The local impact of a global court : assessing the impact of the International Criminal Court in situation countries

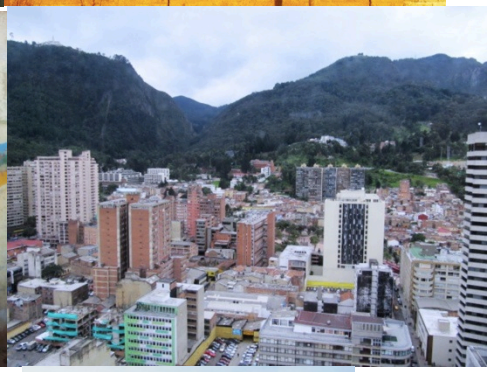
Wierda, M.I.

THE LOCAL IMPACT OF A GLOBAL COURT

Assessing the Impact of the International Criminal Court in Situation Countries

Marieke I. Wierda



THE LOCAL IMPACT OF A GLOBAL COURT

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in 1973

Promotoren:	Prof. dr. C. Stahn
	Prof. dr. L.J. van den Herik
Promotiecommissie:	Prof. dr. W.A. Schabas
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	Prof. dr. H.G. van der Wilt (University of Amsterdam)
	Dr. M. Kersten (University of Toronto, Canada)

We wept with joy because we had succeeded in ensuring that for us to be a human civilization worthy of some self respect, the strong would henceforth forfeit voluntarily their protections in respect of the weak, and most particularly, the victims, whenever allegations of criminal conduct crossed the boundary separating the ordinary from the outrageous. It was, and still is, the most enlightened step in human history ever taken.[1]

[1] Statement by H.R.H. Prince Zeid Raad Zeid Al-Hussein, the Hashemite Kingdom of Jordan, speaking also on behalf of H.E. Christian Wenaweser, Ambassador of the Principality of Liechtenstein, to the twelfth session of the Assembly of States Parties, 20 Nov. 2013.

For my beloved parents, Huib and Truus Wierda, who in their 40 years of medical services provided in Saada, Yemen, taught me the significance of the “local”.

Legend for photos on cover (taken by Marieke Wierda):

1. Pictures depicting martyrs of the Revolution in the Misrata museum, Misrata, Libya 2012
2. Dural Aman Palace, Kabul, Afghanistan 2014
3. Mural of Qhadafi in dumpster, Gheryan, Libya 2014
4. City view Bogota, Colombia 2014
5. Victims gather at site of suspected mass grave at Pul e Charkhi prison, Kabul, Afghanistan 2010
6. Girl in Gulu, Northern Uganda 2014

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In Kenya, a friend and civil society activist, Njonjo Mue, assisted in identifying interviewees. In Afghanistan, interviewees in the international community were identified through my network and with the help of Hashim Alavi, a researcher provided through the Afghan Analyst Network who worked for the High Peace Council. He accompanied me for many of the interviews and provided translation. In Colombia, I benefitted from my connections with the Ministry for Justice and the High Commission for Peace. At one point, I attended an extensive meeting with a small group of international experts to discuss the Havana Peace Process with President Juan Manuel Santos, in April 2015. Also, a local researcher identified by ICTJ, Carlos Lozano Acosta, assisted in identifying interviewees and arranging interviews. Juan Daniel Jaramillo Ortiz, a Colombian lawyer who had worked at ICTY also arranged some interviews. I am grateful to all of these people.

A number of likeminded scholars who inspired this work are cited directly in thesis. But a number of prominent experts and practitioners have inspired me towards this work, either directly or indirectly. These include: Barney Afako, Ravindran Daniel, Julian Hopwood, Priscilla Hayner, Suliman Ibrahim, Sergio Jaramillo, Ian Martin, Nader Nadery, Jimmy Otim, Michael Otim, Jan Michiel Otto, Yasmin Sooka, and Paul Seils.

Finally, I am grateful to my partner, Khaeri Aboushagor, for his support, and to baby Ilias, whose arrival provided impetus to finish the thesis.

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List of Abbreviations

ASF	Advocats Sans Frontier
ASP	Assembly of States Parties
AU	African Union
CAR	Central African Republic
DPP	Department of Public Prosecutions Uganda
DRC	Democratic Republic of Congo
FIDH	International Federation for Human Rights
FARC	Fuerzas Amradas Revolucionarias de Colombia
EU	European Union
HRW	Human Rights Watch
ICC	International Criminal Court
ICD	International Crimes Division (Uganda and Kenya)
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IMT	International Military Tribunal (in Nuremberg or the Far East)
ISAF	International Security Assistance Force (Afghanistan)
ISIL	Islamic State in Iraq and the Levant
JCCD	Jurisdiction, Complementarity and Cooperation Division
JLOS	Justice Law and Order Sector Uganda
JPL	Justice and Peace Law (Law 975) Colombia
LFP	Legal Framework for Peace Colombia
LRA	Lord's Resistance Army
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization of Security and Cooperation in Europe
OTP	Office of the Prosecutor
PEV	Post Election Violence, Kenya
SCSL	Special Court for Sierra Leone
SGBV	Sexual and Gender Based Violence
TFV	Trust Fund for Victims
UNAC	Context and Analysis Unit Colombia
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMID	United Nations Assistance Mission in Darfur
UNSC	United Nations Security Council
UNSMIL	United Nations Assistance Mission in Libya
UPDF	Uganda People's Defense Forces

PREFACE

I was in the room on 11 April 2002 at the UN Headquarters in New York, when the final ten States Parties of the sixty ratifications required for the coming into force of the Rome Statute were deposited with the treaty section of the United Nations. I remember well the sense of optimism, joy, and hope that filled the room when state delegates, civil society and the media rose to their feet and applauded at the conclusion of the ceremony, in the knowledge that the dream of a global court was now a reality. I had worked at the ICTY as an associate legal officer from 1997-2000. The ICTY had demonstrated that fair and functional criminal justice at the international level is indeed possible.[2] International criminal justice was on the rise, and its jewel in the crown was expected to be the International Criminal Court.[3]

My subsequent views on the ICC have been largely shaped by my field experiences as a transitional justice professional. The first such experience was my opportunity to observe the workings of the Special Court for Sierra Leone and the Truth and Reconciliation Commission, from 2002-2005. My experiences in Sierra Leone taught me the importance of a comprehensive approach to transitional justice, where prosecutions are complemented by other mechanisms, many of which may play a very important role for victims. I also observed that even this "hybrid" tribunal often suffered from being perceived as a "space ship phenomenon", i.e. viewed as remote from, and to some extent irrelevant in the society where it operated.

My experiences in Uganda, over fifteen field visits between 2005-2011, also helped to shape my views. I first went to Uganda in 2005 to participate in a survey of victims' views in the North on the ICC, with UC Berkeley. As will be described in this thesis, Court's intervention in Northern Uganda met with strong local opposition. This raised fundamental questions about why a neutral and international institution such as the ICC could evoke such a negative response on the part of victimized communities. Eventually I was involved in the Juba Peace Talks in 2007, where I recommended that Uganda should seek to exercise complementarity in its domestic courts for LRA crimes. This option was pursued in the Juba Agreement on Accountability and Reconciliation, signed in 2008. In 2007-2010, I was involved in the establishment and training of the International Crimes Division in Kampala.

I was also fortunate to have a limited role advising the High Commissioner for Peace and the Ministry of Justice in the Colombian peace process, as well as advising local judges and lawyers during the years of the Justice and Peace Law (Law 975), in 10

[2] The trajectory of the ICTY's growth is eloquently described in Klarin, Mirko, *The Tribunal's Four Battles,* Journal of International Criminal Justice 2 (2004), 546-557.

[3] I was a participant in the last few PrepComs, the first few ASPs, several expert groups that sought to define policy on complementarity, the Trust Fund for Victims, Peace versus Justice, and Article 53, and the Review Conference in Kampala in 2010.

field visits from 2007-2013. During my research for this thesis, I was able to meet with President Santos, who won the Nobel peace prize for his peacemaking efforts in 2016.[4]

From 2009-2010, I spent a year in Afghanistan, embedded in the Afghan Independent Human Rights Commission, to document war crimes and crimes against humanity from 1978-2001. Prior to that, I had conducted around15 field visits to Afghanistan between 2003-2009. The ICC does not have much visibility in the Afghan context. In March 2014 I spoke to Abdel-Hakim Mujahid, former Taliban Ambassador to the UN prior to 9/11, and Vice President of the High Peace Council, an institution that has suffered multiple attacks by the Taliban over the years. I spoke to him about whether an intervention of the ICC may have any impact on the Taliban today. His answer to me was twofold, implying that on the one hand, the Taliban are more interested in suicide attacks and going to paradise than they fear arrest, but he also said that "the insurgency is made up of religious students, who are studying in seminaries with a curriculum that is 800 years old: ninety-nine percent do not know about international conventions and they do not care."[5]

In my role as criminal justice director at ICTJ, I observed and gave advice on domestic criminal justice processes in a number of contexts, including DRC, Iraq, Bangladesh, Kenya, and Lebanon (in relation to the Special Tribunal for Lebanon).[6]

My closest encounter with flawed domestic proceedings was in my role as a transitional justice advisor to UN Support Mission in Libya (UNSMIL) between 2011-2015. During these years I held numerous meetings with the Minister of Justice, the General Prosecutor and local prosecutors and was exposed to their opinions and views on the ICC. As the Minister of Justice in Libya, Mr. Salah Marghani exclaimed during a conversation we had in 2013: "Why does the international community only care about 2 individuals when we have 7000 former Qadhafi loyalists in detention?" UNSMIL was the only organization to monitor the trial of Saif Al-Islam and Abdullah Al-Senussi in Libya. The trials of the former regime figures in Libya, concluded on 28 July 2015 before the Tripoli Court of Assize, fell far short of international standards, as will be discussed in this thesis.

Throughout these experiences, I came to understand that international criminal trials have introduced important fair trial standards that ought to be followed at the

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[4]In 2013, President Santos had made an impassioned plea to the General Assembly of the United Nations: "What we are asking from the U.N. and the international community is to respect Colombia's right, and the right of every nation, to pursuing peace. We ask you to keep accompanying us in this effort, respecting our choices, the way in which we act, and trusting that our decisions have never been against the international community's needs."

[5] Interview with Abdel-Hakim Mujahid, Kabul, 18 March 2014.

[6] Sissons, Miranda and Marieke Wierda. *Political Pedagogy Baghdad Style: The Dujail Trial of Saddam Hussein*, in *Prosecuting Heads of State* (Edited by Ellen Lutz and Caitlin Reiger) Cambridge University Press (2009).

national level. However, international criminal trials are not necessarily viewed as impartial in situation-countries. International actors must have humility, a good contextual understanding, and must seek to comprehend how their efforts impact on local justice struggles.

Propositions relating to the dissertation

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1. Confusion reigns among supporters and founders of the International Criminal Court about its "identity" and what it is meant to achieve. Evidence that the Court is deterring international crimes is not yet conclusive, although it has an important expressive function. It is necessary to devise a custom-made assessment framework for the ICC.

2. A framework for assessing the impact of the ICC can be derived from the founding documents and policy statements of the Assembly of States Parties and the Court's principles. Areas for assessment include systemic effect, transformative effect, reparative effect and demonstration effect.

3. Systemic effect is not the equivalent of complementarity. Complementarity has developed into a court-centric concept, and resulted in competition between the ICC and national authorities. Complementarity cannot address broader rule of law challenges and has other flaws, such as a blindness vis-à-vis due process. In fact, the relationship of the Court with national jurisdictions is often better described as "parallelism" rather than complementarity.

4. The impact of the Court on domestic legal systems could be more usefully described as internalization. Internalization can be demonstrated through the adoption of national legislation; through the creation of specialized domestic capacities; or through conducting genuine domestic proceedings.

5. The Rome Statute and the Court are having systemic effect in situation countries. Although the genuineness of proceedings remains very difficult to demonstrate, it is possible to identify indicators that help to assess genuineness.

6. Transformative effect is reflected in the content of peace agreements (including the scope of prosecutions or punishments); the process of peace negotiations (including the views of victims); or whether it has resulted in fewer amnesties.

7. The coming into force of the Rome Statute has not yet resulted in a paradigm shift away from amnesties and towards accountability in all situations. However, the interests of victims were considered as part of the peace processes in Uganda and Colombia, and the agreements allowed for criminal prosecution, albeit with alternative penalties.

8. Reparative effect can be measured through meaningful participation in ICC proceedings; through empowerment of victims in the Court's strategies; and through victims receiving assistance or reparations through the ICC or the Trust Fund for Victims.

9. The reparative effect of the Court in terms of its impact on victims is limited. While victim participation has led to increased recognition of the rights of victims, so far the realization of remedies through victim participation or reparations is minimal. In the situation in Kenya, even the do no harm principle was not respected.

10. Demonstration effect can be measured in part through perceptions. Perceptions of the ICC suffer from similar challenges in different contexts, including the fact that the Court is not necessarily viewed as impartial; its interventions do not necessarily align with local justice priorities; and it is sometimes seen to advance a foreign or Western agenda.

11. While the Rome Statute and the ICC are having normative impact, in the form of systemic and transformative impact, this impact is undermined by a lack of societal impact, in terms of impact on victims and negative perceptions.

12. Some changes to improve the impact of the ICC can take place within the current legal framework of the Rome Statute. However, in order to maximize respect for Rome Statute norms, more context-specific approaches to dealing with international crimes are needed and should be explored alongside the ICC.

Introduction: The Ideal of a Global Court

I. Introduction

A. "The most serious crimes … must not go unpunished"

The adoption of the Rome Statute by some 120 states in 1998 after many years of negotiation defied expectations. The Rome Statute represented the apex in the struggle against impunity, a sign of true human progress, and a measure to reduce conflict and suffering: an ultimate universal standard in the globalization of human rights. The *Zeitgeist* of the ICC's origins should not be underestimated, nor should the strength of its ambition. At the core of the project of the International Criminal Court was an ideal of a "shared heritage", a "delicate mosaic" that may be "shattered at any time" by "unimaginable atrocities" committed against children, women and men. The Statute Preamble pledges, "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured."[7]

Supporters viewed the establishment of the ICC as a paradigm-shift in global relations, a pinnacle in the fight for the universality of human rights, a triumph of liberalism, and an equalizer between nations. Former Prosecutor Luis Moreno Ocampo referred to an "empire of the law" replacing the "law of the empire."[8] The Court became a powerful symbol that "law would speak to power". In the words of Alvarez: "International lawyers share an appealing evangelical, even messianic agenda. We are on a mission to improve the human condition … [t]his mission requires preferring the international over the national, integration over sovereignty."[9] Zeal for the Court's mission, often "Kantian" or deontological in nature, has translated into a dearth of assessment of its concrete impact on the ground in the scholarship. Now, a decade and a half after its creation, it is time to take stock of the impact of the ICC in situation-countries.

B. Research Question

The primary research question is: what is the impact of the Rome Statute and the International Criminal Court in situation countries (and how should it be assessed).

1. Knowledge Gap on the Court's Impact on the Local Level

[7] Preamble of the Rome Statute of the ICC.
[8] Interview with Luis Moreno Ocampo, New York, November 2014.
[9] Alvarez, Jose E. *Multilateralism and its Discontents*, 11 Eur. J. Int'l L, 393(2000) p. 218, quoting Martti Koskenniemi, *International Law in a Post-Realist Era*, 16 Australian Yearbook Int'l L, 1 1(1995).

In the first 15 years of its existence, relatively little has been written on the impact of the ICC in situation countries. The literature on the International Criminal Court largely focused on the legal dimensions of the Court's work,[10] rather than on the socio-political dimensions. A more limited body of literature exists on the impact of international criminal courts within the societies they were meant to serve. [11]

The ICC's first decade was beset with anxiety that its trajectory to success would be cut short by premature attacks from unfriendly critics. What the Court lacked were friendly critics. Its "friends" consist largely of a microcosm of dedicated supporters, consisting largely of diplomats, activists, non-governmental organizations, international lawyers and judges, and diplomats.[12] Many of those involved in the creation of the ICC went to work for it. Some individuals have been involved in the project for decades. International NGOs invested heavily in the ICC as a cornerstone in the fight against impunity.[13] Few scholars have addressed the impact of the ICC in situation-countries.[14] Instead, much of the literature addresses the Court's investigations and prosecutions; the politics around its case selection; and the political backlash against the Court in the African continent; as well as the Court's apparent reluctance to take on global powers. [15] What is lacking, however, is a methodological assessment of the Rome Statute and the Court's impact in country situations. Stahn advocates for a greater degree of realism and a more *factual*

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[10] Ainley, Kirsten. *The International Criminal Court on Trial.* Cambridge Review of International Affairs 24 (3) (2011) pp. 309-333: "As a centralized, permanent institution for investigating and prosecuting war crimes, the Court has (or should have) two main structural advantages over ad hoc tribunals: cost and efficiency."

[11] Much of the literature that exists on the four country situations at hand will be cited in this thesis. It is worth mentioning that Diane Orentlicher conducted a groundbreaking study on the impact of the ICTY in Serbia and Bosnia, focuses on the Tribunal's impact on victims; its impact on perpetrators; its impact on doing justice and dispelling impunity; its educative function in "addressing the past" or its impact on "truth and acknowledgement"; its impact on the rule of law and domestic war crimes prosecutions; and finally on its impact on reconciliation. Open Society Initiative: Orentlicher, Diane. *That Someone Guilty be Punished: The Impact of the ICTY in Bosnia,* 2008. Open Society Initiative: Orentlicher Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (2008).

[12] Vinjamuri, Leslie and Jack Snyder. *Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice.* Annu. Rev. Polit. Sci. (2004) 7 pp. 345-62. Numerous delegates from the Rome Conference, Preparatory Committee, or Assembly of State Parties joined the Court staff in various capacities, as did representatives of NGOs.

[13] Glasius, Marlies. *The International Criminal Court: A global civil society achievement.* Routledge, London and New York (2006). Hundreds of NGOs form part of the Coalition of the International Criminal Court. Significant lobbies were present at the Rome conference. Dozens of NGOs converge on the Assembly of State Parties each year. NGOs such as Human Rights Watch, Amnesty International and others are fierce court defenders. They have expended considerable resources on support for the Court.

[14] The scholars that have done so, such as Mark Kersten, Phil Clark, Tim Allen and others are cited throughout this thesis. See also Stromseth, Jane. *The International Criminal Court and Justice on the Ground. Ariz. St. L. J.* Vol. 43 (2009), pp. 427.

[15] Robinson, Daryl. *Inescapable Dyads: Why the ICC cannot win.* Leiden Journal of International Law 2015 Vol. 28 (2) pp. 323-347. Cassese, Antonio. *Is the ICC Still Having Teething Problems?* Journal of International Criminal Justice, Volume 4, Issue 3, 1 July 2006, pp. 434-441. Bosco, David. *Rough Justice: The International Criminal Court in a World of Power Politics,* Oxford University Press (2014) p. 181.

understanding of what can be achieved by international justice, while acknowledging the limitations of facts and empirical assessment.[16]

C. Terminology

This thesis forms part of a research project entitled "Post-conflict justice and local ownership", carried out by the Grotius Center for International Legal Studies of Leiden University, and funded by NWO.[17] Impact, defined as a "marked effect or influence", deals with the desired outcomes of the establishment of the Rome Statute and the ICC. While the ICC is not part of the field of development, occasionally it is useful to refer to that field in how it assesses external interventions. The OECD-DAC Glossary of Key Terms in Evaluation and Results-Based Management defines impact as "positive and negative, primary and secondary long-term effects produced by a development intervention, directly or indirectly, intended or unintended."

Scholars and practitioners have tended to focus on a narrower question, which is about the effectiveness of the ICC, which relates to its performance against its mandate. This approach does not question the assumptions underlying the mandate itself. Yuval Shany in his book on the Effectiveness of International Courts argues in favor of a "rational system" or "goal –based approach" to analyzing the effectiveness of international judicial institutions.[18] Shany argues that the mandate providers are key to identifying the overall goals of international courts.[19] Shany suggests that goals can be distinguished between official goals and operative goals.[20] However, Shany cautions "research focusing on mandate providers … cannot ignore the expectations of other constituencies."

This thesis instead will look at the assumptions underlying the mandate of the ICC. Key assumptions are sometimes described in a theory of change, which is defined by the Center of Theory of Change as a "comprehensive description and illustration of how and why a desired change is expected to happen in a particular context". According to the UK development agency DFID, it "is increasingly being used in international development by a wide range of governmental, bilateral and multi-

[16] Stahn, Carsten, Editorial: *Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?* Leiden Journal of International Law, Volume 5, issue 2, (2012) pp. 257-258.
[17] See https://www.nwo.nl/onderzoek-en-resultaten/onderzoeksprojecten/i/23/5023.html. An expert group for the research project was held in 2014: http://www.thehagueinstituteforglobaljustice.org/events/expert-meeting-on-the-impact-and-effectiveness-of-the-international-criminal-court/.
[18] Shany, Yuval. *Assessing the Effectiveness of International Courts,* Oxford University Press 2014 at p. 13.
[19] Ibid. at p. 32.
[20] Ibid. at p. 231.

lateral development agencies, civil society organizations, and research programs intended to support development outcomes."[21]

The core assumptions relate closely to the desired outcomes of an intervention. Impact should go beyond effectiveness to measure a broader range of intended effects. Defining a framework requires first defining the desired outcomes or goals of an intervention, with clear indicators of how to achieve those goals. Impact, can be either direct or indirect and can encompass both intended and unintended effects. The effects explored here are at the country level.

Throughout the Court is referred to as a global justice institution.[22] This is juxtaposed with the local,[23] which is used here mainly refer to the national, rather than the sub-national level, although the impact of the court on victims may be more localized (as was the case in Northern Uganda). At the same time, one must guard against a dichotomy between local and global that is overly simplistic. Donais remarks, "in any post-conflict society, there is never a single coherent set of local owners, and that post-conflict spaces, almost by definition, are characterized far more by diversity and division than by unity."[24] Local ownership is a widely accepted concept in the world of international peace building and development, and is touched on in this thesis.[25]

This thesis will also address various aspects of the global legitimacy of the International Criminal Court, using four types of legitimacy defined by Cassese, i.e. "purposive legitimacy", "universal values legitimacy", "performance legitimacy" and "consent legitimacy."[26] However, the main form of legitimacy that is relevant to this thesis is that linked perceptions of the Court at the local level, meaning its acceptance among victims and affected populations.

II. A Proposed Framework for Assessing the Local Impact of the ICC

A. Methodology: Towards a "Factual Understanding"

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[21] http://www.theoryofchange.org/what-is-theory-of-change/. See Vogel, Isabel. DFID, *Review of the use of "Theory of Change" in International Development*, 2012: http://r4d.dfid.gov.uk/pdf/outputs/mis_spc/DFID_ToC_Review_VogelV7.pdf.

[22] Ocampo, Luis Moreno. *The International Criminal Court: Seeking Global Justice*. 40 Case Western Res. J. International Law 2007-2008, p. 215.

[23] Nesiah, Vasuki. *Local Ownership of Global Governance.* Journal of International Criminal Justice, Volume 14, Issue 4, 1 Sept. (2016) pp. 985-1009. See also Branch, Adam. *International Justice, Local Justice: The International Criminal Court in Northern Uganda.* Dissent (Summer 2004).

[24] Donais, Timothy. *Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peace-building Processes,* Peace & Change, Vol. 34, No. 1 (2009) p. 11.

[25] Ibid. p. 12.

[26] Cassese, Antonio. *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*. Leiden Journal of International Law 25 (2012), p. 492.

The ICC is aware of the importance of assessment, although its focus has been on performance assessment rather than impact assessment.

In 2014, the Assembly of State Parties requested the ICC to "[…] intensify its efforts to develop qualitative and quantitative indicators that would allow the Court to demonstrate better its achievements and needs, as well as allowing States Parties to assess the Court's performance in a more strategic manner".[27] The Court took steps accordingly to identify indicators to assess its performance in four areas, namely whether (1) the Court's proceedings are expeditious, fair and transparent at every stage; (2) the ICC's leadership and management are effective; (c) the ICC ensures adequate security for its work, including protection of those at risk from involvement with the Court; and (4) victims have adequate access to the Court. In November 2016, the Court issued the second of its reports on these performance areas, suggesting specific indicators in each area.[28] All of these indicators are within the span of control of the Court, which is presumably why they were chosen.

Likewise, the Prosecutor has identified indicators related to its performance, which are linked to outputs rather than to its overall impact.[29] These included the numbers of arrest warrants and summons to appear granted, the number of persons with charges confirmed, number of convicted persons, as well as various internal operational and managerial indicators.

However, an attempt to assess the Court's impact mainly according to its performance or efficiency or its internal procedures remains a very narrow exercise, which avoids the larger questions of the Court's effectiveness in relation to broader desired outcomes or its impact. The former focuses on matters within the OTP or the Court's control, thus avoiding "causation complexity."[30] The latter requires the examination of factors external to the Court, as observed by Stahn:

> Performance assessment should not be one-way street or a self-serving exercise of performance validation. It requires a relational account, which takes into account how justice is communicated and perceived. The ICC matters to states or global audiences, but mostly to countries and societies where the crimes are committed.[31]

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[27] ICC-ASP/13/Res.5, 17 December 2014, Annex I, para. 7 (b). This is pursuant to an effort on behalf of the Open Society Justice Initiative to raise attention to the performance indicators of the Court. See OSJI Briefing Paper, Establishing Performance Indicators for the International Criminal Court, Nov. 2015.

[28] ICC, Second Court report on the development of performance indicators for the International Criminal Court, 11 November 2016.

[29] OTP, Strategic Plan 2016-2018, 6 July 2015, para. 104. Kotecha, Birju. *The ICC's Office of the Prosecutor and the Limits of Performance Indicators,* JICL Vol. 15 issue 3 (1July 2007) pp. 543-565.

[30] Kotecha, Birju. *The ICC's Office of the Prosecutor and the Limits of Performance Indicators,* JICL Vol. 15 issue 3 (1July 2007) pp. 543-565.

[31] Stahn Carsten. Human Rights and International Criminal Law Forum: http: //iccforum.com/performance. (2017).

The definition of desired outcomes therefore has to go beyond issues related to performance, to encompass broader goals that the Court was intended to accomplish. These could range from often-cited goals, such as deterrence and prevention, to goals relating to strengthening domestic legal systems, often referred to as complementarity; reducing impunity through more domestic trials or fewer amnesties; and contributing to repairing victims. It is considered increasingly important to be able to demonstrate desired outcomes of international interventions using empirical data. As noted by Scherrer: "An increase in demand for effectiveness and measurable results in the peace-building field has raised awareness of the need to assess impact, but assessing impact in complex post-conflict settings has been considered especially difficult."[32]

This thesis borrows from the fields of transitional justice, rule of law and development, in regard to identifying indicators to assess the impact of the International Criminal Court. In the fields of transitional justice and rule of law, the main sphere of intervention is at the domestic level: therefore, these fields offer valuable tools that can assist in building a framework for assessment. The fields of transitional justice and rule of law have grappled with the empirical standards by which to assess justice interventions.[33] Empirical work seeks to assess the impact of various transitional justice mechanisms against their assumptions or goals.[34] Similarly, in the field of rule of law and development, assessment along pre-defined indicators, using empirical data, is now considered critical to the effectiveness of interventions: as demonstrated by the Sustainable Development Goals of 2015.[35] Likewise, in the human rights and rule of law fields there has been a strong push towards the development of indicators to measure progress, many of which are quantitative in nature.[36]

Formulating "assumptions" is also a crucial element guiding international interventions. As mentioned, sometimes these assumptions are combined in a theory of change.[37] This thesis takes a theory-based approach to impact

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[32] Scherrer, Vincenza. *Measuring the Impact of Peacebuilding Interventions on Rule of Law and Security Institutions*. The Geneva Centre for the Democratic Control of Armed Forces (2012), p. 11.
[33] This debate is driven partially by development actors responsible for providing international aid, and who are used to working with tools for program "design, measurement and evaluation" such as logical frameworks. See for instance Duggan, Colleen. *"Show me your impact": Challenges and Prospects for Evaluating Transitional Justice.* International Development Research Center Evaluation Unit, Paper prepared for the Annual Meeting of the Canadian Political Science Association, Ottawa, ON 29 May 2009.
[34] See for instance Kathryn Sikkink, *The Justice Cascade*, W.W. Norton & Company (2011).
[35] SDG 16 seeks to promote peaceful and inclusive societies for sustainable development, the provision of access to justice for all and building effective, accountable institutions at all levels. SDG 16 seeks to measure complex notions of peace and justice along quantitative indicators such as numbers of intentional homicides (SDG 16.1.1); conflict-related deaths (SDG 16.1.2); victims of violence (16.1.3); under-reporting of violence (SDG 16.3.1) and unsentenced prisoners (SDG 16.3.2).
[36] Rosga, AnnJanette and Margaret Satterthwaie, *The Trust in Indicators: Measuring Human Rights,* Berkeley Journal of International Law Vol. 27 Issue 2 (2009). See also OSJI Briefing Paper, Establishing Performance Indicators for the International Criminal Court, Nov. 2015.
[37] Vogel, Isabel. DFID, *Review of the use of "Theory of Change" in International Development,* 2012: http://r4d.dfid.gov.uk/pdf/outputs/mis_spc/DFID_ToC_Review_VogelV7.pdf.

assessment, testing the assumptions that are explicit (or implicit) in the design of the ICC. By testing the "results-chain" of the ICC, beyond its outputs (investigations and trials) to its outcomes, the thesis seeks to learn whether the ICC is having its intended effects.

In the case of the ICC, the main assumptions that underpin its establishment can be distilled from the Statute itself, but also from examining the resolutions of the Assembly of State Parties, the Court's policy documents, and the statements of senior officials. The baseline for this study is the ICC's establishment in 2002. This thesis seeks to trace developments on the ground since 2002, based largely on long-term observation in the field as a practitioner, combined with research and key stakeholder interviews.

The drive for effectiveness has prompted much debate on what are the empirical standards by which to assess justice interventions.[38] Evaluators bemoan the fact that much of the evidence is anecdotal or inconclusive. A multidisciplinary, qualitative approach is required. Social science methodologies, including key stakeholder interviews or perception surveys, are useful in measuring impact of interventions. Information that can be used for assessments can include literature and publication searches; surveys and opinion polls; quantitative data; and key stakeholder interviews. A combination of these methodologies allows researchers to go beyond the anecdotal, and to start identifying trends.

This thesis seeks to put forward a framework with pre-defined indicators. These can be cast into two categories: normative or societal. First, this thesis will seek to assess the normative impact of the ICC on domestic legal systems, and on political processes such as peace processes. It will also seek to assess the societal impact on the rights of persons who have fallen victim to those crimes and the perceptions of affected populations. In each of these domains, different indicators will be used to measure progress, apart from the last of these, which will be measured by trends.

Measuring the impact of the Court will invariably raise questions of causality, and of attribution. The normative impact of Rome Statute norms on domestic systems or on peace processes may be easier to attribute to the Rome Statute or the Court itself through process tracing. However, attributing impact is more complex when dealing with societal impact in the form of impact on victims or perceptions. Where possible, the latter are supplemented by quantitative data such as opinion polls, but much more quantitative research is needed. On societal experience in particular, this thesis does not go beyond identifying trends or emerging experiences.

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[38]See for instance Duggan, Colleen. *"Show me your impact": Challenges and Prospects for Evaluating Transitional Justice.* International Development Research Center Evaluation Unit, Paper prepared for the Annual Meeting of the Canadian Political Science Association, Ottawa, ON 29 May 2009. See for instance the University of Ottawa Centre for International Policy Studies Working Paper, *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners*, by Oskar Thomas, James Ron and Ronald Paris, April 2008.

Societal impact may influence legitimacy, defined as public support, which is increasingly viewed as important for international criminal justice.[39] Public opinion or support is subjective rather than objective. However, public trust is important to the legitimacy of legal institutions. Different kinds of survey instruments measure trust in public institutions, including courts. Again, more research is needed in this regard, in terms of opinion surveys.

Finally, impact may be generated by the existence of the Rome Statute itself; by the actions of the Office of the Prosecutor, which can be viewed as the engine room of the Court; or by the Court itself, through its decisions and judgments. These will be differentiated in as far as possible throughout the thesis.

1. Comparative analysis of country experiences: country selection

This analysis rests largely on a comparative analysis of country experiences. Much of the current debate on the impact of the ICC has centered on the Court's role in Africa.[40] This thesis seeks to go beyond this debate, and to take a wider view of the Court's impact and performance as a global justice mechanism. Four country experiences form the basis of this work, including two preliminary examination countries (Colombia and Afghanistan) and two investigations, including a Security Council referral and a self-referral (Libya and Uganda). Kenya is also included where appropriate, as one field visit was undertaken there in February 2014.

The country experiences were chosen based on professional experience in those countries, but this diverse selection also serves to give a wider view of the global impact of the ICC than is currently addressed in much of the literature. The contexts are all highly diverse in political, societal, economic and religious terms, and allow for a fuller discussion of the Court's global impact. For example, the World Justice Project's Rule of Law Index seeks to measure rule of law adherence in 113 countries based on 110,000 household and 3000 expert surveys. The countries examined all rank differently on these rule of law indicators. In 2017-2018, Colombia ranked 72 with a score of 0.50, whereas Uganda ranked 104 with a score of 0.40 and Afghanistan 111th with a score of 0.34. Scores on Libya are not available.[41]

This study discusses country experiences on a thematic basis:

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[39] Voeten, Erik. *Public Opinion and the Legitimacy of International Courts*, 14 Theoretical Inquiries in Law (2013). See also OSJI Briefing Paper, Establishing Performance Indicators for the International Criminal Court, Nov. 2015. OSJI argues in favor of "impact indicators" that seek to assess the Courts' perceived legitimacy and credibility.

[40] Nkansah, Lydia. *International Criminal Court in the Trenches of Africa.* African Journal of International Criminal Justice, Vol. 1 (2014) p. 1.

[41] The World Justice Index uses 8 indicators, including Constraint on Government Powers, Open Government, Order and Security, Civil Justice, Absence of Corruption, Fundamental Rights, Regulatory Enforcement, and Criminal Justice. On criminal justice, Colombia scores 0.34 or 92 out of 113, Uganda scores 0.34 or 94 out of 113, and Afghanistan scores 0.28 or 108 out of 113.

- In the discussions on systemic effect, Colombia, Kenya, Uganda, Libya and Afghanistan are all discussed.
- The chapter on transformative effect focuses mostly on the two countries where negotiations have taken place in the shadow of the Rome Statute: Colombia and Uganda, although the discussion on amnesties includes Afghanistan and Libya.
- The chapter on reparative effect focuses mostly on cases that proceeded to the investigation and victim participation stages, including Uganda and Kenya.
- The Chapter on demonstration effect discusses Uganda, Libya, Afghanistan and Colombia.

2. Data collection

In addition to the long-term observation described in the personal note, two methods of data collection were chosen, including (a) literature and document review; (b) key stakeholder interviews used to verify and supplement the conclusions. The information gathered for this thesis is mainly qualitative in nature.

The thesis draws on a wide range of resources. As a main source, it references academic literature and reports of policy institutions, think tanks, NGOs and media. While the Court's interventions in Uganda and Colombia have generated significant writing and analysis, including by experts with extensive knowledge of the local context, less academic literature exists on the situations in Afghanistan and Libya. As this thesis seeks to follow ground-level impact in recent years, it also draws heavily on the reports of policy institutes and think tanks, as well as NGOS and media reports, as these tend to produce "real-time" information on the situation on the ground.

In order to validate my knowledge gathered as part of my professional background, I conducted study trips to Colombia (November 2013, May 2014 and Nov. 2014) Afghanistan (November 2013 (overlapping with the first ICC OTP visit) and April 2014), and Uganda and Kenya (February 2014), to gather additional data for this thesis. I could not visit Libya since the deterioration of the security situation there although I continued to work for UNSMIL until Feb. 2015. It was not possible to conduct structured and comprehensive interviews with the very limited travel funds available to the project, which in fact only covered my travel to Kenya and Uganda.

I conducted interviews with key stakeholders in three of the four situation-countries (Uganda, Colombia, and Afghanistan) and Kenya, using semi-structured interviews, which were transcribed by hand. I also interviewed the former Prosecutor and some ICC staff. During these interviews I clearly identified myself as a researcher for the Grotius Center for International Legal Studies that I was conducting the

interview for PhD research. In some cases, interviewees asked not to be identified by name, due to the sensitivity of the subject matter. In most cases, they are identified by function and the names have been deleted to allow for personal data protection, except where the interview was with public persons who knew their comments might be attributed to them in the research. Direct quotes are usually avoided, since a number of the interviews took place through translation.

The persons interviewed all fall into the category of informed opinion-makers in that particular context. The interviewees fell into the following categories: Court staff, legal professionals, diplomats, UN officials, NGO staff, civil society leaders, Parliamentarians or other politicians, and victims. A full list of the names of interviewees is on file with the author. A list without names is found in the bibliography. [42] The questioning in the interviews followed a semi-structured format, always focusing on one of the four effects as relevant in that situation. The data gathered through the interviews were used in the following ways:

- Interviews with legal professionals assisted to inform the Chapter on systemic effect, although for its conclusions this Chapter relies mainly on documentary sources.
- Interviews with persons involved in the negotiations in Uganda and Colombia were used in the Chapter on transformative effect, although this Chapter too relies mainly on documentary and academic sources.
- Interviews with NGOs, victims, and Court staff were used to supplement the data on reparative effect in Chapter 5. Again, the conclusions in this Chapter rely mainly on documentary sources.
- Interviews with victims, NGOs and other stakeholders, such as parliamentarians, were instrumental in identifying trends in perceptions and form the basis for some of the conclusions in this Chapter. Nonetheless, the Chapter is clear that this data should not be viewed as representative of the general population, but only as indicative of trends.

The conclusions in this thesis are preliminary, and would benefit from more fieldwork. The case studies are limited and the evidence is not cross-compared with other country situations such as DRC, CAR, Cote d'Ivoire, and Sudan. The Court has

[42] This data collection took place prior to new rules being introduced at Leiden University in 2016. These rules require the formulation of a data management plan, in order to allow for open research data, i.e. data that is FAIR (findable, accessible, interoperable, re-usable). The new rules require that the data could be accessed, in as far as possible, by other researchers. These new rules are intended to phase in by 2020. However, since my data was collected in 2013-2014, it did not yet comply with these guidelines. Most notably, interviewees were not asked whether the data could be shared with other researchers, and this creates an ethical barrier to allowing for data to be shared. For the same reasons, the data could not be uploaded to a university server. At the same time, the handwritten data will be scanned and stored on file with the author in PDF files for safekeeping. Copies of the files will be preserved on a USB for 10 years, with a backup saved on iCloud. Only the author will be able to access these files.

only been functioning for 15 years and is constantly evolving. Nonetheless, some preliminary conclusions on the impact of the Court are contained in the last chapter.

B. Identifying the ICC Impact Assessment Framework (Chapter 1)

The Rome Statute Preamble states that the establishment of the ICC seeks to "contribute to ending impunity by conducting fair investigations and trials for the worst crimes, thereby contributing to their prevention." [43]

The presumed overall goal or desired outcome of the Statute as stated in the Preamble is ending impunity of the world's worst crimes, thus contributing to their prevention. Essentially, "the fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression."[44] At the time of the creation of the Court, this assumption was a matter of "faith" than based on empirical evidence or "fact".[45]

Apart from this overall desired outcome, other goals are more difficult to define and have suffered from inflated expectations. The website of the Coalition for the International Criminal Court identifies the goal of the ICC as "100% of humanity protected by the rule of law. Justice, deterrence of crime and peace."[46] Damaška has noted the discussion on goals of international criminal justice is "in disarray" and hampers the assessment of their performance.[47] The list of goals, he says, suffers from "overabundance" and "tensions" (such as peace versus justice, historical record and collective versus individual responsibility; the rights of the accused versus the rights of victims; prosecuting architects of crimes versus direct perpetrators; etc.).[48] It also suffers from the absence of a ranking order.[49] All this gives credence to the view that the field operates by "more of a faith-based

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[43] Impunity has been defined by the United Nations as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims." United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, 2005, E/CN.4/2005/102/Add.1 at Art. 1.

[44] Orentlicher, Diane. *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime.* The Yale Law Journal, Vol. 100, No. 8 (1991) at p.2542.

[45] Alvarez, Jose E. *Multilateralism and its Discontents,* 11 Eur. J. Int'l L, 393(2000) at 218, quoting Martti Koskenniemi, *International Law in a Post-Realist Era*, 16 Australian Yearbook Int'l L, 1 1(1995): "International lawyers share an appealing evangelical, even messianic agenda. We are on a mission to improve the human condition. For many, perhaps most of us, this mission requires preferring the international "over the national, integration over sovereignty." Multilateralism is our shared secular religion.

[46] http://www.coalitionfortheicc.org/fight/global-justice-atrocities.

[47] Damaška, Mirjan. *What is the Point of International Criminal Justice?* Chicago-Kent Law Review, Vol. 83: 239 (2008) p. 330.

[48] Ibid. p. 330-335.

[49] Ibid. p. 339.

conviction than a conclusion based on sober analyses of the legalities of the matter and of the policy dilemmas."[50] Stahn refers to a "fundamental uncertainty about the actual goals and the focus of the Court. The fundamental question what the Court can and should realistically achieved is still unresolved."[51]

Fifteen years after the establishment of the Court, it is worth examining whether violence has reduced in conflicts around the world, including in situation-countries.[52] This question is discussed in Chapter 1. However, there is no broad agreement on other presumed effects of the Rome Statute, or how these ought to be assessed.[53]

Chapter 1 argues that this task is confounded by the fact that uncertainty still prevails about the identity of the Court. Should the Court be primarily considered a criminal court analogous with domestic criminal justice mechanisms; is it a transitional justice instrument; or should it contribute to promoting peace?

While uncertainty persists on some of these questions, in the years since it was established, the Court's founders and supporters increasingly recognize that the main impact of the ICC goes beyond trials in The Hague. Most of the Court's effects are felt on the domestic level, or among the constituencies for which it was ostensibly created. Defining the ICC's underlying assumptions, or intended effects, will therefore assist in developing an assessment framework.

Chapter 1 argues that the main assumption underlying the Court is that it will contribute to ending impunity, through building a culture of accountability for the world's worst crimes which will help to prevent those crimes in the future. Whether this is empirically borne out is not yet certain.

Linked to this main assumption, this thesis identifies four intended effects of the Rome Statute and ICC, including systemic effect on domestic legal systems; transformative effect on peace processes; reparative effect on victims; and demonstration effect, relating to its expressive function. As will be argued in Chapter 1, these areas of impact are reflected in the Rome Statute itself, or in the expressed intentions of the Assembly of States Parties or senior officials of the Court.

C. Applying the ICC Impact Assessment Framework (Chapters 2-6)

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[50] Wiesburd, A. Mark, *International Law and the Problem of Evil,* 34 Vand. J. Transnational Law, Vol. 34 no. 2 (March 2001) p. 230.
[51] Stahn, Carsten. *How is the Water? Light and Shadow in the First Years of the Court,* Criminal Law Forum 22:175-197 (2011), p. 187.
[52] This will be further elaborated in Chapter 1.
[53] Ainley, Kirsten. *The International Criminal Court on Trial*. Cambridge Review of International Affairs 24 (3) (2011) pp. 309-333.

"Systemic effect" refers to the impact of the Rome Statute and the ICC on domestic legal systems. Does the ICC play a role in domestic law reform? The systemic effect of the Rome Statute is presumed to be mainly through the application of the complementarity framework. Chapter 2 will first assess the framework of complementarity, in order to assess its systemic effect.

The Court's approach to complementarity is producing an "unintended effect", in that States take measures mainly to avoid an intervention by the Court. Chapter 3 further expands on this systemic effect, and argues that impact of the Rome Statute on domestic legal systems is best described as "internalization". Internalization is the process whereby states demonstrate compliance with international law.[54] Indicators of systemic effect, in the form of internalization, include:

- Implementation of domestic laws covering the Rome Statute crimes
- Adoption of other legislation that includes Rome Statute norms (such as victim participation)
- The establishment of new institutions to investigate or prosecute Rome Statute crimes
- (Genuine) national proceedings for Rome Statute crimes.

Transformative effect deals with the impact of the Rome Statute and the Court on processes such as peace negotiations, in order to contribute to ending impunity. Chapter 4 will evaluate the impact of the Rome Statute on peace negotiations in Colombia and Uganda. Indicators of transformative effect include:

- Impact on the content of peace negotiations, including the scope of prosecutions or the nature of punishments
- Impact of ICC on the process of peace negotiations, for instance through the inclusion of the views of victims
- Fewer amnesties for Rome Statute crimes in countries under the Court's jurisdiction.

Reparative effect refers to the impact of the Court on making justice available to victims. Chapter 5 will first assess the legal framework for victims and will then assess the reparative effects of the Court in situations that progressed to investigation, Uganda and Kenya. Indicators of reparative effects include:

- Whether victims are able to meaningfully participate in ICC proceedings
- Empowerment of victims as actors that are able to influence the Court's strategy
- Whether victims receive actual assistance or reparations, either

[54] Koh, Harold Hongju. *Why Do Nations Obey International Law?* 106 Yale L. J. (1997) 2599, 2615-34

through the Court or through the Trust Fund for Victims.

Systemic, transformative, and reparative effects are all part of the normative impact of the Rome Statute and the Court. Demonstration effect, in Chapter 6, deals with the societal impact of Court on the affected communities. Different elements are important to demonstration effect, including:

- Whether the Court is perceived as impartial in a specific context
- Whether the ICC's interventions are perceived as relevant or responsive to local communities and their justice struggles
- Whether the Court is viewed as a legitimate justice institution
- Whether it is perceived as independent
- Whether the Court is viewed as prolonging conflict.

In fields such as peace building and development, it is widely recognized that bottom-up approaches are considered a necessary complement to top-down interventions that tend to focus on institutions, [55] and are sometimes deemed as more effective. According to Amartya Sen, the very concept of justice should relate to the lives of ordinary people: "the focus on actual lives in the assessment of justice has many far-reaching implications, for the nature and reach of the idea of justice."[56] Nesiah remarks: "local ownership discourse has had a long shelf life in development, environment and other zones of global governance."[57] In relation to the ICC, which is mostly a top-down institution, the concept of local ownership surfaces most in discussions on outreach, without acknowledging the intricacies of the views of local populations on issues such as impartiality, relevance, and legitimacy. The Chapter on demonstration effect seeks to identify trends across different situations. Negative perceptions of the ICC may be an unintended effect, but can serve to hinder the overall impact of the Court. Finally, a conclusion in Chapter 7 reflects on any general observations that can be drawn from the four areas of effects.

III. Setting the Scene: The Global Context

> *Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must*. - Thucydides
>
> *The Court is not perfect, but it is working, is delivering, and has matured*- Silvia Fernandez de Gurmendi[58]

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[55] De Hoon, Marieke. *The Future of the International Criminal Court: On Critique, Legalism, and Strengthening the ICC's Legitimacy*. ICL Rev. Vol. 17 Issue 4 (2017), pp. 591-614.
[56] Sen, Amartya. *The Idea of Justice*, Penguin Books (2009), Introduction.
[57] Nesiah, Vasuki. *Local Ownership of Global Governance.* Journal of International Criminal Justice, Volume 14, Issue 4, 1 Sept. (2016) pp. 985-1009.
[58] Speech by Silvia Fernandez de Gurmendi at Nuremberg Forum 17, *10 Years after the Nuremberg Declaration on Peace and Justice "The Fight Against Impunity at a Crossroad"*, 20-21 October 2017.

These are troubled times for the International Criminal Court. In 2016, three states threatened to withdraw from the Rome Statute, including long-standing supporter South Africa, although ultimately only Burundi has withdrawn. Whiting refers to a legitimacy deficit or "legitimacy drag" of the ICC,[59] and that it is "losing the perceptions game."[60] Nesiah states that the ICC is "facing a crisis of legitimacy in the localities where it was working the most."[61] Mutua says that the international criminal law and human rights communities "are prone to narratives of optimism but blind to sins of conception", pointing to failure of leadership; defects of conception such as the role of the Security Council; and politicization, which led to impunity for Kenyatta.[62]

Many supporters blame the former Prosecutor for the current malaise surrounding the Court. In October 2017, a series of articles appeared about Luis Moreno Ocampo, based on 40,000 documents retrieved from his email. These reports contain various serious allegations including that the former Prosecutor had maintained offshore bank accounts without declaring these; had colluded with a millionaire in Libya to give advice to those loyal to Haftar on how to avoid the ICC; had sought to have the case against Uhuru Kenyatta withdrawn after he left the Court. Court staff members are accused of having shared confidential information with him, [63] including the Prosecutor herself.[64] While these allegations are damaging and likely to affect perceptions of the International Criminal Court, the conduct of the former Prosecutor is mostly beyond the scope of this thesis.

A. The "Purposive" Legitimacy of the ICC

Cassese in his writing referred to "purposive legitimacy", i.e. the fact that an international tribunal pursues general goals that are broadly shared and approved by the institution's constituency."[65] The "purposive" legitimacy of the ICC comes from the fact that it seeks to prohibit the world's worst crimes, namely war crimes, crimes against humanity, and genocide.[66]

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[59] Subrahmanyam, David. *Whiting offers views on the International Criminal Court's Impact, 15* Oct. 2012, Harvard Law Today.
[60] Fisher, Kirsten. *Is the ICC Losing the Perceptions Game?* International Law and Justice Log, 23 May 2013.
[61] Nesiah, Vasuki. *Local Ownership of Global Governance.* Journal of International Criminal Justice, Volume 14, Issue 4, 1 Sept. (2016) pp. 985-1009.
[62] Mutua, Makau. *The International Criminal Court: Promise and Politics*, 109 Am. Soc. Int'l Law roc. 269 (2015).
[63] Bergsmo, Morten, Wolfgang Kaleck, Sam Muller and William Wiley. *A Prosecutor Falls, Time for the Court to Rise.* Torkel Opsahl Academic E-Publisher, FICHL Policy Brief Series No. 86 (2017).
[64] Spiegel Online, Becker, Sven and Dietmar Pieper, *The Ocampo Affair: Current ICC Chief Prosecutor Weighed Down by Predecessor*, 17 Oct. 2017.
[65] Cassese, Antonio. *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*. Leiden Journal of International Law (2012), 25 p. 492.
[66] This thesis will not deal with debates surrounding the crime of aggression, which only came into force in December 2017.

The purposive legitimacy of the ICC is evidenced in many developments since the Second World War, including the conclusion of international treaties prohibiting these crimes in addition to the Rome Statute; in the large number of signatories to the Rome Statute; and the statements of States that are not signatory or that have not ratified;[67] the positions of regional organizations such as the EU or AU;[68] on the prohibition of these crimes, including the rulings of regional human rights courts; and the increased measures taken for victims of these crimes, including truth-seeking and reparations. Throughout the thesis, this purposive legitimacy is presumed due to an increased acceptance of the norms in the Rome Statute, i.e. that the world's worst crimes should be prohibited.

On the other hand, the general "purposive" legitimacy of the Court is questioned much more in the specifics of particular country situations. This is particularly the case if the Court's actions seem inconsistent with or do not overlap with local justice priorities. This is particularly the case because the ICC does not have one "defined community" to which it is responsible.[69]

B. The "Universal Values" Legitimacy of the ICC

The International Criminal Court is based on the notion of one identity shared amongst all of humanity.[70] It is a universal project, based on what Cassese termed "universal values legitimacy", peremptory norms of international law (*jus cogens*) that are shared by the international community as a whole.[71] The violation of the rights of one part of this corpus is seen as the violation against all. The rights of one become the rights of all (the *civitas maxima*) and those who commit the violations are *hostis humanis* or enemies of humankind. The Court appropriates the plight of the "voiceless" victims, no matter which conflict is under scrutiny. At the same time, the interests of the international community and those of the immediate victims of the Court can, and do come into conflict in concrete situations, as will be discussed further in Chapters 4 and 5.

This decontextualized, abstract approach is further reflected in forms of legalism often displayed by supporters of the Court. Shklar defines legalism as "the ethnical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of rights and duties determined by rules."[72] Legalism is

[67] See for instance the recent statement by Russia, which states that it "consistently advocates that people guilty of grave offences must be held accountable": Dearden, Lizzie. *Russia to Withdraw from ICC amid calls for Syrian air strikes investigation,* The Independent, 16 Nov. 2016.
[68] For instance, the AU Constitutive Act rejects impunity in Article 4.
[69] DeGuzman, Margaret. *Choosing to Prosecute: Expressive Selection at the International Criminal Court*. 33 Michigan Journal of International Law (2012) p. 276/
[70] Koller, David. *The Faith of the International Criminal Lawyer*. International Law and Politics, Vol. 40 (2008) 1019 p. 1050.
[71] Cassese, Antonio. *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*. Leiden Journal of International Law (2012), 25 p. 492.
[72] Shklar, Judith. *Legalism: Law, Morals and Political Trials.* Harvard University Press (1964) p. 1.

reflected in the assertion that the ICC is an entirely apolitical institution that simply "follows the evidence", as a forensic and non-political exercise, leading to inevitable and indisputable conclusions based on the law.[73] According to Shklar, "The urge to draw a clear line between law and non-law has led to the constructing of ever more refined and rigid systems of formal definitions. This procedure has served to isolate law from the political, social and historical context in which it exists."[74] It ignores the fact that law itself is a product of political processes.[75] Nonetheless, many supporters of the Court seek its legitimacy through legalism.[76] This is in spite of the fact that the basic goals of the Court are not agreed.

The elevation of the Court as an institution above all forms of political considerations does not encourage a "consequentialist" assessment of its impact, or it may not encourage assessment at all.[77] Scholars writing about the Court often are remote from the communities where the Court is the most active. While a few scholars conducted empirical studies in situation-countries, but these dealt mainly with attitudinal responses to the Court.[78]

C. The "Performance" Legitimacy of the ICC: Facts and Figures

Discussions on the impact of the ICC often center on what Cassese has called "performance" legitimacy, i.e. the Court's record on its core mandate of investigations and prosecutions.[79] However, assessing the impact of the Court

[73] Some scholars call the Court a project of "constructivism", i.e. "efforts to change the prevailing pattern of social behavior should begin with forceful advocacy for generalized rules embodied in principled institutions such as courts." Snyder, Jack and Leslie Vinjamuri. *Principle and Pragmatism in Strategies of International Justice,* International Security, Vol. 28 No. 3 (Winter 2003/04), p. 10.
[74] Shklar, Judith. *Legalism: Law, Morals and Political Trials*. Harvard University Press (1964) p. 2-3.
[75] De Hoon, Marieke. *The Future of the International Criminal Court: On Critique, Legalism, and Strengthening the ICC's Legitimacy*. ICL Rev. Vol. 17 Issue 4 (2017), pp. 591-614: "Law reflects the outcome of a political struggle and thus is the product of power, and as such may embody and therefore reinforce structural inequalities, power relations and interests."
[76] Hansen, Thomas Obel. *The International Criminal Court and Legitimacy of Exercise* in Law and Legitimacy (Per Andersen et al. (eds)), DJOEF Publishers (2015).
[77] Koller, David. *The Faith of the International Criminal Lawyer*, International Law and Politics, Vol 40 (2008) p. 1019.
[78] See for instance Human Rights Center, University of California at Berkeley, Payson Center for International Development, Tulane University, International Center for Transitional Justice, *Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Republic of Congo*, August 2008; "Human Rights Center, University of California at Berkeley. *Building Peace Seeking Justice: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Central African Republic,* August 2010. A number of other surveys are discussed in detail in Chapter 6.
[79] Cassese, Antonio. The *Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*. Leiden Journal of International Law (2012), 25 p. 493. This concept borrows from an article that I wrote on the Special Tribunal for Lebanon: M. Wierda, H. Nassar, and L. Maalouf, *Early Reflections on Local perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*, (2007) 5 JICJ p. 1065.

merely in terms of "facts and figures" is misleading, as it does not take into account impact in situation-countries.[80]

The OTP Strategic Plans submitted over the years accurately predicted a low number of investigations and trials, to offset expectations that its performance in this regard would be compared to other Tribunals. In terms of numbers of investigations and prosecutions, the ICC indeed has a poorer record than any of the other *ad hoc* Tribunals.[81] As of February 2018, the Court had opened 11 investigations, conducted 25 cases, issued 9 convictions (including contempt cases) and 1 acquittal, reparation orders, and has 4 ongoing trials. Some 14,000 victims had participated in the proceedings.[82]

In its first sixteen years, the ICC brought charges against 40 persons. Thirty-two are under arrest warrants, and 8 under summonses to appear. By way of contrast, in roughly twenty years, ICTY concluded proceedings against 141 accused and 20 are still pending. Eighteen were acquitted. ICTR completed 75 cases with 12 acquitted. The Special Court for Sierra Leone, which was created at the same time as the ICC, completed cases against 9 individuals over the same time span, including appeals. None was acquitted.

As of May 2018, the ICC had issued four convictions: Thomas Lubanga Diyolo, convicted on 14 March 2012 for the very narrow charges of child recruitment; Germain Katanga, convicted on 7 March 2014; Jean-Pierre Bemba, convicted on 21 March 2016 for war crimes and crimes against humanity, including sexual violence committed in CAR; and Ahmed al-Farqi al-Mahdi, convicted on 27 September 2016, pursuant to a guilty plea, for the war crime of attacking religious and historical buildings in Timbuktu. The Court faced many problems during these trials. In *Lubanga,* the first witness famously recanted his testimony, and the Trial Chamber heavily criticized the Prosecution for its reliance on intermediaries.[83] *Katanga* was acquitted of all the original charges leveled against him, and was only convicted because a majority of the Trial Chamber re-characterized the crime.[84] Four other accused from DRC were convicted for offences against the administration of justice. On 8 June 2018, in an epic setback, the Appeals Chamber acquitted Jean-Pierre Bemba, deciding that the Trial Chamber had "failed to appreciate limitations" that

[80] Interview with Luis Moreno Ocampo, New York, November 2013.
[81] Davenport, David. *International Criminal Court: 12 Years, $1 Billion, 2 Convictions.* Forbes 21 March 2014: "You don't have t o be a legal expert to figure that the preventive effect of convicting 2 warlords in 12 years doesn't exactly leave international war criminals shaking in their boots."
[82] Secretary General, Message for the Event Marking the 20th Year Anniversary of the International Criminal Court, 15 Feb. 2018.
[83] *Prosecutor versus Thomas Lubanga Dyilo*, Redacted Decision on the Defence Application Seeking a Permanent Stay of the Proceedings", Case No. ICC-01/04-01/06, 7 March 2011.
[84] *Prosecutor versus Germain Katanga,* Judgement, Minority Opinion of Judge Christine van den Wyngaert, ICC-01/04-01/07-3436-AnxI , 7 March 2014, paras. 138-139, 140.

Bemba faced in his role as remote commander to MLC troops deployed to the Central African Republic, in the investigation and prosecution of their crimes.[85]

The high-profile actions of the Court against African heads of state, including Omar Al-Bashir, Qadhafi, Gbagbo and Kenyatta, have given rise to more difficulties for the Court. First, a Pre-Trial Chamber dismissed genocide charges against Sudanese President Omar Al-Bashir, even though ICC Prosecutor compared the situation in the camps in Darfur to the concentration camps of Nazi Germany.[86] Charges against Qadhafi were brought within 3 months, but Qadhafi was killed shortly afterwards. In the case of Laurent Gbagbo, the confirmation of charges was delayed so that the Prosecutor could expand the charges against him, which were underpinned by "apparently insufficient" evidence.[87] In the Court's most high-profile setback, on 5 Dec. 2014, the Prosecutor announced the withdrawal of charges against Uhuru Kenyatta.[88] One witness had to be withdrawn from the case after admitting that he had provided false evidence, and another had indicated he was no longer willing to testify, so that there was insufficient evidence to proceed to trial. This development raises the difficult question of why the Prosecution chose to proceed on thin evidence in such a high profile case.[89] Witness interference has accompanied almost every case brought at the ICC.[90]

If the Court is to be judged solely by facts and figures relating to its investigations and prosecutions, its record is poor. For instance, the OTP has a poor general record

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[85] Wakabi, Wairagala. *Bemba Acquitted of War Crimes at the ICC.* International Justice Monitor, 8 June 2018.

[86] Mamdani, Mahmood. *Beware Human Rights Fundamentalism*, Mail and Guardian Opinion, 20 March 2009.

[87] The Trial Chamber observed that of 45 incidents with which Gbagbo was charged, "the majority of them are proven solely with anonymous hearsay from NGO Reports, United Nations reports and press articles. As explained above, the Chamber is unable to attribute much probative value to these materials." *Prosecutor vs Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02-11-01/11m 3 June 2013 at para 36.

[88] Simmons, Marlies and Jeffrey Gettleman, *International Court Ends Case Against Kenyan President in Election Unrest: Uhuru Kenyatta Faced Allegations of Crimes Against Humanity*, International New York Times, 5 Dec. 2014.

[89] The withdrawal also came at a very unfortunate time for the Court in terms of the immediate aftermath of the 12th ASP in which supporters of the Court, both States and NGOs, fought hard to preserve the ability of the Court to proceed against Kenyatta. While an amendment to Article 27, which allows the ICC to prosecute sitting government officials, was averted because it was raised too late, amendments were made to the Rules of Procedure and Evidence to as to excuse the accused from attending trial. These included Rules 100 (place of proceedings); Rule 68 (prior recorded testimony); and Rules 134*bis* (presence through the use of video technology and Rule 134*ter* (excusal from presence at trial), and Rule 34*quarter* (excusal from presence at trail due to extraordinary public duties).

[90] For a narrative and journalistic account of many of the trials, see Lingsma, Tjitske, *All Rise: The High Ambitions of the ICC and the Harsh Reality.* Ipso Facto, Utrecht (2017). The ICC ha faced major challenges in providing adequate protection and support to witnesses. Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3 (1 July 2017) pp. 567–591.

on confirmation of charges.[91] Human Rights Watch has argued, "the ICC's investigations and prosecutions have failed to demonstrate coherent and effective strategies for delivering meaningful justice to affected communities."[92]

One factor that accounts for these low numbers is the Court's approach to "focused investigations", under which investigative teams were kept small and rotated between different situations and cases.[93] The number of incidents investigated per case was kept purposely small.[94] However, the investigative teams of the ICC were criticized for lack of seniority and experience.[95] This resulted in "active investigations which are understaffed and investigations in hibernation where the capacity is lacking to maintain contact with the witnesses and preserve their cooperation."[96] During the early phases of the investigation, time in the field was often minimized.[97] Decisions on how to structure investigations sought to conserve resources but led to poor results in court.[98]

Certainly, compared to other tribunals, the Court faces the challenge of investigating during ongoing conflicts. Proponents of real-time prosecutions argue that "memories fade over time, witnesses move or pass away, documentary or physical evidence can be lost, and suspects may no longer be available for prosecution."[99] Conversely, Whiting argues: "in war crimes cases delay can often be essential for allowing the truth to emerge, which means that a rush to prosecute may result in incomplete justice."[100] The case of Kenya certainly comes to mind.[101]

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[91]The Pre-Trial Chamber failed to confirm charges against Callixte Mbarushimana; Abu Garda (who successfully brought evidence of an alibi, almost unheard of in international criminal proceedings); Henry Kosgey; and Muhammed Hussein Ali. Charges against another Kenyan accused, Francis Muthaura, were withdrawn after the Prosecutor admitted, "several people who may have provided important evidence regarding Mr. Muthaura's actions, have died, while others are too afraid to testify for the Prosecution." Statement by ICC Prosecutor on the Notice to withdraw charges against Mr. Muthaura, 11 March 2013.

[92] Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, Sept. 2011.

[93] De Vos, Christian. *Investigating from Afar: The ICC's Evidence Problem*. Leiden Journal of International Law, Volume 26, Issue 4, Dec. 2013 pp. 1009-1024.

[94] OTP Strategic Plan June 2012-2015 para. 48.

[95] Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years* (2010) p. 47. Many senior investigators left the court since 2005, alleging that the input of investigators is not sufficiently valued within the OTP.

[96] OTP Strategic Plan June 2012-2015 para. 17.

[97] Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years* (2010) p. 47.

[98] Alex Whiting. *Guest Post: ICC Prosecutor Announces Important Changes in New Strategic Plan*, 24 Oct. 2013, Just Security Blog.

[99] Human Rights Watch. *Seductions of "Sequencing": The Risks of Putting Justice Aside for Peace,* December 2010 p. 3-4.

[100] Whiting, Alex. *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered.* Harvard International Law Journal, Volume 50, Number 2 (Summer 2009) p. 326.

[101] Interview with Kenyan civil society members, 2 Feb. 2014.

A third factor that contributes to low numbers is the focus on those of the highest levels of responsibility. [102] Investigating only small numbers those at the top, does not necessarily require building an investigative pyramid, but can be pursued through a suspect-based approach. The Appeals Chamber in *Ntaganda* found that the focus on those bearing the greatest responsibility is a policy, but not a legal requirement.[103] In 2012, the Prosecutor changed her approach to investigations to replace focused investigations with "the principle of in-depth, open-ended investigations while maintaining focus"[104] and said that in some cases she will focus on lower and mid-level perpetrators in order to build better cases.[105]

In any case, the Court's performance in terms of numbers of investigations and prosecutions should be assessed against limitations on its resources.[106] This is largely in the domain of the Assembly of States Parties. As described by Whiting, "the ICC cannot focus on just one conflict or set of conflicts for a prolonged period. Rather, it must, with roughly the same resources, investigate and prosecute cases across a range of situations around the world."[107]

The Court itself has adhered to a "limited growth" model encouraged by the ASP. With a current budget in 2017 of around 145 million euros,[108] the Court's annual budget that is roughly equal to that the ICTY at the height of its operations and a staff roughly the same size, if not smaller. The opening of 10 investigations in highly varied situations has created an enormous workload for the Court. The ICTY, like its predecessors, the International Military Tribunals at Nuremberg and Tokyo, could rely on significant support from IFOR and SFOR, international forces deployed to the former Yugoslavia, particularly in conducting arrests. In addition, the Court is following a number of situations through preliminary examinations, which seek also to contribute to encouraging domestic proceedings and to preventing, thus contributing to cost savings.[109] The Court has no such assistance, and since the economic downturn, for years it continuously faced a zero-growth budget, forcing it to do more with less.

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[102] Seils, Paul. *The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court,* Case Selection and Prioritization, ed. Morten Bergsmo, FICHL, Publication Series No. 4 (2010) p. 69.

[103] Seils, Paul. *The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court,* Case Selection and Prioritization, ed. Morten Bergsmo, FICHL, Publication Series No. 4 (2010) p. 69.

[104] OTP Strategic Plan June 2012-2015 para. 6.

[105] Ibid., para. 4.

[106] A 2003 Paper on some policy issues before the Office of the Prosecutor states that "the Office should endeavor to maximize its impact while operating a system of low costs."

[107] Whiting, Alex. *Guest Post: ICC Prosecutor Announces Important Changes in New Strategic Plan*, 24 Oct. 2013, at Just Security blog.

[108] ICC ASP, Proposed Programme Budget for 2017 of the International Criminal Court, ICC-ASP/15/10.

[109] OTP Report on Preliminary Examinations 2017. In 2017 this included Gabonese Republic, Palestine, Ukraine, Colombia, Guinea, Iraq/ UK and Nigeria. Philippines and Venezuela were added in 2018. Afghanistan, Burundi, and the Registered Vessels of Comoros, Greece and Cambodia were completed in 2017. OTP Report on Preliminary Examinations, 2017.

Due to the difference in the situations under its purview, the Court does not necessarily benefit from an "economy of scales" in its additional investigations. In this respect, it can be argued that the global nature of the ICC is not a merit, but a flaw. The fact that the Court is global may cause the international community to *underinvest* in in responses to mass atrocity. In the opening of the Kenya investigation, Judge Hans-Peter Kaul of Germany warned that if the scope of ICC interventions were stretched out this far, it would result in a "hopelessly overstretched, inefficient international court, with related risks for its standing and credibility."[110] One wonders whether this is not already the case. The Court has available to it less than 15 million Euros to spend annually on any situation, about 10% of the budget of ICTY and around half of that of the hybrid tribunals in Sierra Leone. Considering the scope of the conflicts that the Court is dealing with, and the complexity of the situations, this narrow approach calls into question whether the impact of the Court in any given situation can reach beyond the symbolic.

D. "Consent" Legitimacy: Global Acceptance as a Measure of Impact

1. Impact of Self- and Security Council referrals on Global Acceptance

The legitimacy of international criminal justice institutions is often weak at birth, and they must battle to gain acceptance, support, and credibility with time.[111] It may be no surprise that, fifteen years into its life span, the Court still falls short of global acceptance, otherwise termed "consent" legitimacy. The strongest support for the Court continues to come from the EU, Latin America and certain African states, and not from the great powers. Nonetheless, a clause on cooperation with the ICC was removed from the EU's neighborhood policy in 2011.[112] While a certain block of States, the "like-minded" group has generally sought to protect the Court, their support is inconsistent when it comes to dealing with "hard cases" in a post 9/11 context, such as Afghanistan and Palestine.

Out of ten investigations pending before the ICC at the time of writing, six are African self-referrals (Uganda, DRC, Cote d'Ivoire, Mali, and two from CAR). Supporters of the Court argue that the fact that so many situations before the Court

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[110] Dissenting Opinion of Judge Hans-Peter Kaul in Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr 01-04-2010 (31 March 2010).

[111] Stahn, Carsten. *Between "Faith" and "Facts": By What Standards Should We Assess International Criminal justice*? Leiden Journal of International Law, Volume 5, issue 2 (2012) pp. 258. Klarin refers to "four battles" as including the battle for survival, the battle for respect, the battle for hearts and minds, and the battle for time. Klarin, Mirko. *The Tribunal's Four Battles*, Journal of International Criminal Justice (2004), pp. 546-557.

[112] Davis, Laura. *EU Foreign Policy, Transitional Justice and Mediation: Principles, Policy and Practice,* Routledge (2014) p. 90 (Chapter on the EU and the ICC).

were triggered by self-referrals is evidence of the legitimacy of the Court.[113] Instead, the Court's reliance on self-referrals in Africa has contributed to a perception that it is opportunistic and politicized.[114] The Court's practice on accepting referrals has made it appear that the Court was intent on picking low-hanging fruits, while avoiding situations that would aggravate powerful states, which has in fact eroded "consent legitimacy".[115] In the words of Schabas: "Africa is increasingly disheartened, while the United States had become one of the Court's keenest promoters. Could it be that this change accounts for the malaise that today seems to afflict international justice?"[116]

Initially, it seemed as if Security Council referrals might serve to further legitimize the Court.[117] The second Security Council referral on Libya Resolution 1970 (2011), was discussed only for a day before the Security Council adopted it unanimously in March 2011. [118] The former Prosecutor argued that the relationship between the ICC and the Security Council in the Libyan case should be viewed as a new paradigm for international relations, one of a global acceptance of the ICC.[119] However, former ICTY Prosecutor Arbour instead concluded that: "two referrals by the Security Council to the ICC, in the cases of Darfur and Libya, have done little to enhance the standing and credibility of the ICC, let alone to contribute to peace and reconciliation in their respective regions."[120] The Libyan referral, originally mandated to protect civilians, effectively led to an overthrow of the regime.[121]

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[113] Shany, Yuval. *Assessing the Effectiveness of International Courts,* Oxford University Press 2014 p.244. See also Avocats Sans Frontieres, *Africa and the International Criminal Court: Mending Fences*, July (2012) p. 8.

[114] See Chapter 6 on perceptions. Max du Plessis*, Universalising International Criminal Law: The ICC, Africa and the Problem of Political Perceptions*, ISS, 6 Dec. 2013. See also Alana Tiemessen, *The International Criminal Court and the politics of prosecutions*, International Journal of Human Rights, Volume 18 (2014) pp. 444-461.

[115] Nouwen, Sara and Wouter Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, EJIL Vol. 21 No. 4. See also Alana Tiemessen, *The International Criminal Court and the politics of prosecutions*, International Journal of Human Rights, Volume 18 (2014) pp. 444-461.

[116] Schabas, William A. *The Banality of International Justice*, Journal of International Criminal Justice 11(2013), pp.545-551.

[117] On 31 March, the Security Council adopted Resolution 1593, referring Darfur to the ICC, with 11 votes in favor (9 of which were State Parties) and four abstentions, including Algeria, Brazil, China and the US.

[118] The link between this referral and the concept of "Responsibility to Protect" is examined by other scholars but will not be discussed here. See Stahn, Carsten. *Libya, the International Criminal Court and Complementarity: A Test for "Shared Responsibility*, Journal of International Criminal Justice Volume 10, Issue 2 (2012) pp. 325-349.

[119] Ocampo, Luis Moreno. *Gruber Distinguished Lecture in Global Justice*, at Yale (unpublished, on file with author). Ocampo, Luis Moreno, *The Gaddafi case,* NYU School of Law's Hauser Colloquium on International Law, September 2013.

[120] Arbour, Louise. *Doctrines Derailed? Internationalism's Uncertain Future*, International Crisis Group's Global Briefing, 28 Oct. 2013.

[121] Security Council Resolution 1970 exempted non-ICC states parties from any liability. The Resolution states in para. 6: "nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal

Immediately afterwards, even the states who promoted the referral considered brokering a political deal in contradiction to the Security Council referral.[122] Attempts at a Security Council referral to the ICC of the Syrian situation have proved impossible, resulting in vetoes exercised by Russia and China.[123] The fact that the ICC was unable to act on the situation in Syria, one of the largest-scale conflicts since WWII, diminishes its relevance.

2. The "Less Than Universal" Status of the Project

The global acceptance of the Court is currently endangered by the "less-than-universal" status of the project. Supporters of the Court continue to insist that universality is the ultimate aim, but it is an aim that may never be realized. The current situation is that "powerful actors in the international arena are in position to ignore the demands of international courts, and the sword of justice tends to be used most against individuals from states that occupy a lowly place in the *de facto* existing hierarchy of states."[124] In the words of Jean Ping, Chairman of the African Union: "The law should apply to everyone and not only the weak."[125]

This perception has also been strengthened by the Court's inactions in "hard cases", including Iraq, Afghanistan and Palestine. On 9 February 2006, the OTP published a letter to state he had decided not to open an investigation into communications dealing with war crimes committed during military operations by UK soldiers in Iraq between March and May 2003. This was because the number of willful killings (less than 20 in all), did not meet the required level of gravity because these crimes did not appear to be committed "as part of a plan or policy." On 14 January 2014, the German-based European Center for Constitutional and Human Rights and a UK law firm, Public Interest Lawyers, announced it had filed with the Court a 250-page document, detailing 412 cases of grave mistreatment against detainees, including

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Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya, established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State."

[122] William Hague, less than one month after the Court issued arrest warrants, said that a deal may be possible allowing Qadhafi to stay in Libya- while evading questions on whether he should be given immunity. Nicholas Watt and Richard Norton Taylor, *Muammar Qadhafi could stay in Libya, William Hague concedes,* The Guardian, 25 July 2011. The suggestion of a deal was supported by the US and Italy: Borger, Julian and Richard Norton-Taylor. *Diplomats discuss Libya's future as Italy plots Gaddafi's escape route,* The Guardian, 29 March 2011.

[123] UN News Center, Russia, *China block Security Council referral of Syria to the International Criminal Court*, 22 May 2014.

[124] Damaška, Mirjan. *What is the Point of International Criminal Justice?* Chicago-Kent Law Review, Vol. 83: 239 (2008) at p. 330.

[125] Sudan Tribune, *AU Backs Sudan President in ICC Row*, February 3, 2009. As stated by Mamdani: "the fact that the court is answerable to the Security Council means that it will create a regime for impunity for its permanent members and their close allies or clients. Anyone following the practice of the court since its creation will find these fears warranted." Guernica, The Genocide Myth: Joel Whitney interviews Mahmood Mamdani, 12 May 2009.

200 unlawful killings, 11 deaths in custody, and many cases of torture. [126] It since gave additional information on a total of 1071 cases of ill treatment of detainees, 319 alleged unlawful killings (including 52 in detentions), and 21 rapes of male victims.[127] The OTP has concluded that there is a reasonable basis to believe that UK nationals committed Rome Statute crimes in the context of Iraq, but it is still considering whether these crimes meet the gravity threshold and whether the admissibility criteria are met.

Another hard case is Afghanistan. According to the United Nations Assistance Mission in Afghanistan, over 23,000 civilians were killed in the conflict in Afghanistan between January 2007 and June 2015. A further 11,000 casualties were recorded by UNAMA in 2015.[128] In 2017 and 2018, civilian casualties continued to rise.[129] Furthermore, UNAMA has stated that 1820 civilians have been killed by international military forces since 2009.[130] The Taliban Code of Conduct, the *Layha*, allows for attacks on civilians, as reaffirmed in statements by Taliban leaders.

Members of the Taliban have been tried in Afghanistan for crimes against the state as contained in the 1976 Penal Code, the 1987 Penal Law on Crimes against Internal and External Security, and the 2008 Law on Combat against Terrorist Offences. A few government officials have been prosecuted, including two NDS officials, as well as two senior members of the notorious Haqqani Network, but little information exists on these cases.[131] These trials are conducted in secrecy and little information exists on them. Some defendants were executed, leading to retaliatory attacks by Taliban on the judiciary.[132] Nonetheless, several NATO powers, including Germany, expressed concern when the Court opened a preliminary examination.[133]

While US enhanced interrogation policies are well documented, the OTP was slow to conclude that there was a reasonable basis to believe that international forces may be responsible for violations. The OTP first said in 2013 that the torture allegations under its purview had an insufficient nexus to the conflict in Afghanistan.[134] The OTP held while there cases of torture between 2002 and 2003, but it was unsure

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[126] European Center for Constitutional and Human Rights/ Public Interest Lawyers, The Responsibility of UK Officials for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008, p. 6.
[127] OTP Report on Preliminary Examination Activities, 2016 at para. 87.
[128] See https://unama.unmissions.org/civilian-casualties-hit-new-high-2015.
[129] UNAMA, Latest UN Update Records Continuing Record High Levels of Civilian Casualties in 2018, 12 April 2018 . http://unama.unmissions.org/protection-of-civiilians-reports.
[130] OTP Report on Preliminary Examination Activities, 2017 para. 242.
[131] OTP Report on Preliminary Examination Activities 2016 para. 215.
[132] Qaane, Ehsan. *Nuremberg Academy Afghanistan Complementarity Study* (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/
[133] Bosco, David. *Rough Justice: The International Criminal Court in a World of Power Politics*, OUP 2014 at p. 181.
[134] OTP Report on Preliminary Examinations 2013, paras. 49-50.

that these "were committed as part of a policy."[135] In the aftermath of the US Senate Armed Services Committee Report, in 2014 the OTP went into more detail on US interrogation practices in Afghanistan.[136] However, it did not yet make any findings on whether there was a reasonable basis to believe international forces had committed international crimes, although it had information that at least 88 persons held in US custody were allegedly tortured.[137] Only in 2016 did the OTP find that there is a "reasonable basis to believe that, in the course of the interrogating these detainees, and in the conduct supporting those interrogations, members of the US armed forces and the US CIA resorted to techniques" amounting to war crimes (including rape) as part of approved interrogation techniques.[138] She also found that the US Attorney General did not investigate those most responsible for the alleged crimes.

Also relevant is the question of "complicity" of international forces through aiding and abetting torture by handing detainees over to Afghan authorities, with a high likelihood that they will be tortured. UNAMA documented a 35- 51% torture rate in detention facilities. [139] ISAF rules dictate that detainees cannot be transferred under any circumstances where there is a risk that they will be subjected to torture and ill treatment. Yet in 2013 UNAMA still uncovered reports of transfers to such facilities not by ISAF but by the "other government agency", which is taken to be a reference to the US intelligence agencies active in those areas.[140]

In late October 2016, the Prosecutor announced she was about to open an investigation in Afghanistan, as reported in an exclusive interview Foreign Policy.[141] Afghanistan allegedly was unhappy with the Prosecutor's unilateral initiative and allegedly threatened to withdraw from the Court.[142] It submitted new information

[135]Ibid., para. 51-52.
[136] OTP Report on Preliminary Examinations 2014 at para. 94: "In this context, the information available suggests that between May 2003 and June 2004, members of the US military in Afghanistan used so-called "enhanced interrogation techniques" against conflict-related detainees in an effort to improve the level of actionable intelligence obtained from interrogations. The development and implementation of such techniques is documented *inter alia* in declassified US Government documents released to the public, including Department of Defense reports as well as the US Senate Armed Services Committee's inquiry. These reports describe interrogation techniques approved for use as including food deprivation, deprivation of clothing, environmental manipulation, sleep adjustment, use of individual fears, use of stress positions, sensory deprivation (deprivation of light and sound), and sensory overstimulation."
[137] OTP Report on Preliminary Examination Activities 2016, at para. 224.
[138] OTP Report on Preliminary Examination Activities 2016 para. 211.
[139] OTP Report on Preliminary Examination Activities 2016 para. 217.
[140] UNAMA and OHCHR, *Treatment of Conflict-Related Detainees in Afghan Custody One Year On*, January 2013, Kabul, Afghanistan p. 64.
141 Bosco, David. *Exclusive: ICC Poised to open investigation into war crimes in Afghanistan.* Foreign Policy, 31 Oct. 2016.
[142] Anonymous source.

relevant to an admissibility assessment, sending information of 15 cases, including those of Anas Haqqani and Hafiz ul-Rashid.[143]

On 20 November 2017, the Prosecutor filed a request for authorization to open an investigation on crimes committed in the territory of Afghanistan since 1 May 2003 or crimes committed in State Parties with a nexus to the Afghanistan conflict since July 2002. These crimes included: crimes against humanity and war crimes by the Taliban and their affiliated Haqqani Network; War crimes by the Afghan National Security Forces ("ANSF"), in particular, members of the National Directorate for Security ("NDS'") and the Afghan National Police ("ANP"), and war crimes such as torture by members of the United States armed forces on the territory of Afghanistan, and by members of the US Central Intelligence Agency ("CIA") in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003-2004.[144] The OTP mentioned Poland, Lithuania and Romania as such other State Parties. In May 2018, the Pre-Trial Chamber had yet to decide on the opening of an investigation and faced further delay due to a changeover after the election of new judges.

Cooperation between the Afghan government and the OTP has improved, with the conclusion of a Road Map of cooperation and the appointment of an inter-ministerial commission, consisting of Foreign Affairs and Interior, a Special Representative of the President for the ICC, the AG's office, the National Directorate for Security as well as expert in international criminal law. However, Afghanistan takes the position that it should fulfill its own role under that state, "consistent with the Statutes key principles of "national ownership and complementarity."[145]

Afghanistan stated that it would have preferred the OTP "to have held off on its request for an authorization for a full investigation."[146] It has taken several anti-torture measures, including a new (anti-) torture law. It is not clear whether these measures have had impact: a UNAMA report from 2017 indicated that the situation has gotten worse rather than better.[147] Furthermore, the amnesty law discussed in Chapter 4 remains in place. On the other hand, the Afghan Independent Human Rights Commission and civil society welcomed the OTP's request. The OTP

[143] Kate Clark and Ehsan Qaane, AAN, *One Step Closer to War Crimes Trials (2): ICC Prosecutor requests authorization to investigate*, 5 Nov. 2017.
[144] ICC Statement, *The Prosecutor of the ICC Fatou Bensouda Requests Judicial Authorization to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, 20 Nov. 2017.
[145] Statement by H.E. Mahmoud Saikal, Permanent Representative of the Islamic Republic of Afghanistan to the United Nations, delivered at the 16th Session of the Assembly of States Parties to the Rome Statute of the ICC, 7 Dec. 2017.
[146] Ibid.
[147] UNAMA, Treatment of Conflict-Related Detainees: Implementation of Afghanistan's National Plan on Elimination of Torture, April 2017. UNAMA concluded that 39% of those interviewed gave credible accounts of torture as opposed to 35% in 2015. This torture happened in NDS or ANP custody.

concluded that no investigations or prosecutions against Taliban, NDS or ANP had taken place by Nov. 2017.[148]

Much anticipation also accompanies the US response under the Trump administration. The OTP has said that even though the alleged acts of torture are a small percentage of the total of those detained, they can still be considered "serious both in their number and in their effect."[149] For these cases too, the ICC has said that at this stage no relevant investigations or prosecutions have been concluded that would prevent admissibility in these cases.[150] Bosco has argued that a US response to the opening of an ICC investigation could take one of three options: (1) to delay and defer, trusting that US officials would not be prosecuted; (2) a "positive red line" which "vigorously defends its position while also preserving a positive relationship" with the ICC by arguing that the Prosecutor should use her discretion not to prosecute a non-member; and (3) a "negative red line", which would adopt a more confrontational line against the Court. Bosco concludes optimistically: "Even an energetic and multifaceted US campaign against the court would most certainly fail to cripple it."[151]

Perhaps the hardest case of all is that of Palestine. The Israeli incursion into Gaza in 2009, Operation Cast Lead, resulted in over 1200 Palestinian deaths, many of them civilians, as documented in the Human Rights Council's "Goldstone Report".[152] On 22 January 2009, Ali Kashan, then Minister of Justice of the Government of Palestine, filed an Article 12 (3) declaration for "acts committed on the territory of Palestine since 1 July 2002." Reportedly, members of the OTP encouraged the Palestinian Authority to file the declaration, in order to gain credibility with the Arab street to counter criticism over the arrest warrant against Omar Al-Bashir.[153]

Over the next three years, the OTP solicited views on whether it should accept the declaration, but finally issued a decision on 3 April 2012 of only 2 pages. It concluded, "It is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purposes of acceding to the Rome Statute and thereby enabling the exercise of the jurisdiction of the Court under article 12 (1)."[154]

In 2013, the OTP argued that the United Nations General Assembly Resolution (67/19), adopted on 29 November 2012, recognizing Palestine as a non-member

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[148] OTP Report on Preliminary Examinations, 2017.
[149] OTP Report on Preliminary Examination Activities, 2017 para. 273.
[150] Ibid.
[151] Bosco, David. *US Options for Responding to ICC Scrutiny in Afghanistan*. Lawfare Blog, 23 Feb. 2017.
[152] Report of the United Nations Fact Finding Mission on the Gaza Conflict ("Goldstone Report"), A/HRC/12/48, 25 September 2009.
[153] Bergsmo, Morten, Wolfgang Kaleck, Sam Muller and William Wiley. *A Prosecutor Falls, Time for the Court to Rise.* Torkel Opsahl Academic E-Publisher, FICHL Policy Brief Series No. 86 (2017).
[154] ICC-OTP, "Situation in Palestine," 3 April 2012.

observer State to the United Nations did not does not "cure the legal invalidity" of the 2009 declaration, since Palestine had not acceded to the Rome Statute.[155] Several states including the United States, UK, Canada, Germany and The Netherlands, voted against, or abstained from a General Assembly Resolution recognizing Palestine as a state, arguing that statehood could result in an ICC prosecution, and that this would hinder the pursuit of peace.[156] Israel threatened to abandon peace negotiations if Palestine initiated any action at the Court.[157]

In July 2014, widespread conflict broke out once more in Gaza, under operation "Protective Edge". In the aftermath, the Guardian newspaper alleged that that the decision of the Prosecutor not to open an investigation on Palestine was the result of political pressure,[158] but this was denied by the Prosecutor.[159] On 2 January 2015, Palestine acceded to the Rome Statute of the International Criminal Court, and it accepted the ICC jurisdiction since 13 June 2014, through an Art. 12(3) declaration. On 16 January 2015, the Prosecutor opened a preliminary examination on the situation in Palestine. Israel immediately responded by lobbying Canada, Germany and Australia to cut funding to the ICC – to no avail.[160] The OTP is still in the process of gathering relevant submissions and available information. It has also paid visits to Palestine and Israel but has not yet opened an investigation.[161] The situation involves many complex legal and factual questions, but the OTP has stated it will reach conclusions within a "reasonable time frame."[162]

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[155] The comments were an answer to a legal opinion filed by two well-respected human rights organizations, Al-Haq and the Palestinian Center for Human Rights, in October 2013 arguing that if the goal of the Statute is to end impunity, the Court should accept jurisdiction on the basis of the Article 12(3) declaration, in spite of the fact that Palestine has not yet acceded to the treaty. Harriet Sherwood, *ICC urged to investigate 'commission of crimes' in Palestinian territories*, The Guardian, 4 October 2013: ttp://www.theguardian.com/world/2013/oct/04/icc-urged-investigate-commission-of-crimes-palestinian.

[156] Dworkin, Anthony. *Case Study: Goldstone and After- Judicial Intervention and the Quest for Peace in the Middle East,* European Council on Foreign Relations, 5 Nov. 2013.

[157] Sherwood, Harriet. *ICC urged to investigate 'commission of crimes' in Palestinian territories,* The Guardian, 4 October 2013: http://www.theguardian.com/world/2013/oct/04/icc-urged-investigate-commission-of-crimes-palestinian.

[158] Berger, Julian. *Hague Court under Western Pressure not to Open Gaza War Crimes Inquiry*. The Guardian, 18 August 2014.

[159] Bensouda, Fatou. *The truth about the ICC and Gaza,* The Guardian, 29 August 2014. See also Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: "The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine", 2 September 2014: "The simple truth is that the Office of the Prosecutor has never bee in a position to open such an investigation for lack of jurisdiction. We have always, clearly and publicly, stated the reasons why this is so."

[160] See http://www.jpost.com/Arab-Israeli-Conflict/Liberman-We-will-lobby-Canada-Australia-and-Germany-to-cut-ICC-funding-388099.

[161] ICC Report on Preliminary Examination Activities 2016 at paras. 140-143.

[162] OTP Report on Preliminary Examinations, 2017.

On 15 May 2018, the State of Palestine itself made a referral to the ICC pursuant to Articles 13(a) and 14 of the Rome Statute.[163] The scope of the referral encompasses Israel's settlement policy, arguing that it constitutes both a wide variety of war crimes and a crime against humanity. Palestine in its referral argues, "Ensuring justice and accountability is crucial to achieving peace, to deterring the commission of crimes, and to the integrity and credibility of the ICC itself."[164]

The case of Palestine remains highly controversial. The legitimacy of the Court depends on its ability to try such "hard cases". Some however argue that this case is a bridge too far for the Court, and that "the Court's long-term legitimacy is more important than any individual investigation, no matter how deserving of investigation a situation might be."[165] The question is whether the Court's legitimacy can survive by sidestepping the case of Palestine, as this would certainly be seen as a political decision.

In late 2016, a number of countries announced that they were seeking to withdraw from the Rome Statute.[166] The first was Burundi, where the Court had announced it was to open an investigation. It was soon followed by South Arica, a country that had long been supportive of the ICC.[167] South Africa issued a letter on 19 Oct. signed by the Minister for International Relations and Cooperation, to state that its obligations under the Rome Statute may be inconsistent with its Diplomatic Immunity and Privileges Act of 2001. Previously, South Africa was criticized for ignoring an ICC order to arrest Sudanese President Omar Al-Bashir during his visit in 2016. Shortly thereafter, the Gambia also announced it was withdrawing from the Rome Statute, President Jammeh arguing that the court was ignoring war crimes committed by Western countries and that it constituted an "International Caucasian Court".[168]

In November, Russia announced that it would seek to "un-sign" the Rome Statute, which it had signed in 2000, because "[t]he ICC has not justified hopes placed upon it and did not become a truly independent and authoritative judicial body."[169] This took place against a backdrop of calls for an investigation into an air strike on a humanitarian convoy in Syria. However, Russia stated that it "consistently advocated that people guilty of grave offences must be held accountable" and that it had developed laws on genocide, crimes against humanity and war crimes.[170]

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[163] Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf.
[164] Referral, para. 7.
[165] See Kevin Heller. *Britain to Support Palestine's GA Resolution?* 12 Nov. 2012, http://opiniojuris.org/2012/11/26/britain-to-support-palestines-unga-resolution/#comments.
[166] A mass withdrawal had long been referred to in AU meetings but had not yet occurred.
[167] The Guardian, *South Africa to quit the ICC,* 21 Oct. 2016.
[168] Reuters, *Burundi notifies UN of ICC withdrawal*, 26 Oct. 2016.
[169] Dearden, Lizzie. *Independent, Russia to Withdraw from ICC amid calls for Syrian air strikes investigation,* 16 Nov. 2016.
[170] Dearden, Lizzie. *Independent, Russia to Withdraw from ICC amid calls for Syrian air strikes investigation,* 16 Nov. 2016.

Fortune for the ICC reversed itself when President Jammeh was overthrown in The Gambia, and his successor, Adama Barrow, announced in early 2017 that it would not withdraw from the ICC.[171] Not long thereafter, South Africa announced in a letter to the UN Secretary General that its High Court had ruled that the letter of withdrawal was "unconstitutional and invalid", considering that Parliament had not been consulted.[172] This is not to say the Court's troubles are permanently abated. At the Assembly of States Parties in December 2017, South Africa's Justice and Correctional Services Minister, Michael Masutha, announced that he would file a new notice of withdrawal from the Rome Statute with the South African Parliament.[173] He stated that he would also introduce an International Crimes Bill, which "repeals the current Rome Statute Implementation Act (which makes the Rome Statute domestic law) and enacts international crimes similar to those in the Rome Statute. The new legislation will grant extra-territorial jurisdiction to our courts and proposes continued co-operation with other States and international bodies, including the ICC."[174] On 14 March 2018, President Duterte of the Philippines announced it would withdraw from the Rome Statute, after the OTP opened a preliminary examination into his war on drugs.[175]

On the other hand, the OTP itself took an innovative and bold step in requesting a ruling on jurisdiction in the context of the intentional deportation of more than 670,000 Rohingya from Myanmar into neighboring Bangladesh, based on the reasoning that an essential legal element of the crime, the crossing of an international border, occurred on the territory of a State Party to the Rome Statute.[176]

These developments raise the fundamental question of long the Court will be able to continue as a less-than- universal project. At some point in the future, states will no longer want to subject themselves to a legal regime that does not bind the powerful.[177]

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[171] See http://www.africanews.com/2017/02/09/the-gambia-will-remain-in-the-icc-president-barrow-confirms/.
[172] Onishi, Norimitsu. *South Africa reverses withdrawal from ICC*, New York Times, 8 March 2017.
[173] Fabricuis, Peter. *South Africa confirms withdrawal from the ICC,* Daily Maverick, 7 Dec. 2017.
[174] Ibid.
[175] The Guardian, *Rodrigo Duterte to pull Philippines out of the International Criminal Court,* 14 March 2018.
[176] Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018, ICC-RoC 44 (3)-01/18-1.
[177] This has long been the argument of Third World Approaches to International Law scholars such as Antony Anghie. Anghie argues that the conventional history of international law is based on three premises: (1) international law is created through the history and experience of the West, and in particular Europe; (2) the non-European world is peripheral to the making of international law; and (3) the major issue confronting the discipline of international law is how law can be created among equal and sovereign states. Anghie rejects these propositions and argues that international law was an imperialist creation to empower the West and disempower the non-West. The sovereignty doctrine was used to strip non-European peoples of their sovereignty. The sovereignty doctrine is based on identity. The Westphalia experience, Anghie argues, is not universal. He argues that

IV. Conclusion

The ultimate goal of the Rome Statute and the ICC, to end impunity for the world's worst crimes, is widely shared amongst the world's nations, as evidenced in different treaties and instruments, both at the international and national levels. The International Criminal Court represents an important tool through which to reach this goal, and the Rome Statute has important normative value, reflected in its purpose and universal values legitimacy. However, the impact must be sought in actual situations, in countries where the world's most serious crimes are occurring. For this reason, it is important to define a framework that can assess this impact at the country-level over the last 15 years.

It is essential to go beyond an assessment of the Court's performance legitimacy, through facts and figures. It is the Court's tactical decisions that have led to criticisms about its decisions on situation-selection, including its focus on Africa; its relatively low number of successful investigations and prosecutions; and its inability to engage in "hard cases". Assessing the Court based on these factors is difficult, because it is an ever-changing picture. After all, the Court is now investigating outside of Africa, and is conducting a number of important cases. The Prosecutor has applied to open an investigation in Afghanistan and is investigating in Georgia. On the other hand, some of these tactical decisions have decreased "consent legitimacy" and some countries are now pulling out of the Rome Statute.

Instead, the following Chapters will seek to go beyond the tactical, to assess whether the Rome Statute and Court system have normative or societal impact at a national level, on legal systems, political processes, and on the lives victims of Rome Statute crimes. These effects are referred to as systemic, transformative, reparative and demonstration effect, and will be defined further in the next Chapter. Such impact may be more profound than that of trials in The Hague, and may ultimately contribute to the prevention of such crimes, one of the core assumptions of the Rome Statute.

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sovereignty should not be seen as a doctrine of empowerment but of exclusion. Anghie suggests that TWAIL needs to make the experience of the disadvantaged the basis of an inquiry about what should constitute international law. Anghie, Antony. LatCrit and Twail, 42 Cal. W. Int'l L. J. 311 (2012).

Chapter 1: Testing Assumptions: A Framework for Assessing the Impact of the International Criminal Court

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes - Rome Statute Preamble

I. Introduction

The ICC has been entrusted by the mandate providers with a wide range of goals, including ending impunity, encouraging domestic proceedings against perpetrators, generating deterrence against future crimes, promoting peace and security, internationalization of international criminal law, satisfying victims needs, conveying a message of condemnation of international crimes, projecting an image of procedural fairness and legitimacy, and – possibly also- establishing a historical record of atrocities.[178] Similar hopes were once expressed for the ICTY.[179]

The wide-ranging expectations about the ICC connote confusion about the *identity* of the ICC even amongst the mandate-providers, including the Assembly of State Parties.[180] The assumptions articulated around the ICC are far-reaching and sometimes far-fetched. The Court does not neatly fit into the identity of being just a criminal court.[181] Neither is it clearly a transitional justice or peace-building mechanism, although it has an *expressive* function. It follows that the ICC should not be assessed by the assumptions commonly associated with these different fields.

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[178]Shany, Yuval at the Human Rights and International Criminal Law Forum: http: //iccforum.com/performance.

[179]As an ICTY official observed, "the idea that one institution that has been built from scratch 20 years ago can single-handedly resolve the conflict in the Balkans that goes back centuries I don't think … was a realistic expectation." Impunity Watch Policy Brief: *The Expanding Societal Impact of International Criminal Justice – Exploring the links with Memory Initiatives*, February 2014, p. 6, quoting a representative from the ICTY's outreach department.

[180]The annual resolution of the Assembly of States Parties on "Strengthening the ICC" enumerates a wide range of goals that the Court is meant to achieve: "*Convinced t*hat the International Criminal Court ("the Court") is an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law, as well as to the prevention of armed conflicts, the preservation of peace and the strengthening of international security and the advancement of post-conflict peace-building and reconciliation with a view to achieving sustainable peace, in accordance with the purposes and principles of the Charter of the United Nations."

[181] Jessberger, Florian and Julia Geneuss, *The Many Faces of the International Criminal Court*, 10 J. Int'l Crim. Just. 1081 (2012) pp. 1081-1094. Jessberger and Geneuss refer to the Court as a criminal court; a watchdog court (in terms of supervising the complementarity role of domestic courts); and a security court (in terms of balancing peace and justice, for instance through Security Council referrals). These 2 other roles of the Court are dealt with in subsequent Chapters in these thesis. See also Kai Ambos, *International Criminal Court and the Traditional Principles of International Cooperation in Criminal Matters,* 9 Finnish Y.B. Int'l L. 413 (1998), an article in which he argues that many of the traditional principles of International Cooperation do not apply to the ICC.

Instead, the Court should be viewed as a *sui generis* body with unique underlying assumptions. The main assumption underlying the Court is that it will build a culture of accountability that prevents the world's worst atrocities over time. Pathways to prevention can take the form of changes in legal systems and institutions, impact on political processes (such as a refusal to rely on amnesties); and increased recognition of the rights of individuals. These in turn translate into systemic effect, transformative effect, and reparative effect.

These areas for normative impact are distilled from the Rome Statute itself; the priorities of the Assembly of States Parties; and the strategic plans of the Court, including those presented during the Review Conference; as well as the statements of Court principals. Most notably, these areas were discussed during the 2010 Review Conference stocktaking exercise, which looked at (1) complementarity, (2) peace and justice; (3) the impact on victims and affected communities. Additionally, demonstration effect deals with the Court's societal impact, i.e. the way in which the ICC is perceived among the broader public. Negative perceptions serve to undermine the Court's expressive function and its normative impact.

II. The ICC as a Criminal Justice Institution

A. Neither Deterrence nor Effective Retribution?

Among the assumptions underlying the creation of the ICC, deterrence has gained the most currency.[182] Deterrence is most commonly cited as the primary goal of the ICC, by politicians, Court officials and by NGOs.[183] Similar arguments were made in favor of the ad hoc Tribunals.[184] General deterrence may contribute to a culture of accountability through which potential perpetrators decide against committing crimes. Simmons distinguishes between prosecutorial (or specific) deterrence, which is a "direct consequence of legal punishment", or social (or general) deterrence, which is "a consequence of the broader social milieu in which actors operate", and causes potential perpetrators to "calculate the informal consequences of lawmaking."[185]

The ICC and other international tribunals have definitely put accountability on the map in the public conscience. Anecdotal evidence suggests that risk of prosecution

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[182] Koller, David, *The Faith of the International Criminal Lawyer,* International Law and Politics, Vol 40 (2008) 1019 p. 1027. Beth Simmons and Hyeron Jo. *Can the International Criminal Court Deter Atrocity?* Draft 18 Dec. 2014. Vinjamuri, Leslie. *Deterrence, Democracy, and the Pursuit of International Justice.* Carnegie Council for Ethics and International Affairs, 24 no. 2 (2010) p. 191.
[183] Parliamentarians for Global Action, *A Deterrent International Criminal Court, The Ultimate Objective*, citing various government officials, NGO representatives and others on deterrence.
[184] Akhavan, Payam. *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* The American Journal of International Law 95 (1) (2001) at pp. 7-31.
[185] Simmons, Beth and Hyeron Jo, *Can the International Criminal Court Deter Atrocity?* Draft 18 Dec. 2014.

by the ICC, and the accompanying stigma, lurks in the minds of perpetrators of mass violence or the general public, which may point to a growth in general deterrence.[186] For instance, there is evidence in Eastern Congo, due to the ICC, awareness grew that child recruitment was a crime after the *Lubanga* arrest warrant.[187] In Uganda, an outreach officer of the Court said that the Court helped to foster a culture of accountability. It is commonly referred to by people in the street, against corrupt police or army officials: "I will take you to the ICC."[188] In the words of a Colombian Parliamentarian, the "shadow" of the Court has put a focus on "those most responsible", and international crimes such as crimes against humanity have penetrated the public consciousness.[189] All of these are indications that the Court is penetrating the public consciousness. Hayner also argues that there is short-term deterrent effect of the ICC, based on examples from Congo, Kenya, Guinea, and Cote d'Ivoire.[190] In the context of Libya, observers have mentioned that militia leaders show concern about being prosecuted by the ICC.

Yet, in the words of the ICC president, there is no "consistent pattern" of accountability.[191] Criminological studies on the domestic level point to two factors that tend to impact deterrence: certainty of punishment and the severity of sentence.[192] Neither of these can be said to apply readily on the international level, where the chances of being apprehended and tried remain low,[193] and the sentences meted out are often lighter than in domestic systems, many of which retain the death penalty. Deterrence also presumes a rationality of actors, who conduct cost-benefit analysis, which may be less applicable in situations of political violence than

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[186] Hayner, Priscilla. *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict.* Routledge (2018) Chapter 6. Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years,* 2008 at p. 68: Human Rights Watch said that in the Katanga province, Congolese army and Mai Mai rebel leaders said they did not want to end up like Thomas Lubanga.
[187] Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years,* 2008 at p. 68.
[188] Interview with ICC outreach officer, 6 February 2014. Interview with Judge from ICD, 6 February 2014.
[189] Interview with Member of Congress, Bogota, 14 May 2014.
[190] Hayner, Priscilla. *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict.* Routledge (2018) Chapter 6.
[191] Speech by Silvia Fernandez de Gurmendi at Nuremberg Forum 17, *10 Years after the Nuremberg Declaration on Peace and Justice "The Fight Against Impunity at a Crossroad"*, 20-21 October 2017.
[192] Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity,* International Journal of Transitional Justice, Vol. 7, 2013 at pp. 434 -454.
[193] Ku, Julian and Jide Nzelibe. *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?* Hofstra University School of Law Legal Studies Research papers, Research Paper No. 06-27 (2006). The authors examined evidence concerning the fate of failed coup plotters and dictators in Arica to show that the probability of those individuals facing sanctions, in some cases sever, is much higher than the threat of sanctions of international criminal law. Some have argued that the Prosecutorial Strategy of the ICC should be readjusted and targeted more at commanders of organized military structures: Kate Cronin-Furman. *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity,* International Journal of Transitional Justice, Vol. 7, 2013 pp. 434-454.

in cases of ordinary violence. [194] After all, the threat of prosecution by the ICC may for many remain "mild and nebulous."[195] Moreover, prosecutions (particularly if one-sided) can be perceived as destabilizing or politicized: a recent study finds that trials of mid and low-level actors made non-recurrence of civil war 70% less likely, whereas trials of high-ranking actors made it 65% more likely.[196]

One empirical study by Simmons and Jo, suggests that the ICC may have a deterrent effect particularly on government actors, rather than on rebel groups.[197] Their empirical study seeks to assess whether ICC *ratification or actions* resulted in a reduction in intentional civilian deaths, at the hands of governments or rebel groups worldwide. The dataset relied on in the study One-Sided Violence Data set generated by PRIO.[198] The study makes comparisons between ratifying and non-ratifying states that experienced civil wars between 1989-2011, and concludes that "governments in general tend to reduce or refrain from civilian violence after ratification" and that "ICC ratification reduces the intentional civilian killing count by approximately 60%". The study concludes, "this relationship is strong, despite controls for a range of other conditions" and states "investigation reduces intentional civilian killing by 9%."[199] The study argues that factors linked to the ICC including domestic implementation, pressures by NGOs and foreign aid all contribute to reducing killings. In order to answer the difficult question of causality, the authors note that there is "no particular trend in violence between 1989 and 2011" which would explain these reductions. In terms of deterrent effect on rebels, the study concludes that ICC action has reduced killings, although ratification in itself does not produce that change in respect of rebel groups.

The Simmons and Jo study constitutes a significant attempt to understand the causal relationship between the ICC and a reduction in violence. However, the conclusions have been criticized, due to the small sample size, presumptions that conflicts are limited to state boundaries, and strong claims for causation without sufficient consideration for variables.[200] The PRIO dataset, which relies on media reports, is

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[194] Sloane, Robert. *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 Stan. J. Int'l L. 39 (2007) p. 73.
[195] Meijers, Tim and Marlies Glasius. *Trials as Messages of Justice: What should be Expected of International Criminal Courts*. Ethics and International Affairs, 30 No. 4 (2016) p. 431.
[196] Payne, Leigh, Andy Reiter, Chris Mahony, and Laura Bernal –Bermudez, *Conflict Prevention and Guarantees of Non-Recurrence,* 12 April 2017. The study relies on the Transitional Justice Research Collaborative database of 119 transitions in 86 countries found at www.transitionaljusticedata.com. However, this dataset does not include information on the quality of the process.
[197] Simmons, Beth and Hyeron Jo, *Can the International Criminal Court Deter Atrocity?* Draft 18 Dec. 2014.
[198] See the One-sided Violence dataset: http://www,pcr.uu.se/research/ucdp/datasets/ucdp_onesided-violence-dataset. See also https://www.prio.org/Data/Armed-Conflict/Battle-Deaths/.
[199] Simmons, Beth and Hyeron Jo, *Can the International Criminal Court Deter Atrocity*? Draft 18 Dec. 2014.
[200] Mahony, Chris. *If You're Not at the Table, You're on the Menu: Complementarity and Self-Interest in Domestic Processes for Core International Crimes*. In Morten Bergsmo and Song Tianying (eds.),

most likely underreporting political violence, estimating the yearly average intentional civilian killing by a government in conflict countries as 34 a year. Most of the world's conflicts have not accurate casualty figures, as demonstrated by debates around casualty figures in Darfur, Sri Lanka and most recently Syria and Yemen.

Another recent study suggests, "Governments from states that have ratified the Rome Statute commit lower levels of human rights abuses than governments from nonratifier states."[201] This study relies on the Cingranelli-Richards index of physical integrity, including torture, summary executions, physical disappearances and political imprisonment. [202] The study suggests that ICC ratification correlates, or is associated with a reduction in human rights violations, even after accounting for any unobserved preexisting differences between ratifiers and nonratifiers.[203] The study argues that the Court alters the behavior of governments through imposing costs on individuals, including but not limited to imprisonment, so that it lowers their expected payoffs for committing human rights abuses. These costs including domestic costs (including political survival or the call for further investigations), international audience costs (including sanctions and stigmatization, loss of economic or military support), and prosecution costs.[204] The study concludes that ratifiers commit fewer human rights violations, suggesting that variables such as whether the state had a better human rights record before ratification do not explain this difference. Certainly, there has been a peak in crimes committed in non-state parties in recent years, such as in Syria, Iraq, South Sudan, and Yemen. However, whether this correlation amounts to causation remains uncertain. As discussed below, crimes have also continued to be committed in state parties.

It is possible that with additional time, more evidence on the deterrent value of the ICC will emerge. Nevertheless, a quick examination of the specific countries in which the ICC has ongoing investigations is enough to cast serious doubt on the claim that there is conclusive evidence of deterrence, although the long-term preventive impact remains to be seen.

Simmons refers to a fall in crimes at the hands of the LRA after the arrest warrants were issued. Indeed, crimes of the LRA in Uganda made a steep fall after 2005, but LRA killing continued unabated in Central African Republic, DRC, and Southern Sudan, for instance in the notorious "Christmas massacres" between Christmas and 17 January 2009, resulting in the killings of 865 persons in Doruma, Faraje, and

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Military Self-Interest in Accountability for Core International Crimes Brussels: Torkel Opsahl Academic EPublisher, Brussels (2015) pp. 625-629.

[201] Appel, Benjamin. *In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?* Journal of Conflict Resolution (2016), p. 1-26.

[202] The CIRI index relies on US State Department Country Reports and also Amnesty International's Annual Reports.

[203] Ibid., p. 3.

[204] Ibid., p. 6.

other villages of the Haut Uele District of Eastern Congo.[205] Human Rights Watch said its interviewees said Joseph Kony himself, under an ICC arrest warrant, had ordered the attack.[206]

In relation to DRC, Radhika Coomaraswamy, the UN Special Rapporteur for Children in Armed Conflict, famously remarked on the "enormous impact" of the ICC and supports the work of the Court by highlighting criminal accountability for child recruitment. [207] However, Human Rights Watch reported that in Ituri militia leaders were known to hide child soldiers, or abandon them after the Lubanga case. Some were told to lie about their age, and there were threats against child protection officials. Child recruitment however continued in other parts of DRC.[208]

The UN reported that in 2013, Darfur saw 460,000 new displacements and an increase in killings and abductions, with inter-communal fighting, reports of aerial strikes by the Sudanese authorities and an attack on UNAMID.[209]

In Libya, several large-scale massacres occurred after the arrest warrants had been issued on 27 June 2011, at the hands of Qadhafi loyalists (the Yarmouk massacre in Tripoli in late August)[210] and the rebels (the massacre at the Mahari hotel in Sirte in late October). Nonetheless, one scholar has argued that the ICC's involvement had a negative and statistically significant effect on the number of fatalities of civilians at the hand of government forces.[211] Violence flared up again in 2014 in spite of the continued jurisdiction of the Court. Mahmoud Al-Werfalli was subsequently captured on camera committing additional atrocities after the arrest warrant against him was issued.[212]

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[205] Human Rights Watch, *The Christmas Massacres: LRA attacks on Civilians in Northern Congo,* February 2009. See Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court in Investigations in Northern Uganda,* Working Paper No. 22, October 2012 p. 14.
[206] The LRA also engaged in widespread abductions in the area and its attacks caused widespread displacement of up to 140, 000 civilians in the area. These atrocities were likely in retaliation to Operation Lightening Thunder. Human Rights Watch, *The Christmas Massacres: LRA attacks on Civilians in Northern Congo,* February 2009 p. 5.
[207]The trial of Thomas Lubanga was argued to have prompted new awareness among militias that child recruitment is a crime among militia. UN staff on the ground claimed that some militia leaders released child soldiers to become part of a DDR program. IRIN Africa, *Analysis: Jury Still out on ICC trials in DRC,* Bunia, 19 Jan. 2011. See also Niki Frencken, *The International Criminal Court and Deterrence- The Lubanga Syndrome.* Justice in Conflict, 6 April 2012.
[208] Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years,* 2008 p. 68-69. Child recruitment continued most notably with the FARDC forces, which were reported to have recruited 49% of 1593 children, who were recruited between October 2008 and December 2009.
[209] Relief Web. *International Criminal Court Prosecutor Tells Security Council Violence in Darfur Will Not End Without Robust Determination to Apprehend Perpetrators*, Security Council, 11 Dec. 2013.
[210] Physicians for Human Rights, *32nd Brigade Massacre: Evidence of war crimes and the need to ensure justice and accountability in Libya*, Dec. 2011. See also A/HRC/19/68, pp. 68-71.
[211] Hillebrecht, Courtney. *The Deterrent Effects of the International Criminal Court: Evidence from Libya.* International Interventions (2016).
[212] The Libya Observer. *ICC wanted killer Al-Werfalli defies arrest warrant and executes 5 prisoners.* 7 Sept. 2017.

The elections in Kenya in 2013 were remarkably violence-free, particularly when contrasted to the vicious violence following the 2007 elections (known as the "post-election violence"), in which the Waki Commission concluded that up to 1133 Kenyans died and around 600,000 were displaced. Knowledgeable observers have cited the ICC as a "key variable" in the absence of violence.[213] The ICC also had a direct impact on the outcome of the elections. Opposition to the ICC led Kenyatta and Ruto to combine forces in "Uhuruto" alliance, referred to as a "marriage of convenience". The ICC was described as the "life blood" of the Kenyan "coalition of the accused"[214] and differences between the two main protagonists have given rise to a dangerous resurgence of Kikuyu-Kalenjin tensions in the Rift Valley.[215] Kenya's 2017 elections, in which Kenyatta and Ruto ran together again, were dramatically nullified by the Supreme Court.[216] In this context, there were isolated incidents of violence, but not on the scale seen earlier.

In Colombia, some believe that the ICC contributed to a reduction of violence in the last 10 years of the conflict.[217] For instance, some argue that the FARC engaged in less kidnaps in this period. On the other hand, the phenomenon of "false positives", extrajudicial killings committed by Colombia's military, emerged after Colombia became a state party to the Rome Statute in 2002. In addition, paramilitaries continued to commit acts of violence, in spite of the fact of a demobilization process, maintaining much of their structures and violent practices.[218]

The experiences of other Tribunals also cast doubts on deterrence claims. Orentlicher, concludes that fifteen years after its establishment, the evidence on the deterrent effect of the ICTY was "inconclusive."[219] In Lebanon, a string of political assassinations took place after the establishment of the STL.[220] An exception however may be the SCSL: Jallow has argued that it may have contributed to the reduction of violence and peaceful national elections in 2007, by taking influential military and political leaders out of circulation.[221]

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[213] Interview with civil society representative, Nairobi, 3 Feb. 2014.
[214] Interview with civil society representative, Nairobi, 4 Feb. 2014.
[215] Apparently the Kikuyu speak derogatively of the Kalinjan people, referring to them as the "dog" people, Interview with civil society representative, Nairobi, 5 Feb. 2014.
[216] Ombour, Rael and Paul Schemm, *Kenya Supreme Court Cancels Presidential Election Result for Irregularities, Orders New Election,* Washington Post, 1 Sept. 2017.
[217] Interview with Member of the High Judicial Council, Bogota, 14 May 2014.
[218] Ibid.
[219] For instance, the Srebrenica massacre of 1995, found to be a genocide by the Tribunal, happened two years after the ICTY was established, and the Kosovo campaign of 1998-1999 was planned and executed when the Court was well into its activities. Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, Open Society Justice Initiative (2008).
[220] Weeks before the first proceedings of the Special Tribunal for Lebanon were due to start in The Hague, a former finance minister and close advisor of Saad Hariri, Mohamed Chatah, was assassinated in Beirut on 27 December 2013, hundreds of meters from the location of the original assassination of Rafiq Hariri in 2005.
[221] Jallow, Hassan. *Special Court for Sierra Leone: Achieving Justice?* Michigan Journal for International Law Vol. 32, Issue 3 (2011) pp.452-453.

The role of the ICC in preventing violence is further called into question in relation to extremist groups such as the Taliban or ISIL. The Taliban's Code of Conduct, the *Layha*, explicitly allows for attacks on civilians. In recent years, the conflict in Afghanistan has escalated.

Other than deterrence, retribution is often cited as a key goal of sentencing in international criminal tribunals. The ICTY stated that retribution "should not be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes."[222] A recent study concludes that gravity of the crime and aggravating factors are significantly related to sentence length at the *ad hoc* Tribunals.[223] Nonetheless, the application of sentencing at international criminal tribunals remains under theorized.[224] What is certain is that the application of international criminal justice to a select few cases cannot be described as an effective exercise in retribution. In addition, international sentences, while varying wildly, [225] tend to be significantly lighter than sentences for similar crimes at the domestic level and are far from *proportional*.[226] International tribunals have also put an emphasis on forward-looking aspirations, such as reconciliation in their sentencing judgments.[227] Retributivism can give rise to "a risk of moral absolutism and insensitivity."[228] The expressive function of punishment by international criminal tribunals will be discussed further in Chapter 4.

If incapacitation of perpetrators were a central a goal of the ICC, the small numbers of arrest warrants combined with difficulties in securing arrests would render the project ineffective. On the other hand, the ICC does not usually seek the rehabilitation of perpetrators, or their reintegration.[229] This is in contrast to the ICCPR, which states in 10(3), which states that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation or social rehabilitation." On the other hand, the ICC's purpose ought to be seen as broader than these criminal justice goals.

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[222] *Prosecutor versus Aleksovski,* Appeals Chamber Judgement, IT-95-14/1-A, 24 March 2000, para. 185.
[223] Doherty, Joseph and Richard Steinberg. Punishment and Policy in International Criminal Sentencing: An Empirical Study. American Journal of International Law Vol. 110:49 (2016) pp. 49-81.
[224] Sloane, Robert. *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 Stan. J. Int'l L. 39 (2007).
[225] Hola, Barbara, Alette Smeulers, and Catrien Bijleveld, *Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice*, Leiden Journal of International Law, 22 (2009) pp. 79-97.
[226] Drumbl, Mark. *Atrocity, Punishment and International Law,* Cambridge (2007) p. 150-169.
[227] OHCHR, Rule of Law Tools for Post-Conflict States, *Prosecutions Initiatives* (2005) p. 3.
[228] Cryer, Robert, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurts, *An Introduction to International Criminal Law and Procedure (2nd Ed.)* Cambridge (2010) p. 26.
[229] Ibid. p. 28-29. In *Erdemovic,* the ICTY applied the concept of rehabilitation to a lower-level offender: *Prosecutor versus Erdemovic*, Trial Chamber Sentencing Judgement, IT-96-22-T*bis*, 5 March 1998 para. 16.

1. Applying Criminal Law to Political Violence

Apart from not meeting criminal justice goals, some have questioned the appropriateness of applying a criminal law framework to political violence. Luban says, "international criminal law uses trials, punishments, and forms of law to project a radically different set of norms, one that reclassifies political violence from the domain of the sacred to the domain of ordinary thuggery."[230] Yet in the application of ordinary criminal law, breaches of the law are the exception, whereas in times of mass violence, they become the rule.[231] Smeulers states "mainstream criminology studies people who break the law, people who do not live by the rules and people who are deviant. But within such a malignant governmental system, military organization or police unit, it is those who do not break the rules but those who abide by the rules who become perpetrators."[232] As Drumbl puts it, "many extraordinary international criminals, who engaged in acts of unfathomable barbarity, were able to conform easily and live unobtrusively for the remainder of their lives as normal citizens."[233] Professors Ku and Nzelibe suggest: "offenders commit more atrocities in weak states because they have more opportunities to do so, and not because they have a greater inclination to commit such atrocities. Because of norms of political accountability and strong state institutions, potential offenders in more mature states face significant constraints on their ability to mobilize violent groups and engage in large scale humanitarian atrocities."[234]

Some have therefore questioned the relevance of a criminal framework to complex political violence, which is often rooted in horizontal grievances or in deep inequalities.[235] McCargo writes, "International tribunals have been created to solve political problems that lie well beyond their capacity to fix. What is needed instead is not more tribunals, but rather more scope for creative political fixes of the sort that legal experts are unlikely to ever generate."[236] In the context of the post-election violence in Kenya, Muthoni states, "What is it that renders communities more susceptible to political mobilization on grounds of their ethnicity? If the answer is not just a lack of criminal justice but also political and social justice, then in order to have a truly deterrent effect, the ICC would have to deliver on all three

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[230] Luban, David. Afte*r the Honeymoon: Reflections on the Current State of International Criminal Justice*, Journal of International Criminal Justice 11 (2013) p. 510.
[231] Sloane, Robert. *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 Stan. J. Int'l L. 39 (2007) p. 41.
[232] Smeulers, Alette. *Perpetrators of International Crimes: Towards a Typology*. Intersentia, 22 Jan. 2014.
[233] Drumbl, Mark. *Atrocity, Punishment and International Law*, Cambridge (2007) p. 8.
[234] Ku, Julian and Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?* Hofstra University School of Law Legal Studies Research papers, Research Paper No. 06-27 (2006) p. 4.
[235] United Nations: World Bank. *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (2017).
[236] McCargo, Duncan. *Transitional Justice and Its Discontents. Journal of Democracy,* Vol. 26 (April 2015) p. 9.

types of justice."[237] What is clear is that the ICC alone is an insufficient response to political violence: "[International criminal law] remains only one tool, and by no means always the most appropriate or efficacious one, for addressing the diverse circumstance that give rise to large-scale human rights atrocities and violations of the laws of war."[238]

In the context of South Sudan, Mbeki and Mamdani have argued that the ICC follows a "Nuremberg model", but that mass violence is more political than criminal, driven by issues rather than by perpetrators.[239] Mbeki and Mamdani argue that courts should only play a role after a new political order is in place, in times of peace:

> In civil wars, no one is wholly innocent and no one wholly guilty. And extreme violence is seldom a stand-alone act. More often than not, it is part of a cycle of violence. Victims and perpetrators often trade places, and each side has a narrative of violence. To call simply for victims' justice, as the I.C.C. does, is to risk a continuation of civil war. Human rights may be universal, but human wrongs are specific. [240]

The argument that "human wrongs are specific" is appealing in its recognition of the importance of context.[241] But assigning all those involved the label of "survivors" is a position of moral and legal equivalence that disregards the statistical fact that mass violence often victimizes civilians in general, and specifically preys on the weak and the innocent, including the marginalized and minorities, prisoners of war, the elderly, women and children. Decades of development of international legal norms including in particular the Geneva Conventions, the Genocide and Torture Conventions seek the protection of civilians or vulnerable groups.[242]

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[237] Wanyeki, L. Muthoni. *The International Criminal Court's cases in Kenya: origin and impact,* Institute for Security Studies Paper 237 August 2012 at p. 17. The former Prosecutor argues that in countries such as Kenya and Cote d'Ivoire, the ICC presents political leaders with a simple lesson that they cannot use violence as an instrument to gain power. Exclusive interview with Luis Moreno Ocampo on the Kenya Situation, published 6 Feb. 2014: https://www.youtube.com/watch?v=tHBwQwUzgYo.
[238] Sloane, Robert. *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 Stan. J. Int'l L. 39 (2007) p. 46.
[239] Mbeki, Tabo and Mahmood Mamdani. *Courts Can't end Civil Wars*, Op-Ed, International New York Times, 4 Feb. 2014.
[240] Ibid.
[241] Interview with Jamiat-i-Islami Afghan MP from Panjshir, Kabul, 17 March 2014. A former *mujahidin* fighter from the Panjshir valley in Afghanistan, interviewed for this thesis put it this way: "everyone favors justice but their definition of justice differs, and everyone in Afghanistan who got power had their own interpretation of justice and security. Often justice took the form of revenge … Nobody is impartial so as to impose it on others." He added that "as a foreigner, you cannot understand my background, my history … When the Russians were here, the West was on our side, and portrayed us as heroes. After the Bonn Agreement, they now accuse us as warlords."
[242] Louise Arbour, President and CEO of International Crisis Group, *Are freedom, peace and justice incompatible agendas? The Inaugural Berge Lecture,* 3 March 2014 Oxford University. The United Nations too takes a normative approach on accountability for massive violations of human rights and international humanitarian law. The Brahimi report, which reviewed UN peacekeeping after failures such as Srebrenica and Rwanda, found that "no failure did more to damage the standing and

The Rome Statute Preamble, along similar lines, recalls, "Millions of children, women and men have been victims of unimaginable atrocities." As argued above, criminal law in particular provides an important expressive function in labeling the crimes and their condemnation. This goes beyond the political statements made by the Security Council, the Secretary-General, and the High Commissioner on Human Rights or human rights NGOs. As the International Military Tribunal famously ruled at Nuremberg: "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[243] The relevant question, encompassed in Nuremberg Principle IV, is whether "a moral choice was in fact possible." The norms of the Rome Statute that prohibit the world's most serious crimes, have wide acceptance among States and on the social level, and will continue to apply at the international as well as at the domestic level. At the same time, the words of Hana Arendt will continue to provoke debate about the inadequacies of the criminal law framework for mass atrocity: "Men are unable to forgive what they cannot punish and are unable to punish what turns out to be unforgivable."[244]

B. Transitional Justice Assumptions about the ICC

The ICC is often considered as a tool in the toolbox of "transitional justice" responses to mass atrocities.[245] According to the United Nations, transitional justice refers to a "society's attempts to come to terms with a legacy of large-scale abuses, in order to ensure accountability, serve justice and achieve reconciliation."[246] While transitional justice borrows from the normative legacy of Nuremberg, its roots are in the transitions in Latin America, in Argentina and Chile, and in South Africa in the mid to late 1980s. Transitional justice seeks to be transformative in nature, using justice in order to facilitate transition from a period where violations were the norm to one in which they will be the exception. [247]

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credibility of United Nations peacekeeping in the 1990s than its reluctance to distinguish victim from aggressor." Report of the Panel on United Nations Peace Operations, UN. Doc. A/55/305-S/2000/809, 21 August 2000.

[243] International Military Tribunal Judgment at Nuremberg, p. 41.

[244] Arendt, Hana. *The Human Condition*, 1958, p. 241.

[245] Meijers, Tim and Marlies Glasius. *Trials as Messages of Justice: What should be Expected of International Criminal Courts*. Ethics and International Affairs, 30 No. 4 (2016) pp. 429-447.

[246] Report by the Secretary-General. *The rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,* 23 August 2004. S/2004/616 at para. 6-8. Rule of law, a closely related field, according to the UN, "refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights and standards." Report by the Secretary-General.

[247] Van de Merwe, Hugo, Victoria Baxter and Audrey R. Chapman, "*Introduction*", in Hugo van de Merwe, Victoria Baxter and Audrey R. Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, United States Institute for Peace Press (2002) p. 5: ""The toughest test of a specific transitional justice mechanism's efficacy is not only how well it engages with past human rights violations but also how effectively it builds institutions, policies and practices that will

1. Transitional Justice Lessons: Local Ownership, and Tailor-Made and Comprehensive Approaches

However, the ICC differs from transitional justice mechanisms in three essential ways. First, transitional justice requires for a society itself to confront its massive human rights violations, as was the case in Argentina, Chile and South Africa. A seminal UN report on transitional justice states, "no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable".[248] In the words of the International Center for Transitional Justice: "while some generalizations might be possible, what was essential was a context-specific approach with genuine national ownership and empowerment."[249]

The notion of "local ownership" in transitional justice interventions should not be unduly romanticized. Sharp points out that the widespread use of the term "local ownership" in relation to transitional justice mechanisms belies a tension between "liberal internationalism and international human rights on the one hand, and principles of local sovereignty, autonomy and democracy on the other."[250] As commented by Donais, "if the operationalization of local ownership principles were entirely unproblematic, there would be no need for external intervention in the first place."[251] However, transitional justice puts a premium on bottom-up approaches and local ownership, and is implemented mainly on the national level.

International criminal justice on the other hand has its origins in the overtly coercive policies of the victors of the Second World War, and the Security Council (representing those same victors). Some scholars point out that rather than a transitional justice instrument, the ICC is a top-down instrument of "juridified diplomacy,"[252] a tool used between states rather than part of a society's *own* attempt to come to terms with its legacy of large-scale abuses, as required by the United Nations definition. The ICC seeks to substitute for a society's "own" attempts to come to terms with mass atrocity, even though in the words of Donais: "no amount of externally generated policy prescriptions can shift post-conflict societies from a culture of violence to a culture of peace." [253]

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enable the new embryonic democracy to deal with emerging and potential patterns of social conflict and violence."

[248]Report by the Secretary-General. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 23 August 2004. S/2004/616 at para. 17.

[249] ICTJ Side Event During ICC ASP Ninth Session *Making Complementarity Work: The Way Forward*, December 9, 2010.

[250] Sharp, Dustin. *Beyond the "Toolbox": Addressing Dilemmas of the Global and Local in Transitional Justice,* Emory Int'l Law Review (4 July 2013).

[251] Donais, Timothy. *Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peacebuilding Processes, Peace and Change*, Vol. 34, No. 1 January 2009 at p. 12.

[252] Simpson, Gerry. *Law, War and Crime: War Crimes Trials and the Reinvention of International Law,* Polity Press (2007) p. 132.

[253] Donais, Timothy. *Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peace-building Processes, Peace and Change,* Vol. 34, No. 1 January 2009 at p. 11. Report by the

Furthermore, transitional justice seeks to be 'tailor made". It is guided the need to adapt to context and to "eschew one size-fits-all formulas and the importation of foreign models."[254] The Court on the other hand is the ultimate "one-size-fits-all". In its current operating model, it has little flexibility to adjust its operations depending on the local context. The Court's trajectory in terms of process does not deviate depending on the context.

Finally, transitional justice is premised on the recognition that no single mechanism will meet all of its goals, but all transitional justice mechanisms work towards some of these goals in varying degrees.

It could be argued that the ICC itself is intended to be a "comprehensive approach": the Court conducts criminal trials; contributes to truth seeking through victim participation; provides truth seeking and reparations for victims; and strengthens domestic legal systems through complementarity. While the ICC may contribute to a variety of these goals, it is far from possible for the Court at its current capacity to constitute a comprehensive approach to justice in multiple situations. Any claim that the ICC could suffice in fulfilling these different goals ought to be treated with skepticism.

2. Expressivism as a goal

A more convincing goal of the ICC, linked to the field of transitional justice, can be said to be re-articulation of norms through the public denunciation of criminal behavior,[255] norm projection or expressivism. In the words of the UN Secretary-General: "Criminal trials … express public denunciation of criminal behavior. They can provide a direct form of accountability for perpetrators and ensure a measure of justice for victims by giving them the chance to see their former tormentors made to answer for their crimes.[256] Nino writes in the context the domestic trials of the

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Secretary-General. *The rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 23 August 2004, S/2004/616.

[254] Report by the Secretary-General. *The rule of Law and Transitional Justice in Conflict and Post-Conflict Societie*s, 23 August 2004. S/2004/616.

[255] Cryer, Robert, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshursr. *An Introduction to International Criminal Law and Procedure* (2nd Ed.) Cambridge (2010) p. 29.

[256] United Nations Report of the Secretary-General to the Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, 23 August 2004 (S/2004/616) para. 39: Insofar as relevant procedural rules enable the to present their views and concerns at trial, they can also help victims to reclaim their dignity. Criminal trials can also contribute to greater public confidence in the State's ability and willingness to reinforce the law. They can also help societies to emerge from periods of conflict by establishing detailed and well-substantiated records of particular incidents and events. They can help to de-legitimize extremist elements, ensure their removal from the national political process and contribute to the restoration of civility and peace and to deterrence. Yet achieving and balancing the various objectives of criminal justice is less straightforward and there are a host of constraints in transitional contexts that limit the reach of criminal justice, whether related to resources, caseload, or the balance of political power.

military junta in Argentina, "Trials are great occasions for social deliberation and for collective examination of the moral values underlying public institutions. They can help to break a power structure and invent a new democratic society."[257] The trial plays an important role, as "graphic accounts of past human rights abuses and war crimes may be a powerful tool to internalize norms prohibiting such conduct."[258] In the words of Orentlicher, "Trials may, as well, inspire societies that are re-examining their basic values to affirm the fundamental principles of respect for the rule of law, civic trust, and the inherent dignity of individuals."[259] Luban says, "Its mode of functioning is expressive, and its aim is norm projection, the dissemination through trials, punishments and jurisprudence of a set of norms very different from the Machiavellian brutality of the past."[260] De Greiff has referred to the importance of rebuilding civic trust in state institutions.[261] DeGuzman argues that the "ICC's global platform and scope make it an especially effective mechanism for expressing shared social norms."[262] Meijers and Glasius affirm their belief in the transformative potential of expressivism: "laws and legal institutions have the potential to alter people's behavior and attitudes through messaging."[263]

This expressive function also has consequences for how trials are to be conducted in order to have impact. Aloisi and Meernik write about the expressive function of the judgement of international criminal tribunals:[264]

> We believe that judges seek to leave a lasting memory of horrors they adjudicate to develop a message that speaks clearly, forcefully and morally of their recognition of the human cost of these tragedies. We believe they seek to move beyond punishment and acknowledge the pain of victims and local communities and communicate this suffering to the larger international community. In a certain way, moral condemnation does what retribution

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[257] Nino, Carlos. *Radical Evil on Trial,* Yale University (1996) p. 131.
[258] Padhamabhan, Vijay. *Norm Internalization Through Trials for Violation of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*. 31 U. Pa. J. Int'l L., (2009) p. 438.
[259] Orentlicher, Diane. S*ettling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* The Yale Law Journal, Vol. 100, No. 8 (1991) p.2542.
[260]Luban, David. *After the Honeymoon: Reflections on the Current State of International Criminal Justice*, Journal of International Criminal Justice 11 (2013) p. 511. McCargo, Duncan. *Transitional justice and its Discontents*, Journal for Democracy, Vol. 26 (April 2015) at p. 8.
[261] For notions of civic trust, see the work of Pablo de Greiff, for instance in *Articulating the Links Between Transitional Justice and Development: Justice and Social Integration,* in Roger Duthie and Pablo de Greiff (eds), *Transitional Justice and Development: Making Connections* (SSRC 2009) p. 58. Van de Merwe, Hugo, Victoria Baxter and Audrey R. Chapman, *Introduction*, in Hugo van de Merwe, Victoria Baxter and Audrey R. Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research,* United States Institute for Peace Press (2002), p. 3.
[262] DeGuzman, Margaret. *Choosing to Prosecute: Expressive Selection at the International Criminal Court*. 33 Michigan Journal of International Law (2012) p. 316.
[263] Meijers, Tim and Marlies Glasius. *Trials as Messages of Justice: What should be Expected of International Criminal Courts*. Ethics and International Affairs, 30 No. 4 (2016) pp. 429-447 at p. 432.
[264] Aloisi, Rosa and James Meernik*. Judgement Day: Judicial Decision Making at the International Criminal Tribunals,* Cambridge University Press (2017).

> and punishment alone cannot do, it shrinks the "physical and moral distance" between the victims and the communities shattered by the events and the legal proceedings adjudicating the crimes.[265]

The importance of the expressive function therefore, is that it communicates the condemnation of the suffering of the victims to the perpetrators themselves, to the victims, to affected communities and the rest of the world.[266] The ICC becomes a "loudspeaker echoing the values of the international community."[267] Meijers and Glasius make the ambitious claim that "international courts can, instead of expressing the values of an existing legal order, help to transform the vase values and contribute to forging a new social order."[268]

Different elements of the trial are important to expressivism. Rather than targeting rank and file perpetrators, trials should target those who masterminded or orchestrated mass violence, in order to expose the systems that allowed violence to happen. The trial in this respect may be more important than the punishment as the "messaging starts long before the verdict is pronounced."[269] The process and its outcomes ought to be effectively communicated to broader audiences, so that the justice delivered is properly understood.[270]

In this respect, some scholars have cited quantitative data to suggest, "human rights prosecutions have a strong and statistically significant impact on decreasing levels of repression."[271]

The expressive function of the Court is recognized in the criteria of gravity applied by the Office of the Prosecutor. The Prosecutor's Policy paper on Case Selection and Prioritization gives further definition to this concept, [272] focusing on elements such as the scale of the crimes; the vulnerability of the victims (including sexual or gender-based violence or crimes against children); the motives of the perpetrators (including discrimination or persecution); or even the destruction of the

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[265] Ibid.
[266] Meijers and Glasius argue that it is important to look at the sender, the message, the medium and the audience. Meijers, Tim and Marlies Glasius. *Trials as Messages of Justice: What should be Expected of International Criminal Courts*. Ethics and International Affairs, 30 No. 4 (2016) pp. 429-447 at 439.
[267] Jessberger, Florian and Julia Geneuss, *The Many Faces of the International Criminal Court*, 10 J. Int'l Crim. Just. 1081 (2012) pp. 1081-1094.
[268] Meijers, Tim and Marlies Glasius. *Trials as Messages of Justice: What should be Expected of International Criminal Courts*. Ethics and International Affairs, 30 No. 4 (2016) pp. 429-447 at p. 438.
[269] Ibid., p. 436.
[270] OHCHR, Rule of Law Tools for Post-Conflict States, *Prosecution Initiative*s, (2005) p. 5.
[271] Kim, Hun Joon and Kathryn Skikink, *How do Human Rights Prosecutions Improve Human Rights After Transition?* Interdisciplinary Journal of Human Rights Law, Vol. 7: 1 (2012-2013). For an opposing point of view see Jack Synder and Leslie Vinjamuri. *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 Intl Security 5 (2003/2004): "'Evidence from recent cases casts doubt on the claims that international trails deter future atrocities, contribute to consolidating the rule of law or democracy, or pave the way for peace."
[272]OTP, Policy Paper on Case Selection and Prioritisation, 15 Sept. 2016.

environment, the illegal exploitation of natural resources or the illegal dispossession of land.[273]

A prime example of the exercise of expressivism is the case against *Ahmed Al Faqi Al-Mahdi* from Mali, convicted on 27 September 2016 which was largely pursued because it constituted an attack against protected objects (in this case, attacks on nine mausoleums and a mosque in Timbuktu) at a time when such attacks were prevalent among ISIL in Syria.[274] In another example, Dominic Ongwen has many more charges included in his arrest warrant, seventy in total, than Thomas Lubanga (who had three charges against him). Significantly, the Ongwen charges include forced marriage, rape, torture, sexual slavery, and enslavement, whereas the charges against Lubanga omitted sexual violence. However, as will be argued in Chapter 6, the "expressive" function of the Court is diluted further if the actions of the Court are not clearly communicated or not perceived as independent or impartial.[275]

Who should be the main audience for the expressive functions of the Court?[276] The trials of the ICC can have an expressive function within the international community as a whole.[277] This raises an important counterfactual question: if the ICC did not exist, who else would have the authority to condemn crimes on a universal level? While the United Nations has a role, the authority of the Court stems from the fact that they can authoritatively label certain acts as international crimes.

However, expressivism at the international level is a more difficult concept to apply than at the domestic level. ICC trials do not directly contribute to restoring the *social contract* between citizens and institutions at the national level, referred to by Carlos Nino or Diane Orentlicher, since the Court is not a domestic institution.[278] Instead, the expressive function of the ICC is more indirect: it is linked to the reaffirmation of universal values, and seeks to condemn the wrongdoing of the offender on a global scale. It can incentivize action by the state and serve to strengthen constituencies of victims on the domestic level, as has been the case in

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[273] Ibid. at para. 41.
[274] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-1 Red.
[275] See Chapter 6.
[276] For a discussion of this question, see Aloisi, Rosa and James Meernik. *Judgement Day: Judicial Decision Making at the International Criminal Tribunals,* Cambridge University Press (2017).
[277] In the *Katanga* Sentencing judgement, the Trial Chamber explicitly recognized the expressive function of sentencing when it held: "le considère que la peine a donc deux fonctions importantes : le châtiment d'une part, c'est-à-dire l'expression de la réprobation sociale qui entoure l'acte criminel et son auteur et qui est aussi une manière de reconnaitre le préjudice et les souffrances causées aux victimes ; la dissuasion d'autre part, dont l'objectif est de détourner de leur projet d'éventuels candidats à la perpétration de crimes similaires. *Le Procureur c. Germain Katanga,* Decision relative a la peine (article 76 du Statut), 23 Mai 2014, ICC-01/04-01-07, para. 38.
[278] Sloane, Robert. *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 Stan. J. Int'l L. 39 (2007) p. 53:
"The Hobbesian notion of an implicit social contract-whereby individuals surrender certain rights to the state, which then gets a monopoly on legitimate coercion, in exchange for a measure of security-is strained in this context."

Colombia. But the question is whether this message is communicated effectively on the domestic level. As noted by Drumbl:

> When justice is externalized from the afflicted societies for which it ought to be most proximately intended, it then becomes even more difficult for any of the proclaimed goals of prosecuting and punishing atrocity perpetrators – whether denouncing extreme evil, expressing rule of law, voicing retribution, or preventing recidivism – to take hold."[279]

The message that the Court seeks to communicate through its trials can be lost in translation through a wide variety of contextual factors. International criminal justice supporters describe main barriers to such messaging come from "ethnic, religious or other conflict-related bias,"[280] thus implying that misunderstandings by domestic audiences dilute from the objective messaging value of international criminal courts. However, the discussion in Chapter 6 will question this presumption: instead, failures by the ICC to appreciate the local context, in combination with selective prosecutions and other factors, has also diminished the effectiveness of the expressive function of the ICC.

Two further factors complicate the expressive function of the ICC. As will be argued in Chapter 4, the main vehicle for expression should be the trial, not the punishment, which in any event will never be proportional. While the reparative function of the ICC may also have an important expressive dimension, this function likewise is obscured by limitations on proportionality and other practical barriers.

Domestic law reform and proceedings resulting from the systemic effect of the ICC can contribute more directly to reconstructing the social contract between citizens and institutions if these result from "internalization", as discussed in Chapter 3. However, in order to fulfill this function, these trials must abide by fair trial standards.

C. Assumptions about Peacebuilding or Reconciliation

Reconciliation was a clearly stated objective at the time of the creation of the ad hoc Tribunals.[281] The Security Council Resolution creating the ICTY stated it was

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[279] Drumbl, Mark. *Atrocity, Punishment and International Law,* Cambridge University Press (2007) p. 128.

[280] Meijers, Tim and Marlies Glasius. *Trials as Messages of Justice: What should be Expected of International Criminal Courts*. Ethics and International Affairs, 30 No. 4 (2016) pp. 429-447 at p. 443.

[281] Fletcher, Laurel and Harvey Weinstein, *A world unto itself? The application of international justice in the former Yugoslavia*, in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Ed. by Eric Stover and Harvey Weinstein, Cambridge, 2004, at p. 36. See also Eric Stover and Harvey Weinstein, "Conclusion: a Common Objective, a Universe of Alternatives", in the same book at p.323.

intended to contribute to the restoration of peace.[282] At the time, peace and the cessation of violence were often cited justifications for international justice.[283] Similar language was used in the Resolution on the Special Court for Sierra Leone.[284] Ralph Zacklin wrote in 2004:

> The hope was that the establishment of the ICTY would promote reconciliation in the former Yugoslavia. There is little evidence that this is the case. Clearly, the Tribunal itself is not sufficient to promote reconciliation. Additional mechanisms, such as functioning national courts and truth commissions, are needed.[285]

Since the formation of the ICTY, it has become increasingly clear that the relationship between peace and justice processes is sometimes symbiotic and sometimes strained. The ICC is not a conflict resolution mechanism, and should not be expected to end conflicts.[286]

Nonetheless, it is sometimes expected that the ICC will contribute to goals such as reconciliation. While reconciliation is sometimes associated with forgiveness, amnesty and impunity, supporters of international criminal law have often argued that attributing individual criminal accountability promotes reconciliation. The ICC may contribute to reconciliation through different avenues, such as the individualization rather than collectivization of guilt, and by contributing to a judicially tested historical record of the conflict.

However, experience indicates that reconciliation, an often-cited goal for transitional justice mechanisms, may not be a realistic goal for an international criminal court. Jallow argues that in the case of the SCSL, the Hinga Norman indictment "exposed the intense political cleavages in Sierra Leone" and that the Court's failure to allow him to testify before the ICC further diminished the Court's contribution to reconciliation.[287]

1. Do trials individualize or collectivize guilt?

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[282] UN Sec. Council Resolution 827 (1993). See also UN Sec. Council Resolution 955(1994) that created the ICTR.
[283] Vinjamuri, Leslie, *Deterrence, Democracy, and the Pursuit of International Justice*, 2010 Carnegie Council for Ethics in International Affairs.
[284] UN Sec Council Resolution 1315 (14 August 2000).
[285] Zacklin, Ralph. *The Failings of Ad Hoc International Tribunals,* Journal of International Criminal Justice 2 (2004), 541 at p. 544.
[286] It is possible that extending the jurisdiction of the ICC to the crime of aggression will have impact on this relationship in the future, but that is too early to assess for the purposes of this thesis. Shany, Yuval. *Assessing the Effectiveness of International Courts*, Oxford University Press (2014) p. 232.
[287] Jallow, Hassan. *Special Court for Sierra Leone: Achieving Justice?* Michigan Journal for International Law Vol. 32, Issue 3 (2011) pp.455-456.

One of the most often cited justifications for the ICTY was articulated by Antonio Cassese in his report to the General Assembly: "the history of the region clearly shows that clinging to feelings of "collective responsibility" easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes."[288] Hodžić, former spokesperson of the Tribunal later commented:

> Neither Cassese nor any of his successors ever clearly outline how was this court to do so other than by conducting lengthy, complicated trials in an insulated legal bubble, completely removed from the realities of a region ravaged by vicious fratricide, with most of the underlying causes of violence left unaddressed and without anything resembling a comprehensive transitional justice framework.[289]

In fact, some studies suggest that trials dealing with senior state officials such as heads of state or military leaders, lead affected populations to view such proceedings as imposing *collective responsibility or national guilt.* For instance, Madoko writes that just after the conclusion of the Tokyo trial, in November 1948, a newspaper *Asahi Shimbun* wrote that Japanese felt that that the Tokyo Trial judged Japan as a nation, not necessarily legally but historically and morally, "because the country as a whole could have never moved towards the war without organizations supported by people."[290] Burchard similarly writes the following about Nuremberg:

> It is a simple and brutal reality that it was Germany, not the Nazi party, who started the war and industrialized genocide. To forget or suppress this fact denies a historical truth. Yet, exactly this view was, to some extent, fostered by the individualization of criminal guilt in Nuremberg. The major war criminals were made to shoulder the responsibility of the German people as a whole: they were objects for the transfer of guilt.[291]

Orentlicher observes, "While Serbia was not on trial before the ICTY, the prosecution of Milosevic illuminated facts implicating the country's responsibility for the crimes charged against its former leader."[292] Historian Axboe-Nielsen, who served as an expert witness in many ICTY trials, noted that the major Croatian newspaper *Jutarnji List* posted the headline "Croatia is Innocent" right after the acquittal of Ante Gotovina and his co-accused was announced. [293] These examples show that international trials can lead to a perception of collective responsibility.

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[288] Hodžić, Refik. *Accepting a Difficult Truth: ICTY is Not Our Court*. Balkan Insight 6 March 2013.
[289]Ibid.
[290] Madoka, Futamura, *Japanese Societal Attitudes Towards the Tokyo Trial: A Contemporary Perspective*, The Asia-Pacific Journal Vol. 9, Issue 29 No 5, July 18, 2011.
[291] Burchard, Christoph. *The Nuremberg Trial and its Impact on Germany*. Journal of International Criminal Justice 4 (2006), p. 824.
[292] Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia.* OSJI (2008) p. 26.
[293] Irwin, Rachel, *Do Overturned Convictions Undermine Hague Tribunal*, 20 Mar. 2013, IWPR, International Justice, ICTY, Issue 780. See also Milanović, Marko. *Establishing the Facts about Mass*

2. Impact of international tribunals on historical truth-seeking

Much debate around the tribunals has been held about whether they are able to record historical truth. Impact studies do show that witnesses are motivated by a need to ensure that the "truth" about their conflict is recorded.[294] Certainly, this is how ICTY describes its own contribution on its website: "The Tribunal's judgements have contributed to creating a historical record, combatting denial and preventing attempts at revisionism and provided a basis for future transitional justice in the region."[295]

Certainly, the extensive natures of many international judgments reflect a desire to contribute to the establishment of a historical record. Yet Damaška writes that "seen through the prism of a historian … judicial portrayals of the background of international criminality inevitably appear fragmentary, foreshortened, and locked in an arbitrary time frame."[296] A clear illustration is the fact that at Nuremberg and Tokyo, the accused were not allowed to bring evidence of Allied war crimes, including in particular the dropping of the atomic bomb on Hiroshima and Nagasaki. Arendt writes about the Eichmann trial: "The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes … can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment."[297]

The ICTY has been criticized for lack of contextual knowledge on behalf of the judges and lawyers conducting the trials,[298] as exemplified in the Milosević case. In Serbia, the trial quickly became viewed as a competition in which it was generally agreed that Milosević was outperforming Tribunal prosecutors and judges. The contextual part of the indictment, which laid out Milosević's dreams for a "greater Serbia", lent itself to such sparring on historical factors.[299] "In a way, the [two recent cases] say much more about our need for an overly simplistic understanding of the conflict in the former Yugoslavia, which translates into a lingering desire for symbolic

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Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378.

[294] Orentlicher, Diane. *That Someone Guilty be Punished: The Impact of the ICTY in Bosnia.* OSJI (2008) p. 19.

[295] http://www.icty.org/en/about/tribunal/achievements.

[296] Damaška, Mirjan. W*hat is the Point of International Criminal Justice?* Chicago-Kent Law Review, Vol. 83: 239 (2008) p. 336.

[297] Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin NY 2006) p. 253.

[298] Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*. OSJI (2008) p. 74.

[299] As Milosević was representing himself, he was able to show his vastly superior knowledge of the political context as well as pander to domestic audiences in the televised proceedings. Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*. OSJI (2008) pp. 75-79.

convictions of the 'big guys'," stated historian Axboe- Nielsen.[300] Plea-bargaining had a detrimental effect on the ICTY's truth-telling function,[301] particularly in cases where accused pleaded guilty to crimes against humanity in order to avoid genocide charges, such as in the *Plavšić* case.

Fletcher and Weinstein argue that trials alone cannot not establish "incontrovertible truth", because each warring group will interpret the trials according to its own political views.[302] Orentlicher suggests that the role played by local NGOs such as the Humanitarian Law Center in Serbia has been more prominent than that of the ICTY in helping Serbian society confront its past.[303] "Everybody put their eggs in one basket, [as if] the tribunal is going to come up with findings and this is going to resolve all of the disputes," said Eric Gordy, a sociologist at UCL. "Probably if you think about it, no court could ever really do that."[304] The desire that court proceedings lead to an acknowledgement of the crimes by perpetrators is not yet borne out except in isolated cases.[305]

Against the backdrop of experience of the ICTY, which completed many more cases than the ICC, it is prudent to be cautious about what the contribution of the ICC can be in establishing a historical record of the conflicts in which it is active. As will be seen in Chapter 6, often a large segment of the conflict in any given situation country falls outside of the Court's jurisdiction. The very limited number of cases is another hindrance in pursuing a full historical account. In addition, perceptions are shaped by many factors other than the judgments of international tribunals.[306] While the victim participation function, described in Chapter 5, is sometimes referred to as crucial in this regard, the fact remains that the contribution of the Court to truth seeking is likely to remain limited.

III. A Proposed Framework for Assessing the Impact of the ICC

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[300] Irwin, Rachel, *Do Overturned Convictions Undermine Hague Tribunal*, 20 Mar. 2013, IWPR, International Justice, ICTY, Issue 780.
[301] Padmanabhan, Vijay. *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay,* 31 U. Pa. J. Int'l L. 2009 at p. 447.
[302] Laurel Fletcher and Harvey Weinstein. A *world unto itself? The application of international justice in the former Yugoslavia,* in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Ed. by Eric Stover and Harvey Weinstein, Cambridge (2004), p. 44.
[303] Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia.* OSJI, 2008 at p. 59.
[304] Irwin, Rachel, D*o Overturned Convictions Undermine Hague Tribunal*, 20 Mar. 2013, IWPR, International Justice, ICTY, Issue 780.
[305] Orentlicher, Diane. *That Someone Guilty be Punished: The Impact of the ICTY in Bosnia*. OSJI (2008) p. 19.
[306] Milanović, Marko. *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378.

Uncertainty about the identity of the Court makes it difficult to readily borrow from related fields to develop an assessment framework. The ICC as an international criminal justice institution is a *sui generis* mechanism that was intended to achieve specific outcomes. These outcomes can be distilled from the Rome Statute, as well as from the pronouncements of the Assembly of States Parties and Court officials over the years.

As discussed earlier in this Chapter, the Rome Statute clearly states that its primary purpose is to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of these crimes. As the ICTY stated, "it is hoped that the Tribunal and other courts are bringing about the development of a culture of respect for the rule of law and not simply the fear of the consequences of breaking the law, and thereby deterring the commission of crimes."[307] The question is how this translates into a framework for assessing the impact of the ICC, specifically on systems, processes and persons.

Fifteen years after its establishment, the Court's founders and its supporters increasingly recognize that the impact of the ICC will reach beyond trials in The Hague. The clearest recognition of the fact that the Court's impact goes beyond trials in The Hague is reflected in the "stock-taking" exercise, which took place during the Review Conference in 2010. The Assembly of States Parties itself identified areas of change in which it wished to debate the impact of the Court as part of a stocktaking exercise. As part of this process, the Assembly examined four areas that are also considered as relevant in this thesis: impact of the ICC on domestic legal systems, through complementarity; impact of the ICC on the question of peace and justice; and the impact of the ICC firstly on victims and secondly on affected communities.[308]

If the ICC is intended to result in changes, in terms of fostering a culture of accountability, the framework that seeks to assess its impact can borrow from other fields that seek to assess change within interventions. The methodology requires firstly a clear statement of which change that an intervention is intended to accomplish.

In this respect, the ICC should be considered in a similar light to other conflict-related interventions. Central to the core assumptions of the ICC, its "theory of change" or the transformation it seeks to achieve, is ending impunity for the perpetrators of these crimes, and thus contributing to the prevention of these crimes. Impunity is eroded through various pathways to prevention, which in turn lead to a culture of accountability. Such pathways may take the form of trials, but also through an absence of amnesties or peace deals that reinforce impunity. A

[307] *Prosecutor v. Nikolić*, Trial Chamber I Sentencing Judgement, IT-94-2-S, 18 December 2003, paras. 89-90.

[308] The author also prepared or contributed to various papers for the Stocktaking Exercise. See the ICTJ series on impact of the Court in Colombia, DRC, Uganda, Sudan and Kenya.

broader notion of ending impunity may also entail respect for the rights of victims. Prevention is further enhanced through domestic legislation, through creation of capacities to investigate and try these crimes, and through respecting the rights of victims.

Along these pathways, it is possible to identify clear milestones or indicators to assess changes. Discussions of indicators in relation to international interventions have become a common part of the field of peace building and development cooperation in recent years. In the realm of development cooperation, several comparative and global tools with extensive indictors were developed to assess the status of rule of law countries.[309] An obvious indicator is the development of new laws or institutions, but many of these tools also rely on complex data sets, including expert assessments, official data and opinion surveys.[310] The tools use multiple data sources, including administrative data, surveys of experts, public surveys and document reviews.

Similarly, it is possible to identify certain indicators for the Rome Statute or the ICC's impact on domestic legal systems (systemic effect), on processes (transformative effect) and on people or victims (reparative effect). These effects may emanate from the Rome Statute itself or the actions of the Court.

A. Systemic effect

The Preamble of the Rome Statute refers to "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". If States undertake prosecutions of their own, this "catalytic effect" may be the most significant area of impact of the "Rome Statute system". [311] Systemic effect refers to

[309] See http://worldjusticeproject.org/rule-of-law-index. For instance, the World Justice Project devised a Rule of Law Index that relies on more than 100,000 household (at least 1000 per country) and 2400 expert surveys to assess how the rule of law is experienced in countries around the world. The World Justice Project assesses perceptions of justice in eight areas, including criminal law and fundamental human rights. Each of these areas contains a number of pre-defined indicators. The Ibrahim Index for African Governance, a similar assessment tool, was established by the Mo Ibrahim foundation. The Index seeks to assess outputs of governance. The index assesses safety and rule of law. Each area of assessment has over 90 indicators. For instance, independence of the judiciary is an indicator for rule of law. See http://www.moibrahimfoundation.org/iiag/. The United Nations too developed an extensive set of indicators on rule of law that can be applied in order to assess the progress of any country in the area of rule of law. Another such index was developed by the Vera Institute of Justice and Altus Global Alliance, offering a list of 60 rule of law indicators; or the European Commission for the Efficiency of Justice, which uses some 170 quantitative and qualitative indicators. See Caroline Roseveare, DFID, *The rule of law and International Development*, DFID Literature Review, 2013, London UK at para. 23.

[310] See for instance Handbook for Military Support to Rule of Law and Security Sector Reform, US Joint Forces Command, Unified Action Handbook Series, Book Five, 13 June 2011, Chapter on "Assessment and Metrics: Measuring Progress."

[311] Nouwen, Sarah. *Complementarity in the Line of Fire.* The Catalysing Effect of the International Criminal Court in Uganda and Sudan. Cambridge University Press, 2013.

the impact of the Rome Statute or the International Criminal Court on domestic legal systems. Often cited is Luis Moreno Ocampo's statement in 2003 that "[t]he effectiveness of the International Criminal Court should not be assessed by the numbers of cases that reach it", but that "complementarity implies that the absence of trials before the Court, as a consequence of the regular functioning of national institutions, would be a major success."[312]

Stahn refers to the ICC's "potential to create a broader culture of accountability and prevention of mass atrocity crimes constitutes one of the prerequisites for the long-term impact and success of the ICC."[313] In the words of Burke-White: "encouraging national prosecutions within the "Rome System of Justice" and shifting burdens back to national governments offers the best and perhaps the only way for the ICC to meet its mandate and help end impunity."[314] Systemic effect derives from the admissibility framework in Articles 17-19, and was introduced by the Court itself and then promoted by the Assembly of States Parties since the early days of the establishment of the ICC.[315] The Rome Statute is often referred to as a "legal revolution". Sadat refers to the Rome Statute as a "quasi-legislative event that produced a criminal code for the world."[316] Broomhall states that "the best remaining hope for the entrenchment of international criminal law as a regular feature of the international system is the development of a deeply rooted "culture of accountability" that leads to a convergence of perceived interests and of behavior on the part of the States responsible for enforcing this law. Fostering "positive complementarity" became increasingly identified as a central goal of the Court itself, and of its mandate- holders.[317] As the limitations of the Court itself became more apparent, complementarity, i.e. the strengthening of domestic legal systems, became increasingly cited as central justification for the Rome Statute "system."

The Review Conference, held in 2010, highlighted positive complementarity as a central objective for promotion by States Parties, and the ASP was assigned a role in coordinating these efforts.[318] Scholars Dancy and Montal argue that ICC

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[312] Statement of Luis Moreno Ocampo at Inauguration of Prosecutor and Judges of the ICC, 16 June 2003.

[313] Stahn, Carsten. *Taking Complementarity Seriously, The International Criminal Court and Complementarity: From Theory to Practice* Vol. I (edited by Carsten Stahn and Mohamed El-Zeidy), (2011) Cambridge University Press p. 234.

[314] Burke-White, William W. *Proactive Complementarity: The International Criminal Court and National courts in the Rome System of Justice*, Harvard International Law Journal, Vol. 49 (2008) p. 53.

[315] Broomhall, Bruce. *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law.* Oxford: Oxford University Press, 2003 p. 3.

[316] Nadya Sadat, Leila. *The International Criminal court and the Transformation for International Law: Justice for the New Millennium*. New York: Transnational (2002) p. 263.

[317] The Office of the Prosecutor has cited Article 93 (10) as a basis for positive complementarity, which refers to forms of assistance that the Court may give to State Parties. Luis Moreno Ocampo, *A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor.* The International Criminal Court and Complementarity: From Theory to Practice Vol. I (ed. Carsten Stahn and Mohamed El-Zeidy), Cambridge University Press p. 24.

[318] See ASP Resolution RC/ Res. 1 on Complementarity, adopted on 8 June 2010:

involvement in countries significantly increases domestic human rights prosecutions in the immediate term.[319]

While there is broad agreement about the importance of strengthening domestic legal systems, it is questionable whether this is best achieved through the current legal framework as laid out in the Statute, which refers to the concept of "complementarity." This raises the question, discussed in Chapter2, whether "complementarity" as currently interpreted is the best means of strengthening domestic legal systems. Chapter 2 questions the vision of "positive" complementarity as the relationship between two jurisdictions, one national and one international, which address each other's weaknesses in ensuring that the world's worst crimes do not go unpunished.

Instead, Chapter 3 suggests that the impact of the Rome Statute and the Court on domestic jurisdictions can better be viewed as internalization, which refers to the process whereby states demonstrate compliance with international law.[320] The Chapter argues that internalization is in fact happening in situation-countries, and that this has potential for impact that goes beyond the notion of complementarity as currently conceived.

Many of the steps that States are taking go beyond the Rome Statute and its complementarity regime. The Statute does not impose a legal duty as such for States to implement the Statute by incorporating Rome Statute crimes into its domestic law.[321] As stated by the Pre-Trial Chamber, it is sufficient for domestic proceedings in relation to Rome Statute crimes to focus "on the alleged conduct and not its legal

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[319] Dancy, Geoff and Florencia Montal, *Unintended Positive Complementarity: Why International Criminal court Investigations May Increase Domestic Human Rights Prosecutions*, AJIL (2107) Forthcoming.

[320] See for instance Padhamabhan, Vijay. *Norm Internalization Through Trials for Violation of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*. 31 U. Pa. J. Int'l L., 2009 at p. 435.

[321] Some scholars argue that this is necessary because the use of ordinary criminal offences fails to capture the gravity and aggravated nature of the international crimes, and that trials should closely mirror international criminal trials. Regular
national prosecutions for ordinary crimes are not desirable and would undermine the fundamental idea on which the international criminal justice system is founded." See Terracino, Julio Bacio. *National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC*. 5 JICL (2007) p. 439. This has been referred to as the "hard mirror thesis." Heller, Kevin Jon. *A Sentence-Based Theory of Complementarity*, 53 Harvard International Law Journal, 2012 at p. 88. Heller convincingly argues that the Rome Statute does not support the view that prosecuting an international crime as an ordinary crime cannot satisfy the complementarity threshold, what he calls the "hard mirror thesis." Heller makes the point that if the Appeals Chamber believed that a national prosecution for an ordinary crime was insufficient, it would not have endorsed the "same person same conduct" test in Lubanga. Moreover, the *ne bis in idem* standard in Art. 20 (3) refers to the same conduct test. States in the drafting stage explicitly rejected the distinction between international and ordinary crimes. See also Stahn, Carsten. *One Step forward, Two Steps Back? Second thoughts on a "Sentence-Based" Theory of Complementarity*, Vol. 53 Harvard International Law Journal, April (2012) p. 185.

characterization."[322] Currently, at least half of the State Parties have undertaken steps to amend their national law to include Rome Statute crimes, and many more are in the process of doing so.[323] The Court itself actively encourages States to implement the Rome Statute.

The Rome Statute also does not require the establishment of a specialized capacity to try Rome Statute crimes. Yet in recent years, there are many examples of such specialized capacities being established, including in Colombia, Uganda, and Kenya. The establishment of such mechanisms is an important indicator of the internalization of the Rome Statute norms and may contribute to the long-term prevention of Rome Statute crimes.

Similarly, the Statute does not require states to conduct to conduct their own investigations or prosecutions, although if they do not act, States risk an ICC intervention through their inactivity. From the earliest days, the OTP used the terminology of complementarity to refer to this process of building a culture of accountability at the domestic level.[324] Domestic proceedings, provided they are genuine, are the most meaningful indicator of the systemic effect of the Rome Statute and the ICC.

Accordingly, the Chapter seeks to assess the impact of the Rome Statute (and the Court) according to three indicators:

- Implementation of domestic laws covering Rome Statute crimes;
- The adoption of other legislation covering Rome Statute norms;
- The establishment of new institutions to investigate or prosecute Rome Statute crimes; and
- National proceedings for Rome Statute crimes.

B. Transformative effect

Transformative effect refers to the impact of the Rome Statute and the ICC on processes, to reduce impunity, for instance in peace negotiations. The transformative effect of the Rome Statute and the ICC is best demonstrated in situations where those who committed massive violations refuse to lay down their arms unless they are promised some form of immunity from prosecution.[325] Peace

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[322] *Prosecutor versus 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, 31 May 2013 para. 85.
[323] Coalition for the International Criminal Court, Global Advocacy Campaign for the International Criminal Court, Summary Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities. Not dated.
[324] Paper on some policy issues before the Office of the Prosecutor, September 2003.
[325] The question whether, and in how far successor governments must fulfill the obligation of dispensing justice for past crimes is at the core of the field of transitional justice. Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,* Hastings Law Journal, Vol. 43 (1992) p. 1425-1438.

negotiations often require balancing the need to address impunity for past violations, with the need to end the conflict, preventing future violations.

The dilemma of peace and justice long predates the Rome Statute. Prior to the coming into force of the Statute, the South African transition inspired countries around the world.[326] The crime against humanity of apartheid provoked unique universal. In South Africa, victim representatives played a part in the negotiated solution and had a chance to democratically ratify the proposed political solution.[327] The ANC leadership decided to forego the idea of "Nuremberg-style trials", in the words of Desmond Tutu, in favor of a Truth and Reconciliation Commission, as a "historic bridge" from the past to the future. The inspiration of South Africa lies not in the technical innovations of the TRC's individualized "amnesty for truth" formula, or the operations of the TRC, but rather in what the path chosen by Nelson Mandela represented in political and moral terms.[328] While widely internationally welcomed, including by the United Nations,[329] the South African approach was controversial, and remains widely debated today.[330]

In the international human rights movement, "impunity" became increasingly identified with retribution, and interpreted to mean the absence of proportionate punishment.[331] Nevertheless, a powerful argument can be made that an end to conflict may be more likely to *prevent* further atrocities than retribution itself. In the words of Argentinian scholar Carlos Nino:

> Though it is true that many people approach the issue of human rights violations with a strong retributive impulse, almost all who think momentarily about the issue are not prepared to defend a policy of punishing

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[326] In Afghanistan, two of the five MPs interviewed for this thesis mentioned South Africa as a possible example to follow in the context of a conversation about the ICC.

[327] Zalaquett, Jose. *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, Hastings Law Journal, Vol. 43 (1992) at p. 1429.

[328] In the words of the South African Constitutional Court: "It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past." *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996).

[329] Dugard, John. *Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?* 12 Leiden Journal of International Law (1999) pp .1001-1015 at p. 1003.

[330] Some argue that victims were badly deceived due to the fact almost no one was prosecuted, even though most applications for amnesty were denied. Even Bishop Tutu has referred to its "unfinished business." Desmond Tutu, "*Unfinished business" of the TRC's healing,* Mail & Guardian, 25 April 2014.

[331] The Inspector General in Colombia in his interview for this thesis suggested that impunity fuelled the war, foiled peace processes, and allowed for the emergence of paramilitary groups. Interview with Dr. Alejandro Ordonez, Bogota, 15 May 2014.

> those abuses once it becomes clear that such a policy would probably provoke, by a causal chain, similar or even worse abuses …[332]

Similar arguments were raised by other Latin American scholars in the context of transitions in Chile and elsewhere.[333] At the same time, the ICC represents a clear choice in favor of criminal processes in such situations. The OTP claims in its strategic plan that it has had impact on "the growing importance of justice components in peace negotiations" and that it is imposing new legal limits.[334] While the Rome Statute contains several articles that seek to balance peace and justice, in particular Articles 16 and 53, until now these articles remain unused in the context of peace negotiations. In the words of former Prosecutor Moreno Ocampo at the Review Conference in 2010:

> Let me conclude on peace and justice. The drafters of the Rome Statute took great care to exclude political considerations from the work of the Court. The Prosecutor and Judges cannot and will not take political considerations into account. This was a conscious decision, to force political actors to adjust to the new legal limits. We cannot both claim that we will "never again" let atrocities happen and continue to appease the criminals, conducting "business as usual.[335]

Chapter 4 will seek to assess the transformative effect of the Court on recent peace negotiations in Colombia and Uganda, as well as in peace vs. justice discussions in other situations. Indicators for these transformative effects include:

- Impact of the ICC on the process of peace negotiations, for instance through the inclusions of views of victims;

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[332] Nino, Carlos. T*he Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 Yale Law Journal (1991) p. 2619

[333] Well-known Chilean lawyer and human rights activist Jose Zalaquett argued that according to Max Weber, when confronted with the dilemma of a trying to negotiate a peaceful transition, politicians should be governed by the ethics of responsibility, rather than the ethics of conviction. He argued in the context of the Chilean amnesty, that a transitional justice policy should have the objectives of prevention and reparations, and that the policy must be adopted with full cognizance of past human rights violations and through a body of democratically elected representatives or by equivalent democratic means. Within those constraints, he argues that States have ample discretion regarding leniency or clemency, albeit that they are constrained by international law. "Political leaders cannot afford to be moved only by their convictions, oblivious to real-life constraints, lest in the end the very ethical principles they wish to uphold suffer because of a political or military backlash. In the face of a disaster brought about by their own misguided actions, politicians cannot invoke as a justification that they never yielded on matters of conviction. That would be as haughty as it would be futile, and it would certainly bring no comfort to the people who must live with the consequences of the politician's actions." Jose Zalaquett*, Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,* Hastings Law Journal, Vol. 43 (1992) p. 1430-31.

[334] OTP Strategic Plan 2012-2015.

[335] Moreno Ocampo, Luis. *Prosecutor of the International Criminal Court, Review Conference General Debate*. Statement, Kampala 31 May 2010.

- Impact on the content of peace negotiations, including the scope of investigations or prosecutions or the nature of punishments;
- Fewer amnesties for Rome Statute crimes in countries under the Court's jurisdiction.

C. Reparative effect

While the Court's main underlying assumption is to contribute to ending impunity create a culture of accountability, victims are at the heart of the mission of the ICC and are often referenced as the main source of its legitimacy.[336] Delivering justice for victims is one of the indisputable goals of the Rome Statute. Reparative effect refers to the Rome Statute and the Court's intended impact on victims. In the words of the High Commissioner for Peace in Colombia: "Impunity is necessarily measured according to the degree to which the rights of the victims are satisfied."[337] According victims their rights may in itself be an important pathway to prevention. The reparative effect of the Statute seeks to convert the rights of victims into remedies. President Robinson of the ICTY said in 2009, "I fear that the failure by the international community to address the needs of victims of conflicts that occurred in the former Yugoslavia will undermine the Tribunal's efforts to contribute to long-term peace and stability in the region."[338] In contrast to ICTY and other tribunals, which were accused of having instrumentalized victims,[339] the Rome Statute is heralded as the first international criminal forum that actualizes both retributive justice and "reparative" justice for victims. It is the first international criminal court that seeks to meet the needs of victims in terms of participation and reparations.

The Court's own statements seek to derive legitimacy from its representation of victims. The Court is based on the notion of one shared identity, shared amongst all of humanity.[340] The consequence of this shared identity is that the violation of the rights of one part of this *corpus* is seen as the violation against all. The rights of one become the rights of all and those who commit the violations are "enemies of mankind", or *hostis humanis*. The Court appropriates the plight of the "voiceless"

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[336] Cassese, Antonio. *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, Leiden Journal of International Law, Vol. 25, Issue 2, June 2012, pp. 491-501 at p. 492.
[337] Jaramillo, Sergio, High Commissioner for Peace, Speech given at Externado University on 9 May 2013, published at El Tiempo.
[338] ICTY President Patrick Robinson's address to the General Assembly, October 2009, cited in Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7, 2013, p. 522.
[339] At Nuremberg victims were practically absent from the proceedings: Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case Western Res. J. Int'l L. (2011) at p. 476. Zegveld, L. *Victims' Reparations Claims and International criminal Courts: Incompatible Values?* JICJ 8 (2010) at p. 79-111.
[340] Koller, David. *The Faith of the International Criminal Lawyer.* International Law and Politics, Vol. 40 (2008) 1019 at p. 1050.

victims, no matter which conflict is under scrutiny, is essential to its "universal values legitimacy".[341] The establishment of the Court itself represented an important victory for the victims' rights movement, and the mere existence of the Court has empowered victims and given them more influence in specific country situations.[342]

The Court's Statute and Rules provide for victim participation and for reparations, but to what extent can this be realized beyond symbolic acknowledgement? The potential large numbers of victims in some of the cases threaten to overwhelm the Court in administrative terms. Victims only play a very limited role in the political processes behind the ICC, such as at the Assembly of States Parties. The situation in Uganda, where victim representatives opposed the ICC intervention, raised difficult questions about the Court's legitimacy. Even more difficult questions arise from the Kenya case, where witness protection has posed a serious challenge, and where the Trust Fund for Victims has not been able to operate for security reasons.

Crucial decisions taken by the Prosecutor, such as when and how to open investigations raise serious methodological questions about how to take into account the views of victims and who represents them. Victims are often referred to as an abstraction, to infuse legitimacy into the Court, whereas little is known about their individual circumstances, or their needs and desires.

The Rome Statute holds out a promise of justice that includes reparative effects, but are victims' rights converting into remedies? Indicators of reparative effects include:

- Whether victims are able to meaningfully participate in proceedings;
- Whether they receive reparations through proceedings or through the Trust Fund for Victims; and
- How their views are taken into account as part of the Court's strategies, including the decision to open or close an investigation.

D. Demonstration effect

The 2010 Review Conference recognized the importance of discussing the impact of the Rome Statute and the ICC not just on victims, but also on affected populations as a whole. Demonstration effect refers to the ability of an international criminal court or tribunal to contribute to "a culture shift and demands for change or increased accountability through increased rights awareness."[343] Public perceptions matter in determining the "demonstration effect" of the Court, i.e. whether the Court is seen to deliver fair and impartial justice to affected communities. The views of victims and

[341] Cassese, Antonio. *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice.* Leiden Journal of International Law (2012), 25 p. 492.
[342] See for instance Chapter 4 on the enhanced role of victims in the peace negotiations in Uganda and Colombia.
[343] OHCHR Rule of Law Tools, *Maximizing the Legacy of Hybrid Tribunals* (2006).

affected communities should be seen as essential to the Court's success.[344]If the ICC is not being understood as rendering fair and impartial justice, it may be seen as a "spaceship phenomenon", [345] with little connection to the society where it operates, and its overall impact will be reduced. [346]

The impact of the ICC is in part determined by its legitimacy, which in turn is formed by the perceptions among local populations. While the Court is "a court of law and justice, not a political institution that needs to pander to the public opinion,"[347] perceptions are still important to determining whether the ICC is able to contribute to a culture of accountability.

Lessons from other international criminal tribunals show three preliminary trends with implications for the ICC: (1) international criminal trials were often viewed as externally imposed and faces opposition for that reason; (2) conversely, hybrid tribunals or domestic trials were generally perceived more positively; (3) perceptions may vary over time.

1. Perceptions of Nuremberg and Tokyo

Scholarship on the impact of the Nuremberg and Tokyo trials by the International Military Tribunals deals extensively with how they were perceived in their respective societies. In the first instance, these trials were mainly perceived negatively in German and Japanese societies. Over time, acceptance of the Nuremberg trials grew, but it was only consolidated in after the reunification of Germany. The Tokyo trials are still considered controversial in Japan today.

In Germany, while it is common to refer to a "Nuremberg moment", few historians would claim that the IMT alone was responsible for the reorientation of the German society away from fascism towards a liberal democracy, pointing towards a range of

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[344] OSJI Briefing Paper, Establishing Performance Indicators for the International Criminal Court, Nov. 2015.

[345] In my earlier writings, I used this term in relation to the Special Court for Sierra Leone. Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone under Scrutiny*, International Center for Transitional Justice, March (2006) at p. 40.

[346] In the words of Tolbert: "Ultimately, a judicial institution must have credibility and legitimacy, or perhaps more colloquially – respect, to carry out its job effectively. This means not only being seen as independent of political control but also developing credibility with those affected by its judgments—above all, victims and affected communities—and international civil society, including scholars, academics and journalists." Blog by David Tolbert, 3 March 2015, http://jamesgstewart.com/the-iccs-credibility-depends-on-much-more-than-just-power-politics/

[347] Moghalu, Kingsley Chiedu. *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, The Fletcher Forum of World Affairs, Vol. 26: 2 Summer / Fall (2002).

other factors including subsequently conducted domestic trials; de-Nazification; re-education efforts and large-scale economic assistance.[348]

In fact, some scholars remarked that the Nuremberg trial provoked harsh legal criticism in West Germany as a trial of victor's justice imposed by an occupational court. The charges of crimes against the peace were criticized for violating *nullem crimen sine lege* (which the Nazis themselves had abolished from their law).[349] Much of the criticism was leveled at the conviction for waging aggressive war rather than at the charges for war crimes or crimes against humanity. In fact the Allies justified the fact that only Axis leaders were tried almost entirely based on the holocaust (which meant that a similar moral basis did not exist for the trials in Japan: crimes against humanity were only mentioned once in the indictment).[350] The denial of admission of any evidence of crimes against the Germans, including the complete destruction of towns such as Dresden, was perceived as further evidence of victor's justice.[351]

Interestingly, Burchard describes how initial reactions to the Nuremberg trial were more positive than subsequent ones. During the trial, 87 % of German interviewees knew the trial was taking place; 80% considered the proceedings fair; a majority deemed the defendants guilty and 70% thought there are others who should be tried. Only 6% expressed negative or critical assessments and 9% that the proceedings were too harsh. Nevertheless, in the 1950s, in West Germany 30% believed proceedings to have been unfair, and 40% believed that the verdicts had been too harsh. Only 10% said they were satisfied with how the Allies dealt with the problem of war criminals whereas 59% disapproved.

In general, the Tokyo Tribunal has a far more mixed legacy than the Nuremberg Tribunal, with criticism of retroactivity, the emphasis on conspiracy rather than on individual criminal responsibility, the problem of one-sidedness (made worse by the Allied use of nuclear bombs in Hiroshima and Nagasaki, which constituted crimes against humanity) and lack of respect for fair trial rights.[352] Famously, the Indian Judge at Tokyo dissented and acquitted all the Japanese defendants.[353]

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[348] Padmanabhan, Vijay. *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U. Pa. J. Int'l L. (2009) p. 439.

[349] The new German *Grundgesetz* included a prohibition on ex post facto laws without exception. Burchard, Christoph. *The Nuremberg Trial and its Impact on Germany*. Journal of International Criminal Justice 4 (2006), pp. 800-829. See also Sellars, Kristen. *Imperfect Justice at Nuremberg and Tokyo*. EJIL Vol. 21 Issue 4 (2010) at pp. 1085-1102. Tomuschat, Christian. *The Legacy of Nuremberg*. 4 JICJ (2006) p. 833.

[350] Sellars, Kristen. *Imperfect Justice at Nuremberg and Tokyo*. EJIL Vol. 21 Issue 4 (2010) at pp. 1085-1102.

[351] Christoph. The *Nuremberg Trial and its Impact on Germany. Journal of International Criminal Justice* 4 (2006), pp. 800-829.

[352] Sellars, Kristen, *Imperfect Justice at Nuremberg and Tokyo*. EJIL Vol. 21 Issue 4 (2010) at pp. 1085-1102. See also Maga, Tim. *Judgement at Tokyo: The Japanese War Crimes Trials*. University Press of Kentucky (2001). Rolling, B.V.A and Antonio Cassese, The Tokyo Trial and Beyond, Polity Press

In her study of sixty years of Japanese societal attitudes towards the Tokyo trials, Madoko concludes that while the Tokyo trials were debated by elites,[354] including Japanese historians and intellectuals, the general public remains rather apathetic about the topic even today. For decades, since its conclusion until the 1980s, the trials were barely debated in Japan. From opinion polls conducted in 2005 and 2006, 60 to 70 % of Japanese did not know any specifics of the trial.[355] She describes the overriding Japanese attitude towards the trials over sixty years as "passive acceptance" and a "consequence of defeat".[356]

Madoko describes how in the first instance, public interest in the trials waned dramatically after the accused were convicted and executed in late December 1948, since the Japanese at the time faced many other post-conflict challenges such as poverty and hunger. The fact that the Emperor was not tried may have affected the public perception regarding the guilt of other senior accused, since what the accused did was deemed in service of the Emperor. At the same time, Madoko comments that that the Japanese public felt anger against the military leadership for having been "deceived" regarding the success of the war effort, but the trial was accepted as a necessary consequence of military defeat.[357] Revelations of crimes committed in Nanking seem to have shocked the Japanese public.[358] Soon the Japanese took a decidedly forward-looking approach, and focused on reinventing their international image as a "peaceful nation." In this respect, Japanese viewed the trial as a necessary step or "settlement" to re-enter the international community. Madoko cites an opinion poll conducted in August 1955, in which 19 % accepted prosecution and punishment of wartime leaders by the victors as "a matter of course" while 66% accepted it passively, seeing it as inevitable. However, 63% said the victor's war trial "went too far." [359] She describes the popularity of Justice Pal, the Indian Judge who wrote a dissenting opinion in the IMTFE judgment, in Japan.

(1993) pp. 85-89. Rolling cites an American, General Willoughby, who called the Tokyo trial "the worst hypocrisy in recorded history."

[353] Sellars, Kristen, *Imperfect Justice at Nuremberg and Tokyo*. EJIL Vol. 21 Issue 4 (2010) at pp. 1085-1102.

[354] Sellars describes the work of historian Yuma Totani, who describes Japanese responses as follows: the legal academic in the late 1940s generally saw the trials as an advancement in the law; from the 1950s conservative nationalists dismissed the trials as victors justice (based for instance on the severity of sentences); and after that historians criticized the trials for its "expedient narrative of the Asian-Pacific War" which left out events such as the bombings of Hiroshima and Nagasaki. Sellars, Kristen, *Imperfect Justice at Nuremberg and Tokyo*. EJIL Vol. 21 Issue 4 (2010) at pp. 1085-1102. See also Totani, Yuma. *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II,* Harvard University Press (2008).

[355] Madoka, Futamura. *Japanese Societal Attitudes Towards the Tokyo Trial: A Contemporary Perspective,* The Asia-Pacific Journal Vol. 9, Issue 29 No 5, July 18 (2011).

[356] Ibid.

[357]Ibid. Similar sentiments also prevailed in Germany. Burchard, Christoph. *The Nuremberg Trial and its Impact on Germany*. Journal of International Criminal Justice 4 (2006), pp. 823-824.

[358] Ibid.

[359] Ibid.

For a long time, the Tokyo trial was a social taboo in Japan, and not a matter for polite social discussion. Nevertheless, another wave of interest followed, only some 50 years after the trial, in the late 90's, with increased discussion of the plight of the "Comfort Women" and their attempt to seek an apology.[360] The controversy surrounding the visits started by Prime Ministers, including especially Prime Minister Koizumi, to the Yasukuni shrine every year, have provoked further debate.[361] Madoko concludes that "the various problems in the way the Tokyo Trial was conducted and the way it has been debated by some critics made it more difficult for Japanese society and the Japanese people to re-examine war responsibility."[362] In this sense, the Tokyo Tribunal seems to have failed in its expressive function.

2. Perceptions of the ICTY and the ICTR

Much can be learned about the complexity of perceptions from survey work conducted in the former Yugoslavia about the ICTY. In Serbia, attitudes towards the ICTY remain rather negative, despite the passage of time. It was only in 1999 before the Tribunal translated its judgments into Bosnian-Croatian-Serbian.[363] Politicians and the local media filled the political space left by the ICTY and their views probably had much more impact on the local population than ICTY outreach.[364] The ICTY was widely perceived as a NATO court in Serbia, which disproportionately prosecuted Serbs, rather than being viewed as an impartial vehicle of justice.[365]

In 2011, in a poll conducted by the OSCE and Belgrade Center for Human Rights, surveying 1407 respondents in Serbia using a three-phase, stratified and random representative sample, 66% of respondents said they thought the establishment of ICTY is unnecessary (whereas 22% said it was necessary and 13% said they do not know).[366] Forty percent said they thought the primary purpose of trials before the ICTY was to put the blame on Serbs, and 56% said their attitudes were formed by the work or trials of the ICTY itself.[367] Eighty-one percent of Serb respondents did

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[360] Comfort women were women from Asian countries forced into sexual slavery by the Japanese army before and during World War II.

[361] The shrine contains the remains of 12 accused convicted at Tokyo as well as two who died before the end of the trial, and is deemed offensive by China and Korea, both of which host large victim populations. This has provoked international debate on whether Japan really came to terms with its responsibility.

[362] Madoka, Futamura, *Japanese Societal Attitudes Towards the Tokyo Trial: A Contemporary Perspective,* The Asia-Pacific Journal Vol. 9, Issue 29 No 5, July 18 (2011).

[363] Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*. OSJI, 2008 at p. 65.

[364] Klarin, Mirko. *The Impact of ICTY Trials on the Public Opinion of the Former Yugoslavia*. Oxford Journal of International Criminal Law, Vol. 7 March (2009) pp.

[365] Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*. OSJI, 2008.

[366] OSCE and Belgrade Center for Human Rights, *Attitudes towards war crimes issues, ICTY and the national judiciary*, Oct. 2011

[367] OSCE and Belgrade Center for Human Rights, *Attitudes towards war crimes issues, ICTY and the national judiciary*, Oct. 2011.73% said that the ICTY had different attitudes towards individuals

not think that trials of Serbs were fair and did not believe what was established in the judgment (although 90% never read such a judgement).[368] Forty-nine percent thought that the ICTY would not contribute to truth, whereas 71% thought it would not contribute to reconciliation.[369] Forty-six percent classified their general attitude to the ICTY as "extremely negative", whereas 25% said it was "mainly negative." Only 11% said it was "positive" and only 3% "extremely positive."[370] This survey was the last in a series of six surveys in Serbia between 2003 and 2011, of which many of the results were remarkably similar.[371]

The perception that the ICTY is an instrument of the NATO was enhanced by the fact the indictment of Milosevic for crimes committed in Kosovo, where the NATO had intervened, when he had not yet been indicted for either Bosnia or Croatia.[372] These perceptions were further enforced by the failure of the ICTY to investigate NATO; the strong support the Tribunal received from NATO including on arrests; and the pressure of the EU on the countries of the former Yugoslavia. Other factors that cause Serbs to perceive the ICTY as biased include the fact that a number of Bosnian Muslims received light sentences.[373] Kosovar leader Haradinaj was tried twice, acquitted each time, and allowed to continue his political career while on provisional release, at the urging of UNMIK.[374] As observed by Klarin, "the public was weaned on the Marxist maxim that law was an instrument in the hands of the ruling class" and had no experience of an independent judiciary.[375] Whether more assertive outreach from the beginning could have changed some of the prevailing views, particularly in Serbia, remains doubtful.[376] Two BCHR surveys conducted in Bosnia and Herzegovina in 2010 and 2012, with disaggregated data for Republika

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indicted for war crimes depending on their ethnicity. 36% thought that living conditions in the detention unit of the ICTY are bad. 62% thought that Serbia should help indicted Serbs before the ICTY legally and financially. 74% thought this assistance should extend to all Serbs regardless of their citizenship.

[368] Ibid. Interestingly, they also perceived of other trials as unfair, including trials against Croats (64%) trials against Bosniaks (65%), and trials against Albanians (69%). In the latter cases they often cited reasons that too small numbers were accused, acquittals or "gentle" judgments.

[369] Ibid.

[370]Ibid.

[371] Milanović, Marko. *The Impact of the ICTY in the former Yugoslavia: An Anticipatory Postmortem*. 110 AJIL (20116) p. 223.

[372] Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*. OSJI (2008) p. 28.

[373] Ibid. p. 82. This included Oric (2 years, for failing to prevent murders and cruel treatment of Serb detainees); Hadzihansanovic (3.5 years, for failing to prevent war crimes against Serb civilians); and Kubura (2 years for the same).

[374] Escritt, Thomas and Fatos Bytyci, *Kosovar Ex-Premier Haradinaj acquitted of war crimes again,* Reuters 29 Nov. 2012. Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia.* OSJI, 2008 at p. 83.

[375] Klarin, Mirko. *The Impact of ICTY Trials on the Public Opinion of the Former Yugoslavia*. Oxford Journal of International Criminal Law, Vol. 7 March (2009) pp.89-96.

[376] Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia.* OSJI (2008) p. 66.

Srpska, showed similar results. In 2012, 84% had a mainly negative opinion of the ICTY, with only 15% reporting a positive opinion.[377]

However, the "the "popularity" of the ICTY various parts of the former Yugoslavia is inversely proportional to the number of accused that come from the countries, entities, and in particular, the ethnic communities."[378] As can be expected, views in Bosnia in 2012 of the ICTY were much more positive: 59% overall reported positive attitudes towards the Tribunal as opposed to 39% who reported negative attitudes.[379]

"Victimhood" itself has many complex manifestations, and "perpetrator" communities often feel that they themselves are the overall victims of a conflict, or that they were waging a defensive war. This in turn can shape their perception of international justice efforts.[380] International crimes arise mostly in conflict situations where those committing crimes are often perceived to be doing so to protect members of their own social groups.[381] In Serbia, many citizens are yet to accept that Serbs committed the majority of the violations in the Yugoslav conflict. A survey in Serbia in 2004 indicated that 84 percent of Serbs thought that they believed that Serbs were the largest number of victims from the war in Bosnia in 1991-1995.[382] In 2011, those numbers remained quite similar.[383] Only 5% of Serbs believed that they were the greatest perpetrators.[384] In the Bosnian Federation in the survey of 2012, 87% blamed the Serbs as the greatest perpetrators of the

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[377] Milanović, Marko. *The Impact of the ICTY in the former Yugoslavia: An Anticipatory Postmortem*. 110 AJIL (20116) p. 223

[378] Klarin, Mirko. *The Impact of ICTY Trials on the Public Opinion of the Former Yugoslavia*. Oxford Journal of International Criminal Law, Vol. 7 March (2009) pp. 89-96.

[379] Milanović, Marko. *The Impact of the ICTY in the former Yugoslavia: An Anticipatory Postmortem*. 110 AJIL (20116) p. 223. In Croatia, in a survey conducted by BCHR in 2011, 64% of respondents said they were mainly negative about the ICTY and only 23% mainly positive. In contrast, in a survey conducted by UNDP in Kosovo in 2012, 82% of Kosovar Albanians reported that they were partially or very satisfied with ICTY, whereas 87% of Kosovar Serbs were not satisfied.

[380] Laurel Fletcher and Harvey Weinstein, *A world unto itself? The application of international justice in the former Yugoslavia,* in My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity, Ed. by Eric Stover and Harvey Weinsten, Cambridge, 2004, at p. 33.

[381] In Sierra Leone, the RUF and AFRC were widely reviled and their prosecution by the Special Court for Sierra Leone was welcomed, but the decision to prosecute the former head of the Civil Defense Forces who had fought the rebels, the Revolutionary United Front, Chief Sam Hinga Norman, was not. While Hinga Norman died before his final verdict, in the judgment condemning his two co-accused, the Sierra Leonean judge acquitted them both for fighting a "just war."

[382] Belgrade Center for Human Rights and Strategic Marketing Survey, Public Opinion in Serbia: Attitudes towards the ICTY, August 2004.

[383] Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia.* OSJI (2008) p. 62. 69% said that Serbs suffered the largest numbers of casualties whereas 7% said that they committed the most crimes. Their narrative of the conflict is generally not contradicted because there is no significant victim population living in Serbia, as the Serbian territory saw little conflict during the breakup of the former Yugoslavia.

[384] Milanović, Marko. *The Impact of the ICTY in the former Yugoslavia: An Anticipatory Postmortem*. 110 AJIL (20116) p. 223.

conflict.[385] In Croatia, interestingly, 43.4% said Croats were the greatest victims whereas 29.2% said it was in fact the Bosnians.[386] According to Milanović, "the different ethnic communities in the former Yugoslavia are (still) engaged in competitive victimhood, which is a major impediment to mutual forgiveness and reconciliation."[387] In another article, he writes, "With just a bit of political manipulation – and there is plenty of that to go around- the ICTY becomes an instrument for collectivizing innocence, rather than for individualizing guilt."[388]

As mentioned level of acceptance among populations directly victimized by the crime tended to be higher. Even though Bosnian Muslims experienced the ICTY as "imperfect justice", it was infinitely preferable to no justice at all.[389] Bosnian victims however consistently expressed disappointment at sentences handed down by the ICTY as well as at the practice of plea agreements. [390] Victims also expressed a view that the proceedings were too long and complicated.[391]

Ford argues that among affected populations in conflict or post-conflict societies, persons may be forming their perceptions of international criminal tribunals through a process of "motivational reasoning" or "cognitive bias", using a combination of heuristics,[392] cognitive dissonance,[393] and confirmation bias.[394] At the same time, opinions differ, and Serb lawyer Ivanisević observes that since the ICTY "there is incomparably less distortion of the past."[395]

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[385] Ibid.
[386] Ibid.
[387] Ibid.
[388] Milanović, Marko. *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378.
[389] Orentlicher, Diane. *That Someone Guilty be Punished: The Impact of the ICTY in Bosnia*. OSJI, 2008 at p. 13-14. The Krstić judgement is of particular importance in Bosnia because it held that the events in Srebrenica constituted a genocide.
[390] Ibid. p. 14. Before Karadzić and Mladić were arrested, their absence also clouded the perceptions of many Bosnian victims and threatened to undermine the legacy of the ICTY: Orentlicher, p. 15. Klarin, Mirko. *The Impact of ICTY Trials on the Public Opinion of the Former Yugoslavia*. Oxford Journal of International Criminal Law, Vol. 7 March (2009) pp. 89-96.
[391] Ibid. p. 15.
[392]Ford, Stuart, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, Vanderbilt Journal of Transnational Law (2012) Vol. 45, p. 408. By heuristics, the author is referring to the mental shortcuts that persons use to come to a decision "without going through the time-consuming and difficult process of obtaining and evaluating the evidence." Ibid., p. 425
[393] By cognitive dissonance, the author refers to "the uncomfortable feeling caused by simultaneously having conflicting thoughts or beliefs." Ibid. p. 427.
[394]Finally, confirmation bias refers to the "tendency for people to search for, interpret, and remember information in a way that systematically impedes their ability to reject a pre-existing hypothesis." Ibid. p. 434.
[395]Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*. OSJI (2008) at p. 63.

Public awareness of atrocities such as the shelling of Sarajevo, or the massacre at Srebrenica, has grown with the work of the Tribunal,[396] although Milanović questions how deep-rooted the acceptance of Srebrenica as a crime is. For instance, only 10% accepted that more than 7000 Bosnian men and boys were executed, whereas 6% thought that there were many less, and 22% thought that these were casualties of war.[397] Klarin however concludes that: "Unfortunately, the negative image of the ICTY has been shaped by the tendency of domestic audiences to regard the ICTY and its actions, especially those of the Prosecutor, as supremely political."[398] Milanović concludes that "revisionism is rampant" and that "the ICTY failed to persuade the relevant target populations that the findings in its judgments are true. It manifestly did not succeed in combatting denial and preventing attempts at revisionism."[399] The question of why this is the case is crucial to better understanding the potential of the expressive function of international tribunals.[400]

Debate also surrounds the legacy of the ICTR, particularly in Rwanda itself, although less empirical work exists on the subject.[401] On its website, the ICTR emphasizes its own work, particularly in respect of its achievements in investigations and trials; its contribution to formation of international law in relation to genocide; and its contribution to Rwanda, including the construction of an "indisputable historical record", but also the referral to Rwandan courts, outreach and education, and bringing "healing."[402] (The archives of ICTR however are not kept at the Tribunal but at the MICT in The Hague). The ICTR's attempts to expand investigations to the Rwanda Patriotic Front led the Rwandan government to threaten to withdraw all cooperation, and eventually failed, rendering the justice delivered by ICTR one-sided. This resulted in a less-than full account of history, aligning with the narrative

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[396]OSCE and Belgrade Center for Human Rights, Attitudes towards war crimes issues, ICTY and the national judiciary, Oct. 2011.In 2011, 30% said many civilians were killed by snipers in Sarajevo. 40% had heard of Srebrenica and 33% said it constitutes a war crime (but 33% also said that a lot less than 7000 people were killed).

[397]Milanović, Marko. *The Impact of the ICTY in the former Yugoslavia: An Anticipatory Postmortem*. 110 AJIL (20116) p. 223. In contrast, in the 2012 survey in the Bosnian Federation, 97% said they heard of Srebrenica and 99>1% said they thought it was a crime.

[398] Klarin, Mirko. *The Impact of ICTY Trials on the Public Opinion of the Former Yugoslavia*. Oxford Journal of International Criminal Law, Vol. 7 March (2009) pp. 89-96.

[399] Milanović, Marko. *The Impact of the ICTY in the former Yugoslavia: An Anticipatory Postmortem*. 110 AJIL (20116) p. 223

[400] The question why is discussed in Milanović, Marko. *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378. This question is discussed further in Chapter 6.

[401] Kendall, Sarah and Sarah Nouwen. *Speaking of Legacy: Towards an Ethos of Modesty at the ICTR.* 110 AJIL (2016) 212. See also Wippman, David. *Exaggerating the ICC*. Cornell Law School Research Paper No. 04-018, available online at pp. 188-189: "The ICTR commands very little respect within Rwanda. Some decry the Tribunal's almost exclusive focus on Hutu perpetrators; others criticize the slow pace of justice, instances of tribunal mismanagement, and procedural irregularities … one-sided prosecutions, or an inability to secure prosecution of senior political and military leaders, will simply fuel perceptions of bias and illegitimacy."

[402] See http://unictr.unmict.org/.

of Paul Kagame's government. Thus, "RPF impunity forms part of the legacy of the Tribunal".[403] In Rwanda today, genocide denial is considered a crime. In the poignant words of Cruvellier, who refers to the ICTR as a "court of remorse":

> The Arusha-based tribunal is probably the only international tribunal that was not designed and run by the powers who could at least count themselves among the victors. This is exactly how the RPF sees the international community and its members, as a community of the defeated. Accordingly, what government that single-handedly won a military and political battle at the cost of so much bloodshed would agree to be held accountable for the crimes attributed to it by a community of losers?[404]

Studies indicate that victims generally felt that the ICTR placed an excessive emphasis on rights of the accused, and that more ought to have been done for victims or survivors of the genocide.[405] Rape was extremely widespread during the genocide in Rwanda, but a report in 2005 on rape victims from the conflict in Rwanda indicated that they were deeply disappointed with the ICTR.[406] A serious critique of the ICTR was that while those on trial were afforded valuable retro-viral drugs to stave off AIDS, victims of rape were not given the same.[407] Victims and witnesses indicated that they had a sense of being "mistreated" in the courtroom through aggressive cross-examination. Victims also criticized the slow pace of trials at the Tribunal.[408]

The Rwandan legal system did undergo important changes incentivized by the possibility of receiving cases from the ICTR and extradited individuals from other countries, including the abolition of the death penalty, the non-application of solitary confinement during life imprisonment, and better witness protection and

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[403] Kendall, Sarah and Sarah Nouwen. *Speaking of Legacy: Towards an Ethos of Modesty at the ICTR.* 110 AJIL (2016) p.220.

[404] Cruvellier, Thierry. *Court of Remorse: Inside the International Criminal Tribunal for Rwanda.* The University of Wisconsin Press (2006). p. 186-187.

[405] Moghalu, Kingsley Chiedu. *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda,* The Fletcher Forum of World Affairs, Vol. 26: 2 Summer / Fall (2002) p. 29.

[406] Apart from the fact that the ICTR did not proceed with rape charges in many cases, victims of rape also felt that they received inadequate protection; that they were subjected to lengthy and humiliating questioning; and that their identities were often revealed following their testimonies. Moghalu, Kingsley Chiedu. Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda, The Fletcher Forum of World Affairs, Vol. 26: 2 Summer / Fall 2002 at p. 30. In one case, a rape victim perceived that the judges were ridiculing her and laughing at her testimony. Nowrojee, Binaifer. Your *Justice is Too Slow" Will The ICTR Fail Rwanda's Rape Victims?* United Nations Research Institute for Social Development. November 2005.

[407] For the impact of the genocide in Rwanda on rape victims see African Rights, *Broken Bodies, Torn Spirits: living with Genocide, Rape and HIV/ AIDS* (2004).

[408] Moghalu, Kingsley Chiedu. *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda,* The Fletcher Forum of World Affairs, Vol. 26: 2 Summer / Fall (2002) p. 33.

prison conditions.[409] However, the political will to conduct domestic trials, which continue to this day, and the pursuit of *gacaca* proceedings for genocide originated in Rwanda and should not be attributed to ICTR's impact. On the other hand, Rwanda did not become a member of the Rome Statute, stating that it sees no benefit in doing so. [410]

One unpublished but significant study based on extensive fieldwork of the ICTY and ICTR concludes, "the International Criminal Tribunals were not successful at establishing themselves as legitimate and credible mechanisms of transitional justice" and that they fed into national politics in a way that was "contrary to the aims and expectations of the Tribunals."[411] These studies point to the fact that that the perception of the work of an international criminal tribunal links to whether an international tribunal is affirming, or contradicting a social group narrative of the conflict. In addition, "the legitimacy and effectiveness of transitional justice mechanisms decreases with the perception of external imposition."[412]

3. Hybrid tribunals may be perceived more positively

Studies of the hybrid tribunals indicate that they are perceived in a more positive light. In 2007, a survey found that 96% of 1700 randomly selected respondents around Sierra Leone had heard of the Special Court, although their knowledge was not deep.[413] A survey conducted in 2012 sponsored by the Court itself, interviewed 2841 respondents Liberia and Sierra Leone and found that a remarkable 92% in Sierra Leone and 90% in Liberia had heard of the Special Court.[414] The 2012 survey

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[409] Kendall, Sarah and Sarah Nouwen. *Speaking of Legacy: Towards an Ethos of Modesty at the ICTR.* 110 AJIL (2016) pp. 223-224.
[410] Ibid., p. 227.
[411] Seflja, Izabela. (*In)Humanity on Trial: On the Ground Perceptions of International Criminal Tribunals,* PhD thesis submitted at University of Toronto (unpublished, available online 2015). Steflja conducted nine months of fieldwork in Rwanda and six months of fieldwork in BiH and Serbia, conducting 136 semi-structured and open-ended interviews. This thesis concludes that part of the failures result from the fact that local populations did not believe themselves to be the main beneficiaries of the tribunals and felt that the Tribunals paid insufficient attention to the situation on the ground. For both ICTY and ICTR, elites manipulated the Tribunals for their own goals, influencing perceptions. The Tribunals fed into domestic politics and power struggles in ways that affirmed identity politics and did not contribute to reconciliation.
[412] Kastner, Philipp. *Armed Conflicts and Referrals to the ICC: From Measuring Impact to Emerging Legal Obligations,* 12 JICL (2014), pp.471-490, p. 486.
[413] BBC World Service Trust and ICTJ, *Transitional justice survey in Sierra Leone*, 9 Oct. 2007.
[414] Many said they had heard of the Court when it was first established, in 2002-2003. Out of the respondents, 52.74% said that the SCSL was established to prosecute perpetrators, and 79.16% said it had accomplished what it set out to achieve. Special Court for Sierra Leone, Sierra Leone Institute for International Law, Manifesto 99, No Peace Without Justice, Liberian NGOs Network, and Coalition for Justice and Accountability, *Making Justice Count: Addressing the impact and legacy of the Special Court for Sierra Leone and Liberia*, September (2012) pp. 26-28.

suggests that Special Court for Sierra Leone generally seems to invoke positive perceptions. [415]

Research on the Cambodia tribunal shows similar, more positive tendencies. A nation-wide, population-based survey of the ECCC was carried out in Cambodia in 2009. Desire for accountability for the Khmer Rouge in Cambodia was very high (at 90%), but knowledge of the ECCC was relatively low (39% said they had no knowledge, whereas 46% said they had little knowledge, mostly through radio and television). 80% of respondents considered themselves victims of the Khmer Rouge, including many of the 31% that had been born after the Khmer Rouge period. Out of those who had heard of the ECCC, 87% said it would respond to the crimes committed by the Khmer rouge and 67% believed it to be fair and neutral (although 33% said it was not neutral and 23% said it may be corrupt.).[416]

4. The impact of time on perceptions

Perceptions are not a constant and will vary over time. Initially the reaction to the trial in Nuremberg was negative, particularly in West Germany.[417] It was only after the reunification of Germany that a new generation was able to actively embrace the legacy of Nuremberg.[418] Orentlicher argued that the impact of the ICTY should not be assessed yet at 15 years, because the impact of the Nuremberg trials was only felt in Germany after a generation or more. Diane Orentlicher's impact studies of the ICTY in 2008 highlight the highly detrimental impact that the death of Milosevic during trial had on the image of the Tribunal.[419]. Further setbacks were suffered

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[415] According to the survey, up to 83.92% of respondents in a 2012 survey in Sierra Leone and Liberia said the Court had done a good job in bringing those responsible for atrocities to justice. Almost half of all respondents said they were victims or war crimes or crimes against humanity (although it is not certain whether they understood these definitions). A high number of respondents (82.09%) also thought the Special Court had contributed to greater respect for human rights and the rule of law, and a similar number (78.64%) said the SCSL had an impact on the restoration and maintenance of peace in Sierra Leone or Liberia. Special Court for Sierra Leone, Sierra Leone Institute for International Law, Manifesto 99, No Peace Without Justice, Liberian NGOs Network, and Coalition for Justice and Accountability, *Making Justice Count: Addressing the impact and legacy of the Special Court for Sierra Leone and Liberia,* September 2012 p. 29-30.

[416] Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean and Eric Stover, *So We Will Never Forget": A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia*, Human Rights Center, University of California, Berkeley, January 2009.

[417] Burchard, Christoph. *The Nuremberg Trial and its Impact on Germany*. Journal of International Criminal Justice 4 (2006), pp. 800-829.

[418] See Burchard, Christoph. *The Nuremberg Trial and its Impact on Germany*. Journal of International Criminal Justice 4 (2006), pp. 800-829. It is worth noting that Germany now is a staunch supporter of the International Criminal Court and was one of the first to pass implementing legislation, in the form of an international chapter of its criminal code, in 2002. In 2011, it established a Nuremberg Principles Academy.

[419] Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia.* OSJI (2008) p. 80. Serb supporters of the Tribunal had hoped that the judgement would confront the Serb

with acquittals of senior Croat and Serbian accused based on various legal standards in the cases of *Gotovina, Perišić*, and *Stanišić* and *Simatović*, just when the Tribunal was nearing the end of its mandate. In these cases, accused returned home as war heroes.[420] Van der Herik argues that the assessment of legacy of the ICTR can be used to shine light on the "dark holes" that ICTR was not able to cover due to its mandate and extent of its jurisdiction:

> Legacy [is] the moment to open up to stories that the ICTR could not tell … The closure of the ICTR does not signify the endpoint of history.[421]

At the same time, even a snapshot of perceptions at a particular time is valuable information that may help in gauging the potential impact of the ICC, even though it may be too early to be conclusive.

Conducting population-based surveys is a logistically intensive exercise beyond the scope of this thesis. Instead, this thesis will seek to identify in perceptions across four situations, based mainly on qualitative interviews and long-term first-hand observation. This Chapter will seek to measure the perceptions of the ICC along the following trends:

- Whether the ICC is viewed as independent or impartial;
- Whether the ICC is seen as relevant or responsive to local justice struggles;
- How has been perceived as interacting with local justice solutions;
- Whether it is viewed as independent;
- Whether it is perceived as promoting military solutions to conflict.

IV. Conclusion

The Court itself is vastly overburdened with expectations from its supporters. The founders of the ICC believed in the fact that its establishment would lead to a reduction in the world's worst crimes. Yet in the first 15 years of its existence, it is not clear that the ICC is contributing to reducing atrocities in the short term. In fact, most countries that are under investigation have experienced further atrocities, sometimes committed by the same actors. This does not mean that the ICC project should be considered a failure, but a more robust debate is needed on underlying assumptions, and on what are the intended effects of the Rome Statute and the ICC.

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population with the broad historical truth of the role of Serb institutions in atrocities, but without a final verdict this would prove far more difficult.

[420] A Danish judge in the ICTY claimed that the President had exerted pressure to acquit Gotovina and Perišić, in order to apply legal standards that would shield big military powers including the US and Israel, from criminal liability. This scandal damaged perceptions of the ICTY: https://www.ejiltalk.org/danish-judge-blasts-icty-president/, 13 June 2013.

[421] Van den Herik, Larissa. *International Criminal Law as a Spotlight and Black Holes as Constituents of Legacy.* 110 AJIL Unbound (2016) p. 212.

The ICC cannot easily be analogized to a domestic criminal court. Criminal justice goals are not easily applicable to the ICC. In addition, sentences imposed by international courts are often too lenient to be considered retributive. Neither is the Court clearly a transitional justice mechanism. Its external nature means that it is only able to contribute indirectly to transitional justice goals such as expressivism. Its pursuit of individual criminal accountability does not clearly contribute to peace building, causing Mbeki and Mamdani to argue that it is inappropriate to apply a criminal law framework to political violence. However, this perspective discounts the importance of the social condemnation that derives from labeling the crimes, which at least is a form of expressivism on the global level.

This thesis suggests that the ICC ought to be assessed based on its ground-level impact, in situation-countries. This entails measuring the normative and societal impact of the Court to assess whether it is contributing to ending impunity through building a culture of accountability over time. Pathways to prevention can be followed through a framework of indicators distilled from the Rome Statute itself, as well as from the intentions of its mandate-giver, the Assembly of State Parties. The Assembly of States Parties itself gave an indication of which areas are important to assess when it conducted its "stock-taking" exercise during the Review Conference. Court officials and other stakeholders added further statements.

Ultimately, the normative effects of the Rome Statute can be assessed through systemic effects on domestic legal systems, resulting in increased capacity to investigate or prosecute Rome Statute crimes. They can also be assessed in transformative effects reflected in peace negotiations, resulting in outcomes that promote accountability for international crimes; or in reparative effects for victims, such as participation and reparations. All of these ought to be complemented by a societal impact or "demonstration effect." The experiences of historical tribunals already give insights into factors that may impact "demonstration effect", including that the external nature of the ICC can be a complicating factor in perceptions.

The following Chapters will assess various country situations to measure these areas against the proposed indicators, in order to allow for some preliminary conclusions on the overall impact of the ICC in situation-countries.

Chapter 2: Systemic Effect I: The Flaws of Complementarity

"*Courts are built to do justice, but to insist on trials in The Hague is to use justice to build a court.*" Timothy Waters[422]

I. Introduction

"Systemic effect" refers to the impact of the Rome Statute and the International Criminal Court on domestic legal systems. Systemic effect is closely related to, but not synonymous with complementarity. The Rome Statute does not refer directly to complementarity or the Court's intended effect on domestic legal systems, but it does refer to national proceedings within its admissibility framework in Articles 17-19.

"Complementarity" is often used as shorthand for a principle that encourages national systems to conduct their own investigations and trials. Legally the term means exactly the opposite, i.e. the complementarity regime allows the Court to conduct investigations and trials in situation where national systems are unwilling or unable genuinely to conduct investigations or prosecutions.[423] However, "positive" complementarity, in the sense of strengthening domestic legal systems, assumed such prominence amongst the ASP and supporters of the ICC that it was retroactively coined as one of the main intended effects of the Rome Statute.[424] In the words of Burke-White: "encouraging national prosecutions within the "Rome System of Justice" and shifting burdens back to national governments offers the best and perhaps the only way for the ICC to meet its mandate and help end impunity."[425] Thus the Rome Statute was retrospectively re-interpreted by the mandate-providers to put the onus of investigation and prosecution firmly on domestic systems.

This Chapter argues that the systemic effect that can be seen on the domestic level is not necessarily due to the effective functioning of a complementarity regime. The interpretation of complementarity that has prevailed on behalf of the Court is too intrusive. Instead of allowing States to a "margin of appreciation" to conduct their own trials for Rome Statute crimes, application of the complementarity framework often generated an adversarial relationship with States. While there are limited pockets of potential "positive" complementarity, many measurable "systemic

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[422] Waters, Timothy. *Let Tripoli Try Saif Al-Islam. Why the Qaddafi trial is the wrong case for the ICC, Foreign Affairs*, 9 Dec. 2011.
[423] Seils, Paul. *Putting complementarity in its place, Law and Practice of the International Criminal Court,* edited by Carsten. Oxford University Press (2015) at pp. 305-327.
[424] Stahn, Carsten. *Taking Complementarity Seriously,* The International Criminal Court and Complementarity: From Theory to Practice Vol. I (edited by Carsten Stahn and Mohamed El-Zeidy), Cambridge University Press (2011) p. 234.
[425] Burke-White, William W. *Proactive Complementarity: The International Criminal Court and National courts in the Rome System of Justice,* Harvard International Law Journal, Vol. 49 (2008) p. 53.

effects" are implemented by States independently or even in spite of the Court. At the same time, complementarity as currently applied yields unsatisfactory results, such as an excessive focus on very few perpetrators or allowing countries to conduct unfair trials.

II. The Flaws of Complementarity

A. "Positive" Complementarity?

1. A Court-Centric Conception of Complementarity

The full history of complementarity has been explored in many writings and will not be explored in detail here.[426] In the lead-up to the adoption of the Rome Statute, States parties heavily debated the notion. Many States wanted a strong presumption favoring national jurisdictions.[427] Likewise, the concept of "unwillingness" was controversial and difficult to negotiate, due to States' concerns about sovereignty.[428] After all, state representatives who negotiated the Statute were mindful of state sovereignty and did not want a "primacy" model as represented by the ICTY. On the other hand, States also wanted to create an effective and credible court, able to act where States were ineffective.[429]

However, as the concept of complementarity developed in the jurisprudence and amongst the writings of academics and activists, notions of sovereignty were sometimes diminished. From the establishment of the Court, those tasked with formulating the Court's policies on the principle of complementarity took a Court-centric approach, defined through concepts such as division of labor, uncontested admissibility, the impunity gap, and positive complementarity.

In 2003, an informal expert group convened in The Hague to discuss the principle of complementarity. The vision of the relationship between the Court and States Parties foreseen in the report did not anticipate antagonism.[430] Instead it sketched a

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[426] For an in-depth analysis of the topic see Stahn, Carsten and Mohammed El-Zeidy (ed), *The International Criminal Court and Complementarity: From Theory to Practice* Vol. I, Cambridge University (2011). See also Kleffner, Jan. *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press (2008).

[427] Williams, Sharon A.and William A. Schabas, *Commentary on the Rome Statute of the ICC*, Ed. Otto Triffterer, 2nd ed. Beck/ Hart (2008) p. 608.

[428] Ibid. p. 610.

[429] Dissenting Opinion of Jude Anita Usacka, *Prosecutor versus Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Appeals Chamber Judgement 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, 21 May 2014, para. 16.

[430] Schabas, William. *Complementarity in Practice: Some Uncomplimentary Thoughts*, Criminal Law Forum 19 (2008) 5-33 p. 6.

"cooperation-based vision of complementarity."[431] The experts saw the Court as a gentle giant, and mentor for domestic justice systems through a combination of "partnership" on the one hand and "vigilance" on the other. The paper argued that:

> Partnership highlights the fact that the relationship with States that are genuinely investigating and prosecuting can and should be a positive, constructive one. The Prosecutor can, acting within the mandate provided by the Statute, encourage the State concerned to initiate national proceedings, help develop anti-impunity strategies, and possibly provide advice and certain forms of assistance to facilitate national efforts.[432]

Increasingly, Court-centric notions started to dominate the vision of complementarity. Another policy document envisaged a "division of labour" between trials of high- and low-ranking perpetrators:

> The Court is an institution with limited resources. The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who will bear the most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators.[433]

Much-discussed over the years was the potential for a division of labor between the ICC and domestic prosecutions in situations where a State makes a referral or does not contest admissibility, and when it may be "willing to become able." One vision of this approach argued that "the parallel action of two judicial systems will be seen as complementary, and not in terms of inferiority/ superiority, although there may be differences between the two systems (in salary, resources, prison conditions, etc.) that may suggest such a (potentially damaging) hierarchy."[434] Some scholars subsequently spoke of the Rome Statute creating a "shared responsibility".[435] Some actively promoted the idea that the ICC ought to engage in capacity building.[436] In the context of Libya, it was argued, "the overriding benefit of the ICC is that when national authorities are not yet in a position to conduct genuine investigations and prosecutions, the Court can step in to investigate and prosecute some cases in

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[431] Stahn, Carsten. *Taking Complementarity Seriously,* in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I, Ed. by Carsten Stahn and Mohamed M. El-Zeidy (2011) p. 261.
[432] Informal expert paper: The principle of complementarity in practice, ICC-OTP 2003 para. 3. The author was a participant in one of the expert group's meetings.
[433] OTP Paper on some policy issues before the Office of the Prosecutor, Sept. 2003 p. 3.
[434] Conference report: Vancouver Dialogue on the Impunity Gap, Liu Institute Global Justice Program and ICTJ, 4 April 2004.
[435] Stahn, Carsten. *Taking Complementarity Seriously,* The International Criminal Court and Complementarity: From Theory to Practice, Vol. I (Ed. by Carsten Stahn and Mohamed M. El-Zeidy), p. 263. See also Carsten Stahn, *Libya, the International Criminal Court and Complementarity, A Test for "Shared Responsibility",* Journal of International Criminal Justice (2012) p.1-25.
[436] Stromseth, Jane. *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?* Georgetown University Law Center (2009) at p. 89.

accordance with fair trial standards."[437] However, this ignores the fact that ICC trials might in fact be disempowering to domestic justice actors. As argued by Timothy Waters, "the sight of English-speaking judges listening to Arabic on headphones would leave Libyans doubtful that their stories were being told, much less understood."[438]

This vision of complementarity demanded that the Court should be the centerpiece, leaving national jurisdictions to try secondary offenders or "remnants".[439] In another scenario, it was suggested that countries may voluntarily forego doing justice due to lack of capacity or if "groups bitterly divided by conflict may oppose prosecution at each other's hands and yet agree to a prosecution by a Court perceived to be neutral and impartial."[440] While this has happened to a degree, with referrals, instead the perception has grown that the Court is not neutral and impartial, as will be discussed in Chapter 6.

The notion of deferred jurisdiction also linked to "uncontested admissibility", used in self-referrals and became a central part of the Court's approach. This in turn linked to the development of the two-prong test to admissibility in the jurisprudence, with "inaction" i.e. failure to open an investigation being the first prong.[441] The fact that the Court can act when domestic jurisdictions fail to do so greatly enhanced the scope of the Court's role in different situations.

In April 2004, a group of experts convened in The Netherlands to discuss what was then termed the "impunity gap", through a process called the "Vancouver Dialogue." Participants included senior UN officials from the Office of the Prosecutor and the ICC Presidency. The impunity gap was defined as "the base of a pyramid of perpetrators (i.e. those other than the top-echelon offenders) who are not likely to be the focus of attention for the ICC."[442] It was noted that: "this depends on how the complementarity regime will develop in practice, leading some to describe the impunity gap as a "complementarity challenge."[443] The experts however did conclude that: "most questions on the impunity gap should be addressed at the

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[437] O'Donohue, Jonathan and Sophie Rigney. *The ICC must consider fair trial concerns in determining Libya's application to prosecute Saif Al-Islam Gaddafi nationally*, EJILtalk.org, 8 June 2012.
[438] Waters, Timothy. *Let Tripoli Try Saif Al-Islam. Why the Qaddafi trial is the wrong case for the ICC,* 9 Dec. 2011.
[439] See for instance Jonathan O'Donohue, *Libya's defining moment: Justice or Revenge? Gadaffi-regime officials must be tried in the International Criminal Court to Ensure a Fair Trial*. Al Jazeera, 22 Sept. 2013. O'Donohue argues: "While the two most high-profile cases are conducted at the ICC, the national authorities can focus on continuing its efforts to improve the security situation and strengthen the national justice system."
[440] OTP Paper on some policy issues before the Office of the Prosecutor, Sept. 2003 at p. 5.
[441] Stahn, Carsten. *Taking Complementarity Seriously", The International Criminal Court and Complementarity* in From Theory to Practice Vol. I (ed. Carsten Stahn and Mohamed El-Zeidy), Cambridge University Press (2011) p. 241.
[442] Conference report: Vancouver Dialogue on the Impunity Gap, Liu Institute Global Justice Program and ICTJ, 4 April 2004.
[443] Ibid.

domestic level. Domestic prosecutions and other mechanisms should be the cornerstone of any systematic approach to reducing impunity."

In situ ICC trials were considered in a number of contexts, including DRC, Kenya, and Libya, but to date they have not materialized, as they proved too difficult to achieve both from a political or security perspective. Judge Fluor describes the preparations that were made for *in situ* hearings in the Lubanga trial in an old hanger on a MONUC base, where opening statements of the trial were due to be given. But the Minister of Justice ultimately refused, because the presence of the Court could be destabilizing.[444] Similarly, civil society in Kenya opposed *in situ* hearings on the grounds that these were unlikely to be able to adequately safeguard the safety of victims, witnesses and affected communities.[445] A plenary of judges of the ICC eventually decided against an *in situ* trial, as well as against using the ICTR premises.[446]

As early as 2004, the Chief Prosecutor coined a groundbreaking new term when he said he would be taking "a positive approach to complementarity. Rather than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible."[447] In its Strategy, the OTP specified that this would be achieved through encouraging national proceedings; reliance on national and international networks; and participating in a system of national cooperation as central to positive complementarity.[448] The OTP referred to itself as a channel for implementation, and referred to its ability to catalyze national proceedings, including in countries under preliminary examination. The Prosecutor also said it would support a comprehensive strategy to fight impunity at the domestic level.[449] At the Review Conference in Kampala in 2010, the Assembly of States Parties reaffirmed the importance of the principle of complementarity, but emphasized that the Court itself would not play a central role in positive complementarity, mainly due to resource constraints.[450] At the same time, the dominant view remains that of

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[444] Fulford, Judge Sir Adrian. *The Reflections of a Trial Judge*. Criminal Law Forum 22 (2011) p. 216.
[445] Kenyans for Peace, Truth and Justice, Open Letter to the President of the International Criminal court (ICC) on the Decision on William Ruto's Excusal from Continuous Presence at his Trial and the Forthcoming Decision on In Situ Hearings, 9 July 2013.
[446] Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sa*ng, ICC, 26 August 2013.
[447] Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps in The Hague, Netherlands, 12 Feb. 2004.
[448] ICC-OTP, Report on Prosecutorial Strategy (14 September 2006).
[449] Ocampo, Luis Moreno. *A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor* in The International Criminal Court and Complementarity: From Theory to Practice Vol. I (ed. Carsten Stahn and Mohamed El-Zeidy), Cambridge University Press (2011) p. 26.
[450] The ASP Bureau Report redefined positive complementarity as "all activities/ actions by which national jurisdictions are strengthened and enabled to conduct genuine investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity-building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis. "ASP Report of the Bureau on Stocktaking: Complementarity, Resumed eighth session, 18 March 2010 ICC-ASP/8/51 at p. 16.

view national systems as complementing the ICC, rather than the ICC complementing national systems, and positive complementarity was seen as "an instrument to strengthen the goals and impact of the Court."[451]

2. The "Case Snatcher": A Court Competing for Cases

The current so-called "two-prong" approach of the Court to admissibility, which allows the Court to investigate in cases of "inaction",[452] gives considerable leeway to the ICC to meet the admissibility threshold, considering the inactivity and delay in pursuing domestic cases at the domestic level, particularly in countries in conflict. Furthermore, the requirement that an admissibility challenge should be filed as early as possible and in principle only once, according to Article 19, means that that once the Court opens an investigation, it becomes very difficult for the country to "win the case back." The net result is that the Court competes for cases with national jurisdictions.[453]

Thomas Lubanga was already in custody awaiting trial for crimes against humanity and genocide before a national court.[454] This resulted in the well-known ruling by the Pre-Trial Chamber that the "national proceedings must encompass both the person and the conduct which is the subject of the case before the Court."[455] The ICC charged Lubanga only with the recruitment of child soldiers. In response to criticism about the narrowness of these charges, the former Prosecutor (over) emphasized the gravity of the crime of child recruitment and said "forcing children to be killers jeopardises the future of mankind."[456] Katanga and Ngudjolo Chui too had been arrested and held in custody on national charges, but all were "referred" to the Court. In the case of the Central African Republic, legal proceedings had been

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[451] Stahn, Carsten. *Taking Complementarity Seriously* in *The International Criminal Court Complementarity: From Theory to Practice*, Vol. I (Ed. by Carsten Stahn and Mohamed M. El-Zeidy), p. 277.

[452]Schabas, William. *The Rise and Fall of Complementarity*. *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (Ed. by Carsten Stahn and Mohamed M. El-Zeidy), p.158.

[453] Clark, Phil. *Law, Politics, and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*. In Courting Conflict: Justice, Peace and the ICC in Africa, Royal African Society (2008) p. 37- 46.

[454] Schabas, William. *Complementarity in Practice: Some Uncomplimentary thoughts*. Criminal Law Forum (2008) p. 11.

[455] *Prosecutor versus Thomas Lubanga Dyilo,* Appeals Chamber, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19 (2) (a) of the Statute of 3 Oct. 2006, ICC-01-04-01/06-772, 14 Dec. 2006, para. 37.

[456] Statement by Luis Moreno Ocampo, Press Conference in relation with the surrender to the Court of Mr. Thomas Lubanga Dyilo." 18 March 2006. Paul Seils wrote said that the Court asked for Lubanga at a time when he could have been released and that child recruitment charges were the only ones that were ready at the time: Seils, Paul. *The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court,* in *Case Selection and Prioritization*, ed. Morten Bergsmo, FICHL, Publication Series No. 4 (2010) p. 74. Seils also argues that the DRC had no intention of trying Lubanga.

commenced against Bemba, the *Court de Cassation* made a decision that it was unable to investigate and prosecute and the Court took the case. [457] As concluded by Schabas, "neither the Uganda nor the Democratic Republic of Congo situations have been addressed by the Court in a manner aimed at best encouraging the national system to assume its duties under international law."[458]

The Prosecutor visited Libya in November 2011, to convince Libyan authorities to surrender Saif Al-Islam to the ICC, although he stated during his visit "I respect that it's important for the cases to be tried in Libya … and I am not competing for the case."[459] This left many Libyans with the impression that the ICC would quickly cede way to their claim, not realizing that this would require a judicial decision.[460] He also suggested alternative options, including sequencing the proceedings at the ICC and in the domestic courts according to Article 94 or the possibility of an *in situ* trial.[461] However, the Court decided differently. On 21 May 2014, the Appeals Chamber upheld the Trial Chamber decision on the admissibility of the case of *Saif Al-Islam*.

It could be said that the "same person same conduct" violates the spirit of complementarity. As is demonstrated in the case of *Saif Al-Islam*, the test leads to several distortions. First, the national investigations must precisely mirror ICC charges, even if the latter were put together in considerable haste, as was the case with *Saif Al-Islam*. It therefore forces local, ill-equipped prosecutors in transition countries to quickly build complex cases which mirror ICC crimes and modes of liability. Moreover, the mounting of international pressure of a pending ICC arrest warrant may cause States to bring complementarity challenges before these are fully prepared. In the words of one author: "If the objective of the exercise is to address impunity, the fact that an offender is being held accountable for serious crimes should satisfy the requirements of international law."[462]

The "same person same conduct" test was questioned in the Dissenting Opinion of Judge Anita Usacka in the case of *Saif Al-Islam*: ""the problem lies with the test itself, which, contrary to the express language of the chapeau of article 17 (1) of the Statute, disregards the principle of complementarity … the Court will come to wrong and even absurd results, potentially undermining the principle of complementarity

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[457] Schabas, William. *Complementarity in Practice: Some Uncomplimentary thoughts.* Criminal Law Forum (2008) p. 12.
[458] Ibid. p. 27.
[459] BBC World News, *Ocampo: Saif Al-Islam case is huge responsibility for Libya*, 23 Nov. 2011. http://www.bbc.com/news/av/world-africa-15866040/ocampo-saif-al-islam-case-is-huge-responsibility-for-libya.
[460] *Prosecutor versus Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Request to Disqualify the Prosecutor from Participating in the Case Against Saif Al-Islam Gaddafi, ICC-01/11-01/11, 3 May 2012.
[461] Prosecutor's Submissions on the Prosecutor's recent trip to Libya, Gaddafi and Al-Senussi, (IC-01/11—1/11-31), OTP, 25 November 2011. The author met with the Prosecutor during this trip.
[462] Williams, Sharon A. and William A. Schabas, *Commentary on the Rome Statute of the ICC,* Ed. Otto Triffterer, 2nd ed. Beck/ Hart (2008), p. 616.

and threatening the integrity of the Court. [463] Judge Usacka argues that if the test prompted Libya to bring narrower charges against Saif Al-Islam than it intended, that this would be harmful for Libyan victims and that they would be better served by domestic investigations and prosecutions.[464] She proposed that "conduct" be given a much wider definition, and should not be construed so narrowly as to mean the same material and mental elements as the Court has charged.[465]

Yet the "same accused same conduct" test was repeatedly upheld in the subsequent jurisprudence, albeit that it was softened to "substantially the same conduct."[466] Mégret and Samson observe that "it is important to remember that depriving a state of its criminal jurisdiction over cases that it has a perfectly legitimate case to try under ordinary principles of jurisdiction, particularly ones that it will (to put it mildly) feel strongly about, is an exorbitant prerogative."[467] Nonetheless, this is the situation in regard to the Court's jurisprudence today.

3. Amicable or adversarial?

In spite of attempts to the contrary by the Office of the Prosecutor, the relationship between national jurisdictions and the Court often developed into an adversarial one, which limited opportunities for positive cooperation. While complementarity is conceived as "largely based on incentives, and "carrots and sticks" rather than coercion",[468] this is not reflected in practice. The cases of Uganda, Kenya, and Libya all resulted in litigation on admissibility.

While originally the Ugandan authorities were supportive to the ICC while it was investigating the LRA, this changed during the Juba negotiations with the LRA in 2006-2008, when President Museveni took the position that the arrest warrants ought to be lifted. When the International Crimes Division was established in Uganda, the Pre-Trial Chamber itself initiated an admissibility assessment under Art. 19 (1) of the Statute. The Ugandan Government submitted, "The War Crimes Division of the High Court is meant to supplant the work of the International Criminal Court, and accordingly those individuals who were indicted by the

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[463] Separate opinion of Judge Anita Usacka, *Prosecutor versus Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Appeals Chamber Judgement 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, 21 May 2014, paras. 47-48.
[464]Ibid., para 55.
[465] Ibid., para. 58.
[466] *Prosecutor versus Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgement on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011, entitled "Decision on the Application of the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art. 19 (2) (b) of the Statute", ICC-01-09-02/11-274, 30 May 2011.
[467] Mégret, Frederic and Marika Giles Samson, *Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials*, 11 Journal of International Criminal Justice 11 (2013) p. 578.
[468] Stahn, Carsten. *Taking Complementarity Seriously*, in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (Ed. by Carsten Stahn and Mohamed M. El-Zeidy (2011), p. 250.

International Criminal Court will have to be brought before the War Crimes Division of the High Court for Trial." Nonetheless, the Pre-Trial Chamber found that Uganda was in a continued state of inaction and that the case remained admissible. The Appeals Chamber upheld this.[469] Cooperation between the ICC and the ICD is limited.[470] More recently, Museveni personally has displayed a great deal of antipathy to the ICC. He is one of the most vocal leaders of the AU opposition against the Court, after arrest warrants were issued against Al-Bashir and Kenyatta. He invited Al-Bashir to Uganda and attended Kenyatta's inauguration where he said:

> I was one of those that supported the ICC because I abhor impunity. However, the usual opinionated and arrogant actors using their careless analysis have distorted the purpose of that institution … what happened here in 2007 was regrettable and must be condemned. A legalistic process, especially an external one, however, cannot address those events.[471]

On the other hand, the Ugandan authorities supported the surrender of Dominic Ongwen to the ICC in February 2015. They issued a statement to say that they supported his trial at the ICC rather than the ICD due to the "cross-border nature of the crimes."[472] The Government is giving full cooperation in the case. At the same time, President Museveni continued to attack the ICC: in his inauguration in 2016 he referred to the ICC as a "bunch of useless people," prompting Western Ambassadors to walk out.[473]

In Kenya, the Prosecutor first attempted to entice cooperation, particularly by supporting the creation of a Special Tribunal for Kenya through a benchmark agreement, failing which Kenya agreed they would refer a case.[474] When Kenya failed to establish a Special Tribunal, the Prosecutor announced on 30 September 2009 that he favored a three-prong approach, consisting of the ICC prosecuting those bearing the greatest responsibility; national proceedings would target secondary perpetrators; and other reforms plus the TJRC would address underlying

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[469] *Prosecutor v. Kony et al.,* Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009.

[470] Interview with the late Joan Kaghezi, Kampala, Feb. 2014. The Head of the Prosecutions Division and the Head of the Police team made working visits to The Hague of several weeks. The ICD Prosecution and OTP shared evidence in non-ICC cases and also shared best practices. The shared evidence raised some technical concerns, in that transcripts of ICC interviews are not necessarily admissible in Uganda. The fact that some persons are ICC witnesses can be a complicating factor because the ICC instructs them not to talk to anybody else. However, some of the information on LRA command structures gathered by the ICC was useful to Uganda prosecutors.

[471] International Justice Monitor, Tom Maliti, U*gandan President Attacks ICC During Kenyatta Inauguration*, 9 April 2013.

[472] Statement by the Government to the public on the Dominic Ongwen Case at the ICC: http://www.mofa.go.ug/data/dnews/139/Statement-by-the-Government-to-the-public-on-the-Dominic-Ongwen-case-at-the-International-Criminal-Court.

[473] The Guardian, *Walkout at Ugandan President's Inauguration over ICC remarks,* 12 May 2016.

[474] Stahn, Carsten. *Taking Complementarity Seriously,* in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I, Ed. by Carsten Stahn and Mohamed M. El-Zeidy (2011), p. 259.

causes of the violence.[475] He then requested a *proprio motu* investigation to be opened on 26 Nov. 2009, which was approved by the Pre-Trial Chamber on 31 March 2010. Originally the Government of Kenya took a cooperative position to the ICC. The Prosecutor issued summons for the six accused, all of who came to confirmation of charges hearings. Kenya then filed an admissibility challenge under Art. 19, in March 2011, but failed to demonstrate that it was acting against the six accused. Its argument, that judicial reforms should be taken to constitute evidence of investigation or prosecution for the purposes of Art. 17 (1), was rejected by the ICC.[476] The cases against the six accused proceeded. Since that time, the relationship with Kenya dramatically deteriorated during the course of the trials of President Kenyatta and Vice-President Ruto.

The relationship between the post-Revolution Libyan authorities and the Prosecutor also began as amicable, but soon clashed over the admissibility of cases. Originally, the NTC did whatever it could to facilitate the evidence gathering of the Office of the Prosecutor. Nevertheless, after the capture of Saif al-Islam it became obvious that the Libyans intended to conduct their own trials. In the words of one of their spokespersons at the time:

> We will not accept that our sovereignty be violated like that. We will put him on trial here. This is where he must face the consequences of what he has done. We will prove to the world that we are a civilized people with a fair justice system. Libya has its rights and its sovereignty and we will exercise them.[477]

On 30 April 2012, Libya filed an admissibility challenge before the ICC, arguing that it had opened an investigation against Saif al-Islam and should be allowed to proceed. On 31 May 2012 the Pre-Trial Chamber ruled on the admissibility challenge filed by Libya in the case of Saif Al-Islam, finding it admissible.[478] The

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[475] Chistine Alai and Njonjo Mue, *Complementarity in Kenya,* in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I, Ed. by Carsten Stahn and Mohamed M. El-Zeidy, p. 1228.

[476] Hansen, Thomas Obel. *Prosecuting International crimes in Kenyan Courts?* Paper presented at "The Nuremberg Principles 70 Years Later: Contemporary Challenges", 21 November 2016.

[477] Words of Col. Ahmed Bani cited in Chulov, Martin*. Libya insists Saif Al-Islam should be tried at home,* The Guardian, Oct. 29, 2011, quoted in Kersten, Mark, *Justice After the War: The ICC and Post-Gaddafi Libya*, available online.

[478] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* Public Redacted Decision on the Admissibility of the case against Saif Al-Islam, ICC-01/11-01/11, 31 May 2013. The ICC considered Libyan authorities unable to carry out the proceedings against Saif Al-Islam for the three reasons. First, it considered that the Libyan government could not secure his transfer from Zintan into state custody. Secondly, it judged the judicial system unable to obtain witness testimonies, exercise full control over detention facilities and provide adequate witness protection. Thirdly, it saw significant impediments to securing legal representation for Saif Al-Islam, given the security situation in Libya and the risks faced by lawyers representing former government figures. The Trial Chamber concluded that it had not been able 'to discern the actual contours of the national case against Saif Al-Islam so that Libya had not demonstrated that that the domestic investigation covers the same case that is before the Court, a legal requirement in order to succeed at an admissibility challenge before

Appeals Chamber upheld this on 21 May 2014. On the contrary, on 11 October 2013, in deference to domestic proceedings, the ICC decided that the case against Abdullah Al-Senussi was inadmissible. The Pre-Trial Chamber found that the Libyan investigations against Al-Senussi include the same conduct as was being investigated by the ICC. It concluded that Libya is willing to bring him to trial, in spite of the fact that he remained unrepresented, and in spite of the poor security situation, the absence of witness protection, and the inability of the government to exercise control over certain detention facilities. The decisive factor that differed from the case of Saif Al-Islam, was that the Libyan authorities had custody over Al-Senussi. Saif was being held by a militia in Zintan. Also, the Libyan authorities had gathered far more evidence against Al-Senussi than against Saif Al-Islam.[479]

In spite of the adversarial relationship around admissibility, the ICC retains a degree of cooperation with the Libyan authorities. In her remarks to the Security Council in November 2013 the Prosecutor announced that she had signed a "burden-sharing" Memorandum of Understanding with the Libyan government, "to ensure that individuals allegedly responsible for committing crimes in Libya as of 15 February 2011 are brought to justice either at the ICC or in Libya itself."[480] But the scope of this arrangement seems to be effectively restricted to investigating Qadhafi era officials, as evidenced by the arrest warrant against Al-Tuhamy Mohammed Khaled issued on 24 April 2017. Most recently, the Prosecutor has said cooperation was extended to cases involving illegal migration. In August 2017, the Prosecutor issued an arrest warrant against *Saiqa* Commander Mahmoud Al-Werfalli, but General Haftar has refused to hand him over to the ICC.[481] When in February 2018 Al-Werfalli reportedly went to hand himself in, he returned home pursuant to protests in his favor. Protestors reportedly held signs that read: "We are all Major Mahmoud Al-Werfalli."[482] In short, all these examples demonstrate an adversarial relationship between national authorities and the ICC.

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the ICC. It also noted that Libya, assisted by national governments and regional and international organizations, had deployed significant efforts to rebuild institutions, restore the rule of law and to enhance capacity, with respect to transitional justice in the face of extremely difficult circumstances."

[479] *Prosecutor versus Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Public Redacted Decision on Admissibility of the Case Against Abdullah Al-Senussi, ICC-01/11-01/11, 11 Oct. 2013.

[480] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011) Mrs. Fatou Bensouda, Prosecutor of the International Criminal Court, New York, 14 November 2013. The OTP will prioritize those who are outside of the territory of Libya, whereas the Libyans will prioritize those inside of its territory. The MoU also covers information sharing, subject to confidentiality and witness protection. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011) Mrs. Fatou Bensouda, Prosecutor of the International Criminal Court, New York, 14 November 2013.

[481] The Libya Observer. *ICC wanted killer Al-Werfalli defies arrest warrant and executes 5 prisoners.* 7 Sept. 2017.

[482] Al-Jazeera, *Libya Commander Wanted by ICC hands himself in,* 8 February 2018. Reuters, *Libyan Commander Wanted by ICC freed after protest,* 8 February 2018.

B. Complementarity and Broader Rule of Law Challenges

1. Complementarity cannot address broader rule of law challenges

Complementarity is narrow in scope and cannot claim to address the systemic problems of domestic legal systems in countries where Rome Statute crimes have occurred. The scope of those problems is described by the United Nations:

> Helping war-torn societies re-establish the rule of law and come to terms with large-scale pas abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming task.[483]

National legal systems battling with ongoing conflict or emerging from conflicts are often in a chronic state of disrepair. In contexts as varied as Colombia, Libya, and Afghanistan, countries face the dilemma of being called on to deliver justice in a potentially large number of cases at a time, when the justice system is struggling to recover from decades of dictatorship or conflict, or both. In Libya and Colombia, a significant number of alleged perpetrators of high and low levels are in custody.

In other cases, such as Afghanistan, impunity is widespread, yielding a very different set of challenges. Afghanistan is in a continuous state of conflict and insecurity, which poses big challenges to the legal system. To illustrate, Afghanistan's legal system remains weak in spite of fifteen years of rule of law programming on behalf of the national authorities assisted by the international community to strengthen it as part of a general state-building strategy. In 2010 the International Crisis Group said that Afghanistan's justice system is in a "catastrophic state of disrepair', with "many courts inoperable", and "insecurity, lack of proper training and low salaries" driving judges and prosecutors from their jobs.[484]

Corruption is another endemic identified factor. The Taliban operates a parallel justice system in many areas under its control. Many Afghans turn to traditional non-state dispute resolution in the form of *shuras* and *jirgas*.[485] Afghanistan remains bottom of the list (175th) on Transparency International's corruption perception index, a place it shares with North Korea and Somalia.[486] Afghanistan produces 90 percent of the world's opium. NATO and the US consider drug traffickers as

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[483] Secretary-General's Report. *The rule of law and transitional justice in conflict and post-conflict society*, S/2004/616, 23 August 2004 at para. 3.: "It requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights, and more generally, a lack of peace and security."

[484] International Crisis Group, *Reforming Afghanistan's Broken Judiciary*, 17 Nov. 2010.

[485] The USIP has estimated that up to 80% of civil and criminal disputes are handled by these mechanisms.

[486] See Transparency International: cpi.transparency.org/cpi2013/results/.

combatants, because they provide funding to the Taliban.[487] In 2010, the executive director of UNODC said that drugs and bribes combined correspond to about half of the country's illicit GDP.[488]

The Head of the Supreme Court, Adbel Salem Azimi, remained in place three years beyond the expiry of his appointment.[489] The Taliban has committed many attacks on the judiciary. The Supreme Court itself was targeted in a Taliban attack in June 2013, in a suicide bombing that killed 17. Hartmann, a rule of law practitioner with many years of experience in Afghanistan, concludes:

> The international community has failed to help establish the necessary preconditions for the long-term legal and political development necessary to make the justice system a source of legitimacy, predictability and protection for the wider society. Among these, none is more fundamental, as has belatedly been recognized, than checking corruption and ending impunity for the powerful.[490]

Broader rule of law challenges also exist in other countries, though perhaps on a different scale to those in Afghanistan. With the shrinking of political space in Uganda, in recent times the judiciary itself has come under increased political pressure.[491] In 2013, the Chief Justice was due to retire at the end of his term because he has passed the constitutional retirement age, President Museveni wants to reinstate him. Human rights violations such as arbitrary detentions, torture and extrajudicial killing are on the increase in Uganda. NGOs and human rights defenders too have come under pressure with new restrictive laws, as have the opposition.

Libya's justice system after the Revolution was impeded by the volatile security situation. While almost all judges and prosecutors initially reported back to duty, in most parts of the country, judges are reluctant to hold regular court sessions, except in family and civil law cases. Prior to the recent violence, in the east of Libya (Benghazi and Derna), there were numerous physical attacks on court buildings as well as assassinations of prominent judges and prosecutors. In February 2014, the first pro-Qadhafi General Prosecutor, Abdel-Aziz Al-Hassadi, and a main interlocutor with the ICC, himself was assassinated in Derna.

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[487] Hartmann, Michael E. *Casualties of Myopia,* in *The Rule of Law in Afghanistan: Missing in Inaction,* ed. Whit Mason, Cambridge University (2011) p. 176.
[488] Ibid. p. 175.
[489] Interview with Supreme Court Judge, Head of General Criminal Division, Kabul, 18 March 2014. The Judge said he himself decided around 6000 criminal cases per year. Interview with Afghan Representative of Afghanistan Justice Sector Support Program, Kabul, 20 Nov. 2013.
[490] Hartmann, Michael E. *Casualties of Myopia,* in *The Rule of Law in Afghanistan: Missing in Inaction,* ed. Whit Mason, Cambridge University Press (2011) p. 172.
[491] International Bar Association, *Judicial Independence Undermined: A Report on Uganda*, Sept. 2007. In March 2007, elite government forces known as the Black Mambas invaded the trial of opposition leader, Dr. Kizza Besigye, charged with terrorist offences in relation to the LRA.

The enormous challenges that exist at the domestic level require a response that goes far beyond complementarity, and form a challenge for development actors such as the United Nations. [492] Complementarity is pursued by mainly by diplomats and scholars who support the Court but who lack experience in international development.[493] While some of the specialized jurisdictions created to pursue complementarity, described below, may create "islands of competence" within these faulty legal systems, the limits of the complementarity approach becomes clear in situations where the rule of law is largely absent, such as Libya and Afghanistan.

2. Complementarity's Distorting Effect

Scholars usually speak of the "catalyzing" effect of complementarity, focusing on the fact that the ICC may serve to encourage criminal trials that may otherwise not have taken place. But complementarity tends to narrow the debate on a wide range of challenges common to justice systems in post-conflict scenarios, to focus on the fate of a few individuals, either those who are under arrest warrants, or those who potentially could be. Complementarity can therefore have a "distorting effect" i.e. it puts the focus on a very limited number of cases while ignoring the general context. In addition, the Court's "own ability to hold large numbers of trials undercuts the incentive for states to hold their own trials."[494]

This effect is demonstrated for instance in the Libya case. The focus of the international community after the Revolution was exclusively on Saif Al-Islam and Abdullah Al-Senussi, but there are a large number of other senior regime figures also in custody. This prompted the Minister of Justice to ask why the attention of the international community is only on two out of 7000 detainees.[495] Similarly in

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[492] In 2000, the United Nations published a seminal report on peace operations that concluded that "where peace-building missions require it, international judicial experts, penal experts and human rights specialists, as well as civilian police, must be available in sufficient numbers to strengthen rule of law institutions." Report of the Panel on United Nations Peace Operations, A/55/305-S/2000/809, 21 August 2000 at para 39.

[493] The focal points on complementarity and the ICTJ convened several meetings at Greentree in order to foster links between the supporters of the ICC and the development community. Reports of the Greentree meetings are at http://ictj.org/sites/default/files/ICTJ-Global-Complementarity-Greentree-2010 -English.pdf.

[494] Wippman, David. *Exaggerating the ICC*. Cornell Law School Research Paper No. 04-018, available online.

[495] After Tripoli fell, hundreds of perceived Qadhafi loyalists, including former members of the regime and security apparatus, were systematically rounded up, in most cases without arrest warrants. Brigades arrested over 8,000 persons throughout Libya and detained them both in prisons and informal detention centers throughout the country. Those arrested included perceived Qadhafi supporters; suspected mercenaries; and many Tawergha accused of atrocities in Misrata; but they also include senior members of the former regime. Many detainees were kept in poor conditions, mistreated, and denied access to medical facilities or a legal process. Torture has been particularly prevalent in Misrata but numerous cases have also been uncovered by the United Nations in Zawiya, Zintan, and Tripoli. UNSMIL and OHCHR, *Torture and Deaths in Detention in Libya*, October 2013.

Uganda, a conflict that had resulted in mass displacement over 2 decades was reduced to a discussion of what should happen to the five LRA leaders who were subject to arrest warrants. In Kenya a great deal of attention focused on the arrest warrants against Kenyatta and Ruto, instead of on the plight of the victims of post-election violence.[496] The Court can therefore serve to distract from broader justice questions or from taking measures that benefit victims.

3. Is Complementarity an illusion? Is it in fact parallelism?

Proponents of the ICC often argue that the Court is necessary precisely because domestic legal systems are so flawed.[497] Systemic problems are often cited as evidence that national systems are not capable to conduct their own trials.[498] The Court and national systems are therefore conceived of as symbiotic: where the one fails, the other steps in. This creates the illusion that the Court can "complement" or deliver when national systems cannot.

In practice however, the ICC is often confronted with exactly the same challenges. In fact the ICC often inherits the weaknesses of domestic systems. The Achilles heel of the ICC is its lack of enforcement powers and its reliance on state cooperation. State cooperation can be hindered by either unwillingness or inability. Where either of these factors prevent national jurisdictions from moving forward with genuine investigations or prosecutions, it will be equally difficult for the Court to make significant advances. It may therefore be more appropriate to speak of "parallelism" than of complementarity in most situations.

Two prominent examples of unwillingness to proceed with any form of investigation or prosecution are the two Security Council referrals for Sudan and Libya. Neither has resulted in those subject to arrest warrants being surrendered to the ICC, with the exception of the Darfurian rebels. In both of these cases, the Court is hamstrung from moving forward, in spite of bringing pressure to bear via the Security Council or other political avenues. While the involvement of the Court in these situations may continue to play an expressive function in condemning the crimes of those under arrest warrants Al-Bashir, Saif Al-Islam or al-Werfali, it is not clear whether these cases will ever end up in The Hague.

But inability too brings its pitfalls. Inability can arise when a country itself has limited abilities to enforce law in its own territory, and this will often be the case in States that are in active conflict. Again, current experience is replete with examples. For instance, the Ugandan referral was prompted in large part by the fact that Uganda was unable to arrest persons who might bear the greatest responsibility for

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[496] See Chapter 3.
[497] See Jonathan O'Donohue and Sophie Rigney: *The ICC must consider fair trial concerns in determining Libya's application to prosecute Saif Al-Islam Gaddafi nationally*, EJILtalk.org, 8 June 2012.
[498] Ibid.

the relevant crimes.[499] However, years after the issuance of arrest warrants, and in spite of extensive UPDF operations on Congolese soil; direct assistance to the UPDF by US military advisors, and an increased public campaign on behalf of Invisible Children over the years, the ICC has not been able to orchestrate the arrest of Joseph Kony.

State institutions themselves may render the enforcement of arrest warrants, or the effective protection of witnesses impossible. In the aftermath of the post-election violence in Kenya, a main reason why a Special Tribunal for Kenya was not set up is because of the direct role of the police itself in PEV, which gave rise to fears about effective witness protection.[500] The Waki Commission found widespread problems with the Kenyan police, including their involvement in PEV.[501] Fears about the safety of witnesses also meant that the Court was not able to hold *in situ* hearings in Kenya.[502] Predictably, this same inability to protect witnesses has hampered the work of the ICC. The Kenyan government proposed the establishment of an International Crimes Division, but it is quite clear from the context that this mechanism too cannot effectively protect witnesses and does not constitute a real opportunity for victims of post-election violence.

The absence of basic security in countries in conflict also hampers the enforcement powers of governments. In Afghanistan, the ICC cited the security situation and difficulties of conducting in-country investigations in its reports on preliminary examinations, to account for lack of progress.[503] But the same conditions hamper Afghanistan's own efforts in seeking accountability for crimes of the Taliban (though not for government actors).

In situations of inability, the ICC would most serve its complementary purpose if it were able to act as an incubator of domestic proceedings. Other scholars refer to this as "catalyzing effect", but have concluded that this effect is limited.[504] Indeed, the Court's, and certainly the ASP's ambitions to allow the Court to develop into

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[499] Schabas, William. *Complementarity in Practice: Some Uncomplimentary thoughts*. Criminal Law Forum (2008) p. 10.

[500] Alai, Chistine and Njonjo Mue, *Complementarity in Kenya,* The International Criminal Court and Complementarity: From Theory to Practice, Vol. I (Ed. by Carsten Stahn and Mohamed M. El-Zeidy), Cambridge University Press (2011) p. 1232.

[501] Open Society Institute, *Putting Complementarity into Practice: Domestic Justice for International crimes in DRC, Uganda, and Kenya* (2011) p. 90. I travelled to Kenya in 2008 to advise on the establishment of the Special Tribunal.

[502] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of ICC, ICC-01/09-01/11-875, 26 Aug. 2013.

[503] OTP's Report on Preliminary Examinations, 2015 at para. 133: "In October 2015, the Office carried out a security assessment mission to Kabul. To date, however, the Office's planned mission for admissibility assessment purposes has been frustrated by the non-permissive situation in the country."

[504] Nouwen, Sara. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan.* Cambridge University Press (2013).

such an incubator, are limited by resource constraints. But the other factors referred to in this Chapter serve as further inhibitors, including the Court-centric conception of complementarity that has prevailed (including misguided ides of the division of labour); the Court's role as a "case-snatcher"; its often adversarial relationships with states under its scrutiny; its inability to address the broader contextual challenges in which domestic proceedings take place; and its focus on a small number of individual cases, which has a distorting effect. The net result is that when the situation on the ground is hampering the progress of national proceedings, be it the inability to arrest, challenges due to the security situation, absence of political will, or any other such issues, the same problems are likely to hamper the ICC:

> No technical assistance can overcome unwillingness and even in situations of inability the question arises whether the ICC is the most appropriate institution for the facilitation of domestic proceedings and whether the Court should be involved in such matters in the first place. In situations of absolute inability, the ICC cannot remedy the essential obstacles to domestic proceedings.[505]

In this respect, complementarity creates an illusion. It promises that the Court will deliver if countries do not, but often the Court proves unable to do so for the very same reasons.

C. Complementarity's Blindness vis-à-vis Due Process

Complementarity is often still treated as a means of increasing the quality of proceedings at the domestic level, according to what Kevin Heller referred to as the "due process thesis" of complementarity.[506] While many would agree that it is desirable for a successful challenge to admissibility to require the observance of human rights standards, the question is whether the Rome Statute requires it. While supporters of the Court would like to think of the ICC as an institution that seeks to promote procedural fairness, the complementarity framework, and the decisions of the Court in the Libya cases, cast doubt on this.

The due process thesis is based different interpretations of the Rome Statute. Proponents argue that references in Art. 17 (1) to genuineness, unwillingness or ability all require States to observe fairness principles. Others interpret the reference in Article 17(2) to due process standards to extend to national proceedings. Yet others argue that the reference to "independence and impartiality" in Art. 17(2) require the observance of due process standards. Supporters of the

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[505] Nouwen, Sara. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan.* Cambridge University Press (2013) p. 401.
[506] Heller, Kevin Jon. *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome statute on National Due Process.* Criminal Law Forum (2006).

"due process theory" also cite Art. 21 of the Statute, which states, "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights …" Some argue that this means that domestic proceedings held under Art. 17 must also meet international human rights standards.

International human rights organizations are strong proponents of the "due process theory," and argue that domestic systems ought to implement not just substantive provisions, but also "principles of criminal responsibility" as found in Part 3 of the Rome Statute; procedural requirements; elimination of immunities; provision on victim participation and reparations; and abolition of the death penalty.[507] Amnesty International argued in the context of the Juba Peace Agreement in Uganda, "The International Criminal Court may not defer to national courts unless it is satisfied that the proceedings are consistent with an intention to bring those responsible to justice, the suspect will receive a fair trial and that the suspect will not be subjected to torture or other cruel, inhuman or degrading treatment.[508]

Variations of the due process theory include the argument that States should provide for victim participation or reparations as part of complementarity. As stated by the ASF in the context of Uganda, "Since Uganda is a state party to the Rome Statue, its domestic legislation should reflect its international obligation within the Statute to have applications for reparations in the ICD."[509] Others argue that the possibility of the application of the death penalty should render the case inadmissible.[510] Supporters of this view cite the Appeals Chamber dictum in *Lubanga* that "Human rights underpin the Statute; every aspect of it, including the exercise of jurisdiction."[511] Or, in a slightly lesser version: "Of course, although the ICC is not a "human rights court," human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely."[512]

However, the due "due process theory" is not supported by the text of Article 17 of the Statute. As remarked by Mégret and Samson, "to apply this provision as a basis

[507] Amnesty International Checklist for Effective Implementation; Human Rights Watch (HRW), *Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute* (2001).
[508] Amnesty International, *Ugandan Agreement and Annex on Accountability and Reconciliation Fall Short of a Comprehensive Plan to End Impunity.* 1 March 2008.
[509] Advocats Sans Frontiers, *Evaluation of Knowledge and Expertise in International Criminal Justice in Uganda*, Baseline Survey Report, November 2011.
[510] The Uganda ICC Act 2010 makes no specific provision on whether the death penalty should apply or not. JLOS/PILPG National Consultations on the International Crimes Bill, 6th – 7th August 2009, Entebbe.
[511] *Prosecutor versus Thomas Lubanga Dyilo,* Appeals Chamber, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19 (2) (a) of the Statute of 3 Oct. 2006, ICC-01-04-01/06-772, 14 Dec. 2006, para. 37.
[512] Informal expert paper, The principle of complementarity in practice, ICC-OTP (2003) para. 23.

for the Court to insist upon admissibility is a considerable stretch."[513] Heller argues a plain reading gives rise to a different interpretation.[514] For instance, the requirement of "independence and impartiality" must be considered in conjunction with whether a proceeding is "being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice." Similarly, the reference to due process in the chapeau of Art. 17(2) should be read not as a separate requirement. Furthermore, there is nothing in the explanations of genuineness, willingness or ability in the Statute that refers to a due process requirement.[515] Holmes in his commentary notes that; "many delegations believed that procedural fairness should not be a ground for the purpose of defining complementarity."[516]

Heller examines the drafting history of the Rome Statute and notes that Italy tried to introduce a clause that would require the Court to consider whether proceedings were "conducted with full respect for the rights of the accused" but that "many delegations believed that procedural fairness should not be a ground for defining complementarity." [517] Heller convincingly argues that a textual interpretation of Art. 17 (or the remainder of the Statute) does *not* support a due process theory. [518]

On inability, the Rome Statute sets a very low threshold, namely that of examining whether "due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings."[519] This means that the Court gives significant deference to national legal systems: "the standard for showing inability should be a stringent one, as the ICC is not a human rights

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[513] Mégret, Frederic and Marika Giles Samson, *Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials,* 11 Journal of International Criminal Justice 11 (2013) at p. 575.
[514] Heller, Kevin Jon. *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome statute on National Due Process.* Criminal Law Forum (2006).
[515] For an opposite view, see Jonathan O'Donohue and Sophie Rigney: The ICC must consider fair trial concerns in determining Libya's application to prosecute Saif Al-Islam Gaddafi nationally, EJILtalk.org, 8 June 2012: "Safeguarding the rights of the accused is at the heart of a functional legal system. In the absence of such protection, there simply is no ability to carry out proceedings which deliver justice."
[516] Holmes, J. T. *The Principle of Complementarity, in the International Criminal Court: the Making of the Rome Statute*, Issues, Negotiations, Results, ed. Roy. S Lee, Kluwer Law International (1999) p. 50.
[517] Heller, Kevin Jon. *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome statute on National Due Process*. Criminal Law Forum (2006) citing Holmes, *The Principle of Complementarity, in The International Criminal Court: The Making of the Rome Statute*, *Issues, Negotiations, Results*, ed. Roy S. Lee, Kluwer Law International (1999) at p. 50.
[518] Kevin Heller in fact argued that there is a "shadow side" of complementarity: Complementarity is thus a double-edged sword. On the one hand, ICC deferrals will reflect the willingness of States to take the lead in bringing the perpetrators of serious international cries to justice. On the other hand, those deferrals will expose perpetrators to national judicial systems that are far less likely than the ICC to provide them with due process, increasing the probability of wrongful convictions. Heller, Kevin Jon. *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome statute on National Due Process*. Criminal Law Forum (2006) at p. INSERT
[519] Rome Statute, Art. 17(3).

monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards.[520]

1. The Libyan Admissibility Decisions

The consequence of not accepting a due process theory of admissibility is that the ICC essentially has to allow for unfair trials under the Rome Statute framework, if these meet the lower standards of admissibility. This is demonstrated in the Libya admissibility decisions.[521] On 16 May 2011, the Prosecutor of the ICC requested the issuance of arrest warrants against Muammar Qadhafi, Abdullah Al-Senussi, and Saif al-Islam Qadhafi, for "crimes against humanity" including persecution and murder allegedly committed from 15 February 2011 until at least 28 February 2011. The ICC's Pre-Trial Chamber issued the arrest warrants on 27 June 2011.

After the death of Qadhafi on 20 October 2011, Saif Al-Islam and Al-Senussi remained at large until their capture, on 19 November 2011 near Sabha, Libya and 17 March 2012 at Nouakchott airport in Mauritania respectively. On 5 September 2012, Abdullah Al-Senussi was extradited to Libya from Mauritania. As described, the ICC Prosecutor paid a visit to Libya in November 2011, a month after Qadhafi's death, to persuade the Libyans to surrender him to the ICC, but the Libyan authorities remained adamant that they wished to hold the trial of Saif Al-Islam in Libya.

In February 2012, the Libyan General Prosecutor's Office released a directive to indicate that it would prioritize the trials of senior regime figures, pursuant to advice given by UNSMIL. It authorized a special team of investigators to start working on those cases.[522] The ICC Prosecutor said in the Security Council on 8 May 2013 that if Libya can conduct fair trials of alleged perpetrators, these could constitute Libya's "Nuremberg moment."

The senior Qadhafi-era figures thus appeared before the ordinary court, i.e. the Tripoli Court of Assize. A fierce international debate erupted on whether Libya would be able to guarantee a fair trial. For instance, O'Donohue and Rigney argued that a plain reading of Article 17 of the Rome Statute, the interpretation of Article 21(3), and a teleological approach all confirm that a case will not be admissible if judges are not satisfied that the fair trial rights of the accused will be respected

[520] Group of experts, The Principle of Complementarity in Practice, ICC OTP (2003).
[521] See Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016) pp. 145-155.
[522] The author had several meetings with this ICC team of investigators during 2012-2013 in her capacity as UNSMIL's transitional justice advisor.

within a domestic system.[523] The authors argue that genuineness requires a certain quality of the proceedings, including "ensuring the rights of the accused.[524]

However, the Prosecutor himself stated: "We are not checking the fairness of the proceedings. We are checking the genuineness of the proceedings."[525] The Pre-Trial Chamber in the case of Abdullah Senussi further clarified the issue:

> The Chamber emphasizes that alleged violations of the accused's procedural rights are not *per* se a ground for a finding of unwillingness or inability under article 17 of the Statute. In order to have a bearing on the Chamber's determination, any such violation must be linked to one of the scenarios provided for in article 17(2) or (3) of the Statute.[526]

Since that, the Appeals Chamber put the matter to rest when it upheld the Pre-Trial Chamber decision in the case of Abdullah al-Senussi:

> The Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights … Had this been the intention behind article 17, the Appeals Chamber would have expected this to have been included expressly in the text of the provision … Other less extreme instances may arise when the violation of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all. Whether a cases will ultimately be admissible in such circumstances will necessarily depend upon its precise facts."[527]

Later on, the Appeals Chamber reiterates the test: "violations of the rights of the suspects are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect." [528] As observed by Mégret: "The ICC's complementarity scrutiny is quite far removed from a human

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[523] O'Donohue, Jonathan and Sophie Rigney: "The ICC must consider fair trial concerns in determining Libya's application to prosecute Saif Al-Islam Gaddafi nationally," EJILtalk.org, 8 June 2012.
[524] Ibid.
[525] Ibid. citing Luis Moreno Ocampo.
[526] *Prosecutor versus Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Public redacted Decision on the admissibility of the case against Abdullah Al-Senussi, 11 Oct. 2013 ICC-01/11-01/ 11 at para. 235.
[527] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgement on the appeal of Mr. Abdullah Al-Senussi against the decision of the Pre-Trial Chamber I of 11 October 203 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi 24 July 2014 at para. 219, 230.
[528] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Judgement on the appeal of Mr. Abdullah Al-Senussi against the decision of the Pre-Trial Chamber I of 11 October 203 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi, 24 July 2014 at para. 230.

rights compliance analysis."[529] He concluded: "just because the ICC does not exercise jurisdiction over cases on grounds of due process violations does not mean that those accused have nowhere to turn. Rather, they should be encourages to seek human rights remedies both at home and, where applicable, internationally."[530]

These decisions were made before the Libyan proceedings had been concluded. The conclusion of those proceedings has given rise to renewed debate whether the admissibility decision in the case of Al-Senussi should be reviewed under Art. 19 (10) of the Statute, which states, "If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which a case had previously been found inadmissible under Article 17."

2. Libya's National Proceedings (Case 630)

On 24 March 2014, the General Prosecutor opened joint proceedings against 37 senior regime figures for a wide variety of crimes committed during the Revolution in 2011. Among the accused were Saif al-Islam Qadhafi and Abdullah al-Senussi, but they also included a number of other senior accused. The charges included a wide variety of charges, including many charges not relevant under the Rome Statute: the murdering and bombardment of civilians during the 2011 revolution, including through the use of fighter jets; including through several meetings deciding to squash and kill demonstrators in Tripoli and prevent them from reaching Green Square at any cost; murder and bombing of Eastern region; the detentions of thousands of Libyans without trial, accused of opposing the regime; recruiting mercenaries from Africa, and giving them Libyan citizenship; trafficking and distributing illicit drugs and psychotropic substances among soldiers and volunteers; corruption or embezzlement of public funds by using state funds without detailed invoices from suppliers; and organized sexual violence as a means to suppress the revolution, carried out against men and women. The charges also included "starting a civil war in the country, undermining national unity, dividing the Libyan citizens" [531] and "publicly humiliating the Libyan people" by describing them as "rats and traitors" or "dirty groups, agents of Israel and America."[532] All these acts (some of which may not constitute crimes) were charged under the Penal Code of Libya, a well as particular additional laws.

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[529] Mégret, Frederic, *Too much of a good thing? Implementation and the Use of Complementa*rity, The International Criminal Court and Complementarity: From Theory to Practice, Vol. I, Ed. by Carsten Stahn and Mohamed M. El-Zeidy), p.385.
[530]Mégret, Frederic and Marika Giles Samson, *Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials,* 11 Journal of International Criminal Justice 11 (2013) p. 578.
[531] UNSMIL/ OHCHR Report on the trial of 37 former members of the Qadhafi regime (Case 630/ 2012), 21 February 2017 p. 19. The author was one of the main authors of this report.
[532] Ibid. p. 20.

On 28 July 2015, after a trial that lasted over a year, the Court of Assize in Tripoli issued its judgment in the case of 37 former members of the Qadhafi regime, in relation to charges linked to the 17th of February Revolution. Nine defendants were condemned to death by firing squad (including Saif al-Islam and Abdullah al-Senussi); 8 other defendants received life imprisonment; 15 received sentences from 5-12 years, and 4 were acquitted. Saif al-Islam Qadhafi was tried *in absentia,* which means that he will be entitled to a retrial if arrested.[533]

The Libyan proceedings suffered from a dogmatic application of antiquated domestic law to a complex criminal case, and hence fell short of international due process standards. It is difficult to discern whether the international scrutiny by the ICC and others, including the UN, led to improvements to the process.[534] The case is still under review by the Cassation Chamber of the Supreme Court, but cassation does not include a review of the facts or the evidence.

A monitoring report by UNSMIL found that some of the accused were reportedly held in solitary confinement or incommunicado – without access to the outside world – for many months.[535] In the case of Saif al-Islam Qadhafi, he was held in virtual isolation for a period of over three years before the trial, with only a few meetings with external actors. The bulk of the Prosecution case against the accused was composed of interrogation records or confessions of persons in detention, including the accused themselves, taken in unclear circumstances and by persons who were not prosecutors or judicial officers. [536] Some were not represented by a lawyer while they were interrogated, neither is there evidence that they were informed of their rights not to self-incriminate. Some defendants told the Court that they were called in as witnesses and subsequently found themselves as accused.[537]

Torture is widespread in detention facilities in Libya. Many of the detention facilities were run by armed groups, which assumed law-enforcement functions.[538] Several of the accused alleged that they were mistreated or tortured.[539] The court however dismissed such concerns, and did not consider the evidence as inadmissible. Instead, it put the burden of proof on the accused to prove torture or mistreatment. [540] On 2 August 2015, a film appeared on the internet showing the mistreatment of Al-Sa'di

[533]Ibid.
[534] The author was the UNSMIL advisor who offered assistance to the Libyan authorities.
[535] Ibid. pp. 22- 25.
[536] Ibid. p. 32.
[537] Ibid. p. 32.
[538] UNSMIL/ OHCHR, Torture and Deaths in Detention in Libya, October 2013.
[539] UNSMIL/ OHCHR Report on the trial of 37 former members of the Qadhafi regime (Case 630/ 2012), 21 February 2017 at p. 26- 31.
[540]Ibid. Allegations of mistreatment at Al-Hadba, where many of the accused were held and where the trial took place, came to the fore when a video surfaced showing the mistreatment of Saadi Al-Qadhafi and other prisoners

Qadhafi at al-Hadba, adding further credence to these claims.[541]

Beyond the charges themselves, the accused were not provided with information that identifies the material facts alleged against them.[542] The Prosecutor alleged that the accused were part of a "criminal plan" in which each one "played a role" but did not specify beyond that.[543] These facts may have been buried in the written dossier, but many of the accused and their lawyers reportedly only received the dossier shortly before the trial and had insufficient time to consider all its contents.

In the session on 27 April, one of the lawyers representing Abdelmajid al-Mezewghi, Abuajila Mas'ud, and Amer al-Abani asked to separate the trials and said he could offer better legal advice if the trials were conducted separately, but the Prosecutor argued it is not possible because all the defendants are part of the same criminal plan. The court dismissed the request of the defense.

The Libyan authorities did make efforts to publicize the trial mainly by means of televising it. [544] Prior to the start of the trial on 24 March 2014, Article 241 of the Libyan Code of Criminal Procedure was amended to state that a trial session would be considered public if it was broadcast live on satellite T.V. channels, on public screens or any other method. Accordingly, local media had access to the trial and most of the Court's sessions were broadcast live on al-Nabaa television. UNSMIL monitors were granted access to the trial from the outset. Since the outbreak of violence in Tripoli, few observers were able to attend, and UNSMIL did not attend a session since 22 June 2014.

Most of the accused complained that they had insufficient access to their lawyers and have only been able to meet with them on a handful of occasions.[545] Some lawyers mentioned in court that they did not have adequate time to meet their client, nor were able to meet with their client in private. Lawyers who received the dossier maintain that they did not necessarily have time to adequately investigate or respond to the evidence. [546] The political climate in Libya made it very difficult for lawyers to represent these accused, particularly senior former regime figures. At the same time, foreign lawyers who were willing to represent the accused did not get authorization from the Court.

The case itself was held in al-Hadba, a former police academy formally under the Judicial Police of the Ministry of Justice, but under *de facto* control of an armed group, which constituted an intimidating environment for defendants, families and their lawyers.[547] Several defence lawyers claimed that they were attacked, harassed

[541] Ibid. p. 30.
[542] Ibid. pp. 32-34.
[543] Session of 27 April 2016.
[544] Ibid. pp. 34-36.
[545] Ibid. pp. 36-39.
[546] Ibid. pp. 39-42.
[547] The author visited one of the accused, Baghdadi Al-Mahmoudi, in Al-Hadba in the summer of 2013. Ibid. p. 21.

or threatened. Defence lawyers said that some of their witnesses were reluctant to appear. An UNSMIL observer was arrested and briefly detained in May 2014.[548]

Saif al-Islam Qadhafi was not connected to the trial since the session of 22 June and subsequent session took place without his presence as required under Article 243, nor was any lawyer representing him. In total, he only attended four sessions. Several other accused were also absent from individual hearings, including one who missed at least half the trial.[549]

The Prosecutor gave an oral presentation of only about 45 minutes of its case in Court, on 22 June 2014. The Prosecutor indicated that there are 238 witnesses and referred specifically to the testimonies of about 10 individuals. None of the Prosecution witnesses were presented in court, as this is not required under Libyan law.[550] At least one accused asked to hear prosecution witnesses but the Court did not respond to this request. Many lawyers questioned the credibility of the evidence. In addition to raising serious concerns about the fairness of the proceedings, the lack of presentation in court of the Prosecution evidence constituted a crucial missed historical opportunity, depriving the victims and the public from the opportunity to confront and reflect on the crimes of the former regime.

The rights of the defense were further undermined when the Court limited them to calling two to three witnesses per defendant.[551] For example, in the hearing on 30 November 2014, two defense witnesses were heard, but the Court only devoted a few minutes to the testimony of each. Moreover, on several occasions defense counsel put forward arguments which should have been considered in detail but appear to have been summarily dismissed by the Court, including complaints that the trial was being rushed; that they were obeying superior orders or existing laws; or that they had left the regime before 2011. In the verdict, however, the Court did give justifications for its decision, based largely on the confessions and testimony collected by the prosecution.[552]

Case 630 was part of a much broader docket.[553] The realm of charges that are being

[548] Ibid. p. 35.
[549] Ibid. p. 45-47.
[550] Ibid. pp. 42-45. See Art. 159, 244 and 245 of the Libyan Criminal Procedure Code.
[551] Ibid. p. 44.
[552] Ibid. p. 48.
[553] On 5 June 2012, the trial of former Chief of the External Intelligence and Libyan Permanent Representative to the United Nations, Abu Zaid Dorda, opened in Tripoli. Dorda was accused of ordering the use of live ammunition against demonstrators during the 2011 Revolution. On 12 November 2012, the Special Criminal Division of the Tripoli Appeal Court convened the first hearing in the criminal trial of Baghdadi Al-Mahmoudi, former Secretary of the General People's Committee under Qadhafi. Al-Mahmoudi was charged with 'committing actions jeopardizing national security. On 17 July 2012, an investigation of three prominent individuals affiliated with the former regime, Ahmad Ibrahim, Mansour Daw and Khalid Tantush, opened in Misrata. Ibrahim Mansour was sentenced to death in July 2013 but at the time of writing, the death penalty had not been enforced.

brought against accused were much broader than those pursued by the ICC. Libyan prosecutors are also pursuing a variety of financial crimes, some of which showed deficiencies in compiling a sound prosecutorial strategy.[554] The former Justice Minister, Salah Marghani, gave assurances that the trial would be fair: "How we will be judged in history is how we dealt with the Qhadafi regime … We will not have Mickey Mouse trials under this government- we had Mickey Mouse trials in the past and we saw the results."[555]

Since the trial began, Libya slipped into increasing chaos, and poor security impeded their work. Public prosecutors and judges faced consistent threats and intimidation. In the summer of 2014, increased fighting between two broad military coalitions, known as Operation Dawn in the West and Operation Dignity in the East, threatened to split the country entirely.

The Libyan example shows the pitfalls of proceeding under national laws without adequate fair trial safeguards. While this is an undesirable outcome, the complementarity regime as currently interpreted by the Appeals Chamber allows for it. After all, the trial and conviction can be said to constitute a genuine attempt to investigate and try the accused for their crimes.

Some argue the view that the ICC should re-examine the admissibility of the Al-Senussi case under "new facts." The International Bar Association argued, "Shortcomings in the proceedings and the volatile security situation have severely compromised the fairness of the trial."[556] Ellis argued that the test adopted in the Al-Senussi case is too high, and that the fair trial violations in this case are so serious that they should amount to "new facts", so that the ICC itself is not tarnished by the outcome of the Libyan trials. Others however point to the fact that the legitimacy of the Rome Statute will be eroded, if the Court were to exceed the Rome Statute by taking on fair trial and death penalty cases.[557]

A "glass half full" analysis would indicate that the international scrutiny that accompanied the ICC intervention, albeit mostly focused on the cases of Saif Al-Islam and Abdullah Al-Senussi, may have played a role in preventing a scenario of "rough justice" with quick trials and summary executions, and has made the Libyan authorities sensitive to the scrutiny of the international community. The UN

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[554] For instance, the former foreign minister Abd al-Ati al-Obaidi, and his head of parliament Belgassem al-Zwai, were charged with mismanaging public funds by compensating families of victims of the 1988 Lockerbie attack, for which Libya accepted responsibility in 2003. Libya eventually paid relatives of the victims $2.7 billion in compensation. The two men were acquitted of these charges.

[555] Stephen, Christopher. *Judicial Performance in the Midst of Chaos*, International Justice Tribune No. 157, 16 April 2014.

[556] Ellis, Dr. Mark. *Trial of the Libyan regime: An investigation ito international fair trial standards.* Nov. 2015.

[557] IBA Expert Roudtable, Fair Trials and Complementarity, The Hague 6 July 2017.

expressed serious concerns about the fairness of the trial while it was ongoing.[558] UN monitoring of the trial and detention facilities may have contributed to the trial proceeding more slowly and deliberately, and with more safeguards than may otherwise have been the case. This may over time result in more understanding and internalization of fair trial standards. Moreover, until now, none of the death sentences handed down have resulted in executions. Recently, rumors abound that Saif Al-Islam was released from detention.[559] Other accused too have been encouraged to participate in reconciliation processes. The accused are likely seen as more valuable alive than dead by the warring factions.

3. Core assumptions about national systems by international lawyers

While the challenges facing national systems in conducting fair trials of Rome Statute crimes are real and pervasive, supporters of the Rome Statute in general show considerable skepticism towards national legal systems. Sometimes this results in international justice actors using inflammatory language that alienates domestic lawmakers. One lawyer described the detention of Saif Al-Islam in Zintan to the BBC as "Libya's Guantanamo Bay".[560] On another occasion he said about the Libyan authorities: "they just want a show trial and be done with it."[561] Emmerson, counsel for Abdullah Senussi, said the following in the context of the admissibility proceedings: "The ICC has ordered an immediate halt to Libya's unseemly rush to drag Mr. Al-Senussi to the gallows before the law has taken its course. Libya's rebel authorities need to understand that the days of show trials and summary executions are over."[562] While the trial of Al-Senussi has certainly been flawed, it is not exactly a rush to the gallows.

This skepticism was also apparent during an incident in which a Libyan militia detained four members of the Court's Office of Public Defence Counsel and the Registry in Zintan in early June 2012. The Libyan authorities accused Australian lawyer Melinda Taylor of breaching Libyan state security. Libya published its version of events in a letter, arguing that: "on 6 June 2012 … Ms. Taylor handed over to the accused documents which content constitutes a threat to the Libyan National security … One of these documents was a coded letter sent by Mohammed Ismael who had been working as the main aid to the accused, as well as a close security and intelligence assistant to the former Head of Intelligence Service Abdullah Al-Senussi." The Libyans also alleged that members of the delegation were carrying spying devices and a recorder.

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[558] UNSMIL/ OHCHR Report on the trial of 37 former members of the Qadhafi regime (Case 630/ 2012), 21 February 2017.

[559] See ww.dailymail.co.uk/news/article-3678568/Colonel-Gaddafi-s-son-Saif-al-Islam-walks-free-prison-just-one-year-sentenced-death-Tripoli-court.html.

[560] BBC News Africa, *Lawyers appointed for Saif Al-Islam Gaddafi*, 2 May 2013.

[561] Welt, Vivienne, *Libya's Disaster of Justice: The Case of Saif Al-Islam Gaddafi Reveals a Country in Chaos*, 28 June 2013.

[562] Bowcott, Owen. *Libya ordered to hand over Lockerbie mastermind*, The Guardian, 7 February 2013.

The circumstances of the Public Defence Council visit remained unclear in terms of the application of privileges and immunities. Libya is not a member of the ICC Agreement on Privileges and Immunities. Moreover, interview with Saif Al-Islam took place in a non-privileged environment. Eventually, the ICC President travelled to Zintan in the company of several foreign Ambassadors and issued the following statement:

> The ICC deeply regrets any events that may have given rise to concerns on the part of the Libyan authorities. In carrying out its functions, the Court has no intention of doing anything that would undermine the national security of Libya. When the ICC has completed its investigation, the Court will ensure that anyone found responsible for any misconduct will be subject to appropriate sanctions.[563]

III. Conclusion: Parallelism?

When the limitations of Hague-based courts such as the ICTY and ICC became more apparent, complementarity became the vessel that encompassed the hope of creating a new legal order, or in the words of Stahn, "a structural principle of a new system of justice."[564] But rather than staying true to the vision of the ICC as a court of last resort, supporters often promoted the Court as the centerpiece of a global justice order. Rather than deferring to domestic jurisdictions, the Court resorted to "snatching" cases, leading to an adversarial relationship with states rather than "positive "complementarity.

Rebuilding the rule of law in post-conflict societies is an ambitious and large-scale exercise, as shown in the experience of the United Nations.[565] The World Bank has estimated that rebuilding institutions after conflict and re-establishing the rule of law can take between 17 and 41 years: "Transforming institutions – always tough- is particularly difficult in fragile situations… Creating the legitimate institutions that can prevent violence is, in plain language, slow. It takes a generation."[566] The ICC, with limited resources, is unlikely to contribute significantly to this process.

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[563] ICC Statement on Detention of Four ICC staff members, ICC Weekly Update #133, 25 June 2012. Even so, Kevin Heller still wrote that: "A court that cares about defence attorneys ant the rights of defence does not make this statement." Heller, Kevin. *The ICC Commits Cooperation Seppuku,* Opinio Juris, week roundup, 16-22 June 2012.

[564] Stahn, Carsten*. Introduction: bridge over troubled waters? Complementarity themes and debates in context.* The International Criminal Court and Complementarity: From Theory to Practice, Volume I, Cambridge University Press, 2010 at p. 1.

[565] The United Nations gave renewed emphasis to rule of law in the Brahimi report a.k.a. the UN Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305- S/2000/809 of 21 August 2000.

[566] World Development Report, Conflict, Security and Development (2011) at p. 36, 38. See Table 2.1.

Moreover, complementarity as a concept may create an illusion that it can deliver where national systems cannot. Practice shows that where domestic legal systems are unable to investigate or prosecute, such as in Uganda, Kenya or Afghanistan, the Court inherits the same obstacles. After all, effective enforcement and state cooperation is the Court's Achilles heel, and it readily inherits the problems that situation-countries themselves face in this regard. This leads to parallelism rather than complementarity. Furthermore, complementarity may have a distorting effect, by focusing investigations and prosecutions on a few individual cases. States can thus invest a lot of resources in individual cases, creating disparity between cases without addressing systemic problems. While many domestic systems are undoubtedly flawed, the discourse around the ICC can serve to further alienate those affiliated with domestic jurisdictions.

At the same time, complementarity leaves space for national systems to conduct trials are sub-standard in terms of international standards of due process, thus leaving human rights advocates frustrated that the Court is not a "standard-bearer." Such are the flaws of complementarity.

Chapter 3: Systemic Effect II: Internalization of the Rome Statute

[I]n the long term, no ad hoc, temporary or external measures can ever replace a functioning national justice system. Kofi Annan[567]

I. Introduction

The impact of the Rome Statute on domestic legal systems is better described as "internalization", rather than as complementarity. Internalization is the process by which states demonstrate compliance with international law. In this case, internalization is reflected in the fact that States take action to investigate or prosecute Rome Statute crimes. This action may consist of changes to laws; building new specialized capacities to try Rome Statute crimes; or conducting trials. These three indicators will be discussed below.

Traditionally, scholars argued about whether international law promotes compliance through coercion or persuasion.[568] Harold Koh distinguishes between social, political and legal internalization,[569] the latter occurring "when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three."[570] Ryan Goodman and Derek Jinks argue that states are influenced to adopt international human rights law not through persuasion or coercion but through a process of "acculturation",[571] i.e. "the general process by which actors adopt the beliefs and behavioral patterns of the wider culture."[572] Harold Koh argues that the evolution of a state's norm internalization from coercion to persuasion to internal acceptance is a dynamic process "whereby persuasion often occurs in the shadow of coercion, and acculturation often occurs in the shadow of persuasion."[573] The Rome Statute can be said to combine coercion with persuasion. In another article, Koh writes abut the transnational legal process, which he calls non-traditional; non-statist; dynamic and normative:

> Nations react to other states' reputations as law-abiding or not … Domestic decision-making becomes "enmeshed" with international legal norms, as institutional arrangements for the making and maintenance of an international commitment becomes entrenched in domestic legal and political processes. It is through this repeated process of interaction and

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[567] Secretary-General's Report. *The rule of law and transitional justice in conflict and post-conflict society*, S/2004/616, 23 August 2004 at para. 34.
[568] Koh, Harold Hongju. *Why Do Nations Obey International Law?* 106 Yale L. J. (1997). 2599.
[569] Ibid. p. 2656.
[570] Ibid. p. 2657.
[571] Ryan Goodman and Derek Jinks. *Incomplete Internalization and Compliance with Human Rights Law,* EJIL Vol. 19 no. 4 (2008) pp. 725-748.
[572] Ibid. p. 726.
[573] Koh, Harold Hongju. *Internalization through socialization*. 54 Duke Law Journal (2005) p. 981.

> internalization that international law requires its "stickiness", that nation-states acquire their identity, and that nations define promoting the rule of international law as part of their national self-interest.[574]

This Chapter argues that in fact, many countries are internalizing the Rome Statute's norms. Prohibitions on genocide, war crimes, and crimes against humanity, were incorporated into domestic law by states such as Afghanistan, even if they were not strictly required to do. Some states, such as Colombia, are holding extensive domestic proceedings, beyond what complementarity may require. While some of these systemic effects may constitute Drumbl's "legal mimicry",[575] the effects may still be positive, in terms of contributing to States' ability to investigate and prosecute Rome Statute crimes in the future. In the words of Kastner, "a commitment that is internalized – whether consciously or unconsciously- is based on a stronger sense of obligation and may actually be more effective than an imposed or supposedly enforceable obligation."[576]

Indicators of internalization discussed among country experiences include the adoption of implementing legislation, including the adoption of procedural rules that bolster international standards; the establishment of specialized courts or chambers to try Rome Statute crimes; and national trials proceedings. However, as the experiences below will demonstrate, internalization is seldom a straightforward matter or linear process. It can be difficult to discern genuineness, in the sense of good faith or "acculturation" as referred to earlier.

For instance, the establishment of specialized domestic capacities to investigate and try Rome Statute crimes, such as the International Crimes Divisions in Uganda and Kenya, is not necessarily an indicator of genuine political will to investigate and prosecute Rome Statute crimes. The establishment of these capacities can serve as a smokescreen, i.e. an attempt to obscure a lack of political will by emphasizing form over substance. At the same time, in such institutions may still play a role and represent a step forward in building local capacity to investigate and prosecute Rome Statute crimes in the future.

National trials can suffer from many flaws that are difficult to assess on a standard of genuineness. At the same time, national proceedings, in spite of their flaws, are perhaps the strongest indicator of systemic effect. For this reason, it is important to map out indicators of "genuineness". National trials may even result in an acquittal, as was the case with the Kwoyelo case. This however does not mean that the proceedings itself did not result in any "internalization."

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[574] Koh, Harold. *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996) p. 204.
[575] Drumbl, Mark. Atrocity, *Punishment and International Law*, Cambridge University Press (2007) Chapter 5.
[576] Kastner, Philipp. *Armed Conflicts and Referrals to the ICC: From Measuring Impact to Emerging Legal Obligations,* 12 JICL (2014), pp.471-490, p. 486.

II. Implementing Legislation

A. Incorporation of Rome Statute Crimes

A vast number of states have proved wiling to domesticate Rome Statute crimes, in spite of not being obliged to do so under the Rome Statute. This is evidence that states increasingly accept Rome Statute norms.[577] While the incorporation of Rome Statute crimes in domestic law is an important step in internalization, the process may face many of the same challenges faced by any law reform initiative. These challenges may include challenges of retro-activity or tensions with other Constitutional norms; questions of process or attempts to include legal transplants. In this respect, the domestication of international criminal law is comparable to other legal reform processes.

Uganda and Kenya both passed implementing legislation that incorporates Rome Statute crimes into domestic law and give jurisdiction to domestic courts (the High Court in both cases), but in both countries, the respective the International Criminal Court Act (2010) and the International Crimes Act No. 16 are prospective only, and cannot be applied retroactively.[578] In passing the 2010 ICC Act in Uganda, the Committee of Legal and Parliamentary Affairs reverted largely to the language an earlier draft ICC Bill of 2006, abandoning a more extensive draft International Crimes Bill drafted by international advisors with insufficient local ownership.[579] The quick passage of the Act, cutting out any more complicated constructions, reflected a desire to be ready for the Review Conference, held in Kampala in 2010.

The International Crimes Act in Kenya, which was passed in December 2008 but only came into force in January 2009, similarly may not apply to the Post-Election

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[577] Terracino, Julio Bacio. *National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC*. 5 JICL (2007) pp. 421-440.

[578] Article 28(7) of the Ugandan Constitution (1995) states: 'No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.' Uganda is a member of the ICCPR but it is not clear whether this provision could ever be used to overcome a Constitutional prohibition on retroactivity. Uganda had already ratified the Geneva Conventions and incorporated them into domestic law in 1964: however, it is not clear whether the LRA conflict is international in character, and it is not clear whether war crimes in internal armed conflict were criminalized under customary international law or Ugandan law at the time they were committed. Some experts argue that the 'underlying acts' of crimes against humanity and war crimes, such as murder, abduction or rape are criminalized in the Ugandan Penal Code, and that on that basis, it would not be unfair to convict people of war crimes and crimes against humanity that were committed before the Act was passed. See for instance Wrange, Pal. *The Agreement and the Annexure on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army-a Legal and Pragmatic Commentary.* Uganda Living Law Journal 42-128 (2008). Uganda is also a State Party to the Genocide Convention but has not incorporated it into domestic law.

[579] Report of the Committee on Legal and Parliamentary Affairs on the International Criminal Court Bill 2006.

Violence, which took place in early 2008.[580] The Judicial Service Commission argued that these crimes could be prosecuted because of the 2010 Constitution,[581] which states in Art. 50 (2) that every person has the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or an offence under international law. However, the principle of legality may require specific and written law, so the matter remains unresolved.[582]

When Colombia ratified the Rome Statute, it passed a provision in Law 742(2002) making the Rome Statute applicable in domestic courts, but Art. 93 of the Constitution restricted the application of the Rome Statute purely to "the ambit of the subject matter regulated in the Statute."[583] This was intended to avoid any procedural difficulties that could have given rise to inconsistencies with the Colombian Constitution.[584] Certain Rome Statute crimes are also criminalized under the domestic law, but the fact that there is no single piece of legislation incorporating Rome Statute crimes created a complex legal picture. The Criminal Code Law 599/2000 contains certain international crimes, including genocide (including genocide against political groups). Certain crimes against humanity, such as torture, enforced disappearances or forced displacement are also included, [585] although they are not labeled as crimes against humanity.[586] Some war crimes were incorporated in the Criminal Code under a Chapter on "Crimes against Persons and Property protected by IHL", which identified up to 29 new IHL breaches.[587] But accountability for IHL was hampered by the denial of an existence of an armed conflict.[588] Colombian domestic law differs from international law in crucial ways, including on the issue of who constitutes a protected person, and the question of nexus to the armed conflict. The Colombian Congress did amend Colombia's Criminal Code to include various forms of conflict-related sexual violence, including forced nudity, abortion and pregnancy, specifying that certain types of evidence ordinarily required under domestic law are not required to prove these crimes.[589]

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[580] Chistine Alai and Njonjo Mue, *Complementarity in* Kenya, *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I, Ed. by Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011), p. 1125.
[581] Report of the Judicial Services Commission on the Establishment of an International Crimes Division in the High Court of Kenya, 30 October 2012, pp. 88-95.
[582] Kenyans for Peace with Truth and Justice, *Securing Justice: Establishing a domestic mechanism for the 2007/8 post-election violence in Kenya*, May 2013.
[583] Chetman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial,* DOMAC/17 Oct. 2011 at p. 19.
[584] Ibid. p. 17. Colombia also filed an exception to the Court's jurisdiction on war crimes, under Article 124 of the Rome Statute, which expired in 2009.
[585] Ibid. p. 16.
[586] Ibid. p.48. A number of Colombian jurists believe that Rome Statute crimes, particularly crimes against humanity, are so vague defined as to violate notions of the principle of legality, and would be difficult to apply by Colombian courts.
[587] Interview with Former Deputy Minister of Justice, Bogota, 14 May 2014.
[588] Also, the Colombian government was trying to avoid the scrutiny of the Security Council for child recruitment. The FARC, paramilitary and military in Colombia have all used children either as combatants or as informants.
[589] OTP Report on Preliminary Examinations, 2013 at para. 144.

The law refers to these crimes as crimes against humanity, but its application remains to be seen.

The Afghan Penal Code drafted in 1976 did not contain war crimes, crimes against humanity or genocide. The Rome Statute is not directly applicable in Afghanistan, as Article 7 of the Afghan Constitution states: "The state shall abide by the UN Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights."[590] While this article may imply the system is monist, Afghan lawyers in fact consider it dualist.[591]

In 2005, the Afghan Independent Human Rights Commission drafted a law to implement the Rome Statute into domestic law in Afghanistan. The draft law was forwarded to the Department for Legislative Drafting ("*Taqnin"*),[592] but it was not tabled at the Council of Ministers.[593] In an interview, the Ministry of Justice said that it could not endorse the draft, without specifying why.[594] However, since that the *Taqnin,* advised by the Criminal Law Reform Working Group, drafted comprehensive new penal code,[595] with a Chapter that incorporates the Rome Statute definitions for aggression, war crimes, crimes against humanity and genocide (Articles 6, 7, 8 and 8*bis* of the Rome Statute).[596] The crimes are mostly adopted verbatim, with some crucial omissions, such as the requirement of a plan or policy for war crimes; or the crime of recruitment of children under the age of 15 into armed forces.[597] Afghan law only recognizes recruitment of children as a crime for those under 18.

A draft of this new penal code was presented to the Afghan Cabinet on 1 Oct. 2016 and has been adopted.[598] However, it is unlikely that the Penal Code will be given any retroactive application, because of Article 27 of the Constitution: "no deed shall be considered a crime unless ruled by a law promulgated prior to commitment of

[590] A similar provision was found in the 1964 Constitution.
[591] Interview with Michael Hartmann, Kabul, March 2014. Obligations such as those contained in the ICCPR, ratified by Afghanistan in 1983, are not directly enforceable before Afghanistan's courts.
[592] For their website see http://moj.gov.af/en/page/1670.
[593] Interview with AIHRC Commissioner (now Attorney General), 20 Nov. 2013.
[594] Interview with Head of Criminal Law Department, Ministry of Justice, Kabul 15 March 2014.
[595] The Taqnin receives technical assistance from the Criminal Law Reform Working Group. Interview with Michael Hartmann, Head of UNAMA Rule of Law Division, 16 March 2014.
[596] Articles 315 to 322 of the Afghan Penal Code. Interview with Head of Criminal Law Department, Ministry of Justice, Kabul 15 March 2014. See also Interview with previous staff member at the Taqnin, Kabul, 15 March 2014. Qaane, Ehsan. Nuremberg Academy Afghanistan Complementarity Study (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/.
[597] Qaane, Ehsan. Nuremberg Academy Afghanistan Complementarity Study (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/.
[598] Ibid.

the offence".[599] Afghan penal law does provide for the death penalty for crimes such as murder, terrorism, treason, but also adultery and apostasy.[600]

B. Victims' Rights Under Domestic Law

Victims' rights have in some cases also been incorporated into domestic legislation. In Colombia, the "internalization" of the Rome Statute can be seen in improved frameworks for victims, both through the Victims and Land Restitution Law (Law 1448), and through Constitutional Court judgments, for instance on *tutela* actions filed by displaced persons against their municipalities, in order to enforce respect for their rights including housing.[601] A number of legal reform initiatives were also proposed in Uganda,[602] including a new law on witness protection; revisions to the Evidence Act to allow for witnesses to appear via video-link; and certain revisions to the Penal Code.[603] As mentioned, victims are also allowed to participate in ICD trials.

Under Kenya's Criminal Procedure Act, victims can participate in a number of ways common to other common law jurisdiction, such as in the context of a plea agreement, or through "impact statements" at the sentencing stage, compensation or restitution of property.[604] In 2014, the Kenya legislature passed the Victims Protection Act, which gave further rights to victims. For instance, the Act requires national authorities to undertake a preliminary assessment of victims. It gives victims the right to be present at trial and to participate in ways that are similar to the ICC trials. The Act also created a Victim Protection Trust Fund, similar to the ICC Trust Fund. However, so far this legislation has not yet been used in the Kenyan Courts.[605]Additionally, in Kenya, the Witness Protection Act 2006 provided for a Victims Compensation Fund,[606] and established a new Witness Protection Agency. While the Act gives this agency a solid framework, witness protection remains a major challenge in the Kenyan context. The program does not apply to defence

[599] Article 27 of the Afghan Constitution states: Article 27 [Punishment]:
(1) No act is considered a crime, unless determined by a law adopted prior to the date the offense is committed.
(2) No person can be pursued, arrested or detained but in accordance with provisions of law.
(3) No person can be punished but in accordance with the decision of an authorized court and in conformity with the law adopted before the date of offense.
[600] Qaane, Ehsan. Nuremberg Academy Afghanistan Complementarity Study (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/.
[601]See Constitutional Court Decision T-025, 2004.
[602] Interview with Joan Kagezi, 10 Feb. 2014.
[603] Interview with Joan Kagezi, 10 Feb. 2014.
[604] Kenya Criminal Procedure Code, Article 137 (d), Article 329 (C) (1), Article 175 (2) (b), Article 177. Hansen, Thomas Obel. *Prosecuting International Crimes in Kenyan Courts?* Paper presented at "The Nuremberg Principles 70 Years Later: Contemporary Challenges. " 21 November 2015.
[605]Ibid.
[606] See Witness Protection Act, 2006 Art. 3 (1) (1).

witnesses. The Agency lacks funding and is not sufficiently independent from other government agencies such as the police.[607]

Afghanistan incorporates a variety of witness protection measures into its Criminal Procedure Code, but these seem to originate mainly from US law, and are not inspired by the ICC. Victims have a right to participate in trials according to Art. 6 (3) and may also claim compensation (Art. 189-201).[608]

C. Modes of liability

In some cases, domestic systems have incorporated modes of liability found in the Rome Statute, although in particular superior responsibility remains a difficult issue in national law. Colombian courts do refer to international law and to the jurisprudence of the ICC.[609] On the other hand, the Supreme Court has generally rejected international law concepts such as command responsibility and perpetration-by-means,[610] until 2010, when it applied the latter notion to a paramilitary leader, Alvaro Alfonso Garcia Romero. It seemed however to be guided by regional jurisprudence such as the Fujimori decision in Peru.[611] The Supreme Court also designated "aggravated conspiracy to commit a crime" as a substantive offence rather than as a mode of liability, an approach that has been criticized by scholars.[612] In Kenya, modes of liability of the Rome Statute are applicable according to Art. 7(1) of the international Crimes Act, "with any necessary modifications."

D. Incorporation of ICC procedures

When states set up specialized capacities to try Rome Statute crimes, they have also at times sought to rely on ICC procedures, sometimes inordinately so. The

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[607] Hansen, Thomas Obel. *Prosecuting International Crimes in Kenyan Courts?* Paper presented at "The Nuremberg Principles 70 Years Later: Contemporary Challenges. " 21 November 2015.
[608] Qaane, Ehsan. Nuremberg Academy Afghanistan Complementarity Study (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/.
[609] The Judiciary in Colombia includes the Constitutional Court, the Supreme Court of Justice, the State Council, the Supreme Council for the Judiciary, the Prosecutor General (*Fiscalia*), the lower Tribunals and Judges and the Military Criminal Justice. In the criminal system, the top of the hierarchy is the Criminal Chamber of the Supreme Court of Justice, followed by district tribunals, and circuit and municipal courts. Some specialized circuit courts were also established. Chetman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial*, DOMAC/17 Oct. 2011 pp. 14-15. The Justice and Peace magistrates are known to have cited ICC cases, including decision from Lubanga and Katanga.
[610] Perpetration-by-means is included in Art. 25(3)(a) of the Rome Statute but is foreign to Colombia now. Chetman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial,* DOMAC/17 Oct. 2011 at p. 46.
[611] Ibid. p. 48.
[612] While conspiracy is not a mode of liability recognized in the Rome Statute, common purpose is. Ibid. p. 49.

International Crimes Division in Uganda drafted Rules of Procedure and Evidence, which were approved by the Rules Committee, subject to the Judicature Act, and came into force in March 2016.[613] The Rules reflect a complex attempt to transplant specific procedural elements from the Rome Statute or Rules of Procedure and Evidence of the ICC. For instance, the Rules suggest the creation of Pre-Trial and Trial Divisions within the ICD.[614] [615] The Rules also provided for the creation of a Trust Fund for Victims analogous to that of the ICC. [616] In the words of Mégret: "the area of international criminal law that has been fraught with tensions, contradictions, and evolutions so that it should now be transposed as such to domestic systems strikes one as odd."[617]

An interesting impact of the ICC procedures could be seen in Libya. In November 2013, the Assembly of States Parties amended adopted Rules 134 *bis, ter* and *quarter* on the use of video-link technology, excusal from presence at trial and excusal from presence at trial due to extraordinary public duties. Before violence

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[613] The ICD received assistance from ASF and various international and local consultants in drafting the rules.

[614] Draft Rules of Procedure and Evidence of the International Crimes Division of the High Court of Uganda, 2013. The Rules included the establishment of a Victims And Witnesses Unit and the suggestion of a list of counsel similar to that of the ICC. Victims are therefore allowed to participate in ICD trials, a feature that is new to the Ugandan system. The Rules suggest crating a War Crimes Prosecution unit as a separate organ of the ICD, as well as an Investigation Unit within the Police force.

[615] The Draft Rules also follow international practices of allowing for the admission of various forms of evidence, including evidence via audio- or video-link; or conversely not allowing certain forms of evidence in cases of sexual violence or evidence which may self-incriminate a witness. Other areas where the Rules seek to follow international practices are in disclosure of evidence; practices dealing with the protection of victims and witnesses, including their participation and legal representation during proceedings; reparations to victims. The Rules incorporate ICC procedures on arrest and detention; Pre-Trial procedures including confirmation hearings; and various trial procedures, such as status conferences, the filing of various motions, and the possibility to join or separate trials.

[616]For instance, Afghanistan has a lengthy history of international efforts in law reform since the fall of the Taliban in 2001. In particular, many actors in Afghanistan sought to introduce "legal transplants", most often through introducing draft bills through the executive, without a consensus-based technical and political law reform process, which would engender the legitimacy needed for real internalization of new laws. A prime example of this was the Italian-drafted Interim Criminal Procedure Code introduced in Afghanistan. Some of these problems were remedied through the creation of a Criminal Law Reform Working Group, comprised of domestic and international actors, which could constitute an interesting law-making model for other countries. The Criminal Law Working Group was comprised of representatives of the Supreme Court; the Attorney-General's Office; the Ministry of Interior; the Afghan Independent Human Rights Commission; and occasional representation from the Ministry of Justice; and international experts from UNODC, the US State/ INL-funded Justice Sector Support Program; UNAMA; UNDP; the US ad UK Embassies; the Italian Cooperation Office; EUPOL; Canada, and where relevant, the participation of USIP; UNIFEM; US DOD and GIZ. Hartmann, Michael E. and Agnieszka Klonowiecka-Milart, *Lost in translation: Legal Transplants without consensus-based adaption,* in *The Rule of Law in Afghanistan: Missing in Inaction,* ed. Whit Mason, Cambridge University (2011).

[617] Mégret, Frederic, *Too much of a good thing? Implementation and the Use of Complementarity,* The *International Criminal Court and Complementarity: From Theory to Practice*, Vol. I Ed. by Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011), p.374.

broke out in Tripoli in July 2014, Saif al-Islam Qadhafi was participating in the trial via video-link according to Article 2 of Law No. 7 of 2014 amending Article 243 of the Code of Criminal Procedure to give the court discretion to use "advanced communication means" to link the accused to the trial session if there is fear for his security or his escape. This amendment was directly inspired by the amendment at the Assembly of States Parties. But after violence worsened, Saif al-Islam Qadhafi was been connected to the trial since the session of 22 June 2014.

II. Creation of Specialized Domestic Investigative Units or Chambers

Another important indicator of internalization is the dedication of specialized institutions to try Rome Statute crimes. Since the coming into force of the Rome Statute, several countries under the Court's jurisdiction established new capacities that specialized in investigating and prosecuting Rome Statute crimes. In all three examples given here (the Ugandan International Crimes Division, the Kenyan International and Organized Crimes Division, and the Context and Analysis Unit, to some extent their establishment was intended to allow national authorities to pose more effective admissibility challenges to the ICC. Their creation is therefore directly attributable to the ICC, even if it is an unintended effect. Establishing national capacities to try Rome Statute crimes has the potential of contributing directly to establishing a culture of accountability by ensuring that such crimes can be tried before a domestic court. However, rather than a reflection of "genuineness", the establishment of these new institutions was often intended to distract from an unwillingness to investigate or try crimes committed by anyone other than non-state actors.

A. Uganda International Crimes Division

1. Clarifying jurisdiction over international crimes

The creation of specialized capacities can have several advantages for domestic systems, as is demonstrated in Uganda. In July 2008 the Government of Uganda set up a War Crimes Division (later renamed International Crimes Division) of the High Court.[618] The establishment of the ICD has helped to clarify jurisdiction over international crimes, including but not limited to Rome Statute crimes. The ICD was given jurisdiction over a range of international crimes additional to Rome Statute crimes, including human trafficking, piracy and terrorism.[619] A disadvantage

[618] Annexure to the Juba Agreement, section 7. The Division was established pursuant to Art. 141 of the Ugandan Constitution. The High Court (International Crimes Division), Practice Directions ("ICD Practice Directions"), Legal Notice no. 10 of 2011, Legal Notice Supplement, Uganda Gazette, no. 38, vol. CIV, May 31, 2011.

[619] Legislation relevant to the subject-matter jurisdiction of the ICD includes the ICC Act 2010; the Geneva Conventions Act 1964; and the Ugandan Penal Code (charged in the alternative in the case of Thomas Kwoyelo). Cases from the ICD can be appealed to the Constitutional Court and the Supreme Court.

though it that it may not always be clear whether these international crimes can encompass the actions of state agents. While this is not formally excluded by the mandate of the ICD, there is a strong presumption that the ICD exists to try non-state actors.

2. Designating and developing specialized capacities

Another clear advantage is that countries may choose to designate and develop specialized capacities for investigating, prosecuting, and judging international crimes. Unfortunately this does not always include capacity for the defence. The Principal judge appointed four Ugandan judges to the ICD. A number of these judges had international experience in Rwanda, Sierra Leone and elsewhere. One of the judges serves as head of the division.[620] But in general, the ICD remains underfunded and understaffed.

In 2014, the department of Uganda's Directorate of Public Prosecutions (DPP) dealing with ICD cases was composed of six prosecutors. This included the late Joan Kagezi, the Head of the ICD who was murdered in April 2015, presumably in relation to a terrorism case she was involved in on a series of bombings in Kampala during the World Cup in 2010 that killed 79 people. In addition, the Criminal Investigations Department (CID) was composed of 6 police investigators and 45 district focal points.[621] Defendants before the ICD have the right to retain private counsel, or will be represented by state lawyers but only if they are charged with offenses punishable by life in prison or the death penalty.[622] Human Rights Watch has concluded that the ICD suffers from deficits in fairness and quality.[623]

3. Access to Funding and Technical Assistance

An obvious advantage of establishing a specialized capacity is that it may be attractive to donors and other actors, both in terms of funding and technical assistance. The ICD is funded through the Government and international donors, channeled through JLOS.[624] However, apart from the Kwoyelo case, the ICD was largely dormant. In fact, at the national level the International Crimes Division is viewed as donor-driven initiative aimed to please the international community,

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[620] Human Rights Watch, *Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division* (2012) p. 6.
[621] Interview with Joan Kagezi, 10 Feb. 2014.
[622] Human Rights Watch, *Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division* (2012) p. 8. Kwoyelo's defense were not court-appointed but privately paid. Court appointed lawyers can be chosen from a list maintained by the Uganda Law Society but it can be difficult to attract high quality lawyers because the fees are not considered profitable. Interview with ICD Registrar, 10 Feb. 2014.
[623] Human Rights Watch, *Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division* (2012) p. 8.
[624] JLOS donors also provided additional support to the ICD, for instance by funding a study tour to Bosnia, Sierra Leone and The Hague in 2009.

rather than a response to local priorities. As one observer put it, the Ugandan government was "playing to the gallery" when it put in place the ICD. [625] Religious and traditional opposed, Kwoyelo's prosecution and continue to oppose prosecutions of the LRA in general.[626] It remains to be seen whether the ICD will try other LRA actors such as Ceasar Acellam, once a Brigadier in the LRA.[627] He is said to have been on a list of 10 originally provided by the UPDF Intelligence to the ICC, of which 5 were eventually selected for prosecution.[628]

B. The Context and Analysis Unit in Colombia

1. Ability to investigate and prosecute "system crimes"

One of the biggest advantages of establishing specialized capacities is the ability to investigate and prosecute "system crimes". The term "system crimes" was coined by the Dutch jurist B.V. A. Roling, and refers to complex international crimes such as war crimes, crimes against humanity and genocide. The challenges of successfully investigating and prosecuting these crimes are unique, as these crimes are generally characterized by a division of labour, between planners and executants Also, these crimes are crimes of scale that are logistically challenging to investigate.[629]

The Context and Analysis Unit (UNAC) was established in 2012, under the Office of the General Prosecutor (*Fiscalia)*. Its mandate is to investigate large criminal structures, using analytical methods.[630] The work of the unit allows Colombian prosecutors to "prioritize" and focus on cases of those bearing the greatest responsibility, according to the *Fiscalia's* Directive 00001 of October 2012. Its creation was intended to better capacitate the *Fiscalia* to investigate Rome Statute crimes.

2. Allowing for multi-disciplinary investigations and use of analysts

The UNAC combines the capacities of prosecutors, analysts and investigators, to investigate the "context" of the crimes, including those who bear the greatest responsibility for the crimes, and the criminal plan that was formed. The investigation explores the political, historical and economic factors of the context, through social science methodology, followed by a description of the criminal

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[625] Interview with Advocats Sans Frontiers, Kampala, 10 Feb. 2014.
[626] A prominent religious leader referred to Kwoyelo as an "innocent man." Interview with religious leader, Gulu, 9 Feb. 2014.
[627] Ledio Cakaj, *The Lord's Resistance Army of Today*, Enough, November 2010.
[628] Interview with Joan Kagezi, 10 Feb. 2014. At the moment, Acellam is in a safe house under the custody of UDPF 4th Division in Gulu. Rumors abound about whether he has already been granted amnesty. In December 2013, a number of LRA are said to have surrendered in Central African Republic, including a group of 19, including Lieutenant Colonel Obur Nyeko alias Okuti. The DPP may be interested in him and others.
[629]OHCHR Rule of Law Tools for Post-Conflict States, Prosecution Initiatives, 2006 at pp.11-12.
[630] Interview with Head of the UNAC, 12 Nov. 2013.

organization and a reconstruction of its actual function. Analysts are drawn from many different disciplines.[631] Its investigations are intended to show the nexus between the military structures, financiers (such as banana companies or cattle farmers), politicians and armed forces, particularly in areas such as Urawa and Monte Maria.[632] The UNAC said it is investigating crimes committed by different actors and in different phases of the conflict, including extrajudicial killings by the military (false positives); violence against trade unionists; and violence against the Patriotic Union.[633]

The UNAC achieved some important results in investigations. For instance, in an investigation on "false positives", it discovered that the military was documenting FARC kills in an area where FARC was not present.[634] UNAC also took steps to prepare for bringing charges against FARC, including new charges on narco-trafficking, international humanitarian law, attacks on indigenous communities, and displacement.[635] These could not proceed further because of the Havana Talks. UNAC staff said that the ICTY, rather than the ICC inspires the methods of the UNAC.[636]

Critics however level several criticisms at the UNAC approach. Firstly, they argue that the Context and Analysis Unit is "mimicking" international legal structures without being suitably adjusted to the context of the local legal system.[637] Its analytical reports are not necessarily admissible in Court, unless they are admitted as expert evidence.[638] If the reports become evidence, they can be challenged by the defense, which may contribute to the length and complexity of litigation.[639] Secondly, some civil society worry that prioritization through the work of the Unit will lead to impunity.[640] Thirdly, the structure of the unit may not be sufficiently equipped to deal with the complexity of different kinds of crimes in Colombia.[641] This may be a case of over-centralization between different types of investigations on which barriers of separation may be more appropriate.[642] A fourth criticism is that the UNAC's efforts to investigate state crimes are limited. The (former) General Prosecutor himself was the main author on the Military Justice reforms, which will make it more difficult to pursue military cases.[643] Finally, the UNAC is just one in a

[631] Ibid.
[632] Interview with Director ICTJ Colombia, 12 Nov. 2013
[633] Interview with Head of the UNAC, 12 Nov. 2013
[634] Interview with Head of the UNAC, 12 Nov. 2013.
[635] Ibid., 12 Nov. 2013.
[636] Ibid., 12 Nov. 2013.
[637] Interview with Michael Reed, OHCHR, 9 Nov. 2013.
[638] Either Law 600 or Law 906 could apply, depending on how old the case is. For crimes before 1 January 2005, the former applies, whereas Law 906 applies to crimes committed afterwards.
[639] Interview with Director ICTJ Colombia, 12 Nov. 2013
[640] Ibid., 12 Nov. 2013.
[641] Interview with Michael Reed, 9 Nov. 2013.
[642] Ibid., 9 Nov. 2013.
[643] Ibid., 9 Nov. 2013.

series of units created in the *Fiscalia* over the years, with a new post-Havana unit already underway.[644]

C. Kenyan Special Tribunal and International and Organized Crimes Division

Developments in Kenya however demonstrate that the establishment of specialized capacities at the domestic level will not always lead to effective investigation and prosecution. In Kenya, state actors were directly implicated in violence. An attempt to first hybridize national proceedings, via the Kenya Special Tribunal, and then to go to the ICC, both failed. The Waki report criticized state security institutions both for their failure to anticipate violence and their direct involvement.[645] It recommended the establishment of a Special Tribunal for Kenya, a court of mixed composition that would investigate and prosecute PEV, particularly crimes against humanity.[646] The Prosecutor was to be a non-Kenyan. [647] Proponents of the Tribunal hoped that the threat of an ICC intervention would be enough to prompt the Kenyan legislature to pass the Bill.[648] But the Bill failed to obtain the required two-thirds majority in Parliament and was abandoned in July 2009. After that, many lobbied for the slogan: "Don't be vague, go to The Hague."[649] The failure to establish a Special Tribunal was a clear indication of a lack of political will to prosecute PEV on behalf of the Kenyan government.

Unsurprisingly, attempts to establish an International and Organized Crimes Division on the back of those failures have been unsuccessful. Under section 8(2) of the International Crimes Act No. 16 of 2008, Kenya's High Court has jurisdiction to conduct trials over persons responsible for international crimes committed locally or abroad by a Kenyan, or committed in any place against a Kenyan as of January 2009.[650] In October 2012, the Judicial Service Commission published a Report suggesting the establishment of an International and Organized Crimes Division, for "international-scale crimes" including post-election violence but also for

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[644] First was the National Unit for Human Rights, then the Justice and Peace Law unit, then UNAC, and under the Havana Peace Talks, a Special Jurisdiction for Peace will be established. Interview with OHCHR representative, Bogota, 13 May 2014; Interview with Director Colombia ICTJ, 16 May 2014.
[645] Alai, Chistine and Njonjo Mue, *Complementarity in Kenya, The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I Ed. by Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press, (2011) p. 1224.
[646] Ibid. See also Institute for Security Studies, *The International Criminal Court's cases in Kenya: origin and impact*, No. 237 (August 2012) at p. 7.
[647] Open Society Institute, *Putting Complementarity into Practice: Domestic Justice for International crimes in DRC, Uganda, and Kenya*, 2011. I travelled to Kenya in 2008 to advise on the establishment of the Special Tribunal. Alai, Chistine and Njonjo Mue, *Complementarity in Kenya, The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I Ed. by Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011), p. 1225.
[648]Ibid.
[649] See Institute for Security Studies, *The International Criminal Court's cases in Kenya: origin and impact*, No. 237, (August 2012) p. 9.
[650] Hon. Rev. Dr. Samuel Kobia, Commissioner JSC/ Chair ICD Committee, *Complementarity in Practice: Examples from Kenya,* Paper presented at the German-Kenyan Side Event at the ASP, (23 Nov. 2013) p. 8.

transnational crimes, including terrorism, piracy, cyber-crime, human trafficking, money laundering, small arms smuggling and drug trafficking as well as the International Crimes Act No. 16 of 2008.[651] Reverend Samuel Cobia, head of the Judicial Service Commission subcommittee, said the IOCD would be established "modeled on standards of ICC, with necessary modifications to suit the Kenyan Judiciary", with 7 judges sitting in 3 panels with an extra judge, and with its seat in Nairobi.[652] In the words of Willy Mutunga, the Chief Justice of Kenya: " The IOCD is a Kenyan solution to a local problem … The IOCD promises to borrow smart and best practices from the world over to try these cases. In a real sense, this is implementing the Constitutional imperative: to domesticate international law in ways that are useful in terms of substantive law."" [653]

In the political climate in Kenya, particularly after the collapse of the ICC cases, civil society took the view that the this attempt to set up an IOCD does not constitute a "good faith attempt" to do justice for post-election violence.[654] Civil society described the IOCD as "motion without movement."[655] The Kenyan Director of Public Prosecutions, Keriako Tobiko said at Assembly of States Parties in November 2013, that he is pursuing hundreds of cases. But in February 2014, he said that up to 4000 PEV cases couldn't be prosecuted due to lack of evidence.[656] In March 2015, President Kenyatta said that PEV would see no further accountability but that a fund will be established to help victims.[657] After the election of Kenyatta and Ruto, government officials dubbed civil society the "evil society", and attempted to restrict their activities and funding base through new legislation.[658]

III. National Proceedings and "Genuineness"

Domestic proceedings are perhaps the most significant evidence of "systemic effects" of the Rome Statute. Domestic prosecutions can over time contribute to building a "culture of accountability" through strengthening domestic institutions;

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[651] The Judicial Service Commission, Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in The High Court of Kenya, Oct. 2012. Later, in 2015, the name was changed to the International and Organized Crimes Division.
[652] Hon. Rev. Dr. Samuel Kobia, Commissioner JSC/ Chair ICD Committee, *Complementarity in Practice: Examples from Kenya*, Paper presented at the German-Kenyan Side Event at the ASP, 23 Nov. 2013 p. 7.
[653] News Ghana, *IOCD is a local solution to a national problem*, Chief Justice Mutunga, (29 April 2015) at http://www.newsghana.com.gh/iocd-is-kenyan-solution-to-local-problem-cj-mutunga/.
[654] Kenyans for Peace with Truth and Justice, and the Kenyan Human Rights Commission, *Security Justice: Establishing a Domestic Mechanism for the2007/2008 post-election violence in Kenya*, May 2013. Interview with civil society activist, Nairobi, 5 Feb. 2014.
[655] Interview with civil society activists, Nairobi, 3 Feb. 2014.
[656] Koech, Bernard. *French Doubts About Mandate of Kenya's Special Court*, IWPR 21 Feb. 2014.
[657] Hansen, Thomas. *Prosecuting International Crimes in Kenyan Courts?* Paper Presented at the Nuremberg Principles 70 Years Later: Contemporary Challenges", 21 November 2015.
[658] Interview with civil society activists, Nairobi, 3 Feb. 2014.

resulting in legal changes; providing important precedents; and through stimulating national debate on accountability questions.

Impact studies from other international tribunals indicate that countries that held domestic trials following international trials contribute to "internalizing" and processing questions of guilt and acknowledgment. For instance, Germany adopted and internalized the Nuremberg Principles over time.[659] Similarly, Orentlicher argues that the Bosnian War Crimes Chamber in Serbia would not have existed but for the ICTY, and that the work of the ICTY created a climate in which domestic prosecutors could proceed, if only through an antagonistic desire to prove their professional competence and national pride.[660] In 2004, up to 71 percent of Serb respondents in an opinion poll believed it was better to institute war crimes cases in national courts than at the ICTY.[661] In spite of some very mixed results, the Serbian prosecutions were viewed as more legitimate and less controversial than the trials in The Hague, and that they contributed to "normalizing" the prosecution of war crimes.[662]

At the same time, as will be seen from the Colombian cases, domestic trials can be difficult to assess in terms of their contribution to building a culture of accountability. It is important to analyze the experiences in Colombia, in order to distill "indicia of genuineness" that could be used to evaluate future cases, including those held before the Special Jurisdiction for Peace.

A. Domestic Trials in Colombia: Paramilitaries, Politicians, and "False Positives"

Colombia is often mentioned as an example of "positive complementarity" with the ICC as its "ally in the fight against impunity."[663] Colombia ratified the ICC Statute on

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[659] Unlike Germany, Japan did not conduct any further domestic trials after the conclusion of the Tokyo trials and it can be argued that "internalization" was more limited in Japan. The "hybrid court" model may show higher degrees of internalization of values, as indicated by the high approval ratings of the Special Court for Sierra Leone. In Cambodia, respondents were quite explicit for instance that they do not trust the national justice system. Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean and Eric Stover, "*So We Will Never Forget": A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia",* Human Rights Center, University of California, Berkeley (January 2009): only 36% of respondents said they trusted it.

[660] Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia.* OSJI, 2008 at p. 18. Orenticher also points to the role of the assassination of Zoran Djindjic in creating sufficient political will to proceed with domestic trials. The BWCC was further assisted by transfer of evidence from the ICTY, and the transfer of "know-how" particularly in relation to practical issues on how to conduct complex war crimes trials: p. 48.

[661] Ibid. p. 47.

[662] Ibid. p. 56.

[663] Remarks by Ruth Stella Correa Palacio, Minister of Justice and Law, International conference Concerning International Humanitarian Law and International Criminal law in Domestic Law, and Organized Crime, Pintificia Universidad Javeriana, 20-21 June 2013.

5 August 2002.[664] Law 742 (2002) approved implementation of the Rome Statute.[665] Court officials too often refer to Colombia's national proceedings as an example of the ICC's impact.[666] The Colombian Government says it is making "all efforts to ensure that war crimes and crimes against humanity are not left in impunity."[667] In 2005, the Colombian parliament passed Law 975, the background of which is described at length in Chapter 4.[668] In spite of the existence of Law 975, the Colombian authorities decided for the extradition of up to 29 paramilitary leaders to the US on drug-related offences between September 2008 and March 2009. The ICC OTP was sent many communications and urged to intervene by those who considered this a clear indication of unwillingness, but did not act on it.[669]

Proponents of Law 975 say its successes include the acknowledgement of 40,000 crimes; the participation of nearly 77, 000 victims; and the recovery of 5000 bodies.[670] Experts continue to disagree on their assessment of Law 975 and whether it led to effective prosecution of Rome Statute crimes at the domestic level. Human rights organizations argued that Law 975 constituted an attempt to "shield" from responsibility and masked unwillingness, whereas others argue that the law probably amounted in more revealed truth and prosecutions than would otherwise have been the case. [671] Another criticism often leveled at Law 975 is that it did not result in non-repetition, as many paramilitaries continue their involvement in para-

[664] At the time of ratification, President Pastrana appended a declaration under Art. 124 of the Statute, under which ICC would lack jurisdiction over war crimes committed in Colombia for a period of 7 years, reflecting a protectiveness over its military institutions which continues to this date.
[665] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 19. An Article was added to the law to clarify that any inconsistencies between Colombian law and the Rome Statute would "have effect exclusively within the ambit of the subject-matter regulated in the Statute." Differences included the ability to give life sentences (in Colombia the highest sentences were restricted to 60 years), and the application of statutes of limitations, as well as modifications to the *res judicat*a and *non bis in idem* principles in cases of ICC intervention. This law in turn was reviewed by the Constitutional Court, in a detailed decision. Constitutional Court for Colombia Decision C-578 of 2002. Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial*. Domac/17 (Oct. 2011) p. 18.
[666] James Stewart, *Transitional Justice in Colombia and the role of the International Criminal Court,* 13 May 2015, https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.
[667] Remarks by Ruth Stella Correa Palacio, Minister of Justice and Law, International conference Concerning International Humanitarian Law and International Criminal law in Domestic Law, and Organized Crime, Pintificia Universidad Javeriana, 20-21 June 2013,.
[668] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 20. Law 975 (2005) was passed alongside Law 782/2002 and Regulatory Decree 128/03, which provided the framework for demobilization by providing economic packages to demobilizing paramilitaries.
[669]Interview with Member of Congress 2, Bogota, 14 May 2014. Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 30.
[670] International Crisis Group, *Transitional Justice and Colombia's peace Talks*, Latin America Report No. 49, 29 (August 2013) p. 5.
[671] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach*", Lawyers Without Borders Canada (2011) p. 18.

politics and para-economics.[672] In the words of a prominent Colombian parliamentarian the JPL resulted in "0.1 % reparations, 5% justice, 20% truth, but 0% in terms of non-repetition."[673]

On paper, Law 975 appeared to be a great innovation, but in practice, it is now considered a mostly failed experiment, due to the low number of overall convictions, which only came to 10 after 7 years and 110 in 2015.[674] Law 1592 (2012) refocused prosecutions on the "most responsible": sixteen macro-level trials were planned for senior leaders, and the judgments will be applied to all those in custody hopefully before their sentences run out in 2014.[675] However, many Colombians remain proud of the innovations of Law 975 and consider it a transitional justice model that could be exported.[676]

The Prosecutor of the ICC referred to Colombia in unusually positive terms at an early stage:

> No doubt that in Colombia these proceedings are genuine … Colombian judges are very good and the Justice and Peace Law has allowed them to uncover hundreds of thousands of killings. Colombia is a sophisticated country and this law is also a very sophisticated one, very complex and interesting. It is a unique process in the world.[677]

After the extradition of senior paramilitaries to the United States, increasingly paramilitaries used their *version libres* to expose their ties with Colombian politicians.[678] At least sixty members of Congress were exposed as having such links and were convicted. The OTP in its report notes that as of August 2012, over 50 former congressmen had been convicted for "*concierto para delinquir*". [679]
Most of the convictions dealt with election crimes, but four public officials were also convicted of murder, enforced disappearances, kidnapping and torture.[680]
The impact of the ICC on the trials of the para-politics was limited. This is in spite of the fact that the Prosecutor's second visit coincided with the para-politics scandal on which he had addressed a letter to the Colombians on 18 June 2008, referring to

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[672] Interview with Member of Congress, Bogota, 14 May 2014.
[673]Ibid.
[674] Hayner, Priscilla. *The PeaceMakers Paradox: Pursuing Justice in the Shadow of Conflict*, Routledge 2018 (Case Study on Colombia) p. 198.
[675] International Crisis Group, *Transitional Justice and Colombia's Peace Talks,* Latin America Report No. 49, (29 August 2013) p. 5.
[676] Interview with Carlos Holmes Trojillo, Bogota, 17 May 2014. In the words of Carlos Holmes Trojillo, Vice Presidential candidate, "the Peace and Justice Law was a good model."
[677] Velez, Sheila, Luis Moreno-Ocampo, Chief Prosectuor of the ICC: "I have the most important mission in the world", AEGIS trust website, 22 Feb. 2011.
[678] Seils, Paul. *Making Complementarity Work: Maximizing the Limited Role of the Prosecuto*r, in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II Eds. Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p. 1004.
[679] OTP Interim Report, Situation in Colombia, Nov. 2012 at para. 175.
[680] Ibid. at para. 178.

it as a "key issue" for the ICC.[681] The OTP Interim report does not deal with the Administrative Department of Security, a department that is alleged by human rights organizations to serve criminal interests and was allegedly used for illegal acts including the murder of "declared enemies".[682]

Between 2004 and 2008, during the Alvaro Uribe presidency and his Democratic Security Policy, it is alleged that almost 5000 civilians including men, women and children were executed and that their bodies were presented in guerilla uniforms and counted as members of the FARC killed in combat.[683] The widespread nature of this phenomenon points to the existence a policy,[684] which the Colombian Government has denied.[685] Originally the Government took the position that the persons killed were criminals.[686] Various incentives were offered to increase the number of "combat kills", and in the words of a senior Colombian military official, the success of the military should be measured in "litres of blood".[687] Under the Santos administration the military "self-corrected" and abandoned this practice.[688]

The Colombian authorities started to investigate and prosecute some cases, although early efforts aimed at rank-and-file, whereas there are indications that this practice would have been condoned at higher levels.[689] Factors that influenced the Colombian state to conduct these investigations include pressure from various sources including the OHCHR, the Special Rapporteur on extrajudicial, summary or arbitrary executions,[690] the AIHRC, and the USAID conditionality conditions laid

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[681] Vieira, Constanza. *Colombia: International Criminal Court Scrutinises Paramilitary Crimes*, IPS News Agency, 27 Aug. 2008.
[682] Avocats sans Frontiers. *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach"*, Lawyers Without Borders Canada (2011) p. 21.
[683] Seils, Paul. *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, in The International Criminal Court and Complementarity: From Theory to Practice, Vol. II (eds. Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p. 1005.
[684] The Special Rapporteur said in 201 that it appeared that these killings were not carried out "as a matter of state policy" but the high numbers may indicate otherwise. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 31 March 2010 UN Doc. A/HRC/14/24/Add.2.
[685] Seils, Paul. *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II Eds. Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p. 1005.
[686] Interview with OHCHR representative, Bogota, 13 May 2014.
[687] FIDH, *Colombia: The War is Measured in Litres of Blood: False positives, crimes against humanity: those most responsible enjoy impunity*, May 2012 p. 10.
[688] Interview with Head of OHCHR, Bogota, 13 May 2014. In 2013, the Center for Research and Popular Education alleged that there were still around 10 false positives cases. Acuna, Phillip, *Ten 'false positives" cases, 232 extrajudicial killings in 2013: human rights organization,* Colombia Reports, 15 May 2014.
[689] FIDH, Colombia: *The War is Measured in Litres of Blood: False positives, crimes against humanity: those most responsible enjoy impunity*, May 2012.
[690] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 31 March 2010 UN Doc. A/HRC/14/24/Add.2.

down by the Leahy law.[691] Pressure from the ICC has undoubtedly played this part.[692] For instance, the military responsible for the *San Jose Apartado* peace community massacre were eventually tried.[693]

The OTP Interim Report of 2012 found that the false positives cases could constitute crimes against humanity.[694] The report also notes that high officials were aware but did not act.[695] Trials of higher-level military could constitute an important step forward in prompting accountability for state actors in the Colombian conflict.[696] In 2017, the OTP further specified that it had identified five potential cases to date relating to "false positives," focusing on different divisions and brigades of the Colombian army, including 29 commanding officers that were reportedly in charge of these units between 2002 and 2009. Proceedings by the Colombian authorities have now been initiated against 17 of these 29, but the status of some of these cases remains uncertain.[697] The OTP has shared information on this with the Colombian authorities, presumably to incentivize them to take further action.

The 2012 OTP report on preliminary examinations is the lengthiest report on any preliminary examination anywhere in the world. Some have said it concentrates only on a quantitative analysis of the number of open proceeding and indicted persons, without delving into the subject-matter of the cases or evaluating their quantity."[698] However, it is clear that the existence of the ICC has had impact on domestic proceedings in Colombia and that its "shadow effect" achieved more than active investigations probably would have.

B. Indicators of Lack of Genuine Domestic Investigations or Prosecutions

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[691] The Leahy Law or Leahy amendment is a U.S. human rights law that prohibits the U.S. Department of State and Department of Defense from providing military assistance to foreign military units that violate human rights with impunity. Interview with Head of OHCHR, Bogota, 13 May 2014.
[692] Interview with Head of OHCHR, Bogota, 13 May 2014. For instance, the military responsible for the *San Jose Apartado* peace community massacre were eventually tried. Seven peace activists including four children were killed in the crime. Global Post, *A Massacre Explored: Murder in the Jungle*, 16 March 2010.
[693] Global Post, *A Massacre Explored: Murder in the Jungle*, 16 March 2010.
[694] OTP Interim Report, Situation in Colombia, Nov. 2012 at para. 95.
[695] Ibid. at para. 100.
[696] Ambos, Kai. *ICC OTP Report on the Situation in Colombia- A critical analysis*. www.ejiltalk.org (1 Feb. 2013).
[697] OTP Report on Preliminary Examinations, 2017.
[698] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach*", Lawyers Without Borders Canada, (2011) Executive Summary. Some commentators expressed frustration that the OTP's report only deals with the assessment of national proceedings "in a purely quantitative way and thus leaves out some qualitative aspects of a legal and judicial nature that are indispensible to adequately evaluate the results of the Colombian criminal justice system with regard to the prosecution of international crimes." Ambos, Kai. *ICC OTP Report on the Situation in Colombia- A critical analysis.* www.ejiltalk.org (1 Feb. 2013).

The Colombian cases provide many considerations on what may constitute genuineness because they fall on a spectrum in terms of political willingness. Genuineness is relevant to internalization.

1. Absence of Appropriate Punishment

Law 975 in its original form it did not anticipate imprisonment as a punishment.[699] This resulted in challenge by victims and the civil society, which yielded Constitutional Court Decision C-370 of 2006, which amended the Justice and Peace Law in significant ways. The Court therefore decided that the reduced sentences offered by the Justice and Peace law of 5-8 years should only be available under certain conditions, including (1) the offender does not repeat any criminal offense; (2) the offender declares "freely and voluntarily" the facts related to all crimes committed as a member of the illegal armed group, without any "omission or concealment of crimes;"[700] (3) the victims rights to participate in various stages of the investigation, prosecution and punishment is guaranteed; (4) the sentence is served in a regular prison, subsequent to sentencing by a judge, rather than in a "zone of concentration"; (5) the offender contributes to reparations for the victim through contributing their assets whether obtained legally or illegally.

The OTP in its 2012 report on Preliminary Examinations in Colombia considered the reduced sentences in the JPL "acceptable" at least to the point of rendering the domestic proceedings against paramilitaries inadmissible. [701] The OTP concluded that the fact that 43 out of 46 paramilitary leaders alive today have been investigated, prosecuted or sentenced for Rome Statute crimes "means that these specific cases would not be admissible before the ICC."[702] The issue of appropriate punishment is a complex one that is discussed much further in Chapter 4. What makes it complex is the fact that proportionality is not an adequate standard for meting out punishment for mass atrocities.

2. Casting the net too wide

Law 975 encompassed to many perpetrators, including minor ones. The list of targets for prosecutions was not the product of investigation but of an executive decision, which appended a list with roughly 4714 names on it of persons who already had criminal records.[703] The list represented an approach contrary to a prosecutorial strategy akin to that of the ICC, focusing on "those the greatest responsibility." The compilation of this list undermined the impartiality of the

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[699] Seils, Paul. *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, ICTJ 2016 p. 64: Does a National Court's Decision on Punishment After Conviction Have a Bearing on Determining of the Proceedings are Genuine?
[700] Constitucional Claim Decision C-370 de 2006, available on the Constitutional Court website.
[701] OTP Interim Report, Situation in Colombia, Nov. 2012 at para. 166.
[702] Ibid. at para. 173.
[703] Ibid.

Attorney General's Office.[704] Around 1200 estimated that the Attorney General did not have evidence against them and withdrew from the process without confessions.[705] Moreover, up to 20,000 paramilitaries did not participate, instead attempting to avail themselves of Law 782 (2002), which grants pardons for political crimes, or Law 1424 (2010), which grants a form of use immunity for their testimony.[706] Nonetheless, the number of persons who had to be processed during the law was so large as to be unmanageable.[707] It should be noted here that in many national jurisdictions, the principle of legality requires the prosecution of crimes where there is evidence: this is the same in Colombia. At the same time, it is now well-recognized that prioritization and a selection of cases of those bearing the most responsibility for Rome Statute crimes is acceptable at the national level.[708]

3. Selecting low-level targets for investigation and prosecution

A common indicator for genuineness is whether national authorities pursue "system crimes" up the chain of command. The OTP Interim Report of 2012 notes that the Colombian authorities reported that 207 members of the armed forces were convicted for murdering civilians within the ICC temporal jurisdiction, with sentences ranging from 9 to 51 years. Out of these, 52 convictions were rendered in relation to "false positives."[709] But the OTP acknowledges that in general these prosecutions have not focused on those bearing the greatest responsibility.[710]

In more recent statistics, up to 10,000 military actors may be implicated and around 600 have been convicted to date.[711] UNAC was reported to be analyzing allegations of up to 1360 false positives cases.[712] Up to 2900 cases are pending with the Human Rights Unit, but it is not clear whether these cases need to be referred to the Criminal Chamber of the Supreme Court if they involve military leaders. In 2015 Human Rights Watch said, "The apparently widespread and systematic extrajudicial killings by troops attached to virtually all brigades in every single division across Colombia point to the conclusion that the highest levels of the army command at least should have known about the killings, and may have ordered or otherwise actively furthered their commission." In 2016, the OTP said it had identified five

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[704] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach",* Lawyers Without Borders Canada, (2011) p. 14. The same report says that there are suggestions that the lists of candidates were created by the paramilitaries themselves (p. 15).
[705] Ibid. p. 15.
[706] Ibid. p. 15.
[707] Seils, Paul. *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II Eds. Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p. 1007.
[708] See the next Chapter.
[709] ICC Interim Report, Situation in Colombia, Nov. 2012 at para. 180-181.
[710] Remarks by OTP representative, International conference Concerning International Humanitarian Law and International Criminal law in Domestic Law, and Organized Crime, 20-21 June 2013, Pintificia Universidad Javeriana.
[711] Interview with OHCHR representative, Bogota, 13 May 2014.
[712] See the next section for an explanation of the UNAC.

potential cases relating to the false positives.[713] It notes that a significant number of persons (961) had been convicted, but these were mid and lower level.[714] In addition, investigations were initiated against 14 commanding officers, but available information on these was limited.[715] The para-politics proceedings too did not sufficiently expose the responsibility of politicians who "acted as perpetrators-by-means, co-perpetrators, and instigators of many violent crimes in the different regions of Colombia.[716]

4. Failure to conduct independent investigations (for instance through overreliance on confessions)

ASF conducted an extensive analysis of the handling of false positives cases to demonstrate that the Colombian state has no willingness to investigate itself, pointing to numerous deficiencies in the pursuit of these cases. Using statistical data, it argued that a very large proportion of allegations of homicide against members of the armed forces are not pursued beyond the preliminary stage. Many of the cases were lodged under military jurisdiction, being classified as killings committed in the course of duty, rather than homicides. Homicides were not analyzed according to patterns in order to determine who may be at the top of the chain of command. Insider testimony was not used. All of these factors point to such an ineffective investigation and prosecution of "false positives" cases so as to constitute a lack of genuine willingness.[717]

A weakness of Law 975 for the paramilitaries was its over-reliance on confessions Constantly changing rules by the courts applying Law 975, in particular in relation to partial indictments, caused further delays.[718] In May 2007, the Constitutional Court ruled that the law should be amended to withdraw benefits from any applicants who did not make "full confessions", including for all the crimes committed by their subordinates (whether they knew about them or not).[719] This led to the bizarre situation of commanders confessing to long lists of crimes they themselves had put together but may not have known about. In the absence of an equivalent of superior responsibility in Colombian law, prosecutors then attempted to bring partial indictments to remedy this problem but the courts rejected this.

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[713] OTP Report on Preliminary Examination Activities, 2016 at para. 242.
[714] Ibid. at para. 243.
[715] Ibid. at para. 244.
[716] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach",* Lawyers Without Borders Canada (2011) p. 20.
[717] *Avocats sans Frontiers, The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach",* Lawyers Without Borders Canada, (2011) pp. 24-42: "Homicides to Win and Cover Up: The Institutional Lie Escaping Investigation."
[718] Ibid. p. 17.
[719] Seils, Paul. *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II Eds. Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p. 1008.

[720]This problem was compounded by the fact that the Justice and Peace Unit of the *Fiscalia* for many years lacked the capacity and the tools to conduct effective and independent investigations on the information gathered from the *version libres* and other sources. The cases resembled ordinary criminal processes, but for mass crimes.[721] As observed by one commentator: "The procedural advances do not respond to the gravity or patterns of crimes; there are paramilitaries indicted for isolated homicides with no connection to a broader context of violence or attack on the civilian population."[722] The *version libres* gave rise to a serious bottleneck in the streamlining of the process through to the "formulation and attribution of charges" or trial stages.[723] By 2013, it was already clear that many paramilitaries would serve their minimum sentences of 5-8 years, even before concluding their judicial proceedings.

5. Use of military jurisdiction to shield perpetrators (or lack of recognition of superior responsibility)

The military continue to enjoy a high degree of respect in the Colombian society. The Ministry of Defence in Colombia is a powerful institution that controls both the military and the police. Civilian oversight of the military has been described as perfunctory.[724] Many cases that ought to be transferred to civilian jurisdiction are not, but remain with military jurisdiction where victims do not have the same rights.[725] In 2012, the Colombian Government proposed constitutional amendments to articles 116, 152 and 221, seeking to transfer cases from civilian to military jurisdiction, based on notions of personal jurisdiction, known as the "Military Justice Reform". This would apply to all crimes committed by the military "related to acts of military service," except genocide and certain crimes against humanity, including enforced disappearances, extrajudicial executions, sexual violence, torture, and forced displacement. Other violations, such as certain war crimes and arbitrary detention, would only be investigated and tried by military courts. The reforms specify a definition of "direct participation in hostilities" which diverges from that of

[720] Ibid. p. 1008.
[721] See remarks of Mr. Juan Pablo Cadona in the Report of the expert conference, "*In the Shadow of the ICC: Colombia and International Criminal Justice*", Convened by the Human Rights Consortium, the Institute of Commonwealth Studies and the Institute for the Study of the Americas at the School of Advanced Study, University of London, 26-27 May 2011 p. 41.
[722] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach",* Lawyers Without Borders Canada, (2011) p. 17. Steps were taken to remedy this through the establishment of a Context and Analysis Unit (UNAC) in the Prosecutor's office.
[723] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach",* Lawyers Without Borders Canada (2011) p.17.
[724] While the Senate appoints generals, this is considered rubber-stamping.
[725] Interview with Member of the High Judicial Council, Bogota, 14 May 2014.

the ICRC, and is much broader.[726] The Congress adopted the Amendment in a statutory law in June 2013.

The reforms were criticized by the United Nations and human rights group on the ground that military jurisdiction often equals lenience, and on the ground that the reform is at odds with international human rights standards and threatens to deny justice to victims.[727] The Constitutional Court struck down the law in October 2013 on a technical ground so that it never came into force.[728]

IV. The Tale of Kwoyelo: Internalization Without a Conviction?

Finally, it is worth noting that expressive value, and internalization can even take place in the absence of a conviction. This is where a trial may lead to a discussion and re-evaluation of legal standards and norms in accordance with the Rome Statute at a later stage. This is demonstrated by the trial in Uganda of LRA commander Col. Thomas Kwoyelo, a trial that has proved prolonged and complex.[729] Nevertheless, the Kwoyelo trial had significant impact on the national debate on accountability and whether amnesty is an appropriate tool in the reintegration of the LRA in Northern Uganda. While the crimes he is accused of are serious, Kwoyelo was not of senior rank in the LRA and fell well outside the purview of the ICC.[730] Kwoyelo was captured in Garamba in 2008 but the circumstances of his capture remain unclear. On 18 March 2010 the Commission forwarded the application to the DPP, stating that it believed Kwoyelo qualified for amnesty.

Instead, on 6 Sept. 2010, the DPP charged Kwoyelo with various offences of Grave Breaches under Article 147 of the Fourth Geneva Convention (criminalized through Uganda's Geneva Conventions Act). [731] He was also charged with various domestic offences under the Penal Code Act, including murder, kidnap with intent to murder, robbery with aggravation, and attempted murder. Kwoyelo entered a plea of not guilty to all charges. He then filed a petition to the Ugandan Constitutional Court,[732]

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[726] OTP Report on Preliminary Examinations, 2013 at para. 135.
[727] UN News Centre, UN Independent experts urge Colombia to reconsider proposed criminal law for the military, 22 Oct. 2012. UN News Centre, UN Human rights office concerned over Colombia's military justice reform bid, 27 Nov. 2012. Eding, Zach, Colombia's military justice reform could lead to ICC intervention, Colombia reports 19 Nov. 2012.
[728] Freeman, Daniel. *Colombia's Constitutional court knocks down controversial military justice reform law,* 24 Oct. 2013.
[729] Nouwen, Sarah. *Complementarity in the Line of Fire: the Catalysing effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press (2013) p. 231: "The Kwoyelo case is so far the only case indirectly catalyzed by the ICC's complementarity principle."
[730] See also interview with Ledio Cakaj in the International Justice tribune, 12 January 2017 by Stephanie van den Berg.
[731] *Uganda vs. Kwoyelo Thomas alias Latoni,* Amended Indictment, International Crimes Division of the High Court of Uganda at Kampala, 5 July 2011.
[732] Constitutional Petition No. 036/11 (Reference) arising out of HCT-00-ICD-Case No. 02/10 between Thomas Kwoyelo Alias Latoni (Applicant) and Uganda (Respondent), Constitutional Court of Uganda, 22 Sept. 2011.

arguing that the failure by the Director of Public Prosecutions and the Amnesty Commission was discriminatory according to Art. 121 of the Ugandan Constitution. Kwoyelo pointed to the fact that the DPP and the Amnesty Commission granted amnesty certificates to other LRA commanders, such as Kenneth Banya and Sam Kolo, captured under similar circumstances in 2004.

The Attorney General however argued that the Amnesty violated Uganda's legal obligations assumed under the Rome Statute.[733] She noted that Uganda's foreign policy supported the prosecution of international crimes as illustrated in its enactment of the Rome Statute and the establishment of the International Crimes Division. The Attorney General cited a variety of international law sources to argue that a blanket amnesty is in violation of Uganda's international law obligations. [734] In a decision rendered on 22 Sept. 2011, the Constitutional Court ruled in favor of Thomas Kwoyelo. [735] The Constitutional Court argued: "The Act was meant to be used as one of the many possible ways of bringing a rebellion to an end by granting amnesty to those who renounced their activities … The Act is also in line with national objectives and principles of State policy and our historical past which was characterized by political and constitutional instability.[736] It went on to hold that the indictment of senior LRA leaders "… [c]learly shows that Uganda is aware of its

[733] Art. 287 states that "Where (a) any treaty, agreement or convention with any country or international organization was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or (b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention, the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government as the case may be, shall continue to be a party to it." The Attorney General argued that the amnesty is unconstitutional because it granted amnesty for war crimes, including grave breaches of the Geneva Conventions to which Uganda is a party, and that Art. 287 recognized the validity of ratified treaties under Ugandan law such as the Geneva Conventions Act.

[734] International authorities cited by the Attorney General included the Inter-American Court of Human Rights, *Barrios Altos v. Peru*, Judgment 14 March 2001; *Prosecutor v. Morris Kallon and Brima Bazzy Kamara* (SCSL 2004-15/16-AR72); *Prosecutor v. Anton Furundzija,* Judgment, 10 Dec. 1998 (IT-95-17/1-T).

[735] Kwoyelo's counsel cited *Hamdard Dawakhana (Wakf) Lal Delhi and others v. Union of India and others*, 1960 AIR 554, 1960 SCR (2) 671 to argue that in examining the constitutionality of a law, the constitutional court can take into account factors such as the history and purpose of the legislation and the "mischief it intended to suppress." He also cited *Azanian Peoples Organization and 7 others v. President of South Africa and others* (CCT 17/96) [1996] ZACC 16, the well-known South African Constitutional Court decision upholding the constitutionality of certain provisions of the South African Truth and Reconciliation Act, including the amnesty provision.

[736] Constitutional Petition No. 036/11 (Reference) arising out of HCT-00-ICD-Case No. 02/10 between Thomas Kwoyelo Alias Latoni (Applicant) and Uganda (Respondent), Constitutional Court of Uganda, 22 Sept. 2011 at lines 500-510. The Constitutional Court noted that the UPDF, as state agents, are not eligible for amnesties and that this makes it different from the South African Truth and Reconciliation Act, which "granted amnesty to all wrong doers within the apartheid government and within the rebel ranks."

international obligations, while at the same time it can use the law of amnesty to solve domestic problems."[737]

However, this was not the end of the story. The case was referred to the Supreme Court, but there it faced extensive delay due to a lack of quorum. A final decision was only rendered on 8 April 2015. First, the Supreme Court decided that there is no uniform practice in respect of amnesties. Uganda had opted for a "dual conflict response model" of peace and accountability, but the Amnesty Act effectively covers crimes committed in the cause of war or armed rebellion. The Supreme Court found that crimes against innocent civilians or communities could not qualify as such and should not be amnestied.[738] The Court therefore referred the Kwoyelo case back to the High Court's ICD division for trial.

The Kwoyelo case prompted much interest in Uganda and abroad, and provoked a longer-term discussion on the compatibility of amnesty with international obligations.[739] Perhaps it will continue to do so, but this is not clear. The outreach function of the ICD is particularly important, but it has proved difficult to finance and staff this aspect of the proceedings, causing further delays.[740] The ICD already received permission to broadcast the proceedings through Government-owned radio stations.[741] By prompting this discussion, the trial has contributed to the internalization of Rome Statute norms on accountability even in the absence of a conviction.

V. Conclusion: Systemic Effect in Domestic Legal Systems.

Systemic effects to be found domestic legal systems can be viewed as a process of "internalization of Rome Statute norms. This is part of the indirect impact of the Court. Al-Naim suggests in the context of international human rights that "a more realistic and desirable approach … is to seek to diminish the negative consequence of the paradox of self-regulation by infusing the human rights ethos into the fabric of the state itself and the global context in which it operates."[742]

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[737] Constitutional Petition No. 036/11 (Reference) arising out of HCT-00-ICD-Case No. 02/10 between Thomas Kwoyelo Alias Latoni (Applicant) and Uganda (Respondent), Constitutional Court of Uganda, 22 Sept. 2011, lines 595-600.

[738] Nakandha, Sharon. *Supreme Court of Uganda Rules on the Application of the Amnesty Act,* International Justice Monitor, 16 April 2015. http://www.ijmonitor.org. The judges referred to the Juba agreement as indicating that the Ugandan Government wishes to pursue accountability, and they concluded that impunity couldn't bring about peace.

[739] Van Den Berg, Stephanie. *Interview with Ledio Cakaj,* International Justice Tribune, 12 January 2017.

[740] Nakanda, Sharon. *The Kwoyelo Case at the ICD: The Realities of Complementary in Practice*, International Justice Monitor, 5 May 2016.

[741] Ibid.

[742] An-Naim ,Abdullah Ahmed in The Blackwell Companion to Sociology (edited by Judith Blau) Blackwell publishers (2002) pp. 90- 91.

Likewise, ideally the Rome statute will be infused into the fabric of states themselves through legislation, specialized capacities and domestic trials. This process should allow for a "margin of appreciation", and does not require a "hard mirror" approach to the Rome Statute or ICC proceedings. In the words of Federic Mégret, "ICC implementation could thus be characterized as less about certain forms and more about certain goals, emphasizing a degree of political and social preparedness about the need to deal with the worst crimes."[743]

The process may be messy. As observed by Drumbl, a significant degree of "mimicry" accompanies internalization. At the same time, in the longer term such amendments to legal frameworks and institutions may still play represent a step forward in building local capacity to investigate and prosecute Rome Statute crimes in the future, therefore contributing to long-term prevention and a culture of accountability. Domestic proceedings for Rome Statute crimes are the most important indicator of internalization, but are particularly difficult to assess for whether they constitute genuine internalization. Nonetheless, domestic trials for Rome Statute norms in the shadow of the ICC remain the most significant "systemic effects" of the Rome Statute and may contribute to long-term prevention.

This is because domestic trials are likely to involve many more perpetrators and crimes than the ICC is able to process, as demonstrated in Colombia. Domestic trials have more potential to play an expressive function and to constitute meaningful justice for local audiences.[744] As the implementation of Law 975 in Colombia indicates, local proceedings generate national experience that can result in improvements to domestic justice. Domestic trials can also contribute to national debates on Rome Statute norms, which in itself may contribute to internalization over time, as societies grapple with how to confront impunity.

Colombia is often highlighted by the Court itself, and its supporters, as the ICC's most significant example of encouraging domestic trials through "positive complementarity." While the involvement of the ICC certainly is a factor, other factors also distinguish Colombia from other situation-countries before the ICC. In Colombia, the role of law in the society is far more prominent than it is in Afghanistan or Libya. Colombia has a functional legal system with relative independence from the executive, particularly at the levels of the Constitutional Court and Supreme Court. The regional human rights system, with the Inter-American Commission and Court, can also be credited for spurring domestic investigations and prosecutions.[745]

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[743] Mégret, Frederic, *Too much of a good thing? Implementation and the Use of Complementarity*, in *The International Criminal Court and Complementarity: From Theory to Practice,* Vol. I Ed. by Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p.390.
[744] Mégret, Frederic and Marika Giles Samson, *Holding the Line on Complementarity in Libya: the Case for Tolerating Flawed Domestic Trials*, Journal of International Criminal Justice (2013), pp. 571-589.
[745] Interview with Michael Reed, 9 Nov. 2013.

The example of Colombia may just be an indication that the impact ICC in terms of incentivizing domestic proceedings is more likely in countries that already have functional legal institutions, as opposed to where the role of law in a particular society is weaker. According to Voeten, "both across and within countries, citizens who trust their domestic courts more also have more trust in international courts … [C]itizens see international courts not as substitutes for, but as extensions to the domestic rule of law."[746] This conclusion is troubling because it could mean that the Rome Statute and the Court are having the most impact where they are needed the least. This is another manifestation of parallelism. Where respect for the rule of law is stronger, the Court as an institution is more feared.

[746] Voeten, Erik. *Public Opinion and the Legitimacy of International Courts*, 14 Theoretical Inquiries in Law (2013) p. 414.

Chapter 4: Transformative Effect: Peace With Punishment

The goal should be to "achieve peace with maximum justice"[747] – President Juan Manuel Santos, Colombia

On the horns of a dilemma, there is no room for dogma - Barney Afako, Uganda[748]

I. Introduction

This Chapter seeks to assess whether the existence of the Rome Statute and the ICC are having a transformative effect on political processes such as peace negotiations. As discussed in Chapter 1, the logic of the Rome Statute is that effective investigation and prosecution will contribute to prevention. Yet amnesties were often granted during peace negotiations. Is the Court a facilitator or an obstacle to concluding peace agreements? Is the existence of the Court leading to a reduction in amnesties?

The provisions of the Rome Statute that seek to balance peace and justice have not been used in practice, except to guarantee immunity to peacekeepers. During the Review Conference in 2010, speakers referred to a "paradigm shift, in which there was now a positive relation between peace and justice."[749] Amnesties were considered "no longer an option" and "mediators had to find ways to convince parties to come to the negotiating table against a backdrop of actual or possible indictments."[750]

Experiences in Uganda and Colombia show that the peace versus justice dilemma is not imagined, and countries continue to grapple with this difficult question. In Uganda, the talks broke down, and commentators remain divided over the question whether this was a result of the ICC involvement. In Colombia, for now the Havana talks succeeded, based on a complex formula of peace with punishment and political participation. Amnesties too are not entirely off the table in certain situations, as may be seen in Afghanistan and Libya.

II. Legal Framework

A. Article 16: Reluctance of the Security Council?

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[747] UN News Center, *Both peace and justice vital to heal wounds of conflict, Colombian leader tells UN*, 24 Sept. 2013.
[748] Afako, Barney. *Undermining the LRA: Role of Uganda's Amnesty Ac*t, Conciliation Resources, August 2012.
[749] Moderator's Summary of Stocktaking of international criminal justice, Peace and Justice, RC/11 at para. 29 (2010).
[750] Ibid. para. 31.

The need to find a balance between peace and justice was anticipated in the Rome Statute, and the Prosecutor and Pre-Trial Chamber, but also the Security Council were given tools in this regard.[751] Article 16 was a result of the "Singapore compromise" intended to balance two radically different views of the International Criminal Court, one in which the Court would be subservient to the Security Council, and another of an independent court which could act on its own, irrespective of the Security Council.[752] In spite of its potentially crucial role in balancing peace and justice, in the first twelve years deferrals have been contemplated, but were never used to suspend an ongoing investigation.

In the Ugandan Peace Talks, Article 16 was contemplated on several occasions but Uganda was not on the Security Council agenda, which raised practical problems in requesting an Article 16 deferral.[753] In 2008, the AU called upon the Security Council to apply an Article 16 deferral in the case of Omar Al-Bashir, President of Sudan. The UK and France supported the request for a deferral, and actively promoted an exchange of surrender of Haroun and Kushayb and free movement for peacekeepers in return for the deferral.[754] However, the final Security Council did not mention a deferral.[755] The United States was most firmly against, abstaining from the Resolution because "the language added to the resolution would send the wrong signal to Sudanese President Al-Bashir and undermine efforts to bring him and others to justice."[756] Another attempt by the AU to obtain a deferral was in the context of the cases against Kenyatta and Ruto.[757] African Members of the SC tabled the matter, and a draft resolution was considered in a session held on 15 November 2013. Seven members of the SC, voted in favor, but the Resolution did not pass, since eight members abstained.

It may be that the issue of requesting deferrals now is too associated with a political push to obtain reprieve for sitting African Heads of State. The Council has seemingly been reluctant to use these powers, perhaps because of the perceived impact on the credibility of the Court.[758]

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[751] Article 16 states: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted by Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

[752] Schabas, William. *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press (2010) pp. 326-327.

[753] Juba Agreement on Implementing and Monitoring Mechanisms, section 37. The parties to the Peace Talks in Uganda included a provision late in the talks to agree that the Government of Uganda would request a Security Council deferral.

[754] Bosco, David. *Rough Justice: The International Criminal Court in a World of Power Politics*. Oxford University Press (2014) p. 145.

[755] UN Doc S/RES/ 1828 (2008). See also Cryer, Robert. *Prosecuting the Leaders: Promises, Politics and Practicalities.* Gottingen Journal of International Law 1 (2009) 45 p. 68.

[756] UN Doc. S/PV.5947, p. 6.

[757] Decision Ext/ Assembly/AU/Dec. 1 (Oct. 2013).

[758] Bosco, David. *Rough Justice: The International Criminal Court in a World of Power Politics*. Oxford University Press (2014) p. 181.

B. Article 53: An Uncompromising Prosecutor

In Rome, South African delegates raised the possibility of amnesties during the Rome Statute negotiations, [759] but it found no consensus and no expression in the Statute.[760] A non-paper drafted by the US delegation in August 1997 also tabled the suggestion that the ICC should recognize amnesties to facilitate transitions to democracy. This eventually led to the inclusion of Article 53 in the Statute.[761] According to Art. 53, the Prosecutor can choose to suspend an investigation or prosecution "in the interests of justice", a decision that is reviewable by the Pre-Trial Chamber.

This has led to extensive discussions on whether the interests of justice can demand that an investigation or prosecution be halted in the "interests of peace." From early on, many scholars believed that the "interests of justice" should be interpreted broadly.[762] Kirsch noted that this phrase was included in the Rome Statute to allow for "creative ambiguity" in possibly recognizing amnesties.[763] The expert group on complementarity in 2003 argued that the "stance of the OTP with respect to alternative forms of justice should probably be framed, conceptually, under Article 53."[764] Robinson argued that Art. 53 juxtapose the gravity of the crime and interests of victims with the interests of justice, therefore indicating that the latter may trump the former.[765] The wording of Article 53, which requires the Prosecutor to take into account the gravity of the crimes and the interests of victims on the one hand, and the interests of justice on the other, supports the view that a balancing test is required. In this respect, some scholars have argued that the "interests of justice" is akin to "public interest" considerations in domestic legal systems, which allows prosecutorial discretion not to prosecute on grounds such as public safety.

Human rights NGOs however argued that the meaning is more narrow, and that the references in Art. 53 to the "gravity of the crime", "the interests of victims" or the "age or infirmity of the alleged perpetrator" and his or her role in the alleged crime

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[759] South Africa's delegation shared its experience but beyond Articles 16 and 53, nothing definitive was included in the Statute. Schabas, William. *Complementarity in Practice: Some Uncomplimentary thoughts.* Criminal Law Forum (2008) p. 22.

[760] There were those who "had misgivings about laying down an iron rule for all time, mandating prosecutions as the only acceptable response in all situations": Robinson, Daryl. *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, European Journal of International Law (June 2003) p. 483.

[761] Scharf, Micheal, *The Amnesty Exception to the Jurisdiction of the International Criminal Court,* Cornell International Law Journal vol. 31 (1999), p. 507.

[762] Hayner, Priscilla. *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict.* Routledge (2018) pp. 100-102.

[763] Ibid., p. 522.

[764] Informal expert paper: The principle of complementarity in practice, ICC-OTP (2003) p.71.

[765] Robinson, Daryl. *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,* European Journal of International Law (June 2003) p. 488.

refer to considerations linked to a specific case and not to an overall policy objective.[766] HRW and AI pushed for this narrower construction of Art. 53, arguing that a broader interpretation would contradict the object and purpose of the Rome Statute.[767] HRW suggested that any such considerations would fall into the realm of the "political" and would be inappropriate to consider.[768]

Originally the OTP seemed to share the broader interpretation. [769] In announcing the arrest warrants in Uganda in 2005, the Prosecutor said that the ICC would "help bring justice, peace and security for the people of Northern Uganda."[770] During the negotiations headed by Betty Bigombe, the Prosecutor mentioned that the warrants were still reversible under Article 53, creating the impression of a "tap" that could be turned on or off, rather than resembling an unstoppable "train". At a meeting with traditional and religious leaders from Northern Uganda in The Hague, the Prosecutor suggested that Art. 53 could be used to suspend investigations.[771]

However, the policy paper on "the Interests of Justice" issued in 2007, eliminated the space of "creative ambiguity". The paper acknowledges that the interpretation of the "interests of justice" is "the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide (albeit implicitly), but there is no clear guidance." The paper stressed that "the exercise of the Prosecutor's discretion under Article 53 (1) (c) and 53 (2) (c) is exceptional in its nature and that there is a presumption in favor of investigation and prosecution." Secondly, it argued that the criteria of the "interests of justice" test should be informed by the objects and purposes of the Statute, namely the prevention of serious crimes of concern to the international community through ending impunity. Third, and perhaps most significantly, the paper states: "there is a difference between the concepts of the interests of justice and the interests of peace" and finds that "the latter falls within the mandate of institutions other than the Office of the Prosecutor."[772] The Prosecutor argued that the responsibility for peace remains with the Security Council, and that "the interests of justice provision should not be considered a conflict management tool requiring the Prosecutor assume the role of a mediator in political negotiations."[773]

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[766] Stahn, Carsten. *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*. 3 Journal of International Criminal Justice (2005) p. 718.
[767] Human Rights Watch, *Policy Paper: the Meaning of "the Interests of Justice" in Article 53 of the Rome Statute,* June 2005.
[768] Ibid. p. 7.
[769] Brubacher, Matthew. *The ICC investigation of the Lord's Resistance Army,* in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality*, Zed Books (2010) p. 263.
[770] Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, The Hague 14 Oct. 2005.
[771] IRIN News Kenya, *Uganda: ICC Could Suspend Northern Investigations- Spokesman*, 18 April 2005.
[772] OTP Policy Paper on the Interests of Justice, September 2007 at pp.1-2.
[773] Policy Paper on Preliminary Examinations, 4 Oct. 2010.

The OTP states that it does not conflate the "interests of victims "with the "interests of justice", but argues that the wording of Article 53(1)(c) implies that the interests of victims "will generally weigh in favor of prosecution." The notion that the interests of victims could favor a peace agreement or other mechanisms, such as a truth commission, is dismissed. The paper states that other justice mechanisms are to be considered relevant only as complementary, or in addressing the "impunity gap" (reverting to a Court-centric view as discussed in Chapter 2).

In taking this position, the OTP disregards a rich field of experience in terms of interacting with victims about their wishes, during negotiations and in the aftermath of a peaceful settlement. It raises the question what to do in situations where victims are opposed to an ICC intervention or support a peace agreement that proposes another justice arrangement. In some situations, the "do no harm" principle may mean that the interests of victims weigh against proceeding with prosecutions in cases where victims face additional violence or harm, including through prolonged conflict.[774] This should go beyond a mere "operational assessment" of protection obligations in relation to individual witnesses. In the situation on Afghanistan, the ICC gathered information of the impact of the conflict on women and girls as a step towards the do no harm principle.[775]

During the Juba Peace negotiations in 2007-2009, the Prosecutor maintained this harder line as described in the policy paper.[776] Court officials were sceptical that the talks would yield anything, and viewed it mainly as an attempt by the LRA to regroup and rearm.[777] The Prosecutor took a strong stance that the arrest warrants ought to be enforced in spite of the talks.[778] At the Nuremberg Conference in 2007, speaking in the historic courtroom where the Nazi leadership was tried, the Prosecutor said:

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[774] Carlos Nino describes in his book the end of the military dictatorship in Argentina: "Even though Alfonsin believed that punishment of the worst abuses were essential for the long-term consolidation of democracy, he was also fully aware that a miscalculation could jeopardize democracy …. Therefore, if he threatened democracy through trials and weighty sentences to discourage human rights violations, he might in fact be risking future violations." Nino, Carlos. *Radical Evil on Trial,* Yale University (1996). See also Varaki, Maria. *Revising the "Interests of Justice" Policy Paper*, JICL, Vol. 15 Issue 3, pp. 455-470.

[775] OTP Report on Preliminary Examination Activities 2016, para. 227.

[776] Seils, Paul. *The Impact of the ICC on Peace Negotiations*, Expert paper Workshop 7- The Impact of the International Criminal Court, Conference on Building a Future on Peace and Justice, Nuremberg 25-27 June 2007: "The arguments that are presented against the pursuit of justice may often present very stark moral and political dilemmas and no doubt this will continue for a log time to come: the first impact of the Rome Statute however is to change the parameters, and to a large extent the usefulness, of such discussions. This is for the simple reason that it states what the law is now. The time for rhetorical discussions and genuine philosophical debate may not be over, but it will often be beside the point if not conducted with a clear understanding of the implications of the new legal realities. The Rome Statute provides the legal framework in which the discussion about the pursuit for peace must be circumscribed."

[777] Brubacher, Matthew. *The ICC investigation of the Lord's Resistance Army*, in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality*, Zed Books (2010) p. 263.

[778] Interview with Michael Otim, 6 Feb. 2014.

> Arrest warrants are decisions taken by the judges in accordance with the law, they must be implemented … *If* States Parties do not actively support the Court, in this area as in others, then they are actively undermining it … It is the lack of enforcement of the Court's decisions which is the real threat to enduring Peace.[779]

Human Rights Watch shared this view: "Experience indicates that justice, rather than being an obstacle, is a precondition for meaningful peace."[780]. Likewise, the UN Secretary General said in 2009 that "Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives,"[781] and "the debate is no longer between peace and justice, but between peace and what kind of justice."[782] At the Review Conference in Kampala in 2010, the Chief Prosecutor stated: "Let me conclude on peace and justice … The Prosecutor and Judges cannot and will not take political considerations into account. This was a conscious decision, to force political actors to adjust to the new legal limits. We cannot both claim that we will "never again" let atrocities happen and continue to appease the criminals, conducting "business as usual.[783]

At the Review Conference, speakers at the Review Conference argued that peace and justice are fundamentally complementary, and that any conflict between them is virtually imagined.[784] Only one speaker took a much more cautious line, arguing that arrest warrants had hindered the successful conclusion of a peace agreement in Uganda, and that "The Ugandan people and the international community would have to live with the consequences of that decision."[785]

In 2012, when peace talks were just commencing in Colombia, the Prosecutor maintained this hard line when she said: "The international community has put in place some clear divisions of responsibility. The UN Security Council is in charge of

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[779] Address by Luis Moreno- Ocampo, Prosecutor of the International Criminal Court, 25 June 2007, International Conference "Building a future on Peace and Justice", Nuremberg. Own emphasis.
[780] Human Rights Watch Policy Paper: *The Meaning of "The Interests of Justice" in Article 53 of the Rome Statute,* June 2005.
[781] UN Secretary-General Report to the Security Council, *The rule of law and transitional justice in conflict and post-conflict societies,* 23 August 2004, UN Doc. S/2004/616.
[782] "Honouring Geneva Conventions, Secretary-General says debate is no longer between peace and justice but between peace and what kind of justice," SG/ SM/12494, Sept. 26,2009. http://www.un.org/News/Press/docs/2009/sgsm12494.doc.htm
[783] Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Review Conference General Debate. Statement, Kampala, 31 May 2010.
[784] The Prosecutor called for 4 pledges at the Review Conference, including public and diplomatic support to executing arrest warrants; severance of non-essential contacts with persons who are the object of an ICC arrest warrants; cutting off the supply networks of those persons; and providing concrete support for arrest operations.
[785] See remarks by Barney Afako, Moderator's Summary of Stocktaking of international criminal justice, Peace and Justice, RC/11 (2010) at para. 2.

peace and security. The ICC is doing justice."[786] In a press release in April 2013, the OTP again insisted on the role of the Rome Statute's legal framework in "underpinning durable solutions that provide for both peace and justice …"[787] She reiterated in the New York Times: "The debate about peace versus justice or peace over justice is a patently false choice. Peace and justice are two sides of the same coin. The road to peace should be seen as running via justice, and thus peace and justice can be pursued simultaneously."[788] Later on, during the peace negotiations in Colombia, the Prosecutor stated: "To preserve its impartiality, the Office cannot participate in peace initiatives, but it makes clear that any proposed solutions in peace talks have to be compatible with the Rome Statute. It will inform the political actors of its actions in advance, so they can factor the Court into their activities.[789]

The Prosecutor's position is controversial and comes close to *fiat justitia ruat caelum* (do justice lest the heavens fall).[790] The following sections will examine the desirability of this approach and impact of the position of the OTP on negotiations in Uganda and Colombia.

III. Peace Negotiations in the Shadow of the ICC

A. Uganda: Did the ICC Intervention Increase Awareness of Accountability?

Uganda had a bloodstained history, but criminal justice was not used to deal with political violence. After the overthrow of Idi Amin Dada in Uganda, many of his security officials were detained, but released and never tried.[791] In 1987, when Yoweri Museveni came to power he offered amnesty to all opposing forces who surrendered, excluding "heinous crimes" such as genocide, murder, kidnapping and

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[786] Bensouda, Fatou, Seminar Institute for Security Studies (ISS): Setting the record straight: the ICC's new Prosecutor responds to African concerns: Reconciling the independent role of the ICC Prosecutor with conflict resolution initiatives, Key note address Pretoria 10 Oct. 2102.
[787] Press Release, ICC Office of the Prosecutor concludes visit to Colombia, 19 April 2013.
[788] Bensouda, Fatou. New York Times Op Ed., *International Justice and Diplomacy*, 19 March 2013.
[789] Bensouda, Fatou, *Seminar Institute for Security Studies (ISS): Setting the record straight: the ICC's new Prosecutor responds to African concerns: Reconciling the independent role of the ICC Prosecutor with conflict resolution initiatives,* Key note address Pretoria 10 Oct. 2102.
[790] Priscilla Hayner argues that this approach should be revised on 3 grounds: (1) holding off on prosecutions may lead to better justice later, after a conclusion of a peace agreement; (2) the concept of "justice" should be understood more broadly than criminal prosecutions of a few perpetrators; and (3) ending war may be inherently in the interests of justice and in the interest of preventing further atrocities, irrespective of new justice initiatives included in a peace deal. Hayner, Priscilla. *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict.* Routledge (2018) pp. 105-106.
[791] See Barney Afako, Reconciliation and Justice: *Mato Oput and the Amnesty Act, Conciliation Resources* (2002) at http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php.

rape.[792] In the words of Barney Afako: "Ugandans have had to grapple with the meaning of justice in this context."[793]

Some scholars have suggested that the ICC was instrumental in shaping the accountability debate in Uganda.[794] But as in many societies facing prolonged conflict, discussions on striking a balance between accountability and reconciliation in resolving the LRA conflict predated ICC intervention.[795] With advent of the ICC, criminal accountability became a more a central consideration to these debates.

B. Did the ICC focus increased (humanitarian) attention on the conflict?

Some would argue that one of the most significant impact of the ICC in Northern Uganda was to bring renewed international attention, and with it, new resources, to those victimized by the conflict.[796] New actors did come forward to offer various forms of assistance. Some actors did get involved due to the ICC's presence,[797] but with others the connection was less direct. Several new US-based organizations, such as Invisible Children, were formed after the ICC investigation.[798] The Enough Project is focused on Africa including Northern Uganda.[799] Both organizations

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[792] Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p. 18.

[793] Afako, Barney. *Reconciliation and Justice: Mato Oput and the Amnesty Act, Conciliation Resources* (2002) at http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php p. 65.

[794] This is argued by Sarah Nouwen and Mark Kersten.

[795] Prior to the involvement of the ICC, there had been a lively debate in Uganda on traditional ceremonies amongst both conflict resolution specialists and also anthropologists. See Barney Afako, *Reconciliation and Justice: Mato Oput and the Amnesty Act*, Conciliation Resources (2002) at http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php. Sverker Finnstrom, *Living With Bad Surroundings: War and Existential Uncertainty in Acholiland in Northern Uganda.* Uppsala: Acta Universitatis Upsaliensis, Uppsala Studies in Cultural Anthropology no. 35, (2003), pp. 297-299. The conversation alternated between a focus on the need for a truth commission; traditional justice; and amnesties or reintegration of former combatants. These mechanisms provide for various *degrees* of accountability, albeit not criminal accountability.

[796] Allen, Tim. *War in Northern Uganda: An Assessment of the International Criminal Court's Intervention*, Special Report. London, UK: Crisis States Research Centre, (2005) 100 pp.

[797] See for instance Erin Baines, Eric Stover and Marieke Wierda. MacArthur Foundation, *War-Affected Children and Youth in Northern Uganda: An Assessment Report*, 1 May 2006. This report resulted in the establishment of a new fund in Northern Uganda, pursuant to ICC involvement.

[798] Invisible Children was founded in 2004, according to its website, when its founders encountered a boy named Jacob and promised him "we would do whatever we could to stop Joseph Kony and the LRA." Invisible Children "focuses exclusively on the LRA conflict through an integrated four-part model that addresses the problem in its entirety: immediate needs and long-term effects." www.invisiblechilden.com.

[799] The Enough Project was founded in 2006 by a small group of concerned policy makers, including Gayle Smith and John Prendergast. It is a project that "fights to end genocide and crimes against humanity, focused on areas where some of the world's worst atrocities occur. We get the facts on the ground use rigorous analysts to determine the most sustainable solutions, influence political leaders to adopt our proposals, and mobilize the American public to demand change." www.enoughproject.org

engaged in advocacy that sometime depicted the conflict in simplistic terms and presented the LRA as an isolated criminal "problem" that has to be resolved (not unlike the ICC's original narrative of the conflict). As Branch wrote, the ICC "reduced the deep internal political crisis of the Acholi to a simple division between the criminal LRA and innocent civilians."[800]

The increased focus of the international community on the conflict was also a result of other developments independent from the ICC's intervention, such as the publication of the report "*The Hidden War, The Forgotten People*",[801] or the visit of UN OCHA Chief Jan Egeland,[802]or the activism of the Canadian Ambassador to the UN, Alan Rock, who successfully lobbied to have the LRA conflict included in the Security Council agenda.[803] The additional spotlight on the LRA by the ICC and others did put more pressure on the Government of Uganda to seek solutions to the conflict.

C. Influence of the ICC on conduct of state actors

Some have credited the ICC for improved conduct on part of the Ugandan People's Defense Forces, in respect of its human rights record.[804] The former ICC Prosecutor himself claimed impact in this area: "one of the most interesting achievements of the Rome Statute's provisions is that armies around the world are adjusting their regulations to avoid the possibility of committing acts failing under ICC jurisdiction."[805] There is indeed some evidence of improvements of conduct within the UDPF. For instance, a Human Rights Desk was opened, and new rules were established for cordon and search operations in the context of the conflict in Karamajong.[806] A few cases of courts martial were pursued for rape committed in the Central African Republic.[807] The former Prosecutor said that the Ugandan troops left DRC immediately after its ratification of the Rome Statute, but evidence suggests

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[800]Branch, Adam. *Uganda's Civil War and the Politics of ICC Intervention.* 21 Ethics and International Affairs 179 (2007) 191.

[801] Liu Institute for Global Studies, *The Hidden War, the Forgotten People: War in Acholiland and its Ramifications for Peace and Security in Uganda*, 20 Oct. 2003.

[802] In November 2003, UN OCHA Chief Jan Egeland visited Northern Uganda for the first time and famously referred to the crisis in Northern Uganda as the world's "worst, forgotten crisis". Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda*, Working Paper No. 22, 12 Oct. 2012. Egeland, Jan. *A Billion Lives.* Simon & Shuster (March 2008) p. 201. See also http://reliefweb.int/report/uganda/war-northern-uganda-worlds-worst-forgotten-crisis-un. See http://www.irinnews.org/report/58646/uganda-interview-with-jan-egeland-un-under-secretary-general-for-humanitarian-affairs.

[803]See Letter dated 5 January 2006 from the Permanent Representative of Canada to the United Nations addressed to the President of the Security Council, 9 January 2006, UN Doc. S/2006/13.

[804] Justice and Reconciliation Project, *The Dog That Barks But Doesn't Bite: Victims' Perspectives on the International Criminal Court in Uganda*, Policy Brief No. 6 (February 2013) p. 5.

[805] Ocampo, Luis Moreno. *The International Criminal Court: Seeking Global Justice.* 40 Case Western Res. J. International Law (2007-2008) p. 217.

[806] Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda*, Working Paper No. 22 (Oct. 2012) pp,14-15.

[807]Ibid.

that this departure was pursuant to the Luanda Agreement between the Governments of Uganda and DRC.[808]

Other factors, such as pressure from the Uganda Human Rights Commission, also played a role in curbing the behavior of the UDPF. The ICRC conducted different trainings for the UPDF in recent years.[809] Improving the image of the UDPF is also a political priority for Museveni, in the aftermath of numerous corruption scandals.[810]

This is not to say all is now well with the UDPF, which has in recent years been implicated in killings of political opponents and demonstrators.[811] The UPDF remains the military branch of the NRA, and "is not so much pro-regime as it is integrated into the regime itself, each dependent on the other's well-being."[812] Museveni continues to deny that the UDPF was involved in abuses in DRC.[813] A UN Group of Experts in October 2012 accused Uganda of supporting the M23. The leader of the M23, Bosco Ntaganda, was already under arrest warrant by the ICC at the time.[814]

D. The ICC's Role in Empowering Victims in Peace Negotiations

A remarkable impact of the ICC is the enhanced role of victims in peace negotiations, in terms of enabling their voices to be heard. In Uganda, the original Agreement on Accountability and Reconciliation was informed by the many studies of victims' perspectives, which had taken place before June 2007. Once that Agreement was in place, both parties undertook further official consultations among affected communities on which mechanisms of accountability should be put in place, before concluding the Annexure to the Agreement. While it is not clear what role the results of these consultations played in formulating the annexure, certainly the process was an important measure, which in particular contributed to increasing the trust between communities in the North and the Government of Uganda.[815]

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[808] Ocampo, Luis Moreno. *The Office of the Chief Prosecutor: The Challenges of the Inaugural Years,* Gruber Distinguished Lecture in Global Justice, 2013.
[809] Interview with Joan Kagezi, 10 Feb. 2014.
[810] Interview with Mike Otim, 12 Feb. 2014. Years ago, the Judgment of the International Court of Justice condemning UPDF for its operations in Eastern Congo, including finding it responsible for killing, torture and inhumane treatment of Congolese civilians; training of child soldiers; and also looting, plundering and exploitation of Congolese natural resources. International Court of Justice, *Case Concerning Armed Activities on the Territory of Congo, DRC vs. Uganda*, Judgement 19 Dec. 2005 No. 2005/26.
[811] Human Rights Watch, No Justice for April 2011 Killings, 2013.
[812] Freeland, Valerie. *Rebranding the State: Uganda's Strategic Use of the International Criminal Court. Development and Change,* Institute of Social Studies, The Hague (2015) p. 307.
[813] Freeland, Valerie. *Rebranding the State: Uganda's Strategic Use of the International Criminal Court.* Development and Change, Institute of Social Studies, The Hague (2015) p. 299.
[814] Al-Jazeera International, *UN Accuses Rwanda of Leading DR Congo rebels,* 17 Oct. 2012.
[815] The fact that the Minister of Internal Affairs, Rugunda, who had headed the Government delegation at Juba participated personally was particularly important. See Michael Otim and Marieke

This is mirrored in Colombia, where perhaps the single biggest triumph of the peace process as the empowerment of victim organizations. The Ministry of Justice and the Congress both organized victims' consultations. [816] In the Havana peace talks, the United Nations helped to organize groups of victims to attend the talks and represent their experiences and views. Different groups of up to sixty victims travelled to Havana to participate in the process.[817] Directly hearing victims as part of the process is a significant step forward in the practice of conducting peace negotiations. Commentators suggest that the debate around international law and legal trainings on the Rome Statute have served to strengthen victim organizations, who then rallied around the Justice and Peace Law which they viewed as an instrument of impunity. [818] Victim groups and lawyers have seized on the language of victims rights,[819] and the definition of crimes against humanity to analyze their situation and to send communications to the ICC.[820] In the opinion of knowledgeable commentators, the ICC strengthened the position of the victims in Colombia.[821]

E. The ICC as an Incentive to Negotiate?

The argument is sometimes made that the ICC incentivized negotiations in Northern Uganda by luring the LRA to the negotiating table. But the evidence on this remains inconclusive, as it is very difficult to demonstrate causality.

When the ICC opened its investigation in 2004, peace negotiations in Northern Uganda were at a virtual standstill. Betty Bigombe, the chief negotiator, declared that she would resign if the ICC were to issue arrest warrants against the LRA leadership.[822] The talks in 2004 initially led to a cease-fire, but broke down when the senior commander involved in the negotiations, Sam Kilo, himself defected in early 2005.[823] By the time the ICC unsealed its arrest warrants against senior LRA leaders in October 2005, Bigombe's further attempts had wilted. By October 2005, the LRA had mostly moved to Garamba National Park in Eastern Congo, and was less

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Wierda, *Justice at Juba: International Obligations and Local Demands in Northern Uganda, in Courting Conflict? Justice, Peace and the ICC in Africa*, Royal African Society, March 2008.

[816] Interview with Member of Congress, Bogota, 14 May 2014.

[817] See BBC, Colombia's victims join FARC peace talks in Cuba, 17 August 2014, http://www.bbc.com/news/world-latin-america-28822683

[818] See remarks of Mr. Reinaldo Villalba of the Jose Alvaer Restrepo Lawyer's Collective in the Report of the expert conference, In *the Shadow of the ICC: Colombia and International Criminal Justice*, Convened by the Human Rights Consortium, the Institute of Commonwealth Studies and the Institute for the Study of the Americas at the School of Advanced Study, University of London, 26-27 May 2011 p. 36.

[819] See remarks of Ms. Catalina Diaz, Ibid. p. 37.

[820] See remarks of Mr. Reinaldo Villalba of the Jose Alvaer Restrepo Lawyer's Collective, Ibid. p. 36.

[821] Interview with Member of Congress, Bogota, 14 May 2014.

[822] See ICTJ and UC Berkeley's Human Rights Center, Forgotten Voices (2005) p. 18.

[823] Hovil, Lucy and Joanna Quinn, *Peace First, Justice Later: Traditional Justice in Northern Uganda*, Refugee Law Project Working Paper No. 17, July 2005 p. 3.

likely to carry out retaliatory actions.[824] While there were allegations that the ICC arrest warrants contributed to several LRA attacks on foreigners in the weeks after they were unsealed, these rumours were never substantiated.[825] Although the initiating of an investigation and the unsealing of arrest warrants provoked much debate and controversy, initially there was no direct negative impact.

In August 2006, the Government of Uganda and the LRA announced a new ceasefire and the initiation of new peace talks to be mediated by Riekh Machar, the Vice-President of South Sudan. Agenda item number 3 of the talks was devoted to "accountability and reconciliation." The peace talks quickly became the most serious attempt to resolve the conflict to date.[826] However, fearing possible arrest, senior military leaders of the LRA could not come to Juba to negotiate in person. [827] Instead, they were represented by a delegation composed of mainly diaspora Acholi, who often brought their own political agendas. A number of meetings between the LRA, the Ugandan government delegation and the mediator were arranged in remote locations near Marimba, to build some trust, but this limited contact was clearly insufficient. As remarked by Barney Afako: "it is not a crime to talk."

The talks raised questions whether countries could support the talks and whether senior negotiators could have contact with subjects of ICC arrest warrants.[828] But these did not hinder the talks. These are all questions on how ICC should co-exist with on-going negotiations.[829] However, the Prosecutor argued that the ICC arrest warrants brought the LRA to the negotiating table: "The loss of their safe haven led the LRA commanders to engage in negotiations, resulting in a cessation of hostilities agreement in August 2006."[830] This assertion was adopted by scholars such as Schabas, who wrote "it is widely acknowledged that the threat of prosecution by the International Criminal Court helped to bring the Lord's Resistance Army to the

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[824] Brubacher, Matthew. *The ICC investigation of the Lord's Resistance Army*, in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality,* Zed Books (2010) p. 274.
[825] The author was in Uganda in October 2005 when these attacks took place and notified officials of the ICC that there was a perception that these attacks were linked to the ICC. For instance, Finnstrom alleged this in his book at p. 200. The ICC itself subsequently investigated this but was unable to detect such a link.
[826] Grono, Nick and Adam O'Brien, *Justice in Conflict? The ICC and Peace Processes, In Courting Conflict: Justice, Peace and the ICC in Africa*, Ed. Nicholas Waddell and Phil Clark, Royal African Society, 2008 p. 16.
[827] Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p.37.
[828] United Nations Guidance for Effective Mediation, Sept. 2012.
[829] Tim Allen observed in the context of Juba: "The Juba process made clear that the representatives of states that are signatories of the Rome Statute, conciliation organizations, NGOs and UN agencies have not resolved the question of how to adequately support negotiations within the ICC framework. The Juba talks were the first attempt to do so. They failed. But the ICC framework is not going to go away. Hopefully some lessons have been learned." Tim Allen, Frederick Laker, Holly Porter, and Mareike Schomerus, *Postscript: A Kind of Peace and an Exported War,* in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality,* Zed Books (2010) p. 288
[830] Chief Prosecutor's Address to the Assembly of State Parties, 23 November 2006.

negotiating table", citing the Ugandan Ministry for Security, Amana Mbabazi, and Jan Egeland.[831]

In fact, there is no evidence that the LRA had reason to believe that they would be arrested in Sudan, and that this is what prompted their move to Garamba. In fact, the only serious (but failed) attempt to arrest the LRA was in fact by MONUSCO in Garamba, in January 2006. Barney Afako, legal advisor to the mediator of the Juba talks remembers talking to Vincent Otti in late 2005, after the arrest warrants were issued. Afako urged Otti to consider negotiations, but Otti said the LRA preferred to wait for the presidential elections, to see if Kizza Besigje, their preferred candidate, would win. According to Afako, the LRA leaders were "not panicked by the arrest warrants."[832]

A more likely factor in driving the LRA to the negotiating table was the changed situation in Sudan after the Comprehensive Peace Agreement between North and South Sudan.[833] After the CPA was concluded, the LRA was in a difficult position in South Sudan, as they suddenly found themselves in enemy territory and cut off from their supplies. Whether the Sudanese government in Khartoum continued to support them is a disputed matter.[834] The LRA was militarily weakened and the opportunity to negotiate gave it a new "lease on life."[835]The factors that drove the LRA to the negotiating table included the constant military pressure on the LRA exerted by the UPDF and fatigue of fighting; practical difficulties in continuing the war in Uganda from Garamba; defections resulting from the Amnesty Act;[836] and a general reassessment of strategic options (including creating space to rearm and go

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[831] Schabas, William, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals*, Oxford University Press (2012) at p. 194.
[832] Interview with Barney Afako, Barcelona, March 2014.
[833] While the ICC has sometimes taken credit for creating a rift between Khartoum and the LRA through concluding an Agreement with the Government of Sudan to arrest the LRA in October 2005, it is clear that the distancing by the Government of Sudan of the LRA began already with the Nairobi Agreement between Sudan and Uganda in 1999, and was a gradual process. Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda,* Working Paper No. 22 (12 Oct. 2012) at p. 17. See also Ledio Cakaj, *The Lord's Resistance Army of Today*, Enough (November 2010) on the loss of the support of the Sudanese Armed Forces for the LRA.
[834] Louise Mallinder writes that: "It seems unlikely that a government willing to engage in such horrendous acts of violence against its own population will change its policies solely on the basis of international arrest warrants issued against nationals of another state." Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p. 36. But witnesses say that the SPLA gave them three alternatives: (1) conduct peace talks, facilitated by South Sudan; (2) leave South Sudan voluntarily; or (3) risk military action against them by the SPLA. Interview with Michael Otim, 12 February 2014.
[835] Interview with Michael Otim, 12 February 2014.
[836] Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda,* Working Paper No. 22 (12 Oct. 2012).

back to war if need be). [837] While the ICC arrest warrants may have contributed to some further isolation of the LRA, the effect is more accurately described as that "the ICC reinforced an already existing tendency" and ought not to be exaggerated.[838]

As soon as the talks got underway, a vigorous debate began on what should be the consequence of the pending arrest warrants. On 11 May, 2007, the OHCHR issued a statement in the margins of the Juba Peace Talks to remind the parties "discussions concerning those persons should be focusing on the terms and circumstances of their surrender so they can go and address the charges against them before the ICC." The mediator issued a response under the title "ignoring complementarity", arguing that under the Rome Statute Uganda was entitled to explore its own approaches to accountability for the LRA. Human Rights Watch argued that the average sentence of the ICTY for comparable crimes was 17 years, and that Juba should specify similar proportional sentencing.[839] As a practical matter, insisting on sentences of this nature would have made any agreement impossible.

F. The ICC as an Obstacle to Negotiations?

In a curious way the Juba process was simultaneously a failure and a success.[840] Juba was a success because it brought relative calm to Northern Uganda, as the conflict moved elsewhere, and it continues to provide the legal framework according to which the Government is implementing transitional justice to this day. But it can also be considered a failure, because the LRA did not sign the Final Peace Agreement, nor did it demobilize. In fact it has continued to wage attacks outside of Uganda.[841] But the assumption that the ICC led to a breakdown of the Juba Peace Talks is difficult to prove in terms of causality.

The ICC took the view that the talks eventually broke down on grounds other than the arrest warrants.[842] Advocates of the ICC always refer to the fact that all prior

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[837] Grono, Nick and Adam O'Brien, *Justice in Conflict? The ICC and Peace Processes,* In *Courting Conflict: Justice, Peace and the ICC in Africa*, Ed. Nicholas Waddell and Phil Clark, Royal African Society (2008) at p. 16.

[838] Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda*, Working Paper No. 22 (12 Oct. 2012) p. 18.

[839] Human Rights Watch, *The June 29 Agreement on Accountability and Reconciliation and the Need for Adequate Penalties for the Most Serious Crimes*, July 2007,

[840] Michael Otim and Marieke Wierda, *Uganda: Impact of the Rome Statute and the International Criminal Court,* ICTJ Briefing for the Rome Statute Review Conference, May 2010.

[841] In recent years there is some evidence that eventually the LRA may seek to return to Uganda: Cakaj, Ledio. *The Lord's Resistance Army of Today,* Enough (November 2010) p. 20.

[842] In the words of the Prosecutor herself: "The role of the ICC has never precluded or put an end to such processes. Rather, I would say, it has proved a spur to action … As the example of Joseph Kony shows, there can be obvious perverse side effects from deferring judicial proceedings in the name of peace and security. Succumbing to pressure to restrain justice may send out a message to perpetrators that arrest warrants can be stayed if only they commit more crimes or threaten regional peace and security… Bensouda, Fatou, *Setting the record straight: the ICC's new Prosecutor responds to*

attempts to negotiate peace with Joseph Kony over the years also failed.[843] However, a Catholic priest who served for decades in the conflict-affected area, Father Carlos Rodriguez, said: "nobody can convince a rebel leader to come to the negotiating table and at the same time tell him that when the war ends he will be brought to trial."[844] Joseph Kony himself, in a rare interview with German journalist Mareike Schomerus, said the following:

> I read in the paper like this. LRA leadership, Joseph Kony is wanted by the International Criminal Case. That one, as I see, I am not bad and I am not guilty. I did not. I have not done what Museveni is accusing me of … And that accusation was sent by Museveni to [The Hague]. […] we know very well that Museveni is the one who did that to block us or to spoil or name… […].[845]

Later in the same interview, Kony says rather ominously: "So if they want peace, they will take that case from us. But if they do not want peace, then they will continue with it."[846]

As with any peace talks, personalities also played a very important role. The statements of President Museveni were inconsistent, veering between willingness to grant amnesty to the LRA or guaranteeing that he would not hand over the LRA to expressing scepticism about the talks and continuing to promote a military solution.[847] Vincent Otti in particular showed significant interest in the talks, and seemed to be considering returning to Uganda, but was later killed.[848]

Close observers say that it is not accurate that at the last minute, Joseph Kony chose not to sign due to the existence of the ICC arrest warrants.[849] Mike Otim, a prominent civil society activist and first-hand observer of the talks who met with Kony, Otti and other LRA leaders in Garamba nine times during the peace process,

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African concerns: Reconciling the independent role of the ICC Prosecutor with conflict resolution initiatives, Key note address Seminar Institute for Security Studies (ISS), Pretoria (10 Oct. 2102).

[843] Interview with ICC outreach officer, 6 February 2014.

[844] Lanz, David. *The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace versus Justice*, The Fletcher School of Law and Diplomacy (May 2007) p. 1. See also Barney Afako's remarks at the Review Conference: Moderator's Summary of Stocktaking of international criminal justice, Peace and Justice, RC/11 (2011) at para. 2.

[845] Schomerus, Mareike. "*A terrorist is not a person like me": an interview with Joseph Kony*, in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality,* Zed Books (2010) p. 127.

[846] Ibid. p. 128.

[847] McGreal, Chris. *Museveni Refuses to Hand Over Rebel Leaders to a War Crimes Court,* The Guardian, 13 March 2008. Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda,* Working Paper No. 22 (12 Oct. 2012) p. 18.

[848] The author has worked closely with and co-authored several reports with Michael Otim, a prominent civil society leaders who met the LRA leadership up to 9 times over the course of the Juba Peace Process.

[849] For further analysis on this issue, see Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016), pp. 105-108.

describes how in the early meetings, senior LRA leaders engaged with the talks. During Otim's first meeting with the LRA leadership in Garamba in August 2006, most of the LRA had assembled and the senior leadership was present. By the time of the second meeting, in October 2006, it took Kony three days to show up and seemed "less interested'. Other commanders such as Okot Odhiambo were not present and said to be "on mission." In September 2006, legal experts including Barney Afako had travelled to Garamba to explain in more detail the implications of the ICC warrants, and to explain that full amnesty would not be available.[850] Otim observed how Kony engaged less and less with the talks. For instance, when Riekh Machar travelled to Garamba in November 2008, Kony did not show up at all.[851] Kony had a history of reaching out if he was under military pressure, and disappearing when his position is stronger. After failed talks in 1994, he went years without any contact with intermediaries. Since the breakdown of the Juba Peace talks, traditional and religious leaders say they have not heard from Joseph Kony.[852]

Otim also described how external actors increasingly drove the talks and donors, some of whom were invested significantly both financially and politically, including in particular the US. The US also continued to support a military solution through a tripartite agreement with DRC, Rwanda and Tanzania to hunt down the LRA and to rid the region of "negative forces." Local civil society, religious and traditional leaders were cajoled to act as an interface with the LRA and were afraid to sound sceptical, because they were afraid of being labelled as LRA collaborators.

In aggregate, it is most likely that a variety of factors put strain on the talks and caused their disintegration. The two-and-a-half years of negotiation were fraught and suffered numerous challenges and setbacks. Cessations of Hostility Agreements were breached, and deadlines to assemble not respected. The talks also got mired in financial controversies. A rift developed between members of the delegation representing the LRA, and the military leadership in the bush.[853] The head of the delegation changed from Martin Ojul to David Matsanga to James Obita. These differences caused significant tensions within the LRA and led to the murder of Vincent Otti in early October 2007, which in itself was a significant setback.

What is more clear is that ICC's warrants were a complicating factor, considering that one of the key demands of the LRA, the lifting of arrest warrants, could not be met. Until the second failed singing ceremony in November 2008, there were intensive efforts to clarify with the LRA leadership what was being proposed in Agreement No. 3, particularly regarding the relationship between the proposed Special Division and traditional justice.[854] In final meetings between Joseph Kony and religious and traditional leaders in November 2008, it was clear to observers

[850] See http://www.wikileaks.org/plusd/cables/06KHARTOUM2701_a.html.
[851] Interview with Mike Otim 12 February 2014.
[852] Interview with religious leader, Gulu, 8 Feb. 2014.
[853] Interview with religious leader, Gulu, 9 Feb. 2014.
[854] Report of the Workshop on Accountability and Reconciliation in Uganda held in the Fairway Hotel on 6-7 May 2008.

that the LRA senior leadership did not trust the process, and that they were not inclined to surrender.[855]

What was in Kony's mind during those final weeks is impossible to fathom, although mistrust he felt was unlikely solely due to insistence on criminal accountability. It is more likely that he was ultimately unwilling to take the leap of faith to entrust his security to the Government of Uganda due to a fear of being double-crossed or killed.[856] In May 2008, Kony expressed anxiety that the government delegation might be accompanied by snipers, tasked to kill him. During the final meeting with religious and traditional leaders, Otim says it was clear that Kony was aware that new military operations were being prepared against them. [857] Kony said that he wanted peace but that the circumstances were "very tricky."[858] He said he could hide in Garamba without being found for 100 years if he had to. He thanked the religious and traditional leaders for their work and said he would call them when the time was right.

III. Impact of the Rome Statute on the Content of Peace Agreements

A. Uganda: The Rome Statute's Impact on the Juba Peace Agreement

Initially there was a large gap in the negotiations between the Government of Uganda, which wanted simply to give the LRA a "soft landing" to reintegrate them back into Ugandan society, and the LRA, which held out vain hopes that they would be welcomed back to Uganda as "freedom fighters". The delegation increasingly articulated political demands entailing the recognition of the root causes of the conflict, and the need for all sides to accept their responsibility through various mechanisms. In the course of the negotiations, the LRA vehemently and repeatedly demanded that the arrest warrants be withdrawn. The Government of Uganda on the other hand publicly stated on several occasions that it would approach the ICC or the Security Council to have the arrest warrants halted if and when the LRA signed the final agreement.

The discussions on what incentives or benefits offered to the LRA leadership were not held in public, and are not reflected in the text of the Agreement.[859] A number of

[855] Interview with Mike Otim, 12 February 2014.
[856] Cakaj, Ledio. *The Lord's Resistance Army of Today*, Enough (November 2010). This report states: "Kony apparently fears being killed or poisoned by the Ugandan government if he decides to come out peacefully …. One of Kony's wives captured in July 2010 said that Kony thinks the ICC indictments are the biggest stumbling block to peace although he apparently also fears he will hang if he agrees to go to The Hague. Even though Kony was briefed on the ICC indictments during the two years of negotiations as part of the Juba Talks, he appears not to understand some of the basic functions of the ICC (p.11)" The same report alleges that Ongwen claimed that the Juba Talks offered insufficient incentives to the LRA (p. 13)
[857] Interview with Mike Otim, 12 February 2014.
[858] Ibid.
[859] Ibid.

informal, off-the-record discussions took place with the LRA leadership during the course of the negotiations, to explain to them the nature and consequences of the ICC arrest warrants and to present options for a way forward, while clarifying that neither the war-affected population nor the international community would accept impunity. As the talks approached the negotiations on Agenda Item 3, on "accountability and reconciliation", a daylong workshop was held at Juba on 1 June 2007,[860] to discuss current trends in transitional justice around the world,[861] and the consequences of the Rome Statute.[862]

The provisions of the Agreement on Accountability and Reconciliation that emerged are clearly influenced by the Rome Statute as well as other international human rights conventions. The agreement seeks to balance two essential notions: justice and the "restoration of broken relationships".[863] The Annexure set out the mechanisms that will form part of an "overarching justice framework", and the ways in which they relate to each other.[864] Multiple mechanisms were deemed necessary, including formal justice, traditional justice, truth seeking, reparations, and the Amnesty and Ugandan Human Rights Commissions. A cornerstone of the Agreement is found in Art. 4.1, which states:

> Formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict. Provided that, state actors shall be subjected to existing criminal justice processes and not to special justice processes under this agreement.

The Annexure further specifies "a Special Division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict." The establishment of this mechanism opened the door to challenging the admissibility of the ICC proceedings.[865] In particular, the Agreement also referred to a "regime of alternative penalties," that was not specified further.[866]

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[860] The workshop prepared the ground for the eventual written agreement and addressed a number of topics including (1) traditional justice in Acholi and other northern areas; (2) international standards and practices relating to transitional justice; and (3) the Ugandan constitution, the Ugandan legal system and national institutions such as the Amnesty Commission and the Ugandan Human Rights Commission. All of these topics would eventually be reflected in the Agreement itself.

[861] The discussion also concluded that the most relevant provisions of the Rome Statute for current purposes were Articles 17-19, which set out the complementarity framework, rather than Articles 53 or 16, both of which had been a part of the discussions prior to Juba. Participants discussed the fact that criminal proceedings were most likely to meet the complementarity threshold, including the need for an investigation for the same conduct charged in the ICC arrest warrants.

[862] Participants considered the Colombian Justice and Peace Law (2005) on how to combine various transitional justice approaches and on its practice of reduced sentences.

[863] The Agreement on Accountability and Reconciliation defines reconciliation as the "process of restoring broken relationships and re-establishing harmony." (hereafter: Agreement) (see Definitions).

[864] Agreement, s. 5.2.

[865] The Agreement refers to various due process rights of the accused, also protected by Uganda's constitution, including the right to a "fair, speedy and public hearing before an independent and

The impact of the Rome Statute can also be seen in the definition of victims specified in the Agreement[867] The Agreement on Implementation and Monitoring Mechanisms contained several additional provisions relating to the ICC. The Government also undertook to "give the ICC a comprehensive report on the Juba Peace Process, the Agreements between the Parties, and the progress on the implementation of the Agreement on Accountability and Reconciliation."[868]

The Agreement was generally considered to meet international law standards by the United Nations (both the OHCHR[869] and the Office of Legal Affairs).[870] But international NGOs and the ICC OTP remained sceptical. On 20 February, 2008, Amnesty International stated that "it is not acceptable for the Ugandan government and the LRA to make a deal that circumvents international law,"[871] and that Uganda would still need to hand senior LRA leaders over to the ICC. Similarly, the International Federation for Human Rights (FIDH) said: "Uganda is . . . under an absolute obligation to co-operate with the ICC and to hand over the LRA leaders."[872] These statements neglected both Article of the Rome Statute, which allows for challenges to admissibility even after arrest warrants are brought.[873]

The "transformative effect" of the ICC can most clearly be seen in the fact that the Juba Agreement is unique in giving a central place to individual responsibility for the crimes that were committed in the conflict, in contrast to other peace

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impartial court or tribunal established by law",[865] the right to legal representation (Agreement s. 3.7-3.8.) and the right to finality of the proceedings and protection from double jeopardy (Agreement s. 3.9-3.10).

[866] Agreement, s. 4.7.

[867] The Agreement gives a definition of victims which constituted an elaborated version of the definition of victims found in Rule 85 of the Rules of Procedure and Evidence of the Rome Statute : victims are "persons who have individually or collectively suffered harm; including physical or psychological injury, emotional suffering or economic loss, as a consequence of crimes and human rights violations committed during the conflict." Agreement, s. 6.1.

[868] Agreement on Implementation and Monitoring Mechanisms, section 38. For discussion of the impact of the ICC on the Juba Peace process, see Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016) pp.98-100.

[869] The author had some discussions with OHCHR in the aftermath of the Agreement in which they confirmed that they basically considered it acceptable.

[870] The continued participation of the UN Envoy, Joaqim Chissano, is an indication that the UN found the Agreement to meet its standards.

[871] See http://www.amnesty.org.uk/news_details.asp?NewsID=17665. The OHCHR did in fact have an extensive indirect engagement with the talks and prepared a number of other position papers on detailed proposals for the Juba Agreement.

[872] See http://www.fidh.org/spip.php?article5256.

[873] Art. 95 of the Rome Statute states: "Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19."

agreements in the region.[874] But the wording of the Agreement remains ambiguous on key aspects, most notably on the issue of punishment. Options discussed in secret included house arrests or the possibility of a presidential pardon.[875]

B. The Rome Statute's Impact of the Rome Statute on the Justice and Peace Law in Colombia

In 2003, immediately after he took office, President Uribe introduced an agreement with the majority of Colombia's right-wing paramilitaries, the AUC (*Autodefensas Unidas de Colombia*), agreeing to a cessation of hostilities and gradual demobilization plan.[876] Due to the ratification by Colombia of the ICC, offering the paramilitaries a complete amnesty was no longer deemed possible. A prominent paramilitary leader, one of the Castano brothers, retired the day before the ICC entered into force.[877] His brother later said in an interview that he had quit in order to protect himself from ICC liability.[878]

The impact of the ICC on the Justice and Peace process was clear. In March 2005, the Office of the Prosecutor sent a public letter to the Colombian Government to say that the OTP is "monitoring" the situation, and that the proposed Justice and Peace Law should comply with the requirements of peace, justice and reparations. [879] The letter sent by the Prosecutor was debated in Colombia's Congress.[880] The Justice and Peace Law was passed on 22 July 2005 but was immediately challenged by human rights organizations and victim organizations.[881] The revised Justice and Peace Law offered reduced sentences of 5-8 years to Colombia's paramilitaries, under certain conditions.

The ICC was specifically mentioned during parliamentary debates on the Justice and Peace Law.[882] Secret recordings between the government and the AUC were leaked to the press in which the High Commissioner for Peace is heard to say: "The government has proposed a draft law that will block the action of the International

[874] See for instance the 1999 Lome Agreement in Sierra Leone, which provided for a Truth and Reconciliation Commission, and the 2003 Comprehensive Peace Agreement in Liberia, which contained a similar provision.
[875] Interview with Mike Otim, 14 February 2014.
[876] Some say that President Uribe was inspired by a visit to Northern Ireland in proposing the law.
[877] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 19.
[878] Revista Semana. *Habla Vicente Castano*, June 5, 2005.
[879] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 21.
[880] Interview with Member of Congress, Bogota, 14 May 2014.
[881] Saffon, Maria Paula and Rodrigo Uprimny. *Uses and Abuses of Transitional Justice in Colombia.* PRIO Policy Brief 6, (2007).
[882] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 19.

Criminal Court."[883] Others too have said that in their contacts with paramilitary leaders, the desire to escape ICC indictment and trial was one of motivating factors for paramilitaries to agree to the Justice and Peace law (other factors being the desire to avoid extradition to the United States the reduced sentences proposed).[884]

Under his "Democratic Security Policy", President Uribe inclined towards lenience for the paramilitaries. He first introduced a bill on alternative sentencing entitled *Ley de Alternatividad Penal*. The law proposed legal pardons for all armed actors who accepted to demobilize, based on the reasoning that punishment could be an obstacle to reconciliation.[885] Paramilitaries would also continue to have access to their considerable wealth.[886] The law was opposed by Members of Parliament, NGOs, victim organizations and external actors,[887] who perceived it as an attempt by the paramilitaries and their sponsors to escape any form of punishment, thus promoting impunity while disregarding the rights of victims.[888] On the other hand, the position of human rights organizations and victim organizations was marked by "the maximalist right-based approach … according to which victims' rights should be protected without any constraint- the political need of achieving peace notwithstanding."[889]

Criticism of this law prompted the Government to draft a new law in April 2004 on "Justice, Truth and Reconciliation." Eventually this law became known as the "Justice and Peace Law" (Law 975).[890] "

The law was intended to "white-wash" the paramilitaries, particularly since they were allowed to retain most of their assets which they could access after serving short prison terms. For these reasons, the Justice and Peace Law was criticized as a

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[883] Reed-Hurtado, Michael and Amanda Lyons, *Colombia: Impact of the Rome Statute and the International Criminal Court*, May 2010, paper presented to the Rome Statute Review Conference in June 2010, Kampala, citing Semana, *Revelaciones Explosivas*, Sept. 24, 2004.
[884] See remarks of Professor Eduardo Pizarro in the Report of the expert conference, "*In the Shadow of the ICC: Colombia and International Criminal Justice*", Convened by the Human Rights Consortium, the Institute of Commonwealth Studies and the Institute for the Study of the Americas at the School of Advanced Study, University of London (26-27 May 2011) p. 28.
[885] Saffon, Maria Paula and Rodrigo Uprimny. *Uses and Abuses of Transitional Justice Discourse in Colombia*. PRIO Policy Brief 6 (2007).
[886] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 20.
[887]Ibid.
[888]Ibid. See also victim comments at the Consultations conducted by the Ministry of Justice in Bogota on 8-9 November, at which the High Commissioner for Peace, Sergio Jaramillo, commented that the Justice and Peace law was intended to think of offenders whereas a new law would take into account offenders as well as victims.
[889]Saffon, Maria Paula and Rodrigo Uprimny. *Uses and Abuses of Transitional Justice Discourse in Colombia*. PRIO Policy Brief 6 (2007).
[890] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 20.

"more subtle and disguised form of impunity."[891] In 2005, Uribe's administration explained its formula for the paramilitary negotiations: "As much justice as possible, as much impunity as necessary[892]." An original reference in Art. 71, that defined membership in an illegal armed group as the political crime of "sedition" in the Justice and Peace Law and which would have prohibited extradition or transfer to the ICC, was deleted.[893] The law recognized the need to find a balance between peace and justice by more explicitly recognizing victims' rights, and by imposing reduced sentences of 5-8 years under certain preconditions.[894]

A challenge to the law posed by victim groups yielded Constitutional Court Decision C-370 of 2006, which revised the Justice and Peace Law in significant ways. In its decision, the Court recognized that the need to achieve a lasting and stable peace would involve "certain restrictions in terms of the objective value of justice and the correlative rights of the victims to justice" but that "peace does not justify everything."[895] It also held that the Justice and Peace law had to respect victims' rights to truth, justice and reparations.[896]

Commentators agree that the Rome Statute contributed to a legal context in which accountability standards were critically re-examined,[897] and the law was "firmed up" to include minimum prison sentences. However, some of the ruling's practical

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[891]Saffon, Maria Paula and Rodrigo Uprimny. *Uses and Abuses of Transitional Justice Discourse in Colombia*. PRIO Policy Brief 6 (2007).

[892] Reed-Hurtado, Michael and Amanda Lyons, *Colombia: Impact of the Rome Statute and the International Criminal Court*, May 2010, paper presented to the Rome Statute Review Conference in June 2010, Kampala, citing El Tiempo, *El as bajo da manga de los Uribistas*, 13 Feb. 2005.

[893] Reed-Hurtado, Michael and Amanda Lyons, *Colombia: Impact of the Rome Statute and the International Criminal Court*, May 2010, paper presented to the Rome Statute Review Conference in June 2010, Kampala, FN 24.

[894]Saffon, Maria Paula and Rodrigo Uprimny. *Uses and Abuses of Transitional Justice Discourse in Colombia*. PRIO Policy Brief 6 (2007).

[895] Constitucional Claim Decision C-370 de 2006, s. 5.4. The Court therefore decided that the alternative sentence should only be available if (1) the offender does not repeat any criminal offense; (2) the offender declares "freely and voluntarily" the facts related to all crimes committed as a member of the illegal armed group, without any "omission or concealment of crimes;" (3) the victims rights to participate in various stages of the investigation, prosecution and punishment of the victims is guaranteed; (4) the sentence is served in a regular prison, subsequent to sentencing by a judge, rather than in a "zone of concentration"; (5) the offender contributes to reparations for the victim through contributing their assets, whether obtained legally or illegally. If all these conditions were met, the Court stated that the ordinary applicable punishment for crimes could be reduced to a sentence of 5-8 years. The Court also ruled that membership in an illegal armed group could not be considered the political crime of sedition.

[896] The decision that membership of a paramilitary group could not be considered "sedition" also meant that the government's promise of amnesty to some 18,000 paramilitaries not included in the JPL could not be realized. They therefore continued in a state of "legal limbo." Subsequently, the government attempted to apply the "principle of opportunity" to this class of paramilitaries, but this too was ruled unconstitutional by the Constitutional Court in Decision 936/2010, which held that this application violates the principle of legality. Finally the Government passed Law 1424, which suspends arrest warrants and enforcement of sanctions of those paramilitaries: this was held constitutional in Decision 771/2011.

[897] Interview with Member of Congress, Bogota, 14 May 2014.

effects were repealed by Government regulations, which held *inter alia* that the Court's decision was not retroactive,.[898] However, revisions to Law 975 caused backlash, much of it entirely unrelated to the ICC. Senior paramilitaries perceived prison terms as a breach of the pact that they had made with the Government, and started to reveal their links with senior politicians. Some commentators therefore link the "hardening" of the JPL, in which the ICC was a factor, to the perceived breach of the pact between paramilitaries and the Government.[899] However, the JPL law was probably a necessary precursor for the Legal Framework for Peace described below and the Havana peace process. Many argue that it set a new standard for justice, one that also should apply to the FARC.[900]

C. The Rome Statute's Impact on the Peace Process with the FARC

In 2012, President Santos said that the "stars have aligned" to allow for negotiations to end Colombia's longstanding conflict with the FARC.[901] The first of these "stars" was the altered position of the Santos government itself, which recognized the conflict with the FARC as an internal conflict that needs to be resolved through negotiations, thus treating the FARC as a political actor rather than a criminal organization. The second "star" was a "softening of the ground" among victims through the passage of the Victims Law (1446) to meet some of the basic needs of victims. Thirdly, the regional context has changed to favor a peace negotiation, with the death of Hugo Chavez in Venezuela, and decreasing regional support for the FARC. The fourth star was the legal context, as laid out in the Legal Framework for Peace. The fifth was the peace process in Havana, which sought to end the conflict and to commence peace-building and national reconstruction, in a situation where Colombia was experiencing considerable economic growth.[902]

A controversial factor in the peace process is that there was no ceasefire, and violence continues to be perpetrated periodically by both sides. The Havana talks were "talks within the conflict," something which the Central Democratic Party had said would not work.[903] In general, the population in Colombia opposed impunity for the FARC. The Vice-Presidential candidate in the 2014 election stressed that any peace agreement that is seen to guarantee impunity would not be sustainable.[904] In

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[898] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 25.
[899] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011).
[900] Interview with Carlos Holmes Trojillo, Vice-Presidential Candidate, Bogota, 17 May 2014.
[901] Speech given by the High Commissioner for Peace, Sergio Jaramillo, at Externado University on 9 May 2013, published in El Tiempo.
[902] Ibid.
[903] Interview with Carlos Holmes Trojillo, Vice-Presidential Candidate, Bogota, 17 May 2014.
[904] Ivan Carlos Zuluaga, President Santos' political opponent, said he would only continue the peace process under three conditions: (1) negotiations must be preceded by a ceasefire; (2) there can be no impunity for the crimes of the FARC; and (3) political participation in by the FARC in Colombian politics is not acceptable. Carlos Holmes Trojillo explained that there were many previous attempts

the words of Alejandro Ordonez, the Inspector General in Bogota: "We are not saying that all the rigor of the criminal code must be applied. There can be substantial reductions. But there can be no absolute impunity, nor can there be symbolic punishment."[905]

The Havana talks applied the principle that "nothing is agreed until everything is agreed."[906] Part of the challenge for the Government was to convince the FARC that the arrangement proposed on justice would provide legal certainty, and that it would not subsequently be overturned by the Constitutional Court of Colombia, the Inter-American Court for Human Rights, or the International Criminal Court. The debate on accountability and international standards reversed dramatically from where it was on Law 975. Leftists, liberals and human rights activists now argued for lenience, whereas the conservatives, including those close to former President Uribe, argued that there can be no impunity and that international standards must apply.[907]

D. The Rome Statute's Impact on the Legal Framework for Peace

In order to prevent subsequent comprehensive judicial review by the Constitutional Court, and to promote legal certainty in the results of the Havana peace talks, the Government proposed a constitutional amendment to Articles 66 and 67 of the Colombian Constitution in the form of Legislative Act No. 1 of June 2012, which is known as the "Legal Framework for Peace." The Legal Framework for Peace went through several versions and was also elaborated in the Congress before its passage.[908] An early version was very basic and just referred to case selection and prioritization.[909] Members of Congress explicitly referred to Rome Statute obligations in the debates,[910] and the influence of the Rome Statute can be seen in the text, in particular in relation to explicit references to war crimes, crimes against humanity and genocide.[911] On the other hand, the Legal Framework for Peace seems to diverge from international law when it seems to suggest that crimes against humanity and genocide committed systematically may not be considered political crimes.

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to negotiate peace with the FARC but all failed. Interview with Carlos Holmes Trojillo, Bogota, 17 May 2014.

[905] Interview with Alejandro Ordonez, Inspector-General for Colombia, Bogota, 15 May 2014.

[906] The talks in Havana cover six agenda items: land and rural development (concluded May 2013); political participation of the FARC (concluded November 2013); illicit drug trafficking (concluded May 2014); victims of the conflict; demobilization and transitional justice; and implementation, verification and legalization of accords.

[907] Interview with Alejandro Ordonez, Inspector General of Colombia, 15 May 2014; Interview with Carlos Holmes Trojillo, Vice Presidential Candidate, 17 May 2014.

[908] Interview with Legal Advisor of the Constitutional Court, Bogota, 15 May 2014.

[909] Ibid.

[910] Ibid.

[911] Interview with Legal Advisor of the Constitutional Court, Bogota, 15 May 2014.

The Legal Framework for Peace, a short document, grants the National Congress powers to pass a statutory law allowing for the establishment of transitional justice mechanisms, which will "guarantee, to the greatest extent possible, the rights of victims to truth, justice and reparation." The law may "authorize special and differentiated treatment for the different illegal armed groups that have been a part to the internal armed conflict and also for State agents with regard to their participation in the conflict."[912] The idea behind the framework is to be comprehensive, but at the same time, in the words of Sergio Jaramillo, "those who insist … on thinking that the violations of 50 years of war can be investigated on a case by case basis are frankly lying to themselves."[913]

The Legal Framework for Peace stated that "both prioritization and selection criteria are inherent to transitional justice instruments." This is significant because although prioritization was accepted by the Attorney General's directive 001, selection remains controversial in Colombia, because it implies that some cases will not be prosecuted. The Legal Framework provided that the Congress would be able to establish selection criteria to "focus criminal investigation efforts on those most responsible for all crimes that acquire the connotation of crimes against humanity, genocide, or war crimes." The Legal Framework states that the Congress will also look at the "conditions for the suspension of the criminal sentence; establish the cases in which extra-judicial sanctions, alternative sentencing mechanisms or special modalities for the execution and fulfillment of the conviction may be applied; and authorize a conditional waiver of criminal prosecution of all non-selected cases." In Colombia, some human rights groups opposed Legal Framework for Peace, calling it a "backdoor amnesty."

Finally, the LFP provides through Art. 67 that a statutory law will recognize which crimes can be considered as "political offences", the commission of which would not prohibit future political participation. Colombia's Criminal Code typifies the offences of rebellion, sedition, and mob violence as political crimes, which leaves open the question of which crimes may be considered "connected" to those crimes.[914] The logic behind the framework for peace highlights the fact that the duty to prosecute still exists in the context of a political transition, but the scope is not the same, due to the concept of transitional justice.[915]

The High Commissioner for Peace said that the Framework recognizes that justice is comprised of more than just criminal justice. A special penal procedure is not

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[912] Own emphasis. Translation provided by the Colombian Ministry of Justice.
[913] Speech given by the High Commissioner for Peace, Sergio Jaramillo, at Externado University on 9 May 2013, published in El Tiempo.
[914] Maldonado, Silvia. *Political Participation: An Implied Condition for Enduring Peace in Colombia,* International Law / Rev. Colomb. Derecho Int. Bogota (Colombia) No. 23 pp. 267-318 (July-December 2013) p. 308.
[915] Remarks by Ruth Stella Correa Palacio, Minister of Justice and Law, International conference Concerning International Humanitarian Law and International Criminal law in Domestic Law, and Organized Crime, Pintificia Universidad Javeriana, 20-21 June 2013,.

enough: instead comprehensive justice is required, including truth-seeking, which will promote an understanding of the root causes, will uncover the fate of those kidnapped and disappeared; will lead to an "acknowledgement," and will prevent a repetition of the crimes.[916] The LFP was ultimately rejected by the FARC,[917] neither was it accepted by Uribe's Democratic Center.

The Legal Framework for Peace came under fierce criticism by human rights groups. HRW argued that the LFP violates the right of victims to "a judicial remedy for violations of fundamental rights."[918] It argued that victims of cases that would not be pursued through the courts would be denied their right to access to a court of law, and that the fact that even those "most responsible" may be eligible for suspended sentences amounts to a "parody of justice."[919] HRW also argued that to include "state agents" such as military personnel constituted an "unnecessary and illogical concession to the perpetrators of atrocities."[920] Other commentators too have argued that principles of proportionality and necessity should have been included in the Legal Framework for Peace.[921]

E. The Rome Statute's Impact on the Havana Agreement

The FARC's position at the beginning of the talks was that of "not one day in jail."[922] The FARC referred to the Colombian justice system as the "justice of our enemies" and added, "Even our enemies say it is bad."[923] Instead, the FARC have said that they are the main victims of the war.[924] During the talks, the FARC indicated that they might be willing to submit to a tribunal, even an international tribunal established by USAN (UNASUL in Spanish) or another form of hybrid tribunal.[925]

On 23 September 2015, the Colombian government announced that it signed an Agreement Regarding the Victims of the Conflict with the FARC.[926] The agreement contained certain principles, including the fulfillment of victims rights; accountability for individual who participated in crimes; non-repetition of violence;

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[916] Speech given by the High Commissioner for Peace, Sergio Jaramillo, at Externado University on 9 May 2013, published at El Tiempo.
[917] Interview with Member of Congress, Bogota, 14 May 2014.
[918] Human Rights Watch, *Colombia: Amend "Legal Framework for Peace" Bill,* 31 May 2012.
[919] Ibid.
[920]Ibid.
[921] Isa, Felipe Gomez. *Justice, truth and reparation in the Colombian peace process*, Norwegian Peacebuilding Resource Centre, Report (April 2013) p. 2.
[922] Murphy, Helen and Luis Jaime Acosta, *Colombia's FARC may face alternative justice, not impunity,* Reuters, Bogota 5 Sept. 2013. See also Olle Ohlsen Pettersoon, *We will not go to prison: FARC Secretariat,* Colombia Reports, 27 Mar. 2013.
[923] It is possible the FARC was referring to the critical statements by politicians about the justice system made in the context of the Justice and Peace law and the para-politics scandals.
[924] Isa, Felipe Gomez. *Justice, Truth and Reparation in the Colombian peace process*, Norwegian Peacebuilding Resource Centre, Report (April 2013) p. 3.
[925] Interview with Member of Congress, Bogota, 14 May 2014.
[926] See English Summary of the September 23 Government-FARC Communiqué on the Transitional Justice Accord.

promoting the rejection by society of armed conflict; adoption of territorial, group-based and gender-based approaches according to how these were affected by the conflict; the guarantee of legal certainty for individuals who participated in the armed conflict as long as there is compliance with the agreement and especially the Special Jurisdiction of Peace; strengthening coexistence and cohesion within the Colombian society; and achieving legitimacy through respect for national and international obligations."[927]

Under the Agreement, FARC had to "lay aside their weapons" and they would be transformed to a political movement, for whom 10 seats are reserved in Congress until 2026. They will be allowed to exercise their political rights, even if subject to an alternative penalty. In a twist, a public referendum held on 2 October 2016 rejected the peace agreement by 50.2 percent. While the reasons for the rejection of the agreement were complex, in part they were based on opposition to impunity for the FARC.[928]

After the referendum, the government summoned the main political forces for further consultations, which resulted in a (amended) Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace on 24 November.[929] This version of the Agreement was then put to congressional approval (the Democratic Center walked out of the parliament before it was voted on). As part of the agreement, on 15 December the Colombian government announced in a 75-point plan outlining a Comprehensive System of Truth, Justice, Reparations and Guarantees of Non-Repetition. On 13 December, the Constitutional Court declared that legislation to implement the peace agreement could be approved by a "fast track" procedure of the Parliament. This resulted in the quick approval of several laws, including Law 1820 (2016) on amnesty, pardon and special treatment, and Legislative Act 01, establishing a truth commission, Special Unit for Finding Missing Persons, the Special Jurisdiction for Peace, and measures on reparations for victims.[930]

Central to the Agreement is the creation, parallel to the domestic legal system, of a "Special Jurisdiction for Peace" (SJP), with the aim "to do away with impunity, obtain truth, contribute to victims' reparations, and to judge and impose sanctions on those responsible for serious crimes committed during the armed conflict, particularly the most serious and representative ones." The jurisdiction of the SJP will be to "investigate and prosecute those most responsible for the most serious conflict-related crimes, including cases against members of the FARC-EP, members of the

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[927] Olasolo, Hector and Joel M. F. Ramirez Mendoza, *The Colombian Integrated System of Truth, Justice, Reparation and Non-repetition*, JICL Vol. 15, Issue 5, 1 Dec. 2017, pp. 1017-1018. Agreement at 128-9.
[928] Olasolo, Hector and Joel M. F. Ramirez Mendoza, *The Colombian Integrated System of Truth, Justice, Reparation and Non-repetition*, JICL Vol. 15, Issue 5, 1 Dec. 2017 p. 1015.
[929] Ibid. pp. 1011-1047. An English translation of the Final Peace Agreement can be found at http://www.altocomisionadoparalapaz.gov.co/Prensa/Paginas/2017/Mayo/El-Acuerdo-de-paz-en-ingles.aspx.
[930] Ibid., p 1016.

armed forces and those who, directly or indirectly, participated in the armed conflict."[931] It thus reinforces the concept of individual criminal responsibility from the Rome Statute, as well as victims' rights. The Agreement and Legislative Act 01 prohibit the extradition of those falling under the SJP. Some of those previously accused under the Justice and Peace Law may fall under the SJP.

The Special Jurisdiction was originally intended to be an "internationalized" jurisdiction and was proposed to have a minority of foreign magistrates: these were later eliminated when the agreement had to be amended after the peace deal was rejected in a public referendum in October 2016. Instead, foreigners can participate as *amicus curiae*. A Selection Committee, comprised of representatives of national and international institutions and organizations, was mandated with selecting both the national magistrates and the foreign *amicus curiae*. Also, the Constitutional Court has jurisdiction over protection requests (*accion de tutela*) in case of any possible violation of fundamental rights.[932]

The subject matter of the SJP encompasses crimes that fall under Law 1820 (see below) as well as crimes amounting to gross human rights violations and grave breaches of international humanitarian law, committed on account of or in direct or indirect relation to the armed conflict prior to 20 Nov. 2016.[933] It is not yet completely clear whether the Special Jurisdiction includes crimes committed outside the conflict (such as the false positives) or crimes committed by civilians, such as wealthy landowners who sponsored paramilitaries.

The SJP will have three Chambers, including the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts; the Chamber for Amnesty and Pardon; and the Chamber for Definition of Legal Situations. The Tribunal for Peace has different sections, including a first instance section for cases where there is acceptance of fact and responsibility; a first instance section where there is not, an appeals section and a review section. There are also Investigation and Prosecution units and an Executive Secretariat. The Investigation and Prosecutions Unit is anticipated to work closely with the AG's office and has 10 years to file all its requests. It can apply case selection and prioritization. The SJP is expected to last 15 years but can be extended.[934]

The Tribunal for Peace only has jurisdiction over gross human rights violations and grave breaches of IHL. It will share its judgements with the truth commission. The Tribunal decides on legal qualification, and on whether the crimes are covered by Law 1820. It can also decide on the sanction.

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[931] ICC OTP Report on Preliminary Examination Activities, 2016 at para. 253.
[932] Olasolo, Hector and Joel M. F. Ramirez Mendoza, *The Colombian Integrated System of Truth, Justice, Reparation and Non-repetition*, JICL Vol. 15, Issue 5, 1 Dec. 2017 p. 1026-7. Agreement, at 160.
[933] Ibid. pp. 1024-1025. Agreement at 147, 151. Law No. 1820 Arts 32, 30, 45.
[934] Ibid. p. 1027, 1031.

The Special Jurisdiction for Peace can receive information from a wide variety of sources, including the AG's office, the Prosecutor-General's office, but also from other jurisdictions and from victims and human rights organizations. Based on this information it provides the opportunity to individuals to disclose "facts" and "accept responsibility." This disclosure is then verified, and the Chamber decides whether amnesty, pardon or special treatment can apply. In that case it may send the case to the Chamber on Amnesty and Pardon (in the case of the FARC) or the Chamber for the Definition of Legal Situations (in the case of those eligible for pardons or state actors eligible for special treatment). If the person accepts responsibility, the Chamber may send the proceedings with a sanctions proposal to the First Instance Section of the Tribunal for Peace. If disclosure is incomplete, this Section can refer it to the Investigation and Prosecution Unit.[935] The Chamber on Definitions of Legal Situations can establish criteria for the selection and prioritization of cases.[936] The machinery created by the Havana Agreement is highly complex and it remains to be seen how it will operate in practice.

The real issue of contention in relation to the Rome Statute lies in the provisions on alternative penalties. The Agreement establishes a regime of alternative penalties *other than* imprisonment, to be imposed by the Special Jurisdiction. It may include "work, tasks, and activities" aimed at the "satisfaction of victims rights" by "compliance with reparative and restorative functions", for 5-8 years. These can include tasks on rural reform political participation, or related to solutions for illegal drugs, and can be directed at specific damaged caused to minors, women, etc. Tasks can also relate environmental protection and building of infrastructure, waste disposal or demining.[937] The punishment may include restrictions prohibiting movement outside of a defined geographical area for 5-8 years.[938] At the same time, those subject to penalties may still engage in political activities. The element of alternative penalties remained unchanged, even after the referendum, although amendments were made to further specify what was meant by these components of restrictions and reparations. Also, victim representatives must be consulted in the implementation of a sanctions regime. In deciding on a specific sanction, the Tribunal for Peace considers the degree of disclosure, the gravity of the crimes, the existence of aggravating or mitigating circumstances, and the undertaking made by the individual concerned to provide reparations or his/ her participation in demining.[939]

If the facts are contested, the case goes to the Trial Section, which will conduct an adversarial trial. The Trial Section can impose imprisonment of 5-8 years for those who disclose their crimes, and accept responsibility prior to judgement.[940] These persons will go to regular prisons for 5-8 years, where they will "contribute to their

[935] Ibid. p. 1028-1029. Agreement at 156.
[936] Ibid. p. 1031.
[937] Ibid. p. 1033. Agreement at 172, 173.
[938]Ibid. pp. 1033. Agreement at 172.
[939] Ibid. p. 1034. Agreement at 171-172.
[940] Ibid. p. 1035, Agreement at 162,174.

re-socialization through work, training or study." If an accused never accepts responsibility they may be liable to the ordinary penalty provided in the Colombian Penal Code, but for a sentence between 15-20 which can be further reduced through the accused's re-socialization through work, study or training.[941] The Trial Chamber can order the Colombian state and organizations including FARC to provide for symbolic reparations.[942] The Appeals Chamber is competent to decide on appeals by individuals against any decision of the three Chambers of the SJP, as well as by victims who allege violations of their fundamental rights.[943] The Review Chamber may review any order to appear before the SJP or settle conflicts of jurisdiction between the Chambers. It may also review decisions and is the instance of last jurisdiction (although *tutela* requests may now go to the Constitutional Court.)[944]

Law 1820, passed on 30 December 2016, contains provisions on amnesty, pardon and special treatment. It applies to demobilized FARC, including those already convicted or subject to legal proceedings, or listed as FARC members as part of the demobilization process, or those convicted for political offences whose membership of the FARC can be inferred. These may be eligible for amnesty. It also applies to other individuals convicted for political crimes such as illegal protests. Such individuals may be eligible for pardon. Finally, it applies to state officials who have been convicted, prosecuted or identified as responsible for crimes committed in relation to the armed conflict.[945] These individuals may be eligible for special treatment. Law 1820 applies to political offences, but not to ordinary crimes. Neither does it apply to "gross human rights violations or grave breaches of international humanitarian law amounting to genocide, crimes against humanity, serious war crimes, kidnapping or other severe deprivations of physical liberty, torture, extrajudicial executions, enforced disappearances of persons, rape and other forms of sexual violence, abduction of minors, forcible displacement and the recruitment of children."[946] Law 1820 requires beneficiaries to participate in the truth commission or investigations of the Special Unit for Finding Missing Persons and provide disclosure of their crimes.

The 75-point plan also provides for an array of other transitional justice measures such as a Commission for the identification of the Truth, Coexistence and Non-Repetition; a Commission for Missing Persons; A Special Unit for the Investigation and Dismantling of Criminal Organizations; various non-repetition guarantees;[947] and various measures for victims reparations, mostly of a collective nature.

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[941] Ibid. p. 1035, Agreement, at 162.
[942] Ibid. p. 1035-36, Agreement at 162.
[943] Ibid. p. 1036. Agreement at 160.
[944] Ibid. p. 1036-7, Agreement at 163-164.
[945] Ibid. pp. 1019-1020.
[946] Ibid. p. 1021. Agreement at 145,
[947] Some of these are to prevent what happened to the Patriotic Union, a political party founded by FARC, after a ceasefire in 1985. Thousands were subsequently murdered by paramilitary groups.

Human Rights Watch has condemned the agreement as "agreeing to impunity"; saying that it left many questions unanswered including what is meant by restriction of liberties and rights, and the duration of the restriction.[948] It also criticized the fact that references to superior responsibility were struck out.

In contrast, in general the international community welcomed the Agreement, deciding to reward President Santos with the Noble Peace Prize. So far the ICC has reacted cautiously positively to the Havana Agreement. The ICC did issue a press release welcoming the agreement, but this was before the details on restricted liberties became known. In its 2016 report it stated that it "has not formed a specific or final position regarding the Special Jurisdiction for Peace."[949] In September 2017, Fatou Bensouda visited Colombia for the first time and commented positively on the "commitment, invaluable experience, and high standards" of the Colombian courts.[950] The views of the ICC on the fact that the Colombian agreement endorsed alternative, rather than reduced, sentences remain largely unknown, except that the Prosecutor continues to insist on "genuine" sanctions.

However, references to Art. 28, dealing with the responsibility of commanders and other superiors, of the Rome Statute were eliminated from the final revised peace agreement signed on November 24, and Legislative Act 01 contains a more restrictive definition of superior responsibility in relation to state officials than the Rome Statute.[951] This would make it harder to try commanders as the absence of superior responsibility may require their actual knowledge or "effective control" over subordinates who committed crimes. This prompted the ICC Prosecutor to give a statement on 26 January 2017 to say that she will try military commanders if the Colombian courts fail to do so. [952] The OTP is also looking at the definition of "grave" war crimes, and whether nonsystematic war crimes fall under the Amnesty law; the determination of "active or determinative" participation in the crimes, and the sentences involving "effective restrictions of freedoms and rights."[953] It has also filed an *amicus curiae* brief with the Constitutional Court on certain aspects of Legislative Act 01 and the Amnesty Law.

In the interim, the Colombian authorities are moving towards implementation with the establishment of the Special Jurisdiction for Peace, and the enactment of legislation on the implementation of the Havana agreement. The Constitutional Court is due to review the Constitutional amendment on the Comprehensive System of Truth, Justice, Reparations and Guarantees of Non-Repetition. The current

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[948] Human Rights Watch, *Analysis of the Colombia-FARC Agreement*, 21 December 2015.
[949] ICC OTP Report on Preliminary Examination Activities, 2016 at para. 257.
[950] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of her visit to Colombia, 10-13 September 2017.
[951] Olasolo, Hector and Joel M. F. Ramirez Mendoza, *The Colombian Integrated System of Truth, Justice, Reparation and Non-repetition*, JICL Vol. 15, Issue 5, 1 Dec. 2017 p. 1026.
[952] Alsema, Adriaan. *Prosecutor warns ICC will try military commanders if Colombia transitional justice fails.* Colombia reports, 26 Jan. 2017: colombiareports.com.
[953] OTP Report on Preliminary Examinations, 2017.

challenge is to have all necessary legislation approved by the Congress, and to have the Special Jurisdiction for Peace up and running as soon as possible. In the elections in May 2018, the continuation of the peace agreement is at stake. Right-wing parties, including the Democratic Center headed by Ivan Duque, have opposed the peace agreement. Ivan Duque stated in his campaign,"A true peace is built through the triumph of the rule of law not through the relativization of justice."[954] It is likely that Ivan Duque will win the Presidential election in Colombia and the impact on the peace process remains to be seen.

F. Spectator or Player? Impact of the OTP's Actions on Peace Negotiations

While the transformative effect of the Rome Statute on both the process and the content of the peace negotiations are undeniable, much of this effect is indirect, due to an acceptance of the norms of the Rome Statute, and not necessarily due to the direct actions of the OTP. In Uganda, the strong positions of the OTP were sometimes perceived as undermining the talks.[955] In Colombia, the OTP also risked being cast into the position of a spoiler. This became most apparent during the saga of "the letters."

The Colombian Commission of Jurists put the Legal Framework for Peace to a Constitutional challenge, arguing that the selection criteria violate Colombia's international obligation to investigate and prosecute and punish international crimes, not just when they are "systematic". The Colombian Constitutional Court held a public hearing about the Legal Framework for Peace on 25 July 2013.[956] However, in an attempt to influence the process, the OTP sent 2 letters, which were subsequently described as "bombs" in the Colombian media. Both letters were confidential and addressed to the President of the Colombian Constitutional Court but they appeared on the website of a major Colombian newspaper, the *Semana.*[957] Both were sent shortly before the deadline of the final decision on 17 August.

The first was dated 26 July 2013, in the week that the Court was supposed to make its decision. In the letter the Prosecutor stated that a sentence that is manifestly inadequate, considering the seriousness of the crime and the participation of the accused, could be interpreted as an attempt to shield a person from criminal responsibility under the "most reasonable" interpretation of the Rome Statute.[958]

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[954] Associated Press, *Critics of Peace Deal Dominate Colombia Election*, Bogota, 11 March 2018.
[955] Interview with Michael Otim, 6 Feb. 2014.
[956] Interview with Legal Advisor of the Constitutional Court, Bogota, 15 May 2014. The International Criminal Court was not invited, as it is an external organization. The Colombian Constitutional Court does not seek the views of international organizations in its public hearings because this would create legal complexity as to the legal status of those opinions.
[957] See Semana website, 17 August 2013: http://www.semana.com/nacion/articulo/una-carta-bomba/354430-3.
[958] The Prosecutor referred to the fact that the *travaux preparatoires* of the Rome Statute refer to proportionality in relation to sentencing, as does a reference in the Expert Group on Complementarity's report in 2003, which refers to "grossly inadequate sentences". She also refers

She also stated that the object and purpose of the Rome Statute, described as "ending impunity of the most serious crimes" and seeing to it that these "do not go unpunished", would be contravened by suspension of penalties, as these would effectively prevent punishment. The Prosecutor argues that a range of other measures could justify a reduction of sentence, provided that the original sentence was proportional. Finally, the letter argues that a suspension of sentence would amount to the equivalent of a pardon, which is prohibited for *jus cogens* crimes.

In the second letter dated 7 August 2013, Prosecutor Bensouda addresses the Legal Framework's approach to prioritization and selection of cases. She noted that the "mandate of the International Criminal Court differs significantly from domestic judicial systems" and that its prosecutorial policy, which is to focus on those bearing the greatest responsibility for the most serious crimes, is a product of the "global nature of the ICC, its statutory and logistical restraints." She also emphasized that she continued to encourage national authorities to pursue national investigations for offenders of lesser responsibility so as to avoid an "impunity gap", in accordance with positive complementarity. She recited the preamble of the Statute that the most serious crimes "must not go unpunished."

The Prosecutor's first letter appears to have impacted directly on the decision of the Constitutional Court. On 28 August, the Constitutional Court of Colombia upheld the Legal Framework for Peace in a 7-2 decision, in which it established parameters for the statutory law that should be passed after the Agreement. Originally, a press release mentioned 8 parameters.[959] However, the full version of the judgment appeared which included an additional parameter, not included in the earlier press release: "The mechanism of total suspension of execution of sentence, may not

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to other International human rights treaties such as the Genocide Convention, Torture Convention and the Inter-American Court of Human Rights. Although these treaties are silent on the matter of punishment, she cites the *Barrios Altos* case and several other decisions to say that penalties should not reflect impunity but should be proportional to the crimes. However, the *Barrios Altos* case dealt with a self-amnesty, which can be distinguished legally from a democratically ratified amnesty.

[959] The parameters included (1) respect by the State of a duty to investigate in ways that respect the rights of the society and victims, according to transparent selection and prioritization criteria that can be challenged, and if a case is not selected for prosecution to guarantee the right to compensation, truth, and search for and identification of the missing; (2) the armed conflict must end and demobilized groups and individuals must hand in their weapons and cannot commit further offences; (3) international human rights and IHL offences as well as Rome Statute crimes committed in a systematic manner ought to be investigated and those bearing maximum responsibility should be charged; (4) the following crimes ought to be prioritized: extrajudicial executions, torture, forced disappearance, sexual violence against women; forced displacement and illegal recruitment of children, if these constitute genocide, war crimes or crimes against humanity committed in a systematic manner; (5) Statutory provisions should be respectful of international treaty obligations that are part of the "Constitutional block"; (6) the Statutory law shall determine the selection criteria and prioritization; (7) in order to benefit from selection and prioritization, the armed group must contribute in a real and effective way to finding the truth, reparations of victims, release of hostages and the release of all minors and (8) should ensure the truth and disclosure of all the facts constituting serious violations of human rights and international humanitarian law, through judicial and other mechanisms such as the truth commission.

operate for those convicted as most responsible for crimes against humanity, genocide and war crimes committed in a systematic manner."[960]

The sentence of the Constitutional Court in Decision 579 added signification new dimensions to the Court's reasoning. The Court said it is justifiable to focus criminal proceedings on those bearing the most responsibility, as was done at Nuremberg, Tokyo, and the ad hoc Tribunals, and the Cambodia Tribunal.[961] The Decision also states that international crimes are by nature "systematic" but that the reference to "systematic" in relation to war crimes was justified as it reflected the requirement for a "policy" element in Article 8 of the Rome Statute.[962]

The letter of the ICC prosecutor provoked considerable antagonism in Colombia, as many saw it as an attempt to interfere with national sovereignty and the independence of the Constitutional Court.[963] As one commentator put it: "we need a language of persuasion, not of threats."[964] The FARC too reacted negatively to what they called "imperialist not democratic justice."[965] Others however welcomed the letter, because it lent weight to the arguments of human rights organizations and others that the Legal Framework for Peace should be carefully reviewed for its compliance with international standards.[966]

The position of the OTP was eventually softened in a speech given by the Deputy Prosecutor delivered in Bogota in May 2015.[967] During this speech the Deputy Prosecutor said that "in sentencing, States have wide discretion" and that "effective penal sanctions may take many forms" but that they "should serve appropriate goals, such as public condemnation of the criminal conduct, recognition of victims' suffering, and deterrence of criminal conduct." However, the Deputy Prosecutor maintained: "suspending sentences for those most responsible for war crimes and crimes against humanity would amount to shielding the persons concerned from criminal responsibility."

G. Conclusion: Peace with Punishment

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[960] Constitutional Court Dec. C-579/13 para. 8.4.9.
[961] Constitutional Court Dec. C-579 para. 8.2.3 – unofficial translation The Decision gives a definition of "those most responsible" as persons who have "a key role in the criminal organization in the commission of each offense, who directed, exercised control or funded the commission of crimes against humanity, genocide and war crimes committed in a systematic manner.". The Decision suggests that more minor perpetrators could go before the truth commission.
[962] Constitutional Court Dec. C-579. Interview with Legal Advisor of the Constitutional Court, Bogota, 15 May 2014.
[963] Interview with Director of Dejusticia, Bogota, 16 May 2014.
[964] Interview with Member of Congress, Bogota, 14 May 2014.
[965] Ibid.
[966] Interviews in Bogota, May 2014.
[967] James Stewart, *Transitional Justice in Colombia and the role of the International Criminal Court,* 13 May 2015, https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.

In both Uganda and Colombia, the Rome Statute led to recognition that criminal accountability should be recognized as part of the peace agreement. At the same time, it also sparked debates on the extent of the duty to prosecute, and what number of prosecutions might satisfy this duty.[968] Current practice in international criminal law uses case selection and prioritization to focus on persons bearing the greatest responsibility for the most serious crimes.[969] As stated by former chief international prosecutor in East Timor, Siri Frigaard: "It is unrealistic to expect that all crimes committed during a specific conflict will be tried in a court, or to expect that every perpetrator will be held criminally responsible for the offences they have committed."[970]Comprehensive prosecutions were attempted in the 20 years since the conflict in the Former Yugoslavia, including at the ICTY and in domestic courts, but the total numbers remain small. ICTY tried about 200 individuals over 17 years. The Bosnian War Crimes Chamber—a domestic court with international assistance— is generally considered quite successful but convicted around 110 individuals since its creation in 2004, in around 80 trials.[971] Bosnia drafted a War Crimes Strategy under which it will take 15 years to complete trials: it has completed just over 400 so far in total.[972]

The Colombian Legal Framework for Peace suggests both prioritization and selection as appropriate strategies. Directive 001 (2012) of the Colombian Attorney General lays out in much more detail both the policy and legal justifications for a prosecutorial strategy based on case prioritization.[973] However,

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[968] United Nations Report of the Secretary-General to the Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, 23 August 2004 (S/2004/616) para. 46. See also the Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparations, and Guarantees of Non-Repetition, Pablo de Greiff, presented at the 27th General Session of the Human Rights Council, 27 August 2014, A_HRC_27_56_ENG.pdf.

[969] For an extensive discussion on the topic see Bergsmo, Morten (ed), *Criteria for Selecting and Prioritizing Core International Crimes Cases, Forum of International Criminal and Humanitarian Law,* Torkal Opshal Academic Publisher (2010). See also the Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparations, and Guarantees of Non-Repetition, Pablo de Greiff, presented at the 27th General Session of the Human Rights Council, 27 August 2014, A_HRC_27_56_ENG.pdf.

[970] Frigaard, Siri. *Introductory Remarks* in Bergsmo, Morten (ed), *Criteria for Selecting and Prioritizing Core International Crimes Cases,* Forum of International Criminal and Humanitarian Law, Torkal Opshal Academic Publisher (2010) p. 2.

[971]Nidzara Ahmetasevic, *Sarajevo's model under threat*, International Justice Tribune, 15 February 2012. In 2010, prosecutors were involved in 365 cases against some 1165 individuals. According to National War Crimes Strategy, prosecutions in Bosnia were expected to last another 15 years and involve potentially 10,000 cases.

[972]Report of the Special Rapporteur on the promotion of truth, justice , reparation and guarantees of non-recurrence, Pablo de Greiff, to the General Assembly 67th Session, 13 Sept. 2012 at A/67/368.

[973] Directive 001 (2012) of the Colombian Attorney General. The policy reasons for allowing prioritization of such cases are that this allows justice to be delivered to larger numbers of victims; that prosecutions of high-level actors dismantles criminal structures, thereby contributing to non-repetition of the crimes; that it recognizes the links between various sectors of the society (such as politicians and military or paramilitary groups), thereby contributing to historical truth; and it can protect the rights of secondary offenders who may otherwise languish in jail for lengthy periods of time while awaiting their trial. The Directive also highlights the legal reasons for allowing a more

as discussed above, the Prosecutor does not accept this approach, and maintains that the national duty to prosecute remains much broader than that of the ICC. At the same time, in a survey in relation to the Special Court for Sierra Leone,[974] which only prosecuted 9 individuals, respondents overwhelmingly said they felt the SCSL had prosecuted those bearing the greatest responsibility.[975] All of this implies that there ought to be a limit on the number of prosecutions that states can be expected to pursue as part of a peace process.[976]

IV. Alternative Penalties or Amnesties?

A. Punishment Through Alternative Penalties

The examples of Uganda and Colombia suggest that States are increasingly experimenting with alternative penalties in peace agreements as an alternative to amnesties. The Rome Statute is silent on the question of punishment, apart from its Preamble, which states that crimes ought not to go "unpunished." As mentioned, during the Havana talks, FARC advocated for "not one day in jail," [977] elaborating, "no peace process in the world has ended with leaders of the insurgency behind bars."[978] This raised the difficult question of what level punishment is required for Rome Statute crimes, to avoid mere " "symbolic punishment."[979] The debate in the Havana peace talks therefore focused on whether prison terms are necessary at all, and eventually settled on the concept of restricted movement as an alternative. The OTP seemed to leave the door open to alternative sentences under certain conditions.[980]

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narrow focus. It argues that international humanitarian and human rights law do not recognize an absolute right to investigate or prosecute in each individual case. The Directive argues that there is no clear duty to prosecute crimes against humanity or crimes in internal armed conflict, as these are based on customary international law and not treaty law. The Directive also observes that prioritization is practiced by all the international criminal tribunals as well as in some domestic legal systems.

[974] Periello, Tom and Marieke Wierda. *The Special Court for Sierra Leone Under Scrutiny,* International Center for Transitional Justice, March 2006.

[975]Special Court for Sierra Leone and No Peace Without Justice, *Making Justice Count: Assessing the Impact and Legacy of the Special Court for Sierra Leone and Liberia,* September 2012.

[976] It is not realistic to presume that national legal systems will be able to conduct hundreds, if not thousands of prosecutions when international systems are clearly unable to do so. It is even questionable whether Colombia would be required to prosecute the 200 or so FARC members against who *in absentia* cases were concluded.

[977] Murphy, Helen and Luis Jaime Acosta, *Colombia's FARC may face alternative justice, not impunity,* Reuters, Bogota 5 Sept. 2013. See also Olle Ohlsen Petterson, *We will not go to prison: FARC Secretariat*, Colombia Reports, 27 Mar. 2013.

[978] Ivan Marquez, F*ARC guerillas will neither go to prison nor surrender weapons: Rebel negotiator, Rebecca Florey*, Colombia Reports, 23 Feb. 2015.

[979] Interview with Dr. Alejandro Ordonez, Inspector General, Bogota, 15 May 2014.

[980] James Stewart, *Transitional Justice in Colombia and the role of the International Criminal Court,* 13 May 2015, https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf. The Deputy Prosecutor said in his speech in Bogota that the following would help to determine whether a alternative sentence were consistent with a genuine intent to bring the convicted person to justice:

As argued by some authors, the criminal trial itself remains an important aspect of the expressive nature of international criminal law.[981] The case that this expressive function must be fulfilled through long prison sentences is less convincing. [982] The treaties providing for international crimes do not give much guidance on the matter of sentencing. The Convention on the Prevention of Genocide says that penalties ought to be "effective" whereas the Torture Against Convention speaks about "appropriate" penalties that take into account the "grave nature" of the crimes.[983] Both international human rights law and domestic constitutions provide for a prohibition of retroactive penalties (*nulla poena sine lege*) and for the principle of proportionality of punishment in relation to the gravity of the crime and the circumstances of the offender. But this does not necessarily mean that this punishment needs to constitute imprisonment as such. The question then becomes which other forms of punishment would still allow for adequate expression of condemnation for breach of social norms. This may differ widely per society.

The policy objectives behind punishment in international criminal law remain an underdeveloped area.[984] The ICTY and ICTR consistently emphasized the goals of retribution and general deterrence in their sentencing judgments.[985] Judgments have also mentioned specific deterrence, rehabilitation, the protection of society, stigmatization, and reconciliation as goals of punishment, although retribution and general deterrence remain dominant.[986] Nonetheless, sentences imposed by the ICTY over the years were inconsistent, although the scope of crimes and the level of the accused have emerged as important predictors.[987] However, as argued in Chapter 1, neither deterrence nor retribution give adequate justification for sentencing at the international level.[988]

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the usual national practice sentencing for Rome Statute rimes; the proportionality of the sentence in relation to the gravity of the crime and the degree of responsibility of the offender; the type and degree of responsibility of the offender; the type and degree of restrictions on liberty; any mitigating circumstances; and the reasoning that the sentencing judge gave for passing the particular sentence.

[981] Seils, Paul. *Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace.* ICTJ briefing, June 2015. See also Meijers, Tim and Marlies Glasius. *Trials as Messages of Justice: What should be Expected of International Criminal Courts*. Ethics and International Affairs, 30 No. 4 (2016) pp. 429-447 at 435.

[982] This case is made by Sloane, Robert. *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 Stan. J. Int'l L. 39 (2007)

[983] Cryer, Robert, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge (2013) p. 494.

[984] Sloane, Robert. *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 Stan. J. Int'l L. 39 (2007.)

[985] Cryer, Robert, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge (2013) p. 497.

[986]Ibid, p. 498-499.

[987] Hola, Barbara, Alette Smeuler, and Catrien Bijleveld, *Is the ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice*, Leiden Journal of International Law 22 (2009), pp. 79-97.

[988] See Sloane, Robert. *The Expressive Capacity of International Punishment: The Limits of the National*

Imprisonment as a form of punishment should also be seen in historic perspective. A UNODC Handbook on Alternatives to Imprisonment notes that " "[i]n many countries, the use of imprisonment as a form of punishment is relatively recent."[989] The practices of States in punishing their citizens vary, ranging from wide use of incarceration in the United States to a strong focus on rehabilitation in The Netherlands. In Colombia, low-level drug traffickers and paramilitaries suffer the bad conditions or ordinary jails, whereas higher-level offenders usually enjoy considerable luxuries and freedoms even within the confine of prison (a famous example being Pablo Escobar's detention in La Catadral). Both lower-level and higher-level offenders use prison to make connections to continue their illegal activities after their release.[990] In the context of Colombia, restricted movement may therefore constitute a valid alternative to imprisonment.[991]

In Northern Uganda, people considered a prison cell in The Hague under the ICC as a luxury, not a punishment: "Even if Kony is taken to The Hague, that will not be a punishment. The prisons there are air-conditioned! Rather he should be in the community. He should see the suffering he has caused.[992] Surveys taken in Northern Uganda suggest that the views of victims vary in relation to punishment. In Uganda in 2005, prior to the Juba Peace Talks, in a survey administered by Berkeley University and ICTJ, most respondents (66%) said they favored "hard options" in dealing with LRA i.e. trials, punishment or imprisonment. Only 22 percent preferred "soft options" including forgiveness, reconciliation, and reintegration. In a second survey administered by Berkeley University and ICTJ in

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Law Analogy and the Potential of International Criminal Law, 43 Stan. J. Int'l L. 39 (2007) for a critique of retribution as a justification for punishment by an international tribunal. See for instance p. 79: "It is far from clear how punishment by an international tribunal, which derives its authority from either treaty or a Security Council resolution (at bottom, a function of state consent to the U.N.Charter, itself a multilateral treaty), can be a legitimate proxy for the penal interests of the literal victims who suffer extraordinary crimes of violence. This disjuncture may well be a major reason that international tribunals often suffer from a perceived lack of legitimacy in relation to affected local communities or states." Also at p. 81: "Retribution therefore emerges as a problematic justification for ICL punishment in large part because it presupposes both a coherent community and a relatively stable sociopolitical or legal order characterized by shared values. The circumstances that enable widespread violations of international humanitarian law and human rights atrocities generally involve the breakdown of precisely that order."

[989] UNODC, Handbook of basic principles and promising practices on Alternatives to Punishment, New York (2007) p. 3.

[990] The Criminal Code of Colombia makes reference to many concepts other than retribution. Colombia Penal Code Law 599/2000. Article one states that penal law has its basis in human dignity. Article 3 says that punishment shall be governed by the principles of necessity, proportionality, and reasonability. Article 4 refers to the goals of punishment as general deterrence, retribution, specific deterrence, social reinsertion, and respect for rights of the accused.

[991] Colombiapeace.org "*Prison of Deprivation of Liberty for Human Rights Violations*", 2015.

[992] Cited in Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, African Arguments (2006) at p. 135.

2007, during the Juba peace talks, 54% of respondents said they now preferred the "soft options" whereas 41 percent preferred hard options for the LRA.[993]

Victim representatives in Colombia also voiced differing views on the issue of punishment. As observed by President Santos in his receipt of the Nobel Peace Prize in November 2016: "Victims want justice, but most of all they want to know the truth, and they – in a spirit of generosity – desire that no new victims should suffer as they did."

In an event hosted by the Ministry of Justice, a number of victim representatives remarked that historically in Colombia, perpetrators have often received more benefits than the victims.[994] One group expressed the view that those who commit crimes should not become "pampered parties, in luxurious jails." [995] Another group expressed a view that penalties "should not be so harsh as to prevent demobilization and not so flexible as to condone impunity." Some expressed the view that perpetrators should contribute to reconstruction and could thereby become eligible for a reduction of sentences.[996] *De Justicia*, a widely respected Colombian NGO, argued that:

> From the philosophical perspective, specifically with respect to reflections about the purposes of the punishment, it becomes necessary to have a minimum of retribution as a recognition of the suffering of the victims, and as an affirmation of the values that were negated by the serious human rights violations.[997]

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[993] Human Rights Center: *Forgotten Voices: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda*, July 2005, Human Rights Center, UC at Berkeley, and the ICTJ. Out of those who heard about the ICC during that time, 76% said that pursuing trials at that time would endanger the Juba talks. A final survey was conducted in 2010. Views had changed again, quite drastically. Security is much improved in Northern Uganda by now, but a peace agreement with the LRA looks less likely than ever before. When asked what should happen to the LRA, respondents said that they should be persuaded to come out of the bush (24%) or pardoned / amnestied (23%), put on trial (16%), or captured (13%). Interestingly, 87% of respondents said it should not be possible to prosecute former combatants who have received amnesty. The main measures for accountability identified by respondents included the ICC (29%), Ugandan Courts (28%), Amnesty Commission (25%), and traditional measures (8%) But respondents this time said that it was more important to pursue accountability for the government (64%) than for the LRA leadership (19%), or all the LRA (5%).

[994] Consultations of victim representatives organized by the Ministry of Justice on 8-9 November 2014 in Bogota (attended by the author). Some stressed the importance of proportionality between the crime and the punishment, referred to the importance of international treaties, and voiced the view that 8 years is insufficient. In general, representatives expressed concern at the fact that state actors such as the military may be accorded lenience.

[995] Remarks by Claudia Medina at the Consultations on Transitional Justice: A View from the Regions, hosted by the Ministry of Justice, 7-9 November, Bogota.

[996] Reports of the Working Groups on Consultations on Transitional Justice: A View from the Regions, hosted by the Ministry of Justice, 7-9 November, Bogota.

[997] Monograph, www.dejusticia.com, 2013.

B. Amnesia about Amnesties?

While the experiences of Uganda and Colombia indicate that in future agreements, alternative penalties may become more prominent, amnesties are not completely off the table, even in countries where the ICC has jurisdiction. State practice on amnesties remains inconsistent, and indicates that states continue to resort to amnesties to end armed conflicts or even in their aftermath. A comprehensive study by Mallinder of over 500 situations has highlighted that amnesties including for international crimes remain a reality in today's world.[998] Another study on 119 transitions in 86 countries concludes that amnesties neither increase or decrease the likelihood of non recurrence of conflict in civil wars.[999] In the words of Freeman: "amnesties are as prevalent today as at any time in modern history … we are no more at the end of amnesties than we are at the "end of history."[1000]

National courts have upheld amnesty laws in recent years in Uganda (later reversed), Spain and Brazil.[1001] In the *Massacres of El Mozote and Nearby Places versus El-Salvador*,[1002] the Inter-American Court for Human Rights drew a distinction between self-amnesties granted at the end of dictatorships, and amnesties used to end civil wars. In a separate opinion, Judge Diego Garcia Sargan states that when negotiating the end to an armed conflict "States must weigh the effect of criminal justice both on the rights of the victim and on the need to end the conflict." [1003] A set of Guidelines proposed by a group of prominent international lawyers similarly argues in favor of keeping the door open to conditional amnesties.[1004] Louise Arbour, former ICTY Prosecutor, commented: "there must be incentives ... Without compromising the core integrity of justice, this could include very lenient treatment in exchange for disclosing facts, expressing remorse and

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[998] Mallinder, Louise, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Oxford and Portland: Hart Publishing 1st ed. (2008) p. 404.
[999] Payne, Leigh, Andy Reiter, Chris Mahony, and Laura Bernal –Bermudez, Conflict *Prevention and Guarantees of Non-Recurrence,* 12 April 2017.
[1000] Freeman, Mark. *Necessary Evils: Amnesties and the Search for Justice,* Cambridge University Press (2009) p. 4.
[1001] See *Kwoyelo* case below. Supremo Tribunal Federal, ADPF 153- arguicao de descumprimento de preceito fundamental (2010) Brazil; Tribunal Supremo, Setencia Absolutoria, Sentencia No: 101/2012 (Feb. 27,2012), Spain.
[1002] Inter-American Court of Human Rights, *Case of the Massacres of El Mozote and Nearby Places v. El-Salvador*, Judgement of October 25, 2012 (Merits, reparations and costs) paras 287-300.
[1003] Inter-American Court of Human Rights, *Case of the Massacres of El Mozote and Nearby Places v. El-Salvador*, Judgement of October 25, 2012 (Merits, reparations and costs), concurring opinion of Judge Diego Garcia-Sayan, at para. 26-27.
[1004] The Belfast Guidelines on Amnesty and Accountability, General Principles (2013). The Belfast Principles argue that various international obligations, including the obligation to prevent international crimes and the obligation to hold perpetrators accountable should be balanced in the form of amnesties that attach conditionalities, such as participation in truth-seeking or reparations. See also the Nuremberg Declaration on Peace and Justice, UN Doc. A/62/885 (19 June 2008), which states that "amnesties, other than those for bearing the greatest responsibility for genocide, crimes against humanity and war crimes, may be permissible in a specific context and may even be required for the release, demobilization and reintegration of conflict-related prisoners and detainees."

making some form of restitution."[1005] In all the countries examined as part of this thesis, amnesties continued to be considered, as will briefly be considered below.

1. Uganda's Amnesty Act 2000

Effectively, the judgment in Kwoyelo before the Constitutional Court, has limited legal validity of Uganda's amnesty law. Already before that, changes were afoot. In May 2012, the Ugandan Minister of Internal Affairs, Hilary Onek, passed Statutory Instrument 34/2012, with the effect of lapsing Part II of the Amnesty Act 2000. This act was prompted by advocacy from JLOS, RLP, ICJ and the UCICC in the aftermath of Kwoyelo's acquittal, that the amnesty is in breach of international law standards.[1006] The JLOS Secretariat drafted a memo in which it argued that the Amnesty Act contravenes international obligations.[1007] Nonetheless, in May 2013 the Parliament voted to reinstate Part II of the Amnesty Act.[1008]

The lapsing of the amnesty caused a wave of concern from local groups. As of 2012, up to 26,288 rebels from 29 rebel groups had utilized the amnesty law: of these, an estimated 12,971 belonged to the LRA.[1009] A 2006 report refers to the amnesty as the most important "pull factor" in encouraging people to leave the LRA.[1010] A communiqué of 23 May 2012, on behalf of traditional and religious leaders, civil society and other organizations called on the government to reinstate it immediately. The communiqué argued that the amnesty was appropriate considering the LRA is largely composed of abducted children; the conflict is unresolved and continues to affect DRC, CAR and South Sudan, and Uganda has a moral obligation to contribute it resolving it; and that the Amnesty Act is an important tool for reconciliation.[1011] Twenty-two civil society groups from LRA-affected areas in Congo, Central African Republic, South Sudan and Uganda issued a similar communiqué on 12 June.[1012] The amnesty represents one of the few forms of government assistance available to ex-combatants.[1013] Generally, it also seems that reintegration of ex-combatants in Northern Uganda is relatively successful, with

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[1005] Louise Arbour, *Are Freedom, Peace and Justice incompatible agendas?* Inaugural lecture on Human Rights and Human Dignity (17 Feb. 2014) Oxford University.
[1006] Human Rights Watch, *Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division,* 2012.
[1007] Interview with former JLOS advisor, Kampala, 12 February 2014.
[1008] Daily Monitor, *Lawmakers Agree to Extend Amnesty Act*, 16 May 2013.
[1009] Agger, Kasper. *The End of Amnesty in Uganda: Implications for LRA Defections,* Enough Project August 2012.
[1010] Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast, March 2009 at p. 32 citing Conciliation Resources and Quaker Peace and Social Witness, *Coming Home: Understanding why commanders of the Lord's resistance Army choose to return to a civilian life* (May 2006), p.10.
[1011] Communiqué of traditional and religious leaders, civil society and other organisations, 23 May 2012, Fairway, Kampala. See also Note Accompanying Fairway Communiqué.
[1012]Agger, Kasper. *The End of Amnesty in Uganda: Implications for LRA Defections,* Enough Project August 2012.
[1013] Interview with Michael Otim, 12 February 2014.

up to two-thirds of returnees who went through the amnesty process feeling safe during the day, although fewer feel safe at night.[1014] As noted by Adam Branch, "the ICC irresponsibly frames the Amnesty Act not as the product of mobilization by the Acholi trying to find peace and duly promulgated by the Ugandan parliament, but as a gift from the Ugandan executive, to be withdrawn by President Museveni at his convenience."[1015]

2. Afghanistan's National Amnesty, General Reconciliation and National Unity Act 2007

In 2002, shortly after he took power, President Karzai declared, "peace is a necessity and justice a luxury that Afghanistan cannot afford."[1016] Likewise, the international community has supported a "peace first, justice later" approach in Afghanistan since 2001.[1017]The Afghan Independent Human Rights Commission and human rights groups argued that accountability was important in order to increase stability. A seminal moment was the release of the Human Rights Watch "Bloodstained Hands" and Afghan Justice Projects "Casting Shadows" reports, followed by a Human Rights Watch press release in December 2006, which called for the investigation of several individuals by name, including parliamentarians Abdul Rabb al Rasul Sayyaf, Mohammed Qasim Fahim and Burhanuddin Rabbani, Minister of Energy Ismail Khan, Army Chief of Staff Abdul Rashid Dostum, as well as current Vice President Karim Khalili.[1018] (It is worth noting that since 2006, three of these six, Dostum, Khalili and Fahim, were at one point Vice Presidents and four were on the Presidential or Vice-Presidential list of candidates for the 2014 elections, while one (Rabbani) was assassinated and one (Hekmatyar) was invited back to Afghanistan in a controversial clemency agreement in 2017.[1019] This is the extent of impunity in Afghanistan.

The HRW press release sparked a debate in the National Assembly on the necessity for an amnesty law. In their discussions in the National Assembly, representatives referred to existence of the ICC, and to the hanging of Saddam Hussein in December

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[1014] Mallinder, Louise*. Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p. 33.

[1015]Branch, Adam. *Uganda's Civil War and the Politics of ICC Intervention* 21 Ethics and International Affairs 179 (2007) p. 184.

[1016] Rubin, Barnett, *Transitional Justice and human rights in Afghanistan*, International Affairs 79, 2 (2003) p. 574.

[1017] Ahmad Nader Nadery, *Peace or Justice? Transitional Justice in Afghanistan,* The International Journal of Transitional Justice Vol. 1 (2007) p. 173-179.

[1018] Human Rights Watch, *Afghanistan: Justice for War Criminals Essential for Peace: Karzai Must Hold Officials Accountable for War Crimes,* 13 Dec. 2006. See also Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, February 2013 at p. 29.

[1019] Quni, Shereena, Al-Jazeera, *UN lifts sanctions against Gulbuddin Hekmatyar, 4* February 2017. The deal gave Hekmatyar amnesty for past crimes and gave him full political rights. The amnesty was accompanied by a lifting of a UN travel ban, arms embargo and asset freeze.

2006 as reasons for why an amnesty might be necessary.[1020] In February 2007, the National Assembly of Afghanistan passed a law on "National Reconciliation, General Amnesty and National Stability." The law, though poorly drafted, grants a blanket amnesty that is so broad to include Rome Statute crimes, both those committed in the past and those to be committed in future.[1021] The law also provides that it "shall not affect the claims of individuals against individuals based up on *Haqullabd* (rights of people) and criminal offences in respect of individual crimes".[1022] This provision distinguishes between the "rights of God" or collective rights, enforced by the government in its mandate to provide for public order, and the "rights of man" or individual rights, directly enforceable against other individuals. It follows the reasoning that under Islamic law, the "rights of man" cannot be bargained away through an amnesty.[1023] Theoretically therefore, victims of Rome Statute crimes can still go to court in Afghanistan, and demand prosecutions of perpetrators, provided they themselves provide the evidence. While this may provide a loophole, the practical reality and political power-balance is that victims are unlikely to go to court to take on warlords on their own accord without support from the state.

The passage of the amnesty law remains controversial in Afghanistan. [1024] Apart from criticism from the general public, the religious leaders *ulema* in Afghanistan disapproved of the law as un-Islamic. The law was not gazetted until 2009, and to this date Karzai has refused to sign it, casting doubt on its legal status. The law contains no mechanism for its enforcement and in this sense remains inoperable i.e. nobody has utilized it. On the other hand, neither has any prosecution been initiated after its passage. Even if its legal status is doubtful, the amnesty largely extinguished the quest for justice in Afghanistan.

Moreover, amnesty continued to be viewed as a cornerstone of the strategy for reconciliation with the Taliban. The Afghan Penal Code provides for general amnesty (Art. 170) and special amnesty (171), the latter of which incorporates the 2007 National Reconciliation, General Amnesty and National Stability Law.[1025] In 2005, President Karzai had established the Independent Peace and Reconciliation

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[1020] Unofficial notes of National Assembly debate on file with the author.
[1021] Article 3 (1) of the National Reconciliation, General Amnesty and National Stability Law, Afghanistan states: "All political factions and hostile parties who were involved in a way or another in hostilities before establishing of the Interim Administration shall be included in the reconciliation and general amnesty program for the purpose of reconciliation among different segments of society, strengthening of peace and stability and starting of new life in the contemporary political history of Afghanistan, and enjoy all their legal rights and shall not be legally and judicially prosecuted."
[1022] Article 3 (3) of the National Reconciliation, General Amnesty and National Stability Law, Afghanistan.
[1023] Interview with Abdel-Hakim Mujahid, High Peace Council, Kabul, 18 March 2014.
[1024] Afghan Independent Human Rights Commission and International Center for Transitional Justice, *Discussion paper on the Legality of Amnesties*, 21 Feb. 2010.
[1025] Qaane, Ehsan. Nuremberg Academy Afghanistan Complementarity Study (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/

Commission to oversee the reintegration of low-level former fighters.[1026] Also in December 2012, the Afghan Cabinet adopted an Action Plan on Peace, Justice and Reconciliation in Afghanistan.

In 2010 President Karzai convened a Peace Jirga to ratify the Afghanistan Peace and Reconciliation Program (APRP). [1027] He also established High Peace Council. Its members include many former *mujahidin* leaders and a few former Taliban and Hezb-i-Islami members. The HPC mandate is (a) to conduct high-level "reconciliation" with the Taliban, in the form of negotiations, and (b) to promote reintegration of low-ranking Taliban who want to be part of the peace process at the local level, through the APRP.[1028] Amnesty is a part of the APRP.

In spite of various levels of contact and negotiations with the Taliban in recent years, none have constituted a breakthrough. Analysts agree that the Taliban in Afghanistan no longer operates under a unified command structure, which complicates attempts at negotiations.[1029] However, the HPC has focused on the release of senior Taliban commanders, such as Mullah Baradar and Mullah Mansour Dadullah, brother of the infamous Mullah Dadullah.[1030] It also works on delisting Taliban from the Security Council imposed travel ban.[1031]

On the local level, the HPC sponsored provincial peace committees, maintains a Secretariat, and facilitated reintegration of rank-and-file Taliban through the Afghanistan Peace and Reintegration Program. The program seeks to reintegrate combatants by simultaneously seeking to engage in social outreach, confidence building and negotiation, demobilization, and consolidation of peace and community recovery.[1032] The program has been criticized for being under-conceptualized but continues its operations. The number of Taliban reintegrated in 2014 was around 10, 000.[1033] It is not clear that Rome Statute obligations were specifically discussed

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[1026] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, February 2013 p. 44. See also Mohammed Masoom Stanekzai, *Thwarting Afghanistan's Insurgency: A Pragmatic Approach toward Peace and Reconciliation*, USIP Special Report, September 2008.

[1027] For more information on the APRP see http://www.af.undp.org/content/afghanistan/en/home/operations/projects/crisis_prevention_and_recovery/aprp/

[1028] Interview with High Peace Council Staff member, Kabul, 15 March 2014.

[1029] Stanekzai, Mohammed Masoom. *Thwarting Afghanistan's Insurgency: A Pragmatic Approach toward Peace and Reconciliation,* USIP Special Report, September 2008.

[1030] The Hindu, Mullah Baradar to be released, 11 Sept. 2013, tp://www.thehindu.com/news/international/south-asia/mullah-baradar-to-be-released/article5113418.ece.

[1031] Interview with High Peace Council Staff member, Kabul, 15 March 2014.

[1032] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, February 2013 p. 45.

[1033] Interview with UK Embassy official, Kabul, 19 March 2014. Those ready to reintegrate are met by the provincial governor, to go through a reintegration ceremony, and given a lump reintegration sum of about $200 and a *chapan* (an Afghan silk robe often worn by Karzai). The burden of proof for insurgents wishing to benefit from the process is low: they have to hand in a weapon and pledge

in the context of formulating the APRP.[1034] According to an unpublished policy paper by the Joint Secretariat, the amnesty is for political rather than serious crimes,[1035] but so far those taking part have *de facto* been granted amnesty. The European Union does not fund the program because of the amnesty clause.[1036]

According to former Taliban leader Abdel-Hakim Mujahid, insurgents were not aware of the amnesty passed by the National Assembly; neither do they consider it a "benefit", since they do not acknowledge the legitimacy of the Afghan government (or the HPC). They regard it as a "puppet" of the "invaders."[1037] Nonetheless, the broader public remains supportive of the Governments reconciliation efforts, particularly in the provinces bordering Pakistan.[1038] On the other hand, women and minorities remain fearful of the implications of a reintegrated Taliban, and many Afghans feel that these ought to be protected in any peace arrangement.[1039]

In February 2018, President Ashraf Ghani once again invited the Taliban to unconditional peace talks, offering them political recognition,[1040] against the background of a troop surge by the US under the Trump administration, and a general escalation of violence by the Taliban. However, his offer did not address the presence of American troops, the withdrawal of which has always been a key Taliban demand. Thus far the Taliban has not responded to the call for negotiations and violence has intensified in recent years.

3. Libya: Amnesty for Revolutionary Acts?

In Libya, in May 2012 the National Transitional Council passed Law 38, entitled 'special measures for the transitional period', which stated in Article 4 that that

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their commitment to the insurgency. When they report they are kept for some days in order to conduct background checks and biometric tests. Sometimes groups of combatants reintegrate at the same time: if it includes a more senior commander, the HPC may contribute to his upkeep. None were reintegrated into the Afghan National Army for now and there are unconfirmed reports that some rejoined the insurgency. Interview with High Peace Council Staff member, Kabul, 15 March 2014.
www.af.undp.org/content/afghanistan/en/home/operations/projects/crisis_prevention_and_recovery/aprp.html.

[1034] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, February 2013 p. 46. The program's Rule of Law, Governance and Human Rights Pillar promises to be "compliant with the laws and Constitution of Afghanistan and Afghanistan's international treaty obligations."

[1035] Interview with UNAMA Deputy Head of Human Rights, Kabul, 18 March 2014.

[1036] Interview with EU official, Kabul, 16 March 2014. Canada also does not fund the program but cited its opposition to terrorism as a more prevailing reason than the ICC: Interview with UK Embassy official, Kabul, 18 March 2014.

[1037] Interview with Abdel-Hakim Mujahid, High Peace Council, Kabul, 18 March 2014.

[1038] The Asia Foundation. *Afghanistan in 2013: A Survey of the Afghan People.* 63% if surveyed Afghans thought that reconciliation could help to stabilize the country.

[1039] Afghan People's Dialogue on Peace*, Laying the Foundations for an Inclusive Peace Process,* December 2011.

[1040] Deutsche Welle, *Afghan President Ashraf Ghani offers Taliban peace Talks and Political Recognition,* 28 Feb. 2018.

"there shall be no penalty for military, security, or civil actions dictated by the February 17 revolution performed by revolutionaries with the goal of promoting or protecting the revolution." This language seemingly granted a broad amnesty to Revolutionaries, although it left open the question of whether offences such as torture could be said to "promote the revolution." There is no evidence that ICC obligations were considered as part of the discussion, mirroring a belief held in by many Libya that the ICC's jurisdiction ended with the Revolution.[1041] The law was condemned by international human rights groups. HRW wrote a letter to the OTP about it.[1042] But its practical effect was delimited by the passage of a subsequent law introduced by the Justice Minister and entitled 'Criminalization of Torture, Enforced Disappearances, and Discrimination'. This law, which entered into force in April 2013, makes it clear that those crimes are punishable, no matter who has committed them.[1043]

Also in July 2015, in the aftermath of the verdict against former senior regime officials of the Qadhafi government, the Parliament in Tubruq issued another amnesty law granting amnesty for crimes committed since the 2011 Revolution, but exempting war crimes, terrorism, murder, kidnapping, torture, smuggling or corruption.[1044] In December 2015, the United Nations brokered the "Libyan Political Agreement" which was supposed to end the conflict between separate entities following the General National Congress in Tripoli and the House of Representatives in Tubruq. On the issue of accountability, the agreement stipulates that the parties commit to the principles of "prosecuting and punishing perpetrators of murder, torture and other crimes under the international law, including all forms of mistreatment against those detained, whoever they are."

V. Conclusion: More Attention to Justice But No Universal Formula

The Rome Statute anticipated tensions between peace and justice, but the tools it provided to resolve these tensions, Articles 16 and 53, remain unused, particularly due to a rigid interpretation by the Prosecutor of the latter. So far there is no clear evidence to suggest that an ICC intervention either incentivizes or risks peace negotiations. In Uganda, peace negotiations in the shadow of the ICC did not

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[1041] The National Transitional Council also passed Law 35 on Granting Amnesties for some Crimes, mainly applicable to the former regime but excluding certain crimes such as torture and rape. Theoretically this law could apply to international crimes but it is so badly drafted that it is unlikely to apply at all.

[1042] Human Rights Watch, *Libya: Letter to the ICC Prosecutor on Libyan Amnesty Laws,* 25 May 2012.

[1043] An early version of the law provided that "punishment shall be increased by one third to whomsoever abuses his position as being one of the revolutionary fighters and carries out acts in contradiction with Article (4) of Law 38 such as arresting of individuals, entry and searching of houses, detention of individuals previously required for the success and protection of the revolution." While this provision was deleted but the revolutionaries continue to insist that it is wrong to "criminalize" them when they liberated the nation.

[1044] Panapress, Libya: *Parliament passes general amnesty bill,* 28 July 2015.

succeed, although conflict did not return to Northern Uganda. In Colombia, there is a good chance that negotiations will succeed in bringing a transition to peace in the shadow of the ICC.

The Rome Statute did have a "transformative effect" on the peace negotiations of various sorts, as laid out in this Chapter. The existence of the Rome Statute, as well as the shadow of the Court, had a definitive effect on the process of negotiations. It raised the profile of accountability issues, and drew more international humanitarian attention to the conflict. In some respects it impacted on state actors in Uganda and Colombia. Victims were heard and empowered as part of the process, due to the shadow of the ICC. Negotiators chose to include individual criminal accountability in the peace package, adopting a "peace with punishment" model, but leaving space to improvise on penalties. Crucially, victims' rights were also considered as part of these agreements. One observer states, "A process that does not even attempt to include a debate on transitional justice will most likely be considered incomplete and flawed, with negative consequences for the effectiveness and durability of a resulting peace agreement."[1045] However, this transformative effect was largely due to the normative influence of the Rome Statute, rather than due to the actions or statements of the Prosecutor, which were not always well received.

It may be early to speak about a "paradigm shift" in the way that countries balance peace and justice. In some situations, amnesties remain on the table. In Afghanistan and Libya, amnesties were passed, even though these countries were under ICC jurisdiction. These amnesties invited relatively little international commentary, even by ICC-supporting states, thus reflecting a possible double standard. It is not clear what accounts for this double standard, although in both Afghanistan and Libya, Western countries themselves were involved in the military intervention, which weakened calls for accountability for their allies.

The peace versus justice debate raises fundamental questions about the legitimacy of the Court and "who decides." This creates dilemmas for the ICC, since this raises questions about its "democratic deficit" as a supranational institution.[1046] The question of the "national interest" is akin to that of local ownership, and poses a legitimacy challenge for the ICC. In the words of Dugard: "international opinion, often driven by NGO's and western activists who are strangers to repression, fails to

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[1045] Kastner, Philipp. *Armed Conflicts and Referrals to the ICC: From Measuring Impact to Emerging Legal Obligations,* 12 JICL (2014), pp.471-490 at p. 485.

[1046] Morris, Madeline, *The Democratic Dilemma of the International Criminal Court*, Buffalo Criminal Law Review, Vol. 5 (2002) p. 596: "A supra-national judicial authority has been created, but there has been virtually no examination of its democratic legitimacy." In the words of Rabkin: "The international community is likely to be paying much less attention to the consequences of prosecutions in a particular country than the people who live in that country. A domestic prosecutor must live with the people affected by his decisions, while the international prosecutor can move on to new assignments, without ever returning to that country. Jeremy Rabkin, *Global Criminal Justice: An idea Whose Time Has Passed,* 38 Cornell International Law Journal 753 (2005) p. 767.

pay sufficient attention to the circumstances of the society which chooses amnesty above prosecutions; and to the argument that wounds are best healed at home, by national courts and truth commissions, rather than by foreign courts and international tribunals."[1047] Louise Arbour has said that peace and justice "requires compromise- both sides have to give. Many justice advocates, however, wary of losing ground, are unwilling to support that approach."[1048]

In fact, an end to conflict may be more likely to prevent further atrocities. In the words of Carlos Nino, "Though it is true that many people approach the issue of human rights violations with a strong retributive impulse, almost all who think momentarily about the issue are not prepared to defend a policy of punishing those abuses once it becomes clear that such a policy would probably provoke, by a causal chain, similar or even worse abuses …[1049] Similar arguments have been made by other Latin American scholars.[1050] In the human rights movement, it seems that "impunity" became increasingly identified with retribution and interpreted as the absence of proportionate punishment. A broader interpretation of "impunity" should take into account not just punishment of perpetrators but also remedies for victims.[1051] In the words of the High Commissioner for Peace in Colombia:

> The concept of impunity is much abused. Impunity is necessarily measured according to the degree to which the rights of the victims are satisfied. We think that the mistake has been to concentrate simply on the perpetrators. The victims should be the centre of attention."[1052]

[1047] John Dugard. *Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?* 12 Leiden Journal of International Law 1001-1015 (1999) p. 1006.

[1048] Arbour, Louise. *Doctrines Derailed? Internationalism's Uncertain Future*, International Crisis Group's Global Briefing, 28 Oct. 2013.

[1049] Nino, Carlos. *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina.* 100 Yale Law Journal (1991) p. 2619.

[1050] Well-known Chilean lawyer and human rights activist Jose Zalaquett argued that according to Max Weber, when confronted with the dilemma of a trying to negotiate a peaceful transition, politicians should be governed by the ethics of responsibility, rather than the ethics of conviction. Jose Zalaquett, Balancing *Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,* Hastings Law Journal, Vol. 43 (1992) p. 1430-31.

[1051] UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005.102/Add. 1, 8 Feb. 2005, Principle 1: "Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations."

[1052] Speech given by the High Commissioner for Peace, Sergio Jaramillo, at Externado University on 9 May 2013, published at El Tiempo.

In the words of another Colombian, Uprimny: "Each society will have its own approach. A universal formula does not exist."[1053] The ICC should not seek to impose such a universal formula. If this is what is meant by transformative effect, that should not be the objective.

Finally, the Colombian peace process also transformed the ICC, causing it to depart from some of its earlier, more rigid stances on the balance between peace and justice. The speech given by the Deputy Prosecutor showed far more deference to the Colombian process than had previously been the case when he said: "The issue for the Prosecutor of the ICC, but most importantly for State Parties, is how to meet the requirements of the Statute while achieving lasting peace and security." That indeed remains the challenge.

[1053] Interview with Director of Dejusticia, Bogota, 16 May 2014.

Chapter 5: Reparative Effect: From Rights to Remedies?

> *Justice will not be served until those who are unaffected are as outraged as those who are*. — Benjamin Franklin
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> *The victims have no time. They are waiting to be rescued; they are calling to stop the rapes and the killings now*. – Luis Moreno Ocampo, Review Conference, Kampala, 31 May 2010

I. Introduction

Reparative effect refers to the Court's impact on victims. The Court is meant to provide access to justice, as well as remedies, for the victims or the world's worst crimes. This raises questions about how victims participate in the process; how they are empowered; and ultimately, how they are "repaired."

Some commentators referred to the ICC's effects on victims as restorative justice. Restorative justice is defined in the English Oxford Dictionary as "a system of criminal justice which focuses on the rehabilitation of offenders through reconciliation with victims and the community at large." Restorative justice is a horizontal form of justice, which exists in different criminal systems. However, restorative justice is not a dominant feature of the ICC.[1054] Instead, it is more accurate to refer to "reparative" justice in the context of the Rome Statute and ICC. The Rome Statute is heralded as the first international criminal forum that actualizes both retributive and reparative justice. The Rome Statute was inspired by the fact that at the domestic level, many legal systems allow for the direct participation of victims in criminal trials through the *partie civiles* system, and it has sought to reproduce this system on the international level. The Rome Statute drew on other developments such as the Basic Principles and Guidelines to a Remedy and Reparation for Victims of Gross Violations.[1055] In 2009,the Court formulated a Strategy in Relation to Victims, which was updated in 2012.[1056]

The Court's mandate of holding perpetrators accountable and providing for reparations is broadly supported by victims, who often perceive their own systems as biased, corrupted, or favoring impunity.[1057] At the same time, the existence of the

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[1054] While in the *Lubanga* Trial Chamber argued that the reparations function of the Court promotes reconciliation between victim and offender, this seems highly tentative. *Prosecutor versus Thomas Lubanga Dyilo,* Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, 7 August 2012, ICC_01/04-01/06 para. 179.

[1055] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

[1056] Report of the Court on the Strategy in Relation to Victims, ICC- ASP/8/45, 10 Nov. 2009.

[1057] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*. Africa Portal research paper (September 2013) p. 20.

Court raises significant expectations among victim communities. In the words of the FIDH: "Victims and local communities … place their hopes in the activities of the Court. They want justice, to tell their stories, and eventually, to obtain reparations."[1058] The Court's ability to serve victims is supremely important in assessing its overall impact or success, as acknowledged by the Registrar:

> The success of the Court will depend not only on its judgements and sentences for individuals who have committed the gravest crimes of concern to the international community as whole. Rather, the success of the Court will also – if not even to a greater extent – depend on giving the victims voice and adequate reparation and assistance in re-building their lives.[1059]

Reparative justice in the Rome Statute takes the forms of participation in the legal process; followed by reparations for victims and in some cases, assistance through the Trust Fund for Victims. This legal framework will be discussed in Section II. But an analysis of whether the form*s* of reparative justice (participation, reparations) are being respected often becomes a quantitative analysis, which does not necessarily provide insight into whether the Court has reparative effect. It is rather more difficult to measure unquantifiable issues, such as the acknowledgement that victims may obtain from being included in Court proceedings. At a bare minimum, under the "do no harm" principle, victims deserve protection when they come into contact with the ICC.

As part of its universal values legitimacy, the Court is based on the notion of one shared identity, shared amongst all of humanity.[1060] The term "victims" before the ICC is often used as an abstraction, whereas little is known about their individual circumstances, or their needs and desires. Those who commit the violations are "enemies of mankind", or *hostis humanis*. As Kendall and Nouwen have commented: "The moral currency of victimhood is thus appropriated to shore up the legitimacy of the ICC's actions."[1061] But how does the Court's "universal values" legitimacy affect individual victims? Should it override the wishes of victims in specific situations? This also raises methodological questions about how to assess the views of victims and who represents them.

The cases of Uganda and Kenya raise difficult questions about whether victims can realistically expect to see meaningful participation, followed by reparations. What is

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[1058] FIDH, *Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court*, November 2013.
[1059] Registrar's Remarks at Coalition for the ICC Launch Forum Commemorating the 20th Anniversary of the Adoption of the Rome Statute, 15 Jan. 2018.
[1060] Koller, David. *The Faith of the International Criminal Lawyer*. International Law and Politics, Vol. 40 (2008) 1019 p. 1050.
[1061] Kendall, Sara and Sarah Nouwen, *Representational Practices at the ICC: The Gap Between Juridified and Abstract Victimhood*, University of Cambridge Faculty of Law, Research paper No. 24 (2013).

the expressive value of the Court vis-à-vis victims? These questions will be discussed in the following Chapter.

II. Legal Framework

A. "Meaningful" Participation?

Victims are defined in Rule 85 as "any natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. Victim participation, guaranteed in Art. 68(3), is at the core of the Rome Statute's promise of justice for victims. Victims have the right to participate in various stages of the proceedings in a variety of ways, although the extent of this right is subject to the discretion of the judges. The Appeals Chamber decided that the right to participate in the "proceedings" does not include investigations, even though that is arguably a very important stage of the process for victims.[1062] At the same time, the victims can and do participate directly in the Prosecution case, through the submission of evidence. In some cases victims presented their own evidence independent of the prosecutor or defence, as was the case in *Katanga*. The discussion below leaves aside the multitude of complications that the Court has experienced with intermediaries.

Converting the ideal of victim participation into reality was left to the judges of the ICC, and it constitutes an enormous challenge, which is freely admitted by the judges. It is also apparent from the inconsistencies in the Court's jurisprudence in this regard. Measures for victim participation are considered onerous and bureaucratic by all involved, and are applied inconsistently across different Chambers of the Court.[1063] The length and complexity of the victim participation forms, and the requirements for supporting evidence have been criticized by both

[1062]Situation in the Democratic Republic of the Congo, ICC-01-04-556, Judgment on Victim Participation in the Investigative Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, 19 Dec. 2008 at para. 56. Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case Western Res. J. Int'l L. (2011) p. 478.

[1063] FIDH, En*hancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court*, November 2013 pp. 14-15. See also Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, 11 Oct. 2013, ICC-ASP/12/41 at paras 28-37.

proponents and critics of victim participation.[1064] The Court has published the following figures on participation:[1065]

Number of victims participating	Pre Trial	Trial	Appeal
Lubanga	7	129	151
Katanga	57	364	0
Ntaganda	1120	2137	N/A
Bemba	54	5229	In process
Gbagbo and Blé Goudé	N/A	726	N/A
Ongwen	2026	In process	N/A
Al-Mahdi	0	8	N/A

Four cases are currently in the reparations phase: *Lubanga, Katanga, Bemba* and *Al-Mahdi.*

The administrative burden of victim participation is immense. The decision in *Lubanga* that victims were to participate on an individual basis,[1066] as to be decided by the judges, has led to an enormous burden on the Registry, which has to assist victims in preparing their supporting documentation. Moreover, at each new stage of the proceedings, the victim has to re-qualify.[1067] As the number of victims who wanted to participate increased into the thousands, particularly in the cases of *Bemba* and *Gbagbo*, new solutions had to be found. This led to the recognition of a simplified, collective application process in the *Gbagbo* case.[1068] In the Kenya cases, only victims who wish to appear before the Trial Chamber were required to fill out an application form. Those who wish to participate in proceedings without appearing can register through the common legal representative. However, victims are not always adequately consulted in the process of appointing a common legal

[1064] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge,* 44 Case Western Res. J. Int'l L. (2011) p. 481. See also War Crimes Research Office (2009), *Victim Participation at the Case Stage of Proceedings*, Washington: Washington College of Law, American University (2009). Tenove, Chris. *The International Criminal Court: Challenges of Victim Assistance, Participation, and Reparations*, Africaportal backgrounder, No. 52 January 2013. Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* "International Journal of Transitional Justice Vol. 7 (2013) p. 527.
[1065] Second Court's report on the development of performance indicators for the International Criminal Court, 11 Nov. 2016, at p. 63.
[1066] *Prosecutor versus Thomas Lubanga Dyilo*, Decision on Victims' Participation, ICC-01/04-01/06-1119, 18 January 2008. In each case the Chamber must assess whether the victim qualifies as a victim under Rule 85.
[1067] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge,* 44 Case Western Res. J. Int'l L. (2011) p. 482.
[1068] *Prosecutor versus Laurent Gbagbo*, Second Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11-86, 5 April 2012. Interview with, Head of VPRS, May 2014.

representative, neither are there sufficient funds for legal representatives to conduct their field investigations.[1069]

The result is that currently, the modalities for victim participation are applied inconsistently across different Chambers of the Court.[1070] In 2016, a simplified individual approach for participation was laid out in the Court's Practice Manual.[1071]

The lack of a unified vision on participation is apparent from the positions of the judges of the ICC, and their varying viewpoints. Judge van den Wyngaert reflected that "a huge amount of time is spent on victim-related issues" in ICC trials.[1072] Judge Fulford remarked that "the involvement of victims has not greatly added to the length of the case" and "their submissions and questioning have been focused, succinct and seemingly relevant."[1073] Financial and efficiency considerations are increasingly featuring in the debate concerning victims' rights, as remarked by NGOs at the Assembly of States Parties.[1074]

As victims are lumped into ever-larger categories, this presumes homogeneity of their interests in situations where the reality is that their interests may be diverse and fractured and some are more vulnerable than others. On the other hand, if all categories of victims address the Court separately, it will create an unbearable administrative burden. The common legal representative is intended to resolve this problem,[1075] but the challenge of scope is inherent. The result is described by Kendall and Nouwen: "Of the millions of victims in the word, then, only thousands

[1069] Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3, 1 July 2017, Pages 567–591. In 2017, the Court presented a new legal aid system to the ASP, which would allow for field budgets to be calculated on a case-by-case basis.

[1070] FIDH, *Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court (*November 2013) pp. 14-15. See also Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, 11 Oct. 2013, ICC-ASP/12/41 at paras 28-37.

[1071] Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3, 1 July 2017, Pages 567–591.

[1072] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case Western Res. J. Int'l L. (2011) p. 494.

[1073] Fulford, Judge Sir Adrian, *Reflections of a Trial Judge*, Criminal Law Forum 22 (2011) p. 222.

[1074] FIDH, *Enhancing Victims' Rights Before the ICC: A View From Situation Countries on Victims' Rights at the International Criminal Court* (November 2013) p.5: "Discussions at the Court and within different bodies of the ASP have a propensity to address victims' challenges solely as a matter of budgetary concerns, portraying victims' participation as a "cost driver" or an administrative burden."

[1075] In fact some research has indicated that the role of common legal representatives is quite positively perceived: Tenove, Chris, International *Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper, (September 2013) p. 29.

have managed to reach the top of the pyramid of juridified victimhood and have been granted provisional recognition as victims before the ICC. "[1076]

Underlying these tensions is a lack of consensus on what is the fundamental purpose of victim participation i.e. what makes it meaningful.[1077] The goals of victim participation suffer from as much controversy and confusion as the goals of the ICC more broadly. NGOs strongly argue that victim participation is essential, because victims "provide judges with contextual information, ensure a connection with the field and a degree of local ownership of ICC proceedings, thereby advancing the legitimacy of the ICC mandate."[1078] They argue that victim participation can "empower victims and contribute to their healing" while "establishing a strong connection between the Court and victims, with victims providing important factual and cultural context to proceedings, which can also contribute to establishing the truth."[1079] Some go even further, to suggest that the victim participation function is what connects the process of the ICC with the local context: "Regularly, only a few of those involved in the proceedings are thoroughly familiar with the local context and customs that are relevant to understanding the manner and impact of the commission of the crimes and to interpreting the evidence."[1080] Proponents argue that the victim participation function fills that gap.[1081] An argument is also made that the interests of victims in the trial go beyond the punishment of the accused, to include public acknowledgement of what happened and the establishment of a historical record.[1082] Any suggestion to delimit victim participation is vehemently opposed by NGOs:

[1076] Kendall, Sara and Sarah Nouwen, *Representational Practices at the ICC: The Gap Between Juridified and Abstract Victimhood,* University of Cambridge Faculty of Law, Research paper No. 24 (2013).
[1077] Wemmers,Jo-Anne. *Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Rights to Participate*, Leiden Journal of International Law 23 (2010) 629 p. 637. In her research she indicates that officials inside the Court had different ideas on what were the goals of victim participation, whether it is providing information or a form of expression.
[1078] FIDH, *Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court,* (November 2013) p. 4.
[1079] Redress, I*ndependent Panel of Experts report on victim participation at the International Criminal Court,* July 2013.
[1080] Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013) p. 524.
[1081] This was also stated by the Court in the *Katanga and Ngudjolo* case, in the Decision on the Set of Procedural Rights Attached to the Procedural Status of Victims at the Pre-Trial Stage of a Case, Doc. No. ICC-01/04-01/07-474 (13 May 2008) paras. 31-36: victims can assist the judges to "better understand the contentious issues of the case in light of their local knowledge and socio-cultural background."
[1082] Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013) p. p. 525

> A narrow interpretation and application of the rights of victims by the Court may be inconsistent with the requirements of the Statute and undermine the credibility of the Court.[1083]

But this standpoint ignores the challenge that victims "have not been an important consideration in the judges' decision making in determining outcomes such as truth, justice and reparations."[1084] The role that victim participation currently plays in truth telling and acknowledgement, as a matter of practice in Court proceedings, is doubtful.

The Bureau of the ASP stated "participation must be meaningful for victims but also for the purposes of the proceedings, in other words, to provide sufficient relevant information for the Judges, the parties and participants."[1085] All this has prompted debate on what constitutes "meaningful participation." Judge van den Wyngaert has said:

> There is an enormous distance – both in the literal and the cultural sense- that often separates the reality of victims' lies from the proceedings in The Hague. Victims generally do not personally attend the hearings. Considering their numbers, this would simply be impossible. In general, therefore, victims are represented by counsel, and most of them never make it to The Hague … In those circumstances, can legal representation be anything more than symbolic?[1086]

Perhaps victim participation ought to be re-conceptualized as requiring more interaction, in the form of communication and consultation (although in one study less than 10 percent of the Court staff associated victim participation with consultation).[1087] The Special Rapporteur on truth, justice, reparations and guarantees of non-repetition pleads for "meaningful participation in processes of law-making through which they (victims) can give content to the notion of justice (not limited to their own redress)."[1088] Research indicates that until now, victims

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[1083] Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3, 1 July 2017, Pages 567–591.
[1084] Moffett, Luke. *Realising Justice for Victims Before the International Criminal Court*. International Crimes Database (September 2014) p. 8.
[1085] Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries, Twelfth Session, The Hague 20-28 November 2013, ICC-ASP/12/38 at para. 10.
[1086] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case Western Res. J. Int'l L. (2011) p. 489.
[1087] Wemmers, Jo-Anne. *Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Rights to Participate,* Leiden Journal of International Law 23 (2010) 629 p. 637.
[1088] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, Human Rights Council 21st session, 9 August 2012 at A/HRC/21/46.

often perceive of the Court as engaging in one-way rather than two-way communication, and that meetings did not lead to feedback or action.[1089]

The presumption however that participation as currently implemented serves to build local ownership in the Court deserves to be put to question.[1090] Observers have argued the Court is increasingly inclined to take decisions without involving victims.[1091] This includes for instance the appointment of a common legal representative, or in Kenya, on the decision whether to hold *in situ* confirmation hearings.[1092] The Kenyan victims were consulted, but not by the Court.[1093] It may be that consultation, albeit more informal than participation, is more meaningful for victims.

In any case, in the current model, legal representatives and Court staff consume many of the resources reserved for victim participation. Indeed, the gap between the promise of the Court and its delivery in practice is becoming more apparent as time goes on. As stated rather brusquely by the Bureau of Assembly of States Parties in 2013:

> [T]here is a need to close the gap between expectations, right and resources. In other words, while stakeholders should bear in mind that victims' rights are a cornerstone of the Statute and therefore, the debate on victims cannot be reduced to a cost-driver, they should be aware that the world is still facing a financial crisis that has consequences in terms of the allocation of resources. As a result, finding that balance is a matter of priority.[1094]

Until now, only one major study was carried out on the views of victims participating in ICC proceedings, by Berkeley University.[1095] The study concludes that most victims have insufficient knowledge to make informed decisions about whether to participate in ICC cases. In terms of expectations, victims want convictions and reparations: in fact the latter was the main motivator for

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[1089] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper (September 2013) p. 27.
[1090] Some argue that the victims' participation function should constitute consultation: Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013) p. 531.
[1091] Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013) p. 532. Carayon, Gaelle and Jonothan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3 (1 July 2017) pp. 567–591.
[1092] Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013), p. 534.
[1093] Interview with ICC staff, Nairobi, 4 Feb. 2014.
[1094] Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries, Twelfth Session, The Hague 20-28 November 2013, ICC-ASP/12/38.
[1095] Human Rights Center, UC Berkeley, *The Victims Court? A Study of 622 Victim Participants at the ICC: Uganda, DRC, Kenya, Cote d'Ivoire* (2015).

participation in Uganda and DRC. Few however want to participate directly in trial proceedings, whereas they do appreciate filling out individualized applications. At the same time, victims expressed frustration at the length of trials, and their satisfaction depended largely on their personal interactions with ICC staff or their legal representatives, which tended to be very few. Victims in some situations, including in particular Kenya, feared reprisals for their involvement in ICC proceedings.[1096]

The findings of this study are also reflected in some smaller-scale studies. For instance, one study based on focus groups indicated that many victims want to be heard by the ICC, and recommended that the ICC should "listen attentively to the experiences of individual victims."[1097] All of this should give rise to further contemplation about the victim participation function of the Court. For instance, meaningful participation could perhaps be enhanced by more creative use of the outreach function of the Court, or participation could be limited to crucial stages of the proceeding where it is most impactful.

B. Who is Eligible for Reparations?

One of the main purposes of victim participation is so that victims can claim reparations.. Many victims participate with this goal in mind. Reparations proceedings are governed by Article 75 of the Statute.

At the national level, reparations are a crucial form of acknowledgement that the State violated the rights of victims. De Greiff argues that reparations should lead to "recognition, civic trust and social solidarity."[1098] At the international level, such acknowledgement is less central but may still play a role. The big challenge facing reparations is that the numbers that may be eligible for reparations will be far larger than the resources available. Convicted persons themselves will often either be indigent or it may very difficult to access their resources. This means that most orders for reparations would need to be financed from the Trust Fund for Victims, which continues to relatively humble in scope.

The Court currently approaches reparations on a case-by-case basis. The Trial Chamber in *Lubanga* laid down principles and procedures for reparations for that case as provided for in Article 75 (1).[1099] In doing so, the Trial Chamber sketched out an expansive vision of reparations. It held that the reparations function had several important goals, including to require those responsible to repair the harm

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[1096] Ibid.

[1097] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper (September 2013) p. 31.

[1098] Pablo de Greiff, *Justice & Reparations,* in The Handbook of Reparations (ed. Pablo de Greiff), Oxford University Press, 2006 at p. 451.

[1099] *Prosecutor versus Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, ICC_01/04-01/06,7 August 2012.

they caused, and to alleviate the suffering of individuals and communities, thereby affording justice, deterring future violations, and contributing to reconciliation. Particularly significant is that the Trial Chamber put proportionality at the center of its approach to reparation. For instance, the Trial Chamber held that compensation can be granted if there is economic quantifiable harm, if such an award is appropriate and proportionate, and if there are available means to make this approach feasible.[1100] The harm to be compensated is also given a broad definition, including for instance lost opportunities. The Trial Chamber held that "awards ought to be proportionate to the harm, injury, loss and damage."[1101] On the other hand, the scope of reparations could be individual or collective: a collective approach may be appropriate to reach unidentified victims.[1102]

This judgement sets a certain "gold standard" or proportionality, which may be impossible to meet in practice. At the same time, the Trial Chamber took the view that reparations should reflect local cultural and customary practices, if appropriate, and should support programs that are self-sustaining.[1103]

The Appeals Chamber later clarified a number of issues from the Trial Chamber decision.[1104] The Appeals Chamber took a judicial approach to reparations, which closely links the individual criminal responsibility of the perpetrator with the rights of the victim. Nonetheless, the Appeals Chamber urged the TFV to continue "assistance" means to victims who fall outside of the exclusionary categories that it laid out.[1105] As Dixon has argued, this gives prominence to the concept of assistance within the functions of the TFV, as will be elaborated below. On 15 December 2017, the Trial Chambers set the amount of Lubanga's liability for collective reparations at 10 million USD.

Following the Appeals Chamber Decision, in the *Katanga* case,[1106] the Trial Chamber issued individual symbolic compensation of USD 250 per victim, intended to provide "meaningful relief" to the victims. It also ordered collective reparations in the form of support for housing, support for income-generating activities, education aid and psychological support. The Chamber assessed the extent of damage in the case to a monetary value of USD 3,752,620 and, observing proportionality, assessed Katanga's liability at USD 1 million. The Appeals Chamber later held that the Trial

[1100] Ibid., para. 226.
[1101] Ibid., para. 243.
[1102] Ibid, para. 217, 219.
[1103] Ibid, para. 245-246.
[1104] *Prosecutor versus Thomas Lubanga Dyilo*, Appeals Chamber Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129, 3 March 2015.
[1105] Ibid. at para. 215. Dixon, Peter. *Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo*. International Journal of Transitional Justice, (2016) 10 at p. 88-107.
[1106] *Prosecutor v. Germain Katanga,* ICC-01/04-01/07-3728, Ordonnance de reparation en ertu de l'article 75 du Statut, 24 March 2017.

Chamber's assessment of each application and setting out all the findings caused unnecessary delays, and that its role should mainly be to define the harm and determine the appropriate modalities for repaying the harm.[1107]

Another decision on reparations was issued in the *Al-Mahdi* case.[1108] Al-Mahdi was held to owe 2.7 million in expenses for individual and collective reparations for the community of Timbuktu, after his conviction for directing attacks against the religious and historic buildings in that city. Al-Mahdi is indigent, and the TFV is currently working on a draft implementation plan. The Trial Chamber stressed the potential of the award to contribute to deterrence and to reconciliation. The Trial Chamber also ordered individual reparations for those whose livelihoods depended on the attacked sites and whose ancestral burial places were damaged in the attack. On 8 March 2018, the Appeals Chamber ruled that the identities of the victims did not need to be disclosed to Al-Mahdi, but only to the Trust Fund for Victims.[1109]

Many uncertainties remain in reparations proceedings. This lack of clarity is a source of frustration to victims, as has become apparent in the *Ongwen* case.[1110] Moreover, Judge van den Wyngaert has predicted: "if the extent of the harm suffered and the causal link with the crimes has to proved on an individual bases, there is a good chance that the length of the reparations proceedings could exceed the duration of the criminal trial itself."[1111] To be realistic, if Court proceedings are a matter of decades, in countries such as Uganda or Afghanistan, where the life expectancy is significantly lower than in the West, this raises significant doubts whether victims can expect to see reparations in their lifetimes.

But an even bigger challenge is that the TFV will never be able to pay reparations to all the victims that are eligible in any manner proportionate to the offence, or even to provide meaningful relief. At the same time, often victims continue to expect individual reparations, although this may vary according to the context.[1112] Even collective reparations, which in principle are to be welcomed, would severely strain

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[1107] *Prosecutor v. Germain Katanga,* ICC-01/04-01/07 A3 A4 A5, Judgement on the appeals against the order of Trial Chamber II of 24 March entitled ''Order for Reparation Pursuant to Article 75 of the Statute'', 8 March 2018.
[1108] *Prosecutor vs. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-236, Reparations Order, 17 August 2017.
[1109] *Prosecutor vs. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-A, Appeals Chamber, Public Redacted Judgement on the Appeal of Victims Against the "Reparations Order", 8 March 2018.
[1110] Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3 (1 July 2017) pp. 567–591.
[1111] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case Western Res. J. Int'l L. (2011) p. 487.
[1112] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper (September 2013) p. 21: Discussants in Kenya believed that victims of post-election violence need individualized compensation and livelihood assistance. By contrast, respondents in Uganda were much more open to community-level reparations for the whole northern region. Participants also tended to agree on who ought to be prioritized, including the vulnerable (e.g. families without breadwinners, disabled). Ugandans tended to express more interest than Kenyans in symbolic reparations.

the resources of the TFV, which currently would not be sufficient to build even a single school or hospital in any affected community.

This should be contrasted with the expenditure currently going into victim participation, estimated at 7 million in 2012.[1113] The fact that victim participation function costs the Court three times what the TFV initially had available to it annually leaves room for pause as to whether this is the right balance.[1114] According to Judge van den Wyngaert, "a question the Court will have to ask itself is whether the participation system set in place is "meaningful" enough to justify the amount of resources and time invested in it or whether it would be better to spend those resources directly on reparations."[1115]

In contrast, the Colombian Victims and Land Restitution Law (1448) from 2011, which combines assistance and reparations, has registered almost 16 percent of Colombia's population as official victims of the conflict, including many victims of internal displacement.[1116] In 2016, the Colombian government had paid reparations payments to 473,257 victims and assistance payments to 1,184,418.[1117] While elements of the system have also been criticized, it appears to be able to do more for victims than the ICC. As Pablo de Greiff and I wrote in 2005: "it is important to both temper expectations of what the Fund can actually do for victims, especially by way of compensation, and that the struggle for reparations for victims must continue in other *fora*, including the national arena.[1118]

C. The Trust Fund for Victims: Centerpiece or Sideshow?

According to Article 79 of the Rome Statute, the TFV has a two-fold mandate (1) to administer reparations ordered by the ICC against convicted persons; and (2) to use other resources for the assistance of victims. So far, the TFV's activities have centered mainly on the latter part of the mandate, the granting of assistance. The resources for the assistance function of the Court come from voluntary contributions, some of which are earmarked, such as for SGBV.[1119]

[1113] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case Western Res. J. Int'l L. (2011) p. 492.
[1114]Ibid. p. 492.
[1115] Ibid.p. 495.
[1116] Dixon, Peter. *Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo*. International Journal of Transitional Justice (2016) 10 p. 93.
[1117] Ibid. p. 94.
[1118] De Greiff, Pablo and Marieke Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints,* in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, ed. K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens, Intersentia (2005) p. 225-226.
[1119] Both the UK and Japan both made significant contributions earmarked for SGBV, of 800,000 and 600,000 Euros respectively.

The TFV currently functions as a donor to a range of humanitarian projects in ICC-situations, including Uganda, DRC and CAR (although the latter had to be halted due to security). Its annual reports are filled with facts and figures on the performance of projects. In 2016, its projects had 70,667 direct beneficiaries and 230,641 indirect beneficiaries.[1120] Recently, the TFV has started to develop a plan with goals and indicators, in order to measure its own impact.

However, the TFV must also implement the reparations orders of the Court. Some donors have earmarked their donations to be used for reparations. The TFV is currently playing a role in helping to design the reparations approach in *Lubanga* and in *Al-Mahdi*.[1121]

In this respect, the TFV creates both an opportunity and a liability as "[t]he flexible procedures that the TFV may apply make it more suitable to design approaches to reparations for mass crimes than the Court itself."[1122] Dixon argues that the distinction between reparations and assistance exposes tensions "between inclusive and exclusive approaches to reparative justice; between the legal strictures of redress and the complex realities of violence; and ultimately between the supposed symbolic power of reparative justice and victims' actual experience of reparations in practice."[1123]

Efforts of the Assembly of States Parties to secure funding for the TFV are focusing increasingly on fines and forfeitures. As many accused are indigent, it is not clear whether this will result in a sufficient yield to make a substantial difference to what victims can be offered in terms of reparations.[1124] Having said that, annual donations from governments for the TFV have steadily risen. A significant part of donations in recent years are earmarked for victims of sexual and gender-based violence. Also encouraging is the fact that the donor base of the TFV is very broad, with many states participating. The TFV employs a staff member dedicated to fundraising.[1125] At the same time, from 2002-2014 the total contribution to the TFV, both restricted and unrestricted, was 22 million Euros, less than 3 million Euros a year. In 2016, the TFV had 12.7 million available to it, with 5 million reserved for

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[1120]Second Court's report on the development of performance indicators for the International Criminal Court, 11 Nov. 2016, at p.65.
[1121] Interview with TFV Director, 7 May 2014.
[1122] De Greiff, Pablo and Marieke Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints*, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, ed. K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens, Intersentia (2005) p. 243.
[1123] Dixon, Peter. *Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo.* International Journal of Transitional Justice (2016) 10 p. 89.
[1124] Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries, Twelfth Session, The Hague 20-28 November 2013, ICC-ASP/12/38.
[1125] Interview with TFV Director, 7 May 2014.

reparations.[1126] This is a relatively small amount when compared to what many donor countries spend on humanitarian assistance or development projects. The TFV remains chronically underfunded. The cause of paying for the crimes of others seems not to attract significant donor support. While there may be a need for the TFV to explore other sources of funding, such as private donations, all in all it is unrealistic to expect that this amount will increase a great deal over time. With its low income, the TFV remains a "side show" to the ICC project.

In sum, the Court's practices in dealing with victims are showing many shortfalls. As argued by Carayon and O'Donohue:

> To gain victims' confidence, empower them to claim their rights, and ensure that they benefit from (and are not frustrated by) the process, it is essential that the Court is accessible; respectful in its interactions; honest in what it can and cannot achieve; predictable in its processes; and transparent, consistent and fair in its decision-making. Only then can victims make informed choices throughout the process.[1127]

The authors criticize the ICC for not laying out a sufficient strategy on victims; not defining clear indicators for progress, with too much focus on quantitative rather than qualitative indicators in the Courts Strategic Plan, and for not subjecting this area of work to adequate evaluation. But the challenge remains that even if the Court would make those amendments in its planning, whether the plight of victims of the worlds worst crimes is simply too large in scale for this single institution to redress satisfactorily. Even though its legitimacy has so largely hinged on the concept of serving the victims, honesty about this simple fact may help to find diversified solutions.

III. Reparative Effect on the Ground: Country Experiences

A. Uganda: A troubled decade of intervention

The situation in Uganda raised fundamental questions for the Court about how to take into account the views of victims, both at the time of opening an investigation and at the point of an exit strategy. Uganda was the first case to be referred to the ICC, so that it is possible to trace the impact of the Court over the longer term. Victims and affected communities were not consulted prior to the announcement of the referral. After the referral, the ostensible representatives of the victim community, i.e. Acholi local religious and traditional leaders as well as certain members from the civil society, spoke out strongly against the ICC intervention from

[1126] Second Court's report on the development of performance indicators for the International Criminal Court, 11 Nov. 2016, at pp. 65-66.
[1127] Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3 (1 July 2017) pp. 567–591.

the outset.[1128] Local leaders even visited The Hague in a bid to ask the Prosecutor to drop the arrest warrants.

The opposition of the religious and traditional leaders to the ICC was based on several factors. First, the ICC was seen to interfere with local initiatives to pacify the conflict, in particular the Amnesty Act and Acholi traditional justice; second, the ICC was seen as favoring the Government, and the fact that UPDF was not investigated contributed to the impression that this was one-sided justice; and lastly, many local leaders feared that the involvement of the ICC would prevent the LRA from ever agreeing to a peaceful settlement of the conflict.[1129] The enormity of the humanitarian crisis in Northern Uganda caused many humanitarian organizations to side with the local religious and traditional leaders in demanding "Peace First, Justice Later."[1130]

Apart from these substantive objections, the traditional leaders also had objections based on the process of the ICC intervention:

> The ideas of local civil society actors, and their decades of involvement in a war that had affected many of the personally, seemed to be effectively ignored. There was minimal consultation about accountability and justice options before the ICC made its announcement, no prior warning about the announcement, and no mechanism provided for voicing dissent in the immediate aftermath.[1131]

The Court attempted to exercise damage control through conversing with traditional and religious leaders in the North, but it was difficult to correct this perception.

1. Who Represents Victims?

The situation in Northern Uganda concretely raised the difficult question of who represents victims. On the one side were the religious and local leaders and the humanitarian organizations. On the other were international actors supporting the

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[1128] Branch, Adam . *Uganda's Civil War and the Politics of ICC Intervention* 21 Ethics and International Affairs (2007) p. 179. See also Hovil, Lucy. *Challenging International Justice: The Initial years of the International Criminal Court's Intervention in Uganda*, Stability, 2 (1) (2013) pp. 1-11.
[1129] See for instance Otim, Michael and Marieke Wierda, *Justice at Juba: International Obligations and Local Demands in Northern Uganda*, in *Courting Conflict? Justice, Peace and the ICC in Africa*, ed. Nicholas Waddell and Phil Clark Royal African Society (2008) p. 21.
[1130] See Lucy Hovil and Joanna Quinn, *Peace First, Justice Later: Traditional Justice in Northern Uganda*, Refugee Law Project Working Paper No. 17 (July 2005).
[1131] Hovil, Lucy. Challenging International Justice: The Initial years of the International Criminal Court's Intervention in Uganda, Stability, 2 (1) (2013) p 7.

ICC, who often questioned the legitimacy and integrity of these local actors,[1132] sometimes equating opposition to the ICC as opposition to justice.[1133]

Conversely, the "local actors" made a strong argument that it was the ICC intervention that lacked legitimacy. They argued that the ICC had entered at the invitation of President Museveni, himself a party to the conflict. They also argued that the ICC would be ineffective, due to its inability to enforce its arrest warrants, and that it would reinforce a military solution to the conflict. Most of all, they argued that the form of justice that the ICC would deliver was not relevant to the victim communities. As written by Hovil: "to the people of northern Uganda, justice looked like an opportunity to go home in safety and then pursue appropriate forms of justice."[1134] In the words of Branch:

> [The decision, on the one hand, to seek justice through punishment or, on the other, to forgo punishment in favor or justice through reconciliation, is a decision that must be made by the concrete community that is the victim of the crimes and that will have to live with the consequences of the decision. "Humanity" is too thin a community upon which to base a universal right to punish.[1135]

In this debate, everyone claimed to represent victims. Established with the assistance of the Victims Rights Working Group associated with the ICC, a new Coalition, composed largely of groups from Iteso and Lango, favored the ICC. Around the Review Conference in 2010, the Ugandan war Victims Fund and No Peace Without Justice organized tours of delegates to Northern Uganda and a soccer game in the honour of victims, in which both President Museveni and UN Secretary General Ban Ki-Moon played.

Prior to the Juba peace process, this debate became so polarized that the debate became mainly about whether international justice and traditional justice are complementary or not.[1136] According to Allen, the ICC involvement in Uganda entrenched the local justice movement to the extent that it became unpopular to pose questions or proffer views against it.[1137] Allen argued that Ugandans "like

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[1132] Ibid. at p. 8.
[1133] Ibid. at p. 5: "By questioning the ICC's involvement at that point in the conflict, those who criticized the intervention were not turning their backs on the promotion of justice. Rather, they were demanding more justice: justice that was robust and genuinely engaged with the context; justice that would contribute to, or at least complement, the promotion of fair and equal governance; and justice that would deliver."
[1134] Ibid. at p. 7.
[1135] Branch, Adam. *International Justice, Local Justice: The International Criminal Court in Northern Uganda.* Dissent (Summer 2004) p. 22.
[1136] Nouwen, Sara. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan.* Cambridge University Press (2013) p.152-153.
[1137] Allen, Tim. *Bitter roots: the "invention" of Acholi traditional justice*. In *The Lord's Resistance Army: Myth and Reality*. (Ed. Tim Allen and Koen Vlassenroot). Zed Books, London and New York, 2010 p. 242-243. Allen, Tim. *Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda,* in

decent people everywhere else, … require a functioning state to make the best of their lives, including conventional forms of legal protection from those who may oppress them."[1138] Nouwen observes that the promotion of local justice was a form of resistance against the international justice movement and attracted its own donor investment.[1139]

While opinion-makers in Northern Uganda insisted that the majority of the population opposed the ICC, the true picture of the views of the affected population, as studied in various surveys, was much more varied and complex. Scholars like Allen observed early on that privately, some Northern Ugandan leaders would express support for the Court:[1140] "Most of those I spoke to in the displacement camps mixed concern about the security implications of issuing warrants for the arrest of Kony and his senior commanders with a willingness to see them prosecuted or punished. Certainly there was no general rejection of international justice."[1141]

This led to what could be termed "survey wars." Numerous organizations conducted their own surveys of the views of victims in Northern Uganda, including local organizations (Refugee Law Project, Justice and Reconciliation Project); humanitarian organizations (Oxfam, Quaker Peace), the United Nations Office of the High Commissioner for Human Rights; and academic institutions. All claimed to have special insight either by virtue of context-related knowledge or through their methodology, whether quantitative or qualitative.

Berkeley and ICTJ contributed to this debate by carrying out a population-based survey on attitudes about peace and justice. These surveys were carried out in in four districts, including Gulu, Kitgum, Lira and Soroti. The respondents numbered around 2500 each time in total and lived both in camps and villages.[1142] The surveys were repeated over time, in 2005, 2007 and 2010.

Courting Conflict? Justice, Peace and the ICC in Africa, Royal African Society (ed. Nicholas Waddell and Phil Clark) 2008 p. 52.

[1138] Allen, Tim. Ritual (*Ab)use? Problems with Traditional Justice in Northern Uganda*, in *Courting Conflict? Justice, Peace and the ICC in Africa,* Royal African Society (ed. Nicholas Waddell and Phil Clark) (2008) p. 52.

[1139] Nouwen, Sara. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan.* Cambridge University Press (2013) p.147-149.

[1140] Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army,* African Arguments, 2006 p. 138. For instance, Walter Ochora, the LCV chairman in Gulu in 2005 with extensive contact with the LRA, commented that there were many reasons why the LRA chose to remain in the bush, including access to power and women, and that the ICC would not negatively affect the ability to deal with the LRA.

[1141] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, African Arguments (2006) p. 160.

[1142] Sample sizes were calculated proportional to population size. The questionnaire used open-ended questions and was analyzed using Statistical Package for Social Science software.

The views expressed in the surveys varied over the years. In 2005, just after ICC arrest warrants were issued, when respondents were asked what they thought should happen to the LRA leaders who were responsible for violations. 66% said that they favored trial and imprisonment for the LRA, whereas only 22% said that they supported forgiveness (reconciliation and reintegration).[1143] In 2005, only 27% had heard of the ICC, mainly through the media. Up to 83% believed the Court could arrest the LRA, which may have contributed to their favorable opinion. The ICC and its supporters cited the results of the survey as scientific evidence of the presence of victims in Northern Uganda who favored their involvement. While this was undoubtedly the case, it did not reduce the political importance of the opposition of Acholi traditional and religious leaders to the ICC intervention in Uganda, nor did it address issues of perceptions.

In 2007, during the height of the Juba Peace Process, the survey was repeated with 2,875 respondents in Acholi Districts (Amuru, Gulu, Kitgum, Pader), Lango (Lira, Oyam), and Teso (Amuria, Soroti).[1144] By 2007, 60% had heard of the ICC. Of these, 54% still believed they could arrest the LRA (although in Acholi fewer people believed that than in Lango or Teso, due to outreach activities of the ICC). [1145] Opinions related to the ICC's impact on the Juba peace process appeared somewhat contradictory.[1146] It is worth noting that another general population survey taken in the whole of Uganda in 2008 showed more support for the ICC: 67 % of those who answered said they trusted the ICC either "somewhat" or "a lot."[1147]

A third survey was carried out in 2010, of 2,498 respondents across 154 villages in Amuru, Gulu, Pader, and Kitgum, Acholi districts only.[1148] This was long in the aftermath of the conflict, and up to 83% of respondents had now returned to living in villages. 85% considered that there was peace in Northern Uganda, although up

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[1143] Phuong Pham et al, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda*, ICTJ and Human Rights Center, University of California, Berkeley (July 2005) p. 26.

[1144]When victims were asked what they would like to see happen to the LRA leaders, the majority (54%) favored soft options including forgiveness, reconciliation, and reintegration; whereas around 41% still favored hard options for dealing with them. At the same time, 44% favored international trials, whereas 24.7% favored national trials and 31 % said they preferred no trials. Phuong Pham, Patrick Vinck, Eric Stover, Andrew Moss, Marieke Wierda, Richard Bailey, *When the War Ends: A Population-Based Survey on Attitudes About Peace, Justice and Social Reconstruction in Northern Uganda,* ICTJ, Payson Center, and Human Rights Center (December 2007) pp. 37-39.

[1145] Ibid. pp. 37-39.

[1146] Of those who had heard of the ICC, 65% now believed that the Court would contribute to achieving justice and 61% said it would attribute to achieving peace. But interestingly, 55% said that the ICC was helping rather than hindering the peace process, although when asked specifically about Juba, 51% had the opinion that the ICC could jeopardize the peace talks. Ibid. pp. 37-39.

[1147] See Voeten, Erik. *Public Opinion and the Legitimacy of International Courts*, 14 Theoretical Inquiries in Law (2013) p. 429 – 430: citing the Afrobarometer from 2008, www.afrobarometer.org/data/data-rounds-merged (2008).

[1148] Phuong Pham, Patrick Vinck. *Transitioning to peace: A Population-Based Survey on Attitudes About Social Reconstruction and Justice in Northern Uganda*, Human Rights Center (December 2010). ICTJ did not participate in this survey.

to 40% felt it may just be temporary. In 2010 respondents focused on basic needs and provision of services, including food (28%), agriculture, including access to land and seeds (19%), education (15%) and health services (13%). This shows an interesting shift in emphasis to the importance of livelihoods and basic services in the aftermath of conflict, according to Maslow's hierarchy of needs.

Another dramatic change in public opinion was the desire of 64% of respondents thought that it is important to hold the government accountable, whereas 19% mentioned the LRA leadership and 5% the LRA.[1149] Interestingly, the number of respondents who had heard of the ICC had gone down in 2010, from 70% to 59%. In 2010, many people had moved from camps to villages and it is likely that their interests had shifted, A majority of those who had heard of the ICC described their knowledge as being bad (66%), and this was confirmed by follow-up questions which revealed low knowledge on the Court.[1150] Just 3% said they had taken part in a meeting that discussed the Court, and less than 1% in a meeting organized by the ICC itself.[1151] Less than half who knew about the ICC (43%) felt it helped the situation, either through bringing peace and security (40%), forcing negotiations (35%), or bringing attention to the conflict in Northern Uganda (17%). The other 40% believed it had no effect, and 10% said that it hindered the situation.[1152] Interestingly 70% of those aware of the ICC still felt that Kony and the top commanders should be tried by the ICC, whereas only 28% said it should be the Ugandan Courts.[1153] In-depth interviews revealed that the ICC was perceived as more neutral and less corrupt than local courts.[1154]

Part of what these figures indicate is that quantitative surveys are a blunt instrument, often yielding contradictory information that do not give real insight into what respondents understand by complex concepts such as "justice". Nesiah critiques the survey methodology:

> [T]he interviewers retrofitted the responses they received into a finite set of "response options", so that they could be legible to the coding programmes. Thus, preferences could be recorded, tabulated and fed into an algorithm that made "local" voice politically intelligible. By "politically intelligible" I mean

[1149] Ibid. p.43. In results very similar to 2007, 29% said that the ICC was the appropriate mechanism to hold perpetrators accountable, whereas 28% said the Ugandan courts, 25% the Amnesty commission, and 8% traditional mechanisms. When asked what should happen to LRA members responsible for violence, 24% said that hey should be persuaded to come out of the bush, and 23% said they should be given amnesty. Only 16% said they should be put on trial and 13% said they should be captured. 73% said that they had already forgiven the LRA. 87% said it should not be possible to prosecute combatants who have received amnesty. Ibid. pp. 39-40.
[1150] Ibid. p.43.
[1151] Ibid. p.43.
[1152] Ibid. p. 43.
[1153] Ibid. p. 44.
[1154] Ibid. p. 44.

that it spoke to a choice set that was framed by the ICL milieu from which the survey emerged, and the target audience for the survey results.[1155]

In any case, the "survey wars" in Uganda contributed to "consultation fatigue" among affected populations.[1156] Nonetheless, these detailed surveys give some insight into how complex it is to try to discern the views of local populations.

2. Uganda and the (Pre-Ongwen) "Maintenance Strategy"

From the first arrest warrants in 2005 until the arrest of Dominique Ongwen in 2015, the ICC remained an abstraction to many victims of the conflict. As stated by one civil society activist, "prosecuting five persons cannot respond to the needs of 3 million victims in the North."[1157] The Court's outreach in Northern Uganda was perceived as flawed from the outset because it started in non-Acholi areas such as Lira and Soroti, whereas the Acholi perceive of themselves as the primary victims of the conflict.[1158]

After the end of the conflict, victims and affected communities were left to return to land that did not contain infrastructure or that was far removed from schools and hospitals. In general, they resisted government pressure to move into "satellite camps",[1159] instead preferring to return home. However, in general government services such as teachers and medical staff were not deployed to the countryside in adequate numbers. They had to rebuild their own homes. In some cases, they were forced out of the camps.

The fact that the ICC did not succeed in arresting the LRA was a source of disappointment to victims, and once they realized this is the case, the Court became viewed as ineffective and its relevance diminished in their eyes.[1160] With the implementation of the "maintenance strategy" Ugandans also felt that they were longer a priority to the Court, and that the Court is turning its attention to situations "where it can deliver results."[1161]

In early 2014, around 1500 victims were listed as participants in proceedings before the ICC. In November 2013, the Court organized five regional meetings with all

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[1155] Nesiah, Vasuki. *Local Ownership of Global Governance*. JICJ, Vol. 14, Issue 4 (1 September 2016) pp. 985-1009.
[1156] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*. AfricaPortal research paper, September 2013, p. 4.
[1157] Interview with Head of Justice and Reconciliation Project, Gulu, 9 Feb. 2014.
[1158] Ibid.
[1159] The President's half-brother Salim Saleh once showed me a pamphlet of his vision of these "satellite camps." It showed a camp surrounded by tanks, which he preceded to cross out. He envisaged that its inhabitants would work on communal farms that would stimulate the Ugandan economy.
[1160] Justice and Reconciliation Project, *The Dog that Barks But Doesn't Bite: Victims' Perspectives on the International Criminal Court in Uganda*, Policy Brief 6 (February 2013) p. 5.
[1161] Interview with Head of Justice and Reconciliation Project, Gulu, 9 Feb. 2014.

participating victims, in order to manage expectations in respect of the Court winding down its Uganda operations, and to present a report to the Pre-Trial Chamber. Victims expressed anxiety that the ICC is "abandoning" Uganda, but they also expressed frustration at the lack of outcomes and the failure to arrest.[1162] While many persons in Northern Uganda knew about the Court, interest levels had dropped.[1163] Instead, victims turned their attention to the Government's Transitional Justice policy.[1164] Objections to terming to holding a "commemorative" ceremony arose from the fact that some argued that justice has not yet been provided to the victims and the wounds have not yet healed. [1165]

It can be argued that the ICC intervention in Uganda did lead to an increased focus on the LRA conflict and an awareness of the plight of victims.[1166] But some ten years after the ICC opened its investigations, relatively little had been achieved by way of *concrete* impact to the victims of the conflict, either by the ICC or by the Government. On fact, the only concrete impact was through the TFV. As a result, victims conceive of the court as the "dog that barks but doesn't bite."[1167]

3. The Ongwen Trial: Resurgence of Ambivalence

In a surprising twist of fate, on 21 January 2015 senior LRA commander Dominique Ongwen was arrested in CAR by US forces and handed over to the ICC, with the consent of Ugandan authorities. The Ugandan authorities considered that in spite of the establishment of the International Crimes Division, they lacked the capacity to conduct a case of the magnitude of Ongwen, due to his senior rank and their inability to protect witnesses. Affected populations too pointed to the perceived mismanagement of the Kwoyelo case in this regard.[1168] Ongwen's surrender to the ICC provoked a mixed reaction in Uganda, but has gone some way to revitalizing interest in the Court. The opening of his trial has been watched closely by thousands of victims as well as by a delegation of leaders and victim representatives who travelled to The Hague.

Dominic Ongwen is one of the most senior LRA commanders, allegedly responsible for many killings including the "Christmas massacre" which took place in Haut-Uele in DRC in 2008.[1169] He is accused of seven counts of war crimes and crimes against humanity under the Rome Statute. Acholi traditional and religious leaders still maintained that a local solution would in relation to Ongwen would be more appropriate, in particular in regard to his mixed perpetrator-victim status. Ongwen, born in 1980, himself was allegedly abducted when he was fourteen. Eventually he

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[1162] Interview with OHCHR local staff, 6 Feb. 2014.
[1163] Interview with ICC outreach officer, 6 Feb. 2014.
[1164] Interview with UCICC, 11 Feb. 2014.
[1165] Interview with OHCHR local staff, 6 Feb. 2014.
[1166] Interview with ICC outreach officer, 6 Feb. 2014.
[1167] Justice and Reconciliation Project, *The Dog that Barks But Doesn't Bite: Victims' Perspectives on the International Criminal Court in Uganda*, Policy Brief 6 (February 2013).
[1168] Refugee Law Project, *Ongwen's Justice Dilemma* (16 Jan. 2015).
[1169] Justice and Reconciliation Field Note 7, *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen* (July 2008).

was groomed to become second-in-command in the LRA, most likely through beatings combined with witnessing a high degree of violence perpetrated against anyone who defied the LRA.[1170] New recruits are often subjected to cruelty, beatings and indoctrination, and forced to participate in killings from an early stage, often in a ritualistic manner.

While this does not in any way absolve him of the crimes he is alleged to have committed, it points to the challenges of accommodating a dual victim-perpetrator status in a formal legal framework.[1171] It is telling that the start of his trial, Ongwen said "it was the LRA who committed atrocities" and "LRA is Joseph Kony and not me."[1172] Other transitional justice models, such as truth commissions, are more able to deal with these complexities, without designating a person either as a perpetrator or as a victim. Some communities also expressed anxiety that the trial could complicate reconciliation between them, for instance between Lukodi village, home to most of the victims, and Awach, where Ongwen hails from.[1173]

Victims and intermediaries had a sense of being abandoned by the Court during the hibernation period of this case, but were re-incentivized to participate.[1174] Until now, 4107 victims have been admitted to participate in the trial, represented by 2 common representatives.[1175] However, the trial has been received with some scepticism relating to the narrowness of the case against Ongwen and its narrative of the conflict, including failure to hold the state responsible for protecting him; perceptions that he is kept in a "five star hotel" (the ICC detention center) while his victims live in poverty; how his family visits will be conducted when he has many wives (from forced marriage) and children. Some traditional leaders have expressed the view that the trial of Ongwen in The Hague will not help to restore broken relationships in the community.[1176] In addition, the Association of LRA Victims in the Central African Republic has called for Ongwen's case to be extended to crimes committed in the CAR between 2008 and 2014.[1177]

This points to the limitations of the ICC, which tends to base individual criminal responsibility on "situations" often defined by national boundaries, thereby failing to consider the cross-border nature of conflicts. As concluded by the Refugee Law Project, there is a need "to complement the ICC proceedings with domestic processes that provide acknowledgement to the multiple victims of the conflict, provide healing to survivors and the affected community, and take steps to promote national reconciliation and guarantee non-recurrence."[1178] At the same time, the

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[1170]Ibid. See also Van den Berg, Stephanie. Interview with Ledio Cakaj in the International Justice tribune, 12 January 2017.

[1171] See also, Refugee Law Project, *Ongwen's Justice Dilemma* (16 Jan. 2015).

[1172]Van den Berg, Stephanie. Interview with Ledio Cakaj in the International Justice tribune, 12 January 2017.

[1173] Information provided in an email by ICC outreach officer, 19 February 2015.

[1174] Information provided in an email by ICC outreach officer, 19 February 2015.

[1175] Case information sheet, https://www.icc-cpi.int/uganda/ongwen/documents/ongweneng.pdf.

[1176] Refugee Law Project, *Ongwen's Justice Dilemma* (16 Jan. 2015).

[1177]Hirondelle news agency, *Africa: Victims Want Ongwen to be tried for Crimes in Central African Republic,* 25 Feb 2015.

[1178] Refugee Law Project, *Ongwen's Justice Dilemma* (16 Jan. 2015).

victims of the Kwoyelo trial before the ICD have less access to outreach and legal representation than the Ongwen trial, further perpetuating a "hierarchy of victims."

4. The Innovative Approach of the TFV in Northern Uganda

With reparations proceedings in Uganda still some way off, the TFV has in many respects represented the only concrete remedy for victims of the conflict. The work of the TFV in Uganda is generally viewed positively: most complaints pertain to its limited nature and a desire that the TFV could do more. An external evaluation of the TFV's activities in Uganda and DRC shows that it is generally viewed positively, by victims, beneficiaries, implementing partners and government agencies.[1179] The evaluation deemed its interventions as both highly relevant to the needs of victims as well as effective in improving their lives.[1180] Assistance by the TFV is granted within a community context rather than to individuals.

The overall amount currently allocated to the TFV in Uganda annually is modest, around 600K to 800K Euros. Annually, the TFV is expending around 2.5 million between Uganda, DRC and Central African Republic.[1181] The TFV has chosen mainly humanitarian organizations such as CARE as implementing partners, but this means it has not generally partnered organizations that carry out human rights work and that are also in direct contact with conflict-related victims.[1182] At first, CARE was reluctant to associate publicly with the TFV due to fears about potential backlash for its Sudan operations, but now its affiliation is more widely known. The TFV does not work with the same intermediaries as the OTP or else it may create the impression that they are sharing information with the OTP, which could endanger them.[1183]

A key area of TFV activity in Uganda is surgical assistance, including removal of bullets, treatment of burns, fitting of prosthetic devices, and surgical reconstruction including for victims who suffered facial disfigurement or SGBV. Funding from the TFV enabled several thousands of these surgical procedures.[1184] Psychological rehabilitation includes "individual or group-based trauma counseling; community-led healing of memories initiatives; and community sensitization around the rights of victims to promote reconciliation".[1185]

[1179] External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions, ICRW and the TFV, November 2013.
[1180] Ibid. p. 8.
[1181] In recent years, State Parties have started to contribute more to the TFV, with an increase from around 1.5 million to 4.5 million annually.
[1182] Interview with Head of Justice and Reconciliation Project, Gulu, 9 Feb. 2014.
[1183] Interview with TFV Director, 7 May 2014.
[1184] Interview with TFV Head of Office, Kampala, 6 Feb. 2014.
[1185] External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions, ICRW and the TFV, November 2013 p. 12.

The "maintenance strategy" of the Court provided a particular challenges for the TFV and the sustainability of its programs. In 2013, the TFV in Uganda stopped providing material support[1186] and focused on rehabilitation, both physical and psychological. The TFV planned to carry over some of its programs to the Ministry of Health, for sustainability reasons. Other programs too, such as psychological rehabilitation ought to be taken over by the Government in due course. In this sense, the work of the TFV can link to a broader debate on state responsibility for reparations, but that link for the moment appears indirect. While a policy for transitional justice drafted by JLOS includes a section on reparations, it has not been implemented. The Governments seems to fear the financial implications of reparations, while local populations have consistently stressed their desire for acknowledgement, apologies, requests for forgiveness and memorials.[1187]

The mandate of the TFV presents many challenges in practice. For instance, burn victims must demonstrate that their injuries have a nexus to the conflict. HIV also presents a problem in terms of the mandate, because again there must be a nexus to the conflict. The limitations on the jurisdiction of the Court reflect in the TFV, and create selectivity and an element of randomness. At the same time, the TFV makes an effort to refer those who are ineligible to other humanitarian actors.

The TFV selects its partners through competitive bidding processes. The partners of the TFV select beneficiaries, but the TFV holds an annual workshop in terms of training them on how to select. Significantly, beneficiaries can include victims of UPDF crimes, even though these are not under investigation. The recent external evaluation of the TFV commends it for "working with community resources and promoting local ownership."[1188]

One of the main challenges facing the TFV in Northern Uganda is a lack of knowledge about its work.[1189] The TFV's choice to work in a low profile manner and in a way that is not directly affiliated with the Court has meant that victims may not associate it with the ICC's reparative justice.[1190] Those who know about the TFV seemed to view its efforts positively and wished it could do more.[1191] Conversely, the UN recently became more relaxed about collaboration with the TFV as the

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[1186] Material support previously provided included access to safe shelter, vocational training, reintegration programmes for former child soldiers, support for village savings and loans, education grants, and classes in accelerated literacy: Ibid. at p. 8.
[1187] OHCHR, *The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011).
[1188] External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions, ICRW and the TFV, November 2013 at p. 8.
[1189] Interview with LSE researcher, 9 Feb. 2014. She said out of the 200 rape victims that she interviewed for her doctoral thesis, none knew about the TFV.
[1190] See Tenove, Chris. *Uganda and the International Criminal Court: Debates and Developments,* Africaporal, Backgrounder No. 60 (July 2013).
[1191] Interview with TFV Head of Office, Kampala, 6 Feb. 2014.

general sensitivity in regard to the ICC has dropped. Some take the view that a closer relationship between the TFV and the ICC could have enhanced the image of the ICC in Northern Uganda by being responsive to the needs of victims.[1192] Its activities are not always associated with the Court. The approach taken by the TFV is also perceived as regional: among the Acholi that know about the TFV there is a perception that the TFV favored non-Acholi areas.[1193]

The degree of separation between the TFV and the Court meant that the TFV did not benefit from the Court's outreach program. The TFV has operated in a very low-key manner but one that has caused some to question its transparency. For a body specializing in parceling out resources, an absence of public communications led many to question how to access the fund or how decisions on beneficiaries were made. Only recently have the TFV and Court staff started appearing at joint functions, including at a round of consultations held in November 2013.

The larger debate on reparations in Uganda remains unresolved. The Ugandan government argued that the Peace, Recovery and Development Plan (PRDP) for the North ought to be viewed as reparations, [1194] even though it lacks an element of recognition of victims, and is largely funded by international donors.[1195] Victim advocates argue that the Government of Uganda should take responsibility for awarding reparations, and that the international community should encourage but not replace it in this function.[1196] As mentioned, the government of Uganda has not yet instituted a reparations policy. Instead, it engaged in *ad hoc* payments, which are perceived to be overtly political, amounting to "vote-buying."

Rehabilitation, both physical and social, also remains an urgent need among victim communities.[1197] Many victims may have experienced disfigurement or mutilation and need psychological as well as physical rehabilitation. In particular, women returnees face stigmatization and may experience great difficulty in issues of

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[1192] Interview with Head of Justice and Reconciliation Project, Gulu, 9 Feb. 2014.
[1193] Interview with Head of Justice and Reconciliation Project, Gulu, 9 Feb. 2014.
[1194] The PDRP also only allocates a miniscule amount of around 3% to peacebuilding: Interview with OHCHR, 10 Feb. 2014. Also, some women do not find it sufficiently engendered.
[1195] But victims have highlighted that PRDP is aimed at "prosperity for all" rather than recognition of individual harm suffered. ICTJ Briefing, *Reparations for Northern Uganda: Addressing the Needs of Victims and Affected Communities*, September 2012. Victims stressed: "justice itself is an experience and a process, and not simply an outcome." OHCHR, *The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xix. Moreover, the PRDP is "spread thin" and covers 40 districts in the broader North, including many areas which were not affected by the LRA conflict. Interview with religious leader, Gulu, 9 Feb. 2014.
[1196] OHCHR, *The Dust Has Not Yet Settled: Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xxi: In regard to international donors and development partners, interviewees said that they do not "want the to "high-jack" planning processes on truth-recovery or reparations."
[1197] JRP, *The Dog That Barks But Doesn't Bite: Victims Perspectives on the International Criminal Court in Uganda,* Policy Brief No. 6 (February 2013).

marriage, land ownership and inheritance.[1198] The ICC Trust Fund has focused some of its programs on these victims.[1199] Land distribution in Acholi remains contested, and the Government is alleged to have taken advantage of displacement in Acholi areas to grab land for commercial enterprises.[1200] At the same time, the work of the TFV is making a valuable contribution in the Ugandan context.

B. Kenya: Do No Harm? The Victims of Post-Election Violence.

The former Prosecutor often cited the Kenyan case as exemplary in terms of local support for the ICC. A South Consulting poll in June 2011 recorded an 89% level of public support for the ICC cases, just after the six Kenyans originally appeared in court. [1201] In 2012, up to 68% are said to have supported the ICC, according to an Ipsos Synovate poll.[1202]

However, over time the ICC was essentially outmaneuvered in the court of public opinion, after Kenyatta and Ruto decided to join forces and run together for Presidential elections, in 2013. During their election campaign Kenyatta and Ruto mounted a media campaign against the ICC, which impacted significantly on public opinion. In a poll of 2000 Kenyans released 10 July 2013, just after the elections, an Ipsos Synovate poll showed that 39% of Kenyans still supported the ICC. This was a drop of 16% from April 2013.[1203] A South Consulting Poll of 2629 Kenyans said that 50% were still happy with the ICC prosecutions.[1204] (This poll corresponds with the ICC's own perception of its level of support, which it described as "consistent", putting it at around 50%, with some regional variability).[1205] Thirty-three percent of those posed by South Consulting said that they did not think that the ICC has the "real suspects".[1206] In 2014 it was said that up to 65% of Kenyans wanted the ICC cases to be dropped.

[1198] ICTJ Briefing, *Reparations for Northern Uganda: Addressing the Needs of Victims and Affected Communities* (September 2012).
[1199] External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions, ICRW and the TFV, November 2013 at p. 17.
[1200] Atkinson, Ron. *Land issues in Acholi in the Transition from War to Peace.* The Examiner, Issue 4, (Dec. 2008), pp.3-9, 17-25. See also Ronald R. Atkinson & Arthur Owor. *Land Grabbing': The Ugandan Government, Madhvani, and Others versus the Community of Lakang, Amuru District.* Journal of Peace and Security Studies. Vol. 1. Special Issue: Unfolding Land Conflicts in Northern Uganda (December 2013).
[1201] Maliti, Tom. *Two Opinion Polls Show Support for the ICC Drops In Kenya*, The ICC Kenya Monitor, 31 July 2013.
[1202] Maliti, Tom. *Two Opinion Polls Show Support for the ICC Drops In Kenya,* The ICC Kenya Monitor, 31 July 2013.
[1203]Ibid.
[1204]Ibid.
[1205] Interview with ICC staff member, Nairobi, 4 Feb. 2014.
[1206] Maliti, Tom. *Two Opinion Polls Show Support for the ICC Drops In Kenya*, The ICC Kenya Monitor, 31 July 2013.

The reasons for this shift in perception are manifold. The ICC did not engage consistently after it first got involved, and ended up ceding valuable political space.[1207] The ICC invested considerably in media training to increase the knowledge base, but this approach was not effective in countering the media manipulation.[1208] While the ICC continued to receive significant support from civil society groups in Kenya, this was not sufficient to counter the media machinery from the politicians.

Prior to the discontinuance of the cases against Kenyatta and Ruto, perceptions of the former Prosecutor in Kenya were already very mixed. The perception was that the OTP did a "shoddy investigation."[1209] On one visit he diverted to an animal sanctuary to adopt a leopard cub, a move that caused one observer to dryly remark that: "He came a jurist and left a tourist."[1210] Another observed that the narrative of "witness coaching" spread by the politicians was more powerful than the narrative of "witness intimidation" of the Court.[1211]

After their election, Kenyatta and Ruto mounted a massive diplomatic offensive against the ICC.[1212] It is estimated that money spent on trying to eliminate the arrest warrants must have been formidable, including money spent on travel to lobby AU; money to pay lawyers – all at the Kenyan taxpayer's expense.[1213] The ICC became the "only game in town" and the Kenyan government was described as a "single issue government."[1214] Some blame it for distracting from, or complicating the pursuit of victims, claims for other forms of transitional justice, such as reparations, truth-seeking, or local prosecutions.

Kenya successfully rallied the African Union to make several declarations against the ICC for unfairly targeting African leaders for prosecution. The AU amended the Protocol on the African Court of Human and People's Rights to give it jurisdiction over Rome Statute crimes. In February 2016, the Kenyans sought AU backing for a proposal for African States to withdraw from the ICC. The legal nature of the proposal is not binding.[1215]

Kenya also waged war against the ICC at the Assembly of States Parties. During the 12th ASP in 2013, the Kenyan delegation lobbied for an amendment to Article 27,

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[1207] Interview with civil society activists, Nairobi, 3 Feb. 2014.
[1208] Interview with ICC staff member, Nairobi, 4 Feb. 2014.
[1209] Interview with ICC staff, Nairobi, 4 Feb. 2014.
[1210] Interview with civil society activists, Nairobi, 3 Feb. 2014.
[1211] Interview with ICC staff, Nairobi, 4 Feb. 2014.
[1212] Pilling, David, *International Justice has a problem in Africa,* Financial Times, 13 April 2016 at https://next.ft.com/content/1a33f4a2-fff7-11e5-ac98-3c15a1aa2e62.
[1213] See Institute for Security Studies, *The International Criminal Court's cases in Kenya: origin and impact*, No. 237 (August 2012) p. 15.
[1214] Interview with civil society member, Nairobi, 4 Feb. 2014...
[1215] The Guardian, *African Union members back Kenya's plan to leave the ICC*, 1 Feb. 2016, www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court.

which allows the ICC to prosecute sitting government officials, but it was averted because it was raised too late. However, amendments were made to the Rules of Procedure and Evidence to as to excuse the accused from attending trial.[1216] During the 13th ASP Kenya demanded a wide range of amendments to the Rome Statute, including to Article 63 on the presence of the accused, to Article 27 on serving heads of states, to Article 70 on offences against the court to be extended to ASP officials, to Article 112 on the Independent Oversight Mechanism and to the preamble of the Rome Statute to add regional criminal jurisdictions to the complementarity principle. None of these demands succeeded. The diplomatic offensive culminated in a push by Kenya in the 14th session of the Assembly of States Parties to prevent the application of amended Rule 68 (on the admission of prior recorded testimony from some witnesses who later recanted) in the Ruto and Sang cases. The Assembly of States Parties affirmed that in its interpretation the Rule could not be applied retroactively.[1217]

A third prong of the strategy of the Kenyan politicians to defeat the ICC was actual interference with, or intimidation of witnesses. In a motion of 19 December 2013, the Prosecutor requested an adjournment in the trial of Kenyatta.[1218] She informed the Court that one witness had to be withdrawn from the case after admitting that he had provided false evidence, and another had indicated he was no longer willing to testify. In light of this, the Prosecutor considered that it had insufficient evidence to proceed to trial.

This development raises the very difficult question of why the Prosecution chose to proceed on a thin evidentiary base in such a high profile case, one where witnesses were likely to come under severe threat or pressure. On 5 Dec. 2014, the Prosecutor announced the withdrawal of charges against Uhuru Kenyatta.[1219] On March 13, 2015, she terminated proceedings in the case altogether. On 5 April 2016, the Trial Chamber dismissed charges against Ruto and Sang, on grounds of insufficient evidence.[1220] The Prosecutor had attempted to enter prior statements of witnesses who later recanted into evidence, but this attempt was denied. A number of cases were initiated against Kenyans for contempt of court and tampering with or

[1216] These included Rules 100 (place of proceedings); Rule 68 (prior recorded testimony); and Rules 134bis (presence through the use of video technology and Rule 134ter (excusal from presence at trial), and Rule 34quarter (excusal from presence at trail due to extraordinary public duties).
[1217] See Amnesty International, *Kenya: State Parties run dangerously close to interfering with the ICC's independence*, 15 November 2015 at https://www.amnesty.org/en/latest/news/2015/11/kenya-state-parties-run-dangerously-close-to-interfering-with-the-iccs-independence/
[1218] *Prosecutor versus Uhuru Muigai Kenyatta*, Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, 19 Dec. 2013 ICC-01/09-02/11.
[1219] Marlies Simmons and Jeffrey Gettleman, *International Court Ends Case Against Kenyan President in Election Unrest: Uhuru Kenyatta Faced Allegations of Crimes Against Humanity*, International New York Times, 5 Dec. 2014.
[1220] Alistair Leathhead, *Dismissal of case against Kenya's Ruto huge blow against the ICC,* 5 April 2016 at http://www.bbc.com/news/world-africa-35974172.

intimidating witnesses. This also ended the case for reparations, although Judge Eboe-Osuji' argued that reparations should be possible.[1221]

There can be no doubt that the dismissal of the cases against Kenyatta, Ruto and others has damaged the perception of the ICC in Kenya and beyond. It has also meant that witnesses continue to be denied justice. Nonjo Mue, Chairperson of ICJ Kenya has said:

> All this has left the victims of post-election violence deeply wounded, frustrated, and desperate, not knowing where else to look for justice. Going forward, the ICC and all those who support international criminal justice must now embark on some honest soul-searching to reflect on the lessons learned from the Kenyan cases and how the Rome Statute system can be strengthened to deliver meaningful justice to victims of atrocity crimes, especially where alleged perpetrators go on to seize control of the state and to use it to shield themselves against accountability.[1222]

Years after the Post-Election Violence in Kenya, little has been done to ease the plight of victims. A 2012 report by two prominent Kenyan NGOs found that the efforts of the Kenyan government focused almost entirely on displacement and not on the other violations such as killing, infliction of permanent injury, or SGBV.[1223] The report is the result of interviews with more than 800 respondents in around 200 sites. [1224]A few victims said received medical care, but victims of SGBV reported that they did not receive psychosocial support or anti-retroviral drugs. No comprehensive program was implemented on adequate livelihood assistance or compensation. Many people continued to live in camps, in very tenuous circumstances. Programs to deal with displacement suffered from corruption.

Suggestions for reparations in Kenya under national law are relatively recent, and are conceived of mostly as compensation, which raises budgetary concerns. The TJRC report incorporated a reparations policy for victims, drafted by civil society. This reparations policy was submitted to the National Assembly but it has not yet been passed. In 2015, President Uhuru Kenyatta created a USD 110 million Restorative Justice Fund for victims of human rights violations, but it is not yet

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[1221] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, 16 June 2016 .

[1222] See https://ciccglobaljustice.wordpress.com/2016/04/07/rutosang-icc-case-thrown-out-explanation-and-reaction/.

[1223] See also Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*. AfricaPortal research paper (September 2013) p. 13.

[1224] KHRC and Kenyan Section of International Commission of Jurists, *Elusive Justice: A Status Report on Victims of 2007-2008 Post-Election Violence in Kenya (*2012).

operational and has raised questions of how it will combine with the TJRC reparations policy.[1225]

The government mainly focused on giving IDPs money to buy land, but the effort was described as politicized, and there are allegations that mainly Kikuyu have benefited.[1226] The Trust Fund for Victims has not been able to deploy to Kenya, in part due to the risks posed by its association with the Court. The net result is that to date, victims are still awaiting any tangible benefits from the ICC process, and are coming under increasing threat. Victims have therefore not received any significant assistance from either their own Government or the Court.

In October 2014, the Kenyan National Assembly enacted the Victim Protection Act. This act is for all victims, not just victims of human rights violations. It gives victims certain rights to participate in trials. It also gives them rights to security and medical treatment, and a right to take part in restorative procedures. The Act sets up a Victim Protection Trust Fund, which can award compensation. However, the Act is not yet fully functional.[1227] In 2015, President Kenyatta set up a $110 million "Restorative Justice Fund" but it is not operational.

But it is not just that the victims have not been remedied. The Kenya case also showed the weaknesses in the Court's ability to protect victims and witnesses in the face of an uncooperative government. Several witnesses were killed. The ICC Prosecutor admitted: "several people who may have provided important evidence regarding Mr. Muthaura's actions, have died, while others are too afraid to testify for the Prosecution."[1228] As highlighted by the Court, "[i]n light of the two Kenya cases, the Court will face new and unprecedented challenges regarding witness protection, especially due to the large size of families requiring protection."[1229] The case against Kenyatta and Ruto both collapsed due to witnesses recanting their testimony or refusing to testify. On 6 January 2015, media sources reported that a key witness in the Ruto trial was killed.[1230] The ICC said he acted outside the instructions of the witness protection and returned home. In light of the Kenyan situation the ability of the Court to ensure effective witness protection was questioned, and had to be reviewed.

[1225] Kenney, Emily, *What next for the victims of Kenya's post-election violence?* International Justice Monitor (26 May 2016). http://www.ijmonitor.org/2016/05/what-next-for-the-victims-of-kenyas-post-election-violence/.

[1226] Interview with civil society member, Nairobi, 5 Feb. 2014.

[1227] Hansen, Thomas Obel. *Prosecuting International Crimes in Kenyan Courts?* Paper Presented at "The Nuremberg Principles 70 Years Later: Contemporary Challenges," (21 Nov. 2015).

[1228] Statement by ICC Prosecutor on the Notice to withdraw charges against Mr Muthaura, 11 March 2013.

[1229] Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, 11 Oct. 2013, ICC-ASP/12/41 at para. 24.

[1230] BBC, Kenya *ICC defence witness in Ruto trial killed,* 6 Jan. 2015, http://www.bbc.com/news/world-africa-30703876.

For its part, the Kenyan Witness Protection Agency, formed under the Attorney General's Office pursuant to provisions found in the International Crimes Act, is underfunded and has so far failed to gain the trust of the public. The situation in Kenya in respect of witnesses remains tenuous. Kenya is currently undergoing a series of police reforms that may have impact on witness protection in the long run,[1231] but the Kenyan situation failed to meet the "do no harm" standard that should at a minimum apply in ICC interventions.

V. Conclusion: Does the ICC Serve Victims?

The centrality of victims to the ICC project has been heralded as a milestone in international criminal law, and sets an important normative standard. The moral acknowledgement, or expressivism through the recognition of actual victim participants in trials, is significant to victims themselves, as shown in the Berkeley study. At the same time, the ICC is a first attempt to apply the rights of victims in the context of mass atrocity in order to guarantee sufficient remedies. The question is whether sufficient numbers of victims will see their rights converted to remedies. Otherwise the expressive value of victim participation and reparations risks remaining hollow, or symbolic.

Victim participation is under strain, with inconsistent approaches between Chambers and differing interpretations amongst the judges. Technical rules that exclude large numbers of potential victims in ICC cases give rise to the danger of creating new "hierarchies of victims" within situations or "juridified victimhood." The ICC remains primarily a criminal forum, which as a practical matter continues to be focused on investigating and trying alleged perpetrators in as fair a manner as possible while trying to consider the interests of victims. Whether it can guarantee "meaningful participation" is still a matter of debate.

The limited rights of victims to participate at the preliminary examination stage means that victims are often not included in strategic decisions made by the OTP, particularly in cases of Security Council or State referrals.[1232] While the Prosecutorial Strategy states that the ICC may take into account the interests of victims, and consult them in various ways, this process is informal in nature. It is often at the preliminary examination stage when crucial perceptions of the ICC are formed, as will also be seen in the next Chapter. The Court should reconsider how to incorporate the views and interests of victims into preliminary examinations in a more rigorous and structured way.

A positive development is the victim representation process carried out pursuant to Art. 15 (3) of the Rome Statute in the Afghanistan situation. In late 2017 and early

[1231] http://www.ssrresourcecentre.org/2015/10/09/police-reform-in-kenya-challenges-and-opportunities/

[1232] Article 15 of the Statute does require the interests of victims to be taken into account if a case is opened *proprio motu*.

2018, the Victims Participation and Reparations Section reached out to organizations knowledgeable on Afghanistan and gathered the views of victims and those affected by the conflict. 784 victim representations (165 individual and 534 collective) were gathered in this way, mostly through online forms or emails. Only 6 percent were attributable to women. The vast majority of victim representations (680) "overwhelmingly supported" the Prosecutor to open an investigation in Afghanistan, stating that "the current government of Afghanistan cannot overpower the warlords … and there are a lot of crimes happening, but no one can raise their voices because of fear."[1233] What victims may seek is the ability for more interaction with the Court.

What emerges from the practice of the ICC to date is the progressive exclusionary nature of the proceedings of the Court. The more advanced a prosecution before the ICC, the smaller the realm of potential victims who receive recognition under the processes of the Statute. It is not always obvious who self-identifies as victims in any given society, but categories are often much broader than those designated by the ICC. For instance, in Northern Uganda affected populations expressed the view that all IDPs should be considered victims.[1234] In Colombia, IDPs are the largest category of victims of the conflict and are eligible for reparations. This raises the question whether judicial reparations are appropriate for victims of longstanding, complex and intricate violence, a phenomenon that leaves large numbers of persons affected in its wake. Creating hierarchies of victims is by definition not inclusive, and can lead to additional horizontal grievances, which can even contribute to future conflict.[1235]

Some proponents of victim participation argue that victims should have a role in helping to define the charges, pointing to cases such as *Lubanga,* where witnesses did bring evidence about sexual violence and other crimes.[1236] The position of the OTP is that defining the charges falls within its prerogative. At the same time, the

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[1233] Final Report of the VPRS https://www.icc-cpi.int/RelatedRecords/CR2018_01452.PDF, Annex I para. 46 (f). Victims supported opening an ICC investigation for the following reasons: "investigation by an impartial and independent court; bringing the perceived perpetrators of crimes to justice, ending impunity; preventing future crimes; knowing the truth about what happened to victims of enforced disappearance; allowing for victims' voices to be heard, and protecting the freedom of speech and freedom of press in Afghanistan." Most cited reasons against an investigation (in only 15 of the representations) included security concerns and doubts as to whether perpetrators would be brought to justice. Victims want the ICC to investigate murder; attempted murder; imprisonment or other severe deprivation of liberty; torture; rape; sexual violence; persecution; enforced disappearance of persons; other inhumane attacks; attacks against civilian population; attack against protected objects; destruction of property; pillage; forced displacement; outrages upon personal dignity; and denying a fair trial. Annex I, paras. 39 and 40, 44. This is beyond the scope of the current investigations.

[1234] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*. AfricaPortal research paper (September 2013) p. 11.

[1235] United Nations: World Bank. Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict (2017).

[1236] Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013) p. 529.

highly selective nature of charges brought by the ICC can be perceived as arbitrary by victims.[1237] Furthermore, focus group discussions have indicated that indifferent situations, the focus of victims and affected populations may be on political rather than legal accountability.[1238] The narrow range of perpetrators and charges within the range of the Court's purview serves as a source for considerable disappointment for many victims, who may feel that their perpetrators or the crimes they suffered are excluded.[1239] These are all limitations on the expressive value of the Court's reparative processes.

The architecture of the Court does not really allow for a ready connection or engagement to be built with victim communities. Moreover, the narrative attached to the arrest warrants produced by the Court often portray a partial, possibly one-sided view of a complex and prolonged conflict. Beyond their role in participating in the proceedings, which is increasingly carefully circumscribed, most victims of the conflicts are not a *visible* presence either at the Court or at the Assembly of States Parties. This is in spite of the fact that "those directly afflicted by the violence have a greater moral claim to the internalization of justice – certainly methodologically- than global audiences."[1240] The Court is cast into the role of "savior" in the well-known "Savages, Victims and Saviors" paradigm."[1241] Victims become a passive recipient of the Court's interventions, rather than an active participant in their own justice needs. This may contribute to "new incarnations of hegemony", a complaint against the human rights movement."[1242] Branch argues in the context of Uganda:

> The legitimacy of any specific model of justice for dealing with legacies of extreme violence will not come from any putatively absolute, unquestionable sources, whether human rights or tradition, but only through autonomous, democratic processes of deliberation, organization, and action within the community, including those who have been subject to violence themselves.[1243]

[1237] A comparison may be made with the Special Court for Sierra Leone, which indicted 13 individuals and conducted the trials of ten individuals, including Charles Taylor, former President of Liberia. In a recent survey, in 2012, respondents overwhelmingly said they felt the SCSL had prosecuted those bearing the greatest responsibility, but that there could have been additional prosecutions further down the chain of command. The Special Court for Sierra Leone and No Peace Without Justice, *Making Justice Count: Assessing the Impact and Legacy of the Special Court for Sierra Leone and Liberia,* September 2012.

[1238] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper (September 2013) p. 18.

[1239] FIDH, *Enhancing Victims' Rights Before the ICC: A View From Situation Countries on Victims' Rights at the International Criminal Court (*November 2013) p. 10.

[1240] Drumbl, Mark. *Atrocity, Punishment and International Law*, Cambridge University Press (2007) p. 132.

[1241] Makau, Matuna. *Savages, Victims, and Saviors: The Metaphor of Human Rights,* Harvard International Law Journal, Vol. 42, No. 1 Winter (2001) p. 204.

[1242] Odinkalu, Chidi Anselm. Senior Legal Officer, Interights, *International Politics, African Realities: Human Rights and Democracy in Africa* (15 February 2000).

[1243] Branch, Adam . *Uganda's Civil War and the Politics of ICC Intervention* 21 Ethics and International Affairs (2007) 179 at pp. 193-194. See also Weisburd, Mark. I*nternational Law and the Problem of*

The Court's reparative effect can be enhanced through more extensive and genuine interaction and consultation with local communities in the context of ICC interventions. This is not to suggest that will result in uniform views by victims. Donais remarks that "in any post-conflict society, there is never a single coherent set of local owners, and that post-conflict spaces, almost by definition, are characterized far more by diversity and division than by unity."[1244] Nonetheless, the strict dichotomy and competition between "universal values" legitimacy or local ownership, can at least partially be bridged through an increased knowledge of context and through consultations with victims and affected communities on the local level.

Art. 68(3) may allow for Trial Chambers to concentrate the participation of victims to particularly decisive stages of the proceedings, such as the confirmation of charges; the decision on a no-case-to-answer; the closing statements of the trial; the sentencing process; or crucial parts of the appeal insofar as they touch on the interests of victims. So far, this approach has not been taken and victims have been allowed to participate in the full length of the trial, but this is causing significant logistical strain on trials. This would also save funds that could be reallocated to the Trust Fund for Victims.

Many victims will seek to equate justice with reparations, but the Court is still relatively inexperienced with reparations proceedings. The Court itself has defined reparations with proportionality as a central tenant, one that effectively cannot be met. The Trust Fund for Victims has insufficient resources to provide for proportional reparations. It is unlikely that States will pay much more into the TFV in the future. While research indicates that many victims support the key notions behind the ICC, including accountability for crimes, impartiality, reparations or assistance for victims, and victim participation, their implementation is what victims often find unsatisfactory.[1245] It is even more difficult for victims to accept that the Court lacks enforcement powers,[1246] a fact that may render arrest warrants

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Evil, 34 Vanderbilt Journal of Transnational Law (March 2001) p. 279: "If we insist on the importance of the responsiveness of the institution to the affected group, implicitly we admit the importance of according primacy to local values over any which may be preferred by persons acting at the international leave. Once we make that admission, we have questioned the legitimacy of any international approach to evil other than the one that is responsive to all the states in the world and not imposed on any. At least, we are forced to question values and institutions whose claims to superiority and universality seem to rest on no more than mere assertions."

[1244] Donais, Timothy. *Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peace-building Processes,* Peace & Change, Vol. 34, No. 1 (January 2009) p. 11.

[1245] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper (September 2013) p. 4.

[1246] FIDH, *Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court* (November 2013) p. 11. See also Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*. AfricaPortal research paper (September 2013) p. 16,

rather abstract other than their symbolic value. The Court therefore faces a large expectation gap in the countries where it works.

The fact that victims currently have to specify the harm they suffered in detail gives rise to expectations and is likely to lead to further disillusionment and disappointment in this regard when these harms are not compensated. In fact, many victims may wish the Court to do more, but this will prove impossible. This should call into question the judicial approach to reparations taken in the Rome Statute.

The TFV has the potential to avoid "hierarchies" of victims by focusing on broader categories. The TFV can also engage with victims much more directly. In addition, more emphasis should be put on the domestic level: in Colombia significant results have been achieved through a national administrative reparations program. Moffet has argued for "reparative complementarity."[1247]

In Uganda, victims and affected communities were not formally consulted about the referral and remain ambivalent about the ICC, as evident in reactions to the Ongwen trial. When victims and affected communities oppose an ICC intervention, this casts fundamental doubt on its "universal values" legitimacy. As the Court moved into its "maintenance strategy", the only concrete benefit for many victims was the operation of the TFV, which are also limited in scope. The impact of the Ongwen trial has done little to reverse the ambivalence felt in Northern Uganda about the ICC.

In Kenya, regrettably the TFV could not be activated, and national reparations have not been awarded. Finally, the Kenya case serves as a stark reminder of how the noble intentions of the Rome Statute are not enough, and how proceedings can go awry even in the face of original support from victim and affected communities. The tragedy is that victims of Post-Election Violence received no remedy, and witnesses have been killed. In this case, even the "do no harm" principle was not met.

Further satisfaction for victims may come from a more context-sensitive approach, which would require a deeper knowledge of what justice actually means to victims, from a moral, social and cultural perspective rather than just from a legal or political perspective.[1248]Transitional justice options made available to victims on the national level may be more accessible to victims, and may go further in meeting their need for interaction and their expectations. For instance, national measures for victims, including reparations or various forms of assistance, and can concretely

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[1247] Moffet, Luke. *Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the ICC,* International Journal for Human Rights, Vol. 17 Issue 3 (2013) pp. 368-390. READ

[1248]Porter, Holly, *After Rape: Justice and Social Harmony in Northern Uganda*, London School of Economics and Political Science, 2013 at http://etheses.lse.ac.uk/717/. See also Erin Baines, *Spirits and social reconstruction after mass violence: Rethinking transitional justice.* African Affairs 109/ 436 (2010) pp. 409-430. This will be further elaborated in the next chapter.

improve victims' lives within the short to immediate term. Such national options may be more durable, and may yield a more meaningful sense of acknowledgement for victims, thus leading to more expressive value within their own societies.

Chapter 6: Demonstration Effect: Trends in Perceptions

These tribunals must be seen as legitimate by those on whose behalf they operate in order for their work to be accepted within affected societies. [1249] – Laurel Fletcher and Harvey Weinstein

I. Introduction

A *demonstration effect* is described as an idea, model or institution that others are influenced by and try to copy.[1250] In international criminal law, demonstration effect refers to the ability of an international criminal court or tribunal to contribute to "a *culture* shift and demands for change or increased accountability through increased rights awareness."[1251] The demonstration effect should occur mainly on the national level, with a variety of audiences, including victims, but also policy-makers, affected communities and victims. Demonstration effect should be the consequence of the *expressive* function of the Court. Outreach, which has the goal of communicating the actions of the Court, is deemed as crucial to the success of demonstration effect. Demonstration effect should build the legitimacy of the Court by garnering support for its actions. Support for the Court depends in part on "the agendas of the relevant audiences of the court, that is, the issues these audiences view as important and central."[1252]

The Court's officials themselves have often suggested that support for, and hence the legitimacy of the Court, will flow automatically from its performance. As long as its processes are fair, efficient, independent and impartial, legitimacy ought to follow. The independence of the Prosecutor is guaranteed by Article 42 of the Statute, whereas impartiality is derived from Articles 21(3) and 42(7) of the Statute.[1253] Independence and impartiality are also enshrined in the OTP Code of Conduct and in the Policy Paper on Case Selection and Prioritization. In addition, the Court strives to be transparent through publication and consultation of its major policies, including on preliminary examination and on case selection and prioritization. As said by the second Chief Prosecutor:

[1249] Fletcher, Laurel and Harvey Weinstein, *A world unto itself? The application of international justice in the former Yugoslavia* in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity,* Ed. by Eric Stover and Harvey Weinstein, Cambridge University Press (2004) p. 30.
[1250] Cambridge Dictionary.
[1251] OHCHR Rule of Law Tools, *Maximizing the Legacy of Hybrid Tribunals,* 2008 at p. 17 (written by the author). The author first used this term in a report by UNDP and ICTJ on the Legacy of the Special Court for Sierra Leone in 2002.
[1252] Dothan, Shai. *How International Courts Enhance Their Legitimacy*. 14 Theoretical Inq. L. 455 (2013) p. 473.
[1253] For an extensive study on independence and impartiality, see Cote, Luc. *Independence and Impartiality*, in *International Prosecutors* (ed. L. Reydams, J. Wouters and C. Ryngaert), Oxford University Press (2012) pp. 319-415.

> To what does the Court today owe its status and legitimacy as a major actor on the international scene in relation to justice and conflict management? I would like to suggest two main causes. Firstly, its operational framework-its mandate-as defined by the Rome Statute; and secondly, the standardized, clear, transparent, and predictable working methods of the Office of the Prosecutor, providing it with the necessary legitimacy as a strictly judicial actor, in order to function effectively in a highly political international environment.[1254]

The experience to date however indicates that building legitimacy has to go beyond performance legitimacy. The "demonstration effect" of the Court should relate to how it is exercising its *expressive* function, in terms of the situations and cases it is selecting.[1255] It should also be seen as responsive to local justice needs and priorities, in order to strengthen its purposive legitimacy in particular situations. Within the parameters of independence and impartiality, and certain other limits established by the Rome Statute on jurisdiction, admissibility and the interest of justice, the Prosecutor has discretion in deciding who to prosecute and when. Many scholars have commented on prosecutorial discretion and whether it should be circumscribed by criteria[1256] or guidelines. The Prosecutor has published its *Policy Paper on Case Selection and Prioritisation,* which broadly draws the contours of how it exercises discretion. But case selection has prompted controversy in almost every situation in which the Court is involved. This may be much more closely related to an absence on the agreement of the goals underlying the ICC: "since the ICC lacks agreed goals and priorities, articulating "criteria" or "guidelines" for selection may simply highlight the inconsistent manner in which such decisions are made."[1257]

Empirically there is still a dearth of information on what is the "demonstration effect" of the expressive function of the Court. Meijers and Glasius observe that legal scholars "do not typically look closely at the plausibility of the empirical claim that trials have this effect."[1258] Stromseth remarks that:

> We cannot simply trust that positive demonstration effects will inevitably flow from holding international or hybrid trials … If these tribunals fail to address public concerns about their work and simply ignore local perceptions about justice, they may undermine public confidence in fair

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[1254] Bensouda, Fatou. *Reflections from the ICC Prosecutor*. 45 Case Western Reserve Journal of International Law (2012), pp. 505-511 p. 506.
[1255] De Guzman, Margaret. *Choosing to Prosecute: Expressive Selection at the International Criminal Court*. 33 Michigan Journal of International Law (2012) p. 265.
[1256] Goldston, James. *More Candour About Criteria*, JICJ 8 (2010) pp. 383-401. Goldstone argues in favor of guidelines, warning that else the Court is trapped between a pristine notion of "law in a vacuum", promoted by its embattled supporters, and attacks from its critics that it is politicized.
[1257] De Guzman, Margaret. *Choosing to Prosecute: Expressive Selection at the International Criminal Court*. 33 Michigan Journal of International Law (2012) p. 298.
[1258] Meijers, Tim and Marlies Glasius. *Trials as Messages of Justice: What should be Expected of International Criminal Courts*. Ethics and International Affairs, 30 No. 4 (2016) pp. 429-447 at 435.

> justice, reinforce cynicism and despair, rather than helping to build public trust in justice and the rule of law.[1259]

This Chapter will discuss trends in perceptions in situation-countries including: knowledge and expectations of the Court. This is in the absence of significant quantitative data on perceptions about the ICC, beyond the survey work conducted to date, which is still rudimentary.[1260] As will be shown, perceptions in different countries are shaped by the unique historical, cultural and political factors of that context.

The preliminary trends in the case studies below will indicate that (a) the ICC is not necessarily viewed by local audiences as impartial in its case selection; (b) it is not always seen as relevant to local justice struggles, which have their own histories; (c) in certain contexts it has been perceived as undermining local justice solutions, and in some cases, lacking independence or advancing foreign interests; (d) it has also been perceived as complicating negotiations, thus potentially prolonging conflict. The difficulties that the ICC faces in terms of perceptions stem in part from the remoteness of the ICC, and the physical distance of the Court from the communities affected by conflict. This leaves the door open to many other factors that may influence the perceptions of the Court.

As will be seen below, the ICC has had to contend with significant negative perceptions in these four situations. The data in this Chapter is not quantitative and therefore not representative of the views of local populations. Instead, the Chapter will mainly highlight the main trends in perception, based on long-term first-hand observation in the country concerned and open-source qualitative data, complemented by interviews with key opinion-makers.

Due to limitations on the field research, this thesis is not able to break these key opinion-makers into specific categories such as legal professionals, politicians, victims, civil society, etc. It may well be that there are significant variations between these different groups, but further research ought to be conducted to distill these differences.

Further research would also be needed to demonstrate whether there is indeed

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[1259] Stromseth, Jane. *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?* Georgetown University Law Center (2009) p. 89.

[1260] A Gallup 2005 Voice of the People survey asked about trust in the ICC, but this was too early in the life of the ICC to give rise to significant results. The survey was applied in 67 countries plus Kosovo, but knowledge of the ICC was low. Over the 67 countries, 45% of those who mentioned the ICC were positive about it, whereas 13% had a negative option. In a few countries, the negative options outnumbered the positive, including Austria, Croatia, Israel, Serbia, and the US. Voeten found a correlation between support for the United Nations and support for the ICC. See Voeten, Erik. *Public Opinion and the Legitimacy of International Courts,* 14 Theoretical Inquiries in Law (2013) p. 427.

increased "rights awareness" amongst these different groups as a result of the Rome Statute and the ICC. This would require quantitative research that was beyond the scope of this thesis. While it is possible that the Rome Statute and the ICC may have impact on rights awareness, the previous Chapter has argued that the reparative effect in terms of translating rights awareness to remedies for victims is limited.

II. Country- Experiences

A. Uganda and the ICC: Love at First Sight?

Uganda ratified the Rome Statute on 14 June 2002. In some ways, Uganda constituted an "ideal first case" because of the reviled subjects of the first arrest warrants, the Lord's Resistance Army. [1261] But the self-referral by Uganda to the ICC was sudden, and shrouded in controversy from its origins, but based largely on impulse rather than on in-depth knowledge of the local context.[1262]

No single event was as decisive to the perceptions of the ICC as the joint appearance of Luis Moreno Ocampo and President Museveni at the press conference to announce the referral.[1263] That event created a perception of collusion between the Government of Uganda and the Court that proved impossible to correct. Ugandans from across the political spectrum respect the political wiliness of President Museveni, who they refer to as "M7". From that day, Ugandans perceived that their President was driving the Court, and not the other way around.

Yet M7 was not Ocampo's ideal bedfellow. Uganda has a very violent history since it gained independence in 1962. Both the Milton Obote (I and II) and Idi Amin Dada regimes were responsible for massive human rights violations. These leaders, both Northerners, were said to favour their own ethnic and national groups, giving rise to deep divisions.[1264] Up to 300 000 persons are estimated to have died during each of their reigns. After the second fall of Obote, an Acholi army officer by the name of Tito Okello briefly ruled Uganda. As President Museveni likes to recall in his public speeches, the National Resistance Army/ Movement put an end to this bloody era of

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[1261] See Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016), pp. 66-73 for a narrative of the conflict.

[1262] Previously the OTP had focused on obtaining a self-referral from the DRC, but the possibility of a self-referral from Uganda came out of a conversation between the Prosecutor and lawyers representing the Government of Uganda in the ICJ litigation dealing with the UPDF's role in DRC. Sarah Nouwen, Com*plementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press (2013) p. 111. See also Branch, Adam. *International Justice, Local Injustice*. Dissent- Politics Abroad (2004) p.22.

[1263] Tim Allen, Trial Justice: *The International Criminal Court and the Lord's Resistance Army,* African Arguments (2006) p. 128. See also Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, 2008 at p. 41.

[1264] International Crisis Group, *Uganda: No Resolution to Growing Tensions*, April 2012.

Ugandan history, bringing an era of stability and economic growth to most of the country. But events during NRM's rise to power after its defeat of the Tito Okello regime in 1986 continue to be contested.[1265] It also sowed the seeds for long-term grievances between the people of the North, primarily the Acholi, and the NRM.[1266] The LRA rebellion in Northern Uganda links to grievances from these earlier periods of Ugandan history, as well as a deep rift between the North and the South that dates back to the colonial period.[1267] The LRA is unusual in its high cohesiveness and almost cult-like qualities,[1268] all under leadership of Joseph Kony, who is believed to have mystical qualities and to be possessed by spirits by many Northern Ugandans.[1269].

The LRA is notorious for its highly violent and grotesque actions and campaign of terror, mainly targeting, civilians and was horrific in its level of violence. Estimates are that over 66,000 persons were abducted during the LRA conflict in Uganda, a large percentage of which between 10-18 years of age, up to quarter of which were killed.[1270] Victims of the LRA were often killed in ritualistic ways, by being beaten or hacked to death. Others were maimed by hacking off limbs or mutilating the face, including cutting off the lips used to "betray them".[1271] Its hallmark violation was the abduction of children and youth to join their ranks. Although the LRA did not generally engage in wanton rape, in their bush community, girls were distributed and forced into marriages with senior commanders.[1272] The systematic nature of the crimes, and the fact that they targeted civilians made the LRA a seemingly suitable and logical candidate for a first ICC case.[1273] The LRA, often said to be barbaric, irrational, and without political agenda, fell squarely within the "Savages"

[1265] Atrocities were committed in the Luweero Triangle, allegedly committed by Acholi and Langi troops, but the NRM also committed revenge atrocities in return. International Crisis Group, *Northern Uganda: Understanding and Solving the Conflict*, 14 April 2004.

[1266] A commission was appointed to investigate atrocities committed before and during the NRM's rise to power, but its findings were never made public. Hayner, Priscilla B. *Fifteen Truth Commissions—1974 to 1990: A Comparative Study*. Human Rights Quarterly, v. 16, No. 4. (November 1994) pp. 597-655.

[1267] During the colonial period, the Acholi traditionally dominated the military, whereas the British invested in industry and cash crop production in the South, which became economically much more affluent. International Crisis Group, *Northern Uganda: Understanding and Solving the Conflict*, 14 April 2004.

[1268] See Titeca, Kristof, *and The Spiritual Order of the LRA*, in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality*, Zed Books (2010).

[1269] The group's name is thought to be a parody on the National Resistance Army/ Movement. Doom, Ruddy and Koen Vlassenroot, *Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda,* African Affairs 98 (1999) p. 22.

[1270] OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xii-xiii.

[1271] ICTJ and the Human Rights Center at University of California, Berkeley, *Forgotten Voices, A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*. (July 2005) pp. 13-14.

[1272] For a detailed account of a particularly notorious abduction of a group of schoolgirls, see Els De Temmerman, *Aboke Girls: Children Abducted in Northern Uganda*, Fountain Publishers (2001).

[1273] See Matthew Brubacher, *The ICC investigation of the Lord's Resistance Army,* in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality,* Zed Books 2010, p. xx

paradigm. [1274] But this is a vast oversimplification of a complex conflict with much deeper historical roots, much of which is outside of the ICC's jurisdiction.[1275] Anthropologists such as Finnstrom suggest that the LRA wanted to establish a new moral order.[1276] Finnstrom argues that this is what motivates them to abduct children into their order and to kill elderly people, particularly spirit mediums and prophets, known as *ajwaki* and *nebi.*[1277] Finnstrom warns against a "reductionist image of the war and its causes, only too common in the understanding of conflicts in Africa."[1278] In Northern Uganda, Joseph Kony himself is believed to be an *ajwaki* who has spiritual powers..[1279]

Over the years of conflict in Northern Uganda, religious and traditional leaders increasingly mobilised to find peaceful, local solutions to the conflict, devising a dual track approach of peace negotiations and a focus on reintegration of LRA returnees.[1280] Humanitarian and human rights organisations also called for a peaceful solution to the conflict. This is not to suggest that opinions in the North were uniform on how to approach issues of accountability: there were different views, particularly between Acholi and non-Acholi regions.[1281]

Religious leaders, and in particular the Acholi Religious Leaders Peace Initiative, was particularly active in lobbying for peace talks.[1282] Although the Acholi communities were badly victimized by the LRA, they viewed abductees as victims of the conflict, who ought to be forgiven and welcomed back.[1283] To subject former

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[1274] The Prosecutor encapsulated the ICC's narrative of the conflict in his announcement accompanying the arrest warrants: "The LRA is an armed rebel group, claiming to fight for the freedom of the Acholi people in Northern Uganda. The LRA has mainly attacked the Acholis they claim to represent. For nineteen years, the people of Northern Uganda have been killed, abducted, enslaved and raped. "Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague, 14 Oct. 2005.

[1275] See Annex A.

[1276] Sverker Finnstrom, *Living with Bad Surroundings: War, History and Everyday Moments in Northern Uganda,* Duke University Press, Durham and London (2008) p. 5

[1277] See also Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army,* African Argument (2006) p. 153.

[1278] Sverker Finnstrom, *Living with Bad Surroundings: War, History and Everyday Moments in Northern Uganda,* Duke University Press, Durham and London (2008) p. 8.

[1279] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, African Arguments, 2006 p. 164.

[1280] ARLPI, CSOPNU etc. See Barney Afako, *Reconciliation and Justice: Mato Oput and the Amnesty Act*, Conciliation Resources 2002.

[1281] For quantitative studies of the views of affected populations on peace and justice in Northern Uganda, see ICTJ and UC Berkeley's Human Rights Center, *Forgotten Voices* (2005), and *When the War Ends* (2007) (with Tulane University), both at www.ictj.org. Non-Acholi regions were particularly affected in the later stages of the conflict and had suffered brutal retaliation to Operation Iron Fist in 2002.

[1282] Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from *Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice,* Queen's University Belfast (March 2009) p. 20.

[1283] Interview with Michael Otim, 12 February 2014, Interview with religious leader, Gulu, 8 Feb. 2014.

LRA returnees, many of whom are abducted youth or children, to punishment would be to "punish them twice", according to local religious leaders.[1284] Reintegration was always seen as a priority, due to the large number of rank and file who were abducted against their will from their communities, often at a very young age. Other scholars point to the emphasis on social harmony in Acholi culture as a reason for the absence of insistence on punishment.[1285]

Uniquely, the victim population, represented by the Acholi Religious Leaders Peace Initiative and the Concerned Parents Association supported the passage of a comprehensive Amnesty Act, in 2000.[1286] The Attorney General consulted on the bill among the affected population in the North before it was passed, and participants generally expressed support for a broader amnesty.[1287] The Bill was supported by a countrywide consultation prior to coming into force.[1288] The amnesty had a high level of public support, also among populations most affected by the violence.[1289] The amnesty was construed as an incentive to entice insurgents to defect from the LRA and was intended to spur its disintegration, although it has not ultimately had this effect.[1290] Significant efforts were made to publicise the amnesty and to communicate its terms, through Radio Mega FM and other stations.[1291]

It came as a surprise to the ICC itself and its supporters that the ICC investigation, opened in July 2004 and the arrest warrants unsealed in October 2005 were not met

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[1284] Interview with religious leader, Gulu, 9 Feb. 2014.
[1285] Porter, Holly E. *After Rape: Justice and Social Harmony in Northern Uganda,* London School of Economics (2013).
[1286] An early version of the amnesty included the same exception for "heinous crimes" as the 1987 amnesty, but this exception was later deleted: Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p. 20.
[1287] Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p. 21.
[1288] Interview with religious leader, Gulu, 8 Feb. 2014.
[1289] ICTJ and the Human Rights Center at University of California, Berkeley, *Forgotten Voices, A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda.* July 2005; Conciliation Resources and QPSW, *Coming Home: Understanding why Commanders of the Lord's Resistance Army Choose to Return to a Civilian Life*, May 2006. Justice and Reconciliation Project, *To Pardon or Punish? Current Perceptions and Opinions on Uganda's Amnesty in Acholi-land*. 15 Dec. 2011. See also Refugee Law Project, W*hose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation*, Working Paper 15, February 2005.
[1290] Amnesty Act (2000): Preamble: "[I]t is the expressed desire of the people of Uganda to end armed hostilities, reconcile with those who have caused suffering and rebuild their communities."
[1291]Ugandans who engaged in war or armed rebellion against the Government of Uganda since 26 Jan. 1986 and who wish to claim amnesty ("reporters") are only required to renounce the insurgency and are then eligible for reintegration - they are not required to divulge information about atrocities or to participate in any other kind of justice process. The Act says in s. 4 that the requirements are to report to an Army or Police Unit, a Chief, a member of the Executive Committee of a local government unit, a magistrate or a religious leader; to renounce and abandon involvement in the war or armed rebellion; surrender weapons; and to be issued a Certificate of Amnesty.

with more enthusiasm among victim populations.[1292] This is partly due to the complex relationship that exists between the Acholi victim population and the LRA in Northern Uganda. The Acholi view the LRA as primarily composed of abducted children and youth that the communities failed to protect.[1293] But the populations in the North also view themselves as the subject of a campaign of marginalization, displacement, and humiliation by the Ugandan Government and the Ugandan Peoples Defence Forces.[1294] The "vicious counterinsurgency" of the government, combined with widespread displacement contributed to shaping the priorities of the local population for justice in Uganda, which extend far beyond trials for the LRA.[1295] In addition, Northern Uganda continues to struggle under the burden of large youth unemployment and general law and order challenges.[1296]

1. Lack of Impartiality: No Investigation of the UPDF

The Ugandan referral, never published, pertained to the "situation concerning the Lord's Resistance Army". The Prosecutor in his decision to open an investigation clarified that he would interpret the referral as consisting of crimes by both sides.[1297] Nonetheless, the Court's focus in the Uganda situation has remained solely on the LRA. Many in Northern Uganda perceived the failure of the Court to open an

[1292] See Allen, Tim. *Bitter roots; the "invention" of Acholi traditional justice,* in in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality*, Zed Books (2010) p. 242.
[1293] See for instance Justice and Reconciliation Project, "*To Pardon or Punish? Current Perceptions and Opinions on Uganda's Amnesty in Acholi-land.* 15 Dec. 2011. This study for instance finds a very high level of support for the amnesty law (98% of the 44 respondents considered it relevant), primarily because it is "seen to encourage children forcefully abducted by the LRA to return home and reconcile with their communities."
[1294] OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xv: Nearly all interviewees spoke of the violence, impoverishment and humiliation that occurred as a result of forced displacement. They reported that IDP camps – over 240 in number at the height of the conflict were poorly protected and inadequately facilitated … At a minimum, tens of thousands of people died in the camps due to disease and violence."
[1295] Branch, Adam. *International Justice, Local Injustice.* Politics Abroad (2004), p.23.
[1296] Interview with prominent female civil society activist, Gulu, 9 February 2014. Social services such as health care remain poor in the North. The police are highly corrupt. It also suffers from a high incidence of domestic violence and rape.
[1297] Nouwen, Sarah. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press (2013) p.113. Phuong Pham et al, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda*, ICTJ and Human Rights Center, University of California, Berkeley (July 2005) p. 18. Branch, Adam. *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press (2011) p. 187.

investigation against the UDPF as ultimate proof of the bias of the Court.[1298] This view formed when the referral was first announced but persists until today.[1299]

Many Ugandans view the Court's dependence on state cooperation as the reason why the UPDF was not investigated. ICC representatives benefitted from UPDF protection, and were seen in the company of senior UPDF commanders, being given a "guided tour" around Northern Uganda.[1300] In the early days of the investigation, court staff often stayed in the Acholi Inn in Gulu, which was owned by a local UPDF commander. All of these factors reinforced the image that the Court was not only close to the government but also dependent on it. This in turn gave rise to speculation as to whether there was a deal between the Prosecutor and the Ugandan government that gave immunity to the UDPF.[1301] Both the situation in Uganda and in Eastern Congo raise questions of UPDF liability: in eastern Congo the UDPF gave support to Hema militias including the militia run by Thomas Lubanga.[1302]

The position of the Prosecutor is that it has insufficient information to proceed against the UPDF.[1303] The Prosecutor has repeatedly stated that LRA crimes were "much more numerous and of much higher gravity than alleged crimes committed by the UPDF."[1304] The OTP was receiving assistance from UDPF military intelligence to prosecute LRA crimes. The OTP estimated that LRA crimes included 2,200 killings, 3200 abductions, and numerous sexual attacks as part of 850 overall attacks between July 2002 and June 2004.[1305] But the WHO reported that 1000 excess mortalities were occurring per week in the IDP camps in Acholi in Northern Uganda between January and June 2005.[1306] It is worth noting that in the context of Darfur, the OTP was accused of an opposite tendency, counting all deaths in the

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[1298] Phil Clark, Law, *Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda,* in *Courting Conflict? Justice, Peace and the ICC in Africa,* Edited by Nicholas Waddell and Phil Clark, Royal African Society (March 2008).
[1299] Interview with religious leader, Gulu, 9 February 2014. See also JRP, *The Dog That Barks But Doesn't Bite: Victims Perspectives on the International Criminal Court in Uganda,* Policy Brief No. 6, February 2013.
[1300] Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years,* 2008 at p. 57. Branch, Adam. *Displacing Human Rights: War and Intervention in Northern Uganda,* Oxford University Press (2011) p. 187. Interview with Mike Otim, 12 February 2014. Freeland, Valerie. *Rebranding the State: Uganda's Strategic Use of the International Criminal Court*. Development and Change, Institute of Social Studies, The Hague (2015) p. 310.
[1301] Clark, Phil. *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*, in *Courting Conflict? Justice, Peace and the ICC in Africa,* Edited by Nicholas Waddell and Phil Clark, Royal African Society (March 2008) p. 43.
[1302] See http://www.internationalcrimesdatabase.org/Case/814 on the Thomas Lubanga case.
[1303] See also Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years,* 2008 p. 42.
[1304] Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague, 14 October 2005.
[1305] Matthew Brubacher, *The ICC Investigation of the Lord's Resistance Army,* in *The Lord's Resistance Army, Myth and Reality*, edited by Tim Allen and Koen Vlassenroot (2010) p. 269.
[1306] The Republic of Uganda Ministry of Health, Health and Mortality Survey among Internally Displaced Persons in Gulu, Kitgum, and Pader Districts in Northern Uganda, July 2005, WHO, UNICEF, WFP, UNFPA and IRC.

conflict as a result of violence rather than a result of indirect causes such as draught-related diarrhoea (which WHO said accounted for 70-80% of all deaths in Darfur in 2006).[1307]

During the course of the conflict, 94% of the population in Acholi had been corralled into massive camps of thousands of small huts, crammed together into a small space. In Gulu district alone, 65% of the population lived below the national poverty line (of less than $1 a day) compared to 35% in the rest of Uganda.[1308] Deprived from their livelihood by farming, [1309] the population was dependent on food provided by the World Food Program, which was delivered to them by convoy. Facilities such as health care and education were very poor. The close living quarters and lack of economic opportunities destroyed much of the social fabric of the Acholi society. Men were idle and often spent what little money there was on alcohol, leaving it to the women to work the meager fields around the camps, within the strictly enforced curfews, or engage in small trading to feed the family.[1310] Most could not afford to marry and many children were born out of wedlock. The US advocacy group "Invisible Children" made a film about night-commuting in Northern Uganda:[1311] each night hundreds of children would leave their villages to walk to towns such as Gulu to spend the night in shelters, only to return home in the morning. But the film is criticized as a simplistic portrayal that does not touch on the IDP camps or UPDF violations.[1312] Additionally, humanitarian groups such as MSF maintained night commuting was not just a consequence of LRA insecurity but of the complete social disintegration and breakdown of the Acholi society. Malnutrition and communicable diseases such as tuberculosis and scabies were rife in the camps.[1313]

While this forced displacement is widely considered as a government violation against the Acholi people, the Prosecutor maintained that it fell outside of the temporal jurisdiction of the Court, i.e. before 2002. In addition, incidents of abuse by the UDPF against the local population included beatings torture and extrajudicial

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[1307]Mamdani, Mahmood. *Beware Human Rights Fundamentalism*, 20 March 2009, Mail and Guardian Opinion.
[1308] Erin Baines, Eric Stover and Marieke Wierda, *War –Affected Children and Youth in Northern Uganda: Towards a Brighter Future*, An Assessment Report for the MacArthur Foundation (May 2006).
[1309] Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.
[1310] Phuong Pham et al, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda,* ICTJ and Human Rights Center, University of California, Berkeley (July 2005) p. 16.
[1311] Invisible Children: Rough Cut (2004).
[1312] Schomerus, Mareike, Tim Allen and Koen Vlassenroot, *Kony 2012 and the Prospects for Change,* Foreign Affairs, 13 March 2012.
[1313] Phuong Pham et al, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda*, ICTJ and Human Rights Center, University of California, Berkeley July 2005 at p. 15-16.

killings,[1314] as well as recruitment of underage soldiers. The crime of "defilement", in which UPDF soldiers used promises of money, food or clothes or coercion to have sex with underage girls, provoked particular anger and condemnation as well as stigmatization of the victims. Some Acholi suspected the UDPF and the Government of sinister, punitive plans against the Acholi people, involving containing the population in "concentration camps" and grabbing their land, ostensibly for the purpose of increasing agricultural production through mass farming. One local politician and presidential candidate Olaro Ottunu, has referred to the actions of the Government as "genocide".[1315] While this may be an extreme view, Ugandan intellectual Mahmood Mamdani referred to the mass displacement as a crime against humanity.[1316]

A report on memorialization, entitled "We Can't Be Sure Who Killed Us" states that "there is no widely held political or moral understanding of the conflict, and many doubt that one could ever emerge."[1317] The report suggests that victims do not understand many fundamentals about the causes of the war, which atrocities were committed for which reasons, or the actions or motivations of the LRA, about which there is deep ambivalence. To take an example, the Barlonya massacre, in which over 300 IDPs were massacred in February 2004 and was investigated by the ICC, raised many questions about the role of the UDPF in preventing the massacre and dealing with its aftermath. The report "In contrast, for some the Ugandan government's crimes form part of a well-developed narrative … The strategy of forced displacement was in fact a deliberate policy of cultural and economic destruction, demonstrated by the failure of the Ugandan People's Defense Force (UPDF) to offer protection against the LRA once people had been placed in the IDP camps."[1318]

While the displacement of the Acholi,[1319] and the actions of the UPDF may fall outside the temporal or subject matter jurisdiction of the ICC, many in Northern Uganda did accept the explanations given by the OTP for not proceeding against the UDPF. As noted by one author: "through its accommodation to power, the ICC is

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[1314] Human Rights Watch, *Concerns Regarding Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Uganda*, May 2005. OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xiv. See also Chris Dolan, *Which Children Count? The Politics of Children's Rights in Northern Uganda*, 2002.

[1315] IRIN, "*Uganda: ICC to Investigate Allegations of Army Atrocities,"* 3 June 2010. Olaro Ottunu was previously the UN Special Representative of the Secretary-General for Children and Armed Conflict.

[1316] McCormack, Pete. "*Details and Reminders: An Interview with Mahmood Mamdani*," 17 Oct. 2005.

[1317] Hopwood, Julian, "*We Can't Be Sure Who Killed Us", Memory and Memorialization in Post-Conflict Northern Uganda*, ICTJ and Justice and Reconciliation Project, February 2011. See also OHCHR, *"Making Peace Their Own: Victims Perceptions of Accountability, Reconciliation and Transitional Justice in Uganda*, 14 August 2008.

[1318] Hopwood, Julian, "*We Can't Be Sure Who Killed Us", Memory and Memorialization in Post-Conflict Northern Uganda,* ICTJ and Justice and Reconciliation Project, February 2011 p. 14.

[1319] It is generally acknowledged that the displacement was caused both by LRA violence and as a result of Government policy: "*Nowhere to Hide: Humanitarian Protection in Northern Uganda",* Kampala: Civil Society for Organizations in Northern Uganda, 2004 at 63, citing OCHA figures.

imposing a solution that is based upon a narrative of the conflict that does not make sense to many Acholi, and so they reject that narrative and throw into question the model of justice it informs. "[1320] The OTP for its part said it had to resist "popular sentiment" which would push it into less objectivity.[1321] But the manner in which the Prosecutor explained his gravity criteria, mostly in terms of the number of direct conflict-related deaths, continued to be a source of controversy. Resources for further investigation in Uganda were severely reduced in 2012, to one staff member and 111,200 Euros.[1322] Human Rights Watch concluded that "in the absence of clearer, more widely available public explanations, it is easy to understand how some have reached the conclusion that the prosecutor has deliberately chosen not to target the Ugandan military and civilian authorities for prosecution for political reasons. Considerable damage has been done to the ICC's reputation in Uganda due to these perceptions."[1323]

2. Lack of Relevance: Failure to Promote State Acknowledgement for Victims

Another challenge to perceptions of the ICC in Uganda is that it is out of step with local justice demands. An extensive study on priorities for victims of the conflict conducted by the OHCHR from 2007 to 2011 concluded "victims and victim-focused CSOs named truth-recovery, acknowledgement of harms, redress and reparation as their top priorities for any future transitional justice initiatives."[1324] The study indicated that people took a long-term view of the conflict, tracing its origins back to 1986, and that they prioritized fact-finding and inquiry to find out the whole truth about what they had suffered, and to put these on a public record.[1325] In terms of reparations, victims and victim-focused CSOs indicated that priorities included "physical and mental health services, education, housing, land and inheritance, rebuilding livelihoods, empowering youth, public acknowledgement of harm and apologies, information on the disappeared and proper treatment of the dead."[1326]

An important priority of victims in Northern Uganda is state acknowledgement of

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[1320] Branch, Adam. *Displacing Human Rights: War and Intervention in Northern Uganda,* Oxford University Press, 2011 p. 192.
[1321] Matthew Brubacher, "*The ICC Investigation of the Lord's Resistance Army"*, in *The Lord's Resistance Army, Myth and Reality,* edited by Tim Allen and Koen Vlassenroot (2010) p. 269.
[1322] Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Case*s, p. 26.
[1323] Ibid., p. 27.
[1324] OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xvi.
[1325] Justice, Law and order Sector, *Study report on Traditional Justice, Truth-telling and National Reconciliation Uganda*. Disappearances were a major concern to those interviewed. They also stressed in particular the need to look at violations committed against women and children. Victims and victim-focused communities stressed that they wanted to be involved in the design of a fact-finding body or that they favoured community-based truth telling processes led at the local level, as well as national-level acknowledgement. Refugee Law Project had long worked on a bill, as part of its Beyond Juba Project, which proposed a decentralized model of truthseeking: National Reconciliation Bill Draft, 2008.
[1326] OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xviii.

the crimes, a priority that has gone unanswered by the ICC involvement. State acknowledgement of participation in violations in Northern Uganda is still elusive. While President Museveni made a statement of acknowledgement at the 28th NRM anniversary celebrations in January 2014, his remarks provoked a mixed reception, especially his claim that he was not aware of certain incidents. [1327] In any case, an exclusive focus on LRA crimes meant that the ICC could not fully align with the justice priorities of Ugandans particularly in the North.

3. Lack of Legitimacy: The Hague or the Bitter Root?

Another source of opposition to the ICC came from a resistance to an "external justice" that was perceived to trample on traditional Acholi justice alternatives.[1328] Proponents of traditional justice, which included traditional and religious leaders, humanitarian workers, and peace activists claimed that ICC supporters were insensitive to local cultural practices by seeking to trump it with "Western style, retributive" justice. Acholi traditional justice ceremonies featured on the front page of the NYT in 2005, in an article which noted: "[T]he two very different systems- one based on Western notions of justice, the other on a deep African tradition of forgiveness- are clashing in their response to one of this continent's most bizarre and brutal guerrilla wars."[1329] But anthropologists have commented that proponents and opponents of traditional justice often misunderstood or oversimplified these practices, in their quest to equate these with transitional justice mechanisms.[1330]

Prior to the ICC's involvement, in 2000 a paramount chief for Acholi, Rwot David Arcana II, had been appointed through a civil society initiative.[1331] This brought with it a resurgence of interest in traditional practices, some of which are practiced regularly, although more elaborate ceremonies rarely took place due to poverty or poor living conditions in the camps. According to traditional beliefs, in the aftermath of a conflict in which the fate of so many remains unresolved, *cen*

[1327] At the 28th NRM anniversary celebrations on 26 January 2014, President Museveni made the following remarks: "An undisciplined and ideologically bankrupt army cannot create peace in the country. In spite of the general line of the NRA/UPDF of always being on the side of the people, there were incidents in the anti-insurgency campaign for which we are ashamed. I do not know why the people did not report those incidents … I am going to follow up all these incidents, unearth the culprits if they are still alive so as, to hold them accountable and compensate the victims or their descendants." http://chimpreports.com/index.php/news/politics/16415-full-speech-museveni-accounts-for-28-years-in-power.htm.

[1328] Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.

[1329] Lacey, Mark. *Atrocity victims in Uganda choose to forgive*, NYT, 18 April 2005.

[1330] Tim Allen made the point that the Luwo word Timo-Kica has several meanings, including forgiveness, amnesty and reconciliation. Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army,* African Arguments (2006) p. 131.

[1331] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army,* African Arguments (2006) p. 149.

(polluting spirits) can haunt perpetrators of wrongdoing who fail to admit their guilt. These "living dead", through nightmares, visions, and other misfortunes, can plague these persons. The widespread violence prevalent in war creates "bad surroundings" which in turn result in other misfortune such as sickness, failed crops, malnourishment, the presence of evil spirits and widespread deaths.[1332]

Traditional ceremonies reflect the spiritual beliefs of the Acholi through which they ascribe meaning to their environment. These are by no means unique to Acholi: similar traditional practices exist elsewhere in the African continent, for instance in Mozambique.[1333] Neither are these local beliefs ubiquitous. Christian beliefs are also prevalent in Northern Uganda, and religious leaders carry much influence.[1334] Some religious leaders oppose traditional practices such as going to the *ajwaki* on grounds that these are "Satanic". But religious leaders in the North often have promoted these ceremonies, arguing that they are compatible with Christian norms of forgiveness and reintegration. In the words of Bishop Baker Ochola: "God has revealed *mato oput* to our society- to taste the pain in our society, to taste pain and suffering and death … Acholi know that it is only through forgiveness that the problems can be solved."[1335]

Cleansing ceremonies are used to excise foreign and malignant influences or spirits from persons re-entering the community.[1336] An example is the ceremony of stepping on an egg (*nyouo tong gweno*), where the egg symbolizes the pure nature of the community, which is symbolically crushed by the entering of external influences and pressures. Adapted versions of cleansing ceremonies have been used to reintegrate former LRA.[1337] On the other hand, traditional beliefs are also used to deal with outsiders or punish persons excluded from the community, for instance for accusations of witchcraft.[1338]

[1332] Sverker Finnstrom, *Living with Bad Surroundings: War, History and Everyday Moments in Northern Uganda,* Duke University Press, Durham and London (2008) p. 14.
[1333] Igreja, Victor. *Justice and Reconciliation in the Aftermath of the Civil War in Gorongosa, Mozambique Central*, in *Building a Future on Peace and Justice*, Ed. Kai Ambos, Judith Large, Marieke Wierda, Springer (2009) p. 423-438. Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.
[1334] Refugee Law Project, *Peace First, Justice Later: Traditional Justice in Northern Uganda,* July 2005 p. 25.
[1335] Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, African Arguments (2006) p. 137. On the other hand, the "forgiveness" aspect of Acholi culture may be in danger of being overstated and some scholars, such as Holly Porter, have argued that dispensing justice in Northern Uganda is determined by a quest for social harmony, which may result in either peaceful or more violent means. See Porter, Holly. *After Rape: Justice and Social Harmony in Northern Uganda*. PhD thesis submitted to the LSE, 2013. Copy on file with the author.
[1336] ICTJ and the Human Rights Center at University of California, Berkeley, "*Forgotten Voices, A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda."* (July 2005) pp. 50-51.
[1337] Tim Allen, Trial Justice: *The International Criminal Court and the Lord's Resistance Army, African Arguments* (2006) p. 166.
[1338] Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.

A more elaborate and much-discussed ceremony is known as the *Mato Oput* or "drinking of the bitter root."[1339] This ceremony is used to reconcile individuals within a clan, or clans with strong relationships, mostly in cases of unlawful killing, which can be intentional or accidental. The matter is discussed, a common version of events agreed, and compensation agreed. This is followed by a ceremony presided by the local chief (the *Rwot Moo*), which includes the joint drinking of the "bitter root", followed by a shared meal, sometimes involving two goats that are cut in half and the two halves swapped.[1340] Traditional ceremonies carry a strong emphasis on resumption of relationships within the clan, or on reconciliation and unity of the community. Their application b*etween* different clans or communities however is less clear.[1341]

The ICC intervention in Northern Uganda prompted extensive and polarized debates about the respective merits of international and traditional justice. Allen argued that the Acholi "require a functioning state to make the best of their lives, including conventional forms of legal protection from those who might chose to oppress them."[1342] Some argued that traditional justice practices were being "invented" or revived as an alternative to the ICC.[1343] However, a survey applied in 2005 indicated that in Acholi areas about half of the population knew about traditional practices, and that 32% said they would assist in reconciliation (including respondents in Lira and Soroti).[1344] Some argue that this attention boom, prompted in part by the ICC, led to a distortion of the practice, putting all the emphasis on accountability, and that it inadvertently led to the empowerment of traditional power structures, which tend to discriminate women and youth.[1345] The traditional leadership of Ker Kwaro Acholi has been implicated in corruption.[1346]

[1339] Ibid. pp. 147-166.
[1340] ICTJ and the Human Rights Center at University of California, Berkeley, "*Forgotten Voices, A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda."* (July 2005) p. 51.
[1341] Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army, African Arguments* (2006) p. 133.
[1342] Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.
[1343] See for instance Allen, Tim. *Ritual (A)buse? Problems with Traditional Justice in Northern Uganda. Courting Conflict? Justice, Peace and the ICC in Africa*. Edited by Nicholas Waddell and Phil Clark, Royal African Society (2008).
[1344] ICTJ and the Human Rights Center at University of California, Berkeley, *Forgotten Voices, A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*. (July 2005) p. 31-32.
[1345] Allen, Tim. *Ritual (A)buse? Problems with Traditional Justice in Northern Uganda. Courting Conflict? Justice, Peace and the ICC in Africa*. Edited by Nicholas Waddell and Phil Clark, Royal African Society 2008. See also Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army,* African Arguments (2006) p. 132-133. Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.
[1346] The Monitor, *Acholi King in Trouble over Sh230m donor fund*, 2 Dec. 2013.

Discussion of codification of traditional practices led some to argue that this would detract from their inherent value as flexible, informal and "living" spiritual processes.[1347] On the other hand, ICC supporters argued that traditional justice practices are inappropriate to deal with the large-scale atrocities of the LRA, and that they could lead to impunity for LRA leaders. After some time, the debate settled to on a happier medium i.e. a realization that formal and informal justice systems are not mutually exclusive but that they each have a role to play. In a survey carried out in 2010, the post-conflict period, 53% of the population consider traditional ceremonies to be useful in dealing with LRA combatants.[1348]

4. The Debacle of Kony 2012

The Prosecutor frequently asserted that the best way to end the conflict in Northern Uganda is through arresting the LRA leadership. This gave rise to a perception that the ICC is aligned with military actors and a military solution to the conflict.[1349] The UDPF 's war against the LRA was offensive in nature. For years, the UPDF has fought the LRA in Uganda, South Sudan and Congo. The National Resistance Movement's identity is intimately connected with the UPDF.[1350] Senior UPDF commanders Lt. General Salim Saleh and Major General James Kazini are both relatives of Museveni.[1351] But as mentioned, protection of civilians was not a priority: instead, the UDPF exploited the local population and also engaged in serious abuses.[1352] Over time, the conflict generated its own economy and war profiteers. In the aftermath of 9/11, the government of Uganda succeeded in portraying itself as a frontline in the war on terror and putting the LRA on the "B" list of terrorists kept by the United States.

Some scholars argue that the involvement of the ICC has served to further legitimize Museveni,[1353] but this may be overstating the ICC's importance. Before the ICC referral, Museveni was coined as a "new breed of African leaders," with his liberal economic policies and his responsiveness to World Bank conditions.[1354] Uganda was the recipient of $1.3 billion in international aid in 2003, one of the most aid

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[1347] Allen, Tim. *Ritual (A)buse? Problems with Traditional Justice in Northern Uganda. Courting Conflict? Justice, Peace and the ICC in Africa.* Edited by Nicholas Waddell and Phil Clark, Royal African Society (2008) p. 50.
[1348] Pham, Phuong et al., *Building Peace Seeking Justice: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Central African Republic,* August 2010, Human Rights Center, University of California at Berkeley.
[1349] Branch, Adam . *Uganda's Civil War and the Politics of ICC Intervention,* 21 Ethics and International Affairs (2007) 179 p. 184.
[1350] International Crisis Group, *Northern Uganda: Understanding and Solving the Conflict*, 14 April 2004.
[1351] Ibid. p. 13.
[1352] OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xiv.
[1353]Mark Kersten, "*Plus Ca Change: Museveni and the ICC*", Justice in Conflict, 12 June 2013.
[1354] Interview with Mike Otim, 12 February 2014.

dependent governments in Africa.[1355] Museveni is credited for stabilizing Uganda, bringing economic development, promulgating the 1995 Constitution, and reducing HIV infection rates. This meant that he had additional leeway on the involvement of the UDPF in DRC; military corruption; and the war against the LRA. But it is true that Museveni was able to capitalize on the ICC, including by hosting the ICC Review Conference in Entebbe in 2010. At the same time, democratic space in Uganda has continuously eroded over the last decade as Museveni seeks to hold onto power .[1356]

While the ICC alone did not "legitimize" Museveni, its support for a military solution does lend indirect political support to the UDPF. Thus the Court indirectly supported Museveni's patronage network. As argued by one scholar: "the patronage network that keeps the regime in power requires high military spending and corrupt practices that leave its military prone to violating human rights."[1357] The UPDF, already known for its practices of ghost soldiers and purchasing of "junk helicopters", has been enriching itself through various conflicts in the region, including the LRA conflict.[1358] While donors had put some pressure on Uganda to decrease military spending prior to the ICC arrest warrants, this pressure eased afterwards and European support for the military approach increased.[1359] President Museveni played on this by also involving the UDPF in AU-led military operations against the Al-Shabab movement in Somalia. Thus, "the Museveni regime emerged from the ICC's investigation not only unscathed but with an improved international reputation."[1360]

On 14 December 2008, the joint forces of Uganda, DRC and South Sudan organized a military attack on the LRA known as "Operation Lightening Thunder." The attack came as a surprise to many and meant the effective death of the peace process.[1361] Operation Lightening Thunder was another example of a highly ineffective UDPF operation: airstrikes were carried out by helicopter gunships, as jets could not fly due to bad weather.[1362] Helicopter gunships could be heard approaching, allowing the LRA to escape into the forest. The airstrikes were not followed up by infantry troops until a week later. In any case, Joseph Kony was thought not to be present, perhaps due to advance warnings.[1363] In the weeks after "Operation Lightening

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[1355] This aid was provided by the UK, Germany, Japanese and US: Bosco, David. *Rough Justice: the International Criminal Court in a World of Power Politics*, Oxford University Press (2014) p. 97.
[1356] International Crisis Group, *Uganda: No Resolution to Growing Tensions*, 5 April 2012.
[1357] Freeland, Valerie. *Rebranding the State: Uganda's Strategic Use of the International Criminal Court. Development and Change*, Institute of Social Studies, The Hague (2015) p. 294.
[1358] Ibid. p. 308.
[1359] Ibid. p. 309.
[1360] Ibid. p. 310.
[1361] Human Rights Watch, *The Christmas Massacres: LRA attacks on Civilians in Northern Congo,* February 2009. Joost van Puijenbroek en Nico Plooijer, *How Enlightening is the Thunder? Study on the Lord's Resistance Army in the Border Region of DR Congo, Sudan, and Uganda*, IKV Pax Christi, (February 2009) at section 12.
[1362] Downie, Richard. *The Lord's Resistance Army,* Center for Strategic and International Studies, 18 Oct. 2011, Center for Strategic and International Studies, csis.org.publication/lords-resistance-army.
[1363]Ibid.

Thunder" the LRA perpetrated the "Christmas Massacres" leading to the deaths of hundreds of civilians in DRC.

Due to the lobbying of different civil society groups in the United States, such as Invisible Children, Enough and Resolve, the United States Congress in May 2010 enacted the Lord's Resistance Army Disarmament and North Uganda Recovery Act, calling on the White House to take steps to eliminate the LRA.[1364] In 2011, Invisible Children released the infamous "Kony 2012" documentary. The YouTube video of Kony 2012 quickly went viral. If the goal was to achieve notoriety for Joseph Kony, this was certainly accomplished: millions of people in the West who might otherwise not know who is Joseph Kony quickly became aware of his existence. Invisible Children argued that this would increase political pressure, which would result in his arrest within 2012.

Victim populations in Northern Uganda however widely rejected the film as a simplistic and naïve account, intended to demonstrate how white people would save the Northern Ugandans from themselves. Merchandise with Kony's name, sold for profit, was interpreted by victims as glorifying him and as an attempt to make money from suffering. In Lira, rocks were thrown at the screen during its viewing,[1365] but Invisible Children decided to proceed with a viewing in Gulu, where the reaction was so hostile that it caused a confrontation between viewers and police in which one person was killed and others injured.[1366] The vehemence with which local populations reacted to the film showed the risks of "irresponsible advocacy".[1367] In the words of Mamdani: "The LRA is given as the reason why there must be constant mobilization, at first in Northern Uganda, and now in the entire region, why the military budget must have priority and now, why the US must send soldiers and weaponry, including drones, to the region … The reason why the LRA continues is that the victims- the civilian population of the area- trust neither the LRA nor government forces.[1368]

The ICC Prosecutor appeared in Kony 2012 in it several times, including in a sequel. In the film and on other occasions the ICC OTP openly lobbied for a special military force, led by the United States, needed to enforce ICC arrest warrants.[1369] At the Review Conference in 2010 the Prosecutor said: "If we care about victims we need to implement the arrest warrants pending since July 2005."[1370] Moreover, its close

[1364]Ibid.
[1365] Rosebell Kagumire in Lira and David Smith in Johannesburg, *Kony 2012 video screening met with anger in Northern Uganda*, The Guardian, 14 March 2012.
[1366] Acholi Times, David Livingston Okumu, Akena Moses & Sam Lawino, *Kony 2012 screening in Gulu leaves one dead and many injured,* 16 April 2012.
[1367] Branch, Adam. *Dangerous ignorance: The hysteria of Kony 2012*, Al Jazeera Opinion, 12 Mar. 2012.
[1368] Mamdani, Mahmood, *What Jason didn't tell Gavin and his Army of Invisible Children*, Daily Monitor, 13 March 2012.
[1369] Branch, Adam. *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press (2011) p. 201.
[1370] [1370]Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Review Conference General Debate. Statement, Kampala (31 May 2010).

alliance with the US was described by Adam Branch as "a Faustian bargain that will be made at the price of the Court's legitimacy, impartiality, and legality.[1371]

B. Libya: From Infatuation to Estrangement

The Libyan referral gave rise to renewed optimism about the role of the Court, both because it was the result of a unanimous Security Council referral, and because it was seemingly welcomed by local actors. The arrest warrant of the International Criminal Court against Muammer Al-Qadhafi in June 2011 came at the end of a 42-year long rule, in which Qadhafi's state security apparatus systematically menaced the population, creating a climate of fear, and acting with absolute impunity.[1372]

The state machinery routinely perpetrated summary executions, disappearances and torture.[1373] It ran a parallel justice system of political courts and 'black hole' prisons for political opponents including Abu Slim and Ain Zara, where hundreds were detained over the years. Any association or activity based on a political ideology contrary to the principles of the Revolution of 1 September 1969 was illegal and punishable by death—which was regularly and visibly enforced.[1374] The most significant atrocity of the Qadhafi era, and one that is imprinted on the Libyan national psyche, was the 1996 mass killing at Abu Slim prison, which may amount to a crime against humanity. Within two days, over 1,200 prisoners were dead. Family members were not informed of the deaths until 2008, when a Benghazi court ruled that authorities must reveal the whereabouts of 33 individuals believed to have died in Abu Slim.[1375] Indeed, the protest sparking the 17 February Revolution 2011 was led by families of the victims. The fact that Abdullah Al-Senussi is one of the key suspects in the Abu Slim prison massacre is one of the main reasons why many Libyans opposed removing him to The Hague.

During the Revolution, it quickly became apparent that crimes within the jurisdiction of the Rome Statue were occurring. Government forces responded to civilian protests with lethal force, firing live ammunition at protestors without warning.[1376] Security battalions used weapons prohibited by certain international

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[1371] Branch, Adam. *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press (2011) p. 202.

[1372] In addition to crimes committed in Libya, external security services assassinated political opponents abroad (the so-called 'stray dog' policy); and during the 1980s allegedly committed a number of terrorist acts against Western targets, contributing to Libya's international image as a state sponsor of terrorism.

[1373] The Human Rights Committee has noted the large number of documented enforced disappearances and cases of extrajudicial, summary or arbitrary executions in Libya. Considerations of Reports Submitted by State Parties under Art. 40 of the Covenant, Concluding observations of the Human Rights Council, Libya CCPR/C/LBY/CO/4 (15 Oct.- 2 Nov. 2007) para. 14.

[1374] Report of the International Commission of Inquiry to investigate all alleged violations of international law in the Libyan Arab Jamahirya, A/HRC/17/44 p. 21.

[1375] Ibid. p. 22.

[1376] Report of the International Commission of Inquiry on Libya, A/HRC/19/68, 46 pp.52-56.

treaties such as landmines and cluster munitions,[1377] and indiscriminately attacked civilians in al-Zawiya. The government also arrested hundreds in Tripoli, Misrata and the Nafusa Mountains.[1378] Detainees were held in overcrowded shipping containers and warehouses, with poor ventilation, inadequate hygiene facilities and with insufficient food and water provision. Torture by the Qadhafi forces was widespread at facilities in Al-Khums, Al-Qal'a and Yarmuk.[1379]

The ICC Prosecutor produced arrest warrants in the Libyan case with lightening speed, on 16 May 2011, just some ten weeks after the referral. In the press conference the Prosecutor said: "we have strong and solid evidence. We have direct evidence of each of the individuals in crimes. We are almost ready for trial."[1380] The arrest warrants were brief and reflected a simple assertion, i.e. that "a State policy was designed at the highest level of the Libyan State machinery and aimed at deterring an quelling, by any means, including by the use of lethal force, the demonstrations of civilians against Qadhafi's regime which started in February 2011."[1381]

Initially, the ICC arrest warrants found a lot of support from within Libya. Predictably, the regime rejected the arrest warrants, stating that they were a cover for NATO's "illegal" military action, that the ICC was a Western puppet created to pursue African leaders, and that "the leader of the revolution and his son do not hold any official position in the Libyan government and therefore they have no connection to the claims of the ICC against them."[1382] But the Libyan National Transitional Council (NTC), headed by Mustafa Abdel-Jalil and soon recognized by the international community as the legitimate representatives of the Libyan state, welcomed the Prosecutor's arrest warrants.[1383] Immediately, civil society groups in Benghazi and Misrata worked with the NTC legal committee, under the leadership of Mohammed Alagi, to collect evidence for the ICC. There were celebrations in the streets when the arrest warrants were announced. Some commentators say that this was viewed by some as "the beginning of the collapse of the regime."[1384] All of this gave high hopes that Libya would yield easy cases for The Hague. But this was not to be.

[1377]Ibid., p. 149 and Amnesty International, 'The Battle for Libya': Killings, Disappearances and Torture, 13 Sept. 2011, p. 44.
[1378]Ibid., pp. 91-94.
[1379] Ibid., pp. 60-68.
[1380] Andrew Giligan and Bruno Watersfeld, *Libya: arrest warrant sought for Col. Gaddafi, son and intelligence chief*," 16 May 2011 in The Telegraph, UK.
[1381] ICC, Situation in the Libyan Arab Jamahiriya, Public Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 27 June 2011.
[1382] BBC News Africa website, *Libya rejects ICC arrest warrant for Muammar Gaddafi*, 27 June 2011, statement by Mohammed Al-Qamoodi.
[1383] CCTV, *Libya rebels welcome Gaddafi arrest warrants*, 28 June 2011.
[1384] Hayner, Priscilla, *International Justice and the Prevention of Atrocities: Case Study Libya: The ICC enters During War*, ECFR Background paper (November 2013).

1. Lack of Impartiality: The Court's Revolutionaries

It is difficult to know whether ICC arrest warrants had an impact on the ultimate outcome of the conflict, but they had an immediate effect on the morale of revolutionaries, further legitimizing their cause.[1385] The Libyan revolutionaries throughout perceived that the Prosecutor was on "their side." At the same time, the Revolutionaries were implicated in several crimes themselves. The NTC had made a statement that it would adhere to the Geneva Conventions relating to the prisoners of war, and it issued a frontline manual with rules for conduct of armed forces in May 2011.[1386]

The perception that the rebels were immune from the purview of the Prosecutor was strongly reinforced by the Prosecutor's visit to Misrata in April 2012. He was photographed standing on a tank at a NATO bombing site, and paid a visit to the local museum where he left a hand-written letter on display to congratulate the people of Misrata on their brave Revolution.[1387] While the Prosecutor in the Security Council referred to the possibility of holding revolutionaries accountable, this did not seem to penetrate the consciousness of those on the ground.[1388]

Many Libyans were not aware that the ICC jurisdiction continues beyond the conflict and could potentially cover current events. The revolutionaries also moved swiftly to lobby for an amnesty for acts "with the goal of promoting or protecting the revolution," passed by the NTC in May 2002 and known as Law 38. [1389] The amnesty would have covered crimes over which the ICC has jurisdiction. But subsequently the Justice Minister largely undid this amnesty by passing a subsequent law entitled "Criminalization of Torture, Enforced Disappearances, and Discrimination", in April 2013.

Moreover, ICC Prosecutor actively contributed to the perception that Tawerghan fighters raped Misratan women on a wide scale during the Libyan Army's occupation of Misrata in March and April 2011. The Prosecutor seized on this allegation, publically declaring in a press conference on 8 June 2011 that he believed Qadhafi was using rape as a weapon of war and suggesting there were 'hundreds of victims.'[1390] The Prosecutor said that: "By now we are getting some information

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[1385] Brian McQuinn, *Interviews with local commanders in Misrata,* July to August 2011, cited in Marieke Wierda, *Confronting Qadhafi's Legacy*: Transitional Justice in Libya, in The Libyan Revolution and its Aftermath, ed. Peter Cole and Brian McQuinn, Oxford University Press (2015) pp. 153-176.
[1386] Scobbie, Iain. EJIL: Talk! *Operationalising the Law of Armed Conflict for Dissident Forces in Libya,* 31 August 2011. See Final-Libyan-LOAC-Guidelines-17-May-2011.
[1387] Seen by the author during a visit to Misrata in 2012.
[1388] Hayner, Priscilla, *International Justice and the Prevention of Atrocities: Case Study Libya: The ICC enters During War*, ECFR Background paper (November 2013).
[1389] Libya National Transitional Congress, Law 38 para. 4. See Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016) at p.158.
[1390] Bowcott, Owen. *Libya mass rape claims: using Viagra would be a horrific first,* The Guardian, 9 June 2011. See also, Prosecutor of the ICC, Statement to the United Nations Security Council on the

that Qadhafi himself decided to authorize the rapes and this is new. It never was the pattern he used to control the population. The rape is a new aspect of the repression. Apparently he decided to punish using rape."[1391] The Prosecutor also said there was evidence of containers of "Viagra-type medicaments" being handed out to "enhance the possibility to rape women"[1392], which in his words were "confirming the policy."[1393] In another news report he referred to Viagra being used "like a machete. It's new. Viagra is a tool of massive rape. So we are investigating. We are not ready to present the case yet, but I hope in the coming month, we'll add or review the charges for rape."[1394] The Prosecutor followed up with a visit to Misrata on 20 April 2012 where he spoke about looking for evidence of systematic rape without identifying the victims.[1395] These allegations were made by Libyan activists, who suggested that thousands of rapes occurred. For instance, Seham Sawergha said that she personally interviewed 140 women who said they had been raped by Qadhafi forces. She gathered 50,000 responses to a mental health questionnaire in refugee camps in Tunisia and Egypt, including 295 responses of rape, but that she "lost contact" with the victims.[1396] She shared her findings with the ICC.

However, the charges of rape were not added to the arrest warrants published on 27 June 2011, and have not been added to this day. The head of the International Commission of Inquiry, Cherif Bassiouni gave an interview in June 2011 stating: "People are accusing each other of a policy of rape ... It is more of a hysterical social reaction. We have no evidence of it."[1397] An Amnesty International representative, Donatella Rover, who was in Libya during the conflict investigating violations later said that Benghazi rebels had made false claims or manufactured evidence. She had been shown Viagra in Benghazi, by Revolutionaries, allegedly from charred tanks, even though it was unclear why the packets were not charred.[1398] Human Rights Watch seconded the absence of evidence for rape.[1399]

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situation in Libya, pursuant to UNSCR 1970 (2011), 2 Nov. 2011 at para. 14: "While it is premature to draw conclusions on specific numbers, the information and evidence indicates at this stage that hundreds of rapes occurred during the conflict."

[1391] Bowcott, Owen. *Libya mass rape claims: using Viagra would be a horrific first*, The Guardian, Thursday 9 June 2011.

[1392] Ibid.

[1393] UN News Center, *Evidence Emerging of Use of Rape as Tool of War in Misrata*- ICC Prosecutor, 8 June 2011.

[1394] Sara Sidner and Amir Ahmed, *Psychologist: Proof of hundreds of rape cases during Libya's War,* CNN, 23 May 2011.

[1395] "*ICC Prosecutor Visits Libya's Misrata to Investigate Mass Rapes.* www.utube.com/watch?v=uWCAZrlHw. "

[1396] Sara Sidner and Amir Ahmed, "*Psychologist: Proof of hundreds of rape cases during Libya's War,* CNN 23 May 2011. See also Cockburn, Patrick. *Amnesty questions claims that Gaddafi ordered rape as a weapon of war*. The Independent, 24 June 2011.

[1397] Harding, Andrew. *Libya rape claims: Seeking the Truth,* 10 June 2011 Http://www.bbc.co.uk/news/world-africa-13725149.

[1398] Cockburn, Patrick. *Amnesty questions claims that Gaddafi ordered rape as a weapon of war.* The Independent, 24 June 2011.

[1399]Ibid.

Even after the conflict, no conclusive evidence of widespread rape in Misrata has emerged. The Commission of Inquiry reported in March 2012 that "the Commission recognizes the unique difficulties of confirming incidents of sexual violence in Libya. The Commission, however, received no substantiated information indicating that individual Tawergha or organized groups of Tawergha men raped women in Misrata or elsewhere.[1400] A report on Conflict-Related Sexual Violence presented to the Security Council in January 2012 was similarly inconclusive, but found cases of rape against both men and women during the conflict.[1401] While the absence of information itself is not conclusive, it suggests that initial reports on rapes in Misrata were likely exaggerated and used to gain legitimacy for the Revolution. These allegations have, however, entrenched themselves in the Libyan public consciousness and led to widespread retaliation against the Tawerghan community, resulting in massive displacement, arbitrary arrest, torture and retaliatory killings.

To add a further complication, a climate of vengeance, the revolutionaries themselves committed a number of serious violations in their struggle to rid themselves from the former regime, including the killing of Qadhafi himself, his son Muatasim and chief of staff.[1402] At the Mahari Hotel in Sirte, on 20 or 21 October 2011, an estimated 65 to 78 bodies were discovered, some with their hands bound, with civilian residents mixed in among members of Qadhafi's close protection unit.[1403] In addition, thousands of perceived loyalists, including former security sector and government employees, were rounded up and placed in arbitrary detention. Many were kept in poor conditions, mistreated, and denied access to medical facilities and to judicial authorities, and remain detained unto this day. Revolutionary fighters also committed revenge killings of former regime members—Revolutionary Committees, Revolutionary Guards and the Internal Security Agency.[1404] Cases of torture and deaths in custody were frequent, as reported by UNSMIL.

HRW addressed a letter to the Misrata Local Council by Human Rights Watch in April 2012, which stated that armed groups from Misrata may have committed crimes against humanity and that "senior officials, such as yourself, could be held criminally responsible for ordering these crimes, or for failing to prevent or punish them, by courts including the International Criminal Court (ICC) in The Hague."[1405]

[1400] Report of the International Commission of Inquiry on Libya, A/HRC/19/68, p. 122.
[1401] Report of the Secretary-General on Conflict-Related Sexual Violence, 13 January 2012, A/66/657-S/2012/33 pp. 11- 12: "It is, however, too early to determine whether security forces of the former Qadhafi regime and its followers had received orders to carry out rape against women, men and children during the conflict."
[1402] Human Rights Watch, *Death of a Dictator: Bloody Vengeance in Sirte,* October 2012.
[1403] Report of the International Commission of Inquiry on Libya, A/HRC/19/68, pp. 78-79.
[1404] Amnesty International, *The Battle for Libya: Killings, Disappearances and Torture* (2011), pp. 72-73.
[1405] Human Rights Watch, *Letter to Misrata Councils Regarding Serious Crimes by Armed Groups*, 9 April 2012.

HRW particularly referred to abuses in detention facilities. Nearly 3000 conflict-related detainees were being held in Misrata at the time. This letter caused much nervousness among those in charge of detentions in Misrata that they would be prosecuted by the ICC.[1406]

More substantial vengeance was meted out against the Tawerghans, and other ethnic and 'tribal' communities allegedly associated with the regime.[1407] Tawerghans relocated to Benghazi, Tripoli and Al-Khoms, living in IDP camps or with host families.[1408] In late 2012, a short, GNC-mandated conflict was waged against Bani Walid, a perceived Qadhafi stronghold, resulting in the death of civilians and destruction of property. The crimes committed in the name of the "liberation" posed a challenge for the ICC because any investigation of these crimes would pit them directly against the new Libyan authorities. The OTP on multiple occasions highlighted these issues in its reports to the Security Council, referring to the plight of the conflict-related detainees, the Tawerghans, and the attack against Bani Walid. [1409] But Security Council members showed no appetite to put further pressure on Libya, either in respect of non-cooperation or for investigating post-Revolution crimes. The vast majority of these detainees remained in custody before Libya erupted into further violence in 2014, leading to yet further violations.[1410]

By mid-2014, Libya had split into two competing camps, known as Operation Dignity (*karama*) and Operation Dawn (*fajr*). In a report of September 2014, the UN Mission (UNSMIL) accused all sides of war crimes, including indiscriminate shelling; abductions, torture and extrajudicial killings or disappearances; destruction of civilian objects. It proved very difficult for the ICC to conduct further investigations in Libya, due to the security situation and constraints on its resources, but the investigations have reaped some results.

In 2017 Der Spiegel published articles about emails from the former Prosecutor, which shed light on his involvement in the Libya case both prior to and after his stepping down. Der Spiegel wrote that during the time of the NATO attack on Libya, in April 2011, the Prosecutor (at the time) shared information with the French about who he was going to indict, and also described Moussa Kousa in a letter to the British as a "cooperating witness" who should not be indicted. Furthermore, after he left office, in 2015, Ocampo accepted a contract from Hassan Tatanaki, a Libyan business man and oil tycoon, who runs various radio stations. The goal of the contract was to pursue "Justice First" in Libya through investigating terrorists and sharing information with the local courts and the ICC. The value of the contract was

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[1406] At the time, the author was serving in UNSMIL's Human Rights Section. Several of the commanders spoke to UNSMIL, voicing concern that it was sharing information with the ICC.
[1407] International Commission of Inquiry on Libya, A/HRC/19/68, p. 122.
[1408] Ibid. pp. 122-130.
[1409] Statement of the Prosecutor of the International Criminal court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya pursuant to UNSCR 1970 (2011), New York 14 Nov. 2013.
[1410] United Nations Support Mission in Libya, *Torture and Deaths in Detention in Libya*, Oct. 2013.

an extraordinary $3 million dollars for 3 years (plus a daily allowance of $5000 a day). However, some time into his assignment a former employee warned the former Prosecutor that General Haftar's air force commander had used Tatanaki's radio station to say that all Haftar's opponents should be "slaughtered as traitors." Furthermore, a current employee warned him about Tatanaki's role in support of the regime during the uprising in 2011. Der Spiegel alleges on the basis of communications it obtained that Ocampo wrote to Tatanaki's employee, urging that Tatanaki should ensure that "Haftar is neither committing nor inciting to commit crimes" and that it should be "impossible to conclude that Hassan and his channels are supporting crimes." The former Prosecutor's contract ended after an initial payment for $750K, for unknown reasons, but it is believed that he orchestrated a meeting in The Hague between Tatanaki and ICC staff.[1411] The undeniable impression will be that the Libyan tycoon was buying Ocampo's influence with the ICC, and that Ocampo took steps to shield him from investigation. While this impression should be limited to the conduct of a few individuals, in the eyes of the Libyan public the institution is likely to be tainted by this episode.

In April 2017, the ICC unveiled an additional arrest warrant for another Qadhafi-era official, ex-security chief Mohammed Khaled al-Tuhamy, a warrant that had been kept under seal since 2013. In August 2017, the ICC issued an arrest warrant against *Saiqa*- commander Mahmoud Mustafa Busaif Al-Werfalli, associated with General Haftar, a man who had been filmed on several occasions executing prisoners in Eastern Libya.[1412] Al-Werfalli is not a central character in events in Libya.

In 2018, a communiqué of a conference held in Gheryan expressed the following views about the ICC:

> The ICC has used … the "double standard justice" in practicing its jurisdiction *vis à vis* the committed crimes. While the measures taken by the Public Prosecutor - and led to the issuance of three warrants of arrest against those who were at the top of the regime - were considered very fast as they were issued during only four months following the date of the referral, the ICC did not take any action afterwards except issuing two other warrants of arrest despite the high volume of crimes committed by the Libyan conflicting groups during the years following the issuance of referral.[1413]

[1411] Spiegel Online, Sven Becker, Marian Blasberg, Dietmar Pieper, *The Ocampo Affair: The Former ICC Chief's Dubious Links*, 5 Oct. 2017.
[1412] *Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli,* ICC-01/11-01/17.
[1413] Communiqué of Gheryan Conference on the Role of the UN following the Military Intervention in Libya in 2011, 21-22 Feb. 2018, on file with the author.

2. Lack of Legitimacy: Divergences between the Libyan and International Agendas

Although there was general support from the NTC for the ICC arrest warrants at the time they were issued, from an early stage Libyans maintained that Qadhafi ought to be tried in Libya if he were to be tried at all.[1414] His death at the hands of a Misrata brigade on 20 October 2011 rendered the question moot.[1415] While Qadhafi's death was condemned outside of Libya, in Libya there was virtually no protest. While the NTC promised to investigate his death, no such investigation was instigated. But the intransigence of the Libyan authorities only became apparent when Saif Al-Islam was arrested on 19 November 2012.

The Prosecutor immediately traveled to Libya to try to persuade the Libyans to surrender him to the ICC. But the Chairman of the NTC, Abdel-Jalil told him that the Libyan authorities wanted to seize the opportunity to do justice in Libya, to prove how the new regime was different from Qadhafi.[1416] As stated by the Prime Minister at the time, Abdurahhim Al-Keib: "We intend to project the real image of the new Libya."[1417] The Prosecutor essentially ended up agreeing that the Libyans should be allowed conduct the case themselves, although this was in fact for the Pre-Trial Chamber to decide.

On 22 April 2012, Libya field an admissibility challenge before the ICC, arguing that it had opened its own investigation against Saif Al-Islam ands should be allowed to proceed. The collision course with the ICC escalated further over the arrest of Abdullah Al-Senussi at the airport in Nouakchott on 17 March 2012. After protracted negotiations involving several countries, Abdullah Al-Senussi was extradited from Mauritania to Libya. His extradition was viewed as highly significant in the eyes of many Libyans, who view him as a key lynchpin in the Qadhafi regime. On 6 February 2012, Pre-Trial Chamber I of the ICC issued a decision ordering Libya to surrender him to the ICC, this was not generally well perceived in Libya, and there was no public support for the authorities to hand him over. In addition to Saif and Senussi, the post-2011 Libyan authorities had a large number of high-level former regime figures in custody.[1418] These were eventually brought to trial before a Libyan court, as described in Chapter 3.

[1414] Dina Al-Shibeeb and Mustapha Al Baili, *Rebels welcome ICC arrest warrants for Qaddafi, as explosions rock Tripoli,* 16 May 2011, Al Arabiya website.
[1415] Human Rights Watch, *Death of a Dictator: Bloody Vengeance in Sirte*, October 2012. Human Rights Watch attributed his death to an unclear combination of shrapnel wounds, beatings, and gunshots.
[1416] International Bar Association, Webcat Interview with ICC's Former Prosecutor, Luis Moreno Ocampo, October 2012.
[1417] Zain Verjee, *Libya has "great evidence" against Gadhafi's son, ICC Prosecutor Says*, CNN, 19 April 2012.
[1418] These included instance Baghdadi al-Mahmoodi, former Prime Minister; Abu Zaid Dorda, former Chief of External Intelligence and Libyan Permanente Representative to the United Nations; Abdel-Ati al-Obeidi, the former foreign minister; and Bilqasim al-Zwai, former head of parliament, as well as senior advisors Mansur Daw; Ahmed Ibrahim, Qadhafi's cousin; and many others

Due to the particularities of its history, including years of isolation from the outside world during the Lockerbie sanctions, Libyans are suspicious of foreigners, who are frequently accused of spying (as in the case of Melinda Taylor). The rhetoric of sovereignty is strong in Libya, and particularly immediately after the Revolution, Libya was keen to assert its jurisdiction as a new state. The Court neither had a presence nor had it conducted any outreach in Libya.

Libyans are aware that foreign intelligence agencies take a strong interest in Abdullah Al-Senussi because of his potential knowledge on involvement in terrorist acts such as the Lockerbie bombing. Several foreign intelligence agencies sought access to Senussi, including from the US and UK. Many Libyans presumed that the ICC is linked to these foreign intelligence agencies and that they want to take custody of Senussi so as to facilitate foreign access to him. The depth of Libyan suspicion was demonstrated when a battalion in Zintan detained four members of the Court's Office of Public Defence Counsel and the Registry in early June 2012, an incident described in Chapter 2.

3. No Negotiations or Exile for Al-Qadhafi Due to ICC

The arrest warrants in Libya were perceived by actors other than Libyans to complicate a peaceful settlement of the conflict by narrowing Qadhafi's chances of escape. In Libya itself, these perceptions did not play a big part, since the revolutionaries in Libya made it clear from the outset that they were out to topple the regime and would not accept clemency for regime members.

Nevertheless, in July 2011, when the situation looked as if it was headed for a stalemate, both the UK and France publicly flirted with the idea that Qadhafi may be able to remain in Libya if he agreed to leave power, but this idea remained hypothetical, particularly after the fall of Tripoli in late August.[1419] This seemed to indicate that all possibilities remained on the table. Several states are said to have offered asylum to Qadhafi including Uganda, Chad, Malawi, Venezuela, and Zimbabwe.[1420] NATO was reported to have approved his exile to a non-ICC member state.[1421] But there is no evidence that any of these deals were seriously considered by Qadhafi himself, who continuously declared he would die a martyr in Libya,[1422] and diverted to Sirte after the fall of Tripoli. "We have plans A, B, and C. Plan A is to

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[1419]Booth, Willliam. *France: Gaddafi could possibly stay in Libya,* Washington Post, 20 July 2011; Theo Usherwood, *Gaddafi must relinquish power says William Hague,* The Independent, 26 July 2011. Cited in Hayner, Priscilla, *International Justice and the Prevention of Atrocities: Case Study Libya: The ICC enters During War*, ECFR Background paper, November 2013.

[1420] Smith, D. *Where could Colonel Muammar Qadhafi go if he were exiled*, The Guardian, 21 February 2011. See Kersten, Mark. *Between Justice and Politics: The International Criminal Court's Intervention in Libya, available* online.

[1421]Kersten, Mark. *Between Justice and Politics: The International Criminal Court's Intervention in Libya,* available online.

[1422] Black, Ian. *Gaddafi urges violent showdown and tells Libya I'll die a martyr,* The Guardian, 22 February 2011. See also Kersten, Mark. *Between Justice and Politics: The International Criminal Court's Intervention in Libya,* available online.

live and die in Libya. Plan B is to live and die in Libya. Plan C is to Live and Die in Libya," Saif Al-Islam had said to the CNN in late February.[1423] In fact, even at the time of his capture and death at the hands of a Misrata brigade, Qadhafi showed bewilderment at his treatment to the moment he was killed.

Some argue that the ICC arrest warrants complicated potential attempts to mediate the conflict by the African Union, but this is debatable.[1424] It is not clear to which extent the rebels trusted the AU, considering Qadhafi's history within it. The AU had declared in early July 2011 that the ICC arrest warrants would not be implemented in its member states.[1425] Nonetheless, the AU attempts to negotiate were not given much weight by France, Britain and the United States.[1426] Alex de Waal concluded:

> The AU was not able to convince Libyans, Africans, or the world that it was a credible interlocutor for peace in Libya. Africa did not present a united position, and did not provide the financial, military or diplomatic resources necessary for the AU initiative to appear a genuine alternative, let alone to prevail. This is particularly regrettable because the AU's diagnosis of the Libyan conflict was fundamentally correct. This conflict was both a popular uprising against a dictatorship and a civil war within a patronage-based political order, with regional repercussions.[1427]

At the same time, the ICC intervention, especially the speed of issuing the arrest warrants, were very much aligned with a military solution in the Libyan context. NATO was in open support of the arrest warrants, because they gave credence to the official NATO line that the intervention in Libya aimed to protect civilians, and that the regime could not stay in place:

> All the evidence that the Prosecutor has gathered is a stark reminder of why NATO is conducting operations in Libya- to protect civilians against what the prosecutor described as crimes against humanity perpetrated by the Qadhafi regime … It is hard to imagine that a genuine transition in Libya can take place while those responsible for widespread and systematic attacks against the civilian population remain in power.[1428]

C. Colombia and the ICC: Separate but Symbiotic

[1423] UK Telegraph, *Gaddafi's son: our plan is to "live and die" in Libya*, 25 Feb. 2011.
[1424] Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016) p. 140-141.
[1425] African Union, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. EX.CL/670 (XIX)", Assembly/ AU/ Doc 366(XVII), 1 July 2011, para. 6.
[1426] Alex de Waal, *African Roles in the Libyan conflict of 2011,* Chatham House (March 2013).
[1427] Ibid.
[1428] NATO Spokesperson Oana Lungescu and with Wing Commander Mike Bracken, the Operation Unified Protector Spokesperson, "Press briefing on Libya", 17 May 2011.

Colombia and the ICC have a curious relationship. Each provides a key to the other's success. For the Court, Colombia is the prime example of "positive complementarity." Conversely, Colombia takes pride in being the first to resolve its conflict within the international legal framework laid out by the Court. But both seek to keep their distance from the other, and to maintain separation in their symbiosis.

Colombia was an active participant in the negotiations on the Rome Statute and the Elements of Crimes, and was among the first 60 states to become a State party. In 2001it filed an exception to the Court's jurisdiction on war crimes, under Article 124 of the Rome Statute, which expired in 2009. At the same time, much of the Colombian conflict is outside of the scope of the ICC.

The fifty- year old Colombian conflict is highly complex and involves multiple actors, including the state and Colombian army, fighting different guerilla forces (FARC, ELN, M19 and several others), but also involving paramilitary forces, deployed to fight guerillas and protect the interests of wealthy landowners; narco-traffickers (linked to all sides); and politicians or state actors that relied on paramilitary forces to protect their interests. Due to the weakness of the central States, various groups compete over resource-rich and drug-producing areas of the country.[1429]

The late Colombian author Gabriel Garcia Marquez referred to the conflict in Colombia as "a biblical holocaust." The fifty years of violence generated millions of victims. According to a 2013 Report of the Colombian Center for Historical Memory, around 220,000 persons have been killed in the conflict in Colombia; 23,154 were assassinated (with 40% of these killings by paramilitaries, 16.8 % by guerillas, 27% unattributed, and 10% by public security forces); and 4.7 million were internally displaced (this number has since been revised upwards to 7 million by UNCHR). Other hallmark violations included kidnappings, mostly by the FARC (27,023); deaths or amputations from anti-personnel land mines (10,189); and recruitment of children (6400). No figures were given for forced disappearances and sexual violence. [1430] The violence disproportionately affected indigenous communities, groups of African descent, and the poor.[1431] Those who were displaced often moved to the cities, settling in slums.[1432]

Land issues are a fundamental source of conflict in Colombia. Roughly one percent of the population owns 50% of the cultivatable land. Displacement is a hallmark of the Colombian conflict and largely affected poor populations in rural areas. In the last 30 years, victims of the conflict were forcibly dispossessed from an estimated

[1429] Summers, Nicole. *Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?* 25 Harvard Human Rights Journal (2012) p. 221.
[1430] Historical Memory Center, *Basta Ya! Colombia: Memorias de Guerra y dignidad* (Enough Already! Colombia: Memories of War and Dignity, July 2013.
[1431] Summers, Nicole. *Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?* 25 Harvard Human Rights Journal (2012) p. 221-222.
[1432] Ibid. p. 223.

12.6% of Colombia's agricultural land by guerillas, paramilitaries or other armed actors.[1433] Some of the land was taken by large multinational companies who themselves cultivated links with paramilitary groups or the FARC and contributed to human rights violations.[1434]

Since the enforcement of Alvaro Uribe's Democratic Security Policy, the FARC is thought to have decreased in size from around 15,000 combatants to around 6,000. Zuluaga's party says that it does not favor a continuation of the war, but that combating illegal armed groups is a Constitutional obligation, and that it must protect the country against acts of terrorism. Only recently, under the Santos administration, has the Government of Colombia recognized that the conflict as an internal armed conflict in legal terms. Political recognition was given to the FARC and ELN by the Pastrana government in 1998, but the FARC's ability to participate in politics was only decided as part of the Havana negotiations.[1435]

1. Local Priorities: Negotiated Justice

Much of the Colombian debate on justice has focused on fashioning "judicial benefits" in ways that incentivize armed actors to demobilize and integrate into political life. Discussions on accountability were trapped a transactional dynamic about what benefits perpetrators could expect in return for an agreement to surrender to a measure of justice. In *News of a Kidnapping*, Gabriel Garcia Marquez describes the negotiations of the Colombian government with drug-lord Pablo Escobar and his "Extraditables" already in the 1990s.[1436] This dynamic led to the innovation of many different transitional justice mechanisms within a judicial framework in the context of Colombia, including the Justice and Peace Law (Law 975). It also created increased awareness of transitional justice among the general population and led to improvements in the status of victim's rights.[1437]

In the late 1980s and the early 1990s, the Government concluded a peace process with the M19. Some members of M19 participated in the drafting of Colombia's Constitution of 1991, which contains several references to the right to peace.[1438] The Constitution also gave Congress powers to grant amnesties and pardons to political offenders and empowered the government to grant individual pardons.[1439]

[1433] Ibid. p. 222.
[1434] See for instance Business and Human Rights Resource Centre, *"Case profile: Chiquita lawsuits."*
[1435] Chetman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial,* DOMAC (17 Oct. 2011) p. 13.
[1436] Garcia Marquez, Gabriel. *News of a Kidnapping.* Vintage International (1997).
[1437] De Greiff, Pablo. *Strategic Challenges of the Justice and Peace Law*, 23 August 2011 at the conference in Sweden on "Selection or Prioritization as a Strategy for Prosecuting International Crimes."
[1438] Colombia Constitution Art. 22: "Peace is a right and a duty of which compliance is mandatory."
[1439] Maldonado, Silvia Delgado. *Political Participation: An Implied Condition for Enduring Peace in Colombia, International Law:* Rev. Colomb. Derecho Int. Bogota (Colombia) No. 23 pp. 267-318 (July-December 2013) at p. 308. These provisions allowed for a series of laws, passed by Colombia's

M19 members ran for politics.[1440] Many of the same concepts continued to be used in Colombia, including in negotiations with the paramilitaries, resulting in Law 975/05 and the Legal Framework for Peace.

Prosecutions for serious crimes by illegal armed groups are generally supported by the public in Colombia. One opinion poll conducted among urban Colombians by NGOs in 2006, during the enforcement of the Justice and Peace Law, suggested that the urban population supports dialogue with illegal armed groups, 63% supported criminal prosecutions of members of illegal armed groups, and not just the leaders, 75% thought that armed groups ought to be tried an punished, and even more (76%) thought that guerillas should be tried and punished. In general, only around one third of the population supported pardons for the FARC or guerillas. Up to fifty percent favored punishments to be included in the criminal law without special legal benefits for illegal armed groups. In another poll taken in 2012, most respondents (70%) said that the crimes of guerillas and paramilitaries were both serious and should both be severely punished. The Justice and Peace law enjoyed significant support among the population, particularly because of the central role of the criminal justice system. [1441] Part of the reason why the Colombian public voted against the Havana peace deal with the FARC in a plebiscite held on 1 Nov. 2016 was due to its perceived lenience in not handing prison terms to the FARC.

As part of the peace process with the FARC, Colombians have expressed interest in instituting comprehensive truth-seeking as a missing part of transitional justice. Until the Havana Agreement, no comprehensive truth-seeking had been instituted in the Colombian context.[1442] Another local priority is reparations for victims. Until

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Congress, that allow for peace negotiations with guerrilla groups, including Law No. 104/93 and Law 418/ 97.

[1440] Maldonado, Silvia Delgado*. Political Participation: An Implied Condition for Enduring Peace in Colombia,* International Law: Rev. Colomb. Derecho Int. Bogota (Colombia) No. 23, pp. 267- 318 (July-December 2013) p. 304.

[1441] Respondents were roughly equally divided between offering incentives to members of paramilitary groups and guerillas to demobilize them, and seeking to defeat them militarily. While most respondents favored sending paramilitaries to jail (48%), an important percentage favored legal benefits in exchange for truth and reparations (39%) and a minority (12%) favored freedom in exchange for truth and reparations. Centro de Memoria Historica, Organizacion Internacional Para Las Migraciones, Unidad de Atencion y Reparacion Integral a Victimas y Universidad de Los Andes, ?Que pensan los colombianos despues de siete anos de Justicia y Paz? Encuesta Nacional, Bogota, 2012. www.centrodememoriahistorica.gov.co/descargas/ informes2012/encuesta.pdf.

[1442] While the Center for Historical Memory plays an important role in collecting and publishing information on the conflict, its role is limited to generating "knowledge" rather than "acknowledgement" of violations. Other initiatives included the use of *version libres* as part of the Justice and Peace law, and in inquiry into the M19 "Palace of Justice" siege. Also, Law 1424 (2010) allows paramilitaries in "legal limbo" in Colombia, accused of "non-serious crimes", to seek to have their sentences suspended (indefinitely) if they participate in truth-seeking. These paramilitaries can agree to give a statement to the Center for Historical Memory in which they (1) give confirmation that they were with a paramilitary movement; (2) give the context of their participation and (3) give information of the crimes they know about. In return, none of the information can be used against them, their paramilitary structure or family or close friends. In return, they will not go to prison. They may also be required to give a statement of basic information to the *Fiscalia*. In 2014, the Center

the passage of the Victims and Land Restitution Law in 2011 (Victims Law or Law 1448), [1443] the main avenue to make reparations available for victims was the Justice and Peace law. However, out of the 410 000 victims who registered, only 1400 received reparations under the law. This prompted the passage of a new law, Decree 1290 (2008), which establishes an administrative reparations scheme. Difficulties with that scheme in turn prompted the passage of Law 1592, which provides that victims (for crimes since 1985) should seek reparations under the Victims Law.[1444] The Victims Law is being implemented, but was broadly criticized for constituting a transitional justice measure applied in an ongoing armed conflict.[1445]

At the same time, Colombia is a context where many transitional justice measures are being pursued simultaneously. The number of victims of different kinds of violations, by different perpetrators, poses a challenge for the ICC in terms of scope and complexity. The Court deliberately stayed in the shadows in Colombia, a role that many Colombians agree has been useful. The utility of the Court may be seen as an instrument to guarantee non-repetition, rather than as a tool for investigation, prosecution and punishment.[1446]

The political origins of the conflict led to a strong polarization of the society.[1447] The conflict has a strong urban-rural divide, with the violence being barely

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for Historical Memory had signed around 8300 agreements and gathered up to 2500 testimonies from paramilitaries. However, the procedure does not link to their integration so that it can be difficult to track them down. No witness protection is offered under the system. Some of the paramilitaries are subsequently revealed to have committed serious crimes, but the process provides confidentiality so that the Center for Historical Memory is not required to refer them to the Fiscalia. Interview with Staff Member, Center for Historical Memory, Bogota, 16 May 2014.

[1443] Victims included are broadly defined to include victims of human rights and IHL violations since 1985, and encompass those who disappeared, were murdered, or suffered other serious violations, as well as those who were displaced. Unlike in the Justice and Peace law, there is no need to demonstrate perpetrator responsibility to qualify as a victim. Victims may be granted damages; restitution of prior living conditions; social services; and special protections in legal proceedings. Victims of displacement may be entitled to land restitution (both physical and legal) or, if that is not possible, compensation. In the Victims Law, once a victim raises a complaint the burden of proof of landownership "inverts" to the landowner to show that the land was lawfully obtained. Various symbolic measures of reparations re also included in the law. The Victims Law also seeks to regulate corporate land purchases and holds corporations responsible for their role in human rights violations by paying into a Victim's Reparation Fund. At the same time, it is not clear that the Victims Law can deliver on security; on social services for victims at the local level, or that it contributes to truth-seeking. Summers, Nicole. *Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?* 25 Harvard Human Rights Journal (2012) p. 225-235.

[1444] International Crisis Group, *Transitional Justice and Colombia's peace Talks,* Latin America Report No. 49, 29 August 2013 at p. 5. This law is still under review by the Constitutional Court.

[1445] Maldonado, Silvia Delgado. *Political Participation: An Implied Condition for Enduring Peace in Colombia*, International Law: Rev. Colomb. Derecho Int. Bogota (Colombia) No. 23, pp. 267-318 (July-December 2013) p. 270.

[1446] Interview with Congressman Alviro Uribe, Bogota, 14 May 2014.

[1447] Saffon, Maria Paula and Rodrigo Uprimny, *Uses and Abuses of Transitional Justice in Colombia*, PRIO Policy Brief 6 (2007).

noticeable in Colombia's urban centers in recent years, as it is restricted to remote rural areas. Supporters of former President Uribe and the Central Democratic Party favored lenience for paramilitaries and military, but warned that there should be "no impunity" for the FARC. Conversely, those who support the peace process or who have leftist leanings are more willing to promote lenience for the FARC, arguing that it is a political actor, but argued that the Justice and Peace Law was too lenient.

Both camps have used the ICC and international legal standards to argue in their favor. Human rights groups argue that the ICC should have intervened during the Justice and Peace law era, because the outcomes of the law were so limited as to warrant ICC intervention on a finding of "unwillingness." Conversely, those who oppose lenience for the FARC in the peace process in Havana are quick to cite the existence of the ICC in favor of arguing that such lenience is not legally permissible.[1448]

2. The Court in Colombia: El Salvador or "El Coco"?

In Colombia, many elites know about the ICC, because of the prominent debates around the peace negotiations with the FARC in Havana. Even among persons from rural or remote areas affected by the conflict. On 7-8 November 2013, the Ministry of Justice in Colombia held a round of consultations with around 170 victim representatives from all over Colombia. Victim representatives interviewed in the margins of the conference generally had rudimentary knowledge, but a positive view of the ICC.[1449] They said that they had lost faith in Colombian justice and the government, and expressed hope that the Court could apply pressure to prompt the national justice system to do more.[1450] A number of victim representatives said they do not feel adequately protected in Colombia,[1451] that the Colombian system is not able to deal with government actors, the military and paramilitaries, and drug traffickers, and that investigations generally stop at the lower levels.[1452] One victim said that the role of the ICC is important to deal with crimes that could not be judged or sentenced adequately under Colombian law, such as crimes against

[1448] Interview with Alejandro Ordonez, Bogota, Inspector General, 15 May 2014; Interview with Carlos Holmes Trojillo, Vice Presidential candidate, Bogota, 16 May 2014.
[1449] Out of the 9 victims interviewed, eight spoke positively of the Court. One had not heard of it: Interview with victim representative from Santander, Bogota, 8 Nov. 2013. See e.g. Interview with victim representative from Tolima, Bogota, 8 Nov. 2013.
[1450] Interview with victim representative from Choco, Bogota, 7 Nov. 2013. Interview with victim representative from Amazonas, Bogota, 7 Nov. 2013. Interview with victim representative from Choco/ Medellin, Bogota, 8 Nov. 2013. Interview with victim representative from Riohacha, Bogota, 8 Nov. 2013. Victim representatives said that they do not trust the public defenders or regional prosecutors, or even the Ministry of Justice, which had invited them to the conference.
[1451] Interview with victim representative from Choco, Bogota, 7 Nov. 2013. Interview victim representative from Choco/ Medellin, Bogota, 8 Nov. 2013.
[1452] Interview with victim representative from Neiva, Bogota, 8 Nov. 2013; Interview with victim representative from Caldas, Bogota, 8 Nov. 2013.

humanity or disappearances.[1453] Victim representatives expressed hope that the ICC would open an office in Colombia, so that they could have direct contact with the Court, [1454]and show the Court "the reality of what is happening in the country, since the government does not show the full truth."[1455] Some victim representatives said that the functions and operations of the Court are not advertised, and that "the mechanism to contact them is not known".[1456] The victim representatives that had heard of the Court had only heard about it indirectly, via the media, and had never met a Court representative.[1457] Some had the impression that the Court meets only with the government.[1458]

As described in Chapter 3, judges of various courts in Colombia have referred to ICC jurisprudence in their decisions. At the same time, misperceptions are common even among judicial actors. For instance, the Prosecutor-General had been known to say that the ICC could prosecute disappearances that predate the Rome Statute, under the doctrine of continuous crimes.[1459] Some members of the judiciary are said to "fear" judicial oversight by the ICC. Some NGOs perceive of the Court as a "paper tiger" after its refusal to intervene in the Justice and Peace process, in spite of the many communications that were submitted to it.[1460] Even Constitutional Court judges expressed fears that if they would make a decision that goes against the opinion of the ICC Prosecutor, they could themselves be accused in The Hague of promoting impunity.[1461]

Ordinary Colombians have no detailed awareness of the Court's structure or functions. For instance, many accepted at face value President Uribe's announcement that he had referred Hugo Chavez to the ICC. At the same time, Colombians have a strong perception of their own country as a modern nation that is governed by the rule of law. This self-perception strongly contributes to a motivation to escape external review by various international courts and tribunals, such as the IACHR and the ICC.

Some actors in Colombia have trouble distinguishing between the difference in roles of the Inter-American Court and the International Criminal Court, and generally may perceive their roles as similar.[1462] The former Prosecutor, Luis Moreno Ocampo often featured in the Colombian media as commenting on Colombia's legal

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[1453] Interview with victim representative from Caldas, Bogota, 8 Nov. 2013.
[1454] Interview with victim representative from Choco, Bogota, 7 Nov. 2013; Interview with victim representative from Amazonas, Bogota, 7 Nov. 2013.
[1455] Interview with victim representative from Amazon, Bogota, 7 Nov. 2013.
[1456] Interview with 2n victim representative from Amazonas, Bogota, 7 Nov. 2013.
[1457] Interview with 2nd victim representative from Amazonas, Bogota, 7 Nov. 2013. Interview with, victim representative from Tolima, Bogota, 8 Nov. 2013.
[1458] Interview with 2nd victim representative from Amazonas, Bogota, 7 Nov. 2013.
[1459] Interview with OHCHR representative, Bogota, 9 Nov. 2013.
[1460] Interviews in Bogota, May 2014.
[1461] Anonymous, Bogota, 10 Nov. 2013.
[1462] Interview with OHCHR representative, Bogota, 9 Nov. 2013.

system.[1463] Likewise, the leaked letters of the Prosecutor to the Constitutional Court of Colombia were seen as an exercise of "advisory capacity" similar to the role of the Inter-American Court.[1464] Moreover, the ICJ litigation between Colombia and Nicaragua over the Archipelago de San Andres y Providencia and Quita Sueno Bank islands and territorial shelf, resulting in a judgment in 2012 that was perceived as a victory for Nicaragua, contributes to a negative perception of international justice in Colombia.[1465]

For these reasons, some Colombians refer to the ICC as "El Coco", which means a "boogey man" or "devil". Colombians refer to the fact that the "ICC will come" without knowing what it means.[1466] The result is that the Court is presumed as much more powerful than it actually is. This in itself accounts for the indirect impact the Court is able to have, because Colombians presume it is an all-powerful actor that can remove people to The Hague.[1467]

3. Colombia: ICC Letters Complicate Peace Negotiations

Various prominent Colombians said that the OTP's letters, which are described in more detail in Chapter 4, constituted an unwarranted international intervention in the Colombian conflict. Upon receipt of the letters, President Santos remarked that "all countries that have resolved conflicts are confronted with this decision, complicated decisions because generally not everybody is satisfied. Often the majority is dissatisfied. If one leans too much towards justice, maybe peace can not be reached." Ivan Marquez from the FARC called the International Criminal Court "interventionist and biased" and said that it "knows little about the internal Colombian conflict."[1468] In the words of one commentator, "If we have to choose between peace and the ICC, we choose peace."[1469] At the hearings organized by the Constitutional Court, well-respected intellectual Rodrigo Uprimny commented that the Court's actions amounted to interference, and that the peace process is a matter of democratic deliberation for Colombians. An influential member of the Congress argued that the peace process needs a language of persuasion, not of threats.[1470] At the same time, some Colombians feel the ICC played a useful role in the peace process, for instance through serving as a useful guarantee for non-repetition.[1471]

[1463] Ibid.
[1464] Ibid.
[1465] Interview with former Deputy Minister of Justice, Bogota, 14 May 2014
[1466] Interview with OHCHR representative, Bogota, 9 Nov. 2013.
[1467] Ibid.
[1468] Adriaan Alsema, *Colombia Challenges ICC over Possible Amnesty with the FARC,* Colombia Reports, 27 August 2013.
[1469] Interview with former Deputy Minister of Justice, Bogota, 14 May 2014.
[1470] Interview with Member of Congress, Bogota, 14 May 2014.
[1471] Interview with Member of Congress 2, Bogota 14 May 2014.

D. Afghanistan: The Court's Situation of Last Resort

Afghanistan, the so-called Graveyard of Empires, is a place that the Court avoided between 2003 and 2017. The conflict in Afghanistan has continued for almost forty years.[1472] In 1979 the Soviets invaded Afghanistan to assist the struggling PDPA government. Widespread violations prevalent during the PDPA/ Soviet period included widespread illegal detention, torture, extra-judicial killings, and in particular by the notorious KHAD (*Khidamat-e Ittila'at-e Dawlati* or State Information Service); imprisonment in the infamous *Pul-e-Charkh*i prison and disappearances; massive areal bombardments of cities, particularly Herat, and rural areas; and large scale massacres.[1473] The resistance, the Mujahideen, also engaged in violations including killings of government officials or their relatives and attacks on girls schools or on civilians associated with rival factions. After the withdrawal of Soviet forces in 1989 and the eventual collapse of the Najibullah government in 1992, violations continued unabated as rival Mujahideen factions fought for control over the government and Kabul. Chaos and a complete breakdown of the state resulted in further killings, lootings, highway robber, incidents of torture and rape.[1474] The Taliban period brought no reprieve, although particularly in the South the Taliban was welcomed for their potential to reign in the unruly warlords governing Afghanistan. But soon they showed their highly repressive face, severely curbing the rights of women and men. Their reign was marked by persecution of the Hazara as well as a number of large-scale massacres, notably in Mazar-e-Sharif in August 1998, and in the Central Highlands, Bamiyan in 2001.[1475] The Taliban themselves were also the victims of a massacre in Mazar-i-Sharif in May 1997 and at Dash-i Leili in November 2001.[1476]

[1472] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan,* February 2013 citing Olivier Roy, *Islam and Resistance,* Cambridge University Press (1990) p. 95. Recently, a list of 5000 Afghans who disappeared during the early communist period was released by Dutch investigators. See Emma Graham-Harrison, *Names of 5000 Afghans killed in purges published 35 years on,* 20 Sept. 2013 at http://www.theguardian.com/world/2013/sep/20/names-afghans-killed-purges-published. See also Afghan Independent Human Rights Commission, *Death Lists to End Uncertainty of Relatives*, Rotterdam, (September 2013) at //www.aihrc.org.af/en/daily-reports/1730/afghanistan-death-lists-to-end-uncertainty-of-relatives.html.

[1473] A well-known massacre of up to 1000 villager took place in Kerala in Kunar Province in March and April 1979: Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanit*y, 1978-2001 at http://afghanistanjusticeproject.org.

[1474] A particularly notorious incident in this period include the massacre of Hazara civilians at Afshar in Kabul, in February 1993, by Shura-ye Nazar and Ittihad-e Islami. Violations included executions, torture and rape. Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity, 1978-200*1 (July 2005) at http://afghanistanjusticeproject.org.

[1475] See Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, February 2013. See section on "War Crimes and Human Rights Violations in Afghanistan."

[1476] At Mazar-i-Sharif, around 3000 Taliban prisoners were summarily executed by Jombesh soldiers. Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity, 1978-2001* (July 2005) at http://afghanistanjusticeproject.org. On the Dasht-i-Leili massacre, see Rubin, Barnett, *Transitional Justice and human rights in Afghanistan*, International Affairs 79, 2 (2003) p.

Afghanistan is an environment in which the rule of law is almost entirely absent. While Afghanistan is party to a number of international treaties, violations remain common.[1477] Afghanistan's legal system remains weak in spite of twelve years of rule of law programming on behalf of the international community to strengthen it.

In light of these challenges, it is not so surprising that the Court has yet opened an investigation in Afghanistan. Knowledge of the ICC is low even among key stakeholders. Several MPs interviewed for this thesis did not know that Afghanistan is a State Party to the ICC, neither did the Deputy Chief Judge of the Supreme Court.[1478] Few materials on the ICC exist in Dari and even fewer in Pashtu: most materials in Farsi dealing with ICC originate from Iran, which has seen some scholarship on the issue.[1479] Since it became a State Party, only a handful of public discussions took place on the ICC in Afghanistan, most of them immediately after ratification in 2003.[1480] The issue of ICC has received little media coverage since it publicly announced the opening of the preliminary investigation in 2007.

At the same time human rights activists and victim organizations expressed strong support for increased ICC involvement in Afghanistan.[1481] These groups considered the ICC is the only viable alternative to an otherwise corrupt and untrustworthy domestic legal system.[1482] The idea of a global court that can remove perpetrators

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574. Physicians for Human Rights investigated the massacre. Some reports allege US Special Forces as present at the scene of the massacre.

[1477] Afghanistan has ratified the following international instruments: the 1949 Geneva Conventions (ratified by Afghanistan in 1956); the Convention on the Prevention and Punishment of the Crime of Genocide (ratified by Afghanistan in 1956), and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (ratified by Afghanistan in 1987). International law is relevant to the Afghan legal order according to Art. 7 of the Constitution (2004), which was also found in previous Constitutions, going back to 1964. According to this article, Afghanistan can be said to resemble a monist rather than dualist legal system. This would mean that international law may be directly applicable in Afghanistan. While the Constitution is not explicit on customary international law there is no jurisprudence on the issue, the spirit of the provision can be said to include general provisions of international law including custom.

[1478] A Supreme Court judge voiced the view that while the Ministry of Foreign Affairs had signed a convention on international crimes, this had nothing to do with The Hague: Interview with Supreme Court Judge, Kabul,18 March 2014. The five Parliamentarians and the Supreme Court judge who I interviewed for this thesis all showed scant knowledge of the ICC, having heard of it but not knowing its implications or whether Afghanistan is a state party.

[1479] Interview with Representative from Global Rights, Kabul, 17 March 2014.

[1480] Interview with Director of Afghanistan Human Rights and Democracy Organization, Kabul, 22 Nov. 2013

[1481] At an event entitled "The Afghan "Death Lists": Legacies of Past Violations and the Future of Afghanistan", held in The Hague on 4 March 2014, several victim groups expressed hope that the ICC would get involved in Afghanistan. The event was organized by the Federation of Afghan Refugee Organizations in Europe, and around 70 persons were in attendance.

[1482] Interview with Afghan Representative from Afghanistan Justice Sector Support Program, Kabul, 20 Nov. 2013. Interview with Researcher 2, Afghanistan Analysts Network, Kabul, 20 Nov. 2013. Interview with Representative from Afghanistan Forensic Science Organization, Kabul, 20 Nov. 2013.

and spoilers from the scene is attractive in the context on Afghanistan.[1483] Some organizations have argued that ICC involvement may be useful in curbing crimes of the Taliban.[1484] The International Crisis Group, have urged the ICC to open an investigation against the Taliban, such as in the aftermath of the arrest of Mullah Baradar in March 2010.[1485] (Mullah Baradar was released from custody under the reconciliation policy in September 2013). Human Rights Watch argued that the ICC "should expedite a fact-finding mission to Afghanistan to collect testimony and improve its information exchange with Afghan organizations, government bodies and relevant international entities."[1486] Some also argued that this should be done while it is still possible, before a possible settlement with the Taliban.[1487] Proponents of this strategy argue that the Taliban are responsive or sensitive to accusations that are leveled at them.[1488] However, this seems contrary to the views expressed by a former senior Taliban leader:

> You have to understand the religious mentality of the new zealous youth. They wish to find paradise through martyrdom and suicide attacks. They look down on older Taliban leaders, who they say are not certain to go to paradise. The insurgency is made up of religious students, who are studying in seminaries with a curriculum that is 800 years old. Ninety-nine percent do not know about international conventions and they do not care.[1489]

However, some civil society activists who were supportive of the ICC also highlighted the fact that investigations that target only Taliban may appear too partial.[1490]

On the other hand, civil society organizations in Afghanistan feel isolated in advocating for the Court.[1491] Afghan NGOs raise money on a project basis, mostly from foreign sources, this has inhibited their ability to build up effective and sustainable programs on the monitoring and reporting of human rights

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[1483] Mazoori, Dallas. Conference Paper, *Justice for All*, February 2012 (unpublished). On file with the author.
[1484] Interview with AIHRC Commissioner, Kabul, 20 Nov. 2013. (This member is now Attorney General of Afghanistan).
[1485] Rondeaux, Candice and Nick Grono, *Prosecuting Taliban War Criminals*, New York Times Op-Ed, 23 March 2010.
[1486] Human Rights Watch, *Afghanistan: ICC Prosecutor Finds Grave Crimes*, 1 Dec. 2013.
[1487] See for instance interview with Director of Afghanistan Human Rights and Democracy Organization, Kabul, 22 Nov. 2013
[1488] Interview with Director of UNAMA's Human Rights Division, Kabul, 21 Nov. 2013.
[1489] Interview with Abdel-Hakim Mujahid, High Peace Council, Kabul, 18 March 2014.
[1490] Interview with Director of Afghanistan Human Rights and Democracy Organization, 22 Nov. 2013. Interview with Researcher 1, Afghanistan Analyst Network, Kabul, 23 Nov. 2013.
[1491] Interview with Researcher 2, Afghanistan Analysts Network, Kabul, 20 Nov. 2013. See also Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan* (February 2013) p. 42.

violations.[1492] NGOs say that donors in Kabul have shown little interest in ICC-related activities.[1493]

In 2009, the ICC came briefly into focus in Afghanistan when the Prosecutor held a press conference on 9 September 2009 to say that he may be interested in opening an investigation in Afghanistan.[1494] This announcement followed the bombing by German pilots of two petrol tankers on 4 September, an incident in which 91 civilians were killed.[1495] The ICC press conference raised hope amongst some Afghans that the ICC may consider becoming more active on Afghanistan, but between the lines the Prosecutor seemed to be saying that he would open an investigation if the Security Council or the Government of Afghanistan would refer the case to the ICC.[1496] This rendered the entire question rather moot since neither a Security Council nor a Government referral could realistically be expected at the time

In 2011, NGO representatives visited the ICC with a petition with suggestions for better collaboration, and urged them to put in place mechanisms for more effective communication, including the appointment of a focal point, but this has not happened to date.[1497] But NGOs fear that the ICC may not have the potential to lend support or protection in an environment where local NGOs face high threat levels.[1498]

1. Local Priorities: Justice for Crimes of the Past

Nowhere are the limitations of the ICC's temporal jurisdiction as apparent as in Afghanistan. Afghanistan is one of the world's most protracted conflicts.[1499] Prior to the US-led military operation, common estimates are that the war in Afghanistan

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[1492] Interview with Researcher 2, Afghanistan Analysts Network, Kabul, 20 Nov. 2013.
[1493] See for instance interview with Director of Afghanistan Human Rights and Democracy Organization, Kabul, 22 Nov. 2013
[1494] Charbonneau, Louis. *ICC Prosecutor eyes possible Afghanistan War Crimes*, 9 Sept. 2009 in http://www.reuters.com/article/2009/09/09/us-afghanistan-warcrimes-idUSTRE58871K20090909.
[1495] The tankers had become stuck in a riverbed and civilians had surrounded them to tap fuel. Apparently US pilots had suggested to the German pilots to do a fly-over to scare away civilians, but this advice was ignored, raising questions about whether the airstrike constituted a breach of international humanitarian law, which in turn caused a political furor in Germany. See Deutsche Welle, *Bonn Court Reviews 2009 Kunduz Air Strike*, 30 Oct. 2013 at http://www.dw.de/bonn-court-reviews-2009-kunduz-air-strike/a-17194997.
[1496] Charbonneau, Louis. *ICC Prosecutor eyes possible Afghanistan War Crimes*, 9 Sept. 2009 in http://www.reuters.com/article/2009/09/09/us-afghanistan-warcrimes-idUSTRE58871K20090909.
[1497] Interview with Khodadad Basharat, Director of AHRDO, 22 Nov. 2013. See also Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, (February 2013) p. 43.
[1498] Interview with Khodadad Basharat, Kabul, 22 Nov. 2013
[1499] Ibid.

had yielded 1 million deaths. Around 7 million Afghans sought refuge in Iran, Pakistan, and elsewhere. While the vast majority of the crimes in Afghanistan are not under the temporal jurisdiction of the ICC, war crimes and crimes against humanity were committed on a large scale in Afghanistan since the Saur Revolution in1978. Many of the suspected perpetrators continue to wield power today.[1500] The ICC's temporal jurisdiction started on 10 May 2003, although a preliminary examination was only opened in 2007. In its preliminary examinations in 2016, the OTP notes that " the United Nations Assistance Mission in Afghanistan (UNAMA), over 17,500 civilians have been killed in the conflict in Afghanistan in the period between January 2007 and June 2014. Members of anti-government armed groups were responsible for at least 12,100 civilian deaths, while pro-government forces were responsible for at least 3,552 civilian deaths." A number of reported killings remain unattributed.[1501]

The pervasive widespread impunity and continued power of past warlords who are now in government positions translates into Government opposition to accountability for war crimes and crimes against humanity, whether committed in the past or more recently. The debate on justice in Afghanistan after 2001 was largely focused on accountability for the enormous crimes of the past and on how to achieve "transitional justice". But impunity in Afghanistan is so widespread that at least six of the candidates for president or vice-president in the elections held in 2014 were alleged to have committed war crimes or crimes against humanity.[1502] While the topic of their liability came up during their presidential campaigns, apart from General Dostum, other candidates categorically denied responsibility, including in particular Abdel-Rassoul Sayyaf and Ishmael Khan.

After the conclusion of the Bonn Agreement in December 2001, many attempts were made to pursue transitional justice in Afghanistan, but none came to fruition. The Bonn Agreement, the settlement made between allies of the United States in the absence of the Taliban in December 2001, was silent on the issue of transitional justice, although it affirmed the principle of "accountability".[1503] Nonetheless, the clause provoked severe criticism from certain Northern Alliance leaders, including Rabbani and Sayyaf, who said that this was disrespectful to the "liberators" of

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[1500] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan,* February 2013. See section on "War Crimes and Human Rights Violations in Afghanistan." See also Conflict Mapping Report by the Office of the UN High Commissioner for Human Rights (http://www.flagrancy.net/ salvage/ UNMappingReportAfghanistan.pdf). See also the Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity*, 1978-2001 (July 2005) at http://afghanistanjusticeproject.org.
[1501] OTP Report on Preliminary Examinations Activities 2014, para. 82, citing UNAMA.
[1502] Afghanistan Analyst Network representative statement at International Seminar on Peace, Reconciliation and Transitional Justice, Kabul University, 16-18 November 2013.
[1503] In line with UN practice, the original UN-drafted Agreement stated that the interim administration would not be able to grant amnesty for war crimes, crimes against humanity. Lakhdar Brahimi, himself an Algerian, warned the participants against the dangers of an amnesty, based on his own experience. See also, Rubin, Barnett, *Transitional Justice and human rights in Afghanistan,* International Affairs 79, 2 (2003) p. 571.

Afghanistan and that "foreigners would use the agreement to disarm them."[1504] The clause was deleted. The Bonn Agreement served to empower, and legitimize Northern Alliance warlords who had sided with the US and its allies in the fight against the Taliban and Al-Qaeda.[1505] One analyst has called the unquestioning incorporation of these warlords into the new Afghan political order "the possibly single most important point that prevented Afghanistan from moving towards democracy and put it into the current quagmire."[1506]

At the Emergency Loya Jirga[1507] held in June 2002, a regulation required candidates to sign an "eligibility pledge" that they had not been involve in war crimes, crimes against humanity or drug trafficking, but it was not successfully enforced.[1508] The US in particular advocated an "inside the tent" approach, and up to 50 known warlords participated in the Emergency Loya Jirga.[1509] Later on, attempts to introduce vetting criteria into senior political appointments similarly failed and the political process in Afghanistan continued to develop on a separate track from the accountability discussion.

In 2002, the Afghan Independent Human Rights Commission was given a mandate over transitional justice. [1510] In 2005, it completed a widespread consultation on transitional justice summarized in the report "Call for Justice." The report included the views of 4151 respondents in a quantitative survey, complemented by focus group discussions with over 200 participants, administered in 32 of Afghanistan's 24 provinces over an 8-month period.[1511]The report did not mention the ICC, but showed widespread public support for prosecutions. Up to 69% self-identified themselves or immediate family members as victims of crime during Afghanistan's

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[1504] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan* (February 2013) p. 17. See also, Rubin, Barnett, *Transitional Justice and human rights in Afghanistan*, International Affairs 79, 2 (2003) pp. 571-2.

[1505] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan* (February 2013) pp. 14-17.

[1506] Ibid. at p. 17 citing Thomas Rutig.

[1507] Loya Jirga is a name for Grand Assembly in Pashto.

[1508] Afghanistan Independent Human Rights Commission, *A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan* (2005) p. 43. Human Rights Watch, *Seductions of "Sequencing": The Risks of Putting Justice Aside for Peace* (December 2010) p. 9.

[1509] Accusations of war crimes once more arose in the Constitutional Loya Jirga in December 2003, where a female delegate, Malalai Joya, famously spoke out against Northern Alliance warlords present in the gathering, calling them "war criminals" and asking them to be tried by a national or international court. She was removed from the assembly for criticizing the Mujahideen. Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan* (February 2013) p. 17

[1510] Nadery, Ahmad Nader. *Peace or Justice? Transitional Justice in Afghanistan, The International Journal for Transitional Justice,* Vol. 1, (2007) p. 176.

[1511] See Afghanistan Independent Human Rights Commission, *A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan* (2005), Nadery, Ahmad Nadery. *Peace or Justice? Transitional Justice in Afghanistan*, The International Journal for Transitional Justice, Vol. 1, (2007) p. 176.

conflict. Up to 76.4% thought that bringing war criminals to justice would improve stability in Afghanistan. However, 57.8% said that they do not trust the Afghan justice system, whereas 38.6% said that they did (emphasizing that it was based on Islam).[1512]

The Call for Justice report led to sufficient pressure on the government to result in the ratification of an Action Plan on Peace, Justice and Reconciliation in 2006.[1513] The Action Plan was a high-water mark in the search for accountability in Afghanistan, but already at that time criminal justice was not mentioned explicitly as it was deemed too sensitive.[1514] Shortly after the Action Plan was passed, the search for accountability suffered another serious setback. Human Rights Watch issued a press release calling for the prosecution of certain individuals, in early 2007.[1515] The backlash to this call for accountability resulted in the eventual passage of the National Reconciliation, General Amnesty and National Stability Law. This law dealt a serious blow to accountability efforts in Afghanistan.

In this very challenging context, the first official visit of the OTP to Afghanistan took place on 16-18 November 2013.[1516] It was clear that those present lacked basic knowledge of the Court, including in particular of its temporal jurisdiction.

[1512] The main problems identified with the justice system were lack of information, lack of speedy resolution of cases, lack of defense lawyers and gender balance. Judges were generally viewed as corrupt or unprofessional. For this reason, up to 49.6% of respondents surprisingly supported a mixed court of Afghan and international judges to try war criminals; whereas 27.6% were in favor of a fully international court and 21.5 were in favor of a court composed of Afghan judges. Afghanistan Independent Human Rights Commission, *A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan,* 2005. On the other hand, respondents in focus groups did said that if possible international judges should come from other Islamic countries, but not those involved in the conflict such as Pakistan, Iran, or Saudi Arabia. They also highlighted that the role of internationals would be most useful as observers or in a supporting capacity, and they mentioned the United Nations in this regard. Only about 5% of focus group participants had heard of international criminal tribunals, but most felt that domestic law should apply and that trials should be held in Afghanistan (79.5%). Many respondents believed that the international community had supported warlords (41.2%) as those who believed that the international community had taken steps to limit their power (40.4%).

[1513] http://www.aihrc.org.af/media/files/Reports/Thematic%20reports/Action_Pln_Gov_Af.pdf The Plan had 5 components, including (1) acknowledgement of the suffering of the victims; (2) building credible state institutions, including through vetting programs; (3) truth-seeking and documentation; (4) promoting measures of peace and reconciliation; and (5) the establishment of reasonable and effective accountability mechanisms. As part of the last component, the Action Plan provided almost prophetically that: "considering the lofty values of the sacred religion of Islam and in accordance with internationally recognized standards; the perpetrators war crimes, crimes against humanity and other serious human rights violations will not be ignored."

[1514] The author was involved in the policy discussions in framing the Action Plan in Afghanistan.

[1515] Human Rights Watch, *Afghanistan: Justice for War Criminals Essential to Peace,* 12 Dec. 2006.

[1516] A member of the JCCD attended a conference organized by Khilid Group and the Afghanistan Center at Kabul University on transitional justice when a member of the JCCD attended a conference organized by Khilid Group and the Afghanistan Center at Kabul University on transitional justice International Seminar on Peace, Reconciliation and Transitional Justice, Kabul University, 16-18 November 2013. The conference was attended by around 80 representatives from the Afghan Independent Human Rights Commission, civil society, and the media.

Contacts between the Court and the Afghan Government institutions until now have been very limited.[1517] Afghanistan did not attend the Review Conference in 2010.[1518] The ICC OTP has no capacity in the languages of Afghanistan, Dari and Pashtun. The AIHRC expressed willingness to share information with the ICC, but noted that there is no clear communication channel in place.[1519] On its side, the OTP has pointed to security and budgetary constraints on its ability to engage in Afghanistan.[1520]

2. Independence: A Court under the Influence of Western Powers

In late 2013, the OTP for the first time found that there is a reasonable basis to believe that crimes within the jurisdiction of the Court have occurred in Afghanistan, some 7 years after first commencing the preliminary examination, but failed to include international forces in its findings. This finding was met with disagreement in Afghanistan, as there is a widespread perception that international forces are guilty of the gratuitous killing of Afghan civilians.[1521]

Among civil society activists that know about and support the ICC, there is a perception that the Court 's reluctance to engage is due to political factors, including in particular the presence of the US and NATO, but also because of the reluctance of the Afghan authorities to pursue accountability for the Taliban and anti-government forces in the current political climate and in light of the amnesty law.[1522] The perception of the Court is that NATO is "too powerful" while the Taliban are "out of reach."[1523] In any case, the US has always insisted on immunity of its forces, both under the original Status of Forces Agreement (SOFA) concluded in 2003, and as part of the 2013 discussions on the Bilateral Security Agreement.[1524]
The SOFA from May 2003 states that:

[1517] Ibrahmi, Niamatullah. *The Vacant Seat of Afghanistan at the ICC: A Short Report on the ICC Assembly of States Parties (ASP),* The Hague, Netherlands, November 2009, available at: http://www.watchafghanistan.org/article017.htm.
[1518] Afghanistan was represented at the 12th Assembly of States Parties in The Hague, however, and reaffirmed its support to the Rome Statute on that occasion. Conversation with the Afghan Ambassador to the Netherlands at the Assembly of States Parties on 22 Nov. 2013.
[1519] International Seminar on Peace, Reconciliation and Transitional Justice, Kabul University, 16-18 November 2013.
[1520] Interview with AIHRC Commissioner, Kabul, 20 Nov. 2013. The following modalities for future cooperation between the Commission and the ICC were explored: the AIHRC offered to pay for OTP visits, to hold events to build capacity on the ICC among government actors and civil society, and to promote Afghan internships at the ICC.
[1521] Interview with Researcher 1, Afghanistan Analysts Network, 23 Nov. 2013.
[1522] Interview with Director of Afghanistan Human Rights and Democracy Organization, 22 Nov. 2013. Interview with Director of Afghanistan Watch, 22 Nov. 2013.
[1523] Interview with Director of Afghanistan Watch, 22 Nov. 2013.
[1524] See e.g. Interview with Representative from Afghanistan Forensic Science Organization, 20 Nov. 2013.

> U.S. personnel are immune from criminal prosecution by Afghan authorities, and are immune from civil and administrative jurisdiction except with respect to acts performed outside the course of their duties. [The agreement] explicitly authorized the U.S. government to exercise criminal jurisdiction over U.S. personnel, and the Government of Afghanistan is not permitted to surrender U.S. personnel to the custody of another State, international tribunal [including the ICC], or any other entity without consent of the U.S. government.

The current version of the Bilateral Security Agreement states at Art. 13 (5): "Afghanistan and the United States agree that members of the force and of the civilian component may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the United States." Newton has argued that this means that Afghanistan cannot delegate criminal jurisdiction of US personnel to the ICC.[1525] The former Prosecutor has argued too that the SOFA may be the "best US option" if the goal is to avoid ICC investigation, but said that Afghanistan should present the ICC with the SOFA to argue that there is no jurisdiction under Art. 19 (3).[1526]

The widespread impunity for crimes of the past contributes to an antipathy to an accountability mechanism such as the ICC. Accountability or transitional justice is depicted by warlords as a "Western" concept, and those who promote them are accused of being "Western agents."[1527] Since transitional justice and the ICC are promoted by the same actors (the AIHRC, the UN and civil society), they are perceived of as part of the same package by some warlords.[1528] Powerful *mujahideen* who feel threatened by the ICC seek to portray the ICC as an instrument of foreign powers, and not in line with Islamic traditions.[1529] In the words of one Member of Parliament, a member of Jamiat : "When the Russians were here, the West was on our side and made us out to be heroes. After the Bonn Agreement, they called us warlords."[1530] Former *mujahidin* argue that they liberated Afghanistan and do not deserve to be treated as war criminals, although some acknowledge that what happened during the Kabul civil war (1992-1996) is different and cannot fall under the rubric of liberation.[1531] Still, the AIHRC is conceived of as anti-mujahidin in its push for transitional justice, and opponents often recall the communist past of the head of the Commission, Dr. Sima Samar. In the words of one MP: "If you want

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[1525] Cited in Moreno Ocampo, Luis. *The ICC's Afghanistan Investigation: The Missing Option*. Lawfare blog, 24 April 2017.
[1526] Moreno Ocampo, Luis. *The ICC's Afghanistan Investigation: The Missing Option*. Lawfare blog, 24 April 2017.
[1527] Ahmad Nader Nadery describes how some were able to depict transitional justice initiatives as aimed against good Muslims and Mujahideen: Ahmed Nader Nadery, *Peace of Justice? Transitional Justice in Afghanistan, The International Journal of Transitional Justice*, Vol. 1, (2007) p. 177.
[1528] Interview with MP from Panjshir, Kabul, 17 March 2014.
[1529] Interview with Afghan Representative from Afghanistan Justice Sector Support Program, Kabul, 20 Nov. 2013. Interview with Farid Hamidi, AIHRC Commissioner, Kabul, 20 Nov. 2013.
[1530] Interview with Member of Parliament from Panjshir from Jamiat-e-Islami, Kabul, 18 March 2014.
[1531] Interview with Member of Parliament from Herat, Kabul, 17 March 2014.

to destroy a process, don't attack it directly, but just defend it poorly."[1532] Some *mujahideen* think that the National Reconciliation, General Amnesty and National Stability Law will shelter them against the ICC. For instance, when General Dostum's Secretary, Zaki, was whether General Dostum would submit himself to an international court, he said that General Dostum is protected by the amnesty.[1533]

Transitional justice and human rights enjoy strong support among Afghan women and minorities, such as the Hazara population.[1534] Many recent debates in Afghanistan deal with the question of how women and minorities will be affected by peace negotiations with the Taliban, particularly if these result in a power sharing government. Several Members of Parliament said that the Taliban would need to change if it were to play a role in Afghanistan today. One female MP was not so pessimistic: she pointed to the fact that Hezb-i-Islami , which has now joined the government, was pleading for women's votes, when the mujahidin slogan in the 1990s was "women at home or in the grave."[1535] Among women and minorities, there are those who feel that some Taliban should be tried, and they opposed President Karzai's releases of high-level Taliban.[1536]

3. The Court as an Obstacle to Negotiations with Taliban

Although there are currently no negotiations ongoing in Afghanistan, the government and most members of the international community take the view that peace should take priority over justice. Historic advocates of transitional justice, such as the AIHRC, are emphasizing that transitional justice is not just about criminal justice, but that more focus should be put on acknowledgement for victims.[1537] Opinion-makers in the Afghan Government and the diplomatic community both argue that pursuing justice now would diminish incentives for the Taliban to negotiate and lead to a prolongation of conflict: "[T]he ICC's involvement in the Afghan situation at this juncture is both ineffective and counter-productive… Any ICC investigation and potential prosecution of anyone at this time will not achieve the intended goal of preventing impunity or result in peace."[1538] The Afghan government recently stated: "the unique set of circumstances of our stabilization efforts requires a comprehensive approach that aims to ensure justice, while preserving the political stability which is fundamentally important in any post-conflict setting. We will continue to remain engaged with the OTP on relevant issues, including on the investigation of acts that are perpetrated by terrorist

[1532] Interview with MP from Badghis, Kabul, 16 March 2014.
[1533] International Seminar on Peace, Reconciliation and Transitional Justice, Kabul University, 16-18 November 2013.
[1534] Interview with female MP from Paktia, Kabul, 19 March 2014; Interview with Hazara MP, Kabul, 18 March 2014.
[1535] Interview with female MP from Paktia, Kabul, 19 March 2014.
[1536] Interview with Hazara MP, Kabul, 18 March 2014.
[1537] International Seminar on Peace, Reconciliation and Transitional Justice, Kabul University, 16-18 November 2013.
[1538] Afghanistan Justice Organization and the Global Partnership for the Prevention of Armed Conflict, *Transitional Justice in Afghanistan: "We should not repeat old issues?* Oct. 2013.

groups."[1539] In November 2017, Nader Nadery, the President's Advisor on the ICC, said to AAN that President Ghani had told Bensouda that "morally he is on the side of the ICC but legally he is not", because argument of admissibility were not convincing; that an ICC intervention may harm the peace process and would have a negative impact on the presence of international troops in the country, thus it would contravene the "interests of justice."[1540]

IV. Conclusions on Factors Influencing Perceptions

The International Criminal Court represents a limited intervention to combat impunity in prolonged and complex conflicts. The vast majority of crimes in the countries where the ICC operates are outside of its jurisdiction. In Uganda, the conflict had lasted for 20 years when the court intervened; Libya had experienced a 42 year dictatorship; Afghanistan has seen 40 years of continuous conflict; and Colombia the conflict was almost 50 years in duration. The *narrative* of the conflict that is reflected in the arrest warrants of the Court often is only a fragment of the totality of the circumstances. In *selecting* which cases to pursue, the ICC is often endorsing only a fraction of a much longer narrative.[1541] Negative perceptions may also stem from the fact that the Court is externally imposed or that it contravenes the "self-narrative" of the population in relation to the conflict, and how the Court is seen to either reflect or oppose that "self-narrative". Misunderstanding often flows both ways, so that international actors may sometimes dismiss local alternatives as not valid or for lack of understanding.[1542]

Once the Court intervenes in a situation, perceptions may complicate further due to its constraints. In Uganda and Libya, perceptions of the Court were shaped by very limited numbers of highly selective arrest warrants which focused on one side of the conflict; the quick opening of an investigation without fully understanding the local narratives or dynamics; and insufficient in-depth knowledge of context. The arrest warrants in Uganda focused only on the LRA and the arrest warrants in Libya affected only on a few former regime figures.

[1539] Statement by H.E. Mahmoud Saikal, Permanent Representative of the Islamic Republic of Afghanistan to the United Nations, delivered at the 16th Session of the Assembly of States Parties to the Rome Statute of the ICC, 7 Dec. 2017.

[1540] Kate Clark and Ehsan Qaane, AAN, *One Step Closer to War Crimes Trials (2): ICC Prosecutor requests authorization to investigate*, 5 Nov. 2017.

[1541] De Hoon, Marieke. *The Future of the International Criminal Court: On Critique, Legalism, and Strengthening the ICC's Legitimacy*. ICL Rev. Vol. 17 Issue 4 (2017), pp. 591-614.

[1542] See Avocats Sans Frontieres, *Africa and the International Criminal Court: Mending Fences* (July 2012) p. 8: "Uganda had the opportunity to present arguments declaring that despite the referral it had the capacity to try the suspected indictees, a move it did not pursue on the basis of sound legal assessments of its national judicial processes." Ambos, Kai, *Expanding the Focus of the "African Criminal Court*, Ashgate Research Companion to International Criminal Law: Critical Perspectives, 4 Mc Dermott, N. Hayes and W. A.. Schabas, eds. Aldershot, Ashgate 2012: "The implementation of a International Crimes Division at the High Court in Uganda, or the establishment of a hybrid court as proposed by the AU in Sudan- did not go much beyond the drafting of the corresponding legal provisions and did not produce any concrete results with regard to possible prosecutions or trials."

Local justice demands are often linked to locally known available options. This leads to a frequent divergence, and sometimes discord, between what the Court is able to offer in justice terms, and what local populations are demanding. Local demands are also related to measures that will improve the lives of victim, including reparations.

The ICC also suffers from perceptions that it is primarily guided by the agenda of external actors. In Uganda, the Court is perceived among some actors as "Western-style retributive justice." In Afghanistan it is perceived as aligned with, or at least subjugated to, NATO and the United States, and in Libya the Court was perceived to have its own agenda that seeks to trump local justice interests, namely getting custody over Abdullah Al-Senussi in order to cater to Western intelligence interests. In Colombia too the Court is sometimes referred to as "El Coco", a sort of monster. All of these hint at an often-voiced critique of the Court that it is externally imposed or even neo-colonial.

The Court is also perceived as aligned with military solutions to conflict, rather than with peaceful solutions or negotiations. The emphasis of the Prosecutor on enforcing arrest warrants in the context of Uganda and the letters in Colombia gave the impression that the Court is less concerned with negotiated solutions to conflict, and has backlash amongst peace constituencies.

Perceptions among affected populations are likely to remain mixed. For many, the Court remains remote or even irrelevant in terms of being incapable of addressing local justice concerns. This is reminiscent of the ICTY, about which Zacklin wrote that it was perceived as too remote from victims and affected populations; and that victims were misunderstanding its mandate to be about uncovering the fate of loved ones, providing an official history, and yielding compensation.[1543] The Court, with its Hague-based processes is even more remote culturally and geographically from the countries under its purview.

Milanović, in his work on ICTY, identifies the different cognitive, objective and subjective factors that influence perceptions: the comprehensive core belief systems that form the lens through which information about atrocities is filtered; remoteness or lack of immediate experience of the event, which gives space for third party "interpreters" such as the media or politicians; prejudgments about sources of information (including the ICTY itself)[1544]; psychological factors such as a simple

[1543] Zacklin, Ralph. The Failings of Ad Hoc International Tribunals. Journal of International Criminal Justice 2 (2004), 541-545.

[1544] Milanović, Marko. *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378: surveys by the Belgrade Center for Human Rights showed that 90% of Croatian and Bosnian respondents never visited the ICTY webpage, and a similar number never read an ICTY judgement. 73% of Bosnian respondents and 84% of Serbian respondents said that television and

lack of time and energy to search for the truth, leading to recourse to cognitive shortcuts; confirmation bias, motivated reasoning and heuristics, which tend to favour information obtained early in the cognitive process; and the pervasiveness of nationalist or other entrenched narratives.[1545] Visual material such as the video of the killings of Bosnian youth by the Scorpions paramilitary unit shown at the Milosevic trial may have impact, but may also be questioned for their authenticity.[1546] It may be presumed that many of these factors similarly influence ICC audiences and dilute the expressive function of the Court.

The Special Court for Sierra Leone was in danger of being viewed as a "spaceship phenomenon" but had some distinct advantages over the ICC, including its on-the-ground presence and extensive outreach activities.[1547] The ICC risks hovering in an entirely different orbit from the affected populations it is meant to serve.[1548]

A few aspects of the Court's institutional framework have a direct impact on the issue of perceptions. These include the politics of case selection; limitations in resources at the preliminary examination phase; limitations in field presences; and limitations in outreach activities.

A. Expressivism and the Politics of Case Selection

The Court's case selection at times may appear to be driven more by opportunism rather than expressivism. In indicting the LRA on the one hand, or Qadhafi, his son and his chief of intelligence, the ICC Prosecutor appeared to want to be on the right side of history, but these actions did not necessarily translate into the expressive impact that the Court may have wanted in Uganda or Libya. In Uganda, the message of impunity on the side of government actors was reinforced, whereas in Libya those who sided with the Revolution perceived themselves to be beyond the reach of the Court. Expressivism raises tensions as to whether ideally it is exercised on the global level, through an expression of "universal values", or in ways that are more resonant with local communities. In order to increase its legitimacy, the Court will need to strike a balance between the two.

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radio where their main media sources. 44% of Serbs admitted to being influenced by local analysts including political analysts, writers and intellectuals. Only 19% cited the ICTY as a strong influence.

[1545] Milanović, Marko. *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378.

[1546] Ibid.

[1547] Tom Periello and Marieke Wierda, *The Special Court for Sierra Leone under Scrutiny,* International Center for Transitional Justice (2006).

[1548] Rabkin writes: "The most compelling justice comes from a court system which can claim to speak in the name of the society where the victims suffered. In the proper setting, criminal punishment says: "The community acknowledges that a terrible wrong was done and state organs, in the name of this society, are committed to punishing this wrong, to prevent, as much as possible, such wrongs from recurring. Jeremy Rabkin, *Global Criminal Justice: An idea Whose Time Has Passed*, 38 Cornell International Law Journal 753 (2005) p. 775.

B. Limited Resources at the Preliminary Examinations Phase

While there may be an aspiration that a deep understanding of local would be developed at the preliminary examination stage,[1549] in practical terms, relatively few resources are devoted by the ICC to this stage. At the preliminary examination stage, according to the Rome Statute the Prosecutor operates from the seat of the Court as it lacks investigative powers.[1550] The Jurisdiction, Complementarity and Cooperation Division, the only unit to carry out political analysis, is relatively small. Since its inception, the ICC has resisted hiring "political" advisors, deeming this inappropriate for a judicial institution. Only a few analysts may be working on any particular situation at a particular time. This may hinder the Court from developing an in-depth understanding of the local context, and communicating with local audiences. For example, in spite of its troubled relations with the AU, the ICC has lacked internal focal points to deal with regional organizations, neither does it have a liaison office at the AU in Addis Ababa.[1551] With the exception of Colombia, country visits during preliminary examinations are not frequent: an example is Afghanistan where little networking has taken place. In situations such as Uganda and Libya, decisions to open an investigation were taken very swiftly, arguably before there was a well-developed sense of the political context. The Court ran into unanticipated backlash or opposition that may have been avoided or managed better with more thorough context knowledge.

A deeper understanding of the context will not necessarily determine *whether* the Prosecutor opens an investigation in a particular situation, as this is dependent on the criteria circumscribed by the Rome Statute, and specifically by Article 53(1)(a)-(c). But it may play an important role in decisions where the Prosecutor has discretion, such as issues of *who* should be charged, as well as *when* to proceed. These are all matters determined by context. The OTP recognizes this in stating that: "the role of persons or groups may vary considerably depending on the circumstance of the case and therefore should not be exclusively assessed or predetermined on excessively formulistic grounds."[1552]

C. Limited Field Presences

[1549] Ambos, Kai, *Expanding the Focus of the "African Criminal Court,* Ashgate Research Companion to International Criminal Law: Critical Perspectives, 4 Mc Dermott, N. Hayes and W. A.. Schabas, eds. Aldershot, Ashgate 2012. Kai Ambos argues that the "ICC is not only dealing with the concrete situation or case, but takes a more comprehensive, holistic approach to the political and legal situation in the country concerned." He argues that the complementarity analysis "requires a constant and ongoing relationship with the respective country, mainly through communications, cooperation, measures of "positive complementarity", and outreach."

[1550] Rome Statute, Art. 15 (2).

[1551] Opening such a liaison office was identified as a priority by some representatives attending a pre-ASP informal retreat: ICC-ASP/12/INF.2. Informal Summary of the retreat: ICC- the challenges and opportunities in light of the upcoming November Assembly of States Parties, 12 Nov. 2008.

[1552] OTP Policy Paper on Preliminary Examinations, November 2013 para. 60.

The knowledge of context would also have been enhanced by more robust field presences. Field offices are the Court's tentacles on the ground. However, field offices were only opened after some years and currently exist in Uganda, DRC, Kenya, CAR, and Cote d'Ivoire. Only around 15% of the Court's overall staff is allocated to field offices. Its field presences in Kampala and Nairobi remain relatively small and are staffed at rather junior levels, with few senior positions. There is no presence in countries under preliminary examination. Although this would be complex to set up, from a state consent and security perspective, in some situations it may be possible. In Afghanistan and Colombia victims voiced a desire for contact with representatives of the Court. In its Strategic Plan, the OTP acknowledges the weakness of its field presences and states that it will explore with the Registry new models of field presences. It also states that the Office will "aim at having a stronger presence of persons from (the region of) the country in which the situation under investigation is found because this will help in the understanding of the situation and in access to evidence."[1553] Some argue that the OTP ought to engage more multidisciplinary teams, composed of legal experts but also country experts and anthropologists.[1554] This multidisciplinary approach could help to understand the domestic legal system; public attitudes and expectations; local justice priorities; tensions between different groups; and other such factors. [1555]

D. Limitations on Outreach

Outreach program ideally provide an honest explanation of the Court's processes, designed to engage constituents in a genuine dialogue. This in itself could result in an improved perception of the actions of the Tribunals.[1556] At the same time, there may be limits on the degree to which perceptions of international justice mechanisms can be "engineered" through outreach or other structural adjustments, at least in the short term.[1557]

Outreach pertains to conducting "sustainable, two-way communication between the Court and communities affected by situations that are the subject of investigations or proceedings. It aims to provide information, promote understanding and support for the Court's work, and to provide access to judicial proceedings."[1558]

[1553] ICC OTP Strategic Plan June 2012-2015 para. 48.
[1554] Stromseth, Jane. *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?* Georgetown University Law Center (2009) p. 91.
[1555]Ibid.
[1556] Refik Hodžić comments that "the ICTY never answered many basic questions. Why were some people indicted and others not? What was the philosophy of the sentencing policy? How was it possible to quash 1300 page judgments with a few pages of appeals?" Refik Hodžić, *Accepting a Difficult Truth: ICTY is Not Our Court.* Balkan Insight (6 March 2013).
[1557] Ford, Stuart, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, Vanderbilt Journal of Transnational Law (2012) Vol. 45, p. 408.
[1558] ICC Integrated Strategy for External Relations, Public Information, and Outreach p.3

The functions of external relations, public information and outreach of the ICC have ambitious goals, including "building and maintaining cooperation and support for the activities of the Court" and "increasing the broader impact of the Court, contributing to lasting respect for and enforcement of international justice."[1559] The strategy states, "The Court strives to understand and act upon the information needs of affected populations, to build understanding and to foster a local sense of engagement".[1560] In the case of the ICTY, its impact would have been less had it not tried to seek to increase knowledge on the ground and to influence perceptions through outreach. At the same time, authors like Milanović conclude about ICTY, "The Tribunal is in an unenviable, Catch-22 situation: whatever it does will generate distrust in at least one ethnic community, while its work outputs seem to be incapable of penetrating the collective consciousness of these communities."[1561]

Some argue that increased outreach itself can assist to reverse negative perceptions, and can increase its legitimacy.[1562] FIDH argues that international law has to be "brought home" to local communities in order to "contribute to the internalization of the values embodied in the Rome Statute", and that this in turn is the only way to have a deterrent impact within situation countries.[1563] This seems to be putting the cart before the horse and sits uneasily with the concept of "local ownership". As Nesiah states: "In other words, local ownership is precisely about persuading affected populations to cede the terrain of justice to the ICC."[1564]

Studies of perception show that it may not be possible to completely change perceptions merely through outreach: in fact "everything a court with such a mandate does is in fact outreach, whether active or passive."[1565] Experience indicates that the process of absorbing the normative impact of the judgments of an international tribunal, and internalizing these norms, is not one that follows automatically from the tribunal's efforts to appear as apolitical as possible, nor is it a short-term result of one-way messaging through outreach. Instead "the hard work

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[1559] Ibid. p. 2

[1560] Ibid. p. 2.

[1561] Milanović, Marko. *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378.

[1562] Ambos, Kai, *Expanding the Focus of the "African Criminal Court*, Ashgate Research Companion to International Criminal Law: Critical Perspectives, 4 Mc Dermott, N. Hayes and W. A. Schabas, Eds. Aldershot, Ashgate 2012.

[1563] FIDH, *Enhancing Victims' Rights Before the ICC: A View From Situation Countries on Victims' Rights at the International Criminal Cour*t, November 2013, p. 7-8.

[1564] Nesiah, Vasuki. *Local Ownership of Global Governance*. Journal of International Criminal Justice, Volume 14, Issue 4 (1 Sept. 2016) pp. 985-1009.

[1565] Refik Hodžić. *Accepting a Difficult Truth: ICTY is Not Our Court*. Balkan Insight (6 March 2013): "Outreach cannot compensate for the unwillingness to consider how judges' work impacts the Tribunal's ability to fulfil its broader mandate. Especially outreach as understood by the ICTY's principals: a loose mix of public reactions, decontextualized dissemination of information and endless series of conferences."

of changing attitudes of the peoples of the Balkans is not going to be done by the ICTY, but by local and regional actors embedded in the affected societies."[1566]

A much-cited positive example of widespread outreach to the general public was conducted in the case of the Special Court for Sierra Leone. Sierra Leone is a relatively small country and after the end of the conflict in 2002 it was reasonably secure. [1567] In 2007, a survey found that 96% of 1700 randomly selected respondents around Sierra Leone had heard of the Special Court, although their knowledge was not deep.[1568] This widespread knowledge is attributed to the fact that the Special Court for Sierra Leone was located in-country, and ran an extensive, multi-tiered outreach program over the years. 48.18% of the respondents said had participated in an outreach event at some point during the Court's lifespan.[1569]

Comparatively, the ICC's efforts in terms of outreach have been far more limited than that of other tribunals. At the preliminary examination stage, outreach activities are usually very limited or absent. Outreach activities of the ICC have taken place in Uganda, DRC, Sudan, CAR, Kenya, Georgia, and Cote d'Ivoire. In CAR, Darfur and Libya the security situation only allowed for some radio programming.[1570] Although it is included in the core budget of the Court, outreach has also come under particular budgetary pressure.[1571] Steps have been taken to improve the quality of outreach, including through gathering feedback from participants.[1572] Nonetheless, even in a very challenging context such as Kenya, outreach activities largely rested on the shoulders of one staff member.[1573] In 2016,

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[1566] Milanović, Marko. *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378.

[1567] The author has paid at least 15 visits to Sierra Leone between 2002 and 2011.

[1568] BBC World Service Trust and ICTJ, *Transitional justice survey in Sierra Leone*, 9 Oct. 2007.

[1569] Special Court for Sierra Leone, Sierra Leone Institute for International Law, Manifesto 99, No Peace Without Justice, Liberian NGOs Network, and Coalition for Justice and Accountability, *Making Justice Count: Addressing the impact and legacy of the Special Court for Sierra Leone and Liberia*, September 2012 p. 32.

[1570] Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, 11 Oct. 2013, ICC-ASP/12/41 at para. 10.

[1571] For instance, the Report on activities and programme performance of the International Court for the year 2012, dated 4 June 2013 (ICC-ASP/12/9) states that in 2012, five positions were cancelled due to budgetary cuts (para. 166).

[1572] Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, 11 Oct. 2013, ICC-ASP/12/41 at para. 7.

[1573] In 2014, the Court had deployed a single (albeit experienced) outreach officer in Kenya, and she was suffering from many threats due to the fact that she was the only public face of the ICC on the ground. The staffing table for the Kenya Task Force had 3 outreach posts but it was proving challenging to recruit local staff. The number of closed sessions as part of the Kenyatta/ Ruto trials further hindered effective outreach. Instead, the Court could have contemplated deploying a senior media specialist or spokesperson to counter the media machinery of the politicians, as well as to ensure public airtime for senior Court officials on major news channels. The fact that the cases kept being prolonged, and the collapse of three of the cases, played into the hands of the politicians in this respect. Interview with civil society activist, Nairobi, 4 Feb. 2014.

outreach was down to 5 events and 3 hours of radio programming in Kenya.[1574] At the same time, this is not suggesting that the answer is merely more outreach. It is more a question of how outreach is done, and to whom, and how it connects to a process of internalization, or the shaping of narratives on the local level.

E. Country Situations in the Shadow or Spotlight?

The ICC faces many challenges in perceptions. Lack of comprehensive outreach in all four countries contributed to a lack of knowledge, which in turn diminished the perceived relevance of the ICC. In Afghanistan, even MPs or senior justice officials do not have sufficient information on the ICC. As with the historical tribunals, the ICC does not necessarily touch on the lives of many ordinary people.

The relationship between knowledge and positive perceptions is not straightforward. It cannot be presumed that increased knowledge necessarily results in more positive perceptions. For instance, in Afghanistan or Colombia, perceptions may in part be more positive, particularly among victims and civil society, because less is known about the limitations of the Court, than in countries that are already under investigation, such as Uganda or Libya. The shadow of the ICC, in situations of preliminary investigation, may therefore have a more positive influence than the ICC's spotlight, which tends to reveal its limitations.

[1574] Second Court's report on the development of performance indicators for the International Criminal Court, 11 November 2016.

Chapter 7: Conclusions: The Global Court Project after 15 Years

> *Law as a political instrument can play its most significant part in societies in which open group conflicts are accepted and which are sufficiently stable to be able to absorb them and settle them in terms of rules. As an instrument of terror, of coercive persuasion, and of revolutionary re-education, it is all but useless.* – Judith Skhlar, Legalism

> *"Justice? -- You get justice in the next world. In this one you have the law*. — William Gaddis

I. A Global Court

This year marked the 20th anniversary of the Rome Statute, an opportune time to assess what is its impact, particularly in countries affected by the world's worst crimes. Much of the current scholarship addresses the Court's contribution to development of law, procedure and jurisprudence. Since its establishment the Court is conducting numerous preliminary examinations, has opened investigations in around 10 situations, and has concluded 5 trials. A large number of States Parties (123) have signed up to the Rome Statute of the International Criminal Court, and the two Security Council referrals were made to the Court, on Sudan and Libya. In the words of Luis Moreno Ocampo:

> In 2003, there were doubts about the viability of the ICC. In 2017, the Court is in full motion and a consolidated piece of the international landscape. … The Court's existence is not at risk — the Rome Statute's relevance is in question as is the relevance of international law to manage conflicts. The Court is just the face of the Rome Statute system and the current challenge is how the rest of the system works.[1575]

This thesis instead concludes that there is more acceptance in situation-countries of the Rome Statute's norms than there is of the role of the ICC the enforcer of these norms. The normative contribution or "purposive legitimacy" of the Rome Statute is reflected in the acceptance of these norms in numerous situations outside the jurisdiction of the Court, including the establishment of hybrid tribunals in Sierra Leone, Lebanon, the Central African Republic, the proposal for an AU hybrid tribunal for South Sudan, and most recently, the creation of an International, Independent and Impartial Mechanism for Syria, or the trial of Hissan Habre by the Extraordinary African Chambers in the Senegalese Courts.

[1575] Ocampo, Luis Moreno. *Ocampo speaks out on leaked emails*. Journalists for Justice, 4 Dec. 2017.

However, the "performance legitimacy" of the Court has suffered, in comparison with other international tribunals including the ICTY. Many of its investigations and trials were hampered by difficulties, including interference with witnesses, and resulted in unsatisfactory outcomes. Powerful states did not ratify the Rome Statute, and for a long time the ICC avoided hard cases that would bring it into confrontation with these global powers. Some State Parties are now actively seeking to "unsign" the Rome Statute. At the local level, the "universal values" that the Court represents are in danger of remaining an abstraction, particularly for victims. And perceptions of the Court in very different contexts show negative trends.

The Court is cognizant of the need to measure its own impact, and has identified a series of performance indicators,[1576] but these deal mostly with internal rather than external factors. They leave open the broader questions of what are the desired outcomes or intended effects of the Court's interventions and how should these be assessed. This requires a discussion on the underlying assumptions of the ICC.

II. A World Free of Violence? Questioning Assumptions Behind the ICC

While since WWII the normative prohibition of the worlds worst crimes may be consolidating, until now it has not proved possible to prevent those crimes, as is the stated fundamental purpose of the ICC. The state of the world today in terms of violence is worryingly worse than at the time of the creation of the ICC twenty years ago. This casts further doubt on the goals of the ICC in terms of deterrence of the world's worst crimes.

A 2018 study by the UN and World Bank notes that while currently it is the most peaceful era of human history, there was a rapid increase in number and intensity of violent conflicts since 2010.[1577] In fact, 2015 saw more active conflicts, fifty-nine in total, than in the whole period since the end of the Cold War. At this moment in 2017, according to UNHCHR, up to 65 million people are displaced, including 20 million refugees, as a result of violent conflict. In recent years, the world has also become increasingly pre-occupied by the actions of extremist terrorist groups or networks, including ISIL, Al-Qaeda, Boko Haram, Al-Shabab, Taliban and others. Criminal networks and organized crime spread other social ills, such as human trafficking, smuggling of drugs or weapons, destabilizing neighboring states and causing untold human suffering.

The primary assumption underlying the ICC is that its establishment would lead to a reduction in the world's worst crimes. In over fifteen years, it not clear that the existence of ICC is contributing to reducing atrocities. In fact, most countries that

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[1576] Kotecha, Birju. *The ICC's Office of the Prosecutor and the Limits of Performance Indicators*, JICL Vol. 15 issue 3 (1July 2007) pp. 543-565.

[1577] United Nations/ World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (2017).

are under investigation have experienced further atrocities, sometimes even committed by the same actors. This, in combination with the low outputs of the ICC, generates skepticism about the International Criminal Court project and whether it is delivering as expected. These fundamental assumptions behind the creation of the Court, i.e. that it would deter crime, should continue to be questioned and tested.

On the other hand, it would be naïve to expect the ICC to constitute a shortcut to Utopia, in the form of a violence-free world. The ICC is not " a moral high ground floating somewhere above the earthly realm."[1578] In order to reduce violence, the ICC must be combined with interventions that seek to eradicate conflict and violence. Related strategies related to ending atrocities include the promotion of human rights, conflict prevention and mediation, and protection of civilians (including the Responsibility to Protect). The Sustainable Development Goals agenda, adopted by the General Assembly in 2016, commit to promoting "peaceful and inclusive societies" as articulated in Goal 16 (3), pledge to "promote the rule of law at the national and international levels, and to ensure equal access to justice for all" by 2030.

But while the Court cannot deter on its own, its impact should not be reduced to counting the number of investigations and trials held in The Hague. This approach misses the wider realms of normative and societal impact that could be ascribed to the Rome Statute and the Court.

This points to the importance of assessing the ground-level impact of the Court in situation-countries. The exercise of identifying a clear framework for this assessment is hindered by the breadth of aspirations attached to the ICC project articulated by its founders and supporters. These aspirations point to uncertainty about the identity of the Court. Is it a criminal justice institution, a transitional justice mechanism, or an instrument for peace building and reconciliation? As with deterrence, many of these aspirations rested on assumptions that were purely aspirational, and did not have an empirical basis. For instance, these assumptions included the hope that the Court would contribute to bringing peace and reconciliation, while neglecting the polarizing effects that trials can have on post-conflict societies. The ability of trials to contribute to the establishment of an uncontested historical record is further delimited by how the ICC is perceived. The articulation of a clear framework can help to bring into focus realistic assumptions for the ICC process, and to manage expectations around those goals.

This thesis does recognize that investigations and trials conducted by the Court can have an expressive value, an assumption that is increasingly reflected in the literature.[1579] In this respect, the Court has served to highlight conflicts in Northern

[1578] McCargo, Duncan. *Transitional Justice and its Discontents.* Journal of Democracy, Vol. 26 (April 2015) p. 11.
[1579] Aloisi, Rosa and James Meernik. *Judgement Day: Judicial Decision Making at the International Criminal Tribunals,* Cambridge University Press (2017).

Uganda, Colombia, Libya, Afghanistan and other places, which would have perhaps received less attention from international audiences and commentators otherwise. Its trials likewise have served to highlight types of violations, including the use of child soldiers, sexual violence, and attacks on cultural property. However, the expressive value of the ICC is indirect: as an external body it cannot itself contribute to rebuilding a social contract within a society. The Court's expressive impact has also been limited by other factors, such as the small number of accused and limited charges.

The experiences at Nuremberg, Tokyo, and the ICTY and ICTR strongly indicate that the normative messaging of international courts and tribunals is not always accepted by local audiences, who may view the Court's actions as external imposition and therefore illegitimate, politicized, and far from impartial. The challenge of the Court is to translate its global norms to the local level without levels of distortion that seek to dilute its demonstration effect.

III. More Normative than Societal Impact?

This thesis suggests a framework of indicators relating to normative and societal impact of the Rome Statute and the Court. The systemic and transformative effect of the Rome Statute and the ICC are indicative of a normative shift that increasingly, states around the world explicitly recognize that certain crimes should not go unpunished.

Process tracing suggests that the systemic effect of the Rome Statute and the ICC on national legal systems, including in Colombia, Uganda, Afghanistan and Libya is detectable and attributable. This goes beyond the notion of "complementarity", much heralded by the Court itself and by its supporters. Instead, process tracing should follow the more complex process of "internalization" of Rome Statute norms at the domestic level.

Evidence of systemic effect is found in the fact that many countries have implemented domestic laws covering Rome Statute crimes, even if they were not required to do so. States including Uganda, Kenya and Colombia have also adopted legislation based on Rome Statute norms, such as on victim participation. Colombia and Uganda have seen establishment of special investigative units to investigate or prosecute, or divisions of Courts to try Rome Statute crimes.

Domestic proceedings can be especially difficult to evaluate for their genuineness, as can be seen in the various domestic trials in Colombia, Libya and Uganda. At the same time, systemic effect at the national level is present in all the countries discussed in this thesis, and may contribute to the long-term desired outcome of preventing atrocities. Internalization in the domestic realm may become the primary realm where the preventive effect of the Rome Statute will manifest itself.

Transformative effect on political processes where Rome Statute norms are at stake, such as peace negotiations, is more ambiguous, but can still be found through process tracing. There is evidence of clear, attributable impact on peace negotiations in both Uganda and Colombia, both in terms of their content and their process. Crucially, both peace processes committed to the investigation and prosecution of persons responsible for Rome Statute crimes. In Uganda this was mainly focused on the LRA, whereas in Colombia trials may encompass not just former FARC but also state actors. In both situations, victims had a prominent role in the process that could be traced to their empowerment through the Rome Statute and the scrutiny of the ICC.

But transformative effect ought to also manifest itself in the passage of fewer amnesties. The Rome Statute and the Court have not been in existence long enough to be conclusive. Recent amnesties in Uganda and Colombia have excluded Rome Statute crimes. On the other hand, amnesties that included Rome Statute crimes, were passed in Afghanistan or Libya. Amnesties may remain on the table in resolving today's conflicts. In its announcement on withdrawal from the Rome Statute, South Africa indicated that it wanted to continue to play a role as a peace mediator on the African continent, and that it had learned from its own experience that the ICC "was not the only way to resolve disputes".[1580]

Furthermore, the normative impact of the Rome Statute is diminished by its limited reparative effect. Quantitative indicators such as numbers of victims participating, or the number of reparations claims awarded, may be relevant, but do not give insight into qualitative issues such as whether participation is perceived as meaningful. The bureaucracy surrounding participation casts doubt on its meaningfulness. Victims are not often included in key aspects of the OTP's decision-making on when to open an investigation, or when to exit a country, as is demonstrated in the case of Uganda. In Kenya, potential witnesses stood in harm's way, and victims suffered profound disappointment when the cases were discontinued.

The reparations phase of the Court's proceedings are just beginning and may have an important expressive function, but the limited resources available to the Trust Fund for Victims do not bode well for the Court's ability to provide anything beyond symbolic rather than meaningful relief for victims. Given the centrality of victims to the Court's mandate, the limited ability of the Court to yield a reparative effect through its legal processes is concerning. On the other hand, the work of the Trust Fund for Victims provides inspiration on achieving reparative effect for victims through non-legal approaches, even with limited resources. The expressive value of the Court's proceedings should not be overblown, as it will not be able to punish, nor to repair, in any proportion to the harms suffered.

[1580] Fabricuis, Peter. *South Africa confirms withdrawal from the ICC,* Daily Maverick, 7 Dec. 2017

Furthermore, limitations on the demonstration effect of the Court may further inhibit the societal impact of the Court. As an external actor, the Court's actions were not perceived as impartial in ongoing conflicts such as in Uganda and Libya. The arbitrariness associated with the Court's temporal jurisdiction reduced its relevance in the eyes of local populations, who often had other justice priorities. In some cases, the Court was suspected of serving a foreign agenda, or complicating peaceful solutions to conflict. Perceptions of the ICC are far from positive, even across four very different situations, thus further inhibiting the expressive value of the Court.

Perceptions in situations where the Court was in the shadows of the preliminary examination tended to be more positive and optimistic than in situations where the Court was in the spotlight of active investigations, and where its limitations became more obvious for all to see. Unless the ICC succeeds in being perceived as independent and impartial, and universal on the one hand but also responsive to local justice concerns on the other, its overall normative effect may be diminished.

IV. Complementarity or Internalization? Or Parallelism?

A. Does The Court Impact the Most Where it is Needed the Least?

The Prosecutor suggested in 2003 that the true measure of success of the Court ought to be measured by an absence of ICC proceedings. Complementarity therefore became increasingly defined as a vehicle through which to help domestic justice systems. Yet 15 years of experience show that conception of complementarity as an incubator of "systemic effect" may be flawed. The conception of complementarity from the outset was largely court-centric, and based on the notion that the Court, or the Assembly of States Parties would catalyze change at the domestic level through "positive complementarity". Instead, supporters of the Court conceived of complementarity as a Court-centric notion. In their conception, the Court remained the centerpiece of the international criminal justice architecture. The Court itself competed for cases, through applying an overly rigid definition of complementarity using the "same person, same conduct" test to admissibility questions. The relationship that developed between the Court and different states (Uganda, Kenya, Libya, Colombia) was often adversarial.

As addressed in Chapter 3, complementarity is not a concept that is designed to address systemic problems facing national legal systems after periods of extended conflict or mass atrocities. The focus of the Court gives rise to a distorting effect, focusing attention on only on a few cases (Ongwen, Al-Senussi and Saif Al-Islam) in a context of much broader challenges. Complementarity does not address fundamental human rights challenges facing domestic trials, in spite of their importance or centrality to rebuilding the rule of law during a period of transition– as demonstrated in Case 177 in Libya. Complementarity can even foster bias against domestic systems among international practitioners, who may presume there is no capacity to be found at that level.

Due to its lack of enforcement powers or state cooperation, the ICC often replicates challenges faced at the domestic level, therefore giving rise to parallelism rather than complementarity. For example, if the national authorities are not able to guarantee security for investigations (Afghanistan), arrest the accused (Uganda) or protect witnesses (Kenya), neither is the ICC.

It may be useful to reorient the discussion of systemic impact on domestic legal systems to internalization of the Rome Statute, through implementation of the crimes and norms of the Rome Statute in domestic law, the strengthening of domestic capacities and conducting domestic proceedings. But the impact of the Rome Statute on the motivation of States to conduct domestic proceedings seems to be higher in States that are more law-abiding and already have functional legal systems (in this case Colombia, and to some extent Uganda) rather than in states where the rule of law is weaker (Libya or Afghanistan). The high number of domestic proceedings in Colombia demonstrates that rather than catalyzing, the ICC may serve to perpetuate an already existing internal drive to abide by legal norms and standards. This again points to parallelism rather than to complementarity.

In this sense, the Court may have the most impact where it is needed the least, i.e. in states with domestic legal systems that are most able and willing to conduct their own investigation and trials, such as Colombia. Nonetheless, systemic effect through internalization remains a useful way by which to assess the impact of the Rome Statute and the International Criminal Court on the country level, as ultimately it will contribute to prevention.

B. Looking Forward: The Potential of Internalization

Internalization of the Rome Statute is the most promising avenue for prevention of Rome Statute crimes in the future. It is at the domestic level that a solution to impunity ought to be found. This would suggest a radical refocus, away from the ICC as a Hague-based mechanism, and onto the domestic level, beyond what the current framework of "complementarity" allows for.

The Rome Statute could be amended to explicitly require implementation of Rome Statute crimes in domestic law, as is the case in the Convention Against Torture or the Convention on Enforced Disappearances, which states in Article 4 that: "Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law." Considering the willingness currently demonstrated by States to implement the Rome Statute, this seems attainable.

Secondly, the Court should cease its practices of readily accepting state referrals or even competing for cases. The Court should make more effort to distinguish between cases of unwillingness and cases of inability, or use the thresholds of gravity, admissibility and the interests of justice to decline accepting jurisdictions in certain situations. It is not desirable that the Court should conduct cases that

conceivably could be investigated and tried on the national level. This deprives societies from the benefits of "internalization." In cases of inability, the Court should leave more room for states to conduct their own trials or promote assistance to be given through the United Nations and other actors. A good recent example is the Cour Special set up in the Central African Republic, with the assistance of the United Nations.[1581]

In some situations, countries will not be able to uphold international fair trial standards. However, the Court's ability to influence the fairness of trials is constrained by the Statute in any case, as recognized by the Appeals Chamber in the case of Abdullah Al-Senussi. Improving national proceedings can be an active focus of other organizations, including the United Nations. As more experience is accrued in conducting trials at the domestic level, indicia of genuineness will emerge more clearly, as has been the case with the Colombian cases. If the ICC continues its role as a Court of last resort in cases of unwillingness, it can still contribute to avoiding impunity.

Sustainable changes in domestic systems will not miraculously emerge due to pressure from The Hague. Internationalization requires a longer-term, developmental approach, including local ownership, promotion of bottom-up approaches, awareness raising, and capacity building over time. Internalization ought to be viewed as a domestic law reform process, with the same political hurdles and obstacles. Rather than seeking "hard mirror" replications of the Court's norms and procedures, a margin of appreciation should accompany domestic efforts, particularly on matters of procedure, rather than on fundamental issues that would allow loopholes for impunity, such as the definition of crimes, modes of responsibility, or barriers to prosecution.

VI. Transformative Effect: Is Peace With Punishment the Future?

A. Is there a Genuine Paradigm Shift in Peace Negotiations?

The peace versus justice is a dilemma as old as human history, and is likely to remain, in spite of the coming into force of the Rome Statute. More negotiations will take place in the shadow of the ICC in years to come. In the best-case scenario, future negotiations will follow the "peace with punishment" model that was tabled in Uganda and elaborated in the Havana peace accord. If states consistently follow that model, and seek to "achieve peace with the maximum justice", as stated by President Santos, it may be possible to talk about "transformative effect."

[1581] Labuda, Patrick. *The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?* Journal of International Criminal Justice, Vol. 15 Issue 1 (2007) pp. 175-206.

The first Prosecutor advanced the Court as a "game changer" in the world of peace negotiations, rendering an "amnesty for truth" settlement such as in post-apartheid South Africa impossible in the future, stating at Nuremberg in 2007: "If States Parties do not actively support the Court, in this area as in others, then they are actively undermining it … It is the lack of enforcement of the Court's decisions which is the real threat to enduring Peace." At the Review Conference in Kampala in 2010, a panel concluded that amnesties are "no longer an option". To date, Articles 16 and 53 of the Rome Statue have not been used to navigate peace versus justice tensions. The OTP's policy paper renders the "interests of justice" virtually unusable, resulting in a position akin to *fiat justitia ruat caelum*.

As already described, the Rome Statute and the ICC had a measurable transformative effect in peace negotiations in Uganda and Colombia. Involvement of the ICC resulted in more attention to accountability, the perspectives of victims, and humanitarian issues. It has also impacted on actors, including state actors and empowered victims during negotiations. In Uganda and Colombia, models of "peace with punishment" found their way into the agreements. The Juba Agreement contained strong justice provisions, including the establishment of a War Crimes Division, in part inspired by the ICC. In Colombia, the ICC prompted revisions to the Justice and Peace Law (975), and the Legal Framework for Peace by the Constitutional Court and has also resulted in the inclusion of a Special Jurisdiction for Peace in the Havana Peace Accord, including "a component of restriction of liberties and rights". These are important normative developments pointing to transformative effect.

So far, evidence on whether the Court either promotes or hinders negotiations is not conclusive. The argument that the ICC brought the LRA to the table is not proven. The peace talks at Juba ultimately failed, but on the other hand, peace talks in Colombia succeeded in spit of the shadow of the ICC. Experts are not agreed on whether the ICC was causal in the failure of the Juba peace talks.

In any case, it may be too optimistic to speak of a "paradigm shift." It is not clear that States Parties are prepared to take amnesties off the table. Several countries under ICC jurisdiction have continued to pass or renew amnesty laws in recent years. A paradigm shift would entail that even in countries with Western troops on the ground, such as Afghanistan, State Parties would insist on including accountability in negotiations with the Taliban. The recent agreement made with Hekmatyar points to the opposite. In Libya, some States Parties were open to allowing Qadhafi into exile and considered the arrest warrants a hindrance. The imperative to prevent future crimes will continue to weigh heavily against the need to punish the past. If the ICC is to contribute to prevention, it ought to heed this balance, and leave the door open to transitional justice options in peace agreements.

B. Looking Forward: Using Art. 53 as a Balancing Test in Dealing with Peace Processes

Currently, the Prosecutor's interpretation of Article 53 deprives it of its usability and utility. A different interpretation, equating the interests of justice with the national interest, could reintroduce a balancing test to be used in situations where robust peace processes seek to introduce comprehensive measures to deal with accountability and safeguard the interests of victims.[1582] The interests of victims go beyond criminal justice. Many victims emphasize reparations in particular, as they would like to return to a life of dignity. The experience in Colombia has demonstrated that the Court should not seek to ride roughshod over democratic processes that seek to promote peaceful solutions to conflict, but that the Court should exercise restraint in these situations. Opposition to these processes will diminish its legitimacy. The Court ought to tolerate innovative solutions and locally attuned solutions to accountability and punishment, such as those put forward in Colombia. It can afford flexibility, particularly on forms of punishment, better than it can afford rigidity.

The Colombia teaches the world that the broader concept of impunity is broader than that of punishment of perpetrators, and ought to include remedies for victims. There is after all no "universal formula" in deciding how to conclude conflicts. With the conduct of criminal trials, the expressive function that domestic courts are able to play will be largely fulfilled. Peace with alternative forms of punishment may be a model for the future.

VII. Reparative effect: Victims Rights but no Remedies?

A. Is the ICC Serving Victims?

The Rome Statute made a strong commitment to recognizing the rights of victims and providing them with a remedy. Certainly many victim communities put their hopes in the Court to lift them out of their (often miserable) circumstances.

Yet the concept of victimhood that prevails in practice before the Court is disassociated from notions of agency. First, the structures of the Court and its distance from the situations in which it operates do not allow for any significant direct connection and interaction with victims, much of which is handled through intermediaries, including common legal representatives seeking to represent victims. The Court's processes on participation and reparations, as currently being implemented, risk constituting mainly a nominal recognition of the rights of victims. Instead, victims face the prospects of lengthy bureaucratic processes, stretching into

[1582] Hayner, Priscilla. *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict.* Routledge (2018) pp. 105-106, pp. 108-110. Hayner suggest a more elaborate policy on behalf of the OTP on the "interests of justice", with advisors and guidelines.

decades. In some cases in Northern Uganda and CAR victims may not live to see the result. For these reasons it may be justified to reconsider the judicial reparations approach of the Court; to further focus victim participation on the most important stages of the trial; and to reallocate resources to the Trust Fund for Victims to ensure that broader ranges of victims can receive assistance sooner.

The narrow range of the criminal proceedings initiated by the ICC forms a further limitation on victims of mass atrocities being able to access their rights before the Court, and further limits the expressive function of the Court.

Genuine consultation of victims remains a big challenge. Victims and their views are frequently absent in key decisions made by the Court, such as when to enter or to exit a situation. In Northern Uganda this led to "survey wars", during which different opinions from victim populations were solicited by different organizations to promote their own views on whether victims supported the Court.

Victims have struggled to obtain real remedies in the context of the Rome Statute**.** An approach to reparations that takes proportionality as a central principle is simply not realistic considering the means available to the TFV. Even the standard of meaningful relief, set in the jurisprudence, may not be matched by resources. The limitations on reparations in individual cases also casts doubt on the purpose of victim participation.

In Uganda, prior to the arrest of Ongwen, after 10 years of investigations victims asked themselves what was the purpose of the ICC intervention. The case of Ongwen may not be able to reverse this perception. In Kenya, originally support for the ICC was high, but victims are deeply disillusioned with the withdrawal of charges against President Uhuru Kenyatta and other prominent accused. A number of potential and actual ICC witnesses were killed. Victims in the Rift Valley barely received any assistance from the government, and did not receive reparations. The TFV has not been able to deploy to Kenya pending a security assessment, due to the political tensions around the Court. In the Kenya case, even the minimalist do no harm principle was violated.

The limitations on reparative effect for victims, fifteen years into the lifespan of the ICC, should give rise to serious reflection on this aspect of the Court's mandate. The narrow lens of the Court also introduces new hierarchies of victims, and leaves many deserving victims out of its ambit. In contrast, the work of the Trust Fund for Victims receives positive reviews in the countries where it operates, precisely for its non-bureaucratic and non-judicial nature, and because it allows for more engagement, interaction and agency for victims.

B. Looking Forward: Achieving Acknowledgement and Maximizing the Role of the TFV

For many victims, an opportunity to engage with the outreach functions of the Court in their immediate environment may have more meaning than participation in the trials themselves. For instance, the victims that are facilitated to watch proceedings of the Dominic Ongwen trial on television screens in Northern Uganda, followed by genuine two-way discussions, may have as much sense of participation in the process as those who fill out the extensive victim participation forms. Consultation may mean more than participation. Consultation is defined by the UN as "a vigorous and respectful dialogue whereby the consulted parties are given the space to express themselves freely, in a secure environment, with a view to shaping or enhancing the design of transitional justice programs."[1583] Victims themselves highlighted that "justice itself is an experience and a process, and not simply an outcome."[1584]

In regard to participation in the proceedings, one option is to limit it to particularly decisive stages of t he proceedings, such as the confirmation of charges; the decision on a no-case-to-answer; the closing statements of the trial; the sentencing process; or crucial parts of the appeal insofar as they touch on the interests of victims. This would also free up funds from the victim participation function currently spent on legal representation and other costs that that could be reallocated to the Trust Fund for Victims.

Victims need timely and tangible solutions that seek to improve the quality of their l lives. Many of these may take local, culturally relevant forms that will differ per society. Real remedies will require more bottom-up approaches, such a microcredit schemes that seek to empower victims to move ahead. These options also break victims out of the "savages, victims and saviours" paradigm to become active agents in their own futures.

In this regard, the ICC would benefit from more learning from transitional justice systems in how the issues of participation and reparations have been approached. Pablo de Greiff has spelled out some of the challenges:

> Reparations programmes are meant to (partially) redress gross and systematic human rights violations, not sporadic or exceptional ones. This has far-reaching consequences. It implies that the universe of potential beneficiaries is large ad that they probably suffer various and multiple forms of abuse… The violations that reparations benefits are meant to address are frequently of the sort that is, strictly speaking, irreparable.[1585]

[1583] Office of the High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: National Consultations on Transitional Justice, 2009 (authored by Michael O'Flaherty).
[1584] ICTJ Briefing, *Reparations for Northern Uganda: Addressing the Needs of Victims and Affected Communities*, September 2012.
[1585] Office of the High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Reparations Programs, 2008 (authored by Pablo de Greiff).

All of these factors make it very challenging to address reparations effectively through judicial processes leading to proportionate reparations. De Greiff argues that recognition, or acknowledgement of the plight of victims should take a center stage in rebuilding civic trust between citizen and state, as should social solidarity.[1586] These are very important lessons for the ICC, which may face a similar shortage of resources. At the same time, the ICC should make efforts to connect with national programs, as acknowledgement at the national level will do more to restore civic trust than at the international level.

So far, the experience of the TFV, in positively impacting the lives of victims, even with relatively limited resources, is remarkable and hopeful. The TFV's approach avoids the pitfalls of "juridified victimhood." More can also be done is to insist on reparations at the domestic level by States themselves. What has been achieved by Colombia, under its Victims Law, is more significant than what the Court can possibly achieve in any given situation. In any case, ICC interventions ought to be more closely streamlined and coordinated with local justice initiatives, which are more likely to benefit victims directly.

VII. Demonstration Effect and the Challenge of Negative Perceptions

A. The Multifaceted Challenge of Perceptions

Perceptions, positive or negative, can serve to either amplify or reduce the Court's normative impact. Public perceptions are not necessarily a measure of the Court's effectiveness. In fact, the Court could be very effective in carrying out its mandate, but could still be negatively perceived. As is clear from the cases if Kenyatta and Ruto in Kenya, perceptions are time-sensitive, and can be manipulated by political actors. They are also time-sensitive. Even so, negative perceptions towards the ICC undermine its societal impact and its legitimacy.

Perceptions may be more positive in countries where the ICC is in the shadows, at the preliminary examination stage, rather than in the spotlight of investigation. Perhaps this is because the limitations of the Court process are not as clearly understood in those situations. In preliminary examination countries (Afghanistan, Colombia), the Court remains more abstract, and perhaps more feared, or revered, than in countries where the Court has shown the limitations of its actions (Uganda, Libya). Although knowledge of the Court in preliminary examination countries can be scant, in Afghanistan and Colombia victims or their representatives hope that the Court as a supranational mechanism will overrule their inept national authorities or eliminate challenges attached to domestic justice system. This can be contrasted

[1586] De Grieff, Pablo. *Justice & Reparations,* in *The Handbook of Reparations* (ed. Pablo de Greiff), Oxford University Press (2006).

with Uganda and Libya, where the small number of arrest warrants and their one-sided nature clearly showed the limitations of the ICC process.

The degree to which the Court is perceived as relevant among local actors varies. In Colombia, the ICC is seen is as a critical player, albeit as an unwelcome intrusion a national process of negotiations. In Libya, the ICC was seen as relevant during the overthrow of Qadhafi, but its relevance diminished in the post-Revolution period. In Uganda it was seen as relevant during the Juba peace process but less so in its aftermath, in spite of the Ongwen trial. The Kwoyelo trial will be more accessible to victims and affected communities… It has already yielded a certain "internalization" of Rome Statute norms.

It is too early to assess the consequences of the Court opening an investigation in Afghanistan. The Taliban or other groups such as the Haqqani network and ISIS, which widely practice suicide missions, are unlikely to fear the Court; and it will be difficult to investigate international forces in the coming years, particularly with the Trump administration. There are indications that the government will feel betrayed by its Western Allies if only it is investigated or prosecuted: after all, it has been conducting the international community's bidding in the war on terror. Nonetheless, the Court could not avoid taking on one of the "hard cases" without further undermining its legitimacy. As stated by Nader Nadery, Presidential Advisor on the ICC:

> We already took major steps to fulfill our obligation. Prosecutions were carried [out] on cases of torture. Afghanistan's Attorney General conducted a major criminal investigations on war crimes carried out by Taliban. The OTP pressure has only been on our government. The favorable condition we built to adopt complimentary laws is affected negatively by announcement of the OTP.[1587]

In general it has proved difficult for the ICC to align with local justice priorities. For instance, in Afghanistan and Colombia in particular, which are both protracted conflicts, many decades of the conflict are outside the ICC's temporal mandate. In Colombia local priorities have prompted discussions of "benefits" or lenience for paramilitaries and the FARC respectively. In Uganda, local populations tended to put a focus on traditional justice (and the Mato Oput), but also on truth telling and reparations. In Libya and Afghanistan, local priorities focused on various transitional justice measures, such as vetting of perpetrators from positions of power (or negative forms such as political isolation), documentation, and missing persons.

The perception that the Court as an external actor is "trumping" local justice priorities is prevalent in many countries. In Uganda, local religious and traditional leaders advanced the proposition that the ICC seeks to "trump" an indigenous,

[1587] Email to the author dated 15 June 2018.

restorative approach to justice. In Colombia, the Court is referred to as "El Coco", which is the equivalent of an imaginary monster used to scare children. In Libya, the new authorities had trouble understanding why the ICC insisted on contesting admissibility in the cases of Saif al-Islam and Abdullah al-Senussi even after national proceedings were initiated against them.

Limited and one-sided arrest warrants have bred a perception in Uganda and Libya that the Court is not impartial. Many years of local organizations lobbying the Court to open an investigation against the UPDF for its actions in Uganda or DRC have not borne fruit, and many in Uganda believe that the Court is manipulated by Museveni, particularly due to the fact that the referral was first announced in a joint press conference by Museveni and the Prosecutor in January 2004. Likewise, in Libya the rebels believed that the Prosecutor is "their" prosecutor and that the Court's mandate is restricted to Qadhafi-era crimes. This impression was reinforced by the Prosecutor's conduct when he visited Libya: he publicly congratulated the people of Misrata for their brave revolution, whereas the Commission of Inquiry accused the Misratans of a crime against humanity in the form of ethnic cleansing of a nearby town occupied by the Tawergha, dark-skinned Libyans. Similar accounts of the perception of one-sidedness or bias have emerged from other countries under investigation (DRC, Cote d'Ivoire).[1588]

In countries such as Libya and Afghanistan the Court is also perceived as subject to Western agendas. Its failure to get involved in investigating any Western powers for actions in Afghanistan and Iraq reinforces that view. In Libya, the perception of the ICC is an agent of foreign powers emerged both during the Abdullah al-Senussi extradition, and the detention of ICC staff member Melinda Taylor by a militia in Zintan in 2012. In Afghanistan, respondents expressed the view that the presence of American troops is the reason why the Court was seemingly reluctant to open an investigation. In all these situations, the Court is generally perceived of as aligning with military rather than negotiated solutions to conflict, thereby possibly prolonging conflicts, as demonstrated in the Kony 2012 saga.

B. Looking forward: A Case for Context-Sensitive Approaches in International Criminal Law

The Court, as essentially a "top-down" institution, is currently not adequately equipped to take into account the nuances of the local context of all the situations under its scrutiny. As stated by Mbeki and Mamdani: "Human rights maybe universal, but human wrongs are specific."[1589] This is particularly the case during preliminary examination, where the Court's involvement and resources that it can devote to a situation are limited. Yet more knowledge of local context may assist it

[1588] Rosenberg, Sophie. *The ICC in Cote d'Ivoire- Impartiality at Stake?* JICL Vol. 15 Issue 3 pp. 471-490.
[1589] Mbeki, Thabo and Mahmood Mamdani, *Courts Can't End Civil Wars*, Op-Ed, International New York Times, 4 Feb. 2014.

to make better tactical decisions, about whether and when to open investigations. A more careful context analysis in a number of situations could have led to more considered actions and better-timed actions by the Court.

It is sometimes tempting to conclude that lack of support for international criminal justice institutions stems from ignorance, and that winning support or building local ownership is a matter of simply divulging more information about the Court and its processes. However, as the examples above indicate, many of these perceptions were not necessarily founded in misunderstandings, but rather in a realistic appreciation of the limitations of the Court, or disagreements with its actions or non-alignment with local priorities. This indicates that negative perceptions cannot be tackled purely through increasing outreach activities.

Instead, it should involve the broader concept of engagement. In the words of the ICC President: "We must together ensure that the Court engages sufficiently the victims and communities affected by the crimes so that they can understand, participate in, and develop ownership of its proceedings."[1590] However, the key to "engagement" is that the learning process must be mutual, and that the Court on occasion will be called to adjust its policies and strategies, within its legal limitations. So far, this has often not been the case.

Increased local knowledge could be cultivated by more local presence and more engagement and consultation with local communities, which in turn could have cultivated more understanding of local context. Local staff can provide valuable knowledge and insight. In other cases, the Court has utilized the visiting professional program. These resources could be leveraged more strategically. A closer alignment with local justice priorities can increase the Court's expressive value within a particular context.

Resources are a definitive factor in how the Court is able to address perception issues. The Court should consider conducting outreach and encouraging more active engagement in countries that are under preliminary examinations, such as Colombia. Mere accessibility may assist the improvement of public perceptions. Preliminary examinations are in need of a clear communication strategy. The opportunity to of populations to exchange and dialogue with Court representatives, even in situations of preliminary examination, could yield improvements in perceptions, and may lead to more and earlier "internalization" of the Rome Statute norms in domestic contexts. It may also serve to empower victims.

[1590] ICC President's Remarks at Coalition for the ICC Launch Forum Commemorating the 20th Anniversary of the Adoption of the Rome Statute, 15 January 2018.

VIII. Reconsidering the Global Nature of the International Criminal Court

A. The ICC's Preventive Potential

It is still too early to judge whether the Court will be able to contribute to longer-term goals of prevention as opposed to shorter-term goals of deterrence. It is possible that over time the acceptance of the norms of the Rome Statute in different contexts, in the form of systemic or transformative effect, will have this result. Global norms can find unique expression in local contexts: only then will it contribute to long-term prevention:

> Thus, the prevention of future crimes is necessarily a long-term process of social and political transformation, entailing internalization of ideals in a particular context or "reality," or the gradual penetration of principles into given power realities.[1591]

On the other hand, as discussed above, different factors may also complicate the expressive function of the Court and the acceptance of its norms. The expressive value of the Court will not easily be realized through the Court's legal processes, but instead require a process of interaction and deliberation that may lead to internalization or acculturation.

A more active engagement with national stakeholders over time is needed to ensure true preventive impact. The extensive engagement of the ICC in Colombia vis-à-vis other contexts under preliminary examination is instructive in what the Court may be able to achieve in this regard. In Colombia, the Court was able to impact on the formation and implementation of Law 975: the Legal Framework for Peace and Havana Peace Process, and the investigations of false positive cases. The open-ended nature of the preliminary examination was an important asset. But this intervention required a true investment from the Court itself, including the devotion of resources and the gathering of extensive internal knowledge within the ICC. However, such a rebalancing of resources, which will otherwise be spent on investigations and trials in situation countries, may yield more impact in the long term and may enhance the preventive potential of the ICC. The expressive function of the Court may in fact become narrower, the more it becomes focused on its own processes, on individual accused and specific charges.

B. Should the Court Choose Deep Over Wide

The approach of the International Criminal Court in the last fifteen years was engage in a large number of situations where there is potential jurisdiction, largely as a

[1591] Akhavan, Payam. *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* The American Journal of International Law 95 (1) (2001) p. 11.

consequence of self-referrals. Perhaps there was an option earlier in the life of the Court to engage more deeply, but in fewer situations. This would require a departure from current practices in accepting self-referrals. This would also entail more investment in the preliminary examination stage in order to apply an extensive analysis to the question whether a situation should proceed to investigation. The notions of gravity, admissibility (if one departs from the same accused/ same conduct test), and the interests of justice could all be interpreted in ways that allow the Court to decline opening more investigations.

If the Court engaged in fewer situations, it would have been able to develop better in-depth analysis on particular situations. It could have pursued more thorough investigations and more arrest warrants per situation, and would be less susceptible to accusations of one-sidedness or bias. The risks of limited numbers of arrest warrants to the credibility of the Court, and the faith that victim communities have in it, are all too apparent in the recent acquittal of Jean-Pierre Bemba.

The creation of the International, Impartial and Independent Mechanism on international crimes committed in Syria provides an interesting model in this regard.[1592] Its tasks are two-fold: one is to collect, consolidate, preserve and analyse evidence; and second, to prepare files to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts, in accordance with international law. The primary task of the IIIM thus is to collect and analyse the evidence, whereas the question of a suitable venue for trial is to be addressed later on a case-by-case basis. If there were regime-change in Syria, the evidence may even be used in national trials one day. In its first report to the General Assembly, the IIIM pays specific credit to the role of civil society in documenting violations, and states that it will "seek to empower the affected Syrian communities through its work", that it will engage in "promoting effective exchanges so that the views and interests of the affected communities are canvassed and considered on an on-going basis", and that it will be "guided by a victim-centered approach throughout its work."[1593]

This new model has a historic precedent, the UN War Crimes Commission, established in 1942 by the Allied Powers to investigate war crimes committed by Axis war criminals. The Commission investigated and gathered testimony on those crimes, but had no powers of prosecution. It reported cases back to national jurisdictions, which could then initiate trials. The UNWCC listed over 36,000 individuals and units as indicted war crimes suspects at the time of its closure in 1949, resulting in at least two thousand trials conducted in Allied courts in Europe

[1592] Whiting, Alex. *An Investigative Mechanism for Syria: The General Assembly Steps into the Breach,* Journal of International Criminal Justice Vol. 15, Issue 2, 1 May 2017 pp. 231-237.
[1593] Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, A/72/764, 28 Feb. 2018, paras. 19-22.

and the Far East.[1594] Similar to the ICC, the UNWCC was a project in which many different states participated.

These two examples, one historic and one modern, speak to a different model of justice, one in an international mechanism focuses on investigation and where trials are left to the domestic level. The model is very different from the ICC, which has underemphasized investigations and put a premium on trials in The Hague. What if the ICC were to change approach, by putting more emphasis on investigation and on cooperation with national authorities to conduct trials? Would this reshaping have more impact than the current approach?

Some may argue this approach is inconsistent with the Assembly of States Parties' commitment to universality of the Rome Statute. It is difficult to argue that a global court should only be involved in a few situations. On the other hand, the current approach risks that the role of the Court in many situations becomes purely symbolic - if not shambolic. Instead of seeking to adjudicate in all situations, the Court should remain a lynchpin in promoting a global legal order.

C. Global Legal Order vs. Global Court?

The United Nations, a global organization with all its staff and resources, has often been criticized for its formulaic approaches and has been accused of not paying sufficient attention to context and to local ownership. The same was true for the ICTY and ICTR, although they engaged extensively with the domestic context. It is much more complex for the ICC.

The ICC is forced to act in the world's most ravaged societies, where conflicts have raged for decades, and to address the world's worst crimes. These are some of the most politically polarized and divided societies. The Court is called to do that with far less resources at its disposal than the United Nations. This fundamentally calls into question the realism of a global court for all situations. While the values underlying the Rome Statute system should be seen as universal, and a universal global legal order remains a lofty goal, the wisdom of propagating a single mechanism for all of the world's worst crimes is simply not realistic, and it will not yield justice for the victims of those crimes. In as far as possible, justice should continue to be pursued on the national level, through the internalization of international norms combined with strengthening national institutions and bottom-up approaches that empower justice-seekers.

In this respect, it is encouraging to note suggestions of the establishment of new hybrid models in a wide variety of places,[1595] including the CICIG in Guatemala, the

[1594] See the website www.unwcc.org, established by Dan Plesch, Director of the Center of International Studies and Diplomacy at SOAS.
[1595] Schaack, Beth van. *The Building Blocks of Hybrid Justice,* 44 Denver Journal of International Law and Policy (2016), p. 169.

Cour Special in the Central African Republic, the new EU Kosovo tribunal, a hybrid AU Tribunal suggested for South Sudan,[1596] and a International Team to Investigate crime of ISIL in Iraq.[1597] Some scholars are speaking of a resurgence of hybrid tribunals.[1598] Indeed, one of optimum ways to establish national capacities to try Rome Statute crimes in the future may be to combine them effectively with international assistance. Some have also argued for a "regionalization" of international criminal law.[1599]

D. From Law to Justice: The Need for Diverse, Pluralistic and Deliberative Approaches to Pursue Accountability for Mass Atrocity

The former Prosecutor of the ICC liked to refer to the ICC as the hub in a wheel of international criminal justice. Perhaps it is better seen as another spoke in that wheel than the hub itself: the hub is the normative prohibition on war crimes, crimes against humanity and genocide, and the ICC is an avenue to pursue accountability for those crimes. After all, as Drumbl argues, the core liberal concept of the centrality of the individual has led to the application of legal principles and values to societies "where such forms are neither innate nor indigenous."[1600] Goldstone has written: "transitional justice is ultimately about nations torn apart by gross violations of human rights learning to live together within a context of dignity, human rights and social justice."[1601] Global does not need to equate a "universal formula."

Since WWII, violence has evolved more and more to spill across state boundaries and involve many forms of non-state actors. Mass atrocities are sufficiently complex that they require multi-faceted, pluralistic approaches to come to terms with them. Just as societies have shown resilience through decades of conflict, they should also be trusted in proposing solutions to their own historical legacies of violence. Ideally, the involvement of the ICC will generate debate amongst various actors, whether they are proponents or opponents of the ICC process, that itself will contribute to a "norm-generating process".[1602] In fact, "when actors contribute to the creation of legal meaning, they will also feel more compelled to respect these legal norms and assume resulting obligations."[1603]

[1596] Voice of America, *South Sudan Inches Closer to Hybrid Tribunal on Conflict's Four Year Anniversary*, 17 Dec. 2017.
[1597] Schaack, Beth van. *UN Releases Guidelines for Team Investigating ISIS Crimes in Iraq,* Just Security, 18 Feb. 2018.
[1598] See the project of Mark Kersten and Kirsten Ainsley at https://hybridjustice.com/.
[1599] Jalloh, Charles. *Regionalizing International Criminal Law*, International Criminal Law Review 9 (2009), p. 224.
[1600] Drumbl, Mark. *Atrocity, Punishment and International Law,* Cambridge 2007, p. 5.
[1601] Goldstone, Richard, in Pieces of the Puzzle: Key words on Transitional Justice and Reconciliation, (Compress, http://www.oneworldbooks.com, South Africa) 2004.
[1602] Kastner, Philipp. *Armed Conflicts and Referrals to the ICC: From Measuring Impact to Emerging Legal Obligations,* 12 JICL (2014), pp.471-490, p. 487,
[1603] Ibid, p. 488.

A central motivation for the creation of the ICC was the desire not to create more ad hoc Tribunals, which were considered slow and inefficient, as well as enormously expensive. In this sense, the Court was intended as a "cost-saving" measure. Conflict situations are often underserved by an ICC intervention, which can only devote a fraction of its resources to any given situation. The question of who may be subject of ICC arrest warrants ultimately distracts from finding more extensive, context-specific solutions for mass atrocity. Indeed, ICC interventions in some situations may be absorbing valuable political space and resources which could perhaps be put to better and more sustainable use within a domestic transitional justice strategy which balances different approaches and mechanisms.

The trial of *Hissan Habre* by the Extraordinary African Chambers, established in Senegal with the involvement of the AU, based on universal jurisdiction, presents an interesting new model,[1604] and has been praised for extensive victim involvement in initiating the prosecution and eventually as parties civiles and witnesses in the trial, a labour of many decades.[1605] In the words of Brody: "It is unfortunately very rare for victims to play that role (in the center of the legal struggle), but they did so in the Habre case, and it proved as well to be a major factor in creating the political conditions to bring Habre to justice, as their stories captured the attention of the public and of policymakers."[1606] In addition, the trial only cost 8.6 million Euros.

As an external mechanism, the ICC contravenes widely accepted principles in the transitional justice and peace-building fields, about the importance of context-specific, no "one size fits all" solutions; and the importance of domestic ownership. It also contradicts a comprehensive approach and serves to focus attention on the prosecution of a few individuals, which serves as a "lightening rod" to attract attention away from other issues. The external nature of the ICC has contributed to a legitimacy deficit and poor perceptions of the Court in different situation-countries.

Part of the responsibility for the Court's limited impact lies with the Assembly of States Parties, and its decisions on resource allocation. The ICC should not be seen as *the* justice solution for any situation, but as an element of an overall strategy, better suited to some situations than to others. While the Court is global, it should seek to adapt to the local. Only when international justice actors deepen their understanding about what justice means for victims and affected populations, will their interventions have real and lasting impact, and can the ICC evolve from an instrument of law to one of justice.

[1604] Williams, Sarah. *The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem.* 11 Journal International Criminal Justice (2013) p. 1139.
[1605] For a detailed account of the trial see Brody, Reed. *Victims bring a Dictator to Justice: The Case of Hissene Habre,* Bread of the World (2017).
[1606] Brody, Reed. *Victims bring a Dictator to Justice: The Case of Hissene Habre,* Bread of the World (2017) p. 19.

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Samenvatting (Summary in Dutch)

Wat is de impact van het Internationaal Strafhof op nationaal niveau?

In 1998 werd, na jaren van onderhandeling, het Statuut van Rome inzake het Internationaal Strafhof (het ICC of het Strafhof) door 120 landen aangenomen. In 2002 kon het Strafhof worden opgezet, hetgeen veel sneller was dan verwacht. Oprichters van het Internationaal Strafhof spraken van een grote doorbraak in de strijd tegen straffeloosheid, een teken van ware vooruitgang voor de mensheid en een permanente maatregel om conflicten en menselijk leed te verminderen.

Nu, twintig jaar later, worden er steeds meer vragen gesteld over de daadwerkelijke impact van het Strafhof. De resultaten van het Strafhof zijn teleurstellend; tot nu toe heeft het ICC in totaal weinig strafzaken afgehandeld en zijn er maar 4 mensen veroordeeld in Den Haag. Eén daarvan, Jean-Pierre Bemba, de vicepresident van Congo, is na 10 jaar alsnog vrijgesproken in hoger beroep. Maar de oprichters en aanhangers van het Strafhof erkennen in toenemende mate dat de impact van het ICC breder moet worden gezien dan alleen de rechtszaken in Den Haag.

Dit proefschrift stelt daarom de vraag: wat is de impact van het Statuut van Rome en het Internationaal Strafhof op nationaal niveau? Hoe wordt deze impact beoordeeld? Is het Strafhof effectief in het verminderen of voorkomen van internationale misdrijven (waaronder genocide, misdrijven tegen de menselijkheid en oorlogsmisdrijven)? Stelt het landen beter in staat om internationale misdrijven te berechten, of om conflicten op te lossen? Wat is de impact op slachtoffers, en hoe wordt het Strafhof gezien door de bevolking in het algemeen?

Veel van de literatuur over het ICC gaat over de juridische ontwikkelingen bij het Strafhof of over de rol van het ICC in Afrika. Over de impact van het ICC in specifieke landen is weinig geschreven. Dit proefschrift tracht echter een breder beeld te schetsen van de rol van het ICC in landen gesitueerd op verschillende continenten, waaronder Afghanistan, Colombia, Libië, Kenya en Oeganda. De landen zijn gekozen op basis van professionele ervaring van de kandidaat. Om de bevindingen te onderbouwen maakt het proefschrift gebruik van diverse bronnen, waaronder juridische documenten en uitspraken van het ICC, academische artikelen, beleidsstukken van NGO's en denktanks, stukken uit de media en interviews met stafleden van het Hof en met opinieleiders in de betreffende landen.

Uit de literatuur blijkt dat er geen consensus bestaat over de doelen van het Strafhof; er heerst onzekerheid over de "identiteit" van het Hof. Enerzijds is het ICC niet simpelweg een strafhof, maar anderzijds is het ook niet een instrument voor het bereiken van vrede, of "transitional justice", of verzoening. In het Statuut van Rome wordt in de preambule het ultieme doel van het hof als volgt gedefinieerd: "een eind te maken aan straffeloosheid, door het bevorderen van een cultuur van

aansprakelijkheid voor 's werelds ernstigste misdaden." Maar hoe kan dit gemeten worden?

Hoofdstuk 1 stelt een beoordelingskader voor. Dit beoordelingskader is gebaseerd op de tekst van het Statuut van Rome, beleidsstukken, en uitspraken van de oprichters, hoofdaanklager, rechters, en andere hoofdpersonen van het Hof. Om een cultuur van aansprakelijkheid te bevorderen wordt er van het ICC verwacht dat ze van invloed zal zijn op instellingen, processen en personen, om verdere misdrijven te voorkomen. Het beoordelingskader bestaat uit vier onderdelen die kunnen worden gemeten: systematische effecten (effecten binnen nationale rechtssystemen); transformatieve effecten (impact op politieke processen zoals vredesonderhandelingen); reparatieve effecten (impact op slachtoffers); en demonstratieve effecten (met het Strafhof als voorbeeld voor lokale bevolkingen).

Hoofdstuk 2 stelt de vraag of het wettelijk kader betreffende het complementaire karakter van het Strafhof, in de artikelen 17-19 van het Statuut van Rome, geschikt is om veranderingen in nationale rechtssystemen te waarborgen (systematische effecten). In de praktijk concurreert het ICC vaak met nationale autoriteiten. De nauwe focus van het ICC op slechts enkele individuen is niet genoeg om de problematiek van straffeloosheid op nationaal niveau te verhelpen. Het concept van "complementariteit" vereist niet dat er gekeken wordt naar de kwaliteit van processen en of die wel eerlijk zijn. Vaak ontstaat er een soort "parallellisme" tussen nationale autoriteiten en het Hof; als nationale autoriteiten misdaden zelf niet kunnen of willen vervolgen, kan het ICC dat ook niet. Dit is omdat het ICC grotendeels afhankelijk is van de nationale autoriteiten om onderzoek uit te voeren, verdachten te arresteren en getuigen te beschermen.

Wel is er sprake van een proces van "internaliseren" (zich eigen maken) van de normen van het Statuut van Rome in landen onder toezicht van het Strafhof. Hoofdstuk 3 analyseert deze "systematische effecten" waaronder: (1) het aannemen van nationale wetgeving voor de criminalisering van internationale misdrijven (genocide, misdaden tegen de menselijkheid, oorlogsmisdaden); (2) het aannemen van andere wetgeving gebaseerd op de normen van het Statuut van Rome (b.v. voor slachtoffers of bescherming van getuigen); (3) het oprichten van nieuwe, gespecialiseerde instellingen om internationale misdrijven te berechten; (4) het initiëren van nationale strafrechtelijke processen om internationale misdrijven te berechten. Het hoofdstuk concludeert dat internalisering wel plaats vindt, maar dat nationale autoriteiten vaak gemotiveerd zijn om stappen te ondernemen juist om een interventie van het Strafhof te ontlopen. Ook is de oprechtheid van nationale processen vaak moeilijk te beoordelen, maar het is wel mogelijk om indicatoren te identificeren om dit te bepalen.

Transformatief effect verwijst naar het normatieve effect dat het Statuut van Rome kan hebben op vredesonderhandelingen. Eerder werden er in vredesonderhandelingen of transities regelmatig amnestieën toegekend; Zuid Afrika is daar een beroemd voorbeeld van. De artikelen 16 en 53 van het Statuut van

Rome zijn juist in het Statuut opgenomen om een balans tussen vrede en recht te bewaren, maar zijn tot nu toe niet gebruikt. Hoofdstuk 4 evalueert de normatieve effecten van het Statuut van Rome op vredesonderhandelingen, in Colombia en Oeganda, waaronder: (1) de impact op de inhoud van vredesonderhandelingen, inclusief de schaal van vervolgingen, of de aard van straffen; (2) de impact van de ICC op het proces van vredesonderhandelingen, bijvoorbeeld door het perspectief van slachtoffers op te nemen; (3) de vraag of het Statuut van Rome heeft geleid tot minder amnestieën voor internationale misdaden. Het Statuut van Rome heeft duidelijk transformatief effect gehad op zowel de inhoud als het proces van vredesonderhandelingen in Colombia en Oeganda, maar in Afghanistan en Libië zijn er amnestiewetten aangenomen zelfs onder het toezicht van de ICC.

De rechten van slachtoffers zijn een centraal onderdeel van het Statuut van Rome en het mandaat van de ICC. Hoofdstuk 5 beoordeelt het "reparatief (of herstellend) effect", namelijk: (1) of slachtoffers in staat zijn op een zinvolle manier deel te nemen aan de processen van het Strafhof; (2) of en hoe hun wensen een deel vormen van de strategie van de aanklager van de Strafhof; (3) of slachtoffers hulp of schadevergoeding ontvangen via het ICC of via het Trust Fund for Victims. Het hoofdstuk betoogt dat het reparatief effect van het Statuut van Rome en het ICC op slachtoffers minimaal is. Dit is omdat slachtoffers te talrijk zijn om zinvol deel te nemen aan de processen, of om meer dan een puur symbolische schadevergoeding te ontvangen. Zelfs het "do no harm" beginsel werd niet altijd gerespecteerd. Een voorbeeld daarvan is Kenya. Het Strafhof erkent wel de rechten van slachtoffers, maar kan niet veel bijdragen aan daadwerkelijke genoegdoening. Het Trust Fund for Victims speelt een constructieve rol, maar dat is juist vanwege een non-juridische, humanitaire aanpak.

Het Strafhof heeft ook een sociale impact. De acties van het Strafhof dienen als een belangrijk voorbeeld van strafrechtelijke processen en hebben een "demonstratief effect", als voorbeeld van een juridisch proces, op getroffen gemeenschappen. Hoofdstuk 6 analyseert enkele trends in percepties van het ICC in verschilende landen. Hierbij is de uitdaging dat het Hof actief is in landen die al langdurig in conflict zijn. Het Strafhof wordt vaak niet als onpartijdig beschouwd. Ook zijn de lokale prioriteiten in verband met gerechtigheid vaak anders dan de prioriteiten van het ICC. Soms is de nadruk b.v. meer op genoegdoening. Soms heeft de lokale bevolking voorkeur voor nationale of non-juridische processen en wordt het Strafhof gezien als een instrument van het Westen of als niet legitiem. Ook wordt het Strafhof als complicerende factor gezien in het oplossen van conflicten.

In hoofdstuk 7 worden de conclusies getrokken over deze verschillende "effecten" en wat die betekenen voor de toekomst van het ICC. De normatieve impact van het Strafhof wordt namelijk ondermijnd door gebrek aan "sociale impact." Het Strafhof had misschien nog het meeste impact waar het het minste nodig was, namelijk in Colombia, waar er sprake is van een robuust rechtssysteem en er al veel strafzaken plaats vinden op nationaal niveau. Het proefschrift pleit voor een meer context-sensitieve aanpak in het toepassen van internationaal strafrecht en de normen van

het Statuut van Rome. Deels kan dit bereikt worden door het aanpassen van huidige praktijken en het beleid van het Strafhof binnen het Statuut van Rome. Maar ook moeten bepaalde fundamentele kwesties opnieuw doordacht worden. Zou het Strafhof bijvoorbeeld minder situaties in behandeling moeten nemen en zich zo meer verdiepen in een gering aantal situaties? Zijn er andere manieren of modellen te vinden om de normen van het Statuut van Rome te bevorderen op lokaal niveau? Dit proefschrift bepleit dat daar wel mogelijkheden voor zijn, en dat hier meer aandacht voor nodig is in de toekomst.

Curriculum Vitae

Marieke Wierda is a Dutch lawyer, born (27-06-1973) and raised in Yemen and educated in the UK (LL.B., University of Edinburgh, First Class Honours, class of 1995) and the US (LL.M., New York University Hauser Scholar, class of 1997). She is specialized in human rights, international criminal law, rule of law and transitional justice. She is currently the Rule of Law Coordinator for the Dutch Ministry of Foreign Affairs. Ms. Wierda has 20 years experience in rule of law and transitional justice, starting with the International Criminal Tribunal for the former Yugoslavia (1997-2000). In 2001 she joined the International Center for Transitional Justice where she worked for a decade. She worked extensively on transitional justice in Sierra Leone, Uganda, Lebanon, and Afghanistan. From 2007 she was appointed Criminal Justice Director and was based Beirut (2007-2009) and Kabul (2009-2010). In 2009 she spent a year working with the Afghan Independent Human Rights Commission, working on a large-scale documentation project on war crimes and crimes against humanity committed in Afghanistan from 1972 until 2001.

In 2011, she was an advisor to a UN Panel of Experts appointed by the Secretary General to advise on accountability for the final phases of the conflict in Sri Lanka. In October 2011, after the Revolution in Libya she joined the United Nations Support Mission (UNSMIL) as the Transitional Justice Advisor, until January 2015. In March 2015 she joined the Department of Stabilization and Humanitarian Aid of the Dutch Ministry of Foreign Affairs as the Rule of Law Coordinator.

She is the author of many reports, book chapters and articles on international criminal law and transitional justice, including a book on International Criminal Evidence, co-authored with Judge Richard May (2002).