational training brings about is empowerment for women who usually depend on their husband or male relatives for their survival.⁸⁵⁷ Yet, it is not clear, whether economic independence is usually the outcome of vocational training. Often, the choice of vocations offered by such programmes does not reflect a proper market analysis.⁸⁵⁸ Besides, starting your own business requires post-training support and capital which most conflict-affected women lack.⁸⁵⁹ Making women pay fees for vocational training can create further dependency as they may become indebted. In fact, measures or initiatives that bear the label of empowerment may, intentionally or unintentionally, contribute to further disempowerment of women. Even if they are financially successful, this rarely changes the patriarchal structures in which decisions about household income are made – a domain still largely controlled by men.

It is probably not an accident that the most prevalent forms of ‘women’s empowerment’, the therapeutic and the neoliberal model, are also those which least challenge the power of men and the political status quo. As such, they can be interpreted as another accommodation of the ‘but what about men?’ backlash. To come full circle, the Rome Statute’s gender provisions and the OTP’s policy paper have been celebrated

⁸⁵⁷ Interview with NGO Representative, Kampala, 23 July 2014.

⁸⁵⁸ Women’s Commission for Refugee Women and Children/Columbia University, *Vocational Training and Market Demand in Northern Uganda – Preliminary Findings* (2008), available at http://www.seepnetwork.org/filebin/pdf/resources/Vocational_training_Uganda.pdf (visited 23 August 2016), at 4.

⁸⁵⁹ Ibid.; US AID, *Education and Fragility in Northern Uganda*, October 2008, available at http://www.equip123.net/docs/E1-Education_Fragility_Uganda.pdf (visited 23 August 2016), at 22; K. Scott, ‘The Education and Rehabilitation of Former Child Soldiers: Lessons from Liberia’, Uganda Action Movement, available at <https://sites.google.com/site/ugandaaction/resources/liberia-uganda> (visited 23 August 2016). For different conclusions on the economic viability of vocational training based on a different methodology see C. Blattman, N. Fiala and S. Martinez, *The Economic and Social Returns to Cash Transfers: Evidence from a Ugandan Aid Program*, April 2013, available at http://cega.berkeley.edu/assets/cega_events/53/WGAPE_Sp2013_Blattman.pdf (visited 23 August 2016), at 13.

as a victory for structural feminism. But it has been a pyrrhic victory. For one, the Rome Statute's definition of gender, while hinting at its societal construction, is still largely treated as meaning 'both sexes' or 'women only' within the Court's discourse. Furthermore, the focus on SGBV as the quintessential feminist concern and international criminalization as its logical solution has side-lined other important structural concerns such as socio-economic inequality and political marginalization of women. While civil society organizations have tried to push these issues back on the agenda of international law through the avenue of reparations, the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation* had much less traction than the Rome Statute. The analysis of SGBV as emblematic of a 'war against women' has also sown the seeds for an obvious backlash: what about male victims of SGBV? Yet, this legitimate critique has become mixed up with a broader 'but what about men?' backlash. Local and international organizations in Northern Uganda have had little to offer against this backlash and have accommodated it by giving up on a comprehensive, structural attack on patriarchy. Physical and individual violence have become the focal point of gender justice at the expense of other forms of structural violence. Ultimately, it is difficult to avoid the conclusion that structural feminism has emerged weakened from its attempt to elevate SGBV through international criminal law.

6. Conclusion

Gender justice has been one of the ICC's great promises. Yet, what exactly that means is far from clear. There is a debate at the Court about 'quantity': how much 'gender justice' should and can the ICC deliver? Is there too much or too little focus on gender at the

Court?⁸⁶⁰ In this debate, the Prosecutor has started to make good on the promises of her SGBV policy paper. In the Ntaganda case, she added SGBV charges to the initial charges and the Pre-Trial Chamber, for the first time, unanimously confirmed all SGBV charges.⁸⁶¹ In the case against Dominic Ongwen, an LRA commander from Northern Uganda, seven SGBV charges were added in 2015, making Ongwen the defendant facing the highest number of SGBV charges at the Court. These SGBV charges also include the new charge of ‘forced marriage’ which is not listed as separate crime in the Rome Statute.⁸⁶²

The Ongwen case and the ‘forced marriage’ charge in particular, are likely to also thrust to the forefront a ‘qualitative’ debate about what ‘gender justice’ means in the societies in which the Court works, such as Northern Uganda. During the confirmation of charges hearing in January 2016, the prosecutor and the defence already became embroiled in arguments on what a ‘real’ or ‘normal’ marriage as opposed to a ‘forced’ marriage looks like in Acholi society.⁸⁶³ This Chapter has begun to sketch this debate of the ‘what’ and ‘how’ of gender justice using the example of RLP’s challenge to the OTP’s policy paper on SGBV. This challenge ‘from the field’ intersects with similar concerns expressed by academics and practitioners about ‘structural feminism’ in general and the neglect of male victims of SGBV in particular. Yet, RLP’s challenge also brings out deeper concerns about the role of men, masculinity and patriarchy in post-conflict Northern Uganda. In response to alleged ‘gender changes’ unfolding during the war and the efforts

⁸⁶⁰ D. Chaikel, ‘Does Gender matter at the International Criminal Court’, The Hague Justice Portal, 8 March 2011, available at <http://www.haguejusticeportal.net/index.php?id=12400> (visited 23 August 2016).

⁸⁶¹ *Gender Report Card* (2014), at 111.

⁸⁶² D. de Vos, ‘Confirmation of charges hearing in Dominic Ongwen case: hopeful signs for gender justice?’, IntLawGrps, 4 February 2016, available at <http://ilg2.org/2016/02/04/confirmation-of-charges-hearing-in-dominic-ongwen-case-hopeful-signs-for-gender-justice/> (visited 23 August 2016).

⁸⁶³ A. Branch, ‘After the International Criminal Court’, Oxford Transitional Justice Research (OTJR) Seminar Series, 10 February 2016, available at <https://podcasts.ox.ac.uk/after-international-criminal-court> (visited 23 August 2016).

of international organizations to empower women, a backlash has fomented. Proponents of the 'but what about men?' position are sceptical or outright hostile towards the 'gender justice' promises of international organizations including the ICC. Some advocate for a return to pre-war patriarchal Uganda, while others think that whatever change takes place should be negotiated in the communities rather than 'brought' or 'imposed' by outsiders.

Importantly, this backlash also has an internal dimension with contested visions of gender justice within the Court and even outright resistance to what is perceived as 'too much focus on gender'. These overlaps of 'external' and 'internal' backlashes to gender justice also belie the stereotype of an enlightened institution with a clear 'gender justice' vision meeting resistance in 'traditional' societies. These backlashes are likely to proliferate now that the Prosecutor has ventured into the realm of 'marriage customs' in Northern Uganda. Local and international organizations working on gender justice on the ground including the TFV are already under pressure to accommodate the 'but what about men?' backlash. Some try to negotiate the meaning and practice of gender justice with local and traditional stakeholders ('internal balancing'). On the international level, UN Women touts that men are partners not enemies in the fight for gender justice. Yet, perhaps the biggest price for this accommodation has been paid with little fanfare. Looking at development projects aiming at women's empowerment in general and the TFV's programmes in particular, it appears that 'empowerment' is mostly therapeutic and economic but rarely political. Of course, economic empowerment can lead to political empowerment but the sort of economic empowerment that comes from 'vocational training' and 'village loans and saving groups' often does not. The backlash has thus been very successful at 'destructuralizing' and 'depoliticizing' gender justice. The new gender

justice narrative acknowledges that both men and women are victims of 'gender roles' and claims that we need men as partners, role models and heroes to achieve gender justice. As such, it obfuscates structural inequality, male resistance and co-optation that actively prevent a gender-just society from taking shape.

Conclusion

On 19 April 2016, the ICC moved into its ‘permanent premises’ close to Scheveningen’s rolling dunes. According to the ICC’s website, ‘the design of the building reflects the transparency of the institution and its innovativeness’.⁸⁶⁴ The inauguration of the glossy new building was marked by upbeat speeches full of references to justice and peace. The key word though was ‘permanence’; a permanent building for a permanent Court.

For some scholars, this inauguration ceremony was another sign of the ICC being out of touch. ‘Claiming the [#ICC](#) will last forever because it has a shiny new headquarters seems a tad desperate, no?’, one Law Professor tweeted.⁸⁶⁵ Another commentator exclaimed: ‘I just cannot believe that the organisers chose to make what is of course meant to be an optimistic event, a caricature of itself by having Heal the World by Michael Jackson sung by children as the final act of the ceremony.’⁸⁶⁶ He wondered how the event’s organizers reached this decision and imagined the following dialogue:

‘So how should we conclude the opening ceremony of an institution that is struggling to live up to the completely unrealistic expectations that have been put on it since it was created?’

‘I know! Let’s play up those expectations a little more and suggest that the ICC is going to make the world a better place for you and for me and the entire human race!’⁸⁶⁷

⁸⁶⁴ ICC Website, ‘Official Opening of the ICC Permanent Premises on 19 April 2016’, 8 April 2016, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1207> (visited 23 August 2016).

⁸⁶⁵ K.J. Heller, Twitter, @kevinjonheller, 20 April 2016.

⁸⁶⁶ D. Jacobs, ‘Heal the World at the ICC Opening Ceremony...No, they didn’t dare!’, Blog Post, *Spreading the Jam*, 20 April 2016, available at <https://dovjacobs.com/2016/04/20/heal-the-world-at-the-icc-opening-ceremony-no-they-didnt-dare/> (visited 23 August 2016).

⁸⁶⁷ Ibid.

1. Four Misconceptions

This scholarly puzzlement about the Court's self-representation can be related to four misconceptions in the literature: i) the ICC is only a criminal court; ii) the ICC is a coherent actor; iii) the ICC's victims' engagement is the story of a 'global' Court vs. 'local victims'; and iv) justice at the Court is either too self-evident or too complex to be studied. This thesis critically engages with them, aiming to add nuance to an emerging socio-legal scholarship on the ICC as well as to contribute to transitional justice and criminology more generally.

1.1. *The ICC is only a criminal court*

There is a tendency in the literature to make the ICC smaller than it is. For example, in the debate on whether the ICC is biased against African states, a common defence is that it is not the ICC's fault that the Rome Statute created an unequal system in which certain states can subject others to a law they do not have to answer to themselves. Yet, this artificially separates the Court from the law it applies. The ICC *is* also the Rome Statute even though the Court's practitioners did not write it. In a similar vein, the ICC is often depicted as an institution crushed by the expectations heaped on it from the outside. Stahn, for example, claims that 'the Court is viewed as a saviour for all types of societal problems, ranging from the protection of civilians to electoral politics, as well as for remedying gender biases or specific patterns of victimisation'.⁸⁶⁸

⁸⁶⁸ Stahn, 'Justice civilisatrice?' (2015), at 52.

On this basis, many scholars and practitioners plead that the ICC is only a criminal court and as such should focus on its primary mandate of delivering effective, retributive justice. But the ICC was never set up as *simply* a criminal court. The Rome Statute creates an integrated system that incorporates not only retributive justice but also victim participation, reparation and assistance as part of a complementary system that aims at preventing crimes that ‘threaten peace, security and the well-being of the world’.⁸⁶⁹ Once we analyze the Court as the Rome Statute System, it transpires that expectations and pressures do not only emanate from the outside but also from within the institution. Rather than being crushed by unrealistic expectations, the Court’s practitioners actively participate in the proliferation of conflicting justice promises.

1.2. The ICC is a coherent actor

The literature tends to fit the Court into singular identities or images. Three images are recurrent in scholarship on the Court’s victims’ engagement. First, the ICC is portrayed as a highly legalistic institution that cannot look beyond its legal goggles; it ‘juridifies’ victimhood by only *seeing* them through legal and bureaucratic categories.⁸⁷⁰ Second, the Court emerges as a ‘plotting hegemon’ that uses the image of ‘innocent victims’ purposefully to expand its international justice business, while limiting the participation of actual victims where possible.⁸⁷¹ Third, the ICC is represented as a ‘confused teenager’ who still has ‘to grow up’ and become more realistic.⁸⁷² Above all, it needs to understand that it is first and foremost a retributive justice institution that can do very little for

⁸⁶⁹ Preamble, Rome Statute, 1998.

⁸⁷⁰ Kendall and Nouwen (2014), at 261; S. Kendall, ‘Beyond Restorative Justice: The Limits of Legal Humanitarianism’, in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* [e-book] (Cambridge: CUP, 2015) 352.

⁸⁷¹ Clarke, *Fictions of Justice* (2009), at 109.

⁸⁷² Jessberger (2011), at 171; Cassese, ‘Is the ICC Still Having Teething Problems?’ (2006).

victims.⁸⁷³ While all these images capture important aspects of the Court's victims' engagement, they are misleading in their totalizing representation.

Despite their diversity, these images largely feed off the same external analysis of the Court's legal documents, mandate, capacities and public discourse. What is missing from the literature is a more nuanced internal analysis of the diverse discourses and practices through which 'justice for victims' is produced at the Court. This thesis adds such an analysis drawing on interviews and observations in The Hague, Kenya and Uganda in support of a more complicated narrative of the interplay between justice, victims and legitimacy. Far from conforming to any singular identity, the ICC emerges from such an analysis as a divided institution that in its attempt to bootstrap its legitimacy through its construction of 'justice for victims' has also created an opening for more far-reaching justice demands.

1.3. *The Court's victims' engagement is the story of a 'global' Court vs. 'local' victims*

The ICC's relationship with victims is commonly analyzed through the lens of a global-local divide. The global-local divide is a prime example of the tendency in the TJ literature to conflate advocacy and analysis.⁸⁷⁴ Scholars and practitioners increasingly argue that the ICC should be more 'responsive' to affected communities and that its norms need to be 'locally' translated.⁸⁷⁵ The language of 'local ownership' has also become a hallmark of the Court's own discourse, particularly its outreach strategy. Some even speak of a 'local turn' in the scholarship and practice of international criminal justice.⁸⁷⁶ Yet, the 'global-

⁸⁷³ Vasiliev (2016)

⁸⁷⁴ Clark and Palmer (2012).

⁸⁷⁵ C. Stahn, 'Between 'Faith' and 'Facts' (2012), at 277.

⁸⁷⁶ See De Vos, Kendall and Stahn (2015), at 7; F. Mégret (2015).

local' divide is problematic both as analytical lens and as normative commitment. Analytically, it treats the 'global' and the 'local' as real things rather than normative claims. This makes us blind to the ways the 'global' and 'local' are constructed at the Court. For example, the Court has used the notion of the 'local' to outsource much of its victims' engagement to intermediaries, while blaming them for failing to achieve the impossible: managing the expectations of victims who have no other avenue for redress.

Normatively speaking, the merits of the local are oversold while the dangers are underappreciated. 'Of course, we should not romanticize the local' has become a common disclaimer of those advocating for 'bottom-up' approaches to TJ. But this sidesteps the bigger question of how much change we can expect from 'the local', what kind and how. For example, Gready and Robins identify 'the local' as the primary locus of transformation in TJ.⁸⁷⁷ This thesis, on the other hand, argues that the notion of the 'local' obscures more than it illuminates at least about the Court's victims' engagement: it neglects the Court's dependence on in-country actors and their influence on victim selection and participation; it underestimates power hierarchies among victims; it overlooks the resistance of powerful, conservative forces to structural change in gender relationships (they talk the talk but don't walk the walk) and it omits how the notion of a coherent, primordial 'local' can be used to marginalize 'non-local' victims.

1.4. *Justice is either too self-evident or too complex to be studied*

Justice is the Court's main currency but its value, meaning and use at the ICC is hardly explored. For legalists, justice is simply too self-evident to be studied. If the Court conducts fair trials and applies the law correctly, this is justice. In fact, the ICC as a concept

⁸⁷⁷ Gready and Robins (2014), at 360-361.

is premised on a universally valid idea of justice. Yet, even for the Court's practitioners, justice is not always that obvious as the following exchange with an ICC lawyer illustrates:

Leila: 'Some people say that justice is culture-independent. A fair trial is something that every human being can rationally understand.'

George (laughs): 'I definitely disagree with that. I take that person and bring him to one of our meetings and have them explain the rights of the accused to a bunch of rape victims.'⁸⁷⁸

For others, justice is too complex to be studied. Justice perceptions depend 'on the individual victim: on his or her cultural background, gender, what he or she has been a victim of, the when, the how, where the victim is at the moment, what his or her expectations are'.⁸⁷⁹ It is difficult to say anything meaningful about justice in the aggregate. This thesis took a different approach: it argued that justice is socially constructed at the Court to promote its diverse institutional agendas. Justice is neither self-evident – in fact, it is in a constant process of definition and re-definition – nor is it purely relative; not everyone is in a position to authoritatively say what it means. The thesis then developed the concept of interactional justice to examine how 'justice for victims' is constructed, used and implemented at the ICC. Where did we end up?

2. Divided Ideas, Similar Practices: Schizophrenic Justice at the ICC

This thesis ends with a paradox; it has shown that the ICC is an ideologically divided Court. Hidden under the legalistic veneer, the Court's practitioners have different justice visions and articulate them with few constraints. Their ideas bear only a tenuous relationship with the legal process and shift and change through courtroom proceedings, every-day

⁸⁷⁸ Interview with Legal Officer, Registry, The Hague, 12 November 2013 (George is not his real name).

⁸⁷⁹ Interview with A. Vuillemin Grendel, Legal Officer at the CICC, 3 July 2013.

interactions, NGO meetings, field engagement and pockets of deliberative justice, for example, between victims and their lawyers. New concepts have proliferated such as gender justice, transformative justice, civic education, truth and local ownership and are embraced by some and rejected by others. These contestations have unfolded under the radar as justice is usually not openly discussed at the Court or litigated on in the court room.

Yet, despite this ideological diversity, both judicial and administrative processes at the Court reflect a trend towards more restricted victims' practices. Victim participation has become more collective - with hundreds of victims being grouped together and represented by one Court-appointed lawyer - while reparation increasingly takes the shape of collective projects rather than individual awards. Victims can no longer participate at the investigation stage, which is arguably the most important stage for those who want to see their perpetrators prosecuted. Recent judicial developments confirm this trend. The Appeals Chamber in the Lubanga case has narrowed the categories of victims who can receive reparations;⁸⁸⁰ the Chamber in the Ruto and Sang case decided that it cannot consider victims' views and concerns on reparations given that the charges against the accused were vacated;⁸⁸¹ and most pointedly, the Single Judge in the Ongwen case denied legal aid to victims who chose their own lawyers rather than the Court's lawyers.⁸⁸² On the administrative level, the Court is increasingly trying to internalize victims' representation while cutting the costs of its victims' engagement.⁸⁸³ These

⁸⁸⁰ Appeals Chamber Decision on Reparations in Lubanga, 3 March 2015.

⁸⁸¹ Decision on the Requests regarding Reparations, *Ruto and Sang* (ICC-01/09-01/11-2038), Trial Chamber V(A), 1 July 2016, §7.

⁸⁸² Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, *Ongwen* (ICC-02/04-01/15-350), Pre-Trial Chamber II, 27 November 2015, §§19-24

⁸⁸³ FIDH, 'Comments on the ICC Registrar's Revision proposals' (2014).

diverse practices add up to an image of a Court that increasingly restricts victims' access to its proceedings, while promoting diverse and even ambitious ideas of how the ICC can bring justice to them.

One explanation for this paradox might be that ideas do not really matter at the Court. As a criminal court, the ICC's main focus is to run its cases as smoothly as possible. This is the Court's primary mandate and its fulfilment is necessary to secure the ICC's legitimacy in the eyes of its member states, its main constituency. Victim participation and reparation are a hindrance to expeditious trials and therefore have to be circumscribed. They are 'purely symbolic' and thus not meaningful for victims or the Court.

Yet, as the opening ceremony of the ICC's new building showed once again, symbolism matters hugely to the Court. In fact, while victim participation and reparations are dismissed as 'merely symbolic', the *raison d'être* and impact of the ICC is often entrusted precisely to its symbolism or expressiveness. As one Judge explained:

As I have said recently the abbreviation ICC has become known all over the world; and also in Egypt, in Thailand, in Russia, in the Ukraine, in Libya, in the Middle East- in all these problematic areas. And it has become a symbol of the need for justice; it has become a wake-up call for politicians, for societies, for all who have responsibility to ensure that these crimes do not happen and if they happen that there is no impunity and that nobody is above the law. That is a core function of the ICC. Therefore, by the way, I am also optimistic that this Court will not disappear despite all the problems. It is irreversible. The call for more justice, which is symbolized by the ICC, has become so strong that it has become institutionalized here in The Hague.⁸⁸⁴

⁸⁸⁴ Interview with Judge, The Hague, 19 November 2016; Kaul, 'Ten Years International Criminal Court', (2012), at 14-15.

The Judge was not alone in defining the Court's success through what it represents rather than what it does. Many scholars emphasize the Court's important role in 'sending a message of deterrence' or 'expressing the moral condemnation by the international community'.⁸⁸⁵ For the Court's first prosecutor, this was the Court's main rationale rather than its handling of particular cases.⁸⁸⁶ The relevant distinction is thus not between legal proceedings which matter and justice ideas and symbolism which do not, but between symbolism that is embraced and symbolism that is dismissed by the Court's practitioners. Ultimately, ideas and symbols may be much more important for securing the Court's relevance than its actual proceedings.

Another explanation for this paradox might be that there is a fundamental disconnect between justice ideas and practices at the ICC. Legal and institutional practices have little to do with justice rhetoric. Instead, they are defined by institutional interests and the distribution of power within the Court, where conservative stakeholders such as the ICC's judges carry more weight than those actors at the margins like the TFV, victims' lawyers and local intermediaries. Ideas expressed by the latter do not really impact how the Court works, even though they are useful for propping up the Court's legitimacy in the eyes of civil society and international public opinion as an institution fighting for comprehensive justice for victims.

Yet, it is difficult to control the dissemination of ideas and how they shape justice practices in a diverse institution with multiple constituencies. This thesis argues that the integration of 'justice for victims' within the ICC's institutional framework has left its mark

⁸⁸⁵ Drumbl (2009); Glasius, 'It sends a Message' (2015); C. Stahn, 'Reparative Justice after the Lubanga Appeal Judgment: New Prospects for Expressivism and Participatory Justice or 'Juridified Victimhood' by Other Means?', 13 *JICJ* (2015) 801.

⁸⁸⁶ Verini (2016).

on the way the Court works. The judges have failed to develop a common vision of the ICC's victims' engagement, which has created a justice vacuum at the Court as the rationale and modalities of participation and reparation continue to change on a case-to-case basis. At the same time, the victims' provisions have opened the Court's processes to new actors in the field, who are filling that vacuum, as well as to civil society actors who pressure the Court to fulfil its victims' promises. While the judges have closely guarded the legal processes in The Hague, they have sought to appease their victims' constituencies by deepening the Court's field engagement and offering victim assistance instead of participation and reparation. Some victims' lawyers have even used this leeway to take up broader victims' advocacy roles, while the TFV implements development-inspired programmes geared towards reconciliation and social transformation. While these field actors may be invisible from a 'Hague-centric' perspective, their activities greatly shape the Court's imagery in its situation countries – another important constituency. Justice ideas and practices are mutually constitutive at the ICC, even though that does not necessarily make the Court more meaningful to victims. So how can we make sense of an ideologically divided court pushing for increasingly restrictive victims' practices?

I argue that this paradox is not so much a paradox but the logical outcome of the contradictory functioning of justice at the ICC. Justice at the Court is schizophrenic. The ICC tries to build its legitimacy through a dualistic use of justice; by *offering* different constituencies diverse and even conflicting justice visions on the one hand, and by using justice as a way of *managing* these constituencies, particularly victims, on the other. Justice is both a promise and an instrument; with regard to the former, there is room for contestations and conflicting views, with regard to the latter, justice is well policed.

Indeed, every justice offer comes with restrictions and limitations which discipline not only perpetrators but also victims. The Court defines who deserves reparations, how much and what kind. It defines who can participate, when and under what conditions. Victims have to fill out application forms, undergo a vetting procedure to establish whether they are 'really' victims and travel hours to attend meetings with ICC lawyers. What the Court gives, it regulates and can withdraw any time. The *conditionality* of victim participation and reparations at the ICC hollows out the idea that it is a right. Victims are in constant danger of having their status stripped off them again.

3. Justice and Legitimacy: Schizophrenic but not necessarily harmful

What does schizophrenic justice mean for the Court's legitimacy? So far, the Court's proliferating justice claims have furthered not harmed its legitimacy. Through its justice promises, the Court can give something to each constituency. It gives victims sufficient hope for justice, reparations and basic assistance to support or at least not obstruct its processes, while reassuring states that it is not harming their political interests. It persuades civil society that it closely engages with victims, and lawyers that it safeguards due process. In their speeches, the Court's leading practitioners put the ICC in close connection with peace, reconciliation, economic growth and prosperity, as if the latter flow almost naturally from the Court's processes.⁸⁸⁷ At the same time, they are careful not to commit to any particular justice goal and instead seek refuge in abstract and hard to measure goals such as deterrence or the symbolism of a permanent institution that

⁸⁸⁷ F. Bensouda, 'The International Criminal Court and Africa: A Discussion on Legitimacy, Impunity, Selectivity, Fairness and Accountability', GIMPA Law Conference 2016, 17 March 2016, available at https://www.icc-cpi.int/iccdocs/otp/Keynote_Speech_of_the_Prosecutor-GIMPA_Law_Conference_on_the_ICC_and_Africa.pdf (visited 23 August 2016), at 6.

epitomizes the global cry for justice. Against this backdrop, the heavy rhetorical investment into the slogan, ‘a permanent building for a permanent court’, makes more sense. The symbolism of the Court may ultimately be sufficient to ensure its survival.

Yet, schizophrenic justice also means that this careful calibration of different justice offers and ideas to appease different constituencies can spiral out of control. Ironically, the biggest threat to upsetting the ICC’s careful management system may currently come from within the Court rather than from without. Three dynamics are at play. First, the debate about victim participation has become so entrenched at the ICC that it has shifted from being a purely instrumental question to an ideological position of either being for or against it. It has become a way for the judges to create an institutional profile and legacy. Some of them are fundamentally opposed to the regime and have even published on that.⁸⁸⁸ In their effort to undercut the system, they may venture too far and also void its instrumental usage for the Court’s legitimacy. Second, managerial impulses at the Court threaten to alienate victims and their supporters to an extent that it may foment active resistance to the Court. My impression from the week-long registration mission I witnessed in Western Kenya was that victims understand their participation as ‘help’, ‘work’ or ‘cooperation’ rather than ‘voice’ or ‘recognition’ and expect something in return.⁸⁸⁹ In other words, there may be a convergence of perspectives between victims and ‘the Court’. They see the Court as instrumentally as many Court officials see them.⁸⁹⁰ It is quid pro quo. If you do not give victims something, it will backfire eventually. Sadly,

⁸⁸⁸ Wyngaert (2012); Kaul (2013), at 226.

⁸⁸⁹ See M. Chamaka, ‘Why are ICC Judges punishing victims for their cooperation?’, Justice Hub, 19 July 2016, available at <https://justicehub.org/article/why-are-icc-judges-punishing-kenyan-victims-their-cooperation> (visited 23 August 2016).

⁸⁹⁰ Vasiliev (2016).

many victims are in such a desolate situation that even transport reimbursement of a few pounds and lunch with tea qualify as 'something'. Against this background, it is astonishing that some of the Court's practitioners even refuse these basic amenities. My informants told me with outrage that victims would come to meetings with the Court's lawyers where no water was provided.⁸⁹¹ Transportation reimbursement has been cut and the Court's support section has suggested that victims should only receive lunch and tea at the meeting if they have travelled from far.⁸⁹² Victims are too often seen as unnecessary expense rather than as constituency and if these dynamics are driven too far, the Court may not be able to count on their acquiescence in the future.

Third, as this thesis has demonstrated, the institutionalization of 'justice for victims' has also set off new justice dynamics *within* the ICC that can create openings for broader justice visions and practices. With the inclusion of victim participation and reparations in the Rome Statute, the Court had to create new institutions such as the VPRS, the TFV, the OPCV, the victims' lawyers but also intermediaries to give life to that system. These actors have sometimes picked up, appropriated and practiced broader justice visions that potentially create a language for much more far-reaching justice demands at the Court. One idea that has emerged in that mix is transformative justice. To most of my interviewees at the Court this was an entirely different concept of justice. For many, it is part of those exaggerated expectations that see the ICC as a saviour for all societal ills.

⁸⁹¹ Interview with Intermediary, Kisumu, 26 August 2014.

⁸⁹² Field notes, Western Kenya (Migori, Kolweny, Ahero, Vihiga), 18 August to 22 August 2014.

Yet, another reading of the relationship between international criminal justice and transformative justice suggests that they are intimately connected. As Samuel Moyn has argued, international criminal justice only ascended ‘when other schemes of justice - ones that had previously been more aspirational and more popular - had been made unavailable or unexciting. One stream seemed major only as earlier torrents evaporated or were dammed up....’⁸⁹³ In tracing the conceptual origins of the field of ‘transitional justice’, Paige Arthur has claimed that analysts in the 1970s and 1980s recast ‘transition’ from a concept distinctly associated with Marxist ideas of socio-economic transformation into a much more limited notion of ‘political reform’ confined to the legal-institutional level.⁸⁹⁴ She relates that shift amongst others to the global decline of the left and its demand for structural change and economic redistribution.⁸⁹⁵

This reimagining of ‘transition’ has also limited the justice claims that can be put forward within its purview as ‘transitions to socialism may entail very different kinds of justice claims than transitions to democracy’.⁸⁹⁶ After the ‘democratic’ transition paradigm was settled, international criminal justice gradually became its dominant methodology particularly from the 1990s onwards.⁸⁹⁷ From that perspective, international criminal justice owes its ascendancy to the decline of alternative and more

⁸⁹³ S. Moyn, ‘Of Deserts and Promised Lands: The Dream of Global Justice’, *The Nation*, 29 February 2012, available at <https://www.thenation.com/article/deserts-and-promised-lands-dream-global-justice/> (visited 23 August 2016); S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass: Belknap Press of Harvard University Press, 2010).

⁸⁹⁴ Arthur (2009), at 338.

⁸⁹⁵ *Ibid*, at 339.

⁸⁹⁶ *Ibid*, at 341.

⁸⁹⁷ M. Mamdani, ‘Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa’, 43 *Politics & Society* (2015) 61, at 80; K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are changing World Politics* (New York: W.W. Norton, 2011).

radical justice visions such as social and transformative justice; the former transplanted the latter as the dominant justice language of our time.

4. International Criminal Justice and its Discontents

This is where the concept of interactional justice becomes so important. It unmasks justice as simply another socially constructed concept that is part and parcel of political, institutional and ideological struggles within and outside the Court. Its meaning is not self-evident much less inevitable and in fact a lot of effort is invested into limiting the imaginative space for alternatives. Many scholars and practitioners see retributive, restorative and transformative justice as completely different types of justice that should be handled by different institutions: courts, truth and reconciliation commissions and governments. Interactional justice, on the other hand, makes the interdependence of justice visions visible. For example, restorative justice at the ICC is designed not as an alternative or an addition to retributive justice, but as a deliberate effort to redeem retributive justice while keeping at bay more radical justice demands. When the Court's lawyers say that the ICC is only a criminal court and that victims should go somewhere else to 'get' truth, reparations, structural transformation and gender equality, they overlook that it is no accident that the ICC exists as the focal point of global justice, while these other institutions do not. Some scholars have argued that the ICC has actively monopolized global justice by crowding out alternative visions and approaches.⁸⁹⁸ But these alternatives continue to exist within the Court's own discourse; indeed, the Court has actively swallowed all possible justice discourses including even the philosophy of local justice. Why?

⁸⁹⁸ Nouwen and Werner (2015).

A comparative perspective between domestic and international criminal justice helps to shed light on this question. Criminal justice in domestic systems is concerned with maintaining order; it effectively polices the status quo. The assumption is that we already have a good society and the role of the justice system is to maintain it. The answer to injustice lies in the rules we already have, not in changing society. The status quo orientation of criminal justice is even more problematic at the international level where the status quo is a highly unequal and unjust political order. In many of the Court's situation countries, it is implausible to argue that justice merely requires the restoration of the status quo ante. As one ICC judge pondered, 'in a very orderly society, justice means small matters... In countries like Germany justice is looked through a magnifying glass... In countries like the DRC, justice concerns much bigger issues, war and murder and it also involves different countries.'⁸⁹⁹ International criminal justice has won in the political competition between different justice visions, because it reflected the ideological dominance of the West after the Cold War and represented the lowest common denominator states could agree on; that there should be punishment for and prevention of mass atrocities. Yet, given the level of global injustice, it also made it an unsatisfactory concept both for civil society and the Court's own practitioners.

It is in this context that transformative justice has (re-)emerged within the Court's discourse. Of course, the Court's 'transformative justice' concept is far from a call for revolution, but it does put the transformation of societal structures back into the repertoire of possible justice demands in international criminal justice. Some even see transformative justice as the logical corollary of international criminal justice. If the Court

⁸⁹⁹ Interview with Judge, The Hague, 17 December 2013

genuinely wants to prevent crimes, it also has to address the social, economic and political structures that made these crimes possible in the first place. As a senior adviser of the Chambers said when asked whether the Court should concern itself with ‘transformative justice’:

If at one point you really want, as they always say all the time, ‘we are going to prevent crimes against humanity’. This is where you have to act. If you want to be serious... But of course you need the restructuring of the country. Can an international criminal court do such a thing? Many people are going to smile if you say that. But I don’t think you have to give that to them.⁹⁰⁰

Yet, as this thesis has also shown, the inception of transformative justice at the Court has for the most part not translated into more daring justice practices on the ground. Part of the reason is that law is not the only conservative force at the ICC. New disciplinary logics take over once ‘justice’ travels to the field. The examination of the TFV’s assistance programmes in Northern Uganda suggests that once justice escapes legal strictures, it is redefined along the lines of the development paradigm. While this leads to a broadening of justice to include economic and women’s empowerment as well as a broader recognition of victimhood than in the Court’s cases, it is not necessarily more transformative. On the contrary, development methodology puts pressure on victims to become self-sufficient entrepreneurs rather than on the state, the economy and the international community to undergo changes in order to provide their citizens with the conditions for a safe and dignified life.

But transformative justice has not only been blunted by the logic of development; it has also been met with resistance by traditional and local stakeholders. This resistance

⁹⁰⁰ Interview with Adviser, Chamber, The Hague, 8 January 2014.

reflects different visions of what a 'transformed' society should look like but also a more straightforward defence of the 'local' status quo particularly with regard to gender relations. While many scholars still analyze the Court's engagement with its situation countries through the lens of a 'global-local divide', this thesis has argued that the 'global vs. local' scheme is a construct which distracts from the internal contradictions of the Court. It also ignores how the 'global' and the 'local' meet in promoting certain justice discourses thereby marginalizing alternatives. In Northern Uganda, the 'global' and the 'local' meet in their resistance to transformative justice even if with different emphasis. While 'the Court' is more worried about interfering with the political and socio-economic status quo, local stakeholders were more suspicious of interferences with existing gender relationships. The local is thus not the quintessential 'other' of the Court and 'grassroots actors' not necessarily the locus for social transformation. Of course, this sidesteps the question of whether the ICC should be involved in 'transformative justice'. It may be that 'transformative justice' is simply a new cloak for the 'civilizing mission', but it is equally misleading to expect that some other institution or the 'local' will take up the baton.

This thesis has tried to make justice more tangible by offering a conceptual lens - interactional justice - for exploring its diverse and contradictory constructions in the Court's first decades - both in The Hague and in the field. So far, these justice contestations have not chipped away, much less undermined, the Court's legitimacy. Rather, the Court has thrived on its justice contradictions; its failure to commit to any particular justice vision while loosely relating to all possible visions has made the Court impervious to critique. But the thesis has also shown that 'justice for victims' at the ICC is

inherently unstable and its contradictory dynamics may at some point rip the concept apart - and with it the Court's legitimacy.

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- Interview with Legal Representative for Victims (LRV), 24 November 2013.

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