1-1-2009

The International Criminal Court Between Aspiration and Achievement

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THE INTERNATIONAL CRIMINAL COURT BETWEEN ASPIRATION AND ACHIEVEMENT

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This article discusses an important paradox in international criminal law enforcement. On the one hand, international criminal courts attempt to tackle issues of extreme significance, and are often more ambitious than national courts of justice. However, on the other hand, these international courts often lack enforcement powers. This gap between aspirations and realization creates ammunition for the enemies of such courts and challenges their legitimacy. Despite the apparent powerlessness of international criminal courts, some, such as the Tribunal for the Former Yugoslavia, have successfully convicted a number of human rights abusers. Unfortunately, the permanent International Criminal Court has not enjoyed such success. This article describes how the ICC's normative framework increases the likelihood of disparity between its promise and achievement, and presents solutions for the closing of this gap.

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INTRODUCTION

Looking at international criminal courts, a detached observer—someone without ira et studio—cannot fail to observe a paradox: the courts lack inherent enforcement powers but must process crimes of unusual complexity, and still aspire to realize goals more ambitious than their powerful national counterparts. The predictable consequence of this state of affairs is the likelihood of discrepancies between promise and achievement. To be sure, many friends of international criminal justice, human rights activists in particular, are not unduly disturbed by this prospect. In fact, they believe desirable normative expressions should not become hostage to incomplete realization. It is certainly true that proclamations of an "ought" need not always require the full support of a "can." Proclaimed aspirations, even if unattained, may represent signposts facilitating desirable advances to be achieved in more propitious circumstances. But international criminal courts, still struggling to justify themselves, cannot afford to disregard the attainability of the goals they profess to pursue. The gap between promise and achievement may disappoint their audiences and disillusion their friends, while providing argumentative ammunition to their enemies. For these courts, as for all fledgling institutions, the viability of professed goals is a close cousin of legitimacy.

Somewhat surprisingly, the negative consequences of the paradox have received little attention from commentators. One reason for the silence is that the absence of international criminal courts' independent enforcement capacity—their endogenous powerlessness—has not prevented some of them from achieving a measure of success. This applies primarily to the International Criminal Tribunal for the Former Yugoslavia (ICTY) which has managed to produce a fair number of convictions of human rights abusers. For the ICTY, outside assistance worked: albeit reluctantly and intermittently, successor states of the former Yugoslavia cooperated with the Tribunal, largely satisfying the Tribunal's need for both custody of suspects and incriminating evidence. It should not be overlooked, however, that such cooperation was the result not of the Tribunal's moral authority, or its "soft power," but rather the result of internal political changes in successor states and successful outside pressures on them.[1]

[1] The pressure was effective because of the desire of these states to join Western integrative processes and because of their need for economic assistance. A large role in exerting outside pressure was played by the European Union by conditioning admission to the Union on cooperation of the successor states with the Court. The ICTY Prosecutor, a mere party to proceedings, was requested by the Union to advise it on the question of whether state cooperation was satisfactory. In 2007, in a briefing to the External Relations Council of the Union, the ICTY

The permanent International Criminal Court (ICC) may not be so fortunate. Even if in some situations political circumstances facilitate the performance of its functions, the Court will still have to cope with special difficulties. For instance, the ICC's procedural arrangements are more complex and its tasks more demanding than those of other international criminal fora. In other words, the Court's normative framework intensifies the paradox of international criminal justice.

On the pages that follow, I shall first describe the paradox of international criminal justice in general terms. Having outlined its component parts, I shall then examine in some detail how the ICC's normative framework increases the likelihood of disparity between its promise and achievement. There will then follow a sampling of problems this disparity might create, with a focus on issues surrounding the enlarged role of victims — an aspect of the ICC's increased aspirations that is presently all the rage. Motivated by concern that these problems could cloud the Court's future, I shall end by remarking on ways in which the Court could be unburdened and the gap between its reach and its grasp narrowed.

I. THE PARADOX

Let me begin by fixing our gaze on the endogenous powerlessness of international criminal courts. Unlike their national counterparts, they are not backed by a system of coercive enforcement, and thus are at the mercy of outside assistance—primarily of states—for the implementation of their requests and decisions. However, outside assistance will not easily be forthcoming if the state, or another potential support provider, happens to be implicated in the crimes being processed, or has some other compelling reason to refuse cooperation. And even a government supportive of international criminal justice will often only be willing to turn over evidence on conditions designed to protect the secrecy of its intelligence gathering—conditions that are difficult to accept without running afoul of procedural fairness toward the defendant.[2] It is thus only under a favorable constellation of politi-

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Prosecutor conceded that without the pressure exerted by the EU and its member states, her "mandate would be an impossible mission." Carla Del Ponte, Chief Prosecutor of the ICTY, Speech at the European Policy Centre, (July 3, 2007), *available at* http://www.un.org/icty/pressreal/2007/pr1190e-annex.htm (last visited July 1, 2009) (also on file with the author).

[2] A government may insist, for example, that the information it provides be used only as a source of technically admissible evidence, or that the provider of information not be sum-

cal circumstances that international courts obtain the support needed for the successful performance of their functions. Absent these circumstances, even weak states are in position to defy international justice, while convictions of officials, or other important persons, from powerful nations can realistically be expected only in the event of regime change, or the military defeat of these nations. Left only to their own devices, international criminal courts are impotent.

Yet, these "giants without arms and legs"[3] are expected to deal with crimes more difficult to investigate and adjudicate than are standard offenses in domestic law enforcement settings. Typical international crimes involve large numbers of individuals—both on the perpetrators' and on the victims' sides—a feature which in itself generates procedural and substantive complexities only rarely confronted by national courts. Even such an elementary requirement as establishing the crime-site may represent an unusually challenging task, for example, especially if a conflict is still raging. International crimes are also typically the work of large-scale organizations, reproducing in exacerbated form all the thorny problems associated with the domestic prosecution of organized crime. Despite witness protection programs, for example, persuading fearful witnesses to testify is often a more difficult undertaking in the international law enforcement context than it is in national administration of justice.

Considering the endogenous powerlessness of international criminal courts and the special difficulties they face, one would expect their ambitions, as well as those of their votaries, to be rather modest. In fact, however, they are almost grandiose. Unsatisfied with pursuing just the usual objectives of punishment, they want to achieve aims that transcend, or give a special twist, to the aims of national criminal law enforcement. They thus aspire to perform a panoramic truth-telling task by letting victims relate their painful experiences, and to establish in other ways a record of the larger historical context in which acts of inhumanity occurred. They also aspire by their proceedings to achieve the socio-pedagogical goal of advancing the human rights culture. If events involving human rights abuses are in

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moned in court as a witness. Because of the importance of intercept evidence, this can represent a serious practical problem. *See, e.g.*, Laura Moranchek, *Protecting National Security Evidence*, 31 YALE J. INT'L L. 477 (2006).

[3] This metaphor, coined by the German constitutional law scholar Kern, has been adopted in the literature on international criminal law. *See* ANTONIO CASSESE, THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS 426 (Paola Gaeta & Salvatore Zappalá eds., Oxford Univ. Press 2008).

progress, they want to contribute to their cessation, and, if conflicts have ended, they want to facilitate reconciliation. Furthermore, international courts intend to achieve all these objectives in proceedings that observe the exacting standards of fairness—including the defendants' right to speedy trial—developed by human rights courts in the context of national law enforcement.[4]

No more need be said on this subject in order to substantiate my initially advanced claim about the paradoxical situation of international criminal courts. It clearly follows that intrinsically powerless institutions aspire to achieve objectives whose attainment would be a serious challenge to even their most powerful national counterparts. The resulting likelihood of a gap between ambition and achievement was either overlooked, or considered unimportant by the system's architects. They either disregarded or attributed little weight to the operational realities of criminal law enforcement.

II. THE PARADOX AND THE ICC

In approaching the question of whether the framework within which the ICC operates increases the potential for a lacuna between promise and achievement, the Court's dependence on outside support is again a convenient starting point. It does not require much reflection to realize that the Treaty of Rome leaves substantially more room for governments to refuse, delay, or manipulate assistance with the court than the ICTY and ICTR regimes. One reason is that the ICC is authorized to proceed only in a "complementary" fashion—that is, only if states fail to institute proceedings with respect to the same conduct, or fail to proceed genuinely and fairly, may the ICC then have jurisdiction to prosecute.[5] Consider that the ICC Prosecutor must announce his intention to prosecute an international crime to all states which would normally have jurisdiction over the conduct. Having received the notification, the states may then demand that the case be deferred to them. If the Prosecutor disagrees, a potentially lengthy back-and forth debate could follow, but in the end the Prosecutor must accede to state demands, unless he is able to persuade an ICC Pre-Trial Chamber to authorize

[4] Taking into account powerful pressures on the courts to end the "culture of impunity" and satisfy the interest of victims, it is no wonder that these difficulties have given rise to suggestions that less demanding *sui generis* fair trial standards ought to be elaborated for the processing of international criminal cases. *See, e.g.*, Colin Warbrick, *International Criminal Courts and Fair Trial*, 3 J. CONFLICT AND SEC. L. 45, 45-64 (1998).

[5] Rome Statute of the International Criminal Court art. 17., July 17, 1998, U.N. Doc. A/CONF. 183/9 [hereinafter Rome Statute].

international prosecution.[6] Even states that refuse to join the ICC system and might be implicated in an atrocity must be notified, are entitled to seek deferral, and thus acquire an opportunity to postpone or frustrate international criminal justice. Attempts to manipulate ICC jurisdiction may occur even after formal ICC proceedings have been instituted. A state may claim, for example, that it has acquired the previously absent willingness or ability to conduct proceedings on its own. Another procedural reason for the ICC's increased weakness in securing outside assistance is the national security exception to its requests for evidence. Under the regime of *ad hoc* courts, all UN members are obligated to submit requested evidence to the court, even if they claim that the material in question compromises their national security. A judge of the *ad hoc* court is authorized to determine whether the self-defined state interests actually exist, and, if they do, whether they are outweighed by the interests of international justice.[7] In other words, international courts easily have the last word on the matter. The ICC Statute, by contrast, replaces this regime with a cumbersome and delay-prone mechanism that places a far greater emphasis on the right of states to deny requests for cooperation.[8]

In addition to the ICC's greater weakness vis-à-vis the states, the greater complexity of the ICC's procedural arrangements is another factor making the realization of its objectives more difficult. The complementary nature of the ICC's jurisdiction is in itself a source of considerable difficulties. Consider that even after the Court's jurisdiction has been established, many additional factual, legal, and especially political issues, most of them quite delicate, must be resolved in order to ascertain whether its proceedings are "admissible." Another source of complexity flows from the fact that, unlike *ad hoc* courts, the ICC is not assigned a specific event as a nursery of its cases, and must establish in a preliminary inquiry whether a conflict—"situation" is the technical term—deserves the institution of formal proceedings. Because of victim participation, presently to be discussed, this

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[6] *Id.* art. 18.

[7] The procedure was crafted by the ICTY Appeals Chamber. *See* Prosecutor v. Blaskic, Case No. IT-95-14-PT, Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, ¶¶ 61-68 (Oct. 29, 1997).

[8] *See* Rome Statute, *supra* note 5, arts. 72, 87(7), and 93(4); *see also* CASSESE, *supra* note 3, at 520. The change of the arrangement is not difficult to explain. ICTY and ICTR were set up by the UN Security Council, with the view to prosecuting citizens from relatively weak Balkan and African states. ICC, on the other hand, is the creature of a multilateral treaty. Its drafters were concerned that the right of international judges to determine national security interests of powerful states might dissuade these states, jealous of their sovereignty, to join the treaty. What was good for the goose was not good for the gander.

procedural overture can be time-consuming and labor-intensive. Additionally, procedural arrangements for the confirmation of indictments are also more complex and elaborate than those of *ad hoc* courts.

No matter how much the aforementioned complications may make realization of the Court's aspirations more difficult, they significantly pale in comparison to the complications that emanate from the greatly expanded role of victims. According to the regime of *ad hoc* courts, influenced in this regard by Anglo-American trials, victims are limited to playing merely testimonial roles.[9] However, the founding documents of the ICC reject this limitation. To begin with, the ICC Statute contains a general provision authorizing judges to let victims express their "views" and "concerns" at any procedural moment which the Court finds appropriate.[10] The Statute also secures for victims an input into several specific decisions concerning the institution and admissibility of proceedings.[11] ICC Rules of Procedure and Evidence then accord some additional testimony transcending rights to victims at confirmation hearings and trials.[12] Building upon these provisions, and especially the one authorizing victims to express their "views" and "concerns," ICC judges have expanded victims' rights still further. A Pre-Trial Chamber ruled that victims may participate in proceedings as early as the preliminary inquiry to establish whether a "situation" deserves the Court's action, even if they were solely motivated by a general interest in the inquiry.[13] Complex bureaucratic mechanisms were designed to accord applicants the status of victims at this stage—a stage where there is yet no focus on a particular crime, or on a specific perpetrator. Having obtained this status, however, victims are not automatically authorized to participate in subsequent proceedings. Actual participation requires an additional Court decision, rendered on a case-by-case basis. More recently, the ICC Appeals Chamber ruled that, under certain conditions, victims may offer and examine ("lead") evidence relating to the guilt of the accused, and challenge the

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[9] It deserves to be noted, however, that judges have sometimes permitted victims to express grievances in terms that were not strictly testimonial.

[10] Rome Statute, *supra* note 5, art. 68(3).

[11] *Id.* arts. 15(3), 19(3), 53, & 92(2). For example, any challenge to the admissibility of proceedings by a state or defendant justifies the victims' involvement, and so does the prosecutor's decision to start an investigation on its own motion.

[12] *See* ICC Rules of Procedure and Evidence rules 89-91 & 121(10), ICC-ASP/1/3 (Sept. 10, 2002) [hereinafter ICC Rules).

[13] *See* Situation in the Dem. Rep. Congo, Situation No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, Public Redacted Version (Jan. 17, 2006).

evidence's admissibility and relevance.[14]

This, however, is not the end of the story. The shapers of the ICC system were not satisfied with expanding victim participation in criminal procedure proper. Despite its increased complexity, the architects appended to it a further proceeding designed for the reparation of harm caused to victims, thereby adding a new aspiration to international criminal justice.[15] In so doing they followed the national systems of many continental European countries, as well as powerful trends in transitional justice—a trend reflected, *inter alia*, in several UN declarations on the subject of justice for victims of crime.[16] But their scheme for the ICC was in some respects original: the way in which they conjoined retributive and restorative justice differs from prevailing continental patterns of adding civil suits piggy-back onto criminal procedure. Suffice it to note that their model only partially connects the two kinds of justice. A Trust Fund is established, with a Governing Board and a Secretariat, whose mission is not limited to awarding reparations to victims of crimes committed by convicted individuals. It is also charged with awarding reparations to victims of crimes within ICC jurisdiction which were not subject to its criminal process—provided the crimes were committed in a "situation" that has given rise to the process. Victims are allowed to make their requests for awards before, during, and after an ICC criminal prosecution, irrespective of whether or not they participated in it.[17]

This partial linkage of retributive and restorative justice produces yet

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[14] *See* Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 9 & OA 10, Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶¶ 86-105 (July 11, 2008) [hereinafter Judgment on the Appeals]. The Courts retreated, however from the more radical position of Trial Chamber I, according to which victims of a "situation" may participate in trials even if they were harmed by crimes other than those contained in the indictment.

[15] Note that ICTY and ICTR are not authorized to concern themselves with restorative justice. The Registrar of these tribunals is only required to transmit judgments of conviction to national authorities, leaving it to them to concern themselves with the question of damages. ICTY and ICTR judges themselves can only order the return of property unlawfully taken away from victims. *See, e.g.*, Rules of Procedure and Evidence of the Int'l Crim. Trib. for the Former Yugo. rule 105, IT/32/Rev. 43 (July 24, 2009).

[16] On the historical development of the reparation scheme, see JEAN-BAPTISTE JEANGÈNE VILMER, RÉPARER L'IRRÉPARABLE 4-6, 10-16 (Presses Universitaires de France 2009). *See also* United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Powers, G.A. Res. 40/34, U.N. Doc. A/Res./47/1 (Dec. 12, 1948); EU Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings, 2001 O.J. (L82) 1.

[17] For the first instance of the Trusts' Governing Council decision to an award prior to conviction, see http://www.icc-cpi.int/press/press-releases/420.html&l=fr (on file with the author).

another consequence, soon to be commented upon. Whereas, in criminal proceedings, judges consider the reparation issue on an individual basis, the Fund is concerned with the whole universe of "situation" victims, and thus must elaborate comprehensive programs for the fulfillment of this broader task. The Fund is in the position of an administrative agency in charge of sweeping compensation schemes. Although the reparation process and criminal proceedings are thus only partially interconnected, the Fund is not wholly independent from ICC judges, even with regard to the broad aspects of its function. This is because the judges retain a say on the use of the Fund's resources and must approve its reparation programs.[18] In criminal procedure proper, their judgments of conviction must include reparation orders, calling for the resolution of additional factual and legal issues other than those of criminal law. In short, the delegation of broader reparation matters to the Trust Fund merely alleviates—but does not eliminate—additional judicial burdens arising from the assigned reparation function.

Let me now pull these threads together. What emerges from the foregoing discussion is that the ICC regime in fact accentuates the paradox of international criminal justice. The Court will often experience more problems in securing outside assistance and thus face greater difficulties in processing crimes of unusual complexity than the preexisting international criminal courts, while it is pursuing goals more demanding than did its predecessors. Other things remaining equal, then, the likelihood must increase that a disparity will arise between its ambition and achievement.

III. PROBLEMS OF DISPARITY

The disparity could, of course, engender many problems, but limitations of space lead me to confine my comments to a sampling of those generated by the expanded role of victims. I choose this aspect of the ICC's more ambitious agenda because the problems involved confront us with at once the most difficult and most sensitive issues. Consider that the ICC's increased concern for victims' interests is widely celebrated as a historical achievement of international criminal justice. Small wonder. The realization of the impulse is appealing—even ennobling: to increase the opportunity for victims to express their grievances, affect the course of the criminal process, and obtain reparation or assistance. But the prominence given to victims'

[18] VILMER, *supra* note 16, at 169-72. As of this writing, the ICC document on "Strategy in Relation to Victims," adopted in 2008, remains in draft form. Signatory states are in disagreement on many issues related to the scheme.

interests in the ICC scheme is likely to raise victim expectations, and, by the same token, potentially be the source of their greatest disenchantments, if and when a gulf appears between what the Court promises them and what it is able to deliver. An important, and indeed troubling, question for all votaries of the international criminal court is thus whether the ICC is the proper institution to entrust such a significant part of the response to victimizations produced by massive human rights violations.

Two sets of issues arise in this regard: one set concerns issues stemming from the increased participation of victims in criminal procedure, and the other, issues engendered by proceedings designed to repair the harm caused to victims.

To place the first set of issues in proper perspective it is useful to remember a well-known quandary of criminal justice systems that is not limited to international criminal courts: the more emphasis that the system places on safeguarding the interests of victims, the more pronounced the tension becomes with the interests of defendants. Inevitably, the two struggle to diminish each other, and must somehow be balanced. Now, in balancing them, liberal-democratic justice tends to privilege defendants. This pro-defendant bias is reflected not only in the normative ramifications of the presumption of innocence, but can also be discerned in seemingly unrelated areas of the law—sometimes in unexpected places.[19] This pro-defendant slant should be kept in mind when examining problems the ICC is likely to encounter in making the interests of victims central to its concerns without thereby prejudicing the rights of defendants—at least in the form in which those are recognized in domestic law enforcement systems.

Consider first, that according to the ICC's trial liturgy, the victims, or their representatives, may be permitted to deliver opening and closing statements.[20] There is no doubt that reports of suffering, likely to be included in these statements, can bring listeners immediately into the emotional world of victims. The reports are also likely to provide victims with some relief. But emotionally-charged stories of massive atrocities can easily generate an atmosphere of revulsion and anger, in which judges could—consciously or subconsciously—neglect alternative explanations of events, attribute blame more easily, or in greater measure than warranted, and might even lower the

[19] A telling example is the contemporary tendency to ban the use of reliable but illegally obtained evidence. No matter how justifiable on several grounds, the ban privileges defendants over their victims: the latter do not welcome the prospect of the former being set free whenever admissible evidence—left over after the exclusion of the one illegally obtained—fails to satisfy the demanding standards of proof sufficiency.

[20] ICC Rules, rule 89(1).

postulated standard of proof sufficiency.[21] It is also possible that confronted with two separate statements by its procedural opponents—in a two-against-one situation, so to speak—the defense might feel overwhelmed, so that the ideal of "equality of arms" could be compromised.

Consider next the ruling of the Appeals Chamber that victims, or their representatives, have the right to offer and examine evidence.[22] In assessing the impact of this ruling, the difference should be borne in mind between proceedings gravitating toward a court-directed inquiry, and those gravitating towards a contest of two partisan cases. Where fact-finding is court-directed, tendering evidence and participation in proof-taking need not be limited to the parties: fact-finding is like a conference at which many voices can be heard. But where two fact-finding hypotheses are advanced by the parties and are rival suitors for the judges' attention, a bi-polar force field emerges, making it difficult to include successfully a third side in the development of evidence. One difficulty concerns the danger that incentives might be weakened that sustain the successful unfolding of the competitive fact-finding style.[23] Another difficulty involves perceptions of fairness produced by bi-polar pressures. Where both the prosecution and the victims advance incriminating evidence, this process may again easily appear as an alliance of two against one.

It is difficult to say what impact the Appeals Chamber ruling on the victims' right to "lead" evidence will have. One reason is that ICC judges are free to decide whether to take the production of evidence in their own hands, or leave it to the parties.[24] For the moment, they seem to lean toward the "two-cases" model by keeping their own intervention in proof-taking rather modest, and asking questions only after the parties speak. What practice will eventually crystallize remains to be seen. Another reason for the uncertainty on this issue is that ICC judges have approached the victims' proof-taking involvement with considerable circumspection: several limiting conditions

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[21] For psychological studies of this phenomenon, see, for example, Julie H. Goldberg et al., *Rage and Reason: the Psychology of the Intuitive Prosecutor*, 29 EUR. J. OF SOC. PSYCHOL. 781, 781-97 (1999).

[22] *See* Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the Appeals, at ¶¶ 86-105 (July 11, 2008).

[23] Consider that parties must invest heavily in the preparation of proof-taking activity. They must plan, for example, whom to call as witness, in what order to examine him—even what sequence of questions to propound. In this situation, even a limited intervention by a third side may throw their strategy in disarray and make their preparation useless. It is no wonder that victims in Anglo-American procedure are accorded non-testimonial roles only at the sentencing stage—that is, when the adversarial tournament has largely come to an end.

[24] *See* Rome Statute, *supra* note 5, art. 64(8)(b).

have been set on their right to tender and examine evidence, as well as on their right to challenge its admissibility and relevance.[25] A measure of caution is also reflected in ICC's founding documents: proof-taking activity is supposed to be performed by victim representatives, and their questions to witnesses must survive the Trial Chamber's screening.[26] Despite this circumspection, imaginative victim representatives could easily disrupt the smooth unfolding of proceedings, complicate trials and contribute to their length, merely by making arguments and raising issues that require the Court's response.

No speculation is needed, however, to foresee the drain on the Court's energy and resources flowing from the right of victims to participate in the preliminary inquiry and apply for the status of victims at this initial procedural stage. A well-documented recent study has shown that in its first cases the ICC has been greatly delayed by the need to process a few hundred applications for the status of "situation" victim—a status which, it should be recalled, does not guarantee to the victims actual participation in subsequent proceedings.[27] It is thus no accident that the pre-trial stage in the first ICC case lasted much longer than the pre-trial stage of the first case before the ICTY.[28] If several thousands of individuals had applied for the status of situation victim in this case, ICC judges would have been overwhelmed. Hundreds of thousands of applications—a scenario that cannot be ruled out for some future carnivals of bestiality—would paralyze the Court, giving rise to complaints that it has bitten off more than it could possibly chew.

It is time to turn to reparation issues. Although the Court is ten years old, the regulations of its Trust Fund still leave many questions of redress

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[25] *See Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the Appeals, at ¶ 104 (July 11, 2008).

[26] ICC Rules, rule 91. Not fully familiar with all the material gathered by the prosecution and defense, however, it will often be hard for judges properly to evaluate the merits of observations made by victim representatives and the relevance of questions they want to put to witnesses. *See* Claude Jorda & Jerome de Hemptinne, *The Status and Role of the Victim*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1387, 1412 (Antonio Cassese et al. eds., 2002).

[27] *See* Christine Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 NW. U. J. INT'L HUM. RTS. 459, 459-545 (2008). The author established that it typically took a year or more for the Court to decide the applicants' eligibility for the status of situation victims. *Id.* at 508.

[28] Observe that over 800 days elapsed between Lubanga's first appearance in ICC and his trial, while pre-trial proceedings in ICTY's case against Duško Tadić lasted 376 days. The pre-trial wrangling over discovery issues in the Lubanga case cannot by itself explain such a greatly increased delay. *See* Heikelina Verrijn Stuart, *The ICC in Trouble*, 6 J. INT'L CRIM. JUST. 409, 410 (2008).

open, and no case has yet reached the stage where at least some of these questions must authoritatively be answered. Despite the resulting uncertainties, it is surely safe to predict that the danger of victim disillusionment will be greatest in this domain. Two reasons suffice to support this claim. One is the likely insufficiency of Trust Fund resources to alleviate the misery of mass victimization: in 2007, for example, it had only 3 million Euros at its disposal.[29] Considering the large number of victims produced by crimes within ICC jurisdiction, this is a mere pittance—especially if victims expect individual monetary compensation. The other reason flows from the manner in which the architects of the ICC scheme chose to link retributive and restorative justice. We saw that in criminal proceedings—in the retributive part of the process—judges are authorized to give redress only to victims of crimes which they have tried. This is typically only a small portion of misdeeds committed in a situation with which the Court is concerned. Reparation claims of victims can thus often be processed on an individual, piecemeal basis, with an eye toward the ideal of full restitution. The Trust Fund, by contrast, must provide redress to victims of *all* crimes committed in a situation. In this context the large number of victims defies separate analysis of the merits of individual claims. Instead, as was also previously indicated, the Fund must elaborate a program for reparations that takes into account the aggregate need of all situation victims. In short, the different approaches to harm reparation in criminal procedure and the Trust Fund setting are likely to be the source of inequitable differences in the treatment of similarly situated individuals, and thereby also the source of dissatisfaction of victims whose abusers have not made it to court.

Although the addition of reparation tasks to international criminal courts may thus be hailed as an advance in terms of *moral* principle, it is scarcely surprising that it has given rise to misgivings on *pragmatic* grounds. These misgivings are based not only on concerns about creating unrealistic expectations in victims, but also on worries that the involvement of judges in restorative tasks might be detrimental to the proper exercise of the retributive function. Consider that both the President of ICTR and ICTY, familiar with the practical problems of trying international crimes, opined that adding reparation to their courts' responsibilities would not only be inefficacious, but also "destructive" of their principal retributive mandate.[30] More recently,

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[29] *See* VILMER, *supra* note 16, at 84. Barring unexpected changes in attitudes of governments and other donors, dramatic improvement is not in the cards.

[30] *See* Letter dated 14 December 2000 from the Secretary-General addressed to the President of the Security Council, Annex, U.N. Doc. S/2000/1198/Annex (Dec. 14, 2000). For the letter of the ICTY President, see Letter dated 2 November 2000 from the Secretary General ad-

misgivings directed specifically at the ICC reparation scheme appeared in the Report of the International Commission of Inquiry into the Darfur Genocide. As is well known, the Commission recommended that the Security Council refer the Darfur situation to the ICC for criminal prosecution, but completely ignored its reparation scheme by recommending that a special commission in charge of victim compensation be set up by the UN.[31]

IV. REDUCING THE DISPARITY

If the ICC regime in fact increases the likelihood that a gap will arise between its aspirations and achievements, and if that gap is in fact capable of sparking discontent deleterious to the Court's legitimacy, the question then becomes what can be done about it. The gap clearly cannot be filled, or narrowed, by equipping the Court with an independent enforcement capacity. Its effectiveness will for the foreseeable future continue to depend on the fickle winds of the international political climate, and on the willingness of states and international organizations to provide it with assistance and support. If the gap is to be narrowed, then, it can only be done by streamlining its procedures and scaling-down its ambitions.

Elsewhere I have advocated a radical unburdening of international criminal justice.[32] Among other measures, I urged that the plight of victims not be placed at the center of the mission of international criminal courts. International crimes produce mass victimization, I argued, so that meaningful rights of victim participation in proceedings can be granted only to a few aggrieved individuals. The remaining large numbers of victims can receive no relief from participatory rights, and may easily become bitter about what to them appear empty normative gestures. International criminal courts, I suggested, should concentrate on the prosecution of prominent perpetrators of only a few well-chosen episodes of mass atrocity for which the strongest evidence exists. They should avoid arousing expectations in victimized communities that all incidents of atrocities reported by them will be internationally adjudicated. In selecting episodes for trial, I submitted, the Prosecutor should not be compelled to press charges against his better judgment. He

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dressed to the President of the Security Council, Annex, U.N. Doc. S/2000/1063/Annex (Nov. 3, 2000).

[31] *See* Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 J. INT'L CRIM. JUST. 590, 598-99 (2005).

[32] Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 329-365 (2008).

should not be placed in the position of a reluctant role player at the trial—especially if its mode places primary reliance for the development of evidence on the parties. By punishing and stigmatizing the perpetrators of crimes committed in only a few well-selected and persuasively adjudicated episodes, international criminal courts have the best chance of strengthening the sense of accountability for gross human rights violations, and are best positioned to spread the sense of empathy and compassion, crucial for the vitality of the evolving human rights culture.

I realize that such a radical scaling-down of the functions of international criminal justice is presently not in the realm of the feasible. This applies especially to a drastic reduction of victim rights: as I acknowledged earlier, the enlargement of these rights is hailed in many influential quarters as a great historical achievement. Even if such a severe retrenchment were thought desirable beyond a small circle of people familiar with the gritty reality of criminal prosecutions, to implement the retrenchment in the ICC case would require a revision of its founding instruments—a highly visible act for which the political will is clearly lacking at this time. Where specific forms of victim participation are enshrined in the ICC's founding documents, their abandonment is thus hard to imagine.

A moderate, *sotto voce* altering of these rights may still be possible, however. One way would be to interpret restrictively those provisions of the founding documents that open the door to expansion of victim participation rights. Foremost among them is a provision authorizing judges to determine whether it is appropriate in specific situations to let victims express their "views" and "concerns."[33] The other way to proceed is to overturn judicial decisions which extend the rights of victims in ways that are not clearly mandated by the founding documents. The primary candidate for this treatment is the decision of a Pre-Trial Chamber to which I have already adverted, which ruled that victims may participate in the situation phase of the proceedings based on their general interest in investigation, and that they may be accorded the status of victim *vis-à-vis* a conflict at this early stage.[34] Remember that such status does not guarantee victim participation in subsequent proceedings, even though its determination has already proven to be a serious drain on the Court's energy and resources. The determination of who are the victims of crimes committed in a situation should be transferred to the Trust Fund, whose main concern is to cater to their need for reparation and assistance. Whether the previously mentioned Appeals Chamber's

[33] *See* Rome Statute, *supra* note 5, art. 68(3).

[34] For a well-articulated argument along these lines, see Chung, *supra* note 27, at 526-29.

decision that victims have the right to "lead" evidence deserves reconsideration, depends upon the degree to which that decision will complicate and prolong trials. If it turns out that victims often have diverse interests, and that their representatives will be zealous in asserting them, evidentiary issues will frequently have to be considered from three sides, so that judges could easily get bogged down by the need to respond to the multiplicity of issues raised.

In regard to reparation proceedings, it seems desirable that they be detached from criminal procedure as far as the ICC founding documents permit. Remember again that the division of reparation functions between the Court and the Trust Fund leads to the unequal treatment of similarly situated victims. To avoid inequitable results, all reparation functions would again have to be transferred to the Trust Fund: unlike judges in criminal proceedings, the Fund can take a comprehensive view of the needs of all situation victims, and it is also familiar with all resources available for the purpose. Regrettably, the provisions of the founding instruments do not permit a complete transfer of functions, and do not establish full independence of the Fund.[35] It would therefore be worth following the suggestion that the Court limit itself to ordering compensation payments only from the captured resources of convicted persons, with the further proviso that a causal link be established between the criminal activity of the convicts and their victims.[36] All other reparation decisions should be entrusted to the Fund.

CONCLUSION

With these comments I have come to the end of the task I have set for myself. Yet, a caveat remains to be added before I close: a possible misunderstanding should be avoided. Friends of international justice, concerned about the divide between its promise and its aspirations, can follow many paths in expressing their misgivings. These paths are seldom travelled, however, largely, I think, because the journey implies the frustrating abandonment of noble intentions. The most ennobling among them may well be that of placing the plight of victims at the center of attention of international criminal courts. By arguing, as I have, that they should abandon this intention, I have put myself in an unenviable position, because it can easily be

[35] *See* VILMER, *supra* note 16, at 169-172.

[36] *See* Pablo de Greiff & Marieke Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibility and Constraint*, *in* OUT OF THE ASHES 225, 225-39 (Koen De Feyter et al. eds., 2005). *See also* VILMER, *supra* note 16, at 181.

interpreted as evincing a gravedigger's indifference to human suffering. Observe, though, that I do not argue for the disengagement of international institutions from efforts to alleviate the misery of victims of international crimes and from attempts to restore their dignity. Rather, my purpose has been to question the wisdom of placing the heavy burden of the response to massive human rights violations on an endogenously powerless criminal court. Its inability to properly perform this task, I argued, could not only fail to improve the victims' lot, but could also traumatize them all over again by generating in them unrealistic expectations of meaningful redress. As a result, the legitimacy of the Court itself might seriously be weakened. Phrased differently, it was not my intention to suggest that the aspiration of international institutions to attend to the plight of victims of mass atrocity was a quixotic dream. Rather, what I have tried to convey is that the realization of the dream should not be entrusted to a weak criminal court, but be pursued elsewhere and by other means. Was it not Burke who said dreams that only creep in some places can soar in others?