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

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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.