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

Wierda, M.I.

Chapter 6: Demonstration Effect: Trends in Perceptions

These tribunals must be seen as legitimate by those on whose behalf they operate in order for their work to be accepted within affected societies. [1249] – Laurel Fletcher and Harvey Weinstein

I. Introduction

A *demonstration effect* is described as an idea, model or institution that others are influenced by and try to copy.[1250] In international criminal law, demonstration effect refers to the ability of an international criminal court or tribunal to contribute to "a *culture* shift and demands for change or increased accountability through increased rights awareness."[1251] The demonstration effect should occur mainly on the national level, with a variety of audiences, including victims, but also policy-makers, affected communities and victims. Demonstration effect should be the consequence of the *expressive* function of the Court. Outreach, which has the goal of communicating the actions of the Court, is deemed as crucial to the success of demonstration effect. Demonstration effect should build the legitimacy of the Court by garnering support for its actions. Support for the Court depends in part on "the agendas of the relevant audiences of the court, that is, the issues these audiences view as important and central."[1252]

The Court's officials themselves have often suggested that support for, and hence the legitimacy of the Court, will flow automatically from its performance. As long as its processes are fair, efficient, independent and impartial, legitimacy ought to follow. The independence of the Prosecutor is guaranteed by Article 42 of the Statute, whereas impartiality is derived from Articles 21(3) and 42(7) of the Statute.[1253] Independence and impartiality are also enshrined in the OTP Code of Conduct and in the Policy Paper on Case Selection and Prioritization. In addition, the Court strives to be transparent through publication and consultation of its major policies, including on preliminary examination and on case selection and prioritization. As said by the second Chief Prosecutor:

[1249] Fletcher, Laurel and Harvey Weinstein, *A world unto itself? The application of international justice in the former Yugoslavia* in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity,* Ed. by Eric Stover and Harvey Weinstein, Cambridge University Press (2004) p. 30.
[1250] Cambridge Dictionary.
[1251] OHCHR Rule of Law Tools, *Maximizing the Legacy of Hybrid Tribunals,* 2008 at p. 17 (written by the author). The author first used this term in a report by UNDP and ICTJ on the Legacy of the Special Court for Sierra Leone in 2002.
[1252] Dothan, Shai. *How International Courts Enhance Their Legitimacy*. 14 Theoretical Inq. L. 455 (2013) p. 473.
[1253] For an extensive study on independence and impartiality, see Cote, Luc. *Independence and Impartiality*, in *International Prosecutors* (ed. L. Reydams, J. Wouters and C. Ryngaert), Oxford University Press (2012) pp. 319-415.

> To what does the Court today owe its status and legitimacy as a major actor on the international scene in relation to justice and conflict management? I would like to suggest two main causes. Firstly, its operational framework-its mandate-as defined by the Rome Statute; and secondly, the standardized, clear, transparent, and predictable working methods of the Office of the Prosecutor, providing it with the necessary legitimacy as a strictly judicial actor, in order to function effectively in a highly political international environment.[1254]

The experience to date however indicates that building legitimacy has to go beyond performance legitimacy. The "demonstration effect" of the Court should relate to how it is exercising its *expressive* function, in terms of the situations and cases it is selecting.[1255] It should also be seen as responsive to local justice needs and priorities, in order to strengthen its purposive legitimacy in particular situations. Within the parameters of independence and impartiality, and certain other limits established by the Rome Statute on jurisdiction, admissibility and the interest of justice, the Prosecutor has discretion in deciding who to prosecute and when. Many scholars have commented on prosecutorial discretion and whether it should be circumscribed by criteria[1256] or guidelines. The Prosecutor has published its *Policy Paper on Case Selection and Prioritisation,* which broadly draws the contours of how it exercises discretion. But case selection has prompted controversy in almost every situation in which the Court is involved. This may be much more closely related to an absence on the agreement of the goals underlying the ICC: "since the ICC lacks agreed goals and priorities, articulating "criteria" or "guidelines" for selection may simply highlight the inconsistent manner in which such decisions are made."[1257]

Empirically there is still a dearth of information on what is the "demonstration effect" of the expressive function of the Court. Meijers and Glasius observe that legal scholars "do not typically look closely at the plausibility of the empirical claim that trials have this effect."[1258] Stromseth remarks that:

> We cannot simply trust that positive demonstration effects will inevitably flow from holding international or hybrid trials … If these tribunals fail to address public concerns about their work and simply ignore local perceptions about justice, they may undermine public confidence in fair

---

[1254] Bensouda, Fatou. *Reflections from the ICC Prosecutor*. 45 Case Western Reserve Journal of International Law (2012), pp. 505-511 p. 506.
[1255] De Guzman, Margaret. *Choosing to Prosecute: Expressive Selection at the International Criminal Court*. 33 Michigan Journal of International Law (2012) p. 265.
[1256] Goldston, James. *More Candour About Criteria*, JICJ 8 (2010) pp. 383-401. Goldstone argues in favor of guidelines, warning that else the Court is trapped between a pristine notion of "law in a vacuum", promoted by its embattled supporters, and attacks from its critics that it is politicized.
[1257] De Guzman, Margaret. *Choosing to Prosecute: Expressive Selection at the International Criminal Court*. 33 Michigan Journal of International Law (2012) p. 298.
[1258] Meijers, Tim and Marlies Glasius. *Trials as Messages of Justice: What should be Expected of International Criminal Courts*. Ethics and International Affairs, 30 No. 4 (2016) pp. 429-447 at 435.

> justice, reinforce cynicism and despair, rather than helping to build public trust in justice and the rule of law.[1259]

This Chapter will discuss trends in perceptions in situation-countries including: knowledge and expectations of the Court. This is in the absence of significant quantitative data on perceptions about the ICC, beyond the survey work conducted to date, which is still rudimentary.[1260] As will be shown, perceptions in different countries are shaped by the unique historical, cultural and political factors of that context.

The preliminary trends in the case studies below will indicate that (a) the ICC is not necessarily viewed by local audiences as impartial in its case selection; (b) it is not always seen as relevant to local justice struggles, which have their own histories; (c) in certain contexts it has been perceived as undermining local justice solutions, and in some cases, lacking independence or advancing foreign interests; (d) it has also been perceived as complicating negotiations, thus potentially prolonging conflict. The difficulties that the ICC faces in terms of perceptions stem in part from the remoteness of the ICC, and the physical distance of the Court from the communities affected by conflict. This leaves the door open to many other factors that may influence the perceptions of the Court.

As will be seen below, the ICC has had to contend with significant negative perceptions in these four situations. The data in this Chapter is not quantitative and therefore not representative of the views of local populations. Instead, the Chapter will mainly highlight the main trends in perception, based on long-term first-hand observation in the country concerned and open-source qualitative data, complemented by interviews with key opinion-makers.

Due to limitations on the field research, this thesis is not able to break these key opinion-makers into specific categories such as legal professionals, politicians, victims, civil society, etc. It may well be that there are significant variations between these different groups, but further research ought to be conducted to distill these differences.

Further research would also be needed to demonstrate whether there is indeed

---

[1259] Stromseth, Jane. *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?* Georgetown University Law Center (2009) p. 89.

[1260] A Gallup 2005 Voice of the People survey asked about trust in the ICC, but this was too early in the life of the ICC to give rise to significant results. The survey was applied in 67 countries plus Kosovo, but knowledge of the ICC was low. Over the 67 countries, 45% of those who mentioned the ICC were positive about it, whereas 13% had a negative option. In a few countries, the negative options outnumbered the positive, including Austria, Croatia, Israel, Serbia, and the US. Voeten found a correlation between support for the United Nations and support for the ICC. See Voeten, Erik. *Public Opinion and the Legitimacy of International Courts,* 14 Theoretical Inquiries in Law (2013) p. 427.

increased "rights awareness" amongst these different groups as a result of the Rome Statute and the ICC. This would require quantitative research that was beyond the scope of this thesis. While it is possible that the Rome Statute and the ICC may have impact on rights awareness, the previous Chapter has argued that the reparative effect in terms of translating rights awareness to remedies for victims is limited.

II. Country- Experiences

A. Uganda and the ICC: Love at First Sight?

Uganda ratified the Rome Statute on 14 June 2002. In some ways, Uganda constituted an "ideal first case" because of the reviled subjects of the first arrest warrants, the Lord's Resistance Army. [1261] But the self-referral by Uganda to the ICC was sudden, and shrouded in controversy from its origins, but based largely on impulse rather than on in-depth knowledge of the local context.[1262]

No single event was as decisive to the perceptions of the ICC as the joint appearance of Luis Moreno Ocampo and President Museveni at the press conference to announce the referral.[1263] That event created a perception of collusion between the Government of Uganda and the Court that proved impossible to correct. Ugandans from across the political spectrum respect the political wiliness of President Museveni, who they refer to as "M7". From that day, Ugandans perceived that their President was driving the Court, and not the other way around.

Yet M7 was not Ocampo's ideal bedfellow. Uganda has a very violent history since it gained independence in 1962. Both the Milton Obote (I and II) and Idi Amin Dada regimes were responsible for massive human rights violations. These leaders, both Northerners, were said to favour their own ethnic and national groups, giving rise to deep divisions.[1264] Up to 300 000 persons are estimated to have died during each of their reigns. After the second fall of Obote, an Acholi army officer by the name of Tito Okello briefly ruled Uganda. As President Museveni likes to recall in his public speeches, the National Resistance Army/ Movement put an end to this bloody era of

---

[1261] See Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016), pp. 66-73 for a narrative of the conflict.

[1262] Previously the OTP had focused on obtaining a self-referral from the DRC, but the possibility of a self-referral from Uganda came out of a conversation between the Prosecutor and lawyers representing the Government of Uganda in the ICJ litigation dealing with the UPDF's role in DRC. Sarah Nouwen, Com*plementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press (2013) p. 111. See also Branch, Adam. *International Justice, Local Injustice*. Dissent- Politics Abroad (2004) p.22.

[1263] Tim Allen, Trial Justice: *The International Criminal Court and the Lord's Resistance Army,* African Arguments (2006) p. 128. See also Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, 2008 at p. 41.

[1264] International Crisis Group, *Uganda: No Resolution to Growing Tensions*, April 2012.

Ugandan history, bringing an era of stability and economic growth to most of the country. But events during NRM's rise to power after its defeat of the Tito Okello regime in 1986 continue to be contested.[1265] It also sowed the seeds for long-term grievances between the people of the North, primarily the Acholi, and the NRM.[1266] The LRA rebellion in Northern Uganda links to grievances from these earlier periods of Ugandan history, as well as a deep rift between the North and the South that dates back to the colonial period.[1267] The LRA is unusual in its high cohesiveness and almost cult-like qualities,[1268] all under leadership of Joseph Kony, who is believed to have mystical qualities and to be possessed by spirits by many Northern Ugandans.[1269].

The LRA is notorious for its highly violent and grotesque actions and campaign of terror, mainly targeting, civilians and was horrific in its level of violence. Estimates are that over 66,000 persons were abducted during the LRA conflict in Uganda, a large percentage of which between 10-18 years of age, up to quarter of which were killed.[1270] Victims of the LRA were often killed in ritualistic ways, by being beaten or hacked to death. Others were maimed by hacking off limbs or mutilating the face, including cutting off the lips used to "betray them".[1271] Its hallmark violation was the abduction of children and youth to join their ranks. Although the LRA did not generally engage in wanton rape, in their bush community, girls were distributed and forced into marriages with senior commanders.[1272] The systematic nature of the crimes, and the fact that they targeted civilians made the LRA a seemingly suitable and logical candidate for a first ICC case.[1273] The LRA, often said to be barbaric, irrational, and without political agenda, fell squarely within the "Savages"

[1265] Atrocities were committed in the Luweero Triangle, allegedly committed by Acholi and Langi troops, but the NRM also committed revenge atrocities in return. International Crisis Group, *Northern Uganda: Understanding and Solving the Conflict*, 14 April 2004.

[1266] A commission was appointed to investigate atrocities committed before and during the NRM's rise to power, but its findings were never made public. Hayner, Priscilla B. *Fifteen Truth Commissions—1974 to 1990: A Comparative Study*. Human Rights Quarterly, v. 16, No. 4. (November 1994) pp. 597-655.

[1267] During the colonial period, the Acholi traditionally dominated the military, whereas the British invested in industry and cash crop production in the South, which became economically much more affluent. International Crisis Group, *Northern Uganda: Understanding and Solving the Conflict*, 14 April 2004.

[1268] See Titeca, Kristof, *and The Spiritual Order of the LRA*, in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality*, Zed Books (2010).

[1269] The group's name is thought to be a parody on the National Resistance Army/ Movement. Doom, Ruddy and Koen Vlassenroot, *Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda,* African Affairs 98 (1999) p. 22.

[1270] OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xii-xiii.

[1271] ICTJ and the Human Rights Center at University of California, Berkeley, *Forgotten Voices, A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*. (July 2005) pp. 13-14.

[1272] For a detailed account of a particularly notorious abduction of a group of schoolgirls, see Els De Temmerman, *Aboke Girls: Children Abducted in Northern Uganda*, Fountain Publishers (2001).

[1273] See Matthew Brubacher, *The ICC investigation of the Lord's Resistance Army,* in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality,* Zed Books 2010, p. xx

paradigm. [1274] But this is a vast oversimplification of a complex conflict with much deeper historical roots, much of which is outside of the ICC's jurisdiction.[1275] Anthropologists such as Finnstrom suggest that the LRA wanted to establish a new moral order.[1276] Finnstrom argues that this is what motivates them to abduct children into their order and to kill elderly people, particularly spirit mediums and prophets, known as *ajwaki* and *nebi.*[1277] Finnstrom warns against a "reductionist image of the war and its causes, only too common in the understanding of conflicts in Africa."[1278] In Northern Uganda, Joseph Kony himself is believed to be an *ajwaki* who has spiritual powers..[1279]

Over the years of conflict in Northern Uganda, religious and traditional leaders increasingly mobilised to find peaceful, local solutions to the conflict, devising a dual track approach of peace negotiations and a focus on reintegration of LRA returnees.[1280] Humanitarian and human rights organisations also called for a peaceful solution to the conflict. This is not to suggest that opinions in the North were uniform on how to approach issues of accountability: there were different views, particularly between Acholi and non-Acholi regions.[1281]

Religious leaders, and in particular the Acholi Religious Leaders Peace Initiative, was particularly active in lobbying for peace talks.[1282] Although the Acholi communities were badly victimized by the LRA, they viewed abductees as victims of the conflict, who ought to be forgiven and welcomed back.[1283] To subject former

---

[1274] The Prosecutor encapsulated the ICC's narrative of the conflict in his announcement accompanying the arrest warrants: "The LRA is an armed rebel group, claiming to fight for the freedom of the Acholi people in Northern Uganda. The LRA has mainly attacked the Acholis they claim to represent. For nineteen years, the people of Northern Uganda have been killed, abducted, enslaved and raped. "Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague, 14 Oct. 2005.

[1275] See Annex A.

[1276] Sverker Finnstrom, *Living with Bad Surroundings: War, History and Everyday Moments in Northern Uganda,* Duke University Press, Durham and London (2008) p. 5

[1277] See also Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army,* African Argument (2006) p. 153.

[1278] Sverker Finnstrom, *Living with Bad Surroundings: War, History and Everyday Moments in Northern Uganda,* Duke University Press, Durham and London (2008) p. 8.

[1279] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, African Arguments, 2006 p. 164.

[1280] ARLPI, CSOPNU etc. See Barney Afako, *Reconciliation and Justice: Mato Oput and the Amnesty Act*, Conciliation Resources 2002.

[1281] For quantitative studies of the views of affected populations on peace and justice in Northern Uganda, see ICTJ and UC Berkeley's Human Rights Center, *Forgotten Voices* (2005), and *When the War Ends* (2007) (with Tulane University), both at www.ictj.org. Non-Acholi regions were particularly affected in the later stages of the conflict and had suffered brutal retaliation to Operation Iron Fist in 2002.

[1282] Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from *Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice,* Queen's University Belfast (March 2009) p. 20.

[1283] Interview with Michael Otim, 12 February 2014, Interview with religious leader, Gulu, 8 Feb. 2014.

LRA returnees, many of whom are abducted youth or children, to punishment would be to "punish them twice", according to local religious leaders.[1284] Reintegration was always seen as a priority, due to the large number of rank and file who were abducted against their will from their communities, often at a very young age. Other scholars point to the emphasis on social harmony in Acholi culture as a reason for the absence of insistence on punishment.[1285]

Uniquely, the victim population, represented by the Acholi Religious Leaders Peace Initiative and the Concerned Parents Association supported the passage of a comprehensive Amnesty Act, in 2000.[1286] The Attorney General consulted on the bill among the affected population in the North before it was passed, and participants generally expressed support for a broader amnesty.[1287] The Bill was supported by a countrywide consultation prior to coming into force.[1288] The amnesty had a high level of public support, also among populations most affected by the violence.[1289] The amnesty was construed as an incentive to entice insurgents to defect from the LRA and was intended to spur its disintegration, although it has not ultimately had this effect.[1290] Significant efforts were made to publicise the amnesty and to communicate its terms, through Radio Mega FM and other stations.[1291]

It came as a surprise to the ICC itself and its supporters that the ICC investigation, opened in July 2004 and the arrest warrants unsealed in October 2005 were not met

---

[1284] Interview with religious leader, Gulu, 9 Feb. 2014.
[1285] Porter, Holly E. *After Rape: Justice and Social Harmony in Northern Uganda,* London School of Economics (2013).
[1286] An early version of the amnesty included the same exception for "heinous crimes" as the 1987 amnesty, but this exception was later deleted: Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p. 20.
[1287] Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p. 21.
[1288] Interview with religious leader, Gulu, 8 Feb. 2014.
[1289] ICTJ and the Human Rights Center at University of California, Berkeley, *Forgotten Voices, A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda.* July 2005; Conciliation Resources and QPSW, *Coming Home: Understanding why Commanders of the Lord's Resistance Army Choose to Return to a Civilian Life*, May 2006. Justice and Reconciliation Project, *To Pardon or Punish? Current Perceptions and Opinions on Uganda's Amnesty in Acholi-land*. 15 Dec. 2011. See also Refugee Law Project, W*hose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation*, Working Paper 15, February 2005.
[1290] Amnesty Act (2000): Preamble: "[I]t is the expressed desire of the people of Uganda to end armed hostilities, reconcile with those who have caused suffering and rebuild their communities."
[1291]Ugandans who engaged in war or armed rebellion against the Government of Uganda since 26 Jan. 1986 and who wish to claim amnesty ("reporters") are only required to renounce the insurgency and are then eligible for reintegration - they are not required to divulge information about atrocities or to participate in any other kind of justice process. The Act says in s. 4 that the requirements are to report to an Army or Police Unit, a Chief, a member of the Executive Committee of a local government unit, a magistrate or a religious leader; to renounce and abandon involvement in the war or armed rebellion; surrender weapons; and to be issued a Certificate of Amnesty.

with more enthusiasm among victim populations.[1292] This is partly due to the complex relationship that exists between the Acholi victim population and the LRA in Northern Uganda. The Acholi view the LRA as primarily composed of abducted children and youth that the communities failed to protect.[1293] But the populations in the North also view themselves as the subject of a campaign of marginalization, displacement, and humiliation by the Ugandan Government and the Ugandan Peoples Defence Forces.[1294] The "vicious counterinsurgency" of the government, combined with widespread displacement contributed to shaping the priorities of the local population for justice in Uganda, which extend far beyond trials for the LRA.[1295] In addition, Northern Uganda continues to struggle under the burden of large youth unemployment and general law and order challenges.[1296]

1. Lack of Impartiality: No Investigation of the UPDF

The Ugandan referral, never published, pertained to the "situation concerning the Lord's Resistance Army". The Prosecutor in his decision to open an investigation clarified that he would interpret the referral as consisting of crimes by both sides.[1297] Nonetheless, the Court's focus in the Uganda situation has remained solely on the LRA. Many in Northern Uganda perceived the failure of the Court to open an

[1292] See Allen, Tim. *Bitter roots; the "invention" of Acholi traditional justice,* in in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality*, Zed Books (2010) p. 242.
[1293] See for instance Justice and Reconciliation Project, "*To Pardon or Punish? Current Perceptions and Opinions on Uganda's Amnesty in Acholi-land.* 15 Dec. 2011. This study for instance finds a very high level of support for the amnesty law (98% of the 44 respondents considered it relevant), primarily because it is "seen to encourage children forcefully abducted by the LRA to return home and reconcile with their communities."
[1294] OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xv: Nearly all interviewees spoke of the violence, impoverishment and humiliation that occurred as a result of forced displacement. They reported that IDP camps – over 240 in number at the height of the conflict were poorly protected and inadequately facilitated … At a minimum, tens of thousands of people died in the camps due to disease and violence."
[1295] Branch, Adam. *International Justice, Local Injustice.* Politics Abroad (2004), p.23.
[1296] Interview with prominent female civil society activist, Gulu, 9 February 2014. Social services such as health care remain poor in the North. The police are highly corrupt. It also suffers from a high incidence of domestic violence and rape.
[1297] Nouwen, Sarah. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press (2013) p.113. Phuong Pham et al, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda*, ICTJ and Human Rights Center, University of California, Berkeley (July 2005) p. 18. Branch, Adam. *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press (2011) p. 187.

investigation against the UDPF as ultimate proof of the bias of the Court.[1298] This view formed when the referral was first announced but persists until today.[1299]

Many Ugandans view the Court's dependence on state cooperation as the reason why the UPDF was not investigated. ICC representatives benefitted from UPDF protection, and were seen in the company of senior UPDF commanders, being given a "guided tour" around Northern Uganda.[1300] In the early days of the investigation, court staff often stayed in the Acholi Inn in Gulu, which was owned by a local UPDF commander. All of these factors reinforced the image that the Court was not only close to the government but also dependent on it. This in turn gave rise to speculation as to whether there was a deal between the Prosecutor and the Ugandan government that gave immunity to the UDPF.[1301] Both the situation in Uganda and in Eastern Congo raise questions of UPDF liability: in eastern Congo the UDPF gave support to Hema militias including the militia run by Thomas Lubanga.[1302]

The position of the Prosecutor is that it has insufficient information to proceed against the UPDF.[1303] The Prosecutor has repeatedly stated that LRA crimes were "much more numerous and of much higher gravity than alleged crimes committed by the UPDF."[1304] The OTP was receiving assistance from UDPF military intelligence to prosecute LRA crimes. The OTP estimated that LRA crimes included 2,200 killings, 3200 abductions, and numerous sexual attacks as part of 850 overall attacks between July 2002 and June 2004.[1305] But the WHO reported that 1000 excess mortalities were occurring per week in the IDP camps in Acholi in Northern Uganda between January and June 2005.[1306] It is worth noting that in the context of Darfur, the OTP was accused of an opposite tendency, counting all deaths in the

---

[1298] Phil Clark, Law, *Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda,* in *Courting Conflict? Justice, Peace and the ICC in Africa,* Edited by Nicholas Waddell and Phil Clark, Royal African Society (March 2008).
[1299] Interview with religious leader, Gulu, 9 February 2014. See also JRP, *The Dog That Barks But Doesn't Bite: Victims Perspectives on the International Criminal Court in Uganda,* Policy Brief No. 6, February 2013.
[1300] Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years,* 2008 at p. 57. Branch, Adam. *Displacing Human Rights: War and Intervention in Northern Uganda,* Oxford University Press (2011) p. 187. Interview with Mike Otim, 12 February 2014. Freeland, Valerie. *Rebranding the State: Uganda's Strategic Use of the International Criminal Court*. Development and Change, Institute of Social Studies, The Hague (2015) p. 310.
[1301] Clark, Phil. *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*, in *Courting Conflict? Justice, Peace and the ICC in Africa,* Edited by Nicholas Waddell and Phil Clark, Royal African Society (March 2008) p. 43.
[1302] See http://www.internationalcrimesdatabase.org/Case/814 on the Thomas Lubanga case.
[1303] See also Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years,* 2008 p. 42.
[1304] Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague, 14 October 2005.
[1305] Matthew Brubacher, *The ICC Investigation of the Lord's Resistance Army,* in *The Lord's Resistance Army, Myth and Reality*, edited by Tim Allen and Koen Vlassenroot (2010) p. 269.
[1306] The Republic of Uganda Ministry of Health, Health and Mortality Survey among Internally Displaced Persons in Gulu, Kitgum, and Pader Districts in Northern Uganda, July 2005, WHO, UNICEF, WFP, UNFPA and IRC.

conflict as a result of violence rather than a result of indirect causes such as draught-related diarrhoea (which WHO said accounted for 70-80% of all deaths in Darfur in 2006).[1307]

During the course of the conflict, 94% of the population in Acholi had been corralled into massive camps of thousands of small huts, crammed together into a small space. In Gulu district alone, 65% of the population lived below the national poverty line (of less than $1 a day) compared to 35% in the rest of Uganda.[1308] Deprived from their livelihood by farming, [1309] the population was dependent on food provided by the World Food Program, which was delivered to them by convoy. Facilities such as health care and education were very poor. The close living quarters and lack of economic opportunities destroyed much of the social fabric of the Acholi society. Men were idle and often spent what little money there was on alcohol, leaving it to the women to work the meager fields around the camps, within the strictly enforced curfews, or engage in small trading to feed the family.[1310] Most could not afford to marry and many children were born out of wedlock. The US advocacy group "Invisible Children" made a film about night-commuting in Northern Uganda:[1311] each night hundreds of children would leave their villages to walk to towns such as Gulu to spend the night in shelters, only to return home in the morning. But the film is criticized as a simplistic portrayal that does not touch on the IDP camps or UPDF violations.[1312] Additionally, humanitarian groups such as MSF maintained night commuting was not just a consequence of LRA insecurity but of the complete social disintegration and breakdown of the Acholi society. Malnutrition and communicable diseases such as tuberculosis and scabies were rife in the camps.[1313]

While this forced displacement is widely considered as a government violation against the Acholi people, the Prosecutor maintained that it fell outside of the temporal jurisdiction of the Court, i.e. before 2002. In addition, incidents of abuse by the UDPF against the local population included beatings torture and extrajudicial

---

[1307]Mamdani, Mahmood. *Beware Human Rights Fundamentalism*, 20 March 2009, Mail and Guardian Opinion.
[1308] Erin Baines, Eric Stover and Marieke Wierda, *War –Affected Children and Youth in Northern Uganda: Towards a Brighter Future*, An Assessment Report for the MacArthur Foundation (May 2006).
[1309] Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.
[1310] Phuong Pham et al, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda,* ICTJ and Human Rights Center, University of California, Berkeley (July 2005) p. 16.
[1311] Invisible Children: Rough Cut (2004).
[1312] Schomerus, Mareike, Tim Allen and Koen Vlassenroot, *Kony 2012 and the Prospects for Change,* Foreign Affairs, 13 March 2012.
[1313] Phuong Pham et al, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda*, ICTJ and Human Rights Center, University of California, Berkeley July 2005 at p. 15-16.

killings,[1314] as well as recruitment of underage soldiers. The crime of "defilement", in which UPDF soldiers used promises of money, food or clothes or coercion to have sex with underage girls, provoked particular anger and condemnation as well as stigmatization of the victims. Some Acholi suspected the UDPF and the Government of sinister, punitive plans against the Acholi people, involving containing the population in "concentration camps" and grabbing their land, ostensibly for the purpose of increasing agricultural production through mass farming. One local politician and presidential candidate Olaro Ottunu, has referred to the actions of the Government as "genocide".[1315] While this may be an extreme view, Ugandan intellectual Mahmood Mamdani referred to the mass displacement as a crime against humanity.[1316]

A report on memorialization, entitled "We Can't Be Sure Who Killed Us" states that "there is no widely held political or moral understanding of the conflict, and many doubt that one could ever emerge."[1317] The report suggests that victims do not understand many fundamentals about the causes of the war, which atrocities were committed for which reasons, or the actions or motivations of the LRA, about which there is deep ambivalence. To take an example, the Barlonya massacre, in which over 300 IDPs were massacred in February 2004 and was investigated by the ICC, raised many questions about the role of the UDPF in preventing the massacre and dealing with its aftermath. The report "In contrast, for some the Ugandan government's crimes form part of a well-developed narrative … The strategy of forced displacement was in fact a deliberate policy of cultural and economic destruction, demonstrated by the failure of the Ugandan People's Defense Force (UPDF) to offer protection against the LRA once people had been placed in the IDP camps."[1318]

While the displacement of the Acholi,[1319] and the actions of the UPDF may fall outside the temporal or subject matter jurisdiction of the ICC, many in Northern Uganda did accept the explanations given by the OTP for not proceeding against the UDPF. As noted by one author: "through its accommodation to power, the ICC is

---

[1314] Human Rights Watch, *Concerns Regarding Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Uganda*, May 2005. OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xiv. See also Chris Dolan, *Which Children Count? The Politics of Children's Rights in Northern Uganda*, 2002.

[1315] IRIN, "*Uganda: ICC to Investigate Allegations of Army Atrocities,"* 3 June 2010. Olaro Ottunu was previously the UN Special Representative of the Secretary-General for Children and Armed Conflict.

[1316] McCormack, Pete. "*Details and Reminders: An Interview with Mahmood Mamdani*," 17 Oct. 2005.

[1317] Hopwood, Julian, "*We Can't Be Sure Who Killed Us", Memory and Memorialization in Post-Conflict Northern Uganda*, ICTJ and Justice and Reconciliation Project, February 2011. See also OHCHR, *"Making Peace Their Own: Victims Perceptions of Accountability, Reconciliation and Transitional Justice in Uganda*, 14 August 2008.

[1318] Hopwood, Julian, "*We Can't Be Sure Who Killed Us", Memory and Memorialization in Post-Conflict Northern Uganda,* ICTJ and Justice and Reconciliation Project, February 2011 p. 14.

[1319] It is generally acknowledged that the displacement was caused both by LRA violence and as a result of Government policy: "*Nowhere to Hide: Humanitarian Protection in Northern Uganda",* Kampala: Civil Society for Organizations in Northern Uganda, 2004 at 63, citing OCHA figures.

imposing a solution that is based upon a narrative of the conflict that does not make sense to many Acholi, and so they reject that narrative and throw into question the model of justice it informs. "[1320] The OTP for its part said it had to resist "popular sentiment" which would push it into less objectivity.[1321] But the manner in which the Prosecutor explained his gravity criteria, mostly in terms of the number of direct conflict-related deaths, continued to be a source of controversy. Resources for further investigation in Uganda were severely reduced in 2012, to one staff member and 111,200 Euros.[1322] Human Rights Watch concluded that "in the absence of clearer, more widely available public explanations, it is easy to understand how some have reached the conclusion that the prosecutor has deliberately chosen not to target the Ugandan military and civilian authorities for prosecution for political reasons. Considerable damage has been done to the ICC's reputation in Uganda due to these perceptions."[1323]

2. Lack of Relevance: Failure to Promote State Acknowledgement for Victims

Another challenge to perceptions of the ICC in Uganda is that it is out of step with local justice demands. An extensive study on priorities for victims of the conflict conducted by the OHCHR from 2007 to 2011 concluded "victims and victim-focused CSOs named truth-recovery, acknowledgement of harms, redress and reparation as their top priorities for any future transitional justice initiatives."[1324] The study indicated that people took a long-term view of the conflict, tracing its origins back to 1986, and that they prioritized fact-finding and inquiry to find out the whole truth about what they had suffered, and to put these on a public record.[1325] In terms of reparations, victims and victim-focused CSOs indicated that priorities included "physical and mental health services, education, housing, land and inheritance, rebuilding livelihoods, empowering youth, public acknowledgement of harm and apologies, information on the disappeared and proper treatment of the dead."[1326]

An important priority of victims in Northern Uganda is state acknowledgement of

---

[1320] Branch, Adam. *Displacing Human Rights: War and Intervention in Northern Uganda,* Oxford University Press, 2011 p. 192.
[1321] Matthew Brubacher, "*The ICC Investigation of the Lord's Resistance Army"*, in *The Lord's Resistance Army, Myth and Reality,* edited by Tim Allen and Koen Vlassenroot (2010) p. 269.
[1322] Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Case*s, p. 26.
[1323] Ibid., p. 27.
[1324] OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xvi.
[1325] Justice, Law and order Sector, *Study report on Traditional Justice, Truth-telling and National Reconciliation Uganda*. Disappearances were a major concern to those interviewed. They also stressed in particular the need to look at violations committed against women and children. Victims and victim-focused communities stressed that they wanted to be involved in the design of a fact-finding body or that they favoured community-based truth telling processes led at the local level, as well as national-level acknowledgement. Refugee Law Project had long worked on a bill, as part of its Beyond Juba Project, which proposed a decentralized model of truthseeking: National Reconciliation Bill Draft, 2008.
[1326] OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xviii.

the crimes, a priority that has gone unanswered by the ICC involvement. State acknowledgement of participation in violations in Northern Uganda is still elusive. While President Museveni made a statement of acknowledgement at the 28th NRM anniversary celebrations in January 2014, his remarks provoked a mixed reception, especially his claim that he was not aware of certain incidents. [1327] In any case, an exclusive focus on LRA crimes meant that the ICC could not fully align with the justice priorities of Ugandans particularly in the North.

3. Lack of Legitimacy: The Hague or the Bitter Root?

Another source of opposition to the ICC came from a resistance to an "external justice" that was perceived to trample on traditional Acholi justice alternatives.[1328] Proponents of traditional justice, which included traditional and religious leaders, humanitarian workers, and peace activists claimed that ICC supporters were insensitive to local cultural practices by seeking to trump it with "Western style, retributive" justice. Acholi traditional justice ceremonies featured on the front page of the NYT in 2005, in an article which noted: "[T]he two very different systems- one based on Western notions of justice, the other on a deep African tradition of forgiveness- are clashing in their response to one of this continent's most bizarre and brutal guerrilla wars."[1329] But anthropologists have commented that proponents and opponents of traditional justice often misunderstood or oversimplified these practices, in their quest to equate these with transitional justice mechanisms.[1330]

Prior to the ICC's involvement, in 2000 a paramount chief for Acholi, Rwot David Arcana II, had been appointed through a civil society initiative.[1331] This brought with it a resurgence of interest in traditional practices, some of which are practiced regularly, although more elaborate ceremonies rarely took place due to poverty or poor living conditions in the camps. According to traditional beliefs, in the aftermath of a conflict in which the fate of so many remains unresolved, *cen*

[1327] At the 28th NRM anniversary celebrations on 26 January 2014, President Museveni made the following remarks: "An undisciplined and ideologically bankrupt army cannot create peace in the country. In spite of the general line of the NRA/UPDF of always being on the side of the people, there were incidents in the anti-insurgency campaign for which we are ashamed. I do not know why the people did not report those incidents … I am going to follow up all these incidents, unearth the culprits if they are still alive so as, to hold them accountable and compensate the victims or their descendants." http://chimpreports.com/index.php/news/politics/16415-full-speech-museveni-accounts-for-28-years-in-power.htm.

[1328] Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.

[1329] Lacey, Mark. *Atrocity victims in Uganda choose to forgive*, NYT, 18 April 2005.

[1330] Tim Allen made the point that the Luwo word Timo-Kica has several meanings, including forgiveness, amnesty and reconciliation. Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army,* African Arguments (2006) p. 131.

[1331] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army,* African Arguments (2006) p. 149.

(polluting spirits) can haunt perpetrators of wrongdoing who fail to admit their guilt. These "living dead", through nightmares, visions, and other misfortunes, can plague these persons. The widespread violence prevalent in war creates "bad surroundings" which in turn result in other misfortune such as sickness, failed crops, malnourishment, the presence of evil spirits and widespread deaths.[1332]

Traditional ceremonies reflect the spiritual beliefs of the Acholi through which they ascribe meaning to their environment. These are by no means unique to Acholi: similar traditional practices exist elsewhere in the African continent, for instance in Mozambique.[1333] Neither are these local beliefs ubiquitous. Christian beliefs are also prevalent in Northern Uganda, and religious leaders carry much influence.[1334] Some religious leaders oppose traditional practices such as going to the *ajwaki* on grounds that these are "Satanic". But religious leaders in the North often have promoted these ceremonies, arguing that they are compatible with Christian norms of forgiveness and reintegration. In the words of Bishop Baker Ochola: "God has revealed *mato oput* to our society- to taste the pain in our society, to taste pain and suffering and death … Acholi know that it is only through forgiveness that the problems can be solved."[1335]

Cleansing ceremonies are used to excise foreign and malignant influences or spirits from persons re-entering the community.[1336] An example is the ceremony of stepping on an egg (*nyouo tong gweno*), where the egg symbolizes the pure nature of the community, which is symbolically crushed by the entering of external influences and pressures. Adapted versions of cleansing ceremonies have been used to reintegrate former LRA.[1337] On the other hand, traditional beliefs are also used to deal with outsiders or punish persons excluded from the community, for instance for accusations of witchcraft.[1338]

[1332] Sverker Finnstrom, *Living with Bad Surroundings: War, History and Everyday Moments in Northern Uganda,* Duke University Press, Durham and London (2008) p. 14.
[1333] Igreja, Victor. *Justice and Reconciliation in the Aftermath of the Civil War in Gorongosa, Mozambique Central*, in *Building a Future on Peace and Justice*, Ed. Kai Ambos, Judith Large, Marieke Wierda, Springer (2009) p. 423-438. Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.
[1334] Refugee Law Project, *Peace First, Justice Later: Traditional Justice in Northern Uganda,* July 2005 p. 25.
[1335] Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, African Arguments (2006) p. 137. On the other hand, the "forgiveness" aspect of Acholi culture may be in danger of being overstated and some scholars, such as Holly Porter, have argued that dispensing justice in Northern Uganda is determined by a quest for social harmony, which may result in either peaceful or more violent means. See Porter, Holly. *After Rape: Justice and Social Harmony in Northern Uganda*. PhD thesis submitted to the LSE, 2013. Copy on file with the author.
[1336] ICTJ and the Human Rights Center at University of California, Berkeley, "*Forgotten Voices, A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda."* (July 2005) pp. 50-51.
[1337] Tim Allen, Trial Justice: *The International Criminal Court and the Lord's Resistance Army, African Arguments* (2006) p. 166.
[1338] Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.

A more elaborate and much-discussed ceremony is known as the *Mato Oput* or "drinking of the bitter root."[1339] This ceremony is used to reconcile individuals within a clan, or clans with strong relationships, mostly in cases of unlawful killing, which can be intentional or accidental. The matter is discussed, a common version of events agreed, and compensation agreed. This is followed by a ceremony presided by the local chief (the *Rwot Moo*), which includes the joint drinking of the "bitter root", followed by a shared meal, sometimes involving two goats that are cut in half and the two halves swapped.[1340] Traditional ceremonies carry a strong emphasis on resumption of relationships within the clan, or on reconciliation and unity of the community. Their application b*etween* different clans or communities however is less clear.[1341]

The ICC intervention in Northern Uganda prompted extensive and polarized debates about the respective merits of international and traditional justice. Allen argued that the Acholi "require a functioning state to make the best of their lives, including conventional forms of legal protection from those who might chose to oppress them."[1342] Some argued that traditional justice practices were being "invented" or revived as an alternative to the ICC.[1343] However, a survey applied in 2005 indicated that in Acholi areas about half of the population knew about traditional practices, and that 32% said they would assist in reconciliation (including respondents in Lira and Soroti).[1344] Some argue that this attention boom, prompted in part by the ICC, led to a distortion of the practice, putting all the emphasis on accountability, and that it inadvertently led to the empowerment of traditional power structures, which tend to discriminate women and youth.[1345] The traditional leadership of Ker Kwaro Acholi has been implicated in corruption.[1346]

[1339] Ibid. pp. 147-166.
[1340] ICTJ and the Human Rights Center at University of California, Berkeley, "*Forgotten Voices, A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda."* (July 2005) p. 51.
[1341] Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army, African Arguments* (2006) p. 133.
[1342] Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.
[1343] See for instance Allen, Tim. *Ritual (A)buse? Problems with Traditional Justice in Northern Uganda. Courting Conflict? Justice, Peace and the ICC in Africa*. Edited by Nicholas Waddell and Phil Clark, Royal African Society (2008).
[1344] ICTJ and the Human Rights Center at University of California, Berkeley, *Forgotten Voices, A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*. (July 2005) p. 31-32.
[1345] Allen, Tim. *Ritual (A)buse? Problems with Traditional Justice in Northern Uganda. Courting Conflict? Justice, Peace and the ICC in Africa*. Edited by Nicholas Waddell and Phil Clark, Royal African Society 2008. See also Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army,* African Arguments (2006) p. 132-133. Allen, Tim. *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, Politique Africaine 3 No. 107 (2007), pp. 147-166.
[1346] The Monitor, *Acholi King in Trouble over Sh230m donor fund*, 2 Dec. 2013.

Discussion of codification of traditional practices led some to argue that this would detract from their inherent value as flexible, informal and "living" spiritual processes.[1347] On the other hand, ICC supporters argued that traditional justice practices are inappropriate to deal with the large-scale atrocities of the LRA, and that they could lead to impunity for LRA leaders. After some time, the debate settled to on a happier medium i.e. a realization that formal and informal justice systems are not mutually exclusive but that they each have a role to play. In a survey carried out in 2010, the post-conflict period, 53% of the population consider traditional ceremonies to be useful in dealing with LRA combatants.[1348]

4. The Debacle of Kony 2012

The Prosecutor frequently asserted that the best way to end the conflict in Northern Uganda is through arresting the LRA leadership. This gave rise to a perception that the ICC is aligned with military actors and a military solution to the conflict.[1349] The UDPF 's war against the LRA was offensive in nature. For years, the UPDF has fought the LRA in Uganda, South Sudan and Congo. The National Resistance Movement's identity is intimately connected with the UPDF.[1350] Senior UPDF commanders Lt. General Salim Saleh and Major General James Kazini are both relatives of Museveni.[1351] But as mentioned, protection of civilians was not a priority: instead, the UDPF exploited the local population and also engaged in serious abuses.[1352] Over time, the conflict generated its own economy and war profiteers. In the aftermath of 9/11, the government of Uganda succeeded in portraying itself as a frontline in the war on terror and putting the LRA on the "B" list of terrorists kept by the United States.

Some scholars argue that the involvement of the ICC has served to further legitimize Museveni,[1353] but this may be overstating the ICC's importance. Before the ICC referral, Museveni was coined as a "new breed of African leaders," with his liberal economic policies and his responsiveness to World Bank conditions.[1354] Uganda was the recipient of $1.3 billion in international aid in 2003, one of the most aid

---

[1347] Allen, Tim. *Ritual (A)buse? Problems with Traditional Justice in Northern Uganda. Courting Conflict? Justice, Peace and the ICC in Africa.* Edited by Nicholas Waddell and Phil Clark, Royal African Society (2008) p. 50.
[1348] Pham, Phuong et al., *Building Peace Seeking Justice: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Central African Republic,* August 2010, Human Rights Center, University of California at Berkeley.
[1349] Branch, Adam . *Uganda's Civil War and the Politics of ICC Intervention,* 21 Ethics and International Affairs (2007) 179 p. 184.
[1350] International Crisis Group, *Northern Uganda: Understanding and Solving the Conflict*, 14 April 2004.
[1351] Ibid. p. 13.
[1352] OHCHR, "*The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xiv.
[1353]Mark Kersten, "*Plus Ca Change: Museveni and the ICC*", Justice in Conflict, 12 June 2013.
[1354] Interview with Mike Otim, 12 February 2014.

dependent governments in Africa.[1355] Museveni is credited for stabilizing Uganda, bringing economic development, promulgating the 1995 Constitution, and reducing HIV infection rates. This meant that he had additional leeway on the involvement of the UDPF in DRC; military corruption; and the war against the LRA. But it is true that Museveni was able to capitalize on the ICC, including by hosting the ICC Review Conference in Entebbe in 2010. At the same time, democratic space in Uganda has continuously eroded over the last decade as Museveni seeks to hold onto power .[1356]

While the ICC alone did not "legitimize" Museveni, its support for a military solution does lend indirect political support to the UDPF. Thus the Court indirectly supported Museveni's patronage network. As argued by one scholar: "the patronage network that keeps the regime in power requires high military spending and corrupt practices that leave its military prone to violating human rights."[1357] The UPDF, already known for its practices of ghost soldiers and purchasing of "junk helicopters", has been enriching itself through various conflicts in the region, including the LRA conflict.[1358] While donors had put some pressure on Uganda to decrease military spending prior to the ICC arrest warrants, this pressure eased afterwards and European support for the military approach increased.[1359] President Museveni played on this by also involving the UDPF in AU-led military operations against the Al-Shabab movement in Somalia. Thus, "the Museveni regime emerged from the ICC's investigation not only unscathed but with an improved international reputation."[1360]

On 14 December 2008, the joint forces of Uganda, DRC and South Sudan organized a military attack on the LRA known as "Operation Lightening Thunder." The attack came as a surprise to many and meant the effective death of the peace process.[1361] Operation Lightening Thunder was another example of a highly ineffective UDPF operation: airstrikes were carried out by helicopter gunships, as jets could not fly due to bad weather.[1362] Helicopter gunships could be heard approaching, allowing the LRA to escape into the forest. The airstrikes were not followed up by infantry troops until a week later. In any case, Joseph Kony was thought not to be present, perhaps due to advance warnings.[1363] In the weeks after "Operation Lightening

---

[1355] This aid was provided by the UK, Germany, Japanese and US: Bosco, David. *Rough Justice: the International Criminal Court in a World of Power Politics*, Oxford University Press (2014) p. 97.
[1356] International Crisis Group, *Uganda: No Resolution to Growing Tensions*, 5 April 2012.
[1357] Freeland, Valerie. *Rebranding the State: Uganda's Strategic Use of the International Criminal Court. Development and Change*, Institute of Social Studies, The Hague (2015) p. 294.
[1358] Ibid. p. 308.
[1359] Ibid. p. 309.
[1360] Ibid. p. 310.
[1361] Human Rights Watch, *The Christmas Massacres: LRA attacks on Civilians in Northern Congo,* February 2009. Joost van Puijenbroek en Nico Plooijer, *How Enlightening is the Thunder? Study on the Lord's Resistance Army in the Border Region of DR Congo, Sudan, and Uganda*, IKV Pax Christi, (February 2009) at section 12.
[1362] Downie, Richard. *The Lord's Resistance Army,* Center for Strategic and International Studies, 18 Oct. 2011, Center for Strategic and International Studies, csis.org.publication/lords-resistance-army.
[1363]Ibid.

Thunder" the LRA perpetrated the "Christmas Massacres" leading to the deaths of hundreds of civilians in DRC.

Due to the lobbying of different civil society groups in the United States, such as Invisible Children, Enough and Resolve, the United States Congress in May 2010 enacted the Lord's Resistance Army Disarmament and North Uganda Recovery Act, calling on the White House to take steps to eliminate the LRA.[1364] In 2011, Invisible Children released the infamous "Kony 2012" documentary. The YouTube video of Kony 2012 quickly went viral. If the goal was to achieve notoriety for Joseph Kony, this was certainly accomplished: millions of people in the West who might otherwise not know who is Joseph Kony quickly became aware of his existence. Invisible Children argued that this would increase political pressure, which would result in his arrest within 2012.

Victim populations in Northern Uganda however widely rejected the film as a simplistic and naïve account, intended to demonstrate how white people would save the Northern Ugandans from themselves. Merchandise with Kony's name, sold for profit, was interpreted by victims as glorifying him and as an attempt to make money from suffering. In Lira, rocks were thrown at the screen during its viewing,[1365] but Invisible Children decided to proceed with a viewing in Gulu, where the reaction was so hostile that it caused a confrontation between viewers and police in which one person was killed and others injured.[1366] The vehemence with which local populations reacted to the film showed the risks of "irresponsible advocacy".[1367] In the words of Mamdani: "The LRA is given as the reason why there must be constant mobilization, at first in Northern Uganda, and now in the entire region, why the military budget must have priority and now, why the US must send soldiers and weaponry, including drones, to the region … The reason why the LRA continues is that the victims- the civilian population of the area- trust neither the LRA nor government forces.[1368]

The ICC Prosecutor appeared in Kony 2012 in it several times, including in a sequel. In the film and on other occasions the ICC OTP openly lobbied for a special military force, led by the United States, needed to enforce ICC arrest warrants.[1369] At the Review Conference in 2010 the Prosecutor said: "If we care about victims we need to implement the arrest warrants pending since July 2005."[1370] Moreover, its close

[1364]Ibid.
[1365] Rosebell Kagumire in Lira and David Smith in Johannesburg, *Kony 2012 video screening met with anger in Northern Uganda*, The Guardian, 14 March 2012.
[1366] Acholi Times, David Livingston Okumu, Akena Moses & Sam Lawino, *Kony 2012 screening in Gulu leaves one dead and many injured,* 16 April 2012.
[1367] Branch, Adam. *Dangerous ignorance: The hysteria of Kony 2012*, Al Jazeera Opinion, 12 Mar. 2012.
[1368] Mamdani, Mahmood, *What Jason didn't tell Gavin and his Army of Invisible Children*, Daily Monitor, 13 March 2012.
[1369] Branch, Adam. *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press (2011) p. 201.
[1370] [1370]Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Review Conference General Debate. Statement, Kampala (31 May 2010).

alliance with the US was described by Adam Branch as "a Faustian bargain that will be made at the price of the Court's legitimacy, impartiality, and legality.[1371]

B. Libya: From Infatuation to Estrangement

The Libyan referral gave rise to renewed optimism about the role of the Court, both because it was the result of a unanimous Security Council referral, and because it was seemingly welcomed by local actors. The arrest warrant of the International Criminal Court against Muammer Al-Qadhafi in June 2011 came at the end of a 42-year long rule, in which Qadhafi's state security apparatus systematically menaced the population, creating a climate of fear, and acting with absolute impunity.[1372]

The state machinery routinely perpetrated summary executions, disappearances and torture.[1373] It ran a parallel justice system of political courts and 'black hole' prisons for political opponents including Abu Slim and Ain Zara, where hundreds were detained over the years. Any association or activity based on a political ideology contrary to the principles of the Revolution of 1 September 1969 was illegal and punishable by death—which was regularly and visibly enforced.[1374] The most significant atrocity of the Qadhafi era, and one that is imprinted on the Libyan national psyche, was the 1996 mass killing at Abu Slim prison, which may amount to a crime against humanity. Within two days, over 1,200 prisoners were dead. Family members were not informed of the deaths until 2008, when a Benghazi court ruled that authorities must reveal the whereabouts of 33 individuals believed to have died in Abu Slim.[1375] Indeed, the protest sparking the 17 February Revolution 2011 was led by families of the victims. The fact that Abdullah Al-Senussi is one of the key suspects in the Abu Slim prison massacre is one of the main reasons why many Libyans opposed removing him to The Hague.

During the Revolution, it quickly became apparent that crimes within the jurisdiction of the Rome Statue were occurring. Government forces responded to civilian protests with lethal force, firing live ammunition at protestors without warning.[1376] Security battalions used weapons prohibited by certain international

---

[1371] Branch, Adam. *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press (2011) p. 202.

[1372] In addition to crimes committed in Libya, external security services assassinated political opponents abroad (the so-called 'stray dog' policy); and during the 1980s allegedly committed a number of terrorist acts against Western targets, contributing to Libya's international image as a state sponsor of terrorism.

[1373] The Human Rights Committee has noted the large number of documented enforced disappearances and cases of extrajudicial, summary or arbitrary executions in Libya. Considerations of Reports Submitted by State Parties under Art. 40 of the Covenant, Concluding observations of the Human Rights Council, Libya CCPR/C/LBY/CO/4 (15 Oct.- 2 Nov. 2007) para. 14.

[1374] Report of the International Commission of Inquiry to investigate all alleged violations of international law in the Libyan Arab Jamahirya, A/HRC/17/44 p. 21.

[1375] Ibid. p. 22.

[1376] Report of the International Commission of Inquiry on Libya, A/HRC/19/68, 46 pp.52-56.

treaties such as landmines and cluster munitions,[1377] and indiscriminately attacked civilians in al-Zawiya. The government also arrested hundreds in Tripoli, Misrata and the Nafusa Mountains.[1378] Detainees were held in overcrowded shipping containers and warehouses, with poor ventilation, inadequate hygiene facilities and with insufficient food and water provision. Torture by the Qadhafi forces was widespread at facilities in Al-Khums, Al-Qal'a and Yarmuk.[1379]

The ICC Prosecutor produced arrest warrants in the Libyan case with lightening speed, on 16 May 2011, just some ten weeks after the referral. In the press conference the Prosecutor said: "we have strong and solid evidence. We have direct evidence of each of the individuals in crimes. We are almost ready for trial."[1380] The arrest warrants were brief and reflected a simple assertion, i.e. that "a State policy was designed at the highest level of the Libyan State machinery and aimed at deterring an quelling, by any means, including by the use of lethal force, the demonstrations of civilians against Qadhafi's regime which started in February 2011."[1381]

Initially, the ICC arrest warrants found a lot of support from within Libya. Predictably, the regime rejected the arrest warrants, stating that they were a cover for NATO's "illegal" military action, that the ICC was a Western puppet created to pursue African leaders, and that "the leader of the revolution and his son do not hold any official position in the Libyan government and therefore they have no connection to the claims of the ICC against them."[1382] But the Libyan National Transitional Council (NTC), headed by Mustafa Abdel-Jalil and soon recognized by the international community as the legitimate representatives of the Libyan state, welcomed the Prosecutor's arrest warrants.[1383] Immediately, civil society groups in Benghazi and Misrata worked with the NTC legal committee, under the leadership of Mohammed Alagi, to collect evidence for the ICC. There were celebrations in the streets when the arrest warrants were announced. Some commentators say that this was viewed by some as "the beginning of the collapse of the regime."[1384] All of this gave high hopes that Libya would yield easy cases for The Hague. But this was not to be.

[1377]Ibid., p. 149 and Amnesty International, 'The Battle for Libya': Killings, Disappearances and Torture, 13 Sept. 2011, p. 44.
[1378]Ibid., pp. 91-94.
[1379] Ibid., pp. 60-68.
[1380] Andrew Giligan and Bruno Watersfeld, *Libya: arrest warrant sought for Col. Gaddafi, son and intelligence chief*," 16 May 2011 in The Telegraph, UK.
[1381] ICC, Situation in the Libyan Arab Jamahiriya, Public Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 27 June 2011.
[1382] BBC News Africa website, *Libya rejects ICC arrest warrant for Muammar Gaddafi*, 27 June 2011, statement by Mohammed Al-Qamoodi.
[1383] CCTV, *Libya rebels welcome Gaddafi arrest warrants*, 28 June 2011.
[1384] Hayner, Priscilla, *International Justice and the Prevention of Atrocities: Case Study Libya: The ICC enters During War*, ECFR Background paper (November 2013).

1. Lack of Impartiality: The Court's Revolutionaries

It is difficult to know whether ICC arrest warrants had an impact on the ultimate outcome of the conflict, but they had an immediate effect on the morale of revolutionaries, further legitimizing their cause.[1385] The Libyan revolutionaries throughout perceived that the Prosecutor was on "their side." At the same time, the Revolutionaries were implicated in several crimes themselves. The NTC had made a statement that it would adhere to the Geneva Conventions relating to the prisoners of war, and it issued a frontline manual with rules for conduct of armed forces in May 2011.[1386]

The perception that the rebels were immune from the purview of the Prosecutor was strongly reinforced by the Prosecutor's visit to Misrata in April 2012. He was photographed standing on a tank at a NATO bombing site, and paid a visit to the local museum where he left a hand-written letter on display to congratulate the people of Misrata on their brave Revolution.[1387] While the Prosecutor in the Security Council referred to the possibility of holding revolutionaries accountable, this did not seem to penetrate the consciousness of those on the ground.[1388]

Many Libyans were not aware that the ICC jurisdiction continues beyond the conflict and could potentially cover current events. The revolutionaries also moved swiftly to lobby for an amnesty for acts "with the goal of promoting or protecting the revolution," passed by the NTC in May 2002 and known as Law 38. [1389] The amnesty would have covered crimes over which the ICC has jurisdiction. But subsequently the Justice Minister largely undid this amnesty by passing a subsequent law entitled "Criminalization of Torture, Enforced Disappearances, and Discrimination", in April 2013.

Moreover, ICC Prosecutor actively contributed to the perception that Tawerghan fighters raped Misratan women on a wide scale during the Libyan Army's occupation of Misrata in March and April 2011. The Prosecutor seized on this allegation, publically declaring in a press conference on 8 June 2011 that he believed Qadhafi was using rape as a weapon of war and suggesting there were 'hundreds of victims.'[1390] The Prosecutor said that: "By now we are getting some information

---

[1385] Brian McQuinn, *Interviews with local commanders in Misrata,* July to August 2011, cited in Marieke Wierda, *Confronting Qadhafi's Legacy*: Transitional Justice in Libya, in The Libyan Revolution and its Aftermath, ed. Peter Cole and Brian McQuinn, Oxford University Press (2015) pp. 153-176.
[1386] Scobbie, Iain. EJIL: Talk! *Operationalising the Law of Armed Conflict for Dissident Forces in Libya,* 31 August 2011. See Final-Libyan-LOAC-Guidelines-17-May-2011.
[1387] Seen by the author during a visit to Misrata in 2012.
[1388] Hayner, Priscilla, *International Justice and the Prevention of Atrocities: Case Study Libya: The ICC enters During War*, ECFR Background paper (November 2013).
[1389] Libya National Transitional Congress, Law 38 para. 4. See Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016) at p.158.
[1390] Bowcott, Owen. *Libya mass rape claims: using Viagra would be a horrific first,* The Guardian, 9 June 2011. See also, Prosecutor of the ICC, Statement to the United Nations Security Council on the

that Qadhafi himself decided to authorize the rapes and this is new. It never was the pattern he used to control the population. The rape is a new aspect of the repression. Apparently he decided to punish using rape."[1391] The Prosecutor also said there was evidence of containers of "Viagra-type medicaments" being handed out to "enhance the possibility to rape women"[1392], which in his words were "confirming the policy."[1393] In another news report he referred to Viagra being used "like a machete. It's new. Viagra is a tool of massive rape. So we are investigating. We are not ready to present the case yet, but I hope in the coming month, we'll add or review the charges for rape."[1394] The Prosecutor followed up with a visit to Misrata on 20 April 2012 where he spoke about looking for evidence of systematic rape without identifying the victims.[1395] These allegations were made by Libyan activists, who suggested that thousands of rapes occurred. For instance, Seham Sawergha said that she personally interviewed 140 women who said they had been raped by Qadhafi forces. She gathered 50,000 responses to a mental health questionnaire in refugee camps in Tunisia and Egypt, including 295 responses of rape, but that she "lost contact" with the victims.[1396] She shared her findings with the ICC.

However, the charges of rape were not added to the arrest warrants published on 27 June 2011, and have not been added to this day. The head of the International Commission of Inquiry, Cherif Bassiouni gave an interview in June 2011 stating: "People are accusing each other of a policy of rape ... It is more of a hysterical social reaction. We have no evidence of it."[1397] An Amnesty International representative, Donatella Rover, who was in Libya during the conflict investigating violations later said that Benghazi rebels had made false claims or manufactured evidence. She had been shown Viagra in Benghazi, by Revolutionaries, allegedly from charred tanks, even though it was unclear why the packets were not charred.[1398] Human Rights Watch seconded the absence of evidence for rape.[1399]

---

situation in Libya, pursuant to UNSCR 1970 (2011), 2 Nov. 2011 at para. 14: "While it is premature to draw conclusions on specific numbers, the information and evidence indicates at this stage that hundreds of rapes occurred during the conflict."

[1391] Bowcott, Owen. *Libya mass rape claims: using Viagra would be a horrific first*, The Guardian, Thursday 9 June 2011.

[1392] Ibid.

[1393] UN News Center, *Evidence Emerging of Use of Rape as Tool of War in Misrata*- ICC Prosecutor, 8 June 2011.

[1394] Sara Sidner and Amir Ahmed, *Psychologist: Proof of hundreds of rape cases during Libya's War,* CNN, 23 May 2011.

[1395] "*ICC Prosecutor Visits Libya's Misrata to Investigate Mass Rapes.* www.utube.com/watch?v=uWCAZrlHw. "

[1396] Sara Sidner and Amir Ahmed, "*Psychologist: Proof of hundreds of rape cases during Libya's War,* CNN 23 May 2011. See also Cockburn, Patrick. *Amnesty questions claims that Gaddafi ordered rape as a weapon of war*. The Independent, 24 June 2011.

[1397] Harding, Andrew. *Libya rape claims: Seeking the Truth,* 10 June 2011 Http://www.bbc.co.uk/news/world-africa-13725149.

[1398] Cockburn, Patrick. *Amnesty questions claims that Gaddafi ordered rape as a weapon of war.* The Independent, 24 June 2011.

[1399]Ibid.

Even after the conflict, no conclusive evidence of widespread rape in Misrata has emerged. The Commission of Inquiry reported in March 2012 that "the Commission recognizes the unique difficulties of confirming incidents of sexual violence in Libya. The Commission, however, received no substantiated information indicating that individual Tawergha or organized groups of Tawergha men raped women in Misrata or elsewhere.[1400] A report on Conflict-Related Sexual Violence presented to the Security Council in January 2012 was similarly inconclusive, but found cases of rape against both men and women during the conflict.[1401] While the absence of information itself is not conclusive, it suggests that initial reports on rapes in Misrata were likely exaggerated and used to gain legitimacy for the Revolution. These allegations have, however, entrenched themselves in the Libyan public consciousness and led to widespread retaliation against the Tawerghan community, resulting in massive displacement, arbitrary arrest, torture and retaliatory killings.

To add a further complication, a climate of vengeance, the revolutionaries themselves committed a number of serious violations in their struggle to rid themselves from the former regime, including the killing of Qadhafi himself, his son Muatasim and chief of staff.[1402] At the Mahari Hotel in Sirte, on 20 or 21 October 2011, an estimated 65 to 78 bodies were discovered, some with their hands bound, with civilian residents mixed in among members of Qadhafi's close protection unit.[1403] In addition, thousands of perceived loyalists, including former security sector and government employees, were rounded up and placed in arbitrary detention. Many were kept in poor conditions, mistreated, and denied access to medical facilities and to judicial authorities, and remain detained unto this day. Revolutionary fighters also committed revenge killings of former regime members—Revolutionary Committees, Revolutionary Guards and the Internal Security Agency.[1404] Cases of torture and deaths in custody were frequent, as reported by UNSMIL.

HRW addressed a letter to the Misrata Local Council by Human Rights Watch in April 2012, which stated that armed groups from Misrata may have committed crimes against humanity and that "senior officials, such as yourself, could be held criminally responsible for ordering these crimes, or for failing to prevent or punish them, by courts including the International Criminal Court (ICC) in The Hague."[1405]

[1400] Report of the International Commission of Inquiry on Libya, A/HRC/19/68, p. 122.
[1401] Report of the Secretary-General on Conflict-Related Sexual Violence, 13 January 2012, A/66/657-S/2012/33 pp. 11- 12: "It is, however, too early to determine whether security forces of the former Qadhafi regime and its followers had received orders to carry out rape against women, men and children during the conflict."
[1402] Human Rights Watch, *Death of a Dictator: Bloody Vengeance in Sirte,* October 2012.
[1403] Report of the International Commission of Inquiry on Libya, A/HRC/19/68, pp. 78-79.
[1404] Amnesty International, *The Battle for Libya: Killings, Disappearances and Torture* (2011), pp. 72-73.
[1405] Human Rights Watch, *Letter to Misrata Councils Regarding Serious Crimes by Armed Groups*, 9 April 2012.

HRW particularly referred to abuses in detention facilities. Nearly 3000 conflict-related detainees were being held in Misrata at the time. This letter caused much nervousness among those in charge of detentions in Misrata that they would be prosecuted by the ICC.[1406]

More substantial vengeance was meted out against the Tawerghans, and other ethnic and 'tribal' communities allegedly associated with the regime.[1407] Tawerghans relocated to Benghazi, Tripoli and Al-Khoms, living in IDP camps or with host families.[1408] In late 2012, a short, GNC-mandated conflict was waged against Bani Walid, a perceived Qadhafi stronghold, resulting in the death of civilians and destruction of property. The crimes committed in the name of the "liberation" posed a challenge for the ICC because any investigation of these crimes would pit them directly against the new Libyan authorities. The OTP on multiple occasions highlighted these issues in its reports to the Security Council, referring to the plight of the conflict-related detainees, the Tawerghans, and the attack against Bani Walid. [1409] But Security Council members showed no appetite to put further pressure on Libya, either in respect of non-cooperation or for investigating post-Revolution crimes. The vast majority of these detainees remained in custody before Libya erupted into further violence in 2014, leading to yet further violations.[1410]

By mid-2014, Libya had split into two competing camps, known as Operation Dignity (*karama*) and Operation Dawn (*fajr*). In a report of September 2014, the UN Mission (UNSMIL) accused all sides of war crimes, including indiscriminate shelling; abductions, torture and extrajudicial killings or disappearances; destruction of civilian objects. It proved very difficult for the ICC to conduct further investigations in Libya, due to the security situation and constraints on its resources, but the investigations have reaped some results.

In 2017 Der Spiegel published articles about emails from the former Prosecutor, which shed light on his involvement in the Libya case both prior to and after his stepping down. Der Spiegel wrote that during the time of the NATO attack on Libya, in April 2011, the Prosecutor (at the time) shared information with the French about who he was going to indict, and also described Moussa Kousa in a letter to the British as a "cooperating witness" who should not be indicted. Furthermore, after he left office, in 2015, Ocampo accepted a contract from Hassan Tatanaki, a Libyan business man and oil tycoon, who runs various radio stations. The goal of the contract was to pursue "Justice First" in Libya through investigating terrorists and sharing information with the local courts and the ICC. The value of the contract was

---

[1406] At the time, the author was serving in UNSMIL's Human Rights Section. Several of the commanders spoke to UNSMIL, voicing concern that it was sharing information with the ICC.
[1407] International Commission of Inquiry on Libya, A/HRC/19/68, p. 122.
[1408] Ibid. pp. 122-130.
[1409] Statement of the Prosecutor of the International Criminal court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya pursuant to UNSCR 1970 (2011), New York 14 Nov. 2013.
[1410] United Nations Support Mission in Libya, *Torture and Deaths in Detention in Libya*, Oct. 2013.

an extraordinary $3 million dollars for 3 years (plus a daily allowance of $5000 a day). However, some time into his assignment a former employee warned the former Prosecutor that General Haftar's air force commander had used Tatanaki's radio station to say that all Haftar's opponents should be "slaughtered as traitors." Furthermore, a current employee warned him about Tatanaki's role in support of the regime during the uprising in 2011. Der Spiegel alleges on the basis of communications it obtained that Ocampo wrote to Tatanaki's employee, urging that Tatanaki should ensure that "Haftar is neither committing nor inciting to commit crimes" and that it should be "impossible to conclude that Hassan and his channels are supporting crimes." The former Prosecutor's contract ended after an initial payment for $750K, for unknown reasons, but it is believed that he orchestrated a meeting in The Hague between Tatanaki and ICC staff.[1411] The undeniable impression will be that the Libyan tycoon was buying Ocampo's influence with the ICC, and that Ocampo took steps to shield him from investigation. While this impression should be limited to the conduct of a few individuals, in the eyes of the Libyan public the institution is likely to be tainted by this episode.

In April 2017, the ICC unveiled an additional arrest warrant for another Qadhafi-era official, ex-security chief Mohammed Khaled al-Tuhamy, a warrant that had been kept under seal since 2013. In August 2017, the ICC issued an arrest warrant against *Saiqa*- commander Mahmoud Mustafa Busaif Al-Werfalli, associated with General Haftar, a man who had been filmed on several occasions executing prisoners in Eastern Libya.[1412] Al-Werfalli is not a central character in events in Libya.

In 2018, a communiqué of a conference held in Gheryan expressed the following views about the ICC:

> The ICC has used … the "double standard justice" in practicing its jurisdiction *vis à vis* the committed crimes. While the measures taken by the Public Prosecutor - and led to the issuance of three warrants of arrest against those who were at the top of the regime - were considered very fast as they were issued during only four months following the date of the referral, the ICC did not take any action afterwards except issuing two other warrants of arrest despite the high volume of crimes committed by the Libyan conflicting groups during the years following the issuance of referral.[1413]

[1411] Spiegel Online, Sven Becker, Marian Blasberg, Dietmar Pieper, *The Ocampo Affair: The Former ICC Chief's Dubious Links*, 5 Oct. 2017.
[1412] *Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli,* ICC-01/11-01/17.
[1413] Communiqué of Gheryan Conference on the Role of the UN following the Military Intervention in Libya in 2011, 21-22 Feb. 2018, on file with the author.

2. Lack of Legitimacy: Divergences between the Libyan and International Agendas

Although there was general support from the NTC for the ICC arrest warrants at the time they were issued, from an early stage Libyans maintained that Qadhafi ought to be tried in Libya if he were to be tried at all.[1414] His death at the hands of a Misrata brigade on 20 October 2011 rendered the question moot.[1415] While Qadhafi's death was condemned outside of Libya, in Libya there was virtually no protest. While the NTC promised to investigate his death, no such investigation was instigated. But the intransigence of the Libyan authorities only became apparent when Saif Al-Islam was arrested on 19 November 2012.

The Prosecutor immediately traveled to Libya to try to persuade the Libyans to surrender him to the ICC. But the Chairman of the NTC, Abdel-Jalil told him that the Libyan authorities wanted to seize the opportunity to do justice in Libya, to prove how the new regime was different from Qadhafi.[1416] As stated by the Prime Minister at the time, Abdurahhim Al-Keib: "We intend to project the real image of the new Libya."[1417] The Prosecutor essentially ended up agreeing that the Libyans should be allowed conduct the case themselves, although this was in fact for the Pre-Trial Chamber to decide.

On 22 April 2012, Libya field an admissibility challenge before the ICC, arguing that it had opened its own investigation against Saif Al-Islam ands should be allowed to proceed. The collision course with the ICC escalated further over the arrest of Abdullah Al-Senussi at the airport in Nouakchott on 17 March 2012. After protracted negotiations involving several countries, Abdullah Al-Senussi was extradited from Mauritania to Libya. His extradition was viewed as highly significant in the eyes of many Libyans, who view him as a key lynchpin in the Qadhafi regime. On 6 February 2012, Pre-Trial Chamber I of the ICC issued a decision ordering Libya to surrender him to the ICC, this was not generally well perceived in Libya, and there was no public support for the authorities to hand him over. In addition to Saif and Senussi, the post-2011 Libyan authorities had a large number of high-level former regime figures in custody.[1418] These were eventually brought to trial before a Libyan court, as described in Chapter 3.

[1414] Dina Al-Shibeeb and Mustapha Al Baili, *Rebels welcome ICC arrest warrants for Qaddafi, as explosions rock Tripoli,* 16 May 2011, Al Arabiya website.
[1415] Human Rights Watch, *Death of a Dictator: Bloody Vengeance in Sirte*, October 2012. Human Rights Watch attributed his death to an unclear combination of shrapnel wounds, beatings, and gunshots.
[1416] International Bar Association, Webcat Interview with ICC's Former Prosecutor, Luis Moreno Ocampo, October 2012.
[1417] Zain Verjee, *Libya has "great evidence" against Gadhafi's son, ICC Prosecutor Says*, CNN, 19 April 2012.
[1418] These included instance Baghdadi al-Mahmoodi, former Prime Minister; Abu Zaid Dorda, former Chief of External Intelligence and Libyan Permanente Representative to the United Nations; Abdel-Ati al-Obeidi, the former foreign minister; and Bilqasim al-Zwai, former head of parliament, as well as senior advisors Mansur Daw; Ahmed Ibrahim, Qadhafi's cousin; and many others

Due to the particularities of its history, including years of isolation from the outside world during the Lockerbie sanctions, Libyans are suspicious of foreigners, who are frequently accused of spying (as in the case of Melinda Taylor). The rhetoric of sovereignty is strong in Libya, and particularly immediately after the Revolution, Libya was keen to assert its jurisdiction as a new state. The Court neither had a presence nor had it conducted any outreach in Libya.

Libyans are aware that foreign intelligence agencies take a strong interest in Abdullah Al-Senussi because of his potential knowledge on involvement in terrorist acts such as the Lockerbie bombing. Several foreign intelligence agencies sought access to Senussi, including from the US and UK. Many Libyans presumed that the ICC is linked to these foreign intelligence agencies and that they want to take custody of Senussi so as to facilitate foreign access to him. The depth of Libyan suspicion was demonstrated when a battalion in Zintan detained four members of the Court's Office of Public Defence Counsel and the Registry in early June 2012, an incident described in Chapter 2.

3. No Negotiations or Exile for Al-Qadhafi Due to ICC

The arrest warrants in Libya were perceived by actors other than Libyans to complicate a peaceful settlement of the conflict by narrowing Qadhafi's chances of escape. In Libya itself, these perceptions did not play a big part, since the revolutionaries in Libya made it clear from the outset that they were out to topple the regime and would not accept clemency for regime members.

Nevertheless, in July 2011, when the situation looked as if it was headed for a stalemate, both the UK and France publicly flirted with the idea that Qadhafi may be able to remain in Libya if he agreed to leave power, but this idea remained hypothetical, particularly after the fall of Tripoli in late August.[1419] This seemed to indicate that all possibilities remained on the table. Several states are said to have offered asylum to Qadhafi including Uganda, Chad, Malawi, Venezuela, and Zimbabwe.[1420] NATO was reported to have approved his exile to a non-ICC member state.[1421] But there is no evidence that any of these deals were seriously considered by Qadhafi himself, who continuously declared he would die a martyr in Libya,[1422] and diverted to Sirte after the fall of Tripoli. "We have plans A, B, and C. Plan A is to

---

[1419]Booth, Willliam. *France: Gaddafi could possibly stay in Libya,* Washington Post, 20 July 2011; Theo Usherwood, *Gaddafi must relinquish power says William Hague,* The Independent, 26 July 2011. Cited in Hayner, Priscilla, *International Justice and the Prevention of Atrocities: Case Study Libya: The ICC enters During War*, ECFR Background paper, November 2013.

[1420] Smith, D. *Where could Colonel Muammar Qadhafi go if he were exiled*, The Guardian, 21 February 2011. See Kersten, Mark. *Between Justice and Politics: The International Criminal Court's Intervention in Libya, available* online.

[1421]Kersten, Mark. *Between Justice and Politics: The International Criminal Court's Intervention in Libya,* available online.

[1422] Black, Ian. *Gaddafi urges violent showdown and tells Libya I'll die a martyr,* The Guardian, 22 February 2011. See also Kersten, Mark. *Between Justice and Politics: The International Criminal Court's Intervention in Libya,* available online.

live and die in Libya. Plan B is to live and die in Libya. Plan C is to Live and Die in Libya," Saif Al-Islam had said to the CNN in late February.[1423] In fact, even at the time of his capture and death at the hands of a Misrata brigade, Qadhafi showed bewilderment at his treatment to the moment he was killed.

Some argue that the ICC arrest warrants complicated potential attempts to mediate the conflict by the African Union, but this is debatable.[1424] It is not clear to which extent the rebels trusted the AU, considering Qadhafi's history within it. The AU had declared in early July 2011 that the ICC arrest warrants would not be implemented in its member states.[1425] Nonetheless, the AU attempts to negotiate were not given much weight by France, Britain and the United States.[1426] Alex de Waal concluded:

> The AU was not able to convince Libyans, Africans, or the world that it was a credible interlocutor for peace in Libya. Africa did not present a united position, and did not provide the financial, military or diplomatic resources necessary for the AU initiative to appear a genuine alternative, let alone to prevail. This is particularly regrettable because the AU's diagnosis of the Libyan conflict was fundamentally correct. This conflict was both a popular uprising against a dictatorship and a civil war within a patronage-based political order, with regional repercussions.[1427]

At the same time, the ICC intervention, especially the speed of issuing the arrest warrants, were very much aligned with a military solution in the Libyan context. NATO was in open support of the arrest warrants, because they gave credence to the official NATO line that the intervention in Libya aimed to protect civilians, and that the regime could not stay in place:

> All the evidence that the Prosecutor has gathered is a stark reminder of why NATO is conducting operations in Libya- to protect civilians against what the prosecutor described as crimes against humanity perpetrated by the Qadhafi regime … It is hard to imagine that a genuine transition in Libya can take place while those responsible for widespread and systematic attacks against the civilian population remain in power.[1428]

C. Colombia and the ICC: Separate but Symbiotic

[1423] UK Telegraph, *Gaddafi's son: our plan is to "live and die" in Libya*, 25 Feb. 2011.
[1424] Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016) p. 140-141.
[1425] African Union, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. EX.CL/670 (XIX)", Assembly/ AU/ Doc 366(XVII), 1 July 2011, para. 6.
[1426] Alex de Waal, *African Roles in the Libyan conflict of 2011,* Chatham House (March 2013).
[1427] Ibid.
[1428] NATO Spokesperson Oana Lungescu and with Wing Commander Mike Bracken, the Operation Unified Protector Spokesperson, "Press briefing on Libya", 17 May 2011.

Colombia and the ICC have a curious relationship. Each provides a key to the other's success. For the Court, Colombia is the prime example of "positive complementarity." Conversely, Colombia takes pride in being the first to resolve its conflict within the international legal framework laid out by the Court. But both seek to keep their distance from the other, and to maintain separation in their symbiosis.

Colombia was an active participant in the negotiations on the Rome Statute and the Elements of Crimes, and was among the first 60 states to become a State party. In 2001it filed an exception to the Court's jurisdiction on war crimes, under Article 124 of the Rome Statute, which expired in 2009. At the same time, much of the Colombian conflict is outside of the scope of the ICC.

The fifty- year old Colombian conflict is highly complex and involves multiple actors, including the state and Colombian army, fighting different guerilla forces (FARC, ELN, M19 and several others), but also involving paramilitary forces, deployed to fight guerillas and protect the interests of wealthy landowners; narco-traffickers (linked to all sides); and politicians or state actors that relied on paramilitary forces to protect their interests. Due to the weakness of the central States, various groups compete over resource-rich and drug-producing areas of the country.[1429]

The late Colombian author Gabriel Garcia Marquez referred to the conflict in Colombia as "a biblical holocaust." The fifty years of violence generated millions of victims. According to a 2013 Report of the Colombian Center for Historical Memory, around 220,000 persons have been killed in the conflict in Colombia; 23,154 were assassinated (with 40% of these killings by paramilitaries, 16.8 % by guerillas, 27% unattributed, and 10% by public security forces); and 4.7 million were internally displaced (this number has since been revised upwards to 7 million by UNCHR). Other hallmark violations included kidnappings, mostly by the FARC (27,023); deaths or amputations from anti-personnel land mines (10,189); and recruitment of children (6400). No figures were given for forced disappearances and sexual violence. [1430] The violence disproportionately affected indigenous communities, groups of African descent, and the poor.[1431] Those who were displaced often moved to the cities, settling in slums.[1432]

Land issues are a fundamental source of conflict in Colombia. Roughly one percent of the population owns 50% of the cultivatable land. Displacement is a hallmark of the Colombian conflict and largely affected poor populations in rural areas. In the last 30 years, victims of the conflict were forcibly dispossessed from an estimated

[1429] Summers, Nicole. *Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?* 25 Harvard Human Rights Journal (2012) p. 221.
[1430] Historical Memory Center, *Basta Ya! Colombia: Memorias de Guerra y dignidad* (Enough Already! Colombia: Memories of War and Dignity, July 2013.
[1431] Summers, Nicole. *Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?* 25 Harvard Human Rights Journal (2012) p. 221-222.
[1432] Ibid. p. 223.

12.6% of Colombia's agricultural land by guerillas, paramilitaries or other armed actors.[1433] Some of the land was taken by large multinational companies who themselves cultivated links with paramilitary groups or the FARC and contributed to human rights violations.[1434]

Since the enforcement of Alvaro Uribe's Democratic Security Policy, the FARC is thought to have decreased in size from around 15,000 combatants to around 6,000. Zuluaga's party says that it does not favor a continuation of the war, but that combating illegal armed groups is a Constitutional obligation, and that it must protect the country against acts of terrorism. Only recently, under the Santos administration, has the Government of Colombia recognized that the conflict as an internal armed conflict in legal terms. Political recognition was given to the FARC and ELN by the Pastrana government in 1998, but the FARC's ability to participate in politics was only decided as part of the Havana negotiations.[1435]

1. Local Priorities: Negotiated Justice

Much of the Colombian debate on justice has focused on fashioning "judicial benefits" in ways that incentivize armed actors to demobilize and integrate into political life. Discussions on accountability were trapped a transactional dynamic about what benefits perpetrators could expect in return for an agreement to surrender to a measure of justice. In *News of a Kidnapping*, Gabriel Garcia Marquez describes the negotiations of the Colombian government with drug-lord Pablo Escobar and his "Extraditables" already in the 1990s.[1436] This dynamic led to the innovation of many different transitional justice mechanisms within a judicial framework in the context of Colombia, including the Justice and Peace Law (Law 975). It also created increased awareness of transitional justice among the general population and led to improvements in the status of victim's rights.[1437]

In the late 1980s and the early 1990s, the Government concluded a peace process with the M19. Some members of M19 participated in the drafting of Colombia's Constitution of 1991, which contains several references to the right to peace.[1438] The Constitution also gave Congress powers to grant amnesties and pardons to political offenders and empowered the government to grant individual pardons.[1439]

[1433] Ibid. p. 222.
[1434] See for instance Business and Human Rights Resource Centre, *"Case profile: Chiquita lawsuits."*
[1435] Chetman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial,* DOMAC (17 Oct. 2011) p. 13.
[1436] Garcia Marquez, Gabriel. *News of a Kidnapping.* Vintage International (1997).
[1437] De Greiff, Pablo. *Strategic Challenges of the Justice and Peace Law*, 23 August 2011 at the conference in Sweden on "Selection or Prioritization as a Strategy for Prosecuting International Crimes."
[1438] Colombia Constitution Art. 22: "Peace is a right and a duty of which compliance is mandatory."
[1439] Maldonado, Silvia Delgado. *Political Participation: An Implied Condition for Enduring Peace in Colombia, International Law:* Rev. Colomb. Derecho Int. Bogota (Colombia) No. 23 pp. 267-318 (July-December 2013) at p. 308. These provisions allowed for a series of laws, passed by Colombia's

M19 members ran for politics.[1440] Many of the same concepts continued to be used in Colombia, including in negotiations with the paramilitaries, resulting in Law 975/05 and the Legal Framework for Peace.

Prosecutions for serious crimes by illegal armed groups are generally supported by the public in Colombia. One opinion poll conducted among urban Colombians by NGOs in 2006, during the enforcement of the Justice and Peace Law, suggested that the urban population supports dialogue with illegal armed groups, 63% supported criminal prosecutions of members of illegal armed groups, and not just the leaders, 75% thought that armed groups ought to be tried an punished, and even more (76%) thought that guerillas should be tried and punished. In general, only around one third of the population supported pardons for the FARC or guerillas. Up to fifty percent favored punishments to be included in the criminal law without special legal benefits for illegal armed groups. In another poll taken in 2012, most respondents (70%) said that the crimes of guerillas and paramilitaries were both serious and should both be severely punished. The Justice and Peace law enjoyed significant support among the population, particularly because of the central role of the criminal justice system. [1441] Part of the reason why the Colombian public voted against the Havana peace deal with the FARC in a plebiscite held on 1 Nov. 2016 was due to its perceived lenience in not handing prison terms to the FARC.

As part of the peace process with the FARC, Colombians have expressed interest in instituting comprehensive truth-seeking as a missing part of transitional justice. Until the Havana Agreement, no comprehensive truth-seeking had been instituted in the Colombian context.[1442] Another local priority is reparations for victims. Until

---

Congress, that allow for peace negotiations with guerrilla groups, including Law No. 104/93 and Law 418/ 97.

[1440] Maldonado, Silvia Delgado*. Political Participation: An Implied Condition for Enduring Peace in Colombia,* International Law: Rev. Colomb. Derecho Int. Bogota (Colombia) No. 23, pp. 267- 318 (July-December 2013) p. 304.

[1441] Respondents were roughly equally divided between offering incentives to members of paramilitary groups and guerillas to demobilize them, and seeking to defeat them militarily. While most respondents favored sending paramilitaries to jail (48%), an important percentage favored legal benefits in exchange for truth and reparations (39%) and a minority (12%) favored freedom in exchange for truth and reparations. Centro de Memoria Historica, Organizacion Internacional Para Las Migraciones, Unidad de Atencion y Reparacion Integral a Victimas y Universidad de Los Andes, ?Que pensan los colombianos despues de siete anos de Justicia y Paz? Encuesta Nacional, Bogota, 2012. www.centrodememoriahistorica.gov.co/descargas/ informes2012/encuesta.pdf.

[1442] While the Center for Historical Memory plays an important role in collecting and publishing information on the conflict, its role is limited to generating "knowledge" rather than "acknowledgement" of violations. Other initiatives included the use of *version libres* as part of the Justice and Peace law, and in inquiry into the M19 "Palace of Justice" siege. Also, Law 1424 (2010) allows paramilitaries in "legal limbo" in Colombia, accused of "non-serious crimes", to seek to have their sentences suspended (indefinitely) if they participate in truth-seeking. These paramilitaries can agree to give a statement to the Center for Historical Memory in which they (1) give confirmation that they were with a paramilitary movement; (2) give the context of their participation and (3) give information of the crimes they know about. In return, none of the information can be used against them, their paramilitary structure or family or close friends. In return, they will not go to prison. They may also be required to give a statement of basic information to the *Fiscalia*. In 2014, the Center

the passage of the Victims and Land Restitution Law in 2011 (Victims Law or Law 1448), [1443] the main avenue to make reparations available for victims was the Justice and Peace law. However, out of the 410 000 victims who registered, only 1400 received reparations under the law. This prompted the passage of a new law, Decree 1290 (2008), which establishes an administrative reparations scheme. Difficulties with that scheme in turn prompted the passage of Law 1592, which provides that victims (for crimes since 1985) should seek reparations under the Victims Law.[1444] The Victims Law is being implemented, but was broadly criticized for constituting a transitional justice measure applied in an ongoing armed conflict.[1445]

At the same time, Colombia is a context where many transitional justice measures are being pursued simultaneously. The number of victims of different kinds of violations, by different perpetrators, poses a challenge for the ICC in terms of scope and complexity. The Court deliberately stayed in the shadows in Colombia, a role that many Colombians agree has been useful. The utility of the Court may be seen as an instrument to guarantee non-repetition, rather than as a tool for investigation, prosecution and punishment.[1446]

The political origins of the conflict led to a strong polarization of the society.[1447] The conflict has a strong urban-rural divide, with the violence being barely

---

for Historical Memory had signed around 8300 agreements and gathered up to 2500 testimonies from paramilitaries. However, the procedure does not link to their integration so that it can be difficult to track them down. No witness protection is offered under the system. Some of the paramilitaries are subsequently revealed to have committed serious crimes, but the process provides confidentiality so that the Center for Historical Memory is not required to refer them to the Fiscalia. Interview with Staff Member, Center for Historical Memory, Bogota, 16 May 2014.

[1443] Victims included are broadly defined to include victims of human rights and IHL violations since 1985, and encompass those who disappeared, were murdered, or suffered other serious violations, as well as those who were displaced. Unlike in the Justice and Peace law, there is no need to demonstrate perpetrator responsibility to qualify as a victim. Victims may be granted damages; restitution of prior living conditions; social services; and special protections in legal proceedings. Victims of displacement may be entitled to land restitution (both physical and legal) or, if that is not possible, compensation. In the Victims Law, once a victim raises a complaint the burden of proof of landownership "inverts" to the landowner to show that the land was lawfully obtained. Various symbolic measures of reparations re also included in the law. The Victims Law also seeks to regulate corporate land purchases and holds corporations responsible for their role in human rights violations by paying into a Victim's Reparation Fund. At the same time, it is not clear that the Victims Law can deliver on security; on social services for victims at the local level, or that it contributes to truth-seeking. Summers, Nicole. *Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?* 25 Harvard Human Rights Journal (2012) p. 225-235.

[1444] International Crisis Group, *Transitional Justice and Colombia's peace Talks,* Latin America Report No. 49, 29 August 2013 at p. 5. This law is still under review by the Constitutional Court.

[1445] Maldonado, Silvia Delgado. *Political Participation: An Implied Condition for Enduring Peace in Colombia*, International Law: Rev. Colomb. Derecho Int. Bogota (Colombia) No. 23, pp. 267-318 (July-December 2013) p. 270.

[1446] Interview with Congressman Alviro Uribe, Bogota, 14 May 2014.

[1447] Saffon, Maria Paula and Rodrigo Uprimny, *Uses and Abuses of Transitional Justice in Colombia*, PRIO Policy Brief 6 (2007).

noticeable in Colombia's urban centers in recent years, as it is restricted to remote rural areas. Supporters of former President Uribe and the Central Democratic Party favored lenience for paramilitaries and military, but warned that there should be "no impunity" for the FARC. Conversely, those who support the peace process or who have leftist leanings are more willing to promote lenience for the FARC, arguing that it is a political actor, but argued that the Justice and Peace Law was too lenient.

Both camps have used the ICC and international legal standards to argue in their favor. Human rights groups argue that the ICC should have intervened during the Justice and Peace law era, because the outcomes of the law were so limited as to warrant ICC intervention on a finding of "unwillingness." Conversely, those who oppose lenience for the FARC in the peace process in Havana are quick to cite the existence of the ICC in favor of arguing that such lenience is not legally permissible.[1448]

2. The Court in Colombia: El Salvador or "El Coco"?

In Colombia, many elites know about the ICC, because of the prominent debates around the peace negotiations with the FARC in Havana. Even among persons from rural or remote areas affected by the conflict. On 7-8 November 2013, the Ministry of Justice in Colombia held a round of consultations with around 170 victim representatives from all over Colombia. Victim representatives interviewed in the margins of the conference generally had rudimentary knowledge, but a positive view of the ICC.[1449] They said that they had lost faith in Colombian justice and the government, and expressed hope that the Court could apply pressure to prompt the national justice system to do more.[1450] A number of victim representatives said they do not feel adequately protected in Colombia,[1451] that the Colombian system is not able to deal with government actors, the military and paramilitaries, and drug traffickers, and that investigations generally stop at the lower levels.[1452] One victim said that the role of the ICC is important to deal with crimes that could not be judged or sentenced adequately under Colombian law, such as crimes against

[1448] Interview with Alejandro Ordonez, Bogota, Inspector General, 15 May 2014; Interview with Carlos Holmes Trojillo, Vice Presidential candidate, Bogota, 16 May 2014.
[1449] Out of the 9 victims interviewed, eight spoke positively of the Court. One had not heard of it: Interview with victim representative from Santander, Bogota, 8 Nov. 2013. See e.g. Interview with victim representative from Tolima, Bogota, 8 Nov. 2013.
[1450] Interview with victim representative from Choco, Bogota, 7 Nov. 2013. Interview with victim representative from Amazonas, Bogota, 7 Nov. 2013. Interview with victim representative from Choco/ Medellin, Bogota, 8 Nov. 2013. Interview with victim representative from Riohacha, Bogota, 8 Nov. 2013. Victim representatives said that they do not trust the public defenders or regional prosecutors, or even the Ministry of Justice, which had invited them to the conference.
[1451] Interview with victim representative from Choco, Bogota, 7 Nov. 2013. Interview victim representative from Choco/ Medellin, Bogota, 8 Nov. 2013.
[1452] Interview with victim representative from Neiva, Bogota, 8 Nov. 2013; Interview with victim representative from Caldas, Bogota, 8 Nov. 2013.

humanity or disappearances.[1453] Victim representatives expressed hope that the ICC would open an office in Colombia, so that they could have direct contact with the Court, [1454]and show the Court "the reality of what is happening in the country, since the government does not show the full truth."[1455] Some victim representatives said that the functions and operations of the Court are not advertised, and that "the mechanism to contact them is not known".[1456] The victim representatives that had heard of the Court had only heard about it indirectly, via the media, and had never met a Court representative.[1457] Some had the impression that the Court meets only with the government.[1458]

As described in Chapter 3, judges of various courts in Colombia have referred to ICC jurisprudence in their decisions. At the same time, misperceptions are common even among judicial actors. For instance, the Prosecutor-General had been known to say that the ICC could prosecute disappearances that predate the Rome Statute, under the doctrine of continuous crimes.[1459] Some members of the judiciary are said to "fear" judicial oversight by the ICC. Some NGOs perceive of the Court as a "paper tiger" after its refusal to intervene in the Justice and Peace process, in spite of the many communications that were submitted to it.[1460] Even Constitutional Court judges expressed fears that if they would make a decision that goes against the opinion of the ICC Prosecutor, they could themselves be accused in The Hague of promoting impunity.[1461]

Ordinary Colombians have no detailed awareness of the Court's structure or functions. For instance, many accepted at face value President Uribe's announcement that he had referred Hugo Chavez to the ICC. At the same time, Colombians have a strong perception of their own country as a modern nation that is governed by the rule of law. This self-perception strongly contributes to a motivation to escape external review by various international courts and tribunals, such as the IACHR and the ICC.

Some actors in Colombia have trouble distinguishing between the difference in roles of the Inter-American Court and the International Criminal Court, and generally may perceive their roles as similar.[1462] The former Prosecutor, Luis Moreno Ocampo often featured in the Colombian media as commenting on Colombia's legal

---

[1453] Interview with victim representative from Caldas, Bogota, 8 Nov. 2013.
[1454] Interview with victim representative from Choco, Bogota, 7 Nov. 2013; Interview with victim representative from Amazonas, Bogota, 7 Nov. 2013.
[1455] Interview with victim representative from Amazon, Bogota, 7 Nov. 2013.
[1456] Interview with 2n victim representative from Amazonas, Bogota, 7 Nov. 2013.
[1457] Interview with 2nd victim representative from Amazonas, Bogota, 7 Nov. 2013. Interview with, victim representative from Tolima, Bogota, 8 Nov. 2013.
[1458] Interview with 2nd victim representative from Amazonas, Bogota, 7 Nov. 2013.
[1459] Interview with OHCHR representative, Bogota, 9 Nov. 2013.
[1460] Interviews in Bogota, May 2014.
[1461] Anonymous, Bogota, 10 Nov. 2013.
[1462] Interview with OHCHR representative, Bogota, 9 Nov. 2013.

system.[1463] Likewise, the leaked letters of the Prosecutor to the Constitutional Court of Colombia were seen as an exercise of "advisory capacity" similar to the role of the Inter-American Court.[1464] Moreover, the ICJ litigation between Colombia and Nicaragua over the Archipelago de San Andres y Providencia and Quita Sueno Bank islands and territorial shelf, resulting in a judgment in 2012 that was perceived as a victory for Nicaragua, contributes to a negative perception of international justice in Colombia.[1465]

For these reasons, some Colombians refer to the ICC as "El Coco", which means a "boogey man" or "devil". Colombians refer to the fact that the "ICC will come" without knowing what it means.[1466] The result is that the Court is presumed as much more powerful than it actually is. This in itself accounts for the indirect impact the Court is able to have, because Colombians presume it is an all-powerful actor that can remove people to The Hague.[1467]

3. Colombia: ICC Letters Complicate Peace Negotiations

Various prominent Colombians said that the OTP's letters, which are described in more detail in Chapter 4, constituted an unwarranted international intervention in the Colombian conflict. Upon receipt of the letters, President Santos remarked that "all countries that have resolved conflicts are confronted with this decision, complicated decisions because generally not everybody is satisfied. Often the majority is dissatisfied. If one leans too much towards justice, maybe peace can not be reached." Ivan Marquez from the FARC called the International Criminal Court "interventionist and biased" and said that it "knows little about the internal Colombian conflict."[1468] In the words of one commentator, "If we have to choose between peace and the ICC, we choose peace."[1469] At the hearings organized by the Constitutional Court, well-respected intellectual Rodrigo Uprimny commented that the Court's actions amounted to interference, and that the peace process is a matter of democratic deliberation for Colombians. An influential member of the Congress argued that the peace process needs a language of persuasion, not of threats.[1470] At the same time, some Colombians feel the ICC played a useful role in the peace process, for instance through serving as a useful guarantee for non-repetition.[1471]

[1463] Ibid.
[1464] Ibid.
[1465] Interview with former Deputy Minister of Justice, Bogota, 14 May 2014
[1466] Interview with OHCHR representative, Bogota, 9 Nov. 2013.
[1467] Ibid.
[1468] Adriaan Alsema, *Colombia Challenges ICC over Possible Amnesty with the FARC,* Colombia Reports, 27 August 2013.
[1469] Interview with former Deputy Minister of Justice, Bogota, 14 May 2014.
[1470] Interview with Member of Congress, Bogota, 14 May 2014.
[1471] Interview with Member of Congress 2, Bogota 14 May 2014.

D. Afghanistan: The Court's Situation of Last Resort

Afghanistan, the so-called Graveyard of Empires, is a place that the Court avoided between 2003 and 2017. The conflict in Afghanistan has continued for almost forty years.[1472] In 1979 the Soviets invaded Afghanistan to assist the struggling PDPA government. Widespread violations prevalent during the PDPA/ Soviet period included widespread illegal detention, torture, extra-judicial killings, and in particular by the notorious KHAD (*Khidamat-e Ittila'at-e Dawlati* or State Information Service); imprisonment in the infamous *Pul-e-Charkh*i prison and disappearances; massive areal bombardments of cities, particularly Herat, and rural areas; and large scale massacres.[1473] The resistance, the Mujahideen, also engaged in violations including killings of government officials or their relatives and attacks on girls schools or on civilians associated with rival factions. After the withdrawal of Soviet forces in 1989 and the eventual collapse of the Najibullah government in 1992, violations continued unabated as rival Mujahideen factions fought for control over the government and Kabul. Chaos and a complete breakdown of the state resulted in further killings, lootings, highway robber, incidents of torture and rape.[1474] The Taliban period brought no reprieve, although particularly in the South the Taliban was welcomed for their potential to reign in the unruly warlords governing Afghanistan. But soon they showed their highly repressive face, severely curbing the rights of women and men. Their reign was marked by persecution of the Hazara as well as a number of large-scale massacres, notably in Mazar-e-Sharif in August 1998, and in the Central Highlands, Bamiyan in 2001.[1475] The Taliban themselves were also the victims of a massacre in Mazar-i-Sharif in May 1997 and at Dash-i Leili in November 2001.[1476]

[1472] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan,* February 2013 citing Olivier Roy, *Islam and Resistance,* Cambridge University Press (1990) p. 95. Recently, a list of 5000 Afghans who disappeared during the early communist period was released by Dutch investigators. See Emma Graham-Harrison, *Names of 5000 Afghans killed in purges published 35 years on,* 20 Sept. 2013 at http://www.theguardian.com/world/2013/sep/20/names-afghans-killed-purges-published. See also Afghan Independent Human Rights Commission, *Death Lists to End Uncertainty of Relatives*, Rotterdam, (September 2013) at //www.aihrc.org.af/en/daily-reports/1730/afghanistan-death-lists-to-end-uncertainty-of-relatives.html.

[1473] A well-known massacre of up to 1000 villager took place in Kerala in Kunar Province in March and April 1979: Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanit*y, 1978-2001 at http://afghanistanjusticeproject.org.

[1474] A particularly notorious incident in this period include the massacre of Hazara civilians at Afshar in Kabul, in February 1993, by Shura-ye Nazar and Ittihad-e Islami. Violations included executions, torture and rape. Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity, 1978-200*1 (July 2005) at http://afghanistanjusticeproject.org.

[1475] See Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, February 2013. See section on "War Crimes and Human Rights Violations in Afghanistan."

[1476] At Mazar-i-Sharif, around 3000 Taliban prisoners were summarily executed by Jombesh soldiers. Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity, 1978-2001* (July 2005) at http://afghanistanjusticeproject.org. On the Dasht-i-Leili massacre, see Rubin, Barnett, *Transitional Justice and human rights in Afghanistan*, International Affairs 79, 2 (2003) p.

Afghanistan is an environment in which the rule of law is almost entirely absent. While Afghanistan is party to a number of international treaties, violations remain common.[1477] Afghanistan's legal system remains weak in spite of twelve years of rule of law programming on behalf of the international community to strengthen it.

In light of these challenges, it is not so surprising that the Court has yet opened an investigation in Afghanistan. Knowledge of the ICC is low even among key stakeholders. Several MPs interviewed for this thesis did not know that Afghanistan is a State Party to the ICC, neither did the Deputy Chief Judge of the Supreme Court.[1478] Few materials on the ICC exist in Dari and even fewer in Pashtu: most materials in Farsi dealing with ICC originate from Iran, which has seen some scholarship on the issue.[1479] Since it became a State Party, only a handful of public discussions took place on the ICC in Afghanistan, most of them immediately after ratification in 2003.[1480] The issue of ICC has received little media coverage since it publicly announced the opening of the preliminary investigation in 2007.

At the same time human rights activists and victim organizations expressed strong support for increased ICC involvement in Afghanistan.[1481] These groups considered the ICC is the only viable alternative to an otherwise corrupt and untrustworthy domestic legal system.[1482] The idea of a global court that can remove perpetrators

---

574. Physicians for Human Rights investigated the massacre. Some reports allege US Special Forces as present at the scene of the massacre.

[1477] Afghanistan has ratified the following international instruments: the 1949 Geneva Conventions (ratified by Afghanistan in 1956); the Convention on the Prevention and Punishment of the Crime of Genocide (ratified by Afghanistan in 1956), and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (ratified by Afghanistan in 1987). International law is relevant to the Afghan legal order according to Art. 7 of the Constitution (2004), which was also found in previous Constitutions, going back to 1964. According to this article, Afghanistan can be said to resemble a monist rather than dualist legal system. This would mean that international law may be directly applicable in Afghanistan. While the Constitution is not explicit on customary international law there is no jurisprudence on the issue, the spirit of the provision can be said to include general provisions of international law including custom.

[1478] A Supreme Court judge voiced the view that while the Ministry of Foreign Affairs had signed a convention on international crimes, this had nothing to do with The Hague: Interview with Supreme Court Judge, Kabul,18 March 2014. The five Parliamentarians and the Supreme Court judge who I interviewed for this thesis all showed scant knowledge of the ICC, having heard of it but not knowing its implications or whether Afghanistan is a state party.

[1479] Interview with Representative from Global Rights, Kabul, 17 March 2014.

[1480] Interview with Director of Afghanistan Human Rights and Democracy Organization, Kabul, 22 Nov. 2013

[1481] At an event entitled "The Afghan "Death Lists": Legacies of Past Violations and the Future of Afghanistan", held in The Hague on 4 March 2014, several victim groups expressed hope that the ICC would get involved in Afghanistan. The event was organized by the Federation of Afghan Refugee Organizations in Europe, and around 70 persons were in attendance.

[1482] Interview with Afghan Representative from Afghanistan Justice Sector Support Program, Kabul, 20 Nov. 2013. Interview with Researcher 2, Afghanistan Analysts Network, Kabul, 20 Nov. 2013. Interview with Representative from Afghanistan Forensic Science Organization, Kabul, 20 Nov. 2013.

and spoilers from the scene is attractive in the context on Afghanistan.[1483] Some organizations have argued that ICC involvement may be useful in curbing crimes of the Taliban.[1484] The International Crisis Group, have urged the ICC to open an investigation against the Taliban, such as in the aftermath of the arrest of Mullah Baradar in March 2010.[1485] (Mullah Baradar was released from custody under the reconciliation policy in September 2013). Human Rights Watch argued that the ICC "should expedite a fact-finding mission to Afghanistan to collect testimony and improve its information exchange with Afghan organizations, government bodies and relevant international entities."[1486] Some also argued that this should be done while it is still possible, before a possible settlement with the Taliban.[1487] Proponents of this strategy argue that the Taliban are responsive or sensitive to accusations that are leveled at them.[1488] However, this seems contrary to the views expressed by a former senior Taliban leader:

> You have to understand the religious mentality of the new zealous youth. They wish to find paradise through martyrdom and suicide attacks. They look down on older Taliban leaders, who they say are not certain to go to paradise. The insurgency is made up of religious students, who are studying in seminaries with a curriculum that is 800 years old. Ninety-nine percent do not know about international conventions and they do not care.[1489]

However, some civil society activists who were supportive of the ICC also highlighted the fact that investigations that target only Taliban may appear too partial.[1490]

On the other hand, civil society organizations in Afghanistan feel isolated in advocating for the Court.[1491] Afghan NGOs raise money on a project basis, mostly from foreign sources, this has inhibited their ability to build up effective and sustainable programs on the monitoring and reporting of human rights

---

[1483] Mazoori, Dallas. Conference Paper, *Justice for All*, February 2012 (unpublished). On file with the author.
[1484] Interview with AIHRC Commissioner, Kabul, 20 Nov. 2013. (This member is now Attorney General of Afghanistan).
[1485] Rondeaux, Candice and Nick Grono, *Prosecuting Taliban War Criminals*, New York Times Op-Ed, 23 March 2010.
[1486] Human Rights Watch, *Afghanistan: ICC Prosecutor Finds Grave Crimes*, 1 Dec. 2013.
[1487] See for instance interview with Director of Afghanistan Human Rights and Democracy Organization, Kabul, 22 Nov. 2013
[1488] Interview with Director of UNAMA's Human Rights Division, Kabul, 21 Nov. 2013.
[1489] Interview with Abdel-Hakim Mujahid, High Peace Council, Kabul, 18 March 2014.
[1490] Interview with Director of Afghanistan Human Rights and Democracy Organization, 22 Nov. 2013. Interview with Researcher 1, Afghanistan Analyst Network, Kabul, 23 Nov. 2013.
[1491] Interview with Researcher 2, Afghanistan Analysts Network, Kabul, 20 Nov. 2013. See also Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan* (February 2013) p. 42.

violations.[1492] NGOs say that donors in Kabul have shown little interest in ICC-related activities.[1493]

In 2009, the ICC came briefly into focus in Afghanistan when the Prosecutor held a press conference on 9 September 2009 to say that he may be interested in opening an investigation in Afghanistan.[1494] This announcement followed the bombing by German pilots of two petrol tankers on 4 September, an incident in which 91 civilians were killed.[1495] The ICC press conference raised hope amongst some Afghans that the ICC may consider becoming more active on Afghanistan, but between the lines the Prosecutor seemed to be saying that he would open an investigation if the Security Council or the Government of Afghanistan would refer the case to the ICC.[1496] This rendered the entire question rather moot since neither a Security Council nor a Government referral could realistically be expected at the time

In 2011, NGO representatives visited the ICC with a petition with suggestions for better collaboration, and urged them to put in place mechanisms for more effective communication, including the appointment of a focal point, but this has not happened to date.[1497] But NGOs fear that the ICC may not have the potential to lend support or protection in an environment where local NGOs face high threat levels.[1498]

1. Local Priorities: Justice for Crimes of the Past

Nowhere are the limitations of the ICC's temporal jurisdiction as apparent as in Afghanistan. Afghanistan is one of the world's most protracted conflicts.[1499] Prior to the US-led military operation, common estimates are that the war in Afghanistan

---

[1492] Interview with Researcher 2, Afghanistan Analysts Network, Kabul, 20 Nov. 2013.
[1493] See for instance interview with Director of Afghanistan Human Rights and Democracy Organization, Kabul, 22 Nov. 2013
[1494] Charbonneau, Louis. *ICC Prosecutor eyes possible Afghanistan War Crimes*, 9 Sept. 2009 in http://www.reuters.com/article/2009/09/09/us-afghanistan-warcrimes-idUSTRE58871K20090909.
[1495] The tankers had become stuck in a riverbed and civilians had surrounded them to tap fuel. Apparently US pilots had suggested to the German pilots to do a fly-over to scare away civilians, but this advice was ignored, raising questions about whether the airstrike constituted a breach of international humanitarian law, which in turn caused a political furor in Germany. See Deutsche Welle, *Bonn Court Reviews 2009 Kunduz Air Strike*, 30 Oct. 2013 at http://www.dw.de/bonn-court-reviews-2009-kunduz-air-strike/a-17194997.
[1496] Charbonneau, Louis. *ICC Prosecutor eyes possible Afghanistan War Crimes*, 9 Sept. 2009 in http://www.reuters.com/article/2009/09/09/us-afghanistan-warcrimes-idUSTRE58871K20090909.
[1497] Interview with Khodadad Basharat, Director of AHRDO, 22 Nov. 2013. See also Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, (February 2013) p. 43.
[1498] Interview with Khodadad Basharat, Kabul, 22 Nov. 2013
[1499] Ibid.

had yielded 1 million deaths. Around 7 million Afghans sought refuge in Iran, Pakistan, and elsewhere. While the vast majority of the crimes in Afghanistan are not under the temporal jurisdiction of the ICC, war crimes and crimes against humanity were committed on a large scale in Afghanistan since the Saur Revolution in1978. Many of the suspected perpetrators continue to wield power today.[1500] The ICC's temporal jurisdiction started on 10 May 2003, although a preliminary examination was only opened in 2007. In its preliminary examinations in 2016, the OTP notes that " the United Nations Assistance Mission in Afghanistan (UNAMA), over 17,500 civilians have been killed in the conflict in Afghanistan in the period between January 2007 and June 2014. Members of anti-government armed groups were responsible for at least 12,100 civilian deaths, while pro-government forces were responsible for at least 3,552 civilian deaths." A number of reported killings remain unattributed.[1501]

The pervasive widespread impunity and continued power of past warlords who are now in government positions translates into Government opposition to accountability for war crimes and crimes against humanity, whether committed in the past or more recently. The debate on justice in Afghanistan after 2001 was largely focused on accountability for the enormous crimes of the past and on how to achieve "transitional justice". But impunity in Afghanistan is so widespread that at least six of the candidates for president or vice-president in the elections held in 2014 were alleged to have committed war crimes or crimes against humanity.[1502] While the topic of their liability came up during their presidential campaigns, apart from General Dostum, other candidates categorically denied responsibility, including in particular Abdel-Rassoul Sayyaf and Ishmael Khan.

After the conclusion of the Bonn Agreement in December 2001, many attempts were made to pursue transitional justice in Afghanistan, but none came to fruition. The Bonn Agreement, the settlement made between allies of the United States in the absence of the Taliban in December 2001, was silent on the issue of transitional justice, although it affirmed the principle of "accountability".[1503] Nonetheless, the clause provoked severe criticism from certain Northern Alliance leaders, including Rabbani and Sayyaf, who said that this was disrespectful to the "liberators" of

---

[1500] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan,* February 2013. See section on "War Crimes and Human Rights Violations in Afghanistan." See also Conflict Mapping Report by the Office of the UN High Commissioner for Human Rights (http://www.flagrancy.net/ salvage/ UNMappingReportAfghanistan.pdf). See also the Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity*, 1978-2001 (July 2005) at http://afghanistanjusticeproject.org.
[1501] OTP Report on Preliminary Examinations Activities 2014, para. 82, citing UNAMA.
[1502] Afghanistan Analyst Network representative statement at International Seminar on Peace, Reconciliation and Transitional Justice, Kabul University, 16-18 November 2013.
[1503] In line with UN practice, the original UN-drafted Agreement stated that the interim administration would not be able to grant amnesty for war crimes, crimes against humanity. Lakhdar Brahimi, himself an Algerian, warned the participants against the dangers of an amnesty, based on his own experience. See also, Rubin, Barnett, *Transitional Justice and human rights in Afghanistan,* International Affairs 79, 2 (2003) p. 571.

Afghanistan and that "foreigners would use the agreement to disarm them."[1504] The clause was deleted. The Bonn Agreement served to empower, and legitimize Northern Alliance warlords who had sided with the US and its allies in the fight against the Taliban and Al-Qaeda.[1505] One analyst has called the unquestioning incorporation of these warlords into the new Afghan political order "the possibly single most important point that prevented Afghanistan from moving towards democracy and put it into the current quagmire."[1506]

At the Emergency Loya Jirga[1507] held in June 2002, a regulation required candidates to sign an "eligibility pledge" that they had not been involve in war crimes, crimes against humanity or drug trafficking, but it was not successfully enforced.[1508] The US in particular advocated an "inside the tent" approach, and up to 50 known warlords participated in the Emergency Loya Jirga.[1509] Later on, attempts to introduce vetting criteria into senior political appointments similarly failed and the political process in Afghanistan continued to develop on a separate track from the accountability discussion.

In 2002, the Afghan Independent Human Rights Commission was given a mandate over transitional justice. [1510] In 2005, it completed a widespread consultation on transitional justice summarized in the report "Call for Justice." The report included the views of 4151 respondents in a quantitative survey, complemented by focus group discussions with over 200 participants, administered in 32 of Afghanistan's 24 provinces over an 8-month period.[1511]The report did not mention the ICC, but showed widespread public support for prosecutions. Up to 69% self-identified themselves or immediate family members as victims of crime during Afghanistan's

---

[1504] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan* (February 2013) p. 17. See also, Rubin, Barnett, *Transitional Justice and human rights in Afghanistan*, International Affairs 79, 2 (2003) pp. 571-2.

[1505] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan* (February 2013) pp. 14-17.

[1506] Ibid. at p. 17 citing Thomas Rutig.

[1507] Loya Jirga is a name for Grand Assembly in Pashto.

[1508] Afghanistan Independent Human Rights Commission, *A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan* (2005) p. 43. Human Rights Watch, *Seductions of "Sequencing": The Risks of Putting Justice Aside for Peace* (December 2010) p. 9.

[1509] Accusations of war crimes once more arose in the Constitutional Loya Jirga in December 2003, where a female delegate, Malalai Joya, famously spoke out against Northern Alliance warlords present in the gathering, calling them "war criminals" and asking them to be tried by a national or international court. She was removed from the assembly for criticizing the Mujahideen. Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan* (February 2013) p. 17

[1510] Nadery, Ahmad Nader. *Peace or Justice? Transitional Justice in Afghanistan, The International Journal for Transitional Justice,* Vol. 1, (2007) p. 176.

[1511] See Afghanistan Independent Human Rights Commission, *A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan* (2005), Nadery, Ahmad Nadery. *Peace or Justice? Transitional Justice in Afghanistan*, The International Journal for Transitional Justice, Vol. 1, (2007) p. 176.

conflict. Up to 76.4% thought that bringing war criminals to justice would improve stability in Afghanistan. However, 57.8% said that they do not trust the Afghan justice system, whereas 38.6% said that they did (emphasizing that it was based on Islam).[1512]

The Call for Justice report led to sufficient pressure on the government to result in the ratification of an Action Plan on Peace, Justice and Reconciliation in 2006.[1513] The Action Plan was a high-water mark in the search for accountability in Afghanistan, but already at that time criminal justice was not mentioned explicitly as it was deemed too sensitive.[1514] Shortly after the Action Plan was passed, the search for accountability suffered another serious setback. Human Rights Watch issued a press release calling for the prosecution of certain individuals, in early 2007.[1515] The backlash to this call for accountability resulted in the eventual passage of the National Reconciliation, General Amnesty and National Stability Law. This law dealt a serious blow to accountability efforts in Afghanistan.

In this very challenging context, the first official visit of the OTP to Afghanistan took place on 16-18 November 2013.[1516] It was clear that those present lacked basic knowledge of the Court, including in particular of its temporal jurisdiction.

[1512] The main problems identified with the justice system were lack of information, lack of speedy resolution of cases, lack of defense lawyers and gender balance. Judges were generally viewed as corrupt or unprofessional. For this reason, up to 49.6% of respondents surprisingly supported a mixed court of Afghan and international judges to try war criminals; whereas 27.6% were in favor of a fully international court and 21.5 were in favor of a court composed of Afghan judges. Afghanistan Independent Human Rights Commission, *A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan,* 2005. On the other hand, respondents in focus groups did said that if possible international judges should come from other Islamic countries, but not those involved in the conflict such as Pakistan, Iran, or Saudi Arabia. They also highlighted that the role of internationals would be most useful as observers or in a supporting capacity, and they mentioned the United Nations in this regard. Only about 5% of focus group participants had heard of international criminal tribunals, but most felt that domestic law should apply and that trials should be held in Afghanistan (79.5%). Many respondents believed that the international community had supported warlords (41.2%) as those who believed that the international community had taken steps to limit their power (40.4%).

[1513] http://www.aihrc.org.af/media/files/Reports/Thematic%20reports/Action_Pln_Gov_Af.pdf The Plan had 5 components, including (1) acknowledgement of the suffering of the victims; (2) building credible state institutions, including through vetting programs; (3) truth-seeking and documentation; (4) promoting measures of peace and reconciliation; and (5) the establishment of reasonable and effective accountability mechanisms. As part of the last component, the Action Plan provided almost prophetically that: "considering the lofty values of the sacred religion of Islam and in accordance with internationally recognized standards; the perpetrators war crimes, crimes against humanity and other serious human rights violations will not be ignored."

[1514] The author was involved in the policy discussions in framing the Action Plan in Afghanistan.

[1515] Human Rights Watch, *Afghanistan: Justice for War Criminals Essential to Peace,* 12 Dec. 2006.

[1516] A member of the JCCD attended a conference organized by Khilid Group and the Afghanistan Center at Kabul University on transitional justice when a member of the JCCD attended a conference organized by Khilid Group and the Afghanistan Center at Kabul University on transitional justice International Seminar on Peace, Reconciliation and Transitional Justice, Kabul University, 16-18 November 2013. The conference was attended by around 80 representatives from the Afghan Independent Human Rights Commission, civil society, and the media.

Contacts between the Court and the Afghan Government institutions until now have been very limited.[1517] Afghanistan did not attend the Review Conference in 2010.[1518] The ICC OTP has no capacity in the languages of Afghanistan, Dari and Pashtun. The AIHRC expressed willingness to share information with the ICC, but noted that there is no clear communication channel in place.[1519] On its side, the OTP has pointed to security and budgetary constraints on its ability to engage in Afghanistan.[1520]

2. Independence: A Court under the Influence of Western Powers

In late 2013, the OTP for the first time found that there is a reasonable basis to believe that crimes within the jurisdiction of the Court have occurred in Afghanistan, some 7 years after first commencing the preliminary examination, but failed to include international forces in its findings. This finding was met with disagreement in Afghanistan, as there is a widespread perception that international forces are guilty of the gratuitous killing of Afghan civilians.[1521]

Among civil society activists that know about and support the ICC, there is a perception that the Court 's reluctance to engage is due to political factors, including in particular the presence of the US and NATO, but also because of the reluctance of the Afghan authorities to pursue accountability for the Taliban and anti-government forces in the current political climate and in light of the amnesty law.[1522] The perception of the Court is that NATO is "too powerful" while the Taliban are "out of reach."[1523] In any case, the US has always insisted on immunity of its forces, both under the original Status of Forces Agreement (SOFA) concluded in 2003, and as part of the 2013 discussions on the Bilateral Security Agreement.[1524]
The SOFA from May 2003 states that:

[1517] Ibrahmi, Niamatullah. *The Vacant Seat of Afghanistan at the ICC: A Short Report on the ICC Assembly of States Parties (ASP),* The Hague, Netherlands, November 2009, available at: http://www.watchafghanistan.org/article017.htm.
[1518] Afghanistan was represented at the 12th Assembly of States Parties in The Hague, however, and reaffirmed its support to the Rome Statute on that occasion. Conversation with the Afghan Ambassador to the Netherlands at the Assembly of States Parties on 22 Nov. 2013.
[1519] International Seminar on Peace, Reconciliation and Transitional Justice, Kabul University, 16-18 November 2013.
[1520] Interview with AIHRC Commissioner, Kabul, 20 Nov. 2013. The following modalities for future cooperation between the Commission and the ICC were explored: the AIHRC offered to pay for OTP visits, to hold events to build capacity on the ICC among government actors and civil society, and to promote Afghan internships at the ICC.
[1521] Interview with Researcher 1, Afghanistan Analysts Network, 23 Nov. 2013.
[1522] Interview with Director of Afghanistan Human Rights and Democracy Organization, 22 Nov. 2013. Interview with Director of Afghanistan Watch, 22 Nov. 2013.
[1523] Interview with Director of Afghanistan Watch, 22 Nov. 2013.
[1524] See e.g. Interview with Representative from Afghanistan Forensic Science Organization, 20 Nov. 2013.

> U.S. personnel are immune from criminal prosecution by Afghan authorities, and are immune from civil and administrative jurisdiction except with respect to acts performed outside the course of their duties. [The agreement] explicitly authorized the U.S. government to exercise criminal jurisdiction over U.S. personnel, and the Government of Afghanistan is not permitted to surrender U.S. personnel to the custody of another State, international tribunal [including the ICC], or any other entity without consent of the U.S. government.

The current version of the Bilateral Security Agreement states at Art. 13 (5): "Afghanistan and the United States agree that members of the force and of the civilian component may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the United States." Newton has argued that this means that Afghanistan cannot delegate criminal jurisdiction of US personnel to the ICC.[1525] The former Prosecutor has argued too that the SOFA may be the "best US option" if the goal is to avoid ICC investigation, but said that Afghanistan should present the ICC with the SOFA to argue that there is no jurisdiction under Art. 19 (3).[1526]

The widespread impunity for crimes of the past contributes to an antipathy to an accountability mechanism such as the ICC. Accountability or transitional justice is depicted by warlords as a "Western" concept, and those who promote them are accused of being "Western agents."[1527] Since transitional justice and the ICC are promoted by the same actors (the AIHRC, the UN and civil society), they are perceived of as part of the same package by some warlords.[1528] Powerful *mujahideen* who feel threatened by the ICC seek to portray the ICC as an instrument of foreign powers, and not in line with Islamic traditions.[1529] In the words of one Member of Parliament, a member of Jamiat : "When the Russians were here, the West was on our side and made us out to be heroes. After the Bonn Agreement, they called us warlords."[1530] Former *mujahidin* argue that they liberated Afghanistan and do not deserve to be treated as war criminals, although some acknowledge that what happened during the Kabul civil war (1992-1996) is different and cannot fall under the rubric of liberation.[1531] Still, the AIHRC is conceived of as anti-mujahidin in its push for transitional justice, and opponents often recall the communist past of the head of the Commission, Dr. Sima Samar. In the words of one MP: "If you want

---

[1525] Cited in Moreno Ocampo, Luis. *The ICC's Afghanistan Investigation: The Missing Option*. Lawfare blog, 24 April 2017.
[1526] Moreno Ocampo, Luis. *The ICC's Afghanistan Investigation: The Missing Option*. Lawfare blog, 24 April 2017.
[1527] Ahmad Nader Nadery describes how some were able to depict transitional justice initiatives as aimed against good Muslims and Mujahideen: Ahmed Nader Nadery, *Peace of Justice? Transitional Justice in Afghanistan, The International Journal of Transitional Justice*, Vol. 1, (2007) p. 177.
[1528] Interview with MP from Panjshir, Kabul, 17 March 2014.
[1529] Interview with Afghan Representative from Afghanistan Justice Sector Support Program, Kabul, 20 Nov. 2013. Interview with Farid Hamidi, AIHRC Commissioner, Kabul, 20 Nov. 2013.
[1530] Interview with Member of Parliament from Panjshir from Jamiat-e-Islami, Kabul, 18 March 2014.
[1531] Interview with Member of Parliament from Herat, Kabul, 17 March 2014.

to destroy a process, don't attack it directly, but just defend it poorly."[1532] Some *mujahideen* think that the National Reconciliation, General Amnesty and National Stability Law will shelter them against the ICC. For instance, when General Dostum's Secretary, Zaki, was whether General Dostum would submit himself to an international court, he said that General Dostum is protected by the amnesty.[1533]

Transitional justice and human rights enjoy strong support among Afghan women and minorities, such as the Hazara population.[1534] Many recent debates in Afghanistan deal with the question of how women and minorities will be affected by peace negotiations with the Taliban, particularly if these result in a power sharing government. Several Members of Parliament said that the Taliban would need to change if it were to play a role in Afghanistan today. One female MP was not so pessimistic: she pointed to the fact that Hezb-i-Islami , which has now joined the government, was pleading for women's votes, when the mujahidin slogan in the 1990s was "women at home or in the grave."[1535] Among women and minorities, there are those who feel that some Taliban should be tried, and they opposed President Karzai's releases of high-level Taliban.[1536]

3. The Court as an Obstacle to Negotiations with Taliban

Although there are currently no negotiations ongoing in Afghanistan, the government and most members of the international community take the view that peace should take priority over justice. Historic advocates of transitional justice, such as the AIHRC, are emphasizing that transitional justice is not just about criminal justice, but that more focus should be put on acknowledgement for victims.[1537] Opinion-makers in the Afghan Government and the diplomatic community both argue that pursuing justice now would diminish incentives for the Taliban to negotiate and lead to a prolongation of conflict: "[T]he ICC's involvement in the Afghan situation at this juncture is both ineffective and counter-productive… Any ICC investigation and potential prosecution of anyone at this time will not achieve the intended goal of preventing impunity or result in peace."[1538] The Afghan government recently stated: "the unique set of circumstances of our stabilization efforts requires a comprehensive approach that aims to ensure justice, while preserving the political stability which is fundamentally important in any post-conflict setting. We will continue to remain engaged with the OTP on relevant issues, including on the investigation of acts that are perpetrated by terrorist

[1532] Interview with MP from Badghis, Kabul, 16 March 2014.
[1533] International Seminar on Peace, Reconciliation and Transitional Justice, Kabul University, 16-18 November 2013.
[1534] Interview with female MP from Paktia, Kabul, 19 March 2014; Interview with Hazara MP, Kabul, 18 March 2014.
[1535] Interview with female MP from Paktia, Kabul, 19 March 2014.
[1536] Interview with Hazara MP, Kabul, 18 March 2014.
[1537] International Seminar on Peace, Reconciliation and Transitional Justice, Kabul University, 16-18 November 2013.
[1538] Afghanistan Justice Organization and the Global Partnership for the Prevention of Armed Conflict, *Transitional Justice in Afghanistan: "We should not repeat old issues?* Oct. 2013.

groups."[1539] In November 2017, Nader Nadery, the President's Advisor on the ICC, said to AAN that President Ghani had told Bensouda that "morally he is on the side of the ICC but legally he is not", because argument of admissibility were not convincing; that an ICC intervention may harm the peace process and would have a negative impact on the presence of international troops in the country, thus it would contravene the "interests of justice."[1540]

IV. Conclusions on Factors Influencing Perceptions

The International Criminal Court represents a limited intervention to combat impunity in prolonged and complex conflicts. The vast majority of crimes in the countries where the ICC operates are outside of its jurisdiction. In Uganda, the conflict had lasted for 20 years when the court intervened; Libya had experienced a 42 year dictatorship; Afghanistan has seen 40 years of continuous conflict; and Colombia the conflict was almost 50 years in duration. The *narrative* of the conflict that is reflected in the arrest warrants of the Court often is only a fragment of the totality of the circumstances. In *selecting* which cases to pursue, the ICC is often endorsing only a fraction of a much longer narrative.[1541] Negative perceptions may also stem from the fact that the Court is externally imposed or that it contravenes the "self-narrative" of the population in relation to the conflict, and how the Court is seen to either reflect or oppose that "self-narrative". Misunderstanding often flows both ways, so that international actors may sometimes dismiss local alternatives as not valid or for lack of understanding.[1542]

Once the Court intervenes in a situation, perceptions may complicate further due to its constraints. In Uganda and Libya, perceptions of the Court were shaped by very limited numbers of highly selective arrest warrants which focused on one side of the conflict; the quick opening of an investigation without fully understanding the local narratives or dynamics; and insufficient in-depth knowledge of context. The arrest warrants in Uganda focused only on the LRA and the arrest warrants in Libya affected only on a few former regime figures.

[1539] Statement by H.E. Mahmoud Saikal, Permanent Representative of the Islamic Republic of Afghanistan to the United Nations, delivered at the 16th Session of the Assembly of States Parties to the Rome Statute of the ICC, 7 Dec. 2017.

[1540] Kate Clark and Ehsan Qaane, AAN, *One Step Closer to War Crimes Trials (2): ICC Prosecutor requests authorization to investigate*, 5 Nov. 2017.

[1541] De Hoon, Marieke. *The Future of the International Criminal Court: On Critique, Legalism, and Strengthening the ICC's Legitimacy*. ICL Rev. Vol. 17 Issue 4 (2017), pp. 591-614.

[1542] See Avocats Sans Frontieres, *Africa and the International Criminal Court: Mending Fences* (July 2012) p. 8: "Uganda had the opportunity to present arguments declaring that despite the referral it had the capacity to try the suspected indictees, a move it did not pursue on the basis of sound legal assessments of its national judicial processes." Ambos, Kai, *Expanding the Focus of the "African Criminal Court*, Ashgate Research Companion to International Criminal Law: Critical Perspectives, 4 Mc Dermott, N. Hayes and W. A.. Schabas, eds. Aldershot, Ashgate 2012: "The implementation of a International Crimes Division at the High Court in Uganda, or the establishment of a hybrid court as proposed by the AU in Sudan- did not go much beyond the drafting of the corresponding legal provisions and did not produce any concrete results with regard to possible prosecutions or trials."

Local justice demands are often linked to locally known available options. This leads to a frequent divergence, and sometimes discord, between what the Court is able to offer in justice terms, and what local populations are demanding. Local demands are also related to measures that will improve the lives of victim, including reparations.

The ICC also suffers from perceptions that it is primarily guided by the agenda of external actors. In Uganda, the Court is perceived among some actors as "Western-style retributive justice." In Afghanistan it is perceived as aligned with, or at least subjugated to, NATO and the United States, and in Libya the Court was perceived to have its own agenda that seeks to trump local justice interests, namely getting custody over Abdullah Al-Senussi in order to cater to Western intelligence interests. In Colombia too the Court is sometimes referred to as "El Coco", a sort of monster. All of these hint at an often-voiced critique of the Court that it is externally imposed or even neo-colonial.

The Court is also perceived as aligned with military solutions to conflict, rather than with peaceful solutions or negotiations. The emphasis of the Prosecutor on enforcing arrest warrants in the context of Uganda and the letters in Colombia gave the impression that the Court is less concerned with negotiated solutions to conflict, and has backlash amongst peace constituencies.

Perceptions among affected populations are likely to remain mixed. For many, the Court remains remote or even irrelevant in terms of being incapable of addressing local justice concerns. This is reminiscent of the ICTY, about which Zacklin wrote that it was perceived as too remote from victims and affected populations; and that victims were misunderstanding its mandate to be about uncovering the fate of loved ones, providing an official history, and yielding compensation.[1543] The Court, with its Hague-based processes is even more remote culturally and geographically from the countries under its purview.

Milanović, in his work on ICTY, identifies the different cognitive, objective and subjective factors that influence perceptions: the comprehensive core belief systems that form the lens through which information about atrocities is filtered; remoteness or lack of immediate experience of the event, which gives space for third party "interpreters" such as the media or politicians; prejudgments about sources of information (including the ICTY itself)[1544]; psychological factors such as a simple

[1543] Zacklin, Ralph. The Failings of Ad Hoc International Tribunals. Journal of International Criminal Justice 2 (2004), 541-545.

[1544] Milanović, Marko. *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378: surveys by the Belgrade Center for Human Rights showed that 90% of Croatian and Bosnian respondents never visited the ICTY webpage, and a similar number never read an ICTY judgement. 73% of Bosnian respondents and 84% of Serbian respondents said that television and

lack of time and energy to search for the truth, leading to recourse to cognitive shortcuts; confirmation bias, motivated reasoning and heuristics, which tend to favour information obtained early in the cognitive process; and the pervasiveness of nationalist or other entrenched narratives.[1545] Visual material such as the video of the killings of Bosnian youth by the Scorpions paramilitary unit shown at the Milosevic trial may have impact, but may also be questioned for their authenticity.[1546] It may be presumed that many of these factors similarly influence ICC audiences and dilute the expressive function of the Court.

The Special Court for Sierra Leone was in danger of being viewed as a "spaceship phenomenon" but had some distinct advantages over the ICC, including its on-the-ground presence and extensive outreach activities.[1547] The ICC risks hovering in an entirely different orbit from the affected populations it is meant to serve.[1548]

A few aspects of the Court's institutional framework have a direct impact on the issue of perceptions. These include the politics of case selection; limitations in resources at the preliminary examination phase; limitations in field presences; and limitations in outreach activities.

A. Expressivism and the Politics of Case Selection

The Court's case selection at times may appear to be driven more by opportunism rather than expressivism. In indicting the LRA on the one hand, or Qadhafi, his son and his chief of intelligence, the ICC Prosecutor appeared to want to be on the right side of history, but these actions did not necessarily translate into the expressive impact that the Court may have wanted in Uganda or Libya. In Uganda, the message of impunity on the side of government actors was reinforced, whereas in Libya those who sided with the Revolution perceived themselves to be beyond the reach of the Court. Expressivism raises tensions as to whether ideally it is exercised on the global level, through an expression of "universal values", or in ways that are more resonant with local communities. In order to increase its legitimacy, the Court will need to strike a balance between the two.

---

radio where their main media sources. 44% of Serbs admitted to being influenced by local analysts including political analysts, writers and intellectuals. Only 19% cited the ICTY as a strong influence.

[1545] Milanović, Marko. *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378.

[1546] Ibid.

[1547] Tom Periello and Marieke Wierda, *The Special Court for Sierra Leone under Scrutiny,* International Center for Transitional Justice (2006).

[1548] Rabkin writes: "The most compelling justice comes from a court system which can claim to speak in the name of the society where the victims suffered. In the proper setting, criminal punishment says: "The community acknowledges that a terrible wrong was done and state organs, in the name of this society, are committed to punishing this wrong, to prevent, as much as possible, such wrongs from recurring. Jeremy Rabkin, *Global Criminal Justice: An idea Whose Time Has Passed*, 38 Cornell International Law Journal 753 (2005) p. 775.

B. Limited Resources at the Preliminary Examinations Phase

While there may be an aspiration that a deep understanding of local would be developed at the preliminary examination stage,[1549] in practical terms, relatively few resources are devoted by the ICC to this stage. At the preliminary examination stage, according to the Rome Statute the Prosecutor operates from the seat of the Court as it lacks investigative powers.[1550] The Jurisdiction, Complementarity and Cooperation Division, the only unit to carry out political analysis, is relatively small. Since its inception, the ICC has resisted hiring "political" advisors, deeming this inappropriate for a judicial institution. Only a few analysts may be working on any particular situation at a particular time. This may hinder the Court from developing an in-depth understanding of the local context, and communicating with local audiences. For example, in spite of its troubled relations with the AU, the ICC has lacked internal focal points to deal with regional organizations, neither does it have a liaison office at the AU in Addis Ababa.[1551] With the exception of Colombia, country visits during preliminary examinations are not frequent: an example is Afghanistan where little networking has taken place. In situations such as Uganda and Libya, decisions to open an investigation were taken very swiftly, arguably before there was a well-developed sense of the political context. The Court ran into unanticipated backlash or opposition that may have been avoided or managed better with more thorough context knowledge.

A deeper understanding of the context will not necessarily determine *whether* the Prosecutor opens an investigation in a particular situation, as this is dependent on the criteria circumscribed by the Rome Statute, and specifically by Article 53(1)(a)-(c). But it may play an important role in decisions where the Prosecutor has discretion, such as issues of *who* should be charged, as well as *when* to proceed. These are all matters determined by context. The OTP recognizes this in stating that: "the role of persons or groups may vary considerably depending on the circumstance of the case and therefore should not be exclusively assessed or predetermined on excessively formulistic grounds."[1552]

C. Limited Field Presences

[1549] Ambos, Kai, *Expanding the Focus of the "African Criminal Court,* Ashgate Research Companion to International Criminal Law: Critical Perspectives, 4 Mc Dermott, N. Hayes and W. A.. Schabas, eds. Aldershot, Ashgate 2012. Kai Ambos argues that the "ICC is not only dealing with the concrete situation or case, but takes a more comprehensive, holistic approach to the political and legal situation in the country concerned." He argues that the complementarity analysis "requires a constant and ongoing relationship with the respective country, mainly through communications, cooperation, measures of "positive complementarity", and outreach."

[1550] Rome Statute, Art. 15 (2).

[1551] Opening such a liaison office was identified as a priority by some representatives attending a pre-ASP informal retreat: ICC-ASP/12/INF.2. Informal Summary of the retreat: ICC- the challenges and opportunities in light of the upcoming November Assembly of States Parties, 12 Nov. 2008.

[1552] OTP Policy Paper on Preliminary Examinations, November 2013 para. 60.

The knowledge of context would also have been enhanced by more robust field presences. Field offices are the Court's tentacles on the ground. However, field offices were only opened after some years and currently exist in Uganda, DRC, Kenya, CAR, and Cote d'Ivoire. Only around 15% of the Court's overall staff is allocated to field offices. Its field presences in Kampala and Nairobi remain relatively small and are staffed at rather junior levels, with few senior positions. There is no presence in countries under preliminary examination. Although this would be complex to set up, from a state consent and security perspective, in some situations it may be possible. In Afghanistan and Colombia victims voiced a desire for contact with representatives of the Court. In its Strategic Plan, the OTP acknowledges the weakness of its field presences and states that it will explore with the Registry new models of field presences. It also states that the Office will "aim at having a stronger presence of persons from (the region of) the country in which the situation under investigation is found because this will help in the understanding of the situation and in access to evidence."[1553] Some argue that the OTP ought to engage more multidisciplinary teams, composed of legal experts but also country experts and anthropologists.[1554] This multidisciplinary approach could help to understand the domestic legal system; public attitudes and expectations; local justice priorities; tensions between different groups; and other such factors. [1555]

D. Limitations on Outreach

Outreach program ideally provide an honest explanation of the Court's processes, designed to engage constituents in a genuine dialogue. This in itself could result in an improved perception of the actions of the Tribunals.[1556] At the same time, there may be limits on the degree to which perceptions of international justice mechanisms can be "engineered" through outreach or other structural adjustments, at least in the short term.[1557]

Outreach pertains to conducting "sustainable, two-way communication between the Court and communities affected by situations that are the subject of investigations or proceedings. It aims to provide information, promote understanding and support for the Court's work, and to provide access to judicial proceedings."[1558]

[1553] ICC OTP Strategic Plan June 2012-2015 para. 48.
[1554] Stromseth, Jane. *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?* Georgetown University Law Center (2009) p. 91.
[1555]Ibid.
[1556] Refik Hodžić comments that "the ICTY never answered many basic questions. Why were some people indicted and others not? What was the philosophy of the sentencing policy? How was it possible to quash 1300 page judgments with a few pages of appeals?" Refik Hodžić, *Accepting a Difficult Truth: ICTY is Not Our Court.* Balkan Insight (6 March 2013).
[1557] Ford, Stuart, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, Vanderbilt Journal of Transnational Law (2012) Vol. 45, p. 408.
[1558] ICC Integrated Strategy for External Relations, Public Information, and Outreach p.3

The functions of external relations, public information and outreach of the ICC have ambitious goals, including "building and maintaining cooperation and support for the activities of the Court" and "increasing the broader impact of the Court, contributing to lasting respect for and enforcement of international justice."[1559] The strategy states, "The Court strives to understand and act upon the information needs of affected populations, to build understanding and to foster a local sense of engagement".[1560] In the case of the ICTY, its impact would have been less had it not tried to seek to increase knowledge on the ground and to influence perceptions through outreach. At the same time, authors like Milanović conclude about ICTY, "The Tribunal is in an unenviable, Catch-22 situation: whatever it does will generate distrust in at least one ethnic community, while its work outputs seem to be incapable of penetrating the collective consciousness of these communities."[1561]

Some argue that increased outreach itself can assist to reverse negative perceptions, and can increase its legitimacy.[1562] FIDH argues that international law has to be "brought home" to local communities in order to "contribute to the internalization of the values embodied in the Rome Statute", and that this in turn is the only way to have a deterrent impact within situation countries.[1563] This seems to be putting the cart before the horse and sits uneasily with the concept of "local ownership". As Nesiah states: "In other words, local ownership is precisely about persuading affected populations to cede the terrain of justice to the ICC."[1564]

Studies of perception show that it may not be possible to completely change perceptions merely through outreach: in fact "everything a court with such a mandate does is in fact outreach, whether active or passive."[1565] Experience indicates that the process of absorbing the normative impact of the judgments of an international tribunal, and internalizing these norms, is not one that follows automatically from the tribunal's efforts to appear as apolitical as possible, nor is it a short-term result of one-way messaging through outreach. Instead "the hard work

---

[1559] Ibid. p. 2

[1560] Ibid. p. 2.

[1561] Milanović, Marko. *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378.

[1562] Ambos, Kai, *Expanding the Focus of the "African Criminal Court*, Ashgate Research Companion to International Criminal Law: Critical Perspectives, 4 Mc Dermott, N. Hayes and W. A. Schabas, Eds. Aldershot, Ashgate 2012.

[1563] FIDH, *Enhancing Victims' Rights Before the ICC: A View From Situation Countries on Victims' Rights at the International Criminal Cour*t, November 2013, p. 7-8.

[1564] Nesiah, Vasuki. *Local Ownership of Global Governance*. Journal of International Criminal Justice, Volume 14, Issue 4 (1 Sept. 2016) pp. 985-1009.

[1565] Refik Hodžić. *Accepting a Difficult Truth: ICTY is Not Our Court*. Balkan Insight (6 March 2013): "Outreach cannot compensate for the unwillingness to consider how judges' work impacts the Tribunal's ability to fulfil its broader mandate. Especially outreach as understood by the ICTY's principals: a loose mix of public reactions, decontextualized dissemination of information and endless series of conferences."

of changing attitudes of the peoples of the Balkans is not going to be done by the ICTY, but by local and regional actors embedded in the affected societies."[1566]

A much-cited positive example of widespread outreach to the general public was conducted in the case of the Special Court for Sierra Leone. Sierra Leone is a relatively small country and after the end of the conflict in 2002 it was reasonably secure. [1567] In 2007, a survey found that 96% of 1700 randomly selected respondents around Sierra Leone had heard of the Special Court, although their knowledge was not deep.[1568] This widespread knowledge is attributed to the fact that the Special Court for Sierra Leone was located in-country, and ran an extensive, multi-tiered outreach program over the years. 48.18% of the respondents said had participated in an outreach event at some point during the Court's lifespan.[1569]

Comparatively, the ICC's efforts in terms of outreach have been far more limited than that of other tribunals. At the preliminary examination stage, outreach activities are usually very limited or absent. Outreach activities of the ICC have taken place in Uganda, DRC, Sudan, CAR, Kenya, Georgia, and Cote d'Ivoire. In CAR, Darfur and Libya the security situation only allowed for some radio programming.[1570] Although it is included in the core budget of the Court, outreach has also come under particular budgetary pressure.[1571] Steps have been taken to improve the quality of outreach, including through gathering feedback from participants.[1572] Nonetheless, even in a very challenging context such as Kenya, outreach activities largely rested on the shoulders of one staff member.[1573] In 2016,

---

[1566] Milanović, Marko. *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*. Georgetown Journal of International Law Vol. 47 No. 4 (2016) pp. 1321-1378.

[1567] The author has paid at least 15 visits to Sierra Leone between 2002 and 2011.

[1568] BBC World Service Trust and ICTJ, *Transitional justice survey in Sierra Leone*, 9 Oct. 2007.

[1569] Special Court for Sierra Leone, Sierra Leone Institute for International Law, Manifesto 99, No Peace Without Justice, Liberian NGOs Network, and Coalition for Justice and Accountability, *Making Justice Count: Addressing the impact and legacy of the Special Court for Sierra Leone and Liberia*, September 2012 p. 32.

[1570] Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, 11 Oct. 2013, ICC-ASP/12/41 at para. 10.

[1571] For instance, the Report on activities and programme performance of the International Court for the year 2012, dated 4 June 2013 (ICC-ASP/12/9) states that in 2012, five positions were cancelled due to budgetary cuts (para. 166).

[1572] Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, 11 Oct. 2013, ICC-ASP/12/41 at para. 7.

[1573] In 2014, the Court had deployed a single (albeit experienced) outreach officer in Kenya, and she was suffering from many threats due to the fact that she was the only public face of the ICC on the ground. The staffing table for the Kenya Task Force had 3 outreach posts but it was proving challenging to recruit local staff. The number of closed sessions as part of the Kenyatta/ Ruto trials further hindered effective outreach. Instead, the Court could have contemplated deploying a senior media specialist or spokesperson to counter the media machinery of the politicians, as well as to ensure public airtime for senior Court officials on major news channels. The fact that the cases kept being prolonged, and the collapse of three of the cases, played into the hands of the politicians in this respect. Interview with civil society activist, Nairobi, 4 Feb. 2014.

outreach was down to 5 events and 3 hours of radio programming in Kenya.[1574] At the same time, this is not suggesting that the answer is merely more outreach. It is more a question of how outreach is done, and to whom, and how it connects to a process of internalization, or the shaping of narratives on the local level.

E. Country Situations in the Shadow or Spotlight?

The ICC faces many challenges in perceptions. Lack of comprehensive outreach in all four countries contributed to a lack of knowledge, which in turn diminished the perceived relevance of the ICC. In Afghanistan, even MPs or senior justice officials do not have sufficient information on the ICC. As with the historical tribunals, the ICC does not necessarily touch on the lives of many ordinary people.

The relationship between knowledge and positive perceptions is not straightforward. It cannot be presumed that increased knowledge necessarily results in more positive perceptions. For instance, in Afghanistan or Colombia, perceptions may in part be more positive, particularly among victims and civil society, because less is known about the limitations of the Court, than in countries that are already under investigation, such as Uganda or Libya. The shadow of the ICC, in situations of preliminary investigation, may therefore have a more positive influence than the ICC's spotlight, which tends to reveal its limitations.

[1574] Second Court's report on the development of performance indicators for the International Criminal Court, 11 November 2016.