Victim-oriented Complementarity is the Key: A Proposal for a Policy and Structural Change in the Interpretation and Application of the International Criminal Court's Principle of Complementarity for the Achievement of Victim-oriented Justice

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DEDICATION

My Best Friend, Helper, Most Senior Partner, Guide, Teacher, Comfort, Grace, and More…

To my one and only Paraclete

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LIST OF ABBREVIATIONS

ASP	Assembly of States Parties to the Rome Statute
AU	African Union
CAR	Central African Republic
CIPEV	Commission of Inquiry into the Post-Election Violence
CSO	Civil Society Organization
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EU	European Union
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICCst.	Rome Statute of the International Criminal Court

ICD	International Crimes Division
ICJ	International Court of Justice
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JCCD	Jurisdiction Complementarity and Cooperation Division
LRA	Lord's Resistance Army
LRV	Legal Representative for Victims
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MLC	Mouvement de libération du Congo
MoU	Memorandum of Understanding
NGO	Non-governmental Organization
OAS	Organization of American States
OAU	Organization of African Union

OHCHR	Office of the High Commissioner for Human Rights
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RDC	République Démocratique du Congo
REJUSCO	Programme de Restauration de la Justice à l'est de la RDC (Restoration of the Judicial System in the Democratic Republic of Congo (DRC))
RPE	Rules of Procedure and Evidence
SGBV	Sexual and Gender-Based Violence
TFV	Trust Fund for Victims
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	UN General Assembly
UNSC	United Nations Security Council
UPDR	Uganda People's Defence Force
UPR	Universal Periodic Review
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit

Abstract

The Rome Statute system of justice is built on the key principle of complementarity. This requires States Parties and the International Criminal Court (ICC) to function together in their shared objective to end impunity for core international crimes while being mindful of their impact on victims. This thesis analyzed the ICC's complementarity, and victim jurisprudence using doctrinal research method. It found that although victims' provisions dot the core legal texts of the Court, admissibility criteria which regulate complementarity do not expressly include consideration of victims' interests. Victims' ability to participate in complementarity proceedings are restricted, and their interests do not feature as strong elements in complementarity decisions. No study has suggested a policy and structural blueprint for a complementarity mechanism in the interests of victims.

This thesis makes an original contribution to the field of international criminal justice in two ways. First, it proposes a reinterpretative framework for the introduction of victims' elements into admissibility determinations, in the form of victim-oriented qualified deference, i.e. (1) extra time awarded to states who show an element of willingness, to develop justice approaches which benefit victims, (2) facilitation of capacity building (3) the use of a Memorandum of Understanding between the ICC, concerned States, and cooperation partners, negotiated in consultation with victims, and (4) monitoring of state's compliance. Secondly, the thesis is the first study to propose a design for an inclusive, neutral, and independent ICC complementarity division which can better accommodate victims in the process. The thesis's proposals are tested by applying them to existing ICC situations originating from UNSC referrals, States Parties referrals, and *proprio motu* situations. The result shows that making the complementarity regime and process more attuned with victims' needs and interests brings the Rome Statute system one step closer to achieving victim-oriented justice.

Chapter 1: Introduction: Laying the Groundwork

1 Introduction

The adoption of the Rome Statute in 1998 was a breakthrough as the International Criminal Court (ICC or the Court) became a reality after five decades of plans and negotiations to establish such a Court.[1] This was a signal that the international community was more poised than ever to respond to Rome Statute crimes (core international crimes).[2] The Court was also a reaction to the outcry that perpetrators of the most serious crimes of concern to the international community should no longer escape justice but must be held accountable by the ICC or national courts.[3] States retained the primary responsibility for the Rome Statute's main aim of fighting impunity for core crimes, while the ICC would complement states in this regard.[4] This led to the coinage of the term 'complementarity' which does not appear in the Rome Statute but is derived from reference to the Court being 'complementary' to national

[1] See Benjamin Ferencz, 'From Nuremberg to Rome: A personal Account' in Mark Lattima Philippe Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing 2003) pp. 31-45 ('Ferencz, From Nuremberg to Rome: A personal Account (2003)'); The United Nations, 'Rome Statute of the International Criminal Court', Overview, 1998-199 <https://legal.un.org/icc/general/overview.htm> accessed 3 September 2022.

[2] Geoff Gilbert, Responding to international crime (2nd edn, Martinus Nijhoff 2006) p. 17.

[3] Preamble of the Rome Statute (ICCst.) para 4; The United Nations, 'Rome Statute of the International Criminal Court', Overview, 1998-1999 <https://legal.un.org/icc/general/overview.htm> accessed 3 September 2022; Popovski, Vesselin, 'International Criminal Court: A Necessary Step Towards Global Justice' (2000) 31 (4) Security Dialogue 405, pp. 405-418; Carsten Stahn, A Critical Introduction to the International Criminal Court (Cambridge University Press (CUP) 2018) p. 1.

[4] See Preamble to the ICCst., paras 6, 9-10, and Article 1 ICCst.

jurisdictions.[5] Under this complementarity arrangement[6] the ICC would exercise its jurisdiction over international crimes only when states are not in a position to do so.[7] Such an arrangement is logical since it can potentially ensure optimal use of opportunities and resources in domestic jurisdictions and at the ICC to fight against impunity.[8]

With the establishment of the ICC, victims' advocates were optimistic that justice will go beyond merely prosecuting perpetrators[9] because of the several provisions in the Statute for victims' protection, participation, and reparations.[10] Nonetheless, this distinguishing feature of the ICC must be reconciled with its nature as a criminal court set up to ensure accountability of perpetrators by investigating and prosecuting them. How would the ICC balance the

[5] Preamble to the ICCst., para10, and Article 1 ICCst.; This was initially contained in the International Law Commission (ILC)'s Draft Statute, see International Law Commission, Draft Statute for an International Criminal Court with Commentaries, 22 July 1994, Commentary on the Preamble Paras, 1 and 3, Commentary on the Jurisdiction of the Court, para 11 ('Draft Statute for an International Criminal Court with Commentaries, (1994)'); John T. Holmes, 'Complementarity: National Courts versus the ICC' in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court*: *A Commentary* (Vol I, Oxford University Press (OUP) 2002) pp. 677-685 ('Holmes, Complementarity: National Courts versus the ICC (2002)'); James Crawford 'The Work of the International Law Commission' in Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) p. 26; Oscar Solera, 'Complementary Jurisdiction and International Criminal Justice', (2002) 84 Revue Internationale de la Croix-Rouge/International Review of the Red Cross pp. 145-170 ('Solera, Complementary Jurisdiction and International Criminal Justice (2002)').
[6] See Chapter Three for detailed discussion and analysis of complementarity and how it is applied at the ICC.
[7] Holmes, Complementarity: National Courts versus the ICC (2002) pp. 677-678.
[8] Preparatory Committee on The Establishment of an International Criminal Court, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol I, Proceedings of the Preparatory Committee (March-April and August 1996)' UN GAOR, 51st Session, Supplement No.22 (A/51/22) paras 156-157 ('PrepCom Report Vol I (March-April and August 1996 Proceedings').
[9] See for example, William R. Pace, Jennifer Schense, 'The Role of Non-Governmental Organizations' in Paola Gaeta, John R.W.D. Jones, (eds), *The Rome Statute of the International Criminal Court*: *A Commentary* (Vol I, OUP 2002) pp. 105-144; Pam Spees, 'Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power' (2003) 28 (4) Signs: Journal of Women in Culture and Society 1233, pp. 1233-1249; Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article-by-Article (2nd edn, Baden-Baden: Nomos, 2008) pp. 1399, 1439 ('Triffterer, Commentary to the Rome Statute of the ICC: Observer's Notes, Article by Article (2008)'); Conor McCarthy, Reparations and Victim Support in the International Criminal Court (CUP 2012) pp. 1-4 and 34-63 ('McCarthy, Reparations and Victim Support in the International Criminal Court (2012)'); Louise Chappell, The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy (OUP 2016) pp. 35-36.
[10] See for example, paragraphs 2-4 ICCst. Preamble, and Articles 68 for participation, and Article 75 for reparations.

perpetrator-centric nature of criminal justice[11] with its unique feature of victims' participation at an international court? How would victims' needs, and interests feature in a determination of whether the ICC or states will exercise jurisdiction? These are pertinent questions which must be considered. Two decades after the Court's establishment, with over twenty situations from different parts of the world, and thousands of victims before the Court,[12] it is time to re-examine how the ICC and states fulfil their Rome Statute obligations, and what role complementarity plays in this process in relation to justice for victims.

1.1 Victims Are Integral to the Fight Against Impunity

It is important to first clarify what is meant by victims for the purpose of this thesis. Within the context of international criminal justice there is a plurality of interpretation of the term 'victim'.[13] In defining the term 'victim',[14] it is important to avoid suggestions which may

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[11] See Zehr's discussions on the retributive foundations of criminal justice compared to justice approaches which prioritize victims. Howard Zehr, Changing Lenses: A New Focus for Crime and Justice (Herald Press 1990) pp. 177-214.

[12] For a more recent evaluation of the ICC, see ASP 'Final Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System' Commissioned by ASP ICC-ASP/18/Res.7 9th Plenary meeting 6 December 2019, (September 2020) ('Report of the Independent Expert Review of the ICC (2020)'); For update on Situations Before the Court, see The International Criminal Court, 'Situations Under Investigations' <https://www.icc-cpi.int/situations-under-investigations> 'Preliminary Examinations' < https://www.icc-cpi.int/situations-preliminary-examinations> accessed 4 September 2022. For some statistics on victims' participation and reparation at the ICC, see Nema Milaninia, 'Conceptualizing Victimization at the International Criminal Court: Understanding the Causal Relationship between Crime and Harm' (2019) 50 (2) Columbia Human Rights Law Review 116, p. 120 ('Milaninia, Conceptualizing Victimization at the International Criminal Court: Understanding the Causal Relationship between Crime and Harm (2019)')

[13] See for example, UNGA Res 40/34 (29 November 1985); 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 UNGA Res 60/147 (16 December 2005) ('UNBPG, UNGA Res 60/147'); Makau W. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 (1) Harvard International Law Journal 201. 42 Harv. Int'l L.J. 201 (2001) p. 203, fn 11, and pp. 204-207.

[14] See Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame', (2013) 22 (4) Social and Legal Studies 489, p. 502, pp. 500-503 ('McEvoy and McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013)'); Anita Heber, 'Criminal, Crime Victim, or John Smith? Constructions of Victimhood and Perpetratorship Among Swedish Probationers'(2012) 22 (2) International Criminal Justice Review 171, pp. 171-187; Anne-Marie McAlinden, 'Deconstructing Victim and Offender Identities in Discourses on Child Sexual Abuse: Hierarchies, Blame and the Good/Evil Dialectic' (2014) 54 (2) British Journal of Criminology 180, pp. 180-193; Christine Schwöbel-Patel, 'The 'Ideal' Victim of International Criminal Law' (2018) 29 (3) European Journal of International Law 703, pp. 703-724, (Schwöbel-Patel, The 'Ideal' Victim of International Criminal Law (2018)').

disempower the individual,[15] and avoid any form of hierarchy, and a state's perception of deserving and non-deserving victims.[16] McEvoy and McConnachie,[17] and Killean[18] warn that such an approach will result in the exclusion of individuals some of whom may have perpetrated crimes but have also suffered harm. Since this thesis is focused on justice for victims of core crimes within the Rome Statute framework, it draws its definition of a victim from the core legal texts of the Court. According to Rule 85 of the ICC Rules of Procedure and Evidence, victims are defined as

> "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; and may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to [various] purposes."[19]

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[15] Veronika Burcar and Malin Åkerström, 'Negotiating a Victim Identity: Young Men as Victims of Violence Journal of Scandinavian Studies in Criminology and Crime Prevention' (2009) 10 (1) Journal of Scandinavian Studies in Criminology and Crime Prevention 37, pp. 37-51.
[16] Basia Spalek, Crime Victims: Theory, Policy and Practice (Palgrave Macmillan, 2005) p. 13; Michael J. Kelly, 'The Status of Victims Under the Rome Statute of the International Criminal Court' in Thorsten Bonacker, Christoph Safferling (eds), *Victims of International Crimes: An Interdisciplinary Victims of International Crimes: An Interdisciplinary Discourse* (T. M. C. Asser Press 2013) pp. 47-52 ('Kelly, The Status of Victims Under the Rome Statute of the International Criminal Court (2013)'); Schwöbel-Patel critiques some definitions of 'victim' as recognizably reductionist, see Schwöbel-Patel, The 'Ideal' Victim of International Criminal Law (2018) pp. 703-705 and 709-724.
[17] McEvoy and McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) pp. 493-494.
[18] Rachel Killean, 'Constructing Victimhood at the Khmer Rouge Tribunal: Visibility, selectivity and participation' (2018) 24 (3) International Review of Victimology 273, pp. 273–296; Luke Moffett, Justice for Victims Before the International Criminal Court (Routledge 2014) p. 21 ('Moffett, Justice for Victims Before the ICC (2014)'.
[19] Rule 85, ICC Rules of Procedure and Evidence.

Victims can be direct victims who suffered harm themselves,[20] or indirect victims, i.e., those who suffered harm because of harm to direct victims, for example, deceased persons.[21] In both instances there must be a causal link between the victim's harm and the relevant crime charged.[22] It should be noted that the reference made to victims here and throughout this thesis refers to victims of core international crimes within the Rome Statute. Also, reference to victims does not suggest a homogenous group, as victims may be large in number and their views may differ.[23] This definition of 'victim' under Rule 85 qualifies victims for several rights enshrined in the Rome Statute.

The proclaimed aim of the Rome Statute is to fight against impunity of perpetrators of core crimes by ensuring their effective investigation and prosecution.[24] Justice for victims is not clearly stated as a part of the ICC's mandate, but the Preamble to the Rome Statute makes reference to the suffering of victims and the need to combat impunity for such crimes.[25] According to Article 31 (2) of the Vienna Convention on the Law of Treaties (VCLT),[26] a preamble is a key component of a treaty which helps to clarify the meaning of its substantial

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[20] Judgment on The Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga*, *Situation in The Democratic Republic of The Congo*, ICC-01/04-01/06-1432, AC, ICC, 11 July 2008, para 32 ('Judgment on The Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation, ICC-01/04-01/06-1432, 11 July 2008'); Redacted Version of "Decision on 'Indirect Victims'", *Lubanga*, *Situation in The Democratic Republic of The Congo*, ICC-01/04-01/06-1813, TC I, ICC, 8 April 2009, paras 44-52 ('Redacted Version of "Decision on 'Indirect Victims'", *Lubanga*, ICC-01/04-01/06-1813, 8 April 2009').

[21] See Redacted Version of "Decision on 'Indirect Victims'", *Lubanga*, ICC-01/04-01/06-1813, 8 April 2009, paras 44-52. They may also refer to themselves as survivors. See ICC, Representing Victims before the International Criminal Court: A Manual for Legal Representatives (5th Revised edn, Office of Public Counsel for Victims 2018) <https://www.icc-cpi.int/iccdocs/opcv/manual-victims-legal-representatives-fifth-edition.pdf> accessed 16 September 2022, p. 46 ('OPCV Manual for Legal Representatives, (2018)'.

[22] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006); Judgment on The Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation, ICC-01/04-01/06-1432, 11 July 2008, 58 (Jul. 11 2008); Milaninia, Conceptualizing Victimization at the International Criminal Court: Understanding the Causal Relationship between Crime and Harm (2019) pp. 116-158.

[23] See Chapter Two Section 4 for further discussion of victims and how they fit into the ICC's framework.

[24] Preamble and Article 1 ICCst..

[25] Preamble ICCst., paras 2-5.

[26] Vienna Convention on the Law of Treaties (adopted 23 May 1969, in force 27 January 1980) UNTS Vol 1155 (VCLT), Article 31 (2).

provisions within the treaty's context.[27] Sorel and Eveno rightly assert that the preamble should not be neglected when seeking to understand the intention of the parties to the treaty.[28] Since the Preamble to the Rome Statute highlights the fight against impunity and the suffering of victims, it seems that their needs, and interests should be taken into account when interpreting the Statute. Also, the preparatory works of the Rome Statute regime,[29] and the inclusion of victims' provisions in the Statute evince the intention of the drafters to deliver some form of justice to victims, albeit one attached to individual criminal responsibility**.**[30]

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[27] See Case Concerning Rights of Nationals of The United States of America in Morocco (France v. United States of America) (Judgment) [1952] ICJ Reports 1952, p. 176, pp.196-97; Hüseyin Pazarci, 'Preamble 1969 Vienna Convention' in Olivier Corten, Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP, 2011) p. 4, para 9. Regarding the ICC's application of Articles 31 and 32 of the VCLT, see William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute (2nd ed, Oxford Scholarly Authorities on International Law 2016) pp. 517-518 ('Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016)').

[28] Jean-Marc Sorel, Valérie Boré Eveno, 'Interpretation of Treaties, Art.31 1969 Vienna Convention' in Olivier Corten, Pierre Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011), pp. 807-808, para 8.

[29] See Annex A Compilation Of The Preparatory Works For The Drafting Of Article 43(6) And Article 68 Of The Rome Statute, *The Prosecutor V. Thomas Lubanga Dyilo*, *Situation In The Democratic Republic Of The Congo*, ICC-01/04-01/06-1063-AnxA, PTC I, ICC, 7 December 2007; The Rome Statute, and ICC Rules of Procedure and Evidence; Preparatory Committee on The Establishment of an International Criminal Court, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court,' (1996) Vol II, (Compilation of proposals) General Assembly Official Records, Fisty-First Session, Supplement No.22 (A/51/22), pp. 204-206 ('Report of the Preparatory Committee on the Establishment of an International Criminal Court,' (1996) Vol II, (Compilation of proposals)'); Preparatory Committee on The Establishment of an International Criminal Court, 'Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997' UN doc. A/AC.249/1997/L.8/Rev.1, 14 August 1997, pp. 36–37 ('Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997' UN doc. A/AC.249/1997/L.8/Rev.1, 14 August 1997'); Preparatory Committee on The Establishment of an International Criminal Court, 'Draft Statute of the International Criminal Court: Working Paper Submitted by France', UN doc. A/AC.249/L.3, 6 August 1996; Preparatory Committee on The Establishment of an International Criminal Court, 'Article 68, Protection of the Victims and Witnesses and Their Participation in The Proceedings: Proposal Submitted by Canada', UN doc. A/CONF.183/C.1/WGPM/L.58, 6 July 1998; Emily Haslam, 'Victim participation at the International Criminal Court: a triumph of hope over experience?' in Dominic McGoldrick et al. (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, (Hart Publishing 2004) pp. 316-322.

[30] See Order for Reparations, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-3129-AnxA, AC, ICC, 3 March 2015, Principle 1; Enrique Carnero Rojo, 'Commentary on Article 68 Protection of the Victims and Witnesses and Their Participation in the Proceedings' in Mark Klamberg (ed) *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher 2017) <https://www.legal-tools.org/doc/aa0e2b/pdf/> accessed 5 September 2022, p. 515, ('Rojo, Commentary on Article 68 Protection of the victims and witnesses and their participation in the proceedings (2017)'); See also Charles P. Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings', (2008) 29 (4) Michigan Journal of International Law 777, pp. 777-779 ('Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008)'); Hector Olasolo and Alejandro Kiss, 'The Role of Victims in Criminal Proceedings Before the International Criminal Court' (2010) 81 International Review of Penal Law 125, pp. 125-162 ('Olásolo, and

In practice, the ICC's policies and case law show that the Court understands that victims are a part of the Rome Statute framework.[31] This can be seen in how officials and proponents of the Court have invoked doing justice for victims as the reason for the fight against impunity,[32] often linking justice for victims to the investigation and prosecution of core crimes.[33] This does not mean that victims' needs, and interests have become a determinant factor in all ICC decisions. Aksenova observes that 'international criminal law [the ICC being at the center of this body of law] is being pulled in different directions by various conflicting considerations– deterrence,

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Kiss, 'The role of Victims in Criminal Proceedings Before the International Criminal Court' (2010)'); Victims' Rights Working Group, 'The Victims' Rights Working Group (VRWG) and The Lunch Talks Series', <https://asp.icc-cpi.int/iccdocs/asp_docs/20a/VRWG%20Information%20Sheet.pdf> accessed 6 September 2022.

[31] See Eric Stover and others, 'The Impact of the Rome Statute System on Victims and Affected Communities,' RC/ST/V/INF.4 (presented at the Review Conference of the Rome Statute, Kampala, Uganda: International Criminal Court, 30 May 2010) pp. 1-11 ('Stover and others, 'The Impact of the Rome Statute System on Victims and Affected Communities (2010)').

[32] See for example, International Criminal Court (ICC), 'Ms. Fatou Bensouda Prosecutor Elect of the International Criminal Court: Ceremony for the solemn undertaking of the Prosecutor of the International Criminal Court', (2012) <https://www.icc-cpi.int/NR/rdonlyres/561C232F-3C4F-47AC-91CB-8F78DCC6C3FD/0/15062012FBSolemnUndertaking.pdf> accessed 6 September 2022; ICC 'Statement of Judge Sang-Hyun Song, President of the International Criminal Court (ICC), on the Occasion of Human Rights Day, 10 December 2011', (2011) < https://www.icc-cpi.int/news/statement-judge-sang-hyun-song-president-international-criminal-court-icc-occasion-human-1> accessed 6 September 2022; ICC 'Statement of Judge Sang-Hyun Song, President of the International Criminal Court (ICC), on the Occasion of Human Rights Day, 10 December 2012' (2012) <https://www.icc-cpi.int/news/statement-judge-sang-hyun-song-president-international-criminal-court-icc-occasion-human> accessed 6 September 2022; ICC Press Release ICC-CPI-20170428-PR1300, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, Visits Niger, Addresses National Assembly: We Must Never Forget the Victims' (2017) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1300> accessed 6 September 2022; ICC, 'Statement Of ICC Prosecutor, Fatou Bensouda, on The Arrest Of The Second Suspect In The Situation of The Central African Republic (CAR), Mr Patrice-Edouard Ngaïssona: "Our Quest for Justice in the CAR continues"' (2018) <https://www.icc-cpi.int/Pages/item.aspx?name=181212-stat-prosecutor> accessed 6 September 2022; ICC, 'Victims', <https://www.icc-cpi.int/about/victims> accessed 6 September 2022; International Criminal Court Press Release ICC-CPI-20210311-PR1576, 'New ICC Presidency Elected for 2021-2024' (2021) <https://www.icc-cpi.int/news/new-icc-presidency-elected-2021-2024> accessed 6 September 2022; Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, Participation and The Processes of Justice' (2017) 5 (2) Restorative Justice An International Journal 198, pp. 198-200 (Garbett, The ICC and Restorative Justice (2017)').

[33] Ferstman warns of "[the] tendency to associate the 'core mandate' of the ICC with a narrow focus on prosecutions, only or mainly". See Carla Ferstman, 'Reparations at the ICC: the Need for a Human Rights Based Approach to Effectiveness' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (2nd Revised edn, Brill, Nijhoff 2020), p. 448 ('Ferstman, Reparations at the ICC: the Need for a Human Rights Based Approach to Effectiveness (Brill, Nijhoff, 2020)').

retribution, justice for victims.'[34] Indeed, these considerations and expectations[35] while not necessarily conflicting, have been challenging for the Court to manage. It appears that the ICC prioritizes its own understanding of the fight against impunity which is reflected in the way it has interpreted its mandate to investigate and prosecute international crimes.[36] The Court views the complementarity process as one which is almost exclusive to the parties, i.e., the Office of the Prosecutor (OTP), an accused person or states with jurisdiction. The thesis's arguments are based on the understanding that victims are integral to the fight against impunity.

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[34] Marina Aksenova, 'Symbolism as a Constraint on International Criminal Law' (2017) 30 (2) Leiden Journal of International Law 475, pp. 475-499; Gilbert observes a similar phenomenon in relation to the attempt to use international criminal law for the criminalization of global warming. See Geoff Gilbert, 'International Criminal Law Is not a Panacea - Why Proposed Climate Change 'Crimes' Are Just Another Passenger on an Overcrowded Bandwagon' (2014) 14 (3) International Criminal Law Review 551, pp. 551-587.

[35] Sarah M.H Nouwen, Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan (CUP 2013) pp. 8-33 ('Nouwen, Complementarity in the Line of Fire (2013)'); Marieke I. Wierda, 'The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries' (DPhil thesis, Leiden University 2019) pp. 53-73 ('Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019)'); Christian M. De Vos, Complementarity, Catalysts, Compliance: The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo (CUP 2020) pp.1-15 ('De Vos, Complementarity, Catalysts, Compliance (2020)').

[36] Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1213-tENG, TC III, ICC, 15 July 2009, paras 78-79, and 94 ('*Katanga*, Reasons for Oral Decision on Admissibility, ICC-01/04-01/07, 15 July 2009'); Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga and Ngudjolo, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1497, AC, ICC, 25 September 2009, paras 79, 83, 85-fn. 179, ('Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009'); Prosecution Response to "Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute", Muthaura, Kenyatta, and Ali, *Situation in the Republic of Kenya*, ICC-01/09-02/11-71, OTP, ICC, 28 April 2011, paras 16-28; Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Muthaura, Kenyatta, and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-96, PTC II, ICC, 30 May 2011, paras 40-66; Judgment on the Appeal of The Republic Of Kenya Against The Decision Of Pre-Trial Chamber II Of 30 May 2011 Entitled "Decision on The Application By The Government Of Kenya Challenging The Admissibility Of The Case Pursuant To Article 19(2)(B) of The Statute", *Muthaura, Kenyatta, and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-274, AC, ICC, 30 August 2011, paras 16-46, and 95-; Prosecution's Response to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", *Gaddafi and Abdullah Al-Senussi, Situation in Libya*, ICC-01/11-01/11-321-Red, OTP, ICC, 2 May 2013, paras 24-47, although the Prosecutor later accepted the Appeal's Chamber's ruling of inadmissibility of the Al-Senussi case, their submission in the case is helpful to illustrate the OTP's understanding of complementarity; Public redacted version of "Prosecution's Response To Côte d'Ivoire's Challenge To The Admissibility of The Case Against Simone Gbagbo", ICC-02/11-01/12-41-Conf, 9 April 2014, *Simone Gbagbo*, *Situation in the Republic Of Côte D'Ivoire*, ICC-02/11-01/12-41-Red, OTP, ICC, 24 June 2014.

To highlight the link between providing justice for victims and the fight against impunity,[37] Haldemann, and Unger in discussing the United Nations Principles to Combat Impunity assert that

> "…impunity […] arises from a failure of the state to meet *one* of the following four obligations under international human rights law: (i) to investigate serious human rights violations; (ii) to prosecute, try, and duly punish perpetrators of such violations; (iii) to provide victims with effective remedies and reparation for the harm suffered; and (iv) to take the appropriate steps to prevent a repetition of violations."[38]

This means that victims can contribute to investigations and uncovering the truth, identifying the perpetrator, and where necessary, securing a conviction, and obtaining reparations.[39] This interpretation is consistent with the Rome Statute framework which already contains victims' provisions for participation and reparations. It is also consistent with international human rights law from which the Statute draws inspiration.[40] Examples of international human rights

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[37] See UN Commission on Human Rights, 'Updated Set of Principles for The Protection and Promotion of Human Rights Through Action to Combat Impunity', UN doc. E/CN.4/2005/102/Add.1, 8 February 2005, pp. 6-7; Susanne Karstedt, 'From Absence to Presence, From Silence to Voice: Victims in International and Transitional Justice Since the Nuremberg Trials', (2010) 17 (1) International Review of Victimology 9, pp. 9-30; Frank Haldemann, Thomas Unger, The United Nations Principles to Combat Impunity: A Commentary (OUP 2018) p. 6 ('Haldermann and Unger, The UN Principles to Combat Impunity: A Commentary').

[38] Haldermann and Unger, The UN Principles to Combat Impunity: A Commentary (2018) p. 6, (emphasis added).

[39] Aileen Thomson and Kasande Sarah Kihika, 'Victims Fighting Impunity Transitional Justice in the African Great Lakes Region', (International Center for Transitional Justice 2017) <https://www.ictj.org/sites/default/files/Great_Lakes_Report_March.pdf> accessed 6 September 2022; OPCV Consolidated Submissions pursuant to the "Order Scheduling a Hearing before the Appeals Chamber and Other Related Matters" (No. ICC-02/17-72-Corr), Situation in the Islamic Republic of Afghanistan, ICC-02/17-93, OPCV, ICC, 22 October 2019, paras 20-38.

[40] See Article 21 (3) ICCst.; See also Sang-Hyun Song 'The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law', (2014) XLIX (4) UN Chronicles, <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> accessed 6 September 2022; Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", Lubanga, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-568, AC, ICC, 13 October 2006, Para 67; Judgment on the appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled "Decision on the Admissibility of the Case Against Abdullah Al-Senussi", *Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-

instruments which influence the Court's work and have been featured in some of the ICC's decisions include the (1) UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of IHL (UN Basic Principles on Reparations),[41] (2) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ('UN Victims' Declaration')[42] and (3) the well-developed case law of the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR).[43] The thesis argues that in light of the interpretation of the Rome Statute in its context of addressing international crimes, victims are integral to the Rome Statute system of justice.[44] Their participation and reparations can be considered essential elements in the fight against impunity.[45] The recommendations made in the thesis are also based on this understanding.

01/11-01/11-565, AC, ICC, 24 July 2014, para 220 ('Appeals Chamber Decision on Al-Senussi Appeal, ICC-01/11-01/11-565, 24 July 2014'); Alexandre Skander Galand, 'The Systemic Effect of International Human Rights Law on International Criminal Law' in Martin Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (CUP 2019) pp. 104-108.

[41] UNBPG, UNGA Res 60/147.

[42] UNGA Res 40/34 (29 November 1985).

[43] See for example Order for Reparations (Amended) *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-3129-AnxA, AC, ICC, 3 March 2015, Paras 39, fns 18, 40, fns 20-25, 28, para 67, fns 38, 41; Alexandre Skander Galand, 'The Systemic Effect of International Human Rights Law on International Criminal Law' in Martin Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (CUP 2019) pp. 87-131; Dissenting Opinion of Judge Luz Del Carmen Ibáñez Carranza to The Majority's Decision Dismissing as Inadmissible the Victims' Appeals Against the Decision Rejecting The Authorisation of an investigation into the situation in Afghanistan, *Situation in Afghanistan*, ICC-02/17-137-Anx-Corr, AC, ICC, 10 March 2020, paras 43-48 ('Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020').

[44] According to the ICC, 'The Rome Statute system is based primarily on two pillars, namely the International Criminal Court ("ICC" or "Court") and the States Parties to the Rome Statute of the ICC, individually as well as collectively in the form of the Assembly of States Parties.' See The International Criminal Court, 'Cooperation Agreements', p. 5, <https://www.icc-cpi.int/sites/default/files/Cooperation_Agreements_Eng.pdf> accessed 10 August 2022.

[45] Articles 68 (3) ICCst. provides for victims' participation, and Rule 86 of the ICC's Rules of Procedure and Evidence establishes a general principle that requires the Court as a whole to always take victims needs into account in performing their respective functions. See Article 68 (3) 75, 17-19 ICCst., Rule 85, 86 of the Rules of Procedure and Evidence, read in conjunction with Articles 31 and 32 of the VCLT 1969. See also Moffett, Justice for Victims Before the ICC (2014) pp. 38-39; Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019.

1.2 Complementarity is Pivotal in The Pursuit of Victim-oriented Justice

To realize justice for victim, it is important to clarify what form or shape justice will take. This will be helpful for victims themselves as they can adjust their expectations of the ICC accordingly.[46] Vasiliev asserts that the victims' provisions within the Rome Statute point to the fact that the ICC is moving towards making justice victim-oriented, albeit while retaining its retributive values.[47] Other scholars question how effective the ICC has been and can be in delivering justice to victims.[48] The thesis will argue that the ICC's victim regime[49] provides a good foundation upon which victim-oriented justice can be grounded.[50] This form of justice can enhance victims' position in international criminal proceedings,[51] while not compromising

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[46] Luke Moffett, 'Handbook on Civil Society Organizations and Donors Engagement on Reparations', (Reparations, Responsibility: Victimhood in Transitional Societies 2022) p. 7 <https://reparations.qub.ac.uk/assets/uploads/7-QUB-CSO-Handbook-English-Bitmap.pdf>, accessed 6 September 2022.

[47] See Sergey Vasiliev, 'Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC' in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, Nijhoff 2009) p. 677 ('Vasiliev, Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC (2009)'); See also Alessandra Cuppini, 'A Restorative Response to Victims in Proceedings Before the International Criminal Court: Reality or Chimaera?', (2021) 21 (2) International Criminal Law Review 313, pp. 1-29; Luc Walleyn, 'The Participation of Victims in the Process of Collective Reparations at the ICC' in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice* (University of Oxford 2020) pp. 77-78.

[48] See for example, Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008) pp. 801-826; Conor McCarthy, 'Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?', (2012) 10 (2) Journal of International Criminal Justice 351, pp. 351-372; Moffett, Justice for Victims Before the ICC (2014) pp. 86-194; Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court', (2015) 26 (2), Criminal Law Forum 255, pp. 255-289 ('Moffett, Meaningful and Effective? Considering Victims' Interests Through Participation at the ICC (2015)'); Markus Funk, Victims' Rights and Advocacy at the International Criminal Court (2nd edn, OUP 2015) pp. 79-92 ('Funk, Victims' Rights and Advocacy at the International Criminal Court (2015)'); Garbett, The ICC and Restorative Justice (2017') pp. 198-216.

[49] These include the Rules of Procedure and Evidence, see for example Rules 85-99 on definition of victims, general principle concerning victims, their participation in proceedings and reparations for victims, Regulations of the Court, Regulations of the OTP, and of the Registry. See ICC, 'Core Legal Texts' <https://www.icc-cpi.int/resource-library/core-legal-texts> accessed 6 September 2022; Moffett makes a similar argument, see Moffett, Justice for Victims Before the ICC (2014) pp. 38-39.

[50] See Chapter Two for further elaboration of what is meant by victim-oriented justice.

[51] For discussions on procedural and substantive justice in relation to victims of international crimes, see McEvoy and McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) p. 502; Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 (1) International Criminal Law Review 1; See also Moffett, Justice for Victims of Before the ICC, pp. 29-38; Kotecha discusses procedural justice in relation to the OTP's case selection strategy which also impacts on justice for victims, see Birju Kotecha, 'The International Criminal Court's Selectivity and Procedural Justice', (2020) 18 (1) Journal of International Criminal Justice 107.

the fight against impunity. It can contribute to substantive outcomes that can benefit victims.[52] Such outcomes may take the form of uncovering the truth of victims harms due to the commission of Rome Statute crimes, conviction of alleged perpetrators, and reparations provided to victims.[53] Therefore, reference to justice for victims throughout the thesis means victim-oriented justice as further discussed in Chapter Two.

However, justice at the ICC cannot be victim oriented if complementarity is not victim oriented. The Court's approach to interpreting and applying complementarity would positively or negatively affect how justice for victims is shaped and delivered. For example, if the ICC decides to defer to a state, how would representations made by victims be considered in determining the terms of the deferral? If the Court decides to admit the situation or case, how would it carry victims along in its proceedings? Ultimately, will the ICC or states be better positioned to deliver victim-oriented justice in any given situation? These issues should be considered in the interpretation of the principle of complementarity, but the depth of the consideration may be circumscribed by the perception that victims have a limited position in the complementarity process. There are other issues with complementarity in relation to victims. In the Court's practice, victims and the OTP do not always agree on issues of complementarity and more generally on how justice should be served.[54] For instance, victims

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[52] The provisions for procedural aspects of justice include Article 68 (1)-(4) on victims' participation and protection in proceedings to allow them the opportunity to make their voices heard as to how justice should be shaped. See Articles 68 (1)-(4), 15 (3) 19 (3) ICCSt.; Chapter Two which discusses justice for victims at the ICC; See also Vasiliev, Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC, p. 679.

[53] For example, Articles 75, 76 and 79 ICCSt.

[54] Public Redacted Version Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo,* ICC-01/04-101-tEN-Corr, PTC I, ICC, 17 January 2006, para 51 ('Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006)'); Decision On "Prosecutor's Application To Attend 12 February Hearing", *Kony et al.*, *Situation in Uganda*, ICC-02/04-01/05- 155, PTC II, ICC, 9 February 2007, paras 12-16 ('Decision On "Prosecutor's Application To Attend 12 February Hearing"'); Massida cites these and other cases to buttress this point, see

may disagree on the scope of an investigation, case selection for prosecution, or hibernating certain aspects of a situation.[55] An examination of a state's ability and willingness to include victims in domestic justice proceedings is not expressly stated as a requirement to be met for admissibility decisions.[56] Additionally, the ICC's mechanism for implementing complementarity is located within and managed by the Office of the Prosecutor, and victims are not represented in this mechanism.

These issues with how the principle of complementarity is interpreted and applied can be traced back to the drafting history of complementarity framework. Accommodating victims' needs and interests was not the focus of the drafters of the Rome Statute, and victims were not envisaged as vital stakeholders in the complementarity process. The focus was on protecting state sovereignty, and on investigation and prosecutorial issues such as a states' ability to arrest alleged perpetrators, collect evidence for criminal proceedings, and states' willingness to investigate and prosecute.[57] Yet, one fundamental element of justice for victims is victims' participation in relevant proceedings where their interests are affected, including

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Paolina Massidda, 'The Participation of Victims Before the ICC: A Revolution Not Without Challenges' in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice* (University of Oxford 2020) p. 40, fn 16 ('Massidda, The Participation of Victims Before the ICC: A Revolution Not Without Challenges (2020)').

[55] For example, Regulations 55 of the Regulations of the Court; Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure Under Regulation 55 of the Regulations of the Court, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1891-tENG, TC I, ICC, 16 July 2009.

[56] For example, Article 17 ICCst., which is central to complementarity.

[57] Although there were some provisions for victims to make observations during complementarity proceedings. See Draft Statute for an International Criminal Court with Commentaries (1994); Report of the Preparatory Committee on the Establishment of an International Criminal Court,' (1996) Vol II, (Compilation of proposals); PrepCom Report Vol I (March-April and August 1996 Proceedings); Triffterer, Commentary to the Rome Statute of the ICC: Observer's Notes, Article by Article; Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN General Assembly Official Record (UN GAOR), 50th Session, Supplement No 22 (A/50/22) 1995, paras 91-93, 100, ('Report of the Ad Hoc Committee, UN GAOR 50th Session (A/50/22) 1995'); De Vos, Complementarity, Catalysts, Compliance (2020) p. 28; See Chapter Three for further discussions and analysis on this issue.

complementarity proceedings.[58] For example, when victims of the Afghanistan situation were asked about their expectations in relation to justice, one victim made the following statement,

> "Most people in Afghanistan and our bereaved families are not highly educated and do not have access to the internet and facilities and just because they have not been able to file or register this form,[59] please do not disregard their feelings and do not forget them and listen to them […]."[60]

This profound statement accentuates the argument that justice cannot be victim-oriented if victims do not have access to all relevant proceedings to defend their interests.

2 The Gap in the Literature on 'Complementarity' and 'Justice for Victims'

Notwithstanding the importance of complementarity to the Rome Statute system of justice, relatively little has been written about how this principle can be utilized in a manner that positively impacts victims. The concepts of 'complementarity' and 'justice for victims' are often discussed separately in literature, although there may be some overlap. For example, literature discussing how the ICC interprets admissibility criteria outlined in Article 17-20 may also discuss other matters such as victims' take on issues raised during admissibility decisions. Complementarity and justice for victims may appear distinct, they are nonetheless connected.

[58] For complementarity proceedings which may be initiated at different stages of proceedings related to a situation or case, see for example, Articles 15, 17-19, and 53-54 ICCst.
[59] Reference to 'form' here means victims' participation forms through which victims can make representations to the ICC in a given situation.
[60] Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017, *Situation in Afghanistan*, ICC-02/17-29-AnxI-Red, PTC III, ICC, 20 February 2018, Para 46 (a), (emphasis added) ('Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Regarding Authorization of Investigation into the Afghanistan Situation, ICC-02/17-29-AnxI-Red, 20 February 2018').

Moffett discussed in detail the connection between these two concepts.[61] However, his discussions of victim-oriented complementarity neither include an outline of minimum victim-oriented conditions which can aid the ICC in its admissibility determinations for all situations and cases, nor does it include ways to ensure a more active role for victims in the ICC's complementarity mechanism. Besides Moffett's work on this topic, no other scholarly work has engaged in a detail analysis of the relationship between the principle of complementarity and justice for victims.[62]

All other literature on complementarity can be divided into two categories: those discussing the nature of complementarity and its application in the ICC's practice and in domestic jurisdictions,[63] and those discussing ways to improve its efficiency in the fight against impunity

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[61] See Moffett, Justice for Victims Before the ICC (2014) pp. 234-280; Luke Moffett, 'Realising Justice For Victims Before The International Criminal Court' International Crimes Database Brief 6, September 2014, pp. 1-11; Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague', (2015) 13 (2), Journal of International Criminal Justice 281, pp. 281-311 ('Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague, (2015)'); Luke Moffett, 'Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo', (2016) 16 (3), International Criminal Law Review 503, pp. 503-524 ('Moffett, Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo (2016)').

[62] In July 2020, Alejandra Muñoz in a blog post briefly considered a victim-oriented approach to complementarity in the Colombian Situation, see Alejandra Muñoz, 'The Use of Benchmarks in the Colombia Situation: An Opportunity for a Victim-Oriented Approach to ICC Complementarity', (Opinio Juris, 2 July 2020), <http://opiniojuris.org/2020/07/02/the-use-of-benchmarks-in-the-colombia-situation-an-opportunity-for-a-victim-oriented-approach-to-icc-complementarity/> accessed 9 September 2022.

[63] For example, Solera, Complementary Jurisdiction and International Criminal Justice (2002) pp. 145-170; Holmes, Complementarity: National Courts versus the ICC (2002) pp. 667-685; Markus Benzing 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 Max Planck Yearbook a/United Nations Law 591, pp. 592-632 ('Benzing, The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity (2003)'); Mohamed El Zeidy, 'The Principle of Complementarity in International Criminal Law' (Brill 2008) ('El Zeidy, The Principle of Complementarity in International Criminal Law (2008)'); Jo Stigen, 'The Relationship Between the International Criminal Court and National Jurisdictions' (Martinus Nijhoff Publishers 2008); Mauro Politi and Federica Gioia (eds.), *The International Criminal Court and National Jurisdictions* (Routeledge 2008); Jan K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (OUP 2008) ('Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (2008)'); Teresa McHenry, "Complementarity Issues" (2011) 105 Proceedings of the ASIL Annual Meeting 157l, pp. 157-160; M. Cherif Bassiouni, An Introduction to the International Criminal Court (2nd Revised edn, Brill, Nijhoff 2012); Carsten Stahn (ed), The Law and Practice of the International Criminal Court (OUP 2015); Carsten Stahn, A Critical Introduction to International Criminal Law (CUP 2019) ('Stahn, A Critical Introduction to International Criminal Law (2019)'); William Schabas, 'An Introduction to the International Criminal Court' (5th edn, CUP 2017); Robert Cryer, Daryl Robinson and Sergey Vasiliev (eds), An Introduction to International Criminal Law and Procedure (4th edn, CUP 2019).

while minimizing tension between the ICC and States.[64] Generally, they cover literature on negative complementarity, and the different forms of positive complementarity.[65] Negative complementarity derives from the wording of Article 17 which outlines factors which may render a situation or case 'inadmissible' before the ICC. Positive complementarity refers to ways through which states can be encouraged to fulfil their Rome Statute obligations, for example through capacity building of domestic mechanisms.[66] Similar to the Court's practice, academic literature has largely situated a discussion of complementarity within the confines of Article 15 and 17 which sets out investigative, and admissibility criteria. Some have extended it to Articles 18 which cover preliminary rulings on jurisdiction and admissibility.[67] Other scholars and commentators have focused on analyzing Article 20 on *ne bis in idem*,[68] and the

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[64] See Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 (1) Criminal Law Forum 67, pp. 67-102; Carsten Stahn, 'Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC' (2017) 15 (3) Journal of International Criminal Justice 413, pp. 413-434 ('Stahn, Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC (2017)'); Carsten Stahn and Mohamed M El Zeidy (eds), The International Criminal Court and Complementarity: From Theory to Practice (CUP 2011); Nidal Nabil Jurdi, The International Criminal Court and National Courts: A Contentious Relationship (Ashgate 2011) ('Jurdi, The ICC and National Courts: A Contentious Relationship (2011)'); Nidal Nabil Jurdi, 'The Complementarity Regime of the International Criminal Court in Practice: Is It Truly Serving the Purpose? Some Lessons from Libya' (2017) 30 Leiden Journal of International Law 199, pp. 199-220; Muyiwa Adigun, The International Criminal Court and Nigeria Implementing the Complementarity Principle of the Rome Statute (Routledge 2018); Michael A Newton, 'Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations' (2021) 54 (2) Israel Law Review 143, pp. 143-173 ('Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations').

[65] Katharine A Marshall 'Prevention and Complementarity in the International Criminal Court: A Positive Approach' (2010) 17 (2) Human Rights Brief 21, pp. 21-26 ('Marshall, Prevention and Complementarity in the ICC: A Positive Approach (2010)'); Silvana Arbia and Giovanni Bassy, 'Proactive complementarity: a Registrar's perspective and plans' in Carsten Stahn and Mohamed El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 52-55; Carsten Stahn, "Taking Complementarity Seriously: On the Sense and Sensibility of 'Classical', 'Positive' and 'Negative' Complementarity" in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 233-282 ('Stahn, Taking Complementarity Seriously (2011)'); Nouwen, Complementarity in the Line of Fire (2013) pp. 34-110.

[66] See Chapter Three for discussions on forms of complementarity, and Chapter Four for capacity building.

[67] Notably, Holmes, Complementarity: National Courts versus the ICC (2002) pp. 679-682; Carsten Stahn, 'Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) pp. 228-259 ('Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015)'); Carsten Stahn, 'Revitalizing Complementarity a Decade after the Stocktaking Exercise' (2020) TOAEP Policy Brief Series No 115 pp. 1-4 ('Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020)').

[68] Linda E. Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem', (2010) 8 (1) Santa Clara Journal of International Law 165, pp. 165-198 ('Carter, The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem (2010)').

cooperative regime of the Rome Statute.[69] Analysis of complementarity in literature usually covers the work of the OTP's Jurisdiction, Complementarity and Cooperation Division (JCCD) which is the main ICC complementarity division. Admissibility assessments and issues of cooperation are discussed; however, the literature rarely engages with the structure of the JCCD and how it can impact justice for victims, or victims' role in such a body.

As the thesis will be analyzing what victim-oriented justice means and the role of complementarity in its pursuit, literature on justice for victims of core crimes before the ICC and domestically have been reviewed.[70] Some examine victims' protection, and participation at different stages of proceedings, and their reparations.[71] One common element in the literature

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[69] See for instance, Olympia Bekou and Daley Birkett (eds), Cooperation and the International Criminal Court (Brill, Nijhoff 2016) ('Bekou and Birkett (eds), Cooperation and the International Criminal Court (2016)').

[70] See Vasiliev, Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC (2009) pp. 635-690; Håkan Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?' (2009) 22 (3) Leiden Journal of International Law 485, pp. 485-500; Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process', (2009) 20 Criminal Law Forum 395, pp. 396-416; Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts: Incompatible Values?' (2010) 8 (1), Journal of International Criminal Justice 79, pp. 79-111; Brianne McGonigle Leyh, Procedural Justice? Victim Participation in International Criminal Proceedings (Intersentia 2011) pp. 48-51, 65-166, and 225-336; Conor McCarthy, 'Victim Redress and International Criminal Justice Competing Paradigms, or Compatible Forms of Justice?' (2012), 10 (2) Journal of International Criminal Justice 351, pp. 351-372; Marina Pena and Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013) 7 (3) International Journal of Transitional Justice 518, pp. 518-535; Conor McCarthy, 'The Rome Statute's Regime of Victim Redress: Challenges and Prospects' in Carsten Stahn (ed), The Law and Practice of the International Criminal Court (OUP 2015) pp. 1203-1221; See Moffett, Justice for Victims before the ICC (2014); Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague, (2015) pp. 281-311; Carsten Stahn, 'Reparative Justice after the Lubanga Appeal Judgment New Prospects for Expressivism and Participatory Justice or 'Juridified Victimhood' by Other Means?' (2015), 13 (4), Journal of International Criminal Justice 801, pp. 801-813; Funk, Victims' Rights and Advocacy at the International Criminal Court (2015); Kinga Tibori-Szabó and Megan Hirst (eds), Victim Participation in International Criminal Justice: Practitioners' Guide (T.M.C. Asser Press 2017) ('Tibori-Szabó and Hirst, Victim Participation in International Criminal Justice: Practitioners' Guide (2017)').

[71] Michael Bachrach, 'The Protection and Rights of Victims Under International Criminal Law' (2000) 34 (1) International Lawyer 7, pp. 7-20; Elisabeth Baumgartner,'Aspects Of Victim Participation In The Proceedings Of The International Criminal Court' (2008) 90 (870) International Review of the Red Cross 409, pp. 409-440 ('Baumgartner, Aspects of victim participation in the proceedings of the International Criminal Court (2009)'); Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008) pp. 777-826; Christine Evans, The Right to Reparation in International Law for Victims of Armed Conflict (CUP 2012) pp. 86-124; Luke Moffett, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court' (2013) 17 (3) The International Journal of Human Rights 368, pp. 368-384 ('Moffett, Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the ICC (2013)'); Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 8-280; Malin Åberg, 'The Reparations Regime of the International Criminal Court: Reparations or General Assistance?' (Umea Universitet 2015) pp. 5-49; Luke Moffett, 'Reparations for Victims

is that there is a need to improve the quality of justice for victims procedurally and substantively. The principle of complementarity is key in this regard, as it can be a tool for harnessing efforts of the ICC, States Parties to the Rome Statute, and those of other stakeholders such as inter-governmental (IGOs), and non-governmental organizations (NGOs).[72] Thus, fostering the pursuit and realization of victim-oriented justice through the principle of complementarity will be the focus of this thesis.

3 The Importance of the Present Study

The present study fills some of the gaps in the complementarity literature and the broader international criminal justice literature. It contributes to the field of justice for victims of core international crimes in two ways. Firstly, it proposes a victim-oriented reinterpretative framework for the ICC's use when dealing with complementarity issues. Secondly, the thesis proposes the creation of an inclusive complementarity arm and provides a detail framework of how this body should be designed and staffed.

On the first original contribution, the framework for reinterpretation is bifurcated because it includes a victim-oriented qualified deference which is an extension of Stahn's theorization of

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at the International Criminal Court: A New Way Forward?' (2017) 21 (9) The International Journal of Human Rights 1204, pp. 1204-1218 ('Moffett, Reparations for Victims at the ICC: a New Way Forward' (2017)'); Carla Ferstman, Reparations, Assistance and Support, in Kinga Tibori-Szabó and Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (T.M.C. Asser Press 2017) pp. 385-410; Yaiza Alvarez Reyes, 'The Protection of Victims Participating in International Criminal Justice' in Kinga Tibori-Szabó and Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (T.M.C. Asser Press 2017) pp. 171-202; Alina Balta, Manon Bax, and Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations Within the ICC System' (2019) 29 (3) International Criminal Justice Review 221, pp. 221-237; Marina Lostal, Implementing Reparations in the Al Mahdi Case: A Story of Monumental Challenges in Timbuktu, Journal of International Criminal Justice (2021) 19 (4) 831, pp. 831-853; Luke Moffett and Clara Sandoval, 'Tilting at Windmills: Reparations and the International Criminal Court' (2021) 34 (3) Leiden Journal of International Law 749, pp. 749-769.

[72] See Report of the Independent Expert Review of the ICC (2020) para 19. See chapters four and five on victim-oriented complementarity and how it should be implemented.

qualified deference.[73] It also includes the negotiation and conclusion of a unique agreement between the ICC, states, and other stakeholders while carrying victims along. The thesis develops the concept of victim-oriented qualified deference to be applied not only in instances of admissibility challenges, but much earlier in the preliminary examination stage. This is necessary for pre-empting and reducing the number of cases that result in unnecessary admissibility challenges. Victim-oriented qualified deference requires an assessment of minimum victims' protection and participation mechanisms, and openness to reparations which states can show and/or commit to show at an agreed time with the ICC. It includes measures for early determination of states needs for the realization of justice so as to pursue cooperation with other stakeholders to enable states deliver victim-oriented justice.

The originality of the thesis's proposal for victim-oriented qualified deference lies not only in the provision of clear minimum requirements for such deference, but it concretizes Moffett's victim-oriented negative complementarity, i.e., that admissibility assessments should extend to whether states have domestic mechanisms which include measures for victims to participate in relevant proceedings, to obtain protection and support and to claim reparations.[74] The thesis introduces the idea of a 'complementarity understanding' which is more targeted than some typical MoUs which have been concluded at the ICC. The proposed complementarity understanding is meant to be situation and case specific and designed to include conditions in relation to victims, *only* after consulting victims through their representatives. This proposal is important, not least because the Court now has several opportunities to interpret article 18 on

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[73] Stahn's concept of qualified deference aims to provide some margin of appreciation to States to develop accountability mechanisms while maintaining ICC authority, Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 228-259; Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 1-4.
[74] Moffett, Justice for Victims Before the ICC (2014) p. 235.

deference to states, beginning with the Afghanistan situation,[75] but also with Philippines,[76] and Venezuela.[77] How the ICC interprets and applies deference and how it carries victims along in this process will be one to watch.[78] This makes the thesis's proposal for victim-oriented qualified deference timely.

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[75] For the deferral request, proceedings and submissions, see Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's letter concerning article 18 (2) of the Statute (With Public Annex 1), *Situation in The Islamic Republic of Afghanistan*, ICC-02/17-139, PTC II, ICC, 15 April 2020 ('Notification of Afghanistan's Deferral Request to Pre-Trial Chamber, ICC-02/17-139, 15 April 2020'); Annex 1 to the Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's Letter Concerning Article 18 (2) of the Statute, *Situation in The Islamic Republic of Afghanistan*, ICC-02/17-139-Anx1, PTC II, ICC, 16 April 2020 ('Afghanistan's Letter to the OTP Requesting a Deferral of the Situation in Afghanistan, ICC-02/17-139-Anx1, 16 April 2020'); Notification on Status of the Islamic Republic of Afghanistan's Article 18 (2) Deferral Request, *Situation in The Islamic Republic of Afghanistan*, ICC-02/17-142, PTC II, ICC, 16 April 2021 ('Notification on Status of the Islamic Republic of Afghanistan's Deferral Request, ICC-02/17-142, 16 April 2021').

[76] Notification of the Republic of the Philippines' Deferral Request Under Article 18 (2) (With Public Annex A), Situation In the Republic of The Philippines, *Situation in The Republic of The Philippines*, ICC-01/21-14, PTC I, ICC, 18 November 2021 ('Notification of the Republic of the Philippines' Deferral Request Under Article 18 (2)'); Annex A to the Notification of the Republic of the Philippines' Deferral Request Under Article 18 (2), *Situation in The Republic of The Philippines*, ICC-01/21-14-AnxA, PTC I, ICC, 18 November 2021 ('Annex A to the Notification of the Republic of the Philippines' Deferral Request Under Article 18 (2)'); Prosecution's request to resume the investigation into the situation in the Philippines pursuant to article 18 (2), *Situation in The Republic of The Philippines*, ICC-01/21-46, PTC I, ICC, 24 June 2022; ICC Press Release, 'Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, Following the Application For An Order Under Article 18(2) Seeking Authorisation To Resume Investigations in The Situation In The Philippines' 24 June 2022 <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application-order> accessed 10 September 2022; CICC, 'Philippine National Coalition for the ICC statement on the Government's request to defer ICC investigation', 20 November 2021 <https://www.coalitionfortheicc.org/news/20211120/philippine-national-coalition-icc-statement-governments-request-defer-icc> accessed 10 September 2022.

[77] Notification of the Bolivarian Republic of Venezuela's Deferral Request Under Article 18 (2) of the Rome Statute ('With Confidential Annexes A and B'), *Situation In The Bolivarian Republic of Venezuela I*, ICC-02/18-17, PTC I, ICC, 20 April 2022 ('Notification of the Bolivarian Republic of Venezuela's Deferral Request Under Article 18 (2) of the Rome Statute (2020)'); Human Rights Watch, 'Venezuela: Maduro Government Seeks to Delay ICC Investigation: Prosecutor Signals Intention to Move Forward', 22 April 2022 <https://www.hrw.org/news/2022/04/22/venezuela-maduro-government-seeks-delay-icc-investigation> accessed 10 September 2022; Prosecution Request to Resume the Investigation into the Situation in the Bolivarian Republic of Venezuela I Pursuant to Article 18(2), *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18-18, PTC I, ICC, 1 November 2022; ICC-OTP, 'Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan KC, Following the Application for an Order Under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in Venezuela I' <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-kc-following-application-order> accessed 2 November 2022.

[78] Note that the Pre-Trial Chamber II on 31 October 2022 authorized the Prosecutor's resumption of investigations into the Situation in Afghanistan, and on 26 January 2023, the Pre-Trial Chamber I authorized the resumption of investigations into the Situation in the Philippines. With regards to Afghanistan, the Chamber noted that Afghanistan 'has not acted in a manner that shows an interest in pursuing the Deferral Request.' See Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, Situation in Afghanistan, ICC-02/17-196, PTC II, ICC, 31 October 2022, paras 57-60. For Philippines, the Chamber found that 'the totality of the national investigations and proceedings presented (…) do not sufficiently, or at all, mirror, the Court's investigation. The Chamber is therefore not satisfied that the Philippines is undertaking relevant investigations, or is making a real or genuine effort (…) that would warrant a deferral of the Court's investigations

On the second aspect of the thesis's original contribution, this is the first study to propose and provide a detailed design of a new and inclusive complementarity mechanism for the purpose of fostering the pursuit of victim-oriented justice. While some scholars such as Kersten, Newton, Stahn, and Moffett, have highlighted the need for a new type of complementarity arm,[79] none considered the role of victims in such a body, neither was there a proposal of any detailed structural design strategy. This thesis does both and in a comprehensive manner. It grounds these proposals on the current Rome Statute framework without the need for an amendment of the Statute and considers how this new body will fit into the Court's structure. The thesis also shows that a restructuring project of an institution such as the ICC, while not to be taken lightly, is nonetheless feasible and perhaps even desirable given the status of situations before the ICC and the Court's relationship with states.[80]

4 Research Questions and Arguments

This thesis's objective is to propose ways and demonstrate how complementarity can be utilized as a tool for the pursuit of victim-oriented justice at the ICC and in domestic jurisdictions. The thesis asks two research questions.

(…).' see Public Redacted Version of "Authorisation Pursuant to Article 18(2) of the Statute to Resume the Investigation", *Situation in the Republic of the Philippines*, ICC-01/21-56-Red, PTC I, ICC, 26 January 2023, para 98. It would be interesting to see how the Court would rule in the Venezuela I deferral request, and a more detailed analysis of victims' participation in these deferral processes is needed.

[79] See Michael A Newton, 'The Quest for Constructive Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 336-339 ('Newton, The Quest for Constructive Complementarity, (2011)'); Mark Kersten, 'The Politics of ICC Referrals – A Proposal' (Justice in Conflict, 13 November 2012) <https://justiceinconflict.org/2012/11/13/the-politics-of-icc-referrals-a-proposal/> accessed 13 September 2022 ('Kersten, The Politics of ICC Referrals – A Proposal (2012)'); Michael A. Newton, 'Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations' (2021) 54 (2) Israel Law Review 143, pp. 171-173 ('Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021)'); Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 1-4; Moffett, Justice for Victims Before the ICC (2014), p. 237.

[80] See Chapter Three.

The first is: How has the ICC interpreted and applied the principle of complementarity in relation to victims?

The principle of complementarity was developed as a sovereignty shield with a focus on prosecutorial issues. The Court has mostly adopted a strict textual method of interpreting complementarity[81] which has resulted in the prioritization of investigative and prosecutorial issues while victims' needs, and interests do not receive the same level of attention. Victims' ability to participate and to defend their interests in complementarity proceedings has been limited. This can be explained by considering the 'will, 'who', 'where', 'which', and 'how' questions. Will justice be served?[82] Who will investigate and where necessary prosecute, the ICC or states? Where will these proceedings take place, in The Hague or in domestic jurisdictions? These questions are considered in *inter alia* complementarity proceedings, and as early as during preliminary examinations. They form the basis of admissibility examinations,[83] and they will determine which victims can participate, and how justice will be served, i.e., what shape it would take.[84] However, admissibility determinations at the ICC tend to focus on issues of investigations and prosecutions of a small number of situations and cases, and the exercise of jurisdiction by the Court or States. The thesis will argue that sustaining a sovereignty and prosecutorial-focused approach to complementarity will continue to shape the Court's approach to justice for victims. It will essentially circumscribe, if not eclipse the ICC's ability to pursue victim-oriented justice and to galvanize states to do the same.

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[81] De Vos, Complementarity, Catalysts, Compliance (2020) pp. 68-103.
[82] See for example, Solera, Complementary Jurisdiction and International Criminal Justice (2002) p. 168.
[83] Admissibility determinations can be made by the OTP or the Chamber without an admissibility challenge. See Chapter Three for an analysis of complementarity regime.
[84] This is about victim's procedural rights and the outcome of the process.

> The second research question is: how can victims' interests be adequately accommodated in the complementarity regime and process to aid the ICC in the fight against impunity and in achieving victim-oriented justice?

This question considers a change in the method of interpreting complementarity legal regime in a victim-oriented manner, and the practical application of such an approach by an ICC complementarity division. Reinterpretation is chosen over amendment because it is a more viable option. Moreover, the complicated slow process for proposing and adopting amendments and the current political environment makes it less attractive.[85] Reinterpretation means that the Court would use the existing Rome Statute framework which must be interpreted in a manner consistent with internationally recognized human rights as stipulated in Article 21 (3) of the Statute.[86] Doing so helps to increase synergies in different aspects of the ICC's efforts to fight impunity and do justice for victims while protecting the rights of the accused.[87]

The thesis will argue that complementarity provisions particularly Articles 15, 17-19, and related provisions in other core legal texts of the court[88] should be reinterpreted in the light of the Rome Statute's context, object, and purpose.[89] This allows for consideration of victims' needs and interests in determining the admissibility of a situation and case. A purposive interpretation will mean that the Court could interpret victims' right to participate under Article

[85] See Articles 121-122 ICCst; See also Roger S. Clark, 'Article 121 Amendments' in Triffterer, Commentary to the Rome Statute of the ICC: Observer's Notes, Article by Article (2008), p. 1752, para. 3, p. 1754, para. 9 and p. 1755-1756, paras 11-12.
[86] See Article 21 (3) ICCst.
[87] See chapters four and five of this thesis.
[88] This refers to Rome Statute, Elements of Crimes, Rules of Procedure and Evidence, Regulations of the Court, Regulations of the OTP, Regulations of the Registry, Chambers' Practice Manual, Code of Judicial Ethics, and other. See 'ICC Resource library' <https://www.icc-cpi.int/resource-library#coreICCtexts> accessed 12 September 2022.
[89] See discussion above on the fight against impunity and justice for victims. See also Articles 31 and 32 of the VCLT.

68 (3) to include participation in complementarity proceedings[90] and without undue impact on the rights of the defendant.[91] Overall, a reinterpretation in the manner proposed in this thesis would contribute to a move to realizing victim-oriented justice in the ICC and in fostering a pursuit of the same in domestic jurisdictions. With regards to implementing victim-oriented complementarity, the thesis would argue that for victims' interests to be adequately incorporated into the complementarity process, they must have an active role in the complementarity mechanism. The thesis proposes an inclusive complementarity division for this purpose. The following section discusses how the thesis's proposals are in line with internationally recognized human rights of victims and the accused.

4.1 Article 21 (3) of the Rome Statute and a Victim-oriented Approach to Complementarity

In addition to a teleological approach to interpreting complementarity, and victim regimes at the ICC, Article 21 (3) of the Rome Statute is key to a move towards making justice victim oriented. It provides that '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights (…).'[92] 'This article' referred to in the preceding sentence is Article 21 which outlines a hierarchy of applicable law under the Rome Statute framework and gives ICC judges an idea of weightage to be assigned to the different legal sources. Topping the hierarchy are the Rome Statute, Elements of Crimes, and the ICC's Rules of Procedure and Evidence.[93] These are followed by applicable treaties and the principles and rules of international law, including established principles of the

[90] See for example, Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, Situation in Afghanistan, ICC-02/17-196, PTC II, ICC, 31 October 2022, para 31.
[91] See Chapter Two, section 4.6 for a discussion on balancing victims' rights to participate with the rights of the defendant.
[92] Article 21 (3) ICCst.
[93] Article 21 (1) (a) ICCst.

international law of armed conflict.[94] Failing that, the ICC can apply general principles of law derived by the Court from national laws of legal systems of the world, and where appropriate, those of states that would normally exercise jurisdiction over the situation or case.[95] The Court *may* also apply principles and rules of law as interpreted in its previous decisions.[96]

The drafters of the statute placed great emphasis on the need for the interpretation of the core legal texts of the Court and all applicable law under Article 21 to be consistent with international recognized human rights.[97] Article 21 (3) was an important addition to the Rome Statute because it reinforces the connection between international criminal law and human rights and international human rights law.[98] Pellet considers this provision under Article 21 (3) as an 'international super-legality',[99] as it applies to all actions taken by the Court throughout all stages of proceedings, and applies to all parties and participants, including victims.[100]

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[94] Article 21 (1) (b) ICCst.
[95] Article 21 (1) (c) ICCst; For a discussion of general principles of law derived from national laws of legal systems of the world in relation to victims' participation, see Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019, para 60-76; Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020, paras 75-77.
[96] Article 21 (2) ICCst.
[97] Preparatory Committee on The Establishment of an International Criminal Court, 'Report of the Preparatory Committee on the Establishment of An International Criminal Court' (1998) (Addendum) United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (A/CONF.183/2/Add.1) Draft Article 20, n. 63; Margaret M. deGuzman, 'Commentary on Article 21 'Applicable Law' in Otto Triffterer and Kai Ambos (eds) *Commentary on the Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Bloomsbury T&T Clark 2016) paras 48-52; Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) p. 515; Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to article 19 (2) (a) of the Statute of 3 October 2006, *Lubanga*, *Situation in the Republic of the Congo*, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, para 37.
[98] See Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) pp. 511-515 and 531; Patrícia Pinto Soares and Gerhard Kreutzer, 'Catalytic, Gap-Filling or Retardant Effects of ICL on HRL: Quid Juris' in Paul De Hert, Stefaan Smis, and Mathias Holvoet (eds) *Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law*, (Vol 24, Intersentia 2018) p. 4.
[99] Alain Pellet, "Applicable Law", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (Vol II, OUP 2002) pp. 1079-1082.
[100] See Draft Statute for an International Criminal Court with Commentaries, (1994), Commentary on Article 33, applicable law, para 1; Margaret M. deGuzman, 'Commentary on Article 21 'Applicable Law' in Otto Triffterer

As earlier stated, different ICC Chambers have drawn and continue to draw inspiration from various international and regional human rights treaties and soft law instruments[101] which provide victims with a right to an effective remedy which may come in different forms. Such instruments include the UDHR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the UN Victims' Declaration, UN Basic Principles and Guidelines on Right to a Remedy and Reparations, the European Convention on Human Rights (ECHR), and the European Charter of Fundamental Rights.[102] The UN Basic Principles and Guidelines on the Right to a Remedy and Reparations provides a more comprehensive outline of what a right to

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and Kai Ambos (eds) *Commentary on the Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Bloomsbury T&T Clark 2016) paras 51-52; Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) pp. 532-533.

[101] See Section 1.1 above. See also Decision on victims' participation, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1119, TC I, ICC, 18 January 2008, paras 21-37; Decision on Victims' Participation Status, *Laurent Gbagbo and Ble Goude*, *Situation in the Republic of Cote D'ivoire*, ICC-02/11-01/15-379, TC I, ICC, 7 January 2016, para 60; OPCV Manual for Legal Representatives, (2018) pp. -57, 104-105, 141-144, 193-194; Galand, The Systemic Effect of International Human Rights Law on International Criminal Law (2019) pp. 96-100, and 104-108; See Dinah Shelton, Remedies in International Human Rights Law (2nd edn, OUP 2006) pp. 113-152; Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 (5) Journal of International Criminal Justice 1357, pp. 1358-1359, 1364, 1367-1373; ICC, 'Statement of the President of the International Criminal Court, Judge Piotr Hofmański, on the occasion of Human Rights Day 2021' <https://www.icc-cpi.int/news/statement-president-international-criminal-court-judge-piotr-hofmanski-occasion-human-rights> accessed 27 December 2022.

[102] See Article 8 of the UDHR, although a declaration, some of the rights outlined in the UDHR can arguably be considered customary international law. See Hurst Hannum, 'The UDHR in National and International Law' (1998) 3 (2) Health and Human Rights 144, pp. 144-154; European Parliament, 'The Universal Declaration of Human Rights and its relevance for the European Union' <https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA(2018)628295_EN.pdf> accessed 20 December 2022. For a detailed analysis of the status of the UDHR as a source of customary international law, see Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 (1) Georgia Journal of International and Comparative Law 287, pp. 317-354; Antoon De Baets, 'The Impact of the 'Universal Declaration of Human Rights' on the Study of History' (2009) 48 (1) History and Theory 20, pp. 20-21; See also UNGA, International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, in force 4 January 1969) UNTS, vol. 660, 195, Article 14 (2); UNGA, International Covenant on Civil and Political Rights, (adopted 16 December 1966, in force 23 March 1976) UNTS Vol 999, Article 2(3) (a)-(c); UNGA Res 40/34 (29 November 1985) Principles 4-17; UNGA Res 60/147, Principles 11-25; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos 11 and 14, ETS 5 (adopted 4 November 1950, in force 3 September 1953) UNTS Vol. 213, Article 13; European Union, Charter of Fundamental Rights of the European Union (published 18 December 2000, in force 1 December 2009) 2012/C 326/02, Article 47.

an effective remedy entails. It includes '(a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms.'[103] Human rights courts and commissions such as the Inter-American Court of Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples' Rights have recognized and protected this important right.[104] Therefore, interpreting Article 68 (1) and (3) and 75 of the Statute in accordance with Article 21 (3), victims have the right to participate in all relevant proceedings where their personal interests are affected, throughout the lifetime of a situation or case, to be protected in the process and to receive reparations.[105] An effective remedy can also mean that justice should not only be done, but victims should see justice as done. Without adequate

[103] See also Principle 11 (a)-(c) and 12-24 of the UNBPG, UNGA Res 60/147; See also Theo Van Boven, 'The United Nations 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'<https://legal.un.org/avl/ha/ga_60-147/ga_60-147.html> accessed 21 December 2022, p. 2.

[104] For a detailed discussion of victims' right to an effective remedy and how it is protected under international human rights law, see Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019, paras 2-3, 29-59 and 77-79; Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020, paras 27-78; See also African Commission on Human and Peoples' Rights, 'General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)' (ACHPR 2017 Banjul); African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003); Godfrey Musila, 'The Right to an Effective Remedy Under the African Charter on Human and Peoples' Rights' (2006) 6 (2) African Human Rights Law Journal 442, pp. 442-464; Dinah Shelton, Remedies in International Human Rights Law (2nd edn, OUP 2006) pp. 113-152.

[105] See for example, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", *Katanga*, *Situation in the Republic of the Congo*, ICC-01/04-01/07-475, AC, ICC, 13 May 2008, para 57; Margaret M. deGuzman, 'Commentary on Article 21 'Applicable Law' in Otto Triffterer and Kai Ambos (eds) *Commentary on the Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Bloomsbury T&T Clark 2016), paras 51-52; OPCV Manual for Legal Representatives, (2018) pp. 7, 37-41, 104, 143-208, and 479-492; Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua from the Appeals Chambers Decision Regarding Victims' Leave to Appeal Pre-Trial Chamber's Decision Refusing the Authorization of Investigation into the Situation in the Islamic Republic of Afghanistan, Situation in the Islamic Republic of Afghanistan, ICC-02/17-62-Anx, AC, ICC, 17 September 2019 ('Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua from the Appeals Chambers Decision Regarding Victims' Leave to Appeal, Situation in the Islamic Republic of Afghanistan, ICC-02/17-62-Anx, 17 September 2019') paras 35-36 and 45-49; Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019, paras 2-3, 29-59 and 77-79; Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020, paras 27-78.

participation, victims' voices may not be heard,[106] and they may not see justice as done. The thesis argues that Article 21 (3) provides a level of guarantee that in interpreting and applying the complementarity and victim regimes, victims' internationally recognized human rights would be protected by the Court.[107]

Given that making justice more victim-oriented is the central point of orientation of this thesis, the discussions and arguments are necessarily focused on victims. This neither suggests that victims are the only groups whom the ICC must protect, nor does it suggest that the Court should become victim centered. The ICC at its core is still a criminal court dealing with international crimes, and it must protect the rights of accused persons to fair trials. In this regard, Article 21 (3) is also important, and it is as earlier stated, applicable to all stages of proceedings.[108] According to the Appeals Chamber,

> "[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly

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[106] Theo Van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Carla Ferstman and Mariana Goetz (eds) Reparations for Victims of Genocide, War Crimes and Crimes against Humanity Systems in Place and Systems in the Making, (2nd Revised edn, Brill 2009) pp. 15-16; Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019, paras 2-3, 29-59 and 77-79; Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020, paras 27-78; Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 (5) Journal of International Criminal Justice 1357, p. 1370-1373.

[107] Heikkilä speaks of how the ICC gives the concept of internationally recognized human rights a 'broad reading'. See Mikaela Heikkilä M, 'Article 21(3)' in Mark Klamberg and Jonas Nilsson (eds) *Commentary on the Law of the International Criminal Court – The Rome Statute* <https://cilrap-lexsitus.org/clicc/21-3/21-3> accessed 20 December 2022.

[108] See Preparatory Committee on The Establishment of an International Criminal Court, 'Report of the Preparatory Committee on the Establishment of An International Criminal Court' (1998) (Addendum) United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (A/CONF.183/2/Add.1), Draft Article 20, n. 63; Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006: Separate and Partly Dissenting Opinion of Judge Georghios M. Pikis, *Situation in the Democratic Republic of the Congo*, ICC-01/04-169-US-Exp, AC, ICC, 13 July 2006, para 23; Margaret M. deGuzman, 'Commentary on Article 21 'Applicable Law' in Otto Triffterer and Kai Ambos (eds) *Commentary on the Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Bloomsbury T&T Clark 2016) paras 48 and 52; Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) pp. 531-532.

applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety."[109]

Thus, a balancing of victims' interests with those of the accused is required and is possible. This means that victims' rights to participate in proceedings, to be protected[110] and to receive reparations must be applied in a manner[111] that would not be considered inconsistent with the rights of the accused guaranteed in the Rome Statute framework.[112]

5 Research Methodology

The concepts of complementarity and justice for victims upon which this thesis is centered have each received fair amount of attention resulting in an abundance of literature. In conducting the current study, doctrinal method was chosen as the main research method, and

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[109] Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to article 19 (2) (a) of the Statute of 3 October 2006, *Lubanga, Situation in the Republic of the Congo*, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, para 37.

[110] It should be noted that victims' right to protection must be prioritized and the Court has also adopted this approach where victims need protection which may affect the rights of the accused, but not in a manner as to violate their fair trial rights. See Article 68 (1), (3) and (5) ICCst.; Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", *Katanga*, *Situation in the Democratic of the Congo*, ICC-01/04-01/07-475, AC, ICC, 13 May 2008, paras 57-59.

[111] This is further discussed in Chapter Two which analyzes how victims fit into the ICC's framework and highlighted in subsequent chapters. Examples of human rights instruments with provisions for the protection of the rights of the accused include Articles 9-11 UDHR; Articles 9, 10, 14 and 15 of the ICCPR; Articles 5-7 of the ECHR; European Union, Charter of Fundamental Rights of the European Union (published 18 December 2000, in force 1 December 2009) 2012/C 326/02, Articles 47-50; Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica (adopted 22 November 1969, in force 18 July 1978) UNTS 1144 Articles 7-9 ('American Convention on Human Rights'); African Charter on Human and People's Rights (adopted 27 June 1981, in force 21 October 1986) 21 ILM 58, Articles 6 and 7 ('African Charter of Human and Peoples' Rights'); African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003).

[112] This is mainly provided under Article 67 of the Rome Statute 'Rights of the Accused', but other Articles, Rules and Regulations of the Court, the Prosecutor and the Registry also make provisions for the protection of the rights of the accused. See for example, Articles 19 (2), 61 (9), 63, 64 (2), 6 (e) and (8), 65, 66, 68, 69 (2), 72 (7), 76 (2) and (4), 81 (3) (c), and 84 ICCst; Rules 20-22, 74 (9), 75, 76 (3), 79, 81 (2), (4)-(6), 82 (1), (4) and (5), 84, 91 (3), 101, 128, 129, 132, 132*bis*, in particular paras (1), (2) and (6), 134 *bis*, 134 *ter*, 134 *quarter*, 135, 136, and 142-144 of the ICC Rules of Procedure and Evidence; Regulations 4 (3), 42 (3), 46 (4), and 47, of the Regulations of the Registry; Regulations 6 (3), 40 (2) (b) and (6), 54 (p), and 55 of the Regulations of the Court.

it was useful for assessing and analyzing available materials and data on complementarity and victims at the ICC. Doctrinal method is the common method for conducting research among legal practitioners and legal academics.[113] Terms such as legal doctrine, and black letter law have been used to denote research approaches which are similar to doctrinal method, albeit with some level of variations across the globe.[114] There is no universally accepted definition of doctrinal method,[115] yet Smits posits that the method serves the goals of description, prescription, and justification.[116] Peczenik describes doctrinal method as one which regards the law as man-made, and historically changing, and at the same time arranges the law under general principles.[117] In Hutchinson's view, doctrinal method includes the tracing of legal precedent and legislative interpretation, and it has as its essential features 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation.'[118] More relevant to this study is the idea that doctrinal method can help with the making of connections between seemingly disparate doctrinal strands, for

[113] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (2nd edn, Routledge 2017) pp. 7-9 ('Hutchinson, Doctrinal Research: Researching the Jury (2017)'); P. Ishwara Bhat, Idea and Methods of Legal Research (OUP 2020) pp. 143-168.
[114] See Jan M. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W. Micklitz & Edward L. Rubin (eds.*), Rethinking Legal Scholarship: A Transatlantic Dialogue*, (CUP 2017) pp. 209-210 ('Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research').
[115] Rob van Gestel and Hans-W Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (2011) European University Institute (EUI) 2011/05 <https://ssrn.com/abstract=1824237> accessed 12 September 2022, p. 26 ('Van Gestel and Micklitz, Revitalizing Doctrinal Legal Research in Europe: What About Methodology? (2011)').
[116] Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research, p. 213.
[117] Aleksander Pecznick, 'A Theory of Legal Doctrine', (2001) 14 (1) Ratio Juris, pp. 75-79 ('Pecznick, A Theory of Legal Doctrine (2001)').
[118] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) (3) Erasmus Law Review 130 ('Hutchinson, The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law (2015)'); See also, D. Pearce, E. Campbell & D. Harding, Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (1987) 2, 312, [9.17] Which Hutchinson cites, See The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law (2015) n. 6.

instance, 'complementarity' and 'justice for victims'.[119] Doctrinal method also helps to solve ambiguities and gaps in the existing law.[120]

From these explanations of doctrinal methodology, Van Gestel and Micklitz observe that there are three key characteristics of this research method.

- In doctrinal work, arguments are derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications.
- The law somehow represents a system. (…) legal doctrine aims to present the law as a coherent net of principles, rules, meta-rules and exceptions, at different levels of abstraction.[121]
- Decisions in individual cases are supposed to exceed arbitrariness because they have to (be) fit into the system. Deciding in hard cases implies that existing rules will be stretched or even replaced but always in such a way that in the end the system is coherent again.[122]

These highlight the strengths and importance of doctrinal method, and which are applicable to the current study.

5.1 Doctrinal Method in the Current Study

Doctrinal method is important for this study because of the authoritative and verifiable primary and secondary sources from which the thesis's arguments are derived.[123] These sources clarify

[119] Council of Australian Law Deans, 'Statement on the Nature of Legal Research' (2005) <https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf> accessed 12 September 2022, p. 3 ('Council of Australian Law Deans, 'Statement on the Nature of Legal Research' (2005)').
[120] See Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (2017) p. 210.
[121] Pecznick, A Theory of Legal Doctrine (2001), pp. 75-105.
[122] Van Gestel and Micklitz, Revitalizing Doctrinal Legal Research in Europe: What About Methodology? (2011), p. 26; See also Hutchinson, Doctrinal Research: Researching the Jury (2017) p. 14.
[123] Van Gestel and Micklitz, Revitalizing Doctrinal Legal Research in Europe: What About Methodology? (2011), p. 26; Hutchinson, Doctrinal Research: Researching the Jury (2017), p. 13.

the content, purpose, and ambit of application of the ICC's complementarity and victim regime. Doctrinal method provides a solid foundation, a starting point for engagement in analysis and critique[124] of these regimes and how they apply to victims.

The use of doctrinal method required locating the relevant victims' and complementarity provisions within the Rome Statute and core legal texts of the ICC,[125] and analyzing, and synthesizing them.[126] Other authoritative sources were utilized. For example, in the absence of a consolidated preparatory works for the Rome Statute, the thesis engaged in a brief historical analysis[127] of the compilations of records of the International Law Commission (ILC) on the establishment of an international criminal Court,[128] and the different meetings, proceedings, working groups, and plenary sessions prior to and during the Rome Conference.[129] These and secondary sources were necessary for shedding light on the development of the ICC's victims' regime which regulates the status of victims before the Court and their various rights attached

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[124] Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (2017), pp. 207-228.
[125] See 'ICC Resource library' <https://www.icc-cpi.int/resource-library#coreICCtexts> accessed 12 September 2022.
[126] Hutchinson, Doctrinal Research: Researching the Jury (2017) p. 13.
[127] Hutchinson, Doctrinal Research: Researching the Jury (2017) p. 10.
[128] See for example, International Law Commission (ILC), Yearbook of the International Law Commission 1994 Vol I: Summary records of the Meetings of the 46th Session 2 May-22 July 1994 (A/CN.4/SER.A/1994); ILC, Yearbook of the International Law Commission 1994: Vol II Part Two, Report of the Commission to the General Assembly on the work of its 46th Session (A/CN.4/SER.A/1994/Add.l (Part 2)); ILC, Yearbook of the International Law Commission, Summary records of the meetings of the 51st session, 3 May-23 July 1999 (A/CN.4/SER.A/1999); UN, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June -1 7 July 1998 Official Records: Vol I Final Documents, Rome Statute of the International Criminal Court and Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [with an annex containing the resolutions adopted by the Conference] (A/CONF.183/13(Vol.I)) ('Rome Proceedings, A/CONF.183/13, Vol I'); UN, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June -1 7 July 1998 Official Records: Vol. II Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.183/13 (Vol.11)) ('Rome Proceedings, A/CONF.183/13, Vol II'); UN, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June -1 7 July 1998 Official Records: Vol III, Reports and other documents (A/CONF.183/13(Vol Ill)) ('Rome Proceedings, A/CONF.183/13, Vol III'); All three proceedings are accessible via UN, 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 17 July 1998 Official Records' <https://legal.un.org/icc/rome/proceedings/contents.htm> accessed 12 September 2022.
[129] See Mark Klamberg (ed) Commentary on the Law of the International Criminal Court (Torkel Opsahl Academic EPublisher 2017), which is a more recent commentary, but references different preparatory works.

to participation in ICC proceedings. From the analysis of these sources, it was clear that the protection of sovereignty and the permanent nature of the ICC underlined the choice of complementarity as the form of jurisdictional relationship between the ICC and states. They shed light on the development of the complementarity regime, how it should be applied in relations to victims, and how complementarity and victim regimes fit into the wider Rome Statute justice system. Also, analysis of these primary and secondary sources of complementarity, and victim regimes contributed to highlighting whether important phenomenon is lacking, exits, or fledgling. For example, it was apparent that the Court's approach to complementarity is not yet changing in the direction of victims, but there was evidence of a growing call for a better approach to the implementation of the principle of complementarity.

Another way in which doctrinal method has been applied in this thesis can be explained along three elements outlined by Smits.[130] Firstly, he asserts that doctrinal method adopts an internal perspective[131] to study the legal system which is both the subject of the inquiry and at the same time provides the normative framework for analysis.[132] The idea is to use a legal approach to solve problems identified within the law. This thesis proposes a reinterpretation of the complementarity regime in the context of the Rome Statute.[133] This is akin to using a teleological approach of interpreting treaty provisions.[134] Reinterpretation means that the thesis

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130 Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (2017), pp. 210-212.
131 Holmes Jr asserts that it is the business of the jurist to make known the content of the law from within: Oliver Wendell Holmes Jr, 'The Common Law'<https://www.gutenberg.org/files/2449/2449-h/2449-h.htm#link2H_4_0001> accessed 12 September 2022, p. 219; Pauline C. Westerman, 'Open or Autonomous? the Debate on Legal Methodology as a Reflection of the Debate on Law?' in Mark Van Hoecke (ed.), *Which Kind of Method for What Kind of Discipline*? (2011 Hart Publishing) p. 87 ('Westerman, 'Open or Autonomous? the Debate on Legal Methodology as a Reflection of the Debate on Law? (2011)').
132 Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (2017) pp. 210-211.
133 See Article 31(1) & (2) of the VCLT which provide that such an interpretation should take into account preamble and annexes.
134 James Crawford, Brownlies Principles of Public International Law, (9th edn, OUP 2019) p. 365; Shai Dothan, 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of

works from within the current legal regime to provide legal solutions for making complementarity more victim oriented. This proposal is a practical solution which fits within the existing complementarity regime [135] as elaborated in chapters four and five of the thesis. The wording of complementarity provisions leaves room for victims' needs and interests to be read into the regime since it does not expressly forbid such an approach. Thus, complementarity provisions should be reinterpreted in a way that includes victims as 'active participants' in the process as opposed to being seen as 'interested participants'. Active participation means that their views and concerns are presented, adequately considered, and accommodated in the complementarity process.

The second element of doctrinal method outlined by Smits is that the law should be seen as a system[136] whereby through rigorous analysis and creative synthesis the researcher can make connections between seemingly disparate doctrinal strands.[137] This systematizing approach can serve different goals, including the intelligible description of law and the steering of its application.[138] This explanation is at the core of the thesis which combines two important concepts of complementarity, and justice for victims. These concepts may appear incompatible, yet they are interrelated and are necessary for the achievement of the fight against impunity and victim-oriented justice. The thesis identifies specific provisions governing each of these concepts.[139] It also examines general principles of law within the ICC's regime such as the one provided under Rule 86 requiring all organs of the Court to consider victims' needs in carrying

Human Rights' (2019) 42 (3) Fordham International Law Journal 765; Odile Ammann, Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example (Brill 2020), p. 191-221.

[135] Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (2017), pp. 217-218.

[136] Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (2017), pp. 211-212.

[137] He borrows from definition of the Council of Australian Law Deans Council of Australian Law Deans, Statement on the Nature of Legal Research (2005) p. 3.

[138] Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (2017), pp. 211-212.

[139] For example, articles 17-20 for complementarity, 68 and 75 for victims, and those of general application, e.g., Article 21 on applicable law, 87 on cooperation.

out their respective functions.[140] Consequently, the thesis elaborates on the essence of these provisions to show how they interact with each other, and their pivotal role towards victims of situations before the ICC.

The final essential element of doctrinal method as posited by Smits is that it systematizes the present law as it is necessary for the law to accommodate new developments such as recent case law and legislation against the background of societal change.[141] Engagement with legal practice by reacting to changes to the law turns legal doctrine into a living system that aims to achieve both constancy and change in the development of the law.[142] For this study, there are no relevant changes to the Rome Statute. However, there are recent materials including Court documents and other commentaries on important areas of complementarity such as Article 18 on deference, and on justice for victims.[143] There have been recent and important developments in the Court's case law which are discussed throughout the thesis to illuminate the Court's methods of interpretating and implementing the principle of complementarity. These are also used to support arguments that the complementarity mechanism needs an urgent change.

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[140] See Rule 86 of the ICC's Rules of Procedure and Evidence.
[141] Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (2017) pp. 212-213.
[142]Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (2017) p. 212.
[143] Response to the Prosecution's "Request to Authorise Resumption Of Investigation Under Article 18 (2) of the Statute", *Situation In The Islamic Republic Of Afghanistan*, ICC-02/17-167-AnxA, PTC II, ICC, 12 October 2021 (originally filled on 7 October 2021) ('Response to the Prosecution's "Request to Authorise Resumption Of Investigation Under Article 18 (2) of the Statute (2021)'); Decision Setting The Procedure Pursuant To Rule 55(1) Of The Rules Of Procedure and Evidence Following The Prosecutor's 'Request To Authorise Resumption of Investigation Under Article 18(2) Of The Statute', *Situation In The Islamic Republic of Afghanistan*, ICC-02/17-165, PTC II, ICC, 8 October 2021; Janet Anderson, 'Afghanistan: A War of Positions at the ICC' (Justice Info, 21 October 2021) <https://www.justiceinfo.net/en/83498-afghanistan-war-of-position-icc.html> accessed 12 September 2022.

The Central African Republic (CAR),[144] Afghanistan,[145] Venezuela I and II,[146] Colombia, Libya, Kenya, Uganda, and Democratic Republic of the Congo (DRC) situations were studied. They reflect the three trigger mechanisms through which situations come before the ICC, i.e., through State Party referral, United Nations Security Council (UNSC) referral, and *Proprio motu* initiation by the Prosecutor.[147] They show the potentials of the thesis's victim-oriented proposals, and how they can be applied to all situations before the Court regardless of the trigger mechanism. Afghanistan was chosen because it was the first case in which the concept of the interests of justice was cited as the reason for rejecting the opening of an investigation.

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[144] See for example, United Nations Peace Keeping, 'CAR Special Criminal Court (SCC) Now Fully Operational' 9 June 2021 <https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational> accessed 21 September 2022; Human Rights Watch, 'Central African Republic: First Trial at the Special Criminal Court Questions and Answers', 12 April 2022 <https://www.hrw.org/news/2022/04/12/central-african-republic-first-trial-special-criminal-court> accessed 29 September 2022; ICC-OTP Statement, 'ICC Prosecutor Underlines Commitment To Support The Special Criminal Court Of The Central African Republic Following Address By Deputy Prosecutor, Mr Mame Mandiaye Niang At Opening Of First Trial In Bangui', 11 May 2022 <https://www.icc-cpi.int/news/icc-prosecutor-underlines-commitment-support-special-criminal-court-central-african-republic> accessed 12 September 2022 ('ICC Prosecutor Underlines Commitment To Support The Special Criminal Court Of The Central African Republic Following Address By Deputy Prosecutor, Mr Mame Mandiaye Niang At Opening Of First Trial In Bangui (2022)'); Central African Republic, *Situation in the Central African Republic*, ICC-01/05 <https://www.icc-cpi.int/car> accessed 23 September 2022; Central African Republic II, *Situation in the Central African Republic II*, ICC-01/14 <https://www.icc-cpi.int/carII> accessed 23 September 2022; Judicael Yongo, 'Central African Republic Sentences Three Rebels in First War Crimes Trial' (31 October 2022) *Reuters* <https://www.reuters.com/article/centralafrica-justice-trial-idAFL8N31W5T3> accessed 1 November 2022; Barbara Debout, 'C.Africa Special Court Sentences Three for Crimes Against Humanity' *Rédaction Africanews with Afp* <https://www.africanews.com/2022/11/01/cafrica-special-court-sentences-three-for-crimes-against-humanity/> accessed 1 November 2022.

[145] See Notification of Afghanistan's Deferral Request to Pre-Trial Chamber, ICC-02/17-139, 15 April 2020; Notification on Status of the Islamic Republic of Afghanistan's Deferral Request, ICC-02/17-142, 16 April 2021; Request To Authorise Resumption of Investigation Under Article 18(2) of the Statute, *Situation in The Islamic Republic of Afghanistan*, ICC-02/17-161, PTC II, ICC, 27 September 2021; ICC-OTP, 'Statement Of The Prosecutor Of The International Criminal Court, Karim A. A. Khan QC, Following The Application For An Expedited Order Under Article 18(2) Seeking Authorisation To Resume Investigations in the Situation in Afghanistan', 27 September 2021 <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application> accessed 12 September 2022 ('Statement Of The Prosecutor Of The International Criminal Court, Karim A. A. Khan QC, Following The Application For An Expedited Order Under Article 18 (2) Seeking Authorisation To Resume Investigations in the Situation in Afghanistan (2021)'); ICC, Afghanistan, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17 <https://www.icc-cpi.int/afghanistan> accessed 12 September 2022.

[146] See for example, Notification of the Bolivarian Republic of Venezuela's Deferral Request Under Article 18 (2) of the Rome Statute (2020); Human Rights Watch, 'Venezuela: ICC Investigation Opens Maduro Atrocities to Receive International Judicial Scrutiny', 3 November 2021 <https://www.hrw.org/news/2021/11/03/venezuela-icc-investigation-opens> accessed 12 September 2022; ICC, Venezuela I, *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18 <https://www.icc-cpi.int/venezuela> accessed 12 September 2022; ICC, Preliminary examination Venezuela II, ICC-01/20 <https://www.icc-cpi.int/venezuela-ii> accessed 12 September 2022.

[147] See Article 13 (a)-(c) ICCst.

Afghanistan was also the first state to make an article 18 deferral request to the ICC and is useful for studying victims' participation in this type of complementarity proceeding. Libya was selected because it is valuable for showing how victim-oriented complementarity can be applied in UNSC referrals. Colombia had the longest preliminary examination in the Court and it helps to demonstrate the Court's approach to positive complementarity in practice and how it can be improved. Kenya was a good example for illustration of different elements of the thesis's proposal for victim-oriented complementarity including challenges with *proprio motu* situations. The thesis uses Uganda to demonstrate that victim-oriented complementarity must be applied in a way that does not implicate the ICC in the pursuit of one-sided justice, for example by selectively targeting only alleged perpetrators from one side of a conflict or situation. CAR and DRC are good examples of domestic developments that provide reason for cautious optimism that victim-oriented complementarity can be achieved in domestic jurisdictions albeit with multi-stakeholder cooperation and capacity building.

The focus of analysis of the core legal texts of the court, the ICC's case law and secondary sources on complementarity and victims was on factors that were at play in the decision-making process of the ICC and States Parties in relation to complementarity regime and how each factor is weighted in arriving at these decisions. There was also an examination of the JCCD's approach to complementarity and what this means for victims. This method of analysis helped to clarify whether the principle of complementarity has been interpreted and applied in accordance with the intention of the drafters of the Rome Statute, i.e., that the ICC and states work together to fight impunity, and in doing so, contribute to some form of justice for victims. The study highlighted the deficiencies *vis a vis* justice for victims in the conception and implementation of the principle of complementarity. It also laid the foundation for proposing a reinterpretative framework to mitigate such deficiencies and for the pursuit of victim-oriented

justice. Analytical findings are reflected in the discussions and proposals made in chapters two to six.

5.1.1 Limitations of the Doctrinal Method in the Current Study

Doctrinal method has been criticized for different reasons.[148] Some argue that the nature of this research method is not very clear,[149] it is not interdisciplinary and that it is limited when compared to other methods, such as socio-legal method.[150] The latter critique is said to be the result of the doctrinal method's perception of the law as a separate and coherent system which can be understood only by reference to its own self-conception.[151] Twining asserts that such an approach to legal research misses a systematic or regular reference to the context of problems they are supposed to resolve, the purposes they were intended to serve or the effects they in fact have.[152]

It is true that in some instances, doctrinal method may be limited in how it engages with context and the social impact of the law. The main challenge of using doctrinal method in the current study is in relation to understanding how the proposed structural change to the complementarity mechanism would be received by states and practitioners at the ICC. This is because of the

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[148] See for example, Pecznick, A Theory of Legal Doctrine (2001) pp. 75-105; Westerman, 'Open or Autonomous? the Debate on Legal Methodology as a Reflection of the Debate on Law? (2011) p. 91.
[149] Edward L. Rubin, 'The Practice and Discourse of Legal Scholarship', (1988) 86 (8) Michigan Law Review 1835 pp. 1835-1905; Council of Australian Law Deans, 'Statement on the Nature of Legal Research' (2005) p. 1; Edward L. Rubin, 'Legal scholarship' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory*, (2nd edn, Blackwell Publishing Ltd. 2010); Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship', (2014) 20 (3) European Law Journal 292 pp. 292-316; Hutchinson, The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law (2015) p. 131; William Baude, Adam S. Chilton and Anup Malani, 'Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews' (2017) 84 University of Chicago Law Review 37; Smits, What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (2017) pp. 207-228.
[150] Duncan Kennedy, 'Form and Substance in Private Law Adjudication', (1976) 89 (8) Harvard Law Review 1685; Roberto M. Unger, The Critical Legal Studies Movement, Cambridge, MA (Harvard University Press 1986); Laura Lammasniemi, Law dissertations: A step by step guide (Routledge 2018) p. 73; P. Ishwara Bhat, Idea and Methods of Legal Research (OUP 2020) pp. 143-168.
[151] Nigel E. Simmonds, The Decline of Juridical Reason: Doctrine and Theory in the Legal Order (Manchester University Press 1984) pp. 30-31.
[152] Hutchinson, Doctrinal Research: Researching the Jury (2017) p.23, n.62.

novelty of the proposal as well as the effect it may have on how the Court functions. The initial research plan was to supplement doctrinal method by conducting empirical research in the form of interviews with victims, and other stakeholders such as practitioners, NGOs, and officials of States Parties to the Rome Statute. This plan was affected by the author's transfer between universities, and the COVID pandemic. Prior to the start of the pandemic, and after obtaining ethical approval, a limited number of interviews were conducted with four practitioners from the ICC and one legal scholar with expertise on victims. The purpose of the interviews was to gain further insights on factors that influence complementarity decisions in the Court's practice, the deficiencies in the system in relation to victims, and how these can be rectified. For these, interviewees' knowledge, experience, and perspectives proved useful. Nonetheless, the limited number of interviews and the lack of a representative sample prevent a full discussion of findings in this thesis. It is hoped that further interviews on the topic would be conducted in the future, and which can allow for a discussion of all relevant findings in future publications.

It is worth nothing that some literature on justice for victims contained qualitative research data conducted by other researchers[153] and these were beneficial for the current study[154] as they

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[153] Stephen Smith Cody and others, Human Rights Center UC Berkeley Report, 'The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court: Uganda Democratic Republic of Congo Kenya Côte D'ivoire' (2015) <https://escholarship.org/uc/item/1c49288z> accessed 12 September 2022 pp. 1-74 ('Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015)'); See also Moffett, Justice for Victims Before ICC (2014) pp. 196-233; Afghanistan Independent Human Rights Commission (AIHRC), A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan, 25 January 2005 <https://www.refworld.org/docid/47fdfad50.html> accessed 12 September 2022.

[154] Regarding the benefits of using already existing qualitative research data, see Janet Heaton, Reworking Qualitative Data (SAGE 2004), p.9; Claire Largan, and Theresa Morris, Qualitative Secondary Research: A Step-By-Step Guide (SAGE 2019), pp. 13-14; Victoria Sherif, 'Evaluating Preexisting Qualitative Research Data for Secondary Analysis', (2018) 19 (2) Forum: Qualitative Social Research; Anna Tarrant, Kahryn Hughes, 'Qualitative Secondary Analysis: Building Longitudinal Samples to Understand Men's Generational Identities in Low Income Contexts' (2019) 53 (3) Sociology 538, pp. 538-550; Anna Tarrant and Kathryn Hughes, 'The Re-Use of Qualitative Data Is an Under-Appreciated Field For Innovation and The Creation of New Knowledge In The Social Sciences', 8 June 2020 <https://blogs.lse.ac.uk/impactofsocialsciences/2020/06/08/the-re-use-of-qualitative-data-is-an-under-appreciated-field-for-innovation-and-the-creation-of-new-knowledge-in-the-social-sciences/> accessed 12 September 2022; Thomas P. Vartanian, Secondary Data Analysis (OUP 2011); Sarah

provided insights on victims' perspectives on justice. For instance, Tenove's research aim was to assess the ICC from the perspectives of victims in Kenya and Uganda.[155] Clark's publications were based on his field work in Central Africa,[156] and Moffett's work examining the role of victims in ICC proceedings draws on research conducted in Uganda.[157] These provided more insights on some dynamics of the situations studied. Also, the Human Rights Center at the University California, Berkeley, School of Law (UC Berkley) interviewed 622 victims of different situations at the ICC, and 41 ICC staff members, legal representatives, and victims' advocates.[158] The study's aim was to understand the evolution of the victim participation regime at the ICC. They reported difficulties with effective representation of victims, and victims' disenchantment with their participation in ICC proceedings.[159] These findings were additional to analytical findings from historic documents, provisions in the core legal texts of the ICC, case law, and scholarly publications and contributed to the shape of the thesis arguments on how to make justice victim oriented. This variety of sources allowed for better and more comprehensive understanding of the different phenomena studied and contributed to deeper insights about victims' perspectives with regards to participation. Ultimately doctrinal method guided this study in addressing the gap in the theoretical

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Irwin, 'Qualitative Secondary Data Analysis: Ethics, Epistemology and Context', (2013) 13 (4) Progress in Development Studies 295, pp. 295-304; Sarah Irwin and Mandy Winterton 'Qualitative Secondary Analysis: A Guide to Practice' (2012) 19, Timescapes Methods Guides Series <https://timescapes-archive.leeds.ac.uk/wp-content/uploads/sites/47/2020/07/timescapes-irwin-secondary-analysis.pdf> 12 September 2022.

[155] Chris Tenove, 'International Justice for Victims? Assessing The International Criminal Court from The Perspective of Victims in Kenya and Uganda' (2013) Research Paper No. 1 Africa Portal, September 2013, pp. 1-41.

[156] Phil Clark, 'Chasing Cases: the ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 1180-1203 ('Clark, Chasing Cases: the ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda (2011)'); Phil Clark, Distant Justice: The Impact of the International Criminal Court on African Politics (CUP 2018) ('Clark, Distant Justice: The Impact of the ICC on African Politics (CUP 2018)').

[157] Moffett, Justice for Victims Before the ICC (2014) pp. 196-233.

[158] Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) pp. 1-74.

[159] Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) pp. 1-74.

framework of complementarity legal regime and its implementation in the Court as it relates to victims.

6 Structure of the Thesis

This thesis is structured around five main chapters. The current Chapter lays the foundation for the thesis, chapters two to five focus on answering the thesis's two research questions, while chapter six explores possible outcomes of an implementation of the thesis's proposals. Chapter Two examines the ICC's justice framework and how it is currently applied to victims. It analyzes the Court's provisions on victims' participation, protection, assistance, and reparations to understand how they have been interpreted at all stages of proceedings. The chapter elaborates on what is meant by victim-oriented justice for the purposes of the thesis and discusses the ICC's 'interests of justice' notion and its contribution to fostering victim-oriented justice. It discusses the important requirement that interpreting and applying victims' provisions requires victims' rights to be balanced with those of the accused. The Chapter ends by drawing attention to the importance of victim-oriented justice *vis a vis* the complementarity process and provides the point of departure for the next chapter.

Chapter Three begins by highlighting the reasons for the deviation from primacy of jurisdiction accorded to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) to one of complementarity for the ICC. It briefly discusses important elements in the drafting history of key complementarity provisions to point to the intention of the drafters of the Rome Statute *vis a vis* the principle of complementarity and how it applies to victims. Chapter Three examines the different forms of complementarity, i.e., positive, and negative complementarity. The chapter notes that the

Court's approach to complementarity is as some authors have stated 'ICC-centric',[160] and this is not in accordance with the intention of the drafters. It argues for more deference, although this will require attention to issues of cooperation and capacity building which play a role in complementarity in general. Chapter Three also argues that the same minimal consideration of victims' needs, and interests resulting from a sovereignty and prosecutorial-based complementarity regime are replicated in the Court's case law and some of its policies. This amounts to a flaw in the ICC's complementarity regime, as such the chapter concludes that there is a need to develop a victim-oriented approach to complementarity.

Chapter Four begins by introducing the concept of victim-oriented complementarity developed by Moffett but argues that it does not contain a concrete guideline for operationalization which is necessary for fostering victim-oriented justice in the Hague and in domestic jurisdictions. The Chapter outlines the thesis conception of victim-oriented complementarity and provides a framework for reinterpretation of admissibility criteria in a manner that benefits victims while at the same time protecting the rights of the accused. Chapter Four then turns to address an apparent 'incompatibility' between respecting state's sovereignty in how the principle of complementarity is interpreted and applied by the ICC, and the thesis's recommendation for victim-oriented justice. The Chapter argues that both can be achieved and makes recommendations to this effect.

Chapter Five builds on the findings in chapter four and considers how a reinterpretation of the principle of complementarity could be implemented within the current ICC legal framework. The chapter argues that the JCCD is not appropriately structured for realizing a victim-oriented complementarity, and its location within the OTP makes it unsuitable for such. This is because

[160] See Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 2; Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) pp. 97-106, 296-297.

the JCCD will always implement complementarity within the limits of the OTP's interests which may not necessarily align with victims' interests. Chapter Five notes that other victims' units within the ICC cannot individually or collectively realize a victim-oriented complementarity without the involvement of other complementarity stakeholders. Therefore, a proposal is made for the creation of a new inclusive complementarity division, which offers a less contentious platform for engagement with all stakeholders. This proposal is accompanied by a detailed design of how the proposed division should be structured to push victim-oriented justice forward in The Hague and in domestic jurisdictions.

Chapter Six explores possible outcomes of applying the thesis's victim-oriented complementarity to situation**s** before the ICC which reflect State Party referrals, UNSC referrals, and *proprio motu* situations. It examines the Uganda, Central African Republic I and II, Libya, Kenya, and Afghanistan situations. The chapter concludes that victim-oriented complementarity can be applied to all situations before the ICC but must be adapted to fit the specific context and needs of each situation.

The concluding chapter takes a reflective approach to examine the policy and practical implications of all issues raised and proposals made in the thesis. It takes the position that the proposals are achievable, especially if the ICC and the ASP acknowledge the role of the principle of complementarity in the pursuit of justice for victims of core crimes. The chapter restates the impact of the proposals on the effective functioning of the ICC in relation to realizing the Rome Statute aims. It makes the case that should the Court maintain its current approach to complementarity, this will continue to negatively affect how justice for victims is shaped and undermine the ICC's sustainability and universality prospects.[161]

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[161] See Linda E. Carter, 'The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?' (2013), 12 (3) Washington University Global Studies Law Review 451, pp. 451-473.

Chapter Two: Victims, Victim-oriented Justice, and the International Criminal Court

1 Introduction

> "Our mandate is justice, justice for the victims. The victims of Bogoro; the victims of crimes in Ituri; the victims in the DRC. This case, and each of our cases, is a message to victims of crimes worldwide, that perpetrators will be held accountable"[1]

The International Criminal Court has now become well associated with the notion of justice for victims of international crimes in ways that preceding international criminal tribunals were not. When war crimes, crimes against humanity, genocide, or aggression are committed, the ICC tends to be referred to as the Court which could bring the perpetrators of such crimes to justice in the name of victims.[2] This optimism that the Court can deliver justice to victims could be attributed to rights accorded to victims in the Rome Statute framework.[3] ICC officials and proponents of the Court have portrayed the Court as a court that responds to victims' needs.[4] The fact that thousands of victims have applied and participated in proceedings before the ICC

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[1] International Criminal Court Press Release ICC-OTP-20080627-PR332, 'ICC Cases An Opportunity For Communities In Ituri To Come Together and Move Forward' (2008) <https://www.icc-cpi.int/news/icc-cases-opportunity-communities-ituri-come-together-and-move-forward> accessed 14 September 2022.

[2] See UN, 'Rome Statute of the International Criminal Court, Overview', 1998-1999 <https://legal.un.org/icc/general/overview.htm> accessed 14 September 2022; Lauren Baillie, 'Will the Ukraine War Renew Global Commitments to the International Criminal Court? Enhanced Support Will Be Secured by the Court Delivering on its Mandate — the Ukraine Crisis Provides That Opportunity', 28 April 2022 <https://www.usip.org/publications/2022/04/will-ukraine-war-renew-global-commitments-international-criminal-court> accessed 14 September 2022; Feisal G. Mohamed 'How the International Criminal Court Could Prosecute Putin: The legal doctrine of "superior responsibility" makes the Russian president liable for war crimes committed in Ukraine' 29 August 2022 <https://bostonreview.net/articles/how-the-international-criminal-court-could-prosecute-putin/> accessed 14 September 2022.

[3] William Schabas, 'An Introduction to the International Criminal Court' (4th edn, CUP 2011), p. 342 ('Schabas, An Introduction to the International Criminal Court (2011)'); See Articles 15 (3), 19 (3), 43 (6), 53(1)(c), 53 (2), 68, 75 and 79 ICCst.

[4] See Stover and others, 'The Impact of the Rome Statute System on Victims and Affected Communities' (2010) pp. 1-11.

could also explain the optimism that the Court is the Court which can deliver justice for victims.[5] As the Court has now passed its second decade of existence,[6] it is time to closely examine what kind of justice it has delivered to victims who have come before it and its potentials for other victims who may come before it. It is important to consider how the ICC balances the demands of criminal justice, including the protection of the rights of the accused, with meaningful victims' participation, i.e., the kind that can ensure that justice is not only done but seen by victims as done. This chapter engages with these issues and considers how victims currently fit into the ICC's framework. It examines the gap in the Court's practice *vis a vis* victims and provides the foundation for discussions and proposals in chapters three to five.

This chapter is divided into four main parts. The first part places the position of victims in international criminal law in historical context. It examines the trends present in the aftermath of the Second World War which improved victims' position in international criminal justice. Also, the needs and interests of victims of core crimes are considered. The second part unpacks the concept of victim-oriented justice. In the absence of a comprehensive definition of this concept, the thesis draws on criminal justice, and public international literature to highlight essential elements of victim-oriented justice in the context of core crimes. The third part examines how victims feature in the ICC's framework. In the fourth part the ICC's notion of 'interests of justice' is scrutinized to understand whether it contributes to victim-oriented

[5] For example, in the *Bemba* case alone, 5229 victims were granted the right to participate, see Case Information Sheet, *Situation in the Central African Republic, Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, ICC-PIDS-CIS-CAR-01-020/18_Eng, Updated March 2019 <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BembaEng.pdf> accessed 14 September 2022.
[6] Assembly of States Parties to the Rome Statute, '20th Anniversary Events 17 July 2018 - Twentieth Anniversary of the Adoption of the Rome Statute' <https://asp.icc-cpi.int/asp-events/20a> accessed 14 September 2022.

justice. The chapter concludes by discussing the importance of victim-oriented justice in interpreting and applying the key principle of complementarity.

2 Victims and International Criminal Justice

'Justice for victims' is a popular phrase used by many, including international criminal tribunals to explain or legitimize their work.[7] This phrase has become common in academic literature,[8] and often invoked by commentators in relation to international crimes and the fight against impunity. However, victims did not always have a special status at the international level.[9] This may be initially attributable to the notion that international law was created to regulate states in their relationships with each other, and individuals were not considered subjects of this body of law.[10] To contextualize the current position of victims in international criminal justice, it is worth briefly looking at how victims became a part of this process.

2.1 Individuals as Subjects of International Law

International law traditionally viewed individuals as objects who did not have the same status and rights under international law as states who were considered the only subjects.[11] One of the early instances of the consideration of individuals as subjects of international law was in the development and application of international humanitarian law (IHL) which aims to humanize

[7] Schwöbel-Patel, The 'Ideal' Victim of International Criminal Law (2018) pp. 703-705 and 709-724.
[8] See Chapter One discussion literature on justice for victims.
[9] McCarthy, Reparations and Victim Support in the International Criminal Court (2012), p. 43.
[10] See for example Mark Weston Janis, 'Individuals as Subjects of International Law' (1984) 17 (1) Cornell International Law Journal 61, pp. 61-78; Andrew Clapham, 'The Role of the Individual in International Law' (2010) 21 (1) European Journal of International Law 25, pp. 25-30; Solomon E. Salako, 'The Individual in International Law: 'Object' versus 'Subject'' (2019) 8 (1) International Law Research 132, pp. 132-140.
[11] Mark Weston Janis, 'Individuals as Subjects of International Law' (1984) 17 (1) Cornell International Law Journal 61Janis, pp. 61-77.

war[12] by limiting the conduct of hostilities in order to protect individuals.[13] According to Meron while IHL focuses on the interests of states and their sovereignty, it contains human rights elements which are important in the protection of individuals,[14] and contributed to the expansion of subjects of international law.

Another example of this expansion was seen at the end of Second World War when Allied Powers[15] tried Nazi criminals under international law[16] before the international military tribunals (IMTs) at Nuremberg, and in the Far East.[17] The creation of the IMTs was pivotal in changing the status of individuals in international law.[18] The work of these tribunals led to the creation of the concept of individual criminal responsibility where Nazi criminals could be held criminally responsible for their perpetration of international crimes.[19] Victims were called as

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[12] Theodor Meron, The Humanization of International Law (Brill, Nijhoff 2006) pp. 1-85.

[13] See Gerd Oberleitner, Context: The Humanization of International Law Human Rights in Armed Conflict: Law, Practice, Policy (CUP 2015), p. 233, 237; Judge Trindade extensively discussed the concept of humanization of international law. See Cançado Trindade, Antônio Augusto, Judge Antônio A. Cançado Trindade. The Construction of a Humanized International Law (Brill, Nijhoff 2014); Augusto, Antônio Cançado Trindade, 'The Construction of a Humanized International Law' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2017* (OUP 2018).

[14] Theodor Meron, The Humanization of International Law (Brill, Nijhoff 2006) p. 5.

[15] The United Kingdom, United States, France, and the former Soviet Union.

[16] Lassa Francis Oppenheim, International Law. A Treatise. (2nd edn, 2012) The Project Gutenberg EBook of International Law. A Treatise. Volume I (of 2) <https://www.gutenberg.org/files/41046/41046-h/41046-h.htm> accessed 14 September 2022; Wade Mansell and Karen Openshaw, International Law: A Critical Introduction (Hart 2013), pp. 45-48 ('Mansell and Openshaw, International Law: A Critical Introduction (2013)').

[17] International Military Tribunal at Nuremberg, Established by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution And Punishment of the Major War Criminals of the European Axis (adopted 8 August 1945); International Military Tribunal For The Far East, Special Proclamation By The Supreme Commander for The Allied Powers At Tokyo (adopted 19 January 1946).

[18] See Martti Koskenniemi, Hersch Lauterpacht and the Development of International Criminal Law (2004) 2 (3) Journal of international criminal justice 810, p. 813; McCarthy, Reparations and Victim Support in the International Criminal Court (2012), pp. 41-48; Mansell and Openshaw, International Law: A Critical Introduction (2013), pp 45-48.

[19] See ILC, Yearbook of The International Law Commission 1950: Vol II, Documents of the second session including the report of the Commission to the General Assembly (A/CN. 4/SER.A/1950/Add. 1), p. 192, para 43 (3); Article 25 ICCst.; Judge Philippe Kirsch (President of the International Criminal Court) 'Applying the Principles of Nuremberg in the ICC Keynote Address at the Conference "Judgment at Nuremberg" held on the 60th Anniversary of the Nuremberg Judgment' 30 September 2006 <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK_20060930_English.pdf> accessed 14 September 2022.

witnesses for the prosecution,[20] but victims' other needs and interests were not of particular concern.[21] McCarthy puts it this way, 'international criminal law was conceptualized as a system of law little concerned with victims but rather one that was concerned primarily with perpetrators and the enforcement of the rules of international law itself.'[22] The shift in recognizing individuals as subjects of international law was remarkable. Nonetheless, more needed to be done for victims[23] who were not considered as subjects of justice: those who had legitimate interests in, and a say on how justice should be done.

IHL and subsequently, the rise of international human rights law (IHRL) and its respective regional and international instruments[24] contributed to a better status for individuals and the recognition of victims' rights to a remedy. The end of the Second World War and the following years saw the adoption of the Universal Declaration of Human Rights (UDHR),[25] the Genocide

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[20] Stahn, A Critical Introduction to International Criminal Law (2019), p. 301.
[21] McCarthy, Reparations and Victim Support in the International Criminal Court (2012), p.34, and p. 35, fn.2. Although victims' suffering was often invoked to justify the treatment of individuals before an international court. See Moffett, Justice for Victims Before the ICC (2014), pp. 59-60.
[22] McCarthy, Reparations and Victim Support in the International Criminal Court (2012), p. 43 (emphasis added).
[23] Moffett, Meaningful and Effective? Considering Victims' Interests Through Participation at the ICC (2015); Claude Jorda and Jérôme de Hemptinne, 'The Status and Role of the Victim' in Antonio Cassese, Paola Gaeta, and John R.W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (Vol II, OUP 2002), pp. 1387-1417.
[24] Regional conventions include American Convention on Human Rights; African Charter on Human and People's Rights; ECHR; See also Mansell and Openshaw, International Law: A Critical Introduction (2013), pp. 142-143; United National Office of the High Commissioner for Human Rights (OHCR), 'The Core International Human Rights Instruments and their Monitoring Bodies' <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies> accessed 14 September 2022; Theodor Meron, The Humanization of International Law (Brill, Nijhoff 2006) pp. 1-85; The UN created treaty bodies and mechanisms for monitoring these instruments and processing requests made under them, including the Human Rights Council, Universal Periodic Review, Commission on Human Rights (replaced by the Human Rights Council), Special Procedures of the Human Rights Council, Human Rights Council Complaint Procedure. See OHCR 'Instruments and Mechanisms' <https://www.ohchr.org/en/instruments-and-mechanisms> accessed 14 September 2022.
[25] See International Bill of Human Rights, A/RES/217(III)A-E (adopted 10 December 1948).

Convention,[26] Geneva Conventions and their Additional Protocols,[27] and the UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power (UN Victims' Declaration).[28] Of these instruments, it is the UN Victims' Declaration that enhanced victims' position within the general protection of international human rights[29] by defining and recognizing victims of crimes. It provided fair and respectful treatment of victims, their access to justice mechanisms, and remedies for their harm.[30] It also prescribed ways in which states can ensure compensation for victims.[31] The influence of the UN Victims' Declaration led to several changes internationally.[32] For example, victims' provisions emerged[33] across domestic, regional, and international legal framework, and victims began to have more active roles in criminal proceedings.[34] Nevertheless, this change in victims' position was not well reflected in the ad-hoc tribunals.

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[26] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, in force 12 January 1951) UNTS Vol 78, p. 277.

[27] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), adopted 12 August 1949, in force 21 October 1950) 75 UNTS 135; International Committee of the Red Cross, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), (adopted 12 August 1949, in force 21 October 1950) 75 UNTS 287; International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, in force 7 December 1978)1125 UNTS 3; International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (adopted 8 June 1977, in force 7 December 1978) 1125 UNTS 609.

[28] See Principles 1 through to 21 UNGA Res 40/34 (29 November 1985).

[29] UNGA Res 40/34 (29 November 1985); Schabas, An Introduction to the International Criminal Court (2011), p. 345; McCarthy, Reparations and Victim Support in the International Criminal Court (2012), pp. 13-33.

[30] UNGA Res 40/34 (29 November 1985).

[31] UNGA Res 40/34 (29 November 1985).

[32] See Handbook on Justice for Victims: on The Use and Application of The Declaration of Basic Principles of Justice For Victims of Crime And Abuse of Power (United Nations Office For Drug Control and Crime Prevention: Centre For International Crime Prevention (UNODCCP)1999).

[33] Ybo Buruma, 'Doubts on the Upsurge of the Victim's Role' in *Marijke Malsch, Hendrik Kaptein (eds.), Crime, Victims and Justice: Essays on Principles and Practice* (Routledge 2016) p. 3 ('Buruma, Doubts on the Upsurge of the Victim's Role (2016)').

[34] See Raquel Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes', (2004) 26 (3) Human Rights Quarterly 605, pp. 652-657; M. Cherif Bassiouni 'International Recognition of Victims' Rights' (2006) 6 (2) Human Rights Law Review 203, pp. 203-279 ('Bassiouni, International Recognition of Victims' Rights (2006)'); Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008), pp. 777-778, 811 and 825.

2.2 Victims Before the Ad-hoc Tribunals

Nearly five decades after the creation of the international military tribunals, the UNSC created two ad-hoc tribunals, namely the ICTY and the ICTR to try international crimes perpetrated in their respective jurisdictions. The UNSC Resolution 827[35] establishing the ICTY stated that it was to carry out its work without prejudicing victims' right to seek compensation for damages through other external channels.[36] The ICTY's Statute and Rules of Procedure and Evidence did not provide for meaningful victims' participation to enable victims to defend their unique interests and seek reparations within the Tribunal,[37] but there were provisions for victims' protection.[38]

The ICTR's Statute[39] and Rules of Procedure and Evidence[40] have similar provisions. It did not cover meaningful participation and reparations for victims, resulting in a negative perception

[35] UNSC Resolution S/Res 827 (1993).
[36] UNSC Resolution S/Res 827 (1993), Paragraph 7.
[37] American University Washington College of Law, War Crimes Research Office 'Victim Participation Before the International Criminal Court' (International Criminal Court Legal Analysis and Education Project 2007), pp. 2, 9, 11-14; David Donat-Cattin, 'Victims' Rights in the International Criminal Court' in Mangai Natarajan (ed), *International and Transnational Crime and Justice* (2nd edn, CUP 2019), p. 424 ('Donat-Cattin, Victims' Rights in the International Criminal Court (2019)').
[38] UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993, as amended on 17 May 2002) Article 22 ('ICTY Statute'). Also, Article 24 (3)- "In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners." International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991: Rules of Procedure and Evidence (adopted 11 February 1994, IT/32/Rev.50 2015) Rules 2, 34, 39, 40, 40 *bis,* 65, 69, 73 *bis,* 75, 79, 92 *bis,* 96, 106 (on compensation through channels external to the ICTY) ('ICTY Rules of Procedure and Evidence').
[39] UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994, as last amended on 13 October 2006) ('ICTR Statute'), Articles 14, 17, 19, 21, and 23 (3) on restitution of property and proceeds.
[40] International Criminal Tribunal for Rwanda: Rules of Procedure and Evidence (adopted 29 June 1995) U.N. Doc. ITR/3/REV.1, Rules 2, 34, 39, 40, 65, 69, 75, 79, 96, and 106 on compensation to victims ('ICTR Rules of Procedure and Evidence')

of the ICTR by victims,[41] some of whom felt left out and vulnerable.[42] Some Rwandan victims' associations expressed their disappointment with the ICTR due to *inter alia* lack of formal engagement with victims through an official contact,[43] and lack of medical care and issues of reparations.[44] These issues reflect typical needs and interests of victims of international crimes, and addressing them and offering victims some form of meaningful participation in the process[45] could have potentially improved their feeling of inclusiveness.[46]

The creation of the ad-hoc tribunals paralleled a gradual shift in the status of victims attributable to a growing jurisprudence in international human rights field and victimology.[47] There was better enlightenment about victimization and the need to broadly interpret victimhood to include clear provisions for their participation beyond providing evidence.[48] Therefore, the work of these tribunals in fulling their respective mandates, as well as their

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[41] Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008) pp. 786-789; International Federation for Human Rights (FIDH), 'Victims in the Balance Challenges ahead for the International Criminal Tribunal for Rwanda' (2002) <https://www.refworld.org/docid/46f146be0.html> accessed 14 September 2022 ('FIDH Victims in the Balance Challenges ahead for the International Criminal Tribunal for Rwanda (2002)'); The document containing the FIDH report has letters from victims' associations to the ICTR annexed to it; Jean-Marie Kamatali, From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans, (2005) 12 (1) New England Journal of International and Comparative Law 89, pp. 96 and 99 ('Kamatali, Learning from the ICTR Experience in Bringing Justice to Rwandans (2005)'); See Jean-Marie Kamatali, The Challenge of Linking International Justice and National Reconciliation: The Case of the ICTR (2003) 16 (1) Leiden Journal of International Law 115.

[42] FIDH Victims in the Balance Challenges ahead for the International Criminal Tribunal for Rwanda (2002).

[43]FIDH Victims in the Balance Challenges ahead for the International Criminal Tribunal for Rwanda (2002), p.6.

[44] FIDH Victims in the Balance Challenges ahead for the International Criminal Tribunal for Rwanda (2002), p.6.

[45] Claude Jorda and Jérôme Hemptinne, 'The Status and the Role of the Victim' in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds) *The Rome Statute of The International Criminal Court: A Commentary* (Vol II, OUP 2002); Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity Systems in Place and Systems in the Making* (Brill 2009).

[46] See Kamatali, Learning from the ICTR Experience in Bringing Justice to Rwandans (2005), p. 96.

[47] Schabas, An Introduction to the International Criminal Court (2011); p. 345-346. See fn. 17 on p. 345; Bassiouni, International Recognition of Victims' Rights (2006), pp. 203-243; Moffett, Justice for Victims before the International Criminal Court' (2014) p.65.

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

shortcomings *vis a vis* victims' needs and interests laid the foundation for the insertion of advanced victims' provisions in the Rome Statute.[49]

2.3 Victims' Needs and Interests in International Criminal Proceedings

Justice for victims requires understanding their needs and interests, some of which were highlighted by the work of the ad-hoc tribunals. Victims suffer different types of harms, their experiences of victimization vary, and some may be victim-perpetrators.[50] There are similarities in their needs which are useful when pursuing justice for victims.[51] Also, changing personal circumstances or in the wider context of situations involving international crimes means that victims' needs, and interests may evolve over time. A typical example is in cases which were discontinued for lack of evidence, or other reasons, for instance the collapse of the Kenya cases before the ICC.[52] Victims of such a situation may have the need to continue seeking accountability or to seek reparations to move on.[53] In situations of protracted conflict,

[49] Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008), pp. 777, 779-780-789; David Donat-Cattin, 'Commentary on Article 68' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article-by-Article* (2nd edn, Baden-Baden: Nomos 2008) pp. 1276-1277 ('Donat-Cattin, Commentary on Article 68 of the Statute (2008)'). Schwöbel-Patel, The 'Ideal' Victim of International Criminal Law (2018), pp. 707-708.

[50] Louise Mallinder, Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide (Hart 2008), pp. 360–366; Mark Findlay and Ralph Henham, Beyond Punishment: Achieving International Criminal Justice (Palgrave Macmillan 2010) pp.1-31; Moffett, Justice for Victims Before the ICC (2014) p. 29; Paolina Massidda, and others, 'Representing Victims Before the International Criminal Court: A Manual for Legal Representatives' (The Office of Public Counsel for Victims 2014) <https://www.icc-cpi.int/sites/default/files/iccdocs/opcv/OPCVManual-4-Eng.pdf> accessed 15 September 2022, pp. 35-177; Stuart Ford 'What Investigative Resources Does the International Criminal Court Need to Succeed? A Gravity-Based Approach' (2017) 16 (1) Washington University Global Studies Law Review 1, pp. 3, 33-47.

[51] Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) pp. 1-74.

[52] See *The Prosecutor v. Callixte Mbarushimana, Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10, Case Information Sheet-ICC, ICC-PIDS-CIS-DRC-04-003/12_Eng, 15 June 2012; *Situation in the Republic of Kenya*, ICC-01/09 <https://www.icc-cpi.int/situations/kenya> accessed 29 December 2022.

[53] See Moffett, Justice for Victims Before the ICC (2014), p. 29; Human Rights Watch, 'ICC: Countries Should Press Kenya on Obstruction Strong Action Needed to Back-Up Court Ruling' < https://www.hrw.org/news/2016/09/19/icc-countries-should-press-kenya-obstruction> accessed 15 September 2022; Anushka Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation

victims may have urgent medical and material needs, and they may require a cease fire to locate their loved ones.[54] Upon cessation of hostilities some victims may prefer economic assistance to move forward, some may prefer accountability and traditional reconciliation process, and some may prefer both.[55] Victims may have need to know the truth, make their voices heard, be treated with respect, to be kept informed about the progress and outcome of their case, and to obtain different types of support.[56] Of these needs, literature on the topic suggests that victims' mostly value information regarding their case, clarity about their role in the criminal proceedings, and how their harms will be redressed.[57]

Victims' interests in proceedings may be a product of their needs.[58] For example, a victim who has a need to be heard and to be involved in the judicial and non-judicial proceedings has

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in the *Kenyatta* Case' (2018) 16 (3) Journal of International Criminal Justice 571, pp. 573-576, and 584-587 ('Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the *Kenyatta* Case (2018)').

[54] See Patrick Vinck and others, 'Living with Fear: A Population-based Survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Democratic Republic of Congo' (Joint Project of University of California, Berkeley's Human Rights Center and Tulane University's Payson Center for International Development, and the New York–based International Center for Transitional Justice 2008) pp. 23-27; Heidi Rieder and Thomas Elbert, 'Rwanda – Lasting Imprints of A Genocide: Trauma, Mental Health And Psychosocial Conditions In Survivors, Former Prisoners And Their Children' (2013) 7 (6) Conflict and Health 1, pp. 1-12.

[55] Rianne Letschert and others, Victimological Approaches to International Crimes: Africa (Intersentia 2011) pp. 621-642; Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) pp. 1-74; For a discussion of the complexities of meeting some of these needs in societies transitioning, see Rosalind Shaw, Lars Waldorf, and Pierre Hazan, Localizing Transitional Justice: Interventions and Priorities After Mass Violence (Stanford University Press 2010).

[56] Yasmin Naqvi, 'The Right to Truth in International Law Fact or Fiction?' (2006) 88 (862) International Review of the Red Cross 245, pp. 245-273; Mina Rauschenbach and Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?' (2008) 90 (870) International Review of the Red Cross 441 pp. 444-446; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 26-29.

[57] Jo-Anne Wemmers discusses victims' needs and restorative justice from a domestic criminal justice perspective, but it remains useful in this context because international crimes can also be prosecuted domestically. See Jo-Anne Wemmers 'Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice', (2002) 9 (1) International Review of Victimology 43, pp. 44-56; Brianne McGonigle Leyh, Procedural Justice? Victim Participation in International Criminal Proceedings (Intersentia 2011) pp. 48-51; Paolina Massidda expounds on victims' needs in general, see Funk, Victims' Rights and Advocacy at the International Criminal Court (2015) pp. xv-xvii; Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015), p. 3; Tibori-Szabó and Hirst, Victim Participation in International Criminal Justice: Practitioners' Guide (2017) pp. 342-346, 385-409, and 468-469; Massidda, The Participation of Victims Before the ICC: A Revolution Not Without Challenges (2020) p. 38.

[58] See Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) pp. 1-74.

interests in such proceedings. To look after their interests, their need for information must be met. The same applies to victims who have need for compensation or more broadly reparations, such victims will have interests in proceedings that will contribute to the realization of reparations in different forms. What is often referred to as victims' needs, and interests have overtime crystalized into a set of recognizable rights to an effective remedy. Donat-Cattin refers to them as inalienable human rights of victims, and Joinet and Orentlicher categorizes these rights as four pillars of dealing with the past.[59] They include (1) the right to equal and effective access to justice and fair treatment, (2) right to adequate, effective and prompt reparations for harm suffered, and (3) access to relevant information concerning violations and reparation mechanisms.[60] These rights have also been recognized by international criminal courts and tribunals including the ICC.[61] Such a development should contribute to the pursuit and delivery of victim-oriented justice. The following section engages with the concept of

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[59] See Donat-Cattin, Victims' Rights in the International Criminal Court (2019) pp. 424-425; UN Commission on Human Rights, 'Updated Set of Principles for The Protection and Promotion of Human Rights Through Action to Combat Impunity', UN doc. E/CN.4/2005/102/Add.1, 8 February 2005, Joinet's and Orentlicher's four pillars of dealing with the past are the right to know the truth about gross human rights violations; the right to justice-which entails an obligation to investigate violations, a right to fair and effective remedy; the right to reparation; and guarantees of non-repetition; Theo van Boven, 'Victim-Oriented Perspectives: Rights and Realities' in Thorsten Bonacker and Christoph Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (T.M.C. Asser Press 2013) pp. 21-22; Meredith Rossner, 'Restorative justice and Victims Of Crime: Directions and Developments' in Sandra Walklate (ed) *Handbook of Victims and Victimology* (Routledge 2017), p. 230.

[60] See UN Victims' Declaration, UNGA Res 40/34 (29 November 1985) Principles 4-17, and 19 and 21; UNBPG, UNGA Res 60/147; Universal Declaration of Human Rights, UNGA A/RES/217(III) (10 December 1948) Article 8; ICCPR, Article 2 (3); American Convention on Human Rights Article 25(1); Article 13 ECHR; African Charter on Human and Peoples' Rights, Article 7(1)(a); African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa'(2003), Principle C 'Right To an Effective Remedy'.

[61] Reasons For the Appeals Chamber's Oral Decision Dismissing as Inadmissible The Victims' Appeals Against The Decision Rejecting The Authorisation Of An Investigation Into The Situation In Afghanistan, *Situation In The Islamic Republic Of Afghanistan*, ICC-02/17-137, AC, ICC, 4 March 2020, para 23 ('Reasons for the Appeals Chamber's Oral Decision Dismissing as Inadmissible the Victims' Appeals Against the Decision Rejecting the Authorisation of an Investigation into The Situation in Afghanistan, ICC-02/17-137, 4 March 2020'); *Vasilyev v Russia* App no. 32704/04 (ECtHR 17 December 2009), para 157; See also *Al Nashiri v Poland* App no. 28761/11 (ECtHR 24 July 2014), paras 485-486.

victim-oriented justice before examining the Rome Statute framework and its suitability for victim-oriented justice.

3 Conceptualizing Victim-oriented Justice

The concept 'victim-oriented' has been used in different contexts and often without a clear definition. It is different from victim-centered approaches[62] which are less suitable in traditional criminal justice processes because the former prioritizes victims in all matters and procedures.[63] Decaux considers the concept of 'victim-oriented' in the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).[64] For Decaux, the victim-orientedness of The ICPPED stems from *inter alia* its definition of a 'victim' for the purposes the Treaty, provision of victims' rights, protection of their interests, provision for victims' needs to be met in a timely manner, and acknowledgement the role of various stakeholders, including civil society organizations.[65] Palassis discusses the concept of 'victim-oriented' in connection with the ICTY's work.[66] He asserts that a victim-oriented approach in the context of improved international criminal justice is about the victims and their expression of

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[62] See for example Stathis N Palassis, 'From The Hague to the Balkans: A Victim-Oriented Reparations Approach to Improved International Criminal Justice' (2014) 14 (1) International Criminal Law Review 1, pp. 25-26 ('Palassis, From The Hague to the Balkans: A Victim-Oriented Reparations Approach to Improved International Criminal Justice (2014)').

[63] See The United States, Office of Victims of Crime Training and Technical Center, 'Victim' Centered Approach' <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/> accessed 15 September 2022.

[64] Emmanuel Decaux, 'The International Convention for the Protection of All Persons from Enforced Disappearance, as a Victim-Oriented Treaty' in Margaret M. deGuzman and Diane Marie Amann (eds) *Arcs of Global Justice: Essays in Honour of William A. Schabas* (OUP 2018) pp. 57-64 ('Decaux, The International Convention for the Protection of All Persons from Enforced Disappearance, as a Victim-Oriented Treaty (2018)').

[65] Decaux, The International Convention for the Protection of All Persons from Enforced Disappearance, as a Victim-Oriented Treaty (2018) pp. 60-64.

[66] Palassis, From The Hague to the Balkans: A Victim-Oriented Reparations Approach to Improved International Criminal Justice (2014) pp. 1-3.

suffering.[67] The characteristics of such an approach is recognition of victims and their experiences which tend to vary from situation to situation.[68] Hekkila,[69] Vasiliev,[70] and Leyh,[71] writing in the context of international criminal justice, and Buruma dealing with national jurisdictions,[72] posit that victim-oriented systems are victim-friendly, tend to accommodate victims' interests, and can improve services provided to them.[73] According to Gabagambi,[74] and Omale,[75] justice approaches in Africa which promote *inter alia* active victim participation and elements of restoration are preferable.

From the foregoing, it appears that responsiveness to and accommodation of victims' needs, and interests are common features of a method which is victim oriented.[76] The thesis argues that such responsiveness must be adaptable to cultural and social nuances which are applicable

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[67] Palassis, From The Hague to the Balkans: A Victim-Oriented Reparations Approach to Improved International Criminal Justice (2014) pp. 26 and 33

[68] Palassis, From The Hague to the Balkans: A Victim-Oriented Reparations Approach to Improved International Criminal Justice (2014) pp. 26 and 33

[69] Mikaela Heikkilä, International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status (Institute for Human Rights, Abo Akademi University 2004), pp. 35-36 and 40-41('Heikkilä, International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status (2004)') pp. 40-41.

[70] Vasiliev, Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC (2009), pp. 677-678.

[71] Brianne McGonigle Leyh, 'Victim-Oriented Measures at international Criminal Institutions: Participation and its Pitfalls' (2012) 12 (3) International Criminal Law Review 375, pp. 379-380 ('Leyh, 'Victim-Oriented Measures at international Criminal Institutions: Participation and its Pitfalls' (2012)')

[72] Buruma, Doubts on the Upsurge of the Victim's Role (2016), pp. 2- 4.

[73] Vasiliev, Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC (2009), p. 677.

[74] Julena Jumbe Gabagambi, 'A Comparative Analysis of Restorative Justice Practices in Africa', (Hauser Global Law School Program 2018) <https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html> accessed 15 September 2022.

[75] Don John O. Omale 'Justice in History: An Examination of African Restorative Traditions and the Emerging Restorative Justice Paradigm' (2006) 2 (2) African Journal of Criminology and Justice Studies 33, pp. 33-57.

[76] See Rosalind Shaw, Lars Waldorf, and Pierre Hazan, Localizing Transitional Justice: Interventions and Priorities After Mass Violence (Stanford University Press 2010), pp. 4-6; Craig Paterson and Andrew Williams, 'Towards victim-oriented police? Some reflections on the concept and purpose of policing and their implications for victim-oriented police reform' (2018) 1 (1) Journal of Victimology and Victim Justice 85, pp. 92-101.

in the relevant context.[77] Thus, the thesis defines victim-oriented justice as the quality of attention to be given to victims' needs by the relevant stakeholders in the Rome Statute system of justice,[78] and victims' ability to effectively exercise their Rome Statute rights which can lead to substantive outcomes such as reparations.[79] Elements of victim-oriented justice include (1) continuous and meaningful participation of victims, including their representation in relevant mechanisms,[80] (2) consideration and responsiveness to victims needs and interests, and (3) context-awareness.[81] Victim-oriented justice requires balancing the attention given to victims and their rights with the rights of accused,[82] hence, appreciating the limitations of national and

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[77] See Gearoid Millar, 'Local Evaluations of Justice through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice' (2011) 12 (4) Human Rights Review 515 pp. 515-532; Pegorier takes a gender specific approach in discussing related issues of responsiveness to social nuances, in particular how to do justice for victims of rape and sexual violence. See Clotilde Pégorier, 'Denial, impunity and transitional justice The Fate of Female Rape Victims in Bosnia and Herzegovina' in Lisa Yarwood (ed), *Women and Transitional Justice: The Experience of Women as Participants* (Routledge 2013) pp. 119-131.

[78] See Bassiouni, International Recognition of Victims' Rights (2006), pp. 230-246.

[79] See Decaux, The International Convention for the Protection of All Persons from Enforced Disappearance, as a Victim-Oriented Treaty (2018) pp. 57-64; Moffett, Justice for Victims Before the ICC (2014), p.45; Moffett, Meaningful and Effective? Considering Victims' Interests Through Participation at the ICC (2015), pp. 255-260; OHCHR, Rule-of-Law Tools for Post-Conflict States: National Consultations on Transitional Justice, (HR/PUB/09/2 2009), p. 3. The discussion here was in relation to transitional justice which does not rule out international criminal justice processes; See also ICTJ Briefing, Reparations for Northern Uganda: Addressing the Needs of Victims and Affected Communities (ICTJ Uganda 2012).

[80] See Chapter Five Section 3.3 for an example of the inclusion of victims in key justice mechanisms, for instance, in the body responsible for applying complementarity.

[81] See for example Wemmers, Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice (2002) pp. 43-56; Vasiliev, Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC (2009), pp 675-679; Claire Garbett, 'The Truth and The Trial: Victim Participation, Restorative Justice, and The International Criminal Court' (2013) 16 (2) Contemporary Justice Review 193 pp. 193-209; Deutsches Institut für Menschenrechte; Nürnberger Menschenrechtszentrum (2015), Expert Conference: The Meaning and Implementation of Victim Orientation in the Treaty Bodies of the United Nations (Berlin 29-30 September 2014); Emanuela Biffi and others, 'Implementing Victim-Oriented Reform of the Criminal Justice System in European Union' (Project IVOR Report: APAV - Associacao Portuguesa de Apoio à Vitima 2016) pp. 31-69.

[82] UNGA Res 40/34 (29 November 1985); Heikkilä, International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status (2004) 35-36 and 40-41; Moffett, Justice for Victims Before the ICC (2014), p.56; See also Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 281, 286; Moffett, Meaningful and Effective? Considering Victims' Interests Through Participation at the ICC (2015), p. 260 and f.n. 30.

international criminal justice systems.[83] These elements help to ensure that victims' needs and interests contribute to shaping the outcomes of such processes.[84] Vasiliev opined that

> "[i]n a victim-oriented justice system, victims participate to influence the procedural decision-making in a self-beneficial way: by obtaining compensation, by ensuring own safety and preventing further commission of crime, or by praying the Court to mete out a harsher sentence to the offender."[85]

This thesis argues that victim-oriented justice is the ideal approach to justice for victims when dealing with core crimes at the ICC, and in domestic jurisdictions. Below the ICC's victims' regime and case law are analyzed to shed light on areas of improvement.

4 Victims Within the ICC's Current Framework

The ICC was created at a time when there was growing movement to foster justice for victims beyond the punishment of perpetrators.[86] Drafters of the Rome Statute chose to design a broad

[83] Vasiliev, Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC (2009), pp. 675-678; Moffett, Justice for Victims Before the ICC (2014) p. 57; Leyh, Victim-Oriented Measures at international Criminal Institutions: Participation and its Pitfalls (2012) pp. 379-380; For a critique not only of victim-oriented justice, but the use of international criminal justice to address international harm and some underlying causes, see Kamari Maxine Clarke, ''We Ask for Justice, You Give Us Law': The Rule of Law, Economic Markets and the Reconfiguration of Victimhood' in *Christian De Vos, Sara Kendall and Carsten Stahn* (eds), Contested Justice: The Politics and Practice of International Criminal Court Interventions (CUP 2015) pp. 272-301; see also Antonio Franceschet, 'The Rule of Law, Inequality, and the International Criminal Court', (2004) 29 (1) Alternatives: Global, Local, Political 23, pp. 23-39.

[84] See for example Palassis, From The Hague to the Balkans: A Victim-Oriented Reparations Approach to Improved International Criminal Justice (2014), p. 26.

[85] Vasiliev, Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC (2009), p. 679. On considerations of how victims may influence sentencing at the ICC, see also Tonny Raymond Kirabira, 'Elements of Aggravation in ICC Sentencing: Victim Centred Perspectives', (2021) 13 (2) Amsterdam Law Forum 25, pp. 25-42.

[86] Heikkilä, International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status (2004), pp. 34-36; Wemmers Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice (2002), p.43; Victims' Rights Working Group (VRWG) 'The Implementation Of Victims' Rights Before The ICC Issues and Concerns Presented by the Victims' Rights Working Group on the occasion of the 10th Session of the Assembly of States Parties 12 - 21 December 2011' <https://redress.org/wp-content/uploads/2017/12/2011_VRWG_ASP10.pdf> accessed 15 September 2022.

victim participation regime[87] to bring the Statute in line with international standards.[88] The Rome Statute contains provisions which could position the Court to be more responsive to victims' informational, practical, and emotional needs and interests.[89] For individuals to access the ICC to avail of any rights, they must first qualify as 'victims' in accordance with Rule 85 ICC RPE.[90] The Pre-Trial Chamber of the ICC has the responsibility of determining whether an individual or organization[91] meets the Rule 85 criteria,[92] and whether there is a causal link between the relevant crime and the harm suffered, in a way that affects the personal interests of the victim.[93]

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[87] Baumgartner, Aspects of victim participation in the proceedings of the International Criminal Court (2009) pp. 409-410; Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008), pp. 777, 779-789; David Donat-Cattin, 'Commentary on Articles 68 and 75' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, (2nd edn, Baden-Baden: Nomos 2008) pp. 1399-1412.

[88] Sam Garkawe, 'Victims and the International Criminal Court: Three Major Issues' (2003) 3 (4) International Criminal Law Review 345, pp. 345-353; Mina Rauschenbach and Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?' (2008) 90 (870) International Review of the Red Cross, pp. 441-443; Moffett, Justice for Victims Before the ICC (2014) p. 88-89.

[89] Donat-Cattin, Commentary on Article 68 of the Statute (2008); Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008) pp. 788-790; Moffett, Justice for Victims Before the ICC (2014), p. 85.

[90] See Rule 85 of the ICC's Rules of Procedure and Evidence. See also Chapter One, Section 1.1.

[91] It should be noted that while Rule 85 extends the victim status to organizations or institutions, discussions and proposals in the thesis have natural victims as its focus. Nevertheless, they can be applied to institutions or organizations who are victims in this context.

[92] Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *Muthaura, Kenyatta and Ali*, *Situation In The Republic of Kenya*, ICC-01/09-02/11, PTC II, ICC, 26 August 2011, para 64.

[93] Kelly, and Milaninia expound on the different aspects of this process. See Kelly, The Status of Victims Under the Rome Statute of the International Criminal Court (2013), pp. 50-52; Milaninia, Conceptualizing Victimization at the International Criminal Court: Understanding the Causal Relationship between Crime and Harm (2019) pp.127-128, 143-147; See also Baumgartner, Aspects of victim participation in the proceedings of the International Criminal Court (2009) pp. 417-423; Sara Kendall and Sarah Nouwen 'Representational Practices at The International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2013) 76 (3/4) Law and Contemporary Problems 235, pp. 241-252 ('Kendall and Nouwen, Representational Practices at The International Criminal Court: The Gap Between Juridified and Abstract Victimhood (2013)'); Juan-Pablo Perez-Leon-Acevedo 'Victims and Appeals At The International Criminal Court (ICC): Evaluation Under International Human Rights Standards'(2021) 25 (9) The International Journal of Human Rights 1589, pp. 1605-1617.

The recognition of an individual or an organization as a victim at a given stage of ICC proceedings is defined by the specific object of that stage of proceedings.[94] This means that between the commencement of preliminary examinations to the conclusion of reparation proceedings, there may be different categories of victims.[95] This leads to the distinction between 'victims of the situation'-for example victims of the broader DRC situation[96] before the ICC, and 'victims of a case'- for example, victims of the *Ntaganda* case.[97] Within each stage, there may be changes in participating victims.[98] Kendall and Nouwen referred to this as a narrowing victim pyramid,[99] because of how the Rome Statute's victims' regime has been set up with more exclusionary factors popping up as the proceedings develop.[100] For instance, the Appeals Chamber in the *Lubanga* case found that 'only victims who are victims of the crimes

[94] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006), para. 65; Decision on Victims' Applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Situation in Uganda, ICC-02/04-101, PTC II, ICC, 10 August 2007, paras 83-88 ('Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 10 August 2007'); Héctor Olásolo, The Triggering Procedure of the International Criminal Court, (Martinus Nijhoff 2005) pp. 109-116.
[95] See ICC, Chambers Practice Manual (5th edn, 2021) Paras 96-97. This was more pronounced in the 2019 Chamber's Practice Manual, para 98.
[96] See Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the ICC, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/vprs/abd-al-rahman/VPRS-Victims-booklet_ENG.pdf> accessed 18 September 2022, p. 20 ('ICC, VPRS, Victims' Booklet'); OPCV Manual for Legal Representatives, (2018) p. 20.
[97] See Olásolo, and Kiss, 'The role of Victims in Criminal Proceedings Before the International Criminal Court' (2010) p. 131.
[98] The *Ali Kushayb* case is the latest example of such changes. See Information on Common Legal Representation, *Ali Kushayb*, ICC-02/05-01/20-487, TC I, ICC, 14 October 2021 ('Information on Common Legal Representation *Ali Kushayb*, ICC-02/05-01/20-487, 14 October 2021'); Decision on Victims' Participation and Legal Representation in Trial Proceedings, *Ali Abd-Al-Rahman ("Ali Kushayb")*, ICC-02/05-01/20-494, TC I, ICC, 19 October 2021 ('*Ali Kushayb* Decision on Victims' Participation and Legal Representation in Trial Proceedings, ICC-02/05-01/20-494, 19 October 2021'), para 15. The current number of victims participating as of March 2022 was 142.
[99] Kendall and Nouwen, Representational Practices at The International Criminal Court: The Gap Between Juridified and Abstract Victimhood (2013), p. 248.
[100] Paulina Vega Gonzalez, 'The Role of Victims in International Criminal Court Proceedings: Their Rights and The First Rulings of the Court' (2006) 3 (5) Sur International Journal of Human Rights 19, p. 24 ('Gonzalez, The Role of Victims in International Criminal Court Proceedings: Their Rights and The First Rulings of the Court (2006)'); see Judgment on The Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation, ICC-01/04-01/06-1432, 11 July 2008, para 62; Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008), pp. 794-795.

charged may participate in the trial proceedings pursuant to article 68(3) of the Statute read with rule 85 and 89(1) of the Rules.'[101] From this clarification by the Chamber, only victims of the *Lubanga* case were entitled to participate in his trial proceedings. Victims of the broader DRC situation did not enjoy the same rights. This represents an inherent flaw of the ICC's victim regime which is further examined below. Such a method of interpreting victims' participatory right can lead to uncertainties for individuals who receive the victim status for a case but who may lose it at any given time prior to seeing any justice done, and due to no fault of theirs. A victim may begin as a victim of a situation, then a victim of a case when their harm is the result of a crime for which a suspect is charged, and they may be bumped back to being a victim of a situation where the case is not confirmed, or even where it is hibernated.[102] The proposals made throughout this thesis were made with this Rome Statute flaw in mind to ensure that victims are placed in the best possible position to see some form of justice done as proceedings develop. Where the thesis advocates for victims' representation and participation from early stages, it is because if some cases do not go to trial, victims of the situation would have benefitted procedurally by making their voices heard in investigation and pre-trial proceedings. Where possible they can receive support from the Trust Fund for Victims (TFV) or cooperation partners.[103]

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[101] See Judgment on The Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation, ICC-01/04-01/06-1432, 11 July 2008, para 62 (emphasis added).
[102] See ICC Chambers Practice Manual (5th edn, 2021) Paras 96-97, compare with the 2019 Chamber's Practice Manual, para 98.
[103] Reference to cooperation partners here refers to organizations which have supported the work of the Court in the past, and the work of States Parties in an effort to address international crimes and meet some of victims' needs. For example, the TFV, regional organizations, international governmental organizations such as the UN and its agencies, and NGOs such as the International Center for Transitional Justice, International Committee of the Red Cross, and Medecins Sans Frontieres. Each of these institutions can provide a different type of valuable support to victims. See Chapter 5, section 2 discussing the need for, and importance of a more inclusive complementarity mechanism.

4.1 Victims' Participation

For all victims to participate or to receive reparations, they must apply to the Court. The ICC's Victims Participation and Reparations Section (VPRS) processes their application and transmits them to the Chambers.[104] The VPRS plays a vital role in opening the ICC gates and supporting victims who wish to avail of their Rome Statute rights. Article 68 (3) of the Statute is central to victim's regime at the ICC, and it provides 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."[105]

This provision contains several elements which require elaboration for a clearer understanding of its centrality to justice for victims. Victims' participation at the ICC has been extensively discussed in literature.[106] The discussion here focuses on the means of victims' participation before the ICC, i.e., their legal representation, modes of participation, and stages of proceedings in which they are allowed to participate. These are important aspects which help to clarify the relevance of victims' participatory rights to the achievement of victim-oriented justice.

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[104] ICC, 'Victims', <https://www.icc-cpi.int/about/victims> accessed 16 September 2022.

[105] Article 68 (3) of the Rome Statute (emphasis added).

[106] See literature discussed in Chapter One. For example, Heikkilä, International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status (2004) pp. 34-188; Christine H. Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6 (3) Northwestern Journal of Human Rights 459 pp. 459-542; Baumgartner, Aspects of victim participation in the proceedings of the International Criminal Court (2009) pp. 409-440; Moffett Justice for Victims Before the ICC (2014); Tibori-Szabó and Hirst, Victim Participation in International Criminal Justice: Practitioners' Guide (2017); Rudina Jasini and Gregory Townsend (eds), Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice (University of Oxford 2020).

4.1.1 Means of Victims' Participation

The process by which victims participate is a form of procedural justice, i.e., giving them a chance to be involved and to exercise some form of influence over how justice is shaped.[107] For instance, according to UC Berkely report on their study of victims' participation at the ICC,

> "[v]ictim participants reported that completing an ICC application gave them confidence that their experiences would be known at the court and aid in building a case against the accused. (…) most said they would be satisfied if any member of the ICC read their application."[108]

Victims may participate directly or through a legal representative,[109] the latter being the most common way of participation because of the large number of victims[110] which is a feature of international crimes.[111] Victims may also prefer participation through a representative in order

[107] Also, Procedural justice can serve to increase transparency of the proceedings, see Michael M. O'Hear, 'Plea Bargaining and Procedural Justice' (2008) 42 (2) Georgia Law Review 407, pp. 443-445; Tinneke Van Camp and Jo-Anne Wemmers, 'Victim Satisfaction with Restorative Justice: More Than Simply Procedural Justice' (2013) 19 (2) International Review of Victimology 117, p. 124; Moffett, Meaningful and Effective? Considering Victims' Interests Through Participation at the ICC (2015), p. 256.

[108] Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015), p. 3.

[109] Rule 90 (2) (3), and (5) of the ICC Rules of Procedure and Evidence on appointment of legal representatives.

[110] See for example, Dmytro Suprun, 'Legal Representation of Victims Before the ICC: Developments, Challenges, and Perspectives' (2016) 16 (6) International Criminal Law Review 972, pp. 972-994 (Suprun, Legal Representation of Victims Before the ICC: Developments, Challenges, and Perspectives (2016)'); Meghan Hirst, 'Legal Representation of Participating Victims' in Kinga Tibori-Szabó , and Megan Hirst (eds) *Victim Participation in International Criminal Justice : Practitioners' Guide* (T.M.C. Asser Press 2017) pp. 111-170; Rachel Killean and Luke Moffett, 'Victim Legal Representation before the ICC and ECCC' (2017) 15 (4) Journal of International Criminal Justice 713, pp. 715-740 (Killean and Moffett, Victim Legal Representation before the ICC and ECCC (2017)'); FIDH, 'Victims at the Center of Justice From 1998 – 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC' (2018) <https://www.fidh.org/IMG/pdf/droitsdesvictimes730a_final.pdf> accessed 16 September 2022, pp. 22-37; Megan Hirst and Sandra Sahyouni, 'Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions' in Rudina Jasini and Gregory Townsend (eds) *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice* (University of Oxford 2020), pp. 4-32 ('Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020)').

[111] International crimes often occur in remote locations from the ICC, and in very difficult circumstances. For a discussion on the nature of international crimes, see Elinor Fry, 'The Nature of International Crimes and Evidentiary Challenges: Preserving Quality While Managing Quantity' in Elies van Sliedregt and Sergey Vasiliev (eds) *Pluralism in International Criminal Law*, (OUP 2014) pp. 251-272; Kevin Jon Heller, 'What Is an International Crime? (A Revisionist History)' (2017) 58 (2) Harvard International Law Journal 353, pp. 353-415.

to minimize the risk of exposure to their security and well-being.[112] Direct participation of victims in proceedings is very rare, but this can happen for example where victims are called as witnesses (dual status victims)[113] to give account of their suffering usually during the trial phase of the proceedings.[114]

How the legal representation of victims is arranged and executed will impact on the quality of victims' participation, because legal representatives are responsible for protecting victims' needs and interests in the Court's proceedings. Victims participating in ICC proceedings can appoint their own lawyers,[115] but according to Rule 90 (2)-(3) of the ICC's Rules of Procedure and Evidence, the Chamber may make that choice for them to ensure effectiveness of the proceedings and a fair and expeditious trial which is a right of the accused.[116] Where the Chamber appoints legal representatives for victims, it works with the Registry to take all

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[112] Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015), pp. 3-4; Massidda, The Participation of Victims Before the ICC: A Revolution Not Without Challenges (2020) p. 37.

[113] See Decision on the Participation of Victims In The Trial Proceedings, *Banda*, Situation in Darfur, Sudan, ICC-02/05-03/09-545, TC IV, ICC, 20 March 2014, para 22; Nicole Samson, 'Dual Status Victim-Witnesses at the ICC: Procedures and Challenges,' in Rudina Jasini and Gregory Townsend (eds), Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice (University of Oxford 2020) pp. 43-56 ('Samson, Dual Status Victim-Witnesses at the ICC: Procedures and Challenges (2020)').

[114] See for example Decision on the Modalities of Victim Participation at Trial, *Katanga and Chui*, *Situation in The Democratic Republic of The Congo*, ICC-01/04-01/07-1788-tENG, TC II, ICC, 3 March 2010, para 60 ('Decision on the Modalities of Victim Participation at Trial, *Katanga and Chui*, ICC-01/04-01/07-1788-tENG, 3 March 2010'); Wemmers, Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate (2010) pp. 630-635. For a discussion on victim impact statements in domestic courts, and a consideration of a similar notion or role for victims in trials at the ICC, see Tonny Raymond Kirabira, 'Elements of Aggravation in ICC Sentencing: Victim Centred Perspectives', (2021) 13 (2) Amsterdam Law Forum 25, pp. 25-42.

[115] See Rule 90 (1) and (2); see Annex 1 Legal framework and experience to date on common legal representation, *Ruto, Kosgey, and Sang*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-243-Anx1, PTC II, ICC, 1 August 2011; para 5, and 7, fn. 5.

[116] The Ali Kushayb case is one example that the Court may adopt a restrictive approach vis a vis victims' distinctive interest. See *Ali Kushayb* Decision on Victims' Participation and Legal Representation in Trial Proceedings, ICC-02/05-01/20-494, 19 October 2021, paras 6-16; Information on Common Legal Representation *Ali Kushayb*, ICC-02/05-01/20-487, 14 October 2021, paras 5 -11; Order on the Organisation of Common Legal Representation of Victims, Katanga *and Chui*, *Situation In The Democratic Republic of The Congo*, ICC-01/04-01/07-1328, TC II, ICC, 22 July 2009, para 11 ('Order on the Organisation of Common Legal Representation of Victims, Katanga *and Chui*, ICC-01/04-01/07-1328, 22 July 2009'); Decision on common legal representation of victims for the purpose of trial, *Bemba*, *Situation in the Central African Republic I*, ICC-01/05-01/08-1005, TC III, ICC, 10 November 2010, paras 15 and 18-34.

reasonable steps to ensure that the distinct interests of victims are represented, and to avoid any conflict of interest.[117] The Chamber has made a choice of legal representation for victims in cases such as the *Ali Kushayb* case.[118] It is important that such measures do not inadvertently diminish victims' trust in the system of participation, and their sense of empowerment which may result in dissatisfaction.[119]

The ICC's practice of grouping victims based on crimes charged and assigning common legal representation for each group is a good practice[120] which can be maintained and improved.[121] Nonetheless, in identifying general interests of large number of victims, minority interests should not be disregarded,[122] to avoid collectivization of victims' voices which diminishes the

[117] There are other issues regarding victims' legal representations that are equally important for example, proximity of victims to their legal representatives and the need for them to have access to the Court. For a discussion on these, see Kendall and Nouwen, Representational Practices at The International Criminal Court: The Gap Between Juridified and Abstract Victimhood (2013), pp. 248-250.

[118] Ali Kushayb Decision on Victims' Participation and Legal Representation in Trial Proceedings, ICC-02/05-01/20-494, 19 October 2021, paras 6-10; See Rule 90 (1)-(3) IC Rules of Procedure and Evidence, Regulation 80 of the Regulations of the Court; See also Order on the Organisation of Common Legal Representation of Victims, Katanga *and Chui*, ICC-01/04-01/07-1328, 22 July 2009, paras 11-13.

[119] See Killean and Moffett, Victim Legal Representation before the ICC and ECCC (2017) pp. 715-740; Megan Hirst, 'Valuing Victim Participation: Why We Need Better Systems To Evaluate Victim Participation at The ICC' in FIDH, *Victims at the Center of Justice From 1998 – 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC* (2018), p. 11 ('Hirst, Valuing Victim Participation: Why We Need Better Systems To Evaluate Victim Participation at The ICC (2018)'); Human Rights Watch, 'Who Will Stand for Us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond' August 29, 2017, <https://www.hrw.org/report/2017/08/30/who-will-stand-us/victims-legal-representation-icc-ongwen-case-and-beyond#_ftn5> accessed 16 September 2022, pp. 11-12, (HRW, 'Who Will Stand for Us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond (2017)'); Yet for some other victims, the main issue may be having someone who represents their interests, not necessarily whether they participate in choosing the representative. See Suprun, Legal Representation of Victims Before the ICC: Developments, Challenges, and Perspectives (2016), p. 284; Second Decision on Victims' Participation in Trial Proceedings, *Ntaganda*, *Situation in the Democratic Republic of The Congo*, ICC-01/04-02/06-650, TC VI, ICC, 16 June 2015, paras 30-31 16.

[120] For an example of such grouping, see Order on the Organisation of Common Legal Representation of Victims, Katanga *and Chui*, ICC-01/04-01/07-1328, 22 July 2009, paras 8-13; War Crimes Research Office, 'International Criminal Court Legal Analysis and Education Project December 2011: Ensuring Effective and Efficient Representation of Victims at the International Criminal Court' (2011) pp. 3-9 <https://www.wcl.american.edu/wcl-american-edu/assets/wcro_report_15_-_victim_representation.pdf> accessed 27 December 2022.

[121] For a discussion of balancing the issues of efficiency and preserving victims' voices, see Emily Haslam and Rod Edmunds, 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?' (2012) 12 (5) International Criminal Law Review 871, pp. 871-903.

[122] See Alessandra Cuppini, 'A Restorative Response to Victims in Proceedings before the International Criminal Court: Reality or Chimaera?' (2021) 21 (2) International Criminal Law Review 313, pp. 327-328 ('Cuppini, A

meaning of 'personal views and concerns'.[123] Sehmi rightly asserts that this creates a danger of the legal representative becoming a place holder for the victims he or she has barely spoken to.[124] Where there are conflicting interests among different categories of victims,[125] for example regarding where an accused should be tried, the Court must look to the Rome Statute framework to resolve such interests.[126] The importance of victims' rights to participate and the complexities of victims' representation require the ASP and the ICC to do more to regularly monitor and ensure effectiveness of victims' legal representation[127] as a means of protecting

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Restorative Response to Victims in Proceedings before the International Criminal Court: Reality or Chimaera? (2021)'); Order on the Organisation of Common Legal Representation of Victims, Katanga *and Chui*, ICC-01/04-01/07-1328, 22 July 2009, para 10; Kendall and Nouwen, Representational Practices at The International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2013), pp. 248-250; Killean and Moffett, Victim Legal Representation before the ICC and ECCC (2017) pp. 739-740.

[123] Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the *Kenyatta* Case (2018), p. 581; Cuppini, A Restorative Response to Victims in Proceedings before the International Criminal Court: Reality or Chimaera? (2021), p. 338.

[124] See Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the *Kenyatta* Case (2018), p. 581. Rogers also notes the unpredictability of the model for victims' representation at the ICC which can make it difficult to achieve efficiency, even for the Court's resources. see Richard J. Rogers, 'Assessment of the ICC's Legal Aid System' (Global Diligence 2017) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf> accessed 16 September 2022, pp. 277 and 279.

[125] Order on the Organisation of Common Legal Representation of Victims, *Katanga and Chui*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1328, TC II, ICC, 22 July 2009, para 16; Emily Haslam and Rod Edmunds, 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?' (2012) 12 (5) International Criminal Law Review 871, pp. 890-891.

[126] Article 17 remains central to the issue of admissibility. See chapters three and four discussing complementarity, and victim-oriented complementarity.

[127] On qualification and experience of legal representatives for victims, see Rule 22 (1) ICC Rules of Procedure and Evidence; Suggestions have been made regarding a monitoring scheme for victims' legal representation and more generally on making their representation more effective. See Ray Nickson, 'Participation as Restoration: The Current Limits of Restorative Justice for Victim Participants in International Criminal Trials' in Kerry Clamp (ed), *Restorative Justice in Transitional Settings* (1st edn, Routledge 2016) pp. 137-160; Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020) pp. 4-32; HRW, Who Will Stand for Us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond (2017) pp. 3-4, and 7-59; Amnesty International and Redress Trust, 'Independent Panel of Experts Report on Victim Participation at The International Criminal Court' (2013) <https://redress.org/wp-content/uploads/2017/12/July-Independent-Panel-of-experts-report-on-victim-participation-at-the.pdf> accessed 16 September 2022 ('Amnesty International and Redress Trust, 'Independent Panel of Experts Report on Victim Participation at The International Criminal Court' (2013)'); Redress, 'Representing Victims before the ICC: Recommendations on the Legal Representation System' (April 2015) <https://redress.org/wp-content/uploads/2017/12/1504reprentingvictims.pdf> accessed 16 September 2022 ('Redress, 'Representing Victims before the ICC: Recommendations on the Legal Representation System' (2015)').

their voice and agency. [128] Also, victims should also be clearly informed and continuously reminded of the challenges of international criminal justice and its limitations.[129]

4.1.2 Modes of Victims' Participation

Since Article 68 (3) protects victims' rights and those of the accused, the Court is mindful of the need to balance these rights from the early stage where victims' applications are processed.[130] 'Once the Chamber has determined that the interests of victims are affected at a certain stage of the proceedings, it will determine if the [modality of participation requested] is appropriate and consistent with the rights of the defense to a fair and expeditious trial.'[131] The Rome Statute provides for specific victims' participation by submitting 'representations

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[128] Rule 90 (4) of ICC Rules of Procedure and Evidence; Annex 1 Legal Framework and Experience To Date On Common Legal Representation, *Muthaura, Kenyatta, and Ali*, *Situation in the Republic of Kenya*, ICC-01/09-02/11-214-Anx1, PTC II, ICC, 5 August 2011; Kendall and Nouwen, Representational Practices at The International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2013) p. 248; Redress, 'Representing Victims before the ICC: Recommendations on the Legal Representation System' (2015); Suprun, Legal Representation of Victims Before the ICC: Developments, Challenges, and Perspectives (2016) pp. 972-994; Killean and Moffett, Victim Legal Representation before the ICC and ECCC (2017) pp. 731-740; HRW, Who Will Stand for Us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond (2017) pp. 7-59; Registry Report on Common Legal Representation, *Ali-Kushayb*, *Situation in Darfur, Sudan*, ICC-02/05-01/20-477, TC I, ICC, 1 October 2021; Information on Common Legal Representation Ali Kushayb, ICC-02/05-01/20-487, 14 October 2021.

[129] Code of Professional Conduct for Counsel, Resolution ICC-ASP/4/Res.1 (adopted on 2 December 2005), Article 15(1) of the Code; Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015), pp. 4-5; Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022, para 36; Emily Haslam and Rod Edmunds, 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?' (2012) 12 (5) International Criminal Law Review 871, pp. 889-890, and 903.

[130] See Decision on the Registrar's Public "Request for instructions applications", *Ruto and Sang*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-147, PTC II, 28 June 2011, paras 6-10; Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Lubanga, Situation in the Republic of the Congo, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, para 37.

[131] OPCV Manual for Legal Representatives, (2018) pp. 28, 41 and 266; See also Decision on victims' participation, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1119, TC I, ICC, 18 January 2008, para 104; Decision on the 138 Applications for Victims' Participation in the Proceedings, *Mbarushimana*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/10-351, TC I, ICC, 11 August 2011, para 24; See Rules 50 (3), 87 (1), 88 (1), 89 (1) and Rule 91 of the ICC Rules of Procedure and Evidence; Articles 19 (3), 68 (1) and (3), 67 chapeaux, (1) (a)-(c), the listed articles and rules must be applied in accordance with Article 21 (3) ICCst.

or observations' through their legal representatives. This can happen in complementarity proceedings under Article 15 (3) covering *proprio motu* investigations, and 19 (3) regarding challenges to jurisdiction of the Court or of the admissibility of a case.[132] Both are crucial stages when the initiation or continuation of proceedings is at stake. Also, victims have a specific right to appeal any reparations decisions under Article 82 (4) which adversely affects their interest.[133] They can participate[134] generally when the Chamber seeks their views on certain matters in accordance with Article 68 (3) and Rule 93,[135] including for reparations pursuant to Article 75. Such a move by the chamber amounts to consulting victims, and in this instance, they can share their views and concerns. This also triggers a duty on the part of the Court to keep them notified about issues related to complementarity and other proceedings throughout the lifetime of the situation or case.[136] It is a key right of participation as through such notifications the legal

[132] See ICC Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006), paras 61-62; Notwithstanding, a closer examination of the Core Legal Texts of the Court and its case law will reveal that for victims to participate in most ICC proceedings, they must show how their personal interests are affected. See Massidda, The Participation of Victims Before the ICC: A Revolution Not Without Challenges (2020), p. 34; For discussions on different types of victims' participation scheme at the ICC, see for example, Carsten Stahn, Héctor Olásolo, and Kate Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC' (2006) 4 (2) Journal of International Criminal Justice 219, pp. 220-238; Baumgartner, Aspects of victim participation in the proceedings of the International Criminal Court (2009) pp. 414-416; Moffett, Justice for Victims Before the ICC (2014), pp. 97-100.

[133] Article 82 (4) ICCst.

[134] For a discussion of different forms of victims' participation in criminal justice processes, see Ian Edwards 'AN AMBIGUOUS PARTICIPANT: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 (6) The British Journal of Criminology 976, pp. 967-980; Wemmers, Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate (2010) pp 629-643.

[135] Article 68 (3) ICCst., Rule 93 of the ICC Rules of Procedure and Evidence; Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006), paras 61-62; Rule 93 covers a number of those instances including review by the Pre-Trial Chamber of Prosecutor's decision not to investigate under Article 53 (1) (a)-(b), Rule 107 and 109 ICC RPE, Rule 125 ICC RPE concerning decision to hold confirmation of hearing in the absence of a person concerned, Rule 128 Concerning amendment of charges, Rule 136 Regarding joint and separate trials for the accused persons, and Rule 191 regarding assurance provided by the Court under Article 93 (2), i.e. concerning non prosecution, detention or subjection to any restriction of personal freedom by the Court. Victims can make presentations during the confirmation of hearing. See ICC, Chambers Practice Manual (5th edn, 2021) para 51.

[136] Victims' provision of information to the Court has also been seen as a form of participation because this contributes significantly to the ability of the Court to begin preliminary examinations especially in the case of *proprio* motu proceedings under Article 15. The Statute and other core legal texts of the Courts make room for the notification of 'victims who provided information' or who made submissions, see Article 15 (6) ICCst, Rule 50 (1), and Rule 92 of the ICC's Rule of Procedure and Evidence.

representatives of victims can seek to work effectively to protect victims' interests at different stages of the proceedings, liaising with the necessary stakeholders within and outside the Court for this purpose.[137]

The ICC has established through its case law that the modalities of victims' participation must ensure that they participate meaningfully and not symbolically.[138] Nonetheless, the Court's case law suggest that in some instances their participation may be more symbolic than meaningful. This can be due to restrictions on access to proceedings or modalities of participation in some stages of proceedings. This is not only confusing but can be frustrating for legal representatives of victims especially those taking up their position at different stages of the proceedings and who may not be clear as to how to effectively strategize to protect victims' interests. Indeed, as Hirst and Sahyouni have questioned, how can victims fully exercise their Rome Statute Rights for justice to be done if they are not given adequate access to participate at crucial stages of proceedings?[139]

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[137] See Andreas Schüller and Chantal Meloni, 'Quality Control in the Preliminary Examination of Civil Society Submissions' in Morten Bergsmo, Carsten Stahn, (eds), *Quality Control in Preliminary Examination: Volume II*, (TOAEP 2018) pp. 521-551 ('Schüller and Meloni, 'Quality Control in the Preliminary Examination of Civil Society Submissions (2018)'); See also Chapter Five for a discussion of the composition of the proposed Complementarity Division and how it can improve synergies in the Court for realizing victim-oriented complementarity.

[138] See, for example, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006), para 71; Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Katanga and Chui*. *Situation in the Democratic Republic of The Congo*, ICC-01/04-01/07-474, PTC I, ICC, 13 May 2008, para 157 ('Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Katanga and Chui*, ICC-01/04-01/07-474, 13 May 2008'); Decision on Victims' Participation In Trial Proceedings, *Ntaganda, Situation in the Republic of The Congo*, ICC-01/04-02/06-449, PTC VI, ICC, 6 February 2015, paras 29-33; Preliminary Directions for Any LRV or Defence Evidence Presentation, *Ongwen*, *Situation in Uganda*, ICC-02/04-01/15-1021, TC IX, ICC, 13 October 2017, paras 2 (i); Massidda, The Participation of Victims Before the ICC: A Revolution Not Without Challenges (2020), p. 35.

[139] Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020), pp. 12-14.

4.1.3 Stages of Proceedings Determined to Be Appropriate for Victims' Participation

Victims need to first secure access to relevant stages of proceedings before they can exercise any rights to participate through the different modes of participation. A textual interpretation of Article 68 (3) suggests that victims can participate in early complementarity proceedings relating to preliminary examinations, or investigations during which time admissibility issues and deferral requests may be discussed and decided. The challenge remains that the language of Article 68 (3) is vague in this respect and provides no guidance on when victims can participate, except that it will be at 'appropriate' stages of the proceedings.[140] The decision is left to judges who possesses wide discretion on the matter and this has resulted in an inconsistent approach in how victims' right to participate is interpreted.[141] Victims' access to stages of proceedings varies depending on the specific context of each situation or case and the composition of the relevant Chamber.[142] In the DRC situation, the early approach to victims' participation was more favorable. The Pre-Trial Chamber adopted a broad approach to

[140] Also, Article 68 (3) does not offer clarity on what the mode of participation will be. See for example Wemmers, Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate (2010), pp. 632-633; Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008), pp. 793-794; Kelly, The Status of Victims Under the Rome Statute of the International Criminal Court (2013), p. 53; Mariana Pena, 'Victim Participation In The International Criminal Court: Victim Participation At The International Criminal Court: Achievements Made and Challenges Lying Ahead' (2010) 16 (2) ILSA Journal of International and Comparative Law 497, pp. 498-516.

[141] See the wording of Article 68 (3) which makes reference to the 'Court' which is to permit victims' participation during proceedings determined to be appropriate and which decides on the manner of participation; Hirst, Valuing Victim Participation: Why We Need Better Systems To Evaluate Victim Participation at The ICC (2018), pp. 11-12; See also Sara Kendall, 'Juridified Victimhood at the ICC' in (Rudina Jasini and Gregory Townsend, (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice* (University of Oxford 2020) pp. 141-148; Report of The Bureau on Victims and Affected Communities and The Trust Fund for Victims, Including Reparations and Intermediaries: Twelfth Session of the ASP, 20 - 28 November 2013 – The Hague, The Netherlands, (ICC-ASP/12/38 15 October 2013), para 10.

[142] Massidda, The Participation of Victims Before the ICC: A Revolution Not Without Challenges (2020), P. 35.

interpreting victims' right to participate in different stages of proceedings,[143] but this was later reversed by the Appeals Chamber.[144]

Victims' participation is largely determined by their 'personal interests' in such proceedings,[145] and their mode of participation must not be prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.[146] In some cases, the relevant chambers ruled that personal interest requirements are met when victims can show a connection to the issues which are subject matter of the proceedings.[147] Such personal interests include seeking determination of the truth concerning the events they experienced, wishing to see the perpetrators of the crimes they suffered brought to justice, obtaining protective measures, or reparations.[148] This

[143] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006) para. 63. This is further discussed in the section below on victims' participation in the investigation stage.

[144] See below discussion on victim's participation during investigations section 4.2.4.1; See also Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', Situation in The Islamic Republic of Afghanistan, ICC-02/17-62, PTC II, ICC, 17 September 2019, paras 18- 25; Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua from the Appeals Chambers Decision Regarding Victims' Leave to Appeal, Situation in the Islamic Republic of Afghanistan, ICC-02/17-62-Anx, 17 September 2019.

[145] Pre-Trial Chamber I in the *Lubanga* case was of the view that with regards to specific victims' participation victims did not need to prove the personal interest requirement. See Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006), paras 61-76. For a discussion on how the Court explains 'personal interests', see Decision on the Modalities of Victim Participation at Trial, Katanga and Chui, ICC-01/04-01/07-1788-tENG, 3 March 2010, paras 58-64; Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008) pp. 797-801.

[146] See Articles68 (3) and (5), 64, 67, and 69 (2) and (4) interpreted in accordance with 21 (3) ICCst.; Rules 91, 101, 128, 132 *bis*, and 81 ICC Rules of Procedure and Evidence; See also Decision on the Defence Observations Regarding the Right of the Legal Representatives of Victims to Question Defence Witnesses and on the Notion Of Personal Interest -and Decision On The Defence Application To Exclude Certain Representatives Of Victims From The Chamber During The Non-Public Evidence of Various Defence Witnesses, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2340, TC I, ICC, 11 March 2010, paras 34-35.

[147] See for example, Reasons for the Appeals Chamber's Oral Decision Dismissing as Inadmissible the Victims' Appeals Against the Decision Rejecting the Authorisation of an Investigation into The Situation in Afghanistan, ICC-02/17-137, 4 March 2020.

[148] See Decision on victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 10 August 2007, paras 96-99; Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Katanga and Chui*, ICC-01/04-01/07-474, 13 May 2008, 13 May 2008, paras 35-36, 41-44; Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008) p. 788; Judgment on The Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation, ICC-01/04-01/06-1432, 11 July 2008, paras 3-4, 97-99; Decision on the Modalities of Victim Participation at Trial, Katanga and Chui, ICC-01/04-01/07-

means that victims can potentially access complementarity proceedings. However, this is not certain especially if they occur during the investigation stage,[149] thereby obscuring the scope and meaning of 'personal interests'. This creates a legal problem since the 'personal interests' of victims is the determinant factor for when they can participate,[150] and calls for the Chambers to clarify the parameters of victims' participation. This can come in the form of an updated Chambers Practice Manual addressing specific issues of victims' participation. Such clarity is important given that victims' Rome Statute rights hinge on their ability to participate, the mode of participation, and stages in which they are allowed to participate.

4.1.4 A Narrow Approach to Victims' Right to Participate in Early Stage, and Interlocutory Proceedings

Complementarity proceedings can occur during investigations in the context of situations, and during the pre-trial, and the trial stages in the context of a case.[151] Victims' ability to participate in early-stage complementarity proceedings (i.e., during preliminary examination and

1788-tENG, 3 March 2010, paras 59-61; Decision (i) Ruling on Legal Representatives' Applications to Question Witness 33 and (Ii) Setting A Schedule for the Filing of Submissions in Relation to Future Applications to Question Witnesses, *Bemba*, Situation in the Central African Republic, ICC-01/05-01/08-1729, TC III, ICC, 12 September 2011, paras 15-16.

[149] Judgment on Victim Participation in the Investigation Stage of The Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I Of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, Situation in the Democratic Republic of the Congo, ICC-01/04-556, AC, ICC, 19 December 2008, paras 56-57 ('Judgment on Victim Participation in the Investigation Stage of The Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I Of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008'); Olásolo, and Kiss, 'The role of Victims in Criminal Proceedings Before the International Criminal Court' (2010), pp. 138-144.

[150] See for example, Trumbull, Victims of Victim Participation in International Criminal Proceedings (2008) pp. 790-801; Olásolo, and Kiss, 'The role of Victims in Criminal Proceedings Before the International Criminal Court' (2010) pp. 130-162; Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020), pp. 12-14.

[151] The Pre-Trial stage is where the confirmation of charges takes place following an investigation. See ICC 'Pre-Trial Stage', <https://www.icc-cpi.int/about/how-the-court-works> accessed 18 September 2022.

investigations) and in any interlocutory proceedings[152] is crucial because several decisions are made in such proceedings which can affect how justice is pursued and shaped.[153] These include decisions on the scope of investigations and charges, and on the conduct of proceedings.

4.1.4.1 Victims' participation at the investigation stage

Victims' personal interests may be affected by decisions taken during the Prosecution's investigation and may give rise to procedural rights for victims. For example, the Prosecutor may decide to defer an investigation, deprioritize, postpone or to hibernate some aspects of the investigation, thereby temporarily reducing its scope.[154] There are few instances when judges might consider it appropriate for victims to participate in these proceedings.[155] In the DRC situation the Pre-Trial Chamber granted victims the right to participate at the investigation

[152] See Chapter Five Section 4.1 discussion of the possibility of avoiding the need to resort to judicial interventions through the proposed Complementarity Division, an inclusive complementarity division that can replace the JCCD.

[153] Decision on Victim Participation in the Appeal of the Office of Public Counsel for the Defence Against Pre-Trial Chamber I's Decision of 7 December 2007 and in the Appeals of the Prosecutor and the Office of Public Counsel for the Defence Against Pre-Trial Chamber I's Decision of 24 December 2007, *Situation in the Democratic Republic of the Congo*, ICC-01/04-503, AC, ICC, 30 June 2008, paras 36, 94-97; Decision on the Modalities of Victim Participation at Trial, *Katanga and Chui*, ICC-01/04-01/07-1788-tENG, 3 March 2010, paras 58-60; ICC, VPRS, Victims' Booklet, p. 20; OPCV Manual for Legal Representatives, (2018) pp. 39-41.

[154] This is also discussed in Chapter Five. Thomas Weatherall, 'The Evolution of "Hibernation" at the International Criminal Court: How the World Misunderstood Prosecutor Bensouda's Darfur Announcement' (2016) 20 (10) American Society of International Law <https://www.asil.org/insights/volume/20/issue/10/evolution-hibernation-international-criminal-court-how-world> accessed 18 September 2022; See Notification on Status of the Islamic Republic of Afghanistan's Deferral Request, ICC-02/17-142, 16 April 2021; Amnesty International, 'New Opinion Piece Series: The Cost of Hibernated Investigations' 26 July 2021 <https://hrij.amnesty.nl/the-cost-of-hibernated-icc-investigations-blog-series/> accessed 18 September 2022 ('Amnesty International, 'New Opinion Piece Series: The Cost of Hibernated Investigations' 26 July 2021'); Statement of the Prosecutor of The International Criminal Court, Karim A. A. Khan QC, Following the Application for An Expedited Order Under Article 18 (2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan (2021); Decision on the "Victims' Request for Review of Prosecution's Decision to Cease Active Investigation", *Situation in the Republic of Kenya*, ICC-01/09-159, PTC II, ICC, 5 November 2015.

[155] ICC, VPRS, Victims' Booklet, p. 20; Decision on Submissions Received and Order to the Registry Regarding the Filing of Documents in the Proceedings Pursuant to articles 18 (2) and 68 (3) of the Statute, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-171, PTC II, ICC, 8 November 2021, para 12; See also Sara kendall, 'Restorative Justice at The International Criminal Court' (2018) 70 (2) Revista Española de Derecho Internacional 217, pp. 219-220.

stage,[156] stating that '[their personal interests] are affected in general at the investigation stage, since [their participation] at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.'[157]

What appeared to be a win for victims was short-lived as the Appeals Chamber[158] reversed the Pre-Trial Chamber's ruling and limited victims' participation at the investigation stage.[159] The Appeals Chamber clarified that victims did not have any 'general rights' to participate at this stage of proceedings,[160] and that participatory rights can only be granted under article 68 (3) of the Statute once the requirements of that provision have been fulfilled. The Chamber added that 'victims are not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations, provided their 'personal interests' are affected by the

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[156] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006), paras 46-63.

[157] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006), para. 63; The Appeals Chamber subsequently held that 'the Pre-Trial Chamber cannot grant the procedural status of victim entailing a general right to participate in the investigation'. See Judgment on Victim Participation in the Investigation Stage of The Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I Of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, paras 56-59.

[158] There have been some dissenting opinions regarding victims' participatory rights during pre-trial (including complementarity) proceedings and interlocutory proceedings. See for example Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua from the Appeals Chambers Decision Regarding Victims' Leave to Appeal, Situation in the Islamic Republic of Afghanistan, ICC-02/17-62-Anx, 17 September 2019; Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019; Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020.

[159] Judgment on Victim Participation in the Investigation Stage of The Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I Of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008; Reasons for the Appeals Chamber's Oral Decision Dismissing As Inadmissible The Victims' Appeals Against The Decision Rejecting The Authorisation of an Investigation into the Situation in Afghanistan, ICC-02/17-137, 4 March 2020.

[160] Judgment on Victim Participation in the Investigation Stage of The Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I Of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, Paras 55-57.

issues arising for resolution.'[161] This ruling confirms the uncertainties regarding victims' participation especially in relation to early-stage proceedings involving complementarity determinations.

Also in the DRC Situation, the Appeals Chamber made clear that investigations are not considered judicial proceedings, and victims' participation should be within judicial proceedings.[162] This can affect procedural aspects of justice as victims will be limited in their participation (an important means of procedural justice) which can in turn affect their ability to avail of assistance and receive reparations (a type of substantive justice). For instance, victims' interests in the conduct of broad investigations may not align with the OTP's approach to investigation and case selection in a situation. The Prosecutor's selection of cases and charges should be determined *inter alia* by evidence, the correct legal characterization of crimes, and ability to prove the guilt of the accused beyond reasonable doubt, but these do not always explain the unusual narrow approach to some situations. The *Lubanga* case from the DRC Situation is instructive given that some victims sought to expand the charges which the Prosecutor brought in accordance with Regulations 55 of the Regulations of the Court.[163] By the end of the case, there was a limited number of victims who were able to access reparations also due to the limited nature of the charges for which Mr Thomas Lubanga Dyilo was

[161] Judgment on Victim Participation in the Investigation Stage of The Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I Of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, para 56; For commentary on the 'personal interests' requirement, see Rojo, Commentary on Article 68 Protection of the victims and witnesses and their participation in the proceedings (2017) pp. 519-523.

[162] see Judgment on Victim Participation in the Investigation Stage of The Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I Of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, para. 45.

[163] See Regulations 55 of the Regulations of the Court; Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure Under Regulation 55 of the Regulations of the Court, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1891-tENG, TC I, ICC, 16 July 2009.

eventually convicted.[164] This meant that those victims who do not fall within this category of victims of the crimes he was convicted for could not access reparations. Reparations is only one aspect of justice for victims, but procedural justice is as crucial as substantive justice. Recent ICC case law does not paint a good picture of the ICC's practice in this regard.[165]

4.1.4.2 Victims' Participation in Interlocutory Proceedings

Victims' rights to appeal ICC decisions and to participate in interlocutory proceedings have been contentious.[166] In some cases, the Court granted them participatory rights in appeal proceedings, but not standing to appeal the Court's decision.[167] In the Afghanistan situation,

[164] Trust Fund for Victims, Factsheet (4 March 2021) <https://www.trustfundforvictims.org/en/news/factsheet-4-march-2021-collective-reparations-form-services-victims-crimes-which-thomas> 19 September 2022.
[165] See Chapters Six discussions of more ICC's situations including Afghanistan and CAR II in relation to hibernation and deprioritization of situations and cases.
[166] For a detailed discussion on victims' rights of appeal see Juan-Pablo Perez-Leon-Acevedo, 'Victims and Appeals at The International Criminal Court (ICC): Evaluation Under International Human Rights Standards' (2021) 25 (9) The International Journal of Human Rights 1598, pp. 1598-1619; Rojo, Commentary on Article 68 Protection of the victims and witnesses and their participation in the proceedings (2017), p. 522.
[167] See for example *Lubanga*, Decision on the Participation of Victims in the Appeal, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1453, AC, ICC, 6 August 2008, para 12; Decision on the Participation of Victims in The Appeals Against Trial Chamber I's Conviction and Sentencing Decisions, *Lubanga*, *Situation in the Democratic Republic of the Congo*, AC, ICC, ICC-01/04-01/06-2951, 13 December 2012, para 3; Decision on the Admissibility of the Appeals against Trial Chamber I's "Decision Establishing the Principles and Procedures to Be Applied to Reparations" and Directions on the Further Conduct Oof Proceedings, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2953, AC, ICC, 14 December 2012; FIDH, 'New ICC Judges Must Ensure the Meaningful Participation of Victims in Criminal Proceedings' (2020) <https://www.fidh.org/IMG/pdf/iccjudges759ang_final.pdf> accessed 19 September 2022.

the Pre-Trial Chamber[168] and the Appeals Chamber[169] dismissed victims' request to appeal their respective admissibility decisions for lack of standing. According to the Pre-Trial Chamber, those victims did not qualify as 'either party' within the meaning of Article 82 (1) of the Statute,[170] notwithstanding that the requirements for filing an appeal under Article 82 was met.[171] The Pre-Trial Chamber opined that they were not fully victims for the purposes of Rule 85, rather they were 'potential victims'[172] who participated at the Article 15 communication

[168] Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-62, PTC II, ICC, 17 September 2019; Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua from the Appeals Chambers Decision Regarding Victims' Leave to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-62-Anx, 17 September 2019; For the Prosecutor and LRV 1's requests for leave to appeal, see respectively, Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-34, PTC II, ICC, 7 June 2019; Victims' Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-37, PTC II, ICC, 10 June 2019.

[169] *Situation in the Islamic Republic of Afghanistan*, Transcript of Hearing (Appeals), 4 December 2019, ICC-02/17-T-001-ENG ET WT; *Situation in the Islamic Republic of Afghanistan*, Transcript of Hearing (Appeals), 5 December 2019, ICC-02/17-T-002-ENG ET WT, pp. 2-5; *Situation in the Islamic Republic of Afghanistan*, Transcript of Hearing (Appeals), 6 December 2019, ICC-02/17-T-003-ENG ET WT; Reasons for the Appeals Chamber's Oral Decision Dismissing as Inadmissible the Victims' Appeals Against the Decision Rejecting the Authorisation of an Investigation into The Situation in Afghanistan, ICC-02/17-137, 4 March 2020, paras 11-23.

[170] Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-62, 17 September 2019, paras 22-26 and 30.

[171] See Submissions in the General Interest of the Victims on the Prosecution's Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" (ICC-02/17-34), *Situation in the Republic of Afghanistan*, ICC-02/17-59, PTC II, ICC, 12 July 2019 ('OPCV Submissions in the General Interest of the Victims on the Prosecution's Request for Leave to Appeal the Afghanistan PTC II Decision, ICC-02/17-59, 12 July 2019'), paras 11-52 outlined this criteria and how the victims' interests were affected. "The Issues arising from the Decision impact on the fair and expeditious conduct of the proceedings or their outcome and as such affect the interests of the Victims." see para 18.

[172] Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-62, 17 September 2019, paras 17-26 regarding the issue of 'potential victims' can be contrasted with the Pre-Trial Chamber I's approach in Bangladesh/Myanmar situation. See Request Under Regulation 46(3) of The Regulations Of The Court: Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-RoC46(3)-01/18-37, PTC I, ICC, 6 September 2018, para 21; See also Order Setting the Procedure and the Schedule for the Submission of Observations, Situation in the State of Palestine, ICC-01/18-14, PTC I, ICC, 28 January 2020, paras 13-14; Kendall and Nouwen, Representational Practices at The International Criminal Court: The Gap Between Juridified and Abstract Victimhood (2013), pp. 241-252.

(preliminary examination) phase.[173] This means that victims' participation in such an instance may be limited to sharing information with the Court and where possible being notified of updates.

Judge Mindua of the Pre-Trial Chamber,[174] and Judge Ibanez Carranza of the Appeals Chamber[175] have expressed their opinions on the impact of the Court's approach to victims' participation, arguing that victims should have standing to appeal such a decision. Granting victims standing to appeal this type of decision could improve their position. Nonetheless, it would not comprehensively address other issues required for victim-oriented justice such as their representation in the ICC's complementarity mechanism.[176] A narrow approach to victims' procedural rights means that if their views and concerns are not adequately taking into account at early and crucial stages of proceedings, justice may not be served or the shape of

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[173] Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-62, 17 September 2019, paras 17-26. Note that the Pre-Trial Chamber II in its 31 October 2022 decision authorizing the Prosecutor to resume investigations into the Afghanistan Situation, clarified that its use of the term 'potential victims' was solely to "distinguish individuals whose applications have not yet gone through the application process pursuant to rule 89 of the Rules, (…) on the one hand, from those individuals who have been admitted to participate in proceedings as victims through the rule 89 procedure, on the other. (…)." See Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022, para 32.

[174] Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua from the Appeals Chambers Decision Regarding Victims' Leave to Appeal, Situation in the Islamic Republic of Afghanistan, ICC-02/17-62-Anx, 17 September 2019, paras 17-49.

[175] See Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019, Para 54; Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020, paras 1-3, and 7-78.

[176] This is further discussed in chapters four to six.

justice could be severely distorted.[177] The more restricted their participatory rights are, the higher degree of negative impact it will have on substantive outcomes.[178]

For victims to avail of their rights to participate, they need assurances of protection not least because of the nature of the harm suffered, to avoid revictimization and to protect their privacy. Victims would need adequate legal representation which may be costly to retain, and they may need other kinds of support during the process which may span several years. The next section discusses victims' protection, assistance and reparations which are crucial components of justice for victims.

4.2 Victims' Protection

The protection of victims is extremely important to ensure that their interaction with the ICC does not result in further harm to them, given the challenges ICTY's and ICTR's challenges in this regard.[179] Victims' protection is pivotal to their continued participation in all proceedings.[180] Without this they may feel very unsafe to engage with the Court.[181] Where the

[177] Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the *Kenyatta* Case (2018) pp. 571-591; See for example the Kenyan Situation where charges were withdrawn and some vacated for three accused persons, leaving victims of the situations with little or no hope of justice, ICC, *Situation in the Republic of Kenya*, ICC-01/09 <https://www.icc-cpi.int/kenya> 19 September 2022; Kendall and Nouwen, Representational Practices at The International Criminal Court: The Gap Between Juridified and Abstract Victimhood (2013), pp. 241-252; Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the *Kenyatta* Case (2018), pp. 572-573.

[178] Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019, para 28; Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020, paras 25, 31-50; OPCV Submissions in the General Interest of the Victims on the Prosecution's Request for Leave to Appeal the Afghanistan PTC II Decision, ICC-02/17-59, 12 July 2019, paras 1-2, 6-7 14-16, 48-49.

[179] Göran Sluiter, 'The ICTR and the Protection of Witnesses' (2005) 3 (4) Journal of International Criminal Justice 962, pp. 962-976; Human Rights Watch, Commentary for the March-April Preparatory Committee Meeting <https://www.hrw.org/legacy/campaigns/icc/docs/icc0398.htm> accessed 19 September 2022.

[180] See Article 68 (1) of the Rome Statute.

[181] Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015), p. 4.

ICC's engagement galvanizes local redress mechanisms through positive complementarity, victims may feel unsafe to engage with domestic authorities unless there are guarantees of protection.[182] Article 68 (1) mandates the Court to take appropriate measures to holistically[183] protect the safety, physical and psychological well-being, dignity, and privacy of victims, including dual status victims-witnesses.[184] It also provides that the Court must have regard to all relevant factors including age, gender, the nature of the crime, for example sexual or gender-based violence, or violence against children.

Protection of victims is an absolute duty for all ICC organs, and in the case of victim-witnesses the party or participant calling the witness is also responsible for their protection.[185] As Cattin asserts, no derogation from this mandate is allowed because the requirement to protect victims is engrained in the prevention of secondary victimization.[186] The Victims and Witnesses Unit (VWU) has the special function of advising the Prosecutor, the Court and other victims' units on appropriate protective measures, security arrangements, counselling, and assistance[187] for

[182] See Chapter Four which discusses minimum victim-oriented requirements for deference.
[183] See for example, Regulations of the Registry, Regulation 79 regarding general provisions to prevent further harm, suffering or trauma for the witnesses, 81 on travel, 82 on accommodation, 83 (2) on support for duration of stay at the seat of the Court or site of judicial proceedings, 89 on health care and wellbeing, 90 on dependent care, 91 on accompanying support person, on 92 security arrangements, Regulation 93 on location protection measures; Victims and Witnesses Unit Recommendations on Psycho-Social in-Court Assistance, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1149, TC I, ICC, 31 January 2008, paras 7- 8; Principles 4 and 6 (d), UN Victims' Declaration UNGA Res 40/34; Principle 10, UNBPG, UNGA Res 60/147.
[184] Article 68 (1) ICCst.
[185] Article 68 (1) ICCst.; Decision on Various Issues related to Witnesses' Testimony during Trial, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1140, TC I, ICC, 29 January 2008, para. 36; Human Rights Watch, 'Courting History: The Landmark International Criminal Court's First Years' (2008) <https://www.hrw.org/reports/2008/icc0708/icc0708webwcover.pdf> accessed 30 September 2022, pp. 151-155 ('Human Rights Watch, Courting History: The Landmark ICC's First Years (2008)').
[186] Donat-Cattin, Victims' Rights in the International Criminal Court (2019) pp. 421-422.
[187] Article 68 (4) and 43 (6) ICCst.

victims and those accompanying them.[188] Per the ICC's Rules of Procedure and Evidence, victims are to be consulted before such measures are put in place[189] to obtain their consent.[190]

Although the ICC's protection system is advanced, it has not been without its challenges particularly in some early ICC situations. For instance, one of the Court's protection mechanisms called the Initial Response System,[191] relies on local security forces who may have corrupt persons, and persons linked to the accused. Such possible connection has resulted in victims and witnesses being attacked because of their involvement with the Court, as was obtainable in the Kenyan Situation.[192] The Court has developed its measures to include the use of sealed proceedings where necessary across different stages of the proceedings, ensuring that legal representatives of victims are kept informed of issues relating to victims' security.[193]

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[188] ICC, 'Victims Before the Court' <https://www.icc-cpi.int/sites/default/files/Publications/VictimsENG.pdf> 19 September 2022.

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[190] See Article 68 (1) and (2) ICCSt.; Rule 87 (1) ICC Rules of Procedure and Evidence; Gioia Greco 'Victims' Rights Overview Under the ICC Legal Framework: a Jurisprudential Analysis' (2007) 7 (2-3) International Criminal Law Review 531, p. 545.

[191] Human Rights Watch, Courting History: The Landmark ICC's First Years (2008) pp. 152-153; Understanding the International Criminal Court (2020) <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> accessed 19 September 2022, p. 61.

[192] See 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*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-896-Corr-Red, TC V (A), 5 September 2013; See also, Moffett, Justice for Victims Before the ICC (2014) pp. 140-141; Stephen Smith Cody, Alexa Koenig, and Eric Stover, 'Witness Testimony, Support, and Protection at the ICC' In Kamari M. Clarke , Abel S. Knottnerus and Eefje de Volder, (eds), *Africa and the ICC Perceptions of Justice* (CUP 2016) pp. 301-318; Donat-Cattin, Victims' Rights in the International Criminal Court (2019), p. 422; For the security issues in Kenya, see Human Rights Watch, 'Kenya and the International Criminal Court: Questions and Answers January 2011' <https://www.hrw.org/sites/default/files/related_material/QA%20-%20Kenya%20and%20the%20ICC%2001.25.11.pdf> accessed 20 September 2022 ('Human Rights Watch, 'Kenya and the International Criminal Court: Questions and Answers (2011)').

[193] Judgment on Victim Participation in the Investigation Stage of The Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I Of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, para 54; Rojo, Commentary on Article 68 Protection of the victims and witnesses and their participation in the proceedings (2017), pp. 514-520; Donat-Cattin, Victims' Rights in the International Criminal Court (2019), pp. 421-422; Nicole Samson, 'Dual Status Victim-Witnesses at the ICC: Procedure and Challenges' in (Rudina Jasini and Gregory Townsend, eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice* (University of Oxford, 2020) pp. 43-56; ICC, 'Witnesses' <https://www.icc-cpi.int/about/witnesses>, accessed 20 September 2022.

4.3 Victims' Assistance

Victims' ability to participate at the ICC can be facilitated through assistance. There are two types of assistance to victims: legal aid for victims' participation, and the Assistance Mandate of the TFV. The TFV's assistance provided to victims is not concerned with helping victims to participate. It is a mechanism of the TFV which focuses on providing rehabilitation measures and other types of support to victims of a situation when there is an investigation, and it is independent of a specific case before the Court.[194] This means that victims of the broader situation can avail of assistance programs.[195] The following parts explains these two types of assistance for victims and their relevance in the pursuit of justice for victims.

4.3.1 Legal Assistance for Victims

Not all legal representatives of victims have experience working at international criminal courts and tribunals. Their expertise in domestic jurisdictions is vital, but it is equally important to ensure that they work with other legal representatives with knowledge and experience in international criminal justice who can help them navigate this area of law. Hiring such legal representatives can be costly for victims, and the majority may not be able to bear such costs.[196]

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[194] See Trust for Fund for Victims, 'Providing reparative value for victims and survivors' <https://www.trustfundforvictims.org/en> accessed 19 September 2022; The Trust Fund for Victims, 'Assistance Programmes' <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes> accessed 7 January 2023; ICC Press Release ICC-TFV-20170517-PR1304, 'Trust Fund for Victims Decides to Launch Assistance Programme in Côte d'Ivoire' (2017) <https://www.icc-cpi.int/news/trust-fund-victims-decides-launch-assistance-programme-cote-divoire> accessed 19 September 2022.

[195] See Regulations 47 and 48 of the Trust Fund for Victims; The Trust Fund for Victims, 'Assistance Programmes' <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes> accessed 07 January 2023.

[196] William Schabas, An Introduction to the International Criminal Court (5th edn, CUP 2017), p. 344; Amnesty International and Redress Trust, 'Independent Panel of Experts Report on Victim Participation at The International

The ICC has adopted the use of legal aid[197] which is an essential part of criminal justice process for defendants and for victims. It is regulated by the ICC Rules of Procedure and Evidence, the Regulations of the Court, and that of the Registry.[198] Rule 90 (5) makes provision for victims to receive as appropriate, financial assistance to pay for a common legal representative chosen by the Court.[199] When compared to the defense teams representing one or two defendants, legal aid at the ICC is provided only for one victims' counsel who will usually represent large number of victims scattered over long distances.[200] Therefore, there is a need to improve the administration of the ICC's Legal Aid to ensure effective and meaningful victims' participation.

The definition of victims discussed earlier in Chapter One[201] may affect access to legal aid by individuals who the ICC consider 'potential victims' participating in preliminary examinations and earlier stages of investigations. The Office of Public Counsel for Victim's work can help to close some gaps, yet it is currently limited in its own ability to participate at that stage. In

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Criminal Court' (2013) pp. 27-32; Maria Radziejowska, 'Meaningful Victim Participation–But Only if You Can Pay or It?' (Beyond The Hague Thoughts on International Justice from The Hague and Beyond, 15 June 2016) <https://beyondthehague.com/2016/06/15/meaningful-victim-participation-but-only-if-you-can-pay-for-it/> accessed 20 September 2022.

[197] For more detail on ICC's legal aid program, see for example, ASP, Registry's Single Policy Document on The Court's Legal Aid System, Twelfth Session The Hague, 20-28 November 2013, The Hague, The Netherlands, ICC-ASP/12/3, 4 June 2013; ICC, Legal Aid Policy of the International Criminal Court: Amendment proposal, 15 September 2018 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/css/Draft_LAP-1.2_ENG.pdf> accessed 20 September 2022; Amnesty International, Independent Panel of experts report on victim participation at the International Criminal Court (July 2013) < https://www.amnesty.org/en/documents/ior53/001/2013/en/> accessed 10 March 2022; Redress, Representing Victims before the ICC: Recommendations on the Legal Representation System (April 2015); HRW, Who Will Stand for Us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond (2017) p. 8, and 20-21; International Bar Association, 'Priorities and Recommendations for the 19th Session of the International Criminal Court Assembly of States Parties' December 2020 <https://www.ibanet.org/MediaHandler?id=35647a75-e765-4d19-bc4d-37399224178a > accessed 20 September 2022, pp. 9-11; Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020) pp. 14-16.

[198] See Article 67 ICCst. (for defendants), and Rule 90 (5) of the ICC's Rules of Procedure and Evidence, Regulation 83 (2) Regulations of the Court, and Regulation 113 Regulations of the Registry (for victims).

[199] Rule 90 (5) ICC Rules of Procedure and Evidence.

[200] Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020), pp. 9-10.

[201] See Chapter One, Section 1.1.

Chapter Five, the thesis outlines ways in which a new complementarity mechanism can improve victims' access to complementarity proceedings.

4.3.2 Assistance Mandate of the TFV

Even where legal aid is available for victims to cover the costs of a good legal representative, there may still be the need for other kinds of assistance which the legal representative cannot provide to the victims. Article 79 of the Statute provides that the Trust Fund shall be for the benefit of victims.[202] The TFV has a two-fold mandate: (1) to implement Court-Ordered reparations-the Reparations Mandate, and (2) to provide physical, psychological, and/or material support to victims and their families-the Assistance Mandate.[203] The Assistance Mandate is important because it is not tied to the guilt of an accused and can be used to benefit victims during preliminary examinations or investigations stage.[204] It shows that the Court is being responsive to victims' needs, i.e., in this manner being victim oriented.

Assistance Projects which commence early during these periods offer a lifeline to victims to address some practical needs such as varied health care needs, and it can give hope and strength to victims to continue participating in what is often a long process.[205] Assistance Projects offered at the end of proceedings generate a new ray of hope to victims who may have otherwise lost hope because they were not considered victims of charges for which a perpetrator was convicted. This could also be because the OTP could not secure a conviction

[202] See also 98 (5) Rules of Procedure and Evidence.
[203] ICC 'Trust Fund for Victims', <https://www.icc-cpi.int/tfv> accessed 20 September 2022.
[204] The Trust Fund for Victims, 'Assistance Programmes' <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes> accessed 07 January 2023.
[205] See Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the *Kenyatta* Case (2018), p. 571; Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015), p. 4.

for various purposes including the collapse of the cases. In the *Bemba* case,[206] and in the Kenyan situation,[207] despite some commendable efforts by the Court to ensure victims' participation and their protection by for example modifying the application process,[208] majority of the cases failed.[209] At the time of writing, the TFV has implemented three assistance projects in Uganda,[210] the Central African Republic, and the Democratic Republic of the Congo,[211] and four more are under construction in Côte d'Ivoire, Mali, Georgia, and Kenya.[212]

The ICC has recognized the importance of projects that offer assistance to victims,[213] perhaps due to the limitations of reparations. For example, Dixon notes that there will always be forms of harm, and immediate needs that fall outside the boundaries of reparations programs. This makes the TFV Assistance mandate a useful and necessary tool of victim-oriented justice to

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[206] Trust Fund for Victims, 'Central African Republic', <https://www.trustfundforvictims.org/en/locations/central-african-republic> accessed 20 September 2022.

[207] *Situation in the Republic of Kenya*, ICC-01/09 <https://www.icc-cpi.int/situations/kenya> accessed 29 December 2022; The Trust Fund for Victims, Decisions taken by the Board of Directors of the Trust Fund for Victims September to December 2020 (4 March 2021) <https://www.trustfundforvictims.org/index.php/en/news/decisions-taken-board-directors-trust-fund-victims-september-december-2020> accessed 20 September 2022.

[208] Decision on Victims' Representation And Participation, *Muthaura and Kenyatta*, *Situation in The Republic of Kenya*, ICC-01/09-02/11-498, TC V, ICC, 3 October 2012; Decision on Victims' Representation and Participation, *Ruto and Sang*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012; Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the *Kenyatta* Case (2018), pp. 572-578.

[209] Only two cases regarding offences against the administration of justice are pending. *Situation in the Republic of Kenya*, ICC-01/09 <https://www.icc-cpi.int/situations/kenya> accessed 29 December 2022; Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the *Kenyatta* Case (2018), pp. 572-578.

[210] Trust Fund for Victims 'Northern Uganda', <https://www.trustfundforvictims.org/en/locations/northern-uganda> accessed 20 September 2022.

[211] Trust Fund for Victims, 'Central African Republic', <https://www.trustfundforvictims.org/en/locations/central-african-republic> accessed 20 September 2022; The Trust Fund for Victims, TFV Management Brief Q3/2021 1 July – 30 September 2021 < https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Management%20Brief%20Q3_2021_ENG.pdf> accessed 20 September 2021, pp. 16-19; FIDH Press Release, 'The Bemba Case: Heavily Criticized, The ICC Must Maintain Victims' Legal Representation As The Establishment Of Assistance Programs For Victims is Awaited', (2018), <https://www.fidh.org/en/region/Africa/central-african-republic/the-bemba-case-heavily-criticised-the-icc-must-maintain-victims-legal> accessed 20 September 2022.

[212] The Trust Fund for Victims, 'Assistance Programmes' <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes> accessed 07 January 2023.

[213] ICC, Trust Fund for Victims (TFV): Background Summary, (August 2008) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV_Background_Summary_Eng.pdf> accessed 20 September 2022.

address some of these shortcomings.[214] However, the TFV is not always able to act swiftly even with Assistance Programs which take 7.5 years on average for commencement[215] following victims' harms,[216] and its resources[217] are limited compared to the number of victims of situations before the Court. These highlight the need for states to provide more comprehensive assistance and reparation to victims, additional or external to what the ICC provides.[218]

4.4 Reparations for Victims

In addition to victims' participation, protection and assistance which are important procedural aspects of victim-oriented justice, reparation is a crucial substantive outcome. It serves a unique expressive function that victims deserve redress for the harm they suffered. This is enshrined

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[214] Peter J. Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2016) 10 (1) International Journal of Transitional Justice, 88, pp. 88-107 ('Dixon, Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo (2016)').

[215] This is derived from calculating the total number of years it took to commence each Assistance Project after issuance of arrest warrant, or commencement of investigation, divided by the total number of current programs and those under construction. See The Trust Fund for Victims, 'Assistance Programmes' <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes> accessed 07 January 2023. There are no published criteria on how the TFV Board of Directors decide which situations can benefit from an Assistance Program.

[216] See Fergal Gaynor and Anushka Sehmi, 'The Perfect Storm: Obstruction, Intimidation and Inaction in the Kenya Situation' in FIDH, '*Victims at the Center of Justice From 1998 – 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC*' (2018) <https://www.fidh.org/IMG/pdf/droitsdesvictimes730a_final.pdf> accessed 16 September 2022, pp. 55-62; 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', April 25 2016 <https://www.hrw.org/news/2016/04/25/letter-board-directors-icc-trust-fund-victims > accessed 20 September 2022.

[217] ICC, Trust Fund for Victims (TFV): Background Summary, (August 2008) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV_Background_Summary_Eng.pdf> accessed 20 September 2022.

[218] Moffett has extensively discussed the concept of reparative complementarity, see Moffett, Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the ICC (2013) pp. 368-384; Moffett, Reparations for Victims at the ICC: a New Way Forward' (2017) pp. 1204-1218.

in Article 75 of the Rome Statute and is an attempt to restore victims' dignity. This feature of the ICC makes it more victim-oriented than other international criminal tribunals before it.[219]

Reparations at the ICC are primarily tied to individual criminal responsibility which means that it will only be fully activated upon the conviction of a perpetrator.[220] All ICC reparations have been made against the convicted persons who have been found to be indigent, including Mr Lubanga, Mr Katanga, and Mr Al Mahdi.[221] The Court invited the TFV to use its resources for the implementation of reparations in these cases.[222]

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[219] See Carla Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002) 15 (3) Leiden Journal of International Law 667, pp. 667-686 ('Ferstman, The Reparation Regime of the International Criminal Court: Practical Considerations'); Carla Ferstman, 'Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness' in Rudina Jasini and Gregory Townsend (eds), Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice (University of Oxford 2020), p. 57 ('Ferstman, Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness (University of Oxford, 2020)').

[220] This is how the ICC has approached reparations in its nascent case law on it. See for example, 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*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-3129, AC, ICC, 3 March 2015, paras 65, and 99 ('*Lubanga*, 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 ICC-01/04-01/06-3129, 3 March 2015'); Carsten Stahn, 'Reparative Justice after the Lubanga Appeal Judgment: New Prospects for Expressivism and Participatory Justice or "Juridified Victimhood" by Other Means?' (2015) 13 (4) Journal of International Criminal Justice 801, pp. 801-813 (discussing 'perpetrator-centered' reparations); Ferstman, The Reparation Regime of the International Criminal Court: Practical Considerations, pp. 59-58; Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019), p. 301.

[221] Order for Reparations (amended), ICC-01/04-01/06-3129-AnxA, *Lubanga*, *Situation in the Democratic Republic of the Congo*, AC, ICC, 3 March 2015, paras 60-61; Order for Reparations Pursuant to Article 75 of the Statute with One Public Annex (Annex I) and One Confidential Annex ex parte, Common Legal Representative of the Victims, Office of Public Counsel for Victims and Defence Team for Germain Katanga (Annex II), *Katanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-3728-tENG, 17 August 2017, paras 326-330; Reparations Order, *Al-Mahdi*, *Situation in the Republic of Mali*, ICC-01/12-01/15-236, TC VIII, ICC, 17 August 2017, paras 113-114, 138, and 148; Reparations Order, *Ntaganda*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-2659, TC VI, ICC, 8 March 2021, paras 223-231, 254-257 (*Ntaganda*, Reparations Order, ICC-01/04-02/06-2659, 8 March 2021'); Note that the process of the Ntaganda reparations is still ongoing, see ICC Press Release ICC-CPI-20220912-PR1671 (2022) 'Ntaganda Case: Appeals Chamber directs the Trial Chamber to Issue a New Reparations Order' <https://www.icc-cpi.int/news/ntaganda-case-appeals-chamber-directs-trial-chamber-issue-new-reparations-order> accessed 20 September 2022.

[222] The Trust Fund for Victims, 'Reparation implementation' <https://www.trustfundforvictims.org/en/what-we-do/reparation-orders> accessed 20 September 2022; See also Order approving the Proposed Programmatic Framework for Collective Service-Based Reparations Submitted by the Trust Fund for Victims', *Lubanga*, *Situation in the Democratic of Congo*, ICC-01/04-01/06-3289, TC II, ICC, 6 April 2017, para 9; Judgment on the Appeals Against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-3466-

One outstanding element of the ICC's reparations system is that the Court[223] and the TFV emphasize victims' participation in program planning to ensure that reparations are meaningful to them.[224] This method of inclusion of victims in the process of reparations can contribute to making justice more victim-oriented since victims can make their voices heard.[225] Also, some victims who did not participate in the ICC proceedings prior to the reparations stage may apply for reparations at that stage.[226] This potentially increases the number of victims who can see justice served in the relevant case, but it does not completely offset the exclusionary flaw of victims' participation discussed earlier.[227] Nonetheless, it is a good practice that the ICC can maintain and continue to improve.

Red, AC, ICC, 18 July 2019, para 54 ('Judgment on the Appeals Against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', ICC-01/04-01/06-3466-Red, 18 July 2019'); The Trust Fund for Victims, 'The Lubanga Case' <https://www.trustfundforvictims.org/what-we-do/reparation-orders/lubanga>, accessed 20 September 2022; The Trust Fund for Victims, 'The Katanga Case' <https://www.trustfundforvictims.org/what-we-do/reparation-orders/katanga>, accessed 20 September 2022; The Trust Fund for Victims, 'The Al Mahdi Case' <https://www.trustfundforvictims.org/what-we-do/reparation-orders/al-madhi>, accessed September 2022; For a discussion on reparations in the *Al Mahdi* case, see Marina Lostal, 'Implementing Reparations in the Al Mahdi Case: A Story of Monumental Challenges in Timbuktu' (2021) 19 (4) Journal of International Criminal Justice 831, pp. 831-853; The Trust Fund for Victims, 'Reparation implementation' <https://www.trustfundforvictims.org/en/what-we-do/reparation-orders> accessed 20 September 2022.

[223] See Regulations 70 of the Regulations of the Court; Ntaganda, Reparations Order, ICC-01/04-02/06-2659, 8 March 2021, paras 250-252.

[224] ICC, Trust Fund for Victims (TFV): Background Summary, (August 2008) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV_Background_Summary_Eng.pdf> accessed 20 September 2022.

[225] ICC, Trust Fund for Victims (TFV): Background Summary, (August 2008) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV_Background_Summary_Eng.pdf> accessed 20 September 2022.

[226] See for example, Decision Establishing the Principles and Procedures to be Applied to Reparations, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2904, TC I, ICC, 7 August 2012, paras 219-221; Judgment on the Appeals Against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', ICC-01/04-01/06-3466-Red, 18 July 2019, paras 90-92, stressing at para 92 that the finding regarding victims who may request reparations later, was not overturned by the Appeals Chamber'; Ntaganda, Reparations Order, ICC-01/04-02/06-2659, 8 March 2021, paras 232-235.

[227] See section 4.1 above.

There have been issues with the implementation of reparations at the ICC.[228] The length of time it takes for victims to see any reparations, the low prospects, and the drawn-out process may dissuade victims from participating.[229] This could be exacerbated where victims' participation is fraught with litigations to hold onto their participatory rights.[230] Also, only a limited number of victims may access reparations based on their ability to show a link between their harm and the charges for which the perpetrator was convicted.[231] Dixon refers to this as the 'politics of recognition'[232] as it is yet another exclusionary factor in an ever-narrowing pyramid of victims from the preliminary examination stage to reparations stage. In the *Lubanga* case, Sexual and gender-based violence (SGBV) was not defined as a harm resulting from the crimes for which Mr Lubanga was convicted.[233] Therefore victims of SGBV crimes were not considered victims

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[228] Ferstman, Reparations at the ICC: the Need for a Human Rights Based Approach to Effectiveness (Brill, Nijhoff, 2020) pp. 447-478; Ferstman, Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness (University of Oxford, 2020), P. 57, 65-67; Public Redacted Version of 'Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations', 12 July 2018, Al-Mahdi, Situation in the Republic of Mali, ICC-01/12-01/15-273-Red, TC VIII, ICC, 12 July 2018, paras 9 and 14.

[229] Observations de la Ligue pour la Paix, les Droits de l'Homme et la Justice (LIPADHOJ) présentées conformément à l'ordonnance de la Chambre de céans du 15 juillet 2016 rendue en application de la règle 103 du règlement de procédure et de prevue, *Lubanga*, *Situation in the Democratic Republic of Congo*, ICC-01/04-01/06-3232, TC II, ICC, 29 September 2016, para 25.

[230] Observations de la Ligue pour la Paix, les Droits de l'Homme et la Justice (LIPADHOJ) présentées conformément à l'ordonnance de la Chambre de céans du 15 juillet 2016 rendue en application de la règle 103 du règlement de procédure et de prevue, *Lubanga*, *Situation in the Democratic Republic of Congo*, ICC-01/04-01/06-3232, TC II, ICC, 29 September 2016; The Trust Fund for Victims, 'The Al Mahdi Case' <https://www.trustfundforvictims.org/what-we-do/reparation-orders/al-madhi> accessed 20 September 2022; Ntaganda, Reparations Order, ICC-01/04-02/06-2659, 8 March 2021; The Trust Fund for Victims, 'The Katanga Case' <https://www.trustfundforvictims.org/what-we-do/reparation-orders/katanga>, accessed 20 September 2022; The Trust Fund for Victims, Decisions taken by the Board of Directors of the Trust Fund for Victims September to December 2020 (4 March 2021) < https://www.trustfundforvictims.org/index.php/en/news/decisions-taken-board-directors-trust-fund-victims-september-december-2020> accessed 20 September 2022.

[231] Carla Ferstman, 'Limited Charges and Limited Judgments by the International Criminal Court – Who Bears the Greatest Responsibility?' (2012) 16 (5) International Journal of Human Rights 796, pp. 796-808.

[232] Peter J. Dixon, 'Reparations and the Politics of Recognition' In Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015) see for example pp. 236-237 ('Dixon, Reparations and the Politics of Recognition (2015)').

[233] The Prosecutor pursued a narrow charge of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities. See ICC Press Release ICC-OTP-20060302-126, 'Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo' (2006) <https://www.icc-cpi.int/news/issuance-warrant-arrest-against-thomas-lubanga-dyilo> accessed 20 September 2022; *Lubanga*, 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 ICC-01/04-01/06-3129, 3 March 2015, paras 196-198.

for the purposes of reparations.[234] This approach to reparations may be practical due to the limitation of the Court's resources, but it does not fully align with the concept of victim-oriented justice with requires inclusion of victims.

4.5 Balancing Victims' Rights with the Rights of the Accused

The interpretation and implementation of the ICC's victims' regime must not be prejudicial to or inconsistent with the rights of the accused. [235] The core legal texts of the Court have several inbuilt safeguards to ensure that proceedings are fair, impartial, expeditious and that there is a protection of equality of arms between the OTP and the defense.[236] As previously discussed in Chapter One[237] and mentioned in the current chapter, the Court would usually engage in a balancing exercise in this regard. From the wording of the pivotal Article 68 (3), in balancing

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[234] *Lubanga*, 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 ICC-01/04-01/06-3129, 3 March 2015, paras 196-198.

[235] Article 68 (3) ICCst; For detailed discussion about the Court's practice with regards to the rights of the defense, see Mugambi Jouet 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court (2007) 26 (2) Saint Louis University Public Law Review 249, pp. 249-307; Salvatore Zappalà, 'The Rights of Victims v. the Rights of the Accused' (2010) 8 (1) Journal of International Criminal Justice 137, pp. 137-164 ('Zappalà, The Rights of Victims v. the Rights of the Accused (2010)'); Scott Johnson 'Neither Victims Nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court' (2010) 16 (2) ILSA Journal of International and Comparative Law 489, pp. 489-496; Bridie McAsey, 'Victim Participation at the International Criminal Court and Its Impact on Procedural Fairness' (2011) 18 Australian International Law Journal 105, pp. 105-125; Karolina Kremens, 'The Protection Of The Accused In International Criminal Law According To The Human Rights Law Standard', (2011) 1 (2) Wroclaw Review of Law Administration and Economics 26, pp. 26-48; Marianna Tonellato, The Victims' Participation at a Crossroads: How the International Criminal Court Could Devise a Meaningful Victims' Participation while Respecting the Rights of the Defendant' (2012) 20 (3) European Journal of Crime 315, pp. 315-359; Natalie von Wistinghausen 'Victims as Witnesses: Views from the Defence' in Thorsten Bonacker and Christoph Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (T.M.C. Asser Press 2013) pp. 165-172.

[236] See in particular Article 67, but also and Articles 22-24 of the Rome Statute, regarding *Nullum crimen sine lege, nulla poena sine lege,* non-retroactivity *ratione personae*, Articles 61 on confirmation of charges, 63 regarding trial in the presence of the accused, 65 proceedings on admission of guilt (used for example in the *Al-Mahdi* case), and 66 on the presumption of innocence; Rules 20-22 ICC Rules of Procedure and Evidence, on responsibilities of the Registrar relating to the rights of the defense, assignment of legal assistance to the defense, and appointment and qualifications of counsel for the defense, and rules 67-68 governing evidence and testimony, Regulations 55, Regulations of the Court; The International Criminal Court, 'The Defence', <https://www.icc-cpi.int/about/defence> 20 September 2022.

[237] See Chapter One, Section 4.1.

victims' participation with the rights of the accused, the latter takes primacy.[238] A balancing of interests may be done in the context of a trial where in accordance with Article 64 (2) of the Statute, the Trial Chamber ensures that trial is conducted in a fair and expeditious manner with full respect for the rights of the accused, while having due regard for the protection of victims and witnesses.[239] Another instance relates to the modalities of victims' participation at the ICC. Where victims' legal representatives attend and participate in proceedings, the possibility of questioning a witness, an expert, or an accused would be managed by the Chamber and would be subject to a fair, impartial and expeditious trial.[240]

Also, the Rome Statute provides an accused with an opportunity to enter an admission of guilt provided that '[he or she] understands the nature and consequences of the admission of guilt (…) the admission is voluntarily made by the accused after sufficient consultation with defence counsel'.[241] This is akin to a plea bargain in domestic jurisdictions.[242] Although currently unpopular in international criminal justice,[243] a well conducted admission of guilt process and agreement can be commonly beneficial for the accused, victims, the ICC and concerned state. For instance, the admission of guilt may result in the reduction in the length of trial and amount of resources expended, conducting proceedings closer to the home country of the accused and victims, and ensuring certain procedural and substantive standards in line with internationally

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[238] See Article 68 (3) and 67 of the Statute. See also Zappalà, The Rights of Victims v. the Rights of the Accused (2010) pp. 140, and 143-145.
[239] See Article 64 (2) ICCst.
[240] See Rule 91 (3) (b) of the ICC Rules of Procedure and Evidence; Decision on the Modalities of Victim Participation at Trial, *Katanga and Chui*, ICC-01/04-01/07-1788-tENG, 3 March 2010, paras 44-52.
[241] See Articles 64 (8) (a) and 65 (1)-(3) ICCst and Rule 139 ICC Rules of Procedure and Evidence.
[242] See Regina Rauxloh, Plea Bargaining in National and International Law (Routledge 2014) pp. 25-202; Jenia lontcheva Turner, 'Plea Bargaining and International Criminal Justice' (2017) 48 (2) The University of the Pacific Law Review 219, pp. 219-226.
[243] Jenia lontcheva Turner, 'Plea Bargaining and International Criminal Justice' (2017) 48 (2) The University of the Pacific Law Review 219, pp. 219-221, 226-246.

recognized human rights. For states and the ICC in particular, suspects who have refused to surrender to either jurisdiction may be persuaded to do so where some acceptable agreement regarding for example, location of trial, and punishment can be reached. For victims, hearing the perpetrator of a crime which harmed them, accept responsibility without victims' enduring very prolonged proceedings, serves as a great tool for the determination of the truth, and a public recognition of victims' harms.[244] The ICC has implemented the admission of guilt in the *Al-Mahdi* case which is the shortest case of this kind (following confirmation of charges) to have been completed in the Court's two-decade history.[245] Although factors such as the ICC's growing experience, could have influenced the speed of this trial compared to other cases, Mr Al Mahdi's admission of guilt appears to be a strong factor.

The foregoing shows that the ICC is serious in its adherence to the requirement that the rights of the accused be protected.[246] Zappalà notes that the lack of legal certainty on victims' participation has led to difficulties in finding the right balance *vis a vis* the rights of the accused.[247] Nevertheless, in different situations and cases, the Court has based its restriction on victims' participation on the need to protect the rights of the accused.[248] There have been

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[244] See Jenia lontcheva Turner, 'Plea Bargaining and International Criminal Justice' (2017) 48 (2) The University of the Pacific Law Review 219, pp. 226-246.
[245] This is based on the time between the confirmation of charges hearing (1 March 2016) to verdict and sentencing (27 September 2016) = 7 months. See *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *Situation in the Republic of Mali*, ICC-01/12-01/15, ICC, <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/Al-MahdiEng.pdf> accessed 13 January 2023.
[246] Croquet discusses the ICC's approach to defense rights in comparison to international human rights courts, Nicolas A. J. Croquet 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?' (2011) 11 (1) Human Rights Law Review 91, pp. 91-131.
[247] Salvatore Zappalà, 'The Rights of Victims v. the Rights of the Accused' (2010) 8 (1) Journal of International Criminal Justice 137, pp. 145, 152-160.
[248] Draft Statute for an International Criminal Court with Commentaries, (1994), Commentary on Article 43, para 2; Preparatory Committee on The Establishment of an International Criminal Court, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court,' (1996) Vol II, (Compilation of proposals), UN GAOR, 51st Session, Supplement No.22 (A/51/22); Decision, in limine, on Victim Participation in the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims'

occasions where victims' access to case files were restricted to public documents, this led to legal representatives of victims petitioning the Court for access to such documents it deemed necessary for protecting victims' interest.[249] There have also been instances where victims' ability to provide evidence in Court have been limited, and some have questioned whether such restrictions were necessary for the protection of the rights of the accused.[250]

A balance of the rights of the accused and victims' rights to participate can be achieved without overly restricting victims' participation especially when it contributes to the determination of the truth, the fight against impunity and reparations. Victims must access relevant proceedings, resources, and materials to defend their interests except if doing so may unduly impact the rights of the accused.[251] The Court should re-sensitize all ICC organs and units of the reality and importance of victims' participation in the Court's proceedings. This can help to the

Participation", *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1335, AC, ICC, 16 May 2008, para 50; Judgment on The Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation, ICC-01/04-01/06-1432, 11 July 2008, paras 99-100; Lubanga, Decision on the Participation of Victims in the Appeal, Lubanga, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-1453, AC, ICC, 6 August 2008, para 12; *Ongwen*, *Situation in Uganda*, Transcript of Hearing (Trial) 4 April 2017, ICC-02/04-01/15-T-65-Red-ENG, pp. 54-56; Donat-Cattin, Commentary on Article 68 of the Statute (2008), p. 1280; Wemmers, Victims' Rights and the International Criminal Court: Perceptions Within the Court Regarding the Victims' Right to Participate (2010) p.633.

[249] For example, Decision on Victims' Representation and Participation, *Ruto and Sang*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012; Decision on Victims' Representation and Participation, *Muthaura and Kenyatta, Situation in The Republic of Kenya*, ICC-01/09-02/11-498, TC V, ICC, 3 October 2012; Decision on the Participation of Victims in The Trial Proceedings, *Banda, Situation in Darfur, Sudan*, ICC-02/05-03/09-545, TC IV, ICC, 20 March 2014; There appears to be some improvements on the matter although it remains to be seen whether the old restrictive trend will be a thing of the past. See for example, Decision on Victims' Participation in Trial Proceedings, *Ntaganda, Situation in the Republic of The Congo*, ICC-01/04-02/06-449, PTC VI, ICC, 6 February 2015; Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims', *Al-Mahdi*, *Situation in the Republic of Mali*, ICC-01/12-01/15-97-Red, TC VIII, ICC, 8 June 2016; Decision on Principles Applicable to Victims' Applications for Participation, to Legal Representation of Victims, and to the Manner of Victim Participation in the Proceedings, *Al-Hassan*, *Situation in the Republic of Mali*, ICC-01/12-01/18-289-Red-tENG, PTC I, ICC, 20 March 2019.

[250] Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020), pp. 11-14.

[251] See Decision on the Modalities of Victim Participation at Trial, Katanga and Chui, ICC-01/04-01/07-1788-tENG, 3 March 2010, paras 14-16, 110-114, 121-123 and 125; Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020) pp. 13-14.

improve internal culture towards victims' participation[252] and contribute to a court-wide approach for balancing their rights with the rights of the defendant. Victim-oriented complementarity proposed in chapters four and five can aid the Court in this process.

The preceding discussion shows that while the ICC has promoted victims' rights, it continues to prioritize what many consider its chief mandate-the prosecution and punishment of perpetrators.[253] Consequently, victims' rights are not fully realized at the ICC,[254] which then affects their ability to contribute to how justice is shaped.[255]

5 Applying Victim-Oriented Justice at the ICC

Meaningful participation is at the core of victim-oriented justice, and victim-oriented approaches within the Rome Statute system of justice can be successfully implemented. Proceedings and decisions must as far as possible, take into account victims' views about their needs and interests as the situation or case progresses in line with the general principle enshrined in Rule 86 of the ICC's Rules of Procedure and Evidence.[256] For this reason, it is

[252] Massidda, The Participation of Victims Before the ICC: A Revolution Not Without Challenges (2020), p. 40; Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020), pp. 12-14.
[253] Christine H. Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6 (3) Northwestern Journal of Human Rights 459, pp. 464-466; Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 (1) Case Western Reserve Journal of International Law 475, pp. 476-496; Ferstman, Reparations at the ICC: the Need for a Human Rights Based Approach to Effectiveness (Brill, Nijhoff, 2020) p. 449; UK Statement by Andrew Murdoch to ICC Assembly of States Parties 17th session Delivered on: 5 December 2018, The Hague, Netherlands <https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session> accessed 21 September 2022.
[254] Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020), pp. 12-14.
[255] Vasiliev, Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC (2009), p. 679.
[256] Measures for realizing this are further explored in chapters four and five.

useful to examine the ICC's interests of justice policy to highlight its potentials for advancing victim-oriented complementarity at the ICC and in domestic jurisdictions.

5.1 Understanding the ICC's Concept of the Interests of Justice

Under Article 15[257] and 53[258] of the Rome Statute, the Prosecutor has a duty to determine whether to initiate an investigation where there is reasonable basis to do so, and subsequently where there is sufficient basis for a prosecution, the Prosecutor should initiate such proceedings.[259] In making any of these determinations the Prosecutor must consider whether a crime within the jurisdiction of the Court has been committed, and whether the case or situation is or would be admissible under article 17.[260] Considering the gravity of the crime and the interests of victims, the Prosecutor must determine whether an investigation or prosecution would be in the 'interests of justice'.[261]

The 'interests of justice' concept is not defined in any of the ICC's core legal texts,[262] and the Court's practice for several years did not advance clear guidelines on how to determine this concept.[263] There were calls for clarity during the investigation into the Ugandan situation while the Juba Peace Process was ongoing,[264] because of the question of whether justice could

[257] Ignaz Stegmiller, 'Commentary on Article 15 of the Rome Statute' in Mark Klamberg, (ed) *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher 2017), pp. 182-191.
[258] Karel De Meester, 'Commentary on Article 53 of the Rome Statute' in Mark Klamberg, (ed) *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher 2017), pp. 387-399.
[259] See Article 15 ICCst.
[260] Article 17 ICCst. regulates the admissibility of cases to the ICC and is the main article through which the principle of complementarity is interpreted.
[261] Article 53 (1) and (2) ICCst.
[262] ICC-OTP, Policy Paper on the Interests of Justice, (September 2007) p.2 ('OTP's Policy Paper on the Interests of Justice (2007)').
[263] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, *Situation in the Republic of Afghanistan*, ICC-02/17-33, PTC II, ICC, 12 April 2019, para 87; Human Rights Watch, 'The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute' (Human Rights Watch, Policy Paper 2005) p. 1.
[264] Agreement on Accountability and Reconciliation Between the Government of The Republic of Uganda and The Lord's Resistance Army/Movement, Juba, Sudan (29 June 2007) UN doc. S/2007/435 ('Uganda and LRA/M Accountability Agreement, 29 June 2007'); Annexure to the Agreement on Accountability and Reconciliation (19 February 2008) <https://peacemaker.un.org/uganda-annex-accountability2008> accessed 21 September 2022.

be suspended to realize peace.[265] In 2007 the OTP released a Policy Paper on the Interests of Justice.[266] The OTP has consistently refrained from engaging in detailed submissions on the interests of justice.[267] For each situation or case, the OTP lists a few points for why it has not identified any reason an investigation will be contrary to the interests of justice.[268] Also, the OTP is yet to refuse to investigate or prosecute on the basis that doing so will not be in the interests of justice. Such a decision by the OTP could happen in future situations or cases and can affect victims' ability to see justice done. This section briefly examines the OTP's Policy Paper on the Interests of Justice which clarifies the Office's understanding of this concept. It will also help to demonstrate how this concept should be interpreted and applied to contribute to victim-oriented justice.

5.1.1 OTP's Policy on the Interests of Justice

According to the OTP, three points underpin its understanding of 'the interests of justice'. The first is that it may 'exceptionally' decide not to select and pursue a situation or case based solely on its finding that the situation or case will not serve the interests of justice. This means that such a decision is an exception, not the rule. Secondly, the OTP explained that the object and purpose of the Statute to prevent serious crimes of concern through ending impunity, underpins

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[265] See for example, OTP's Policy Paper on the Interests of Justice (2007) p. 4; Bartłomiej Krzan, 'International Criminal Court Facing the Peace vs. Justice Dilemma' (2016) 2 (2) International Comparative Jurisprudence 81, pp. 81-88; Clark, Distant Justice: The Impact of the ICC on African Politics (CUP 2018), pp. 187-229; Linda M. Keller, 'The False Dichotomy of Peace versus Justice and the International Criminal Court' (2008) 3 (1) Hague Justice Journal 12, pp. 12-47 <tjsl.edu/sites/default/files/files/Keller_Uganda_ICC_EN.pdf> accessed 21 September 2022.
[266] OTP's Policy Paper on the Interests of Justice (2007); Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 (3) European Journal of International Law 481, pp. 481-505.
[267] See Maria Varaki, 'Revisiting the 'Interests of Justice' Policy Paper' (2017) 15 (3) Journal of International Criminal Justice 455, p. 465 ('Varaki, Revisiting the 'Interests of Justice' Policy Paper' (2017)').
[268] See Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, *Situation in the Republic of Afghanistan*, ICC-02/17-33, PTC II, ICC, 12 April 2019, para 87.

its understanding of the interests of justice, and prosecutorial decisions based on interests of justice.[269] Thirdly, the OTP explained that it strictly differentiates interests of justice from interests of peace and clarified that the latter falls outside its mandate.[270]

The OTP is under an obligation to consider the interests of victims when seeking to make an interests of justice determination.[271] It has explained that it considers the 'interests of victims' to include interests in seeing justice done, and other essential interests, such as their protection.[272] According to the OTP Article 53 (1) (c) of the Statute implies that the interests of victims will generally weigh in favor of prosecution.[273] This may not always be the case as even where victims will favor prosecution, some may prefer it to be done closer to home.

Furthermore, the OTP has clarified that a determination that investigation or prosecution will be in the interests of justice is not a positive requirement which it must satisfy.[274] Rather it is a potential countervailing consideration that might produce a reason not to proceed even where other elements of complementarity are satisfied.[275] This means that the OTP is under no obligation to show that an investigation or prosecution is or will be in the interests of justice.

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[269] OTP's Policy Paper on the Interests of Justice (2007) p.4.
[270] OTP's Policy Paper on the Interests of Justice (2007) p.1; Davis argues that relying on the 'interests of justice' concept, the OTP should be able to consider political effects of its involvement in a situation and defer investigations or prosecutions which may be detrimental to the ICC's viability. Such a move risks weakening the ICC, especially before recalcitrant states. See Cale Davis, 'Political Considerations in Prosecutorial Discretion at the International Criminal Court' (2015) 15 (1) International Criminal Law Review 170, pp. 171-183 and 185-189.
[271] See Article 53 (1) (c) ICCst. The OTP also has strategies and policies related to victims, which are yet to be fully leveraged. See for example, ICC-OTP, Policy Paper on Victims' Participation (April 2010); ICC-OTP, 'Strategies and Policies' <https://www.icc-cpi.int/about/otp/otp-policies> accessed 21 September 2022.
[272] OTP's Policy Paper on the Interests of Justice (2007) p.5.
[273] OTP's Policy Paper on the Interests of Justice (2007) p.5.
[274] The Pre-Trial Chamber instead found otherwise in its rejection of the OTP's Request. See PTC II Decision Refusing the Prosecutor's Request to Open an Investigation into the Situation in Afghanistan, ICC-02/17-33, 12 April 2019, para 35. However, the Appeals Chamber ruled that the OTP need not make an affirmative determination on the concept, as such in support of the OTP's view, see Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, *Situation in the Islamic of Afghanistan*, ICC-02/17-138, AC, ICC, 5 March 2020, para 49 ('Appeals Chamber Decision Authorizing Investigation in the Situation in Afghanistan, ICC-02/17-138, 5 March 2020').
[275] OTP's Policy Paper on the Interests of Justice (2007) p.2.

The impact of a decision to not investigate or prosecute based on the interests of justice[276] necessitates a practice of serious and meaningful consultation with victims and other relevant stakeholders from early stages of the proceedings.[277] To illustrate, an investigation or prosecution may be less favorable for victims perhaps because it affords them lesser capacity to meaningfully participate and receive reparations than what is obtainable domestically.[278] However, if the OTP believes otherwise, and once it establishes that the Court has jurisdiction and that the case is admissible, these will suffice for commencing proceedings at the ICC. Such an approach to the interests of justice is incompatible with the interests of victims. Where domestic capacity can be built, more victims could meaningfully participate closer to home, and more resources could be geared towards victims' reparations. This may be the preferred option, particularly if measures are taken to ensure the impartiality of local or hybrid mechanisms present in the situation country and to protect the rights of the accused.[279]

The DRC situation is instructive regarding the issue of building local capacity. A project called REJUSCO[280] was launched and sponsored by multiple donors including the EU to rebuild the judiciary of the DRC, increase capacity of local authorities,[281] and bring justice closer to

[276] See Varaki, Revisiting the 'Interests of Justice' Policy Paper' (2017) pp. 455-470.
[277] See Chapter Five Section 3.3 for a discussion of why victims should be involved in the proposed complementarity division.
[278] This situation is possible especially given the relatively limited number of victims served by the ICC and the growing need for states to take on investigations and prosecutions.
[279] See Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) pp. 267-270.
[280] Programme de Restauration de la Justice à l'est de la RDCongo: REJUSCO, Devis programme croisière 2008, <http://www.diplomatie.be/oda/11178_PROGDESCR_dossier_technique_et_fianncier.pdf> accessed 21 September 2022; European Parliament, Parliamentary question - E-008408/2011(ASW): Answer Given by High Representative/Vice-President Ashton on Behalf of the Commission, 26 January 2012 <https://www.europarl.europa.eu/doceo/document/E-7-2011-008408-ASW_EN.html> accessed 21 September 2022.
[281] For example, the Bunia Courts in DRC. See Clark, Chasing Cases: the ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda (2011) pp. 1192-1197; For the EU's Support of access to justice and peace and security in Bunia, DRC, see European Commission Press Release IP/06/845, (2006) 'The European Commission Contributes to the Restoration of Justice in the East of the Democratic Republic of Congo' <https://ec.europa.eu/commission/presscorner/detail/en/IP_06_845> accessed 21 September 2022; Sofia

victims. With this multi-donor project, the DRC was able to apprehend and try different perpetrators.[282] Local authorities in DRC collected dossiers on *inter alia* Mr Lubanga, expressed their readiness to try him, and they understood the impact of justice done closer to home.[283] These point to the potentials of domestic jurisdictions in delivering justice for victims.[284]

The essence of the Rome Statute system of justice is to harness ICC and states' efforts to combat impunity and to do justice for victims.[285] States may not have the same standard as the

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Candeias, and others, 'The Accountability Landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009–2014)' (ICTJ Briefing, 7 July 2015), <https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Prosecutions-2015_1.pdf> accessed 21 September 2022; Human Rights Watch, 'Making Justice Work: Restoration of the Legal System in Ituri, DRC' (Human Rights Watch Briefing Paper, September 2004) <https://www.hrw.org/legacy/backgrounder/africa/drc0904/> accessed 21 September 2022; Koen Vlassenroot and Valerie Arnould, 'EU Policies in the Democratic Republic of Congo: Try and Fail?' (Paper commissioned by the Human Security Study Group, SiT/WP/06/16, 2016) pp. 12-13.

[282] This is also discussed in Chapter Three on complementarity. See for example, Clark, Chasing Cases: the ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda (2011) pp. 1180-1203; European Commission, 'Restoring Faith in Justice in the Democratic Republic of the Congo', <https://fpi.ec.europa.eu/stories/restoring-faith-justice-democratic-republic-congo_en> accessed 21 September 2022.

[283] Clark, Chasing Cases: the ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda (2011), pp. 1191-1197; See also Annex II Public (Containing 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-01/07, 10 February 2006') *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-520-Anx2, PTC I, ICC, 17 July 2008, para 33.

[284] A similar development is taking place in the Central African Republic. Recently, international judges Oliver Beauvallet and Volker Nerlich were appointed to the Appeals Chamber of the Special Criminal Court in Bangui, Central African Republic to support the work of this Court in prosecuting international crimes. See Radio Ndeke Luka, 'Centrafrique: la Chambre d'Appel de la CPS au Grand Complet', 4 February 2022, <https://www.radiondekeluka.org/actualites/justice/38125-centrafrique-la-chambre-d-appel-de-la-cps-au-grand-complet.html> accessed 21 September 2022. Prior to that two international judges and one prosecutor were swron in, see United Nations Peace Keeping, 'CAR Special Criminal Court (SCC) Now Fully Operational', 9 June 2021, <https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational> accessed 21 September 2022; Judicael Yongo, 'Central African Republic Sentences Three Rebels in First War Crimes Trial' (31 October 2022) *Reuters* <https://www.reuters.com/article/centralafrica-justice-trial-idAFL8N31W5T3> accessed 1 November 2022; Barbara Debout, 'C.Africa Special Court Sentences Three for Crimes Against Humanity' *Rédaction Africanews with Afp* <https://www.africanews.com/2022/11/01/cafrica-special-court-sentences-three-for-crimes-against-humanity/> accessed 1 November 2022.

[285] Géraldine Mattioli and Anneke van Woudenberg, 'Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo' in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society 2008) pp. 57-59; Clark, Chasing Cases: the ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda (2011) pp. 1180-1203; Open Society Foundations, 'Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya' (2011) <https://www.justiceinitiative.org/publications/putting-complementarity-practice> accessed 28 September 2022, pp. 54-57 ('Open Society Foundations, Putting Complementarity into Practice: Domestic Justice

ICC, and the Statute does not require them to do so.[286] Yet they are pivotal in ensuring that victims will experience justice, given the ICC's own limitations and narrow focus on the most responsible perpetrators. The Court must make decisions on situation or case selection based on *inter alia* legal classification of crimes which fall within the Court's jurisdiction and are apparently admissible. The Prosecutor's ability to prove such crimes beyond reasonable doubt would inevitably play a huge role in the selection of cases and charges. Nonetheless, victims' voices must be heard, and their interests considered.[287] As such, in determining the interests of justice prior to investigations, or prosecutions, it is in the interests of victims that the OTP and the ICC consider whether doing justice in The Hague or in domestic jurisdictions will serve victims better.[288] This is an issue of the interests of justice determination and one of complementarity,[289] and it can be addressed while being mindful of the rights of the accused.

5.1.2 The Chambers' Role in Interpreting and Applying the Concept of Interests of Justice

The Chambers has the power to review the Prosecutor's decision based on the interests of justice.[290] The Afghanistan situation marked the first time in which ICC Chambers were expected to address this concept in a situation following the Prosecutor's application for the

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for International Crimes in DRC, Uganda, and Kenya (2011)'); Passy Mubalama and Simon Jennings, 'Roving Courts in Eastern Congo' Institute for War & Peace Reporting (13 February 2013) <https://iwpr.net/global-voices/roving-courts-eastern-congo> accessed 21 September 2022; De Vos, Complementarity, Catalysts, Compliance (2020) pp. 193-237.

[286] See Harmen van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' (2008) 8 (1-2) International Criminal Law Review 8, pp. 229-272.

[287] See Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 (5) Journal of International Criminal Justice 1357, pp. 1364-1370.

[288] See PTC II Decision Refusing the Prosecutor's Request to Open an Investigation into the Situation in Afghanistan, ICC-02/17-33, 12 April 2019, para 88.

[289] For further discussion on complementarity, see Chapter Three.

[290] See Article 53 (1)-(3) ICCSt.; See also Varaki, Revisiting the 'Interests of Justice' Policy Paper' (2017) pp. 455-470.

authorization of an investigation in the situation.[291] The Pre-Trial Chamber refused to authorize the Afghanistan situation because in their opinion, an investigation will not be in the interests of justice.[292] This decision was highly criticized,[293] and it seemed at odds with the Prosecutor's submissions in which she noted that majority of victims' representations favored an ICC investigation, as did several civil society organizations.[294] Nonetheless, according to the Pre Trial Chamber,

> "(…) at the very minimum, an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame. (…) An investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigation not feasible and inevitably doomed to failure."[295]

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[291] Public redacted version of "Request for Authorisation of an Investigation Pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-7-Red, PTC III, ICC, 20 November 2017 ('OTP's Request for Authorization of Investigation into the Situation in Afghanistan, ICC-02/17-7-Red, 20 November 2017').

[292] See PTC II Decision Refusing the Prosecutor's Request to Open an Investigation into the Situation in Afghanistan, ICC-02/17-33, 12 April 2019, paras 87-96.

[293] See for example, Luca Poltronieri Rossetti, 'The Pre-Trial Chamber's Afghanistan Decision: A Step Too Far in the Judicial Review of Prosecutorial Discretion?' (2019) 17 (2) Journal of International Criminal Justice 585, pp. 585-608; For a critique of the Pre-Trial Chamber's and Appeals Chamber's decisions, see Lloyd T. Chigowe, 'The ICC and the Situation in Afghanistan: A Critical Examination of the Role of the Pre-Trial Chambers in the Initiation of Investigations *Proprio Motu*' (2022) 35 (3) Leiden Journal of International Law 699, pp. 699-718; David Luban, 'The "Interests of Justice" at the ICC: A Continuing Mystery' (Just Security, March 17, 2020) <https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/> accessed 21 September 2022.

[294] OTP's Request for Authorization of Investigation into the Situation in Afghanistan, ICC-02/17-7-Red, 20 November 2017, paras 365-372.

[295] See PTC II Decision Refusing the Prosecutor's Request to Open an Investigation into the Situation in Afghanistan, ICC-02/17-33, 12 April 2019, Paras 89-90; Heller, Bergsmo, and Klamberg respectively shared opinions on whether the Pre-Trial Chamber of the ICC should have such power of judicial review over the Prosecutor's determination of the interests of justice, and what exactly the concept entail, but they do not deeply engage in its assessment of interests of victims. See Kevin Jon Heller, 'Can the PTC Review the Interests of Justice?' (Opinio Juris, 12 April 2019) <https://opiniojuris.org/2019/04/12/can-the-ptc-review-the-interests-of-justice/> accessed 21 September 2022; Morten Bergsmo, 'The Theme of Selection and Prioritization Criteria and Why it Is Relevant' in Morten Bergsmo (ed), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, (2nd edn, TOAEP 2010), pp. 13-14; Mark Klamberg, 'Rebels, the Vanquished, Rogue States and Scapegoats in the Crosshairs: Hegemony in International Criminal Justice' in Morten Bergsmo and others (eds), *Power in International Criminal Justice*, (TOAEP 2020), pp. 633-636.

Notably, the Pre-Trial Chamber argued that the fact that meaningful participation of victims in potential cases may never be materialized was a reason to believe that the investigation will not be in the interests of justice.[296] The thesis argues that a mere observation of this fact is not enough, as the Pre-Trial Chamber did not outline a detailed examination of the interests of victims based on their representations to arrive at its conclusion. Justice can be a step closer to being victim-oriented when crucial decisions take victims' interests and views into account. As Ambos and Heinze assert,[297] this should have been done to balance victims' interests and the gravity of the crimes, with other 'political considerations' which the Chamber chose to engage with. Refusing to authorize the investigation into Afghanistan without an alternative mechanism for justice does not serve the interests of victims. Queens University Belfast *Amicus*,[298] and Labuda argue that such a finding risk rewarding the non-cooperation of states[299] which can also affect victims.

The Appeals Chamber subsequently overturned the Pre-Trial Chamber's decision and authorized an investigation into Afghanistan situation,[300] but without any further discussion to

[296] See PTC II Decision Refusing the Prosecutor's Request to Open an Investigation into the Situation in Afghanistan, ICC-02/17-33, 12 April 2019, Paras 87 and 96.
[297] Written Submissions in the Proceedings Relating to the Appeals Filed Against the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' Issued on 12 April 2019 (ICC-02/17-33) and Pursuant to 'Decision on the Participation of *Amici Curiae*, the Office of Public Counsel for the Defence and the Cross-border victims' Issued on 14 October 2019 (ICC-02/17-97), *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-108, AC, ICC, 14 November 2019, para 7.
[298] Observations by Queen's University Belfast Human Rights Centre as amicus curiae on the appeal of Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' of 12 April 2019, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-115, AC, ICC, 15 November 2019, para 10.
[299] Patryk I. Labuda 'A Neo-Colonial Court for Weak States? Not Quite. Making Sense of the International Criminal Court's Afghanistan Decision' (EJIL: Talk, 13 April 2019) <https://www.ejiltalk.org/a-neo-colonial-court-for-weak-states-not-quite-making-sense-of-the-international-criminal-courts-afghanistan-decision/> accessed 21 September 2022; Samantha Clare Goh, 'Afghanistan: Towards Wider Interests of Justice?' (2020) 5 LSE Law Review 49, pp. 49-58.
[300] Appeals Chamber Decision Authorizing Investigation in the Situation in Afghanistan, ICC-02/17-138, 5 March 2020.

clarify what the interests of justice concept really means.[301] In the absence of a clear and binding judicial determination of how to approach the concept of the interests of justice, the thesis argues that the OTP must ensure that its interpretation and application of this concept will contribute to victim-oriented justice.

6 Conclusion

A review of international criminal tribunals preceding the ICC reveals that victims have played a marginal role in them and have received very limited attention.[302] The involvement of victims in the Rome Statute system is remarkable but victim-oriented justice is yet to be fully realized at the ICC. Scholars and practitioners have highlighted the importance of victims' participation and the need to reinforce their position as the stakeholders and beneficiaries of the Rome Statute.[303] As stakeholders, they must not be treated as an ad-on to the other aspects of the Court's mandate.[304] The Court needs to do more to ensure a Court-wide approach to interpreting Article 68 (3) which is at the center of justice of victims. Doing so can encourage a careful pursuit of systematic, procedural, and substantive justice for victims from the

[301] The Appeals Chamber ruled that the Pre-Trial Chamber has no authority to review the Prosecutor's interests of justice determination unless the Prosecutor declined to investigate or prosecute based on that. See Appeals Chamber Decision Authorizing Investigation in the Situation in Afghanistan, ICC-02/17-138, 5 March 2020, paras 25-46.

[302] See for example, Sam Garkawe, 'Victims and the International Criminal Court: Three Major Issues' (2003) 3 (4) International Criminal Law Review 345, pp. 345-367.

[303] Review Conference of The Rome Statute of The International Criminal Court, Kampala, 31 May-11 June 2010, ASP Official Records RC/11, p. 88, paras 12-15; *Juan Humberto Sánchez v. Honduras*, Judgment (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 99 (7 June 2003), para 186; *Zambrano Vélez et al. v. Ecuador*, Judgment (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 166 (4 July 2007) para 149.

[304] See Ferstman, Reparations at the ICC: the Need for a Human Rights Based Approach to Effectiveness (Brill, Nijhoff, 2020) p. 449.

beginning of the complementarity process.[305] It will limit the inconsistencies in decisions from different chambers. This can result in giving victims access to relevant proceedings to make their voices heard, to contribute to the determination of the truth which can strengthen the Prosecutor's pursuit of justice. This will also feed into to the selection of cases for investigation or prosecution, and the scope of charges which will potentially widen the scope of reparations. The next Chapter examines the Court's approach to interpreting and applying complementarity and what it means for justice for victims.

[305] According to Judge Politi, "specifying the nature and scope of the proceedings in which victims may participate in the context of a situation, prior to, and/or irrespective of, a case, is critical to ensuring the predictability of proceedings and ultimately the certainty and effectiveness of victims' participation." See Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 10 August 2007, para 88 (footnote omitted).

Chapter Three: Complementarity in Practice at the ICC: Interpretation and Application *vis a vis* Victims

1 Introduction

The concept of complementarity was essential for the establishment of the ICC[1] because states wanted to protect their sovereignty.[2] In the Rome Statute system, states and the ICC possess jurisdiction over core international crimes based on the principle that the ICC can only exercise its jurisdiction when the concerned states are not in a position to do so.[3] This system of complementarity[4] ensures that the Court and national authorities can function together in the fight against impunity.[5] Hence, there was a need to create a suitable legal regime which will aid the Court in determining who could exercise their jurisdiction at any given time.[6] This chapter aims to answer the thesis's first research question by analyzing the ICC's complementarity regime and practice in relation to victims.

The chapter is structured into three main parts. The first section briefly discusses the choice of complementarity as the form of jurisdictional relationship between the ICC and states, as

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[1] Carsten Stahn and Mohamed M. El Zeidy (eds), 'Foreword by Silvia A. Fernandez De Gurmendi' in *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011); William A. Schabas, 'The Rise and Fall of Complementarity' in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 150-155.

[2] For a discussion on the choice and development of the principle of complementarity and how protecting state sovereignty played a role in this see for example, Rome Proceedings, A/CONF.183/13, Vol II, p. 213, para 19; Rome Proceedings, A/CONF.183/13, Vol II, pp. 221, para. 49; Sharon A. Williams and William A. Schabas, 'Commentary on Article 17: Issues of Admissibility' in Otto Triffterer, *'Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article-by-Article* (2nd edn, Baden-Baden: Nomos 2008) pp. 605-626; Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) p. 447.

[3] Article 17 ICCst.

[4] Ad Hoc Committee on the Establishment of an International Criminal Court, Resumed Session 14-25 August 1995, Draft Report of the Ad Hoc Committee, 22 August 1995 (A/AC.244/CRP.5), p. l.

[5] ICC-OTP, Policy Paper on Preliminary Examinations (November 2013) p. 23 ('OTP's Policy Paper on Preliminary Examination (2013)').

[6] See Articles 12-20 ICCst.; Stahn, Taking Complementarity Seriously (2011) pp. 233-248.

opposed to primacy which was accorded to the ICTY and the ICTR. It highlights important aspects of the drafting history of the complementarity legal regime to contextualize the Court's approach to the interpretation of complementarity *vis a vis* victims. In the second part, there is a legal and case law analysis of the regime with a focus on admissibility criteria contained in Article 17. Part three discusses different forms of complementarity. It begins with negative complementarity which is associated with admissibility assessments and positive complementarity which generally refers to the Court's ability to encourage states to fulfil their Rome Statute obligations. Part three also contains examples of both forms of complementarity and their limitations in relation to victims. The chapter will conclude that the ICC's method of interpreting and applying the principle of complementarity limits the pursuit and realization of victim-oriented justice by the Court and in concerned states.

2 Rome Statute: The Jurisdictional Relationship Between the ICC and States Parties

2.1 Choosing Complementarity Over Primacy

The drafters of the Rome Statute[7] were tasked with creating a permanent court with wider material and territorial jurisdiction[8] which can try individuals for violations of international crimes provided jurisdictional requirements are met.[9] This type of jurisdiction was different

[7] For more information on the drafters of the Statute and bodies involved in the process including the Ad-hoc Committee which existed between 1995-1998, the Preparatory Committee (PrepCom) and the Rome Conference, see M. Cherif Bassiouni, Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 (3) Cornell International Law Journal 443, pp. 443-469; Fanny Benedetti, Karine Bonneau, and John L. Washburn, Negotiating the International Criminal Court (Brill, Nijhoff 2014) pp. 17-55.
[8] Report of the International Law Commission on the Work of its Forty-Sixth Session 1 September 2004, UNGA (A/49/355) 1994, p. 3.
[9] M. Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court', (1997) 10 Harvard Human Rights Journal 11, p.60.

from the limited jurisdiction of the ad-hoc tribunals,[10] consequently they sought ways to reconcile the ICC's jurisdiction with state sovereignty.[11] The drafters of the Statute considered given the ICC primacy,[12] meaning that at any stage of the procedure in the respective domestic courts, the international court may formally request national courts to defer to its competence.[13] Such an obligation on a sovereign state to defer to the competence of an international court to exercise jurisdiction over international crimes committed within its territory was not acceptable to states.[14] Although primacy of jurisdiction may arguably carry some advantages such as limiting the frequency of admissibility challenges, it would have placed a heavy burden on the ICC as a permanent court of first instance for international crimes.[15] The drafters of the Statute recognized these issues, and looked for a better alternative[16] which they hoped would (1) protect state sovereignty, (2) ensure that the ICC would remain within the parameters of its mandate, and (3) potentially maximize cooperation. Therefore, the International Criminal

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[10] The ICTY and the ICTR were limited by international crimes committed in the Former Yugoslavia, and Rwanda respectively, and within strict timelines. See ICTY Statute, Articles 1-5; ICTR Statute, Articles 1-3.

[11] Bartram S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 Yale Journal of International Law 383, p. 417 ('Brown, Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals (1998)'.

[12] For details of the consideration of primacy in this context, see ILC Draft Statute for an International Criminal Court with commentaries (1994), pp. 36-43, 64, 68.

[13] See UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993, as amended on 17 May 2002) Article 9 (2); UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994, as last amended on 13 October 2006) Article 8 (2); Morten Bergsmo, Philippa Webb, 'International Criminal Courts and Tribunals, Complementarity and Jurisdiction', *The Max Planck Encyclopedia of Public International Law* (MPEPIL 2008) para 4

[14] See ILC Draft Statute for an International Criminal Court with Commentaries (1994), pp. 36-43, 64, 68; M. Cherif Bassiouni, Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 (3) Cornell International Law Journal 443, pp. 443-469; Fanny Benedetti, Karine Bonneau, and John L. Washburn, Negotiating the International Criminal Court (Brill, Nijhoff 2014) pp. 17-55; Brown, Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals (1998), pp. 395-396; Paul Seils, Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes (ICTJ 2016) pp. 5-9.

[15] Morten Bergsmo, Philippa Webb, 'International Criminal Courts and Tribunals, Complementarity and Jurisdiction', *The Max Planck Encyclopedia of Public International Law* (MPEPIL 2008) paras 11-12; The Court also recognizes this fact in its own decisions, see for example, Decision on the Prosecutor's Application for Warrants of Arrest, ICC-01/04-520-Anx2, 17 July 2008; ICC-OTP, para 60.

[16] Jurdi, The ICC and National Courts: A Contentious Relationship (2011) pp.18-19.

Court was created on the basis that it will have concurrent jurisdiction[17] with national courts but will be complementary to them in dealing with genocide, war crimes, crimes against humanity, and the crime of aggression.[18] To better understand the principle of complementarity, it is worth considering how it developed through relevant aspects of the drafting history of the Rome statute, which will be the focus of the next section.

2.2 Drafting History of the Complementarity Regime in the Rome Statute

The drafting history of the Rome statute and its complementarity regime has been widely discussed in literature.[19] The focus of this section is mainly to highlight some important aspects in its development which continue to influence how complementarity is applied in the Court's practice, especially in relation to victims. There is no single Rome Statute *Travaux Préparatoires*. The closest to such a document are compilations of the International Law Commission, and accounts of participants and observers contained in books, articles and commentaries which are referenced throughout this thesis.[20]

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[17] The term 'concurrent' here is used to denote the fact that states and the ICC have jurisdiction over international crimes, although states possess primary jurisdiction. On this issue see PrepCom Report Vol. 1 (March-April and August 1996 Proceedings), para 158; Holmes, Complementarity: National Courts versus the ICC (2002), p. 672.

[18] See the Rome Statute of the International Criminal Court, paragraph 10 of the Preamble, Article 1, and paragraph 5-8 *bis*. Placement of complementarity in the preamble was for the clarification on the implications of the principle of complementarity for the substantive provisions of the Draft Statute, see Report of the Ad Hoc Committee, UN GAOR 50th Session (A/50/22) 1995, paras 29-56, 131-133; Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) p. 447.

[19] See for example, Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (2008); Stahn, El-Zeidy, Judge de Gurmendi, and Politi, in Carsten Stahn and Mohamed M. El Zeidy (eds), The International Criminal Court and Complementarity: From Theory to Practice (CUP 2011); PrepCom Report Vol. 1 (March-April and August 1996 Proceedings); John T. Holmes, 'The Principle of Complementarity' in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer 1999), pp. 41-78 ('Holmes, The Principle of Complementarity (1999)'); M. Cherif Bassiouni, and William A. Schabas (eds), The Legislative History of the International Criminal Court (2nd Revised edn, vol I Brill 2016) ('Bassiouni and Schabas, The Legislative History of the International Criminal Court (2016)').

[20] In addition to previously referenced literature on the drafting history of the Rome Statute, the account of John T. Holmes is relevant here. He was the coordinator of informal consultations on the issue of complementarity in the Preparatory Committee (PrepCom) Holmes, The Principle of Complementarity (1999), pp. 41-78. The

Concretizing complementarity was not an easy task for the drafters.[21] The interconnected issues of how to protect sovereignty, ensure that states act in good faith while at the same time preventing impunity were major sticking points.[22] Different proposals were made[23] which were geared towards narrowing down a definition of the kind of complementarity that was acceptable to states.[24] There were questions on whether the Court's jurisdiction will be automatic,[25] or whether there would be any need for the Court to satisfy itself that it has

different groups involved in the drafting and negotiation of the Rome Statute include the International Law Commission (ILC) which prepared the Draft Statute for an International Criminal Court (ILC Draft Statute) which was later developed into the Rome Statute, Ad-Hoc Committee, the Preparatory Committee, the Rome Conference delegates, and others. References to drafting history may relate to any one or more of these groups. See for example, UNGA A/Res/47/33 (9 February 1992); ICC Press Release ICC-CPI-20140409-PR992, 'Statement by the International Criminal Court on the passing of Arthur Robinson' (2014) <https://www.icc-cpi.int/news/statement-international-criminal-court-passing-arthur-robinson> accessed 22 September 2022; James Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal' (1994) 88 (1) The American Journal of International Law 140, pp. 140-152; James Crawford 'The ILC Adopts a Statute for an International Criminal Court' (1995) 89 (2) The American Journal of International Law 404, pp. 404-416; Bassiouni and Schabas, The Legislative History of the International Criminal Court (2016) pp. 1-131.

[21] See Holmes, Complementarity: National Courts versus the ICC (2002), pp. 673-674; PrepCom Report Vol. 1 (March-April and August 1996 Proceedings) pp. 36-41; ILC, 1994 Draft Statute, Article 35; Preamble of the ILC 1994 Draft Statute uses the word 'ineffective', and phrase 'not available' to try and narrow down when the ICC would be justified to act; Holmes, The Principle of Complementarity (1999) pp. 45-47; PrepCom Report Vol. 1 (March-April and August 1996 Proceedings) page 36, Paras 153-154.

[22] Brown, Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals (1998) pp. 384-436; Elizabeth Wilmshurst, 'Jurisdiction of the Court' in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer 1999), pp.131-133 ('Wilmshurst, Jurisdiction of the Court (1999)'); Mauro Politi, 'Reflections on Complementarity at the Rome Conference and Beyond' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 142-149; Jurdi, The ICC and National Courts: A Contentious Relationship (2011) pp. 9-31; Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) pp. 446-451.

[23] See ILC, Yearbook of the International Law Commission 1990 Vol I: Summary Records of the Meetings of the 42nd Session 1 May-20 July 1990 (A/CN.4/SER.A/1990) pp. 31-32, paras 33-36 ('Yearbook of the ILC 1990 Vol I (A/CN.4/SER.A/1990)'); Mohamed El Zeidi, 'The Gensis of Complementarity' in Carsten Stahn and Mohamed El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) p. 71.

[24] See Yearbook of the ILC 1990 Vol I (A/CN.4/SER.A/1990), p. 37, paras 6, 8, p. 39, 20-21, pp. 40-41, para 34, pp. 41-42, pp. 42-3, paras 40, paras 1-4 and 6 ('Yearbook of the ILC 1990 Vol I (A/CN.4/SER.A/1990)'); Ferencz, From Nuremberg to Rome: A personal Account (2003); El Zeidi argues that complementarity dates back to the 1919, see Mohamed El Zeidi, 'The Gensis of Complementarity' in Carsten Stahn and Mohamed El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 69 to 141; Yearbook of the ILC 1990 Vol I (A/CN.4/SER.A/1990), pp. 31-32, paras 33-36.

[25] Yearbook of the ILC 1990 Vol I (A/CN.4/SER.A/1990), pp. 31-32, paras 33-36, pp. 32-36, paras 34-76; International Committee of The Red Cross: Concerns on Jurisdiction of The International Criminal Court Relating to the Bureau Proposal (A/CONF.183/C.1/L.59) Information Conveyed by New Zealand, UN doc A/CONF.183/INF/9, 13 July 1998; Rome Proceedings, A/CONF.183/13, Vol. II, p. 214, para 27.

jurisdiction on a case-by-case basis.[26] The drafters also considered the question of whether victims, states and the UNSC could trigger the jurisdiction of the ICC[27] and how this could be achieved without opening the trigger mechanism to politicization.[28] These issues necessitated the admissibility process mainly regulated by a set of criteria listed in Article 17 of the Rome Statute.[29]

The ICC's concurrent jurisdiction with states led to the creation of provisions containing preconditions to the exercise of the Court's jurisdiction. These are important because they essentially determine whether victims will see any justice served in The Hague or in domestic jurisdictions. The preconditions were couched in a way as to protect state's primacy,[30] and to ensure that the Court remained within its limited sphere of operation.[31] States Parties to the Rome Statute had to consent to the crimes and defendants which the Court could exercise jurisdiction over.[32] This is reflected in Article 12 of the Statute which provides that the Court may exercise its complementary jurisdiction if (1) a Rome Statute crime is committed in the territory of a State Party, or (2) where a non-state party on whose territory a Rome Statute

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[26] This is now contained in Article 19 (1) ICCst.
[27] See Articles 13, 14 and 15 ICCst.; Report of the Ad Hoc Committee, UN GAOR 50th Session (A/50/22) 1995, para 117.
[28] See PrepCom Report Vol I (March-April and August 1996 Proceedings), paras 117-128; Wilmshurst, Jurisdiction of the Court (1999) pp. 128-131; Philippe Kirsch and Darryl Robinson, 'Referral by States Parties' in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court*: *A Commentary* (Vol I OUP 2002), pp. 619-625; PrepCom Report Vol I (March-April and August 1996 Proceedings), paras 118-119, 145-148.
[29] See Article 17 ICCst.
[30] See Wilmshurst, Jurisdiction of the Court (1999) pp. 128-130; Report of the Ad Hoc Committee, UN GAOR 50th Session (A/50/22) 1995, paras, 38-47, 91-111; Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court' in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer 1999) pp.79-126 for a discussion of core crimes.
[31] ILC Draft Statute for an International Criminal Court with commentaries (1994), Commentary on the Preamble, para 2. Such circumstances were reflected in the Draft Articles on crimes within the jurisdiction of the court, preconditions to the exercise of jurisdiction and issues of admissibility. See ILC 1994 Draft Articles 20 (e), 21 and (35).
[32] Rome Proceedings, A/CONF.183/13, Vol III, Option 1 to Article 7 on Acceptance of Jurisdiction, p. 208; For more detail about the different considerations and debate on acceptance of jurisdiction, see Wilmshurst, Jurisdiction of the Court (1999), pp. 131-134.

crime is committed accepts the Court's jurisdiction,[33] (3) or if the accused is a national of the State Party.[34] There was no precondition based solely on victims. For instance, the Court would not be able to exercise its jurisdiction solely because a country whose nationals are victims of core crimes is a State Party to the Statute. Instead, jurisdiction based on nationality was limited to the nationality of the defendant.

2.3 Minimal Consideration of Victims Under Complementarity Provisions

During the drafting of the complementarity regime, there were suggestions that victims or their relatives should be authorized to trigger the ICC's jurisdiction.[35] There was also a suggestion that 'a special commission should be established within the court to review complaints filed by individuals and to determine before the initiation of any further action whether the necessary criteria were met so as to avoid overloading the court.'[36] These proposals were not carried forward. If adopted they would have enhanced victims' ability to request a review of the Prosecutor's decision not to investigate or prosecute which would have mitigated the effects of their current inability to appeal such decisions.[37] Alternatively, victims' ability to trigger the Court's jurisdiction could have provided them with the grounds to participate in other complementarity proceedings more actively, including those of an interlocutory nature.

[33] For example, although 'Ukraine is not a State Party to the Rome Statute, but it has twice exercised its prerogatives to accept the Court's jurisdiction over alleged crimes under the Rome Statute occurring on its territory.' See ICC, *Situation in Ukraine*, ICC-01/22, <https://www.icc-cpi.int/ukraine> accessed 22 September 2022.

[34] This is now contained in Article 12 of the Statute. For previous coverage in earlier drafts of the Statute, see ILC 1994 Draft Articles 20 and 21, and their respective commentaries; See Michail Vagias, The Territorial Jurisdiction of the International Criminal Court (CUP 2014) pp. 1-78 in particular.

[35] Report of the Ad Hoc Committee, UN GAOR 50th Session (A/50/22) 1995, para 117.

[36] Report of the Ad Hoc Committee, UN GAOR 50th Session (A/50/22) 1995, para 117.

[37] See Chapter Two for discussions of victims' participation in relation to appeals and interlocutory proceedings. Section 4.1.4. Also, this does not negate the argument that granting victims standing to appeal would not tackle all other issues regarding their access to complementarity processes and mechanism.

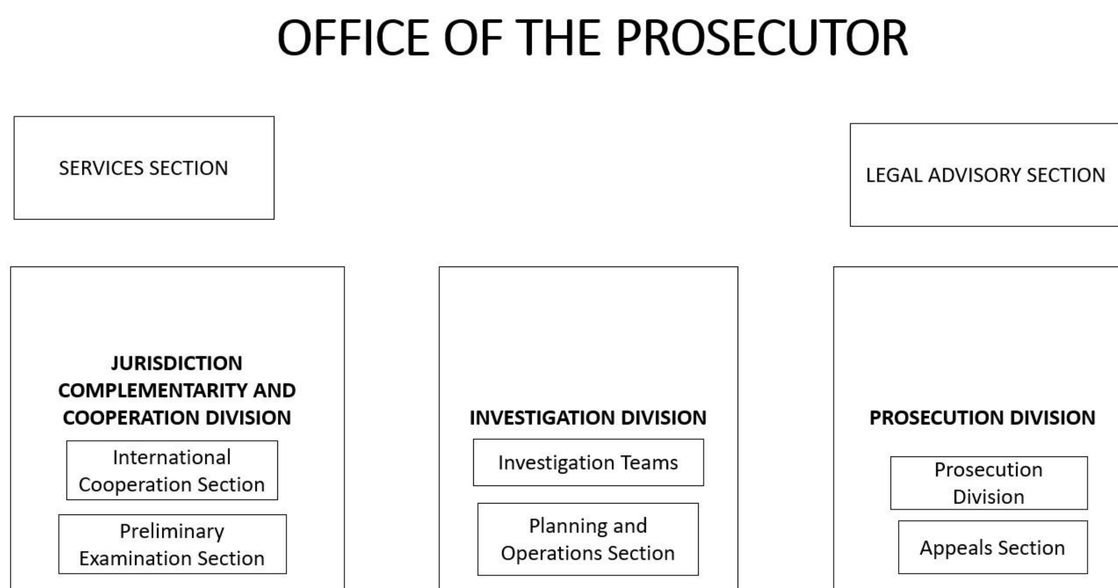
During the drafting process it was also suggested that victims should be given an opportunity to participate by way of submitting observations in proceedings regarding the challenge to the Court's jurisdiction or admissibility of a case.[38] This was later adopted as Article 19 (3) of the Rome Statute, and it is the only article that expressly provides victims with a participatory right during an admissibility proceeding. This is not an absolute right as it is subject to the discretion of the relevant chamber.[39]

The drafters did not pay sufficient attention to the significance of victims' inclusion in complementarity proceedings and this represents a flawed approach to the regime governing such an important stage in the Court's proceedings.[40] For example, victims can play an important role in uncovering the truth, increasing the possibility of convictions in instances where such an outcome will be appropriate, and serving as reminders of the need for justice to be victim oriented.[41] The minimal consideration of victims' needs and interests in complementarity provisions is not helped by the structure of the ICC's main complementarity body, the Jurisdiction, Complementarity and Cooperation Division. The JCCD is one of the three main divisions of the Office of the Prosecutor, in addition to the Investigation Division, and the Prosecution Division.[42] The OTP created the JCCD to support the Office in the

[38] Rome Proceedings, A/CONF.183/13, Vol III, p. 28 (by the time of the Rome conference, Article 17 dealt with these issues of challenges to the jurisdiction of the Court) pp. 100-102.
[39] See Chapter Two, Section 4.1 on discussion of victims' participation.
[40] Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019, paras 2, 23-29, 38-50; Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020, paras 44-48; Rome Proceedings, A/CONF.183/13, Vol II, p. 120, para 86; Moffett, Justice for Victims Before the ICC (2014) pp. 52-56.
[41] Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020, paras 44-48; Rome Proceedings, A/CONF.183/13, Vol II, p. 120, para 86; Moffett, Justice for Victims Before the ICC (2014), pp. 52-56.
[42] ICC-OTP, 'Office of the Prosecutor' <https://www.icc-cpi.int/sites/default/files/Publications/otpENG.pdf> accessed 5 October 2022.

fulfilment of its main mandate of investigating and prosecuting core crimes.[43] The JCCD is itself made up of the Preliminary Examination Section and the International Cooperation Section[44] as illustrated in Figure 3.1 below.

Figure 3.1



The JCCD's duties are multifaceted and cuts across all stages of the OTP's work. It 'analyses referrals and communications [on situations in which Rome Statute crimes may have occurred], (…), assess[es] admissibility, helps secure the cooperation needed for the activities of the

[43] See ICC-OTP, 'Office of the Prosecutor' <https://www.icc-cpi.int/sites/default/files/Publications/otpENG.pdf> accessed 5 October 2022; Overall Response of the International Criminal Court to the "Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report": Preliminary Analysis of the Recommendations and information on relevant activities undertaken by the Court (14 April 2021) para 19 ('ICC's Overall Response to the Independent Expert Review (2021)'); Prior to being called the JCCD, this Division was called the 'The External Relations and Complementarity Unit', nevertheless its duties are similar, if not the same as the current JCCD. See ICC-OTP, 'Draft Paper on Some Policy Issues Before the Office of The Prosecutor for Discussion at The Public Hearing in The Hague on 17 And 18 June 2003' <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/draft_policy_paper.pdf> accessed 5 October 2022, p. 8; Jo Stigen, 'The Admissibility Procedures' in Carsten Stahn and Mohammed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) p. 507.

[44] Report of the Independent Expert Review of the ICC (2020) para 118.

Office and is responsible for all external relations aspects of the Office.'[45] In carrying out its responsibilities, the JCCD interacts with and nudges states to fulfil their primary obligation to investigate and prosecute international crimes.[46] Although the JCCD appears to be prima facie well-structured to manage these important responsibilities of the complementarity process, the issue lies in its attachment to the OTP. Hence, the JCCD's policies, and approach to fulfilling its responsibilities are guided by the interests of the OTP, which as earlier stated, may not always encompass all victims' interests. The following part analyzes complementarity in practice by looking at the work of the OTP and the Chambers, and further highlights the foundational flaw in the complementarity regime in relation to victims.

3 Analysis of the Complementarity Regime and Practice

Complementarity proceedings can take place in the 'situation' phase, i.e., concerning one or more countries where Rome Statute crimes are alleged to have occurred,[47] or at the 'case' level where suspects have been identified.[48] The Statute provides for the different stages of

[45] ICC-OTP, 'Office of the Prosecutor' <https://www.icc-cpi.int/sites/default/files/Publications/otpENG.pdf> accessed 5 October 2022 (emphasis added); See also Report of the Independent Expert Review of the ICC (2020) paras 117- 118. Note that in the Overall Response of the ICC to the Independent Expert Review of the Court, it was stated that the JCCD's International Cooperation Section also has a small General Cooperation and External Relations team. See ICC's Overall Response to the Independent Expert Review (2021) para 134.
[46] See Figure 3.1 which illustrates the JCCD's composition and location in the OTP; See also Jo Stigen, 'The Admissibility Procedures' in Carsten Stahn and Mohammed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) p. 507; Regulation 7 of the Regulations of the OTP.
[47] See Rod Rastan, 'Situation and case: Defining the Parameters' in Carsten Stahn and Mohamed El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice*, (2011) p. 422.
[48] For example, Article 17 (1) (b) and (c), and (2) and (3) of the Statute refer to the actions and decisions of states with regards to a 'person' and the 'accused', suggesting that in such instances, a suspect has been identified and is being or has been investigated or prosecuted. Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006), para 65; Decision on the Prosecutor's Application for a Warrant of Arrest. Article 58, *Lubanga*, *Situation in the Republic of the Congo*, ICC-01/04-01/06-1-Corr-Red, PTC I, ICC, 17 March 2006, para 21 ('Decision on the Prosecutor's Application for a Warrant of Arrest, *Lubanga*, ICC-01/04-01/06-1-Corr-Red, 17 March 2006'); For the meaning of a 'case' in the context of admissibility proceedings, see Annex II Public (Containing 'Decision on

proceedings whether at the situation phase or when specific cases have been identified.[49] The complex nature of the complementarity regime necessitates a coordination of the functions of organs of the Court through different stages of proceedings. Due to complementarity's connection with investigations and prosecutions, it is the Office of the Prosecutor which has the most involvement with the complementarity regime. Many procedures under complementarity are managed by divisions within the OTP as explained in the preceding section. The Chambers may be called upon to issue different kinds of orders and to make rulings on complementarity and admissibility issues.[50]

3.1 Admissibility Criteria Under Article 17 of the Rome Statute

Before proceeding with an analysis of admissibility criteria, it is important to restate the link between complementarity and 'admissibility'.[51] From the drafting history it was said that

> "[admissibility criteria contained in Article 17] was the result of extensive discussions in the Preparatory Committee on the Establishment of an International Criminal Court

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the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-01/07, 10 February 2006') *Lubanga, Situation in the Democratic Republic of the Congo*, ICC-01/04-520-Anx2, PTC I, ICC, 17 July 2008, para 31; Decision on the Prosecutor's Application for a Warrant of Arrest, Lubanga, ICC-01/04-01/06-1-Corr-Red, 17 March 2006, para. 37; Rod Rastan, 'What is A Case for the Purpose of the Rome Statute', (2008) 19 Criminal Law Forum 435, pp. 435-448.

[49] Note that proceedings include both judicial and non-judicial proceedings. Beside 'investigations' explained above, 'prosecutions' is another important proceeding before the Court. See Rod Rastan, 'Situation and case: Defining the Parameters' in Carsten Stahn and Mohamed El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice*, (2011), pp. 445-446; Michael P. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court, 1999 32 (3) Cornell International Law Journal 507, p. 525; Darryl Robinson, 'Serving the Interest of Justice: Amnesties, Truth Commissions and The International Criminal Court' (2003) 14 (3) European Journal of International Law 481, p. 500; Jurdi, The ICC and National Courts: A Contentious Relationship (2011), pp. 35-36.

[50] ICC, Understanding the International Criminal Court (2020) p. 8 <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>, accessed 19 September 2022.

[51] See Articles 21, and 34-36 of ILC Draft Statute for an International Criminal Court with commentaries (1994); Rome Proceedings, A/CONF.183/13, Vol II, p. 103, para 100, p. 341, para 65 for examples of comments on linkage between admissibility and complementarity.

> concerning the principle of complementarity. In those discussions, virtually all States had indicated the importance which they attached to the inclusion of the principle of complementarity in the Statute - the principle that the primary obligation for the prosecution of crimes falling within the jurisdiction of the Court lay with States themselves."[52]

As Schabas asserted, complementarity is part of the ICC's DNA.[53] Thus, admissibility criteria serve as a check to ensure that the Court is acting in a complementary manner to states,[54] and not usurping state primacy.[55] The admissibility criteria were framed by matters of investigation and prosecution. It featured issues such as ability to apprehend suspects, availability of a national system to prosecute perpetrators of core crimes, and unwillingness to investigate or prosecute.[56] These foundational considerations and the framing of admissibility criteria reflect the sovereignty-based and prosecutorial focused approach taken by the drafters of complementarity regime.[57]

The ICC interprets admissibility as complementarity and gravity.[58] The analysis of Article 17 in this section and the following sections is conducted in two parts. The first part examines

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[52] See Rome Proceedings, A/CONF.183/13, Vol II, p. 213, para 19 (emphasis added).
[53] Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) p. 447.
[54] Paul Seils, Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes (ICTJ 2016) p. 19; Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) p. 447.
[55] Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) p. 447.
[56] Report of the Preparatory Committee on The Establishment of an International Criminal Court: Addendum, (A/CONF.183/2/Add.) 14 April 1998, pp. 40-42 outlines the structure of what is now Article 17 with some explanatory footnotes.
[57] Rome Proceedings, A/CONF.183/13, Vol II, p. 213, para 19; De Vos, Complementarity, Catalysts, Compliance (2020) p. 28.
[58] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, PTC II, ICC, 1 April 2010, para 52 ('Decision Authorizing Investigation into the Situation in Kenya, ICC-01/09-19-Corr, 1 April 2010'); Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Ruto*, *Kosgey*, and *Sang*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-101, PTC II, ICC, 30 May 2011, para 47 ('PTC II Rejection of Kenya's Admissibility Challenge, *Ruto*, *Kosgey*, and *Sang*, ICC-01/09-01/11-101, 30 May 2011').

how the ICC adheres to the Rome Statute requirement that it be mindful of its complementary nature in making admissibility decisions.[59] The second part analyzes admissibility criteria of 'gravity', 'unwillingness', and 'inability'.[60] This method was adopted because the way in which the Court pays attention to its complementary nature sheds light on how it interprets the 'gravity', 'unwillingness' and 'inability' criteria.

As Solera observes, 'the introduction to the complementary character of the Court was spelled out and emphasized in the Preamble: (…)'[61] Article 17 of the Rome Statute provides that

> "1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3 [*ne bis in idem*];
>
> (d) The case is not of sufficient gravity to justify further action by the Court."[62]

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[59] See Paragraph 10 of the Preamble to the Rome Statute, and Article 1 of the same.
[60] This analysis does not cover *ne bis in idem* which forms part of admissibility criteria, because it does not significantly contribute to the current discussion. *Ne bis in idem* is covered under Article 20 (3) of the Statute which outlines three instances where a trial will be inadmissible. See Article 20 (1)- (3) ICCst.
[61] Solera, Complementary Jurisdiction and International Criminal Justice (2002) pp. 163-169.
[62] Article 17 (1) ICCst. (emphasis added).

3.1.1 The Court's Regard to its Complementary Nature

Under Article 17 (1), the ICC in admitting situations and cases or deferring to states, must have regard to its complementary nature.[63] Judge Nsereko asserts that this reference of complementarity in the Chapeau of Article 17 makes it the overarching principle that must inform the Court's admissibility determinations.[64] Hence, the question of complementarity is inextricably linked with admissibility such that a discussion of one triggers a consideration of the other. The requirement that the ICC pays attention to its complementary nature provides it with the means to ensure that where possible, justice can be done closer to victims whose participation is crucial.[65] Niang refers to this as 'the justice of proximity'.[66] However, the Court has not always paid due regard to its complementary nature in a way that can encourage such domestic processes for victims' benefit.

In the early years of the ICC, its practice regarding a consideration of issues of admissibility was a short statement noting that the relevant case was considered admissible, without prejudice to subsequent determination.[67] The DRC Situation referred by the DRC

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[63] Article 17 (1) ICCSt.
[64] Daniel Nsereko, 'The ICC and Complementarity in Practice' (2013) 22 (2) Leiden Journal of International Law 427, p. 441.
[65] Morten Bergsmo, Olympia Bekou and Annika Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2 Goettingen Journal of International Law 791, pp. 800-801, (Bergsmo, Bekou and Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools (2010)').
[66] See ICC-OTP, 'ICC Prosecutor Underlines Commitment to Support the Special Criminal Court of the Central African Republic Following Address by Deputy Prosecutor, Mr Mame Mandiaye Niang at Opening of First Trial in Bangui Image' 11 May 2022 <https://www.icc-cpi.int/news/icc-prosecutor-underlines-commitment-support-special-criminal-court-central-african-republic> accessed 22 September 2022 ('Prosecutor Khan's Statement of Commitment to Support the Special Criminal Court of the Central African Republic, 11 May 2022'); See also Mark A. Drumbl, Atrocity, Punishment and International Law (CUP 2007) p. 128.
[67] For example, Warrant of Arrest For Joseph Kony Issued on 8 July 2005 as Amended On 27 September 2005, *Situation in Uganda*, ICC-02/04-01/05-53, PTC II, ICC, 13 October 2005, para 38; Warrant of Arrest For Vincent Otti, *Otti*, *Situation in Uganda*, ICC-02/04-01/05-54, PTC II, ICC, 13 October 2005, para 38; Warrant of Arrest For Raska Lukwiya, *Lukwiya*, ICC-02/04-01/05-55, PTC II, ICC, 13 October 2005, para 26; Ben Batros, 'Evolution of the ICC Jurisprudence on Admissibility' Carsten Stahn and Mohamed El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) p. 560 (Batros, Evolution of the ICC Jurisprudence on Admissibility (2011)')

Government[68] presented the Court with the first opportunity to consider the question of admissibility in some detail.[69] This admissibility determination was not carried out in the context of a challenge, but in the course of the issuance of arrest warrants against Mr Lubanga and Mr Ntaganda.[70] The Chamber stated regarding admissibility that '… it is the Chamber's view that an initial determination of whether the case against Mr Thomas Lubanga Dyilo falls within the jurisdiction of the Court and is admissible is a prerequisite to the issuance of a warrant of arrest for him.'[71] In these cases, the Chamber considered the link between complementarity and admissibility. The Court noted that DRC's referral of the situation apparently meant that they were unable to undertake the investigation and prosecution of the crimes falling within the jurisdiction of the Court.[72] The Chamber found that the referral was consistent with the purpose of the complementarity regime.[73] The Chamber also acknowledged that the DRC's national judicial system had undergone certain changes which resulted in the advancement of proceedings against Mr Lubanga and Mr Ntaganda for *inter alia* crimes against humanity, and genocide, some of which were possibly within the jurisdiction of the Court.[74]

[68] *Situation in the Democratic Republic of the Congo*, ICC-01/04 <https://www.icc-cpi.int/drc> accessed 23 September 2022; Decision on the Prosecutor's Application for a Warrant of Arrest, Lubanga, ICC-01/04-01/06-1-Corr-Red, 17 March 2006, paras 22 (i) and 35; Annex 1 to "Submission of the Redacted Version of the Formatted English Version of the Prosecution's Application for a Warrant of Arrest", ICC-01/04-01/07-129-Anx1, PTCI, ICC, 25 February 2008.
[69] Batros, Evolution of the ICC Jurisprudence on Admissibility (2011) p. 560.
[70] Annex 2 to "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", *Ntaganda*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-20-Anx2, PTC I, ICC, 21 July 2008, paras 29-64, 77-89 ('Lubanga and Ntaganda Arrest Warrant, ICC-01/04–02/06–20-Anx2, 21 July 2008').
[71] See Decision on the Prosecutor's Application for a Warrant of Arrest, Lubanga, ICC-01/04-01/06-1-Corr-Red, 17 March 2006, paras 18-20, 29-75. The *Lubanga* case is one containing many firsts for the ICC, as such it is referenced throughout this chapter.
[72] Lubanga and Ntaganda Arrest Warrant, ICC-01/04–02/06–20-Anx2, 21 July 2008, Para 36; Decision on the Prosecutor's Application for a Warrant of Arrest, Lubanga, ICC-01/04-01/06-1-Corr-Red, 17 March 2006, paras 34-35.
[73] Lubanga and Ntaganda Arrest Warrant, ICC-01/04–02/06–20-Anx2, 21 July 2008, para 36; Decision on the Prosecutor's Application for a Warrant of Arrest, Lubanga, ICC-01/04-01/06-1-Corr-Red, 17 March 2006.
[74] Lubanga and Ntaganda Arrest Warrant, ICC-01/04–02/06–20-Anx2, 21 July 2008, para 37; Decision on the Prosecutor's Application for a Warrant of Arrest, Lubanga, ICC-01/04-01/06-1-Corr-Red, 17 March 2006, para 36; see also Human Rights Watch, 'Democratic Republic of Congo and the International Criminal Court Hearing

The Chamber's acknowledgement of the apparent capabilities of the DRC's system *vis a vis* Mr Lubanga, suggests that the Court should have paid greater attention to its complementary nature. In this regard, Schabas argues that the Pre-Trial Chamber's assessment can be interpreted as meaning that the DRC's justice system was not suffering from a total or substantial collapse or unavailability of its national judicial system, such as to warrant the situation being admitted to the ICC.[75] According to Clark, senior judicial officials in Ituri[76] did not share the DRC's central government's view regarding unwillingness and inability to investigate and prosecute Mr Lubanga as these regional authorities were already investigating him and others.[77] This thesis argues that the declaration that the *Lubanga* case was admissible because *inter alia* the national proceedings against Mr Lubanga did not cover the same case,[78] appears to be inconsistent with the purpose of complementarity. The Appeals Chamber reversed the Pre-Trial Chamber I's 10th February 2006 decision that the *Ntaganda* case was inadmissible, thus, the ICC exercised jurisdiction over Mr Ntaganda.[79] The Trial Chamber in the *Katanga* admissibility rulings which came later[80] also considered the link between

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to Confirm the Charges against Thomas Lubanga Dyilo: Questions and Answers' <https://www.hrw.org/legacy/backgrounder/ij/lubangaqna1106/> accessed 23 September 2022.

[75] See William A. Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts (2008) 19 Criminal Law Forum 5, pp. 24-25 ('Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts (2008)').

[76] Ituri is part of the geographical area of the DRC situation.

[77] Clark, Chasing Cases: the ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda (2011) pp. 1195-1197.

[78] Decision on the Prosecutor's Application for a Warrant of Arrest, Lubanga, ICC-01/04-01/06-1-Corr-Red, 17 March 2006, pp. 29-40. Although the Chamber also stated that it was admissible because it met the gravity threshold, see paras 74-75.

[79] See, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", *Situation in the Democratic Republic of the Congo*, ICC-01/04-169-US-Exp, AC, ICC, 13 July 2006 paras i, ii, and 1-3.

[80] *Katanga*, Reasons for Oral Decision on Admissibility, ICC-01/04-01/07-1213-tENG, 15 July 2009, paras 74, 76-79; For the Appeals Chamber's Take on the matter, see Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga* and *Chui*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/07-1497, AC, ICC, 25 September 2009, paras 84-86; The same approach was used in the *kony et al* admissibility decision-a *proprio motu* review of admissibility, and the Pre-Trial Chamber based its admittance of the case on Uganda's inaction. See Decision on the Admissibility of the Case Under article 19 (1) ICCst., *Kony et al.*, *Situation in Uganda*, ICC-02/04-01/05-377, PTC II, ICC, 10 March 2009, Paras 34-52 ('Uganda Admissibility Decision, ICC-02/04-01/05-377, 10 March 2009').

admissibility and complementarity. It found that admissibility requirement can be fulfilled where a state (DRC) refers a situation to the Court for investigation and prosecution and cooperates fully and in a timely fashion with the Court.[81]

The principle of complementarity requires the Court to only intervene in cases where national systems cannot do so, and not where national systems are simply willing to refer.[82] The important State Party-referral trigger mechanism was created for such situations where an ICC intervention would be justified on the basis of a state's unwillingness, and lack of ability, including where its national system is otherwise unavailable for different reasons.[83] Trying the *Lubanga*, *Ntangada*,[84] and *Katanga* cases domestically could have provided the opportunity for more victims to participate and have justice done closer to home than the limited number who participated in the Court's case against him.[85] This is related to the issue of interests of justice which includes consideration of the interests of victims. These DRC cases should have been left for the local authorities who expressed willingness, were able by the standards of the

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[81] *Katanga*, Reasons for Oral Decision on Admissibility, ICC-01/04-01/07-1213-tENG, 15 July 2009, para 79.

[82] See Section 2 above discussing *inter alia* drafting history. Also, for more discussions about the Court's policies and approach to self-referral and admissibility in this case, see Clark, Chasing Cases: the ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda (2011) pp. 1180-1203; Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) pp. 367-371 and 387-390; ICC OTP, Paper on Some Policy Issues before the Office of the Prosecutor (September 2003); Antonio Coco, 'Commentary on Article 13' (15 August 2017) 2016), Ignaz Stegmiller 'Commentary on Article 14' (30 June 2016) in Case Matrix Network, *Commentary on the Law of the International Criminal Court* <https://www.casematrixnetwork.org/index.php?id=336#4021> Accessed 23 September 2022.

[83] See Article 17 ICCSt.; Anotonio Marchesi, 'Commentary to Article 14 Referral of a Situation by a State Party' in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article-by-Article* (2nd edn, Baden-Baden: Nomos 2008), p. 578, para 8; Decision on the Admissibility and Abuse of Process Challenges, *Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-802, 24 June 2010, para 75; Akhavan discusses the requirement of prosecutorial and judicial scrutiny regarding handling self-referrals. See Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 (2) American Journal of International Law 403, pp. 404 and 411 ('Akhavan, The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the ICC (2005)').

[84] See *Ntaganda*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06, ICC, <https://www.icc-cpi.int/drc/ntaganda> accessed 23 September 2022.

[85] The ICC's current Prosecutor has recently acknowledged the importance of justice done locally. See Prosecutor Khan's Statement of Commitment to Support the Special Criminal Court of the Central African Republic, 11 May 2022.

Statute,[86] and had international support to build their capacity.[87] It would have also provided an opportunity to further strengthen DRC's local capacity to fight impunity while ensuring victims' participation and protection.[88]

The Court in its decisions and policies indicates that it is mindful of states' primary responsibility under the Statute. However, from other admissibility determinations discussed below, there remains a need for the ICC to give due regard to its complementary nature to ensure that cases meant for national courts are tried there.[89] This is important to avoid unnecessary jurisdictional disputes with states, and which goes against the very intention of the drafters of the Statute.[90]

One may question how more deference may lead to states doing victim-oriented justice. The answer lies in the Court's ability to qualify such deference with victim-oriented conditions, while supporting states in capacity building in accordance with the Rome Statute's cooperation

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[86] Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts (2008) p. 20.
[87] This is further discussed in Chapter Four.
[88] See discussions in Chapter Four on capacity building for victim-oriented complementarity.
[89] See ICC-OTP, 'Informal expert paper: The Principle of Complementarity in Practice' (2003) ICC-01/04-01/07-1015-Anx, 1 April 2009, para 5 ('OTP's Informal Expert Paper on the Principle of Complementarity in Practice (2003)'); Judgment on Mr Yekatom's appeal against Trial Chamber V's "Decision on the Yekatom Defence's Admissibility Challenge", 9 October 2020, ICC-01/14-01/18-678-Conf, *Yekatom* and *Ngaissona*, *Situation in the Central African Republic*, ICC-01/14-01/18-678-Red, AC, ICC, 11 February 2021, para 47 ('*Yekatom* Appeal Judgment, ICC-01/14-01/18-678-Red, 11 February 2021').
[90] See Draft Report of the Ad Hoc Committee: B, The Principle of Complementarity', Resumed Session 14-25 August 1995 A/AC.244/CRP.5, 22 August 1995, p. 1; Rome Proceedings, A/CONF.183/13, Vol II, p. 213, para 19, p. 221, para 49; Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber H of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute": Dissenting Opinion of Judge Anita Usacka, *Ruto*, *Kosgey*, and *Sang*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-336, AC, 20 September 2011, para 19 ('Dissenting Opinion of Judge Uscaka from the Appeals Chamber's Judgment on Kenya Appeal, *Ruto*, *Kosgey*, and *Sang*, ICC-01/09-01/11-336, 20 September 2011'); Shahrzad Fouladvand, 'Complementarity and Cultural Sensitivity: Decision-Making by The ICC Prosecutor in Relation to the Situations in The Darfur Region of The Sudan and the Democratic Republic of The Congo (DRC)', pp. 187-190 (DPhil thesis, University of Sussex 2012); Padraig McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism' (2014) 13 (2) Chinese Journal of International Law 259, pp. 270, 286-289; Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021), pp. 145-147.

framework.[91] The Prosecutor recently made the following statement in relation to the opening of a new international crimes case at the Central African Republic's Special Criminal Court, an institution that can help CAR to fulfil its obligations under the Rome Statute.

> "Justice is best delivered closest to those impacted by crimes. We should support all efforts that aim to engage with and empower communities, that allow them to participate more directly in the process of justice. The [Special Criminal Court] is an excellent example of how this partnership between the international community, national authorities and local actors can result in tangible steps towards this goal."[92]

This is a good sign that the OTP is apparently leaning towards a higher commitment to upholding the tenets of complementarity in some aspects of its work by pledging support to a State Party in an effort to push forward the Rome Statute's aims. An examination of the admissibility criteria will be useful to highlight areas where the OTP could improve its method of interpreting and applying complementarity. It is important to note here that all admissibility determinations and more generally the complementarity process must be carried out in a manner which is consistent with internationally recognized human rights as provided under Article 21 (3) of the Statute.[93]

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[91] This is discussed further in chapters four and five. Domestic developments in states, the latest being Central African Republic, also suggest that some states are aware of the potentials of complementarity. See Prosecutor Khan's Statement of Commitment to Support the Special Criminal Court of the Central African Republic, 11 May 2022; see also Judicael Yongo, 'Central African Republic Sentences Three Rebels in First War Crimes Trial' (31 October 2022) *Reuters* <https://www.reuters.com/article/centralafrica-justice-trial-idAFL8N31W5T3> accessed 1 November 2022; Barbara Debout, 'C.Africa Special Court Sentences Three for Crimes Against Humanity' *Rédaction Africanews with Afp* <https://www.africanews.com/2022/11/01/cafrica-special-court-sentences-three-for-crimes-against-humanity/> accessed 1 November 2022.

[92] Prosecutor Khan's Statement of Commitment to Support the Special Criminal Court of the Central African Republic, 11 May 2022.

[93] See Articles 17 (2) 19, and 20 (3) ICCst.

3.2 Analysis of Admissibility Criteria

3.2.1 Gravity as an Admissibility Criterion

The gravity of international crimes is at the very core of the Rome Statute[94] which provides that the most serious crimes of concern to the international community must not go unpunished.[95] It was necessary to include 'gravity' as an admissibility criterion.[96] Article 17 (1) (d) provides that the Court shall determine that a case is inadmissible where it is not of sufficient gravity to justify further action by the Court. For victims, the gravity of crimes usually reflects their harms,[97] and it is the sole admissibility criterion that requires a consideration of victims' issues. The idea behind the gravity criterion was to ensure that the ICC would not be overloaded with situations and cases, and that it would not focus on minor incidents which may qualify as crimes but do not warrant any intervention by the Court.[98]

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[94] For various discussions on the gravity element, see Margaret M. deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32 (5) Fordham International Law Journal 1400, pp. 1399-1465 ('DeGuzman, Gravity and the Legitimacy of the International Criminal Court (2008)'); Alette Smeulers, Maartje Weerdesteijn and Barbara Hola, 'The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance' (2015) 15 (1) International Criminal Law Review 1, pp. 1-39; Stahn, Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC (2017) pp. 413-434.

[95] See para 4 of the Preamble and para 5-8*bis* of the Statute.

[96] See Article 17 (1) (d) of the Rome Statute. See also Draft Article 35 (c) ILC 1994 Draft Statute. PrepCom Report Vol I (March-April and August 1996 Proceedings), paras 55-115, and 169; El Zeidy, The Principle of Complementarity in International Criminal Law (2008), pp. 159-308.

[97] In the Al-Mahdi case where no victim died, but attacks carried out in the context of the situation destroyed cultural properties, the Court still found that there were victims who suffered due to Mr Al Madhi's conduct. See Judgment and Sentence, *Al Mahdi*, *Situation in the Republic of Mali*, ICC-01/12-01/15-171, TC VIII, ICC, 27 September 2016, para 80 ('*Al Mahdi* Judgement, ICC-01/12-01/15-171, 27 September 2016'); See also Megumi Ochi, 'Gravity Threshold Before the International Criminal Court: An Overview of The Court's Practice' (2016) ICD Brief 19, pp. 13-14 ('Ochi, Gravity Threshold Before the International Criminal Court: An Overview of The Court's Practice (2016)').

[98] For details on how the gravity criterion was shaped through the drafting history, see Draft Article 35 (c) ILC 1994 Draft Statute; PrepCom Report Vol I (March-April and August 1996 Proceedings) paras 55-115, and 169; See also ICC-OTP, Policy Paper on Case Selection and Prioritisation (15 September 2016) paras 34-44 ('OTP's Policy Paper on Case Selection and Prioritisation (2016)'); ICC OTP, Strategic Plan: 2016-2018 (16 November 2015) paras 35-37 and 104; ICC OTP, Strategic Plan: 2019-2021 (17 July 2019) paras 18-22; Decision on the Confirmation of Charges, *Abu Garda*, *Situation in Darfur, Sudan*, ICC-02/05-02/09-243-Red, PTC I, ICC, 8 February 2010, paras 31-32; Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", *Situation in the Republic of Cote D'Ivoire*, ICC-02/11-14-Corr, PTC III, ICC, 15 November 2011, paras 202-206; "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application

There is no definition of 'gravity' in the Statute for the purposes of an admissibility assessment, and unlike other admissibility criteria,[99] the statute does not provide a corresponding list of factors to aid the Court in a determination of gravity.[100] Nonetheless, for the purposes sentencing of the accused, Article 78 (1) read in conjunction with Rules 14 (1) (c) and 145 (2) (b) lists factors that can serve as indicia of the gravity of crimes.[101] They include the extent of the harm caused to victims and their families, the nature of the unlawful conduct and the manner of perpetration, the degree of participation of the convicted person and the degree of intent.[102] These are also useful for admissibility assessments.

The Pre-Trial Chamber in the DRC situation found three main factors necessary for a situation or case to meet the gravity threshold,[103] (1) the systematic or large-scale nature of the crime, (2) the social alarm such conduct may have caused,[104] (3) the ranking of the accused, and their role in perpetrating the crimes.[105] According to the Pre-Trial Chamber, the requirement that gravity assessment must consider the ranking of the accused was to maximize the ICC's deterrent effect and achieve prevention of Rome Statute crimes.[106] The Appeals Chamber

for Warrants of Arrest, Article 58", 13 July 2006: Separate and Partly Dissenting Opinion of Judge Georghios M. Pikis, *Situation in the Democratic Republic of the Congo*, ICC-01/04-169-US-Exp, AC, ICC, 13 July 2006, para 40.

[99] See below discussion on 'inability' and 'unwillingness'.

[100] Stahn, Taking Complementarity Seriously (2011), p. 242; See also Susana SáCouto and Katherine A. Cleary, 'The Gravity Threshold of the International Criminal Court' (2008) 23 (5) American University International Law Review 807, p. 808.

[101] See Article 78 (1) ICCst.; Rules 145 1 (c) and 145 (2) (b) ICC Rules of Procedure and Evidence; Regulations 29 (2) Regulations of the Office of the Prosecutor.

[102] Rules 145 1 (c) and 145 (2) (b) of the ICC Rules of Procedure and Evidence. In addition, the Court can be guided by the stipulations in Articles 6 to 8 *bis* of the Statute and the Elements of Crimes of the ICC; Susana SáCouto and Katherine A. Cleary, 'The Gravity Threshold of the International Criminal Court' (2008) 23 (5) American University International Law Review, pp. 809-810.

[103] *Lubanga* and *Ntaganda* Arrest Warrant, ICC-01/04–02/06–20-Anx2, 21 July 2008, paras 47-64.

[104] *Lubanga* and *Ntaganda* Arrest Warrant, ICC-01/04–02/06–20-Anx2, 21 July 2008, paras 46-47.

[105] *Lubanga* and *Ntaganda* Arrest Warrant, ICC-01/04–02/06–20-Anx2, 21 July 2008, paras 50-53.

[106] *Lubanga* and *Ntaganda* Arrest Warrant, ICC-01/04–02/06–20-Anx2, 21 July 2008, paras 49-61.

declared this assessment of gravity an error in law,[107] and found no legal basis for the Pre-Trial Chamber's finding in this regard.[108] The Appeals Chamber's ruling should have settled the issue regarding the relevant threshold required for a gravity determination, but subsequent examination of gravity in other cases show that some chambers still considered a perpetrator's rank.[109] Such a requirement for gravity determination can be detrimental for victims and can be antithetical to the very purpose of retribution and prevention.[110]

In the *Bemba* case from the Central African Republic I (CAR I) situation, it is not clear how the gravity of crimes was accessed in relation to admissibility.[111] Nonetheless, this case exemplifies how focusing only on the alleged most senior perpetrator as an element of gravity can be detrimental for victims. The ICC's investigation in CAR I concentrated on alleged war

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[107] Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", *Situation in the Democratic Republic of the Congo*, ICC-01/04-169-US-Exp, AC, ICC, 13 July 2006, para 73 ('Appeals Chamber Decision Regarding PTC I's *Ntaganda* Arrest Warrant Decision, ICC-01/04-169-US-Exp, 13 July 2006').

[108] Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", *Situation in the Democratic Republic of the Congo*, ICC-01/04-169-US-Exp, AC, ICC, 13 July 2006, paras 73-79.

[109] Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, Situation on the Registered Vessels of The Union of The Comoros, The Hellenic Republic and The Kingdom of Cambodia, ICC-01/13-34, PTC I, ICC, 16 July 2015, para. 21; Decision Authorizing Investigation into the Situation in Kenya, ICC-01/09-19-Corr, 1 April 2010, paras 55-62, 182, 188-198; Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", *Situation in the Republic of Cote D'Ivoire*, ICC-02/11-14-Cor, PTC III, ICC, 15 November 2011, paras 204-206; Ochi, Gravity Threshold Before the International Criminal Court: An Overview of The Court's Practice (2016) pp. 1-16.

[110] Appeals Chamber Decision Regarding PTC I's Ntaganda Arrest Warrant Decision, ICC-01/04-169-US-Exp, 13 July 2006, Paras 73-79.

[111] From the Arrest Warrant Decision, the Pre-trial Chamber only glossed over the issue of admissibility, with brief mention of the fact that the case is admissible since there is no evidence that Bemba was being prosecuted by the CAR authorities at the time. See Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-14-tENG, PTC III, 17 July 2008, paras 11-22; See also a similar conclusion in the Confirmation of Charges Decision, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, paras 22-28; In the Decision on the Admissibility and Abuse of Process Challenges, the Chamber simply stated that the case satisfied the gravity test for admissibility apparently relying on the Pre-Trial Chamber's finding of the same in the confirmation of charges decision. See Decision on the Admissibility and Abuse of Process Challenges, *Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-802, PTC TC III, ICC, 24 June 2010, paras 249, and 261; Ochi, Gravity Threshold Before the International Criminal Court: An Overview of The Court's Practice (2016) pp. 4-14.

crimes and crimes against humanity committed in the context of the conflict in the Central African Republic since 1 July 2002. The investigation produced one main case, The *Prosecutor v. Jean-Pierre Bemba Gombo*.[112] The Prosecutor brought charges against Mr Bemba based on two modes of liability, including as the commander of Mouvement de libération du Congo ("MLC") troops pursuant to Article 28 (a) or (b) on command or superior responsibility.[113] The Trial Chamber found that Mr Bemba was criminally responsible pursuant to article 28(a) of the Statute and he was convicted as a person effectively acting as a military commander and with effective control over the MLC.[114] The Appeals' Chamber subsequently quashed his conviction stating that the Trial Chamber made two serious errors, one of which relates to their assessment of Mr Bemba's responsibility for crimes committed by MLC troops.[115] Since the OTP focused mainly on Mr Bemba as a senior perpetrator, at the time of writing, there is no further proceeding before the ICC through which justice for victims may be pursued.[116] This justice gap demonstrates that the gravity element of admissibility should focus more on victims' harm regardless of the ranking of the perpetrator.

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[112] *Situation in the Central African Republic*, ICC-01/05, <https://www.icc-cpi.int/car> accessed 23 September 2022. The other case against Bemba and other accused (*Bemba et al*) was in relation to offences against the administration of justice, see *Bemba et al*., ICC-01/05-01/13, <https://www.icc-cpi.int/car/Bemba-et-al> accessed 23 September 2022.

[113] Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence [With Prosecution only, Defence only, and Public Annexes] Bemba, *Situation in the Central African Republic*, ICC-01/05-01/08-395, PTC II, ICC, 30 March 2009.

[114] Judgment pursuant to Article 74 of the Statute, *Bemba*, *Situation in the Central African Republic*, ICC-01/05-01/08-3343, TC III, ICC, 21 March 2016, paras 693-752.

[115] The other error relates to category of crimes for which Mr Bemba was charged and the Trial Chamber's assessment of measures he should have taken to address the commission of such crimes. See Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", *Bema*, *Situation in Central African Republic*, ICC-01/05-01/08-3636-Red, AC, ICC, 8 June 2018, paras 1-11 and 116-198.

[116] Central African Republic, *Situation in the Central African Republic*, ICC-01/05 <https://www.icc-cpi.int/car> accessed 23 September 2022.

Following the *Bemba* trial, the OTP sought to clarify the factors which guide its examination of the gravity of crimes for both admissibility determinations, and case selection.[117] From the OTP's policy on these issues, the number of victims,[118] their vulnerability, and the extent of damage which they suffered were meant to feature in gravity assessments.[119] Nonetheless, the ICC is yet to achieve consistency in its determinations of gravity, and this has attracted some debate among scholars and commentators.[120] On the one hand, some chambers considered the ranking of the accused as well as impact of the crimes on victims.[121] On the other hand, other chambers did not consider the accused's ranking as a determinant factor of gravity for the purposes of admissibility.[122] The Appeals Chamber adopted a holistic approach to gravity assessment in its judgement on the *Al Hassan Appeal*.[123] The Chamber found that

[117] OTP's Policy Paper on Case Selection and Prioritisation (2016), paras 35-41; Regulations 29 (2) of the Regulations of the Office of the Prosecutor.

[118] The number of victims is not the only determinant factor but must be considered together with other factors. See DeGuzman, Gravity and the Legitimacy of the International Criminal Court (2008) p. 1432.

[119] OTP's Policy Paper on Case Selection and Prioritisation (2016), paras 38-40.

[120] See Ray Murphy, 'Gravity Issues and the International Criminal Court' (2006) 17 Criminal Law Forum 281, p. 312; William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 (4) Journal of International Criminal Justice 631, pp. 740-749; DeGuzman, Gravity and the Legitimacy of the International Criminal Court (2008), pp. 1425-1435; Batros, Evolution of the ICC Jurisprudence on Admissibility (2011) pp. 560-602; Ignaz Stegmiller, 'Interpretative gravity under the Rome Statute: Identifying Common Gravity Criteria' in Carsten Stahn and Mohamed M El Zeidy (eds), The International Criminal Court and Complementarity: From Theory to Practice (CUP 2011), pp. 612-626, 633-641; Russell Buchan, 'The Mavi Marmara Incident and the International Criminal Court' (2014) 25 Criminal Law Forum 465, pp. 492-498.

[121] See for example, Decision Authorizing Investigation into the Situation in Kenya, ICC-01/09-19-Corr, 1 April 2010, para 50-60; Pre Trial-Chamber III's Decision Authorizing an Investigation into the Situation in Afghanistan, ICC-02/11-14-Corr 15 November 2011, paras 201-206; Decision on the request of the Union of the Comoros to Review the Prosecutor's Decision not to Initiate an Investigation, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and The Kingdom of Cambodia*, PTC I, ICC, 16 July 2015, paras 21-24; Request for Authorisation of an Investigation Pursuant to article 15, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-3, PTC III, ICC, 23 June 2011, paras 56-57; Kai Ambos and Florian Huber, The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?: Extended version of the Statement in the "Thematic session: Colombia", (ICC OTP – NGO roundtable, 19/20 October 2010, The Hague) <https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/epapers/Colombianpeaceprocessandcomplementarity.pdf> accessed 24 September 2022.

[122] Decision on the Confirmation of Charges, Abu Garda, Situation in Darfur, Sudan, ICC-02/05-02/09-243-Red, PTC I, ICC, 8 February 2010, paras 31-32.

[123] Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision Relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense', *Al Hassan*,

> "(…) both quantitative (in particular, the number of victims) and qualitative criteria (such as nature, scale and manner of commission of the alleged crimes, including (…) their impact on victims, the role and degree of participation of the accused, and whether the acts were committed on the basis of discriminatory motives) are relevant to assessing the gravity requirement in a given case."[124]

The Appeals Chamber's approach in the *Al Hassan* case is a good benchmark for a determination of gravity, since it allows for the possibility of an expansion of the list of alleged perpetrators. While avoiding overloading the ICC, both states and the Court must work together to ensure that the burden is shared so that more perpetrators can be brought to justice, and more victims will have the possibility of seeing justice done.

Additionally, the gravity of a situation or a case may warrant intervention by the Court, or deferral to national courts.[125] The latter was obtainable in the Iraq/UK situation which was first terminated on 9th February 2006 due to a finding of insufficient gravity following preliminary examination.[126] The thesis argues that given this possible outcome of gravity assessments at the preliminary examination stage, it is in victims' best interests that the OTP conducts a thorough

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Situation in the Republic of Mali, ICC-01/12-01/18-601-Red, AC, ICC, 19 February 2020 ('*Al Hassan* Appeals Judgment, ICC-01/12-01/18-601-Red, 19 February 2020').

[124] *Al Hassan* Appeals Judgment, ICC-01/12-01/18-601-Red, 19 February 2020, paras 92-94.

[125] See OTP's outline of its approach on gravity assessment in ICC-OTP, Policy Paper on Preliminary Examinations (November 2013), paras 43, 59; *Situation in Iraq/UK*: Final Report, 9 December 2006, paras 119-125; Annalisa Ciampi, 'Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the International Criminal Court' in Olympia Bekou and Daley Birkett *Cooperation and the International Criminal Court. Leiden* (Brill, Nijhoff, 2016) p. 21 ('Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016)').

[126] Note that the OTP examined the situation a second time and found that the crimes within this situation met the gravity requirement, but stated that from all assessments, it could not "conclude that the UK authorities have been unwilling genuinely to carry out relevant investigative inquiries and/or prosecutions (article 17(1)(a)) or that decisions not to prosecute in specific cases resulted from unwillingness genuinely to prosecute (article 17(1)(b))." See ICC-OTP, Situation in Iraq/UK: Final Report, 9 December 2020, paras 1, 11, 119-148, and 502-504 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf> accessed 23 September 2022; For the earlier decision to close the preliminary examination, see ICC-OTP, 'OTP response to communications received concerning Iraq', 9 February 2006 <https://www.icc-cpi.int/news/otp-response-communications-received-concerning-iraq> accessed 23 September 2022.

gravity assessment based on the holistic criteria outlined in the *Al Hassan* Appeal Judgment. If a situation or case is terminated for insufficient gravity, it will also be in the victims' interests that the Court work with the concerned states to ensure that victims can access justice domestically, as this is one of the purposes of the principle of complementarity. It appears that the Prosecutor is taking some initiatives to raise extra funds which could support the Court's work,[127] hence, the proposals made in this thesis regarding working with cooperation partners for fundraising and capacity building are achievable.

Current domestic justice trends for example in DRC and Central African Republic suggest that the Court has a real opportunity to encourage domestic proceedings through complementarity, but it must do so in a victim-oriented manner.[128] This is amplified by Central African Republic's Deputy Prosecutor Niang statement who rightly argues that combined actions with the OTP and international actors supporting CAR's work, makes the fight against impunity for international crimes effective and makes justice relevant to the most affected communities.[129]

After a gravity determination, unwillingness or inability of a state must be examined. Under Article 17 (1) (a) and (b), a case will be inadmissible where it is being or has been investigated or prosecuted by a state which has jurisdiction over it, *unless* the state is unwilling *or* unable genuinely to carry out the proceedings, or a decision not to prosecute resulted from unwillingness or inability of the state genuinely to prosecute. The following section begins by analyzing 'unwillingness'.

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[127] See ICC-OTP, 'Statement of ICC Prosecutor, Karim A.A. Khan QC: Contributions and Support from States Parties will Accelerate action Across Our Investigations', 28th March 2022, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-contributions-and-support-states-parties-will> accessed 24 September 2022.

[128] Luke Moffett, 'Realizing Justice for Victims Before the International Criminal Court' (2014) ICD Brief 6, pp. 1-2.

[129] ICC Prosecutor Underlines Commitment to Support the Special Criminal Court of the Central African Republic Following Address by Deputy Prosecutor, Mr Mame Mandiaye Niang at Opening of First Trial In Bangui (2022).

3.2.2 Unwillingness as an Admissibility Criterion

When national proceedings are ongoing there will be a presumption that those cases will be inadmissible[130] because the state is making an effort which seemingly points to their willingness to investigate and prosecute. The ICC will usually examine the unwillingness criterion when a state has initiated an investigation or prosecution and there are reasons to believe that such proceedings will not result in justice being done.[131] The purpose of unwillingness assessments is to determine genuine proceedings[132] by examining them in an objective manner, having regard to principles of due process recognized by international law.[133]

The Rome Statute does not provide a definition of 'unwillingness', but Article 17 (2) provides a list of factors which may raise doubts about a state's motive,[134] and can prevent their proceedings from passing the unwillingness test.[135] Such factors include signs that the proceedings and decisions are designed to shield the accused from criminal responsibility for

[130] Sharon A. Williams and Williams A. Schabas, Commentary on the Rome Statute, 'Commentary on Article 17: Issues of Admissibility' in *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article-by-Article* (2nd edn, Baden-Baden: Nomos 2008), p. 616, para 24.

[131] Jurdi, The ICC and National Courts: A Contentious Relationship (2011) p. 37; Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, paras 1 and 75-78; PTC I's Judgement on Côte D'ivoire Admissibility Challenge, ICC-02/11-01/12-47-Red, 11 December 2014, para 27; Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, *Gaddafi* and *Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-344-Red, PTC I, ICC, 31 May 2013, paras 216-218 ('PTC I's Decision on the Admissibility of the Case Against *Gaddafi*, ICC-01/11-01/11-344-Red, 31 May 2013').

[132] Jurdi, The ICC and National Courts: A Contentious Relationship (2011) pp. 38-42.

[133] Articles 17 (2) and 21 (3) ICCst.

[134] Holmes, Complementarity: National Courts versus the ICC (2002), pp. 672-677; OTP's Informal Expert Paper on the Principle of Complementarity in Practice (2003) paras 44-47. Although in an interesting finding by the Pre-Trial Chamber in the *Katanga* Admissibility Challenge declared that "The Chamber is not in a position to ascertain the real motives of a State which expresses its unwillingness to prosecute a particular case." see *Katanga*, Reasons for Oral Decision on Admissibility, ICC-01/04-01/07-1213-tENG, 15 July 2009, para 80.

[135] See OTP's Informal Expert Paper on the Principle of Complementarity in Practice (2003) paras 44-47; Jurdi, The ICC and National Courts: A Contentious Relationship (2011) pp. 37-38; Article 17 (2) (c) of the Statute; Appeals Chamber Decision on Al-Senussi Appeal, ICC-01/11-01/11-565, 24 July 2014, paras 218-221.

Rome Statute crimes, unjustified delays, lack of independence and impartiality, and proceedings which are inconsistent with an intent to bring the accused to justice.[136]

The Court examined unwillingness in the *Katanga*,[137] and the Libya (*Al-Senussi*) admissibility challenges[138] by considering these elements. In the latter case, the Pre-Trial Chamber looked at how the proceedings against Mr Al-Senussi progressed from investigations to preparations for his trial[139] to determine whether there were reasons to believe that there was an unjustified delay inconsistent with an intent to bring Mr Al-Senussi to justice.[140] The Chamber also considered whether there were violations of his procedural rights such that could suggest that there was a lack of independence and impartiality of the proceedings against him in Libya within the meaning of Article 17 (2) (c).[141] The Pre-Trial Chamber concluded that Libya could not be found to be unwilling to investigate and prosecute Mr Al-Senussi,[142] and the Appeals' Chamber confirmed this decision.[143]

In *Katanga*, the Trial Chamber found that there were no indications that DRC had an intention to shield Mr Katanga from justice,[144] yet the Chamber considered what it referred to as another

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[136] See Article 17 (2) ICCst.
[137] *Katanga*, Reasons for Oral Decision on Admissibility, ICC-01/04-01/07-1213-tENG, 15 July 2009, paras 76-77.
[138] Decision on the Admissibility of the Case Against Abdullah Al-Senussi, *Gaddafi* and *Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-466-Red, PTC I, ICC, 11 October 2013, paras 227-229, 290-292 ('PTC I's Decision on the Admissibility of the *Al-Senussi* Case, ICC-01/11-01/11-466-Red, 11 October 2013'); The Pre-Trial Chamber did not consider 'unwillingness' in relation to the case against Gaddafi because it found Libya unable as further discussed below. See PTC I's Decision on the Admissibility of the Case Against Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, para 216-218.
[139] PTC I's Decision on the Admissibility of the Al-Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 227-258.
[140] PTC I's Decision on the Admissibility of the Al-Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 222-234, 290-292.
[141] See Article 17(2)(c) of the Statute; PTC I's Decision on the Admissibility of the Al-Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 230-258.
[142] PTC I's Decision on the Admissibility of the Al-Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 243 and 290-310.
[143] Appeals Chamber Decision on Al-Senussi Appeal, ICC-01/11-01/11-565, 24 July 2014, paras, 189-232 and 299. This is further discussed in Chapter Six.
[144] *Katanga*, Reasons for Oral Decision on Admissibility, ICC-01/04-01/07-1213-tENG, 15 July 2009, para 77.

form of unwillingness which is not expressly provided for in Article 17.[145] According to the Chamber, the DRC intended to see the accused brought to justice, but not before national courts, i.e., they were willing to waive jurisdiction, defer to the ICC and to cooperate with it.[146] In the Chamber's opinion this satisfied the 'unwillingness' criterion although not in a negative manner, but more along the lines of 'willingness' to defer to the Court's jurisdiction. This thesis argues that a state's desire to see an accused brought to justice, but not before national courts, should not be generally accepted as sufficient to meet the unwillingness criterion; especially when such a reason is the main basis for a finding of unwillingness.[147] This approach[148] may be beneficial to the ICC in cases of self-referrals such as the DRC situation because a state forfeits its exercise of jurisdiction in favor of an ICC investigation or prosecution. In a sense, their interests and that of the OTP's align in such an instance. This approach is not as appropriate for other trigger mechanisms, especially in instances where the state is challenging admissibility. If this method is applied to *proprio motu*, or UNSC situations, a state who launches an admissibility challenge because it wishes to conduct national proceedings, could then be *prima facie* considered as 'unwilling'. This is especially so where the OTP has interests

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[145] *Katanga*, Reasons for Oral Decision on Admissibility, ICC-01/04-01/07-1213-tENG, 15 July 2009, paras 77-79.

[146] See *Katanga*, Reasons for Oral Decision on Admissibility, ICC-01/04-01/07-1213-tENG, 15 July 2009, paras 77-80 and 95. There are issues with self-referrals and waivers of complementarity beyond what the thesis can cover. For discussions of such issues, see for example Claus Kress, 'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy (2004) 2 (4) Journal of International Criminal Justice 944, pp. 944-948; Patrick Wegner, 'Self-Referrals and Lack of Transparency at the ICC – The Case of Northern Uganda Posted on October', (Justice in Conflict, 4 October 2011, <https://justiceinconflict.org/2011/10/04/self-referrals-and-lack-of-transparency-at-the-icc-%E2%80%93-the-case-of-northern-uganda/>, accessed 24 September 2022.

[147] Markus Benzing considers instances where a waiver of complementarity/referrals may be favorable for the fight against impunity/some aspects of the interest of justice. See Benzing, The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity (2003) pp. 629-632.

[148] A similar finding in relation to unwillingness was made in an earlier admissibility challenge in the *Bemba* case, although the Trial Chamber defined it as 'willingness' of CAR to see Mr Bemba prosecuted before the ICC, see Decision on the Admissibility and Abuse of Process Challenges, *Bemba*, Situation in the Central African Republic, ICC-01/05-01/08-802, PTC TC III, ICC, 24 June 2010, paras 243-244.

in pursuing the same case in the Hague which is the subject of the concerned state's national proceedings.

Mr Katanga appealed the Trial Chamber's admissibility ruling on the ground that *inter alia* it wrongly interpreted 'unwillingness'. In considering this ground of appeal, the Appeals Chamber focused on whether there was an existing proceeding, or whether one had existed to warrant further examination of unwillingness.[149] The Chamber found that since neither scenario was obtainable,[150] it saw no reason to address the correctness of the Trial Chamber's definition of unwillingness.[151]

A pertinent question which must be considered is how victims feature in assessment of 'unwillingness' criterion. The ICC case law show that in its assessment of admissibility criteria, including unwillingness, the Court does not necessarily consider whether a state is carrying victims along and accommodating their interests, as a reason to find the state unwilling. The focus is on bringing the accused to justice without unjustified delay and in accordance with due process recognized by international law.[152] The lack of consideration of victims' needs and interests in such instances makes justice at the ICC less victim-oriented, and at the same time the Court misses an opportunity to encourage victim-oriented justice in domestic proceedings.[153]

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[149] Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, paras 73-79, and 96-111.
[150] See below for further discussion of 'instances of inaction'.
[151] Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, paras 96-97, and 116.
[152] See Article 17 (2) of the Statute; PTC I's Decision on the Admissibility of the Al-Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 290-292.
[153] See Chapter Four which discusses this component of victim-oriented justice.

3.2.3 Inability as an Admissibility Criterion

Inability is an important criterion in advancing the aims of complementarity ensuring that states are capable of fulfilling their Rome Statute obligations.[154] According to Article 17 (3), the inability criterion relates to a state's inability to (1) obtain the accused, or (2) the necessary evidence and testimony, (2) or otherwise an inability to carry out its proceedings.[155] The Court will examine a situation or case to determine whether there is substantial or partial collapse, or unavailability of national judicial system.[156] Some indicators of inability include

> "lack of necessary personnel, lack of judicial infrastructure; lack of substantive or procedural penal legislation (…); lack of access (…); obstruction by uncontrolled elements (…); and amnesties, and immunities [any of which may render the system] "unavailable"."[157]

A determination of inability by the Court should be done on a case-by-case basis, while paying attention to the peculiarities of the concerned state.[158] According to Holmes, in the absence of a functioning national justice mechanisms employed in a state, such a state can be hardly seen as able to conduct proceedings which meet the admissibility test.[159] Moreover, a state may have suffered some breakdown in its national systems, but is still able to carry out proceedings to address international crimes.[160] This is supported by the provision of alternate thresholds for

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[154] Holmes, Complementarity: National Courts versus the ICC (2002) pp. 677-678.
[155] Article 17 (3) ICCst.
[156] Article 17 (3) ICCst.
[157] OTP's Informal Expert Paper on the Principle of Complementarity in Practice (2003) p. 31; Jurdi, The ICC and National Courts: A Contentious Relationship (2011) pp. 48-55; Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016), pp. 469-470.
[158] Holmes, Complementarity: National Courts versus the ICC (2002), pp. 677-678; Kai Ambos, Treatise on International Criminal Law, Volume III: International Criminal Procedure, (OUP 2016) pp. 283-284.
[159] Holmes argues that the total collapse of national systems can be self-evident, thus accounts for why this term was not further defined by the drafters of the Statute. John T. Holmes, Complementarity: National Courts versus the ICC (2002) p. 677.
[160] Holmes, Complementarity: National Courts versus the ICC (2002) p. 677.

determining inability, i.e., the 'total' or 'substantial' collapse, or 'unavailability' of the national system. Nevertheless, the minimum criterion is that a substantial collapse of the national judicial system has rendered the state unable.[161] This thesis argues that where a state has challenges with capacity which do not rise to any of the inability thresholds, and where the state is able to provide for victims' participation and preserve the possibility of reparations,[162] the ICC should defer to the willing and able state to fulfil its obligation. This method would be consistent with the intention of the drafters of the Statute because the Court should only intervene when states are not in a position to do so.

In the Court's practice, a determination of inability has been made in a number of decisions, but victims' needs, and interests did not feature as strong elements which influenced the Court's decision.[163] In the Libya admissibility challenges, issues of the existence of relevant legislation, various procedural matters, and Libya's overall capacity to conduct criminal proceedings against Mr Gaddafi[164] and Mr Al-Senussi[165] were considered in determining 'inability'. The ICC found that Mr Gaddafi was not in Libya's custody at the time of the admissibility challenge, and Libya could neither secure his arrest, nor gather necessary evidence for the proceedings.[166] Also, due to security and other challenges which were present in Libya, the

[161] See Jurdi, The ICC and National Courts: A Contentious Relationship (2011) pp. 48-53; See also OTP's Informal Expert Paper on the Principle of Complementarity in Practice (2003) p. 31.
[162] See Chapter Four discussion of requirements for victim-oriented complementarity and the role of cooperation partners in relation to reparations.
[163] Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) p. 301.
[164] For the procedural history and relevant findings of the Pre-Trial and Appeals Chamber in the Libya admissibility challenges in relation to Mr Gaddafi, see Judgment on Libya's Appeals re-*Gaddafi* Decision, 01/11-01/11-547-Red, 21 May 2014.
[165] For the procedural history and relevant findings of the Pre-Trial and Appeals Chamber in the Libya admissibility challenges in relation to Mr Al-Senussi, see PTC I's Decision on the Admissibility of the Al-Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013; Appeals Chamber Decision on Al-Senussi Appeal, ICC-01/11-01/11-565, 24 July 2014.
[166] See PTC I's Decision on the Admissibility of the Case Against Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, paras 199-211; Article 17 (3) of the Statute. There were other procedural issues, including issue with securing a legal representation for Mr Gaddafi, however, the inability to secure his arrest was a major reason for a finding of admissibility.

Court found the Libyan system to be "unavailable" (thus unable) in relation to successfully investigating and prosecuting Mr Gaddafi.[167]

In the *Al-Senussi* case,[168] issues of procedural fairness, such as access to legal representation, Libya's security situation, the impact on witness protection, and how these may affect proceedings against Mr Al-Senussi were considered in determining inability.[169] The Pre-Trial Chamber acknowledged that there were serious security issues which could impact the progress of his case in Libya, but as at the time of its admissibility assessment Mr Al-Senussi was already in Libya's custody.[170] The Chamber also noted that Libya had acquired considerable amount of evidence concerning his case,[171] hence, Libya was not found to be unable in relation to investigating and prosecuting Mr Al-Senussi.[172] This was the first and only time the ICC has deferred a situation to national authorities following an admissibility challenge.

These divergent findings in the two cases from the same situation is challenging to reconcile especially given the ICC's own inability to apprehend Mr Gaddaffi. They also suggest that the Court chose a strictly textual approach in interpreting the inability criterion at the material time

[167] PTC I's Decision on the Admissibility of the Case Against Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, paras 200-215. The Appeals Chamber upheld the Pre-Trial Chamber's decision, Judgment on Libya's Appeals re-Gaddafi Decision, 01/11-01/11-547-Red, 21 May 2014.

[168] Note that Libya first launched a challenge to the *Gaddafi* and *Al-Senussi* cases, but with the Court determining that the *Al-Senussi's* case was inadmissible, Mr Al-Senussi's defense team also filed another admissibility challenge which was subsequently dismissed by the Appeals Chamber. See Appeals Chamber Decision on Al-Senussi Appeal, ICC-01/11-01/11-565, 24 July 2014.

[169] See PTC I's Decision on the Admissibility of the Al Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 203-217, 221-243, and 294; Appeals Chamber Decision on Al-Senussi Appeal, ICC-01/11-01/11-565, 24 July 2014, paras 266, 274-282, 289-291, and 294-296.

[170] PTC I's Decision on the Admissibility of the Al Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 294-310.

[171] PTC I's Decision on the Admissibility of the Al-Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 294-310.

[172] PTC I's Decision on the Admissibility of the Al-Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 294-310.

of admissibility assessment.[173] The context of each situation, including the difficulties and uncertainties faced by states involved in armed conflicts or transitioning from one must be seriously considered in making admissibility findings.[174] It may require a phased approach to admissibility determinations to allow the Court an opportunity to monitor events in the situation country before making a final determination.[175] This ensures that the Court and states can effectively address Rome Statute crimes, while remaining flexible enough to accommodate real time changes.[176]

In the Chamber's decision on the OTP's request for authorization of an investigation into the Afghanistan situation, the presence of amnesties was considered in the process of determining inability within the meaning of Article 17 (3).[177] In other admissibility challenges before the ICC, including *Cote D'Ivoire*, and *Yeakatom*, the Court refrained from making a determination of inability where it found that there was inactivity.[178]

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[173] See Article 17 (1) (b) and (3) of the Statute read together with paras 66 (v), and 307-309 of the Al-Senussi Decision on Admissibility, see PTC I's Decision on the Admissibility of the *Al-Senussi* Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 66 (v), and 307-309; Appeals Chamber Decision on Al-Senussi Appeal, ICC-01/11-01/11-565, 24 July 2014, paras 181, and 198.

[174] See Decision Pursuant to article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022, para 47; Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 228-259; Payam Akhavan, 'Complementarity Conundrums: The ICC Clock in Transitional Times' (2016) 14 (5) Journal of International Criminal Justice 1043, pp. 1043-1059 ('Akhavan, Complementarity Conundrums: The ICC Clock in Transitional Times (2016)'); Stahn, Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC (2017) pp. 413-434.

[175] Decision Pursuant to article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022, para 47.

[176] Judge van den Wyngaert expressed concern about the security situation in Libya and the potential that it would worsen. This happened shortly after the successful admissibility challenge in Libya. See Declaration of Judge Christine Van den Wyngaert [in relation to Decision on the admissibility of the case against Abdullah Al-Senussi] *Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-466-Anx, AC, ICC, 11 October 2013; See chapters four and six for more discussion.

[177] PTC II Decision Refusing the Prosecutor's Request to Open an Investigation into the Situation in Afghanistan, ICC-02/17-33, 12 April 2019, paras 74-75.

[178] PTC I's Judgement on Côte D'ivoire Admissibility Challenge, ICC-02/11-01/12-47-Red, 11 December 2014, para 36; Decision on the Yekatom Defence's Admissibility Challenge, *Yekatom* and *Ngaissona*, *Situation in the Central African Republic II*, ICC-01/14-01/18-493, TC V, ICC, 28 April 2020, paras 14-21 ('Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493, 28 April 2020').

A state's ability could have an impact on its willingness to investigate and prosecute, as much as it would impact on their ability to do so in a way that benefits victims. Nonetheless, the indicators of inability are focused on the accused and whether the concerned state can bring them to justice. The Court is yet to find a case admissible because a state lacked capacity in relation to victims,[179] neither has it found a case inadmissible because a state was better suited to attend to victims of that situation. Three issues have developed from the ICC's manner of interpreting the important criteria of 'unwillingness' and 'inability' and these can affect the pursuit and achievement of victim-oriented justice, as explained in the following section.

3.3 Limitations of the ICC's Approach to Interpreting Complementarity Regime

3.3.1 The Two-Step Inquiry of Admissibility Determination

The Pre-Trial Chamber in the DRC situation set out a two-step inquiry into accessing admissibility.[180] This means that with the exception of 'gravity',[181] the Court will only examine unwillingness or inability to investigate and prosecute where there is an existing case, or where one formerly existed.[182] Consequently, a finding that no case exists or existed, means that there

[179] See Moffett, Justice for Victims Before the ICC (2014) p. 236.
[180] Decision on the Prosecutor's Application for a Warrant of Arrest, Lubanga, ICC-01/04-01/06-1-Corr-Red, 17 March 2006, paras 29-30; See also Prosecution's Communication of Materials and Further Observations Pursuant to Article 18 (2) and Rule 54 (1), *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-195, PTC II, ICC, 29 August 2022, paras 39-41.
[181] The OTP usually examines gravity during preliminary examination and investigations, as this needs to be done to clarify whether the situation meets the gravity element to warrant further intervention by the Court.
[182] Several scholars have analyzed this interpretation, see for example, Benzing, The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity (2003), p. 601; Holmes, Complementarity: National Courts versus the ICC (2002), pp. 672-678; Claus Kress, 'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy (2004) 2 (4) Journal of International Criminal Justice 944, p. 946; El Zeidy, The Principle of Complementarity in International Criminal Law (2008) pp. 161, 221, and 230; Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (2008) pp. 103-104; Jo Stigen, 'The Relationship Between the International Criminal Court and National Jurisdictions' (Martinus Nijhoff Publishers 2008) pp. 197-201; Nidal Nabil Jurdi, 'Some Lessons on Complementarity for the International Criminal Court Review Conference' (2009) 34 South African Yearbook of International Law 28, pp. 29-30 ('Jurdi, Some Lessons on Complementarity for the International Criminal Court

was 'inaction' on the part of the concerned state.[183] This is due to a strict textual interpretation and application of Article 17[184] to situations and cases before it.[185]The most recent admissibility challenge as at the time of writing is the *Yekatom* admissibility challenge, and the Chamber did not engage with an interpretation of 'unwillingness' because of a finding of 'inactivity'.[186]

Also, if the state is investigating or prosecuting a situation or a case which is not the same as the one pursued by the ICC,[187] this will be interpreted as an instance of inaction.[188] Nouwen,[189] and Moffett,[190] observe that the same conduct-same case requirement provides little guidelines as to what states should be doing to complement the ICC. Other scholars have considered as

Review Conference (2009)'); William W. Burke-White and Scott Kaplan, 'Shaping the Contours of Domestic Justice: The International Criminal Court and the Admissibility Challenge in the Ugandan Situation' (2009) 7 Journal of International Criminal Justice 257, p. 260.

[183] See Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, paras 78-79; PTC II Rejection of Kenya's Admissibility Challenge, Ruto, Kosgey, and Sang, ICC-01/09-01/11-101, 30 May 2011, paras 48-70; Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493, 28 April 2020, paras 17-21.

[184] See the wording of Article 17 (1) ICCst.; See also Nicola Palmer, 'The Place of Consultation in the International Criminal Court's Approach to Complementarity and Cooperation' in Olympia Bekou and Daley Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill, Nijhoff 2016), pp. 212-224.

[185] PTC II Rejection of Kenya's Admissibility Challenge, Ruto, Kosgey, and Sang, ICC-01/09-01/11-101, 30 May 2011, para 70; Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute", *Muthaura*, *Kenyatta*, *Ali*, *Situation in the Republic of Kenya*, ICC-01/09-02/11-274, AC, ICC, 30 August 2011 ('Kenya Appeals Judgment, *Muthaura*, *Kenyatta*, *Ali*, ICC-01/09-02/11-274, 30 August 2011'); PTC I's Judgement on Côte D'ivoire Admissibility Challenge, ICC-02/11-01/12-47-Red, 11 December 2014, paras 26-30, and 36; Judgment on the Appeal of Côte d'Ivoire Against the Decision of Pre-Trial Chamber I of 11 December 2014 Entitled "Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case Against Simone Gbagbo", *Simone Gbagbo*, *Situation in the Republic of Cote d'ivoire*, ICC-02/11-01/12-75-Red, AC, ICC, 27 May 2015, paras 30 ('Cote d'ivoire Appeals Judgement, *Simone Gbagbo*, ICC-02/11-01/12-75-Red, 27 May 2015').

[186] See Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493, 28 April 2020.

[187] This became known as the 'same case/same person same conduct' test. See Prosecutor v. Lubanga, Decision on the Prosecutor's Application for a Warrant of Arrest, Lubanga, ICC-01/04-01/06-1-Corr-Red, 17 March 2006, paras 37-40.

[188] PTC I's Judgement on Côte D'ivoire Admissibility Challenge, ICC-02/11-01/12-47-Red, 11 December 2014, para 36 and 40- 65; paras 65, 76-78; Cote d'ivoire Appeals Judgement, Simone Gbagbo, ICC-02/11-01/12-75-Red, 27 May 2015, paras 58-59.

[189] Nouwen, Complementarity in the Line of Fire (2013) p. 70.

[190] Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) p. 299.

well as questioned the basis for such an interpretation in relation ti inaction[191] which may not always work in favor of victims who in some instances may be better served by national proceedings.[192] For example, in a bid to investigate more narrowly to meet the Court's same-conduct requirement, states may abandon wider scope of activities within transitional justice programs.[193] Such programs may include criminal proceedings and non-judicial reparations for more victims than the ICC can accommodate in a particular case, and may offer them better modes of participation.[194]

Refraining from an examination of unwillingness or inability because a state of inaction exists undermines the important role of these two fundamental criteria 'around which the notion of admissibility and the very principle of complementarity revolve.'[195] This also means that many situations and cases may not be adequately considered in a way that allows the ICC to encourage states to fulfil their obligations.[196] Such situations and cases get bogged down in issues of inaction by a state because where the Court finds inaction, the question of the state's

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[191] See Holmes, Complementarity: National Courts versus the ICC (2002), pp. 672-673; Sharon A. Williams and William A. Schabas, 'Commentary on Article 17: Issues of Admissibility' in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Hart 2008), pp. 615-612, para 23; Hector Olasolo, 'The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor' (2005) 5 (1) International Criminal Law Review 121, pp. 121-146; Rod Rastan, 'What is A Case for the Purpose of the Rome Statute', (2008) 19 Criminal Law Forum 435 p. 436.
[192] See Dissenting Opinion of Judge Anita Usacka [from Appeals Chamber Judgment on Libya's Appeals re-*Gaddafi* Decision, 01/11-01/11-547-Red, 21 May 2014] *Gaddafi* and *Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-547-Anx2, AC, ICC, 21 May 2014, para 55 ('Dissenting Opinion of Judge Anita Usacka from the *Al-Senussi* Appeals Decision, ICC-01/11-01/11-547-Anx2, 21 May 2014')
[193] See Dissenting Opinion of Judge Anita Usacka from the *Al-Senussi* Appeals Decision, ICC-01/11-01/11-547-Anx2, 21 May 2014, para 55.
[194] Wierda, makes a similar argument in relation to the number of perpetrators domestic courts can try. See Marieke I. Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries' (DPhil thesis, Leiden University 2019) pp. 151.
[195] See Uganda Admissibility Decision, ICC-02/04-01/05-377, 10 March 2009, para. 36; Jurdi, Some Lessons on Complementarity for the International Criminal Court Review Conference (2009) pp. 30-31.
[196] Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts (2008) p. 21; Jurdi, Some Lessons on Complementarity for the International Criminal Court Review Conference (2009) pp. 30-31; Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) pp. 97-106.

unwillingness or inability would not be considered.[197] It inadvertently encourages inaction whether this was due to inability of the state, or lack of interest in addressing Rome Statute crimes and victims' harms. Nevertheless, the Court has continuously found that a determination of admissibility is a two-step inquiry,[198] and some within the Court have consistently argued for an interpretation of complementarity which is more attuned to the intention of the drafters.[199] It should be noted that the OTP has indicated that in examining states' unwillingness and inability, it would need to take into account how the competent domestic authorities have or are carrying out the proceedings in the context of their own domestic legal framework and practice. It remains to be seen whether such a method will offset the negative effects of the two-step inquiry into admissibility.[200]

3.3.2 'Unwillingness' and 'Inability' as Alternatives

The second issue with the Court's approach to interpreting admissibility criteria relates to 'unwillingness' and 'inability' being alternatives as denoted by the use of 'or' in Article 17 (1) (a) and (b). A strict textual interpretation of this provision would suggest that willingness and

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[197] Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, paras 78-79.

[198] The OTP's policy and submissions reflect the same approach to admissibility, see OTP's Informal Expert Paper on the Principle of Complementarity in Practice (2003) paras 19 and 62; See Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, para 75, 78-79; Prosecution's Observations regarding the Admissibility of the Case against Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, *Kony et al.*, *Situation in Uganda*, ICC-02/04-01/05-352, PTC II, ICC 18 November 2008, para. 9; Prosecution's Response to Defence's Request Challenging the Admissibility of the Case Pursuant to Article 17 and 19 ICCst., *Laurent Gbagbo*, *Situation in Cote d'ivoire*, ICC-02/11-01/11-428, PTC I, ICC, 17 April 2013, para 5; see also Decision on the Prosecutor's Application for a Warrant of Arrest, Lubanga, ICC-01/04-01/06-1-Corr-Red, 17 March 2006, para 29; Uganda Admissibility Decision, ICC-02/04-01/05-377, 10 March 2009, para 36; *Katanga*, Reasons for Oral Decision on Admissibility, ICC-01/04-01/07-1213-tENG, 15 July 2009, para 21; PTC I's Decision on the Admissibility of the Case Against Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, para 58; PTC II Decision Refusing the Prosecutor's Request to Open an Investigation into the Situation in Afghanistan, ICC-02/17-33, 12 April 2019, para 71.

[199] "The literal understanding of the term "complementary" conveys that the Court and States should work in unison - by complementing each other - in reaching the Statute's overall goal, i.e. to fight against impunity for the commission of the most serious crimes of concern to humankind." See Dissenting Opinion of Judge Anita Usacka from the Al-Senussi Appeals Decision, ICC-01/11-01/11-547-Anx2, 21 May 2014, paras 19 (footnote omitted) and 21.

[200] See ICC OTP, Strategic Plan: 2019-2021 (17 July 2019) para 21.

inability are not cumulative requirements for an admissibility determination. The respective chambers in *Katanga*,[201] and *Libya*[202] admissibility challenges held that there will be no reason to consider unwillingness if a state is found to be unable. The same would apply to a state found to be unwilling, as such a finding prevents a consideration of inability. This method could unwittingly favor some states which may act in bad faith, especially where such a state is found to be able, and no inquiry into its willingness was conducted. The thesis argues that the alternate nature of unwillingness' or 'inability' is meant to prevent justice efforts being thwarted by overly restricting the Court's ability to intervene in cases where it cannot find a state both unwilling and unable. This interpretation is supported by the drafting history of the admissibility criteria as drafters understood that some states may act in bad faith and defeat the purpose of complementarity.[203]

The Court should examine states' ability as well as willingness genuinely to fulfil their Rome Statute obligations. This is necessary because a state can claim that it is able where it can show some indicum of ability, even when it is not willing to pursue justice. The Sudan situation is a good example. Under former President Omar Al Bashir, Sudan made efforts to obstruct ICC's proceedings in relation to the Darfur situation[204] of which Al Bashir was one of the accused.[205] Such efforts included racing to create national mechanisms to claim that Sudan was able[206] in

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[201] *Katanga*, Reasons for Oral Decision on Admissibility, ICC-01/04-01/07, 15 July 2009, paras 74-75.
[202] PTC I's Decision on the Admissibility of the Case Against Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, para 216.
[203] See for example, Rome Proceedings, A/CONF.183/13, Vol II, pp. 213-214, 217-221, 295, and 305-307; Rome Proceedings, A/CONF.183/13, Vol III, proposals regarding 'issues of admissibility', pp. 27-28, 100, and 240; Holmes, The Principle of Complementarity (1999), pp. 48-56; Moreover, the Pre-Trial Chamber I in deciding on Libya's admissibility challenge regarding the *Al-Senussi* case examined both Libya's unwillingness and inability, without the need to focus only on one of the two. See PTC I's Decision on the Admissibility of the Al-Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 2920-310.
[204] ICC, *Situation in Darfur, Sudan*, ICC-02/05, <https://www.icc-cpi.int/darfur>, accessed 24 September 2022.
[205] Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Situation in Darfur*, *Sudan*, ICC-02/05-01/09-1, PTC I, ICC, 4 March 2009.
[206] Nouwen, Complementarity in the Line of Fire (2013) pp. 279-284.

order to suspend the ICC's intervention. Where unwillingness and inability are examined before making a final determination of admissibility, it bolsters the foundation upon which the ICC can make a strong admissibility determination. If the issue in a situation is one of unwillingness, the Court should consider targeted measures, such as dialogue and working with other entities to galvanize the relevant state into action.[207] If it is determined to be unable, yet willing, the Court should consider ways by which it can aid the state in developing ability through its cooperation regime.

3.3.3 Ongoing Jurisdictional Tension Between the ICC and States

The ICC invokes ending impunity by ensuring effective investigation and prosecution of Rome Statute crimes, as a reason for its approach to interpreting complementarity.[208] As previously stated,[209] to date, Libya, a non-State Party is the only state to have successfully challenged the admissibility of a case before the Court.[210] Opinion is divided on the finding of inadmissibility of the *Al-Senussi* case given that the situation in Libya deteriorated after that decision.[211] No State Party has succeeded in challenging the ICC's jurisdiction. The Court's relationship with states has been strained due to this ICC-centric approach complementarity. For example, the

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[207] See chapters four and five for a discussion of non-contentious approach to encourage states to fulfil their obligations and a framework for a suitable complementarity division which can operationalize such an approach.
[208] See for example, Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, para 79; PTC II Rejection of Kenya's Admissibility Challenge, *Ruto, Kosgey, and Sang*, ICC-01/09-01/11-101, 30 May 2011, para 44; Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Muthaura, Kenyatta, and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-96, PTC II, ICC, 30 May 2011.
[209] See above in Section 3.2.3.
[210] PTC I's Decision on the Admissibility of the Al-Senussi Case, ICC-01/11-01/11-466-Red, 11 October 2013; Appeals Chamber Decision on Al-Senussi Appeal, ICC-01/11-01/11-565, 24 July 2014; Conversely, a decision not to investigate due to gravity has been successfully challenged by the Union of Comoros. See Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) p. 21.
[211] Declaration of Judge Christine Van den Wyngaert [in relation to Decision on the admissibility of the case against Abdullah Al-Senussi] *Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-466-Anx, AC, ICC, 11 October 2013. This is further discussed in Chapter Six.

ICC's rejection of the Kenya admissibility challenge, and its case against Mr Omar Al-Bashir caused many African states to oppose the Court and its activities.[212] Others have withdrawn or threatened withdrawals.[213] These issues call for measures to minimize the jurisdictional tensions between the ICC and states which negatively affect the fight against impunity and justice for victims. A change in the Court's approach to complementarity can help to eliminate or at least counter doubts about its respect for state sovereignty grounded on the complementarity regime.

A purposive approach to complementarity is ideal because it will enable the Court to use admissibility determinations to encourage states to fulfil their obligations.[214] States involved in active conflict and transitioning states face difficulties with *inter alia* conducting quality investigations, apprehending the accused, and conducting trials, which are also among the

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[212] See for example, Evelyn A. Ankumah (ed), The International Criminal Court and Africa: One Decade On (Intersentia 2016), see in particular, pp. 1-62, 199-226, and 245-274; Jean-Baptiste Jeangène Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis' (2016) 92 (6) International Affairs 1319, pp. 1319-1342 ('Vilmer, The African Union and the International Criminal Court: Counteracting the Crisis (2016)'); Gino Naldi and Konstantinos D. Magliveras, 'The International Criminal Court and the African Union: A Problematic Relationship' in Charles Chernor Jalloh, and Ilias Bantekas (eds), *The International Criminal Court and Africa* (OUP 2017) pp. 111-137; Western K. Shilaho, 'The International Criminal Court and the African Union: Is the ICC a Bulwark Against Impunity or an Imperial Trojan horse?' (2018) 18 (1) African Journal on Conflict Resolution 119, pp. 119-143 ('Shilaho, The International Criminal Court and the African Union: Is the ICC a Bulwark Against Impunity or an Imperial Trojan horse? (2018)'); Emmanuel Okurut and Hope Among, 'The contentious relationship between Africa and the International Criminal Court (ICC)' (2018) 10 (3) Journal of Law and Conflict Resolution 19, pp. 19-29; This is further discussed in chapters five and six.

[213] FIDH, 'Burundi Withdraws from the ICC: an Attempt to Shield Perpetrators from Prosecution' <https://www.fidh.org/en/region/Africa/burundi/burundi-withdraws-from-the-icc-an-attempt-to-shield-perpetrators-from> accessed 25 September 2022; Duncan E. Omondi Gumba, 'Will other African countries follow Burundi out of the ICC?' (Institute for Security Studies, 16 November 2017) <https://issafrica.org/iss-today/will-other-african-countries-follow-burundi-out-of-the-icc> accessed 25 September 2022; Manisuli Ssenyonjo, 'State Withdrawals from the Rome Statute of the International Criminal CourtSouth Africa, Burundi, and The Gambia' in Charles Chernor Jalloh, and Ilias Bantekas (eds), *The International Criminal Court and Africa* (OUP 2017) pp. 214-246.

[214] Padraig McAuliffe, 'Bad Analogy: Why the Divergent Institutional Imperatives of the ad hoc Tribunals and the ICC Make the Lessons of Rule 11bis Inapplicable to the ICC's Complementarity Regime' (2014) 11 (2) International Organizations Law Review 345, pp. 416-423 ('McAuliffe, Bad Analogy: Why the Divergent Institutional Imperatives of the ad hoc Tribunals and the ICC Make the Lessons of Rule 11bis Inapplicable to the ICC's Complementarity Regime (2014)').

problems that have plagued several cases before the Court.[215] Instead of maintaining an inflexible approach to the interpretation of complementarity based on the two-step inquiry, the ICC can work with concerned states as they develop acceptable ways to fulfil their obligations.[216] This should be the case even where a state's approach is legitimately different from the ICC's but not inconsistent with the Statute.[217] This will make it easier to introduce victim-oriented elements into complementarity regime and practice.

The examination of complementarity and admissibility in this part shows that the operationalization of the concept in the ICC's practice can take a 'negative' form in relation to a decision to admit a case or defer to states. It can also take a 'positive' form, i.e., measures to assist states in fulfilling their Rome Statute obligations. In both forms, the method applied by the Court can either promote or limit the pursuit of justice for victims. Thus, it is worth considering the general forms of complementarity and their potentials for victim-oriented justice.

[215] Some of these cases such as the *Gaddafi* case, have not been able to proceed beyond the investigation Stage at the ICC, while nationally, victims remain bereft of justice, see ICC, 'Situations under investigations' <https://www.icc-cpi.int/situations-under-investigations> accessed 25 September 2022; Wierda MI, 'The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries' (DPhil thesis, Leiden University 2019) p. 101.
[216] Moffett, Justice for Victims Before the ICC (2014), pp. 193, 231 and 235; Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 1-4.
[217] Frédéric Mégret, Marika Giles Samson, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials' (2013) 11 (3) Journal of International Criminal Justice 571, pp. 571-589 ('Megret and Samson, Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials (2013)'); Steven Kay and Joshua Kern, 'Complementarity and a Potential Settlements Case: A Response to the OTP's Report on its Preliminary Examination of the Situation in Palestine' (Opinio Juris, 14 March 2019) <https://opiniojuris.org/2019/03/14/complementarity-and-a-potential-settlements-case-a-response-to-the-otps-report-on-its-preliminary-examination-of-the-situation-in-palestine/> accessed 25 September 2022; Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 1-4; Carsten Stahn, A Critical Introduction to International Criminal Law (CUP 2019) p. 225.

4 Forms of Complementarity

4.1 Negative Complementarity

The term ‘negative complementarity’ is derived from the wording of Article 17 of the Statute. It considers a case ‘inadmissible’ if a state which has jurisdiction over it is investigating or prosecuting such a case unless the state is found to be unwilling or unable.[218] As Moreno-Ocampo,[219] and Stahn explain, admissibility criteria can be considered a measure of forum allocation, and they are ‘negative’ principles excluding the exercise of jurisdiction.[220] In this regard, the role of the Court in exercising its jurisdiction over Rome Statute crimes is mainly justified by shortcomings or failures of domestic jurisdictions in fulling their Rome Statute obligations.[221] As such, negative complementarity is a threat-based system,[222] which according to Stahn, is geared towards compliance using ‘carrots and sticks’, where states are expected to create conditions for the effective investigation and prosecution of crimes.[223] The DRC, and Libya admissibility challenges discussed earlier are examples of negative complementarity where admissibility assessments were made, although only the *Al-Senussi* case resulted in an inadmissibility decision.

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[218] See Article 17 of the Rome Statute; Review Conference of the Rome Statute, ‘Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap, Informal Summary by the Focal Points’ (Annex V(c) RC/112010) para 4.
[219] Luis Moreno-Ocampo, ‘A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor’ in Carsten Stahn and Mohamed El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) p. 23.
[220] Stahn, Taking Complementarity Seriously (2011) p. 241.
[221] Stahn, Taking Complementarity Seriously (2011) p. 253.
[222] See Draft Article 34 of the ILC 1994 Draft Statute, in comparison with Article 19 of the Rome Statute; PrepCom Report Vol I (March-April and August 1996 Proceedings) paras 246-252; Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (2008) p. 309.
[223] Stahn, Taking Complementarity Seriously (2011) pp. 241 and 253; See also Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (2008) pp. 309-340; OTP’s Informal Expert Paper on the Principle of Complementarity in Practice (2003) p. 3; Strengthening the International Criminal Court and the Assembly of States Parties: Resolution ICC-ASP/17/Res.5 (adopted on 12 December 2018); Sang Hyun Song, ‘The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law’ (2014) 4 (XLIX) <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> accessed 25 September 2022.

This thesis argues that despite the important forum allocation role of negative complementarity, it is still plagued by tension and disagreement between the ICC and states. This is especially so when states feel pressured to decide on measures of achieving justice, and when such measures fall below the ICC's own expectations. Newton warns that If the Court habitually overrides the discretion of domestic officials and displaces their authority based on its own preferences or the expediency of political considerations, the entire premise of the complementarity principle will have been eviscerated.[224] The current interpretation of negative complementarity does not feature victims needs as part of admissibility considerations. The focus is on willingness or inability to investigate and prosecute not on how victims' needs, and interests will be addressed in such proceedings. These limitations of negative complementarity occasioned the search for other approaches to complementarity.

4.2 Positive Complementarity

4.2.1 Various Forms of Positive Complementarity

The concept of 'positive complementarity' has its origins in the Rome Statute and refers to measures to encourage and assist states in fulfilling their obligations under the Statute.[225] Prior to crystalizing into a concrete policy, elements of positive complementarity were present in

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[224] Newton, The Quest for Constructive Complementarity, (2011) pp. 304-305; Michael A. Newton, 'The Complementarity Conundrum: Are We Watching Evolution or Evisceration?' (2010) 8 (1) 8 Santa Clara Journal of International Law 115, p. 119, more generally pp. 115-164.

[225] William W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome Statute System of Justice' (2007) 19 Criminal Law Forum 59, pp. 59-85; El Zeidy, The Principle of Complementarity in International Criminal Law (2008) pp. 336-345; Nouwen, Complementarity in the Line of Fire (2013) p. 97; Carsten Stahn, 'Complementarity: A Tale of Two-Notions' (2008) 19 (1) Criminal Law Forum 87, pp. 87-113 ('Stahn, Complementarity: A Tale of Two-Notions (2008)').

different statements, briefings, and strategic documents connected to the OTP.[226] It was brought to limelight through the policies of the OTP in relation to preliminary examination.[227]

Positive complementarity has been extensively discussed and analyzed in academic literature, commentaries, and the ICC's policies.[228] Different assumptions underpin this concept and its meaning.[229] These include ICC's method of interpreting the complementarity regime, avoidance of a consideration of admissibility criteria where there is a state of inaction, and a refusal to examine the unwillingness criterion where a state is considered unable and vice versa.[230]

One of the widely accepted features of positive complementarity is that it can aid, or in some instances move states towards the fulfilment of their obligations to fight impunity and deliver

[226] See for example, OTP's Informal Expert Paper on the Principle of Complementarity in Practice (2003) paras 3-4 and 14-15; Nouwen, Complementarity in the Line of Fire (2013) p. 97; Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom' 3 May 2018 <https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf > accessed 25 September 2022 p. 1 ('Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom (2018)')

[227] ICC-OTP, Policy Paper on Preliminary Examinations (November 2013); The 2010 draft of this policy also contained information about their approach to positive complementarity. See ICC-OTP, Draft Policy Paper on Preliminary Examinations (4 October 2010) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf> accessed 25 September 2022.

[228] See for example, William W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome Statute System of Justice' (2007) 19 Criminal Law Forum 59, pp. 59-85; El Zeidy, The Principle of Complementarity in International Criminal Law (2008) pp. 336-345; Stahn, Complementarity: A Tale of Two-Notions (2008) pp. 87-113; Christopher K. Hall, 'Positive Complementarity in Action' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 1014-1041; Fidelma Donlon, 'Positive Complementarity in Practice ICTY Rule 11bis and the Use of the Tribunal's Evidence in the Srebrenica Trials before the Bosnian War Crimes Chamber' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 920-954; Hitomi Takemura, 'Positive Complementarity' *Max Planck Encyclopedia of International Procedural Law* (MPEiPro 2018); For policies see, ICC-OTP, ICC-OTP, Report on Prosecutorial Strategy (14 September 2006) p. 4; The Prosecutorial Strategy of 2009-2012 was also based on four principles, including the principle of positive complementarity, see ICC-OTP, Prosecutorial Strategy 2009-2012 (1 February 2010), pp. 4-5; OTP's Strategic Plan 2019-2021, paras 49-51; Marshall, Prevention and Complementarity in the ICC: A Positive Approach (2010) pp. 21-26; Nouwen, Complementarity in the Line of Fire (2013) pp. 337-405.

[229] Stahn, Complementarity: A Tale of Two-Notions (2008) pp. 87-113.

[230] See Newton, The Quest for Constructive Complementarity, (2011) p. 339-340.

justice to victims.[231] Some have referred to this as the shadow of the Court,[232] and as the catalyzing effect of the principle of complementarity.[233] This common perception is reflected in various forms of positive complementarity such as constructive complementarity-a partnership between the ICC and States Parties based on mutual respect and a renewed resolve to end impunity.[234] There is what is referred to as proactive complementarity which ensures that the ICC only deals with the right kinds of cases, (i.e. not dealing with those meant for states)[235] and is characterized by the pursuit of early capacity building of states' apparatus.[236] There is also Victim-oriented positive complementarity aimed at enabling states to deliver justice for victims.[237]

This thesis argues that the ultimate intention underlying these different forms of positive complementarity appears to be a move towards ensuring that Rome Statute crimes are effectively addressed at the national and international levels. Positive complementarity allows the Court to be an influencer for the purpose of justice.[238] It requires communication, dialogue,

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[231] See Stahn, Complementarity: A Tale of Two-Notions (2008) pp. 87-113; Stahn, Taking Complementarity Seriously (2011) pp. 233-251 and 256-273; Carsten Stahn, 'Perspectives on *Katanga*: An Introduction' (2010) 23 (2) Leiden Journal of International Law 311, pp. 312-318; For a critique on the ICC's approach to the Rome Statute system of complementarity, see for example Padraig McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism' (2014) 13 (2) Chinese Journal of International Law 259, pp. 259-296; See also ASP Resolution ICC-ASP/8/Res.9 (adopted on 25 March 2010); Bergsmo, Bekou and Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools (2010) pp. 791-811; William A. Schabas and Mohamed El Zeidy, 'Commentary on Article 17 Issues of Admissibility' in Otto Triffterer and Kai Ambos (eds) *Commentary on the Rome Statute of the International Criminal Court*: A Commentary (2016) p. 795, para 25.

[232] See for example Moreno-Ocampo, 'A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor' (2011) pp. 30-31.

[233] Nouwen, Complementarity in the Line of Fire (2013) p. 97.

[234] Newton, The Quest for Constructive Complementarity (2011) pp. 304-340.

[235] William W. Burke-White, 'Reframing positive complementarity: Reflections on the First Decade and Insights from the US federal Criminal Justice System' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 341-360.

[236] See Silvana Arbia and Giovanni Bassy, 'Proactive Complementarity: a Registrar's Perspective and Plans' in Carsten Stahn and Mohamed El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 52-67.

[237] Moffett, Justice for Victims Before the ICC (2014) pp. 234-238; see Chapter Four for further discussion of this.

[238] Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (2008) 318-331; Stahn, Taking Complementarity Seriously (2011) p. 251.

and various forms of cooperation between the ICC and states, as well as with other cooperation partners.[239] Positive complementarity also entails assistance, including technical, legislative assistance, knowledge transfer and training on international criminal law, and capacity building.[240]

The ICC's policy on positive complementarity is mostly pursued during preliminary examinations by the OTP with the JCCD taking the lead.[241] This is important because it presents the ICC with opportunities to offset some of the limitations of negative complementarity, for example, admissibility challenges which often occur after preliminary examinations. The problem with mainly pursuing positive complementarity during preliminary examinations is that victims' access is usually very limited at this stage. This in turn limits their ability to make coordinated and meaningful contributions to positive complementarity projects which will be in their interests. For instance, victims can submit information to the Court During preliminary examinations, and during investigations they may submit observations,[242] but there is no guarantee that the OTP would keep victims informed during or after this process or update

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[239] See Articles 86-99 ICCst.
[240] Olympia Bekou, 'Building National Capacity for the ICC: Prospects and Challenges' in Triestino Mariniello (ed), *The International Criminal Court in Search of Its Purpose and Identity* (Routledge 2014) pp. 133-145.
[241] OTP's Policy Paper on Preliminary Examinations (2013) pp. 23-25; Report of the Independent Expert Review of the ICC (2020) p. 235, para 734.
[242] For example, victims were invited to make representations in the Afghanistan Situation prior to the OTP's commencement of investigations into the Situation. See OTP's Request for Authorization of Investigation into the Situation in Afghanistan, ICC-02/17-7-Red, 20 November 2017, paras 373-374; The VPRS and the Registry work alongside the OTP in facilitating victims' engagement during these stages. See Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017, *Situation in Afghanistan*, ICC-02/17-29-AnxI-Red, PTC III, ICC, 20 February 2018; Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-29, PTC II, ICC, 20 February 2018; Decision on Submissions Received and Order to the Registry Regarding the Filing of Documents in the Proceedings Pursuant to articles 18 (2) and 68 (3) of the Statute, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-171, PTC II, ICC, 8 November 2021, para 12, and Decision Pursuant to article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022, para 36 captures the Pre-Trial Chamber's opinion regarding victims' participation at this stage and the OTP's duties in relation to victims.

them as to why some decisions were taken.[243] Moreover, the OTP's policy of case selection and prioritization is one of focusing on those who bear the most responsibility for the most serious crimes.[244] The OTP has stated that its approach to positive complementarity will be to encourage local authorities to investigate and prosecute similar cases likely to fall within the ambit of its case selection policy without being limited to them.[245] The issue with this is that it has the potential of restricting states' efforts to narrow cases, which at the ICC is already severely narrowed, thus further excluding victims both at the ICC and domestically.[246]

The Colombia Situation before the ICC is useful to illustrate some aspects of positive complementarity because of Columbia's several proceedings to address Rome Statute crimes,[247] and their prospects for victim-oriented justice in the situation.[248] It is helpful to clarify how the ICC's approach to positive complementarity can be improved. It should be noted that the achievements of positive complementarity in this situation is the result of the efforts of

[243] For the thesis's proposals for an inclusive complementarity division, see Chapter Five Section 4 discussing the Functions of the Proposed Complementarity Division.
[244] OTP's Policy Paper on Preliminary Examinations (2013) p. 24; ICC-OTP, Policy Paper on Case Selection and Prioritisation, 2016, p. 14, para 42.
[245] OTP's Policy Paper on Preliminary Examinations (2013) p. 24.
[246] See Chapter Five for further discussions and the thesis's proposals of how this issue can be better managed; See also Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 (5) Journal of International Criminal Justice 1357, pp. 1357-1370.
[247] Éadaoin O'Brien, Par Engstrom and David Cantor, 'In the Shadow of the ICC: 'Colombia and International Criminal Justice' in *Expert conference on the International Criminal Court and Colombia* (Human Rights Consortium, University of London, May 2011) pp. 3-57 ('O'Brien and Cantor, In the Shadow of the ICC: 'Colombia and International Criminal Justice' (2011)'); Aaron A. Acosta, 'Measuring Performance: A Case Study of Positive Complementarity Catalyzed During the Preliminary Examination Stage in Colombia' (ICC Forum, 15 July 2017) <https://iccforum.com/forum/permalink/106/6231> accessed 25 September 2022; Hyeran Jo, Beth A Simmons and Mitchell Radtke, 'Conflict Actors and the International Criminal Court in Colombia' (2021) 19 (4) Journal of International Criminal Justice 959, pp. 959-977 ('Jo, Simmons and Radtke, Conflict Actors and the International Criminal Court in Colombia (2021)'); Annika Björkdahl and Louise Warvsten, 'Friction in Transitional Justice Processes: The Colombian Judicial System and the ICC' (2021) 15 (3) International Journal of Transitional Justice 636, pp. 636-657.
[248] See for example ICC-OTP, 'Report on Preliminary Examination Activities 2020' (14 December 2020) paras 121-141 ('OTP's Report on Preliminary Examinations (2020)'); Moffett, Justice for Victims Before the ICC (2014) p. 279; For some of the issues identified as challenges to the Colombian national proceedings, see OTP's Report on Preliminary Examinations (2020) paras 147-151.

multiple organizations including those within the Inter-American Human Rights system, Colombian civil society and victim groups, and the ICC.

4.2.2 Situation in Colombia

4.2.2.1 Background of the Situation

Colombia has been a State party to the Rome Statute since 2002. The OTP in June 2004 opened a preliminary examination into the situation regarding alleged crimes against humanity and war crimes committed in the context of the armed conflict between and among government forces, paramilitary armed groups, and rebel armed groups.[249] The OTP began engaging in series of dialogues and consultations with Colombian authorities. Its assessment in 2012 was that the authorities were actively conducting large proceedings against different actors including those who appeared most responsible for Rome Statute crimes.[250] The OTP found gaps which indicated insufficient activities relating to certain categories of persons and crimes, but acknowledged that these did not indicate unwillingness or inability.[251] However, the OTP continued in its engagement with Colombia and maintained the preliminary examination until 28th October 2021.[252] The OTP's argument for the prolonged preliminary examination into the situation was that it was instrumental in the Colombian authorities' extension of the scope and depth of their investigations and prosecutions.[253] Some remain apprehensive as to the

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[249] ICC-OTP, Situation in Colombia: Interim Report (November 2012); OTP's Report on Preliminary Examinations (2020) p. 27; ICC, 'Preliminary Examination: Colombia' <https://www.icc-cpi.int/colombia> accessed 25 September 2022.
[250] ICC-OTP, Situation in Colombia: Interim Report (November 2012) paras 11-20.
[251] ICC-OTP, Situation in Colombia: Interim Report (November 2012) paras 14-22.
[252] ICC, 'Preliminary Examination: Colombia', <https://www.icc-cpi.int/colombia> accessed 25 September 2022.
[253] ICC, 'Preliminary Examination: Colombia', <https://www.icc-cpi.int/colombia> accessed 25 September 2022; Human Rights Watch, 'Colombia: Letter to the Prosecutor of the International Criminal Court' (30 September 2021) <https://www.hrw.org/news/2021/10/14/colombia-letter-prosecutor-international-criminal-court> accessed 25 September 2022.

Colombian authorities' ability and commitment to adequately fulfil their Rome Statute obligations following the closure of preliminary examination into this situation.[254] While the OTP's engagement has contributed positively to how Colombian authorities are responding to crimes within the situation, the thesis argues that the prolonged preliminary examination was not necessary to realize this impact.[255]

4.2.2.2 Positive Complementarity in Colombia

The debate about the impact of positive complementarity in Colombia is divided.[256] Some believe that the ICC's involvement has limited transitional justice approaches by maintaining emphasis on retributive justice.[257] Others agree that the ICC has achieved success in the way it influenced justice for international crimes in Colombia.[258] For example, Colombia's obligations under the Rome Statute has contributed to its investigation and prosecution of core crimes.[259] The Colombian authorities have enacted several victims' provisions on reparations

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[254] Kai Ambos, 'The Return of "Positive Complementarity"' (EJIL: Talk, 3 November 2021) < https://www.ejiltalk.org/the-return-of-positive-complementarity/> accessed 25 September 2022 ('Ambos, The Return of "Positive Complementarity" (2021)'); Juan Pappier and Liz Evenson, 'ICC Starts Next Chapter in Colombia, But Will It Lead to Justice?' (EJIL: Talk, 15 December 2021) < https://www.ejiltalk.org/icc-starts-next-chapter-in-colombia-but-will-it-lead-to-justice/> accessed 25 September 2022.
[255] Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) pp. 269-270.
[256] Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) pp. 125-126, 139-148, and 267-270
[257] Isabella Bueno and Andrea Diaz Rozas, 'Which Approach to Justice in Colombia under the Era of the ICC?' (2013) 13 (1) International Criminal Law Review 211, pp. 211-247 ('Bueno and Rozas, Which Approach to Justice in Colombia under the Era of the ICC? (2013)').
[258] Bueno and Rozas, Which Approach to Justice in Colombia under the Era of the ICC? (2013) 211-247; Moffett, Justice for Victims Before the ICC (2014) p. 279; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 299-300; Juan Carlos Botero, 'Multicultural Understanding of Integrity in International Criminal Justice' in Morten Bergsmo and Viviane E. Dittrich (eds) *Integrity in International Justice* (TOAEP 2020) pp. 262-263.
[259] Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom (2018) pp. 26-58 and 165-167.

both by the perpetrators, or by the state,[260] and such provisions are pivotal to any attempt to make justice victim oriented in Colombia.

Some achievements were made due to *inter alia* the publicly accessible publications of the OTP's several reports on the Colombian situation, its missions to Colombia and dialogue with the authorities.[261] There were adjustments to Colombia's prosecutorial strategy on relevant cases, prosecution of some senior perpetrators, and the rectification by Colombian authorities of the shortcomings of its framework for peace.[262] On the latter point, the authorities prohibited the full suspension of penalties for perpetrators of Rome Statute crimes, which were identified by the OTP as incompatible with the Rome Statute.[263] Nevertheless, some scholars suggested

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[260] Julián Guerrero Orozco and Mariana Goetz, 'Reparations For Victims In Colombia: Colombia's Law On Justice And Peace' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill 2009) pp. 445-458; Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom (2018) pp. 26-58; Luke Moffett and Peter Dixon (eds) 'Reparations In Colombia: Where To? Mapping the Colombian Landscape of Reparations for Victims of the Internal Armed Conflict' (Queen's University Belfast February 2019) pp. 4-67.

[261] See for example, Jennifer Easterday, 'Beyond the 'Shadow' of the ICC: Struggles over Control of the Conflict Narrative in Colombia' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015) pp. 432-455; Annika Björkdahl and Louise Warvsten, 'Friction in Transitional Justice Processes: The Colombian Judicial System and the ICC' (2021) 15 (3) International Journal of Transitional Justice 636, pp. 636-657.

[262] ICC-OTP, Situation in Colombia: Interim Report (November 2012); ICC-OTP, Report on Preliminary Examination Activities 2013 (25 November 2013) pp. 29-37; ICC-OTP, Report on Preliminary Examination Activities 2014 (2 November 2014) pp. 25-32; ICC-OTP, Report on Preliminary Examination Activities 2015 (12 November 2015) pp. 32-39; ICC-OTP, Report on Preliminary Examination Activities 2016 (14 November 2016) pp. 52-59; ICC-OTP, Report on Preliminary Examination Activities 2017 (4 December 2017) pp. 28-35; Rene Uruena, 'Prosecutorial Politics: The ICC's Influence In Colombian Peace Processes, 2003–2017' (2017) 111 (1) American Journal of International Law 104, pp. 104-125; ICC-OTP, Report on Preliminary Examination Activities 2018 (5 December 2018) pp. 35-44; ICC-OTP, Report on Preliminary Examination Activities 2019 (5 December 2019) pp. 24-36; ICC-OTP, Report on Preliminary Examination Activities 2020 (14 December 2020) pp 27-39; Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom (2018) pp. 26-58; ICC Press Release ICC-CPI-20211028-PR1623, 'ICC Prosecutor, Mr Karim A. A. Khan QC, Concludes the Preliminary Examination of the Situation in Colombia with a Cooperation Agreement with the Government Charting the Next Stage in Support of Domestic Efforts to Advance Transitional Justice' (2021) <https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia> accessed 25 September 2022.

[263] See Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom (2018) p. 42, generally pp. 26-52.

that the ICC should exercise its jurisdiction due to the limitations of the Colombian transitional justice process.[264]

The approach to positive complementarity applied in the Colombian situation by the ICC is a step in the right direction which could be improved to foster victim-oriented justice. The ICC had consultations with civil society, but the extent of victims' participation in these meetings, and their contribution to the recently concluded MoU between the ICC and Colombia is not very clear.[265] This is an area which could be bolstered by the ICC in its ongoing implementation of positive complementarity in the Colombian situation.[266] Also, the impact of the ICC's communication and engagement with the Colombian authorities can be seen in the adjustment of national laws on suspension of penalties which would have jeopardized justice for the victims of crimes of some senior perpetrators. The Court's ability to influence changes in Colombian laws is relevant to victim-oriented justice which requires victims' provisions, but there is still room for further improvement.[267] For instance, the 17-year length of the preliminary examination into the Colombian situation could have been shortened through a memorandum of understanding containing victim-oriented conditions and monitoring mechanisms. This could address concerns about potential negative impacts which the closure of the preliminary examination into Colombia could have on the ongoing efforts to deliver justice to victims of this situation.

[264] O'Brien and Cantor, In the Shadow of the ICC: 'Colombia and International Criminal Justice' (2011) pp. 3-57.
[265] Cooperation Agreement Between the Office of The Prosecutor of The International Criminal Court and The Government of Colombia, (28 October 2021).
[266] See Chapter Four on the thesis's suggestions of how such agreements should be concluded to benefit victims.
[267] See, Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 299-300; Bueno and Rozas, Which Approach to Justice in Colombia under the Era of the ICC? (2013) pp. 211-247.

The ICC can learn from its experience with positive complementarity applied in the Colombia situation to enrich complementarity in other situations. The OTP's way of implementing positive complementarity should be carefully broadened beyond investigative and prosecutorial efforts. It should include victims and should encourage and cultivate victim-oriented cooperation efforts, for example through assistance or non-judicial reparation programs. When complementarity is victim-oriented, it increases the chances of achieving victim-oriented justice at the ICC and in domestic jurisdictions.

5 Conclusion

The foregoing analysis of complementarity case law evinces the ICC's understanding of complementarity.[268] The discussions in this chapter suggest that the drafters' intention of protecting state sovereignty and fighting impunity through the principle of complementarity has not been consistently achieved by the ICC. The Court through negative complementarity reminds states to fulfil their obligations or face a loss of the opportunity to do so. States in turn invoke complementarity as a reason to challenge the ICC's jurisdiction based on their primary right to investigate and prosecute Rome Statute crimes. Thus, the Court often finds itself at odds with states, to the extent that some have seriously resisted the ICC, while others have withdrawn.[269] These are issues that the principle of complementarity was meant to mitigate.

[268] Moffett, Justice for Victims Before the ICC (2014) p. 235.

[269] For example, the withdrawal of Burundi and the Philippines, and African States' expression of displeasure with the Court which proved problematic with the Darfur, Sudan case. See Coalition of the ICC, 'Victims Lose Out as Burundi Leaves ICC' <https://www.coalitionfortheicc.org/latest/resources/burundi-and-icc> accessed 25 September 2022; Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia' (2018) 29 (1) Crim Law Forum 63, pp. 63-119 ('Ssenyonjo, State Withdrawal Notifications from the Rome Statute of the ICC: South Africa, Burundi and the Gambia (2018)'); ICC Press Release ICC-CPI-20180320-PR1371, 'ICC Statement on The Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law' (2018) <https://www.icc-cpi.int/news/icc-statement-philippines-notice-withdrawal-state-participation-rome-statute-

Those who suffer from this tension between the ICC and states are the victims of the Rome Statute crimes over which states, and the ICC compete to exercise their respective jurisdictions. This often-antagonistic, threat-based approach to complementarity[270] prevents a realization of the full potentials of the concept, especially in relation to how it can be used to achieve justice for victims.[271] The analysis of complementarity case law in this chapter provides an answer to the thesis's first research question. The ICC's manner of interpreting and applying the principle of complementarity has not particularly encouraged a pursuit of justice which sufficiently factors in victims' needs and interests and carries them along at all stages. The thesis posits that there are ways in which the Court and states can fight against impunity and deliver justice to victims while respecting state sovereignty. It requires a change in how complementarity is interpreted as outlined in Chapter Four.

system-essential> accessed 25 September 2022; Aisyah Jasmine Yogaswara, 'Impact of Philippines' Withdrawal from International Criminal Court On Crime Against Humanity Investigation In Philippines' (2020) 4 (2) Padjadjaran Journal of International Law 226, pp. 226-243; BBC, 'African Union backs mass withdrawal from ICC' (1 February 2017) <https://www.bbc.co.uk/news/world-africa-38826073> 25 September 2022.

[270] See Holmes, Complementarity: National Courts versus the ICC (2002) pp. 671-678; Federica Gioia, State Sovereignty, Jurisdiction and 'Modern' International Law: The Principle of Complementarity in the International Criminal court (2006) 19 Leiden Journal of International Law 1095, pp. 1100-1115; Stahn, Complementarity: A Tale of Two-Notions (2008) p. 13.

[271] See chapters four and five for a more detailed discussion of ways through which complementarity can be used to realize victim-oriented justice.

Chapter Four: Victim-Oriented Complementarity

1 Introduction

The growing jurisprudence of the International Criminal Court shows that justice for victims can be negatively affected by the interpretation and application of the Court's complementarity regime. This is not a surprise seeing that complementarity was not developed with victims in mind, nevertheless, it is impossible to ignore the impact it has on all aspects of justice for victims in The Hague and in domestic jurisdictions. If the ICC requires states to mirror ongoing situations and cases before the Court to secure deference, this will circumscribe domestic measures to deliver justice.[1] If the ICC adopts a purposive approach to complementarity, this gives states the room to develop measures for addressing Rome Statute crimes which can benefit victims.[2] This chapter explores the thesis's second research question of how victims' interests can be adequately accommodated in the complementarity regime to aid the ICC in the fight against impunity and in achieving victim-oriented justice. The answer lies in the thesis's conception of victim-oriented complementarity advanced in this chapter.

The first part of this three-part chapter introduces and analyzes victim-oriented complementarity conceptualized by Moffett and examines his suggestions for implementation of the same.[3] The chapter then argues that there is a need for minimum guidelines to aid the

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[1] Wierda argues that such mirroring can cause the ICC and states to mirror their respective weaknesses and strengths. Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019), pp. 110-112. For the ICC's latest complementarity decision emphasizing the 'mirror' approach, see Public Redacted Version of "Authorisation Pursuant to Article 18(2) of the Statute to Resume the Investigation", *Situation in the Republic of the Philippines*, ICC-01/21-56-Red, PTC I, ICC, 26 January 2023, paras 16-17, 28, 60, 68-69, 83, 94, 96-98.

[2] OPCV's Observations on "Libyan Government's Further Submissions on Issues Related to the Admissibility of the Case Against Saif Al-Islam Gaddafi", *Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-279, PTC I, ICC, 18 February 2013, para 53.

[3] See for example, Moffett, Justice for Victims Before the ICC (2014) pp. 234-289.

ICC in its operationalization of victim-oriented complementarity. Thus, part two of this chapter details a reinterpretative framework which includes an adaptation of Stahn's qualified deference. The thesis makes three interconnected proposals of how complementarity can be reinterpreted for victims' benefit. Firstly, it argues that the ICC should give willing states extra time to develop unique approaches for addressing international crimes in a victim-oriented manner coupled with monitoring their compliance, and where necessary, facilitating capacity building for states. Secondly, it proposes a victim-oriented qualified deference following a state's commitment to achieve minimum victim-oriented conditions-this can also come with capacity building where necessary. Thirdly, the thesis proposes the use of a complementarity understanding, a type of MoU within which complementarity agreements concluded for each situation or case would be captured. The importance of capacity building and cooperation in implementing victim-oriented complementarity is also considered in the second part. Part three addresses what may appear to be a conflict between the recommendation in Chapter Three that the ICC should interpret the principle of complementarity in a manner which respects states sovereignty, and the victim-oriented proposals made throughout the thesis. It explains that the achievement of both proposals is possible but is dependent on certain actions by the ICC and states and these must be carried out in a manner that is not prejudicial to or inconsistent with the rights of the accused. The chapter concludes that the thesis's proposals for victim-oriented complementarity stand a better chance of encouraging the pursuit and achievement of victim-oriented justice because the thesis adopts a comprehensive approach to tackling complementarity issues.

2 The Concept of Victim-oriented Complementarity

2.1 Victim-oriented Complementarity as Propounded by Moffett

Victim-oriented complementarity was advanced by Moffett as a means to achieve justice for victims especially at the domestic level.[4] He grounds this concept on states' primary responsibility to end impunity through investigating and prosecuting core crimes so as to deliver justice to victims, and the ICC's complementary role in doing the same for those victims before it.[5] This covers victim-oriented negative and positive complementarity.[6]

Moffett presents victim-oriented negative complementarity as the process by which the ICC in making admissibility determinations considers a state's ability to protect victims' rights.[7] This entails an examination of whether States Parties have victims' provisions, and domestic mechanisms for victims to participate in proceedings, to obtain protection, and support, and to claim reparations.[8] Moffett rightly recognizes the need for margin of appreciation for states to achieve justice for victims within their own unique context and legal system.[9] Moreover, states transitioning from a period of mass violence may suffer substantial destruction to judicial infrastructure, shortage of human resources and may be under pressure to deliver other necessities to its citizens.[10] Regarding unwillingness, he posits that victims' participation could be a significant factor in the Court's assessment since they can provide what he refers to as

[4] See Moffett, Justice for Victims Before the ICC (2014) pp. 234-280; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 234-280; Luke Moffett, 'Realising Justice For Victims Before The International Criminal Court' International Crimes Database Brief 6, September 2014, pp. 1-11; Moffett, Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo (2016) pp. 503-524.
[5] Moffett, Justice for Victims Before the ICC (2014) p. 234; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 296-297.
[6] Moffett, Justice for Victims Before the ICC (2014) p.235.
[7] Moffett, Justice for Victims Before the ICC (2014) pp.235-236.
[8] Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) p. 297; Moffett, Justice for Victims Before the ICC (2014) pp. 235-236.
[9] Moffett, Justice for Victims Before the ICC (2014) pp. 193, 231 and 235.
[10] See Moffett, Justice for Victims Before the ICC (2014) p. 236.

'bottom-up perspective of the local reality of the government's willingness and ability to conduct investigations and prosecutions.'[11]

According to Moffett, victim-oriented positive complementarity 'would require states [with the help of the ASP] to develop procedural rules within (…) domestic accountability mechanisms to enable victims' interests to be presented and considered, as well as for victims to obtain justice, truth, and reparations.'[12] He notes that delivering justice for victims domestically does not demand that states should transplant the Rome Statute victim provisions into its own system, rather a degree of flexibility should be allowed.[13] He asserts that such discretion should ensure that those responsible are held to account. Not necessarily that all perpetrators must be prosecuted, but that the most responsible should be held accountable, and required to provide reparations.[14] This is important because such flexibility is a recognition of the limits of international criminal justice, and without it the chances of realizing victim-oriented justice will be reduced.[15] Currently, the ICC is yet to admit or defer a situation based on a consideration of a state's ability or willingness in relation to victims' needs and interests.[16]

Moffett's theorization of victim-oriented complementarity is pioneering; however, it is not accompanied by a framework for interpretation. This can come in the form of minimum victim-oriented conditions to be applied to admissibility determinations to make certain that the Court

[11] Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) p. 299.
[12] Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 299-300; Moffett, Justice for Victims Before the ICC (2014) pp. 236-239.
[13] Moffett, Justice for Victims Before the ICC (2014) p.236.
[14] See Moffett, Justice for Victims Before the ICC (2014) p.236.
[15] Moffett, Justice for Victims Before the ICC (2014) pp. 236-237; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 300-301.
[16] Moffett, Justice for Victims Before the ICC (2014) p. 236. This remains the status quo as of the date of writing.

can read victims' interests into such determinations at all stages and in all situations. This is necessary to ensure that the focus is not only on what states can do but on what the ICC can do through the system of complementarity. It can also make certain that in considering a state's willingness to investigate, prosecute and provide victim-oriented justice, the Court would be better equipped to ascertain their commitment in this regard.[17] To illustrate, at the time of an admissibility determination, a state may not have readily available means for victims' participation and protection but may be opened to developing them with some capacity building. Another state may be able to investigate and prosecute yet unwilling to deliver victim-oriented justice for different reasons, including that such victims may not be 'deserving victims' in the state's perspective.[18] Therefore, it is important to outline concrete minimum victim-oriented conditions applicable in all situations which states must show or commit to develop as proof that they are willing genuinely to deliver justice to victims. This does not eliminate flexibility or attention to context and peculiarities of each situation, but they are important because any margin of appreciation accorded to states must be qualified to limit the chances of abuse.

2.2 Moffett's Proposals for Achieving His Conception of Victim-oriented Complementarity

2.2.1 A Multifaceted Role for the Assembly of States Parties

Moffett argues that the implementation of victim-oriented complementarity mostly lies with states and the ASP. To this effect, he posits that the ASP should create subsidiary independent

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[17] See Moffett, Justice for Victims Before the ICC (2014) p. 237.

[18] See for example, Graham Dawson, 'The desire for Justice, Psychic Reparation and the Politics of Memory in 'Post-conflict' Northern Ireland' (2014) 18 (2) Rethinking History 265, pp. 265-285; Amaia Álvarez Berastegi and Kevin Hearty, 'A context-based model for framing political victimhood: Experiences from Northern Ireland and the Basque Country' (2018) 25 (1) International Review of Criminology 19, pp. 19-33.

oversight bodies to monitor and evaluate the work of the ICC under the ASP's mandate to consider non-cooperation.[19] He argues that such bodies will be responsible for the initial examination of complementarity of States Parties in cooperating with the ICC on the fight against impunity and justice for victims.[20] However, there is no discussion of victims' representation and active role in such a complementarity body, which is vital, given victims' limited access to early stage complementarity proceedings which take place during preliminary examinations and investigations stages.

Moffett also suggests that the ASP should create victim-oriented guidelines on best practices of complementarity which states can use to tackle impunity, promote adaptable minimum standards or principles of justice for victims for states to follow, and engage in knowledge transfer and capacity building.[21] These are important recommendations which this thesis adopts but advances them further. The thesis argues that where basic victims' systems exist, they can be used as benchmarks to ascertain the level of support a state requires so that capacity building measures can be effectively created and implemented on a case-by-case basis. Where basic victims' systems are non-existent, a state's commitment to creating such systems up to a minimum standard can be used to determine how to proceed on complementarity matters.

Moffett offers alternative implementation platforms such as Universal Periodic Review of the UN Human Rights Council (UPR),[22] regional pressure and the expansion of universal

[19] Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 306, and 309-311; Moffett, Justice for Victims Before the ICC (2014) p. 237.
[20] Moffett, Justice for Victims Before the ICC (2014) p. 237; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 305-306.
[21] Moffett, Justice for Victims Before the ICC (2014) pp. 237-239; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 305, 309.
[22] UPR is a relevant method but should be accompanied by other measures to achieve any real impact. See below, Section 4 below which discusses UPR.

jurisdiction.[23] The thesis argues that securing state compliance with victim-oriented complementarity requires a comprehensive approach pioneered by an inclusive complementarity division. This does not discount the unique place of the ASP, instead, within such a body, key stakeholders such as the OTP, victims, the ASP, regional and international organizations, and CSOs must be represented as its members, working together and leveraging their wider networks. This method stands a better chance of encouraging state compliance, compared to when this is done in a decentralized manner without such an inclusive body.[24]

2.2.2 Regional Pressure

Regional pressure can be a useful tool for realizing victim-oriented complementarity, but regional organizations have varying levels of effectiveness. Effectiveness also depends on the organization's collective political will, which is in turn dependent on each member state's level of commitment to the relevant objective. This explains why some regional organizations may have different views about a particular situation.[25] As such, the crucial role regional

[23] For Moffett's discussion of universal jurisdiction, see Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 308-309; See also Stahn, A Critical Introduction to International Criminal Law, pp. 185-191; Naomi Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction' (2001) 35 (2) New England Law Review 311, pp. 311-319; Roozbeh Rudy B. Baker 'Universal Jurisdiction and the Case of Belgium: A Critical Assessment' (2009) 16 (1) ILSA Journal of International and Comparative Law 141, pp. 143-167; Statement By Ms. Ahila Sornarajah First Secretary (Legal Affairs) United Kingdom Mission to The United Nations General Assembly, Sixth Committee, Seventieth Session, Agenda Item 86, The Scope and Application of Universal Jurisdiction, 20 October 2015 <https://www.un.org/en/ga/sixth/70/pdfs/statements/universal_jurisdiction/uk.pdf> accessed 26 September 202; Ordonnance De Non-Lieu Partiel, De Mise En Accusation Et De Renvoi Devant La Chambre Africaine Extraordinaire Dt Assises, Hissein Habre, RP N°: 01/13 (Chambres Africaines Extraordinaires 13 February 2015); Human Rights Watch 'Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal' 3 March 2016 <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal> accessed 26 September 2022; Juan Pablo Perez-Leon-Acevedo, 'The Extraordinary African Chambers in the Senegalese Courts and the Development Of International Criminal Law In Africa' in Jeremy Sarkin, Ellah T. M. Siang'andu (eds) *Africa's Role and Contribution to International Criminal Justice* (Intersentia 2020) pp. 60-64; Statement by the Federal Republic of Germany at the Sixth Committee on "The Scope and Application of the Principle of Universal Jurisdiction" (UN, New York, October 2021) <https://www.un.org/en/ga/sixth/76/pdfs/statements/universal_jurisdiction/15mtg_germany.pdf> accessed 26 September 2022.
[24] See Chapter Five.
[25] See Chatham House, 'Beyond the ICC: The Role of Domestic Courts in Prosecuting International Crimes Committed in Africa' (Summary of a Meeting Held at Chatham House, Friday 30 April 2010) pp. 4-5; Fatuma

organizations can play is contingent on their willingness to ensure compliance of the state under scrutiny perhaps due to shared goals with the ICC. Jo and Simmons argue that a judicial institution such as the ICC is at its most powerful when prosecutorial and social deterrence reinforce one another due to actors threatening to impose extra legal costs, for example aid pressure.[26] Similarly, Human Rights Watch observed that efforts to address international crimes and to deliver justice to victims are likely to have more traction and impact where other international partners are also promoting accountability.[27] This was the case in Guinea and Colombia where the ICC was one of several international actors on justice.[28] While in Georgia, HRW found little evidence that other potential partners, including diplomatic missions, regional organizations, and UN agencies, made it a priority to engage domestic authorities on the importance of accountability for relevant cases.[29]

As Moffett notes, regional organizations such as the AU, Organization of American States (OAS), Council of Europe (CoE) and the European Union (EU) reflect common concerns and interest and they encourage compliance with international norms due to their political and geographic proximity.[30] Although these organizations have all passed resolutions on the ICC, some of which are victim-oriented,[31] their respective levels of influence differ.[32] The thesis

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Mninde-Silungwe, 'The Regionalisation of International Criminal Justice in Africa' (DPhil Thesis, University of Western Cape 2017) pp. 93-130.

[26] Hyeran Jo and Beth A. Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) International Organization 443, pp. 444, 446-465.

[27] Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom' May 3, 2018, p. 9.

[28] Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom (2018) p. 9; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) p. 299.

[29] Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom (2018) p. 9.

[30] Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) p. 307.

[31] Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) p. 307.

[32] Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 307-308.

argues that it is better to connect regional bodies and other stakeholders with the complementarity mechanism through some form of permanent liaison.[33] This would ensure that there is a Court-wide method to developing, maintaining, and leveraging relationships when needed. Such a method allows the ICC to build trust, have a better understanding of regional dynamics which can be invaluable in dealing with core crimes, and increases the ability of the Court to improve the pursuit of justice for victims locally. The proposal that regional organizations should be systematically connected to the ICC's complementarity mechanism comes from an examination of the OAS's and the AU's respective responses to situations from their respective regions before the ICC.

A linear comparison of effectiveness of these regional organizations may not be appropriate in this context given that they operate in different political and cultural climates, and due to their unique historical contexts.[34] Nonetheless, some inferences can be made[35] from their structure, mode of operation, and their responses to situations before the Court. In terms of the approach to admitting cases and adjudicating over them, the respective commissions, and commissioners

[33] See Chapter Five Section 3.3 for a discussion of the composition of a proposed complementarity division to replace the ICC's JCCD.
[34] Colonial history has an impact on how some African officials and institutional leaders may react to, interpret, or commit to obligations under international law, including in relation to international criminal justice. See Oumar Ba, 'International Justice and the Postcolonial Condition' (2017) 63 (4) 45, pp. 45-58; Kamari Maxine Clarke, Affective Justice: The International Criminal Court and the Pan-Africanist Pushback (Duke University Press 2019) pp. 91-115 and 'Preface: Assemblages of Interconnections', and 'Introduction: Formations Dislocations, and Unravelings; Everisto Benyera, 'How colonialism's legacy continues to plague the International Criminal Court' (2020) *The Conversation* <https://theconversation.com/how-colonialisms-legacy-continues-to-plague-the-international-criminal-court-142063> accessed 29 December 2022; Sascha-Dominick Dov Bachmann and Naa A. Sowatey-Adjei, 'The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice?' (2020) 29 (2) Washington International Law Journal 247, pp. 249-252; Marshet Tadesse Tessema and Marlen Vesper-Gräske, 'Africa, the African Union and the International Criminal Court: Irreparable Fissures?' (2016) FICHL Policy Brief Series No 56, pp. 1-4 ('Tessema and Vesper-Gräske Africa, the African Union and the International Criminal Court: Irreparable Fissures? (2016)'); Vilmer, The African Union and the International Criminal Court: Counteracting the Crisis (2016) pp. 1319-1342; Shilaho, The International Criminal Court and the African Union: Is the ICC a Bulwark Against Impunity or an Imperial Trojan horse? (2018) pp. 119-143; Eki Yemisi Omorogbe, 'The Crisis of International Criminal Law in Africa: A Regional Regime in Response?' (2019) 66 Netherlands International Law Review 287, pp. 287-309.
[35] See Başak Çalı, Mikael Rask Madsen, and Frans Viljoen, 'Comparative Regional Human Rights Regimes: Defining a Research Agenda' (2018) 16 (1) International Journal of Constitutional Law 128, pp. 128-135.

of all three human rights systems can act as the first point of call for victims and others who wish to lodge a human rights complaint.[36] Such structural and operational similarity can be beneficial when dealing with Rome Statute crimes because it can contribute to development of victim-oriented norms.

The OAS and its institutions (the Inter-American Human Rights System) have taken a more active part to galvanize American states[37] such as Colombia[38] and Venezuela[39] into addressing international crimes and to deliver justice to victims. They have also supported the work of the Court in these two situations.[40] In Colombia, the Inter-American Human Rights system

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[36] For example, Office of The High Commissioner for Human Rights (OHCHR) Human Rights in The Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (Professional Training Series No. 9, 2003) pp. 71-112; Christof Heyns, David Padilla and Leo Zwaak, 'A Schematic Comparison of Regional Human Rights Systems: An Update' (2005) 5 (2) African Human Rights Law Journal 308, pp. 312-318; African Union, 'Judicial, Human Rights & Legal Organs' <https://au.int/en/legal-organs> accessed 26 September 2022.

[37] For example, The Inter-American Commission on Human Rights (IACHR) Press Release, 'IACHR Publishes Compendium on Truth, Memory, Justice, and Reparations in Transitional Contexts' (2021) <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/184.asp> accessed 26 September 2022; IACHR, Compendium on Human Rights on Truth, Memory, Justice and Reparation in Transitional Contexts: Inter-American Standards' (OAS Official records OEA/Ser.L/V/II) 12 April 2021 ('IACHR, Compendium on Human Rights on Truth, Memory, Justice and Reparation in Transitional Contexts, 12 April 2021'); Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom (2018) pp. 26-58.

[38] IACHR, Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia, Colombia Country Report (OAS OR OEA/Ser.L/V/II. Doc. 49/13) 31 December 2013; Jo, Simmons and Radtke, Conflict Actors and the International Criminal Court in Colombia (2021) pp. 968-970.

[39] Organization of American States, Letter from Luis Almagro Concerning the Situation in Venezuela (OSG/243-16) 30 May 2016; IACHR, Democratic Institutions, The Rule of Law and Human Rights in Venezuela: Country Report, (OEA/Ser.L/V/II. Doc. 209) 31 December 2017; OAS Press Release E-031/18, 'Panel of Independent International Experts Finds "Reasonable Grounds" for Crimes against Humanity Committed in Venezuela' (2018) <https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-031/18> accessed 26 September 2022; OAS, Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes Against Humanity in Venezuela (2nd edn, OAS OR OEA/Ser.D/XV.19 2021) March 2021 ('Report of the General Secretariat of the OAS and the Panel of Independent Experts on the Situation in Venezuela (2nd edn, March 2021) ').

[40] Memorandum of Understanding on Cooperation Between the General Secretariat of the Organization of American States Through the Executive Secretariat of Inter-American Commission on Human Rights and the Office of the Prosecutor of the International Criminal (25 April 2012); The Inter-American Commission on Human Rights (IACHR) Press Release, 'IACHR Publishes Compendium on Truth, Memory, Justice, and Reparations in Transitional Contexts' (2021) <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/184.asp> accessed 26 September 2022; IACHR, Compendium on Human Rights on Truth, Memory, Justice and Reparation in Transitional Contexts, 12 April 2021; Annex III Transmission of Documents Received from the Authorities of the Bolivarian Republic of Venezuela on 9 July 2021, *Situation in the Bolivarian Republic of Venezuela I*, ICC-

contributed to the progress of national prosecutions and other efforts to deliver justice to victims.[41] In Venezuela, the OAS was instrumental in the first referral to the ICC[42] and subsequent opening of an investigation into the situation.[43]

The AU's approach to situations before the ICC has not been as supportive since the ICC opened several investigations into situations in the African continent.[44] The AU tried to persuade the UNSC to defer the ICC's proceedings in the Darfur, Sudan situation through

02/18-14-AnxIII, PTC I, ICC, 13 July 2021, para 390; Naomi Roht-Arriaza, 'The ICC in Latin America: An Old Friend with New Challenges' (2019) 47 (3) Georgia Journal of International & Comparative Law 607, pp. 614-615.

[41] Rene Uruena, 'Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003–2017' (2017) 111 (1) American Journal of International Law 104, pp. 104-125; See also Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom (2018) pp. 26-58; Jo, Simmons and Radtke, Conflict Actors and the International Criminal Court in Colombia (2021) pp. 968-970.

[42] This was after the report by a panel of experts commissioned by the OAS Secretary General established that there were reasonable grounds to believe that Rome Statute crimes were committed. See Unofficial Translation of the Referral Letter from OAS Member States (26 September 2018) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf> accessed 26 September 2022; OAS Press Release E-057/18 'OAS Secretary General Expresses "Complete Support" for the Referral to the ICC of Investigation of Venezuela' (2018) <https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-057/18> accessed 26 September 2022; For the report of the Panel of Experts, see Report of the General Secretariat of the OAS and the Panel of Independent Experts on the Situation in Venezuela (2nd edn, March 2021); OAS, Fostering Impunity: The Impact of The Failure of The Prosecutor of The International Criminal Court to Open An Investigation into The Possible Commission Of Crimes Against Humanity In Venezuela (OAS OR OEA/Ser.D/XV.23) 2 December 2020; See also Humberto Briceño León, 'The International Criminal Court: Interconnection Between International Bodies In Venezuela' (2020) 24 (1) Lewis and Clark Law Review 261, pp. 261-297; OAS Press Release E-031/18, 'Panel of Independent International Experts Finds "Reasonable Grounds" for Crimes against Humanity Committed in Venezuela' (2018) <https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-031/18> accessed 26 September 2022; Report of the General Secretariat of the OAS and the Panel of Independent Experts on the Situation in Venezuela (2nd edn, March 2021).

[43] ICC Press Release ICC-OTP-20211105-PR1625, 'ICC Prosecutor, Mr Karim A.A. Khan QC, Opens an Investigation into the Situation in Venezuela and Concludes Memorandum of Understanding with the Government' (2021) <https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-aa-khan-qc-opens-investigation-situation-venezuela-and-concludes> accessed 26 September 2022; OAS Press Release S-023/20, 'Fact Sheet: OAS General Secretariat Launches New Report Detailing Human Rights Violations in Venezuela and Impact of Inaction by ICC Prosecutor' (2020) <https://www.oas.org/en/media_center/press_release.asp?sCodigo=S-023/20> accessed 26 September 2022; OAS, Fostering Impunity: The Impact of The Failure of The Prosecutor of The International Criminal Court to Open An Investigation into The Possible Commission Of Crimes Against Humanity In Venezuela (OAS OR OEA/Ser.D/XV.23) 2 December 2020.

[44] Tessema and Vesper-Gräske Africa, the African Union and the International Criminal Court: Irreparable Fissures? (2016) pp. 1-4; Priya Pillai, 'The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability Issue', (2018) 22 (10) American Society of International Law Insights <https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court> accessed 22 February 2023.

mechanisms within the Rome Statute, i.e., Article 16 on UNSC request for deferral of investigation or prosecution, and Article 98 dealing with official immunity. When these efforts proved unsuccessful, the AU from 2009 onwards resorted to a non-cooperative approach towards the Court in relation to situations from African states,[45] such as the Libya, and Kenya situations.[46] The relationship between the AU and the ICC deteriorated to the point of encouraging a mass withdrawal of its member states from the ICC.[47] Many AU member states who are also States Parties to the ICC such as Kenya, Burundi, The Gambia, and South Africa were in support of the AU's approach of dealing with the Court.[48] Nonetheless, with the

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[45] Priya Pillai, 'The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability Issue', (2018) 22 (10) American Society of International Law Insights <https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court> accessed 22 February 2023.

[46] African Union 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)' (AU Sirte 2009) Doc. Assembly/AU/13(XIII); UNSC S/RES/1970 (26 February 2011); Tim Murithi, 'The African Union and the International Criminal Court: An Embattled Relationship?' (2013) The Institute for Justice and Reconciliation Policy Brief No 8, pp. 1-9 ('Murithi, The African Union and the International Criminal Court: An Embattled Relationship? (2013)'); African Union 'Decision on International Jurisdiction, Justice and The International Criminal Court (ICC)' (AU Addis Ababa 2013) Doc. Assembly/AU/13(XXI), paras 3-7 (footnote omitted which made reference to 'Reservation entered by the Republic of Botswana on the entire decision'); Reuters, 'Ethiopian Leader Accuses International Court of Racial Bias' (27 May 2013) <https://www.reuters.com/article/us-africa-icc-idUSBRE94Q0F620130527> accessed 26 September 2022; Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, ''To be or not to be?' The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33 (3) Nordic Journal of Human Rights 243, pp. 243-268; Vilmer, The African Union and the International Criminal Court: Counteracting the Crisis (2016) p. 1321.

[47] AU, 'Decision on Africa's Relationship with The International Criminal Court (ICC)' (AU Addis Ababa 2013) Ext/ Assembly/AU/Dec.; African Union 'Decision on The International Criminal Court' (AU Kigali 2016) Doc. EX.CL/987(XXIX); African Union 'Decision on The International Criminal Court' (AU Addis Ababa 2017) Doc. EX.CL/1006(XXX) (footnote omitted which made reference to 'Reservations entered by Benin, Botswana, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Lesotho, Liberia, Madagascar, Malawi, Mozambique, Nigeria, Senegal, Tanzania, Tunisia and Zambia'), see for example paras 6 and 8; See also BBC News, 'African Union Backs Mass Withdrawal From ICC' (1 February 2017) <https://www.bbc.co.uk/news/world-africa-38826073> accessed 26 September 2022; Gerhard Werle, Lovell Fernandez and Moritz Vormbaum, (eds), Africa and the International Criminal Court (T.M.C. Asser Press 2014); Gwenyth Gamble Jarvi, 'African Union Leaders Back Leaving ICC' (1 February 2017) *Jurist* <https://www.jurist.org/news/2017/02/african-union-leaders-back-leaving-icc/> accessed 26 September 2022; Vilmer, The African Union and the International Criminal Court: Counteracting the Crisis (2016) pp. 1319-1342; Onyango discusses the political aspects of the African backlash. See Joe Oloka-Onyango, 'Unpacking the African Backlash to the International Criminal Court (ICC): The Case of Uganda and Kenya' (2020) 4 (1) Strathmore Law Journal 41, pp. 41-67.

[48] Eki Omorogbe, 'The African Union and the International Criminal Court: What to Do with Non-Party Heads of State?' (2017) University of Leicester School of Law Research Paper No 17-09, pp. 1-25 <https://ssrn.com/abstract=2997666> accessed 26 September 2022; Ssenyonjo, State Withdrawal Notifications from the Rome Statute of the ICC: South Africa, Burundi and the Gambia (2018) pp. 63-119.

exception of Burundi, certain constraints such as those related to respective national laws and or constitutions, and perhaps other political issues, prevented them from fully implementing the AU's non-cooperation and withdrawal decisions.[49] Other non-ICC States Parties like Sudan were very willing to support the AU's decisions, while countries like Botswana, Ghana, Senegal and Nigeria continued to support the ICC.[50]

Although the AU's response to the ICC from 2009 has been less cooperative, an argument can be made that its attempt to engage with the Court using Rome Statute provisions suggest that at the very least it acknowledges the system.[51] Also, the mixed responses from the AU's Member States offer some hope that there is still a chance at salvaging the relationship between the Court and the AU.[52] The history and current dynamics in the relationship between the AU

[49] See African Union 'Decision on The International Criminal Court' (AU Addis Ababa 2017) Doc. EX.CL/1006(XXX) para 6; Rome Statute of The International Criminal Court Rome, 17 July 1998, South Africa: Withdrawal Notification (Reference: C.N.786.2016.TREATIES-XVIII.10) Effected on 19 October 2016; Rome Statute of The International Criminal Court Rome, 17 July 1998 South Africa: Withdrawal of Notification of Withdrawal (Reference: C.N.121.2017.TREATIES-XVIII.10) Effected on 7 March 2017; Dewa Mavhinga, 'South African High Court Rejects ICC Withdrawal: Government Action Ruled Unconstitutional, Invalid' 22 February 2017 <https://www.hrw.org/news/2017/02/22/south-african-high-court-rejects-icc-withdrawal> accessed 26 September 2022; Ssenyonjo, State Withdrawal Notifications from the Rome Statute of the ICC: South Africa, Burundi and the Gambia (2018) pp. 63-110; Vilmer, The African Union and the International Criminal Court: Counteracting the Crisis (2016) pp. 1320-1323.

[50] See African Union 'Decision on The International Criminal Court' (AU Addis Ababa 2017) Doc. EX.CL/1006(XXX) (footnote omitted which made reference to 'Reservations entered by Benin, Botswana, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Lesotho, Liberia, Madagascar, Malawi, Mozambique, Nigeria, Senegal, Tanzania, Tunisia and Zambia'); See also Sarah Rayzl Lansky, 'Africans Speak Out Against ICC Withdrawal: Governments Signal Continued Support for Court' 2 November 2016 <https://www.hrw.org/news/2016/11/03/africans-speak-out-against-icc-withdrawal> accessed 26 September 2022; Elise Keppler, 'African Members Reaffirm Support at International Criminal Court Meeting Countries Commit to Working Within the ICC System' 17 November 2016 <https://www.hrw.org/news/2016/11/17/african-members-reaffirm-support-international-criminal-court-meeting> accessed 26 September 2022; Ssenyonjo, State Withdrawal Notifications from the Rome Statute of the ICC: South Africa, Burundi and the Gambia (2018) pp. 63-105; Shilaho, The International Criminal Court and the African Union: Is the ICC a Bulwark Against Impunity or an Imperial Trojan horse? (2018) pp. 119-143.

[51] Dapo Akande 'Africa and the International Criminal Court' (EJIL: Talk, 8 June 2009) <https://www.ejiltalk.org/africa-and-the-international-criminal-court/> accessed 26 September 2022.

[52] The ICC is currently working on cooperation initiatives with ECOWAS, thirteen of who are also members of the African Union (Guinea Bissau and Togo are not States Parties to the Rome Statute, although the former has signed but not ratified Statute). See ICC Press Release ICC-CPI-20220525-PR1656, 'ICC Holds High-Level Regional Conference on Cooperation and Complementarity in Senegal' 25 May 2022 <https://www.icc-cpi.int/news/icc-holds-high-level-regional-conference-cooperation-and-complementarity-senegal> accessed 26 September 2022; See also Economic Community of West African States (ECOWAS), 'Member States',

and the ICC[53] point to the same opportunity. For example, many AU[54] Member States were influential in the creation of the Court,[55] and currently an overwhelming majority of AU Member States (33:22) are States Parties to the Rome Statute. Therefore, when motivated accordingly and with coordination of efforts, regional organizations can contribute to the implementation of victim-oriented complementarity for the realization of justice for victims.[56]

A review of the case law on complementarity discussed in the preceding chapters shows that the ICC could adopt a more comprehensive view of this concept, currently limited to investigations and prosecution. Thus, Moffett's conception of victim-oriented complementarity is important because it recognizes the potentials of complementarity in pursuing justice for victims, but it would require more to ensure that that victims' interests are adequately accommodated throughout all stages of proceedings. In the next part, the thesis further develops the concept of victim-oriented complementarity to provide clear guidelines for its implementation. Victim-oriented complementarity proposed here goes beyond the ICC's understanding of complementarity and admissibility determination. The definition nonetheless mirrors the two main forms of complementarity. The thesis argues that these proposals have

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<https://ecowas.int/?page_id=381>, accessed 26 September 2022; Tonny Raymond Kirabira, 'Surrender of Ali Kushayb and Paul Gicheru: New Perspectives in Africa's Relationship with the ICC' (2021) 54 (1) New York University, Journal of International Law and Politics 23, pp. 23-33.

[53] Fatuma Mninde-Silungwe, 'The Regionalisation of International Criminal Justice in Africa' (DPhil Thesis, University of Western Cape 2017) pp. 122-130.

[54] Note that the African Union replaced the defunct Organization for African Unity (OAU).

[55] See Tessema and Vesper-Gräske Africa, the African Union and the International Criminal Court: Irreparable Fissures? (2016) p. 1; Line Engbo Gissel, 'A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003' (2018) 29 (3) European Journal of International Law 725, pp. 725-748; Philomena Apiko and Faten Aggad, 'The International Criminal Court, Africa and the African Union: What Way forward?' (2016) European Centre for Development Policy Management Discussion Paper No 201 <https://ecdpm.org/work/the-international-criminal-court-africa-and-the-african-union-what-way-forward> accessed 22 February 2023.

[56] For discussions of the work of the AU and Senegalese Government in achieving the prosecution of Hissène Habré including the award of reparations to victims, see Stahn, and Vagias See Stahn, A Critical Introduction to International Criminal Law (2019) pp. 185-191; Fatuma Mninde-Silungwe, 'The Regionalisation of International Criminal Justice in Africa' (DPhil Thesis, University of Western Cape 2017) pp. 114-122; Michail Vagias, 'Other "Hybrid" Tribunals' in Sergey Sayapin, and others (eds) *International Conflict and Security Law*: *A Research Handbook*, pp. 644-645.

their legal basis in the core legal texts of the court and can be applied in a way that respects the rights of accused as demonstrated below.

3 Expanding the Concept of Victim-Oriented Complementarity

The thesis defines victim-oriented positive complementarity as a series of coordinated, robust, and inclusive measures geared towards supporting states to investigate and prosecute international crimes and to deliver victim-oriented justice. Such measures could be pioneered by complementarity stakeholders like the ICC, states, and cooperation partners, and should be done in consultation with victims. Victim-oriented negative complementarity is defined by the thesis as the ICC's holistic consideration of a state's willingness and ability to investigate and prosecute international crimes and to deliver justice to victims within a reasonable margin of appreciation reflective of the peculiarities of the relevant situation or case.

Negative and positive victim-oriented complementarity are equally important in realizing justice for victims. However, it is more beneficial for states and the ICC to pursue a victim-oriented positive complementarity as early as possible, but no later than the opening of a preliminary examination. Doing so helps to mitigate unnecessary admissibility challenges and fosters the aims of the Rome Statute. If states could be supported and given flexible yet limited timeline to develop victim-oriented approaches to addressing international crimes, this is preferable to a rigid interpretation of complementarity.

3.1 Measures for Achieving the Thesis's Victim-Oriented Complementarity

3.1.1 Flexible Approach to the Time Requirement: A Necessity for the Development of Victim-oriented Measures for Addressing Core Crimes

It is important to reiterate the connection between different provisions of the complementarity regime. Article 17 of the Statute is central to complementarity in that it regulates the admissibility of situations and cases before the ICC, thereby ensuring that the principle of complementarity is adequately followed. For instance, Article 15 which concerns the Prosecutor's *proprio motu* powers and Article 53 which deals with the initiation of an investigation, outline instances where the OTP can initiate an investigation following a preliminary examination, and provided the requisite standard is met.[57] For an investigation to be initiated, the case must appear to fall within the ICC's jurisdiction and potentially admissible in accordance with Article 17.[58] Since both the ICC and states have jurisdiction over international crimes, Article 18 became necessary as a tool to manage 'competing interests involved—the desire to avoid over-lapping investigations by giving primacy to the national proceedings, the need to ensure expeditious determinations if questions of admissibility arose,' and to prevent a waste of resources for both the Court and states with jurisdiction.[59] Where a state decides to challenge the Court's jurisdiction or admissibility, they can do so under Article 19[60] which may be more contentious compared to proceedings under Article 18. It is against this backdrop that the thesis argues for flexibility with timing in relation to issues of

[57] For an investigation to be initiated, there has to be 'reasonable basis' to proceed with such an investigation. See Article 15 (3) and 53 (1) (a) ICCst.

[58] See Articles 15 (4) and 17 ICCst.; OTP's Policy Paper on Preliminary Examinations (2013) paras 34-88; ICC-OTP, Policy Paper on Case Selection and Prioritization (15 September 2016) paras 24-44.

[59] Holmes, Complementarity: National Courts versus the ICC (2002) pp. 681-682.

[60] Challenges to admissibility or the jurisdiction of the Court can also be brought by an accused person under Article 19 ICCst.

admissibility. Consequently, the concept of qualified deference becomes crucial to help the ICC and states to effectively implement complementarity in their fight against impunity.

It should be noted at the outset that timing is part of victim-oriented qualified deference discussed below. A separate discussion was warranted because states who refer their situations to the Court may be guided within a timeframe to fulfil their obligations without the need for a deferral *stricto sensu*.[61] The element of timing plays a pivotal role in the implementation of complementarity[62] because the Court will usually make its admissibility determination based on the facts of the situation or case at the time of its assessment.[63] Hence it is important to consider timing in the context of triggers of an admissibility determination and how this should be managed when implementing victim-oriented complementarity.

Admissibility determinations may be made in response to a deferral request by a state under Article 18 (2) of the Statute following the Prosecutor's notification of an intention to open an investigation.[64] Secondly, an admissibility challenge under Article19 (2) can be brought by an accused or a state pursuant to Article 17. Thirdly, the Chamber can institute a *proprio motu* admissibility proceeding under Article 19 (1). For all these pathways to an admissibility determination, the Rome Statute sets the timeframes for raising issues of admissibility to manage the Court's resources and prevent unnecessary delays.[65] The general preference is to

[61] See Article 18 ICCst.
[62] Stahn discusses 'timing' together with his concept of qualified deference which this thesis adopts and expands below. See Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) 228-259; Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 1-4.
[63] Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, para 56; Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493, 28 April 2020, paras 17-21; *Yekatom* Appeal Judgment, ICC-01/14-01/18-678-Red, 11 February 2021, paras 47-48; See also Prosecution's Communication of Materials and Further Observations Pursuant to Article 18 (2) and Rule 54 (1), *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-195, PTC II, ICC, 29 August 2022, paras 37 and 56.
[64] Article 18 (1) and (2) ICCst.
[65] See Dov Jacobs, 'The Importance of Being Earnest: The Timeliness of the Challenge to Admissibility in Katanga' (2010) 23 (2) Leiden Journal of International Law 331, p. 332.

raise such issues very early in the proceedings. For deferral requests,[66] this could be before an investigation is opened or during investigations, and for admissibility challenges,[67] it could be any time before the commencement of trial.

The thesis proposes that when a state requests a deferral or when they lodge an admissibility challenge, the Court should consider the specifics of each situation or case to identify at a minimum some elements of willingness to investigate and prosecute. When this is present, the Court should then engage in continuous constructive dialogue with the state[68] as a means of encouraging them to deliver victim-oriented justice with or without support from cooperation partners. In this process, states' capacity needs which may result in fatal admissibility challenges should be identified. By pre-empting an unsuccessful admissibility challenge, states are offered the opportunity to develop capacity in a way that can benefit victims. Only after some level of willingness and commitment have been identified can the Court award the state reasonable time to fulfil its obligations. The time awarded should reflect the uniqueness of the situation or case. There should be a possibility of extension in instances where the concerned state can show progress made towards agreed conditions.[69] This is in line with the current admissibility criteria which the ICC in making admissibility determinations searches for *inter alia* 'genuineness' in state's action.[70] Also, in applying this flexible approach to timing and depending on whether a suspect or an accused has been identified, states must be reminded that

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[66] Article 18 (2) ICCst.
[67] See Article 19 (4) and (5) ICCst. The Court has discretion to grant leave for an admissibility challenge at a later time, but this is limited to a challenge based on *ne bis in idem*.
[68] *Yekatom* Appeal Judgment, ICC-01/14-01/18-678-Red, 11 February 2021, para 42.
[69] See Stahn's recommendation of flexible time but in relation to qualified deference. Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 247; Report of the Independent Expert Review of the ICC (2020), p. 237, R263, on using time limits.
[70] See Article 17 ICCst; Holmes, The Principle of Complementarity (1999), pp. 49-51; OTP's Informal Expert Paper on the Principle of Complementarity in Practice (2003) paras 5 and 21-23; Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (2008) pp. 81-82.

the Court would have due regard to the principles of due process recognized by international law, and unjustified delays which are inconsistent with the rights of the accused must be avoided.[71]

States making deferral requests under Article 18 are expected to adhere to the one-month timeframe from the date of notification by the OTP of an intention to open an investigation. If deference is granted, it may be open to review by the OTP six months after the deferral.[72] Such requirements place states at a disadvantage when considering the difficulties they experience in investigating and prosecuting crimes, something that the OTP's own track record also reflects.[73] The Appeals Chamber rightly noted in the *Katanga* Appeal's judgment that domestic activities for addressing international crimes may change over time, and a case or situation that was originally admissible may be rendered inadmissible by such a change of circumstances.[74] Nevertheless, the Court stopped short of advancing a flexible time approach to reflect dynamics which are inherent in situations before it.[75] Addressing the timing issue in admissibility determination, Judge Uscaka in her dissenting opinion argued that,

> "(…) if a State has the right to start an investigation and prosecution and to bring an admissibility challenge at any time before the start of the trial before the Court, then it stands to reason that the State may also start its investigation and prosecution when the admissibility challenge has already been made. In this context, one may note that article

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[71] See for example, Articles 17 (2) and 20 (3), 21 (3), and 67 ICCst.
[72] Article 18 (3) ICCst.
[73] See ICC-OTP, 'Measures Available to the International Criminal Court to Reduce the Length of Proceedings' (Informal Expert Paper 2003) <https://www.icc-cpi.int/sites/asp/files/asp_docs/library/organs/otp/length_of_proceedings.pdf> accessed 26 September 2022; Benjamin Gumpert and Yulia Nuzban, 'What can be done about the length of proceedings at the ICC?' (EJIL: Talk, 15 November 2019) <https://www.ejiltalk.org/part-i-what-can-be-done-about-the-length-of-proceedings-at-the-icc/> accessed 26 September 2022.
[74] Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, para 56.
[75] See also the *Al-Senussi* case discussed below.

> 19 (5) of the Statute provides: "A State [...] shall make a challenge at the earliest opportunity." This is in the interest of the Court and the proper administration of justice because it will avoid potentially lengthy and expensive proceedings before the Court that may have to be stopped at a later stage because the case has become inadmissible. This also supports that a State, acting in good faith, may use the mechanism of a State challenge as early as possible, even though the State has not yet reached the stage of fully investigating or prosecuting a given case and intends to start to do so in the course of the proceedings on the admissibility challenge."[76]

The ICC appears to maintain its approach[77] to the timing issue,[78] yet flexibility is required. The difficulty with the timing issue is exacerbated by the continued implementation of the Court's same person/same conduct test which means that states may scramble just to show that their situation or case is substantially the same as the ICC's or be forced to give up an attempt.[79] This outcome can be discouraging for willing but initially unable states since there is a higher

[76] Dissenting Opinion of Judge Uscaka from the Appeals Chamber's Judgment Decision on Kenya Appeal, Ruto, Kosgey, and Sang, ICC-01/09-01/11-336, 20 September 2011, para 21 (footnote omitted). The caveat is making sure that states acting in bad faith do not exploit this opportunity, as such, qualified deference and close monitoring become crucial.

[77] Decision Pursuant to article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, Situation in Afghanistan, ICC-02/17-196, PTC II, ICC, 31 October 2022, paras 44-47. Although the current authorities in Afghanistan did not pursue the deferral request submitted by the former government, the Chamber's ruling confirms that the Court's approach to timing may remain a challenge which states may struggle to overcome.

[78] Note that the Prosecutor granted Venezuela a three-month extension of the usual one-month time frame. See Notification on the Status of Article 18 Notifications in the Situation in the Bolivarian Republic of Venezuela I, *Situation in the Bolivarian Republic of Venezuela*, ICC-02/18-16, PTC I, ICC, 17 January 2022, para 6; Human Rights Watch, 'Venezuela: Maduro Government Seeks to Delay ICC Investigation: Prosecutor Signals Intention to Move Forward', 22 April 2022 <https://www.hrw.org/news/2022/04/22/venezuela-maduro-government-seeks-delay-icc-investigation> accessed 10 September 2022.

[79] See Chapter Three analysis on complementarity; Judgment on Libya's Appeals re-*Gaddafi* Decision, 01/11-01/11-547-Red, 21 May 2014, paras 71-73; Appeals Chamber Decision on Al-Senussi Appeal, ICC-01/11-01/11-565, 24 July 2014, para 119; Dissenting Opinion of Judge Anita Usacka from the Al-Senussi Appeals Decision, ICC-01/11-01/11-547-Anx2, 21 May 2014, para 56; Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 247; Frederic Mégret, 'Too Much of a Good Thing?: Implementation and the Uses of Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) pp. 361-390 ('Megret, Too Much of a Good Thing?: Implementation and the Uses of Complementarity (2011)'); Megret and Samson, Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials (2013) pp. 577-589.

possibility of failure when an admissibility challenge is hastily prepared. As Stahn, and Akhavan note, such a strict timeframe limits states' legitimate prosecutorial choices and may undermine their primary responsibility under the Statute.[80] This is especially so when states have a different opinion on which cases to investigate and try, or their method differs from the Court's.[81] Ultimately, the ICC's approach to the time requirement in relation to admissibility, and the jurisdictional tension it creates, makes it more challenging for the Court to encourage states to adopt measures for victim-oriented justice.

3.1.1.1 Contingencies vis a vis Adopting a Flexible Approach to the Time Requirement

In applying the flexible approach to the timeline proposed here, what is considered 'reasonable time' may differ in relation to the particularities of each situation or case. The Rome Statute provides some guidance on this in Article 18 (2) and (3) offering states one month to file a deferral request, and six months by which time the deferral would be open to review by the OTP. Yet, neither timing may be appropriate in all situations given the uncertainties and complexities involved in dealing with international crimes. For example, on average, it takes the OTP about four years from opening a preliminary examination to the filing a request for authorization to investigate, while the ICC's Pre-Trial Stage lasts 362 days.[82] At the ICC efforts

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[80] Stahn, 'Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 2, s. 1.2; Akhavan, Complementarity Conundrums: The ICC Clock in Transitional Times (2016) pp. 1043-1059; See also Yekatom Defence Appeal Brief – Admissibility, Yekatom and Ngaissona, Situation in the Central African Republic, ICC-01/14-01/18-523, AC, ICC, 19 May 2020, paras 36 and 59 ('Yekatom Defence Appeal Brief, ICC-01/14-01/18-523, 19 May 2020'); Nicola Palmer, 'The Place of Consultation in the International Criminal Court's Approach to Complementarity and Cooperation' in Olympia Bekou and Daley Birkett (eds) *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill, Nijhoff 2016) pp. 210-224.

[81] Kai Ambos, Treatise on International Criminal Law, Volume III: International Criminal Procedure, (OUP 2016), p. 284. Akhavan, Complementarity Conundrums: The ICC Clock in Transitional Times (2016) pp. 1043-1059; Moffett, Justice for Victims Before the ICC (2014) pp. 238-239.

[82] Report of the Independent Expert Review of the ICC (2020) paras 490-498, and 71716. It remains to be seen how this trend will change with the new Prosecutor and updates to the ICC's policies from 2022.

have been made to remedy delays, but the complexities involved in addressing international crimes[83] must factor into complementarity decisions. The OTP has shown its openness to grant states extra time to prove that they are actively taking steps to fulfil their investigations. In its 17 January 2022 notification to the Pre-trial Chamber concerning the status of the deferral process in the Venezuela I situation, the Prosecutor made the following statement.

> "In a spirit of cooperation, dialogue and fairness, the Prosecutor <u>further agreed to grant Venezuela a three months extension, namely until 16 April 2022,</u> to inform the Court of its investigation within the meaning of article 18(2) – given that this time period would ordinarily expire on 16 January 2022. This extension is appropriate and justified due to several circumstances, which are to be considered exceptional given, inter alia, the time that has elapsed between Venezuela's 3 January request to the Prosecutor and his 13 January response, the provision of additional information, unsuccessful attempts by the Prosecution to meet in person with the Venezuelan authorities to discuss relevant procedural matters, the intervening Court recess as well as the ongoing challenges brought on by the on-going global pandemic."[84]

Moreover, the period during which states, and the ICC are developing responses to international crimes is important. Without such preparation and development, substantive results may be compromised, and this will not advance justice for victims.[85] Other important concerns of adopting a flexible approach to timeline include the possibility that victims may view justice delayed as meaning justice denied, the protection of victims and witnesses, and

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[83] Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 229.
[84] Notification on the Status of Article 18 Notifications in the Situation in the Bolivarian Republic of Venezuela I, *Situation in the Bolivarian Republic of Venezuela*, ICC-02/18-16, PTC I, ICC, 17 January 2022, para 6 (footnotes omitted, emphasis added).
[85] Report of the Independent Expert Review of the ICC (2020), paras 490-494.

deterioration of evidence.[86] These are some of the reasons for the thesis's proposal of continuous communication and consultation with victims through their legal representatives. Keeping victims informed throughout all stages of proceedings is important, as it helps them to keep track of the proceedings and can contribute to managing despair in the event of prolonged or delayed proceedings.[87]

In terms of evidence preservation and victim's protection, states, and the ICC with the support of CSOs and international organizations can take measures to protect victims and witnesses.[88] This can be extended to the collection and preservation of evidence. The Rome Statute provides for such instances including through cooperation procedures. Articles 18 (6), 19 (8), 68 (1) and (4), and 56 assign the OTP and the Chamber specific roles in relation to the collection and preservation of evidence.[89] Some states may be less inclined to allow the ICC to collect such evidence on their territory due to jurisdictional disputes, or pure obstructionism. In such instances, other third-party stakeholders-including local CSOs, and UN agencies, can work with states to collect and preserve evidence. Evidence collection and preservation is currently being implemented in the situations in Syria and in Ukraine,[90] and the latter situation is currently under investigations by the ICC.

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[86] See for example, Report of the Independent Expert Review of the ICC (2020), para 706.
[87] See Chapter Five on the proposed new complementarity division and its composition which should include a permanent legal representative for victims on complementarity issues; Chris Tenove, 'International Justice for Victims? Assessing The International Criminal Court from The Perspective of Victims in Kenya and Uganda' (2013) Research Paper No. 1 Africa Portal, September 2013, pp. 4-5; Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) pp. 3-5.
[88] The Court is making some efforts in this direction. See for example, ICC, 'Seminar on Cooperation in The Hague with national focal points', 21 January 2019, <https://www.icc-cpi.int/about/cooperation/seminar-cooperation-hague-national-focal-points>, accessed 27 September 2022.
[89] See also Articles 94, 95, 93 (10) ICCst.
[90] For Syria, see UNGA A/RES/71/248 (21 January 2016) Establishing the Impartial and Independent Mechanism (IIIM) to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes Under International Law Committed in the Syrian Arab Republic Since March 2011 (21 December 2016) <https://iiim.un.org/who-we-are/mandate/> accessed 27 September 2022; On Yemen, see International Commission of Jurists, 'Civil Society Groups Seek Urgent UN Action on Yemen' <https://www.icj.org/civil-

When extra time has been awarded for developing victim-oriented mechanisms to address international crimes, the Court and the concerned state must then agree on effective monitoring and reporting of progress.[91] This allows the Court to work with cooperation partners to provide support where necessary, or to prepare to intervene by resuming its own proceedings should the need arise.[92] The time awarded may be revoked where states fail to fulfil the agreed conditions without cogent reasons, including where the rights of the accused have been severely affected in a manner inconsistent with the Statute and internationally recognized human rights.[93]

It is important to reiterate that what Stahn refers to as a ‘significant attention to the application of black letter law’[94] of timing requirements under the Statute could frustrate the very aims of

society-groups-seek-urgent-un-action-on-yemen/> accessed 27 September 2022; Human Rights Watch, ‘Civil Society Groups Seek Urgent UN Action on Yemen’ 2 December 2021 <https://www.hrw.org/news/2021/12/02/civil-society-groups-seek-urgent-un-action-yemen> accessed 27 September 2022; On Ukraine, see for example, Project Sunflowers, ‘Description of the Project’, <https://projectsunflowers.org/about-project> accessed 27 September 2022; Council of Europe Press Release, ‘Eurojust: Council Adopts New Rules Allowing the Agency to Preserve Evidence of war crimes’ (2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/05/25/eurojust-le-conseil-adopte-de-nouvelles-regles-permettant-a-l-agence-de-conserver-des-preuves-de-crimes-de-guerre/> accessed 27 September 2022; The Regulation is now in force as of 31 May 2022 as ‘Regulation (EU) 2022/838 of the European Parliament and of the Council on amending Regulation (EU) 2018/1727 As Regards the Preservation, Analysis and Storage at Eurojust of Evidence Relating to Genocide, Crimes Against Humanity, War Crimes and Related Criminal Offences’ (2022) Official Journal of the European Union L 148/1.

[91] See Articles 18 (2) and 3, and 19 (10)-(11) ICCst.

[92] See Article 19 (10) (11) ICCst. The ICC’s Pre-Trial Chamber has authorized resumption of proceedings following the Court’s decisions on the Article 18 (2) deferral requests in Afghanistan, and Philippines situations; See also Carsten Stahn Policy, Revitalizing Complementarity a Decade after the Stocktaking Exercise, Brief Series No. 115 (2020) p. 3.

[93] Akhavan and Stahn make general suggestions of how the complementarity process can be maximized while adopting a flexible approach to timing. See Akhavan, Complementarity Conundrums: The ICC Clock in Transitional Times (2016) pp. 1043-1059; Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 228-259; Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 1-4; Human Rights Watch discusses some concrete steps which the DRC government can take to pursue and realize justice for victims. See Human Rights Watch ‘DR Congo: Prioritize Justice for Serious Crimes New Lukonde Government Should Set Transitional Justice Roadmap’, 29 April 2021, <https://www.hrw.org/news/2021/04/29/dr-congo-prioritize-justice-serious-crimes> accessed 27 September 2022.

[94] See Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 246.

complementarity.[95] Reasonable timing should be awarded to states to develop mechanisms for addressing core crimes which can accommodate victims and their interests. This will be vital for encouraging victim-oriented justice especially when timing is awarded in advance of an admissibility challenge. Both the ICC and states can save resources which could be put to better use for victims. A flexible timeframe can be awarded following an admissibility proceeding. In this instance, it can be a part of the Court's process for arriving at a final decision to defer as discussed below.

3.1.2 The Concept of Qualified Deference

Victim-oriented qualified deference is another aspect of the three-part method for reinterpreting complementarity in a way that benefits victims. It is an adaptation of Stahn's conception of qualified deference.[96] According to Stahn, qualified deference is a means to tackle what he refers to as the 'dilemmas of timing'.[97] These are some of the problems that have emerged in the practice of complementarity and which may have been less clear when the regime was drafted.[98] Stahn defines qualified deference as context-sensitive approaches which the ICC can employ to minimize jurisdictional tensions with states, and through which the Court can aid

[95] Megret, Samson, and Wierda discuss ways through which the ICC can foster and encourage domestic efforts to fight impunity and at the same time do justice for victims. See Megret, Too Much of a Good Thing?: Implementation and the Uses of Complementarity (2011) pp. 361-390; Megret and Samson, Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials (2013) pp. 571-589; Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) pp. 101-103, 150-152.

[96] "Qualified deference' was initially coined by Mark Drumbl in connection with the relationship between international criminal justice and transitional justice." see Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 230-231; Mark A. Drumbl, 'Policy through complementarity: The atrocity trial as justice' in Carsten Stahn and Mohamed M El Zeidy (eds), The International Criminal Court and Complementarity: From Theory to Practice (CUP 2011) p. 22; Mark A. Drumbl, Atrocity, Punishment and International Law (CUP 2007) pp. 187-204.

[97] See Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 246-249.

[98] See Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 246-249.

them to meet the admissibility criteria.[99] This requires ongoing interactions between the ICC and domestic jurisdictions.[100]

Stahn identifies three measures for qualified deference.[101] The first is time management of parallel proceedings. This means giving states extra time and flexibility to adjust their case *after* the filing of an admissibility challenge, and prior to the decision on admissibility in a situation or case which the ICC is also interested in.[102] The case will remain admissible, but this means that there are parallel proceedings at the ICC and nationally, as ICC actions will not be entirely barred notwithstanding the requirement of Article 19 (7) that the OTP suspend the proceedings. Stahn asserts that with this method, '[t]he state would be required to meet 'the same conduct' test, but would have an opportunity to adjust its investigations or prosecutions after the filing of the admissibility challenge.'[103] The thesis's attention to victim-oriented elements is the main difference between its proposal of flexibility with the time requirement[104] and Stahn's proposal of time management of parallel proceedings. Another equally important difference is that Stahn's proposal targets the period after notice of an admissibility challenge,[105] while the thesis argues that flexible timing can be used before an admissibility challenge. This can happen once a state becomes aware of the Prosecutor's interests in their situation whether at the preliminary examination stage, or during investigations.[106]

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[99] See Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 230-231.
[100] Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 229-231.
[101] Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 255-258.
[102] See Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 255.
[103] See Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 255 (emphasis added).
[104] See Section 3.1.1 above.
[105] Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 3; Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 254-256.
[106] See for example, Article 18 (1) ICCst.

Stahn also proposes a deferral to a states combined with continued judicial monitoring after a decision under Article 19.[107] He argues that such a method gives the ICC a means of verifying whether a state's action is geared towards the same case, so that the admissibility decision can take into account the developments made by states in the time period granted.[108] The third measure is conditional admissibility which means that instead of unconditionally deferring to states, the ICC can postpone a deferral and only make a final decision when certain conditions such as those relating to justice standards have been met.[109]

Stahn's qualified deference is a creative approach to manage some of the problems caused by the rigid nature of admissibility determinations.[110] However, it does not eliminate the problem caused by the same case-same conduct requirement.[111] His recommendation of time management is geared towards helping states meet this requirement by adjusting their investigations or prosecutions after lodging an admissibility challenge.[112] Hence, a state which successfully proves that they are investigating the same case may not necessarily be inclined to expand their approach to addressing other international crimes.[113] Moreso, they do not need to develop cases or situations in a way that makes room for victims in the domestic proceedings,

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[107] Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 254.
[108] Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 255-256.
[109] See Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 256-258.
[110] On the same case-same conduct test, see Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009; Judgment on Libya's Appeals re-Gaddafi Decision, 01/11-01/11-547-Red, 21 May 2014, paras 71-733; Appeals Chamber Decision on Al-Senussi Appeal, ICC-01/11-01/11-565, 24 July 2014, para. 119.
[111] This approach is still favored by the OTP and the Chamber, notwithstanding that as the Pre-Trial Chamber II notes, the same-case method is challenging to apply to situations particularly in relation to Article 18. See Decision Pursuant to article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022, paras 46 and 55; See also Prosecution's Communication of Materials and Further Observations Pursuant to Article 18 (2) and Rule 54 (1), *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-195, PTC II, ICC, 29 August 2022, paras 63-64.
[112] Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 255.
[113] Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) p. 150.

conditions for deferral need not include victims' provisions,[114] and victims' representatives may not be privy to state's progress after a deferral by the ICC.

Seven years on from Stahn's first proposal of qualified deference, the ICC is yet to consider its merits in complementarity jurisprudence. In the *Yekatom*'s case, qualified deference was raised by the defense to seek a ruling of inadmissibility.[115] The Trial Chamber in issuing its decision in April 2020[116] retained the two-step approach to admissibility determination without any discussion of the merits or demerits of qualified deference. The Appeals Chamber in the same case did not examine the concept.[117] Nonetheless, Stahn's ideas for qualified deference can be adapted and extended in a manner that can encourage a victim-oriented approach to justice. The following section discusses victim-oriented deference and its relevant requirements.

3.1.3 Victim-oriented Qualified Deference

Victim-oriented qualified deference refers to the ICC's deferral of exercise of jurisdiction to states upon proof of willingness and ability to address core crimes and openness to do so in a way that accommodates victims and their interests, with or without support for capacity building.[118] Victim-oriented qualified deference may be final at the time it is considered or a final deferral can be postponed pending when states meet agreed conditions which are geared

[114] Note that Stahn does not outline specific conditions but leaves it open for the Court to decide.
[115] Yekatom Defence's Admissibility Challenge-Complementarity, *Yekatom and Ngaissona*, *Situation in the Central African Republic*, ICC-01/14-01/18-456, TC V, ICC, 17 March 2020, paras 14-15, 34-37 ('*Yekatom* Defence's Admissibility Challenge, ICC-01/14-01/18-456, 17 March 2020').
[116] Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493, 28 April 2020
[117] Yekatom Appeal Judgment, ICC-01/14-01/18-678-Red, 11 February 2021, para 49.
[118] Scholars and practitioners, including defense teams have argued that states should be given 'fair opportunity' to fulfil their Rome Statute obligation. See for example, Akhavan, Complementarity Conundrums: The ICC Clock in Transitional Times (2016) pp. 1047-1048; Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 228 and 254; Yekatom Defence Appeal Brief, ICC-01/14-01/18-523, 19 May 2020, paras 59-60.

towards victims' interests. The latter form is particularly useful in cases of inaction due to states' inability. Such deference will involve judicial or non-judicial monitoring.[119] Victim-oriented qualified deference advances victim-oriented positive complementarity, (helping to build state's capacity for victim-oriented justice) and victim-oriented negative complementarity (determining admissibility in a victim-oriented manner).

3.1.3.1 Victim-oriented Qualified Deference Within the Rome Statute Framework

A purposive interpretation of the Rome Statute will show that victim-oriented qualified deference is achievable under the current complementarity regime. As Stahn notes, the wording of 18 (2) foresees the possibility of a suspension of the ICC's investigations or conditional deferral to states subject to re-initiation if domestic proceedings prove inadequate.[120] Article 18 (2) and (3) support victim-oriented qualified deference, allowing the ICC to re-assert its jurisdiction should the relevant state fail to meet agreed conditions.[121] Stahn also makes a compelling argument about the role of the Chambers in making admissibility and by extension complementarity decisions. He avers that

> "[t]he power to tie admissibility to conditions may be inherent in the complementarity regime. The Court is the ultimate arbiter over complementarity, and it is mandated to rule on deference. (…). A legal justification for the use of conditions may in particular be derived from an *a majore ad minus* argument. If a Chamber is entitled to make a final finding on inadmissibility, based on the criteria of Article 17, it must have the power to rule on the steps leading to that result. This logic is particularly compelling in

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[119] See chapters five and six for further discussion on this.
[120] Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 3.
[121] See Article 18 (2) and (3) ICCst.

> light of the nature of the decision on deference. Technically, deference would constitute an interim decision on inadmissibility, which becomes final when conditions are met. The use of conditions is a means by which the Chamber would be assisted in reaching its final assessment."[122]

Stahn's argument is applicable to victim-oriented qualified deference arising from admissibility challenges, or admissibility proceedings initiated *proprio motu* by the chamber.[123] Although, his argument does not expressly address similar decisions which could be made by the OTP in the early stages during preliminary examinations and before pre-trial,[124] his reasoning can be extended to those instances. Articles 17-19 and 53 of the Statute show that the Prosecutor can exercise discretion with regards to opening an investigation where situations have been referred to the Court by the UNSC, or states. Article 53 confers on the Prosecutor the power to initiate an investigation upon consideration of *inter alia* the admissibility of the case or situation.[125] This means that with the exception of *proprio motu* investigations, and State Party referral in relation to the crime of aggression under Article 15 and 15 *bis*,[126] the Prosecutor has the powers to make admissibility assessments in all other instances without the need to involve the Chambers or to seek a UNSC determination.[127] Yet the Prosecutor can decide not to seek such an authorization from the Chamber. Even in instances where the Prosecutor is leaning towards opening an investigation *proprio motu*, there is still a room for

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[122] See Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 257.
[123] See Article 19 (1) ICCst.
[124] See Chapter Three Section 3.
[125] Although Article 53 specifically refers to a 'case' the Court has clarified that it is applicable to 'situations'. See Decision Authorizing Investigation into the Situation in Kenya, ICC-01/09-19-Corr, 1 April 2010, para 44; Article 53 (1) ICCst.
[126] See Article 15 and 15 *bis* ICCst.
[127] See *Yekatom* Appeal Judgment, ICC-01/14-01/18-678-Red, 11 February 2021, para 43; See also Carsten Stahn, 'Judicial Review of Prosecutorial Discretion: Five Years On' in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, Nijhoff 2009) pp. 247-279; Article 15 *bis* (6)-(8) ICCst.

deferring to states prior to officially requesting authorization from the Chamber. Thus, victim-oriented complementarity can be pursued before any need for the chamber to rule on admissibility determinations due to a challenge by a state or by a defendant. This is accentuated by the last sentence of Article 53 (1) which provides that '[i]f the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on sub paragraph (c) [on the interests of justice], he or she shall inform the Pre-Trial Chamber.'[128] It follows that where the Prosecutor decides not to investigate or prosecute, and the decision is not based solely on the interests of justice, there would be no need for the Chamber to rule on an issue of admissibility unless triggered by the Prosecutor, a review request to the Chamber by the referring state, or *proprio motu* by the Chamber.[129]

Victim-oriented qualified deference considers the genuineness of national proceedings if any, and in the case of inaction, it should consider whether a state is willing genuinely to take action to address the situation. This aligns with complementarity which as Stahn explains is process-based since it looks at states' action at the relevant time, as opposed to the outcomes.[130] It should be noted that victim-oriented qualified deference can be applied to all eligible situations and cases regardless of whether they are UNSC referrals, state referrals, or initiated *proprio*

[128] Article 53 (1) ICCst. (emphasis added). Note that in Chapter Five, the thesis argues that preliminary examinations be conducted by a new complementarity division which will liaise with the OTP on complementarity matters. It is possible that victim-oriented qualified deference may take place during this stage, in which case the OTP would be involved in making that decision based on Article 53 (2) of the Statute. See Chapter Five, Section 4.1.2 for further discussion on this.
[129] See Appeals Chamber Decision Authorizing Investigation in the Situation in Afghanistan, ICC-02/17-138, 5 March 2020, paras 30-32 and fn 53.
[130] See Articles 17-19 ICCst.; Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 3, s. 13.3.2.

motu by the Prosecutor.[131] This is because its aim is to maximize the complementarity process for victim-oriented justice through inclusive and constructive dialogue and cooperation.[132]

3.1.3.2 Minimum Conditions for Accommodating Victims' Interests in Domestic Jurisdictions

States must commit to certain minimum conditions in order to seek the postponement of a final admissibility determination and must prove that they have met them in order to secure a deferral. In such instances, they can be seen as victim-oriented conditions for admissibility. These conditions would go to show that a state's system can accommodate victims' interests. A state does not have to show the availability of all victim-oriented measures at the same time when deference is considered but must commit to developing them with or without support for capacity building by a timeline agreed with the ICC. These same minimum conditions can be utilized without an admissibility determination, but as tools of positive victim-oriented complementarity to develop national systems.

It is worth noting at the outset that the minimum conditions discussed below (in particular providing victims with the right to participate) may require changes to domestic procedural systems of States Parties and other states whose situations come before the ICC. The thesis argues that such a change should be implemented for core crimes contained in the Rome Statute.[133] There is no requirement to extend victims' participation to victims of ordinary crimes where such a feature was not already available in the relevant domestic system. This approach may be regarded as the application of different methods to victims of ordinary crimes

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[131] See Moffett, Justice for Victims Before the ICC (2014) p. 277.
[132] See Chapter Six on further discussions of specific ICC situations and cases; OTP's Informal Expert Paper on the Principle of Complementarity in Practice (2003) pp. 3-7; Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (2008), pp. 309-340.
[133] See Articles 5-8*bis* ICCst.

compared to those of core crimes. May asserts that ‘paradigmatic international crimes [are set apart] from domestic crimes [because], in some sense, humanity is harmed when these crimes are perpetrated.’[134] Indeed, core crimes are regarded as ‘the most serious crimes of concern to the international community’[135] because as Bassiouni notes, they threaten the peace and security of humankind and shock the conscience of humanity.[136] The nature of these and the level of victimization they cause warrant a special attention to victims of such crimes. Although, states can consider gradually extending victims’ participation to victims of ordinary crimes.

3.1.3.2.1 Recognition of victims

At the minimum, states must commit to adopting a comprehensive definition of a ‘victim’ which does not politicize victimhood or seek to place victims in any hierarchical order. Such a definition can be modelled against Rule 85 of the ICC’s Rules of Procedure and Evidence which is comprehensive.[137] Certain essential elements are identifiable from the ICC’s victim definition, including non-discrimination against individuals based on *inter alia* race, ethnicity, sex, age, religion, nationality, political or other opinion, cultural beliefs or practices, and

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[134] Larry May, Crimes against Humanity: A Normative Account (CUP (2005) pp. 83-84, see also generally pp. 80-95 where May lays out his philosophical arguments as to why international crimes are different from ordinary crimes.

[135] See paragraph 4 of the Preamble to the Rome Statute.

[136] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (2nd Revised edn, Kluwer Law International 1999) pp. 230, 237, 239-244.

[137] See Rule 85 of the ICC Rules of Evidence and Procedure. See also Chapter Two discussion on the meaning of victims.

disability. The definition is based on the individual's harm[138] attributable to the commission of a Rome Statute crime,[139] as reflected in the domestic characterization of the same.[140]

While there is no requirement to transplant the Rome Statute into domestic systems, states can fulfil the minimum requirement of recognition of victims through their national Rome Statute implementing legislation. States which are yet to adopt such a legislation may base their recognition of victims on the 1985 UN Victims' Declaration[141] which inspired the Rome Statute's definition of a victim and can be considered a universal authority on what is meant by the term 'victim'.[142] Therefore, to benefit from the flexible time frame, or victim-oriented qualified deference, a state must prove that it has victims' provisions through its own legislation or it can rely on international instruments to which it is a signatory. Otherwise, the state should commit to adopting such provisions which accord victim status to natural or legal persons,

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[138] Harm is not defined in the Rome Statute, but the Chamber determines harm. See for example, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006) paras 82 and 172; Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga*, *Situation in the Central African Republic*, ICC-01/04-01/06-1432, AC, ICC, 11 July 2008, paras 32-33; ICC, 'Victims', <https://www.icc-cpi.int/about/victims> accessed 27 September 2022; Gonzalez, The Role of Victims in International Criminal Court Proceedings: Their Rights and The First Rulings of the Court (2006) pp. 21-31; Olásolo, and Kiss, 'The role of Victims in Criminal Proceedings Before the International Criminal Court' (2010) pp. 127-162; ICC, VPRS, Victims' Booklet, pp. 12-15, 19-20 and 25.

[139] See Rule 85 ICC Rules of Procedure and Evidence; principles 1-3 of the UN Victims' Declaration (1985); McEvoy and McConnachie, Victims and Transitional Justice: Voice, Agency and Blame' (2013) p. 502; Moffett, Justice for Victims Before the ICC (2014) pp. 22-24, 161, 194, 277; Mélissa Fardel and Nuria Vehils Olarra 'The Application Process: Procedure and Players' in Kinga Tibori-Szabó and Meghan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (T.M.C. Asser Press 2017) pp. 11, 18-25, 31; Heloise Dumont, 'Requirements for Victim Participation' in Kinga Tibori-Szabó and Meghan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (T.M.C. Asser Press 2017) pp. 55-68.

[140] The ICC does not require states to characterize crimes in the same way as international crimes but have allowed for 'ordinary crimes' for example theft, as opposed to 'pillaging' as a war crime, so long as the characterization covers the same conduct. See ILC, International Law Commission 1994: Volume II Part Two, Report of the Commission to the General Assembly on the Work of its 46th session (A/CN.4/SER.A/1994/Add.l), p. 58, para 6; Carter, The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem (2010) pp. 172-181; Kevin Jon Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53 (1) Harvard International Law Journal 201, pp. 227-230; PTC I's Decision on the Admissibility of the Case Against Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, para 88.

[141] The definition can be interpreted to include organizations who are victims since it covers economic loss-a type of harm which legal persons may suffer. See UN Victims' Declaration (1985) Principle 1.

[142] The Victims' Declaration is considered a 'Universal Instrument', not least because it was adopted by the UN General Assembly.

without any form of discrimination, and must be based on direct or indirect harm suffered as a result of core crimes.

3.1.3.2.2 Provision for Victims' Participation

States must commit to giving victims access to participate in proceedings as a second part of the minimum conditions. This proposal is made while being aware of the challenges which the ICC has faced in managing victims' participation,[143] such as the risk that some victims' voices may be overshadowed by collective voices.[144] Nonetheless, mass victimization is an inherent feature of international crimes and must be factored into considerations of the practicalities of victim participation in measures for addressing core crimes which can still allow a meaningful participation.

In terms of modes of participation, the minimum threshold is a collective participation scheme with one or more representatives.[145] Research shows that this form of participation is not uncommon in domestic jurisdictions, both in formal justice settings[146] and in alternative justice

[143] Note: For more discussions on the challenges with victims' participation at the ICC and methods employed as well as those which could be employed to overcome them, see David Taylor, 'Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?' (2014) Impunity Watch Discussion Paper <http://www.antoniocasella.eu/restorative/Taylor_2014.pdf> accessed 27 September 2022, pp. 10-12; Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020) pp. 17-32.

[144] See Chapter Two Section 4.2 for a discussion on victims' participation.

[145] Decision on Victims' Participation, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-1119, TC I, ICC, 18 January 2008, para 116; See Redress and Institute for Security Studies, 'Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions' (2015) <https://redress.org/wp-content/uploads/2017/11/Englishvictim-rights-report.pdf> accessed 27 September 2022.

[146] Juan-Pablo Perez-Leon-Acevedo, 'Victims at the Central African Republic's Special Criminal Court' (2021) 39 (1) Nordic Journal of Human Rights 1, pp. 1-17, ('Perez-Leon-Acevedo, Victims at the Central African Republic's Special Criminal Court (2021)'); The UN Office on Drugs and Crime in explaining different forms of victims' participation stated that "NGOs, victim associations or other third parties may also be represented as a "civil party" in such processes, in particular in cases of mass victimization or structural victimization." See United Nations Office of Drugs and Crimes (UNODC) 'Victims and Their Participation in the Criminal Justice Process', July 2019 <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-11/key-issues/5--victims-

mechanisms such as customary courts, and truth and reconciliation commissions.[147] Collective participation can be through respected community leaders, civil society organizations or victims' associations.[148] Such entities have represented victims in different situations before the ICC, sometimes referred to as intermediaries.[149] Not all states currently provide for effective victim participation, including through civil society organizations.[150] The thesis's proposals can contribute to changing this phenomenon.

Collective victim participation can be meaningful rather than symbolic, and it should ensure that the rights of the accused are protected without undue limitation to victims' rights. A minimum threshold for 'meaningfulness' in this context should include (1) keeping victims informed, (2) making room for them to participate in all relevant proceedings, (3) accessing relevant case files including confidential files, provided the representatives remain bound to

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and-their-participation-in-the-criminal-justice-process.html> accessed 27 September 2022; Collective participation is also applicable in cases of hybrid tribunals such as the Special Tribunal, Rules of Procedure and Evidence (adopted 20 March 2009, as amended) (Rule 86 (D) ('STL Rules of Procedure and Evidence'); In the Extraordinary Chambers in the Courts of Cambodia (ECCC) where collective participation were utilized, see Extraordinary Chambers in the Courts of Cambodia Internal Rules REV.9 (as Revised on 16 January 2015) Rule 23 *Quarter* ('ECCC Rules'); See also example Rachel Hughes, 'Victims' Rights, Victim Collectives and Utopic Disruption at The Extraordinary Chambers in the Courts of Cambodia' (2016) 22 (2) Australian Journal of Human Rights 143, pp. 143-161; Fardel and Olarra, The Application Process: Procedure and Players (2017) pp. 11-44.

[147] See Anne-Marie de Brouwer and Etienne Ruvebana, 'The legacy of the Gacaca courts in Rwanda: Survivors' Views' (2013) 13 (5) International Criminal Law Review 937, pp. 937-976; Redress, and Institute for Security Studies, 'Expert Conference on Participation of Victims of International Crimes in National Criminal Justice Systems: Pretoria, South Africa 8 - 9 September 2015' (Conference Report November 2015) <https://redress.org/wp-content/uploads/2017/12/November-Expert-conference-on-participation-of-victims.pdf> accessed 27 September 2022 ('Redress, and Institute for Security Studies, Report on the Expert Conference on Participation of Victims of International Crimes in National Criminal Justice Systems (November 2015)').

[148] Victims could participate through victims' association in the Extraordinary Chambers in the Courts of Cambodia (ECCC). See Rule 23 *quarter* of the ECCC Rules.

[149] See Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020) pp. 18-20; Application by the Uganda Victims Foundation to Submit Amicus Curie Observations pursuant to Rule 103 of the Rules of Procedure and Evidence, *Ongwen*, *Situation in Uganda*, ICC-02/04-01/15-211, PTC II, 20 March 2015; Khulumani Support Group was created by victims of the South African Apartheid regime. See Redress, and Institute for Security Studies, Report on the Expert Conference on Participation of Victims of International Crimes in National Criminal Justice Systems (November 2015) pp. 8-9.

[150] Redress, and Institute for Security Studies, Report on the Expert Conference on Participation of Victims of International Crimes in National Criminal Justice Systems (November 2015) pp. 19-21.

applicable codes of conduct and ethics,[151] and (4) making opening and closing statements. In addition to these, where possible and necessary, victims should be allowed to lead evidence and question witnesses, especially for reparations purposes.[152] The modalities of victims' participation must nonetheless be implemented in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[153]

The key to potentially realizing meaningful victims' participation is as Frank and Ferstman suggest 'a broad engagement with victims and civil society when considering ways to prosecute international crimes domestically and how to enhance the role of victims in such proceedings.'[154] Such engagement allows different categories of victims, for example victims of sexual and gender-based violence SGBV, and victims of mutilation, to express their views and concerns on the preferred form of participation and what it means to them.[155]

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[151] See for example, ICC Code of Professional Conduct for counsel: Resolution ICC-ASP/4/Res.1 ((adopted on 2 December 2005); Decision on the Modalities of Victim Participation at Trial, Katanga and Chui, ICC-01/04-01/07-1788-tENG, 3 March 2010, paras 110-114, 121-123 and 125.

[152] See for example, Kenya's Victim Protection Act 2014 which established minimum standards and rights for victims including support and protection and gives them rights to clear information and support services. Victim Protection Act 2014 (KE) Kenya Gazette Supplement No 143 (Acts No 17) Revised Edition 2019 ('Kenya's Victim Protection Act (2014)'); Bowry and Co Advocates, 'A New Era for Victims of Crime in Kenya', <https://bowrycoadv.com/a-new-era-for-victims-of-crime-in-kenya/>, accessed 28 September 2022.

[153] See Articles 68 (3) and (5), 64, 67, and 69 (2) and (4) interpreted in accordance with 21 (3) ICCst.; Rules 91, 101, 128, 132 *bis*, and 81 ICC Rules of Procedure and Evidence; Decision on the Defence Observations Regarding the Right of the Legal Representatives of Victims to Question Defence Witnesses and on the Notion Of Personal Interest -and Decision On The Defence Application To Exclude Certain Representatives of Victims From The Chamber During The Non-Public Evidence of Various Defence Witnesses, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2340, TC I, ICC, 11 March 2010, paras 34-35

[154] Redress, and Institute for Security Studies, Report on the Expert Conference on Participation of Victims of International Crimes in National Criminal Justice Systems (November 2015) p. 5.

[155] Collective participation may be empowering for some victims who may otherwise feel disenfranchised, fearful, or ashamed of participating individually, it may also help to alleviate some of the pains and relieving the experiences of harm suffered. For discussion on the impact on victim's participation in a customary setting, see Anne-Marie de Brouwer and Etienne Ruvebana, 'The legacy of the Gacaca courts in Rwanda: Survivors' Views' (2013) 13 (5) International Criminal Law Review 937, pp. 937-976; See also Article 22 (4) Law No.05/L-053 On Specialist Chambers And Specialist Prosecutor's Office, which recognizes the possibility of organizing SGBV victims into a separate group to facilitate their participation in proceedings; See also Rule 86 (D) (ii) of the STL Rules of Procedure and Evidence.

Also, collective participation may be meaningful to victims where their chosen representative regularly consults with local authorities in charge of the situation or case, and in turn consults with the rest of the victim-group to ensure that their voices are actually being heard throughout the stages of the proceedings.[156] This method may not be subject to very strict procedural rules applicable at the ICC.[157] It has the potential of promoting feelings of safety, and can signal continued interest in victims' perspectives.[158] Principle 7 of the UN Victims' Declaration supports this method of participation if it will contribute to redress for victims. This is also in line with the flexibility element of the principle of complementarity discussed earlier which is necessarily context-specific and recognizes the country's unique legal systems. Furthermore, the ASP can play a knowledge transfer role as proposed by Moffett and other scholars.[159] This will ensure that domestic professionals and volunteers involved in addressing international crimes are equipped with knowledge and skills to implement victims' participation at the national level.

3.1.3.2.3 Provision for Victims' Protection

A vital condition for pursuing victim-oriented qualified deference is victims' protection. This is pivotal to their participation and general inclusion in mechanisms for addressing

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[156] See UC Berkley's Recommendations regarding victims' participation. Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) p.5; Deirdre Healy, 'Exploring Victims' Interactions with the Criminal Justice System: A Literature Review' (University College Dublin October 2019) pp. 17-97.
[157] See for example, Order on the Organisation of Common Legal Representation of Victims, Katanga *and Chui*, ICC-01/04-01/07-1328, 22 July 2009, paras 3-11.
[158] Chris Tenove, 'International Justice for Victims? Assessing The International Criminal Court from The Perspective of Victims in Kenya and Uganda' (2013) Research Paper No. 1 Africa Portal, September 2013, pp. 4-5; Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) p.5.
[159] Moffett, Justice for Victims Before the ICC (2014) pp. 237-238; Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 3-4.

international crimes. Without the assurance of safety, victims' ability to participate and avail of their rights will be severely compromised, since in such circumstances, many victims may forfeit seeing justice done.[160] This was evident in the Kenya cases before the ICC which were marred by intimidation of victims, some of who suffered further harm.[161] Following this, Kenya enacted the Victims Protection Act of 2014 with the object of recognizing and giving effect to the rights of victims of crime and to protect their dignity.[162] Prior to enacting the Victims Protection Act, Kenya already set up a Witness Protection Agency[163] to serve witnesses, including victim-witnesses.[164] This Witness Protection Act is regarded as comprehensive but with little or unknown successes which may be in part due to the secretive nature of witness protection.[165] The Witness Protection program continues to be sponsored by the European

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[160] See Redress, and Institute for Security Studies, Report on the Expert Conference on Participation of Victims of International Crimes in National Criminal Justice Systems (November 2015) p. 20; Hoegen and Brienen discuss the importance of victims' protection in the context of 22 European Countries and it buttresses the role of protection in victims' participation which remains a relevant today. See Ernestine Hoegen and Marion Brienen, 'Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure' (Wolf Legal Productions 2000) pp. 1103 and 1150.

[161] See Chapter Two discussion of victims' right to protection; Human Rights Watch, 'Kenya and the International Criminal Court: Questions and Answers (2011) pp. 7-8; Geoffrey Lugano, 'Assessing the Acceptance of International Criminal Justice in Kenya' in Susanne Buckley-Zistel, Friederike Mieth and Marjana Papa (eds), *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice* (International Nuremberg Principles Academy 2017) pp. 1-16; BBC News, 'Claims of Witnesses in Kenya ICC Trial 'Disappearing'' (8 February 2013) <https://www.bbc.co.uk/news/world-africa-21382339> accessed 28 September 2022; Victims' Application Relating to Possible Disclosure of Confidential Information, *Kenyatta*, *Situation in the Republic of Kenya*, ICC-01/09-02/11-789, TC V(B), ICC, 13 August 2013 ('Victims' Application Relating to Possible Disclosure of Confidential Information, *Kenyatta*, ICC-01/09-02/11-789 13 August 2013').

[162] Kenya's Victim Protection Act 2014; Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the Kenyatta Case (2018) pp. 587-590.

[163] Witness Protection Act (KE) CAP 79 Revised Edition 2012 [2006].

[164] L. Muthoni Wanyeki, 'The International Criminal Court's cases in Kenya: Origin and Impact' (2012) Institute for Security Studies Paper 237 <https://www.files.ethz.ch/isn/153512/Paper237.pdf> accessed 28 September 2022.

[165] Saya Cliffton, 'The Law on Witness Protection in Kenya: A Whistleblower's Refuge or Just A Pipe-Dream?' (University of Nairobi School of Law 2020) pp. 52-53; Demas Kiprono, 'Witnesses Should Be Given State Protection', 5 February 2021 <https://www.standardmedia.co.ke/business/commentary/article/2001402379/witnesses-should-be-given-state-protection> accessed 28 September 2022.

Union to date,[166] which has contributed to tackling some of the program's issues.[167] In the DRC, some authorities have implemented creative protection measures such as veiling victims, altering their voices, or having them give testimonies behind a curtain.[168] Some of these processes implemented nationally may require improvement, but these efforts are worth noting because they showcase potentials of domestic jurisdictions.[169]

This thesis recommends that states work on developing mechanisms for victims' protection, including setting up a unit to take charge of this. They should adopt affordable yet creative and effective protective measures such as anonymity, redaction, and closed sessions. Victims' protection will require the adoption of domestic victims' provisions[170] which should reflect the different categories of victims who may need a higher level of protection, for instance, victims

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[166] UNODC 'Witness Protection Agency Celebrates its Tenth Anniversary at Regional Conference' 11 November 2021 <https://www.unodc.org/easternafrica/en/Stories/witness-protection-agency-celebrates-its-tenth-anniversary-at-regional-conference.html> accessed 28 September 2021; UNODC Eastern Africa News and Stories, 'Witness Protection Agency receives vehicles to boost its operations', <https://www.unodc.org/easternafrica/Stories/vehicles-boost-witness-protection-in-kenya.html> accessed 28 September 2022.

[167] Institute for War and Peace Reporting, Big Questions About Witness Protection in Kenya, 27 May 2014, ACR Issue 391 <https://www.refworld.org/docid/538c6b6c4.html> accessed 28 September 2022

[168] Bilge Sahin, 'Mobile hearings in the Eastern DRC: Prosecuting International Crimes and Implementing Complementarity at National Level' (2021) 15 (2) Journal of Eastern African Studies 297, p. 305; Derek Inman and Pacifique Muhindo Magadju, 'Prosecuting international crimes in the Democratic Republic of the Congo: Using Victim Participation as a tool to Enhance the Rule of Law and to Tackle Impunity' (2018) 18 (1) African Human Rights Law Journal 293, p. 310; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 303.

[169] See Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019), pp. 150-151; Mark A. Drumbl, Atrocity, Punishment and International Law (CUP 2007).

[170] This has also been done in some ICC Situation countries. Perez-Leon-Acevedo discusses another example of Central African Republic. See Perez-Leon-Acevedo, Victims at the Central African Republic's Special Criminal Court (2021) pp. 1-17; Redress, and Institute for Security Studies, Report on the Expert Conference on Participation of Victims of International Crimes in National Criminal Justice Systems (November 2015) p. 22; Moffett, Justice for Victims Before the ICC (2014) pp. 247-248; Isabelle Fery, 'Executive Summary of a Study on the Protection of Victims and Witnesses in D.R. Congo' (Protection International July 2012) <https://www.protectioninternational.org/en/policy-maker-tools/executive-summary-study-protection-victims-and-witnesses-dr-congo> accessed 28 September 2022; Patryk I. Labuda, 'The ICC in the Democratic Republic of Congo: A Decade of Partnership and Antagonism' in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (CUP 2016) p. 205.

of Sexual and gender-based violence.[171] It is possible that some monist states may rely on the Rome Statute protection provisions since international law becomes part of national law upon the state's ratification of the relevant instrument. Such reliance may even generate some level of support in the form of knowledge transfer from the Court based on its own experience of protecting victims. In addition to the ICC's protection regime or alternative to it, Monist States may utilize UN instruments.[172] Measures adopted for the protection of victims can be applied in a manner which is not inconsistent with the rights of the accused.[173] The thesis also recommends that the development of protection measures for victims be prioritized as early as possible and it is a non-negotiable element of victim-oriented complementarity.

3.1.3.2.4 Commitment To Victims' Reparations

The final element for pursuing victim-oriented justice through complementarity is that states should show a willingness to provide reparations directly, or indirectly, including through other donors and cooperation partners. Reparation schemes by states need not be tied to a convicted person but can be created to support victims of a situation. This neither absolves the convicted person of criminal responsibility nor does it mean that responsibility is passed to the state. Rather, like the ICC, such a move could be a way to close the reparations gap where the convicted person is indigent and to protect victims' rights.[174] States can create a body like the

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[171] Both ad-hoc tribunals and the ICC's victim' protection regime have approached protection measures in this manner. See for example, Rules 34, 69 and 75 of the ICTY and ICTR's Rules of Procedure and Evidence; Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Tadic*, IT-94-1, TC, ICTY, 10 August 1995, paras 46–50; Rule 16-19 ICC Rules of Procedure and Evidence.
[172] See Principle 6 (d) UN Victims' Declaration (1985).
[173] See Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", *Katanga*, *Situation in the Democratic of the Congo*, ICC-01/04-01/07-475, AC, ICC, 13 May 2008, paras 57-59.
[174] Moffett has discussed the concept of reparative complementarity by states. See Moffett, Reparations for Victims at the ICC: a New Way Forward (2017) pp. 1204-1218; Moffett, Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the ICC (2013) pp. 368-384.

ICC's Trust Fund for Victims to ensure that there is no confusion between state responsibility and the responsibility of the convicted person. This will allow states more room to redress as many victims as possible without being dissuaded by the perception that doing so may signal acceptance of responsibility. Where a body such as the TFV is created by a state to address victims' harms, it can source for funds from donors and cooperation partners who may be motivated to support such national efforts.

To fulfil the reparations condition for victim-oriented qualified deference, the existence of state sponsored reparations or a state's *sua ponte* commitment to establish reparations mechanisms should be considered when making decisions on admissibility. This requirement can be satisfied either by a state offering to fund reparations for victims where a convicted person is indigent, or to only fund symbolic reparations programs[175] not tied to the conviction of a perpetrator. If the latter option is chosen, the caveat contained in Article 75 (6) of the Statute will apply to remind states that they remain responsible for their existing obligations to victims under international law.[176]

A flexible approach to the reparations condition is designed to ensure that reparations for victims is not entirely left out, as it is a crucial substantive component of victim-oriented justice. This is also in line with international human rights standards.[177] For example, Principle

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[175] Robin Adèle Greeley and others, 'Repairing Symbolic Reparations: Assessing the Effectiveness of Memorialization in the Inter-American System of Human Rights' (2020) 14 (1) International Journal of Transitional Justice 165, pp. 165-192.

[176] Article 75 (6) of the Statute provides that "Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law."; Order for Reparations Pursuant to Article 75 of the Statute, *Katanga*, *Situation in the Republic of the Congo*, ICC-01/04-01/07-3728-tENG, TC II, ICC, 17 August 2017, para 323; Article 75 (6) ICCst; Moffett, Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the ICC (2013) pp. 368-384; Moffett, Reparations for Victims at the ICC: a New Way Forward (2017) pp. 1204-1218.

[177] See Article 75 (6) ICCst.; Moffett, Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the ICC (2013) pp. 368-384; Moffett, Reparations for Victims at the ICC: a New Way Forward (2017) pp. 1204-1218.

16 of the UN Basic Principles on Reparations provide *inter alia* that 'states should *endeavor* to establish national programs for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.'[178] While it uses soft language, the UN Basic Principles on Reparations is a reminder of the role states must play with regards to reparations for victims. It can also be considered a benchmark from which states can draw inspirations in the interests of victims. Additionally, addressing international crimes require robust mechanisms and processes, and can include civil actions. Where criminal prosecutions exist, states can choose to incorporate provisions for 'damages' or 'referral to civil litigation'[179] as part of the criminal trial, so that upon conviction, victims can claim damages from the convicted person or through other available means.[180]

In DRC reparations for international crimes were awarded by the Military Courts to several thousand victims, but only a very small number of victims have received reparations.[181] There have been discussions about state-sponsored reparation programs[182] for victims in Cote

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[178] UN Victims' Declaration (1985) Principle 16 (emphasis added).
[179] The Kosovo Specialist Chambers' Law and Rules of Procedure and Evidence provide for the same, see Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (adopted 3 August 2015) Article 22 (10); and Rule 167, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (adopted on 17 March 2017, revised on 29 May 2017, amended on 29 and 30 April 2020, including Rules of Procedure for the Specialist Chamber of the Constitutional Court (adopted and entered into force on 21 July 2017, amended on 13 March 2020)) ('Kosovo Specialist Chambers Rules of Procedure and Evidence').
[180] For example, the ICTY's Statute makes room for such a process as noted in para 7 of the UN Resolution establishing the ICTY. See UNSC Resolution S/Res 827 (1993) para 7; Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997' UN doc. A/AC.249/1997/L.8/Rev.1, 14 August 1997, p. 37, para 8; See also UNSC S/RES/1757 (30 May 2007) With Annex-Statute of the Special Tribunal for Lebanon ('STL Statute') Article 25 regarding compensation to victims.
[181] See Avocats Sans Frontières (ASF), Case Study: The Application of The Rome Statute of The International Criminal Court by The Courts of The Democratic Republic of Congo (2009) <https://www.asf.be/wp-content/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf> 28 September 2022, pp. 86-91; Moffett, Justice for Victims Before the ICC (2014) pp. 245-248. For an update on the progress of DRC's disbursement of reparations to victims following the court's award, see 'L'urgence Pour La RDC De Solder Sa Dette Envers Les Victimes De Crime De Masse Et Revoir Sa Politique De Réparation' (ASF, TRIAL International and RCN Justice and Democracy: Policy Brief 2020); TRIAL International, 'DRC Must Pay Off Its Debt to Victims of Mass Crimes' 15 October 2010 <https://trialinternational.org/latest-post/drc-must-pay-off-its-debt-to-victims-of-mass-crimes/> accessed 28 September 2022; Ephrem Rugiririza, 'In DRC, Reparations Still A Dream For Victims Of Mass Crimes' (Justiceinfo 3 November 2020) <https://www.justiceinfo.net/en/45844-drc-reparations-dream-victims-mass-crimes.html> accessed 28 September 2022.
[182] Moffett, Reparations for Victims at the ICC: a New Way Forward (2017) pp. 1210-1215.

D'Ivoire[183] (including victims of the post-election crisis) and in Kenya[184] which respectively created reparation frameworks and assigned agencies to implement them. In Cote D'Ivoire there has been some promising implementation progress.[185] Whereas in Kenya very little progress has been recorded because the government is yet to fully operationalize the reparations recommendations of the Kenyan Truth, Justice, and Reconciliation Commission.[186] Ultimately, states have different options for meeting the minimum reparation condition. The option for symbolic reparation can ensure that more states can be encouraged to adopt some form of reparations as part of justice for victims.

The minimum conditions discussed here may be applied in the situation stage of proceedings where no accused has been identified or in a case stage where such a person has been identified. Regardless of the stage, the rights of the accused must be respected and balanced with those of victims. For instance, the crucial protection of victims can be implemented in a manner that would not unduly affect the accused ability to prepare a defence.[187] This is very important in

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[183] In 2015 the Ivorian Government established a national reconciliation and reparations commission (Commission Nationale pour la Réconciliation et l'Indeminisation des Victimes des Crises survenues en Côte d'Ivoire, CONARIV) tasked with the responsibility of overseeing a reparations program for victims of violence including those committed during the 2010-2011 post-election crisis. See '"To Consolidate This Peace of Ours"': A Human Rights Agenda for Côte d'Ivoire', (Human Rights Watch December 2015) <https://www.hrw.org/report/2015/12/08/consolidate-peace-ours/human-rights-agenda-cote-divoire> accessed 28 September 2022.

[184] Truth, Justice and Reconciliation Commission Report, (Kenya Transitional Justice Network August 2013) <https://www.knchr.org/Portals/0/Transitional%20Justice/kenya-tjrc-summary-report-aug-2013.pdf?ver=2018-06-08-100202-027> accessed 28 September 2022; Allan Ngari, 'Reparative Justice in Kenya: Building Blocks for a Victim-centred Framework' (2013) Institute for Justice and Reconciliation Policy Brief No 4, pp. 1-10 <https://www.ijr.org.za/portfolio-items/kenya-policy-brief-no-4-reparative-justice-in-kenya/> accessed 28 September 2022; Human Rights Watch, 'Kenya: Elusive Justice for Gross Injustice, Abuse 6 Years On, No Action on Truth, Justice, Reconciliation Report', 10 December 2019 <https://www.hrw.org/news/2019/12/10/kenya-elusive-justice-gross-injustice-abuse> accessed 28 September 2022.

[185] Moffett, Reparations for Victims at the ICC: a New Way Forward (2017) pp. 1216-1217.

[186] Hezron Kangerep, 'Seeking Justice for Victims and Survivors of Historical Violations and Marginalization-The KNCHR Journey!' (Kenyan National Commission on Human Rights18 June 2018) <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1043/Seeking-Justice-For-Victims-And-Survivors-Of-Historical-Violations-And-Marginalization-The-KNCHR-Journey> accessed 28 September 2022; Natascha Mueller-Hirth, 'Reparations and the Politics of Waiting in Kenya' (2021) 15 (3) Journal of Eastern African Studies 464, pp. 464-478.

[187] See Article 67 ICCst.

national proceedings which to a higher degree may be prone to politicization and with a higher risk of retaliatory prosecutions. In organizing victims' participation, care should be taken to reduce its impact on a fair and expeditious trial. Where certain cases have been selected for prosecution, victims of the case should be those for which their crimes have been charged against an accused, while ensuring that victims of the broader situation can benefit through other means such as assistance projects or non-perpetrator focused reparations.

It should be noted that Cooperation and capacity building go hand in hand[188] to help states meet the 'ability' requirement under Article 17 (3) in a victim-oriented manner,[189] because states may require support through cooperation partners. The Court must consider such needs in its application of victim-oriented complementarity.

3.1.3.2.5 Capacity Building

Capacity building can manifest as a concerted effort of various stakeholders who work together with a state to develop and bolster the capacity of its different sectors so that the state can address international crimes and deliver justice to victims. Bekou defines capacity building 'as the strengthening of national jurisdictions so that they are able to oversee national investigations and prosecutions at a suitable level, and to cooperate with the ICC.'[190]

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[188] See for example ICC-OTP's Policy Paper on preliminary Examinations (2013) paras 17-18 and 99-103; ICC-OTP, Policy on Situation Completion (15 June 2021) paras 29, 51, 68, 97-98; OTP's Strategic Plan: 2019-2021, paras 51, 53; Also, see the various prosecutorial strategies of the Court and corresponding reports which reflect some aspects of capacity building without expressly referring to it as such. ICC-OTP, 'Policies and Strategies', <https://www.icc-cpi.int/about/otp/otp-policies> assessed 28 September 2022.

[189] Olympia Bekou, 'The ICC and Capacity Building at the National Level' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (OUP 2015) p. 1245 ('Bekou, The ICC and Capacity Building at the National Level (2015)'); Emily Hunter, 'Establishing the Legal Basis for Capacity Building by the ICC' in M Bergsmo (ed), Active Complementarity: Legal Information Transfer (TOAEP 2011) pp. 67-93.

[190] Bekou, The ICC and Capacity Building at the National Level (2015) pp. 1245-1246.

Capacity building can be the difference between a state's ability to fulfil its Rome Statute obligations, and their dereliction of that duty[191] to the detriment of victims. For instance, a state may require capacity building and cooperation to develop a functional protection mechanism. This happened in Kenya where the UN Office on Drug and Crime became Kenya's cooperation partner to strengthen its protection program through funding provided by the European Union.[192] Domestic justice efforts in DRC, and Uganda were supported and some continue to be supported by rule of law cooperation partners such as the Open Society Justice Initiative, the UN High Commissioner for Human Rights (OHCHR),[193] Avocats Sans Frontières, and REJUSCO.[194] Zerrougui rightly stated in relation to UN provision of support to the justice sector in DRC, that

> "… recent experiences by peacekeeping missions (…) have demonstrated that supporting the fight against impunity and the strengthening of the justice sector can be used to engage politically with key stakeholders and influence their behavior, in both conflict and post-conflict settings (….)"[195]

[191] See Philippe Kirsch, 'The Role of the International Criminal Court in Enforcing International Criminal Law' (2007) 22 (4) American University International Law Review 539, pp. 545-547 ('Kirsch, The Role of the International Criminal Court in Enforcing International Criminal Law (2007)'); Bekou, The ICC and Capacity Building at the National Level (2015) pp. 1245-1247.

[192] UNODC 'Witness Protection Agency' <https://www.unodc.org/easternafrica/plead/witness-protection-agency.html> accessed 28 September 2022; Human Rights Watch, 'Kenya and the International Criminal Court: Questions and Answers (2011) pp. 7-8.

[193] OHCR, 'OHCHR in Democratic Republic of the Congo' <https://www.ohchr.org/en/countries/democratic-republic-congo/our-presence> accessed 28 September 2022.

[194] See Open Society Foundations, Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya (2011); Adam Day 'Rule of Law: Support to Conflict Prevention and Sustaining Peace in the Democratic Republic of the Congo', United Nations University Case Study 6 (March 2021) pp. 157-175 <https://i.unu.edu/media/cpr.unu.edu/attachment/5177/RuleofLaw_DRC.pdf> accessed 28 September 2022.

[195] Leila Zerrougui, 'Strengthening the Rule of Law and Protection of Civilians in the Democratic Republic of the Congo' (2018) 55 (2) UN Chronicle 8.

Although the ICC continues to implement cooperation initiatives in light of complementarity,[196] it appears that it prefers a hands-off approach to capacity building broadly speaking.[197] An aspect of the Court's perception of capacity building is that it is a method of horizontal cooperation and complementarity between states and civil society organizations.[198] This thesis argues that the ICC should contribute to capacity building[199] not only focused on prosecutorial needs, but more generally for victim-oriented justice.[200] This should be done in a joint effort with intergovernmental organizations and civil society organizations. Capacity building in this manner furthers the aim of complementarity and victim-oriented justice, and the Court's influence[201] on domestic systems.[202] It will also contribute to easing tensions between the ICC and states.

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[196] These include workshops, trainings, and retreats, see OTP's 2019-2021 Prosecutorial Strategy, para 51; ICC, 'Fostering Cooperation, Complementarity and Universality' <https://www.icc-cpi.int/about/cooperation> accessed 28 September 2022.

[197] See for example, Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493, 28 April 2020, ICC, para 22; ASP Seventeenth Session, The Hague, 5-12 December 2018, 'Report of the Bureau on Complementarity' (ICC-ASP/17/34 29 November 2018) p. 5, para 23; ASP Eighteenth session, The Hague, 2-7 December 2019, 'Report of the Bureau on Complementarity' ICC-ASP/18/25 (29 November 2019) p. 6, para 27; McAuliffe, Bad Analogy: Why the Divergent Institutional Imperatives of the ad hoc Tribunals and the ICC Make the Lessons of Rule 11bis Inapplicable to the ICC's Complementarity Regime (2014) pp. 417-423; Bergsmo, Bekou and Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools (2010) pp. 797-799

[198] See Bergsmo, Bekou and Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools (2010) p. 799; Review Conference of The Rome Statute, 'Focal points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' (RC/ST/CM/INF.2 30 May 2010); Luis Moreno-Ocampo, 'A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor' in Carsten Stahn and Mohamed El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) p. 24; ASP, Report of the Bureau on complementarity: Nineteenth Session of the ASP, 7-17 December 2020 – New York (ICC-ASP/19/22 8 December 2020); Emily Hunter, 'Establishing the Legal Basis for Capacity Building by the ICC' in M Bergsmo (ed), Active Complementarity: Legal Information Transfer (TOAEP 2011) p. 73.

[199] Stahn, Taking Complementarity Seriously (2011) pp. 262-263.

[200] Bekou addresses the potential of positive complementarity as a channel for capacity building, and states that "it is the clear intention of the States Parties that positive complementarity ought to constitute the foundation on which all capacity building should occur." see Bekou, The ICC and Capacity Building at the National Level (2015) pp. 1253-1254.

[201] See Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) p. 298.

[202] See Stahn, Taking Complementarity Seriously (2011) pp. 262-263; Vilmer, The African Union and the International Criminal Court: Counteracting the Crisis (2016) p. 1321.

3.1.3.2.6 Cooperation

Cooperation is crucial for the successful functioning of the Rome Statute system of justice,[203] which involves the shared responsibilities of the Court and States Parties to combat impunity and by the same token deliver justice to victims.[204] In the absence of an ICC enforcement mechanism, cooperation is required to locate and apprehend suspects, obtain evidence, and witness testimony, support national proceedings,[205] build capacity and other technical processes. According to Nouwen, the realization of positive complementarity comes down to cooperation,[206] and this extends to victim-oriented complementarity. The Rome Statute provides for mandatory[207] and discretionary[208] forms of cooperation. Mandatory cooperation requires compliance from states,[209] and the Statute provides for measures to tackle failure to cooperate by States Parties and Non-States Parties.[210] Discretionary cooperation also known as

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[203] ICC-OTP, Strategic Plan June 2012-2015 (11 October 2013) para 67.

[204] "The last two paragraphs of the Preamble make it clear that domestic jurisdictions and the Court are united by a common bond, namely guaranteeing 'lasting respect for and the enforcement of international justice'." See Stahn, Taking Complementarity Seriously (2011) pp. 237-238.

[205] See Kirsch, The Role of the International Criminal Court in Enforcing International Criminal Law (2007), pp. 545-547; H.E. Judge Dr. jur. h. c. Hans-Peter Kaul, 'Keynote Address' (Salzburg Law School on International Criminal Law, Salzburg, 8 August 2011) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/289B449A-347D-4360-A854-3B7D0A4B9F06/283740/010911SalzburgLawSchool.pdf> accessed 28 September 2022; Jurdi, The ICC and National Courts: A Contentious Relationship (2011) pp. 70-71; See also Articles 54, 57, 70, 72, 87-93 and 98-99 of the Rome Statute covered in Parts 5, 6, 9 and 10 of the Statute which contain several provisions on cooperation and judicial assistance. Other parts of the Statute have supporting provisions on the same issue. The same is obtainable with other Core Legal Texts of the Court.

[206] Nouwen, Complementarity in the Line of Fire (2013) p. 97.

[207] See Articles 86-93 (1)-(2) ICCst.

[208] See Article 93 (10) ICCst. This form of cooperation has also been referred to as reverse cooperation.

[209] Phakiso Mochochoko, 'International Cooperation and Judicial Assistance' in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer 1999) p. 306 ('Mochochoko, International Cooperation and Judicial Assistance (1999)').

[210] See Article 86 and 87 (7); Articles 89 (1) and 93 (1) ICCst. further defines their obligations vis-à-vis arrest and surrender and other forms of requests, using the stricter term of 'comply'. This can be construed as leaving States Parties little room for refusal. See Phakiso Mochochoko, 'International Cooperation and Judicial Assistance' in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer 1999); Federica Gioia, 'Complementarity and Reverse Cooperation' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) p. 807 ('Gioia, Complementarity and Reverse Cooperation (2011)').

reverse cooperation, involves the ICC providing judicial assistance to states[211] in concert with other cooperation partners. This is closely linked to capacity building efforts, thus, cooperation in the context discussed here may be bilateral or multilateral.[212]

Article 87 (6) of the Statute provides an avenue for an ICC/intergovernmental cooperation. For example, in the Situation in the Democratic Republic of the Congo, the European Union and the United Nations Development Program (UNDP) worked together on what they called 'Restoring Faith in Justice in the Democratic Republic of the Congo' implemented between 2015 and 2018.[213] There was an earlier project by the International Bar Association (IBA) and the International Legal Assistance Consortium (ILAC) which 'was aimed at conducting a needs assessment of the Congolese judicial system in order to assess where expertise can be most constructively applied – both geographically and thematically – to assist the reconstruction of the justice system.'[214] This kind of support helped local authorities in carrying out judicial functions, some of which would have been impossible without some sort of international cooperation.

In terms of relevance to victim-oriented complementarity,[215] cooperation may be required to develop and fund reparation programs with states who may have less resources or lack

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[211] Gioia, Complementarity and Reverse Cooperation (2011) p. 807.
[212] Stahn posits that "the intent of the drafters to create not only a multilateral treaty but a system of justice is further reflected in the cooperation regime. Cooperation under Part 9 of the Rome Statute is based on the premise that the ICC and domestic jurisdictions form mutually supportive forums of justice." Stahn, Taking Complementarity Seriously (2011) p. 49. See also ICC 'Cooperation Agreements', <https://www.icc-cpi.int/sites/default/files/Cooperation_Agreements_Eng.pdf> accessed 28 September 2022.
[213] See European Commission, 'Restoring Faith in Justice in the Democratic Republic of the Congo' <https://fpi.ec.europa.eu/stories/restoring-faith-justice-democratic-republic-congo_en> accessed 28 September 2022; Monica Dispo, 'Evaluation of UNDP's Support to Mobile Courts in DRC, Sierra Leone and Somalia' (UNDP May 2017) <https://www.undp.org/publications/evaluation-undps-support-mobile-courts-drc-sierra-leone-and-somalia> accessed 28 September 2022.
[214] See IBA and ILAC, Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the Democratic Republic of Congo: An International Legal Assistance Consortium and International Bar Association Human Rights Institute Report (August 2009) <https://issat.dcaf.ch/download/12040/121847/DRC-IBA-ILAC-Justice-Aug09.pdf> accessed 28 September 2022.
[215] Articles 75 (4), 93 (1) and 99 ICCst.

technical knowledge on how to effectively implement reparations. It is also useful for locating victims who have migrated or in hiding, to execute reparations, and to locate and freeze perpetrators' assets for immediate or future reparations.[216] The Statute also requires cooperation to be implemented in accordance with internationally recognized human rights.[217]

The interactions and collaboration between states and the ICC necessitates some form of acceptable and reliable agreement to ensure that both parties are clear on their commitment and can be held accountable for breaches. Compliance with the agreed minimum conditions can be improved when states are encouraged and incentivized to fulfil their obligation through dialogue and the conclusion of a well negotiated agreement. These are the aims of the thesis's proposal for the use of a complementarity understanding. It should help both parties to achieve an acceptable agreement with realistic goals on how a situation may be best managed.

3.1.3.3 The Meaning, Content, and Importance of a Complementarity Understanding

A complementarity understanding can be described as a form of bilateral or multilateral cooperation agreement or an MoU that should accompany the ICC's preliminary examination or subsequent proceedings in any relevant situation.[218] The ICC has used MoUs in the context of the complementarity process.[219] Many of such agreements have been signed by the Court as

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[216] See Article 93 (1) (h) ICCst. See Bekou and Birkett (eds), Cooperation and the International Criminal Court (2016); Ferstman, Carla 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations' in Olympia Bekou and Daley Birkett (eds) Cooperation and the International Criminal Court: Perspectives from Theory and Practice (Brill, Nijhoff 2016) pp. 227-245.

[217] See Articles 17 (2) 19, and 20 (3) ICCst; Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-512, PTC I, ICC, 4 October 2006, pp. 8-9; See also OPCV Manual for Legal Representatives, (2018) p. 307.

[218] Not all situations will require an MoU, for example those closed early during the preliminary examination stage because they fall outside the Court's jurisdiction or require no further action by the ICC.

[219] See ICC's Overall Response to the Independent Expert Review (2021) para 528.

a whole,[220] and recently the OTP signed an MoU with the Venezuelan government regarding the situation in Venezuela,[221] previously with Sudan regarding the Uganda situation,[222] with the Central African Republic,[223] Libyan,[224] Sudan,[225] and Colombia authorities regarding these respective situations.[226] Nevertheless, they differ in content, target, and method of implementation from the thesis's proposed complementarity understanding. The ICC's publicly available MoUs sometimes provide basic insights into the signatories' perception of

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[220] See for example, Memorandum of Understanding Between the International Criminal Court and the United Nations, on Building the Capacity of States to Enforce, in Accordance with International Standards on The Treatment of Prisoners, Sentences of Imprisonment Pronounced by The Court (ICC-PRES/15-02-14, in force 26 September 2014); Memorandum of Understanding between the International Commission on Missing Persons and the Office of the Prosecutor of the International Criminal Court (7 July 2016); UNDP News, 'UNDP and the International Criminal Court Sign New Partnership Agreement' (27 October 2022) <https://www.undp.org/news/undp-and-international-criminal-court-sign-new-partnership-agreement> accessed 2 November 2022.

[221] ICC Press Release ICC-OTP-20211105-PR1625, 'ICC Prosecutor, Mr Karim A.A. Khan QC, Opens an Investigation into the Situation in Venezuela and Concludes Memorandum of Understanding with the Government' (2021) <https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-aa-khan-qc-opens-investigation-situation-venezuela-and-concludes> accessed 26 September 2022; Memorandum of Understanding Between the Bolivarian Republic of Venezuela and the Office of the Prosecutor of the International Criminal Court (3 November 2021) ('MoU Between the OTP and Venezuela (2021)').

[222] UK Parliament, 'Memorandum submitted by the International Crisis Group on Conflict and Development: Prospects for Sustainable Peace in Uganda', (Prepared 24 July 2007) <https://publications.parliament.uk/pa/cm200607/cmselect/cmintdev/853/853we05.htm> accessed 28 September 2022; Tim Raby, 'Advocacy, the International Criminal Court and the conflict in Northern Uganda' (2007) 36 (9) Humanitarian Practice Network <https://odihpn.org/publication/advocacy-the-international-criminal-court-and-the-conflict-in-northern-uganda/> accessed 28 September 2022.

[223] ICC-OTP Press Release ICC-OTP-20141031-PR1058, '"Cooperation Underpins Efforts to Deliver Justice to the Victims": the ICC Prosecutor, Fatou Bensouda, Meets A Government Delegation from the Central African Republic' (2014) <https://www.icc-cpi.int/news/cooperation-underpins-efforts-deliver-justice-victims-icc-prosecutor-fatou-bensouda-meets> accessed 28 September 2022.

[224] Although this is not public, but it was the subject of litigation between the OTP and the Gaddafi Defense team. See Decision on the "Request for Disclosure of Memorandum on Burden Sharing between the ICC Office of the Prosecutor and the Government of Libya", *Gaddafi*, *Situation in Libya*, ICC-01/11-01/11-578, PTC I, ICC, 4 February 2015.

[225] ICC-Press Release ICC-OTP-20210817-PR1607 'The Prosecutor of the International Criminal Court, Mr Karim A. A. Khan QC, Concludes His First Visit to Sudan with the Signing of a New Memorandum of Understanding Ensuring Greater Cooperation' (2021) <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-mr-karim-khan-qc-concludes-his-first-visit-sudan> accessed 28 September 2022 ('ICC Press Release on the Conclusion of Prosecutor Khan's First Visit to Sudan and the Conclusion of an MoU (2021)').

[226] ICC-Press Release ICC-CPI-20211028-PR1623, 'ICC Prosecutor, Mr Karim A. A. Khan QC, Concludes the Preliminary Examination of the Situation in Colombia with a Cooperation Agreement with the Government Charting the Next Stage in Support of Domestic Efforts to Advance Transitional Justice', 22 October 2021, <https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia> accessed 28 September 2022; Cooperation Agreement Between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia (28 October 2021).

the relevant situation and some hints on their respective stance on named issues.[227] Some tend to focus on witness relocation, release of persons, and enforcement of sentences, [228] and may apply across multiple situations and cases.

In terms of content, the proposed complementarity understanding should capture, (1) the objectives of the complementarity process, (2) what the ICC expects from the concerned state (i.e., the minimum victim-oriented conditions discussed above) and what the state expects from the Court or other cooperation partners, (3) what victims should expect from the agreement, (4) how the rights of the accused will be protected, (5) stakeholders' roles in the process, and if known, a list of approved stakeholders for the relevant situation (6) agreed timelines to fulfil or show significant progress in fulling the minimum conditions, (7) methods of monitoring and reporting progress, (8) potential disputes, and measures for resolving them,[229] and (9) clauses on admitting or re-admitting the case to the ICC.

The proposed complementarity understanding should be negotiated and agreed upon on a case-by-case basis. It should address the peculiarities and needs of each situation or case which can be ascertained through dialogue and consultation process in relation to Article 17-19 proceedings. Where an agreement falls through during the implementation process, and an admissibility challenge is inevitable, then the content of the complementarity understanding may be considered by the relevant chamber in its determination of admissibility. As such, it

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[227] MoU Between the OTP and Venezuela (2021).

[228] ICC 'Cooperation Agreements', <https://www.icc-cpi.int/sites/default/files/Cooperation_Agreements_Eng.pdf> accessed 28 September 2022; MoU Between the OTP and Venezuela (2021).

[229] Concerning disputes, the complementarity understanding should contain clauses on the role of the Chamber, but this could be considered as a last resort especially where the agreement is concluded in the absence of an admissibility challenge. Nonetheless, the power of the Prosecutor to reject the agreement, request a review by the Chamber, or challenge complementarity issues must be preserved. See Articles 19 (3), (10)-(11). Article 19 (8) ICCst. may also be used by the Prosecutor in the context of a complementarity understanding, perhaps as a relevant interim measure should the need arise.

helps the Court to interpret the admissibility criteria set out in Article 17 of the Statute in a victim-oriented manner. This will improve the Court's approach to admissibility challenges which currently leaves little to no room for negotiations once the Chamber is seized with the matter.[230] However, there is no guarantee that a chamber may consider the content of a complementarity understanding or place a strong value on it, in reaching its decisions. The best approach is to boost efforts during the period before an admissibility challenge where tensions may be relatively lower, and states may be more willing to cooperate.[231]

Consultation with victims to ensure that their views are presented and considered is an essential part of their participatory right provided in the Rome Statute framework.[232] The thesis argues that the Court should employ an inclusive method of consultation for negotiating and concluding a complementarity understanding.[233] The UN Office of the High Commissioner for Human Rights has defined consultation in the context of transitional justice as 'a form of vigorous and respectful dialogue whereby the consulted parties are given the space to express themselves freely, in a secure environment, with a view to shaping or enhancing the design of

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[230] Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 228-259; Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 1-3.

[231] This is further discussed in Chapter Six.

[232] See Article 68 (3) ICCst.; ICC Rules of Procedure and Evidence, Rules 89-91 regarding victims participation in proceedings, 93, 107 and 109-regarding request for a review of the Prosecutor's decision not to proceed with an investigation, 125-regarding a decision to hold the confirmation hearing in the absence of the person concerned, amendment of the charges, 136-regarding joint and separate trials, 139 regarding decision on admission of guilt, and Rule 191 regarding assurance provided by the Court under Article 93 (2) of the Statute; Decision on Victim Participation in the Appeal of the Office of Public Counsel for the Defence Against Pre-Trial Chamber I's Decision of 7 December 2007 and in the Appeals of the Prosecutor and the Office of Public Counsel for the Defence Against Pre-Trial Chamber I's Decision of 24 December 2007, *Situation in the Democratic Republic of the Congo*, ICC-01/04-503, AC, ICC, 30 June 2008, para 97; Compare with OHCHR, Rule-Of-Law Tools for Post-Conflict States: National Consultations on Transitional Justice (2009) p. 4; See also Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) p. 301.

[233] See ICC-OTP, 'Statement of ICC Prosecutor, Fatou Bensouda, Inviting Stakeholders to Consultation the Development of A Benchmarking Framework For The Situation In Colombia', 15 June 2021 <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-inviting-stakeholders-consult-development-benchmarking> accessed 28 September 2022; ICC-OTP, 'Situation in Colombia Benchmarking Consultation', 15 June 2021 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210615-COL-Benchmarking-Consultation-Report-eng.pdf> accessed 28 September 202, para 43.

transitional justice programs.'[234] This is in line with the Rome Statute's framework for obtaining and considering victims views, and can be extended to the process for concluding a complementarity understanding which should involve not only the Court, and concerned states, but other relevant stakeholders such as a representative for victims, and cooperation partners. Doing so contributes to transparency and potentially reduces surprises, and the chances of default by any signatory. The argument for inclusivity is made while being mindful of the need to minimize bureaucracy through a lengthy process of consultation involving different stakeholders.[235]

Consultation of victims must be carried out in a manner that does not prejudice the rights of the accused. For instance, where victims are consulted in respect of issues regarding the OTP's case selection, prioritization, deprioritization, hibernation or amendment of charges, this should be subject to a notification to the defense, as such respecting the rights of the accused at different stages of proceedings.[236] The accused can use the measures available to them under the Rome Statute framework to protect their interests.

The legal nature of the proposed complementarity understanding matters as it will determine its impact on efforts to make complementarity victim oriented. According to the ICC, cooperation agreements increase legal certainty and mutual understanding between both parties.[237] They represent a concrete demonstration of the States Parties' commitment to the

[234] OHCHR, Rule-Of-Law Tools for Post-Conflict States: National Consultations on Transitional Justice, (HR/PUB/09/2 2009) <https://www.ohchr.org/sites/default/files/Documents/Publications/NationalConsultationsTJ_EN.pdf> accessed 28 September 2022, p. 3 ('OHCHR, Rule-Of-Law Tools for Post-Conflict States: National Consultations on Transitional Justice (2009)').

[235] See Chapter Five Section 3.3 which discusses the composition of the complementarity mechanism to facilitate the conclusion of a complementarity understanding.

[236] See Article 61 (9) ICCst. which requires notification of the accused in relation to amendment of charges, and Rules 93 and 128 of the ICC Rules of Procedure and Evidence.

[237] ICC 'Cooperation Agreements' <https://www.icc-cpi.int/sites/default/files/Cooperation_Agreements_Eng.pdf> accessed 28 September 2022.

Court and its mandate.[238] The thesis argues that due to the aims and content of the proposed complementarity understanding, it can be considered legally binding. Should states default without cogent reasons, the Court can exercise its jurisdiction, and may request an intervention of the ASP, and in some cases an external stakeholder, such as a regional organization. These consequences of a default should be discussed with the concerned state before the conclusion of the complementarity understanding. A state may default on some aspects of the agreement due to changes in circumstances of the situation beyond theirs or the ICC's control. In such instances, the Court could intervene only where it is certain that adjusting the content of the agreement for example by extending time limit, would not lead to concrete victim-oriented results.

4 Not a Zero-Sum Proposal but a Win-Win-Solution

Chapters one to three of this thesis have highlighted the impact of the ICC's method of interpreting and applying complementarity on how justice is pursued and shaped, and on the Court's relationship with states. The current chapter proposed a reinterpretation of the principle of complementarity in a way that will *per se* require states to deliver victim-oriented justice and for the ICC to defer to states where certain victim-oriented minimum conditions are met. At the outset, it does appear that implementing these recommendations may result in the ICC taking on more cases because some states may lack ability to deliver victim-oriented justice

[238] ICC 'Cooperation Agreements' <https://www.icc-cpi.int/sites/default/files/Cooperation_Agreements_Eng.pdf> accessed 28 September 2022.

when compared to the ICC which has robust victims' provisions.[239] Such contingencies can be managed by giving states room and time to develop a minimum of victims' protection and participation with close monitoring and facilitation of capacity building as outlined above.[240] The ICC can qualify its deference to states which agree to these minimum conditions, and deference can be revoked upon proof of unjustified default. This does not mean that the current admissibility criteria in Article 17 should be suspended, but that a victim-layer test should be added to complementarity considerations while at the same time balancing victims' rights with those of the accused. These proposals can work even where no admissibility challenge has been launched, because the aim is to use a less-contentious means to maximize the potentials of the complementarity process.

For these recommendations to work, the Court must limit itself to mainly admitting situations and cases where the concerned states are in no position to fulfil their obligations in a victim-oriented manner, even with support for *inter alia* capacity building. Many states have fallen behind in their Rome Statute obligations to investigate and prosecute core crimes. Such an approach to complementarity and admissibility by the ICC will maintain the spotlight on the gap in addressing core crimes at the domestic level. Moreover, in keeping with the trend in victims' rights under international human rights law,[241] international criminal tribunals created after the ICC have made room for victims by providing them with rights of participation,

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[239] Paolina Massidda and Sarah Pellet, 'Role and Practice of the Office of Public Counsel for Victims' in Carsten Stahn and Göran Sluiter (eds), The Emerging Practice of the International Criminal Court (Brill, Nijhoff 2009) p. 692; Funk, Victims' Rights and Advocacy at the International Criminal Court (2015) pp. 3-5; A.H. Guhr, 'Victim Participation During the Pre-Trial Stage at the International Criminal Court' (2008) 8 (1–2) International Criminal Law Review 109, p.110; Luke Moffett, 'Realizing Justice for Victims Before the International Criminal Court' (2014) ICD Brief 6, pp. 1-11; Moffett, Justice for Victims Before the ICC (2014) pp. 238-239.
[240] See Section 3.
[241] See Funk, Victims' Rights and Advocacy at the International Criminal Court (2015) pp. 19-42; Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 (5) Journal of International Criminal Justice 1357, p. 1358; see also Dinah Shelton, Remedies in International Human Rights Law (2nd edn, OUP 2006) pp. 104-172.

protection, and reparations.[242] This includes the Extraordinary Chambers in the Courts of Cambodia,[243] the Extraordinary African Chamber (EAC),[244] the Special Tribunal for Lebanon,[245] and the Kosovo Specialist Chambers and Specialist Prosecutor's Office.[246] The

[242] Tibori-Szabó and Hirst, Victim Participation in International Criminal Justice: Practitioners' Guide (2017), pp. 1-5. Various chapters in the book discuss different aspects of victims' participation, protection and reparation at the ICC, ECCC, and STL.

[243] Law on the Establishment of the Extraordinary Chambers with inclusion of amendments (as promulgated on 27 October 2004) NS/RKM/1004/006, Articles 34 (5) and 36; ECC Rules, Rules 12-organization of victims' participation, 12 *bis*-victims' support section, 12 *ter*-Civil Party Lead Co-Lawyers, 23-General Principles of Victims Participation as Civil Parties, with provisions for reparations, 23 bis-application and admission of civil parties, 23 *ter*-representation of Civil Parties, 23 *quarter*-Victims Associations, 23 *quinquies*-Civil Party Claim and reparations, 29 and 63 (3) (b) (1)-protective measures, 49 (3) and (4) regarding lodging complaints which can trigger the ECCC's jurisdiction, and 101 (5) and 105 (1) (c) regarding sentencing and reparations' appeals, 113 on enforcement of sentences and civil reparations.

[244] See Statut des Chambres Africaines Extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la Période du 7 Juin 1982 au 1er Décembre 1990 (adopted 22 August 2012), Articles 14-general principle on victims' participation as civil parties right from the investigation stage, 15 (4)-protection, 17 (4)- victims' complaint, 21 (2)-measures for victims' protection which may require adjustment to how the rights of the accused are protected, 27-reparations, and 28 Trust for Victims; For an unofficial English translation, see Human Rights Watch, 'Statute of the Extraordinary African Chambers' (2013) <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers> accessed 28 December 2022; for discussions of victims' rights and role in the EAC process, see Juan Pablo Perez-Leon-Acevedo, 'The Extraordinary African Chambers in the Senegalese Courts and the Development Of International Criminal Law In Africa' in Jeremy Sarkin, Ellah T. M. Siang'andu (eds) *Africa's Role and Contribution to International Criminal Justice* (Intersentia 2020) pp. 76-79; Daley J Birkett, 'Victims' Justice? Reparations and Asset Forfeiture at the Extraordinary African Chambers' (2019) 63 (2) Journal of African Law 151, pp. 151-161; Thierry Cruvellier, 'The Trial of Hissène Habré' (2016) *The New York Times* <https://www.nytimes.com/2016/02/16/opinion/the-landmark-trial-of-hissene-habre.html> accessed 28 December 2022.

[245] STL Statute, Article 12 (4) regarding a victims and witnesses unit, 16 (2) regarding measures for the protection of victims which may require adjustment to how the rights of the accused are protected, 17 regarding victims' rights, and 25 regarding compensation to victims; STL Rules of Procedure and Evidence, Rules 50 on victims and witnesses unit, 51 on victims' participation unit, 52 on Outreach Programme Unit, 86, 87, 112 *bis*, 113 (B), 91 (h), 92 (A)-(C), 93 (a) (ii), (B)-(D), 114 (B), 143, 146 (A) and (B) (ii) and (v), 147, 150 (D), 171 (B) on victims' participation, 115, 137, 133, and 166 regarding the protection of victims and witnesses, 91 (D) on victims' representation in meetings akin to status conferences, 112 regarding the interests of victims, and 125 regarding victims' access to evidence.

[246] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (adopted 3 August 2015) Article 8 (b) regarding victims' standing before the Kosovo Specialist Chambers, 21 (2) regarding measures for the protection of victims which may require adjustment to how the rights of the accused are protected, Article 22 regarding victims' status and rights, 23 on the protection of victims and witnesses, 24 (1) (b) and 34 (6) which provides for a victims' participation office within the Registry, 39 (11) and 40 (f) on the role of judges regarding victims' protection, 44 (6) regarding forms of reparation for victims, 46 (9) regarding appeals by victims' counsel, 49 (3) regarding referral by victims with respect to a violation of their rights, 53 (1) (e) regarding cooperation or assistance with respect to protection of victims; Kosovo Specialist Chambers Rules of Procedure and Evidence, Rules 20 (1) regarding victims' ability to lodge a referral before the Specialist Chambers, 21 (Rules of Procedure for the Specialist Chamber of the Constitutional Court), 80, 81 and 105 regarding the protection of victims, 23 (5) on victims' participation office, 113 and 114 and 67 (3), 79 (1) 126 (1) and (2), 134 (c), 135, 142, 143, on victims' participation, 26 (2) and 162 (2) on victims' common legal representation, 167 regarding referral to civil litigation in favor of victims, 168 and 196 (h) regarding reparations, 173 regarding appeals by victim's counsel, 187 (3) and 191 regarding the possibility of seeking views of victims' counsel, 201 (2), 202, 208 (2), and 211 on cooperation and assistance for victims' benefit (Rules of Procedure for the Specialist Chamber).

victim-oriented proposals made in this chapter and throughout this thesis are useful for remedying the asymmetry in the interpretation and application of victims' rights in international criminal proceedings in the Hague and in national jurisdictions. These proposals can help to bring more states in line with international human rights standards because the primary responsibility to address international crimes and deliver justice to victims remains with states.

Should the Court adopt the thesis's proposed approach to victim-oriented complementarity, it will be implementing complementarity in a manner that is more in line with the intention of the drafters, albeit with the inclusion of victims. This can be justified on the grounds that the Statute itself generally provides for measures to realize justice for victims pursuant to Article 68 (3), and the general principle found in Rule 86 of the ICC's Rules of Procedure and Evidence. It is expected that in the face of public scrutiny, the concerned states and the Assembly of States Parties will find it difficult to sustain the criticism that the Court is overstepping its bounds. Victim-oriented complementarity will increase the pressure on states to take action no matter how moderate. Some may argue that expecting or hoping that states will fulfil their obligation in this manner may not yield any fruit, instead it may risk widening the impunity gap. The monitoring safeguards to be included in the complementarity understanding and managed by a designated monitoring body should be adopted by the Court to manage such an issue.

There are other ways to ensure that the victim-oriented proposals made here do not result in the ICC being overburdened with situations and cases. Firstly, this can be achieved through the

OTP's publication of reports of preliminary examination,[247] and the ICC's public and confidential reports of its activities[248] to the UNSC and the UN General Assembly (UNGA). These can be considered as effective methods of jolting states into action in some situations, and these practices can be improved and maintained.

Outside the ICC, other rule of law and human rights mechanisms such as UPR can contribute to sustaining the pressure on states to fulfil their Rome Statute obligations in a victim-oriented manner. UPR is a process involving the review of the human rights records of all UN Member States every four years.[249] Etone asserts that a distinctive feature of this process is that it is based on *inter alia* cooperation and dialogue.[250] It is also inclusive and collaborative,[251] as states engage with other states, human rights mechanisms, as well as civil society. Indeed, dialogue, inclusivity, and collaboration are essential elements for realizing victim-oriented complementarity because the ICC, states, victims, and other stakeholders must be able to communicate. As Afako argued, in addressing international crimes, it is important that there is

[247] Marshall, Prevention and Complementarity in the ICC: A Positive Approach (2010) p. 21-26; Ambos, The Return of "Positive Complementarity" (2021); Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom (2018) pp. 1-19, 26-58, 154-162, 165-171.
[248] See for example, Report on the Activities of the International Criminal Court: Twentieth Session of the ASP, 6-11 December 2021- The Hague (ICC-ASP/20/9 8 November 2021); Report of the International Criminal Court to the UNGA, 76th Session UNGAOR (A/76/293) 24 August 2021; Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011) (23 November 2021).
[249] UNGA A/RES/60/251 (15 March 2006); UN Human Rights Council, 'Basic facts about the UPR' <https://www.ohchr.org/en/hr-bodies/upr/basic-facts> accessed 28 September 2022.
[250] Damian Etone, The Human Rights Council: The Impact of the Universal Periodic Review in Africa (Routledge 2020) p. 2 ('Etone, The Human Rights Council: The Impact of the Universal Periodic Review in Africa (2020)'); Resolution 5/1, UN Doc A/HRC/RES/5/1 on Institution-building of the United Nations Human Rights Council, Principle 3 (b) and (m).
[251] Etone, The Human Rights Council: The Impact of the Universal Periodic Review in Africa (2020) p. 2; Resolution 5/1, UN Doc A/HRC/RES/5/1.

a buy in at the national level for whatever is proposed, since justice that is imposed will always be limited due to lack of ownership of the national system.[252]

Universal Periodic Review has in some instances, included public recommendations for concerned states to implement the Rome Statute domestically in ways which can benefit victims, and to cooperate with the ICC.[253] The Coalition of the ICC explains that when a state accepts such recommendations, it commits to implementing them by the time it next comes under review. This opens the door for civil society to engage with such states and to monitor their implementation.[254]A good example is the Review of Kenya in 2010 which put the spotlight on the country[255] due to a number of issues including the 2007-2008 post-election violence which was at the time the subject of an ICC investigation.[256] Kenya's first and subsequent reviews[257] resulted in them making legal and institutional reforms. For example,

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[252] Barney Afako's Response to the Author's question posted online during the "Architectures for Peace' Panel of the European Union State of the Union 2022. The author asked, 'Can the panelists suggest concrete ways in which we can constructively and simultaneously manage peace and international criminal processes without compromising the fight against impunity and justice for victims?' ('Architectures for peace' delivered on 6 May 2022 on the occasion of the hybrid 2022 edition of European University Institute State of the Union on 'A Europe fit for the next generation?'); UN ECOSOC, 'The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) (Revised Final Report Prepared By Mr. Joinet Pursuant To Sub-Commission Decision 1996/119)' E/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997), p. 28.

[253] Coalition of the International Criminal Court, 'Universal Periodic Review Provides Opportunity to Promote ICC' 20 May 2014 <https://www.coalitionfortheicc.org/news/20140520/universal-periodic-review-provides-opportunity-promote-icc> accessed 28 September 2022.

[254] Coalition of the International Criminal Court, 'Universal Periodic Review Provides Opportunity to Promote ICC' 20 May 2014 <https://www.coalitionfortheicc.org/news/20140520/universal-periodic-review-provides-opportunity-promote-icc> accessed 28 September 2022.

[255] Report of the Working Group on the Universal Periodic Review: Kenya, A/HRC/15/8, 17 June 2010.

[256] Situation in the Republic of Kenya, ICC-01/09 <https://www.icc-cpi.int/situations/kenya> accessed 29 December 2022.

[257] See Human Rights Council, 'Report of the Human Rights Council on its Fifteenth Session' A/HRC/15/60 (31 October 2011) pp. 144-149; Etone provides a detailed discussion of Kenya's two Universal Periodic Reviews in 2010 and 2015, see Etone, The Human Rights Council: The Impact of the Universal Periodic Review in Africa (2020) pp. 100-137; For Kenya's third Universal Periodic Review, see Human Rights Council, 'Report of the Working Group on the Universal Periodic Review of Kenya' A/HRC/44/9 (20 March 2020); OHCHR, 'Letter for Implementation of the Third Cycle Recommendations from Universal Periodic Review of Kenya' (4 December 2020) <https://www.upr-info.org/sites/default/files/documents/2021-07/letter_for_implementation_3rd_upr_ken_e.pdf> accessed 23 February 2023; UPR Info, 'Kenya', <https://www.upr-info.org/en/review/kenya> accessed 28 September 2022.

they made changes to their judiciary and police,[258] and enacted new laws such as the Victim Protection Act of 2014.[259] The Kenya situation at the ICC collapsed due to several issues including those related to protection, and cooperation.[260] However, the Country's improvement to their judiciary and law enforcement mechanisms represent a step forward in the right direction. Given the frequency of Universal Periodic Reviews,[261] with continuous commitment by Kenya, incentives such as support from relevant stakeholders, and with regional and international pressure,[262] there is a real chance that victims of the Kenya Situation may still see some justice done.

Other examples of the role UPR can play in managing potential difficulties with implementing victim-oriented complementarity is seen in the Cote D'Ivoire and DRC Situations. In 2014, the Coalition for the ICC noted that these states accepted the recommendation to align their legislation with the Rome Statute.[263] Cote D'Ivoire adopted a Rome Statute implementing legislation in 2015 to fully implement the substantial provisions of the Statute, including all

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[258] For some statistical analysis of Kenya's efforts towards implementation of recommendations from its second cycle of the Universal Periodic Review, see Kenya UPR Stakeholders' Coalition, 'Kenya's 2nd Cycle Universal Periodic Review Mid Term Report' <https://www.khrc.or.ke/civic-space-publications/192-kenya-s-2nd-cycle-universal-periodic-review-mid-term-report/file.html> accessed 28 September 2022; Etone, The Human Rights Council: The Impact of the Universal Periodic Review in Africa (2020) pp. 107-117.

[259] Although it is called Victim Protection Act, it includes provisions for victims' access to information, participation, and different forms of reparations. See Kenya's Victim Protection Act (2014).

[260] See Christopher Totten, Hina Asghar, and Ayomipo Ojutalayo, 'The ICC Kenya Case: Implications and Impact for Propio Motu and Complementarity' (2014) 13 (4) Washington University Global Study Review 699, pp. 699-766; Daniel M. Mburu, 'The Lost Kenyan Duel: The Role of Politics in the Collapse of the International Criminal Court Cases against Ruto and Kenyatta' (2018) 18 (6) International Criminal Law Review 1015, pp. 1015-1047; Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the *Kenyatta* Case (2018) pp. 571-591; See Chapter Six, Section 3.6.2 discussing the application of victim-oriented complementarity in to the Kenya situation.

[261] Kenya's next Universal Periodic Review is scheduled for 2025, see UPR Info, 'Kenya', <https://www.upr-info.org/en/review/kenya> accessed 28 September 2022.

[262] Etone also recognizes the impact regional states and bodies can make for example in getting regional peers (i.e., states within the same region) to make necessary commitments. See Etone, The Human Rights Council: The Impact of the Universal Periodic Review in Africa (2020) pp. 107-108, 111-115.

[263] Coalition of the International Criminal Court, 'Universal Periodic Review Provides Opportunity to Promote ICC' 20 May 2014 <https://www.coalitionfortheicc.org/news/20140520/universal-periodic-review-provides-opportunity-promote-icc> accessed 28 September 2022.

but one general principle.[264] The DRC in 2016 enacted Rome Statute implementing legislation which modified its criminal and military laws to fully implement both substantial and cooperation provisions of the Rome Statute.[265] The DRC[266] has made efforts to tackle impunity, and in some cases they carried victims along with the support of external donors. Central African Republic, and Uganda have made some efforts to address international crimes. The former set up a Special Criminal Court in 2015 which has international support including from the ICC.[267] Uganda enacted the International Criminal Court Act in 2010 (ICC Act) and created a Special Crimes Division within its High Court.[268] Cases are ongoing in each of these

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[264] See Parliamentarians for Global Action, 'Côte d'Ivoire and the Rome Statute' <https://www.pgaction.org/ilhr/rome-statute/cote-divoire.html> accessed 29 September 2022.

[265] See Parliamentarians for Global Action, 'Democratic Republic of the Congo (DRC) and the Rome Statute' <https://www.pgaction.org/ilhr/rome-statute/drc.html>, and 'PGA Welcomes the Enactment of the Implementing Legislation of the Rome Statute of the ICC by the Democratic Republic of the Congo' (2 January 2016) <https://www.pgaction.org/news/pga-welcomes-enactment-drc-implementing.html> accessed 29 September 2022; See also Patrick I. Labuda, 'Applying and 'Misapplying' the Rome Statute in the Democratic Republic of Congo' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015) pp. 408-431.

[266] See chapters two and three; Human Rights Council, 'Report of the Working Group on the Universal Periodic Review of Democratic Republic of the Congo' A/HRC/42/5 (5 July 2019); Parliamentarians for Global Action, PGA Welcomes the Enactment of the Implementing Legislation of the Rome Statute of the ICC by the Democratic Republic of the Congo (2 January 2016) <https://www.pgaction.org/news/pga-welcomes-enactment-drc-implementing.html> accessed 29 September 2022.

[267] For example, "Since 2015, the UN Security Council has mandated MINUSCA to support the operationalization of the Special Criminal Court." See Human Rights Watch '"Looking for Justice": The Special Criminal Court, a New Opportunity for Victims in the Central African Republic' (17 May 2018) <https://www.hrw.org/report/2018/05/17/looking-justice/special-criminal-court-new-opportunity-victims-central-african>, accessed 29 September 2022; Human Rights Watch, 'Central African Republic: First Trial at the Special Criminal Court' (12 April 2022) <https://www.hrw.org/news/2022/04/12/central-african-republic-first-trial-special-criminal-court#whendidthe> accessed 29 September 2022; United Nations Peace Keeping, 'CAR Special Criminal Court (SCC) Now Fully Operational' (9 June 2021) <https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational> accessed 21 September 2022; ICC, 'Training for Magistrates of the Special Criminal Court for the Central African Republic' (22 March 2018) <https://www.icc-cpi.int/about/cooperation/training-magistrates-special-criminal-court-central-african-republic> accessed 29 September 2022; Prosecutor Khan's Statement of Commitment to Support the Special Criminal Court of the Central African Republic, 11 May 2022; Perez-Leon-Acevedo, Victims at the Central African Republic's Special Criminal Court (2021) pp. 1-17.

[268] Moffett, Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo (2016) pp. 503-524; Anna Macdonald, '"In the interests of justice?" The International Criminal Court, Peace Talks and the Failed Quest for War Crimes Accountability in Northern Uganda' (2017) 11 (4) Journal of Eastern African Studies 628, pp. 628-630; Sharon Nakandha, 'Complementarity Reality Check: The Case of Uganda's International Crimes Division' (International Justice Monitor 21 June 2020) <https://www.ijmonitor.org/2020/06/complementarity-reality-check-the-case-of-ugandas-international-crimes-division/> accessed 29 September 2022.

domestic institutions which have recorded different levels of progress.[269] Yet capacity building and knowledge exchange may be required to maximize such potentials in the context of international crimes,[270] and this is something that the ICC can contribute to.[271]

The reasonable achievements made by these states to follow through on the recommendations from their Universal Periodic Reviews were made possible due to support from other stakeholders such as Parliamentarians for Global Action.[272] Such coordination and collaboration suggest that the thesis's proposals are achievable with a lot of political will and some change to the ICC's complementarity mechanism. It is safe to say that there is at least a framework, internal and external to the ICC that allows the implementation of the proposals, outlined throughout this thesis, and without unduly burdening the Court.

5 Conclusion

Victim-oriented complementarity is crucial to ensure that justice for victims of core crimes can be realized before the ICC and in domestic jurisdictions. This concept was first discussed by

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[269] For analysis of these institutions and their work, see for example, Moffett, Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo (2016) pp. 504-524; Sharon Nakandha, 'Complementarity Reality Check: The Case of Uganda's International Crimes Division' (International Justice Monitor 21 June 2020) <https://www.ijmonitor.org/2020/06/complementarity-reality-check-the-case-of-ugandas-international-crimes-division/> accessed 29 September 2022; Patryk I. Labuda, 'The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?' (2017) 15 (1) Journal of International Criminal Justice 175, pp. 175-206 ('Labuda, The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity? (2017)').

[270] See for example, Antonina Okuta, 'National Legislation for Prosecution of International Crimes in Kenya' (2009) 7 (5) Journal of International Criminal Justice 1063, pp. 1063-1076; Kenyans for Peace with Truth and Justice (KPTJ), 'Domestic Prosecution of International Crimes, Lessons for Kenya' (2015).

[271] See Carsten Stahn, 'Fair and Effective Investigation and Prosecution of International Crimes, Inventory and State-of-the-Art: Context, Cluster 1 and Cluster 2', International Nuremberg Principles Academy, pp. 12-13; See Perez-Leon-Acevedo, Victims at the Central African Republic's Special Criminal Court (2021) pp. 1-17; Labuda, The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity? (2017) pp. 175-206.

[272] Parliamentarians for Global Action, 'Rome Statute', <https://www.pgaction.org/tags.html?tag=rome+statute> accessed 29 September 2022; ICC-ASP, 'Parliamentarians for Global Action, PGA', <https://asp.icc-cpi.int/complementarity/parliamentarians-global-action-pga> accessed 29 September 2022.

Moffett, but it requires concrete minimum conditions on how it can be operationalized by the ICC. This thesis fills this gap by outlining a set of interpretative guidelines for admissibility determinations at all stages of proceedings in the interests of victims. A state which shows signs of willingness to address international crimes and to carry victims along in the process can be awarded extra time to develop agreed measures to do so and this can be accompanied by support for capacity building. States can secure deference by the ICC, but they should at a minimum prove that they have met the requirement for victim's protection and participation regime, and symbolic reparations, or optionally, a more substantive one. The chapter also proposed ways to prevent abuse of victim-oriented complementarity and the opportunities it offers to states by using public reporting of the ICC's activities, leveraging universal periodic reviews and insertion of monitoring and other compliance clauses into the proposed complementarity understanding.

Achieving victim-oriented complementarity requires a framework that covers judicial and institutional aspects of complementarity because of the different processes involved and its implications for the OTP, the accused, states, and victims. The judicial aspect has been discussed in this chapter which proposes the reinterpretation of the complementarity regime. For the institutional aspect, there should be a less contentious and inclusive platform for states to engage with the Court pre-admissibility litigation. This will also help to prevent a monopoly of the process by the Jurisdiction Complementarity and Cooperation Division of the OTP which functions in accordance with the OTP's interests. This is further explored in the next chapter.

Chapter Five: Implementing Victim-oriented Complementarity Through an Inclusive Complementarity Division

1 Introduction

Interpreting and applying the principle of complementarity is a multifaceted process. During early-stage complementarity proceedings such as preliminary examinations and investigations, the OTP's Jurisdiction Complementarity and Cooperation Division (JCCD) takes the lead on complementarity. Although other OTP Division, the Prosecutor and the Chambers play their respective roles in accordance with the Statute.[1] Complementarity involves several stakeholders including the ICC, states, the accused, and victims. Each stakeholder has its own unique interests in the process and in complementarity decisions. For example, states, and the ICC may want to exercise their respective jurisdictions for various reasons, victims may desire to participate, the accused as well as victims and may want justice to be served in The Hague or in domestic jurisdictions. Managing these diverse and sometimes conflicting interests in complementarity can be complex.[2] Thus, this chapter deals with an aspect of the thesis's second research question. It proposes the creation of a neutral and independent ICC complementarity division for the implementation of victim-oriented complementarity.

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[1] See Articles 15-20, and 53 of the Statute.

[2] In a number of instances, the OTP's and victims' interests may diverge as earlier discussed. See Victims' Response to the 'Prosecution's Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta', *Kenyatta*, *Situation in the Republic of Kenya*, ICC-01/09-02/11-984, TC V(B), ICC, 9 December 2014; Samson, Dual Status Victim-Witnesses at the ICC: Procedures and Challenges (2020) pp. 50-51; Request to Appear Before the Chamber Pursuant to Regulation 81(4)(b) of the Regulations of the Court, *Situation in Afghanistan*, ICC-02/17-39, PTC II, ICC, 10 June 2019, para 2 ('OPCV, Request to Appear Before the Chamber, ICC-02/17-39, 10 June 2019').

It is worth mentioning at the outset that this proposal is based on legal institutional arguments. The thesis recognizes that there are wider political and international relations issues at play, nonetheless, it limits its considerations of these and keeps its focus on legal matters. This choice was made firstly to ensure that the arguments are well grounded in the Rome Statute framework and other core legal texts of the Court, and to keep the attention on their viability based on purposive interpretation. Relatedly, limited space meant that detailed discussions of some political and international relations issues could not be accommodated in this chapter. Some of such issues were extensively debated during the drafting history of complementarity, as were highlighted in Chapter Three.[3]

The discussions in this chapter are contained in three parts. The first part outlines the reasons why a new complementarity division is needed. The second part deals with models for the creation of the proposed complementarity division and sets out the proposed structure. In the third part, the chapter elaborates on the function of the proposed complementarity division in reinterpreting complementarity, fostering victim-oriented justice, and maximizing the Rome Statute system. The third part also considers the policy and practical implications of the proposed body, while the chapter concludes by restating its importance in advancing victim-oriented complementarity.

2 The ICC Needs a New Complementarity Division

As discussed in Chapter Three, the JCCD was created by the OTP to aid the Office in carrying out its duties, especially those related to complementarity and cooperation.[4] The JCCD's

[3] See Chapter Three Section 2 on drafting history.
[4] See Chapter Three, Section 2.3.

structure and location within the OTP limits the former's ability to implement victim-oriented complementarity, and other victims' units cannot realize this on their own. The thesis proposes a new ICC Independent Complementarity Division to be the Court's main complementarity division.

At the ICC, there have been efforts to increase the efficiency of complementarity by making practical and policy changes to how the JCDD works. During the tenure of former Prosecutor Bensouda, the OTP implemented the use of advance integrated teams to perform its core tasks during the preliminary examination phase of situations that are likely to result in investigations. The advance integrated teams are led by Senior Trial Lawyers from the Prosecution Division and composed of members with complementary skill sets drawn from the staff of the Investigation Division, Prosecution Division and the JCCD.[5]

Outside the OTP, there have been scholarly suggestions for the creation of an ASP body which can oversee complementarity from the early stages and to serve as a bridge between the Court and States Parties.[6] There have also been discussions among stakeholders on how to enhance different aspects of the complementarity process and strengthen it at the national level.[7] Some

[5] See ICC-OTP, 'Response of the ICC Office of the Prosecutor to an Outcome Report and Recommendations from Open Society Justice Initiative (OSJI) and Amsterdam Law School (University of Amsterdam) based on a workshop held on 25-26 March 2020 on Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms and Practices' (8 May 2020) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/200508-OTP-response-to-OSJI-UoA-report.pdf> accessed 29 September 2022, pp. 6-7; Report of the Independent Expert Review of the ICC (2020) para 124; ICC's Overall Response to the Independent Expert Review (2021) paras 144-148.

[6] See Newton, The Quest for Constructive Complementarity, (2011) pp. 336-339; Moffett, Justice for Victims Before the ICC (2014) pp. 236-239; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 237 (fn. 5)-238; Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021) pp. 170-173; Stahn suggested an ASP Task Force on Complementarity, see Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 3-4.

[7] See for example, ICTJ and UNDP, 'Synthesis Report on "Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law"' (7-9 December 2011) ('Synthesis Report on "Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law" (2011)'); ICTJ, Synthesis Report on "Supporting Complementarity at the National Level: From Theory to Practice": Greentree III' (25-26 October

of these discussions took place in high level meetings of the Greentree Process which is an initiative facilitated by the International Centre for Transitional Justice (ICTJ).[8] Suggestions made included that the ICC can utilize the potential of preliminary examinations, and further streamline the coordination and cooperation that currently exists with law enforcement networks in specific countries.[9] Those who participated in the Greentree Process envisaged that the ASP could play a role of encouraging States Parties to pool resources to pursue accountability for serious crimes.[10] They considered the creation of a group of stakeholders including ICC representatives, whose role would be to develop strategies and country-specific plans on the delivery of complementarity assistance.[11]

Some international actors including the EU, the ICTJ, and Open Society Foundation have contributed to progress in the form of cooperation initiatives and rule of law program support,

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2012) ('Synthesis Report on "Supporting Complementarity at the National Level: From Theory to Practice" (2012)'); CICC, 'ASP 2017' <https://www.coalitionfortheicc.org/explore/assembly-states-parties/assembly-states-parties-2017/asp-2017-low-down> accessed 29 September 2022; Public International Law and Policy Group (PILPG) 'ASP20 Side Event: Complementarity and the ICC: from Preliminary Examinations (Guinea, Colombia) to Investigations (Sudan, Venezuela)' (16 December 2021) <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2021/12/16/asp20-side-event-complementarity-and-the-icc-from-preliminary-examinations-guinea-colombia-to-investigations> accessed 29 September 2022; ASP Resolution ICC-ASP/16/Res.6 (adopted on 14 December 2017) pp. 48-49; ASP Resolution ICC-ASP/17/Res.5 (adopted on 12 December 2018) pp. 46-47; ASP, Report of the Bureau on Complementarity: Twentieth Session of the ASP, 6-11 December 2021– The Hague (6 December 2021); See ASP, 'Complementarity: ASP Documents' <https://asp.icc-cpi.int/complementarity> accessed 29 September 2022.

[8] ICTJ, 'Greentree Meeting Advances Complementarity from Policy to Practice', 16 December 2011 <https://www.ictj.org/news/greentree-meeting-advances-complementarity-policy-practice> accessed 29 September 2022.

[9] Synthesis Report on "Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law" (2011) paras 10 -14; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) pp. 299-300; Sara Wharton and Rosemary Grey, 'The Full Picture: Preliminary Examinations at the International Criminal Court' (2018) 56 Canadian Yearbook of International Law 1 ('Wharton and Grey, The Full Picture: Preliminary Examinations at the International Criminal Court (2018)'); Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom' 3 May 2018; Morten Bergsmo and Carsten Stahn (eds) Quality Control in Preliminary Examination (Vol I, TOAEP 2018) pp. 1-32, 317- 337, although the contributors to this edition engage in discussions on the importance and potentials of preliminary examinations.

[10] Synthesis Report on "Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law" (2011) paras 10-14.

[11] Synthesis Report on "Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law" (2011) paras 12-14; Synthesis Report on "Supporting Complementarity at the National Level: From Theory to Practice" (2012) paras 19-24.

and other types of support provided to national mechanisms for addressing Rome Statute crimes.[12] These developments, although not all victim-oriented, are useful to support arguments for a more effective complementarity mechanism. While these discussions have been ongoing, for example with different stakeholders organizing meetings and events before[13] and during[14] the ASP yearly sessions,[15] no new inclusive complementarity body has been created to maximize the process for the benefit of victims.[16]

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[12] Synthesis Report on "Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law" (2011) para 11; European Commission, 'Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the Gap Between International & National Justice' (31 January 2013); Open Society Foundations, 'Justice In DRC Mobile: Courts Combat Rape and Impunity in Eastern Congo', (January 2013, <https://www.justiceinitiative.org/uploads/972ab1f9-fae9-49d0-b098-b5238433a859/justice-drc-20130114.pdf> accessed 29 September 2022.

[13] IBA International Criminal Court and International Criminal Law Programme, 'Strengthening the International Criminal Court and the Rome Statute System: A Guide for States Parties' (October 2021) <https://www.ibanet.org/document?id=ICC-Report-Rome-Statute-October-2021> accessed 29 September 2022, pp. 26-29.

[14] See for example, FIDH Press Release, 'Assembly of States Parties: Inside the Governing Body of the International Criminal Court', (2021) <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/fidh-at-the-20th-assembly-of-states-parties-to-the-rome-statute-of>, accessed 29 September 2022; ABA's Criminal Justice Section and Center for Human Rights, FIDH and Human Rights Watch, Side Event at the 18th Assembly of States Parties on Upcoming ICC Review, 'A Civil Society Conversation on ICC Review: Towards a Victim-Cantered Assessment of ICC Performance' (2 December 2019) <https://www.international-criminal-justice-today.org/events/side-event-at-the-icc-assembly-of-states-parties-on-upcoming-icc-review//>, accessed 29 September 2022; CICC, '#ASP20 Civil Society Side Events' <https://www.coalitionfortheicc.org/side-events-asp20> accessed 29 September 2022.

[15] During the ASP yearly session some issues are selected for deliberation by States Parties throughout the year in working groups. There is a working group on complementarity and often discussions about complementarity intersect with those about cooperation, and reports of these sessions are contained in various Reports of the Bureau on Complementarity. See for example, ASP, Report of the Bureau on Cooperation: Sixth Session of the ASP, 30 November - 14 December 2007 – New York (ICC-ASP/6/21 19 October 2007); ASP, Report of the Bureau on Cooperation: Eighth Session of the ASP, 18-26 November 2009 – The Hague (ICC-ASP/8/44 15 November 2009); ASP, Report of the Bureau on Cooperation: Ninth Session of the ASP, 6-10 December 2010 – New York (ICC-ASP/9/24 17 November 2010) para 11; CICC, 'Assembly of States Parties 2016, <https://coalitionfortheicc.org/fr/node/1277> accessed 29 September 2022; ASP, 'Complementarity: ASP Documents' <https://asp.icc-cpi.int/complementarity> accessed 29 September 2022.

[16] Bekou, The ICC and Capacity Building at the National Level (2015) p. 1255, fn. 64; See Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 3-4.

2.1 The JCCD is not Appropriately Structured or Located to Implement Victim-oriented Complementarity

As previously stated, the JCCD is one of the three main divisions of the Office of the Prosecutor.[17] The JCCD is responsible for admissibility assessments and securing cooperation for the OTP's activities.[18] The execution of these responsibilities is guided by the interests of the OTP whose work can carry certain advantages for victims, especially when their interests and that of the OTP align.[19] For instance, the OTP has made clear that in conducting preliminary examinations, it will '[assess] the existence of local institutions, international organizations, [NGOs] and other entities available as potential sources of information and/or of support for victims.'[20] This can be beneficial for victims; it is a good practice and should be improved upon by increasing cooperation with such entities for victims' benefit. Nonetheless, there are instances where the OTP's interests and those of victims do not align, or victims have other interests not already covered by the OTP.[21] Following a preliminary examination into a situation, victims may want the OTP to broaden the scope of its investigation, expand case

[17] See Chapter Three, Section 2.3; See also ICC-OTP, 'Office of the Prosecutor' <https://www.icc-cpi.int/sites/default/files/Publications/otpENG.pdf> accessed 5 October 2022.

[18] ICC-OTP, 'Office of the Prosecutor' <https://www.icc-cpi.int/sites/default/files/Publications/otpENG.pdf> accessed 5 October 2022; Report of the Independent Expert Review of the ICC (2020) paras 117- 118; ICC's Overall Response to the Independent Expert Review (2021) para 134.

[19] See for example, Prosecution's Response to the "Yekatom Defence's Admissibility Challenge – Complementarity", *Yekatom* and *Ngaissona*, *Situation in the Democratic Republic of the Congo*, ICC-01/14-01/18-466, TC V, ICC, 30 March 2020, paras 1-3, 4-5, 9 and 21 ('Prosecution's Response to the "Yekatom Defence's Admissibility Challenge – Complementarity", ICC-01/14-01/18-466, 30 March 2020'); Common Legal Representatives' Joint Observations on the "Yekatom Defence's Admissibility Challenge—Complementarity", *Yekatom* and *Ngaissona*, *Situation in the Democratic Republic of the Congo*, ICC-01/14-01/18-482-Red, TC V, ICC, 17 April 2020, paras 2-3 (second and third sentence of paragraph 3) 4, 20-25, 32-35, 44, 54-56, 58-59, 62, and 86; Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493 28 April 2020, paras 8-12; See also Moffett, Justice for Victims Before the ICC (2014) pp. 86-142.

[20] ICC's Policy Paper on Preliminary Examinations (2013) para 86.

[21] See Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 (5) Journal of International Criminal Justice 1357, pp. 1358-1359, and 1361-1375.

selection, or they may not be in support of deprioritization of some aspects of the situation.[22] Once preliminary examinations are concluded, there is no certainty that victims' representations made at that stage and reviewed by the JCCD, will strongly factor into the OTP's subsequent decisions on investigations and prosecutorial matters. Also, victims and CSOs who have submitted communications to the OTP have not always been in the best position to challenge the Prosecutor's analysis and any lack of investigation[23] following a preliminary examination.

Schuller and Meloni rightly assert that while the OTP has attempted to be more transparent through publishing preliminary examination reports,[24] there appears to be a gap in the ICC-designed system of preliminary examinations.[25] Victims do not have sufficient access to defend their interests at this early stage of the proceedings *vis-à-vis* the OTP's broad discretion.[26] In these instances, especially where victims and OTP's interests may differ,[27] the JCCD would be limited in its ability to implement complementarity in a neutral yet inclusive and victim-oriented manner. This is because ultimately the JCCD will support the OTP's approach to such issues which may mean that victims' participation could be limited, and decisions could be

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[22] See for example, Request by the Victims' Representative for authorisation to make a further written submission on the views and concerns of the victims, *Ruto*, *Kosgey*, and *Sang Situation in the Republic of Kenya*, ICC-01/09-01/11-367, PTC II, ICC, 9 November 2011, paras 9-18.
[23] Schüller and Meloni, Quality Control in the Preliminary Examination of Civil Society Submissions (2018) pp. 541-542; Katherine Booth, Karine Bonneau and Maître Jeanne Sulzer, Victims' Rights before the ICC: A Guide for Victims, their Legal Representatives and NGOs' (FIDH 2007) Chapter IV, p. 20 ('FIDH, Victims' Rights before the ICC: A Guide for Victims, their Legal Representatives and NGOs' (FIDH 2007)').
[24] ICC-OTP, 'Reports' <https://www.icc-cpi.int/about/otp/otp-reports> 29 September 2022.
[25] Schüller and Meloni, Quality Control in the Preliminary Examination of Civil Society Submissions (2018) pp. 536, 542-543.
[26] Schüller and Meloni, Quality Control in the Preliminary Examination of Civil Society Submissions (2018) pp. 536, 542-543; See Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 (5) Journal of International Criminal Justice 1357, pp. 1358-1359, and 1361-1375.
[27] See Chapter Six discussion of the OTP's deprioritization of some aspects of the Afghanistan Situation; Victims' Response to the 'Prosecution's Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta', *Kenyatta*, *Situation in the Republic of Kenya*, ICC-01/09-02/11-984, TC V(B), ICC, 9 December 2014; Samson, Dual Status Victim-Witnesses at the ICC: Procedures and Challenges (2020) pp. 50-51; OPCV, Request to Appear Before the Chamber, ICC-02/17-39, 10 June 2019, para 2.

more focused on issues of investigation and prosecution. Likewise, the JCCD's efforts to nudge states into fulfilling their Rome Statute obligations would be in line with the OTP's policies and may not necessarily be as victim oriented as proposed in this thesis.

Some may argue the JCCD was not created to aid the ICC in delivering victim-oriented justice, rather it was created to support the OTP's implementation of the principle of complementarity. Notwithstanding, complementarity has implications for victims because admissibility decisions will effectively determine whether states or the ICC would adjudicate over a situation, how justice is shaped, which victims can participate, and the mode of their participation.[28] These will in turn determine substantive outcomes. The JCCD's attachment to the OTP illustrated in Chapter Three, Figure 3.1 and the OTP's substantial control of the complementarity process, make the JCCD less suitable for implementing victim-oriented complementarity.[29]

2.2 Other Victims' Units Cannot Realize Victim-Oriented Complementarity on Their Own

There are four important victims' units at the ICC and some of their functions have been highlighted in previous chapters:[30] the Victims' Participation and Reparations Section (VPRS),[31] the Office of Public Counsel for Victims (OPCV),[32] Victims and Witnesses Unit

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[28] Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 (5) Journal of International Criminal Justice 1357, pp. 1357-1370.

[29] According to Finkelstein "[a]gencies that do not (…) change to adapt to evolving needs, deserve to be judged inadequate." Lawrence S. Finkelstein, 'International Organizations and Change: The Past as Prologue' (1974) 18 (4) International Studies Quarterly 485, p. 506.

[30] See in particular, Chapter Two, Sections 4.1-4.3.

[31] International Criminal Court, 'Victims', <https://www.icc-cpi.int/about/victims> accessed 6 September 2022.

[32] On the OPCV, See Regulations 81 of the Regulations of the Court, and Regulations 114-115 of the Regulations of the Registry.

(VWU) of the Registry,[33] and the Trust Fund for Victims (TFV).[34] All four units have been established within the Registry which is the administrative arm of the Court. The VPRS processes victims' applications for participation and reparations, while the VWU provides support and protection to witnesses and to victims who appear before the Court.[35] The OPCV assists victims as required in their legal representation in court, and the Trust Fund can provide different kinds of support to victims as well as court ordered reparations.[36] The merger of these existing units into one victims' unit would not be sufficient to effectively protect victims' interests throughout all stages of proceedings. Victims need to be represented within the ICC's complementarity mechanism. The structure of the proposed Complementarity Division outlined in Section 3.3 below can contribute to ensuring that meaningful inputs of victims' units are more streamlined and better coordinated. Also, each of these units' own networks can improve cooperation on victims' issues,[37] some of which can be severe during prolonged preliminary examinations.

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[33] Article 43 (6) ICCst.

[34] Articles 75 (2) and 79 ICCst.

[35] ICC, VPRS, Victims' Booklet, pp. 14-15

[36] ICC, VPRS, Victims' Booklet, pp. 14-15.

[37] Article 93 (1) (j) and (l) of the Statute allows for cooperation on victims' issues. Assistance programs have contributed to meeting victims' needs during prolonged proceedings. See Trust Fund for Victims, 'Northern Uganda' <https://www.trustfundforvictims.org/en/locations/northern-uganda>; Trust Fund for Victims, 'Democratic Republic of the Congo' < https://www.trustfundforvictims.org/en/locations/democratic-republic-congo>; Trust Fund for Victims, 'Central African Republic' <https://www.trustfundforvictims.org/en/locations/central-african-republic> accessed 29 September 2022; See also Anne Dutton and Fionnuala Ní Aoláin, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate' (2019) 19 (2) Chicago Journal of International Law 490, pp. 490-597; Jennifer McCleary-Sills and Stella Mukasa, '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) <https://www.icrw.org/wp-content/uploads/2016/10/ICRW-TFV--Evaluation-Report.pdf> accessed 29 September 2022; Trust Fund for Victims, 'Democratic Republic of the Congo' <https://www.trustfundforvictims.org/en/locations/democratic-republic-congo> accessed 29 September 2022.

2.3 Goals of the Proposed Independent Complementarity Division

The goals of the proposed Independent Complementarity Division are broken down into three broad themes, (1) to promote the implementation of victim-oriented complementarity, (2) to ensure that victims' issues are presented, heard, and adequately considered in complementarity proceedings and throughout the lifetime of a situation, and (3) to make it easier to introduce and agree on victim-oriented conditions in complementarity decisions. The implementation of these goals must be carried out while ensuring that the rights of the accused are not prejudiced.

2.3.1 To Promote the Implementation of Victim-oriented Complementarity

The first goal of the proposed Independent Complementarity Division is that it should be a neutral body which promotes effective implementation of victim-oriented complementarity from the preliminary examination stage. Its neutrality allows it to provide a less contentious platform for early dialogue on complementarity related issues[38] with the OTP, Office of the Public Counsel for the Defence, states, victims, and other relevant stakeholders. This means that it can promote justice for victims and the fight against impunity. This is crucial because there have been instances, like in the Afghanistan situation, where complementarity proceedings have been plagued with series of litigations, including between the OTP, states, and victims,[39] which hamper efforts to do justice. The proposed Complementarity Division should strive to provide a platform for early and continuous dialogue to manage such differences between stakeholders.[40] In the case of recalcitrant states who may be unwilling and

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[38] Report of the Independent Expert Review of the ICC (2020) para 953; Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 3-4.
[39] See for example Appeals Chamber Decision Authorizing Investigation in the Situation in Afghanistan, ICC-02/17-138, 5 March 2020, paras 10-16; See also Chapter Six, Section 3.7.
[40] See Synthesis Report on "Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law" (2011) paras 10-14.

unyielding, the proposed body can use tools of victim-oriented qualified deference discussed in Chapter Four, to nudge them towards fulfilling their Rome Statute obligations.

2.3.2 Protecting Victims' Interests Throughout the Lifetime of a Situation

The second aspect of the proposed Division's goals concerns victims procedural and substantive rights in situations before the Court. Victims' have interests in preliminary examinations,[41] and the Court must make important choices at this stage given its limited resources. Mindful of these, the proposed Complementarity Division can ensure that complementarity and related decisions are made after adequately considering victims' interests.[42] A benefit of participating in complementarity proceedings from the early stages through the proposed Division is that victims can be made aware of the complexities involved in addressing international crimes, and this may make it somewhat easier for them to digest decisions and the chosen approach to justice. This can help to address some of the criticisms of the OTP's selection strategy which may not always be clear to victims and other stakeholders if they are not included in the process in the manner proposed throughout this thesis.

[41] See section 2.1 above on the work of the JCCD and its implications for justice for victims; Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 (5) Journal of International Criminal Justice 1357, pp. 1367- 68; Victims' Joint Appeal Brief Against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-75, AC, ICC, 30 September 2019, paras 9-10, 92, and 104, ; Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua from the Appeals Chambers Decision Regarding Victims' Leave to Appeal, Situation in the Islamic Republic of Afghanistan, ICC-02/17-62-Anx, 17 September 2019, paras 21-22, 30-32; Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019; Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020, paras 1-3 and 7-78.

[42] Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 (5) Journal of International Criminal Justice 1357, pp. 1366-1368.

2.3.3 Ensuring The Inclusion of Victim-oriented Conditions in Complementarity Decisions and MoUs

The proposed Complementarity Division will be responsible for ensuring that minimum victim-oriented conditions are introduced into complementarity discussions and agreements before the contentious admissibility challenges begin. They can boost the chances of states accepting such minimum conditions by recommending or working with rule of law and development stakeholders who can help to build the capacity of a state in accordance with the Rome Statute's cooperation regime.[43] During investigations were specific suspects have been identified, pre-trial or even at the start of a trial, it is possible that an accused and the prosecutor may engage in discussions of the accused's admission of guilt as discussed in Chapter Two.[44] Concerned states may also be involved in this process, for example when they have an interest in exercising their jurisdiction over the accused in their territory or regionally, or other interests regarding bringing the accused to justice. The proposed Division can work to ensure that such an agreement on admission of guilt is victim-oriented while respecting the rights of accused.

It is likely that even with the non-competitive and less-contentious platform that the proposed Complementarity Division offers, states, the OTP and the defence may want to protect their respective interests. In such cases the proposed complementarity division can through dialogue and communication, remind states of the minimum conditions they agreed to.[45] They can remind the OTP of the importance of making decisions which factor in victims' needs and interests. This aspect of the proposed Division's goals is crucial for victims because it can

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[43] See Bekou, The ICC and Capacity Building at the National Level (2015) pp. 1253-1254; ASP Resolution RC/Res.1 (adopted on 8 June 2010) para 8; Synthesis Report on "Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law" (2011) paras 3, 10, and 14; Synthesis Report on "Supporting Complementarity at the National Level: From Theory to Practice" (2012) para 19.

[44] See Chapter Two, Section 4.5; Articles 64 (8) (a) and 65 ICCst.

[45] See Chapter Four, Section 3.1.3.3

impact subsequent admissibility disputes. For instance, the relevant chamber seized of an admissibility challenge may be inclined to award states more time to develop victim-oriented mechanisms or reverse a prior decision[46] to defer to them for failure to meet the victim-oriented conditions they previously agreed to. In the former scenario, a chamber may refuse to authorize an investigation because it considers that such an investigation would be better handled by the state who has shown willingness, even where capacity may need to be built, but where there is support for the state. The Chamber's ruling in this manner may be due to their knowledge based on submissions of the parties or participants, including the proposed Division's recommendations on the situation which becomes part of the court records. Additionally, the Chamber may prevent an accused from abusing the process by raising admissibility challenges, especially if they initially reached an admission of guilt agreement with the OTP.[47] These scenarios are plausible because some judges at the ICC have through their various dissenting and separate opinions shown their readiness to strengthen victims' position in complementarity proceedings and in other ICC proceedings.[48]

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[46] This could be a decision by the OTP in accordance with Article 18 (2) and could be based on the work of the Complementarity Division, or a decision of the chamber following an application by the OTP or a state in accordance with Articles 15 (5), 17-19 of the Statute.

[47] This is subject to Article 65 (5) ICCst. and the Chamber's own determination following the evidence before it.

[48] Judge Ibanez-Carranza is among judges who have encouraged victims to continue to use the means available to them within the core legal texts of the Court to protect their Rome Statute rights. Judge Song, and Judge Mindua have also leaned towards giving effect to the participatory rights of victims where their interests are clearly affected for example, regarding an appeal. See Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019; Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020; Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua from the Appeals Chambers Decision Regarding Victims' Leave to Appeal, Situation in the Islamic Republic of Afghanistan, ICC-02/17-62-Anx, 17 September 2019; Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims (Judgment on the appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo") *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-824, AC, ICC, 13 February 2007; Separate Opinion of Judge Sang-Hyun Song from the Appeals Chamber Decision on the Application by Victims for Participation in the Appeal, *Laurent Gbagbo*, *Situation in the Republic of Cote D'ivoire*, ICC-02/11-01/11-491-Anx, AC, ICC, 27 August 2013; For similar decisions, see also Application to Participate in the Interlocutory Appeal Filed by the

3 Designing the Proposed Independent Complementarity Division

3.1 Scholarly Proposals for a New Complementarity Body

There have been some scholarly proposals for a body which can improve the complementarity process and its impact. Kersten suggested that the OTP or the Registry should create an arm's length, independent body called a 'Referral Review Panel', and that this could be done without any amendment to the Rome Statute, or approval of the ASP.[49] According to Kersten, instead of being staffed with ICC lawyers, his proposed panel would have regional experts, some diplomats, people with knowledge of the politics of international law and who can work voluntarily.[50] He argues that his proposed body would critically assess referrals from all trigger mechanisms.[51] The panel will then create a non-binding report which will form the basis upon which the OTP could proceed to an investigation.[52]

Newton, Moffett, and Stahn, have all made different but somewhat similar proposals for a new complementarity unit. Their proposals were all premised on making complementarity more effective through *inter alia* rethinking the ASP's role regarding complementarity.[53] All three

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Defence against the "Third Decision on the Review of Laurent Gbagbo's Detention Pursuant to article 60(3) of the Rome Statute" of 12 July 2013, *Laurent Gbagbo*, *Situation in the Republic of Cote D'ivoire*, ICC-02/11-01/11-460, AC, ICC, 23 July 2013, para 23, fn. 30.

[49] See Kersten, The Politics of ICC Referrals – A Proposal (2012).

[50] Kersten, The Politics of ICC Referrals – A Proposal (2012).

[51] Kersten, The Politics of ICC Referrals – A Proposal (2012).

[52] Kersten, The Politics of ICC Referrals – A Proposal (2012).

[53] See Newton, The Quest for Constructive Complementarity, (2011) pp. 336-339; Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021) pp. 171-173; Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 3-4; Moffett, Justice for Victims Before the ICC (2014) p. 237.

scholars agree that a complementarity body should be created by the ASP. Newton[54] and Moffett[55] suggest that the complementarity body be created under Article 112 (4) of the Rome Statute which gives the ASP the authority to establish such subsidiary bodies as may be necessary.[56] However, Newton proposes an amendment to Article 112 (4) by adding a paragraph requiring the ASP to create a 'standing complementarity coordination committee'.[57] Stahn argues for an ASP Task Force on Complementarity composed of selected representatives of States Parties, which could help to address some of the more systemic dimensions of complementarity.[58] Newton and Stahn suggest that such a unit need not be separate or neutral from the ASP, while Moffett argues that it should provide independent oversight to monitor and evaluate the ICC's work, and take on the initial examination of complementarity in situations before the Court.[59] Whereas Kersten's proposal is limited to referral reviews,[60] Newton's vision[61] of the function of his complementarity body include overseeing some aspects of admissibility review.[62] Thus, Newton, Stahn and Moffett suggest that such body could be useful for (1) facilitating communication, (2) consultation and coordinating cooperation on admissibility issues, strengthening positive complementarity, and (3) creating, and sustaining

[54] Newton, The Quest for Constructive Complementarity (2011) pp. 336-337; Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021) pp. 171-172.
[55] Moffett, Justice for Victims Before the ICC (2014) pp. 237 (fn. 5) p. 238.
[56] Article 112 (4) ICCst.
[57] Newton, The Quest for Constructive Complementarity (2011) pp. 336-338; Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021) p. 172; In his 2011-piece, Newton called his proposed complementarity division 'Complementarity Coordination Committee'.
[58] See Stahn, 'Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 4.
[59] Moffett, Justice for Victims Before the ICC (2014) p. 237; Moffett, Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) p. 306; Moffett, Justice for Victims Before the ICC (2014) p. 237.
[60] Kersten, The Politics of ICC Referrals – A Proposal (2012).
[61] See Newton, The Quest for Constructive Complementarity, (2011) pp. 336-339; Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021) pp. 171-173.
[62] The implementation of both proposals may be problematic due to judicial independence of the Court, and the Independence of the OTP, as decisions as to admissibility of cases is a judicial matter for the ICC. For more on the nature of admissibility, see Decision on the Yekatom Defence's Admissibility Challenge, 28 April 2020, ICC-01/14-01/18-493, para 22; Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 1-3; Report of the Independent Expert Review of the ICC (2020) pp. 12-22.

constructive relationship between the ICC and States Parties.[63] These issues highlighted by all four scholars are pertinent and in addition to issues specific to victims, they underlie the thesis's proposal for a new complementarity division.

Unlike Newton's proposal for an amendment to the Statute, this thesis's proposals on the composition and functions of the proposed Division are based on the existing framework of the Statute as demonstrated in Chapter Four and further elaborated below. Newton,[64] and Stahn propose that such a body should be composed of state representatives, although Stahn envisages a more inclusive composition.[65] Both authors suggest that such a body should be controlled by the ASP, which means that they lack the neutrality and independence crucial for the implementation of victim-oriented complementarity. Newton, and Kersten's respective suggestions that such a body be involved with admissibility review would be problematic to implement as admissibility decisions are judicial matters for the ICC.[66] Moffett's proposal comes within his main proposal for making complementarity more victim-oriented, but there is no discussion as to how his proposed ASP subsidiary body will include victims in the complementarity process.[67] Likewise, none of the other three scholars considered the inclusion of victims in such a complementarity body. Beside briefly outlining their ideas of how such a body could be composed,[68] none of the scholars proposed a clear structure to enable such an

[63] See Newton, The Quest for Constructive Complementarity (2011) pp. 336-339; Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021) pp. 171-173; Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 3, s. 2; Moffett, Justice for Victims Before the ICC (2014) p. 237.

[64] Newton, The Quest for Constructive Complementarity (2011) pp. 336-337; In his 2021-piece on the same issue he proposed a lower number of representatives from twelve to seven, see Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021) p. 172.

[65] See Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 3-4.

[66] Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493 28 April 2020, para. 22; 2020 Independent Expert Review of the ICC, pp. 12-22. Note that the body which Newton proposes is to be controlled by the ASP, whereas Kersten's proposed body may not.

[67] See Moffett, Justice for Victims Before the ICC (2014) pp. 236-239.

[68] Moffett does not engage with this, only Newton and Stahn suggest who may be included in their respective proposed complementarity bodies.

entity execute the functions they envisage. Ultimately, their proposals draw much needed attention to an important topic.

3.2 Legal Basis for Creating the Proposed Complementarity Division

This thesis argues that the proposed Independent Complementarity Division should be created by the ASP in accordance with Article 112 (4), and that it should be functionally independent from the ASP and other arms of the Court. Article 112 (4) provides that 'the Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.'[69] Although the word 'subsidiary' is used here, nothing in the Statute indicates that such bodies must be controlled by the ASP. The fact that an 'independent' oversight mechanism can also be created under this article suggests that the ASP can create other independent units if they are 'necessary' and can contribute to the 'enhancement and efficiency' of the ICC. One of the functions envisaged for the proposed Division is complementarity assessments which is a legal matter for the Court. Hence, such a complementarity division should not be controlled by the ASP which falls outside the chain of organs and units of the ICC responsible for the administration of justice.[70] The TFV is an example of an article 112 (4) creation,[71] and it is functionally independent of the Court and the

[69] Article 112 (4) ICCst.

[70] See ICC's Overall Response to the Independent Expert Review (2021) paras 21-22. States Parties have also expressed concerns about their level of involvement in complementarity issues *vis a vis* victims. See ASP, Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims and Reparations: Eleventh Session of the ASP, 14-22 November 2012 – The Hague (ICC-ASP/11/32 23 October 2012) p. 6, para. 33.

[71] Mark Klamberg, 'Commentary on Article 112' in Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (TOAEP, 2017) p. 728 (fn. 838).

ASP.[72] Therefore, creating a new functionally independent complementarity division under Article 112 (4) is both desirable and feasible.

3.3 The Composition of the Proposed Independent Complementarity Division

It is important to note that any changes to how the system of complementarity is currently implemented will impact how the ICC functions[73] because the Court is a complex institution.[74] The design model proposed here is premised on the ability of the Independent Complementarity Division to fit into the Court's current structure and avoid any negative impact on the Court's independence. This thesis proposes that the new Complementarity Division be made up of three main units, a Situation Analysis Unit, Cooperation Unit, and a Complementarity Committee.[75] The unique composition of the proposed Division will include a victims' representative and other stakeholders needed to help the ICC and states to realize victim-oriented justice.[76] Figure 5.1 below provides a simple overview of the makeup of these units.

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[72] ICC 'Trust Fund for Victims' <https://www.icc-cpi.int/tfv> accessed 20 September 2022; The Trust Fund for Victims, 'About us' <https://www.trustfundforvictims.org/en/about/vision> accessed 29 September 2022.

[73] See Devesh Kapur 'Processes of Change in International Organizations' in Deepak Nayyar (ed) *Governing Globalization: Issues and Institutions* (OUP 2002) pp. 334-354; Beth A Simmons and Lisa L. Martin, 'International Organizations and Institutions' in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds) *Handbook of International Relations* (Sage Publications 2012) pp. 326-345; Erik Voeten 'Making Sense of the Design of International Institutions' (2019) 22 (1) Annual Review of Political Science 147, pp. 148-159; Ignacio de la Rasilla, International Law and History Modern Interfaces (CUP 2021) pp. 283-307.

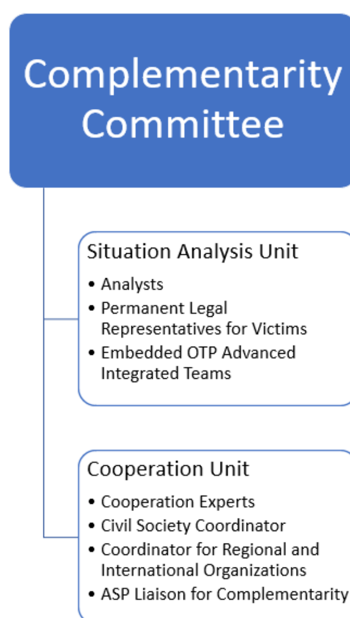
[74] See Report of the Independent Expert Review of the ICC (2020) paras 26-50; See also ICC's Overall Response to the Independent Expert Review (2021) paras 16-50; ASP, Report of the Court on Measures to Increase Clarity on the Responsibilities of the Different Organs: Ninth Session of the ASP, 6-10 December 2010 – New York (3 December 2010) p. 2.

[75] Although the names are similar to some sections of the JCCD, the proposed sections will be modified in their composition and the work they do, and task duplication could be avoided as explained below.

[76] See Panellists' discussions during the 2010 Kampala Review Conference, including statements by Silvana Arbia, and Carla Ferstman, and David Tolbert, see Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010, ASP Official Records RC/11, p. 88, paras 12-15; Human Rights Watch, 'Pressure Point: The ICC's Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom (2018) pp. 9, 16-19. On victims' access to complementarity proceedings, see OPCV, Request to Appear Before the Chamber, ICC-02/17-39, 10 June 2019; OPCV Submissions in the General Interest of the

Figure 5.1

Proposed Complementarity Division



3.3.1 Situation Analysis Unit

The thesis proposes that this Unit[77] should replace the JCCD's Preliminary Examination Section and should take over the conduct of preliminary examinations.[78] This section should be staffed on a permanent basis by analysts with knowledge and experience in

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Victims on the Prosecution's Request for Leave to Appeal the Afghanistan PTC II Decision, ICC-02/17-59, 12 July 2019; See also generally Yasmin Naqvi, 'The Right to the Truth in International Law: Fact or Fiction?' (2006) 88 (862) International Review 245, pp. 245-273.

[77] Note that within the OTP, there used to be a unit named the Situation Analysis Section, which is now named Preliminary Examination Section. See FIDH, Victims' Rights before the ICC: A Guide for Victims, their Legal Representatives and NGOs' (FIDH 2007) ch II, p. 14.

[78] See below section 4 below on the functions of the independent complementarity division.

complementarity, a Permanent Legal Representative for Victims on Complementarity issues, and the OTP's 'advance integrated teams' should be connected to the unit.[79]

3.3.1.1 Permanent Legal Representative for Victims on Complementarity Issues

The Permanent Legal Representative for Victims on Complementarity issues (Permanent LRV) placed in this section should have a support staff attached to the OPCV as the latter provides general support and assistance to the legal representative of victims and to victims.[80] The OPCV's mandate is of a general nature and commences very early in ICC proceedings.[81] The Pre-Trial Chamber can instruct the OPCV at the complementarity stage to represent the interests of unrepresented victims, for instance where the Court is examining an arrest warrant request from the OTP, alternatively the OPCV can seek leave of the Court to do so.[82] Therefore, the Court may choose to appoint the proposed Permanent LRV from existing personnel in the OPCV. All other victims' units and representatives can have access to the proposed Permanent LRV and their office. The holder of this position will (1) work with them to represent victims' interests especially at the preliminary examination stage; (2) be the point person for victims, their intermediaries, and representatives on complementarity issues, including by providing

[79] As earlier stated, the OTP's practice is to use 'advance integrated teams' which are engaged earlier in the preliminary examination process (at phase 2 of its four-phased approach) when the prospects of investigations in a situation are higher at that stage. See OTP's Policy Paper on Preliminary Examination (2013) pp. 17-20; On the composition and duties of integrated teams see Report of the Independent Expert Review of the ICC (2020) paras 124, 741, 746, and 757. On the composition and duties of advance teams see paras 163, and Report of the Independent Expert Review of the ICC (2020) p. 334.
[80] See Regulations 80 and 81 of the Regulations of the Court; Decision on the OPCV's Request to Participate in the Reparations Proceedings, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2858, *TC* I, ICC, 5 April 2012, para 13.
[81] See Regulations 81, 73, and 80 of the Regulations of the Court.
[82] See Regulations 81, 80, and 73 of the Regulations of the Court. See also Chamber's Practice Manual, para 98 (1). Decision on the OPCV's Request to Participate in the Reparations Proceedings, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2858, *TC* I, ICC, 5 April 2012, para 13, although this example is in relation to reparations proceedings; See also OPCV, Request to Appear Before the Chamber, ICC-02/17-39, 10 June 2019.

them with updates on communications submitted to the Court;[83] (3) and will generally look after victims' interests in complementarity proceedings.

Having victims represented in the proposed Complementarity Division is achievable within the current legal framework of the Court.[84] Rule 86 of the ICC Rules of Procedure and Evidence enshrines a general principle that all organs of the Court in performing their functions shall take into account the needs of victims.[85] Since complementarity is a crucial process for the implementation of the Court's mandate,[86] it is logical to have such a position as a mechanism to enforce Rule 86. For instance, whether the OTP or the Court decides to retain a situation or defer to states, such decisions must include victim-oriented conditions stemming from victims' own representations. Also, Article 68 (3) provides for the presentation and consideration of victims' views and concerns where their personal interests are affected, without excluding complementarity proceedings.[87] The legal representatives of victims can make such presentations, and the Court can through the LRVs make different types of notifications to victims.[88]

Although there may be one Permanent Legal Representative for Victims on Complementarity issues, the structure of the proposed Complementarity Division offers better transparency to

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[83] See FIDH, Victims' Rights before the ICC: A Guide for Victims, their Legal Representatives and NGOs' (FIDH 2007) ch IV, p. 20; Schüller and Meloni, Quality Control in the Preliminary Examination of Civil Society Submissions (2018) pp. 541-542.
[84] See for example, Articles 68 (3), 15 (3) & (4) ICCst., Rules 86, 50, ICC Rules of Procedure and Evidence; Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020, paras 34-38; Judgment on Victim Participation in the Investigation Stage of The Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I Of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, para 56.
[85] Rule 86, ICC Rules of Procedure and Evidence.
[86] Paul Seils, 'Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes' (ICTJ 2016) ('ICTJ Handbook on Complementarity (2016)').
[87] See Articles 68 (3), 15, 19 (3), and 53 (1) (c) ICCst.
[88] See Rules 50, 59 (1) (b), 107 (5) ICC of the Rules of Procedure and Evidence.

the complementarity process. This should contribute to limiting the possibility of victims' issues and the recommendations of the permanent legal representative being side-lined.[89]

3.3.1.1.1 Benefits of Victims' Representation in the Proposed Body

In addition to the benefits discussed above, having victims represented in this complementarity mechanism helps with relieving the time-limit pressure for filing victims' representations at the complementarity stage. For example, the time limit for victims to make representations following the OTP's announcement of a request to the Pre-Trial Chamber for authorization of an investigation is 30 days.[90] Victims' input at this stage is undoubtably important,[91] yet such a short time frame may not allow them to make adequate representations. Having a Permanent LRV embedded within the proposed Complementarity Division gives victims a head start in the process, and better standing should the opening of an investigation be sought. This proposal is not implausible as comparable arrangements have been provided for victims to access preliminary stages of mechanisms, for example at the Inter-American Commission,[92] designed to address gross human rights abuses.

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[89] In discussing victims' participation at the ICC, Hirst and Sahouni have warned of what they referred to as 'a culture that sidelines participating victims'. See Hirst and Sahyouni, Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions (2020) pp. 12-14.

[90] See Article 15 (3) ICCSt., Rule 50 (3) Rules of Procedure and Evidence of the ICC, and Regulation 50 (1) of the Regulations of the Court.

[91] See for example, *González Medina and Family v. Dominican Republic*, Judgement (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 240 (27 February 2012) paras 251 and 263; Dissenting Opinion [of Judge Luz Del Carmen Ibáñez Carranza] to The Majority's Oral Ruling Of 5 December 2019 Denying Victims' Standing to Appeal, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-133, AC, ICC, 5 December 2019, paras 2, and 13-79.

[92] Inter-American Commission on Human Rights, Strategic Plan 2011-2015 <https://www.oas.org/en/iachr/docs/pdf/iachrstrategicplan20112015.pdf> accessed 29 September 2022, pp. 59-63.

The representation of victims within the proposed Complementarity Division will positively impact the work of other victims' units in subsequent stages of proceedings at the ICC. By being involved in the development of situations and cases, victims' legal representatives are better placed to advocate for victims' interests and support their participation.[93] This is preferable to the current practice where some of them come in at the later stages of the proceedings. Also, the several submissions and requests by different representatives for victims in the Afghanistan situation reflect the need for this position.[94] Among the relief sought by these victims was a standing to appeal the Pre-Trial Chamber's decision not to authorize the investigation, but their request was not granted. Such a Permanent Legal Representative on Complementarity Issues would have been useful to coordinate between these legal representatives and between them and the Court where necessary, thereby consolidating efforts, and saving time and resources.[95]

3.3.2 Embedded OTP Advance Integrated Teams

The OTP should be well connected to the proposed Complementarity Division due to the former's responsibilities regarding investigations and prosecutions.[96] There should be OTP

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[93] Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) p. 4.
[94] See Observations Concerning Diverging Judicial Proceedings Arising from the Pre-Trial Chamber's Decision Under Article 15 (filed simultaneously before Pre-Trial Chamber II and the Appeals Chamber), *Situation in the Republic of Afghanistan*, ICC-02/17-41, PTC II, ICC, 12 June 2019, paras 2-3; Victims' Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-37, PTC II, ICC, 10 June 2019; Victims' Response to the Requests for Leave to Appeal Filed by the Prosecution and by Other Victims, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-45, PTC II, ICC, 13 June 2019; Corrigendum of Updated Victims' Appeal Brief, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-73-Corr, AC, ICC, 2 October 2019.
[95] See Chapter Six, Section 3.7.
[96] Stahn makes a similar suggestion. See Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 4.

advance integrated teams attached to proposed Situation Analysis Unit. The OTP developed this practice of constituting advance integrated teams[97] during the preliminary examination phase of situations that are likely to result in investigations.[98] This practice has several advantages including early identification of investigative opportunities, efficient and timely preservation of materials during the preliminary examination stage and where necessary, a smooth transition to investigations.[99]

Given the thesis's proposal that preliminary examinations should be handled by the new Complementarity Division, the existing JCCD's Preliminary Examination Section may be absorbed into the proposed Division. Nonetheless, the good practice of forming integrated team members can be transplanted into the new Complementarity Division,[100] as this will be budget friendly. Their duty will remain unchanged, i.e., they will aid the proposed Complementarity Division in their work in conducting effective preliminary examinations and if necessary, investigations. Should investigations by the ICC not be necessary, and the situation is being transferred back to a state or international organization for further action, the work of the integrated team will also be useful in ensuring a smooth transition, as well as in achieving any agreed victim-oriented goals. A good example of this will be where non-judicial monitoring of the state's case have been agreed upon as part of a victim-oriented qualified deference. Integrated Teams can work with the International Cooperation Section of the proposed

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[97] See ICC's Overall Response to the Independent Expert Review (2021) para 520, p. 109; ICC-OTP, 'Full Statement of the Prosecutor, Fatou Bensouda, on External Expert Review and Lessons Drawn from the Kenya Situation, 26 November 2019 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/261119-otp-statement-kenya-eng.pdf> accessed 29 September 2022 ('Statement of Former Prosecutor Bensouda on External Expert Review and Lessons Drawn From the Kenya Situation (2019)'); Report of the Independent Expert Review of the ICC (2020) paras 373-385, and their corresponding recommendations.
[98] ICC's Overall Response to the Independent Expert Review (2021) p. 30, para 144, and p. 109, para 520.
[99] Report of the Independent Expert Review of the ICC (2020) para 163.
[100] There may be a difference in the composition of this team. See ICC's Overall Response to the Independent Expert Review (2021) p. 109, para 520; For brief explanation about a possible change in the composition of an integrated team, see sub-section below on the proposed Cooperation Unit.

Complementarity Division to aid states where possible or to monitor their progress in achieving agreed goals.

3.3.3 Cooperation Unit

Securing and maintaining international cooperation for investigations and prosecutions of international crimes, and for addressing victims' needs and interests, can be complex.[101] The key is gaining and maintaining access to relevant networks, and galvanizing cooperation partners into taking required action in a timely fashion. For victims, the quality of cooperation feeds into the quality of investigations, prosecutions and reparations, or other forms of remedies.[102] This thesis proposes a uniquely structured Cooperation Unit to be regarded as the ICC's cooperation body which will benefit victims and the entire Court.[103] Although cooperation needs may differ across ICC organs,[104] it is feasible and budget friendly for the Court to have a single cooperation unit.[105] By being neutral, all organs of the Court can send and process cooperation requests through it, especially those relating to complementarity, while having regard to confidentiality. This Unit should be made up of cooperation experts with

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[101] See Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 3-4.
[102] See Schüller and Meloni, Quality Control in the Preliminary Examination of Civil Society Submissions (2018) pp. 523-526; Synthesis Report on "Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law" (2011) paras 10 -11.
[103] Currently the Registry transmits several cooperation requests on behalf of the Court. Rastan discusses some of the issues regarding the transmission of cooperation requests. see Rastan Rod, 'Testing Co-Operation: The International Criminal Court and National Authorities' (2008) 21 (2) Leiden Journal of International Law 431, pp. 447- 449.
[104] See Report of the Independent Expert Review of the ICC (2020) paras 757-758 on OTP's cooperation needs. The Registry may seek cooperation of different entities to execute Court ordered custodial sentences, or reparations while working with the VPRS and TFV.
[105] See ICC-OTP, 'Paper on Some Policy Issues Before the Court' (2003) pp. 2-3; Report of the Independent Expert Review of the ICC (2020) paras 757-760; ICC's Overall Response to the Independent Expert Review (2021) paras 525-530; It is to be expected that the OTP may want to retain one or two international cooperation experts of their own. See Report of the Independent Expert Review of the ICC (2020) paras 757-758. This means that the composition of the OTP's integrated team which will be embedded in the Situation Analysis Unit of the proposed Independent Complementarity Division may remain unchanged and can serve as the OTP's representative in the new Division.

experience in diplomacy, international relations, and regional politics. It should also have an ASP Liaison, and cooperation coordinators.

3.3.3.1 Cooperation Coordinators in the Proposed Cooperation Unit

There should be two positions for Coordinators: one for civil society organizations, including those representing victims,[106] and one for international and regional governmental organizations such as UN agencies, the AU, EU, and the OAS. The importance of these entities in the work of the ICC cannot be overemphasized.[107] The Court depends on third party information in the early stages of its proceedings[108] of which these organizations are crucial. They also have better access to affected communities and would in many cases build networks

[106] These entities make it easier to access CSOs, regional, and international organizations relevant for each situation before the Court. See United Nations, 'Civil Society' <https://www.un.org/en/civil-society/page/about-us> accessed 30 September 2022; Although there are numerous entities which fall under CSOs and international organizations, there have been a trend of umbrella organizations or unions that organize them. See The Coalition for the International Criminal Court, 'About the Coalition' <https://www.coalitionfortheicc.org/about-coalition-0> accessed 30 September 2022; FIDH, 'International Federation for Human Rights' <https://www.fidh.org/en/about-us/What-is-FIDH/> accessed 30 September 2022; InterAction, <https://www.interaction.org/about-interaction/> accessed 30 September 2022; The International Civil Society Centre <https://icscentre.org/about-us/our-story/> accessed 30 September 2022; Sudan Consortium <https://reliefweb.int/organization/sudan-consortium> accessed 30 September 2022; US Library of Congress 'Darfur Consortium- African and International Civil Society Action for Darfur' <https://www.loc.gov/item/lcwaN0012480/> accessed 30 September 2022; New York University Center for International Cooperation and work in ICC Situation countries, <https://cic.nyu.edu/about> and <https://cic.nyu.edu/programs> accessed 30 September 2022.

[107] See Killean and Moffett, Victim Legal Representation before the ICC and ECCC (2017) pp. 737-740; Tonny Raymond Kirabira, 'NGO influence In Global Governance: Achieving Transitional Justice in Uganda and Beyond' (2021) 10 (2) Cambridge International Law Journal 280, pp. 280-299 ('Kirabira, NGO influence In Global Governance: Achieving Transitional Justice in Uganda and Beyond (2021)'); Zoe Pearson, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' (2006) 39 (2) Cornell International Law Journal 243, pp. 243-284; Marlies Glasius, 'What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations' (2009) 31 (2) Human Rights Quarterly 496, pp. 496-520; Netsanet Belay and Japhet Biegon, 'Civil Society and International Criminal Justice in Africa Perspectives on the Proposed African Court of Justice and Human Rights' in Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (CUP 2019) pp. 1101-1124; Erika de Wet, 'Concurrent Jurisdiction of the International Criminal Court and the African Criminal Chamber in the Case of Concurrent Referrals' in Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (CUP 2019) pp. 180-197.

[108] See for example, Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021) p. 148.

and trust which the ICC can leverage.[109] They can be considered extended complementarity stakeholders whose efforts can be harnessed to support the work of the ICC.[110]

The proposed Cooperation Coordinators should ensure a good line of communication and cooperation between the Court and these extended stakeholders while having regard to confidentiality. These extended stakeholders can help generate or encourage states' willingness to fulfil their obligations by employing different means, including inducements, threat of sanctions, and actual sanctions.[111] The OAS's role in referring the Venezuela I situation to the ICC is an example of the kind of impact such organizations can have especially when motivated.[112] The ASP and some NGOs, have seen the need for this type of stakeholder involvement in complementarity.[113] The work of the proposed cooperation coordinators will contribute to faster development and implementation of unique approaches for each situation. Consequently, information gaps and trust issues can be bridged, and the needs of states, as well as cooperation partners who can help with the same can be identified earlier.[114]

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[109] See Report of the Independent Expert Review of the ICC (2020) p. 64, R 82 (iii).
[110] The challenges with the ICC's New York Liaison Office (NYLO) point to the fact that more needs to be done. See Report of the Independent Expert Review of the ICC (2020) paras 371-373; For recommendations on how this issue can be tackled, see below suggestions on staffing models and the role of the Registry.
[111] See Chapter Four discussions of regional pressure. See also Hyeran Jo and Beth A. Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) International Organization 443, pp. 444, 446-465.
[112] OAS Press Release E-057/18 'OAS Secretary General Expresses "Complete Support" for the Referral to the ICC of Investigation of Venezuela' (2018) <https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-057/18> accessed 26 September 2022; OAS, Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes Against Humanity in Venezuela (2nd edn, OAS OR OEA/Ser.D/XV.19 2021) March 2021; For the unofficial translation of the referral letter, see Mauricio Macri, Justin Trudeau, Iván Duque Márquez, Sebastián Piñera Echenique, Mario Abdo Benítez, and Martín Vizcarra Cornejo, 'Unofficial Translation of Referral Letter Referring the Situation in Venezuela to the ICC' <https://www.icc-cpi.int/sites/default/files/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf> accessed 30 September 2022.
[113] ASP Resolution RC/Res.1 (adopted on 8 June 2010); Synthesis Report on "Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law" (2011) paras 3, 10, 14; Synthesis Report on "Supporting Complementarity at the National Level: From Theory to Practice" (2012) para 19.
[114] Bekou, The ICC and Capacity Building at the National Level (2015) pp. 1254-1257.

3.3.3.2 ASP Liaison on Complementarity

There should be a position for an ASP liaison on complementarity for ease of communication between the proposed Independent Complementarity Division and the ASP. The limit to what can be communicated to the ASP liaison and the extent of their involvement in the work of the proposed Division will be determined by confidentiality and neutrality.[115] It has been the practice of the ASP to select two focal points for complementarity each year and these positions rotate from one State Party to another.[116] Their responsibility is to promote discussions and foster projects that enhance the implementation of the principle of complementarity, before, during and after the ASP's yearly sessions.[117] The proposed ASP liaison for complementarity can be the ASP focal points for the year. Alternatively, and to encourage continuity it can be a qualified member of staff from the ASP Bureau.

3.3.3.3 Benefits of the proposed Cooperation Unit

The proposed Cooperation Unit is attainable and crucial and can help with the ICC's challenges with different approaches to cooperation.[118] For example, the ICC's New York Liaison Office was created to enhance cooperation with the international community, CSOs included. Their mandate has not been fully realized in part due to varying approaches to communication

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[115] Newton, and Stahn make similar suggestions. See Newton, The Quest for Constructive Complementarity (2011) pp. 337-339; Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021) pp. 171-172: Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 3-4.

[116] For example, in 2020 it was Australia and Romania, in 2016 it was Sweden and Botswana, and in 2011 it was Denmark and South Africa. See ASP, Report of the Bureau on complementarity: Nineteenth Session of the ASP, 7-17 December 2020 – New York (ICC-ASP/19/22 8 December 2020); ASP, Report of the Bureau on Complementarity: Fifteenth Session 16-24 November 2016 –The Hague (10 November 2016); ICTJ, 'Greentree Meeting Advances Complementarity from Policy to Practice', 16 December 2011 <https://www.ictj.org/news/greentree-meeting-advances-complementarity-policy-practice> accessed 29 September 2022.

[117] See for example, ICTJ, 'Greentree Meeting Advances Complementarity from Policy to Practice', 16 December 2011 <https://www.ictj.org/news/greentree-meeting-advances-complementarity-policy-practice> accessed 29 September 2022.

[118] For a more detailed discussion on this, see Statement of Former Prosecutor Bensouda on External Expert Review and Lessons Drawn from the Kenya Situation (2019); Report of the Independent Expert Review of the ICC (2020) paras 373-385, and corresponding recommendations.

adopted by organs of the Court, which causes a disconnect between the New York Liaison Office, those it should be engaging with, and the Court.[119] The proposed Cooperation Unit can help with this issue.[120] As Schüller and Meloni who assert that

> "[c]ivil society plays a crucial role not only in documenting [large scale human rights violations and, in developing ways to sanction them. Victims CSOs and other stakeholders can] jointly discuss strategies about how to achieve criminal justice. The earlier local and international groups engage in the process, the better."[121]

Moreover, Stahn argues that involving this sector will help in achieving efficiency with complementarity.[122] It will help to address diverse expectations of justice by victims who are often non-homogenous and encourage support for the Court's work.[123] The ICC can also understand the challenges and difficulties these CSOs, regional and international organizations face in relation to international criminal justice. This can in turn have a positive impact on attitude towards the Court, as well as on messaging about the Court and its work.

3.3.4 The Complementarity Committee

The thesis proposes that the Complementarity Division should have a Complementarity Committee which should be its management arm. This Committee will oversee and approve the work done by the Independent Complementarity Division as a whole before situations move

[119]Report of the Independent Expert Review of the ICC (2020) paras 370-376, and corresponding recommendations.

[120] See section 2 above; Report of the Independent Expert Review of the ICC (2020) para 379.

[121] Schüller and Meloni, Quality Control in the Preliminary Examination of Civil Society Submissions (2018) p. 523.

[122] See Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) pp. 3-4, s. 2.1, and 2.2.3.

[123] Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) pp. 4-5.

on to the OTP for investigations, or to the Chambers for a decision, in case of admissibility issues requiring their attention.[124] It will be the main interface between the OTP and other Organs of the Court on complementarity matters. It will also serve as the unit to implement the pre-contentious phase of complementarity where amicable solutions that benefits victims are sought. In the event that the contentious phase is activated by means of an admissibility challenge, this Committee together with the Permanent LRV on Complementarity will be responsible for pioneering matters which are relevant to victims. The addition of this Committee as part of the complementarity mechanism is particularly important for bridging the gap between States Parties and the Court and minimizing the tension between them.[125]

The thesis proposes that members of this Committee be made up of experts elected by the ASP, but who will represent all States Parties. The Court may adopt the OAS's approach to the election of members of the Inter-American Commission who are elected in a personal capacity by the OAS General Assembly from a list of candidates proposed by the governments of the Member States. Each of those governments may propose up to three candidates who may be nationals of the State proposing them or of any other OAS Member State.[126] The Complementarity Committee should be composed of five members, including a chairperson.[127] The composition of the Committee will be one of a representative character, hence ensuring

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[124] Although different from the Referral Review Panel Which Kersten proposes, it can execute similar functions. See Kersten, The Politics of ICC Referrals – A Proposal (2012).
[125] Moffett, Stahn, and Newton also agree on this point that some sort of representation of States' Parties in complementarity mechanisms is needed. See Newton, The Quest for Constructive Complementarity (2011) pp. 336-337; Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021) p. 172; Moffett, Justice for Victims Before the ICC (2014) pp. 237-238.
[126] See OAS, Inter-American Commission on Human Rights (IACHR) About the IACHR Composition <https://www.oas.org/en/iachr/mandate/composition.asp> accessed 30 September 2022; Articles 35-38 American Convention on Human Rights.
[127] This post is akin to the president of the Commission in EU context. See Paul Craig and Gráinne de Búrca, EU Law: Text, Cases, and Materials UK Version (7th edn, OUP 2020) pp. 62-63 ('Craig and de Búrca, EU Law: Text, Cases, and Materials (2020)').

that each of the five committee members will represent one of the five geographical regions of ICC States' Parties.[128]

The requirement of independence of the proposed Complementarity Division is crucial and in line with the design of other institutional structures of international organizations tasked with addressing various states' violations of human rights, or other treaty provisions.[129] For example, the Inter-American Commission on Human Rights is responsible for *inter alia* receiving, analyzing and investigating human rights violations.[130] It was designed in such a way that protects its independence which is crucial for the achievement of its mandate.[131]

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[128] That is African States, Asia-Pacific States, Eastern Europe, Latin American and Caribbean States, and Western European and other States. This geographical allocation originates from the ASP. See Assembly of States Parties to the Rome Statute, 'The States Parties to the Rome Statute', <https://asp.icc-cpi.int/states-parties> accessed 30 September 2022. The staffing model for this complementarity division is supported by the current ASP Bureau composition which is designed in a way as to ensure equitable geographical representation and borrows from the Inter-American Commission's composition. See ICC ASP, 'Bureau of the Assembly' <https://asp.icc-cpi.int/bureau> accessed 30 December 2022; Inter-American Commission on Human Rights, 'IACHR Composition' <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/composition.asp > accessed 30 September 2022.

[129] Fact Sheets on the European Union European Parliament, 'The European Commission' <https://www.europarl.europa.eu/factsheets/en/sheet/25/the-european-commission> accessed 30 September 2022; European Commission Press Release IP/10/487 'European Commission Swears Oath to Respect the EU Treaties' (2010) <https://ec.europa.eu/commission/presscorner/detail/en/IP_10_487> accessed 30 September 2022; Alan Dashwood and others,
'Independence of EU Commission at Risk Over Spitzenkandidat Process' *EUobserver* (Brussels, 26 June 2014) <https://euobserver.com/opinion/124768> accessed 30 September 2022.

[130] Article 35 of the American Convention on Human Rights; IACHR, 'What is the IACHR?' <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp> accessed 24 September 2021; The defunct European Commission of Human Rights can be considered a good example. It was previously responsible for assessing and addressing human rights violations. See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol (1950), Articles 24-25 and 27-28 and 30-32, to access the 1950 Convention see <https://www.echr.coe.int/Documents/Archives_1950_Convention_ENG.pdf> accessed 20 September 2022; Refworld, 'Council of Europe: European Commission on Human Rights' <https://www.refworld.org/publisher/COECOMMHR.html#:~:text=Although%20the%20European%20Commission%20on,Rights%20from%201953%20to%201998.> accessed 30 September 2022.

[131] There remains challenges or shortcomings, but these could be more severe without the requirement of independence and neutrality. See Human Rights Watch, 'OAS Leader Undermining Rights Body Members Should Protect Commission's Credibility' 27 August 2020 <https://www.hrw.org/news/2020/08/27/oas-leader-undermining-rights-body> accessed 30 September 2022; International Commission of Jurists, 'Independence of the Inter-American Commission of Human Rights Must be Protected from Undue Political Interference', 1 September 2020 <https://www.icj.org/independence-of-the-inter-american-commission-of-human-rights-must-be-protected-from-undue-political-interference/> accessed 30 September 2022; José Miguel Vivanco and Tamara Taraciuk Broner, 'Why a Human Rights Icon Needs Its Independence', 2 September 2020 < https://www.hrw.org/news/2020/09/02/why-human-rights-icon-needs-its-independence> accessed 30 September

The different units discussed above which make up the composition of the proposed Independent Complementarity Division makes it a better alternative to the ICC's JCCD because of its (1) inclusive character, (2) increased transparency in the complementarity process, and (3) its ability to serve as a less-contentious platform for dialogue to achieve victim-oriented justice. The following section discusses its location and how it can interact with other ICC organs.

3.4 Location of the Proposed Independent Complementarity Division

The locations of organs and units of the ICC is not merely prosaic but is done with careful consideration of their unique mandates and the impact location can have on their achievement.[132] For example, the OPCV is an essential office for victims' representation before the ICC and is functionally independent, but it falls within the Registry for administrative purposes.[133] The VPRS which processes victims' applications for participation and reparations is also located within the Registry. This is logical because it is important that the OPCV can easily connect with victims and their representatives, understand their needs and interests, and effectively represent them. It is most beneficial that the proposed Complementarity Division

2022; Office of the High Commissioner for Human Rights Press Releases, 'Bachelet Urges End to Crisis Caused by Refusal to Reappoint Head of Inter-American Commission on Human Rights' (2020) <https://www.ohchr.org/en/press-releases/2020/08/bachelet-urges-end-crisis-caused-refusal-reappoint-head-inter-american> accessed 30 September 2022; For a discussion of how mandates play a role in how institutions are structured, see Beth A Simmons and Lisa L. Martin, 'International Organizations and Institutions' in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds), *Handbook of International Relations* (Sage Publications 2012) pp. 326-345; Devesh Kapur 'Processes of Change in International Organizations' in Deepak Nayyar (ed) *Governing Globalization: Issues and Institutions* (OUP 2002) pp. 334-354; Voeten 'Making Sense of the Design of International Institutions' (2019); Ignacio de la Rasilla, International Law and History Modern Interfaces (CUP 2021) pp. 283-307.

[132] See Barbara Koremenos, Charles Lipson and Duncan Snidal, 'The Rational Design of International Institutions' International Organization (2001) 55 (4) 761, p. 762.

[133] Regulation 81 (2) of the Regulations of the Court; International Criminal Court, 'Victims', <https://www.icc-cpi.int/about/victims> accessed 6 September 2022.

be located within the Registry for effectiveness in its ability to work with victims' units and other organs of the Court, nonetheless, it will remain functionally independent. Figure 5.2 below shows the current structure of the Registry, while figure 5.3 shows how the proposed Complementarity Division will fit into the Registry.

Figure 5.2 The Current Structure of the ICC's Registry

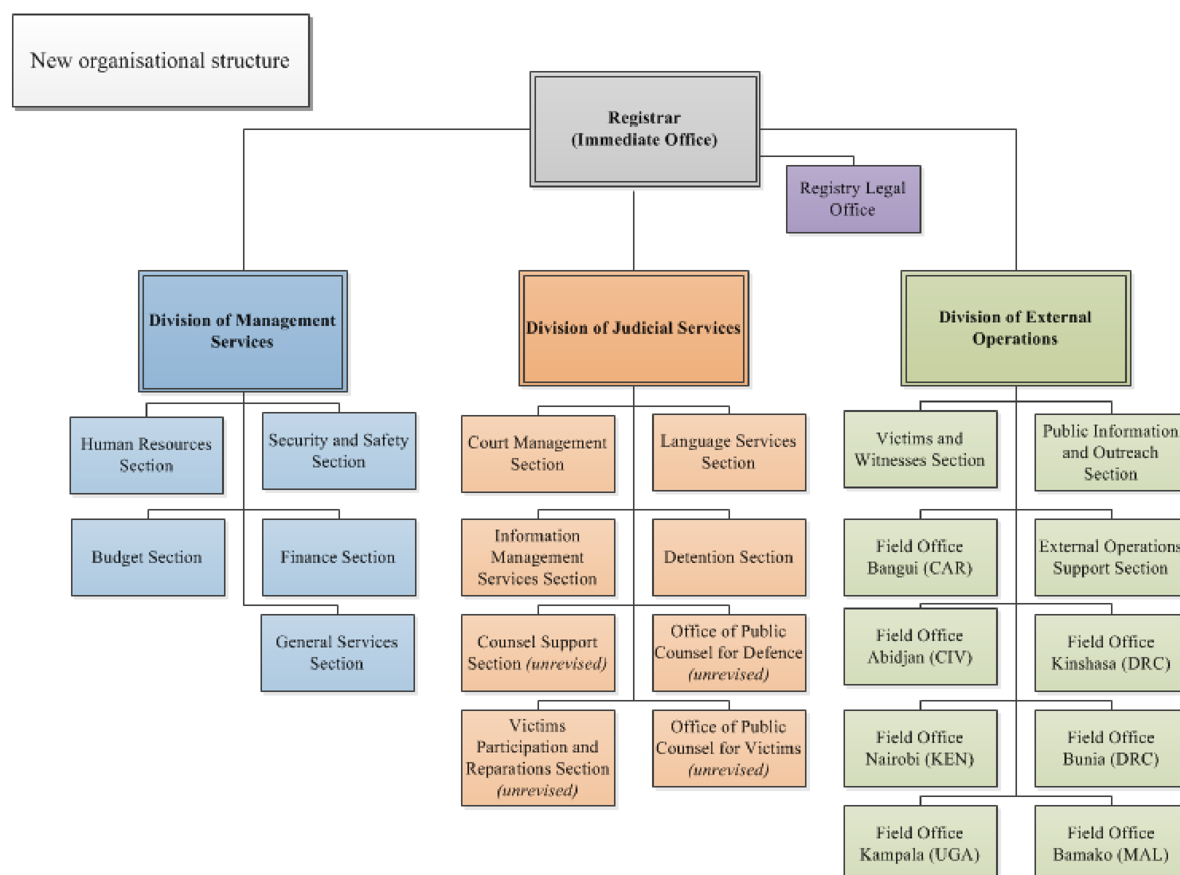
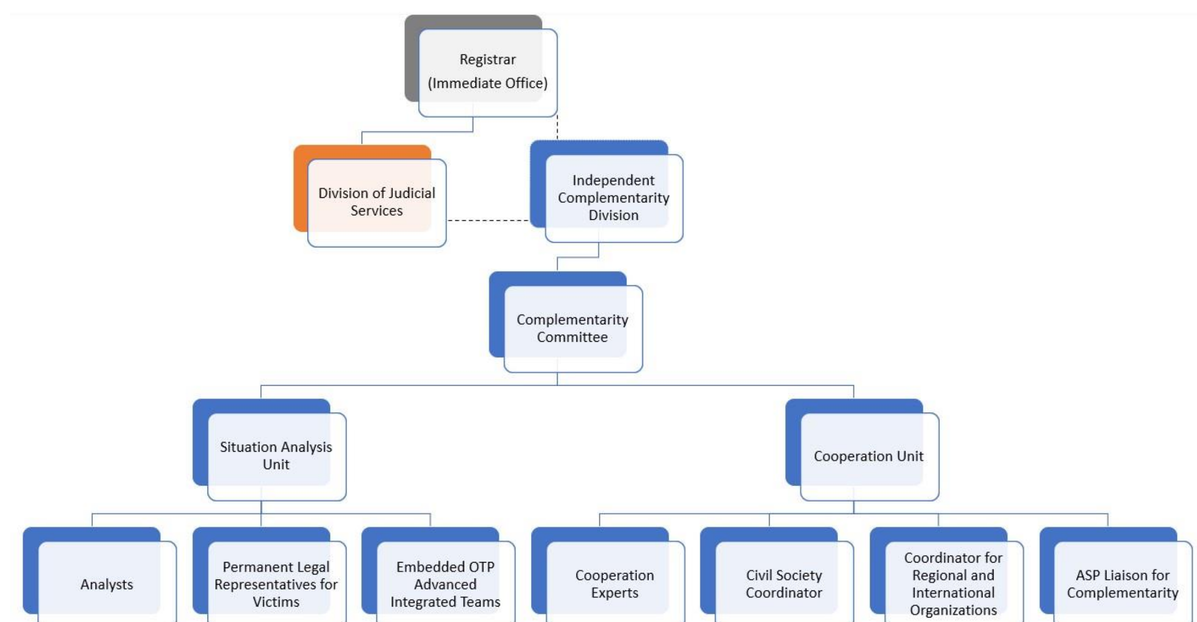


Figure 5.3

Proposed Complementarity Division



This proposal is beneficial for reasons of (1) neutrality, (2) efficiency, and (3) avoidance or at least minimization of task duplication.

3.4.1 Neutrality

The Registry is a neutral organ that provides services to all other organs so the ICC can function adequately.[134] The Registry's neutrality (i.e. being located as a separate organ, but accountable to the ICC Presidency) makes it possible for it to offer services in the form of judicial support to the OTP, defense, and victims' teams, to contribute to the management of the Court, and

[134] International Criminal Court, 'Registry', <https://www.icc-cpi.int/about/registry/default> accessed 30 September 2022. See also Article 43 of the Rome Statute. Locating the new body within the Registry is the best way forward as it cannot be created as a new organ since this requires an amendment of the Statute. See Article 34 ICCst.

external relations.[135] The Complementarity Division can be placed under the Registry and still remain functionally independent like the OPCV.[136] Also, locating it within the Registry is ideal because it makes it not liable to be subordinate to OTP interests.[137]

3.4.2 Efficiency and Avoidance of Task Duplication

This concerns both efficiency in communication, collaboration on tasks, and resource management. When located within the Registry, the proposed Independent Complementarity Division can communicate effectively with other victims' units on issues affecting victims from the complementarity stage. This brings some consolidation to efforts to make justice victim-oriented at the ICC.

There will be some efficiency in resource management because the proposed Division can use some resources already available to the Registry, or pool resources where necessary to reduce cost, and this can reduce task duplication.[138] One of the ways of achieving the latter is to merge[139] the Country Analysis Unit in the Registry[140] with the Situation Analysis Unit of the proposed Division as these teams will fall under the Registry and will to an extent be performing similar tasks.[141] The Registry's Country Analysis Unit is not responsible for

[135] For a chart on the structure of the Registry and the different units and sections within it, see, ICC, 'Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court' (August 2016) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/ICC-Registry-CR.pdf> 30 September 2022, p. 2 ('Comprehensive Report on the Reorganisation of the Registry of the ICC (2016)').
[136] International Criminal Court, 'Victims', <https://www.icc-cpi.int/about/victims> accessed 6 September 2022.
[137] See Article 43 (2) ICCst.
[138] See Report of the Independent Expert Review of the ICC (2020) para 49, R6-R7; For a chart showing the different categories of services the Registry provides and their nature, see Comprehensive Report on the Reorganisation of the Registry of the ICC (2016) p. 2 and 77-170.
[139] See Report of the Independent Expert Review of the ICC (2020) para 49.
[140] This unit is located within the Registry's External Operations and Support Section. For a chart which explains the location and function of the Registry's Country Analysis Unit, see Comprehensive Report on the Reorganisation of the Registry of the ICC (2016) pp. 2 and 4.
[141] See Report of the Independent Expert Review of the ICC (2020) para 49; Comprehensive Report on the Reorganisation of the Registry of the ICC (2016) p. 4.

conducting preliminary examination. Rather it serves as 'a centralized focal point for general information gathering and analysis regarding situation countries and other areas, and this task is crucial for supporting the operations of a number of Registry Sections, other Court organs and Registry clients.'[142] A merger of the Registry's Country Analysis Unit with the proposed Situation Analysis Unit will be ideal as the Registry and the proposed Complementarity Division are neutral, hence conflict of interest issues could be avoided. An alternative to merging both units is to transfer only the tasks relevant to preliminary examination to the proposed Situation Analysis Unit. Either option, i.e., a merger, or transfer of some relevant tasks, should eliminate task duplication, and free the Registry's Unit up for more focused tasks which can also benefit the proposed Complementarity Division.

Efficiency can also be achieved in connecting, liaising, and working with other organs of the Court through the Registry's participation in the ICC's Coordination Council-a regular meeting of the three principals of the Court, i.e., the President of the Court, the Prosecutor, and the Registrar.[143] Experts commissioned by the ASP to review the ICC in 2020 recommended that there should be an extended version of the Coordination Council which includes the heads of functionally independent offices,[144] and the ICC welcomed this suggestion.[145] As such, the head of the proposed Complementarity Committee who would be the overall head of the Independent Complementarity Division can be included in these meetings which offer the possibility of further integrating victims' issues into Court wide approaches.[146]

[142] Comprehensive Report on the Reorganisation of the Registry of the ICC (2016) p. 4, para 4.
[143] Report of the Independent Expert Review of the ICC (2020) para 51.
[144] Report of the Independent Expert Review of the ICC (2020) para 58.
[145] Report of the Independent Expert Review of the ICC (2020) para 43.
[146] Report of the Independent Expert Review of the ICC (2020) para 58, and R 11.

Furthermore, efficiency can be increased by leveraging on the Registry's administrative and management functions, since it manages different lists and roasters, for example, lists of counsels, and experts who can work with the Court in different capacities. The Registry also helps with organizing and coordinating outreach activities for the Court, including for the OTP.[147] Early outreach to affected communities and subsequently to victims of situations and cases before the ICC is crucial,[148] yet it has proven challenging for the entire Court.[149] Locating the proposed Independent Complementarity Division within the Registry will increase synergies in outreach efforts to victims and can contribute to some improvement due to the inclusive composition of the Division.[150]

4 Functions of the Independent Complementarity Division

The functions discussed in this section are functions of the Complementarity Division as a whole, with specific units identified where necessary. It is best to discuss their functions in two phases (1) a pre-contentious phase, i.e., the period from when communications about alleged Rome Statute crimes have been made to the ICC, up to the end of a preliminary examination

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[147] Comprehensive Report on the Reorganisation of the Registry of the ICC (2016) p. 2.

[148] See Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) p. 302.

[149] Clara Ramírez-Barat, 'Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice' (ICTJ 2011); FIDH, Victims' Rights before the ICC: A Guide for Victims, their Legal Representatives and NGOs' (FIDH 2007) ch III, pp. 1-11; FIDH, 'Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims´ Rights at the International Criminal Court' (November 2013) <https://www.fidh.org/IMG/pdf/fidh_victimsrights_621a_nov2013_ld.pdf> accessed 30 September 2022; The World Federalist Movement, and Institute for Global Policy, 'Review of the International Criminal Court' (June 2021) <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/RM-AP-Comments-WFM.pdf> accessed 30 September 2022; See Chapter Six, Section 2 on Applying Victim-oriented Complementarity to select situations.

[150] The Registry's Public Information and Outreach Section can work with the proposed Permanent Legal Representative for Victims on Complementarity issues, and the two Coordinators for CSOs and IOs. See Figures 5.2 and 5.3. See also Jennifer Easterday, 'Transforming Outreach and Engagement with Local Stakeholders' (International Justice Monitor, 15 July 2020) <https://www.ijmonitor.org/2020/07/transforming-outreach-and-engagement-with-local-stakeholders/> accessed 30 September 2022; Clara Ramírez-Barat, 'Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice' (ICTJ 2011).

phase without any admissibility challenge. (2) A contentious phase, i.e., the period from the end of a preliminary examination phase[151] when the OTP decides to commence an investigation or seek authorization for one, or once an admissibility challenge is launched.[152]

Adopting a phased approach to assessing complementarity issues before the Court is crucial for realizing the fight against impunity and pursuing victim-oriented justice. It is in the Court's best interest to lean towards a more cooperative relationship with states.[153] The purpose of the pre-contentious stage is to avoid or at least minimize tensions between the ICC and states, and to resolve issues between OTP, the defense, and victims while upholding the Rome Statute's aims.

4.1 Functions of the Proposed Complementarity Division in the Pre-Contentious Phase

4.1.1 Analysis of Communications and Engaging in Dialogues with States

In the pre-contentious stage, the proposed Independent Complementarity Division will receive and process communications regarding situations where international crimes may have been or are being committed and will engage with concerned states where necessary. Reviews of communications will be done by the proposed Situation Analysis Unit in consultation with the OTP via the advance integrated teams. If there is sufficient information at this stage to believe

[151] For discussions of the preliminary examination process and to increase efficiency while maximizing the process, see the various contributions to, Morten Bergsmo, Carsten Stahn, (eds) Quality Control in Preliminary Examination (Vol I and II, TOAEP 2018); Stahn, Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC (2017) pp. 413-434; Rosemary Grey and Sara Wharton, 'Lifting the Curtain: Opening a Preliminary Examination at the International Criminal Court' (2018) 16 (3) Journal of International Criminal Justice 593, pp. 593-621.

[152] The terms 'pre-contentious' and 'contentious' are derived from the EU's approach to the enforcement of EU law against breaches by Member States. See Craig and de Búrca, EU Law: Text, Cases, and Materials (2020) pp. 467-468.

[153] See Newton, The Quest for Constructive Complementarity, (2011) pp. 304-340; Newton, Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations (2021) pp. 143-173.

that crimes are being or may have been committed, the proposed Complementarity Committee can engage with states to dialogue and clarify any issues at this early stage. This includes, the (1) states' knowledge of the alleged situation and crimes, (2) what it has done or may do to address them, (4) how victims' interests will be protected; and (4) reminding the relevant state of its Rome Statute's obligations, and in the case of non-State Parties, their obligations under international law. In doing so, the Complementarity Committee takes the lead, while working with the Division's Cooperation Unit, and in close consultation with the OTP. The proposed Division acts as a neutral party to facilitate dialogue and where possible collaboration but maintaining a posture of the Court's readiness to act, should states fail to do so within an agreed timeline.[154]

The Inter-American Commission uses the non-contentious approach for friendly settlements between parties, but where this fails, they would proceed to contentious proceedings.[155] This method is also used by the European Commission when enforcing EU law.[156] Craig and de Burca opine that in the EU context, the pre-contentious phase is in part an elite channel where dialogue and communication are used for the amicable resolution of disputes involving EU

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[154] Article 17 ICCst. See also safeguards to prevent states from abusing qualified deference discussed in Chapter Four.

[155] Inter-American Commission on Human Rights, 'Petition and Case System Informational Brochure' (OAS 2010) <https://www.oas.org/es/cidh/docs/folleto/CIDHFolleto_eng.pdf> accessed 30 September 2022, paras 41-43

[156] Craig and de Búrca, EU Law: Text, Cases, and Materials (2020) pp. 485-486; For some statistics regarding the use of pre-contentious (pre-litigation) and contentious processes in enforcing EU law see, European Commission, 'Better Monitoring of the Application of Community Law' (16 May 2003) COM(2002)725; European Commission, 'Thirteenth Annual Report on Monitoring the Application of Community law' (14 October 1996) (96/C 303/01) COM(96) 600; European Commission, 'Sixteenth Annual Report on Monitoring the Application of Community Law' (9 July 1999) (1999/C 354/01) COM(1999) 301; EU Commission, 'Report from the Commission: Monitoring the Application of European Union law 2021 Annual Report (15 July 2022) COM(2022) 344 SWD(2022) 194; For examples of the detailed steps in cases against some member states from the 2021 reporting year of the Commission see European Commission, 'September Infringements Package: Key Decisions' <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_4681> accessed 30 September 2022; The defunct European Commission on Human Rights utilized this method. See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol (1950) Articles 28 and 30-32; see also Greer Steven, 'Europe, in Daniel Moeckli *et al*., (ed) *International Human Rights Law (3rd edn)*, (OUP 2017) p. 448.

Member States without recourse to litigation.[157] The overarching idea is to explore friendly settlements and other non-judicial options where necessary or refer the case to the relevant court after a deadline. In the Rome Statute context, if information provided does not meet the Rome Statute criteria-i.e., crimes within the jurisdiction of the Court and the gravity requirement, then there will be no need to proceed with the formal opening of a preliminary examination,[158] which will unnecessarily clog the Court.

4.1.2 Conducting Preliminary Examination

Following consultation with the OTP, if there is a decision by the Complementarity Committee to proceed with opening a preliminary examination, the Situation Analysis Unit will then take charge of this process of conducting detailed examination of the relevant situation in accordance with the complementarity regime. It will determine whether the jurisdictional, admissibility, and interests of justice criteria are met to warrant investigations.[159]

It is not unusual for preliminary examination to be carried out by the proposed Complementarity Division.[160] The drafting history of the Rome Statute show that a similar proposal was made but in relation to victims' triggering the jurisdiction of the Court. It was proposed that 'a special commission should be established within the court to review

[157] Craig and de Búrca, EU Law: Text, Cases, and Materials (2020) pp. 481-485.

[158] See Articles 15 (1)-(2), 17, and 53 (1) (a)-(c) ICCst. which cover the opening investigations, and addresses the issue of admissibility of a case and situations, of which preliminary examination is a first step into that. If crimes do not fall within the Court's jurisdiction it automatically bars any further analysis into the situation. If they fall within the jurisdiction of the Court but are not of sufficient gravity to warrant ICC's intervention, the same conclusion will be reached, only that the ICC may notify States to take action to prevent escalation or impunity.

[159] See Article 53 (1)(a)-(c) ICCst.; OTP's Policy Paper on Preliminary Examinations (2013) p. 2.

[160] The European Commission on Human Rights which was the first port of call for both individual and state applicants to the European Court of Human Rights (ECtHR). They played a vital role of assisting the ECtHR by determining the facts of a case, considering its admissibility. See Greer Steven, 'Europe' in Daniel Moeckli *et al.*, (ed) *International Human Rights Law (3rd edn)*, (OUP 2017) p. 448; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol (1950) Articles 24-25, 27-28 and 30-32.

complaints filed by individuals and to determine before the initiation of any further action whether the necessary criteria were met so as to avoid overloading the court.'[161] Nothing in the current Rome Statute framework prohibits such an arrangement where preliminary examination is conducted by an independent ICC Division while the OTP maintains access to the process.[162] Thus, this proposal can be implemented provided that the OTP will eventually make an independent decision on whether to proceed with the opening of an investigation.[163] What the structure of the proposed Division offers is better access for victims to be heard and kept informed,[164] transparency of the process, i.e., a way to improve prosecutorial accountability,[165] and to ensure that all proceedings are as victim-oriented as possible.

4.1.3 Facilitating Cooperation for Victim-oriented Justice

The Cooperation Unit of the proposed Complementarity Division should take the lead on cooperation for achieving victim-oriented complementarity. Their role during preliminary examination is (1) to simultaneously engage in multilateral dialogue; (2) to minimize any delays to justice; (3) find friendly or acceptable settlements where necessary, and (4) facilitate

[161] Report of the Ad Hoc Committee, UN GAOR 50th Session (A/50/22) 1995, para 117.
[162] Stahn makes a similar argument albeit in relation to giving the ASP a role in strengthening complementarity through dialogue and consultation. See Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 3, s. 1.3.3.3; See also FIDH, 'Preliminary Examinations at the ICC: An Analysis of Prosecutor Bensouda's Legacy' (September 2021) <https://www.fidh.org/IMG/pdf/fidh_preliminary_examinations_at_the_icc_stocktaking_report.pdf> accessed 30 September 2022, p. 13; Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) pp. 2-5, but more generally the discussions and findings throughout the document.
[163] This is derived from both literal and teleological interpretation of Articles 53 and 17 of the Statute, and related provisions of the core legal texts of the ICC.
[164] See FIDH, Victims' Rights before the ICC: A Guide for Victims, their Legal Representatives and NGOs' (FIDH 2007) ch IV, p. 20. This issue has not been completely settled in the Court's current practice.
[165] See Rosemary Grey and Sara Wharton, 'Lifting the Curtain: Opening a Preliminary Examination at the International Criminal Court' (2018) 16 (3) Journal of International Criminal Justice 593, pp. 593-621.

cooperation including for capacity building of states[166] to aid them in meeting their agreed victim-oriented minimum conditions.

While the proposed Division dialogues with states about the findings of the ongoing preliminary examination, it also uses the opportunity to inquire about their needs to aid them in fulfilling their Rome Statute obligations in a victim-oriented manner.[167] The Cooperation Unit can then work with cooperation partners to support states. For example, if the need is more informational due to limited resources and expertise, the ICC, may help with this in accordance with the Statute. The OTP has leaned towards doing so, and cooperation provisions of the Court provide a legal basis to aid states in this manner.[168] However, if the need is financial and infrastructural, an evaluation can be made on how to proceed and this may involve international and regional entities, as well as broad transitional justice and rule of law mechanisms.[169]

4.1.4 Advancing the Negotiation and Conclusion of a Complementarity Understanding

The Complementarity Division will be responsible for facilitating negotiations for a complementarity understanding between the OTP, concerned states, victims, and other relevant stakeholders.[170] The Complementarity Division's duty in this regard is to ensure that the negotiations are carried out with victims' interests, while informing victims through their representatives, of the inherent limitations that may impact their expectations of justice. The

[166] See Emily Hunter, 'Establishing the Legal Basis for Capacity Building by the ICC' in M Bergsmo (ed), Active Complementarity: Legal Information Transfer (TOAEP 2011) p. 73.
[167] See Chapter Four, Section 3.1.3.
[168] See ICC-OTP's Policy Paper on preliminary Examinations (2013), para 102; ICC-OTP, Policy on Situation Completion (15 June 2021) paras 29, 51, 68, 97-98; OTP's Strategic Plan: 2019-2021, paras 51 and 53; Also, see the various prosecutorial strategies and corresponding reports which reflect some aspects of capacity building without expressly referring to it as such. ICC-OTP, 'Policies and Strategies' <https://www.icc-cpi.int/about/otp/otp-policies> assessed 28 September 2022
[169] See Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 4, s. 2.2.3.
[170] See Chapter Four Section 3.1.3.4 on the content of a complementarity understanding.

rights of the accused must be protected in this process. One practice which could be adopted by the proposed Complementarity Division is that of status conference utilized by the Chambers in ensuring fair and expeditious trails.[171] Such a method can facilitate consultations with the OTP, concerned states, cooperation partners, victims and defense counsel. This can happen where an accused has been identified or in early stages of proceedings where no accused have been identified but the Office of the Public Counsel for the Defence can nonetheless represent the general interests of the defense in an ad hoc fashion in keeping with the practice of the Court.[172]

The final complementarity understanding should reflect agreed goals and commitments of all relevant stakeholders. The proposed Division can monitor states' implementation of such goals. As Stahn notes, 'monitoring under the authority of the Prosecutor is 'party-driven' and potentially 'confrontational' rather than cooperation oriented,'[173] this makes the proposed Division preferable. However, judicial monitoring by the chambers remains an alternative, and the ICC may consider monitoring by an external organization similar to the ICTY's approach.[174]

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[171] See Rule 132 (2) of the ICC Rules of Procedure and Evidence.

[172] See Regulation 77 of the Regulations of the Court; Regulations 143-144 of the Regulations of the Registry; ICC, 'Defence', <https://www.icc-cpi.int/about/defence> accessed 25 December 2022; ICC, 'The Defence' Fact Sheet, CC-PIDS-FS-08-001/13_Eng <https://www.icc-cpi.int/sites/default/files/DefenceEng.pdf> accessed 25 December 2022; Sarah Wharton, 'Judges, the Registry, and Defence Counsel' in Margaret M. deGuzman and Valerie Oosterveld (eds) *The Elgar Companion to the International Criminal Court* (Edward Elgar 2020) pp. 213, 220-221; The International Bar Association, 'Lawyers and the ICC' <https://www.ibanet.org/ICC_ICL_Programme/Lawyers_and_the_ICC> accessed 25 December 2022.

[173] Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 252.

[174] See Organization for Security and Co-operation in Europe (Permanent Council) 'Decision No. 673 Co-Operation Between the Organization for Security and Co-operation in Europe and The International Criminal Tribunal for The Former Yugoslavia' 556th Plenary Meeting (19 May 2005) PC.DEC/673; OSCE Press Release, 'OSCE and ICTY Say Justice System of Bosnia and Herzegovina Capable of Efficiently Processing War Crimes Cases' (2011) <https://www.osce.org/bih/84632> accessed 30 September 2022; Decision on Referral of Case Under Rule 11 *Bis*, Trbic, IT-05-88/l-PT, TC (Referral Bench), ICTY, 27 April 2007, para 44, fn. 147.

4.1.4.1 Contingencies

The proposed complementarity understanding is expected to have a binding effect or at least carry more weight than traditional MoUs because of its purpose, and considering the parties involved in its conclusion. A case can certainly be made that where the complementarity understanding is concluded and signed, the relevant ICC chamber should make a ruling of authentication to bind all parties involved, thereby increasing the chances of compliance with the agreements. There is no guarantee that this may be acceptable in all situations as while the OTP and victims may be willing to obtain such ruling, certain states may be wary of judicial intervention at this stage. Indeed, the whole purpose of the approach to victim-oriented complementarity discussed here is to minimize tension and provide a neutral platform for constructive dialogue and agreement of achievable goals. It is expected that built-in safeguards of monitoring and potential judicial intervention can encourage compliance. As Bekou notes, '[t]he effect of monitoring is preemptive. States wishing to avoid having the case removed from their national courts and taken back to The Hague are more likely to abide by international standards.'[175]

The ICTY as part of its completion strategy utilized monitoring by the ICTY Prosecutor in implementing its Rule 11 *bis* referrals to ensure that states abided by set standards, for example of fair trial.[176] In many instances it was successfully implemented by the Organization for

[175] Olympia Bekou, 'Rule 11 Bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence' (2009) 33 (3) Fordham International Law Journal 722, p. 787 ('Bekou, Rule 11 Bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence (2009)').

[176] Rule 11 *bis* of the ICTY Rules of Procedure and Evidence provides guidelines for the transfer of cases from the ICTY to domestic courts. See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991: Rules of Procedure and Evidence (adopted 11 February 1994, IT/32/Rev.50 2015).

Security and Co-operation in Europe (OSCE).[177] It also contributed to ensuring that national mechanisms of Bosnia and Herzegovina (BiH) fulfilled their obligations. The OSCE concluded that BiH's judicial system was capable of processing war crimes cases in line with international and national standards, albeit certain human rights improvement where needed.[178]

At any time in the pre-contentious phase process described here, the OTP, the defence, and States' Parties retain their respective rights to challenge any part of the process, or to disagree on suggested solutions. It is foreseeable that disputes between the OTP and the Complementarity Division, or between both, and States Parties may not be resolved through a pre-contentious process. This will require a decision by the Chambers in accordance with their duties to safeguard the complementarity process.[179] In the same manner, where victims are unsatisfied with the content of a complementarity understanding, they may through the procedures available to them submit their observations or requests to the Chambers to receive a ruling in accordance with Rome Statute framework.

It is expected that the proposals regarding the pre-contentious phase will contribute to the reduction in the number of cases that result in admissibility challenges because of the unique composition of the proposed Complementarity Division, as well as the use of a phased approach, i.e., a pre-contentious, then a contentious phase. However, it is possible that they

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[177] Organization for Security and Co-operation in Europe (Permanent Council) 'Decision No. 673 Co-Operation Between the Organization for Security and Co-operation in Europe and The International Criminal Tribunal for The Former Yugoslavia' 556th Plenary Meeting (19 May 2005) PC.DEC/673; OSCE Press Release, 'OSCE and ICTY Say Justice System of Bosnia and Herzegovina Capable of Efficiently Processing War Crimes Cases' (2011) <https://www.osce.org/bih/84632> accessed 30 September 2022; Decision on Referral of Case Under Rule 11 Bis, Trbic, IT-05-88/l-PT, TC (Referral Bench), ICTY, 27 April 2007, para 44, fn. 147.

[178] See OSCE Press Release, 'OSCE and ICTY Say Justice System of Bosnia and Herzegovina Capable of Efficiently Processing War Crimes Cases' (2011) <https://www.osce.org/bih/84632 > accessed 30 September 2022; OSCE, 'The Processing of ICTY Rule 11bis cases in Bosnia and Herzegovina: Reflections on Findings from Five years of OSCE Monitoring, A report of the Capacity Building and Legacy Implementation Project' (January 2010) <https://www.osce.org/files/f/documents/c/f/118964.pdf> accessed 30 September 2022, pp. 7-8.

[179] See Articles 15 (4) and (5), 18 (4)-(7), and 19 ICCst.

may fail to achieve a complementarity understanding in some situations. In other instances where a complementarity understanding was concluded, there may be compliance issues which may result in admissibility challenges, or a decision in favor of an ICC re-initiation of proceedings. Where a contentious phase is inevitable, the proposed Complementarity Division will have unique responsibilities in their capacity as the guardian of the interests of justice, as opposed to the OTP and States which may have interests to exercise their respective jurisdictions.

4.2 Functions of the Independent Complementarity Division During the Contentious Phase

4.2.1 Promoting Victim-oriented Conditions Throughout the Remainder of the Lifetime of a Situation or Case

The contentious phase will usually commence once an admissibility challenge has been officially launched by a state or the accused or where the defense, victims and the OTP disagree on certain issues and may resort to judicial intervention for resolving them. Any of these instances would send a signal that efforts to find a workable solution has failed. While such cases before the relevant ICC Chamber will involve the ICC, and the defense, as parties to the proceedings, concerned states and victims are considered participants.[180] Although states have higher procedural complementarity rights than victims. Given the neutral position of the Complementarity Division, it can participate in admissibility proceedings in that capacity[181]

[180] Victims can be considered as parties in certain reparations proceedings, for example where they appeal a reparations order.

[181] This is comparable to the role played by the Commission of the European which remains involved in the proceedings before the relevant courts, but with the aim of promoting the EU's interests, including those relating

with the sole duty of promoting and protecting the conditions and standards agreed to in the complementarity understanding. Alternatively, it can provide relevant support to the OPCV, and Legal Representatives of victims in their efforts to defend victims' rights in such litigations.

4.2.2 Recommending and Supporting the Implementation of Victim-oriented Qualified Deference

During preliminary examination, the strict textual interpretation of admissibility criteria to a situation may warrant an ICC intervention mainly because states which are willing, may fall short of proving ability at the time of examination or admissibility challenge.[182] The proposed Complementarity Division will wholistically examine a state's willingness through evidence provided in the communication and dialogue process. Its findings will be used to justify a recommendation of a victim-oriented qualified deference. Deference may come in the form of the OTP suspending its right to seek an authorization of an investigation from the Chamber,[183] the Chamber's postponement of a decision on admissibility while awarding extra time for states to develop national proceedings,[184] or a decision to defer but with monitoring to ensure adherence to victim-oriented conditions.[185]

to human rights in the region. See Article 258 (2) and 260 (2) of the Treaty of Functioning of the European Union (TFEU).

[182] Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, para 56.

[183] This could be because the proposed Complementarity Division recommended qualified deference at the pre-contentious stage.

[184] This is applicable where an admissibility challenge has been lodged. Note that at this time the OTP may be required to pause its proceedings and give the state a chance to develop its own cases. See Articles 18 (6) and 19 of the Statute.

[185] See Chapter Four on victim-oriented qualified deference, and minimum victim-oriented conditions.

4.3 Importance of the Proposed Division for the Functioning of Rome Statute System

The creation of the proposed Complementarity Division will contribute to the effective functioning of the system of complementarity. It is inclusive because it involves not only the OTP, but victims and other important stakeholders. Its inclusive composition was in part to maintain lines of communication and dialogue through this neutral platform and to reduce tension. For instance, in situations involving African states, beside communicating with the relevant states, the proposed Cooperation Unit can work with the African Union and if necessary, ECOWAS counterparts to better manage the situation.[186] Also, Due to the composition of the proposed Complementarity Division, it can complement other efforts of the Court to develop and strengthen cooperation. Victims can benefit when states work with the proposed Division and other stakeholders to increase states' capacity to fulfil their obligations in a victim-oriented manner. The ICC will be able to focus on investigating and prosecuting the most responsible perpetrators.[187] Yet in doing so, it will through the proposed Division, adequately carry victims along within the remit of the Statute.

The uncertainty of desired enforcement actions by the Court and the ASP can undermine justice for victims.[188] This is particularly the case where cooperation requests or orders are not

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[186] In addition to the discussion in Chapter Four Section 2.2.2 on transforming ICC-AU relationship, see Benson Chinedu Olugbuo, 'Challenges in the Relationship Between the ICC and African States: The Role of Preliminary Examinations under the First ICC Prosecutor' in Morten Bergsmo and Carsten Stahn (eds) Quality Control in Preliminary Examination (Vol I, TOAEP 2018) pp. 317-337; Erika de Wet, 'Concurrent Jurisdiction of the International Criminal Court and the African Criminal Chamber in the Case of Concurrent Referrals' in Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (CUP 2019) pp. 180-197.

[187] See ICC's Overall Response to the Independent Expert Review (2021) para 93.

[188] See Joint Dissenting Opinion of Judge Luz Del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa from the Judgment in the Jordan Referral re Al-Bashir Appeal, *Situation in Darfur*, *Sudan*, ICC-02/05-01/09-397-Anx2, AC, ICC, 6 May 2019, para 194; For the main judgment, see Judgment in the Jordan Referral re Al-Bashir Appeal, *Situation in Darfur*, *Sudan*, ICC-02/05-01/09-397, AC, ICC, 6 May 2019.

implemented and in a timely fashion, whether in relation to arrest warrants, or seizure for reparations purposes. In the Darfur, Sudan situation, in relation to Jordan's refusal to comply with requests to arrest and surrender Al Bashir, Judge Ibáñez Carranza and Judge Balungi Bossa noted the importance of cooperation and enforcement actions on justice for victims in ICC situations.[189] As such, bolstering cooperation efforts through the work of the proposed Division benefits the ICC which lacks an enforcement mechanism.

4.4 The Implementation the Proposal for a Structural Change at the ICC, and its Limitations

4.4.1 Budgetary Issues

Budgetary considerations can impact the adoption of both legal and structural changes in any context, including at the ICC. For example, in 2020, it was noted that the JCCD's Preliminary Examination Section was made up of 12 staff members, 'Three Situation Analysts (P-3), six Associate Situation Analysts (P-2), two Assistant Situation Analysts (P-1), and one Head of Section (P-5). No additional resources have been allocated to it since an increase in 2014.[190] The proposals made here may not require significant budget increases.[191] They are actionable by employing *inter alia*, a reinterpretation of existing provisions of the Rome Statute and other core ICC texts,[192] as well as the use of different staffing models to minimize cost. The proposed

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[189] Joint Dissenting Opinion of Judge Luz Del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa from the Judgment in the Jordan Referral re Al-Bashir Appeal, *Situation in Darfur*, *Sudan*, ICC-02/05-01/09-397-Anx2, AC, ICC, 6 May 2019, Para 194.

[190] Report of the Independent Expert Review of the ICC (2020) para 180, fn. 105; ICC, Proposed Programme Budget for 2020 of the International Criminal Court (ICC-ASP/18/10 25 July 2019) paras 261-265.

[191] See Report of the Independent Expert Review of the ICC (2020) paras 17-19.

[192] ICC, 'Core Legal Texts' <https://www.icc-cpi.int/resource-library/core-legal-texts> accessed 30 September 2022.

structure means that some existing ICC positions may be absorbed into some proposed units.[193] The JCCD, and integrated teams are made up of staff members based on different staffing models,[194] including permanent and short-term needs-basis staff. This thesis recommends that the same approach be used for filling the positions of the proposed Division, of which the use of rosters will be useful.[195] These rosters should be updated regularly so they are readily available when situations arise.[196] Additionally, there are neutral-costs positions, i.e., those that are already existent at the ICC, and which can contribute to the work of the proposed Complementarity Division without additional costs. For instance, the proposed Division can use the services of support and admin staff who work in the Registry.

4.4.2 Remarks Regarding the Scope of the Proposal

As earlier stated, the proposals made here have focused on legal and institutional arguments on why and how a new complementarity mechanism should be created, but some political issues were considered, and contributed to how the proposals are shaped. One of the pertinent questions which may be asked in relation to creating a new complementarity division is whether the ASP has the political will to do so while avoiding any encroachment into the

[193] See Report of the Independent Expert Review of the ICC (2020) para 49 and R. 7; ICC's Overall Response to the Independent Expert Review (2021) paras 44-48.

[194] Report of the Independent Expert Review of the ICC (2020) paras 180, fn. 105, 124 and 179; Proposed Programme Budget for 2020 of the International Criminal Court (ICC-ASP/18/10 25 July 2019) paras 261-265 and 278-337.

[195] The report of the review of the ICC contained recommendation regarding short-term appointments and local recruitment, Report of the Independent Expert Review of the ICC (2020) paras 170-170, 225, and 743. In the Afghanistan situation some Afghan CSOs raised concerns regarding outreach to victims, and the need for a consultant with country-specific knowledge and skills to be hired. See Annex D to the Transmission of a "Motion Seeking Remedies for Information and Effective Outreach", *Situation in Afghanistan*, ICC-02/17-143-AnxD-Red, PTC II, ICC, 17 June 2021, paras 12- 13. If not already in existence, the Registry can liaise with each state representative in the ASP as well as the two proposed coordinators of CSOs and IOs to create and maintain two unique rosters-one for all languages spoken in each State Party's territories, and the second for local and foreign experts with knowledge of local politics and history in each situation country.

[196] Regarding the impact of lack of expertise on situation countries, see Report of the Independent Expert Review of the ICC (2020) paras 167-168, 170-171, in particular 225.

independence of the ICC as whole. Both the ICC and the ASP have recognized the need to increase efficiency in the implementation of complementarity.[197] Civil society organizations and international organizations have shown different levels of willingness and commitment to aid the Court in doing so. For example, the implementation of complementarity and issues of cooperation featured in the 2010 Kampala Review Conference[198] and continue to feature as priority issues in the ASP's yearly sessions.[199] Some of the discussions have not resulted in concrete steps, at least not in the manner proposed here. However, these go to show that there is a fledgling political will which can be galvanized to make concrete progress. What this thesis offers is a design strategy, one way for the ASP and the ICC to foster victim-oriented justice through a change in how complementarity is interpreted.

Another important question is how to implement such an inclusive complementarity mechanism, i.e., better access for other stakeholders beside victims, without compromising the independence of the Court. Measures can be put in place to ensure that some stakeholders do not usurp their access to the Court to push forward their own agenda. Nonetheless, they may prefer to keep a safe distance from the Court to avoid complicating matters in communities where they work and to maintain their own unique voice and mandate.[200] For this reason, the thesis proposed a method of coordination of stakeholders through Cooperation Coordinators of

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[197] See Report of the Independent Expert Review of the ICC (2020) para 26; ICC's Overall Response to the Independent Expert Review (2021) paras 16-18.

[198] ASP Draft resolution on Complementarity Resolution ICC-ASP/8/Res.9, Annex VII (March 2010); Review Conference of the Rome Statute, 'Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap, Informal Summary by the Focal Points' (Annex V(c) RC/112010); Bergsmo, Bekou and Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools (2010) pp. 791-811.

[199] See for example, ASP Resolution ICC-ASP/9/Res.3 on Strengthening the International Criminal Court and the Assembly of States Parties (adopted on 10 December 2010); ASP Resolution ICC-ASP/19/Res.6 on Strengthening the International Criminal Court and the Assembly of States Parties (adopted on 16 December 2020) para 133 and annex I to the same document, para. 14(a).

[200] See for example the Independent Expert Review's comments on the need to delicately balance such relationships, Report of the Independent Expert Review of the ICC (2020) paras 377-379.

the proposed Complementarity Division within limits of the Rome Statute framework and of the principle of confidentiality.

5 Conclusion

Operationalizing the principle of complementarity involves several processes and complementarity decisions affect the interests of multiple stakeholders including victims. Currently the OTP's JCCD takes the lead on implementing complementarity, but it lacks the neutral and inclusive structure required to effectively protect victims' interests in the process. The JCCD itself must work in accordance with the OTP's own interests which may not always align with that of victims, and in some cases may not be the best approach to combating impunity. There have been calls in the past to create a new complementarity mechanism, but no clear and detailed framework has been put forward to this effect. This chapter explored the second aspect of the thesis's second research question of how to adequately accommodate victims' interests in the complementarity process to aid the ICC in the fight against impunity and in achieving victim-oriented justice. The thesis has proposed the creation of a uniquely structured Independent Complementarity Division whose main goal is to implement victim-oriented complementarity. The Division should take over the conduct of preliminary examination from the JCCD and should ensure that victims issues are adequately presented and protected in all ICC proceedings and decisions. The proposed Division's functions could generate other positive cumulative effects which can offset some of the flaws with the complementarity regime. Chapter Six looks at possible outcomes of applying victim-oriented complementarity to current situations before the ICC through the proposed Division.

Chapter Six: Exploring Possible Outcomes of Victim-oriented Complementarity Applied Through the Proposed Independent Complementarity Division

1 Introduction

The ICC's case law on victims' participation has developed over the years but victims' right to participate in complementarity proceedings, including preliminary examinations and investigations, remain uncertain.[1] Victims are not represented in the JCCD, and this can impact their ability to effectively defend their interests throughout all stages of ICC proceedings. This thesis proposed a reinterpretation of the principle of complementarity in a way that accommodates victims' interests. It also proposed the creation of an inclusive complementarity mechanism which makes room for victims to be represented, thereby using complementarity to foster victim-oriented justice in The Hague and in domestic jurisdictions. There is a need for an in-depth analysis of the impact of these proposals on ICC situations and cases, but this would only be possible after they have been implemented in the Court's practice. As such, this chapter aims to show potential outcomes of applying the thesis's proposals to ongoing ICC situations originating from all possible scenarios,[2] while respecting the rights of the accused. It examines the Uganda, Central African Republic (CAR) I and II, Libya, Kenya, and Afghanistan situations. Where necessary, it makes mention of other situations, for instance as a form of

[1] See Rudina Jasini and Gregory Townsend (eds), Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice (University of Oxford 2020) pp. 1-42; See Tibori-Szabó and Hirst, Victim Participation in International Criminal Justice: Practitioners' Guide (2017); Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) p. 21.

[2] See Article 13 ICCst.

comparison. The thesis argues that while some findings are specific for the situations examined per trigger mechanism, majority of the findings are applicable to situations arising out of those trigger mechanisms by adapting to the peculiarities of such situations.

It is important to acknowledge at the outset that the arguments made in this chapter while adopting an optimistic tone, do not suggest that there will be no difficulty in applying victim-oriented complementarity through the proposed Complementarity Division. For instance, the level of cooperation[3] mainly from concerned states would determine the level of challenge the proposed Division must overcome in carrying out its functions. Cognizant of this, the chapter suggests ways to navigate such difficulties.

This chapter has two main parts. The first part looks at the role of cooperation in shaping the strategies of the proposed Division in interpreting and applying complementarity to ICC situations and cases. The second part considers how the proposed Division can apply the different aspects of victim-oriented complementarity (flexibility with the time requirement, victim-oriented qualified deference, a complementarity understanding) to the situations examined. The chapter concludes by reiterating that the design of the proposed Independent Complementarity Division is one way for the ASP and the ICC to push forward the fight against impunity and justice for victims in the Hague and in domestic jurisdictions.

[3] For a discussion of cooperation which gives an insight into the ASP's and ICC's perspectives on the matter, see, Anniken Ramberg Krutnes, 'Reflections of the Facilitator for Cooperation in the Hague Working Group, 2012–2015' in Olympia Bekou and Daley Birkett (eds) *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill, Nijhoff 2016) pp. 248-267.

2 The Continuing Thread of Cooperation

Cooperation is the launch pad for applying victim-oriented complementarity and the tool to sustain it. State cooperation is not the only type required but it is arguably the most important because without it, the ICC would face a greater challenge in its efforts to conduct investigative or judicial proceedings.[4] Cooperation from other stakeholders such as civil society organizations and international organizations whose work support the Court's is also necessary, particularly since the ICC lacks an enforcement mechanism comparable to those available to states.[5]

Situations from each trigger mechanism would activate a different level of state cooperation with the ICC. On one end of the spectrum are self-referred situations from the territorial state or the state whose national is implicated in the commission of Rome Statute crimes.[6] Such situations potentially have the best prospects of cooperation since the concerned state would have 'voluntarily' referred the situation to the Court.[7] On the other end of the spectrum are UNSC referrals which may generate the lowest level of state cooperation because referred states may feel coerced to engage with the Court.[8] Situations which fall in the middle are those

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[4] Olympia Bekou and Daley Birkett (eds) Cooperation and the International Criminal Court: Perspectives from Theory and Practice (Brill, Nijhoff 2016) Forward VII; The University of Nottingham Human Rights Law Center, 'Report of Expert Workshop on Cooperation and the International Criminal Court' (18-19 September 2014) para 17 <https://www.nottingham.ac.uk/hrlc/documents/specialevents/cooperation-and-the-icc-final-report-2015.pdf> accessed 1 October 2022, ('University of Nottingham Report on Expert Workshop on Cooperation and the International Criminal Court (2014)'); Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) p. 7.

[5] See Chapter Four; Kirsch, The Role of the International Criminal Court in Enforcing International Criminal Law (2007) pp. 546-547; Bekou, The ICC and Capacity Building at the National Level (2015) pp. 1252-1253; Bekou and Birkett (eds), Cooperation and the International Criminal Court (2016) Forward VII, and p. 1.

[6] See Article 12 (2) (a) and (b) of the Rome Statute.

[7] *Katanga*, Reasons for Oral Decision on Admissibility, ICC-01/04-01/07-1213-tENG, 15 July 2009, paras 74-79, and 94-5; Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, paras 59-60, 80-82; Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493 28 April 2020, paras 15-21.

[8] Before 2020, the OTP reported its difficulties with Sudan in relation cooperation. See for example, University of Nottingham Report on Expert Workshop on Cooperation and the International Criminal Court (2014) para 9; ICC-OTP, 'Twenty-Fourth Report of the Prosecutor of the International Criminal Court to the United Nations

referred by State Parties other than the concerned state, and those opened *proprio motu* by the Prosecutor following authorization by the Chamber. The level of cooperation in the latter situations may not be as high as in self-referred situations, but they may not be as low as what would be expected of UNSC referrals.

The proposed Complementarity Division must seriously consider varying levels of cooperation when engaging with states and in devising strategies to apply complementarity. This means that their work and their approach to victim-oriented complementarity may differ based on the trigger mechanisms. For example, *proprio motu* situations would usually involve a longer preliminary examination. The proposed Division may recommend awarding extra time to states coupled with facilitating capacity building to help them fulfil their Rome Statute obligations in a victim-oriented manner. In situations from State Party referrals, they may consider burden sharing outlined in a complementarity understanding containing victim-oriented conditions. These suggestions are further examined in the second part of this chapter. The following section makes general remarks on the degree of cooperation in situations from the three trigger mechanisms beginning with State Party Referrals.

Security Council Pursuant to UNSCR 1593 (2005)' 13 December 2016, paras 2-4, 6-13, 33-34 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/161213-otp-rep-24-darfur_Eng.pdf> accessed 1 October 2022, (The Prosecutor's Twenty-Fourth Report on the Darfur, Sudan Situation to the UNSC, 13 June 2016'); ICC-OTP, 'Thirty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005)' 9 June 2021, paras 3-9, paras 21-25, 32-47 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2021-06-09-otp-report-unsc-darfour-eng.pdf> accessed 1 October 2022; ICC-OTP, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, to the United Nations Security Council on the Situation in Darfur, Pursuant to Resolution 1593 (2005)' 17 January 2022 <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-united-nations-security-council-situation-darfur> accessed 1 October 2022 (Prosecutor Khan's Statement to the UN on the Situation in Darfur, 17 January 2022'); Erika de Wet, 'Referrals to the International Criminal Court Under Chapter VII of the United Nations Charter and the Immunity of Foreign State Officials' (2018) 112 American Journal of International Law Unbound 33, pp. 33-37; Nerina Boschiero, 'The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593' (2015) 13 (3) Journal of International Criminal Justice 625, pp.625-653 ; Olympia Bekou, 'Dealing with Non-cooperation at the ICC: Towards a More Holistic Approach' (2019) 19 (6) International Criminal Law Review 911, pp. 911-931.

2.1 Securing Cooperation in Situations Referred by State Parties

Articles 13 (a) and 14 of the Rome Statute provide that a situation in which Rome statute crimes have been committed can be referred to the ICC by a State Party.[9] The drafters of the Statute expected that situations arising out of this trigger mechanism will usually come from one or more States Parties referring situations concerning another state party.[10] However, this version of State Party referral has only been used in the Venezuela I,[11] and Ukraine[12] situations.[13] The more common trigger mechanism under Article 13 (a) and 14 is self-referral, i.e., a State Party referring a situation concerning their own state to the ICC. Uganda,[14] DRC,[15] Central African Republic (CAR) I and II,[16] Mali,[17] Palestine,[18] and Venezuela II,[19] situations were self-referred.

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[9] See Article 13 (a) and 14 ICCst.

[10] See, Oscar Solera, 'Complementary Jurisdiction and International Criminal Justice', (2002) 84 Revue Internationale de la Croix-Rouge/International Review of the Red Cross, p. 159; Mahnoush H. Arsanjani and Michael Reismann, 'The Law-in-action of the International Criminal Court' (2005) 99 (2) American Journal of International Law 385, p. 386; Megret and Samson, Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials (2013) p. 572; Darryl Robinson, 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse' (2011) 9 (2) Journal of International Criminal Justice 355, pp. 361-366; Schabas, The International Criminal Court: A Commentary on the Rome Statute (2016) p. 387-390.

[11] ICC, Venezuela I, Situation in the Bolivarian Republic of Venezuela I, ICC-02/18 <https://www.icc-cpi.int/venezuela> accessed 12 September 2022.

[12] Note that Ukraine is not a State Party to the Rome Statute, but it has twice accepted the Court's jurisdiction over alleged Rome Statute crimes occurring in its territory from 21 November 2013 to 22 February 2014, and secondly on an open-ended basis from 20th February 2014. While the Prosecutor was preparing to seek authorization to open an investigation into the Situation, a group of 43 State Parties to the Rome Statute referred the situation to the ICC, hence the Prosecutor was able to move forward with opening an investigation into the Situation. See *Situation in Ukraine*, ICC-01/22 (Situation referred to the ICC by 43 States Parties: March - April 2022) <https://www.icc-cpi.int/ukraine> accessed 1 October 2022.

[13] See Article 12 (3) ICCst.

[14] *Situation in Uganda*, ICC-02/04 (Situation referred to the ICC by the Government of Uganda January 2004) <https://www.icc-cpi.int/uganda> accessed 1 October 2022.

[15] *Situation in the Democratic Republic of the Congo*, ICC-01/04, (Situation referred to the ICC by the DRC Government: April 2004) <https://www.icc-cpi.int/drc> accessed 1 October 2022.

[16] *Situation in the Central African Republic*, ICC-01/05 (Situation referred to the ICC by the CAR Government: December 2004) <https://www.icc-cpi.int/car> accessed 23 September 2022 and *Situation in the Central African Republic II*, ICC-01/14 (Situation referred to the ICC by the CAR Government: May 2014) <https://www.icc-cpi.int/carII> accessed 23 September 2022.

[17] *Situation in the Republic of Mali*, ICC-01/12, (Situation referred to the ICC by the Government of Mali: July 2012) <https://www.icc-cpi.int/mali> accessed 1 October 2022.

[18] *Situation in the State of Palestine*, ICC-01/18 (On 22 May 2018 Palestine referred to the Prosecutor the Situation since 13 June 2014) <https://www.icc-cpi.int/palestine> accessed 1 October 2022.

[19] *Venezuela II*, ICC-01/20 (Situation referred by the Government of the Bolivarian Republic of Venezuela: February 2020) <https://www.icc-cpi.int/venezuela-ii> accessed 1 October 2022.

In self-referred situations, the relative speed in which the ICC moves from conducting preliminary examinations into opening an investigation could be a pointer to the level of cooperation it received.[20] It is true that in these types of situations, preliminary examinations may be expedited[21] compared to *proprio motu* investigations which begin with Article 15 communications usually from other entities seeking OTP's engagement in the situation.[22] Other factors may play a role in how quick the Court can conduct its proceedings, for example, the amount of workload and resources it has at its disposal. Some statistics on the different trigger mechanisms would be useful to show that self-referral situations tend to progress quicker compared to situations from other trigger mechanisms.

The DRC situation was referred by the DRC Government in April 2004, and the ICC opened an investigation into the situation in June of the same year.[23] The Ugandan Government referred the situation in Northern Uganda to the ICC in January 2004, and by July 2004 an investigation was opened.[24] The first situation from the Central African Republic, CAR I was referred to the ICC in December 2004 and the Court opened an investigation in May 2007. CAR II was referred by the CAR Government in May 2014, and by September 2014 an

[20] See Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) pp. 7, 17-21, and 38.
[21] See ICC, 'Preliminary examination Venezuela II' ICC-01/20, <https://www.icc-cpi.int/venezuela-ii> accessed 1 October 2022.
[22] See Article 15 (6) and 53 (1) of the Statute, Regulation 7 (a) of the Regulations of the OTP, and Rule 104 of the Rules of Procedure and Evidence; Regulation 25 (1) of the Regulations of the Office of the Prosecutor; *Situation in the State of Palestine*, ICC-01/18 (On 22 May 2018 Palestine referred to the Prosecutor the Situation since 13 June 2014) <https://www.icc-cpi.int/palestine> accessed 1 October 2022.
[23] See *Situation in the Democratic Republic of the Congo*, ICC-01/04, (Situation referred to the ICC by the DRC Government: April 2004) <https://www.icc-cpi.int/drc> accessed 1 October 2022; Lubanga and Ntaganda Arrest Warrant, ICC-01/04–02/06–20-Anx2, 21 July 2008, para 22; Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) pp. 18-19.
[24] See *Situation in Uganda*, ICC-02/04 (Situation referred to the ICC by the Government of Uganda January 2004) <https://www.icc-cpi.int/uganda> accessed 1 October 2022; Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) p. 18.

investigation was opened.[25] The Mali situation was referred to the Court by the Malian Government in July 2012 and the ICC opened an investigation in January 2013.[26] The Palestine situation is the most unusual situation as it took about six years to go from the commencement of preliminary examinations (January 2015) to investigations in 2021.[27] There were jurisdictional questions adjudicated by ICC judges and which should be factored into the time between opening a preliminary examination into this situation and opening an investigation. From the foregoing, on average it takes the ICC 20 months to open an investigation following a preliminary examination. This is based on the six referred situations currently under investigation, including the unusual Palestine situation and its jurisdictional issues. If the situation in Palestine is set aside, it takes the ICC approximately nine months to move from conducting preliminary examinations into opening an investigation. The DRC situation is she shortest as it took two months. Generally, the length of time fluctuates between two-six months.[28]

State Party non-self-referral situations take on average 23 months from preliminary examination to investigation, although the situation in Ukraine took less than one month. *Proprio motu* investigations takes on average approximately 47 months from preliminary examination to opening an investigation. The UNSC referrals also presented an interesting

[25] CAR I appears to be an unusual situation within the self-referred trigger mechanism because it took the Court 2.5 years to open an investigation. This could be because the ICC was relatively new at the time, its workload was increasing since it was already dealing with DRC, and Uganda situations. See *Situation in the Central African Republic*, ICC-01/05 (Situation referred to the ICC by the CAR Government: December 2004) <https://www.icc-cpi.int/car> accessed 23 September 2022.
[26] See *Situation in the Republic of Mali*, ICC-01/12, (Situation referred to the ICC by the Government of Mali: July 2012) <https://www.icc-cpi.int/mali> accessed 1 October 2022.
[27] See *Situation in the State of Palestine*, ICC-01/18 (On 22 May 2018 Palestine referred to the Prosecutor the Situation since 13 June 2014) <https://www.icc-cpi.int/palestine> accessed 1 October 2022; Decision on the 'Prosecution Request Pursuant to article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine', *Situation in the State of Palestine*, ICC-01/18-143, 5 February 2021, para 109.
[28] (CAR 1: 29 months, CAR II: 4 months, DRC: 2 months, Uganda: 6 months, Mali: 6 months, Palestine: 6.2 years approximately 74 months). See ICC, 'Situations under investigations' <https://www.icc-cpi.int/situations-under-investigations> 6 September 2022.

finding. To date, the UNSC has referred two situations to the ICC. The first was the Darfur, Sudan, situation,[29] and the second, was the Libya situation.[30] It takes the Court two months on average between receiving the referrals and opening an investigation. In Libya it took a month while in Sudan it took three months. In these two cases, the speed at which investigations were opened may not be attributable to Sudan and Libya's cooperation, rather it may be in part due to the impetus of the UNSC's 'backing'. It may also be due to the attention and reaction of the international community to the events in Sudan and Libya, like what is obtainable in the Ukraine situation.

The statistics from the situations discussed suggest that *ceteris paribus*, ICC proceedings progress quicker where state cooperation is forthcoming due to the situation being self-referred by them, especially in relation to the execution of arrest warrants.[31] This is beneficial for the Court's activities to the extent that that it neither limits the ICC's ability to conduct a timely, impartial, and broad examination, nor its ability to implement complementarity in a victim-oriented manner.

The thesis argues that in self-referral situations where state cooperation is available, the Court must be mindful of national political dynamics.[32] This is necessary to avoid being implicated in fostering what may be seen as victor's or one-sided justice,[33] as some states may manipulate

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[29] See *Situation in Darfur*, *Sudan*, ICC-02/05 (Situation referred to the ICC by the United Nations Security Council: March 2005) <https://www.icc-cpi.int/darfur> accessed 1 October 2022; UNSC S/RES/1593 (31 March 2005).
[30] *Situation in Libya*, ICC-01/11 (Situation referred to the ICC by the United Nations Security Council: February 2011) <https://www.icc-cpi.int/libya> accessed 1 October 2022; UNSC S/RES/1970 (26 February 2011).
[31] Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) pp. 16-21.
[32] See Clark, Chasing Cases: the ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda (2011) pp. 1180-1203; Clark, Distant Justice: The Impact of the ICC on African Politics (CUP 2018).
[33] Kersten, The Politics of ICC Referrals – A Proposal (2012).

self-referrals for their own interests.[34] There is also the possibility that the self-referring state may make its cooperation conditional and may withdraw cooperation where certain conditions change. This could be because of a change in the state's political interests, or for fears that the ICC will investigate and prosecute those other than the persons the referring state intended the ICC to investigate. Such concerns were raised in the self-referred Uganda situation discussed below.[35]

2.2 Securing Cooperation in UNSC Referrals

The second trigger mechanism provided under Article 13 (b) of the Rome Statute is through the UNSC acting under Chapter VII of the UN Charter. UN member states vested the UNSC with the primary responsibility for the maintenance of international peace and security which includes the protection of human rights.[36] As mentioned in the preceding section, the UNSC referred the Darfur, and Libya situations to the ICC.[37] Neither Sudan nor Libya are States Parties to the Rome Statute. The five permanent members of the UNSC often have their own interests in such situations, which may underlie UNSC referrals.[38] Compared to self-referred

[34] Jaya Ramji-Nogales, 'Bespoke Transitional Justice at the International Criminal Court' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015) p. 111.
[35] Paola Gaeta, 'Is the Practice of 'Self-Referrals' a Sound Start for the ICC?' (2004) 2 (4) Journal of International Criminal Justice 949, pp. 949-952; M. Cherif Bassiouni, 'The ICC — Quo Vadis?' (2006) 4 (3) Journal of International Criminal Justice 421, pp. 421-427; Kersten, The Politics of ICC Referrals – A Proposal (2012); See also Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) p. 38.
[36] United Nations, Charter of the United Nations, (signed 26 June 1945, in force 24 October 1945) 1 UNTS XVI, Articles 24.
[37] UNSC S/RES/1593 (31 March 2005); UNSC S/RES/1970 (26 February 2011).
[38] For an exposition on UNSC Referrals to the ICC, including issues of legality and politics, see Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 (2) Journal of International Criminal Justice 333, pp. 333-352; Louise Arbour, 'The Relationship Between the ICC and the UN Security Council' (2014) 20 (2) 195, pp. 195-201; United Nations Security Council, 'Security Council Members', <https://www.un.org/securitycouncil/content/security-council-members> accessed 1 October 2022; Alexandre Skander Galand, , UN Security Council Referrals to the International Criminal Court: Legal

situations, a UNSC referral is more likely to be contentious from the onset given that states will want to oppose such an intervention which they may consider as an intrusion into their sovereignty.

For the purposes of victim-oriented complementarity, the main difference in the developments in Darfur, Sudan, and Libya situations is the existence of willingness to engage and cooperate with the ICC. When the Darfur referral was made, Sudan was under the leadership of Omar Al-Bashir who the ICC indicted in relation to the situation. It did not come as a surprise that Sudan was unwilling to engage with the Court[39] and this meant that cooperation at that stage was non-existent. Sudan sought ways to exploit the principle of complementarity through establishment of multiple national mechanisms and their purpose and impact were questionable.[40] This situation gave rise to non-cooperation decisions by the ICC against several states[41] including South Africa and Jordan who are State Parties, albeit in relation to arresting

Nature, Effects and Limits (Brill 2018); Gabriel M. Lentner 'UN Security Council Referrals to the ICC and the Principle of Legality' (EJIL: Talk, 12 November 2021) <https://www.ejiltalk.org/un-security-council-referrals-to-the-icc-and-the-principle-of-legality/> accessed 1 October 2022.

[39] Decision on the Defence Request to Have an MOU Registered in the Record of the Case and on Reclassification of Filings, *Ali Kushayb*, *Situation in Darfur*, *Sudan*, ICC-02/05-01/20-323, PTC II, ICC, 26 March 2021, para 6.

[40] See for example Nouwen, Complementarity in the Line of Fire (2013) pp. 244-336; Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) p. 39.

[41] See Nerina Boschiero, 'The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593' (2015) 13 (3) Journal of International Criminal Justice 625, pp. 626-653; Decision on the non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, *Al Bashir*, *Situation in Darfur*, *Sudan*, ICC-02/05-01/09-267, PTC II, ICC, 11 July 2016; Decision on the Non-compliance by the Republic of Djibouti with the Request to arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, *Al Bashir*, *Situation in Darfur*, *Sudan*, ICC-02/05-01/09-266, PTC II, ICC, 11 July 2016; The Prosecutor's Twenty-Fourth Report on the Darfur, Sudan Situation to the UNSC, 13 June 2016, para 13; Erika de Wet, 'Referrals to the International Criminal Court Under Chapter VII of the United Nations Charter and the Immunity of Foreign State Officials' (2018) 112 American Journal of International Law Unbound 33, pp. 33-37.

and transferring Mr Al Bashir.[42] The level of non-cooperation in the situation was highlighted by Prosecutor Khan who stated that

> "For a variety of reasons over the last 17 years, including the non-cooperation of the government of Sudan by the previous administrations, there were no field investigations in the country. And [Former Prosecutor Bensouda hibernated for a long period the Darfur situation] so that investigations did not mature."[43]

With the change of government, and since 2020, Sudan's approach to the ICC appears to be shifting towards one of openness to cooperate.[44] The OTP signed an MoU with Sudan, but this is not public, and from the Prosecutor's statement, it may have the arrest and transfer of suspects as its focus.[45] Even so, the Prosecutor noted that cooperation has not materialized as expected.[46] These recent developments coupled with the uncertainties in the country[47] merit a comprehensive analysis of the situation beyond what the thesis can offer at this time. Further

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[42] Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, *Al Bashir*, *Situation in Darfur*, *Sudan*, ICC-02/05-01/09-302, PTC II, ICC, 6 July 2017; Judgment in the Jordan Referral re Al-Bashir Appeal, Situation in Darfur, Sudan, ICC-02/05-01/09-397, AC, ICC, 6 May 2019.
[43] Prosecutor Khan's Statement to the UN on the Situation in Darfur, 17 January 2022 (emphasis added).
[44] ICC-OTP, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a media Briefing in Khartoum, Sudan: "There is an Urgent Need for justice in Sudan. Sustainable Peace and Reconciliation are Built on the Stabilizing Pillar of Justice"' 20 October 2020 <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-media-briefing-khartoum-sudan> accessed 1 October 2022; ICC Press Release on the Conclusion of Prosecutor Khan's First Visit to Sudan and the Conclusion of an MoU (2021).
[45] According to the Prosecutor, "Transfer of any suspect is an important step towards achieving justice but should be preceded and accompanied by substantive and ever deepening cooperation by the Sudanese authorities (…)" See ICC Press Release on the Conclusion of Prosecutor Khan's First Visit to Sudan and the Conclusion of an MoU (2021).
[46] ICC-OTP, Thirty-Fifth Report of The Prosecutor of The International Criminal Court to The United Nations Security Council Pursuant to Resolution 1593 (2005) 23 August 2022 <https://www.icc-cpi.int/sites/default/files/2022-08/20220823-otp-report-darfur-sudan-eng.pdf> accessed 1 October 2022; Prosecutor Khan's Statement to the UN on the Situation in Darfur, 17 January 2022.
[47] Human Rights Watch, 'World Report 2022: Sudan Events of 2021' <https://www.hrw.org/world-report/2022/country-chapters/sudan> accessed 1 October 2022; UN Meetings Coverage: Security Council 9113TH Meeting (AM) SC/15002, 'Despite First Trial on War Crimes, Thousands of Displaced Persons in Darfur Still Without Justice, International Criminal Court Prosecutor Tells Security Council' (2022) <https://press.un.org/en/2022/sc15002.doc.htm> accessed 1 October 2022.

analysis on the possible outcomes of applying victim-oriented complementarity in UNSC referrals will focus on Libya.

2.3 Securing Cooperation in *Proprio motu* situations

Proprio motu situations arise out of the third trigger mechanism under Articles 13 (c) and 15 of the Rome Statute.[48] The Rome Statute drafting history shows that states were concerned about an over-wielding of power by an ICC prosecutor, hence they sought ways to limit this, particularly in *proprio motu* situations.[49] Others argued that the Prosecutor should be vested with powers so they can efficiently execute their tasks which in many instances will not be welcomed by states.[50] These concerns suggest that obtaining cooperation in *proprio motu* situations may be more challenging, even if it may not rise to the level of challenges associated with UNSC referrals. Article 15 of the Rome Statute represents a compromise as while the Prosecutor can initiate investigations *proprio motu* based on communications received, the Pre-

[48] See Article 13 (c) and 15 ICCst.
[49] See Articles 15, 17 and 53 ICCst; ILC Draft Statute for an International Criminal Court with commentaries (1994) para 4; PrepCom Report Vol. 1 (March-April and August 1996 Proceedings) paras 150-152; Philippe Kirsch and John T. Holmes. 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 (1) The American Journal of International Law 2, pp. 8-9; Carsten Stahn, 'Judicial Review of Prosecutorial Discretion: Five Years On' in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, Nijhoff 2009) p. 265; Ignaz Stegmiller 'Commentary on Article 15' (30 June 2016) in Case Matrix Network, Commentary on the Law of the International Criminal Court <https://www.casematrixnetwork.org/index.php?id=336#4021> Accessed 23 September 2022.
[50] See PrepCom Report Vol. 1 (March-April and August 1996 Proceedings) para 149; Bergsmo, Morten and Jelena Pejic 'Commentary on Article 15: Prosecutor' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article-by-Article* (2nd edn, Baden-Baden: Nomos 2008) pp. 581–593.

Trial Chamber must authorize such investigations.[51] This was the case in Kenya,[52] Cote D'Ivoire,[53] Georgia,[54] Burundi,[55] Myanmar,[56] Afghanistan,[57] and Philippines[58] situations.

There are unique developments in the Kenya and the Afghanistan situations which allow for an analysis of how the proposed Independent Complementarity Division would have pioneered victim-oriented complementarity. For example, all cases at the ICC arising out of the Kenya situation have collapsed.[59] The Afghanistan situation is the first time a state filed a deferral request under Article 18 of the Statute which provides states with jurisdiction an opportunity to request that the ICC suspend their proceedings in favor of proceedings in domestic courts. The Afghanistan situation is useful to see how victims' interests could be protected in such an instance, because a well implemented deferral which carries victims along would foster the aims of the Rome Statute.

[51] See Article 15 (1) ICCst.; Chantal Meloni, 'Proprio Motu Investigation: International Criminal Court (ICC)' *Max Planck Encyclopedia of International Procedural Law* (MPEiPro 2019).
[52] *Situation in the Republic of Kenya*, ICC-01/09 <https://www.icc-cpi.int/kenya> 19 September 2022; Gabrielle Lynch and Miša Zgonec-Rožej, 'The ICC Intervention in Kenya' (Chatham House, AFP/ILP 2013/01 2013) <https://www.chathamhouse.org/sites/default/files/public/Research/Africa/0213pp_icc_kenya.pdf> accessed 1 October 2022.
[53] *Situation in the Republic of Côte d'Ivoire*, ICC-02/11 <https://www.icc-cpi.int/cdi> accessed 1 October 2022. The investigation opened after authorization of the Pre-Trial Chamber on 3 October 2011
[54] *Situation in Georgia*, ICC-01/15 <https://www.icc-cpi.int/situations/georgia> accessed 1 October 2022. The investigation commenced after authorization of the Pre-Trial Chamber on 27 January 2016.
[55] *Situation in the Republic of Burundi*, ICC-01/17 <https://www.icc-cpi.int/burundi> accessed 1 October 2022. The investigation opened after authorization by the Pre-Trial Chamber on 25 October 2017.
[56] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19 <https://www.icc-cpi.int/bangladesh-myanmar> accessed 1 October 2022. The investigation opened after authorization from the Pre-trial Chamber on 14 November 2019.
[57] *Situation in the Islamic Republic of Afghanistan*, ICC-02/17 <https://www.icc-cpi.int/afghanistan> accessed 1 October 2022.The investigation was opened following authorization of the Appeals Chamber on 5 March 2020.
[58] *Situation in the Republic of the Philippines*, ICC-01/21 <https://www.icc-cpi.int/philippines> accessed 1 October 2022. The investigation was opened after authorization from the Pre-Trial Chamber on 15 September 2021.
[59] Except the administration of justice cases.

3 Victim-oriented Complementarity Through the Proposed Independent Complementarity Division: What Are the Prospects?

Having considered the role of cooperation in achieving victim-oriented complementarity in each of the trigger mechanisms, this part examines how the proposed Complementarity Division can apply complementarity to select situations based on the level of cooperation obtainable in each situation. Victim-oriented complementarity discussed in this thesis includes awarding states extra time to develop approaches to justice which carry victims along and benefit them substantively. It also includes victim-oriented qualified deference with victim-oriented conditions and monitoring mechanisms to ensure state compliance and the protection of the rights of the accused. The agreement with states should be contained in a complementarity understanding following consultation with victims.[60] In all instances, the basis for declaring a situation or case admissible or inadmissible must be the complementarity framework interpreted and applied while reading victims' needs into such decisions. This framework should not be set aside even when the OTP's and states' interests align, for example due to what has been referred to as a 'waiver of complementarity' by states.[61] This ensures that the Court can follow a systematic approach to complementarity albeit one that would be context specific.

It should be noted that due to space constraint and to avoid repetition, not all aspects of victim-oriented complementarity are discussed here in relation to the situations from the same trigger mechanism. For example, the *Yekatom* admissibility is more relevant for demonstrating victim-

[60] See Decision Pursuant to article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022, para 36.

[61] See Andreas Th. Müller and Ignaz Stegmiller, 'Self-Referrals on Trial: From Panacea to Patient' (2010) 8 (5) Journal of International Criminal Justice 1267, pp. 1267-1294; Nouwen, Complementarity in the Line of Fire (2013) p. 114.

oriented qualified deference in instances of state party referrals because it involves an actual case where qualified deference was raised. Nonetheless, the discussion and findings are applicable to Uganda because like CAR, the Uganda situation was self-referred, and both Uganda and CAR have domestic mechanisms (the International Crimes Division, and the Special Criminal Court respectively) for dealing with Rome Statute crimes. In the Afghanistan Situation, the focus is on how the proposed Division could have better advanced victims' rights with respect to deferral requests. Qualified deference is not proposed, as deferral to the current Afghan authorities at this time would not be advisable[62] unless this is in the context of pursuing justice for victims of the situation in third countries or on the territory of other countries for example the US, Poland, Romania, and Lithuania, all of which are states with jurisdiction over the situation.

The following section examines strategies for applying different aspects of victim-oriented complementarity in the Uganda, CAR, Libya, Kenya, and Afghanistan situations. It begins by considering the issue of cooperation for each situation, and depending on the level of cooperation, some recommendations are made as to how the proposed Complementarity Division can proceed in the relevant situation.

[62] See Decision Pursuant to article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022.

3.1 Applying Victim-oriented Complementarity in State Party Referrals: Uganda

3.1.1 Securing Cooperation in the Uganda Situation

In January 2004 Uganda referred the situation concerning the Lord's Resistance Army (LRA) in Northern and Western Uganda to the ICC.[63] For the material time,[64] the LRA fought against the Ugandan government.[65] Several commentators as well as the ICC[66] note the cycles of victimization by different forces some of which were linked to the Ugandan Army-Ugandan People's Defense Force (UPDF).[67] Six months after the referral, the Prosecutor opened an investigation into the situation.[68] The referral was significant because it came early after the ICC first became operational in July 2002. Uganda showed willingness to cooperate with the Court,[69] although the referral appeared as a tool of the Ugandan Government against the LRA

[63] See Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, *Situation in Uganda*, ICC-02/04-1, ICC Presidency, 6 July 2004; *Situation in Uganda*, ICC-02/04.

[64] Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended On 27 September 2005, *Situation in Uganda*, ICC-02/04-01/05-53, PTC II, ICC, 13 October 2005, Paras 31-32.

[65] *Kony and Vincent Otti*, *Situation in Uganda*, 'Case Information Sheet' <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/KonyEtAlEng.pdf> accessed 1 October 2013; Trial Judgment, *Ongwen*, *Situation in Uganda*, ICC-02/04-01/15-1762-Red, TC IX, ICC, 4 February 2021, paras 10-11 ('*Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021').

[66] *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021.

[67] Human Rights Watch, 'Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda' 20 September 2005 <https://www.hrw.org/report/2005/09/20/uprooted-and-forgotten/impunity-and-human-rights-abuses-northern-uganda> accessed 1 October 2022; Moffett, Justice for Victims Before the ICC (2014) pp. 197-200; Chris Dolan, Social Torture: The Case of Northern Uganda, 1986–2006 (Berghahn Books 2009); Phuong Pham and others 'When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda' (UC Berkeley Human Rights Center, Payson Center for International Development Tulane University, and ICTJ December 2007); Human Rights Watch, 'Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda' 20 September 2005 <https://www.hrw.org/report/2005/09/20/uprooted-and-forgotten/impunity-and-human-rights-abuses-northern-uganda> accessed 1 October 2022.

[68] *Situation in Uganda*, ICC-02/04, <https://www.icc-cpi.int/uganda> accessed 1 October 2022.

[69] Victor Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) 31 (3) Human Rights Quarterly 655, pp. 655-691 ('Peskin, Caution and Confrontation in the ICC's Pursuit of Accountability in Uganda and Sudan (2009)'); Alexander K.A. Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court' (2009) 50 (1) Virginia Journal of International Law 107, pp. 108-109; Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) p. 17-18, and 38; Pascal Turlan, 'The International Criminal Court Cooperation Regime – A Practical Perspective from the Office of the Prosecutor' in Olympia Bekou and Daley Birkett (eds) *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill, Nijhoff 2016) p. 69; See also The International Criminal Court Act 2010 (UG) Supplement No 6, Uganda Gazette No 39 Vol CIII, 25 June 2010 ('Uganda's ICC Act 2010').

and other perpetrators who were not affiliated with the government.[70] To address the latter issue, the OTP clarified that it would investigate the entire situation and not specific cases against the LRA.[71] This will subsequently become problematic for what appeared like a good relationship between the OTP and the Ugandan government.

Proceedings at the ICC could not progress without the arrest of the LRA suspects. Meanwhile Uganda engaged in peace talks with the LRA and worked towards a compromise for example by offering to use local accountability mechanisms as opposed to proceedings at the ICC.[72] Such an offer by Uganda raised doubts about its cooperation with the Court including in relation to executing arrest warrants against LRA suspects.[73] The peace talks led to the drafting of the Agreement on Accountability and Reconciliation and its corresponding Annexure.[74] These agreements made provisions for the establishment of mechanisms to apply civil and criminal forms of justice to individuals alleged to have committed international crimes.[75] This

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[70] Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, Situation in Uganda, ICC-02/04-1, ICC Presidency, 6 July 2004, p. 4; Nouwen, Complementarity in the Line of Fire (2013) pp. 111-116; Nadia Shamsi, 'The ICC: A Political Tool? How The Rome Statute Is Susceptible to The Pressures of More Power States' (2016) 24 (1) Willamette Journal of International Law and Dispute Resolution 85, pp. 85-104; Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts (2008) pp. 14-15.

[71] Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, Situation in Uganda, ICC-02/04-1, ICC Presidency, 6 July 2004, p. 4; See Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) pp. 17-18.

[72] Uganda and LRA/M Accountability Agreement, 29 June 2007 Clause 4.1; Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008; Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest, *Situation in Uganda*, ICC-02/04-01/05-52, PTC II, ICC, 13 October 2005, para 13; Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended On 27 September 2005, *Situation in Uganda*, ICC-02/04-01/05-53, PTC II, ICC, 13 October 2005; Payam, Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 (2) The American Journal of International Law 403, pp. 403-421; Alexander K.A. Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court' (2009) 50 (1) Virginia Journal of International Law 107, pp. 108-122; Peskin, Caution and Confrontation in the ICC's Pursuit of Accountability in Uganda and Sudan (2009) pp. 655-657 and 679-691.

[73] *Situation in Uganda*, Transcript of Status Conference Before the Pre-Trial Chamber II, 11 December 2007, ICC-02/04-01/15-T-3-ENG, PTC II, ICC, 11 December 2007, pp. 2, 25-30, although the entire transcript sheds the light on the issue of the peace talks and necessary cooperation for the situation; Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts (2008) p. 16; Peskin, Caution and Confrontation in the ICC's Pursuit of Accountability in Uganda and Sudan (2009) pp. 655-657 and 679-691.

[74] Uganda and LRA/M Accountability Agreement, 29 June 2007; Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008.

[75] Uganda and LRA/M Accountability Agreement, 29 June 2007, Clause 4.1.

move was designed to stop the ICC's intervention which at the time seemed to prevent the execution of the peace agreements between the Ugandan government and the LRA.[76] The ICC's intervention and its refusal to withdraw the arrest warrants against Mr Kony, Mr Ongwen, and three other suspects were considered sticking points in the peace process.[77] Thus, the Ugandan government was caught between their Rome Statute obligations to cooperate and their local peace needs.[78] There was also the possibility that Ugandan cooperation would cease and the referral may be withdrawn if the OTP brought charges against government forces.[79] Nouwen puts it this way '[a] realist explanation for the ICC's starting with (…) exclusive focus on the LRA is that any investigation into [crimes committed by Ugandan Forces] would fall outside the terms of the marriage of convenience between Uganda and the ICC.'[80]

These developments highlight the fragility of state cooperation especially where the motivations of the cooperating state may be one of political expediency.[81] To address these

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[76] Sarah Nouwen, 'Complementarity in Uganda Domestic diversity or international imposition?' in Carsten Stahn and Mohamed El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) p. 1122; Renée Jeffery, 'Forgiveness, Amnesty and Justice: The case of the Lord's Resistance Army in Northern Uganda' (2011) 46 (1) Cooperation and Conflict 78, pp. 78-92; Moffett, Justice for Victims Before the ICC (2014) pp. 200-222.

[77] See Agreement on Implementation and Monitoring Mechanisms Juba, Sudan Between Uganda and LRA/M (29 February 2008) Clause 37; Marieke Wierda and Michael Otim, 'Justice at Juba: International Obligations and Local Demand in Northern Uganda' in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society 2008) p. 23.

[78] Sarah Nouwen, 'Complementarity in Uganda Domestic diversity or international imposition?' in Carsten Stahn and Mohamed El Zeidy (eds) The International Criminal Court and Complementarity: From Theory to Practice (CUP 2011) pp. 1122; Peskin, Caution and Confrontation in the ICC's Pursuit of Accountability in Uganda and Sudan (2009) pp. 655-657 and 679-691; Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts (2008) pp. 14-16.

[79] Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) pp. 17-18, and 38; Cale Davis, 'Political Considerations in Prosecutorial Discretion at the International Criminal Court' (2015) 15 (1) International Criminal Law Review 170, pp. 176-178.

[80] Nouwen, Complementarity in the Line of Fire (2013) p. 116; Kenneth A. Rodman and Petie Booth, 'Manipulated Commitments: The International Criminal Court in Uganda' (2013) 35 (2) Human Rights Quarterly 271, pp. 275-276, 288 and 300.

[81] See Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) pp. 17-18; Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts (2008) pp. 5-33; Bocchese discusses Politics of cooperation of states with the ICC including in relation to state referrals. See Marco Bocchese, 'Gbagbo's Lost Bet: When Inviting External Judicial Scrutiny Backfires' (2019) 23 (10) The International Journal of Human Rights 1648, pp. 1648-1668; Marco Bocchese, 'Odd Friends: Rethinking the

issues and attempt the elimination of doubts as to the ICC's exercise of jurisdiction for crimes committed by *Kony et al*, the Pre-Trial Chamber II initiated a *proprio motu* admissibility proceeding in accordance with Article 19 (1) of the Statute.[82] The Chamber confirmed the admissibility of the situation to the ICC,[83] which meant that Uganda was under an obligation to cooperate with the Court notwithstanding its own political priorities. Uganda's own International Criminal Law Act enacted in 2010 also allows it to cooperate with the Court.[84] In January 2015 Ongwen voluntarily surrendered to the ICC, and his transfer to The Hague was coordinated with the Central African Republic, the African Union, the US special forces and Uganda's UPDF.[85]

Although Uganda conditionally cooperated with the ICC in this situation, they may not be so inclined to cooperate with the Court if it ever indicts government forces. This shows how conditional cooperation can affect justice for victims.[86] Moreover, the implementation of cooperation in the Uganda situation was dominated by prosecutorial issues such as the execution of arrest warrants and transfer of suspects. There may be cooperation in relation to implementation of reparations in this situation, which is ongoing,[87] but it is not clear how much effort was put into cooperation for victims' issues at early complementarity stages and before

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Relationship Between the ICC And State Sovereignty' (2017) 49 (2) New York University Journal of International Law and Politics 339, pp. 339-387.

[82] Uganda Admissibility Decision, ICC-02/04-01/05-377, 10 March 2009.

[83] Uganda Admissibility Decision, ICC-02/04-01/05-377, 10 March 2009.

[84] Uganda's ICC Act 2010.

[85] Report of the Registry on the Voluntary Surrender of Dominic Ongwen and His Transfer to the Court, *Kony et al, Situation in Uganda*, ICC-02/04-01/05-419, PTC II, ICC, 7 July 2015.

[86] Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) pp. 245-250.

[87] See Order for Submissions on Reparations, *Ongwen*, *Situation in Uganda*, ICC-02/04-01/15-1820, TC IX, ICC, 6 May 2021; Annex II Public Registry Submissions on Reparations in the Ongwen Case, *Ongwen, Situation in* Uganda, ICC-02/04-01/15-1919-AnxII, TC IX, ICC, 6 December 2021.

reparations. Two out of the five suspects in the Ugandan situation are deceased,[88] two remain at large,[89] while Dominic Ongwen was convicted of war crimes and crimes against humanity by the ICC.[90] It remains to be seen whether and how victims of the situation would see justice done. The following section examines what the proposed Division could have done differently considering Uganda's conditional cooperation in this situation.

3.1.2 Complementarity Understanding for the Uganda Situation

To date, no person has been investigated or indicted by the ICC for crimes committed by government forces, despite the clarification from the OTP that investigations into Uganda will not be limited to crimes allegedly perpetrated by the LRA.[91] The developments in the Uganda situation which are relevant and should have shaped the content of a complementarity understanding for Uganda are (1) the possibility of withdrawal of the referral by the Ugandan government if the Court extends its investigations to alleged perpetrators who are part of the Ugandan Forces, and (2) Uganda's enactment of national laws to address international crimes, and the establishment of the International Crimes Division (ICD).

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[88] Decision to Terminate the Proceedings Against Raska Lukwiya, *Kony et al*, *Situation in Uganda*, ICC-02/04-01/05-248, PTC II, 12 July 2007; Decision Terminating Proceedings Against Okot Odhiambo, *Kony et al*, *Situation in Uganda*, ICC-02/04-01/05-431, PTC II, ICC, 10 September 2015; *Kony and Vincent Otti*, *Situation in Uganda*, 'Case Information Sheet' <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/KonyEtAlEng.pdf> accessed 23 February 2022.

[89] *The Prosecutor v. Joseph Kony and Vincent Otti*, *Situation in Uganda*, ICC-02/04-01/05, <https://www.icc-cpi.int/uganda/kony> accessed 14 January 2023.

[90] *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021; See Order for Submissions on Reparations, *Ongwen*, *Situation in Uganda*, ICC-02/04-01/15-1820, TC IX, ICC, 6 May 2021; Annex II Public Registry Submissions on Reparations in the Ongwen Case, *Ongwen, Situation in* Uganda, ICC-02/04-01/15-1919-AnxII, TC IX, ICC, 6 December 2021.

[91] Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, *Situation in Uganda*, ICC-02/04-01/05-68, PTC II, ICC, 2 December 2005 paras 4 -5.

According to Article 17 (3) of the Rome Statute, 'inability' can be found where a state is unable to obtain the accused or the necessary evidence and testimony.[92] Uganda fulfilled this element of inability at the time of the admissibility proceeding before the Chamber[93] because it was unable to capture the LRA commanders. Ongwen's surrender and subsequent transfer which was facilitated by cooperation of multiple parties, including Uganda, suggests that capacity building and targeted cooperation could have helped to move the Ugandan cases forward domestically. Instead of an ICC intervention based on Uganda's inability at the relevant time, the proposed complementarity Division could consider capacity building for Uganda since there was some level of cooperation. This and other victim-oriented conditions could be included in a complementarity understanding for the situation which would contain clear goals for Uganda's own development of its local mechanisms to ensure that justice is done. This would not be as a favor to the ICC, but a demand from the Court in keeping with Uganda's Rome Statute obligations.

Certain acceptable compromises will be inevitable in instances where states are being encouraged to fulfil their Rome Statute obligations provided that they do not vitiate justice to the point that it becomes a caricature. As such, a complementarity understanding must be drafted in a way that leaves room for the ICC to exert necessary pressure on states to deliver justice to victims while respecting the rights of the accused. Clauses on regular monitoring which will allow adjustment of approach and timeline where necessary, and those on defaults and penalties could have been included. The Ugandan government had an interest in the

[92] See Article 17 (3) ICCst.

[93] Uganda Admissibility Decision, ICC-02/04-01/05-377, 10 March 2009.

protection of their international reputation and their relationship with donors,[94] hence, penalties for default could *inter alia* target such interests. This approach could help to limit Uganda's ability to control the terms of the referral and subsequent developments in relation to the peace talks with the LRA.

3.1.3 The Potential Impact of a Complementarity Understanding in Uganda's Creation of Laws and the International Crimes Division

The approach to Uganda's creation of laws and the International Crimes Division reinforces the need for a comprehensive complementarity understanding which contains minimum victim-oriented goals. The International Crimes Division is to an extent a good impact of the ICC's involvement in the situation, but it was limited by Uganda's move to restrict the ICC's intervention following the self-referral.[95] It was also limited because it was meant to apply a one-sided approach to justice for crimes committed in the situation.[96] The agreement between the Ugandan Government and the LRA was that the ICD could only be used to try the LRA, and not government perpetrators who would instead be subjected to existing criminal justice process.[97] Uganda's selective approach to fulfilling its Rome Statue obligations reflects its

[94] Christian Michael De Vos, 'A catalyst for justice? The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo' (DPhill Thesis, Leiden University 2016) p.111; Nouwen, Complementarity in the Line of Fire (2013) pp. 115-116; Moffett, Justice for Victims Before the ICC (2014) p. 224.

[95] See Marieke I. Wierda, 'The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries' (DPhil thesis, Leiden University 2019) p. 133.

[96] Moffett, Justice for Victims Before the ICC (2014) pp. 218-219, 226; Anna Macdonald, '"In the interests of justice?" The International Criminal Court, Peace Talks and the Failed Quest for War Crimes Accountability in Northern Uganda' (2017) 11 (4) Journal of Eastern African Studies 628, pp. 628-642; Grace Matsiko, '12 Years On, Uganda's International Crimes Division Has Little to Show' (Justice Info, 9 March 220) <https://www.justiceinfo.net/en/43986-12-years-on-uganda-international-crimes-division-has-little-to-show.html> accessed 1 October 2022; Stephen Oola, 'In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015) pp. 147-170 ('Oola, In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda (2015)').

[97] See Uganda and LRA/M Accountability Agreement, 29 June 2007, Clause 41.1; Moffett, Justice for Victims Before the ICC (2014) p. 224.

political interests which underpinned Uganda's manipulation of the principle of complementarity to the detriment of victims.[98]

Also, some Ugandan national laws which were influenced by the Rome statute do not meet the minimum threshold required for victim-oriented justice. For example, Uganda's Rome Statute implementing legislation-the 2010 ICC Act makes it possible for international crimes to be prosecuted in Uganda. It does not provide substantive victim provisions beyond Uganda's obligation to cooperate with the ICC on some victim-related matters such as enforcement of fines and seizures for reparations.[99] Ugandan legal practitioners have been reluctant to apply the provisions of the ICC Act to the crimes committed during the Northern Ugandan Conflict as they consider that it will be against the principle of non-retroactivity.[100] The International Crimes Division in 2016 adopted rules which included victims' participation and protection,[101] but it has been difficult for the ICD to give effect to these provisions. This means that victims' participation, protection, and reparations remain largely non-existent and where present, they may not be meaningful.[102] One of the reasons for this difficulty is that Ugandan Judiciary and

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[98] See Moffett, Justice for Victims Before the ICC (2014) pp. 218-219, 232-233; Avocats Sans Frontieres, 'Reflections on Victim Participation before the International Crimes Division in Uganda' (Policy Brief September 2019) <https://www.asf.be/wp-content/uploads/2019/11/Policy-Brief-Victims-participation-in-Uganda-1.pdf> accessed 1 October 2022 ('ASF, Reflections on Victim Participation before the International Crimes Division in Uganda (2019)'); ASF, 'Fatigue among the victims Regarding the case of Thomas Kwoyelo', 15 May 2019 <https://asf.be/fatigue-among-the-victims-regarding-the-case-of-thomas-kwoyelo/> accessed 1 October 2022; See also Oola, In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda (2015) pp. 147-170.
[99] See Uganda's ICC Act 2010, S. 46, 58 and 64.
[100] Moffett, Justice for Victims Before the ICC (2014) pp. 223-224; Human Rights Watch, 'Justice for Serious Crimes before National Courts: Uganda's International Crimes Division' (January 2012) <https://www.hrw.org/report/2012/01/15/justice-serious-crimes-national-courts/ugandas-international-crimes-division#_ftn59> accessed 2 October 2022.
[101] Statutory Instruments 2016 No. 40, The Judicature (High Court) (International Crimes Division) Rules, (UG) Supplement No 40, Uganda Gazette No 42, Volume CIX, 15th June 2016; Redress, 'Ugandan International Crimes Division (ICD) Rules 2016 Analysis on Victim Participation Framework' (August 2016) <https://redress.org/wp-content/uploads/2017/12/1608REDRESS_ICD-Rules-Analysis.pdf> accessed 2 October 2022.
[102] Josephine Ndagire, 'A Critical Assessment of the International Crimes Division of the High Court of Uganda' in Emma Charlene Lubaale, Ntombizozuko Dyani-Mhango, (eds) *National Accountability for International Crimes in Africa* (Palgrave Macmillan 2022) pp. 395-420 ('Ndagire, A Critical Assessment of the International

practitioners are unfamiliar with victims' participation in criminal proceedings as they follow the common law system, and there are other operational challenges.[103]

Complementarity could have been implemented in a different manner with victims involved.[104] The proposed Complementarity Division could have worked towards overcoming issues of non-retroactivity or other legal gaps which appeared problematic in terms of Uganda being able to fulfil its obligations. One way to do so is by supporting the training of Ugandan practitioners in international law to improve their approach to interpreting and applying the Rome Statute to their unique context. Cooperation partners[105] such as Avocats Sans Frontières (ASF),[106] Parliamentarians for Global Action,[107] and the Coalition for the ICC[108] have worked on similar projects including in Uganda.[109] A complementarity understanding in Uganda could have mapped out ways to reform Uganda's domestic laws to suit retributive goals, and to ensure

Crimes Division of the High Court of Uganda (2022)'); Moffett, Justice for Victims Before the ICC (2014) pp. 225-226.

[103] Oryem Nyeko, 'A Test Case for Justice in Uganda: Government Should Signal More Commitment to Uganda's International Crimes Division' 15 November 2018 <https://www.hrw.org/news/2018/11/15/test-case-justice-uganda> accessed 2 October 2022; ASF, Reflections on Victim Participation before the International Crimes Division in Uganda (2019); ASF 'A Trial for History: Thomas Kwoyelo in Uganda' 20 September 2018 <https://asf.be/thomas-kwoyelo-in-uganda-a-trial-for-history/> accessed 2 October 2022; Moffett, Justice for Victims Before the ICC (2014) pp. 225-226; Jane Patricia Bako, 'One Step Forward, 'One Step Back: The Fate of Victims Before the International Crimes Division of Uganda' (International Justice Monitor, 27 July 2018) <https://www.ijmonitor.org/2018/07/one-step-forward-one-step-back-the-fate-of-victims-before-the-international-crimes-division-of-uganda/> accessed 2 October 2022.

[104] Moffett, Justice for Victims Before the ICC (2014) p. 231; Christian Michael De Vos, 'A catalyst for justice? The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo' (DPhil Thesis, Leiden University 2016) p.16.

[105] Kirabira discusses the role and influence of NGOs in the promoting justice for victims in the Uganda situation. See Kirabira, NGO influence In Global Governance: Achieving Transitional Justice in Uganda and Beyond (2021) pp. 280-299.

[106] ASF, 'ASF in Action' <https://asf.be/asf-in-action/> accessed 2 October 2022.

[107] Parliamentarians for Global Action, 'Uganda and the Rome Statute' <https://www.pgaction.org/ilhr/rome-statute/uganda.html> accessed 2 October 2022, and 'About Us' <https://www.pgaction.org/about/>, accessed 2 October 2022.

[108] Coalition for the International Criminal Court, 'What We Do', <https://www.coalitionfortheicc.org/about/what-we-do>, accessed 2 October 2022.

[109] ASF, 'Annual Report' (2021) <https://asf.be/wp-content/uploads/2022/08/ASF_Annual_Report_2021_light.pdf> accessed 2 October 2022, pp. 23-27; Parliamentarians for Global Action, 'Uganda and the Rome Statute' <https://www.pgaction.org/ilhr/rome-statute/uganda.html> accessed 13 September 2022.

that minimum victim provisions are covered while ensuring a fair and expeditious trial for the accused. As Akhavan,[110] and Schabas[111] rightly argue regarding the Uganda referral, the Government was at the time desperate to find a solution for dealing with the LRA whom it failed to defeat militarily. This was one of their main motivations for the referral of the situation. It is plausible to argue that under such circumstances,[112] Uganda may be more inclined to accept a victim-oriented approach to complementarity. Although an acceptance could mean that the Court may investigate government forces, Uganda may still be willing especially where it could generate cooperation and capacity building for the Government to tackle what appeared to be its most pressing needs.

Since its inception, Uganda's International Crimes Division has been trying one former LRA commander Thomas Kwoyelo for crimes that fall within the jurisdiction of the Court, and his case is still pending.[113] Issues related to outreach, and lack of resources have affected Mr Kowyelo's defense and have delayed the trials,[114] and victims' meaningful participation in the

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[110] Akhavan, The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the ICC (2005) pp. 409-411.
[111] Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts (2008) pp. 14-15.
[112] Akhavan, The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the ICC (2005), p. 411.
[113] Ndagire, A Critical Assessment of the International Crimes Division of the High Court of Uganda (2022) pp. 407-409; *Thomas Kwoyelo alias Latoni v Uganda* (Constitutional Petition 36 of 2011) [2011] UGCC 10 (22 September 2011) [2011] UGCC 10; Sharon Nakhanda, 'Supreme Court of Uganda Rules on the Application of the Amnesty Act' (International Justice Monitor,16 April 2015) <https://www.ijmonitor.org/2015/04/supreme-court-of-uganda-rules-on-the-application-of-the-amnesty-act/> accessed 2 October 2022; Oryem Nyeko, 'A Test Case for Justice in Uganda: Government Should Signal More Commitment to Uganda's International Crimes Division' 15 November 2018 <https://www.hrw.org/news/2018/11/15/test-case-justice-uganda> accessed 2 October 2022; ASF, Reflections on Victim Participation before the International Crimes Division in Uganda (2019); Moffett, Justice for Victims Before the ICC (2014) pp. 224-225; ASF 'A Trial for History: Thomas Kwoyelo in Uganda' 20 September 2018 <https://asf.be/thomas-kwoyelo-in-uganda-a-trial-for-history/> accessed 2 October 2022; Anna Macdonald and Holly Potter, 'The Trial of Thomas Kwoyelo: Opportunity Or Spectre? Reflections From the Ground on the First LRA Prosecution' (2016) 86 (4) Africa 698, pp. 698-722; Moffett, Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo (2016) pp. 503-524.
[114] ICTJ, 'Victims in the Thomas Kwoyelo Case Forced to Wait Longer for Justice' 25 July 2018 <https://www.ictj.org/news/victims-thomas-kwoyelo-case-forced-wait-longer-justice> accessed 2 October 2022; Hafitha Issa, 'Thomas Kwoyelo to Court: Forward My Case to ICC for Speedy Trial' *Uganda Radio Network* (Kampala, 1 March 22) <https://ugandaradionetwork.net/story/thomas-kwoyelo-to-court-forward-my-case-to-icc-for-speedy-trial>, accessed 2 October 2022.

proceedings.[115] There is a need for Uganda's International Crimes Division to make more progress. If this institution was a product of a well negotiated burden-sharing agreement between the ICC and Uganda, it would have a better foundation to function more effectively.[116] The Court could have directly or through a designated third party, monitored Uganda's progress in achieving each victim-oriented condition and the protection of the rights of the accused in such a process.

The Ugandan government is responsible for ensuring that its International Crimes Division is well funded and prepared to deliver victim-oriented justice. The burden is on them, particularly when it is appears to be the main domestic body implementing complementarity in the Uganda situation. One way through which the government can improve justice for victims of the situation is through the creation of a body like the ICC's TFV. This can allow Uganda to source for funds from international donors to support their efforts to deliver justice. The developments such as the important roles international donors have played in supporting the DRC and CAR situations discussed throughout this thesis[117] indicate that such a move by Uganda could garner some support.

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[115] Ndagire, A Critical Assessment of the International Crimes Division of the High Court of Uganda (2022) pp. 414-417; Oryem Nyeko, 'A Test Case for Justice in Uganda: Government Should Signal More Commitment to Uganda's International Crimes Division' 15 November 2018 <https://www.hrw.org/news/2018/11/15/test-case-justice-uganda> accessed 2 October 2022.

[116] Oola, In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda (2015) pp. 147-170; Grace Matsiko, '12 Years On, Uganda's International Crimes Division Has Little to Show' (Justice Info, 9 March 220) <https://www.justiceinfo.net/en/43986-12-years-on-uganda-international-crimes-division-has-little-to-show.html> accessed 1 October 2022; Ndagire, A Critical Assessment of the International Crimes Division of the High Court of Uganda (2022) pp. 395-420.

[117] See chapters three and four discussions on DRC and CAR situations.

3.2 Applying Victim-oriented Complementarity in State Party Referrals: Central African Republic

3.2.1 Securing Cooperation in Central African Republic Situations

A similar approach to cooperation in Uganda can be seen in the Central African Republic situations.[118] CAR has encountered decades of armed conflicts involving government and rebel forces.[119] The first situation before the ICC, i.e. Central African Republic (CAR) I was referred to the Court in December 2004 by the CAR government under the leadership of Francoise Bozize after he ousted former President Ange-Felix Patasse.[120] The focus of this situation is on alleged Rome Statute crimes committed in the context of a conflict in CAR since 1 July 2002.[121] The OTP opened an investigation into CAR I which resulted in the prosecution of Mr Bemba, and his subsequent acquittal on appeal.[122] Central African Republic (CAR) II was the second situation referred to the ICC in May 2014 by CAR's transitional government and focuses on alleged Rome Statute crimes committed in the context of renewed violence in CAR starting in

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[118] Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) pp. 19-20, and 38.
[119] See Robert Kłosowicz, 'Central African Republic: Portrait of A Collapsed State After the Last Rebellion' (2016) 42 Politeja 33, pp. 33-48; RULAC, Geneva Academy, 'Non-international Armed Conflicts in the Central African Republic' <https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-the-central-african-republic> accessed 1 October 2022.
[120] See Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) pp. 19-21; Human Rights Watch, 'Q&A Central African Republic: First ICC Anti-Balaka Trial' 7 February 2021 <https://www.hrw.org/news/2021/02/07/qa-central-african-republic-first-icc-anti-balaka-trial> accessed 2 October 2022; UN News, 'Central African Republic: Said trial opens at International Criminal Court' 26 September 2022 <https://news.un.org/en/story/2022/09/1127951> accessed 2 October 2022; France 24 'Central African Republic Seleka Leader Pleads Not Guilty at ICC' 26 September 2022 <https://www.france24.com/en/africa/20220926-alleged-central-african-republic-senior-rebel-leader-goes-on-trial-at-icc> accessed 2 October 2022.
[121] For information on CAR I, see Situation in the Central African Republic, ICC-01/05 <https://www.icc-cpi.int/car> accessed 23 September 2022.
[122] See Chapter 3, Section 3.2.1.

2012.[123] Within four months of CAR II referral and following a brief preliminary examination into the situation, the ICC Prosecutor opened an investigation.

With regards to cooperation in CAR I, former Prosecutor Moreno-Ocampo referred to the *Bemba* case as an example of how cooperation should work, and this was in relation to Mr. Bemba's arrest and transfer to the Court.[124] Arresting and trying the accused and other related procedural issues are important, but there is more to cooperation than this, particularly in relation to victims.[125] Moreover, the relative speed at which an investigation was opened into CAR II suggest that cooperation was forthcoming. The OTP has since been pursuing three cases arising out of this situation, i.e., the *Yekatom* and *Ngaïssona* Case,[126] *Said* case,[127] and *Mokom* case.[128] Statements from Central African Republic authorities and the Prosecutor suggest that CAR continues to cooperate with the Court and vice versa.[129] This development in CAR is especially encouraging because as part of an agreement with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA),[130] CAR authorities established a hybrid Special Criminal Court which could try

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[123] Central African Republic II, *Situation in the Central African Republic II*, ICC-01/14 <https://www.icc-cpi.int/carII> accessed 23 September 2022; For a critique of complementarity in CAR after the ICC's intervention, see Labuda, The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity? (2017) pp. 175-206.
[124] UN News, 'African War Crimes Suspect Transferred to International Criminal Court' 3 July 2008 <https://news.un.org/story/2008/07/265262> accessed 2 October 2022; Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) pp. 19-20; The University of Nottingham Human Rights Law Center, 'Report of Expert Workshop on Cooperation and the International Criminal Court' (18-19 September 2014) <https://www.nottingham.ac.uk/hrlc/documents/specialevents/cooperation-and-the-icc-final-report-2015.pdf> accessed 1 October 2022.
[125] See chapters four and five.
[126] *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18.
[127] *The Prosecutor v. Mahamat Said Abdel Kani*, ICC-01/14-01/21.
[128] *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, ICC-01/14-01/22.
[129] Prosecutor Khan's Statement of Commitment to Support the Special Criminal Court of the Central African Republic, 11 May 2022.
[130] Loi Organique Portant Creation, Organisation et Fonctionnement De La Cour Penale Speciale (CF) Loi No. 15/ 003, 3 June 2015. Note that the SCC which is considered a hybrid court is one of other courts which could address international crimes in CAR alongside ordinary courts.

international crimes. This hybrid court can contribute to bringing justice closer to victims and may do so relatively faster compared to the ICC. For instance, it was reported that on the 31 of October 2022, the Special Criminal Court sentenced some rebels to prison for *inter alia*, crimes against humanity.[131] The caveat remains that there is a need to ensure that cooperation between the Court and local authorities would not be unduly explored to foster states' own interests or limit the ICC's ability to do its work in a victim-oriented manner.

Generally, for self-referred situations, the proposed Independent Complementarity Division must be mindful of the motivation behind the cooperation it would receive from the self-referring state. This would allow the Division from the onset to introduce contingencies into its communication and cooperation with the relevant state. This could in turn limit the state's ability to frustrate the pursuit of victim-oriented justice where their political interests have changed[132] and can ensure that the internationally recognized human rights of the accused remain protected.

3.2.2 Victim-oriented Qualified Deference to CAR

The *Yekatom and Ngaissona* case was the first case from CAR II to enter the Trial phase at the ICC and the subject of analysis in this section.[133] The establishment of CAR's hybrid Special Criminal Court which could try international crimes came three years after the CAR II referral

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[131] Judicael Yongo, 'Central African Republic Sentences Three Rebels in First War Crimes Trial' (31 October 2022) *Reuters* <https://www.reuters.com/article/centralafrica-justice-trial-idAFL8N31W5T3> accessed 1 November 2022; Barbara Debout, 'C.Africa Special Court Sentences Three for Crimes Against Humanity' *Rédaction Africanews with Afp* <https://www.africanews.com/2022/11/01/cafrica-special-court-sentences-three-for-crimes-against-humanity/> accessed 1 November 2022.

[132] See Refugee Law Project (Faculty of Law, Makerere University 28 July 2004) <https://www.refugeelawproject.org/files/archive/2004/RLP.ICC.investig.pdf> accessed 2 October 2022, pp. 2-5.

[133] Trial into the *Said* only commenced on 26th September 2022. See Central African Republic II, *Situation in the Central African Republic II*, ICC-01/14 <https://www.icc-cpi.int/carII> accessed 3 October 2022.

to the ICC. The *Yekatom* Defense launched an admissibility challenge and argued that CAR was able as of 2020[134] to try Mr Yekatom nationally because of the newly established court. The Defense relied on Stahn's version of qualified deference and asked the ICC to give CAR a chance to try Mr Yekatom.[135] The Court deemed arguments advanced by the *Yekatom* Defense as incompatible with its approach to complementarity for reasons discussed in Chapter Three, particularly because admissibility determinations are made based on the facts as they exist at the time of assessment.[136] The Court noted that there was inaction on CAR's part since no case against Mr Yekatom was in existence in CAR at the relevant time.[137] There was also the issue that CAR authorities did not appear to be interested in the admissibility challenge perhaps due to Article 37 of CAR's Organic Law 15/003 which gives ICC primacy[138] over cases where CAR and the ICC share concurrent jurisdiction. The Pre-Trial Chamber refused to

[134] Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-456, 17 March 2020, paras 1, 11-15 and 32-43. It appears that there was some delay before the Special Criminal Court opened its first trial on 16 May 2022. See MINUSCA, 'CAR Special Criminal Court (SCC) now fully operational' 9 June 2021 <https://minusca.unmissions.org/en/car-special-criminal-court-scc-now-fully-operational> accessed 2 October 2022.

[135] Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-456, 17 March 2020, paras 1, 11-15, 32-43.

[136] See Chapter Three Section 3; Prosecution's Response to the "Yekatom Defence's Admissibility Challenge – Complementarity", ICC-01/14-01/18-466, 30 March 2020, paras 1-21; Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493 28 April 2020, paras 15-24; There was an appeal, but this was based on the Pre-Trial Chamber's refusal to invite the CAR Government for observations regarding their willingness to investigate and prosecute Mr Yekatom. See Yekatom Defence Appeal Against Admissibility Decision, *Yekatom and Ngaissona*, *Situation in the Central African Republic*, ICC-01/14-01/18-499, AC, ICC, 29 April 2020; Yekatom Defence Appeal Brief – Admissibility, *Yekatom and Ngaissona*, *Situation in the Central African Republic*, ICC-01/14-01/18-523, AC, ICC, 19 May 2020, paras 11-12; Yekatom Appeal Judgment, ICC-01/14-01/18-678-Red, 11 February 2021; ICC-OTP, 'Situation in the Central African Republic II, OTP Article 53 (1) Report' 24 September 2014, para 225; Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493 28 April 2020, para 17, fn. 62. The timing limitation was also an issue in the Libya admissibility challenges. See The Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to "Document in Support of Libya's Appeal Against the "Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi", *Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-454-Red, AC, ICC, 23 September 2013, paras 4-23, 36-37.

[137] Prosecution's Response to the "Yekatom Defence's Admissibility Challenge – Complementarity", ICC-01/14-01/18-466, 30 March 2020, paras 1-5; Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493 28 April 2020, paras 15-24; Public redacted version of "Prosecution Response to "Yekatom Defence Appeal Brief - Admissibility"", 10 June 2020, *Yekatom and Ngaissona*, *Situation in the Central African Republic*, ICC-01/14-01/18-548-Red, AC, ICC, 10 June 2020, paras 3-12, 23-29.

[138] Note that one of the Defense's arguments was in relation to this law- Organic Law 15/003 which the Appeals Chamber declared incompatible with the Rome Statute. See Yekatom Appeal Judgment, ICC-01/14-01/18-678-Red, 11 February 2021, para 48.

apply Stahn's qualified deference due to the need to introduce some flexibility in admissibility rulings to mitigate the strict time requirements.[139] The Chamber also stated that increasing or encouraging state capacity is not within its purview.[140]

The unsuccessful admissibility challenge by the *Yekatom* Defense does not signal the unviability of the arguments which underpin the concept of qualified deference or its potentials. With regards to the issue of time limitation and since cooperation from CAR was forthcoming, the proposed Complementarity Division could have recommended a phased approach to implementing complementarity. This entails activating the non-contentious phase before the admissibility challenge by the *Yekatom* defense. This could have been pursued since there was an effort by other international actors such as UN agencies, partner states and donors, to restore security and build CAR's capacity to deliver justice for victims.[141] The work of these entities provided a good opportunity to facilitate cooperation in a victim-oriented manner. The proposed Complementarity Division could have adapted the phased approach to the CAR situation's unique characteristics. For example, even before the *Yekatom*'s admissibility challenge, the proposed Division could have recommended qualified deference with victim-oriented conditions and clauses for the protection of the accused, with timeline to implement them. Alternatively, they could have considered burden-sharing and a postponement of a final decision on admissibility. This could have been done even if CAR at the outset showed no

[139] The Chamber also rejected qualified deference due its connection to capacity building. See Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493 28 April 2020, para 18-24.
[140] Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18-493 28 April 2020, Paras 22-24.
[141] See Labuda, The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity? (2017) pp. 175-206; Amnesty International, 'One Step Forward, Two Steps Backwards: Justice in the Central African Republic' (Research Briefing December 2021) <https://www.amnesty.org/en/wp-content/uploads/2021/12/AFR1950382021ENGLISH.pdf> accessed 2 October 2021; CICC, 'Central African Republic (I and II)', <https://www.coalitionfortheicc.org/country/central-african-republic-i-and-ii> accessed 2 October 2022; ICC-OTP, 'Situation in the Central African Republic II, OTP Article 53 (1) Report' 24 September 2014, para 248.

interests in challenging admissibility.[142] This would then provide the ICC with the grounds to defer the *Yekatom* and other relevant cases to CAR where necessary,[143] thereby freeing up the Court's resources for situations which were hibernated for lack of resources.[144] This method would not amount to a waste of resources[145] and time because relevant ICC work products could be shared with CAR within the cooperation[146] and victims and witnesses' protection framework[147] of the ICC. Proceedings at the ICC would usually take years to complete. The ICC could have worked with CAR within this same duration, and as CAR built its capacity with the help of international donors.[148] This would be a more sustainable approach because

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[142] Schabas, 'Complementarity in Practice': Some Uncomplimentary Thoughts (2008) p. 14.
[143] On the practice of deferral to national courts in the context of international criminal justice, see Bekou, Rule 11 Bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence (2009) pp. 723-791; OSCE, 'The Processing of ICTY Rule 11bis cases in Bosnia and Herzegovina: Reflections on Findings from Five years of OSCE Monitoring, A report of the Capacity Building and Legacy Implementation Project' (January 2010) <https://www.osce.org/files/f/documents/c/f/118964.pdf> accessed 30 September 2022; McAuliffe, Bad Analogy: Why the Divergent Institutional Imperatives of the ad hoc Tribunals and the ICC Make the Lessons of Rule 11bis Inapplicable to the ICC's Complementarity Regime (2014) pp. 400-427.
[144] For example, the Nigerian Situation. ICC, 'Preliminary examination Nigeria' <https://www.icc-cpi.int/nigeria> accessed 2 October 2022; Benson Chinedu Olugbuo, 'Nigerian Victims Deserve More Than Hibernated ICC Investigations – They Deserve Justice' 20 September 2021 <https://hrij.amnesty.nl/nigerian-victims-deserve-more-than-hibernated-icc-investigations-they-deserve-justice/> accessed 2 October 2022; Amnesty International, 'New Opinion Piece Series: The Cost of Hibernated Investigations' 26 July 2021 <https://hrij.amnesty.nl/the-cost-of-hibernated-icc-investigations-blog-series/> accessed 2 October 2022; Weatherall discusses what he refers to as the 'evolution of hibernation at the ICC'. See Weatherall, The Evolution of "Hibernation" at the International Criminal Court: How the World Misunderstood Prosecutor Bensouda's Darfur Announcement (2016).
[145] See Prosecution's Response to the "Yekatom Defence's Admissibility Challenge – Complementarity", ICC-01/14-01/18-466, 30 March 2020; Public redacted version of "Prosecution Response to "Yekatom Defence Appeal Brief - Admissibility"", 10 June 2020, *Yekatom and Ngaissona*, *Situation in the Central African Republic*, ICC-01/14-01/18-548-Red, AC, ICC, 10 June 2020, paras 3-12, 23-29.
[146] See Article 93 (10) of the Rome Statute.
[147] See for example, Articles 68, 54 (f), 57 (1) (c), 64 (2), and (6) (c) and (e), 87 (4), 93 (1) (j) of the Rome Statute. These are complemented by provisions of other core legal texts of the ICC.
[148] Akhavan, Complementarity Conundrums: The ICC Clock in Transitional Times (2016), pp. 1047-1048; *Yekatom* and *Ngaissona* case information sheet provides a timeline but only from the issuance of the arrest warrant to the ongoing trial proceedings. It does not include period for preliminary examination and investigations. See *Situation in Central African Republic II, The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18 <https://www.icc-cpi.int/sites/default/files/2022-04/yekatom-ngaissonaEn.pdf> accessed 2 October 2022.

the national jurisdiction would remain the first point of call as intended by the drafters of the Statute.[149]

3.2.3 A Complementarity Understanding for the Central African Republic Situations

With the phased approach, a complementarity understanding could have been negotiated and applied in a step-by-step manner as the situation evolves. This allows the proposed Division to support CAR to achieve agreed victim-oriented goals. Currently there are domestic provisions for victims' participation in the Special Criminal Court, including participation as civil parties, and victims can potentially influence investigations by contacting investigative judges.[150] There is also a provision for Victims and Defense Aid Service.[151] These provisions must be effectively implemented for them to contribute to victim-oriented justice. Monitoring which is an essential component of a complementarity understanding could be beneficial for this purpose and for ensuring the protection of the rights of the accused. The proposed Division could facilitate support for CAR where necessary, and this could be the difference between the performance of CAR's Special Criminal Court and Uganda's International Crimes Division.

3.3 Way Forward for State Party Referrals

It appears that the OTP has changed its approach to self-referrals since its early years when the first self-referred situations came through. Nevertheless, the arguments made here remain

[149] Megret, Too Much of a Good Thing?: Implementation and the Uses of Complementarity (2011) pp. 361-390; Megret and Samson, Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials (2013) pp. 571-589; Linda E. Carter, 'The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?' (2013), 12 (3) Washington University Global Studies Law Review 451, pp. 451-473.
[150] See Code De Procedure Penale Centrafricain (CF) Loi No 10.002, 6 January 2010, 'Section II De La Constitution De Partie Civile', articles 56 to 62; Patryk Labuda, ''Open for Business': The Special Criminal Court Launches Investigations in the Central African Republic' (EJIL:Talk, 8 February 2019) <https://www.ejiltalk.org/open-for-business-the-special-criminal-court-launches-investigations-in-the-central-african-republic/> accessed 2 October 2022.
[151] See Perez-Leon-Acevedo, Victims at the Central African Republic's Special Criminal Court (2021) p. 11.

pertinent because of the inherent political nature of self-referrals,[152] and the need to consistently apply victim-oriented complementarity regardless of trigger mechanisms. The ICC still has an opportunity to ensure that victim-oriented justice is delivered in CAR, Uganda, DRC, and other similar situations by leveraging on the higher level of cooperation it would usually receive from self-referring states. Victim-oriented complementarity outlined in this thesis ensures that investigations, prosecutions, and other measures to deliver justice to victims are not one-sided. If applied, it can encourage the pursuit of a comprehensive approach to justice regardless of whether a state is willing to relinquish its jurisdiction.

3.4 Applying Victim-oriented complementarity in UNSC Referrals: Libya

A UNSC referral does not mean that the ICC will be justified to act in the entirety of the situation. In accordance with the complementarity regime, there must be an analysis of whether admissibility criteria are met and whether admitting such a situation will be in the interests of justice for victims. Even where the situation is admitted, a phased approach can contribute to reducing tensions between the referred state and the ICC. This would be helpful for introducing victim-oriented conditions into the process and decisions. The discussion in this section focuses on the Libya situation as Libyan authorities showed some willingness to cooperate at the relevant time. The analysis and conclusions made can be applied to the Darfur situation given Sudan's recent openness to cooperate.

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[152] Robinson considers the issue of politics here as 'a special case of a more general challenge inherent in international criminal law and not a product of any trigger mechanism'. See Darryl Robinson, 'The Controversy Over Territorial State Referrals and Reflections on ICL Discourse' (2011) 9 (2) Journal of International Criminal Justice 355, p. 356; M. Cherif Bassiouni, The ICC — Quo Vadis?' (2006) 4 (3) Journal of International Criminal Justice 421, pp. 421-427.

3.4.1 Securing Cooperation in the Libya Situation

The Libya Situation was referred to the ICC by the UNSC in February 2011 following widespread violence by the Muammar Mohammed Abu Minyar Gaddafi regime against civilians.[153] Cases of crimes against humanity and war crimes were identified by the Court and were originally against five suspects, including Saif Al-Islam Gaddafi and Abdullah Al-Senussi.[154] Following the overthrow of the Gaddafi regime in 2011,[155] Mr Saif Gaddafi and Mr Abdullah Al-Senussi were separately apprehended and transferred to Libya, although only Mr Al-Senussi was in custody of the internationally recognized authorities in Tripoli.[156] With the ICC proceedings activated by the UNSC referral, Libya communicated to the Court ways in which they (Libya) could fulfil their obligations under international law. Libya was receiving

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[153] UNSC S/RES/1970 (26 February 2011).

[154] For more information on the background of the case, see UNSC S/RES/1970 (26 February 2011); ICC-OTP, 'Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011)' 4 May 2011 <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/0BDF4953-B5AB-42E0-AB21-25238F2C2323/0/OTPStatement04052011.pdf> accessed 2 October 2021; *Situation in Libya*, ICC-01/11 <https://www.icc-cpi.int/libya> accessed 2 October 2022; *Situation in Libya*, *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11 <https://www.icc-cpi.int/sites/default/files/2022-08/GaddafiEng.pdf> accessed 2 October 2022; *The Prosecutor v. Mahmoud Mustafa Busyf Al-Werfalli*, ICC-01/11-01/17. The case against Mr Al-Werfalli was terminated on 15 June 2022 following the Prosecutor's notification of his death. See *Al-Werfalli* Case information Sheet <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/al-werfalliEng.pdf> and <https://www.icc-cpi.int/libya/al-werfalli > accessed 2 October 2022; *The Prosecutor v. Al-Tuhamy Mohamed Khaled*, ICC-01/11-01/13 and *Khaled* Case Information Sheet <https://www.icc-cpi.int/CaseInformationSheets/khaledEng.pdf> accessed 1 October 2022; Cristina Orsini, Jordan Street, and Lewis Brookes, 'Enshrining Impunity: A Decade of International Engagement in Libya' (Saferworld and Lawyers for Justice in Libya, February 2022) pp. 25-26.

[155] Note that this was Muammar Gaddafi's government, and although he was a subject of ICC arrest warrant, his case was terminated following his death. See ICC-OTP 'Third Report of the Prosecutor of the International Criminal Court To The UN Security Council Pursuant To UNSCR 1970 (2011)' May 2012 <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D313B617-6A86-4D64-88AD-A89375C18FB9/0/UNSCreportLibyaMay2012Eng.pdf> accessed 2 October 2022, para 14 ('OTP's Third Report (2012) to the UNSC Regarding UNSCR 1970 (2011)'); ICC-OTP, 'Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant To UNSCR 1970 (2011)' November 2012 <https://www.icc-cpi.int/iccdocs/otp/UNSCreportLibyaNov2012_english5.pdf > accessed 2 October 2022, para 4; *Situation in Libya*, ICC-01/11 <https://www.icc-cpi.int/libya> accessed 2 October 2022 ('OTP's Fourth Report to the UNSC Regarding UNSCR 1970 (2011) (2012)').

[156] OTP's Third Report (2012) to the UNSC Regarding UNSCR 1970 (2011) para 14; OTP's Fourth Report to the UNSC Regarding UNSCR 1970 (2011) (2012) para 13.

capacity building support, it expressed openness to continue to build its domestic capacity,[157] and recognized the importance of victims' participation in domestic proceedings.[158] At the early stages of this situation, the OTP noted that cooperation with Libya was forthcoming, and this was useful for the OTP's missions and investigations in Libya.[159] This appears to be unusual given the expectation that cooperation in a UNSC referral may be challenging to obtain. Nonetheless, in addition to expressing willingness to cooperate with the ICC, Libyan authorities informed the Prosecutor that they intended to conduct their own national proceedings.[160]

From 2012, Libya began to make moves to assert jurisdiction over Mr Gaddafi and Mr Al-Senussi by requesting postponement of their surrender to the ICC,[161] and subsequently launching admissibility challenges.[162] The ICC rejected the postponement request, and the admissibility challenge in relation to Gaddafi who at the time was not in Libya's custody.[163] Libya was then instructed to surrender Mr Gaddafi, but cooperation with the Court in this

[157] Libyan Government's Further Submissions on Issues Related to the Admissibility of the Case Against Saif Al-Islam Gaddafi, *Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-258-Red2, PTC I, ICC, 25 January 2013, paras 103-114; PTC I's Decision on the Admissibility of the Case Against Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, paras 183-184, 204; see also PTC I's Decision on the Admissibility of the *Al-Senussi* Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 190.
[158] Libyan Government's Consolidated Reply to the Responses of the Prosecution, OPCD, and OPCV to its Further Submissions on Issues Related to the Admissibility of the Case Against Saif Al-Islam Gaddafi, *Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-293-Red, PTC I, ICC, 4 March 2013, paras 57, 62-64.
[159] OTP's Third Report (2012) to the UNSC Regarding UNSCR 1970 (2011) paras 11-13.
[160] OTP's Third Report (2012) to the UNSC Regarding UNSCR 1970 (2011) para 13.
[161] OTP's Third Report (2012) to the UNSC Regarding UNSCR 1970 (2011) paras 15-23.
[162] Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, *Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-130-Red, PTC I, ICC, 1 May 2012.
[163] Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, *Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-100, PTC, ICC, 4 April 2012; Government of Libya's Appeal Against the "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi", *Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-103, AC, ICC, 10 April 2012; PTC I's Decision on the Admissibility of the Case Against Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013. Libya appealed this decision, and the Appeals Chamber upheld the Pre-Trial Chamber's admissibility decision, See Judgemnt on Libya's Appeals re-Gaddafi Decision, 01/11-01/11-547-Red, 21 May 2014.

regard was lacking.[164] Mr Gaddafi has since been released from prison and is vying for the presidency of Libya.[165] Meanwhile for Mr Al-Senussi, the Court approved Libya's request to postpone his surrender,[166] and subsequently declared his case inadmissible.[167] The Court found that the same case against Mr Al-Senussi was before it and that Libya was not unwilling or unable genuinely to carry out proceedings against Al-Senussi.[168] Notwithstanding the political dynamics of Libya and the region, and the security situation in the country, the ICC unconditionally deferred the case to Libya.[169]

It should be noted that the Court rightly acknowledged in its Libya admissibility decisions, that the national authorities appeared to be making efforts to address crimes for which Mr Al-Senussi and Mr Gaddafi were accused.[170] The OTP also noted that Libya was cooperating with it,[171] they reiterated support for the ICC and their interest to work cooperatively.[172] In November

[164] OTP's Third Report (2012) to the UNSC Regarding UNSCR 1970 (2011) para 16; Decision on the Non-compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, Gaddafi, Situation in Libya, ICC-01/11-01/11-577, PTC I, ICC, 10 December 2014.

[165] BBC News, 'Saif al-Islam Gaddafi: Son of Libya ex-ruler runs for president' 14 November 2021 <https://www.bbc.co.uk/news/world-africa-59280215> accessed 2 October 2022; Karen Allen, Institute for Security Studies, ISS Today, 'Gaddafi's bid for president questions the ICC's influence', 26 November 2021 <https://issafrica.org/iss-today/gaddafis-bid-for-president-questions-the-iccs-influence> accessed 2 October 2022; Aljazeera, 'Libyan court reinstates Saif Gaddafi as presidential candidate' 2 December 2021 <https://www.aljazeera.com/news/2021/12/2/libya-court-reinstates-gaddafis-son-as-presidential-candidate> accessed 2 October 2022.

[166] See Decision on Libya's Postponement of the Execution of the Request for Arrest and Surrender of Abdullah Al-Senussi Pursuant to article 95 of the Rome Statute and Related Defence Request to Refer Libya to the UN Security Council, *Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-354, PTC I, ICC, 14 June 2013.

[167] PTC I's Decision on the Admissibility of the *Al-Senussi Case*, ICC-01/11-01/11-466-Red, 11 October 2013; Appeals Chamber Decision on Al-Senussi Appeal, ICC-01/11-01/11-565, 24 July 2014.

[168] PTC I's Decision on the Admissibility of the *Al-Senussi* Case, ICC-01/11-01/11-466-Red, 11 October 2013, para 311.

[169] PTC I's Decision on the Admissibility of the *Al-Senussi* Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 272-301

[170] PTC I's Decision on the Admissibility of the Case Against Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, paras 144 and 204; PTC I's Decision on the Admissibility of the *Al-Senussi* Case, ICC-01/11-01/11-466-Red, 11 October 2013, paras 190-217, 227-229.

[171] OTP's Third Report (2012) to the UNSC Regarding UNSCR 1970 (2011) para 13.

[172] OTP's Third Report (2012) to the UNSC Regarding UNSCR 1970 (2011) para 13.

2013, the OTP and Libya concluded an MoU on burden-sharing[173] where the OTP will focus on alleged perpetrators outside Libya.[174] In subsequent reports, the OTP mentioned that cooperation continued between both parties and they enjoyed a good working relationship,[175] although Libya apparently did not officially change its stance on exercising jurisdiction over Gaddafi.[176] As such it could be argued that Libya's cooperation was in a way limited. There were also issues of non-cooperation by other states which is necessary to move the situation forward.[177] Since the OTP and Libya have enjoyed a good working relationship for several years, why has justice for victims remained elusive in the Libyan situation?[178] While security factors and cooperation issues may be blamed, they do not completely explain this

[173] Note that the content of this MoU is confidential, and it is not clear how victim-oriented it is, especially given that it was concluded between the OTP and Libya.
[174] ICC-OTP, 'Seventh Report of the Prosecutor of the International Criminal Court to the Un Security Council Pursuant to UNSCR 1970 (2011)' 13 May 2014 <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/UNSC-Report-Libya-May-2014-ENG.PDF> accessed 2 October 2022, paras 12-13; ICC-OTP, 'Tenth Report of the Prosecutor of the International Criminal Court To The United Nations Security Council Pursuant TO UNSCR 1970 (2011)' 26 October 2015 <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/otp-rep-unsc-05-11-2016-Eng.pdf> accessed 2 October 2022, para 46.
[175] ICC-OTP, 'Eleventh Report of the Prosecutor Of The International Criminal Court to the United Nations Security Council Pursuant TO UNSCR 1970 (2011)' 26 May 2016, paras 25-31 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/otp_report_lib_26052016-eng.pdf> accessed 2 October 2022; ICC-OTP, 'Fifteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)' 9 May 2018, paras 30-34 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/180509-otp-rep-UNSC-lib-ENG.pdf> accessed 2 October 2022; ICC-OTP, 'Twenty-first Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)' 17 May 2021, para 36 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/210517-otp-report-unsc-libya-eng.pdf> accessed 2 October 2022.
[176] UN News and Press Release SC/14874 'Security Council 9024th Meeting: International Criminal Court Prosecutor Pledges to Deliver Justice against Crimes Committed in Libya, Briefing Security Council on New Investigation Strategy' (2022) <https://press.un.org/en/2022/sc14874.doc.htm> accessed 2 October 2022; Permanent Mission of Ireland to the UN, 'Statement at the UNSC Briefing on the ICC - Libya' 28 April 2022 <https://www.dfa.ie/pmun/newyork/news-and-speeches/securitycouncilstatements/statementsarchive/statement-at-the-unsc-briefing-on-the-icc---libya.html> accessed 2 October 2022; Decision on the Non-compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, *Gaddafi*, *Situation in Libya*, ICC-01/11-01/11-577, PTC I, ICC, 10 December 2014; Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) pp. 28-30.
[177] Stimson, International Peace Institute, Security Council Report, 'The Situation in Libya: Reflections on Challenges and Ways Forward' 5 July 2022 <https://www.stimson.org/wp-content/uploads/2022/07/Situation-in-Libya-Meeting-Note-Proofs26.pdf> accessed 23 February 2023; Cristina Orsini, Jordan Street, and Lewis Brookes, 'Enshrining Impunity: A Decade of International Engagement in Libya' (Saferworld and Lawyers for Justice in Libya, February 2022) p. 26.
[178] *Situation in Libya*, ICC-01/11 <https://www.icc-cpi.int/libya> accessed 2 October 2022.

phenomenon.[179] More could have been done to maximize the pre-contentious phase before Libya officially filed an admissibility challenge.

3.4.2 Victim-oriented Qualified Deference to Libya

Instead of prolonging the admissibility issue over the *Al-Senussi* and *Gaddafi* cases based on very strict reading of Article 17, the ICC should have used the opportunity to make an impact in Libya.[180] The thesis argues that victim-oriented qualified deference would have been one way for the Court and Libyan authorities to work together to kickstart cases in Libya or elsewhere in the region if Libya was open to this compromise.[181] To consider qualified deference, there must be some level of willingness, and this was not lacking in the situation. For example, Libya has provisions for victims' participation, and showed a disposition towards carrying victims along in domestic proceedings.[182] This willingness could have been cultivated

[179] See ICC-OTP, 'Twenty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011) 21 April 2022, paras 44-45 <https://www.icc-cpi.int/sites/default/files/2022-04/2022-04-28-otp-report-unsc-libya-eng.pdf> accessed 2 October 2022, ('OTP's Twenty-Third Report (2022) to the UNSC Regarding UNSCR 1970 (2011)'). Although the OTP suggests that Libya can take some blame for the accountability gap in the domestic context, the Court has not achieved success with the cases it is pursuing in the Hague. The Prosecutor also noted staffing and resource issues at the ICC, see paras 46-47.

[180] See for example, Megret and Samson, Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials (2013) pp. 577-589; Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) pp. 96-124; Karen Allen, Institute for Security Studies, ISS Today, 'Gaddafi's bid for president questions the ICC's influence', 26 November 2021 <https://issafrica.org/iss-today/gaddafis-bid-for-president-questions-the-iccs-influence> accessed 2 October 2022.

[181] Although a different situation, the UNSC Resolution referring the Darfur situation to the ICC suggested that prosecutions in the region of the situation country was desirable and possible. See UNSC S/RES/1593 (2005) para 3.

[182] See Code of Criminal Procedure and Supplementary Laws (LY) 28 November 1953, articles 61 and 173; See also OPCV's Observations on "Libyan Government's Further Submissions on Issues Related to the Admissibility of the Case Against Saif Al-Islam Gaddafi", *Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-279, PTC I, ICC, 18 February 2013, para 11, fn. 16; Moffett, Justice for Victims Before the ICC (2014) p. 273; Libyan Government's Consolidated Reply to the Responses of the Prosecution, OPCD, and OPCV to its Further Submissions on Issues Related to the Admissibility of the Case Against Saif Al-Islam Gaddafi, *Gaddafi and Al-Senussi*, *Situation in Libya*, ICC-01/11-01/11-293-Red, PTC I, ICC, 4 March 2013, paras 57, 62-64.

using cooperation partners who can ensure that Libya would implement victims' participation, and this process could be monitored.

The ICC unconditionally deferred the *Al-Senussi* case to Libya. Such an approach can be problematic because it leaves the Court little room to review an inadmissibility decision[183] except where the OTP has an interest in filing a review in accordance with Article 19 (10) of the Statute which states that

> "If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17."[184]

Soon after the ICC's deferral to Libya, there were calls from scholars and commentators urging the OTP to file such a review of the inadmissibility decision of the *Al-Senussi* case.[185] This was because after the Court's deference to Libya, the situation in the country deteriorated, and Libya's political divide did not improve.[186] These events suggested that the ICC would have

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[183] See Kevin Jon Heller, 'It's Time to Reconsider the Al-Senussi Case. (But How?)' (Opinio Juris, 2 September 2014) <http://opiniojuris.org/2014/09/02/time-reconsider-al-senussi-case/> accessed 2 October 2022 ('Heller, It's Time to Reconsider the Al-Senussi Case. (But How?) (2014)'); Carla Ferstman and others, 'The International Criminal Court and Libya: Complementarity in Conflict' (Chatham House International Law Programme Meeting Summary, 22 September 2014) <https://www.chathamhouse.org/sites/default/files/field/field_document/20140922Libya.pdf> accessed 2 October 2022 ('Chatham House International Law Programme Meeting Summary, The International Criminal Court and Libya: Complementarity in Conflict (2014)').

[184] See also Article19 (3) ICCSt.; Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 249.

[185] Heller, It's Time to Reconsider the Al-Senussi Case. (But How?) (2014); Chatham House International Law Programme Meeting Summary, The International Criminal Court and Libya: Complementarity in Conflict (2014).

[186] Heller, It's Time to Reconsider the Al-Senussi Case. (But How?) (2014); CICC, 'Abdullah al-Senussi'<https://www.coalitionfortheicc.org/cases/abdullah-alsenussi> accessed 2 October 2022; Chatham House International Law Programme Meeting Summary, The International Criminal Court and Libya: Complementarity in Conflict (2014); FIDH Press Release (2015) <https://www.fidh.org/en/region/north-africa-middle-east/libya/fidh-condemns-libyan-court-s-decision-to-sentence-nine-gaddafi-era> accessed 2 October 2022.

probably found the case admissible in such an instance.[187] However, the Prosecutor did not file a review, but reiterated the Chamber's inadmissibility decision.[188] Had the ICC qualified its deference to Libya, it could offer a legal basis to recall the *Al-Senussi* case where monitoring exercises reveal that the expected results were not forthcoming even after reasonable adjustments which factors in the changing situation.[189] The thesis argues that due to the nature and importance of complementarity, the ability to request inadmissibility reviews should not be limited only to the Prosecutor.[190] The structure and composition of the proposed Division allows for such a review to be requested without undermining the powers of the Prosecutor.[191] It contributes to prosecutorial accountability given the concurrent jurisdiction which the ICC and states possess.

3.4.3 Complementarity Understanding for Libya

A complementarity understanding for Libya would capture the terms of the victim-oriented qualified deference proposed earlier. It could have outlined *inter alia* (1) Libya's role, and that of the ICC in the situation, (2) various victim-oriented goals, including how to meet victims' needs pending completion of proceedings, (3) timing to meet each of these goals, (4) ways to ensure the protection of the rights of the accused, (5) a mechanism to report progress or further

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[187] See Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015), p. 249; Heller, It's Time to Reconsider the Al-Senussi Case. (But How?) (2014); Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 248-249.

[188] Up to 2016, the OTP maintained the position that there were no new facts which negate the basis on which the Pre-Trial Chamber found Mr A1-Senussi's case inadmissible, and as at the time of writing this author is unaware of any pending review request.

[189] Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 255-257.

[190] It is understandable that the avoidance of forum shopping may be the reason why the defense does not have this right. See Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) pp. 249-250.

[191] See Article 61 (7) of the Rome Statute; See also Stahn, Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference? (2015) p. 249.

challenges (for instance, the deteriorating security situation in Libya) and (6) clauses that allow the Court and Libya to adapt to the changing circumstances. It could have also covered who key cooperation partners would be and their roles, including those already working with Libya and the ICC, penalties for default, and when deference must be reviewed by the Court to allow a resumption of exercise of ICC jurisdiction. Such a tailored approach could have helped with aligning expectations of justice with realities on the ground. It could have saved resources expended on admissibility challenges which did not result in the progress of the situation in The Hague or in Libya. It would have also allowed the ICC to better support Libya to fulfil its obligations.

With regards to monitoring, the Prosecutor through yearly reports to the UNSC stated that the OTP continued to monitor the national proceedings in the *Al-Senussi* case.[192] In 2016, former Prosecutor Bensouda made the following statement; 'as regards the Al-Senussi case, […] At this stage, my Office remains of the view that no new facts have arisen which negate the basis on which the Pre-Trial Chamber found Mr Al-Senussi's case inadmissible before the Court.'[193] A similar statement was repeated in one of the OTP's 2018 reports where The Prosecutor

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[192] See for example, ICC-OTP, 'Fifteenth Report Of The Prosecutor Of The International Criminal Court To The United Nations Security Council Pursuant To UNSCR 1970 (2011)' 9 May 2018 <https://www.icc-cpi.int/itemsDocuments/180509-otp-rep-UNSC-lib-ENG.pdf> accessed 2 October 2022, para 18; ICC-OTP, 'Seventeenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970 (2011)' 8 May 2019, para 20 <https://www.icc-cpi.int/itemsDocuments/190508-rep-otp-UNSC-libya-ENG.pdf> accessed 2 October 2022; ICC-OTP, 'Eighteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)' 6 November 2019, para 19 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/191024-report-icc-otp-UNSC-libya-eng.pdf> accessed 2 October 2022; ICC-OTP, 'Nineteenth Report of The Prosecutor of The International Criminal Court to the United Nations Security Council Pursuant To UNSCR 1970 (2011)' 5 May 2020 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/19th-report-icc-otp-UNSC-libya-ENG.pdf> accessed 2 October 2022; Twenty-First Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970 (2011)' 17 May 2021 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/210517-otp-report-unsc-libya-eng.pdf> accessed 2 October 2022; OTP's Twenty-Third Report (2022) to the UNSC Regarding UNSCR 1970 (2011) para 13.

[193] See ICC, 'Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)' 9 November 2016, para 12 <https://www.icc-cpi.int/news/statement-united-nations-security-council-situation-libya-pursuant-unscr-1970-2011-2> accessed 2 October 2022; OTP's Seventeenth Report (2019) to the UNSC Regarding UNSCR 1970 (2011) para 20.

maintained the same position.[194] The next time the OTP provided an update on this case was in its report issued on 21 April 2022 where it simply stated that

> "The ICC proceedings against Abdullah Al-Senussi came to an end on 24 July 2014 when the Appeals Chamber confirmed a decision declaring the case inadmissible before the ICC because it was the subject of domestic proceedings conducted by the competent Libyan authorities."[195]

It is unclear why the sudden resumption of reporting on the *Al-Senussi* case.[196] What is clear is that this monitoring exercise was not due to a policy of victim-oriented complementarity, nonetheless it highlights the importance of effective monitoring, especially in challenging situations such as Libya.

3.5 Way Forward for UNSC Referrals

In its April 2022 Report to the UNSC, Prosecutor Khan made the following statement which appears to be in line with some suggestions made here in relation to the Libyan situation, albeit not as victim oriented.

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[194] See OTP's Fifteenth Report (2018) to the UNSC Regarding UNSCR 1970 (2011) para 18; ICC-OTP, 'Twenty-First Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970 (2011)' 17 May 2021 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/210517-otp-report-unsc-libya-eng.pdf> accessed 2 October 2022; By 2021 the OTP's 21st report made no mention of the Al-Senussi case. See Twenty-First Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970 (2011)' 17 May 2021 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/210517-otp-report-unsc-libya-eng.pdf> accessed 2 October 2022

[195] See ICC-OTP, 'Twenty-Third Report of the Prosecutor of The International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)' 21 April 2022 <https://www.icc-cpi.int/sites/default/files/2022-04/2022-04-28-otp-report-unsc-libya-eng.pdf> accessed 2 October 2022, para 13. Months before this report, in the Prosecutor's November 2021 statement to the UNSC regarding Libya, there was no mention of the case.

[196] ICC-OTP, 'Twenty-Third Report of the Prosecutor of The International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)' 21 April 2022 <https://www.icc-cpi.int/sites/default/files/2022-04/2022-04-28-otp-report-unsc-libya-eng.pdf> accessed 2 October 2022, para 13.

> "Victims deserve clarity as to the overarching objectives of the Office in relation to the Libya situation and anticipated timelines by which it seeks to deliver identified goals. To meet the expectations of those awaiting justice, and to provide a meaningful answer to the call for action by the Council, our approach must be targeted and focused on tangible outputs. The response of the Office to the referral by the Council cannot be permanently open-ended, but timing will depend on the evolution of the conflict, and the development of genuine national capacity to ensure accountability."[197]

To deliver on this vision, the Prosecutor promises first to prioritize the situation and the allocation of resources to reflect this. Secondly to empower *inter alia* victims to participate in OTP's work by significantly enhancing the OTP's ability to engage on the ground.[198]

> "Third, a fresh approach to engagement with Libyan authorities in order to promote and support accountability efforts at the national level wherever possible, in line with the principle of complementarity. Finally, the establishment of a proactive and accelerated policy of cooperation with third States, regional organizations and international partners so as to fully exploit all avenues for the use of information and evidence collected by the Team."[199]

It seems that the OTP is changing course in the Libya situation, and this is a welcome development. While the OTP talks about empowering *inter alia* victims to participate in the work of the Court, nothing in this outline talks about addressing victims short term needs, beyond ensuring their safety.[200] The Prosecutor plans to strengthen cooperation with Libyan

[197] OTP's Twenty-Third Report (2022) to the UNSC Regarding UNSCR 1970 (2011) para 50.
[198] OTP's Twenty-Third Report (2022) to the UNSC Regarding UNSCR 1970 (2011) para 51.
[199] OTP's Twenty-Third Report (2022) to the UNSC Regarding UNSCR 1970 (2011) paras 50-51, see also paras 52-73.
[200] OTP's Twenty-Third Report (2022) to the UNSC Regarding UNSCR 1970 (2011) paras 58-62.

authorities through high-level engagements, working meetings, dialogues, and another MoU,[201] but it is not clear how these will be any different from the previous ones which the OTP implemented. Also, one issue must not be forgotten which is the OTP's control over the complementarity process, albeit with some level of oversight by the Chamber.[202] This removes much needed inclusivity and transparency even within the limits of confidentiality and independence of the Court. The representation of victims in the proposed Independent Complementarity Division is crucial for victim-oriented justice in the Libyan situation. Therefore, to translate the OTP's outlined commitment into concrete results, the arguments made in this thesis should be considered by the ICC and other stakeholders.

UNSC referrals have yet to prove their worth in international criminal justice in The Hague and in domestic jurisdictions, as the Libyan and Darfur situations do not paint a good picture. This does not mean that a UNSC referral is not important as a trigger mechanism, but the ICC must ensure that the politics of the process do not filter into how it applies complementarity.[203] Regardless of trigger mechanisms,[204] the ICC must approach all situations with a view to doing victim-oriented justice by interpreting and applying the complementarity framework in a manner that accommodates victims' interests.

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[201] OTP's Twenty-Third Report (2022) to the UNSC Regarding UNSCR 1970 (2011) paras 63-67.
[202] See Chapter Four on the limitation with regards to the Chamber's oversight of OTP's powers for preliminary examinations and investigations.
[203] Kersten discusses the Libyan referral, the politics of the situation and the ICC's present and future impact. See Mark Kersten, 'Between Justice and Politics: The ICC's Intervention in Libya' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015) pp. 456-478.
[204] Kersten, The Politics of ICC Referrals – A Proposal (2012).

3.6 Applying Victim-oriented complementarity in *Proprio Motu* Situations: Kenya

3.6.1 Securing Cooperation in the Kenya Situation

The Kenyan situation is focused on alleged crimes against humanity committed in the context of the post-election violence in Kenya in 2007/2008.[205] The OTP opened a preliminary examination into the situation in 2007 and was communicating with the Kenyan government.[206] A Kenyan Commission of Inquiry into the Post-Election Violence (CIPEV, Waki Commission) investigated the situation and recommended that the government establish a special tribunal for dealing with high level persons who were implicated in the violence.[207] To ensure the prevention of the impunity of such perpetrators, the Waki Commission recommended that if Kenya failed to set up the proposed tribunal, it would hand over the evidence collected to the ICC.[208]

Meanwhile, the OTP engaged in dialogues and consultations with the Kenyan government to defer to the jurisdiction of the Court or investigate and prosecute.[209] The OTP reported that on different occasions, Kenyan authorities expressed their commitment to combat impunity by

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[205] *Situation in the Republic of Kenya*, ICC-01/09 <https://www.icc-cpi.int/situations/kenya> accessed 29 December 2022

[206] Request for Authorisation of an Investigation Pursuant to Article 15, *Situation in the Republic of Kenya*, ICC-01/09-3 26-11-2009, PTC II, ICC, 26 November 2009, paras 3-5.

[207] Truth, Justice, and Reconciliation Commission, 'Commission of Inquiry into Post-Election Violence (CIPEV)' (2008) <https://www.knchr.org/Portals/0/Reports/Waki_Report.pdf> accessed 2 October 2022 ('Waki Commission Report (2008)') p. 472; ICTJ, 'The Kenyan Commission of Inquiry into Post-Election Violence' <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf> accessed 2 October 2022.

[208] Waki Commission Report (2008) p. 18.

[209] Request for Authorisation of an Investigation Pursuant to Article 15, Situation in the Republic of Kenya, ICC-01/09-3 26-11-2009, PTC II, ICC, 26 November 2009, paras 14-20; Agreed Minutes of Meeting of 3 July 2009 between the ICC Prosecutor and the Delegation of the Kenyan Government (Annex 15) to the OTP's Request for Authorization into the Situation in Kenya accessible here <https://reliefweb.int/report/kenya/agreed-minutes-meeting-3-jul-2009-between-icc-prosecutor-and-delegation-kenyan> accessed 2 October 2022 ('Agreed Minutes of Meeting of 3 July 2009 between the ICC Prosecutor and the Delegation of the Kenyan Government').

addressing Rome Statute crimes committed in the situation.[210] It appeared that the OTP was leaning towards persuading Kenya to refer the cases to the ICC.[211] The OTP put forward a referral as the first way for the ICC to open an investigation into the situation, and the second option was for the Prosecutor to request authorization to investigate.[212]

Attempts by the Kenyan Parliament to pass a bill to establish the proposed tribunal failed.[213] The Waki Commission handed over evidence collected to the OTP[214] and the Prosecutor sought authorization[215] to open an investigation. In 2010, the Pre-Trial Chamber authorized the investigation.[216] This was the ICC's first *proprio motu* situation.[217] The Kenyan Government launched an admissibility challenge, but this was rejected by the Court based on a finding of Kenya's 'inaction' in relation to the same cases before the ICC.[218] For years the Prosecutor

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[210] Request for Authorisation of an Investigation Pursuant to Article 15, Situation in the Republic of Kenya, ICC-01/09-3 26-11-2009, PTC II, ICC, 26 November 2009, paras 13-14, 16, 21; Agreed Minutes of Meeting of 3 July 2009 between the ICC Prosecutor and the Delegation of the Kenyan Government.

[211] Request for Authorisation of an Investigation Pursuant to Article 15, Situation in the Republic of Kenya, ICC-01/09-3 26-11-2009, PTC II, ICC, 26 November 2009, para 20.

[212] Request for Authorisation of an Investigation Pursuant to Article 15, Situation in the Republic of Kenya, ICC-01/09-3 26-11-2009, PTC II, ICC, 26 November 2009, para 20.

[213] See Kenyans for Peace with Truth and Justice, 'Impunity Restored? Lessons Learned from the Failure of the Kenyan cases at the International Criminal Court' (2016) p. 2 <https://kptj.africog.org/wp-content/uploads/2016/11/ICC_Learning-from-Past-Mistakes_Final.pdf> accessed 2 October 2022, ('KPTJ, Impunity Restored? Lessons Learned from the Failure of the Kenyan cases at the International Criminal Court (2016)').

[214] ICC Press Release ICC-OTP-20090716-PR439, 'Waki Commission list of Names in the Hands of ICC Prosecutor' (2009) <https://www.icc-cpi.int/news/waki-commission-list-names-hands-icc-prosecutor> accessed 2 October 2022.

[215] Request for Authorisation of an Investigation Pursuant to Article 15, Situation in the Republic of Kenya, ICC-01/09-3 26-11-2009, PTC II, ICC, 26 November 2009.

[216] Decision Authorizing Investigation into the Situation in Kenya, ICC-01/09-19-Corr, 1 April 2010.

[217] Request for Authorisation of an Investigation Pursuant to Article 15, Situation in the Republic of Kenya, ICC-01/09-3 26-11-2009, PTC II, ICC, 26 November 2009.

[218] PTC II Rejection of Kenya's Admissibility Challenge, *Ruto, Kosgey, and Sang*, ICC-01/09-01/11-101, 30 May 2011, paras 48-70; Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Muthaura, Kenyatta, and Ali, Situation in the Republic of Kenya*, ICC-01/09-02/11-96, PTC II, ICC, 30 May 2011, paras 44-66; The Appeals Chamber confirmed the admissibility of these cases, see Judgment on the appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", *Ruto*, *Kosgey*, *Sang*, *Situation in Kenya*, ICC-01/09-01/11-307, AC, ICC, 30 August 2011; Kenya Appeals Judgment, *Muthaura, Kenyatta, Ali*, ICC-01/09-02/11-274, 30 August 2011; See also Dissenting Opinion of Judge Uscaka from the Appeals Chamber's Judgement on Kenya Appeal, Ruto, Kosgey, and Sang, ICC-01/09-01/11-336, 20 September 2011.

tried to make the OTP's case against six accused persons. Two cases were never confirmed,[219] the charges against Mr Kenyatta were withdrawn,[220] proceedings against Mr Ruto and Mr Sang were vacated,[221] and two suspects remain at large.[222]

Ciampi avers that Kenya in a way cooperated with the ICC which made it possible for the Prosecutor to sustain some cases during pre-trial trial phase.[223] It could be argued that Kenya showed willingness to engage with the Court, but cooperation was questionable,[224] although the OTP's policy at the time appeared to favor an ICC investigation.[225] Former Prosecutor Bensouda acknowledged that the OTP could learn from its shortcomings in early handling of the Kenya Situation.[226] The Chamber,[227] an expert review of the failure of the Kenya cases,**[228]** as well as Kenyan civil society organizations highlight some of the reasons for the status of the Kenya situation before the Court. These include (1) inadequate investigation before the confirmation of charges, (2) an overemphasis on proceeding with the Kenyan situation at the

[219] The charges against Mr Hussein Ali, and Mr Henry Kosgey were not confirmed, see *Situation in the Republic of Kenya*, ICC-01/09 <https://www.icc-cpi.int/situations/kenya> accessed 29 December 2022.
[220] *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11 <https://www.icc-cpi.int/kenya/kenyatta> accessed 3 October 2022.
[221] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11 <https://www.icc-cpi.int/kenya/rutosang> accessed 3 October 2022.
[222] *Situation in the Republic of Kenya*, ICC-01/09 <https://www.icc-cpi.int/situations/kenya> accessed 29 December 2022.
[223] Ciampi, Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of the ICC (2016) p. 39.
[224] See Second Decision on Prosecution's Application for A Finding of Non-Compliance Under Article 87 (7) of the Statute, *Kenyatta*, *Situation in the Republic of Kenya*, ICC-01/09-02/11-1037, 19 September 2016; Human Rights Watch, 'ICC: Countries Should Press Kenya on Obstruction, Strong Action Needed to Back-Up Court Ruling' 19 September 2016 <https://www.hrw.org/news/2016/09/19/icc-countries-should-press-kenya-obstruction> accessed 3 October 2022.
[225] See KPTJ, Impunity Restored? Lessons Learned from the Failure of the Kenyan cases at the International Criminal Court (2016) p.21.
[226] Statement of Former Prosecutor Bensouda on External Expert Review and Lessons Drawn from the Kenya Situation (2019).
[227] See for example, Concurring Opinion of Judge Christine Van den Wyngaert, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, *Kenyatta*, *Situation in the Republic of kenya*, ICC-01/09-02/11-728-Anx2, TC V, ICC, 26 April 2013; Christian M. De Vos 'Investigating from Afar: The ICC's Evidence Problem' (2013) 26 (4) Leiden Journal of International Law 1009, pp. 1009-1024.
[228] Statement of Former Prosecutor Bensouda on External Expert Review and Lessons Drawn from the Kenya Situation (2019) p. 3.

ICC at all costs, and (3) poor decision-making process by the OTP at the time.[229] In addition to issues of cooperation and the OTP's handling of the Kenya situation, the collapse of the Kenya cases has also been attributed to insufficient evidence, attacks against victims, witness tampering and intimidation.

These issues in the Kenya situation once again call attention to the close connection between cooperation of concerned states and justice for victims. Securing genuine cooperation is even more challenging in situations such as the Kenya where some of the suspects were high level members of the government from whom cooperation was sought. This does not mean that all such situations would inevitably be fatal, as there are reasons for cautious optimism in relation to a change in how complementarity is implemented. If the Darfur situation offers any lessons, it is that powerful alleged perpetrators[230] can be brought to justice with sustained efforts of victims, and national and international actors. For example, In Kenya, one of the former accused, Mr. Kenyatta has recently left office and this can open him up to possible indictments if not at the ICC, then elsewhere. The same could be the fate of Mr. Ruto down the line. This is possible because Mr Kenyatta's case was withdrawn due to insufficient evidence,[231] and the case against Mr Ruto was terminated by the Chamber who by majority accepted that the case for the prosecution was weak.[232] Article 20 of the Statute would not prevent their cases from

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[229] It also worth mentioning that not all staff of the component units of the OTP were in favor of the Office's approach, but their concerns apparently did not result in a change of course. See Statement of Former Prosecutor Bensouda on External Expert Review and Lessons Drawn from the Kenya Situation (2019) pp. 2-3, E7-E10; Shehzad Charania and others, The ICC at a Crossroads: The Challenges of Kenya, Darfur, Libya and Islamic State' (Chatham House, Meeting Summary, 11 March 2015) pp. 3-4.

[230] Bashir is yet to be convicted locally or at the ICC, but he has been ousted from power and arrested. See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 <https://www.icc-cpi.int/darfur/albashir> accessed 2 October 2022.

[231] *The Prosecutor v. Uhuru Muigai Kenyatta*, *Situation in the Republic of Kenya*, ICC-01/09-02/11, <https://www.icc-cpi.int/kenya/kenyatta> accessed 14 January 2023.

[232] ICC, 'Questions and Answers Arising from the Decision of No-Case to Answer in the Case of Prosecutor v Ruto and Sang', ICC-PIDS-Q&A-KEN-01-01/16_Eng <https://www.icc-cpi.int/sites/default/files/iccdocs/PIDS/publications/EN-QandA-Ruto.pdf> accessed 14 January 2023.

being reopened where there is new evidence.[233] Kenya has an active civil society, which together with other entities such as the African Union's Panel of Eminent African Personalities[234] worked towards accountability locally or in The Hague.[235] The proposed Complementarity Division makes room for the involvement of such stakeholders through ICC coordinators and without jeopardizing the Court's independence. This inclusivity could have made a difference in how the situation was handled from the start since preliminary examinations in the Kenya situation would have been conducted by the proposed Division in coordination with the OTP. It could have contributed to transparency and increase accountability for prosecutorial discretion in the situation.

3.6.2 Victim-oriented Qualified Deference to Kenya

States would most likely adopt a defensive and uncooperative position towards the OTP's *proprio motu* intervention in their situation, which makes the phased approach to complementarity much more important in these types of situations. For instance, through conducting preliminary examinations there would be more opportunities to explore less-contentious approaches to fight impunity and deliver justice to victims. The OTP's approach

[233] See Article 20 of the Rome Statute; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11 <https://www.icc-cpi.int/kenya/rutosang> accessed 3 October 2022; The Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11 <https://www.icc-cpi.int/kenya/kenyatta> accessed 3 October 2022.

[234] Kofi Annan Foundation Press Release, 'AU Panel of Eminent African Personalities on the Appointment of Kenya's Truth, Justice and Reconciliation Commission' (2009) < https://www.kofiannanfoundation.org/foundation-news/statement-issued-by-the-au-panel-of-eminent-african-personalities-on-the-appointment-of-kenyas-truth-justice-and-reconciliation-commission/> accessed 3 October 2022; See the Waki Commission's Report (2008).

[235] See Christine Bjork and Juanita Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya' (2011) 14 (1) Yale Human Rights and Development Law Journal 205, pp. 205-229; Chandra Lekha Sriram and Stephen Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact (2012) 12 (2) International Criminal Law Review 219, pp. 221-226; Thomas Obel Hansen, 'Complementarity in Kenya? An Analysis of the Domestic Framework for International Crimes Prosecution' in Ronald Slye (ed) *The Nuremberg Principles in Non-western Societies A Reflection on their Universality, Legitimacy and Application* (International Nuremberg Principles Academy 2016) pp. 146-160.

to see the Kenyan situation progress in The Hague at all costs[236] raises the question of what amount of effort was directed towards ensuring that Kenya had a fair opportunity[237] to investigate and prosecute. Some attention has been given to the internal structure of the OTP and how it may have contributed to the collapse of the Kenya cases.[238] Nonetheless, there is a need to examine whether a different complementarity mechanism could have arrived at a better outcome.

An alternative approach to the Kenya situation would be to adopt at the outset the best comprehensive method to realizing victim-oriented justice. This could have been accompanied by an emphasis on capacity building in specific areas where Kenya needed to boost its capacity, for example to conduct national investigations.[239] This is preferable because achieving success at the ICC in the Kenya cases would be welcomed, but this would still leave a large justice gap due to the nature of crimes committed and victims' harms.[240] A clear outline of goals as part of victim-oriented qualified deference for this situation could have been used to push the situation forward at the national or even regional level. In this regard, the AU's relationship with the ICC is important because the AU could be a positive force when rightly motivated. It should be noted that the AU tried to mediate between the ICC and Kenya in this situation through its

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[236] Statement of Former Prosecutor Bensouda on External Expert Review and Lessons Drawn from the Kenya Situation (2019) pp. 2-4, E8-E11, and pp. 3-4, E16-E18.
[237] Akhavan, Complementarity Conundrums: The ICC Clock in Transitional Times (2016) pp, 1047-1048.
[238] See KPTJ, Impunity Restored? Lessons Learned from the Failure of the Kenyan cases at the International Criminal Court (2016) pp. 14-17; Statement of Former Prosecutor Bensouda on External Expert Review and Lessons Drawn from the Kenya Situation (2019).
[239] See Waki Commission Report (2008) p. 469.
[240] See KPTJ, Impunity Restored? Lessons Learned from the Failure of the Kenyan cases at the International Criminal Court (2016) p. 19.

Panel of Eminent African Personalities which eventually triggered the failsafe provision of the Waki Commission by handing the ICC a list of alleged perpetrators.[241]

Notwithstanding the uneasy relationship between the ICC and the AU, the proposed Complementarity Division offers an opportunity for change. This will require a systematic development along a clear strategy for victim-oriented justice,[242] and some dynamics in the ICC-AU relationship support this argument. For instance, the AU is familiar with the Rome Statute system and has previously used this to engage the ICC in relation to the Sudan, Libya, and Kenya situations.[243] When this failed, the AU resorted to mobilization of many African states into a position of non-cooperation, or at least hesitancy in cooperating with the ICC.[244] These moves by the AU offer a unique potential which can be transformed to the ICC's advantage. This is possible because the row between the AU and the ICC over its perceived excessive focus on Africa did not obliterate support of individual African states for the ICC and its mandate. For example, Botswana has publicly refused to support the AU's non-

[241] ICC-OTP, 'Kenya National Dialogue and Reconciliation Two Years On: Where Are We?' Statement Delivered by Luis Moreno-Ocampo, 2 December 2010 <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/7D0C962C-92E5-4E8D-94AB-6C9D83B0752A/282734/02122010_Kenya.pdf> accessed 3 October 2022; Gabrielle Lynch and Miša Zgonec-Rožej, 'The ICC Intervention in Kenya' (Chatham House, AFP/ILP 2013/01 2013) <https://www.chathamhouse.org/sites/default/files/public/Research/Africa/0213pp_icc_kenya.pdf> accessed 1 October 2022.

[242] See for example, Tonny Raymond Kirabira, 'Surrender of Ali Kushayb and Paul Gicheru: New Perspectives in Africa's Relationship with the ICC' (2021) 54 (1) New York University, Journal of International Law and Politics 23, pp. 23-33; Coalition for the International Criminal Court, 'African Union A Strained, but Repairable, relationship' <https://www.coalitionfortheicc.org/state-support/regional-organization/au> accessed 3 October 2022; Working with African civil society will also be important in this regard. See for example, Parliamentarians for Global Action, 'Sudan: One step Closer to Ratifying the Rome Statute of the International Criminal Court' 5 August 2021 <https://www.pgaction.org/news/sudan-one-step-closer-rome-statute.html>, accessed 3 October 2021.

[243] Tessema and Vesper-Gräske Africa, the African Union and the International Criminal Court: Irreparable Fissures? (2016) pp. 1-4; Johan D van der Vyver, 'Deferrals of Investigations and Prosecutions in the International Criminal Court' (2018) 51 (1) The Comparative and International Law Journal of Southern Africa 1, pp. 1-18.

[244] Murithi, The African Union and the International Criminal Court: An Embattled Relationship? (2013) pp. 1-9; Tessema and Vesper-Gräske Africa, the African Union and the International Criminal Court: Irreparable Fissures? (2016) pp. 1-4; Ssenyonjo, State Withdrawal Notifications from the Rome Statute of the ICC: South Africa, Burundi and the Gambia (2018) pp. 63-110; Emmanuel Okurut and Hope Among, 'The contentious relationship between Africa and the International Criminal Court (ICC)' (2018) 10 (3) Journal of Law and Conflict Resolution 19, pp. 19-29.

cooperation policy and other countries have entered reservations at different times to some of the AU's decisions regarding the ICC.[245] Moreover, in paragraph 6 of the AU's 2009 Non-Cooperation Resolution *vis a vis* the ICC, the AU signalled its understanding and importance of capacity building of national jurisdictions.[246] It encouraged Member States to initiate programs of cooperation and capacity building to enhance national capacity for dealing with serious crimes of international concern, and the strengthening of cooperation amongst judicial and investigative agencies.[247] Moreover, as Omorogbue notes, the AU's predecessor, the Organization for African Unity in some ways contributed to the work of the ICTR by endorsing the Tribunal in 1997 which increased the cooperation of African States with the ICTR.[248] The AU also continued to reiterate its interests to combat impunity,[249] including during a meeting held on 5th and 6th September 2022 between the ICC President, the Chairperson of the AU, and

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[245] See African Union 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)' (AU Sirte 2009) Doc. Assembly/AU/13(XIII) para 10; African Union 'Decision on International Jurisdiction, Justice and The International Criminal Court (ICC)' (AU Addis Ababa 2013) Doc. Assembly/AU/13(XXI) (Botswana entered a reservation to the entire decision); AU, 'Decision on the International Criminal Court' (Addis Ababa, 2016) Doc.EX.CL/952(XXVIII) para 3 commends South Africa on non-cooperation on Al Bashir's arrest, para 10 calls for strategy for mass withdrawal; African Union 'Decision on The International Criminal Court' (AU Addis Ababa 2017) Doc. EX.CL/1006(XXX) para 5 addresses the mass withdrawal strategy; African Union 'Decision on The International Criminal Court' (AU Addis Ababa 2017) Doc. EX.CL/1006(XXX) (several countries including Botswana entered reservations on this decision); See also Dapo Akande, 'Is the Rift between Africa and the ICC Deepening? Heads of States Decide Not to Cooperate with ICC on the Bashir Case' (EJIL: Talk, 4 July 2009) <https://www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/> accessed 3 October 2022; Murithi, The African Union and the International Criminal Court: An Embattled Relationship? (2013) p. 4.

[246] African Union 'Decision on International Jurisdiction, Justice and The International Criminal Court (ICC)' (AU Addis Ababa 2013) Doc. Assembly/AU/13(XXI) para 6. This has not been completely translated into concrete results, but at the very least it reflects openness on the AU's part.

[247] African Union 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)' (AU Sirte 2009) Doc. Assembly/AU/13(XIII) para 6.

[248] Eki Omorogbe, 'The African Union and the International Criminal Court: What to Do with Non-Party Heads of State?' (2017) University of Leicester School of Law Research Paper No 17-09, pp. 4-5 <https://ssrn.com/abstract=2997666> accessed 26 September 2022; OAU, 'Statement of the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution on the Situation in the Great Lakes Region with Particular Reference to Eastern Zaire' (Lome, 27 March 1997) <https://reliefweb.int/report/democratic-republic-congo/statement-central-organ-oau-mechanism-conflict-prevention> accessed 3 October 2022.

[249] See for example, African Union 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)' (AU Sirte 2009) Doc. Assembly/AU/13(XIII) para 4; AU, 'Decision on The International Criminal Court' (Addis Ababa, 2018) Doc. EX.CL/1068 (XXXII) para 2 (i); AU, 'Decision on the International Criminal Court' (Addis Ababa, 2019) Doc. EX.CL/1138(XXXIV), para 2.

Chairperson of the AU Commission.[250] The proposed Independent Complementarity Division as a neutral and inclusive body can help to build a stronger alliance with the many AU Member States who continue to support the work of the ICC.[251] It provides a real possibility that the AU can encourage its member states to achieve victim-oriented justice, especially if this will help to give them a sense that their sovereignty can still be protected within the framework of the Statute. Victim-oriented qualified deference could be the tool to test the waters in this regard.

3.6.3 Complementarity Understanding for Kenya

As the Kenya situation progressed, and while the OTP communicated with Kenyan authorities, the latter agreed to some steps required to fulfil its obligations. As earlier stated, Kenya showed some element of willingness to engage with the Court. In one instance, the OTP put together a list of points agreed by both parties contained in minutes of a meeting of the Former Prosecutor Moreno-Ocampo with a Kenyan Government delegation.[252] Points briefly covered in the minutes were that the Kenyan delegation offered to provide the Prosecutor[253] an update within three months on the status of investigations and prosecutions of cases arising out of the situation, and other information requested by the OTP to perform its preliminary

[250] ICC Press Release ICC-CPI-20220906-PR1669, 'ICC President meets with Chairperson of African Union and Chairperson of African Union Commission' (2022) <https://www.icc-cpi.int/news/icc-president-meets-chairperson-african-union-and-chairperson-african-union-commission> accessed 3 October 2022.
[251] Ssenyonjo, State Withdrawal Notifications from the Rome Statute of the ICC: South Africa, Burundi and the Gambia (2018) pp. 104-106; Sarah Rayzl Lansky, Africans Speak Out Against ICC Withdrawal: Governments Signal Continued Support for Court, 2 November 2016 <https://www.hrw.org/news/2016/11/03/africans-speak-out-against-icc-withdrawal> accessed 26 September 2022; Elise Keppler, 'African Members Reaffirm Support at International Criminal Court Meeting Countries Commit to Working Within the ICC System' 17 November 2016 <https://www.hrw.org/news/2016/11/17/african-members-reaffirm-support-international-criminal-court-meeting> accessed 26 September 2022.
[252] ICC-OTP, Agreed Minutes of the Meeting Between Prosecutor Moreno-Ocampo and the Delegation of the Kenyan Government, The Hague, 3 July 2009.
[253] ICC-OTP, Agreed Minutes of the Meeting Between Prosecutor Moreno-Ocampo and the Delegation of the Kenyan Government, The Hague, 3 July 2009.

examinations.[254] They offered to update the Prosecutor on measures put in place to ensure the safety of victims and witnesses pending the initiation and completion of 'suitable' judicial proceedings.[255] Additionally, they offered to provide information[256] on the modalities for conducting national proceedings into the situation, with clear benchmarks over a 12-month period.[257] In the alternative, if there was no parliamentary agreement regarding the establishment of the Waki Commission's proposed Special Tribunal for Kenya, the Prosecutor expected Kenya to refer the situation to the ICC.[258] Beside the meeting minutes, it was reported that the Kenyan government signed an MoU with the ICC in 2010,[259] but apparently beyond facilitating some Court activities in Kenya, the agreement has not yielded much fruit. Outlining the agreements in the meeting minutes was a good start, although a complementarity understanding should have captured more victim-oriented conditions and the process should be inclusive.

Proprio motu situations such as the one in Kenya require careful and creative approach, persistence, as well as carrots and sticks.[260] While the OTP's effort to put together some agreements was a step in the right direction, its policy in Kenya may have prevented it from

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[254] ICC-OTP, Agreed Minutes of the Meeting Between Prosecutor Moreno-Ocampo and the Delegation of the Kenyan Government, The Hague, 3 July 2009.
[255] ICC-OTP, Agreed Minutes of the Meeting Between Prosecutor Moreno-Ocampo and the Delegation of the Kenyan Government, The Hague, 3 July 2009.
[256] ICC-OTP, Agreed Minutes of the Meeting Between Prosecutor Moreno-Ocampo and the Delegation of the Kenyan Government, The Hague, 3 July 2009.
[257] Note that the OTP also reported that on 9th July 2009 it received from the Government of Kenya copies of the (i) Report to the Hon. Attorney General by the Team on the Review of Post-Election Violence related in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi Provinces, February 2009; and (ii) Status Report on the Operationalization of the Witness Protection Programme. See Request for Authorisation of an Investigation Pursuant to Article 15, Situation in the Republic of Kenya, ICC-01/09-3 26-11-2009, PTC II, ICC, 26 November 2009, para 16.
[258] Request for Authorisation of an Investigation Pursuant to Article 15, Situation in the Republic of Kenya, ICC-01/09-3 26-11-2009, PTC II, ICC, 26 November 2009, para 9.
[259] Human Rights Watch, 'Perceptions and Realities: Kenya and the International Criminal Court', 14 November 2013 <https://www.hrw.org/news/2013/11/14/perceptions-and-realities-kenya-and-international-criminal-court> accessed 3 October 2022.
[260] Stahn, Taking Complementarity Seriously (2011) pp. 250-251.

preparing and implementing a comprehensive plan to tackle issues in the situation. The independence and neutrality of the proposed Division means that it could have been better suited to prepare a realistic complementarity understanding and should genuinely pursue its implementation while leaving room for flexibility. For instance, it will give Kenya a fair opportunity to fulfil its obligations[261] or risk ICC intervention if it fails in its duties without justifiable reasons.

3.7 Applying Victim-oriented Complementarity in *Proprio Motu* Situations: Afghanistan

3.7.1 Securing Cooperation in Afghanistan Situation

The Afghanistan situation is the second *proprio motu* situation before the ICC. Preliminary examination into Afghanistan commenced in 2006.[262] It focused on war crimes and crimes against humanity allegedly committed in the context of the armed conflict between pro-government forces (members of the Afghan authorities, members of the US Armed Forces or the CIA), and anti-government forces (mainly the Taliban, Haqqani Network, and Hezb-e-

[261] Dissenting Opinion of Judge Uscaka from the Appeals Chamber's Judgment on Kenya Appeal, *Ruto, Kosgey, and Sang*, ICC-01/09-01/11-336, 20 September 2011, paras 16 to 22.
[262] Request for Authorisation of an Investigation Pursuant to Article 15, Situation in the Republic of Kenya, ICC-01/09-3 26-11-2009, PTC II, ICC, 26 November 2009, paras 22-29; *Situation in the Islamic Republic of Afghanistan*, ICC-02/17 <https://www.icc-cpi.int/afghanistan> accessed 3 October 2022; ICC-OTP, Report on Preliminary Examination Activities 2017 (4 December 2017) pp. 51-61; FIDH, 'Preliminary Examinations at the ICC: An Analysis of Prosecutor Bensouda's Legacy' (September 2021) <https://www.fidh.org/IMG/pdf/fidh_preliminary_examinations_at_the_icc_stocktaking_report.pdf> accessed 30 September 2022, pp. 8 and 11.

Islami Gulbuddin) since 1 May 2003.[263] It also covers crimes in the context of the situation allegedly committed in Poland, Romania and Lithuania since 1 July 2002.[264]

The OTP reported significant difficulties with conducting its preliminary examination and activities in the situation,[265] with assessing admissibility criteria in potential cases identified, and fostering cooperation.[266] This was *inter alia* due to the security situation in the country, the OTP's own resource constraints, and limited or reluctant cooperation.[267] The reluctance of international and regional organizations in relation to cooperating with the ICC may be due to the need to avoid compromising their relationship with concerned states.[268] Whereas for CSOs, it may be due to a lack of clarity of what the ICC requires of them, the issue of independence of the ICC and the CSOs, or clashes in their respective mandates.[269]

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[263] OTP's Request for Authorization of Investigation into the Situation in Afghanistan, ICC-02/17-7-Red, 20 November 2017, paras 19, 29-260.

[264] OTP's Request for Authorization of Investigation into the Situation in Afghanistan, ICC-02/17-7-Red, 20 November 2017, para 49.

[265] See ICC-OTP, Report on Preliminary Examination Activities 2011 (13 December 2011) para 30; ICC-OTP, Report on Preliminary Examination Activities 2012 (22 November 2012) paras 36-38; ICC-OTP, Report on Preliminary Examination Activities 2013 (25 November 2013) paras 53-54, and ICC-OTP, Report on Preliminary Examination Activities 2014 (2 November 2014) paras 98-101 show that they found ways to manage or work around the difficulty; ICC-OTP, Report on Preliminary Examination Activities 2015 (12 November 2015) para 131-133; ICC-OTP, Report on Preliminary Examination Activities 2016 (14 November 2016) paras 226-229, these paragraphs provide a summary of the OTP's activities in relation to the situation but no mention of security concerns. By the 2017 Report, the OTP had requested the authorization of investigation into the Afghanistan situation from the Pre-Trial Chamber. See OTP's Request for Authorization of Investigation into the Situation in Afghanistan, ICC-02/17-7-Red, 20 November 2017, paras 24-28.

[266] OTP's Report on Preliminary Examinations (2011) para 30; OTP's Report on Preliminary Examinations (2012) paras 37-38; OTP's Report on Preliminary Examinations (2013) paras 54-56; OTP's Report on Preliminary Examinations (2014) paras 84-102; OTP's Report on Preliminary Examinations (2015) paras 131-133; OTP's Report on Preliminary Examinations (2016) paras 214, and 226-229

[267] OTP's Report on Preliminary Examinations (2011) para 30; OTP's Report on Preliminary Examinations (2012) paras 37-38; OTP's Request for Authorization of Investigation into the Situation in Afghanistan, ICC-02/17-7-Red, 20 November 2017, paras 22-26.

[268] Report of the Independent Expert Review of the ICC (2020) 377-378.

[269] See Report of the Independent Expert Review of the ICC (2020) paras 381-385; Kirabira assesses the role CSOs play in situation countries as well as their local and international relationships including with the ICC. see Kirabira, NGO influence In Global Governance: Achieving Transitional Justice in Uganda and Beyond (2021) pp. 280-299.

The severe security situation in Afghanistan, the Taliban takeover in the middle of the pandemic, and the particularly uncooperative attitude of states such as the United States[270] are significant challenges that even the proposed and uniquely structured Independent Complementarity Division would find difficult to overcome. Nonetheless, it is expected that given its neutrality and composition, the proposed Division would have projected less tension while carrying out preliminary examinations into the situation and can realize more for victims than what is currently obtainable. With victims and Cooperation Coordinators represented in the proposed Division, there should be a better chance of galvanizing cooperation of donors for assistance programs for victims in a timely manner. While other humanitarian NGOs and partners may be donating towards the wider Afghanistan situation, the focus of assistance programs discussed here, is on those victims before the ICC. Such programs ensure that while international criminal proceedings which can span decades are underway, some aspects of victims' harms can be alleviated.[271]

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[270] See Request for Authorization of Investigation into Afghanistan, OTP's Request for Authorization of Investigation into the Situation in Afghanistan, ICC-02/17-7-Red, 20 November 2017, para 330; Leila Nadya Sadat, Mark A. Drumbl, 'The United States and the International Criminal Court: A Complicated, Uneasy, Yet at Times Engaging Relationship' (2016) Washington University in St. Louis Legal Studies Research Paper Series No 16-07-02, pp. 1-25 <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1504&context=wlufac> accessed 3 October 2022; Sarah L. Ochs, 'The United States, the International Criminal Court, and the Situation in Afghanistan' (2019) 95 (2) Notre Dame Law Review Reflection 89, pp. 89-100; US Embassy Consulates in Italy, 'Former Secretary Pompeo's Remarks to the Press on 5 March 2020 <https://it.usembassy.gov/secretary-pompeos-remarks-to-the-press/> accessed 3 October 2022.

[271] See Annex I-Red to the Registry's Final Consolidated Report on Article 18 (2) Victim Representations, *Situation in the Islamic Republic of Afghanistan*, PTC II, ICC, ICC-02/17-190-AnxI-Red, 25 April 2022, para 29 (b); Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) pp. 301-302.

3.7.2 Complementarity Understanding for Afghanistan

Where a deferral process is activated, the proposed Division could improve victims' access to complementarity proceedings to defend their interests. When former Prosecutor Bensouda notified victims of her intention to commence an investigation into the Afghanistan situation, she also invited them to make representations. These representations were to be made within a short time frame which may impact appropriate consultation with victims.[272] In response to the Prosecutor's request, 699 victims' representations were made by victims or their representatives, and were collated by the VPRS and the Registry, and transmitted to the Pre-Trial Chamber.[273] The Prosecutor noted that many of the victims who made representations were in support of an ICC investigation[274] because they *inter alia* wanted to know the truth and to make their voices heard.[275] There were victims who did not favor an ICC investigation, citing security concerns and doubts that it will result in the perpetrators being brought to justice.

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[272] See Rule 50(1)-(3) of the ICC Rules of Procedure and Evidence, and Regulation 50 (1) of the Regulations of the Court; OTP's Request for Authorization of Investigation into the Situation in Afghanistan, ICC-02/17-7-Red, 20 November 2017, para 373; Order to the Victims Participation and Reparation Section Concerning Victims' Representations, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-6, PTC III, ICC, 9 November 2017, paras 13-14 and 16; OPCV Submissions in the General Interest of the Victims on the Prosecution's Request for Leave to Appeal the Afghanistan PTC II Decision, ICC-02/17-59, 12 July 2019, para 54; Public redacted version of "Registry Request for Extension of Notice Period and Submissions on the Article 15(3) Process", 15 July 2021, ICC-01/21-8-Conf, *Situation in the Republic of Philippines*, ICC-01/21-8-Red, PTC I, ICC, 16 June 2021, paras 10-14; Declaration of Ehsan Qaane, Annex E to the Transmission of a "Motion Seeking Remedies for Information and Effective Outreach", *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-143-AnxE, PTC II, ICC, 29 April 2021, paras 14-16.

[273] Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-29, PTC II, ICC, 20 February 2018; Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Regarding Authorization of Investigation into the Afghanistan Situation, ICC-02/17-29-AnxI-Red, 20 February 2018.

[274] See OTP's Request for Authorization of Investigation into the Situation in Afghanistan, ICC-02/17-7-Red, 20 November 2017, para 365; Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Regarding Authorization of Investigation into the Afghanistan Situation, ICC-02/17-29-AnxI-Red, 20 February 2018, paras 39-40 and 47.

[275] Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Regarding Authorization of Investigation into the Afghanistan Situation, ICC-02/17-29-AnxI-Red, 20 February 2018, paras 39-40.

In the Prosecutor's application for authorization of an investigation into the situation, she relied among others, on those victims' representations which supported an investigation.[276] The OTP's request was denied by the Pre-Trial Chamber[277] which based its decision on the fact that an investigation into the situation will not serve the interests of justice.[278] The Appeals Chamber subsequently authorized the investigation.[279] Within a month after receiving approval to investigate, the former Afghan Government filed a deferral request to the Court[280] which led to the suspension of the OTP's investigation in accordance with Article 18 (2) of the Statute.[281] While this proceeding was pending, the Taliban took control of Afghanistan,[282] hence casting further doubts as to the possibility of realizing justice through Afghan justice mechanisms in the nearest future. On 27 September 2021 the Prosecutor requested that the Pre-Trial Chamber authorize a resumption of investigation into the Afghanistan situation due to the Taliban takeover, and activities in Afghanistan.[283] On the same day, without consulting victims,[284] the

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[276] Note that these representations came through after the OTP filed the request for authorization but were relevant throughout the proceedings before the Pre-Trial Chamber, and subsequently before the Appeals Chamber. See OTP's Request for Authorization of Investigation into the Situation in Afghanistan, ICC-02/17-7-Red, 20 November 2017, paras 261-335 and 336-363; Prosecution Appeal Brief, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-74, AC, ICC, 30 September 2019, paras 65 and 158.

[277] PTC II Decision Refusing the Prosecutor's Request to Open an Investigation into the Situation in Afghanistan, ICC-02/17-33, 12 April 2019, paras 87-96.

[278] For discussion of the 'interests of justice', see Chapter Two Section 5.

[279] Appeals Chamber Decision Authorizing Investigation in the Situation in Afghanistan, ICC-02/17-138, 5 March 2020.

[280] Afghanistan's Letter to the OTP Requesting a Deferral of the Situation in Afghanistan, ICC-02/17-139-Anx1, 16 April 2020; Notification on Status of the Islamic Republic of Afghanistan's Article 18 (2) Deferral Request, ICC-02/17-142, 16 April 2021; ICC Press Release ICC-OTP-20210509-PR1591, 'The Office of the Prosecutor and high-level delegation from the Islamic Republic of Afghanistan hold productive meetings at the Seat of the Court' (2021) <https://www.icc-cpi.int/news/office-prosecutor-and-high-level-delegation-islamic-republic-afghanistan-hold-productive> accessed 3 October 2022.

[281] See also ICC-OTP, 'Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, Following the Application for An Expedited Order Under Article 18 (2) Seeking Authorization to Resume Investigations in the Situation in Afghanistan' 27 September 2021 <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application> accessed 3 October 2021.

[282] Request To Authorise Resumption of Investigation Under Article 18(2) of the Statute, *Situation in The Islamic Republic of Afghanistan*, ICC-02/17-161, PTC II, ICC, 27 September 2021.

[283] Request To Authorise Resumption of Investigation Under Article 18(2) of the Statute, *Situation in The Islamic Republic of Afghanistan*, ICC-02/17-161, PTC II, ICC, 27 September 2021, paras 8-19.

[284] See Response to Submissions on Behalf of Certain Victims Who Participated in the Litigation Under Article 15(4) (ICC-02/17-146-Anx and ICC-02/17-148-Anx), *Situation in the Republic of Afghanistan*, ICC-02/17-152,

Prosecutor released a statement that he had decided to deprioritize other aspects of the investigation, and would concentrate his focus on crimes allegedly committed by the Taliban and the Islamic State-Khorasan province.[285] The Chamber in setting out the procedure for proceedings regarding the Prosecutor's request to resume investigations stated that

> "[t[he statutory framework neither provides an opportunity for potential victims to intervene at this stage nor for the participation of other persons or entities without leave of the Chamber. Accordingly, the Submitters, (…) lack legal standing to participate in the proceedings triggered by the Prosecutor's Request and, as a result, [the relevant submission] must be dismissed *in limine*."[286]

The Prosecutor and the Chamber's statements further accentuate the level of restrictions of victims' access to complementarity proceedings. The Pre-Trial Chamber II subsequently clarified its use of the term 'potential victims' in this context and reminded the Prosecutor 'that the duties and obligations as regards victims should indeed inform its investigative and

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PTC II, ICC, 17 May 2021, para 7; Michael G. Karnavas, 'The Big Pivot: ICC Prosecutor Khan's Not So Slight, Afghan Slight Sleight of Hand' (Michaelgkarnavas, 4 October 2021) <http://michaelgkarnavas.net/blog/2021/10/04/icc-prosecutor-afghan-pivot/> accessed 3 October 2022; Amnesty International, 'Afghanistan: ICC Prosecutor's Statement on Afghanistan Jeopardises His Office's Legitimacy and Future' 5 October 2021 <https://www.amnesty.org/en/documents/ior53/4842/2021/en/> accessed 3 October 2021; FIDH, 'Resumption of the ICC investigation into Afghanistan, While Welcome, Should Not Exclude Groups of Victims or Crimes Within the Court's jurisdiction' 28 September 2021 <https://www.fidh.org/en/region/asia/afghanistan/resumption-of-the-icc-investigation-into-afghanistan-while-welcome> accessed 3 October 2021; Julian Elderfield, 'Uncertain Future for the ICC's Investigation into the CIA Torture Program' (Just Security, 12 November 2021) <https://www.justsecurity.org/79136/uncertain-future-for-the-iccs-investigation-into-the-cia-torture-program/> accessed 3 October 2022; Annex I-Red to the Registry's Final Consolidated Report on Article 18 (2) Victim Representations, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-190-AnxI-Red, PTC II, ICC, 25 April 2022, para 28.

[285] Statement of the Prosecutor of The International Criminal Court, Karim A. A. Khan QC, Following the Application for An Expedited Order Under Article 18 (2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan (2021); Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022, paras 33-36

[286] Decision Setting The Procedure Pursuant To Rule 55(1) Of The Rules Of Procedure and Evidence Following The Prosecutor's 'Request To Authorise Resumption of Investigation Under Article 18(2) Of The Statute', *Situation In The Islamic Republic of Afghanistan*, ICC-02/17-165, PTC II, ICC, 8 October 2021, para 22 (emphasis added and footnote omitted).

prosecuting action at all stages.'[287] Nonetheless, victims' rights at early-stage complementarity proceedings remain restricted.[288] A provisional complementarity understanding could have been completed at early stages of the Afghanistan proceedings based on *inter alia* a positive victim-oriented complementarity. A much later opportunity to conclude a complementarity understanding for Afghanistan came up when the Afghan Government requested a deferral in accordance with Article 18 (2) of the Statute.[289] At such a point, it became vital to victim-oriented justice that a complementarity understanding be concluded.

It is plausible that a complementarity understanding in the Afghanistan situation could have made the Prosecutor more cautious when planning to deprioritize some aspects of the situation without consulting victims. Such a move is at odds with the Prosecutor's obligation to respect victims' interests and personal circumstances in accordance with Article 54 (1) (b) of the Statute.[290] It also raised doubt as to the scope of the investigation which should be as broad as possible,[291] and victims made this clear in their representations to the OTP.[292] The need to act swiftly may be advanced as a reason why it was not feasible to consult victims prior to taking

[287] See Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022, para 32, see para 35 regarding the Chamber's views on the Prosecutor's duties *vis a vis* victims.
[288] See Decision on Submissions Received and Order to the Registry Regarding the Filing of Documents in the Proceedings Pursuant to articles 18 (2) and 68 (3) of the Statute, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-171, PTC II, ICC, 8 November 2021, para 15.
[289] Afghanistan's Letter to the OTP Requesting a Deferral of the Situation in Afghanistan, ICC-02/17-139-Anx1, 16 April 2020.
[290] Article 54 (1) (b) of the Rome Statute; See also Amicus Curiae Observations on Behalf of Former International Chief Prosecutors David M. Crane, Benjamin B. Ferencz, Richard J. Goldstone, Carla del Ponte and Stephen J. Rapp, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-113, AC, ICC, 15 November 2019 para 8; See also Decision Pursuant to article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022, para 36.
[291] See Dissenting Opinion of Judge Ibanez Carranza to the Appeals Chamber Decision against Victims' Appeals, Afghanistan Situation, ICC-02/17-137-Anx-Corr, 10 March 2020, para 12, 31-50. On selection of cases within a situation, see Regulation 33 of the Regulations of the OTP.
[292] Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Regarding Authorization of Investigation into the Afghanistan Situation, ICC-02/17-29-AnxI-Red, 20 February 2018, paras 42-45; OPCV, Request to Appear Before the Chamber, ICC-02/17-39, 10 June 2019, para 29; Annex A to the Transmission of "Victims' Request for Leave to Submit Observations", 13 October 2021, ICC-02/17-168-AnxA, *Situation in the Republic of Afghanistan*, ICC-02/17-168-AnxA, PTC II, ICC, 14 October 2021.

such steps. The representation of victims in the proposed Division could have increased the chances of better consultation with them in dealing with all relevant aspects of the deferral request, not just on their opinion regarding resumption of investigations.[293] The proposed Permanent Legal Representatives for Victims on Complementarity Issues could contribute to the consolidation of similar existing efforts within the Court[294] and can improve synergy. Where issues are unresolved through the proposed Division, judicial intervention can be a last resort. The Chambers may maintain that victims have no standing to appeal certain decisions which are detrimental to their interests. Even so, the representations captured in a complementarity understanding for Afghanistan could then be referred to and used as pressure points to encourage victim-oriented justice be it at the ICC, other domestic jurisdictions of the concerned states, or when possible, in Afghanistan.

On the 31st of October 2022, the Pre-Trial Chamber issued a decision authorizing the resumption of the Prosecutor's investigation into the situation in Afghanistan.[295]

> "The Chamber emphasise[d] that, notwithstanding the Prosecutor's 27 September 2021 statement to the media in which a modified focus was referred to, <u>the present authorisation relates to all alleged crimes and actors that were subject to the Prosecution's</u>

[293] See Final Consolidated Report on Article 18(2) Victim Representations, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-190, PTC II, ICC, 25 April 2022, paras 3- 4; Decision on Submissions Received and Order to the Registry Regarding The Filing of Documents in the Proceedings Pursuant To Articles 18(2) and 68(3) of the Statute, *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-171, PTC II, ICC, 8 November 2021, para 14. Also p. 9 which contains the operative paragraphs of this decision makes clear that the Chamber does not see victims as having standing with regards to Article 18 (2) deferral proceedings.

[294] In addition to the previous references to the Registry's Reports, see Article 15 (3), and 19 (3) of the Rome Statute.

[295] Decision pursuant to article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022.

> 'Request for authorisation of an investigation pursuant to article 15', for which the Appeals Chamber has granted authorisation."[296]

This decision by the Chamber reinstating the original scope of the authorized situation is welcomed and would potentially contribute to the pursuit of justice for victims. It is possible, although unlikely that the Prosecutor would appeal this decision based on a desire to narrow the scope of the investigation. Also, all ICC Chambers operate within the Rome Statute framework, including the Chambers Practice Manual,[297] nonetheless, their respective compositions differ. Other Chambers may not follow the same approach or issue a similar decision as the current composition of the Pre-Trial Chamber II, especially since this is not a decision of the Appeals Chamber. Thus, there remains a need for the creation of the type of inclusive complementarity division which this thesis proposes and which should offer victims a better chance to protect their interests from early stages of proceedings.

3.8 Way Forward for *Proprio Motu* Situations

In *Proprio motu* situations such as Kenya, the ICC must make certain that it does not become complicit in fostering impunity, while patience is needed since measures to galvanize or encourage political will of states may take time. The work of NGOs and other international and national actors such as Parliamentarians for Global Governance, Kenyan Civil Society, and the Panel of Eminent Africans, can contribute to delivering justice. Creativity is also crucial due to the reach and connection of the alleged perpetrators, to prevent them from completely frustrating efforts locally and in The Hague. Such measures may take some time as well as

[296] Decision Pursuant to article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, *Situation in Afghanistan*, ICC-02/17-196, PTC II, ICC, 31 October 2022, para 58 (emphasis added and footnotes omitted).
[297] See ICC Chambers Practice Manual (5th edn, 2021).

require the cooperation of various stakeholders. In the meantime, victims' needs, and interests must be addressed, and the TFV is currently constructing an Assistance Program to help victims of the Kenyan Situation.[298]

It is understandable that the OTP was operating in uncharted territories in the Afghanistan situation which was the first time Article 18 (2) request was ever made in the history of the Court.[299] However, the absence of a complementarity understanding in the Afghanistan situation reduces the chances that victim-oriented justice would be achieved given the OTP's approach to complementarity in this situation. The OTP in communicating and dialoguing with the former government should have mapped out the minimum requirements for a victim-oriented justice, especially since it stated that it was considering a burden-sharing approach to favor accountability for victims.[300] Afghanistan is not the only country implicated in this situation, hence such a move could be useful to seek justice for victims through other concerned states. This of course may depend on political interests and right timing. For instance, the United States which has interests in the Afghanistan situation, but which has also antagonized the ICC, may be ready to reconsider its relationship with the ICC given the recent events in Ukraine.[301]

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[298] The Trust Fund for Victims, 'Assistance Programmes' <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes> accessed 07 January 2023.

[299] Response to Submissions on Behalf of Certain Victims Who Participated in the Litigation Under Article 15(4) (ICC-02/17-146-Anx and ICC-02/17-148-Anx), *Situation in the Republic of Afghanistan*, ICC-02/17-152, PTC II, ICC, 17 May 2021, para 3.

[300] Request To Authorise Resumption of Investigation Under Article 18(2) of the Statute, *Situation in The Islamic Republic of Afghanistan*, ICC-02/17-161, PTC II, ICC, 27 September 2021, para 17; Statement of the Prosecutor of The International Criminal Court, Karim A. A. Khan QC, Following the Application for An Expedited Order Under Article 18 (2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan (2021).

[301] See Beth Van Schaack, 'Statement of the United States at the 21st Session of the Assembly of States Parties of the International Criminal Court' <https://www.state.gov/statement-of-the-united-states-at-the-21st-session-of-the-assembly-of-states-parties-of-the-international-criminal-court/> accessed 13 December 2022; Colum Lynch, 'America's ICC Animus Gets Tested by Putin's Alleged War Crimes: Does U.S. Support for an Investigation of Russia's Attack on Ukraine Signal a Bigger Policy Shift?' *FP* (15 March 2022)

Should the proposed Complementarity Division have been involved in the complementarity proceedings, a complementarity understanding would have been pursued as early as possible. In the event of a contentious phase as was obtainable in the situation, the proposed Division could work with the OTP, victims, and other stakeholders to honor the victims' provisions contained in the understanding. Such provisions could include interim relief for victims through cooperation agreements, and a plan on how to resume cases which may be deprioritized. This is crucial since attempt to dialogue with the new government may prove futile given their illegitimate seizure of power.

4 Conclusion

The ICC has on different occasions suggested that it works to make justice more meaningful by ensuring that victims' participation is meaningful.[302] Early decisions of the Court for example in the DRC, Uganda and Darfur situations, raised hope that victims' right to participate would be broadly applied to see their needs and interests factor as strong elements

<https://foreignpolicy.com/2022/03/15/us-icc-russia-invasion/> accessed 3 October 2022; David Schwendiman, 'The Way: The Chief Prosecutor, the Int'l Criminal Court, and Ukraine' (Just Security, 20 March 2022) <https://www.justsecurity.org/80757/the-way-the-chief-prosecutor-international-criminal-court-and-ukraine/> accessed 3 October 2022; Sarah L. Ochs, 'The International Criminal Court matters. Can Ukraine make us see that?' *Chicago Tribune* (15 March 2022) <https://www.chicagotribune.com/opinion/commentary/ct-opinion-russia-ukraine-conflict-international-criminal-court-20220315-acv77ao3wvfwriqa7rhwmgtyx4-story.html> accessed 3 October 2022; Lauren Baillie, 'Will the Ukraine War Renew Global Commitments to the International Criminal Court? Enhanced Support will be Secured by the Court Delivering on its Mandate — the Ukraine Crisis Provides That Opportunity.' (United States Institute of Peace, 28 April 2022) <https://www.usip.org/publications/2022/04/will-ukraine-war-renew-global-commitments-international-criminal-court>, accessed 6 August 2022,- note that the author's commentary on the topic does not cover the US's involvement in Afghanistan.

[302] See for example, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006) para 71; Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Katanga and Chui*, ICC-01/04-01/07-474, 13 May 2008, para 157; Decision on Victims' Participation in Trial Proceedings, *Ntaganda, Situation in the Republic of The Congo*, ICC-01/04-02/06-449, PTC VI, ICC, 6 February 2015, paras 29-33; Preliminary Directions for Any LRV or Defence Evidence Presentation, Ongwen, Situation in Uganda, ICC-02/04-01/15-1021, TC IX, ICC, 13 October 2017, paras 2-6.

in ICC decisions.[303] This has not been the case as Article 68 (3) which is central to the ICC's victim regime continues to be narrowly interpreted across all ICC situations.[304] Thus some scholars and commentators argue that the role of international criminal law, and justice for victims before the ICC is symbolic.[305]

This study has reemphasized the centrality of complementarity to the Rome Statute system,[306] which makes it an indispensable feature in efforts to do justice for victims of core crimes, in The Hague and in domestic jurisdictions. However, the minimal consideration of victims in the drafting of the complementarity regime has also been reflected in the ICC's practice. The cases discussed in this chapter represent the three trigger mechanisms through which situations come

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[303] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr (17 January 2006) paras 46-63; Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, *Situation in Uganda*, ICC-02/04-101, PTC II, ICC, 13 August 2007, paras 83-97; Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, *Situation in Darfur*, *Sudan*, ICC-02/05-111-Corr, PTC 1, ICC, 14 December 2007, para 11.

[304] Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, *Situation in the Republic of kenya*, ICC-01/09-24, PTC II, ICC, 4 November 2010, para 9; ICC, VPRS, Victims' Booklet, p. 20; Judgment on Victim Participation in the Investigation Stage of The Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I Of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, para 45; Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019), pp. 300-301; Separate and Dissenting Opinion of Judge Odio Benito from Judgment pursuant to Article 74 of the Statute, *Lubanga*, *Situation in the Democratic Republic of the Congo*, ICC-01/04-01/06-2842, TC, ICC, 14 March 2012, paras 7-8; FIDH, 'New ICC Judges Must Ensure the Meaningful Participation of Victims in Criminal Proceedings' November 2020, p. 5 <https://www.fidh.org/IMG/pdf/iccjudges759ang_final.pdf> accessed 3 October 2022; As at the time of writing, the ICC has 17 situations under investigation, 1 each in DRC, Uganda, Darfur, Sudan, Kenya, Libya, Cote D'Ivoire, Mali, Georgia, Burundi, State of Palestine, Bangladesh/Myanmar, Afghanistan, Republic of Philippines, Venezuela I, and Ukraine, and two in the Central African Republic. See ICC, 'Situations Under Investigations' <https://www.icc-cpi.int/situations-under-investigations> accessed 6 September 2022. Guinea, Nigeria, and Venezuela II are under preliminary examination, see <https://www.icc-cpi.int/situations-preliminary-examinations>, accessed 22 June 2022.

[305] See for example, Aksenova Marina, 'Symbolism as a Constraint on International Criminal Law' (2017) 30 (2) Leiden Journal of International Law; Garbett, the ICC and Restorative Justice (2017) pp. 475-499; Rianne Letschert and others, Victimological Approaches Applied to International Crimes, in Rianne Letschert and others (eds) *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) p. 646; Moffett, Justice for Victims Before the ICC (2014) p. 282; Wierda, The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries (2019) pp. 295 and 301.

[306] Carsten Stahn and Mohamed M. El Zeidy (eds), The International Criminal Court and Complementarity: From Theory to Practice (CUP 2011) pp. 1, 236-239; Katanga Appeals Judgment, ICC-01/04-01/07-1497, 25 September 2009, para 85; De Vos, Complementarity, Catalysts, Compliance (2020) p. 104.

before the ICC. They show the Court has mostly adopted a strict textual method of interpretating Article 17. Such an approach which Stahn refers to as an ICC-centric vision of complementarity[307] has led to greater focus on prosecuting very limited number of perpetrators in the Hague.[308] In response to the thesis's first research question, it was argued that the sovereignty[309] and prosecutorial-based underpinnings of the principle of complementarity has negatively affected the way justice for victims is pursued and shaped at the ICC.

This chapter's application of victim-oriented complementarity to ongoing ICC situations and cases suggests that making complementarity victim-oriented and creating an ICC inclusive complementarity division can increase the protection of victims' interests throughout all stages of proceedings. The strategy which the proposed Independent Complementarity Division can apply to each situation or case would be dependent on the level of cooperation the Court is able to secure. The proposed Division's composition and functions will provide a momentum to ensure that the OTP's policies on victims' participation are maximized. There is a real chance that the proposed Division can aid the ICC in the fight against impunity and in fostering victim-oriented justice in The Hague and in domestic jurisdictions. Therefore, the findings made in this chapter can be applied to these situations before the Court as they progress.

[307] See Stahn, 'Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 2.

[308] ICC-OTP, 'Statement of ICC Prosecutor, Fatou Bensouda, Regarding Her Decision to Request Judicial Authorization to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan' <https://www.icc-cpi.int/Pages/item.aspx?name=171103_OTP_Statement> accessed 3 October 2022; Akhavan, Complementarity Conundrums: The ICC Clock in Transitional Times (2016), pp. 1047-1048; Steven Kay and Joshua Kern, 'Complementarity and a Potential Settlements Case: A Response to the OTP's Report on its Preliminary Examination of the Situation in Palestine' (Opinio Juris, 14 March 2019) <https://opiniojuris.org/2019/03/14/complementarity-and-a-potential-settlements-case-a-response-to-the-otps-report-on-its-preliminary-examination-of-the-situation-in-palestine/> accessed 3 October 2022; Yekatom Defence Appeal Brief, ICC-01/14-01/18-523, 19 May 2020, paras 36 and 59; See also Stahn, Revitalizing Complementarity a Decade after the Stocktaking Exercise (2020) p. 3; Stahn, A Critical Introduction to International Criminal Law (2019) p. 225.

[309] 'Foreword by Silvia A. Fernandez De Gurmendi' in The International Criminal Court and Complementarity: From Theory to Practice (CUP 2011).

Chapter 7: Thesis Conclusion

1 The ICC and Victim-oriented Complementarity: Looking Ahead

This year, the ICC celebrated the twentieth anniversary of its existence made possible by the principle of complementarity. For victims' advocates this anniversary may be a reminder of the importance they attach to the Rome Statute, which many regard as a positive change in recognizing victims as important actors in international criminal justice.[1] The Court has since conducted proceedings in at least 23 situations, with 17 active investigations and 2 under preliminary examinations.[2] Several thousand victims have come before the ICC seeking justice for Rome Statute crimes committed in the context of these situations.[3] As the ICC's first Prosecutor once stated, the ICC is in full motion.[4] Consequently, this thesis has evaluated how the Rome Statute system of justice has worked in relation to victims. The thesis recognized the importance of the key principle of complementarity in the realization of justice for victims. It asked two main research questions in this regard. Firstly, how has the ICC interpreted and applied the principle of complementarity in relation to victims? Secondly, how can victims'

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[1] ICC Media Advisory ICC-CPI-20220513-MA275, 'Conference to Mark the ICC's 20th Anniversary on 1 July 2022' (2022) <https://www.icc-cpi.int/news/conference-mark-iccs-20th-anniversary-1-july-2022> accessed 3 October 2022.

[2] ICC, 'Preliminary Examinations' < https://www.icc-cpi.int/situations-preliminary-examinations> accessed 4 September 2022; The International Criminal Court, 'Situations Under Investigations' <https://www.icc-cpi.int/situations-under-investigations> accessed 6 September 2022.

[3] Decision on Victims' Representation and Participation, *Ruto And Sang*, *Situation in the Republic of Kenya*, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012, paras 23-24; Although it was issued nine years ago, many situations and cases before the Court have been ongoing for several years and decisions on victims' participation are usually made earlier, as well as in subsequent proceedings, for example during reparations; ICC, 'Statement from the President: International Criminal Justice Day' 16 July 2013 <https://www.icc-cpi.int/news/statement-president-international-criminal-justice-day> accessed 3 October 2022, this provides some insights into the vast number of victims who have come before the Court. Cody and others, The Victims' Court? A Study Of 622 Victim Participants at The International Criminal Court (2015) pp. 1 and 27. Case Information Sheet, *Situation in the Central African Republic, Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, ICC-PIDS-CIS-CAR-01-020/18_Eng, Updated March 2019 <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BembaEng.pdf> accessed 14 September 2022

[4] Journalists for Justice, 'Ocampo Speaks Out on Leaked Emails' 4 December 2017 <https://jfjustice.net/ocampo-speaks-out-on-leaked-emails/> accessed 3 October 2022.

interests be adequately accommodated in the complementarity regime and process to aid the ICC in the fight against impunity and in achieving victim-oriented justice? This study advances knowledge in the field of international criminal justice by proposing a reinterpretative framework and a structural design strategy to turn complementarity into an effective tool for fostering the pursuit and realization of victim-oriented justice. The thesis made five main arguments.

1. Although the ICC has improved the position of victims in international criminal justice, it is yet to fully deliver victim-oriented justice to victims before it.
2. The foundations of the complementarity regime have affected its interpretation and application by the ICC in a manner that impacts how justice for victims is shaped.
3. A victim-oriented approach to the principle of complementarity is urgently needed to ensure that victims and their interests are adequately accommodated in the complementarity process and decisions which can aid the Court in its fight against impunity and advance victim-oriented justice.
4. An ICC independent and inclusive complementarity mechanism is necessary because the OTP's Jurisdiction, Complementarity, and Cooperation Division is not adequately structured to implement victim-oriented complementarity, and their location within the OTP makes them less suitable for such.
5. With the thesis's proposed Independent Complementarity Division, there is a real chance that victim-oriented justice can be achieved in The Hague and in domestic jurisdictions.

This chapter highlights answers to the thesis's two research questions and ways in which this study has made an original contribution. It then suggests some areas for further research.

2 Victim-oriented Justice Can be Achieved Through the Thesis's Proposals

This study closes the gap in the miniscule victim-oriented complementarity literature. It proposes a reinterpretative framework in the form of three interconnected methods to aid the ICC in admissibility determinations, and in constructively prodding states to fulfil their obligations while carrying victims along and respecting the rights of the accused. Firstly, the thesis proposed that the ICC can award extra time to states who have shown some element of willingness, to allow them to develop unique approaches for addressing core crimes in a victim-oriented manner, and this will be coupled with monitoring of state compliance. Where necessary, the ICC can work with complementarity stakeholders to facilitate capacity building for states to enable them deliver victim-oriented justice, even in the absence of admissibility challenges. Secondly, after a state commits to achieving minimum victim-oriented conditions, the ICC can conditionally defer to the state while monitoring their progress, and on fulfilling agreed conditions, total deference can be applied, i.e., victim-oriented qualified deference. Thirdly, the thesis proposed the use of a complementarity understanding, a type of MoU between the Court, concerned states, and other stakeholders and which should be concluded in consultation with victims. Carrying victims along in the negotiation process and the inclusion of minimum conditions make the proposed complementarity understanding unique when compared to MoUs which the Court has used in different situations including Colombia,[5] and Venezuela[6] situations.[7] Victims' needs, and interests must contribute to shaping the Court's

[5] Cooperation Agreement Between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia (28 October 2021).
[6] Memorandum of Understanding Between the Bolivarian Republic of Venezuela and the Office of the Prosecutor of the International Criminal Court (3 November 2021).
[7] The OTP signed an MoU with Sudan, but this is not public, as is the case in some other OTP's MoUs. See ICC Press Release on the Conclusion of Prosecutor Khan's First Visit to Sudan and the Conclusion of an MoU (2021).

decisions to award extra time, to postpone a final admissibility determination, or a total deference, and this must be done in a way that does not unduly impact the rights of the accused. These victim-oriented proposals are means to mitigate the flaws in the complementarity regime and the Court's manner of interpretation in relation to victims. These proposals are in line with Article 21 (3) of the Rome Statute which requires the application of the core legal texts of the ICC to be applied in a way that is consistent with internationally recognized human rights.

The process of interpreting and applying the principle of complementarity involves various stakeholders within and outside the ICC, and the Court must balance interests before it, including those of the accused, states and victims. The significance of complementarity for the mandate of the Court and for these stakeholders necessitate a methodical approach to its application. Thus, the thesis proposed the creation of an independent, neutral, and inclusive complementarity division to implement victim-oriented complementarity. This can be done by the ASP in accordance with Article 112 (4) of the Statute. The thesis makes a unique contribution by outlining a design strategy for the creation of the proposed Division which is grounded on the existing Rome Statute framework. The proposed Division can fit into the ICC's structure by being in the Registry as a functionally independent body such as is obtainable with the OPCV. The staffing models and changes suggested also mean that creating and operationalizing the Division could be budget friendly. The suggested composition of the proposed Division is inclusive because it makes room for the representation of the OTP, the ASP, victims, and cooperation partners, while liaising with the Office of the Public Counsel for the Defence. It is expected that the proposed Division would make it easier to introduce and agree on victim-oriented conditions in complementarity decisions, for victims' interests to be

accommodated and protected throughout the lifetime of a situation or case while respecting the rights of the accused.[8]

2.1 Better Outcomes Are Possible in Existing ICC Situations

The thesis's proposals were applied to situations before the ICC arising from state-referrals, UNSC referrals, and *Proprio motu* situations to examine possible outcomes. The findings support the thesis's argument that victim-oriented complementarity can be applied in all ICC situations regardless of their trigger mechanisms. The thesis argued that in self-referred situations such as Uganda, the proposed Complementarity Division provides the Court with a layer of protection from implicating itself in one-sided justice by referring parties over their rivals. It also increases the possibilities that victims of crimes committed by the referring party may see justice served in The Hague or in domestic jurisdictions through concerted and targeted efforts of the proposed cooperation coordinators and the ASP Liaison on Complementarity.

In UNSC referrals such as in Sudan and Libya, applying victim-oriented complementarity through the proposed Division will help to ensure that what may be an already contentious process, and a fragile or non-existent cooperation of the state is not worsened in the way admissibility criteria is interpreted. The proposed Division increases the possibility that complementarity would always be applied in line with its legal regime while making room for victims. This may help to address the perception that the Court is a political tool of powerful states within the UNSC. Also, since UNSC referrals may be necessary due to the referred state being a non-state party, the proposed Division may be better suited as a neutral body to

[8] See Articles 21 (3) and 67 ICCst.

encourage such a state's compliance, and perhaps subsequent accession to the Rome Statute. This conclusion is not implausible considering the current trends in the Sudan situation. After maintaining an uncooperative posture for several years, Sudan appears to be making moves towards an accession to the Rome Statute and this calls for some optimism.[9] Such developments can be leveraged by encouraging and supporting national capacities in a way that can benefit victims. A victim-oriented complementarity has a better chance of moving the Rome Statute one step closer to universality than its current approach.[10]

For *proprio motu* situations such as in Kenya and Afghanistan, the Prosecutor's decision to open an investigation or to prosecute certain cases in The Hague must be the last resort in keeping with the tenets of complementarity. Such decisions as well as decisions to defer to states should be made after adequate consultation with victims whose needs and interests should be accommodated. The proposed Division offers an opportunity for transparency in the complementarity process and decisions although within the confines of necessary confidentiality. It will also be a tool to improve accountability for prosecutorial discretion which is considerably wide especially in relation to early complementarity proceedings.

The thesis also found that to some extent, there could have been more desirable outcomes *vis a vis* victims including in how they participated (all situations examined), in the outcomes of the proceedings (Uganda, CAR and Kenya), and the future development of the situations (all

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[9] See Parliamentarians for Global Action, 'Sudan: One step Closer to Ratifying the Rome Statute of the International Criminal Court' 5 August 2021 <https://www.pgaction.org/news/sudan-one-step-closer-rome-statute.html>, accessed 3 October 2021; France 24, 'Sudanese Cabinet Votes to Back International Criminal Court' (Khartoum, 3 August 2021) *AFP* <https://www.france24.com/en/live-news/20210803-sudanese-cabinet-votes-to-back-international-criminal-court> accessed 3 October 2022; Dabanga, 'Sudan Cabinet Unanimous on Bill to Join Rome Statute of ICC' (Khartoum, 3 August 2021) <https://www.dabangasudan.org/en/all-news/article/sudan-cabinet-unanimous-on-bill-to-join-rome-statute-of-icc> accessed 3 October 2022.
[10] Newton makes a similar claim although not in relation to victim-oriented complementarity. see Newton, The Quest for Constructive Complementarity, (2011) p. 304.

situations examined). The situations considered suggest that victim-oriented complementarity is both necessary and achievable.

3 Implications of the Implementation of Victim-oriented Complementarity in How the ICC Operates

The creation of the ICC required a mammoth effort, the use of integrated approaches from different legal jurisdictions, and contributions of different stakeholders. The pivotal role of complementarity was demonstrated in how early delegates at the Rome Conference agreed to this jurisdictional relationship between states and the ICC.[11] The Statute and by extension the ICC is a result of acceptable compromise on some political issues, including on the substance of the principle of complementarity. As Bergsmo *et al* note, there was no doubt that future changes were required to address intractable issues and subsequent ones which would arise as the Court matured.[12] Some of these issues were discussed throughout this thesis, for instance the way complementarity was shaped, and mainly leaving its operationalization with the OTP with some degree of oversight by the Chambers. These issues suggest that the ICC is due a structural change.

Should the thesis's proposals be implemented, it will change the way the Court as a whole operates and will require changes in some sections of the Court, including those which were

[11] Adrian Boos, 'From the International Law Commission to the Rome Conference (1994-1998)' in Antonio Cassese, Paola Gaeta, and John R.W. D. Jones (eds) *The Rome Statute of The International Criminal Court: A commentary* (Vol I, OUP 2002) p. 45; Carsten Stahn and Mohamed M. El Zeidy (eds), 'Foreword by Silvia A. Fernandez De Gurmendi' in *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011); See Chapter Three.
[12] Bergsmo, Bekou and Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools (2010) pp. 793-803.

not considered here. For instance, the OTP will need to adjust to higher levels of transparency and scrutiny of its work while maintaining its necessary independence. The entire Court will need to adapt to a new complementarity mechanism, and this may be seen in areas of decision making and enhanced inter-organ and inter-unit cooperation and synergies. It would also be reflected in new or updated policies and strategies for Court wide approaches to issues such as cooperation, completion of MoUs, facilitation of capacity building, and victims' participation in ICC proceedings. As with all processes of change, there will be challenges which come with them, some envisaged and some not. The ICC will need to address these as they arise, and they could become new areas for further research.

4 Areas For Further Research

The theories put forward by this thesis could be further tested beyond what the study could achieve due to time and space constraints. One of the areas which may require more detailed research concerns the capacity building of states to ensure that donors do not solely dictate how capacity should be built. The inclusive composition of the proposed Complementarity Division should prevent donors from monopolizing decisions on capacity building projects. A list of projects can be created as part of the proposed Division's strategy for each situation, then donors can exercise their free choice as to which projects to fund from this existing list. Given the importance of capacity building for the thesis's proposals, it is necessary to conduct further study on this topic and to identify sets of standards for measuring effectiveness of capacity building efforts for victim-oriented complementarity.

Additionally, wider qualitative studies in the form of interviews, focus groups, and observations could be conducted as part of further research on implementing victim-oriented

complementarity. Potential interviewees include victims, their representatives, ICC staff members who have the most involvement with complementarity, ASP, and individual state representatives, CSOs, and representatives of international organizations. Interviewing the latter four would help to ascertain their views on the creation and composition of the proposed Division. Focus groups could also be employed for larger number of victims across different ICC existing situations to increase the research sample. Surveys could be administered to staff from different ICC organs since it may be easier to increase the sample and see how they would respond for instance to a structural and operational change. Participant observations would be more beneficial for gaining inside knowledge of how the OTP's JCCD, investigation and prosecution teams work with the Registry and various victims' units and representatives on complementarity issues. However, participant observation method could be more challenging to utilize as some potential participants from the Court may be unwilling to consent to the study, and the process could also be complicated and prolonged.

Another way to test the thesis' proposals is an in-depth examination into how victim-oriented complementarity can be applied to other ICC situations not considered in detail here. For example, how can it be applied in Venezuela, and the Philippines[13] which have requested deferrals under Article 18 in addition to the Philippine's withdrawal from the Rome Statute? How successful would it be in Darfur, Sudan-the second UNSC referral with some new trends, and in Burundi whose situation is pending before the Court notwithstanding their withdrawal from the Statute. Examining how victim-oriented complementarity could make a difference in

[13] Note that a decision of the Pre-Trial Chamber I authorizing resumption of the Prosecutor's investigation into the situation in the Philippines was made months after the submission of this thesis, hence a separate detailed analysis of the process, victims' involvement and the decision itself is not included here. See Public Redacted Version of "Authorisation Pursuant to Article 18(2) of the Statute to Resume the Investigation", Situation in the Republic of the Philippines, ICC-01/21-56-Red, PTC I, ICC, 26 January 2023.

these situations would further emphasize its importance for fostering justice that would be in the interests of victims.

The thesis did not engage in detailed analysis of the political implications of victim-oriented complementarity but limited itself to legal and institutional analysis and arguments. Further research could be done to deepen the understanding of the political dimensions of a victim-oriented approach to complementarity, particularly in relation to how it can bring the Court closer to achieving universality.

This study is the first to outline a detailed legal as well as a structural strategy based on the current Rome Statute framework to change how complementarity is interpreted and implemented in the interests of victims. It has shown that complementarity and justice for victims are two inseparable concepts. It is hoped that the thesis's proposals can at the very least increase attention on this important topic and galvanize real change in the field of international criminal justice in the interests of victims.

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