

NGOs for International Justice

Criminal or Victims' Justice?

Kjersti Lohne

1. Introduction

Academics and legal practitioners have pointed out that doctrines and practices of international criminal law violate the fundamental principle of legality and fair trial rights, such as the presumption of innocence and the equality of arms.¹ Others have noted the dearth of penal theory and fuzzy penological objectives with international punishment,² with some even suggesting that international criminal justice inevitably ends up producing ‘show trials’ wherein the defendant merely serves an instrumental role for ulterior purposes, such as establishing ‘truth’, ‘memory’, and ‘justice for victims’.³ Meanwhile, the figure of the victim has taken central stage in international criminal justice.⁴ Victims are now invoked as the *raison d’être* and telos of the work of the ICC by academics, practitioners and promoters of international criminal justice alike, often – as demonstrated by the Rome Statute’s Preamble – in association with the need to ‘end impunity’ as a foundational value of the ICC.⁵ According to Bassiouni, ‘[o]ne of the most important recognitions of the victim as a subject of international criminal law is contained in the ICC Statute’.⁶ The provisions regarding rights for victims of international crimes *as victims* in the ICC’s

¹ George P. Fletcher and Jens David Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3 *Journal of International Criminal Justice* 539; Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925; Dov Jacobs, 'A Tale of Four Illusions: The Rights of the Defence before International Criminal Tribunals' in C. Rohan and G. Zyberi (eds), *Defence Perspectives on International Criminal Justice* (Cambridge University Press 2017)

² Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 *European Journal of International Law* 561; Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007); Barbora Holá and Joris van Wijk, 'Life after Conviction at International Criminal Tribunals: An Empirical Overview' (2014) 12 *Journal of International Criminal Justice* 109.

³ Martti Koskeniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law Online* 1

⁴ Sofia Stolk, 'The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths About Mass Atrocity' (2015) 13 *Journal of International Criminal Justice* 973

⁵ Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2014) 76 *Law and Contemporary Problems* 235.

⁶ M. Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 *Human Rights Law Review* 203 230.

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Rome Statute and Rules of Procedure and Evidence are therefore celebrated as ‘[o]ne of the major innovations of the International Criminal Court’,⁷ with the ICC recognising and outlining principles of victim participation in court proceedings, protection of victims and witnesses during proceedings, rights to compensation or reparations, and the creation of a Trust Fund for Victims from which reparations may be made.

Thus here we are at a critical juncture for international criminal justice. As already observed by others, ‘going too far in the direction of victims will, aside from creating well-known liberal fears for the defendant, transform international criminal justice so as to deny it its very character as a criminal law enterprise’.⁸ Aside from constituting ‘justice’ as a zero-sum game between these two different constituencies, the victim – perpetrator issue speaks to broader and deeper notions about the ‘identity’ of the international criminal justice project, and specifically to Robinson’s and Mégret’s respective diagnosis of international criminal justice as in a state of ‘identity crisis’⁹ and as ‘riddled by anxieties’.¹⁰ As an amalgam of different legal fields – criminal law, human rights law and humanitarian law – international criminal law’s norms and practitioners ‘draw a deep intellectual inheritance from human rights and humanitarian law’, pointing in particular to the interpretative, substantive and ideological assumptions travelling with a ‘victim-focused teleological reasoning’.¹¹ In a similar vein, Dixon and Tenove suggest that international criminal justice is constituted at the intersection of three global fields – interstate diplomacy, criminal justice, and human rights advocacy – with the latter especially influencing its approach to victims.¹²

⁷ Jo-Anne Wemmers, 'Victims and the International Criminal Court (Icc): Evaluating the Success of the Icc with Respect to Victims' (2009) 16 *International Review of Victimology* 211 211.

⁸ Frédéric Mégret, 'The Anxieties of International Criminal Justice' (2016) 29 *Leiden Journal of International Law* 197 211

⁹ Robinson, 'The Identity Crisis of International Criminal Law'

¹⁰ Mégret, 'The Anxieties of International Criminal Justice'

¹¹ Robinson, 'The Identity Crisis of International Criminal Law' (n 9) 961. See also other important contributions on international criminal justice as an amalgam of legal regimes and traditions (domestic criminal law, human rights law, humanitarian law, and transitional justice) Allison Marston Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) *California Law Review* 75; Peter Dixon and Chris Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims' (2013) 7 *International Journal of Transitional Justice* 393.

¹² Dixon and Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims'

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While the associations between international criminal courts and human rights NGOs are well-observed,¹³ there is far less empirical analysis of the underlying arrangements and assumptions of those working to influence the field. This matters because in as much as a question of ‘being’ is a question of ‘being as’, the identity of international criminal justice is at the mercy of interpretations narrated through the stories told about it, and ‘to what’ international criminal justice is compared to and associated with.¹⁴ To this end, the chapter specifically approaches the victim – perpetrator tension in international criminal justice through a legal sociology approach to NGO advocacy at the ICC, adopting a view ‘from the outside’ in order to explore how international criminal law and justice are embedded in and by wider social processes. Based on fieldwork observations and interviews, the chapter analyses the imbalance in victim – perpetrator focus in NGO advocacy in international criminal justice through an exploration of NGO advocacy at the ICC. It argues that the significant imbalance in attention towards victims and defendants in NGO advocacy at the Court can shed additional light on the ‘identity’ of international criminal justice as victims’ rather than criminal justice.

Following a contextualisation of NGOs in international (criminal) law and a method section, the analysis proceeds in five parts where the victim-perpetrator dichotomy in NGO advocacy is incrementally explored. The first part describes and ‘unpacks’ core non-governmental organisation for the ICC, revealing that there is only one major NGO advocating the rights of defendants – the International Bar Association (IBA). Their organisation is further explored in part two, where it is suggested that there is a separation between ‘rule of law’ advocacy and ‘human rights’ advocacy in international criminal justice. The third part probes deeper into the associations between human rights advocacy as victims’ advocacy, and argues that the ‘fight against impunity’ demonstrates interesting ‘pro-prosecution’ sensibilities at the international level that to some extent contradicts NGO engagement with domestic systems of criminal justice in western democracies. This apparent contradiction is further explored in part four, which focuses on NGOs’ approach to legal aid. What

¹³ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998); Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (Routledge 2006); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W. W. Norton & Company 2011).

¹⁴ For a narrative concept of the state, see Erik Ringmar, ‘On the Ontological Status of the State’ (1996) 2 *European Journal of International Relations* 439

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is explored here are the social conditions of NGO advocacy as centred on victims' justice through analysing part of what can be referred to as the field's moral economy, that is, to the norms and sensibilities lending legitimacy to market rationalities:¹⁵ materially, victims are a more fundable constituency for human rights NGOs to advocate on behalf of; imaginatively, as explored in the chapter's final part, the presumption that defendants might indeed be innocent seems to be, at best, weak. Having thus enquired into what type of justice international criminal justice is imagined to provide – and for whom – the chapter concludes that for those advocating international criminal justice, the justice imagined is that for victims.

2. Approaching NGOs in international criminal justice

As aptly put by Philippe Sands in his keynote speech at the European Society of International Law's annual conference in Oslo, '[o]ur legal world is no longer just about states'.¹⁶ The presence and participation of NGOs in international law and policy development is familiar by now. They have advanced the creation of treaties and international organisations, and lobbied for implementation and enforcement of international rules at the domestic level.¹⁷ Their activities 'encompass virtually every area of international concern,'¹⁸ and the growth in numbers of international NGOs alone makes it eminently reasonable to enquire into not only if they matter, but how and when they matter.¹⁹

Writing about the United Nations, Donini declared more than two decades ago that 'the Temple of States would be a rather dull place without nongovernmental organizations.'²⁰ It reflects a more

¹⁵ Susanne Karstedt and Stephen Farrall, 'The Moral Economy of Everyday Crime: Markets, Consumers and Citizens' (2006) 46 *British Journal of Criminology* 1011; Kristin Bergtora Sandvik, 'The Political and Moral Economies of Dual Technology Transfers: Arming Police Drones', *Drones and Unmanned Aerial Systems* (Springer 2016)

¹⁶ Philippe Sands, 'Reflections on International Judicialization' (2017) 27 *European Journal of International Law* 885 889

¹⁷ Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 *The American Journal of International Law* 348.

¹⁸ Karsten Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law' (1999) *Indiana Journal of Global Legal Studies* 579 589

¹⁹ For example, in 1990 there were approximately 20,300 organisations listed as international NGOs in the *Yearbook of International Organizations*. Two decades later there were 56,000 international NGOs. By 2013, this number had arisen to just over 58,500. See UIA, *Yearbook of International Organizations* (Brill 2014).

²⁰ Antonio Donini, 'The Bureaucracy and the Free Spirits: Stagnation and Innovation in the Relationship between the Un and Ngos' (1995) 16 *Third World Quarterly* 421 421

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general claim about NGOs contribution to the ‘humanisation’ of international law and policy,²¹ that is, to the normative shift in the international legal order towards a focus on human security – the security of peoples and persons – rather than an exclusive focus on state security.²² In particular, the work of human rights NGOs has pushed the evolution of human rights norms and its legal institutionalisation and dispersion around the world.²³ As seen by Glasius,²⁴ ‘[t]hese two features are, of course, interrelated: the development of a more people-empowering international rule of law, and the emergence of a global civil society capable of contributing to such a rule of law, feed and drive one another’.

The development of international criminal justice is considered part of the advance towards a more ‘people-empowering’ international rule of law. Indeed, the creation of the ICC is referred to as a ‘global civil society achievement’,²⁵ or even, an ‘achievement of the masses organized’.²⁶ According to scholars and advocates, the emergence of the NGO *Coalition for International Criminal Court* (CICC) as ‘the most advanced and sophisticated organization thus far created collectively by civil society to influence and shape multilateral treaty-making is an irresistibly compelling feature of the story of the Rome Statute’.²⁷ Therefore, alongside the legacy of Nuremberg,²⁸ the crafting of the ICC can also be seen as emerging from the globalisation of human rights and the proliferation of NGOs in the late 1980s, and specifically, to the emergence of an international campaign against impunity.

²¹ Charnovitz, 'Nongovernmental Organizations and International Law'; see generally Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*; Ruti G. Teitel, *Humanity's Law* (Oxford University Press 2011).

²² Teitel, *Humanity's Law*

²³ Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*; Risse Thomas, Stephen C Ropp and Kathryn Sikkink, 'The Power of Human Rights: International Norms and Domestic Change' (1999) Cambridge, UK: Cambridge University Press

²⁴ Marlies Glasius, 'Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court' in Marlies Glasius, Mary Kaldor and Helmut K. Anheier (eds), *Global Civil Society* (Oxford University Press 2002)

²⁵ Glasius, *The International Criminal Court: A Global Civil Society Achievement*

²⁶ Cenap Cakmak, 'Transnational Activism in World Politics and Effectiveness of a Loosely Organised Principled Global Network: The Case of the Ngo Coalition for an International Criminal Court' (2008) 12 *The International Journal of Human Rights* 373 373

²⁷ Fanny Benedetti, Karine Bonneau and John L. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Nijhoff 2014)

²⁸ Geoffrey Best, *War and Law since 1945* (Clarendon 1994); Antonio Cassese, *International Criminal Law* (2 edn, Oxford University Press 2008).

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By the time of the Rome Conference – the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court – in 1998, the CICC comprised a transnational advocacy network of approximately 800 organisations. Out of these, 236 NGOs were accredited to the conference, and were represented by about 500 individuals. The CICC was thus the biggest ‘delegation’ in Rome, in numbers and expertise far surpassing state delegations. They provided a number of functions, such as lobbying state and intergovernmental representatives; writing expert documents, reports, and journal articles; convening seminars and conferences; disseminating the Court ideal to a wider audience; seeking and giving financial support for Southern NGO and expert participation in the debates; providing experts and interns to smaller and poorer government delegations; and street action.²⁹ Through process tracing, Glasius examines the specific contribution of NGOs to three specific provisions to the Statute, finding that NGOs played a significant role in influencing the drafting and adoption of an independent prosecutor and gender-specific crimes in the Rome Statute, while being less successful regarding their attempts to include prohibitions on the use of indiscriminate weapons in the Rome Statute.³⁰

While there is a substantial amount of literature on the role of NGOs in the ICC treaty negotiations, as it has become somewhat of an emblem for the ‘new diplomacy’ of the 1990s,³¹ much less has been written on the continued significance of these actors for the Court and for the development and identity of international criminal justice generally. Since ‘Rome’ however, the role of NGOs has developed in tandem with the ICC’s institutionalisation,³² fulfilling a number of functions at the international level that, arguably, would be inconceivable within western systems of criminal justice.³³ In addition to their ‘traditional’ roles of advocacy and agenda-setting, they identify and represent victims to the Court; they provide evidence and *amicus curia* briefs, draft penal codes

²⁹ Glasius, 'Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court'.

³⁰ Ibid; Comparing the efforts of NGOs in these three areas, she suggests that core features such as strength in numbers, experience as ‘conference-goers’, and internal support, largely affected the success of the campaigns.

³¹ David Davenport, 'The New Diplomacy' (2002) 116 Policy Review 17

³² Heidi Nichols Haddad, 'After the Norm Cascade: Ngo Mission Expansion and the Coalition for the International Criminal Court' (2013) 19 Global Governance: A Review of Multilateralism and International Organizations 187

³³ At the domestic level however, NGOs are engaged to a much greater extent on behalf of the defendant.

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and lobby for their implementation in domestic systems of criminal justice, to give but a few examples.³⁴

As Pearsons observe however, '[i]n any situation where the subtleties and complexities of human dynamics are crucial to the outcome, as they are in the case of the ICC negotiations, such evidence is neither available nor quantifiable.'³⁵ The intention of this chapter is thus not to identify a direct effect of NGOs to specific developments in international criminal law. Rather, the importance of analysis of NGOs' interaction with international criminal law is in observing the dynamics of their involvement, and in the complexities of processes shaping the field of international law. In this manner, the role of human rights NGOs in providing moral authority, visibility, and legitimacy to international criminal justice is as important³⁶ – if not more – than states adopting NGOs' positions on specific wordings or interpretation of statutory provisions, namely because it recognises the normative orderings within which legal norms operate. The empirical analysis is therefore concerned with norms, values and material relations, as these are constitutive of social conditions for the practice and development of international criminal law. In lieu of democratic accountability, transparency in international law-making processes as well as the social conditions on which law – broadly understood – is administered, interpreted and enforced, is fundamental to its legitimacy.³⁷ A legal sociological approach that sees international criminal law from 'the outside' – as constitutive of and by society – enables an empirically founded critique of the power that international criminal law embodies.

Therefore, mindful to the way in which human rights NGOs are assumed as 'particularly important for mobilizing moral authority'³⁸ to the field of international criminal justice, the aim of this

³⁴ Kjersti Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice* (Oxford University Press forthcoming 2018)

³⁵ Zoe Pearson, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' (2006) 39 *Cornell International Law Journal* 243 254

³⁶ Cakmak, 'Transnational Activism in World Politics and Effectiveness of a Loosely Organised Principled Global Network: The Case of the Ngo Coalition for an International Criminal Court'; Dixon and Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims'; Kjersti Lohne, 'Global Civil Society, the Icc, and Legitimacy in International Criminal Justice' in N. Hayashi and C. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017)

³⁷ Jürgen Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15 *Constellations* 444

³⁸ Dixon and Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims'

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chapter is to probe into the material and ideational aspects of this role. Who are they and how are they organised; what issues matter to them, and why? In focusing on the materialities and imaginations of nongovernmental organisation for the ICC, the empirical analysis below reveal significant imbalances in attention towards the rights of victims and defendants in international criminal justice, which, on a broader level, reveal important dimensions of the social conditions informing the identity of international criminal justice as embodied by the ICC.

3. Methods

The data for this chapter is based on parts of the author's doctoral research, which is a transnational, multi-sited ethnography of human rights NGOs in international criminal justice.³⁹ As the hub of global justice-making, The Hague has been the primary perspective in research and analysis.⁴⁰ This chapter specifically draws on data from observations in The Hague and interviews conducted in 2013 with all staff members of the Coalition for the International Criminal Court's (CICC) secretariat office in The Hague (7 informants), except from the administration and finance officer, in addition to the CICC's convenor, one regional staff member, and two representatives from their national coalitions. Moreover, the analysis builds on interviews conducted with NGO informants working on international justice issues from the International Bar Association, Human Rights Watch, Open Society Justice Initiative, Parliamentarians for Global Action, and REDRESS. Two people who formerly had been central NGO actors were interviewed in their capacities as independent victims' rights experts, now acting as consultants and experts on the ICC and victims' rights in particular. The analysis of the organisational make-up of NGO advocacy has been further informed by the NGOs' online representations of issue agendas and activities. The triangulation of interviews, observations and (online) representations provide a holistic analysis of non-governmental organisation for the ICC, in comparison to methodological approaches that for instance base analysis upon online representations.⁴¹

³⁹ Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice*

⁴⁰ The CICC also has a secretariat in New York, the 'UN office', and many of the international human rights NGOs that is the focus in this analysis likewise have representatives in New York or Washington. While there is reason to believe that data from New York would have provided different insights, in studying law in its cultural, social and political contexts I considered proximity to the actual workings of the Court more important than a New York-based analysis on global justice lobbyism.

⁴¹ R. Charli Carpenter and Betsy Jose, 'Transnational Issue Networks in Real and Virtual Space: The Case of Women, Peace and Security' (2012) 12 *Global Networks* 525.

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The analysis was done through a series of coding in NVivo, a qualitative analysis software, where the data was assigned to thematic, conceptual and analytic codes.⁴² Narrative analysis was used to analyse interviews, which is an approach that underlines informants' self-presentations of identities and values. In other words, what has been important in analysis has been the search for informants' meaning-making, and how agency is conditioned by culture and context.⁴³ The research process can therefore be described as a swirl of interpretation, moving in and out of theory, method and data. Hence, in employing this methodological approach to the role of NGOs in order to say something about the 'identity' of international criminal justice, '[o]bjectivity is not measured by procedures that assure an accurate mapping of the world but by the growth of knowledge; that is, the imaginative and parsimonious reconstruction of theory to accommodate anomalies.⁴⁴

Importantly though, international criminal justice is a field in constant flux, driven by events that have the potential to significantly change the landscape in which international criminal justice operates. Since the empirical research was conducted, there has been an articulation of a legitimacy crisis for the ICC, and several African countries have already, or are voicing their intention to, send notice of withdrawal from the ICC and the Rome Statute. To a certain extent then, empirical analysis is contextual – informed by the specificities of space and time. Yet the analytical aim is nonetheless to tease out elements and qualities in international criminal justice-making that are more stable, by way of identifying trends, characteristics and dynamics of the field. Such an approach can in turn deepen the understanding of the pushback and legitimacy 'crisis' that international criminal justice-making is currently experiencing. In what follows, the chapter demonstrates the skewed nature of the international criminal justice project through an analysis of the significant imbalance in attention towards victims and defendants in NGO advocacy at the Court.

⁴² See e.g. Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (Sage 2009): 32

⁴³ Lois Presser, 'The Narratives of Offenders' (2009) 13 *Theoretical Criminology* 177; Sveinung Sandberg, 'Are Self-Narratives Strategic or Determined, Unified or Fragmented? Reading Breivik's Manifesto in Light of Narrative Criminology' (2013) 56 *Acta Sociologica* 69.

⁴⁴ Michael Burawoy, 'The Extended Case Method' (1998) 16 *Sociological theory* 4: 5

4. The victim-perpetrator dichotomy in NGO advocacy

4.1 Nongovernmental organisation for the ICC

Today, the CICC has developed into an institution of international criminal justice. According to its own website and description,

The Coalition for the International Criminal Court includes 2,500 civil society organizations in 150 different countries working in partnership to strengthen international cooperation with the ICC; ensure that the Court is fair, effective and independent; make justice both visible and universal; and advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity and genocide.⁴⁵

Cooperation between the ICC and NGOs is endorsed by the ICC Rules of Procedure and Evidence. While having formal roles, such as dealing with accreditation of civil society to the annual Assembly of States Parties (ASP) meetings,⁴⁶ the NGOs also serve a range of informal roles in the functioning of the ICC. For example, the CICC facilitates access between the Court and civil society in situation countries, they do outreach to explain the Court's mandate to affected communities, lobby state parties for political and financial support to the Court, and organise a host of events and awareness-building activities such as lectures, seminars and side events at the ASP meetings as well as in the everyday life of international criminal justice in The Hague. Such engagement has led to characterisations of the relationship between the ICC and the CICC as one of 'synergy', to the extent that for those unacquainted to the internal dynamics of international criminal justice, the latter has been confused with being an organ of the former.⁴⁷ Moreover, the role of the CICC can be seen as both mobilisers and monitors of international criminal justice, both of which play into their lobbyism and legal assistance, campaigns, capacity-building and outreach. Their activities thus span both sides of a common division characterising NGOs: advocacy and service provision.⁴⁸ However, service provision, such as building capacity and giving assistance to local civil society organisations in ICC situation countries, or offering legal and technical

⁴⁵ 'About the Coalition' (*Coalition for the International Criminal Court*) <www.iccnw.org/?mod=coalition> accessed 8 February 2014.

⁴⁶ Assembly of States Parties to the Rome Statute of the International Criminal Court, 'Handbook for Participants' (20 October 2015) <www.asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ASP14-Handbook-ENG.pdf> accessed 27 June 2016.

⁴⁷ Lohne, 'Global Civil Society, the ICC, and Legitimacy in International Criminal Justice'

⁴⁸ Amanda Murdie and David R Davis, 'Looking in the Mirror: Comparing Ingo Networks across Issue Areas' (2012) 7 *The Review of International Organizations* 177.

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assistance to governments, are still services imbued with norms, values and imaginations of justice. Hence, advocacy and service provision are not mutually exclusive aims, but rather different strategies used by NGOs in their promotion of international criminal justice.

The CICC's structure can be understood as having three different parts: a secretariat, a transnational advocacy network of supporting NGOs, and a group of steering committee members. The steering committee provides policy and program coherence for the CICC's activities, and includes many of the founding members of the Coalition. Given their central roles in NGO advocacy for the ICC, Amnesty International, the International Federation for Human Rights, Human Rights Watch, No Peace Without Justice, Parliamentarians for Global Action, REDRESS, Women's Initiatives for Gender Justice, and the World Federalist Movement-Institute for Global Policy can be identified as core steering committee members.⁴⁹ Next to these eight organisations, Open Society Justice Initiative and the International Bar Association can also be identified as belonging to the group of NGOs that are particularly active in ICC advocacy.

Known as the 'drafters' or the 'usual suspects' by people in the field, these organisations are all international, western-based organisations with a human rights profile: They have campaigns or programs to do with international criminal justice, and most have staff members working specifically on ICC related issues, which reflects both their resource capabilities and their perception of international criminal justice as a critical human rights issue. Most of them have offices and permanent representation in The Hague. There they monitor the progress of international criminal law coming out of the ICC, they draft proposals and recommendations, and lobby state parties at The Hague Working Group meetings, which are diplomatic working group meetings between state members of the Court – a type of mini-ASPs on particular issues. This core group of NGOs have become conspicuous participants in the field of international criminal justice and at the ASP meetings in particular; here, they give plenary statements to the General Debate, host shadow meetings and side events where, for instance, they bring together their own expertise with states' representatives, ICC officials and other international criminal law professionals. In the

⁴⁹ In addition, the following organisations were steering committee members at the time of research: Adaleh Center for Human Rights Studies, Andean Commission of Jurists, Asian Forum for Human Rights and Development, Asociación Pro Derechos Humanos, Civil Resource Development and Documentation Centre, Georgian Young Lawyers Association, Human Rights Network-Uganda, and Justice Without Frontiers.

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everyday life of international criminal justice in The Hague, they drink coffee with, and lobby state representatives; they organise and participate as expert voices in conferences and seminars, and attend and hold receptions for international criminal justice professionals in the city.

In order not to duplicate each other's work and to maximise their combined efforts, the CICC's advocacy issues are organised in NGO issue-specific teams and 'thematic caucuses'. However, there is a significant organisational imbalance between attention to victims and defendants in international criminal justice advocacy. While the Victims' Rights Working Group (VRWG) is by far the largest thematic caucus – according to their website, they are a 'network of over 300 national and international civil society groups and experts'⁵⁰ – there are no thematic caucus or issue-team that focuses on the rights and interests of the defence in international criminal justice. Moreover, out of the ten organisations identified as the most central advocates of international criminal justice in The Hague, this leaves only one, namely the International Bar Association (IBA), dealing with the latter.

4.2 The IBA, the rule of law, and the lack of imagination

Out of the core group of international NGOs in The Hague, the only organisation that specifically focuses on defence rights is the IBA, which is a federation of national bar associations supporting the human rights and independence of lawyers and the judiciary. The IBA's ICC program is twofold. The first part of their mandate is to monitor the ICC as a legal institution and workplace, representing the 'global voice of the legal profession'. The second part of their mandate is geared towards advocacy and especially monitoring the ICC, as is also the case for the other NGOs. However, the IBA does not consider itself an NGO, but is nonetheless listed as such in the Yearbook of International Organization. Their representatives explain that they are often associated with being an NGO 'because of the type of work we do' – the ICC program is a branch of the IBA's Human Rights Institute based in London. They thus identify as a 'hybrid' organisation, a 'not-for-profit association', and their focus on human rights are those that concern the legal profession, and especially the independence of the judiciary and the upholding of the rule of law.

⁵⁰ 'Who we are' (VRWG) <www.vrwg.org/about-vrwg/who-we-are> accessed 27 June 2016.

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In their work on the ICC, a major part of their monitoring work is focused on fair trial rights as, according to one of their representatives, ‘without fair trial rights you don’t have rule of law, and secondly, there was an enormous gap in this area. We’re the only organisation in The Hague – well, others touch on it, but nobody is focusing on these issues’. In part then, their motivation for focusing on fair trial rights can be explained by carving out an issue for themselves as part of a ‘division of labour’ among international justice advocacy at the ICC. A more articulated motivation however, and that can also help explain the variation of issue emergence and adoption among the ‘usual suspects’ of NGOs at the ICC, is the IBA’s principled and pre-existing moral standards regarding the rule of law.⁵¹ As an association of legal practitioners and bar associations, it is the rule of law as interpreted by international legal professionals, rather than human rights as interpreted and advocated by transnational networks of human rights NGOs, that inform their work. What emerges into view is thus a separation of organisations in NGO advocacy for international criminal justice: whereas human rights organisations primarily focus on victims, defence issues are dealt with by lawyers’ associations.

A question may thus be asked about how this imbalance in victim and defendant advocacy plays into the perception of fairness in international criminal justice⁵² – and the bent to identify grievances. An IBA representative explains that ‘The fairness aspect is there – it is in the statutes, the rules and frameworks – but the means and the will are not there!’ This lack of ‘means and will’ is seen to cause a lack of thinking and imagination in international criminal justice, especially as concerns defendants’ rights. For example, after the ICC’s first acquittal in its second case, Congolese Mathieu Ngudjolo Chui filed for asylum on the grounds of being unable to return to the Democratic Republic of the Congo (DRC) for personal security reasons after having implicated the Congolese government. After having spent months following his acquittal at Schiphol’s immigration detention centre, he was transferred to the ICC’s ‘protection...in a hotel in The Hague’ while awaiting a decision by a Dutch district court regarding his appeal for asylum in The Netherlands.⁵³ While his claim for asylum (and compensation) were in turn denied, and Ngudjolo

⁵¹ R. Charli Carpenter, 'Setting the Advocacy Agenda: Theorizing Issue Emergence and Nonemergence in Transnational Advocacy Networks' (2007) 51 *International Studies Quarterly* 99

⁵² Mégret, 'The Anxieties of International Criminal Justice'

⁵³ Tjitske Lingsma, 'Acquitted by the ICC, but Still Not Free' *International Justice Tribune* (The Hague April 4 2014) 4.

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expelled back to the DRC in May 2015,⁵⁴ his situation stirred up frustration as indicative of legal and moral ‘loopholes’ in the field.⁵⁵ As the IBA representative asserted: ‘The Court didn’t imagine what would happen after someone have been acquitted. They only imagined what would happen if someone was found guilty’.

While the articulation of the acquitted accused as a ‘forgotten party’ in international criminal justice is not new,⁵⁶ it is however interesting to note that such sensibilities are still strong among observers in the field. In their understanding, it is simply not what ‘people in the field want to focus on’. I ask why not.

Atrocity crimes bring a lot of emotion, and obviously, the first thing on people’s minds are the victims, which is very understandable. Most NGOs in the field are looking at human rights and victims, making sure states are signing up, that arrests are happening. The train is always moving in that direction, and yes, fair trial rights do get lost in the shuffle.

What is pointed to here resonates with Bass’ observation that in international criminal justice, legalism is not enough: one also needs moral outrage.⁵⁷ International criminal justice taps into and is propelled by the humanitarian impetus to ‘do something’ about the suffering of others. This is also the *raison d’être* of human rights NGOs, as mobilisers of moral outrage on behalf of distant others, predicated on a theory of change that knowledge about suffering produces action.⁵⁸ As part of this, victims – more so than perpetrators – are in the hearts and minds of international justice advocates.

⁵⁴ Joris Van Wijk and Barbora Hola, 'Acquittals in International Criminal Justice: Pyrrhic Victories?' (2016) *Leiden Journal of International Law* 1.

⁵⁵ Joris van Wijk, 'When International Criminal Justice Collides with Principles of International Protection: Assessing the Consequences of Icc Witnesses Seeking Asylum, Defendants Being Acquitted, and Convicted Being Released' (2013) 26 *Leiden Journal of International Law* 173

⁵⁶ Benoit Henry, 'The Acquitted Accused, a Forgotten Party of the Ictr' (2005) 12 *New England Journal of International and Comparative Law* 81

⁵⁷ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000)

⁵⁸ Richard Ashby Wilson and Richard D. Brown, *Humanitarianism and Suffering : The Mobilization of Empathy* (Cambridge University Press 2009)

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4.3 Victims' advocates and the 'punitive turn'

As recognised by Wemmers, the 'major innovation and shift in the status of victims before the court is due, in part, to pressure from non-governmental organizations'.⁵⁹ In the ICC negotiations in Rome, victims' rights were at the top of many of the NGOs' agendas, uniting under the VRWG. The working group was facilitated by REDRESS, a London based human rights organisation that, in spite of its relatively small size compared to the other NGOs, holds a particularly central position in victims' advocacy. According to their website, the VRWG work to promote the rights and interests of victims before the Court, and focus particularly on participation and legal representation, protection and support, reparations, ensuring victims' voices are heard in considering the interest of victims', and a gender sensitive approach.⁶⁰

In considering victim participation, a central argument for including victims in the criminal justice process is their potential to contribute 'facts', 'truth', and 'memory'. For example, NGO informants pointed to how victims participating in the *Lubanga* case have helped clarify social conventions, such as the use of names in DRC, which benefited criminal proceedings. Another such example is the way in which sexual and gender based violence were brought to 'public' attention through victims participating in the *ad hoc* tribunals as witnesses.⁶¹ As part of this, a central issue has been to advocate for ICC charges brought against alleged perpetrators being 'reflective' of the conflict, as expressed here:

As a victims' advocate I think one of the main reasons why you want to have victim participation is to have some sort of control on the type of charges that are brought being representative of what actually happened.

This is seen as an important element in considering trials as 'memory', or, rather, as writing history. As such, this rationale is closely associated with a preference for the ICC's prosecutorial strategy to be reflective of the underlying patterns of the conflict in question. Although most of the human rights NGOs were involved, the FIDH, consisting of 178 human rights organisations, has been particularly active in pushing for and implementing victim participation. Through their Legal

⁵⁹ Wemmers, 'Victims and the International Criminal Court (Icc): Evaluating the Success of the Icc with Respect to Victims' (n 13) 211.

⁶⁰ 'Strategy' (VRWG) <www.vrwg.org/about-vrwg/strategy> accessed 12 February 2014.

⁶¹ See also Mariana Pena and Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013) *International Journal of Transitional Justice* (n 39).

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Action Group, comprising a network of pro-bono lawyers, FIDH has provided legal support for victims of international crimes, and have *inter alia* represented victims in proceedings at the ICC. Part of FIDH's strategy of facilitating victim participation was to challenge the Prosecutor's policy in relation to cases and charges, strategically using victim participation as a means to make advocacy for prosecutions of international crimes.⁶²

Before going any further, however, it is important to note that the turn to criminal law has required a significant adjustment of thinking for human rights NGOs. In the early days of the human rights movement, the criminal justice system was associated with repression – a system inherently repressive due to its potential for violence. 'While some criminal justice systems might have been more suspect than others, all were considered as capable of abusing power'.⁶³ The human rights focus was originally aimed at the rights of the defendant and of the political prisoner of authoritarian regimes. While there are nuances within organisations, amnesty and the release of political prisoners were at the very core of Amnesty International's foundation in 1961, an organisation that since spearheaded the movement and became an 'iconic global symbol of moral authority'.⁶⁴ As the organisation grew, they started to work more broadly on prisoners' and defence rights: on issues such as unlawful detention and the right to fair trial. Yet in 1972, Amnesty International suggested the creation of an international tribunal to investigate torture around the world in their *Campaign for the Abolition of Torture*, based on a mistrust in the ability of any national system to deal with the matter systematically.⁶⁵ From a former position of scepticism then, human rights NGOs gradually came to embrace the criminal justice system as a tool for the work of liberation and emancipation *from* repression.

This shift is especially apparent as concerns human rights NGOs' approach to amnesties for international crimes, as 'impunity' is now widely framed as a human rights violation 'in and of

⁶² FIDH, *Supporting the Participation of Victims from Drc before the International Criminal Court* (Report of the FIDH Legal Action Group, 2006).

⁶³ Karen Engle, 'Self-Critique,(Anti)Politics and Criminalization: Reflections on the History and Trajectory of the Human Rights Movement' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law* (T.M.C Asser Press 2012) 58.

⁶⁴ Stephen Hopgood, *Keepers of the Flame: Understanding Amnesty International* (Cornell University Press 2006) 2

⁶⁵ Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*.

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itself'.⁶⁶ In general, human rights organisations oppose amnesties for international crimes on the grounds that they are impermissible according to international law. Amnesty International's position is especially interesting, both as being representative of the human rights movement generally and also because of the aforementioned shift in approach to the criminal justice system. For example, in their press release immediately following the opening of ICC investigations in Uganda, they write that '[u]nder no circumstances should amnesty laws include crimes under international law', and further that 'Amnesty International opposes amnesties, pardons and similar measures of impunity for crimes under international law in all circumstances where they would prevent a judicial determination of guilt or innocence, the discovery of the truth or full reparations'.⁶⁷ Four years later they reiterate their position in a report commenting on an agreement between the Lord's Resistance Army (LRA) and the Ugandan government on Accountability and Reconciliation, resulting from peace negotiations, saying that the 'Amnesty Act of 2000 is a serious barrier to accountability and justice to tens of thousands of victims of Uganda's conflict...Amnesty International has repeatedly called on Uganda to repeal the Act and revoke all amnesties granted to ensure justice, truth and reparations for all crimes under international law committed during the conflict'.⁶⁸ It is interesting to note that, not only is the organisation opposing the use of amnesties, but it is also advocating that Uganda should 'revoke' the amnesties already granted to LRA rebels who have defected, as the agreement between the LRA and the Ugandan government 'severely undermines the commitment to accountability by exempting the more than 20,000 persons who have been granted amnesty'.⁶⁹ Human Rights Watch has adopted a similarly punitive position, both in specific cases such as the situation in Uganda, but and also generally, saying 'No Amnesty for Atrocities'.⁷⁰

⁶⁶ William A Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1996) 7 *Duke Journal of Comparative & International Law* 461 515.

⁶⁷ Amnesty International, 'Uganda: First Steps to Investigate Crimes Must Be Part of Comprehensive Plan to End Impunity' (30 January 2004) AFR 59/001/2004 2.

⁶⁸ Amnesty International, 'Agreement and Annex on Accountability and Reconciliation falls short of a comprehensive plan to end impunity' (March 2008) AFR 59/001/2008 21-22.

⁶⁹ Amnesty International, 'Agreement and Annex on Accountability and Reconciliation falls short of a comprehensive plan to end impunity' (n 59) 21.

⁷⁰ Human Rights Watch, 'Letter to Obama on Targeted Killings and Drones' (7 December 2010) <www.hrw.org/news/2010/12/07/letter-obama-targeted-killings-and-drones> accessed 27 June 2016.

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As there is no direct prohibition of amnesty in international law, the legal argumentation and reasoning of human rights NGOs is worth particular attention.⁷¹ According to Scharf, ‘there are several articles of the Rome Statute that might be read as permitting the Court under certain circumstances to recognize an amnesty exception to its jurisdiction’, and ‘[t]he Rome Statute is purposely ambiguous on the question of whether the International Criminal Court should defer to such an amnesty-for-peace arrangement in deciding whether to exercise its jurisdiction’.⁷² Importantly then, it is the NGOs interpretation of international law that is put forth in their advocacy.

Indicative of what can be called this ‘punitive turn’ in human rights advocacy, in the run up to the treaty negotiations in Rome, Amnesty International also argued that substantive defences such as the statutes of limitation, superior orders, duress, coercion and other ‘negation of responsibility’ were ‘impermissible’ and ‘inappropriate’ as defences for the ICC statute.⁷³ In fact, as observed by Wilson, ‘the AI “blacklist,” if adopted, would have left available to international criminal defendants and their lawyers only a narrow range of defences such as insanity or other mental impairment, alibi, and failure of proof’.⁷⁴ Albeit human rights NGOs are stronger on procedural defences, the analysis provided here reveals that this is not what human rights NGOs in international criminal justice prioritise. It thus appears that in international criminal justice, ‘[m]any traditionally liberal actors (such as non-governmental organizations or academics), who in a national system would vigilantly protect defendants and potential defendants, are among the most strident pro-prosecution voices, arguing for broad definitions and modes of liability and for narrow defences, in order to secure convictions and thereby fulfil the victim’s right to justice.’⁷⁵

⁷¹ Kieran McEvoy and Louise Mallinder, ‘Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy’ (2012) 39 *Journal of Law and Society* 410.

⁷² Michael P Scharf, ‘Amnesty Exception to the Jurisdiction of the International Criminal Court, The’ (1999) 32 *Cornell International Law Journal* 507: 522, 526.

⁷³ Amnesty International, ‘The Quest for International Justice: Defining the Crimes and Defences for the International Criminal Court’ (February 1997) IOR 40/06/97.

⁷⁴ Richard J Wilson, ‘Defenses in Contemporary International Criminal Law. By Geert-Jan GJ Kooops’ (2002) 96 *AJIL* 517 518.

⁷⁵ Robinson, ‘The Identity Crisis of International Criminal Law’ (n 9) 930.

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4.4. Legal aid and the domestic paradox

Even though victims have gained a more prominent status in western systems of criminal justice in the past decades,⁷⁶ what emerges into view is an interesting paradox in relation to domestic systems of criminal justice in established democracies. It may look like as if human rights NGOs tend to speak on behalf of, and represent, directly or by proxy, different constituencies depending on whether their concern is criminal justice at the international level or at the domestic level in western democracies: Internationally, human rights NGOs are, largely, victims' advocates; at the domestic level, they advocate for the rights of defendants and prisoners. For example, many of the central human rights NGOs advocating victims' rights to justice at the ICC (Amnesty International, Human Rights Watch, REDRESS) are at the same time among the most vocal and active advocates for defendants' rights vis-à-vis military commissions at Guantanamo Bay (albeit the latter operates beyond the US civil and criminal justice system).⁷⁷ As observed by Robinson, domestically, 'liberal sensitivities focus on constraining the use of the state's coercive power against individuals. In ICL, however, prosecution and conviction are often conceptualized as the fulfilment of the victims' human right to remedy'.⁷⁸

This distinction is particularly apparent when considering how human rights NGOs approach legal aid at the ICC. Whereas legal aid is mainly provided to defendants in western domestic criminal justice systems, in international criminal justice, NGOs' judicial assistance and legal aid is primarily provided to victims of international crimes. To understand better the underlying social conditions for this difference, one needs to acknowledge the central role of 'the victim' to the human rights industry, and the way that it connects to the role of NGOs in international criminal justice. Consider the following excerpt from one informant, as we discuss the role of NGOs as particularly significant in international criminal justice.

Why is it that international criminal justice has developed this [strong] role for NGOs? Is it because NGOs put their foot in the door to start with? Maybe. Is it because they almost started the whole thing anyway? [...] I think it is because justice is ultimately about and for victims.

⁷⁶ See generally Sandra Walklate, *Handbook of Victims and Victimology* (Willan publishing 2007).

⁷⁷ Kjersti Lohne, 'Prisoners' Advocates at Gitmo: The Role of NGOs in (De)Legitimising Punishment in Response to Cosmopolitan Dilemmas' (International Studies Association Annual Convention)

⁷⁸ Robinson, 'The Identity Crisis of International Criminal Law' (n 9) 930.

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Rather than a direct remedy for victims' suffering, criminal law has traditionally been conceptualised as the state's reaction to an offence and the offender.⁷⁹ The claim reproduced above, then, which was widespread among my informants, differs from the dominant justifications for criminal law and state punishment. Yet the perception that justice is 'ultimately about and for victims' says something important about what kind of justice international criminal courts are expected to deliver among those working within the field.⁸⁰ Albeit 'natural' given the atrociousness of the crimes in question, and the large numbers of victims accordingly perceived as 'beneficiaries' of this type of humanitarianism/justice, the expectation of international criminal justice to serve 'victims' justice' by human rights NGOs inescapably influences the direction of their efforts. In this manner, legal aid has predominantly become a 'victims' issue' in international criminal justice.

As regards the legal aid program, critical concern among NGOs has been to ensure its adequate funding. As an NGO representative put it: 'One of the main worries at the moment is that they are not trying to make the system better; they are trying to make it cheaper!' Another NGO representative elaborated on the matter:

How to represent victims is being viewed from a purely budgetary perspective, like 'what's the way we can represent a thousand victims?' Our point of view is that it should be the other way around: What do victims need? And then look at how much it will cost and the most efficient way of doing that.

Importantly, unlike most domestic systems of justice, the ICC has to negotiate its budget annually at the ASP meetings, and the legal aid program has to demonstrate to its state parties how it contributes to the Court's objectives. It is therefore interesting to observe how over the years the ICC budget has become one of the major advocacy issues for the Coalition, with Amnesty International heading the Coalition's working group on budget. On the face of it, budget issues seem a long way away from what is generally considered human rights advocacy. As a universal membership organisation financed by private donations, members' dues and fund-raising campaigns, it seems even further from Amnesty International's trademark letter writing campaigns.

⁷⁹ Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1988).

⁸⁰ Carolyn Hoyle and Leila Ullrich, 'New Court, New Justice?: The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court' (2014) 12 *Journal of International Criminal Justice* 681.

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Budget issues are far from ‘sexy’ enough to attract popular support, which a member-based campaign organisation such as Amnesty International relies upon. For these reasons, budget was initially a controversial issue within the CICC, and sparked resistance from its members. A CICC representative explains that there has been a significant change of opinion as regards budget advocacy:

No matter what (former Chief Prosecutor) Moreno Ocampo or (former) President Kirsch said, or the Registrar, if it wasn’t in the budget, then it wasn’t there. So now Amnesty and Human Rights Watch are the primary monitors of the budget.

As the legal aid program finances legal counsels and representatives for both victims and perpetrators, the budgetary discussion adds another dimension to the inclusion of victims in criminal justice proceedings – namely the extent to which victims’ rights come at the expense of defendants’⁸¹ While international criminal judges and defence counsel alike have voiced considerable concern for the principle of equality of arms, particularly as regards material resources made available to the defence,⁸² human rights NGOs have primarily focused on the cost implications for victims.⁸³ During an interview with a Coalition representative, I asked about the major organisations working on legal aid and victim representation:

Informant: Redress, Amnesty International, and FIDH are very big on it, as well as a number of organisations in situation countries who work with victims on a daily basis, such as *Advocats Sans Frontiers*. So yes, a lot of them! Defence legal aid is another one but that is more the bar organisations that are interested in that, the International Criminal Bar.

Author: So these are more rule of law oriented organisations?

Informant: Well, they are legal profession organisation whereas others are more human rights, so obviously they focus more on victims’ issues – not to say they’re not interested in defence rights, but they focus more on victims. It is also a matter of resources...

⁸¹ Salvatore Zappalà, 'The Rights of Victims V. The Rights of the Accused' (2010) 8 *Journal of International Criminal Justice* 137.

⁸² Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an Icc Trial Judge' (2011) 44 *Case Western Reserve Journal of International Law* 475; Masha Fedorova, 'The Principle of Equality of Arms in International Criminal Proceedings' in C. Rohan and G. Zyberi (eds), *Defence Perspectives in International Criminal Justice* (Cambridge University Press 2017).

⁸³ FIDH and Montserrat Carboni, *Cutting the Weakest Link: Budget Discussions and Their Impact on Victims Rights to Participate in the Proceedings* (Position Paper, 11th Session of the Assembly of States Parties to the Rome Statute, 2012).

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Commenting on the imbalance between victim and defendant advocacy among Coalition members, another informant explains that victims are much more interesting for NGOs, also because they are directly related to funding flows. In the moral economy of international criminal justice, victims are the driving engine, just as they are for human rights NGOs. Defence rights are simply ‘not as sexy’, she said:

Victims’ issues are of course at the heart of many human rights institutions and organisations, and this is what our Coalition is made up of, so there is a much greater focus on victims’ issues, to ensure that the best interests of victims are met...At the end of the day, it’s the victimhood, the victimized – that’s what we’re here for and working on.

While the ‘imperative to represent or stand in for the figure of the absent victim permeates the discourse of those who ‘practice’ international criminal law – whether as lawyers, diplomats or activists’,⁸⁴ claims to ‘speak for’, ‘give voice to’ and ‘represent’ the interests of victims are significantly embedded in the practice of human rights NGOs. According to Mutua, the representation of the victim is the ‘giant engine’ of human rights organisations, asserting that ‘[w]ithout the victim there is no savage or savior, and the entire human rights enterprise collapses’.⁸⁵ In a similar manner, it is the figure of the victim that drives international criminal justice advocacy.

4.5. Smeared by association

However, the focus on victims rather than defendants is not just a question of resources and interests. In this final part, it is considered how defence rights are also viewed as a difficult topic to focus on vis-à-vis a general public opinion, and therefore far from ideal for human rights NGOs to mobilise and advocate on behalf of. An NGO representative articulates it in the following manner, explaining that in the working field of international criminal justice, ‘It’s more difficult to come home and say “I’m going to represent Gbagbo” than to say “Hi, I found a job at ICC in Chambers”’.⁸⁶ Using ‘home’ as a symbol of ‘general public opinion’, she says that ‘That’s just how

⁸⁴ Kendall and Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (n 14) 240.

⁸⁵ Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201 227.

⁸⁶ Former President of Côte d'Ivoire Laurent Gbagbo is currently on trial at the ICC, charged with four counts of crimes against humanity as indirect co-perpetrator allegedly committed in post-election violence in Côte d'Ivoire in 2010-2011.

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it is'. There is neither sympathy nor moral outrage to be gained from working on the defence side, namely because criminal defendants in international criminal justice are hardly perceived innocent until proven guilty. There is a sense of defending the defendant in international criminal justice as being morally problematic, indicating antipathy towards the criminal defendant in international criminal justice. As argued by Jacobs:

One explanation for this can be found in a very basic psychological trope: guilt by association. Defence lawyers are seen to be defending the 'scum of the world', as one Prosecutor was heard saying to a Defense Counsel at the ICC...Who would ever expect Muammar Ghadafi, Saddam Hussein or tomorrow, Assad or Bashir to be acquitted? For such political figures, international trials are purely symbolic; a formal validation of what everybody thinks they already know about what they did.

Indeed, this perception of the trial being a 'formal validation,' or a show trial really, seem to be lurking underneath the surface in the mentalities of some of the NGO representatives most central in ICC advocacy too. Before meeting with one of my NGO informants, I had been observing trial proceedings against Laurent Gbagbo at the ICC the same day. During our interview, my informant refers to the sensibilities emerging when sitting up close, observing and monitoring trial proceedings at the Court:

What were you feeling when you watch him, and you sit there, with Gbagbo's supporters (next to you)? Maybe a bit apprehension. But at the end of the day, if you really believe in the rule of law, you know. But that's a very narrow lawyer's perspective, and I do understand that, but innocent until proven guilty...That's very narrow (whispers).

What is expressed here is an appreciation of the presumption of innocence as a legal principle according to the rule of law. That is a principled stance. Yet, it should give pause for thought when central NGO representatives in international criminal justice advocacy suggest that this is a 'narrow' view, precisely because these are the people and organisations that act as intermediaries between the courts, member states, affected communities, and a generalised (mostly online) globalised public.

5 Discussion and Conclusion

This chapter has approached international criminal justice from a legal sociology perspective with aim to shed light on the anxiety and hybridity in international criminal justice as 'being' criminal justice or victims' justice. Continuing the story of NGO influence upon then Rome Statute system

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of justice, the chapter has provided an analysis of their organisational structures and advocacy issues, and the rationalities and sensibilities therein. It has revealed a fundamental discrepancy between advocacy on behalf of victims and defendants' in international criminal justice. Out of the central NGOs promoting international criminal justice, IBA is the only organisation that has a primary focus on defence rights at the ICC. In contrast to the fight against impunity focus of human rights organisations, the IBA promotes a 'rule of law' focus, indicating different perceptions on what type of 'justice' international criminal justice is imagined to provide among its different stakeholders. While legal professionals' associations emphasise parallels with domestic systems of criminal justice in terms of due process and the objectives of criminal law procedures, human rights NGOs' appear to put a greater emphasis on international criminal justice as part of transitional justice, seeking to help the criminal justice process establish 'truth' and 'memory' and public recognition of victims' suffering. For human rights NGOs, international criminal justice is primarily a means to enforce human rights; indeed, the 'punitive turn' in the human rights movement indicates that the fight against impunity has become a central human rights issue. In consequence, it is victims – not defendants – that are the focus of human rights advocacy in international criminal justice. And yet while victims' advocacy can be both unproblematic and morally defensible when seen in isolation, when taken together, the dominance of victims' advocates can in part explain how imbalances and tensions between 'victims' or 'criminal' justice emerge in the field of international criminal justice.

The comparison of advocacy on behalf of victims and defendants in international criminal justice thus offers insight into the skewed nature of the international criminal justice project – into where it has developed from, and perhaps where it is going. In lieu of democratic legitimacy, international criminal law and justice has sought legitimacy in global universals; to not leave unpunished those atrocities that shock the 'conscience of humanity'. Yet, in alleging *hostis humani generis*, a part of humanity is abstracted from the rest, called to answer for the part that suffers. Riddled with anxiety at this paradoxical state, torn between two parts of an inseparable whole, it appears the justice imagined is one of victims' justice – rather than fairness in a substantive, international, criminal justice' sense.