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ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Catalysing victim-oriented justice in The Hague and beyond through an inclusive complementarity division: A design proposal

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Abstract

The International Criminal Court's (ICC or the Court) principle of complementarity is key to the ICC's existence and sustainability due to states' desire to protect their sovereignty. Yet it impacts how justice for victims is shaped and delivered, and which victims may participate. Implementing complementarity is a multifaceted process and involves several stakeholders, including, ICC organs, states, the accused, and the victims. Each stakeholder has its own unique interests in the process and in complementarity decisions. For example, states and the ICC may want to exercise their respective jurisdictions for various reasons, victims may desire to participate, the accused, as well as victims, may want justice to be served in domestic, regional, or subregional jurisdictions or in The Hague. Managing these diverse and sometimes conflicting interests in complementarity can be complex. Thus, this paper proposes a design strategy for the creation of a neutral and independent ICC complementarity division. Such a division can ensure that victims' interests can be adequately accommodated in the existing complementarity regime and process, without jeopardizing the rights of the suspect or accused or other interests before the Court. These proposals have their legal basis in the core legal texts of the Court. The paper argues that such an approach to complementarity through the proposed division should realign complementarity with the original intention of the drafters of the Rome Statute (Statute), to end impunity and do justice for victims.

Keywords: International Criminal Court; policy on complementarity and co-operation; victim-oriented complementarity; victim-oriented justice; victim-oriented qualified deference

1. Introduction

The International Criminal Court (ICC) was created on the principle of complementarity, sharing jurisdiction with national courts that bear primary responsibility for addressing international crimes under the Rome Statute.[1] As a legal concept, complementarity manifests in the admissibility criteria outlined in Article 17, with Articles 18–20 of the Statute providing the framework

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[1]1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Para. 10 of the Preamble, Arts. 1, and 5–8 *bis* (RS); J.T. Holmes, 'Complementarity: National Courts Versus the ICC', in A. Cassese, P. Gaeta, and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. 1, 667 at 672.

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for when either states or the ICC should step in to address international crimes. Complementarity also has a political aspect. It is a tool to ensure respect for states' sovereign interests over such crimes, and the practical means enshrined in the framework of the Rome Statute (Statute) by which states can defend these interests regardless of whether they are parties to the Statute. Stahn observes that 'complementarity is in many situations a cornerstone for a constructive relationship with non-states parties and a possible solution for accountability challenges. This requires not only legal interaction, but political dialogue'.[2] Additionally, there is what has been described as the systemic aspect of complementarity,[3] given the wording of the Preamble and Article 1 of the Statute, read in conjunction with Articles 17 to 20. This aspect of complementarity commands division of labour, co-ordination, and co-operation between the ICC and states.[4] Contrary to the intention of the drafters of the Statute, the Court's 'ICC-centric' approach[5] to complementarity, often seen in how admissibility determinations are made, has not always balanced these three dimensions of this foundational principle. This has far-reaching implications for victims.[6]

The ICC adopts a two-step inquiry into assessing admissibility.[7] This means that with the exception of 'gravity',[8] the Court will *only* examine unwillingness or inability to investigate and prosecute where there is an existing case, or where one formerly existed.[9] Consequently, a finding that no case exists or existed, means that there was 'inaction' on the part of the concerned state.[10] This is due to a strict textual interpretation and application of Article 17 to situations and cases before the Court. Also, if the state is investigating or prosecuting a case which is not the same as the one pursued by the ICC, this will be interpreted as an instance of inaction.[11] This became known as the same person and substantially same conduct test. Some scholars have considered as well as questioned the basis for such an interpretation in relation to inaction.[12] This approach to complementarity does not align with the object and purpose of the Rome Statute system of complementarity to fight impunity and do justice for victims, who in some instances may be better served by national proceedings.[13] This paper examines these issues and proposes an approach to interpreting and implementing complementarity in a manner that maximizes its potential.

[2]C. Stahn, 'Revitalizing Complementarity a Decade after the Stocktaking Exercise', (2020) 115 *TOAEP Policy Brief Series* 1, at 4.

[3]International Criminal Court Assembly of States Parties, Report of the Bureau on complementarity, ICC-ASP/19/22 (2020), Para. 25.

[4]Ibid.

[5]See Stahn, *supra* note 2, at 2; M.I. Wierda, *The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries* (DPhil thesis, Leiden University, 2019), at 97–106, 296–7.

[6]L. Smith-van Lin and F. McKay, 'Making Space for Victims in the ICC's Evolving Complementarity Regimes', in C. Stahn and R.B. da Silva (eds.), *The International Criminal Court in Its Third Decade* (2024), 319 at 319–37; see Stahn, *supra* note 2, at 4.

[7]*Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest. Art. 58, ICC-01/04-01/06, PT.Ch., 10 February 2006, Paras. 29–30; *Situation in the Islamic Republic of Afghanistan*, Prosecution's Communication of Materials and Further Observations Pursuant to Art. 18 (2) and Rule 54 (1), ICC-02/17, PT.Ch., 26 August 2022, Paras. 39–41.

[8]A gravity assessment is required to determine whether a situation meets the gravity threshold to warrant further intervention by the Court.

[9]*Situation In the Central African Republic II*, Decision on the Central African Republic's Challenge to the Admissibility of the Case against Edmond Beina, ICC-01/14, PT.Ch., 12 September 2025, Para. 44.

[10]Ibid.; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-OA8, A.Ch., 25 September 2009, Paras. 78–9; *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Yekatom Defence's Admissibility Challenge, ICC-01/14-01/18, T.Ch., 28 April 2020, Paras. 17–21.

[11]See *Situation In the Central African Republic II*, Decision on the Central African Republic's Challenge to the Admissibility of the Case against Edmond Beina, *supra* note 9, Para. 44; see *Lubanga* Arrest Warrant Application Decision, *supra* note 7, Paras. 29–30, 37–40.

[12]See Holmes, *supra* note 1, at 672–3; R. Rastan, 'What is a Case for the Purpose of the Rome Statute', (2008) *Criminal Law Forum* 435, at 436.

[13]*Prosecutor v. Saif Al-Islam Gaddafi*, Dissenting Opinion of Judge Anita Usacka, Case No. ICC-01/11-01/11-OA4, A.Ch., 21 May 2014, Para. 55; *Situation In the Central African Republic II*, Public redacted version of ICC-01/14-211-Conf

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This paper is broadly divided into two categories of discussions and proposals: law and policy and organizational restructuring. The former is contained in Section 2 which locates justice for victims and victim-oriented complementarity within the Rome Statute framework. Sections 3 and 4 contain the organizational restructuring discussions and proposals. Section 3 looks at rationales for a new complementarity division independent of the Office of the Prosecutor (OTP) and of the Assembly of States Parties to the Rome Statute (ASP). Section 4 continues in this direction by examining scholarly suggestions for a new complementarity body before setting out the paper's proposed design. In Section 5, the paper uses select ICC situations to contextualize the functions of the proposed division in promoting the goals of the Rome Statute system of justice. Thus, it pulls the law and policy and organizational restructuring proposals together. The paper concludes by acknowledging that political will to advance these proposals may currently appear non-existent in the face of marked retrogression to anti-rule of law attitudes. Nonetheless, the creation and existence of the ICC suggest that when sustained efforts align with right timing, remarkable changes are achievable.

2. Victims in the ICC framework

2.1 A victim-oriented court

The three dimensions of complementarity mentioned in the introduction are expressly provided for in the Rome Statute framework. The Preamble, a key component of the Statute,[14] makes reference to the suffering of victims and the need to combat impunity for such crimes. Other parts of the Statute and other core legal texts of the Court contain several provisions covering the procedural and substantive rights of victims.[15] For example, those who suffered harm as a result of crimes listed in the Statute can be recognized as victims in accordance with Rule 85 of the ICC Rules of Procedure and Evidence (RPE). Article 68(1) of the Statute covers their right to protection. Article 68(3) provides for their meaningful participation in proceedings where their personal interests are affected, at stages determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Moreover, if victims' harms were due to crimes committed by a perpetrator convicted by the Court, they are entitled to reparations as set out in Article 75.

The drafters of the Statute placed great emphasis on the need for the interpretation of the core legal texts of the Court and all applicable law to be consistent with internationally recognized human rights,[16] as outlined under Article 21(3). Pellet considers this provision an 'international super-legality',[17] as it applies to all actions taken by the Court throughout all stages of proceedings, and applies to all parties and participants, including victims.[18] Thus, the Preamble to the Statute, its preparatory works,[19] and its victims' provisions, evince the intention of the drafters to deliver

"Observations on behalf of Victims on the Central African Republic's Challenge to the Admissibility of the Case against Edmond Beina", ICC-01/14, PT.Ch., 7 May 2025, Para. 56.

[14]1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 31(2).

[15]E.g., Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3 and Corr.1 (2026), Rules 16–9 and 85–99 (RPE); Regulations of the Court, ICC-BD/01-05-16 (2026) (RoC); Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 (2009); Regulations of the Registry, ICC-BD/03-03-13 (2024).

[16]M.M. deGuzman, 'Article 21 Applicable Law', in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2016), 932 at 947–8, Paras. 48–52; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06 (OA4), Para. 37.

[17]A. Pellet, 'Applicable Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. II, 1051 at 1079–82.

[18]See deGuzman, *supra* note 16, at 948, Paras. 51–2; W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2016), at 532–3.

[19]E.g., *The Prosecutor v. Thomas Lubanga Dyilo*, Ann. A, Compilation of the Preparatory Works for the Drafting of Article 43(6) and Article 68 of the Rome Statute, ICC-01/04-01/06, PT.Ch., 7 December 2007.

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some form of justice to victims,[20] albeit one attached to individual criminal responsibility. This victim regime provides a good foundation for victim-oriented justice which can aid the fight against impunity and enhance the position of victims without compromising the rights of the accused. Victim-oriented justice may manifest in substantive outcomes that can benefit victims,[21] such as uncovering the truth of their harms, the conviction of alleged perpetrators, and victims' reparations.[22] Therefore, the paper's arguments are based on the understanding that victims are integral to the fight against impunity.[23]

2.2 Defining and locating victim-oriented complementarity within the Rome Statute framework

Justice at the ICC cannot be victim-oriented if its principle of complementarity is not victim-oriented. For example, if the ICC decides to defer to a state, how would representations made by victims be considered in determining the terms of the deferral? If the Court decides to admit the situation or case, how will it carry victims along in its proceedings? Ultimately, who between the ICC, states, regional, and sub-regional institutions would be better positioned to deliver victim-oriented justice in any given situation? These issues should be considered in the implementation of the principle of complementarity, since victims are integral to this system and the achievement of the ICC's goals.

Victim-oriented complementarity was advanced by Moffett, who argues that state parties and the Assembly of State Parties should play a greater role in implementing justice for victims domestically.[24] This paper defines victim-oriented positive complementarity as a series of co-ordinated, robust, and inclusive measures, geared towards supporting states to investigate and prosecute international crimes and to deliver victim-oriented justice. Such measures could be pioneered by complementarity stakeholders – the ICC, states, and co-operation partners, and should be done in consultation with victims. Victim-oriented classical complementarity refers to the ICC's holistic consideration of a state's willingness and ability to investigate and prosecute international crimes, within a reasonable margin of appreciation reflective of the peculiarities of the situation or case, while making room for victims to meaningfully contribute to the process and outcome. It may require adjustment to how the Court currently deals with the role of timing in admissibility determinations, qualifying deference to states, and adoption of a complementarity understanding with monitoring clauses. Ultimately, it requires reading victims' interests into complementarity provisions. 'Victim-oriented' was chosen as opposed to victim-centred, because the ICC is an international 'criminal court', which should prosecute perpetrators while carrying victims along and balancing all interests before the Court.

Article 68(3), which is central to victims' participation in ICC proceedings, does not expressly exclude complementarity proceedings, as well as those that occur during investigations from stages of proceedings accessible to victims.[25] After much litigation on this

[20]M. Bachrach, 'The Protection and Rights of Victims under International Criminal Law', (2000) 34 *International Lawyer* 7, at 7.

[21]S. Vasiliev, 'Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), 635 at 679; L. Moffett, *Justice for Victims Before the International Criminal Court* (2014), at 29–38.

[22]See RS, *supra* note 1, Arts. 75, 76, and 79. See also RS, *supra* note 1, Art. 21(3); S. Song, 'The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law', (2014) *XLIX UN Chronicles*, available at www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law.

[23]F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary* (2018), at 6.

[24]See Moffett, *supra* note 21, at 234–80; L. Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague', (2015) 13 *Journal of International Criminal Justice* 281, at 296–7; L. Moffett, 'Realising Justice for Victims before the International Criminal Court', (2014) *International Crimes Database Brief* 1, at 1–11; L. Moffett, 'Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo', (2016) 16 *International Criminal Law Review* 503.

[25]See RS, *supra* note 1, Arts. 15, 19(3), 53(1)(c) and 68(3).

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issue,[26] the Appeals Chamber in the Democratic Republic of the Congo (DRC) Situation ruled that they may participate in judicial proceedings during the investigation stage 'provided their personal interests are affected by the issues arising for resolution'.[27] Moreover, Regulation 81(4) of the Regulations of the Court (RoC) reflects the Court's appreciation that the interests of victims may be affected at any stage of proceeding and should be protected. Such interests may relate to being kept informed about the progress of situations and cases.[28] It may also relate to being consulted on wide-ranging issues.[29] For instance, regarding a decision not to investigate or prosecute,[30] confirmation hearings in absentia,[31] amendments of charges,[32] joint or separate trials for accused persons in the same situation,[33] and issues around the admission of guilt.[34] This reinforces the notion that victims are integral to the Rome Statute system of justice. Yet in practice, much of these proceedings would not take place without some form of initiation by the Prosecutor, and victims' ability to participate is not always guaranteed. Hence, the period before the commencement of an investigation is crucial, as much can be done to implement and ensure subsequent implementation of complementarity in a manner in line with the drafters' intention and beneficial to victims.

2.3 Flexibility with the time requirement

It is important to clarify the connection between different provisions of the complementarity regime to highlight the relevance of the timing requirement for admissibility determinations. Articles 15 and 53 of the Statute outline instances where the OTP can initiate an investigation following a preliminary examination.[35] For an investigation to be initiated, the case must appear to fall within the ICC's jurisdiction and be potentially admissible in accordance with Article 17.[36] Article 18 is necessary for avoiding overlapping investigations by giving primacy to the national proceedings, ensuring expeditious determinations if questions of admissibility arose,[37] and for preventing a waste of resources. Pursuant to Article 19, the Court may, on its own motion, determine the admissibility of a case in accordance with Article 17.[38] Where a state or an accused

[26]E.g., *Situation in the Democratic Republic of the Congo*, Judgment on Victim Participation in the Investigation Stage of The Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-OA4-OA5-OA6, A.Ch., 19 December 2008; *Situation in the Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01-04, PT.Ch, 17 January 2006.

[27]*Situation in the Democratic Republic of the Congo*, Judgment on Victim Participation,*supra* note 26, Para. 56.

[28]See RS, *supra* note 1, Art. 15(3); see RPE, *supra* note 15, Rules 50(1) and (3)–(4).

[29]See RPE, *supra* note 15, Rule 93.

[30]Ibid., Rule 107; see RS, *supra* note 1, Art. 53(3)(a); *Situation on Registered Vessels of The Union of The Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia*, Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to Initiate an Investigation in the Situation, ICC-01/13, PT. Ch., 29 January 2015; see also RPE, *supra* note 15, Rule 109.

[31]See RPE, *supra* note 15, Rule 125; *Prosecutor v. Joseph Kony,* Decision on the Confirmation of Charges in Absentia against Joseph Kony Pursuant to Articles 61(2)(b) and 61(7) of the Rome Statute, ICC-02/04-01/05, PT.Ch., 6 November 2025.

[32]See RPE, *supra* note 15, Rule 128; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* Request by the Victims' Representative for Authorisation to Make a Further Written Submission on the Views and Concerns of the Victims, *Ruto*, *Kosgey*, and *Sang Situation in the Republic of Kenya*, ICC-01/09-01/11, PT.Ch., 9 November 2011, at 9–18.

[33]See RPE, *supra* note 15, Rule136; ICC, 'Katanga and Ngudjolo Chui Case: ICC Trial Chamber II Severs Charges; Verdict on Mathieu Ngudjolo Chui to be issued on 18 December 2012', 2012, available at www.icc-cpi.int/news/katanga-and-ngudjolo-chui-case-icc-trial-chamber-ii-severs-charges-verdict-mathieu-ngudjolo; ICC, 'ICC Pre-Trial Chamber II Joins Yekatom and Ngaïssona Cases', 2019, available at www.icc-cpi.int/news/icc-pre-trial-chamber-ii-joins-yekatom-and-ngaissona-cases.

[34]See RPE, *supra* note 15, Rule 139; ICC, 'Al Mahdi Case: Accused Makes an Admission of Guilt at Trial Opening', 2016, available at www.icc-cpi.int/news/al-mahdi-case-accused-makes-admission-guilt-trial-opening.

[35]See RS, *supra* note 1, Arts. 15(3) and 53(1)(a).

[36]Ibid., Arts. 15(4), 53(1)(b).

[37]See Holmes, *supra* note 1, at 681–2.

[38]*Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision on the admissibility of the Case Under Article 19(1) of the Statute, ICC-02/04-01/05, PT.Ch., 10 March 2009, Paras. 13–29.

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decides to challenge the Court's jurisdiction or admissibility of a case, they can do so under Article 19, which may be more contentious compared to proceedings under Article 18. For all these pathways to an admissibility determination, the Rome Statute sets the timeframes for raising issues of admissibility to manage the Court's resources and prevent unnecessary delays.[39] The general preference is to raise such issues early in the relevant proceeding.[40]

Victims can participate in proceedings on challenges to the jurisdiction of the Court or the admissibility of a case under Article 19,[41] but their participation in deference proceedings under Article 18 is neither expressly provided nor precluded. Articles 18 and 19 proceedings share a commonality – they deal with issues of investigations and prosecutions, and victims can already participate in these proceedings.[42] Moreover, according to Rule 55 RPE, it is for the Pre-Trial Chamber to decide on the procedure to be followed for Article 18 deference proceedings. The practice has been to involve victims, albeit with limited participatory rights, as was evident in Afghanistan,[43] Venezuela,[44] the Philippines,[45] and State of Palestine situations.[46]

It is against this backdrop that the paper argues for flexibility with timing requirements in relation to issues of admissibility. The paper proposes that in the process of conducting preliminary examinations, when a state requests a deferral or when they lodge an admissibility challenge, the Court should consider the specifics of each situation or case to identify at a minimum, some elements of willingness to investigate and prosecute. When this is present, the Court should engage in continuous constructive dialogue with the state as a means of encouraging them to deliver victim-oriented justice.[47] In this process, states' capacity needs which may result in fatal admissibility challenges should be identified. They could then be offered the opportunity to develop capacity to fulfil their Rome Statute obligations and in a way that can benefit victims.[48] Only after some level of willingness and commitment have been identified can the Court award the state reasonable time to fulfil its obligations. There should be a possibility of extension in instances where the concerned state can show progress made towards agreed conditions.[49] This is in line with the current admissibility criteria, which

[39]D. Jacobs, 'The Importance of Being Earnest: The Timeliness of the Challenge to Admissibility in Katanga', (2010) 23 *Leiden Journal of International Law* 331, at 332.

[40]See RS, *supra* note 1, Arts. 18(2), 19(4) and (5).

[41]Ibid., Art. 19(3).

[42]Ibid., Art. 18(2) read together with Arts. 53, and 68(3), RPE Rules 55(1), 56(1), Rules 91(2), 92(2) and (8) and 93 ; The restriction in Rule 92(1) may not always have the effect of preventing such notifications in all contexts because when Art. 53 is activated, it could be for any of the reasons under Arts. 15, 18, and 19, and must be in accord with Art. 17; *Situation in the State of Palestine*, Joint Dissenting Opinion of Judge Luz Del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa, Case No. ICC-01/18-OA3, A.Ch., 17 October 2025, Paras. 6–9; D. Donat-Cattin, 'Article 68 Protection of Victims and Witnesses and Their Participation in the Proceedings', in Triffterer and Ambos, *supra* note 16, 1681 at 1686–7, Paras. 9–10.

[43]*Situation in the Islamic Republic of Afghanistan*, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber II entitled "Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation", ICC-02/17-OA5, A.Ch., 4 April 2023, Paras. 13–15, and 19.

[44]*Situation in the Bolivarian Republic of Venezuela I*, Decision Authorising the Resumption of the Investigation Pursuant to Article 18(2) of the Statute, ICC-02/18, PT.Ch., 27 June 2023, Para. 9.

[45]*Situation in the Republic of the Philippines*, Judgment on the Appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation Pursuant to Article 18(2) of the Statute to Resume the Investigation', ICC-01/21-OA, A.Ch., 18 July 2023, Para. 23.

[46]*Situation in the State of Palestine*, Abridged Request for an Order Requiring an Article 18(1) Notice, and Staying Proceedings Pending Such a Notice, ICC-01/18, PT.Ch., 23 September 2024.

[47]*Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, 'Judgment on Mr Yekatom's Appeal Against Trial Chamber V's "Decision on the Yekatom Defence's Admissibility Challenge"', 9 October 2020, ICC-01/14-01/18-678-Conf, ICC-01/14-01/18-OA, A.Ch., 11 February 2021, Para. 42.

[48]See Smith-van Lin and McKay, *supra* note 6, at 332.

[49]C. Stahn, 'Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 228 at 247–8; ASP, Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report (2020), at 237, R263.

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requires a determination of *inter alia* 'genuineness' in a state's action,[50] even in the absence of a deferral request.

2.4 Victim-oriented qualified deference within the Rome Statute framework

Victim-oriented qualified deference is an adaptation of Stahn's conception of qualified deference[51] – a creative approach and a step in the right direction to manage some of the problems caused by the rigid nature of the ICC's admissibility determinations.[52] However, it does not eliminate the problem caused by the same person and substantially same conduct requirement which forces states to mirror ICC investigations to secure a deferral.[53] His recommendation of time management is geared towards helping states meet this requirement by adjusting their investigations or prosecutions after lodging an admissibility challenge.[54] Hence, a state which successfully proves that they are investigating the same person for substantially same conduct may not necessarily be inclined to expand their approach to addressing other core international crimes affecting more victims.[55] Conditions for deferral need not include victims' provisions, and victims' representatives may not be privy to a state's progress after the ICC defers to the state.

Victim-oriented qualified deference refers to the ICC's deferral of the exercise of jurisdiction upon proof of states' willingness and ability to address international crimes in a way that accommodates victims and their interests, with or without support for capacity building.[56] It advances victim-oriented positive complementarity – helping states to build their capacity for victim-oriented justice, and victim-oriented classical complementarity – determining admissibility in a victim-oriented manner.

A purposive interpretation of victims' and complementarity provisions of the Rome Statute will show that victim-oriented qualified deference can be advanced under the Statute framework.[57] Stahn notes that since the Court is the ultimate arbiter over complementarity based on Article 17 criteria, the Chambers must have the power to rule on the steps leading to that result, including tying admissibility to conditions.[58] His argument can be extended to similar decisions, which could be made by the Prosecutor in the early stages during preliminary examinations and before pre-trial. Articles 17–19 and 53 of the Statute show that the Prosecutor can exercise discretion with regards to opening an investigation where situations have been referred to the Court by the UN Security Council (UNSC), or states. Beside *proprio motu* investigations, and state party referrals in relation to the crime of aggression under Articles 15 and 15 *bis* of the Statute, the Prosecutor has the powers to make admissibility assessments in all other instances without the need to involve the Chambers or to seek a UNSC determination.[59] Where the Prosecutor's decision not to investigate or prosecute is not based solely on the interests of justice, there would be no need for the Chamber to rule on an issue of admissibility unless triggered by the Prosecutor, initiated by the Chamber or

[50]See RS, *supra* note 1, Art. 17; J.T. Holmes, 'The Principle of Complementarity', in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), 41 at 49–51; ICC OTP 2003, Informal Expert Paper: The Principle of Complementarity in Practice, ICC-01/04-01/07-1015-Anx (1 April 2009), Paras. 5 and 21–3.

[51]See Stahn, *supra* note 49, at 228–59.

[52]E.g., the timing issues. See *Katanga* Appeal Judgment, *supra* note 10, Para 56.

[53]See *Situation in the Islamic Republic of Afghanistan,* Prosecution's Communication of Materials, *supra* note 7, Paras. 63–4; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled "Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi", ICC-01/11-01/11-OA4, A.Ch., 21 May 2014, Paras. 71–3 and 120.

[54]See Stahn, *supra* note 49, at 255.

[55]See Wierda, *supra* note 5, at 151.

[56]P. Akhavan, 'Complementarity Conundrums: The ICC Clock in Transitional Times', (2016) 14 *Journal of Intnerational Criminal Justice* 1043, at 1047–8; see Stahn, *supra* note 49, at 228 and 254.

[57]See RS, *supra* note 1, Art. 18(2) and (3).

[58]See Stahn, *supra* note 2, at 3; see Stahn, *supra* note 49, at 257.

[59]See *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Judgment on Yekatom's Appeal, *supra* note 47, Para. 43.

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a review request to the Chamber by the referring state or the UNSC.[60] Therefore, there is scope to pursue victim-oriented complementarity in all eligible situations and cases, regardless of a formal deferral request, because the aim is to maximize the complementarity process.

2.4.1 Minimum conditions for accommodating victims' interests in domestic jurisdictions

2.4.1.1 Victims' status. The first minimum condition which states must commit to in order to seek the postponement of a final admissibility determination is commitment to recognition of victims which neither politicizes victimhood nor places victims in any hierarchical order.[61] Thus, to benefit from victim-oriented qualified deference, a state must prove that it has victims' provisions through its own legislation. Otherwise, the state should commit to adopting such provisions which accord victim status to natural or legal persons, without any form of discrimination, and which must be based on direct or indirect harm suffered as a result of international crimes.

2.4.1.2 Victims' participation. The second condition for securing victim-oriented qualified deference is a state's commitment to providing victims' participation within the state's means and unique context. Mass victimization is an inherent feature of international crimes. It must be factored into considerations of the practicalities of victims' participation in measures for addressing such crimes, while still pursuing their meaningful participation. The key to potentially realizing meaningful victims' participation is, as Frank and Ferstman suggest, 'a broad engagement with victims and civil society when considering ways to prosecute international crimes domestically and how to enhance the role of victims in such proceedings'.[62] This approach can help to address challenges associated with mass victim participation, such as the risk that some victims' voices may be overshadowed by collectivization of their views and concerns.

2.4.1.3 Victims' protection. Commitment to victims' protection is the third condition for pursuing victim-oriented qualified deference and is pivotal to their participation and general inclusion in mechanisms for addressing international crimes. Without the assurance of safety, victims' ability to participate and avail of their rights will be severely compromised, since in such circumstances, many victims may forfeit seeing justice done.[63] This was evident in the Kenya cases before the ICC which were marred by intimidation of victims.[64] Protection measures for different categories of victims should be prioritized as early as possible. This is a key requirement for victim-oriented qualified deference because victims are often witnesses for parties to the proceedings. In the DRC, some authorities implemented creative protection measures such as veiling victims, altering their voices, or having them give testimonies behind a curtain.[65]

2.4.1.4 Victims' reparations. The final condition for securing deference for pursuing victim-oriented justice is that states should show a willingness to provide reparations directly, or indirectly, including through other donors and co-operation partners. Reparation schemes by states need not be tied to a convicted person but can be created to support victims of a situation. This neither absolves the convicted person of criminal responsibility nor transfers responsibility to the state. Rather, like the

[60] *Situation in the Islamic Republic of Afghanistan*, Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-OA4, A.Ch., 5 March 2020, Paras. 30–2 and note 53. Note also that Art. 16 may be invoked by the UNSC to defer a situation.

[61] See RPE, *supra* note 15, Rule 85; General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. 40/34 (1985), at Principle A (1)-(3).

[62] Redress and Institute for Security Studies, Expert Conference on Participation of Victims of International Crimes in National Criminal Justice Systems: Conference Report (2015), at 4, available at redress.org/wp-content/uploads/2017/12/November-Expert-conference-on-participation-of-victims.pdf.

[63] Ibid., at 20.

[64] *Prosecutor v. Uhuru Muigai Kenyatta*, Victims' Application Relating to Possible Disclosure of Confidential Information, ICC-01/09-02/11, T.Ch., 13 August 2013.

[65] B. Sahin, 'Mobile Hearings in the Eastern DRC: Prosecuting International Crimes and Implementing Complementarity at National Level', (2021) 15 *Journal of Eastern African Studies* 297, at 305; see Moffett (2015), *supra* note 24, at 303.

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ICC and the work of the Trust Fund for Victims, such a move could be a way to close the reparations gap where the convicted person is indigent and to protect victims' rights.[66]

A state does not have to show the availability of all victim-oriented measures at the same time when deference is considered. However, it must commit to developing them with or without support for capacity building by a timeline agreed with the ICC, and protection measures must be prioritized.

2.4.2 Complementarity understanding

To improve the chances of states' compliance with agreed conditions, the paper proposes the use of a complementarity understanding – a type of Memorandum of Understanding (MoU) between the ICC, concerned states, and co-operation partners. It should be negotiated in a way that ensures that victims' views are presented and adequately considered.[67] Such agreements represent a concrete demonstration of states parties' commitment to the Court and its mandate.[68] The OTP has used MoUs in this context, including those signed with the Venezuelan[69] and Guinean[70] authorities regarding these respective situations. These differ to an extent in content, target, and method of implementation, from what the paper proposes. Depending on the stage of proceedings, the proposed complementarity understanding should capture some or all of the following: (i) the objectives of the complementarity process;[71] (ii) what the ICC expects from the concerned state, including the minimum victim-oriented conditions discussed above, and what the state expects from the Court or other co-operation partners;[72] (iii) what victims should expect from the agreement;[73] (iv) how the rights of the suspect or accused will be protected;[74] (v) stakeholders' roles in the process in accordance with Article 93; (vi) agreed timelines to fulfil or show progress in fulfilling the minimum conditions; (vii) methods of monitoring and reporting progress; (viii) potential disputes, and measures for resolving them, and (ix) clauses on admitting or re-admitting the case to the ICC.[75] It is expected that built-in safeguards of monitoring and potential judicial intervention can encourage states' compliance.[76]

3. The ICC needs a new complementarity division

3.1 The status quo

As is evident from the foregoing and recalling the legal and technical, political and the systemic dimensions of complementarity discussed in the introduction, implementing complementarity is a multifaceted process with the OTP at the centre. The Chambers may be required to play an oversight role in accordance with the Statute.[77] Each stakeholder – the ICC, states, the suspects or

[66]See RS, *supra* note 1, Arts. 75 and 79; L. Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?', (2017) 21 *International Journal of Human Rights* 1204, at 1214–18.

[67]See RS, *supra* note 1, Art. 68(3); see RPE, *supra* note 15, Rules 89–91, 93, 107, 109, 125, 136, 139, and 191; see Wierda, *supra* note 5, at 301.

[68]ICC, 'Cooperation Agreements', available at www.icc-cpi.int/sites/default/files/Cooperation_Agreements_Eng.pdf.

[69]Memorandum of Understanding between the Bolivarian Republic of Venezuela and the Office of the Prosecutor of the International Criminal Court (2021), available at www.icc-cpi.int/sites/default/files/itemsDocuments/otp/acuerdo/acuerdo-eng.pdf.

[70]Memorandum of Understanding Between the Republic of Guinea and the Office of the Prosecutor of the International Criminal Court (2022), available at www.icc-cpi.int/sites/default/files/2022-09/2022-09-29-mou-icc-guinea-ns-eng.pdf.

[71]See RS, *supra* note 1, Preamble, Arts. 1, 17–9.

[72]Ibid., Arts. 86–99.

[73]Ibid., Arts. 68(1) and (3) and 75; See, e.g., Memorandum of Understanding Between the Government of the Federal Republic of Nigeria and the Office of the Prosecutor of the International Criminal Court (2026), available at www.icc-cpi.int/sites/default/files/2026-03/2026-03-26-mou-icc-nigeria-eng.pdf, Arts. 4 and 5.

[74]See Memorandum of Understanding, *supra* note 73, Art. 4; see RS, *supra* note 1, Arts. 65–7, 68(3).

[75]See RS, *supra* note 1, Arts. 17–19.

[76]O. Bekou, 'Rule 11 Bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence', (2009) 33 *Fordham International Law Journal.* 722, at 787.

[77]See RS, *supra* note 1, Arts. 15–20, and 53.

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the accused, and victims,[78] has unique interests in complementarity proceedings and decisions. The current structure of the OTP is shown in Figure 1, which also reflects the entire ICC structure. It is helpful for visualizing the institutional mechanisms that influence how complementarity is implemented.

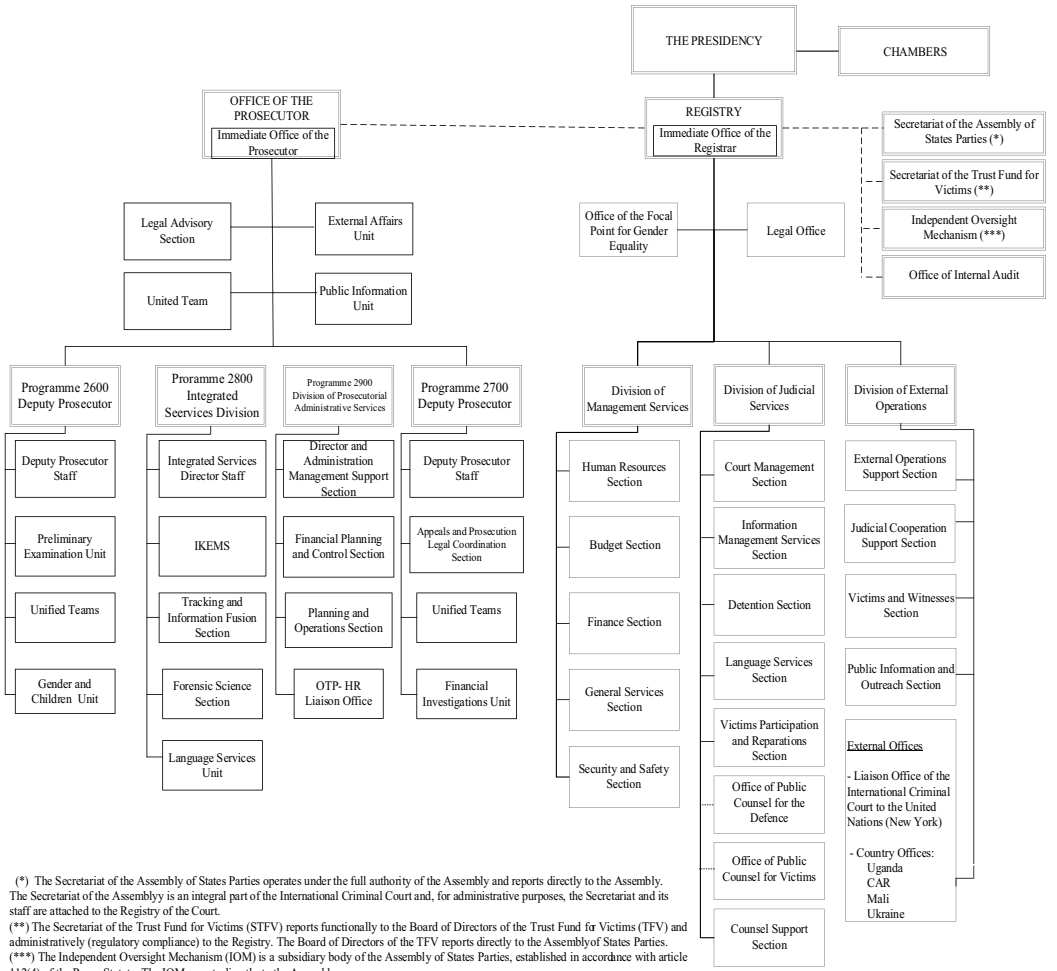


Figure 1: Organizational structure of the ICC[79]
Source: ICC, Proposed Programme Budget for 2026 of the International Criminal Court, ICC-ASP/24/10 (2025), Annex I, at P. 204, available at asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-24-10-ENG.pdf.

[78]E.g., *Situation in the State of Palestine,* Decision on the Conduct of Proceedings and Other Procedural Matters Related to 'Israel's Challenge to the Jurisdiction of the Court Pursuant to Article 19(2) of the Rome Statute', ICC-01/18, 28 May 2025, PT.Ch., 28 May 2025, Para. 19; *Situation in the State of Palestine,* Joint Submissions on Behalf of Palestinian Victims Pursuant to Art. 68(3) of the Rome Statute Related to Article 19 Proceedings, ICC-01-18, PT.Ch., 27 June 2025; *Situation in the State of Palestine,* Corrected Version of 'Views, Concerns and General Interests of Victims of the October 7 Attack under Article 68(3)' 12 August 2024 ICC-01/18-333 and Annex I, ICC-01/18, PT.Ch., 2 October 2024.

[79]Source: ICC, Proposed Programme Budget for 2026 of the International Criminal Court, ICC-ASP/24/10 (2025), Annex I, at P. 204, available at asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-24-10-ENG.pdf.

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The OTP's Preliminary Examination Unit (PEU) takes the lead on complementarity by examining all communications on alleged international crimes to determine whether a situation meets jurisdictional and admissibility criteria to initiate an investigation.[80] The PEU also supports litigation arising out of this stage.[81] All OTP teams are guided by the interests of the OTP which may not always encompass all victims' interests and may not always reflect the intention of the drafters of the Statute.[82] This is exemplified by Afghanistan's deferral request,[83] as victims were dissatisfied with the Prosecutor's attempt to deprioritize some aspects of the situation.[84] Another example comes from Israel's litigation on preliminary rulings on admissibility and challenge to the ICC's jurisdiction in the context of the State of Palestine situation.[85] This generated several submissions from the parties and victims and dissenting and concurring opinions from judges.[86] Moreover, the accused may support proceedings at the ICC for various reasons, including guarantees of an independent, impartial, and expeditious trial, as demonstrated in the *Beina* case in the context of the Central African Republic's (CAR) admissibility challenge.[87] Therefore, the following sections discuss the organizational restructuring proposals which can address these issues.

3.2 Some efforts and proposals to improve complementarity from within and outside the Court

There have been efforts at the ICC to increase efficiency in how complementarity is implemented, to address challenges of lack of co-operation and growing attacks against the ICC's work and staff, and to improve inclusivity and support for national authorities.[88] For example, the OTP used advance integrated teams under former Prosecutor Bensouda[89] and are now using unified teams following reorganization by the current Prosecutor.[90] Regardless of their names, it appears that their composition and functions are similar. They are mainly comprised of staff members with complementary skill sets – lawyers, investigators, analysts, international co-operation advisers, and country experts involved across the investigative and trial stages of work in relation to a situation.[91] In 2024, the Prosecutor published the OTP's first ever Policy on Complementarity and Cooperation. As part of the strategy for implementing this policy, he created some new platforms. One is the Complementarity and Civil Society team within the OTP's External Affairs Unit. Its

[80]Ibid., Paras. 273–84 and 344–8; ICC, Proposed Programme Budget for 2025 of the International Criminal Court, ICC-ASP/23/10 (2024), Para. 336.

[81]See ICC, *supra* note 79, Para. 337.

[82]C. Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap', (2012) 10 *Journal of International Criminal Justice* 1357, at 1358–9, and 1361–75.

[83]*Situation in the Islamic Republic of Afghanistan*, Ann.1 to the Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's Letter Concerning Article 18(2) of the Statute, ICC-02/17, PT.Ch., 26 March 2020.

[84]E.g., ICC, 'Statement of the Prosecutor of The International Criminal Court, Karim A.A. Khan QC, Following the Application for An Expedited Order Under Article 18 (2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan', 27 September 2021, available at www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application; see *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Request by Victims' Representative, *supra* note 32, Paras. 9–18.

[85]*Situation in the State of Palestine,* Appeal of 'Decision on Israel's Request for an Order to the Prosecution to Give an Article 18(1) notice' (ICC-01/18-375), ICC-01/18, A.Ch., 13 December 2024; *Situation in the State of Palestine,* Decision on Israel's Challenge to the Jurisdiction of the Court Pursuant to Article 19(2) of the Rome Statute, ICC-01/18, PT.Ch., 21 November 2024.

[86]E.g., *Situation in the State of Palestine*, Judgment on the Appeal of the State of Israel against Pre-Trial Chamber I's 'Decision on Israel's Request for an Order to the Prosecution to Give an Article 18(1) notice', ICC-01/18-OA3, PT.Ch., 15 December 2025, Paras. 1–17, 21, 34, 110, 140 and 141.

[87]*Situation In the Central African Republic II*, Public Redacted Version of 'Written Observations of Mr Edmond Beina on the Central African Republic's Admissibility Challenge', ICC-01/14, PT.Ch., 17 March 2025, Paras. 13–61.

[88]ICC, Proposed Programme Budget for 2024 of the International Criminal Court, ICC-ASP/22/10 (2023), Para. 442; see ICC, *supra* note 79, Paras. 279 and 289; ASP, Report of the Bureau on Complementarity, ICC-ASP/24/35 (6 November 2025).

[89]See ASP, *supra* note 49, Paras. 117–24.

[90]See ICC, *supra* note 79, Para. 351.

[91]Ibid.; see ASP, *supra* note 49, Paras. 117–24.

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aim is ‘ ‘to ensure a centralized focal point to support coordination of work and coherence of action with respect to regular engagement with civil society organizations’.[92] The other is the Complementarity and Cooperation Forum, which is meant to include victims’ representatives.[93] However, the nature of the Forum’s activities, issues for prioritization, and engagement on complementarity issues with stakeholders are set and controlled by the Prosecutor.[94]

There have also been discussions and efforts within and outside the ASP on how to maximize complementarity and deepen stakeholders’ engagement and support, including through the ASP’s Complementarity Platform for Technical Assistance.[95] While these efforts have somewhat improved how complementarity is implemented, they remain insufficient for fighting impunity and doing justice for victims.

Some scholars have proposed the creation of an ASP body which can oversee complementarity from the early stages and serve as a bridge between the Court and states parties.[96] Kersten suggested that the OTP or the Registry should create an arm’s length independent body called a ‘Referral Review Panel’ and that this could be done without any amendment to the Rome Statute or approval of the ASP.[97] Instead of being staffed with ICC lawyers, the panel should have regional experts, some diplomats, people with knowledge of the politics of international law and who can work voluntarily and critically assess referrals from all trigger mechanisms.[98] The panel will then create a non-binding report which will form the basis upon which the OTP could proceed to an investigation.[99] Almost 12 years after this proposal, Prosecutor Khan convened an expert panel to support the evidence review and legal analysis in relation to his application for arrest warrant in the *State of Palestine Situation*.[100] The Panel did not advise on issues related to the admissibility of a case.[101] While not quite the referral review panel that Kersten proposed, this move by the Prosecutor reflects the political and legal complexities of complementarity.

Additionally, Articles 42(1) and 13–15 of the Statute designate the OTP as the body responsible for receiving referrals and any substantiated information on crimes within the Court’s jurisdiction. Articles 42 and 44(1) suggest that such a panel which Kersten proposes may be created by the Registry or OTP if they and their staff form part of these organs. Per Article 44, the Registrar is free to organize the Registry as they see fit for carrying out their functions. So far to this author’s knowledge, such bodies, established by the Registry and those required for judicial aspects of the Court’s work, have either been expressly provided for in the Rome Statute or in the Regulations of the Court.[102] There is also the issue that the use of gratis personnel or volunteers is restricted in the

[92]See ICC, Proposed Programme Budget for 2025 *supra* note 80, Para. 274. See also Para. 214.

[93]ICC-OTP, Policy on Complementarity and Cooperation (2024), Paras. 38–45; Secretariat of the ASP to the Rome Statute of the International Criminal Court, ‘The Hague Working Group of the Bureau: Complementarity Second Meeting 4 July 2024 Summary’, 2024, at 3.

[94]Ibid.; ICC, Report of the Court on Cooperation, ICC-ASP/24/9 (5 December 2025), Paras. 14–6.

[95]ASP, Strengthening the International Criminal Court and the ASP, ICC-ASP/23/Res.1 (2024), Paras. 133–44; see Complementarity Second Meeting, *supra* note 93; see ASP, *supra* note 3, Paras. 21–29; ASP, Report of the Bureau on Complementarity, ICC-ASP/23/24 (2024), Paras. 1–3, 6–8, and 16–7, and Ann. I Contributions from Complementarity Stakeholders, at 16–30.

[96]M. A. Newton, ‘The Quest for Constructive Complementarity’, in C. Stahn and M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (2011), 304 at 336–9; see Moffett, *supra* note 21, at 237 (note 5); see Moffett (2015), *supra* note 24, at 305–7; M.A. Newton, ‘Absolutist Admissibility at the ICC: Revalidating Authentic Domestic Investigations’, (2021) 54 *Israel Law Review* 143, at 170–3; see Stahn, *supra* note 2, at 3–4.

[97]M. Kersten, ‘The Politics of ICC Referrals – A Proposal’, 13 November 2012, available at justiceinconflict.org/2012/11/13/the-politics-of-icc-referrals-a-proposal/.

[98]Ibid.

[99]Ibid.

[100]ICC-OTP, ‘Panel of Experts in International Law Convened by the Prosecutor of the International Criminal Court: Report of the Panel of Experts in International Law’, 2024, available at www.icc-cpi.int/sites/default/files/2024-05/240520-panel-report-eng.pdf.

[101]Ibid., at 2, note 1.

[102]See RS, *supra* note 1, Art. 44; see RoC, *supra* note 15, Regs. 77 and 81.

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Statute, their effectiveness may be limited if they do not form part of the Court for administrative and regulatory purposes,[103] and may not be sustainable in the long run. Nonetheless, this paper supports Kersten's view that such a panel should be more inclusive and not controlled by the OTP.

Newton proposes an amendment to Article 112(4) of the Statute by adding a paragraph requiring the ASP to create a standing complementarity coordination committee to oversee some aspects of admissibility review[104] and with a view to facilitating effective domestic investigations.[105] Stahn argues for an ASP Task Force on Complementarity composed of selected representatives of states parties.[106] They can then work to address some of the more systemic dimensions of complementarity relating to questions of the division of labour, co-ordination, and co-operation between the Court and states, dialogue and process.[107] Moffett argues that an ASP subsidiary body could take on the initial examination of complementarity.[108]

Issues highlighted by all four scholars are pertinent. However, a complementarity body controlled by the ASP would lack the neutrality and independence crucial for the implementation of complementarity in the manner this paper proposes. Their involvement with admissibility review may not be possible within the Rome Statute framework, as admissibility determinations are matters for ICC organs.[109] Also, none of these scholars covered the inclusion of victims in such a body. Besides briefly outlining their ideas of the potential composition of such a body, none proposed a clear structure to enable such an entity to execute the functions envisaged. This paper's proposals cover these and are based on the existing framework of the Statute as further elaborated below.

4. Designing the proposed independent complementarity division

4.1 Neutrality and independence

A discussion of what the neutrality and independence of the proposed division entail is warranted for four main reasons. First, the explanations for the many reshuffling exercises within the OTP reveal their struggles with dealing with the political and some co-operation aspects of complementarity, while also focusing on their core investigative and prosecutorial mandate.[110] Second, the current global political climate characterized by increased states' non-compliance with international law and a shift towards influence of regional and subregional alliances. Third, the fact that the ICC is still an international organization, and like all such entities, it cannot completely insulate itself from the politics of international law. Fourth, to maintain any prospects of universality, or at the very least limit withdrawals from the Court. Complementarity which is the corner stone of the Statute for fighting impunity and delivering justice for victims, captures these issues and can be the solution when implemented through the right mechanism.

Here, neutrality refers to the ability of the proposed division to promote the goals of the ICC, and preserve the system of complementarity, without advocating and protecting specific interests of any party or participant to the detriment of the overall object and purpose of the Statute. This understanding of neutrality explains the paper's choice of 'victim-oriented' used to describe complementarity as opposed to 'victim-centred'.

[103]M. Karagiannakis, 'Article 44 Staff', in Triffterer and Ambos, *supra* note 16, 1289 at 1289–90; see Schabas, *supra* note 18, at 765.

[104]See Newton (2011), *supra* note 96, at 336–8; see Newton (2021), *supra* note 96, at 172.

[105]See Newton (2021), *supra* note 96, at 171–3.

[106]See Stahn, *supra* note 2, at 4; See ASP, *supra* note 3, Para. 25.

[107]Ibid.

[108]See Moffett, *supra* note 21, at 237; see Moffett (2015), *supra* note 24, at 306.

[109]See ASP, *supra* note 49, at 12–22.

[110]See, e.g., ICC, Proposed Programme Budget for 2022 of the International Criminal Court, ICC-ASP/20/10, (2021), at 46, Paras. 106, 178–80; ICC, Proposed Programme Budget for 2023 of the International Criminal Court, ICC-ASP/21/10, (2022), Paras. 225–8, 231 and 331; see ICC, Proposed Programme Budget for 2024, *supra* note 88, Paras. 219, 333–7, 387–9, and 442; see ICC, Proposed Programme Budget for 2025, *supra* note 80, Paras. 211–6, 266–72, 336–8; see ICC, *supra* note 79, Paras. 275–9, 288–9.

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Neutrality is closely linked to the requirement of independence, key features of institutional structures of international organizations tasked with addressing various states' violations of human rights, or other treaty provisions.[111] While not a criminal court, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (Inter-American Commission) are principal autonomous organs of the Organization of American States for the protection of human rights.[112] The Inter-American Commission is responsible for *inter alia* receiving, analysing, and investigating human rights violations and is not a party to proceedings before the Inter-American Court.[113] After examining admissibility and other substantive aspects of a petition, communication, or case, the Inter-American Commission can assist the parties to reach a friendly settlement or submit it to the Inter-American Court.[114]

The independence and autonomy of the Inter-American Commission have contributed to its success in fulfilling its mandate in the face of severe difficulties.[115] Like the OAS, the ASP should consider a neutral, independent and inclusive ICC complementarity body, which is not a party to the proceedings. This can improve states' co-operation with the ICC and other stakeholders for addressing international crimes in a sustainable and inclusive manner, domestically, regionally, subregionally, and in the Hague.

4.2 Creating the proposed complementarity division

The proposed division should be created by the ASP in accordance with Article 112(4) of the Statute. It provides that 'the Assembly may establish such subsidiary bodies as may be necessary, *including* an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy'.[116] The fact that an independent oversight mechanism can and has been created under this article,[117] suggests that the ASP can create other independent units if they are necessary and can contribute to the enhancement and efficiency of the ICC. Nothing in the Statute indicates that such bodies must be controlled by the ASP. Yet, they may be accountable to them, to the extent that their work is scrutinized through periodic reports similar to those issued by some ICC organs to the ASP. Given the reasons for neutrality discussed above, the proposed division should not be controlled by the ASP, which falls outside the chain of organs and units of the ICC responsible for the administration of justice.[118]

While creating the proposed division may not require an amendment to the Statute, to execute the functions proposed in this paper, an amendment may be inevitable. This is because Articles 13, 14, and 42(1) suggest that no other organ or unit within the ICC is mandated to receive such referrals.[119] One way to avoid an amendment to the Statute would be to create a system where the OTP transmits such referrals to the proposed division for preliminary examination. Yet this might

[111]Treaty on the Functioning of the European Union [2012] OJ C26/47, Art. 245; Treaty on European Union [2008] OJ C115/13, Art. 17; Fact Sheets on the European Union: European Parliament, 'The European Commission', available at www.europarl.europa.eu/factsheets/en/sheet/25/the-european-commission; Office of the High Commissioner for Human Rights Press Release, 'Bachelet Urges End to Crisis Caused by Refusal to Reappoint Head of Inter-American Commission on Human Rights', 2020, available at www.ohchr.org/en/press-releases/2020/08/bachelet-urges-end-crisis-caused-refusal-reappoint-head-inter-american; 1969 American Convention on Human Rights, 1144 UNTS 123, Arts. 34–51.

[112]See American Convention on Human Rights, ibid., Arts. 33–43, 48–51, 52–65.

[113]Ibid., Arts. 35–7 and 41–7.

[114]Ibid., Arts. 33–51.

[115]A. Dulitzky, 'The Inter-American Human Rights System Fifty Years Later: Time for Changes', (2011) *Quebec Journal of International Law* 128, at 146.

[116]See RS, *supra* note 1, Art. 112 (4).

[117]ASP, Establishment of an Independent Oversight Mechanism, ICC-ASP/8/Res.1 (2009).

[118]See ICC, Overall Response of the International Criminal Court to the "Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report": Preliminary Analysis of the Recommendations and Information on Relevant Activities Undertaken by the Court (2021), Paras. 21–2.

[119]See RS, *supra* note 1, Arts. 13–5, 42(1) and (2), 43(1) and 53.

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be discretionary and may be vulnerable to inconsistencies in dealing with situations. It may also result in prolonging or bureaucratizing the process instead of minimizing such.

It should be noted that the amendments anticipated here for the proposed division's functions should not affect Articles 5–8 *bis* on crimes within the Statute. Which means that they would fall within Article 121(4) and may be relatively easier to adopt. Article 121(6) provides for the chance of withdrawal from the Statute, should seven-eighths of states parties accept the amendments. A positive view of the issue of potential withdrawal is that should this be obtainable, it means that such an amendment is favoured by a majority. Also, the time between achieving such rate of acceptance and the time during which a state considers a withdrawal, offer the opportunity for the latter state to reconsider their position.[120] However, it is difficult to envisage that a state party may choose to withdraw from the world's only international criminal court dealing with horrendous crimes, due to amendments meant to realign it with the original intention of the drafters of the Statute.[121]

4.3 Composition of the proposed independent complementarity division

The design model proposed here is premised on the ability of the proposed division to fit into the Court's current structure and avoid any negative impact on the Court's independence.[122] This paper argues that the proposed complementarity division be made up of three main units: a Situation Analysis Unit, Co-operation Unit, and a Complementarity Committee. Figure 2 provides an overview of the makeup of these units, which are further discussed in relation to their proposed functions. Figures 3 and 4 show their proposed location within the Registry due to the Registry's neutrality and role as the administrative arm of the Court, which provides services to all other organs so that the Court can function adequately.[123]

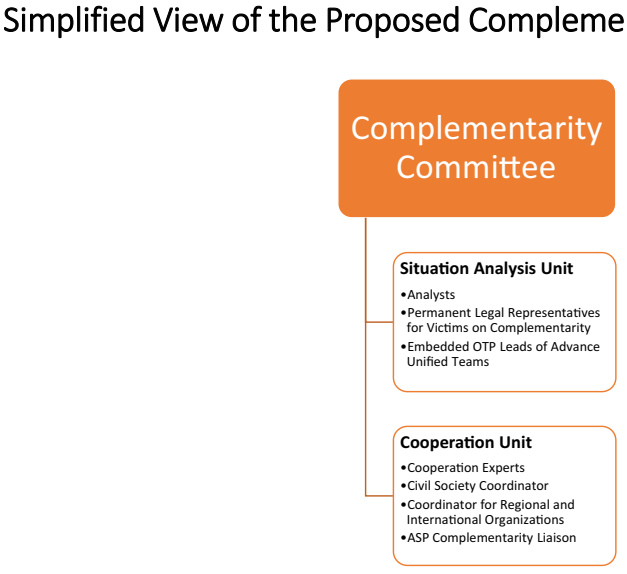


Figure 2: Simplified view of the proposed complementarity division

[120]See Schabas, *supra* note 18, at 1504.

[121]A. Bos, 'From the International Law Commission to the Rome Conference (1994–1998)', in Cassese et al., *supra* note 1, 35 at 39 and 44–5; L.T. Chigowe, 'The ICC and the Situation in Afghanistan: A Critical Examination of the Role of the Pre-Trial Chambers in the Initiation of Investigations Proprio Motu', (2022) 35(3) *Leiden Journal of International Law* 699, at 711–18.

[122]See ASP, *supra* note 49, Paras. 26–50; See ICC, *supra* note 118, Paras. 16–50.

[123]See RS, *supra* note 1, Art. 43; ICC, 'Registry', available at www.icc-cpi.int/about/registry/default53.

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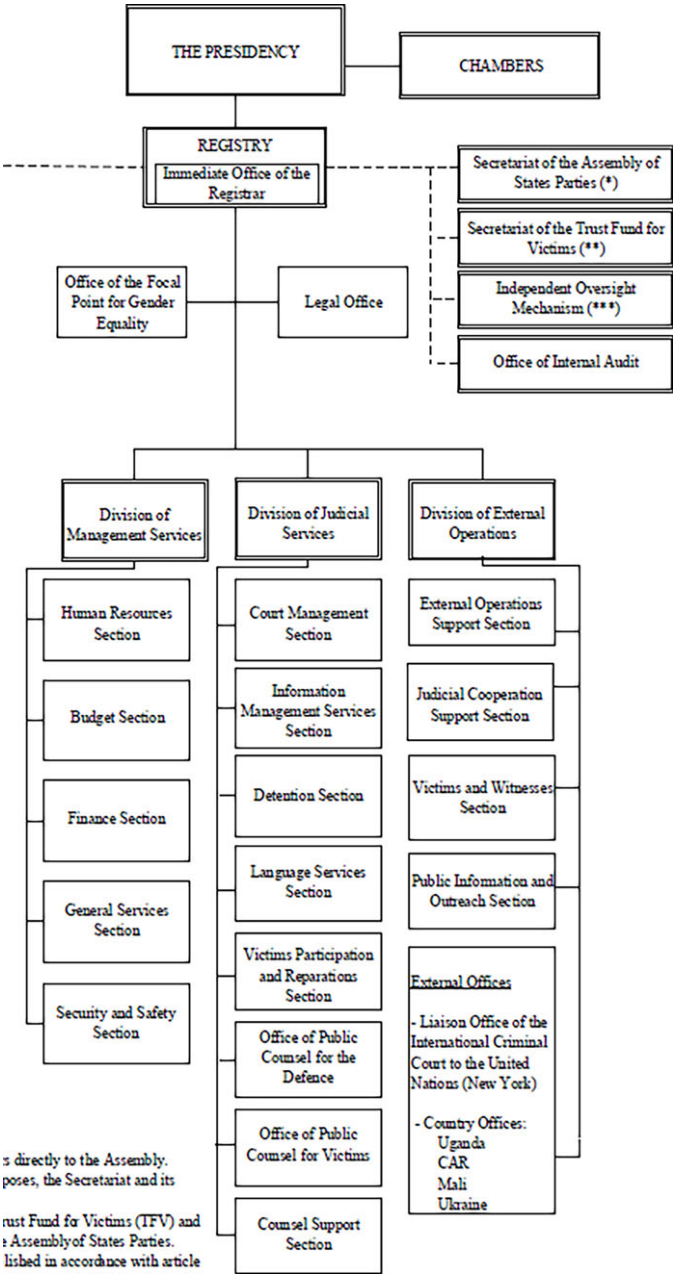


Figure 3: The current structure of the ICC's Registry
Source: ICC, Proposed Programme Budget for 2026 of the International Criminal Court, ICC-ASP/24/10 (2025), Annex I, at p. 204, available at asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-24-10-ENG.pdf.[124]

[124]Source: ICC, Proposed Programme Budget for 2026 of the International Criminal Court, ICC-ASP/24/10 (2025), Annex I, at p. 204, available at asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-24-10-ENG.pdf.

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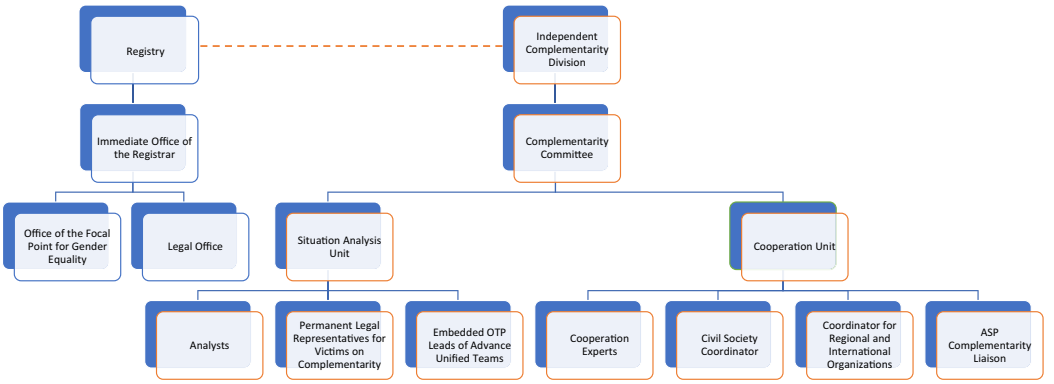


Figure 4: The proposed complementarity division within the registry

4.3.1 The Complementarity Committee

This Committee should act as the proposed division's management arm and should oversee the work done by the entire division. This Committee should be made up of experts elected in their individual capacity by the ASP, but who will represent all states parties and will reflect the five geographical regions of ICC States Parties.[125]

4.3.2 Co-operation Unit

Securing judicial and non-judicial co-operation can be challenging and the quality of co-operation will impact preliminary examinations, investigations, prosecutions, and reparations. As mentioned above, the OTP has struggled with this while managing its core mandate of investigations and prosecutions. The issue persists, although the OTP, the Registry and Presidency have made several efforts to improve their respective and court-wide co-operation strategies and structures, including through the creation of co-operation focused units.[126] Poor rate of adoption of co-operation implementing legislation by states parties contributes to the difficulties with co-operation.[127] Nonetheless, political support and general co-operation might be improved if a neutral body involved in complementarity matters takes the lead. Thus, the proposed division should have a Co-operation Unit to take on the political and general aspects of co-operation from the very early stages of situations,[128] while working with the Registry which is also neutral and already supports all organs of the Court with judicial co-operation.[129]

[125]ASP, 'The States Parties to the Rome Statute', available at asp.icc-cpi.int/states-parties; Inter-American Commission on Human Rights, 'IACHR Composition', available at www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/composition.asp.

[126]See ICC, 2025 Report on Cooperation, *supra* note 94, at 1–16; see ICC, *supra* note 118, Para. 134; ICC-OTP, Annual Report of the Office of the Prosecutor –2022 (2022), at 80; see ICC, *supra* note 79, Para. 276; ICC, Report of the Court on Cooperation, ICC-ASP/23/21 (2024), Para. 6; ICC, International Criminal Court Strategic Plan 2026-2029 (2025), at 38.

[127]See ICC, 2024 Report on Cooperation, ibid., at 16, Recommendation 31; see ICC, 2025 Report on Cooperation, *supra* note 94, at 18, Recommendation 31.

[128]ICC, International Criminal Court Strategic Plan 2023–2025, Strategic Goal 4; see ICC-OTP 2022 Annual Report, *supra* note 126, at 80.

[129]See RPE, *supra* note 15, Rule 176; see ICC, 2025 Report on Cooperation, *supra* note 94, Paras. 9, 27–30, 38–40; see ICC, 2024 Report on Cooperation, *supra* note 126, Para. 6; see ICC, Strategic Plan 2026–2029, *supra* note 126, at 47; R. Rod, 'Testing Co-Operation: The International Criminal Court and National Authorities', (2008) 21 *Leiden Journal of International Law* 431, at 447–9; see ICC, Proposed Programme Budget for 2022, *supra* note 110, Paras. 178 and 180; see ICC, Proposed

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The proposed Co-operation Unit should be made up of co-operation experts in *inter alia* regional and subregional politics, a co-operation co-ordinator for civil society organizations (CSOs), and one for international, regional, and subregional governmental organizations.[130] It is worth noting that in 2024, the Prosecutor established the OTP-CSO Structured Dialogue initiative, which aims at facilitating quarterly sessions where the OTP and CSOs can enhance dialogue and co-operation.[131] As stated, neutrality could serve the Court's needs in this regard, especially in the evolving international political landscape and the need for the OTP to focus on its core mandate.

The co-operation unit should also have an ASP Liaison because of the ASP's important role of facilitation of knowledge exchange among states parties to address international crimes.[132] The limit to what can be communicated to the liaison and the extent of their involvement in the work of the proposed division will be determined by confidentiality and neutrality.[133]

4.3.3 Situation Analysis Unit

The proposed Situation Analysis Unit should take over the conduct of preliminary examinations. This section should be staffed on a permanent basis by analysts and a Permanent Legal Representative for Victims on Complementarity issues. There should be a way to link the proposed division to the OTP due to the Prosecutor's responsibilities regarding investigations and prosecutions.[134] The OTP uses its unified teams for its core tasks, to build situation-specific knowledge and a continuity of resources and expertise.[135] The heads of the unified teams can be embedded within the proposed Situation Analysis Unit.

4.3.3.1 Permanent Legal Representative for Victims on Complementarity. Complementarity's centrality to the Rome Statute system of justice requires giving victims a seat at the table.[136] There are four important victims' units at the ICC: the Victims Participation and Reparations Section (VPRS);[137] the Office of Public Counsel for Victims (OPCV);[138] Victims and Witnesses Section (VWS) of the Registry;[139] and the Trust Fund for Victims.[140] The VPRS processes victims' applications for participation and reparations, while the VWS provides support and protection to witnesses and to victims who appear before the Court.[141] The OPCV assists victims as required in their legal representation in court, and the Trust Fund for Victims can provide different kinds of support to them and they implement court ordered reparations.[142] The merging of these existing

Programme Budget for 2023, *supra* note 110, Paras. 7, 225, 288–9; see ICC, Proposed Programme Budget for 2024, *supra* note 88, Paras. 4 and 268; see ICC, *supra* note 79, at 215, Paras. 276, 327–8, 618, and 834; see ICC, 2024 Report on Cooperation, *supra* note 126, Para. 6; see ICC, 2025 Report on Cooperation, *supra* note 94, Paras. 27–30.

[130]ICC, '"Recommendations on States" Cooperation with the International Criminal Court (ICC): Experiences and Priorities', Priority 6, available at www.icc-cpi.int/sites/default/files/2022-04/66-Recommendations-Flyer-ENG.pdf.

[131]This is in addition to the Complementarity and Civil Society team mentioned in Section 3.2 *infra*. See ICC, Proposed Programme Budget for 2025, *supra* note 80, Para. 214; see ICC, 2025 Report on Cooperation, *supra* note 94, Para. 69.

[132]See ICC, 2025 Report on Cooperation, *supra* note 94, Paras. 10, 75.

[133]See Newton 2021, *supra* note 96, at 171–2; see Stahn, *supra* note 2.

[134]See Stahn, *supra* note 2, at 4.

[135]See ICC, *supra* note 118, at 30, Para. 144, and 109, Para. 520; Now called 'Unified teams' under the new Prosecutor. See ICC, Proposed Programme Budget for 2022, *supra* note 110, at 46, Paras. 179, 254–6, note 50; see ICC, *supra* note 79, Para. 351.

[136]See Smith-van Lin and McKay, *supra* note 6, at 329–32; P. Clark, *Distant Justice the Impact of the International Criminal Court on African Politics* (2018), at 148–9 and 302.

[137]ICC, 'Victims', available at www.icc-cpi.int/about/victims.

[138]See RoC, *supra* note 15, Reg. 81; see Regulations of the Registry, *supra* note 15, Regs. 114–15.

[139]See ICC, *supra* note 79, at 204; see RS, *supra* note 1, Art. 43(6).

[140]See RS, *supra* note 1, Arts. 75(2) and 79.

[141]VPRS, 'Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the ICC', at 14–5, available at www.icc-cpi.int/sites/default/files/itemsDocuments/vprs/abd-al-rahman/VPRS-Victims-booklet_ENG.pdf.

[142]Ibid.

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units into one victims' unit would not be sufficient to effectively protect victims' interests throughout all stages of proceedings and may result in conflicts of interests given their respective mandates.[143] Victims need to be represented within the ICC's complementarity mechanism so that meaningful inputs of victims' units are more streamlined and better co-ordinated. Also, each of these units' own networks can improve co-operation on victims' issues some of which can be severe during prolonged preliminary examinations.

The proposed Permanent Legal Representative for Victims on Complementarity issues placed in this section could have a support staff attached to the OPCV whose mandate commences very early in ICC proceedings including those designed to address complementarity issues.[144] The Pre-Trial Chamber can instruct the OPCV to represent the interests of unrepresented victims, for instance, in deferral proceedings.[145] Alternatively, the OPCV can seek leave of the Court to do so.[146] Having a dedicated victims' representative in the proposed division is achievable within the current legal framework of the Court as demonstrated in Section 2. Additionally, Rule 86 of the ICC RPE enshrines a general principle that all organs of the Court in performing their functions, shall take into account victims' needs.[147] Since complementarity is crucial for the implementation of the Court's mandate, it is logical to have such a position as a mechanism to enforce Rule 86.

5. Functions of the independent complementarity division

This section turns to contextualizing the functions of the proposed division using select ICC situations and cases. The proposed division should focus on promoting the goals of the Rome Statute system of complementarity throughout all stages of proceedings, while being mindful of the three dimensions of complementarity discussed in Section 1. They should be involved with analyses of communications and dialoguing with states, conducting preliminary examination, facilitating co-operation for victim-oriented complementarity, conclusion of a complementarity understanding, and contributing to non-party driven monitoring and compliance.[148] Since complementarity issues may arise at different stages in ICC proceedings, it is useful to look at the functions of the proposed division in phases. For this purpose, the paper borrows the European Union law terms 'pre-contentious phase' and 'contentious phase'.[149]

5.1 Functions of the proposed complementarity division in the pre-contentious and contentious phases

The pre-contentious phase is the period from when communications about alleged Rome Statute crimes have been made to the ICC up to the end of a preliminary examination phase without any admissibility challenge. Within this phase there is scope to read victims' interests into complementarity provisions as explained in Section 2. The purpose of the pre-contentious phase is to avoid or at least minimize tensions between the ICC and states and to resolve issues between the OTP, the defence, and victims while upholding the Rome Statute's aims. It could also be used to foster as far as practicable, local, regional, and subregional responses to situations by ascertaining states' needs and applying flexible timing and victim-oriented qualified deference. At any time in

[143]E.g., J. Gilissen, 'Review Committee Response in Relation to the OPCV Interlocutor', at 7–9, available at www.icc-cpi.int/sites/default/files/iccdocs/LT/OPCV/Jean-LouisGilissenOPCVEng.pdf; Avocats Sans Frontiéres, 'Review Committee Response in Relation to the OPCV Interlocutor', Paras. 5–7, available at www.icc-cpi.int/sites/default/files/iccdocs/LT/OPCV/ASFsOPCV.pdf.

[144]See RoC, *supra* note 15, Regs. 73, 80 and 81.

[145]Ibid., Regs. 81(4), 80, and 73.

[146]Ibid.

[147]See RPE, *supra* note 15, Rule 86.

[148]See Stahn, *supra* note 49, at 252.

[149]P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials UK Version* (2020), at 485–94.

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the pre-contentious phase, the OTP, the defence, states, and victims retain their respective rights to challenge any part of the process by relying on relevant Rome Statute and RPE provisions available to them.

The contentious phase will usually commence once an admissibility challenge has been officially launched by a state or the accused, where there are compliance issues, or where the defence, victims and the OTP disagree on certain issues and may resort to judicial intervention for resolving them. In such cases, the proposed division can in the spirit of balancing interests and pursuing the Statute's object and purpose, and through dialogue and communication, remind states of the minimum conditions they agreed to.

The paper uses the situations below from all ICC trigger mechanisms to explain how neutrality and independence could position the proposed division to function and arrive at more acceptable outcomes. For Cote d'Ivoire, there have been accusations that efforts to deliver justice in The Hague and in Cote d'Ivoire have been inefficient, biased, and does not sufficiently cover all sides to the conflict, or representative of crimes and victims' harms.[150] The CAR II situation is useful for showing how victim-oriented complementarity through the proposed division could be consistently pursued in accordance with the goals of the Statute, regardless of states' shifting political interests. Libya was chosen because it was not a party to the ICC at the time the UNSC referred the situation to the Court.[151] Also, Libya's somewhat cooperative posture with the Court despite the African Union's own stance on the ICC at the relevant time, and Libya's subsequent acceptance of the ICC's jurisdiction in 2025,[152] provide useful insights for such situations.

5.1.1 Cote d'Ivoire Situation

The Cote d'Ivoire Situation was opened *proprio motu* by the Prosecutor with three individuals charged. Cote d'Ivoire challenged admissibility of Simone Gbagbo's case, invoking the principle of complementarity.[153] The Court rejected this for failure on Cote d'Ivoire's part to prove that it was taking concrete, tangible, and progressive steps with regards to the OTP's charges against her.[154] The other two defendants' acquittal was confirmed by the Appeals Chamber, and charges against Simone Gbagbo were also vacated.[155] As of the OTP's 2025 Annual Report, investigations in the situation are pending and regular contacts have been maintained with key stakeholders.[156]

Opinions differ as to how the situation was and could have been handled before the collapse of these cases and limited accountability domestically, including with respect to the ICC's restrictive interpretation of admissibility criteria.[157] The Cote d'Ivoire situation could have been suitable for applying tools of victim-oriented qualified deference through the proposed division, especially

[150]See Moffett, *supra* note 21, at 266–7; International Federation for Human Rights ('FIDH'), 'Côte d'Ivoire's Post-Electoral Crisis, 11 Years on: Victims Forgotten, Justice Sacrificed', 2022, available at www.fidh.org/en/region/Africa/cote-d-ivoire/cote-ivoire-post-electoral-crisis-victims-forgotten-justice-sacrificed; N.P. Tawa with A. Engelsdorfer, 'Acceptance of the International Criminal Court in Côte d'Ivoire: Between the Hope for Justice and the Concern of "Victor's Justice"', in S. Buckley-Zistel et al. (eds.), *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice* (Nuremberg: International Nuremberg Principles Academy, 2017), available at www.nurembergacademy.org/fileadmin/publications_images/acceptance-of-the-international-criminal-court-in-cote-divoire-between-the-hope-for-justice-and-the-concern-of-victors-justice/Cote_d_Ivoire.pdf, at 1–10.

[151]United Nations Security Council, Resolution 1970 (2011), UN Doc. S/RES/1970 (2011).

[152]ICC, 'Libya Accepts ICC Jurisdiction over Alleged Crimes From 2011 to the end of 2027', 15 May 2025, available at www.icc-cpi.int/news/libya-accepts-icc-jurisdiction-over-alleged-crimes-2011-end-2027.

[153]*Prosecutor v. Simone Gbagbo*, Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case Against Simone Gbagbo, ICC-02/11-01/12, PT.Ch., 11 December 2014.

[154]Ibid., Para. 36.

[155]ICC, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11.

[156]ICC-OTP, Office of the Prosecutor Annual Report 2025 (2025), at 26.

[157]K.J. Heller, 'Radical Complementarity', (2016) 14 *Journal of International Criminal Justice* 637, at 637–65; FIDH, 'The Victims' Mandate of the International Criminal Court: Disappointments, Concerns and Options for the Way Forward

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before reaching the point of judicial intervention. For example, Cote d'Ivoire adopted Rome Statute implementing legislation in 2015 to fully implement the substantial provisions of the Statute, including all but one general principle.[158] They established domestic mechanisms to address crimes within the context of the situation,[159] and Cote d'Ivoire's civil society actively pushed for accountability.[160] Therefore, constructive dialogue, facilitation of co-operation, qualifying deference, and monitoring of compliance coupled with Cote d'Ivoire's active civil society, could have improved the chances of delivering justice to more victims from all sides of the conflict. This could be in The Hague, in Cote d'Ivoire, in the region or subregion, for example through the Economic Community of West African States Court of Justice.[161]

5.1.2 CAR II

CAR's hybrid Special Criminal Court (SCC) which could try international crimes became functional seven years after the CAR II referral to the ICC.[162] The Yekatom case is useful here as qualified deference was raised by the defence when seeking a ruling of inadmissibility.[163] The Trial Chamber in issuing its decision followed the two-step approach to admissibility determination without any discussion of the merits or demerits of qualified deference.[164] The Appeals Chamber in the same case did not examine the concept.[165] The *Yekatom* defence had argued that CAR was able as of 2020 to try Mr. Yekatom because of the SCC.[166] The defence relied on Stahn's version of qualified deference and asked the ICC to give CAR a chance to try Mr. Yekatom.[167] The Court deemed arguments advanced by the defence as incompatible with its approach to complementarity. This is because admissibility determinations are made based on the facts as they exist at the time of assessment, and not about adopting flexibility in admissibility rulings to mitigate the strict time requirements or address inability issues.[168]

The Court noted that there was inaction on CAR's part since no case against Mr. Yekatom was in existence in CAR at the relevant time.[169] There was also the issue that Article 37 of CAR's Organic

Observations and Recommendations for the Independent Expert Review', 2020, Paras. 52–3, available at www.fidh.org/IMG/pdf/cpiang752.pdf.

[158]Parliamentarians for Global Action, 'Côte d'Ivoire and the Rome Statute', available at www.pgaction.org/ilhr/rome-statute/cote-divoire.html.

[159]See Moffett, *supra* note 21, at 266–7; International Center for Transitional Justice, 'With Gbagbo and Blé Goudé Acquitted, What Is Next for Victims in Côte d'Ivoire?', 2021, available at www.ictj.org/news/gbagbo-and-blé-goudé-acquitted-what-next-victims-côte-d'ivoire; see Tawa and Engelsdorfer, *supra* note 150.

[160]Human Rights Watch, 'Making Justice Count: Lessons from the ICC's Work in Côte d'Ivoire', 2015, at 52–8, available at www.hrw.org/sites/default/files/report_pdf/cdi0815_4up.pdf.

[161]*Gbela Guelalo and 3 Others v. Republic of Côte D'ivoire*, (ECW/CCJ/APP/51/22; ECW/CCJ/JUD/18/25) [2025] on ECOWASCJ (8 April 2025), at Paras. 7–33, 54–74, 100–10, 116–29, and 161–3.

[162]P. Labuda and J. de Hemptinne, '"In the Long Term, the Special Criminal Court Is a Stabilizing Factor Because It Aims to Break the Cycle of Violence": An Interview with Patience Guerengbo', (2025) 23 *Journal of International Criminal Justice* 137, at 137–43; Amnesty International, 'CAR: Special Criminal Court at Serious Risk Of Closure in 2026 Due to Lack of Funding', 11 February 2026, available at www.amnesty.org/en/latest/news/2026/02/car-special-criminal-court-2/.

[163]*Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Yekatom Defence's Admissibility Challenge—Complementarity, ICC-01/14-01/18, T.Ch., 17 March 2020, Paras. 14–15, 34–46.

[164]See *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on Yekatom Defence's Admissibility Challenge, *supra* note 10, Paras. 22–4.

[165]See *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Judgment on Yekatom's Appeal, *supra* note 47, Para. 49.

[166]See *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Yekatom Defence's Admissibility Challenge, *supra* note 163 at, Paras. 1, 11–15 and 32–43.

[167]Ibid.

[168]See *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on Yekatom Defence's Admissibility Challenge, *supra* note 10, Paras. 14–24; see *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Judgment on Yekatom's Appeal, *supra* note 47.

[169]Ibid.

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Law 15/003 gives the ICC primacy over cases where CAR and the ICC share concurrent jurisdiction.[170] Moreover, CAR authorities did not appear to be interested in the admissibility challenge.[171] This same law came under scrutiny in the *Beina* case, but this time, CAR wanted to exercise its jurisdiction. Thus, it challenged the admissibility of the *Beina* case before the ICC.[172] Victims in this case preferred justice to be done by CAR's SCC and the Pre-Trial Chamber ruled in CAR's favour.[173]

This paper argues that with regards to the issue of time limitation and since CAR was co-operating in both cases, the proposed complementarity division could have recommended a phased approach to implementing complementarity. For the *Yekatom* case, the non-contentious phase could have been activated before the admissibility challenge by the defence. This could have been pursued since there was an effort by other international actors to restore security and build CAR's capacity to deliver justice for victims.[174] The proposed division could have recommended qualified deference with victim-oriented conditions and clauses for the protection of the rights of the accused, with timeline to implement them. Alternatively, they could have considered burden-sharing and a postponement of a final decision on admissibility, even if CAR at the outset showed no interests in challenging admissibility. This would then provide the ICC with grounds to defer the *Yekatom* and other relevant cases to CAR where necessary, thereby freeing up the Court's resources for situations which at the time were hibernated for lack of resources.[175] This method would not amount to a waste of resources because relevant ICC work products could, and have indeed been shared with CAR,[176] thereby contributing to its capacity which is a more sustainable approach. CAR's domestic proceedings afforded victims the chance to participate, and some have recently been awarded reparations in record time compared to the ICC.[177]

5.1.3 Libya

The UNSC referred the Libya Situation to the ICC.[178] At the early stages of this situation, the OTP noted that Libya was co-operating.[179] Libya received capacity building support,[180] and eventually

[170]See *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Judgment on Yekatom's Appeal, *supra* note 47, Para. 48.

[171]Ibid., Para. 24.

[172]See *Situation In the Central African Republic II*, Decision on CAR's Admissibility Challenge, *supra* note 9, Paras. 41–3 and 78; see *Situation In the Central African Republic II*, Observations on behalf of Victims, *supra* note 13, Paras. 4, 56–7; F. Petit, 'A Courts' Chase in Bangui', *JusticeInfo*, 9 December 2024, available at www.justiceinfo.net/en/139237-court-chase-bangui.html.

[173]Ibid.

[174]P. I. Labuda, 'The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?', (2017) 15 *Journal of International Criminal Justice* 175, at 175–206; ICC-OTP, Situation in the Central African Republic II, OTP Article 53 (1) Report (2014), Para. 248.

[175]B. C. Olugbuo, 'Nigerian Victims Deserve More Than Hibernated ICC Investigations – They Deserve Justice', 2021, available at hrij.amnesty.nl/nigerian-victims-deserve-more-than-hibernated-icc-investigations-they-deserve-justice. The OTP decided not seek authorization for opening an investigation into the Nigeria Situation. See ICC-OTP Statement, 'ICC Deputy Prosecutor Concludes Mission to Nigeria, Signing a Memorandum of Understanding to Enhance Complementarity', 2026, available at www.icc-cpi.int/news/icc-deputy-prosecutor-concludes-mission-nigeria-signing-memorandum-understanding-enhance.

[176]ICC, 'The Deputy Prosecutor of the ICC, Mame Mandiaye Niang, Concludes His Visit to the Central African Republic on the Occasion of the Signing of two Memoranda of Understanding, Deepening Cooperation and Complementarity with the National Justice System', 2023, available at www.icc-cpi.int/news/deputy-prosecutor-icc-mame-mandiaye-niang-concludes-his-visit-central-african-republic.

[177]R. le Roi Benga, 'Central African Republic Reparations: What Victims Say About First Payments', 2024, available at www.justiceinfo.net/en/137103-central-african-republic-reparations-what-victims-say-about-first-payments.html.

[178]See UN Doc. S/RES/1970 (2011), *supra* note 151.

[179]ICC-OTP, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011) (2012), Paras. 11–13.

[180]*Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Libyan Government's Further Submissions on Issues Related to the Admissibility of the Case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, PT.Ch., 23 January 2013, Paras. 103–14.

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challenged the admissibility of the *Gaddafi* and *Al-Senussi* cases.[181] The ICC rejected the admissibility challenge in relation to Gaddafi who at the time was not in Libya's custody,[182] and instructed Libya to surrender him. Co-operation with the Court in this regard remained problematic,[183] and Gaddafi has now been reported dead.[184] The Court eventually declared Mr. Al-Senussi's case inadmissible.[185] It found that the same case against him was before the ICC and that Libya was not unwilling or unable genuinely to carry out proceedings against Al-Senussi.[186] Notwithstanding the political dynamics of Libya and the region, and the security situation in the country, the ICC unconditionally deferred the case to Libya.[187] Subsequently, the situation in the country deteriorated, and Libya's political divide did not improve.[188] These events suggested that the ICC would have probably found the case admissible in such an instance.[189] However, former Prosecutor Bensouda did not file a review in accordance with Article 19(10) of the Statute,[190] but reiterated the Chamber's inadmissibility decision.[191] Had the ICC qualified its deference to Libya, it could have offered a legal basis to recall the *Al-Senussi* case where monitoring reveals that the expected results were not forthcoming even after reasonable adjustments which takes into account the changing situation.[192]

Instead of prolonging the admissibility proceedings based on a very strict reading of Article 17, the ICC should have used the opportunity to make an impact in Libya,[193] since it displayed signs of willingness, had provisions for victims' participation and showed a disposition towards carrying them along.[194] This willingness could have been cultivated using co-operation partners who can ensure that Libya carried victims along, and this process could be monitored. There is still room for a victim-oriented approach to complementarity in this situation, especially since Libya has now accepted the ICC's jurisdiction.

[181] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Application on behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11, PT.Ch., 1 May 2012.

[182] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, PT.Ch., 31 May 2013; see *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on Libya's Appeal, *supra* note 53.

[183] See ICC-OTP, Third Report, *supra* note 179, Para. 16; *Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the Non-compliance by Libya With Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, ICC-01/11-01/1, PT.Ch., 10 December 2014; ICC-OTP, Twenty-Ninth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant To Resolution 1970 (2011) (2025), Para. 27.

[184] J. H. Anderson, 'Gaddafi's Death, the Last Nail in an ICC Coffin', *JusticeInfo*, 5 February 2026, available at www.justiceinfo.net/en/155092-gaddafis-death-last-nail-icc-coffin.html.

[185] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the Admissibility of the Case against Abdullah Al-Senussi, ICC-01/11-01/11, PT.Ch., 11 October 2013; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled "Decision on the Admissibility of the Case Against Abdullah Al-Senussi", ICC-OI/II-OI/II-OA6, A.Ch., 24 July 2014.

[186] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the Admissibility of the Case against Abdullah Al-Senussi, *supra* note 185, Para. 311.

[187] Ibid., Paras. 272–301.

[188] K. J. Heller, 'It's Time to Reconsider the Al-Senussi Case. (But How?)', *OpinioJuris*, 2 September 2014, available at opiniojuris.org/2014/09/02/time-reconsider-al-senussi-case.

[189] See ibid.; see Stahn, *supra* note 49, at 248–9.

[190] See Stahn, *supra* note 49, at 249.

[191] ICC-OTP, Seventeenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970 (2011) (2019), Para. 20.

[192] See Stahn, *supra* note 49, at 255–7; see Heller, *supra* note 188.

[193] See Wierda, *supra* note 5, at 96–124.

[194] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Libyan Government's Consolidated Reply to the Responses of the Prosecution, OPCD, and OPCV to its Further Submissions on Issues Related to the Admissibility of the Case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, PT.Ch., 4 March 2013, Paras. 57, and 62–4.

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5.2 Political will and budgetary considerations

One of the pertinent questions that may be asked in relation to creating a new complementarity division is whether there is an appetite to do so in the current global political climate. The discussions in Section 3 regarding the Court, the ASP, and stakeholders' efforts to address issues with how complementarity is implemented, suggest that there is a fledgling political will to be galvanized for concrete progress.[195] However, it may be time to move away from an untenable patchy approach to addressing these issues, and step towards practical and sustainable solutions.

It is important to note here that budgetary considerations can impact the adoption of proposals for legal and structural changes in any context including at the ICC. The paper's proposals may not require significant budgetary increase. They could be actionable by employing *inter alia* a purposive interpretation of existing provisions of the Rome Statute, other core ICC texts,[196] and by using different staffing models to minimize cost.[197] The proposed structure means that some existing ICC positions may be absorbed into some of the proposed units.[198] Additionally, there are cost neutral positions – those that already exist at the ICC and which can contribute to the work of the proposed complementarity division. Implementing complementarity in the manner proposed here and through such a body stands a better chance of increasing states' exercise of their primary responsibility to address international crimes. More regional and subregional organizations may also get involved. Thus, in the long run, the benefits accrued may outweigh any short-term budgetary increase,[199] and this would require a comprehensive assessment beyond this paper.

6. Concluding remarks

This paper examined how the ICC's goal of fighting impunity can be consistently pursued by upholding the system of complementarity as originally intended by the drafters of the Statute, while balancing all interests before the ICC. Victim-oriented complementarity stands a better chance of encouraging justice that is more meaningful and sustainable. A state which shows signs of willingness to address international crimes in a victim-oriented manner, should be given a chance to do so, even if it means allowing some flexibility with the time requirement of admissibility determinations. This can be accompanied by support for capacity building through complementarity stakeholders. State parties and non-parties can secure deference by the ICC, but they should at a minimum prove that they have met the requirement for victims' protection and participation, and symbolic reparations, or a more substantive one. These are possible if the Court adopts a purposive approach to interpreting victims and complementarity provisions within the Rome Statute framework.

The paper argued that it is time for the various efforts to improve efficiency in complementarity to evolve into a bolder step forward. The ASP should consider creating a less contentious and an inclusive platform for states and other stakeholders to engage with the Court before contentious proceedings and subsequently. The composition of the proposed complementarity division should allow the ICC to focus on investigating and prosecuting the most responsible perpetrators. It also offers enhanced transparency of the process – a way to improve prosecutorial accountability,[200]

[195]See ASP, *supra* note 49, Para. 26; See ICC, *supra* note 118, Paras. 16–18.

[196]ICC, 'Core Legal Texts', available at www.icc-cpi.int/resource-library/core-legal-texts.

[197]See for, e.g., ICC, 'Proposed Programme Budget for 2020 of the International Criminal Court, ICC-ASP/18/10 (2019), Paras. 261–5 and 278–337; ICC, Proposed Programme Budget for 2021 of the International Criminal Court, ICC-ASP/19/10 (2020), Paras. 284–305; see ICC, Proposed Programme Budget for 2022, *supra* note 110, Paras. 170–81, 204–9, 211–3, 219–21 and 273–90; see ICC, *supra* note 79, Paras. 341–79.

[198]E.g., ICC, *supra* note 79, Paras. 52, 273–90.

[199]See. e.g., Justice R. Goldstone, 'To Strengthen the ICC Office of the Prosecutor, Karim Khan is On the Right Path', *Just Security*, 25 August 2021, available at www.justsecurity.org/77984/to-strengthen-the-icc-office-of-the-prosecutor-karim-khan-is-on-the-right-path/.

[200]R. Grey and S. Wharton, 'Lifting the Curtain: Opening a Preliminary Examination at the International Criminal Court', (2018) 16 *Journal of Interntational Criminal Justice* 593, at 593–621.

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and better access for victims to be heard and kept informed. These proposals require political will, which is currently hard to imagine, given the increasing attacks against the ICC, more outbreaks of wars and other international incidents, and increased tendency of states to draw closer to regional organizations. Yet inspiration should be drawn from the perseverance and sustained efforts which saw the remarkable adoption of the Rome Statute in 1998 and the subsequent creation of the ICC, after over six decades of efforts to create such a court.[201]

[201]B. Ferencz, 'From Nuremberg to Rome: A Personal Account', in M. Lattimer and P. Sands (eds.), *Justice for Crimes Against Humanity* (2003), 31 at 32–44.

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