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## In whose name?

The ICC and the search for constituency

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### Introduction

Who is international criminal justice imagined as being rendered for? Who are the beneficiaries or at least recipients of its work? And, relatedly, who is the 'we' in international criminal justice?<sup>1</sup> Specifically, who is imagined as being the symbolic authority behind the International Criminal Court's (ICC) work? Is the authority behind the ICC the same as its beneficiaries, or are they distinct? These questions are rarely addressed directly, but they go to the heart of the project of international criminal justice, especially as it conceives of itself as a project of intervention, one whose legitimacy is constantly in need of buttressing.

In this respect, studies of the legitimacy of international institutions and international criminal tribunals sometimes look at these subjects from the outside in, rather than from the inside out. In other words, they are interested in the extent to which legitimacy can be granted by something external (by focusing on issues of mandate or accountability, for example) rather than how its legitimacy may be produced, at least in part, by international institutions themselves through a range of choices and strategies. All theories of the legitimacy of international institutions – theories based on mandate/consent, charisma, rule adherence or results – can nonetheless be reframed as something that tribunals do not simply inherit or obtain but deliberately seek to activate, as agents of their own legitimacy.<sup>2</sup>

<sup>1</sup> The question of the 'we' of international criminal justice has been explored in more detail by Immi Tallgren. See I. Tallgren, 'We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court', *Leiden Journal of International Law*, 12 (2004), 683. This chapter is less directly interested in this 'we' than it is in its implicit 'them', but the two are obviously related.

<sup>2</sup> See generally M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches', *Academy of Management Review*, 20 (1995), 571.

The main hypothesis of this chapter is that constituency building and invocation is a key part of the Court's search for legitimacy. There is by now a rich emerging literature on the legitimacy of international criminal tribunals, focusing, for example, on their ability to adhere to noble founding principles<sup>3</sup> or to be responsive to the populations whose decisions they affect.<sup>4</sup> However, this chapter is less interested in the issue of legitimacy as such than it is in a number of practices of legitimacy that international tribunals engage in because they apparently feel compelled to. In that respect, I am interested in the fact that legitimacy is something that actors seek to produce actively and it does not simply derive unproblematically from their existence. I also deliberately leave aside the question of whether such practices actually make international tribunals more or less legitimate; I merely focus on the fact that it makes them what they are. The point is to investigate how the appeal to certain constituencies – their production through discourse and narrative – helps to construct a particular role and identity for the ICC. 'Speaking in the name of' may or may not boost international criminal tribunals' legitimacy, but ultimately it speaks more – *through* questions of legitimacy – to an ongoing sense of identity and place in the world. It is, in other words, constitutive of international criminal justice, regardless of whether it is also legitimising of it.

This chapter is therefore interested in the way practices of legitimacy are inherently tied up with the ability to 'speak for' or 'speak in the name of', to occupy a certain space in international interventions of 'standing in' for something bigger than oneself. This is not the same thing as consent theories, in that I do not claim that external constituencies have actually given their consent to (or 'authorised') the ICC's intervention (they may have, but that is not the problem). Indeed, the ability to 'speak in the name of' is not the same thing as 'speaking with a mandate from' or even 'having spoken to'. 'Speaking in the name of' may be the exact opposite of these things in that one is not specifically authorised to do so by those involved, and one may even speak for them without ever having meaningfully interacted with them. Rather, following Sara Kendall and Sarah Nouwen's lead,<sup>5</sup> I am interested in *practices of*

<sup>3</sup> A. Fichtelberg, 'Democratic Legitimacy and the International Criminal Court: A Liberal Defence', *Journal of International Criminal Justice*, 4 (2006), 765.

<sup>4</sup> M. Glasius, 'Do International Criminal Courts Require Democratic Legitimacy?', *European Journal of International Law*, 23 (2012), 43.

<sup>5</sup> S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood', *Law and Contemporary Problems*, 76 (2014), 235.

*representation without consent*, or where the consent is at best imagined. Indeed 'speaking in the name of' often refers to a type of legitimacy that is produced in the eyes of a third party or oneself, rather than necessarily the agent one is speaking for. For example, one could 'speak in the name of victims' but not particularly interact with them, as some theories of the legitimacy of international criminal justice insist is vital.

In the process, I hope to make a contribution to our understanding of international criminal justice's politics of representing itself as a complex exercise in which strategies of discursive representation compete with and may even, over time, undermine each other. While practices of representation have garnered increasing attention, the existing scholarship has focused mostly on how representation relates to victims. Without denying the importance of that particular constituency (which is discussed in the final section), this chapter stresses that victims are only one possible constituency and representation strategy among others. Moreover, assessing the current centrality of victims as a source of symbolic legitimacy for the ICC entails an understanding of what particular void victims end up filling, and what their existence owes to the challenges involved in constructing alternative constituencies.

In that respect, the debate on the constituencies of international criminal justice mirrors and charts – although it never fully overlaps with – two similar debates. The first is the domestic debate on for whom criminal justice is rendered. As is well known, a traditional focus on the state and public order has occasionally ceded space to a view of criminal justice as having a more societal function or as directed primarily at victims.<sup>6</sup> Such debates have had a profoundly structuring effect on criminal justice: they are both manifestations of its changing nature and causes of it. The second is the old international debate on who the ultimate beneficiaries of international law are. Again, a traditional focus on the state has long been challenged by a view of international legal institutions operating for the benefits of peoples or individuals.<sup>7</sup> Although these debates will not be addressed as such here, it is unsurprising that the debate on international criminal justice – as the ultimate hybrid between both international and criminal justice – echoes these separate conversations.

<sup>6</sup> F. Carrington and G. Nicholson, 'The "Victims" Movement: An Idea Whose Time Has Come', *Pepperdine Law Review*, 11 (1983), 1.

<sup>7</sup> J. Spiropoulos, 'L'individu et Le Droit International', *Recueil des cours de l'Académie de droit international de La Haye*, 31 (1929), 191–270.

Specifically, this chapter will characterise the debate on the implicit beneficiaries of international criminal justice as the product of a tension between a propensity to imagine a number of ideal recipients and a countervailing temptation to concede who the actual patrons of the project are. The more abstract the imagined recipients of international criminal justice, the easier it becomes to claim things in their name, although also the more artificial the move may appear to be; the more concrete the 'patrons' of international criminal justice, the easier it becomes to claim political backing, but the more it risks appearing as merely their object. This idea draws on the work of Martti Koskeniemi and his identification of the oscillation between apology and utopia as the inevitable fate of international legal argumentation.<sup>8</sup> However, it reconceptualises this oscillation as embedded in actual institutional practices of representation, rather than simply legal-doctrinal discourse. In between these extremes, the chapter argues that a 'local turn' in the justificatory strategies of the ICC is discernible, one focusing on 'societies', 'communities' and 'victims'. The strength of this strategy is that it appears to ground itself in both the reality and dignity of actual suffering. However, as I will argue, this is a difficult strategy to execute in conditions where victims' aspirations may be quite at odds with those of the Court.

### Imagining the ICC's ideal recipients

Doubts about the legitimacy of international criminal justice in a world of states may lead to a degree of rhetorical flight. In a context where international criminal justice cannot prevail itself of the backing of a world sovereign, the temptation may be to move beyond sovereignty altogether. At the most abstract level, the ICC may perceive itself, or be perceived as, working for 'Justice'. This is a fairly traditional conceit, one that foregrounds the value of an idea as antecedent to the institutions seeking to incarnate it. This reference to a disincarnated, *a priori* form of justice is certainly present in the discourse. For example, Amnesty International has supported the notion of 'prosecuting crimes in the name of international justice'.<sup>9</sup> International criminal tribunals are conceptualised as the embodiment of a certain idea. This sort of discourse is never far but its fragility is all too obvious. Justice is an appealing ideal,

<sup>8</sup> M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (New York: Cambridge University Press, 2005).

<sup>9</sup> 'Prosecuting Crimes in the Name of International Justice', Amnesty International, [www.amnestyusa.org/our-work/issues/international-justice/international-criminal-court](http://www.amnestyusa.org/our-work/issues/international-justice/international-criminal-court).

but it is hard to think of it as an operative principle and even less as a constituency. Moreover, appeals to international justice are easily suspected of having ulterior motives.<sup>10</sup>

A more concrete cosmopolitan defence of international criminal justice might emphasise the degree to which it is being pursued 'for the sake of humanity'.<sup>11</sup> Such ideas have a venerable pedigree, starting with the notion that there is such a thing as 'crimes against humanity', which reminds us of the extent to which humanity is sometimes largely constructed negatively, through its breach.<sup>12</sup> The Rome Statute itself nods to this notion in its preamble by emphasising 'that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time'. Such references are reminiscent of an earlier age when the existence of a *civitas maxima* was taken for granted. The emergence of the notion of crimes against humanity is very much seen as one of the most evident moments of genesis of a cosmopolitan law, transforming the idea of humanity from a 'regulative idea into a substantive reality'.<sup>13</sup> It represents the culmination of successive processes of abstraction from actual victims – for example, the hardly evident idea that the Holocaust is not primarily 'the culmination of the history of anti-Semitism' or 'the history of racism at its worst' but a 'crime against the human condition', which manifests 'the cosmopolitanisation of political life'.<sup>14</sup>

The ICC, in this context, might be seen as 'act[ing] in the name of humanity, to protect the interests of humanity'.<sup>15</sup> The beauty of such a reference is that it bypasses states altogether and portrays international

<sup>10</sup> Consider, for example, Paul Kagame's typical assertion to the African Union that 'It is evident that political bias, control and flawed methodology are being deployed in the name of International Justice.' Paul Kagame, 'Statement by H.E Paul Kagame, President of the Republic of Rwanda at the 21st Ordinary Session of the Assembly of the Union' (Addis Ababa, 26 May 2013).

<sup>11</sup> R. Teitel, *Humanity's Law* (New York: Oxford University Press, 2011).

<sup>12</sup> R.A. Wilson, 'Crimes against Humanity and the Conundrum of Race and Ethnicity at the International Criminal Tribunal for Rwanda', in I. Feldman and M. Ticktin (eds.), *In the Name of Humanity: The Government of Threat and Care* (Durham: Duke University Press, 2010), 28.

<sup>13</sup> R. Fine, 'Crimes against Humanity: Hannah Arendt and the Nuremberg Debates', *European Journal of Social Theory*, 3 (2000), 293.

<sup>14</sup> D. Levy and N. Sznajder, 'The Institutionalization of Cosmopolitan Morality: The Holocaust and Human Rights', *Journal of Human Rights*, 3 (2004), 143, 144.

<sup>15</sup> W. Driscoll, J.P. Zompetti, and S. Zompetti, *The International Criminal Court: Global Politics and the Quest for Justice* (New York: International Debate Education Association, 2004), 53.

criminal justice as operating directly and radically for the benefit of a sort of cosmopolitan audience. It is part and parcel of the invention of a constitutive humanity as the very basis of international institutions of justice and further officialises the idea of certain matters as inherently public concerns, as opposed to part of states' 'private' affairs.<sup>16</sup> The existence of 'humanity', moreover, opens the way to the exercise of an international form of sovereignty superseding states within which the ICC presumably has a central role to play in the impartial ascription of suspicion and guilt. It builds on several strands in international law, including a long and infamous tradition of bombing in the name of humanity.<sup>17</sup>

This sensitivity is quite present in the discourse. As Ilana Feldman and Miriam Ticktin have shown in their book-length treatment of the ability to speak 'in the name of humanity', the fact that every universalistic claim may hide a quite particular viewpoint does not change the potency of the claim that something is universal.<sup>18</sup> Theories of cosmopolitanism that emphasise its roots in experience (particularly the Holocaust) rather than Enlightenment-type philosophising<sup>19</sup> provide at least an air of plausibility to the notion that 'humanity' is affronted by certain crimes. The ICC might be seen as a leading artisan in the cultivation of sentiments extolling its own role as a vanguard of the historical emergence of humanity in international politics. There is at least superficial plausibility that 'humanity' – either as a community or an essence – is harmed whenever thousands of people are slaughtered.

Nonetheless, it is a strategy that has some evident weaknesses. There is a degree of abstraction in the notion that, for example, the Rwandan genocide was primarily committed against 'humanity', when its perpetrators were surely only interested in massacring Tutsis *qua* Tutsis. To see genocides as essentially identical crimes against the diversity of

<sup>16</sup> Indeed that process may be reminiscent of earlier efforts at imagining 'society' as an existing whole justifying intervention in its name. B. Beck, 'The Politics of Speaking in the Name of Society', *Social Problems*, 25 (1977), 353.

<sup>17</sup> G. Abraham and K. Hopkins, 'Bombing for Humanity: The American Response to the 11 September Attacks and the Plea of Self-Defence', *South African Law Journal*, 119 (2002), 783; F. Harhoff, 'Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?', *Nordic Journal of International Law*, 70 (2001), 65; N.D. White, 'The Legality of Bombing in the Name of Humanity', *Journal of Conflict and Security Law*, 5 (2000), 27.

<sup>18</sup> I. Feldman and M. Ticktin, *In the Name of Humanity: The Government of Threat and Care* (Durham: Duke University Press, 2010).

<sup>19</sup> Levy and Sznajder, 'The Institutionalization of Cosmopolitan Morality'.

humankind may be to put too philosophical (and perhaps too Western) a spin on offences that have very localised dynamics. Indeed, whilst the Rwandan government has drawn on the cosmopolitan moorings of the notions of crimes against humanity and genocide, going to great lengths to ensure that what happened in 1994 was directly traceable to the Holocaust, it has also at times shunned the cosmopolitan consequences that would ensue, notably in the form of a dispossession of the case load for the benefit of the international community. When it suited its needs, the Rwandan government was adamant that these were crimes committed primarily against Tutsis or the Rwandan nation, not humanity. There may even be a risk of moral trivialisation of atrocity crimes when their particular gravity is seen as a function of how they affect the whole of mankind or the idea of mankind, rather than crimes of flesh and blood.

Moreover, there must be a difference between the existence of a general, abstract hostility to crimes against humanity and support for the ICC as a peculiar institution, not to mention actual ICC policies. It may be hard, in fact, to argue that there is considerable cosmopolitan support for the ICC independent of particular successes the Court may or may not be able to claim for itself. Although public opinion in countries that have joined the ICC is generally supportive of the Court, that is not always true of countries that have been the target of investigations. *A fortiori* beyond states parties, public opinion may be indifferent or hostile to the ICC's interventions (except as they may, very exceptionally, indirectly affect them or some of their allies). All of this belies the idea that 'humanity' speaks with one voice in its condemnation of international crimes.

In effect, the prioritisation of cosmopolitan ambitions over local demands, from Uganda to Libya, is easily faulted for being disconnected from where the true locus of justice should be. It has been repeatedly assailed not only for its lack of realism but, more pointedly and painfully for cosmopolitans, for its inherent unfairness, thus weakening the matter-of-course-ness of the cosmopolitan case. As Adam Branch puts it, for example,

[W]hen international prosecution is not in solidarity with local demands, then the idea that any part of humanity is entitled to punish those guilty of 'crimes against humanity' necessarily entails a rejection of others' autonomy and self-determination. The decision, on the one hand, to seek justice through punishment or, on the other, to forgo punishment in favor of justice through reconciliation, is a decision that must be made by the

concrete community that is the victim of the crimes and that will have to live with the consequences of the decision. 'Humanity' is too thin a community upon which to base a universal right to punish.<sup>20</sup>

It is quite clear that international criminal tribunals are aware of these arguments – regardless of their ultimate merit – and wary of pushing the cosmopolitan argument too far, lest they appear too disconnected from the reality of international and local politics.

A rather more grounded variant of the appeal to 'humanity' is the notion that the ICC is working for international civil society more generally. There is certainly much evidence that the Court would not be what it is without the support of a number of NGOs actively involved in the last two decades – but particularly in the run-up to and at the Rome conference – in promoting its principles.<sup>21</sup> More importantly, the Court has gone on to treat NGOs as a serious constituency, hosting, for example, regular meetings with civil society representatives in The Hague. This reliance on civil society is also a feature of some well-known critiques of the Court.<sup>22</sup> As Emily Haslam has argued, the reliance on formal transnational advocacy networks loosely representing 'victims' has, in addition to objectively benefitting the ICC, ironically helped to muzzle the voices of actual victims.<sup>23</sup>

One of the problems is that civil society cannot easily stand in for humanity or be equated with the world's population. The NGOs present at the Rome conference may well have had a crucial degree of expertise, but it would be very hard to see them as a substitute for real democratic engagement. Moreover, it is one thing to say that the ICC was created thanks to, and is supported by, civil society, but another to say that international criminal justice is rendered in its name. Such a basis for the legitimacy of the Court would run into all of the typical critiques that have been made of civil society's claims to represent different constituencies. This is all the more so since civil society happens to be divided on many issues concerning international

<sup>20</sup> A. Branch, 'International Justice, Local Injustice', *Dissent*, 51 (2004), 22, 25.

<sup>21</sup> M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (London/New York: Routledge, 2006); M. Glasius, 'Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court', in M. Glasius, M. Kaldor and H.K. Anheier (eds.), *Global Civil Society Yearbook* (Oxford: Oxford University Press, 2002), 137.

<sup>22</sup> S. Sur, 'Vers Une Cour Pénale Internationale: La Convention de Rome Entre Les ONG et Le Conseil de Sécurité', *Revue générale de droit international public*, 1 (1999), 103.

<sup>23</sup> E. Haslam, 'Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society', *International Journal of Transitional Justice*, 5 (2011), 221.



criminal justice and therefore does not offer an unambiguous support base. In the African context, civil society has been found on both sides of the debate. Again, what matters is less whether international criminal tribunals are actually working for civil society than the perception within the tribunals that these arguments can only be pushed so far on both empirical and normative grounds.

### Acknowledging the ICC's patrons

If the invocation of ideal constituencies turns out to be too abstract, the ICC can opt for another strategy: acknowledging the extent to which it is working for a number of 'patrons' who cannot be equated with humanity. For example, a classical way of seeing international criminal justice is as being rendered by and for the international community, which is itself understood less as a global community of mankind than as the society of states. This is what one might view as a 'Grotian' imagination of the constituency of international criminal justice, one focused on sovereigns, but only insofar as they transcend their sovereignty through belonging to a social whole. Again, a rhetorical inclination to invoke the international community is evident in much literature on the ICC and the Court's own discourse. A sensitivity to this more grounded view is evident, for example, in the way in which the ICC is constructed and presented as conducive to international peace and security – surely a widely shared goal of the international community – and as the heir to some of the narrower earlier projects of international criminal justice incarnated by the ad hoc tribunals. The recognition of the Security Council's power to defer investigations is recognition of this fact.

There are, however, evident problems with this view. The ICC's operations may be in tension with some more traditional concerns of the international community, such as the ability to use tools like amnesties. The international community's deep divisions when it comes to the role of international criminal justice in international affairs may end up belying the notion that there is much of a community to speak of. Or, it will come together briefly to support international criminal justice, in ways that suggest that its interest in supporting the ICC is merely tactical and instrumental. In other words, while the ICC may portray itself as conducive to international criminal justice generally and 'sell' its more general justice mandate on that count, the international community may be interested in it *only* to the extent that it is conducive to international

peace and security.<sup>24</sup> The relative enthusiasm with which the Security Council once referred the situations of Sudan or Libya to the Court as part of the management of complex crises suggests precisely such an instrumentalism.<sup>25</sup>

More importantly, the idea that the ICC is working for the 'international community as a whole' only works if one thinks of the Court as being quasi-universal or at least as having a recognised vocation to be.<sup>26</sup> However, this view seems blind to the reality that prospects for universal ratification are extremely dim at present and even in decades to come. A less generous view would see the ICC as merely the Court of a particular club, bringing together European, South American and African states. There is a clear and lasting 'exterior' to the Court that belies its view as 'naturally' tending towards universality. The international criminal law regime is not the laws of the sea regime, or even the laws of war regime, whose quasi-universality align them naturally with concepts of international community. This is most evident in the rapport between the ICC and the United Nations (UN), the one organisation that can make a good claim to being universal. The integration of the Security Council within its functioning suggests a certain mutual recognition but, in fact, the Rome Statute allows the UN to do something that in all likelihood it could have done anyhow. Adding insult to injury, the UN has considered that the Rome Statute gives it privileges but few obligations; in particular, the Security Council has refused to consider that it ought to finance the very investigations that its referrals have mandated.<sup>27</sup>

If not really an emanation of the international community at large, the ICC might be seen as a sort of avant-garde, acknowledging that it is working directly only for *some* states (typically state parties), but at least creating a positive externality (peace, justice) for the entire international community. For example, Sara Kendall has shown the success of a view of

<sup>24</sup> See further Chapter 3 by Koller in this volume.

<sup>25</sup> See further Chapter 18 by Kersten in this volume.

<sup>26</sup> The idea that the ICC is destined to eventually become universal runs deep in the discourse. For example, the Coalition for the International Criminal Court (CICC) insists that 'In order for the International Criminal Court to succeed in its universal project, it needs an increasing majority of the world's nations to join the Rome Statute.' See 'A Universal Court with Global Support', Coalition for the International Criminal Court, [www.iccnw.org/?mod=universalcourt](http://www.iccnw.org/?mod=universalcourt).

<sup>27</sup> S/RES/1593 (2005), 31 March 2005, para. 7 (Darfur referral). W.M. Reisman, 'On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court', *American Journal of International Law*, 99 (2005), 615.

states parties as the primary 'shareholders' of the ICC, at least in the discursive strategies deployed by the Prosecutor.<sup>28</sup> There may be something disingenuous, however, about the idea that the ICC is working for the international community at large, despite the fact that there seems to be nothing temporary about non-states parties' refusal to join, and their quite principled reasons for not doing so. At any rate, the idea that states parties 'sacrifice' themselves for the greater good, in that they expose themselves to international criminal justice at least partly for the sake of others, is not very plausible.

A somewhat more grounded view would acknowledge that the ICC's more direct constituency is its states parties, and only really those states parties. This has the advantage of classicism: at least in strict public international law, an international institution is only working 'for' its members, whatever benefits it may more or less accidentally yield are for its periphery. This view, in other words, would emphasise the extent to which the ICC is a states parties' 'thing', an institution working, albeit diffusely, for their collective interest. In effect, the 'we' in international criminal justice is often heavily associated with states parties rather than the international community at large.<sup>29</sup>

The Assembly of States Parties (ASP) could be seen as the central manifestation of this inward-looking constituency of the Court. It has been quite boldly described as the ICC's 'legislative body'<sup>30</sup> (as if the ICC were a sort of democracy). Effectively, it has the ability to adopt norms such as the Rules of Procedure and Evidence (which states parties specifically did not want to be left entirely to praetorian judicial creation), the Elements of Crimes and the addition of new crimes, including the definition of 'aggression'. The ability to elect judges and prosecutors (and, symmetrically, to remove them) shows that this is evidently a prerogative of states, which also take the 'risks' associated with Court membership. Finally, the ASP is at least theoretically the final stop for the Court when dealing with non-cooperation by a state party, and it has recently shown its ability to reform the rules of the Court to

<sup>28</sup> S. Kendall, 'Commodifying Global Justice: Economies of Accountability in the International Criminal Court', *Journal of International Criminal Justice*, 13 (2015), 113.

<sup>29</sup> See, e.g., 'Ceremony for the Solemn Undertaking International Criminal Court', Statement by the President of the Assembly of States Parties Ambassador Tiina Intelmann, 12 December 2013. 'The Statute reflects *our* determination to put an end to impunity' [emphasis added].

<sup>30</sup> ICC Fact Sheet on the Assembly of States Parties, available at [www.icc-cpi.int/en\\_menus/asp/publications/factsheet/Documents/ASP-Factsheet-2013-v4-ENG-web.pdf](http://www.icc-cpi.int/en_menus/asp/publications/factsheet/Documents/ASP-Factsheet-2013-v4-ENG-web.pdf).

accommodate certain state interests.<sup>31</sup> One can conceptualise the Assembly as a form of permanence of the political interests that gave rise to the creation of the ICC, with a certain power to monitor its activities and set a loose framework for its work.

There are, nonetheless, several problems with this view. First, the idea that the ICC works unmistakably for the interests of its members may be denied (occasionally vigorously) by some states parties themselves. There is in other words a difference, and sometimes quite a wide gap, between states' initial adherence to the Rome Statute and the actualisation of their national interest in various circumstances, one that may lead them to express frustration, disappointment or anger with the Court. Several African states parties have been less than moderate in their efforts to contain African Union initiatives to limit the power of the ICC; they have at times seemed to join the enemies of the Court, as for example when they accepted the possibility of excusal from presence at trial for high-ranking officials.<sup>32</sup> Ensuring that states parties behave as supportively as they might be expected has become a deliberate goal of international civil society.<sup>33</sup>

In this context there may be something disingenuous about saying that international criminal justice is exercised for the benefit of state parties in the face of flagrant denials by actual states parties that this is the case. At any rate, the ability of states parties to control or influence the ICC, although greater than that of non-states parties, remains somewhat limited. For example, the ASP is only tasked with management oversight of the administration of the Court and not, for example, prosecutorial decisions. The ICC involves a 'high degree of delegation' compared to other international institutions.<sup>34</sup> This means that if the Court can claim that it is working 'for' states parties, it must be able to do so despite some member states' denial that this is the case and complaints about the Court's lack of responsiveness to their needs. The ICC therefore cannot

<sup>31</sup> Article 134 of the Rules of Procedure and Evidence was amended, largely at Kenya's behest, so that defendants who have 'extraordinary public duties at the highest national level' and who are not the subject of an arrest warrant can be exempted from attending their trial, as long as they are represented.

<sup>32</sup> 'Justice at Risk: States Parties to the ICC Statute Concede to Political Pressure', FIDH (28 November 2013).

<sup>33</sup> 'Call for African ICC States Parties to Affirm Support for the ICC at the Assembly of States Parties Session', Human Rights Watch (12 November 2013).

<sup>34</sup> C.A. Bradley and J.G. Kelley, 'The Concept of International Delegation', *Law and Contemporary Problems*, 71 (2008), 1, 22.

be equated with states parties' interests, since the latter's interests vary considerably.

Moreover, the idea of international criminal justice as foregrounding the interests of ICC states parties may sacrifice too much in terms of ideals. It often seems key to the rhetoric of the ICC that it is not merely a privately run, inward-looking project but one that is more generally in the global or cosmopolitan interest. Moreover, if the ICC is really run in the interests of its members, then it is hard to avoid the conclusion that its members should have some sort of right of veto against particular investigations or prosecutions that are not seen as conducive to their actualised national interest. Although this is close to what some states have sought, becoming a member of the ICC has almost always been understood as involving at least a theoretical risk to states parties in the form of unexpected and adverse investigations/prosecutions.

Yet, an even more grounded view might see international criminal justice as rendered for the benefit of those particular states that have referred cases to it. Here the view of the ICC might be of a sort of 'international public service' of justice, ready and willing to render services to states in need. This view is at least consonant with the evolution of the notion of complementarity, less as a form of discipline against recalcitrant states than as a vector of transmission of cases to The Hague, through the practice of so-called self-referrals. The element of global justice, international *ordre public* and top-down enforcement is thereby radically relativised, if not exactly trivialised. The Court acts as a service provider when for some reason states decide that it would be in their interest to have a supranational jurisdiction deal with sensitive cases for them.

It may well be that the Court has become exactly such an annex to states' designs. However, ICC proponents have also argued that the Court will not simply allow itself to become a puppet of sovereigns' designs. Moreover, this view of referring states as the constituency of international criminal justice has been amply criticised as sovereign-consensual: the ICC is so in line with states' interests as to be virtually indistinguishable from it.<sup>35</sup> In short, rather than the ICC having states as a constituency the Court risks becoming a pawn of the states.

Finally, an extreme realist view might see the ICC as always having been in a sense subservient to big power interests, notably as a tool of

<sup>35</sup> W.A. Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts', *Criminal Law Forum*, 19 (2008), 5.

influence for European middle powers,<sup>36</sup> and perhaps even the United States. Here, the element of groundedness is impeccable, and an argument may be made that the ICC was always more or less darkly conceived as an instrument to express a certain civilisational domination over the African continent, or something even more tactical – linked, for example, to the possibility of the use of force. However, such a view raises problems of plausibility: surely the Court escapes big powers’ calculus at least occasionally, if only because their interests must be at odds at least sometimes. Moreover, it raises considerable normative problems: although the ICC is sometimes *denounced* as a puppet of big powers, it is almost never *defended* as such precisely because to do so would undermine its very claim of being an institution of justice. For example, it is notable that the option that the Court operates entirely at the whim of the Security Council was excluded early on in negotiations.

### The ‘local turn’: of societies, communities and victims

The challenge, then, seems to be to find constituencies that do not appear eerily abstract at the risk of undermining international criminal justice’s authenticity and power, nor so grounded as to associate it with merely the use of force. The classical vehicle for doing so is of course international law itself, and international criminal law might very much appear to serve that role. International criminal justice might be understood as merely an instrument of ‘the law’. This form of representation – international criminal tribunals as natural steps somehow mandated by the existence of international law and expressing that ideal’s actuality in history – is quite common, even if not always quite as conscious. The idea of international law is often complemented with the idea of a universal rule of law, of which international criminal tribunals are a natural, perhaps even essential, element.

The strength of such an appeal is that international law already incorporates its own compromises between apology and utopia, and comes with an already stabilised identity. It confers upon international criminal justice an aura of indisputable historical pedigree, portraying international criminal tribunals as the latest and perhaps most promising attempt in setting up a universal rule of law. The personification of the law – its idea as a living, even thinking and acting, force of progress in

<sup>36</sup> ‘ICC a European Tool, Libya Says’, *News24*, 28 June 2011.

history<sup>37</sup> – is one of the most powerful rhetorical tropes conceived by the legal imagination. Such personification also powerfully reinforces a particular professional constituency, that of international criminal lawyers.

The idea of international criminal justice as merely a slave of the law is both aggrandising and depoliticising, since major dilemmas of interpretation can be understood as merely part of professional exercises of competence. Nonetheless, such an appeal remains problematic. It is too abstract because ‘international law’ is hardly a constituency; it is more of an idea or a project. Or it risks being too grounded if the law is effectively reduced to the interests of a particular profession, which is surely an unappealing option. At any rate, it is quite clear that nothing in international law compels the creation of international criminal tribunals and that, moreover, blind following of international criminal law might lead to deeply problematic results in terms of legitimacy. Appeals to the law serve to partly legitimise the practice of international criminal justice but they cannot ground its existence.

One characteristic of both ‘lofty’ and ‘grounded’ constituencies of international criminal justice is that they both seem ultimately rooted in traditional understandings of the international. On the one hand, justice, natural law and humanity; on the other hand, international public order, states and sovereignty. Both types of appeals thus play out in quite predictable and somewhat circular ways. As has been shown, each ‘descending’ appeal risks being denounced as excessively apologetic, as renouncing too much in terms of what makes international criminal justice recognisable to its proponents; conversely, each ‘ascending’ appeal risks undermining the sovereign basis of international criminal justice needed to make the enterprise both credible and legitimate. Hence the temptation of trying to bypass the state/international community dichotomy by more radically piercing the sovereign veil (not without irony, since this is precisely what international criminal justice is otherwise supposed to be about). Much of the work of the ICC, in particular, can be seen as developing at least a symbolic societal, communitarian and victim constituency. I say symbolic because, in the end, whether that constituency exists, or exists quite the way it is imagined, is relatively independent of the belief that it does.

The idea that the ICC works for the societies whose individuals it prosecutes is one that has some resonance. The rhetorical frame of

<sup>37</sup> T. Skouteris, *The Notion of Progress in International Law Discourse* (The Hague: T.M.C. Asser Press, 2010).

reference is at least clearly more often societal than statist. For example, a communiqué of the International Federation for Human Rights (FIDH) describes the Ruto and Sang trial as a ‘historical opportunity’ for Kenyan society to ‘face the truth and find justice’.<sup>38</sup> In this sense, the goal of international criminal justice is less an international legal goal of reining in states than the transitional justice goal of helping societies shift to forms of governance that minimise the likelihood of recurrence of international crimes. The real or imagined support of ‘societies’ has thus become a key prong in the struggle for legitimacy between international criminal justice and state elites. ICC supporters may even seek to portray society as, in some respect, against the state when it opposes international criminal justice, and the state as no longer having a monopoly on the representation of its society. Conversely, democratic legitimacy, when it is forthcoming, will be heralded by the state as evidence that the government has an unassailable claim to be equated with society.

That international criminal justice is rendered for particular communities is less explicitly touted, but it is sometimes implicit as part of the pro-victim rhetoric. It is less explicit because it might render international criminal justice vulnerable to accusations of partiality and as merely doing one group’s bidding. Nonetheless, international criminal justice is hardly foreign to the notion that ‘not all communities are equal’: in armed conflict or following atrocities, some have clearly suffered a disproportionate burden. The claim that justice is rendered for particular communities, rather than for society at large, is sometimes present in the rhetoric, although often as a criticism (as in the suggestion that Rwanda is organising a form of ‘Tutsi justice’).<sup>39</sup> Rather than communities per se, it is communities of victims that have emerged as one of the most explicit imagined constituencies of the ICC.<sup>40</sup> The idea of victim communities meshes well with the notion, now quite broadly accepted, that reparations will ultimately have a broad collective character.

The emphasis currently placed on victims at the ICC can be partly explained by the weaknesses and precariousness of other constituencies. The more general focus on victims is now something that is quite well documented. Kendall and Nouwen, for example, have shown the

<sup>38</sup> ‘Beginning of ICC Trial against Ruto and Sang Is a Historical Opportunity for Victims and for the Kenyan Society to Face the Truth and Find Justice’, FIDH (9 September 2013) (FIDH, ‘Beginning of ICC Trial’).

<sup>39</sup> D. Orrin Butare, ‘Hutus in Horror Jails Await Tutsi “Justice”’, *The Independent*, 1 May 1995.

<sup>40</sup> See further Chapter 11 by Clarke in this volume.



ICC's near obsession with 'victims and the justice they deserve' as the 'sole raison d'être of the ICC'.<sup>41</sup> They suggest that whilst 'juridified' victims have become an ever-narrower category, the 'abstract' victim has become an almost deified entity, which they boldly describe as the 'absent "sovereign" of international criminal law'.<sup>42</sup> The invocation of victims serves to silence dissent and to make international criminal justice unimpeachable (who, after all, will dare being against victims?).<sup>43</sup> The ICC seems content to let go of all its other potential constituencies for the benefit of this one. *Contra* 'society' or 'communities', victims are a category rather than a specific group. They may not even think of themselves as bound by anything other than the chance of having been victimised by the same individuals who are facing charges before the ICC. The emphasis on victims is evident both in what has become a historically relatively generous victim participation regime, and in the increasing focus on reparations as the ultimate outcome of the trial. ICC authorities have undertaken explicit efforts to court victim communities, engaging in significant outreach activities and touring affected regions, all in an attempt to obtain the sort of local support that is seen as indispensable to the enterprise's success.

Although different, these potential victim constituents provide similar advantages for the Court. First, they avoid the dangers characteristic of arguments about international criminal justice as either too concrete or too abstract. As such, international criminal justice avoids the danger of clinging to too statist a vision of itself by following (only with probably more urgency) the path of many domestic criminal justice systems that have sought, notably through a greater emphasis on victims, to redefine themselves as having a more social function. Simultaneously, the ICC avoids the accusation of excessive abstraction because victims are in a sense as concrete as can be, whilst avoiding the suspicion of excessive groundedness, for victims are not presumed to have any particular political agenda outside of justice.

Second, talking directly to/for societies, communities and victims can be a way of forging alliances that bypass the state altogether and empower the Court against recalcitrant sovereigns. In effect, the ICC deemphasises the state element in its interventions in favour of a societal emphasis – the international community, states, humanity – that is portrayed as being

<sup>41</sup> Kendall and Nouwen, 'Representational Practices', 239, citing the ICC Prosecutor.

<sup>42</sup> *Ibid.* <sup>43</sup> *Ibid.*, 255.

directly in touch with particular intra-state groups.<sup>44</sup> Victims also come endowed with an inherent dignity and respectability that is hard to question politically without incurring the ever-present suspicion of revisionism, which can help silence dissent. As Kamari Clarke puts it, 'the pursuit of justice invoked through privileging claims of victim subjectivity is a technique that manifests aspirations of justice as both real and justified.'<sup>45</sup>

Third, references to 'society' or 'victims' share with references to 'humanity' or 'the international community' the fact that these are diffuse constituencies, in whose name it is therefore all the easier to speak. Societies, communities and victims are less likely to forcefully and at least univocally protest an ICC intervention than are states or the organised variants of international civil society. At any rate, the relative lack of organisation of these diffuse constituencies may create opportunities for a forceful outside intervener to try to articulate their needs in lieu of them. The distinction between actual victims and abstract victims routinely invoked by international criminal tribunals,<sup>46</sup> or the emphasis on organised advocacy NGOs purporting to act as intermediaries rather than real victims, is also what makes it possible to, in a sense, claim 'the victims' voice', even against actual victims' voices. In effect, the faceless victim comes very close to an invocation of 'humanity', for it is in the name of the victim's abstract humanity that international criminal justice is invoked.

Nonetheless, there are evident problems with the investment in these diffuse constituencies, and the idea that they constitute facile (or even unmistakably helpful) refuges from more classical international constituencies. All are more fractured entities than their ordinary invocation suggests, and the ICC's invocation of them is a recurring story of being confronted with the messiness and ambiguity of reality. In fact, it is often the ICC itself that will have to give up implicit claims about the more or less unitary character of societies as ultimately implausible. Confronted with claims that 'Kenyan society' or 'Sudanese society' or 'Ugandan society' wants certain things (typically something other than what the

<sup>44</sup> This draws attention away from the problematic inter-state distributive dimensions of the ICC's work. The 'Why Africa?' question, for example, can be marginalised by an appeal to 'this is what these victims *here* want'.

<sup>45</sup> K.M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa* (New York: Cambridge University Press, 2009), 21.

<sup>46</sup> Kendall and Nouwen, 'Representational Practices'. See further Chapter 12 by Fletcher in this volume.

ICC would want<sup>47</sup>), and the consequent marginalisation of those who seek to cooperate with it, the Court has been forced to problematise the notion that there is such a thing as a unified society speaking with one voice.

Instead, the ICC will seek to highlight that those who speak 'for' society may only speak for certain quarters of it, and at any rate not necessarily for victim communities and individual victims. They will designate certain groups (typically those that are supportive of its actions) as having similar or better claims to representing 'society' or to be doing it a service by locally upholding the cause of international criminal justice.<sup>48</sup> If nothing else, they will emphasise the existence (as the case may be) of majoritarian support for the ICC.<sup>49</sup> In other words, the Court will engage in its own politics of calling the bluff of those who speak for others.

Furthermore, even though the ICC may invoke all of the above quite freely, states are constantly in competition to represent them. The recalcitrant state will also invoke society, communities and victims and may have more powerful tools to do so (national allegiance, a propaganda machine, etc.). Indeed, there will be nothing that a state might appreciate more than the opportunity to remind the world that, even if hated or contested by part of its population, it better represents the demos. In this context, the precariousness of the representation claims of the ICC is that they emanate not from a broad mandate from populations, but from an ability to satisfy their peculiar demand for justice, an ability that is severely limited by the Court's powers and constraints – of fairness to the accused, adherence to the international rule of law – that it would not want to easily shake off.

<sup>47</sup> The Sudanese minister for foreign affairs, Al-Samani al Wasilah, is reported to have pointed out that 'the Sudanese judiciary should be given the opportunity to complete its task in accordance with the conditions of the Sudanese society which is more interested in the reconciliations system and cordial solution than the judicial one'. See A. Al-Awsat, 'No Dialogue with ICC- Sudanese Minister', *Asharq Al-Awsat*, 23 July 2008.

<sup>48</sup> 'The unsung heroes of these proceedings are the victims and witnesses who, despite a difficult and sometimes threatening environment, have committed themselves to the search for truth and justice. Their engagement will benefit the whole Kenyan society.' FIDH, 'Beginning of ICC Trial'.

<sup>49</sup> See G. Oteino's memo from Kenyans for Peace with Truth and Justice (KTPJ), 'The ICC has always enjoyed high public support in Kenya; as of January 2013, 66% of Kenyans said they supported the ICC prosecutions. Surely 66% is of far greater significance than the figure cited by Kamau as evidence of "overwhelming support" of the indictees.' 'KPTJ Memo Responding to Kenyan Ambassador's Letter to the UNSC on ICC Cases, Africa Centre for Open Governance', 7 May 2013, available at [www.africog.org/content/kptj-memo-responding-kenyan-ambassadors-letter-unsc-icc-cases](http://www.africog.org/content/kptj-memo-responding-kenyan-ambassadors-letter-unsc-icc-cases).

Finally, and perhaps more importantly, societies, communities and victims may have or develop the ability to speak in their own name. Indeed, they will occasionally protest ICC interventions, belying the idea that such interventions are being carried out for their sake. As Laurel Fletcher argues convincingly, the practice of international criminal justice constantly exposes a gap between 'real' and 'imagined' victims, the latter being used to implicitly exclude the former.<sup>50</sup> At the very least, they will routinely complain about the partiality, slowness and insensitivity to local needs of international prosecutions. This was clear in Uganda, for example, where some victim communities tended to act as arbiters of international justice, faulting it for being too focused on the Lord's Resistance Army rather than the Ugandan military, in effect being too committed to a sovereign constituency.<sup>51</sup>

The reality and legitimacy of the ICC's efforts to represent victims was also called into question: 'How can you try to right a wrong, when you have not spoken to those who were wronged?' asked one Ugandan victim.<sup>52</sup> In the Darfur case, a number of Sudanese citizens even managed to make submissions as *amicus curiae* to the Court opposing admissibility. In a sense, therefore, the ICC calls attention to victims at its own risk: if they are pliant and supportive, then the Court's legitimacy will be enhanced; if they are invoked too freely, its bluff may be exposed. Challenges to the legitimacy of the ICC coming from victims have thus arguably hurt it most, and have been perceived as a potentially mortal wound. If international criminal justice is not even for victims, given how much it has invested in that idea, then it becomes hard to imagine what its justification could be.

Ultimately, the claim to represent societies, communities and victims' aspirations, even against their clearly stated frustrations (or straightforward opposition), will end up weakening the ICC's own quasi-democratic ethos. It will drive the Court into a posture of paternalism in which it claims to know better what is good for victims than they do; into a flight of abstraction, invoking 'justice' and 'humanity'; or a descent into concreteness, invoking the mandate given by referring states. If these contradictions are exposed, the very legitimacy of the exercise of speaking for victims will be exposed as highly questionable, if not outright fraudulent.

<sup>50</sup> See Fletcher (Chapter 12).

<sup>51</sup> F. Ogola, 'Uganda Victims Question ICC's Balance', Institute for War and Peace Reporting, ACR Issue 261, 14 June 2010. See further Chapter 6 by Oola in this volume.

<sup>52</sup> I. Wairimu, 'Uganda: Victims Waiting for ICC Justice', *The Independent*, 3 February 2012.

## Conclusion

This chapter has sought to examine the extent to which the legitimacy, identity or authority of the ICC can be understood as a function of who its constituents are understood as being, and who the Court can more or less successfully claim to 'speak for'. More importantly, invocations of justice or 'humanity' show the Court as the servant of an ideal and depoliticise it. On the negative side, such appeals may fail to convince many beyond a small core of activists or other interested parties. Seeking to ground the ICC in something more tangible comes with distinct advantages. The Court cannot be dismissed as irrelevant or utopian. It has powerful patrons and knows what it is doing.

But this grounding comes with its own set of dangers as well. The greater the perception of the ICC as anchored in sovereign consent and will, the more the Court risks being viewed as sacrificing some of its sacred justice mission. The invocation of societies, communities and victims has thus emerged as a sort of ideal middle ground, one that bypasses a few of the tensions inherent in basing legitimacy on some variant of the international argument but that also has its pitfalls. Victims, in particular, may be a prized constituency, although it is not evident that the ICC is willing to do what it takes to represent actual victims as opposed to a highly idealised version of them.

Three more general lessons seem to emerge. First, in the discourse of international criminal justice, 'who?' and 'for whom?' are questions that are intimately related. For example, if justice is perceived as being rendered 'for X', then the suggestion may be that it is X that is, if not actually rendering justice, the authority that gives the ICC the symbolic or moral power to do so. X will be imagined as both the beneficiary downstream and the implicit authority upstream. Even if the authority for international criminal justice and its constituents are not envisaged as the same (as in 'the international community rendering justice for victims'<sup>53</sup>), they will be seen as coterminous or closely related. This particular circularity (international criminal justice rendered 'by and for X'), then, reinforces the status of international criminal justice by underlining the congruence between subject and object and reducing anxiety about appropriation or instrumentalisation.

Second, the politics of 'speaking for' can be understood as responsive to a number of needs and constraints. Questions of identity and

<sup>53</sup> Kendall and Nouwen, 'Representational Practices', 256.

authenticity evidently matter, and 'speaking for' is not only ever an instrumental exercise. Understanding whom one thinks of oneself as speaking for is a way of understanding what international criminal justice practitioners and institutions think they are doing. Invoking certain constituencies is also a way of seeking to capture some of their legitimacy for the international criminal project, and perhaps for certain directions in which the project seeks to orient itself. Which constituency is invoked at any given junction will depend on a range of exogenous and endogenous factors, the degree and strength of resistance that the ICC faces and what its particular tactical and strategic goals are in any given circumstance. In that respect, some constituencies may be prized for what one can say in their name, and the relative ease with which those things can be said. Imagining highly abstract beneficiaries has the advantage that it is hard to go wrong or at least to disprove the usefulness of international criminal justice. Who is to say, in the end, whether 'humanity' will be well served by the actions of the ICC?

Third, it is important to note that the constituencies of international criminal justice – victims, states and the 'international community' itself – are both imagined and real. They are to a degree imagined as collectives existing at times through nothing else than the rhetorical force of the spokespersons of the project. In that respect, constituency discourse is constitutive of constituencies, rather than the other way around.<sup>54</sup> However, representation is not a one-way process and the reaction of those on behalf of whom one speaks (or who can legitimately make a claim to being those in whose name international courts speak) is a significant factor in assessing strategies of representation. International criminal justice does not have a monopoly over the creation of its constituencies, who are likely to have an ability to 'speak back' to those who claim to speak in their name.

In the end, practices of 'speaking for' typically oscillate between many constituencies based on what the ICC can realistically get away with and what politics it is seeking to promote. Local support may be the default preference and it certainly is ideal from the point of view of international criminal justice's legitimacy and effectiveness in particular settings in a context where a number of alternative grand narratives – a 'world state', 'humanity', 'global peace' – are clearly on the defensive. However, when

<sup>54</sup> See Ian Clark's recent work on the 'international social practice of the vulnerable' and the way in which it serves to constitute the notion of an 'international society'. I. Clark, *The Vulnerable in International Society* (Oxford: Oxford University Press, 2013), 2.

that support is not forthcoming, several retreat strategies are available, buttressing either the sovereign credentials of international criminal justice or its long-term legacy for future generations. Ultimately, every constituency can be mobilised against any other constituency: the state can be faulted for letting down 'humanity' and its own population, not to mention its own commitment to international criminal law and justice; the abstraction of cosmopolitan references can be compensated by local moorings; and the idiosyncrasy of local desire can be offset by the universalism of cosmopolitan horizons. In that respect, it only makes sense to speak of constituencies in the plural, because each constituency in a sense compensates for the inherent weaknesses of the others.

Yet, if the ICC can only have its way by successively mobilising a series of constituencies that are inherently in tension with each other, what remains is the feeling that the Court's ultimate constituency is nothing but itself. The 'absent sovereign', then, is not any of international criminal justice's many constituencies (not even victims), but the agent that is capable of articulating the successive prominence and effacement of these constituencies. The ICC itself is a leading contender for that role and this chapter has shown that it is capable of deploying the rhetoric of constituency in highly sophisticated ways. Ultimately, 'humanity', 'civil society', 'state parties', 'societies', 'communities' or 'the international community' are all signifiers that international criminal tribunals invoke for their own ends.