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STRIKING THE BALANCE

The Effectiveness of the International Criminal Court in the Democratic Republic of the Congo

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Master Thesis
Master in International Relations in Historical Perspective
Utrecht University 2009-2011
August 2011, Utrecht
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Preface

With this research on the effectiveness of the International Criminal Court (ICC) in the Democratic Republic of the Congo (DRC), a six year long journey is coming to an end. This journey started in 2005 when I moved to Utrecht with the object of studying International Relations, combined with minors in American and Conflict studies, at Utrecht University. In six years it brought me from Utrecht, to Australia, to Jordan and back to Utrecht again where I started my Master in International Relations in 2009.

My first course in this Master was the research seminar of Dr. Peter Malcontent, The Guilt of Nations: dealing with historical injustices at the national and international level. This course, and the paper on the politicization of the ICC that I wrote for it, made me enthusiastic about transitional justice and about the work of the ICC in particular. It moved me to apply for an internship at the Office of the Prosecutor (OTP) of the ICC. As the three months long internship that followed only increased my enthusiasm, inspired me further and introduced me to the challenges the ICC faces, I was determined to continue on this subject. Furthermore, the scale of the ongoing conflict in the DRC, fuelled by the presence of natural resources, and my lack of knowledge of a conflict of this size and gravity, shocked me. Being very interested in the judicial process of the Court and the difficulties therein, but also eager to learn more of the conflict in the DRC, the impact of the Court there and how the Congolese people perceive its interference, this research was a great final step of that journey.

The process of writing this thesis was not always easy, but with the support and patience of so many to whom I would like to express my gratitude here, I managed to achieve this accomplishment. I want to thank Dr. Peter Malcontent for introducing me to this interesting subject through his research seminar and for his supervision during this thesis, including his patience, understanding and his commitment, especially in the final phase. I want to thank my internship supervisor at the ICC for my internship and for all that I learned during my time there. I want to thank my nearest co-intern Mwendwa from Kenya, for teaching me about Africa and all that it entails. I want to thank Francesca for her notes on, and help with, my English throughout this thesis. I want to thank Caspar for letting me use his computer and room when my laptop gave in.

I want to thank Kalina for being my constant companion these past six years, for inspiring me, motivating me, encouraging me and for showing me what I can achieve. I want to thank Juul, Diana, Jasmijn and Joelle for their endless support and believe in me the past year. I want to thank Yke, especially, for her company while writing this thesis; for all those

hours we studied together in the library, for all our tea breaks, for always being there for me and always encouraging me.

I also want to thank my parents for their support these past six years, for making it possible financially, for helping me make the right decisions, for letting me make my own decisions, for their patience and for their continuous support. However, most of my gratitude goes out to Jaap for his endless support and believe in me the past year and years. To all of you I would like to say: I could not have done it without you, thank you.

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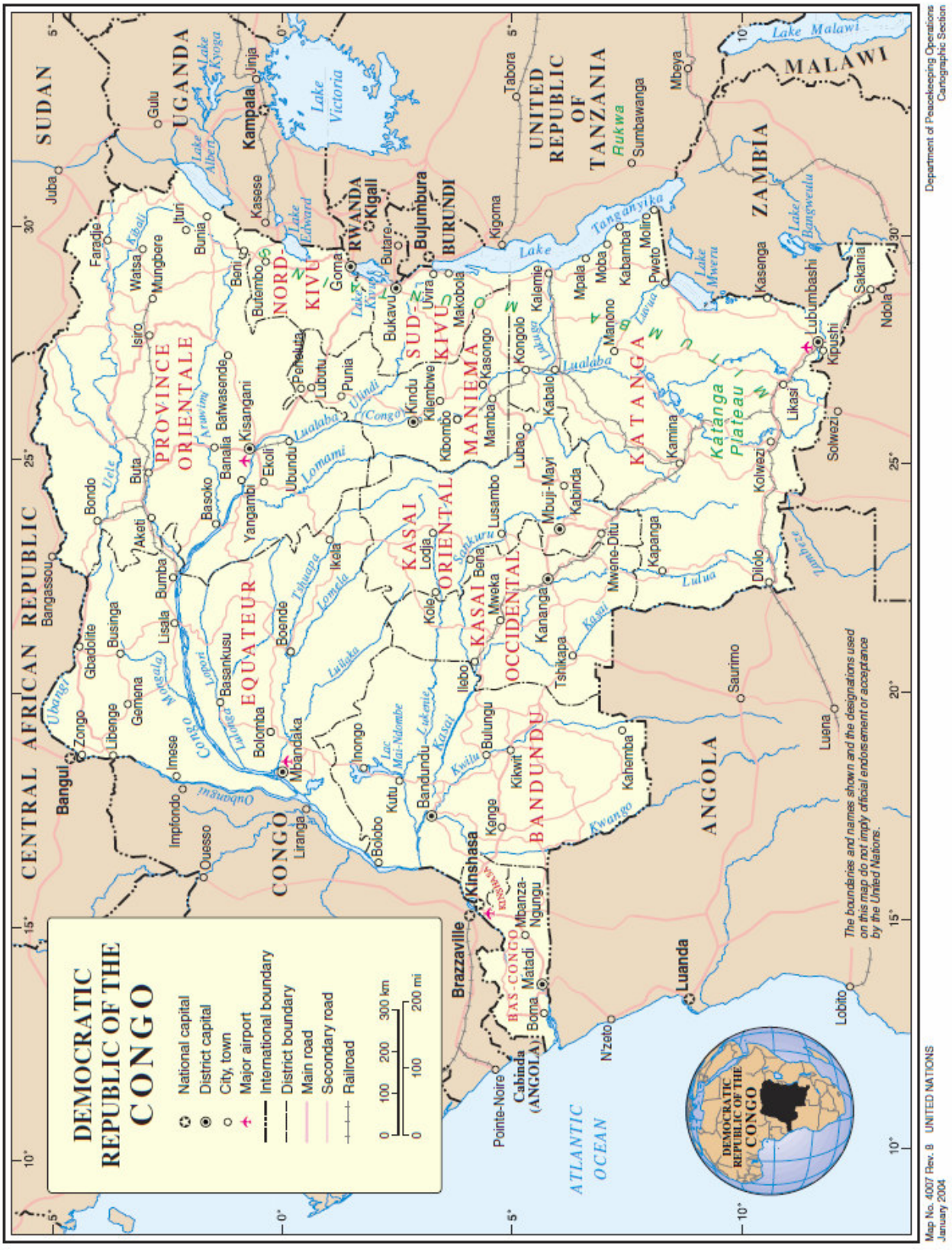
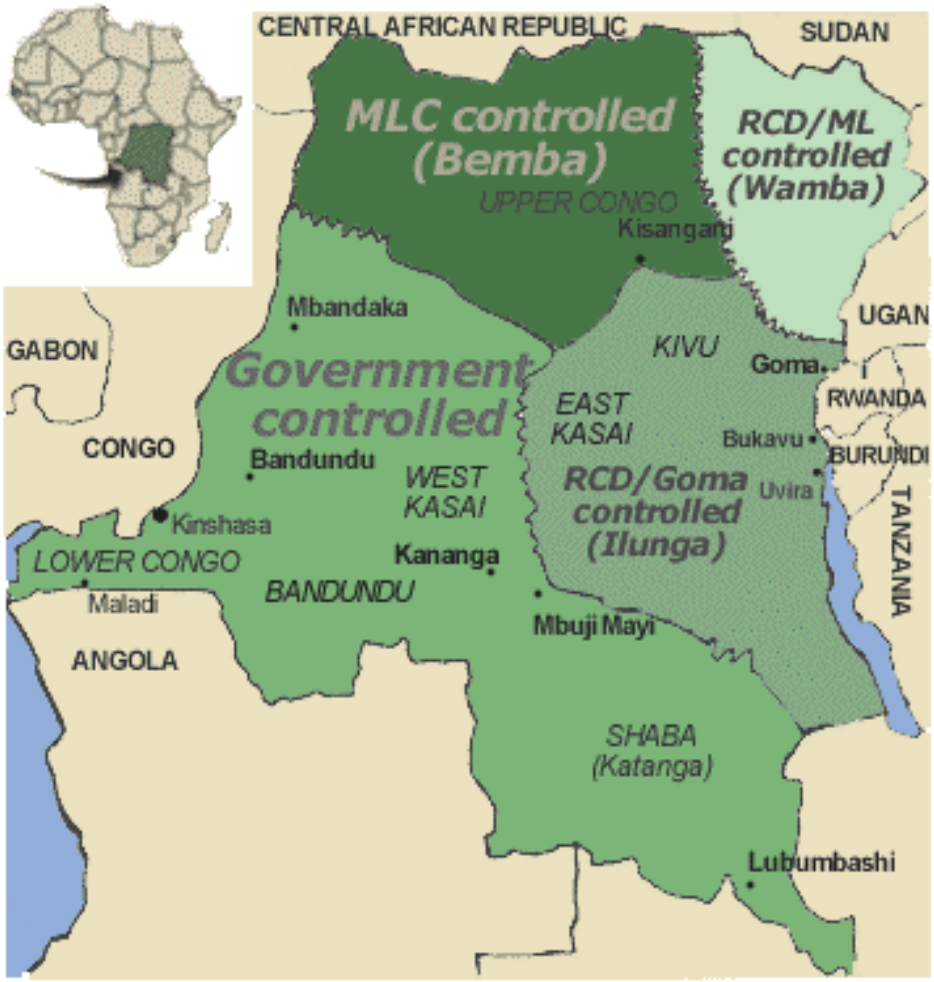
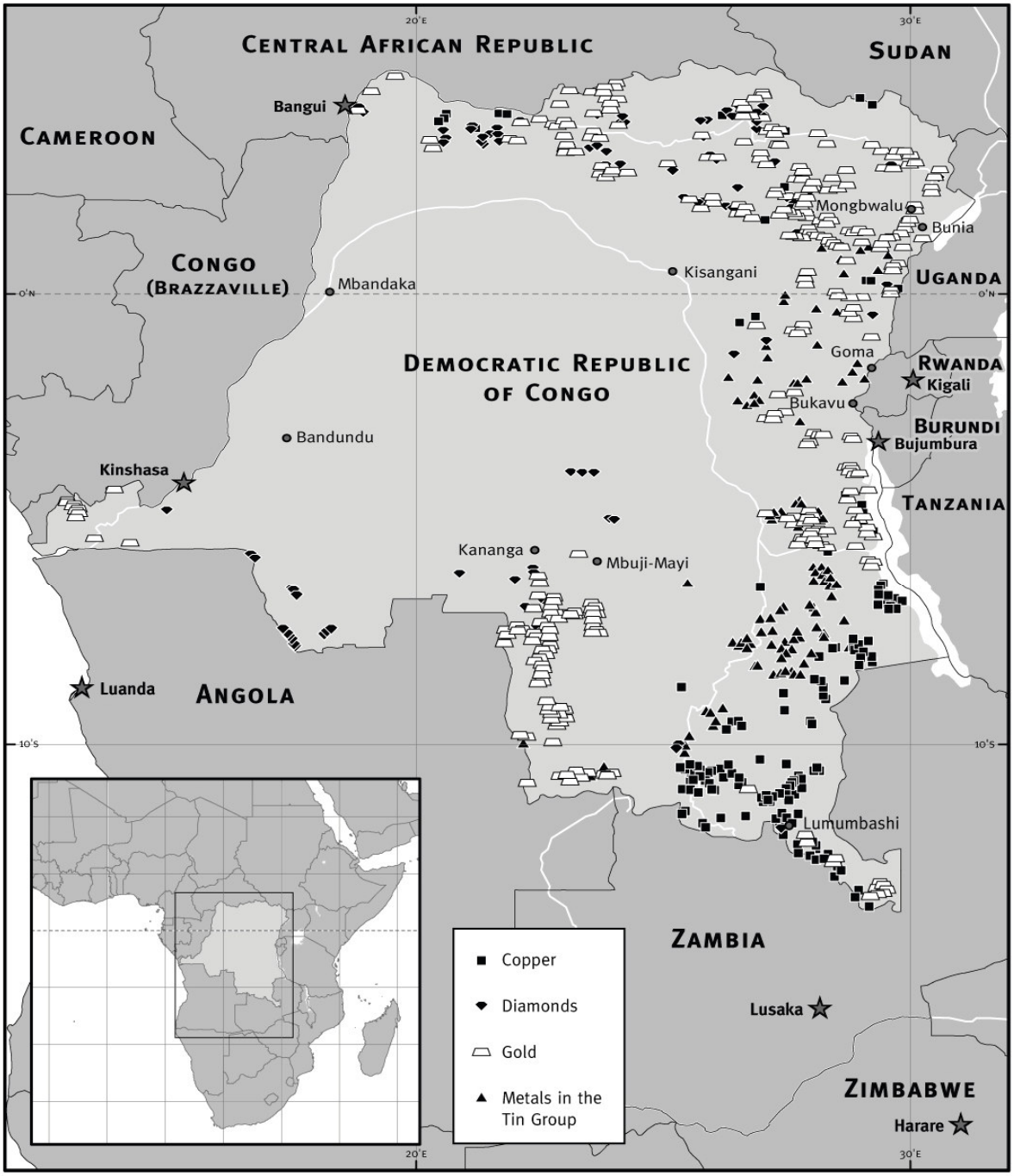
Maps of the Democratic Republic of the Congo



Map 1: The Democratic Republic of the Congo.
Source: *Map No. 4007 Rev. 8,* United Nations, Department of Peacekeeping Operations, Cartographic Section (January 2004).



Map 2: The Politico-Military Zones of the Democratic Republic of Congo January 2000
Source: Herbert Weiss, 'War and Peace in the Democratic Republic of the Congo', online available at: http://www.unc.edu/depts/diplomat/AD_Issues/amdipl_16/weiss/weiss_congo5.html, last retrieved on 11 August 2011.



Map 3: 'Major Mineral Deposits in the Democratic Republic of Congo'.
Source: Human Rights Watch, *The Curse of Gold: Democratic Republic of Congo* (2005).

List of Abbreviations and Acronyms

AMICC	American Non-Governmental Organizations Coalition for the International Criminal Court
CAR	Central African Republic
CNDP	*Congrès National pour la Défense du Peuple* (National Congres for the Defence of the People)
DDR	Disarmament, Demobilization, and Reintegration
DRC	Democratic Republic of the Congo (also referred to as Congo here)
FAQs	Frequently Asked Questions
FAR	*Forces Armées Rwandaises* (Rwandan Armed Forces)
FARDC	*Force Armées de la République Démocratique du Congo* (Armed Forces of the Democratic Republic of Congo)
FDLR	*Forces Démocratiques pour la Liberation du Rwanda* (Democratic Forces for the Liberation of Rwanda)
FPLC	*Forces Patriotiques pour la Libération du Congo* (Patriotic Forces for the Liberation of Congo)
FNI	*Front des Nationalistes et Intégrationnistes* (National Integrationist Front) – Lendu
FPLC	*Forces Patriotiques pour la Liberation du Congo* (Patriotic Force for the Liberation of Congo)
FPR	*Front Patriotique Rwandais* (Rwandan Patriotic Front)
FRPI	*Force de Résistance Patriotique en Ituri* (Patriotic Resistance Force in Ituri) – Ngiti
HRW	Human Rights Watch
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDPs	Internally Displaced Persons
IRC	International Rescue Committee

MLC	*Mouvement pour la Libération du Congo* (Movement for the Liberation of Congo)
MONUC	*Mission de l'Organisation des Nations Unies en République démocratique du Congo* (United Nations Organization Mission in the DRC)
OTP	Office of the Prosecutor (of the International Criminal Court)
RCD	*Rassemblement Congolais pour la Démocratie* (Congolese Rally for Democracy)
RCD-G	*Rassemblement Congolais pour la Démocratie - Goma* (Congolese Rally for Democracy - Goma)
RCD-ML	*Rassemblement Congolais pour la Démocratie - Mouvement de Libération* (Congolese Rally for Democracy - Liberation Movement)
SCSL	Special Court for Sierra Leone
SG	Secretary General
TRC	Truth and Reconciliation Commission
UN	United Nations
UCDP	Uppsala Conflict Data Program
UNHCR	United Nations High Commissioner for Refugees (UN Refugee Agency)
UNITA	*União Nacional para a Independência Total de Angola* National Union for the Total Independence of Angola
UPC	*Union des Patriots Congolais* (Union of Congolese Patriots) – Hema
VPRS	Victims Participation and Reparation Section

1 Introduction

Context, Scholarly Debates and Methodology

On 8 July 2010, Trial Chamber I of the International Criminal Court (ICC) ordered, for the second time in the case of *The Prosecutor vs. Thomas Lubanga Dyilo*, the stay of proceedings and the release of the accused.[1] Although, this decision was overturned by the Appeals Chamber on 8 October 2010, this incident has raised new questions on the success of the ICC in general and in the situation in the Democratic Republic of the Congo (DRC) in specific. As the term of the first Prosecutor, Luis Moreno-Ocampo, is coming to an end, it is time to start evaluating the successes and the problems of the ICC and with this knowledge, look at the future. As the ICC is still in the process of establishing itself as a legitimate version of the first international criminal court, these lessons of the past can propose improvements for the future. As the situation in the DRC was the first situation under the attention of the ICC and as it is the most advanced situation at the Court with four accused at (pre)trial stage, most experiences of the ICC have been gained in this situation, making it best suitable for examination of the effectiveness of the ICC.

The Conflict in the Democratic Republic of the Congo

The conflict in the DRC has been referred to as 'the bloodiest war since the Second World War', 'Africa's First World War' and has even been characterized as 'half a holocaust'.[2] In 2003 the International Rescue Committee (IRC) found that the war in the DRC had 'taken more lives than any other since World War II'; an estimated 3,3 million people died between August 1998 and November 2002.[3] Although, of this number just 200.000 people died directly of the violence and the vast majority of deaths were an indirect result of the war, linked to the collapse of the health system and economy, this does show that the death toll of the conflict in the DRC is high and that the consequences of it are great and grave. The IRC now estimates a death toll of 5.4 million people between August 1998 and April 2007 as a

[1] *Prosecutor v. Thomas Lubanga Dyilo (Lubanga)*, Case No. ICC-01/04-01/06-2517-Red, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU (8 July 2010).
[2] Thomas Turner, *The Congo Wars: Conflict, Myth & Reality* (London 2007) 1.
[3] International Rescue Committee, 'Conflict in Congo Deadliest Since World War II, Says The IRC' (8 April 2003) online available at: www.theirc.org/news/conflict-congo-deadliest-world-war-ii-says-irc-3730, retrieved last on 10 August 2011.

result of the war, mostly caused by easily treatable diseases and malnutrition.[4] Although there are discussions on the correctness of these numbers, it is generally acknowledged that violence in the conflict of the DRC is very often directed at the civilian population and that the use of sexual violence is common.

Discussion also occurs on the type of conflict that has plagued the DRC. The different views include: a civil war against dictatorship; an invasion of Congo by some of its neighbours; a regional war; or an international war. For example, the World Bank is determined to regard the conflict in the DRC as a civil war, whereas the United Nations (UN) emphasize foreign involvement.[5] However, the definition is very important because, as Turner has noted, the type of war is directly linked to the question of who is responsible for the deaths.[6] This question of responsibility is of course of the greatest concern for the ICC. The Uppsala Conflict Data Program (UCDP) uses the following short, but all encompassing, description as an introduction:

> The Democratic Republic of Congo/Zaire (DRC) has been seen by many as the epitome of a collapsed state, torn by conflicts on many levels - regional, national and local - intertwined and complex. Rebel factions have been fighting the government, fighting each other, attacking civilians and been subjected to infighting. The vast country is rich in natural resources, a fact that ha[s] prolonged the conflicts.[7]

What can be concluded is that the conflict is very complex and needs to be addressed to develop a background that makes it possible to understand the ICC's effectiveness in the DRC.

Introduction to the Democratic Republic of the Congo

The DRC is the third-largest country in Africa (after Sudan and Algeria, which both encompass large parts of the Saharan desert), the twelfth largest in the world, has over 71 million inhabitants and is the largest country in the Great Lakes region, which also includes Burundi, Rwanda, Uganda and Tanzania. The country, furthermore, possesses vast reserves of gold, copper, diamonds, uranium, oil, coltan, cobalt, cadmium, manganese, silver, tin and zinc

[4] International Rescue Committee (IRC), 'Mortality Survey' (March 2007) online available at: www.rescue-uk.org/the-bigger-picture/crisis-in-congo/mortality-survey/, last retrieved on 10 August 2011.
[5] Turner, *The Congo Wars*, 2.
[6] Turner, *The Congo Wars*, 2.
[7] Uppsala Conflict Data Program, 'Congo, Democratic Republic of (Zaire)', online available at: www.ucdp.uu.se/gpdatabase/gpcountry.php?id=38&regionSelect=2-Southern_Africa, last retrieved at: 7 December 2010.

(see Map 3 for the location of the most important resources). Since, however 'these blessings have rarely been used to the benefit of the Congolese population', the DRC is sometimes referred to as a geological scandal.[8] These resources have also been a key factor in the interest of foreign powers in the DRC.[9]

Moreover, Congo has a long history of 'unaddressed legacies of mass atrocities', with the brutal rule of King Leopold II of Belgium from 1877 until he transferred power to Belgium in 1908, with political turmoil after independence from Belgium between 1960 and 1965 and during the rule of Mobutu Seso Seko from 1965 onwards.[10] Mobutu's rule was characterized by oppression and kleptocracy, and resulted in the gradual decay of the state, eventually degrading the country to the status of a collapsed state.[11] Mobutu had been able to stay in power due to Cold War realities and the support of key Western allies. After the end of the Cold War in 1989, Mobutu lost this support and change became imminent.[12]

The Rwandan Genocide and the First Congo War

Most texts on the conflict in the DRC start, however, with the spillover of the Rwandan genocide in 1994.[13] This genocide of mostly (Rwandan) Tutsis and the seizure of power in Rwanda by the Tutsi-led Rwandan Patriotic Front (FPR) resulted in the fleeing of about 2 million Rwandan Hutu refugees across the border into eastern Zaïre, mostly to the provinces of North and South Kivu.[14] Although 85 to 90 per cent of these refugees had not been part of the Rwandan Armed Forces (FAR) or the Interahamwe militia, among them were the main perpetrators of the genocide who used the refugee camps in Zaïre to carry out raids into Rwanda, attacked Banyamulenge (Congolese Tutsis) and who were suspected by the Rwandan government to plan an invasion.[15] Since the international community refused to demilitarize the refugee camps, Rwandan defense minister Paul Kagame started his own plan, as he explained in an interview in 1997, to dismantle the camps, destroy the structure of the

[8] David Renton, David Seddon and Leo Zeilig, *The Congo: Plunder and Resistance* (London 2007) 1.
[9] Federico Borello, *A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of the Congo*, International Center for Transitional Justice (October 2004) vii.
[10] Laura Davis and Priscilla Hayner (International Center for Transitional Justice), *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC* (March 2009) 7-8.
[11] Ibidem, 8.
[12] Borello (ICTJ), *A First Few Steps, 8.*
[13] Séverine Autesserre, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding*, Cambridge Studies in International Relations, (2010) 47.
[14] Turner, *The Congo Wars,* 3.
[15] John Pomfret, 'Rwandans Led Revolt In Congo', Washington Post Foreign Service (9 July 1997) A01.; Uppsala Conflict Data Program, 'The war against Mobutu (1996-1997)', part of the website on 'Congo, Democratic Republic (Zaire)', online available at: www.ucdp.uu.se/gpdatabase/gpcountry.php?id=38&regionSelect=2-Southern_Africa, last retrieved at: 10 August 2011.

Hutu army and to topple Mobutu who had supported the previous Rwandan Hutu regime and who had accepted the Hutu refugees on his soil.[16]

The Rwandan army began training Banyamulenge and made contact with other Congolese rebel forces that opposed Mobutu.[17] In addition, Rwanda abducted and conscripted Congolese children, which was a relatively new phenomenon.[18] When the Banyamulenge started revolting in early October after the South Kivu governor had announced that all Banyamulenge had to leave the province within a week, Rwanda invaded.[19] Only 'after the offensive had begun, it was announced that it was being conducted by' the *Alliance des Forces démocratiques pour la Libération du Congo-Zaire* (AFDL), led by 'longtime leftist opponent of Mobutu' Laurent Kabila.[20] The AFDL used child soldiers for the first time on a large scale and while moving westwards was accompanied by Rwandan forces that attacked the refugee camps and massacred thousands, mostly Hutu refugees.[21] The Hutu extremists leaders that 'survived the chase' would later form the *Forces Démocratiques de Libération du Rwanda* (FDLR).[22] Seven months later, on 17 May 1997, Kinshasa fell.[23] Uganda and Angola had also supported and aided the rebellion, because of Mobutu's support for rebel groups such as UNITA in Angola and the LRA in Uganda. Mobutu fled and Kabila established a new government and renamed the country the Democratic Republic of the Congo. This war of 1996-1997 that ended the over three decades long dictatorship of Mobutu Seso Seko is now called the First Congo War.

The Second Congo War

Kabila, however, managed to quickly alienate the regional coalition that had helped him gain power. On 26 July 1998 the Congolese government decided that Rwandan and other foreign soldiers were to leave the country. The measure was imposed to prove his independence of foreign forces in order to positively influence his domestic legitimacy by liberating himself from the 'Rwandan and Ugandan overrule' that was highly unpopular with the Congolese.[24]

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[16] Pomfret, 'Rwandans Led Revolt'.
[17] Ibidem.
[18] David van Reybrouck, *Congo, een geschiedenis* (Amsterdam 2010) 441.
[19] Turner, *The Congo Wars*, 4.
[20] Ibidem; Patrick Vinck, Phuong Pham, Suliman Baldo, and Rachel Shigekane, *Living with Fear: A Population-based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo*, Human Rights Center of the University of California Berkeley, Payson Center for International Development, and ICTJ (August 2008).
[21] Van Reybrouck, *Congo*, 443.
[22] Vinck, et al., *Living With Fear*, 10.
[23] Ibidem.
[24] Filip Reyntjens, 'Briefing: Democratic Republic of Congo: Political Transition and Beyond', in: *African Affairs* 106/423 (2007) 307-317, there 308.

This triggered the Second Congo War. Only a week later fighting started in the eastern cities of Goma, Bukavu and Uvira. Reyntjes noted that 'just as in 1996, a domestic rebel structure followed some time after the beginning of an insurgency initiated by Congo's eastern neighbours'.[25] Ten days later, on August 12, the rebel movement received its name: *Rassemblement Congolais pour la Démocratie* (RCD).[26]

The RCD was supposed to overthrow the government of Kabila, as quick as the AFDL had ousted Mobutu a year earlier. On the other side, however, Zimbabwe, Angola and Namibia supported Kabila's government, creating a military stalemate that divided the country into three zones (see Map 2). One was controlled by the government of Kabila and covered the west and south. The north was controlled and exploited by the newly established *Mouvement pour la Libération du Congo* (MLC) of Jean Pierre Bemba Gombo that was supported by Uganda. The RCD, supported by both Rwanda and Uganda, ruled in the east. In addition, the Mai Mai militias – local nationalistic militias in the Kivus – were used by different actors in the conflict and shifted alliances throughout the conflict. While they had initially opposed Kabila's AFDL for its foreign influences, they were later supported and used by Kabila to fight against the RCD that ruled in their region.

In this military stalemate Rwanda and Uganda then began to transform their military presence into an 'outright military occupation'.[27] Both countries no longer wished to move further west to Kinshasa, but controlled almost half of the Congolese territory and the rebel movements in it to massively exploit the available resources.[28] Statistics reveal this exploitation, as Uganda's gold export rose in 1999 and 2000 to 90 - 95 million dollar per year, with export figures being 'consistently greater than production values', and Rwanda exported 29 million dollar in those years, while it has no significant production of gold.[29] Furthermore, where Uganda had not even exported two hundred thousand dollar of diamonds before the war, this number was increased almost tenfold to 1.8 million dollar in 1999.[30] Rwanda, a country that has no diamond production, exported up to 40 million per year of diamonds.[31] The same goes for cassiterite (tin ore): while Rwanda produced 2200 tons of cassiterite between 1998 and 2004, it exported 6800 tons, over three times as much, with the extra

[25] Reyntjens, 'Briefing: Democratic Republic of Congo', 308.
[26] Ibidem.
[27] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice,* 8.
[28] Van Reybrouck, *Congo*, 465.
[29] Ibidem, 480. *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, UN Doc. S/2001/357 (12 April 2001) para. 96.
[30] Van Reybrouck, *Congo*, 480.
[31] Ibidem.

cassiterite coming from the Kivu.[32] All these increasing export numbers coincided with their occupations of eastern Congo from 1997 onwards.[33]

The competition between Uganda and Rwanda for control of the rebel movements and those resources resulted in a split within the RCD and subsequently in the zone they controlled. The Rwandan backed RCD-Goma (RCD-G) controlled the two Kivus and parts of the provinces of Katanga, Maniema and Eastern Kasai, whereas the Ugandan backed RCD-*Mouvement de Libération* (RCD-ML) controlled parts of North Kivu and the Oriental province, including the Ituri district.[34]

The Lusaka Ceasefire Agreement was signed in 1999, but was never kept. It did trigger the deployment of a UN peacekeeping mission – the UN Mission in the Democratic Republic of the Congo (MONUC) – in 2000 to assist in implementing the Lusaka Peace Accord. In January 2001 President Laurent Kabila was assassinated and was succeeded by his son Joseph Kabila. His vision of peace and progress led to the start of the Inter-Congolese Dialogue, an aspect of the earlier Lusaka agreement, to agree on terms of a transition to a democratic government, in Sun City, South Africa, in 2002.[35] The Sun City Accords of 2002 established a transitional government with President Kabila and four vice presidents representing the three warring parties of the 1998-2002 conflict and the unarmed opposition. It also called for the withdrawal of foreign troops and the integration of armed factions into the national army.[36] This manner of 'granting significant political power to many of the worst abusers' and 'integrating all the fighting forces with no provision for excluding human rights violators', is often argued to have 'served to entrench a culture of impunity'.[37] It is a strategy, also referred to as *brassage*, that has since been used frequently accompanying separate peace agreements with armed groups not included in this agreement.

While the installation of this transitional government marked the official beginning of the transition from war to peace, the 'skewed power-sharing arrangement', Vinck, et al., noted, 'meant that the transitional partners had little incentive to begin the difficult tasks of resolving the root causes of Congo's recurrent conflicts, ending impunity, and instituting the rule of law and the enforcement of basic human rights'.[38] The Sun City agreement had also included a Truth and Reconciliation Commission (TRC) and 'a call for the creation of a new

[32] Van Reybrouck, *Congo*, 480.
[33] *Report of the Panel of Experts*, UN Doc. S/2001/357 (2001) para. 96, 98 and 100.
[34] Vinck, et al., *Living With Fear*, 11.
[35] Reyntjens, 'Briefing: Democratic Republic of Congo', 309.
[36] *Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo*, Signed in Pretoria, Republic of South Africa (16 December 2002).
[37] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice,* 13.
[38] Autesserre, *The Trouble with the Congo,* 52; Vinck, et al., *Living With Fear*, 12.

"International Criminal Court" specifically for the DRC to address crimes in the country between 1960 and the transition', but such ideas for justice were not (seriously) implemented.[39] Elections were scheduled for June 2005. Although the elections were postponed several times, they were finally held in July 2006 and resulted in massive voter turnouts and Kabila being elected president.[40]

However, neither this peace agreement of 2002, nor the elections of 2006 meant the end of the atrocities. Fighting continued (not coincidentally) in the mineral-rich eastern Congo (see Map 3), in Ituri of the Oriental province and the provinces of North and South Kivu between various armed groups and militias that were not part of the Sun City Accords. Of the 5.4 million death estimated by the IRC mentioned earlier, 2.1 million were claimed to have occurred since the formal end of the war in 2002.[41]

Ituri

In Ituri a historic dispute between two rival ethnic groups, Hema and Lendu, over land use that had escalated in 1999 – aggravated by the broader international war in the DRC and exacerbated by proxy support from Uganda – continued in 2002-2003.[42] The pastoralist Hema, that had managed to build a strong and profitable business and who were favored during colonial times and Mobutu's rule because 'they managed to acquire more land', and the Lendu, who were traditionally agriculturalists and 'considered as second-class citizens under the Belgian colonial regime', had a long history of land conflict.[43] However, Human Rights Watch (HRW) noted: 'At no point in the documented history of Ituri ha[d] the violence attained the levels seen since 1999'.[44] It was the broader conflict in the DRC that sparked the greater violence in this local conflict.[45] In 1999 the violence had started after a commander of the Ugandan army – Uganda was an occupying force in Ituri between August 1998 and May 2003 – had created a separate province of Ituri with Bunia as its capital and had appointed a Hema as top-administrator, triggering the violence.[46] While tensions between the two ethnic

[39] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice,* 12-13.
[40] Reyntjens, 'Briefing: Democratic Republic of Congo', 311-312.
[41] IRC, 'Mortality Survey' (2007).
[42] Vinck, et al., *Living With Fear*, 12.
[43] Uppsala Conflict Data Program (UCDP), 'Hema-Lendu', actor information, part of the website on 'Congo, Democratic Republic (Zaire)' under 'Non-State Conflict', online available at: www.ucdp.uu.se/gpdatabase/gpcountry.php?id=38&regionSelect=2-Southern_Africa, last retrieved at: 10 August 2011.
[44] Human Rights Watch (HRW), *Ituri: "Covered in Blood", Ethnically Targeted Violence in Northeastern DR Congo*, Vol. 15, No. 11 (A) (July 2003) 18.
[45] Ibidem, 18.
[46] Human Rights Watch (HRW), *Courting History: the Landmark International Criminal Court's First Years* (July 2008) 25.

groups had been mostly on land use and local power, the outbreak of conflict between these groups was fueled by proxy support from Uganda to the leadership of both groups.[47]

The violence escalated further in January 2002 when the Hema-Lendu conflict merged with a leadership conflict in the earlier mentioned Ugandan backed national rebel group RCD-ML.[48] One RCD-ML faction supported the Lendu, while the other faction, the *Union des Patriotes Congolais* (UPC) created by Thomas Lubanga Dyilo in July 2001 and its military wing the *Forces Patriotiques pour la Libération du Congo* (FPLC), supported the Hema. The Lendu militias were assembled in the *Front Nationalist et Intégrationist* (FNI), with Mathieu Ngudjolo as commander, and cooperated with the Ngiti ethnic militia *Forces de Résistance Patriotiques en Ituri* (FRPI) lead by Germain Katanga, in their fights against the UPC over the control of Bunia. The UPC had seized Bunia in August 2002 allegedly in order to protect Hema civilians.[49] After this seizure, large-scale massacres 'performed by both ethnic groups' had followed.[50] When Ugandan troops withdrew in May 2003 obeying their agreement with the DRC, the Lendu attacked Hema civilians in a manner described by the UCDP as 'ethnic cleansing' accompanied by 'widespread looting', even at the MONUC compound.[51] The Lendu controlled Bunia until 12 May when 'the Hema UPC retook the town' and 'replicated the Lendu atrocities'.[52] The following description of an attack on nearby Bogoro village of the fact sheet of the ICC on the case of both Katanga and Ngudjolo shows the atmosphere in which the crimes were committed:

> The joint attack [of the FNI and FRPI] on Bogoro village on 24 February 2003, was directed not only against a military camp that existed in that village, but was also directed against the civilian population of the village. The attack was intended to "wipe out" or "raze" Bogoro village by killing the predominantly Hema civilian population and destroying homes of civilian inhabitants during and in the aftermath of the attack. The attack was launched in order to secure Lendu and Ngiti control of the route to Bunia which would, amongst other things, facilitate the transit of goods along the Bunia-Lake Albert axis.[53]

[47] Vinck, et al., *Living With Fear*, 12.
[48] UCDP, 'Hema-Lendu', summary.
[49] Ibidem.
[50] Ibidem.
[51] Ibidem.
[52] Ibidem.
[53] *Case Information Sheet: Situation in the Democratic Republic of the Congo, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC Doc. ICC-PIDS-CIS-DRC2-03-004/10_Eng.

During the conflict both sides committed atrocities and used concerning language towards the other group. UCDP has summarized this as follows:

> Both Hema and Lendu militias have claimed to be protecting civilians of their own group against violence perpetrated by the other side, and both groups have invoked fears of extermination, comparing the situation to that in Rwanda. Fear and rumours have been used to mobilise fighters, leading to pre-emptive strikes and reprisal attacks.[54]

In addition to the local ethnic militias, national rebel groups such as the MLC, the RCD-ML, and the RCD-G have supported them in their conflicts as a way to 'expand their own base of power in the DRC transitional government'.[55] These national groups, together with the local ethnic groups, were supported in turn, by the Ugandan, Rwandan and DRC governments.[56] Furthermore, Uganda as occupying power until 2003 'played a direct role in political and administrative changes in Ituri, stimulating new political parties and militia groups to form', thereby using the conflict as a 'pretext to remain in the resource-rich area, exploiting its minerals and commerce'.[57] So, the Ugandan army 'claimed to be a peacemaker in a region torn by ethnic strife', but in reality 'provoked political confusion and created insecurity in areas under its control'.[58]

Moreover, as the description of the ICC case information sheet of the case against Katanga and Ngudjolo pointed out as well, although the attack on Bogoro village may have been intended to wipe out the village, the underlying motive of the Lendu was economic. In fact, UCDP states that 'while the conflict over land and local power has been the prime reason for violence, the presence of gold and other minerals in Ituri', as shown in Map 3, has been the reason for the continuation of fighting.[59] HRW agrees that 'competition for the region's lucrative gold mines and trading routes was a major contributing factor to the fighting'.[60] Thus, this competition over land, power and especially resources, was a 'major factor' of the crisis Ituri.[61] The ICC's Office of the Prosecutor (OTP) also admitted the role of natural resources in the conflict already in its very first decision to closely follow the situation in Ituri:

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[54] UCDP, 'Hema-Lendu', summary.
[55] HRW, *Ituri: "Covered in Blood"*, 2.
[56] Ibidem.
[57] Ibidem.
[58] Ibidem, 6.
[59] UCDP, 'Hema-Lendu', summary.
[60] Human Rights Watch (HRW), 'The International Criminal Court Trial of Thomas Lubanga' (23 January 2009) online available at: www.hrw.org/en/news/2009/01/22/international-criminal-court-trial-thomas-lubanga#_What_has_happened, last retrieved on 11 August 2011.
[61] UCDP, 'Hema-Lendu', summary.

> The fighting taking place in Ituri seems to be the outcome of ethnic strife and of the struggle for local power, intertwined with national and regional conflicts. All of these aspects of the situation are fuelled by the way natural resources are exploited.[62]

Although Uganda and Rwanda withdrew in 2002-2003, elite networks were left to maintain their influence in the region and control over resources.[63] So, their withdrawal did not mean the end of the conflict or their exploitation.

In conclusion the Second Congo War was, as Turner stated, 'degenerated from a war to overthrow Kabila into a war to control and exploit one slice or other of the Congolese pie'.[64] The crimes committed were both 'in aid of and financed by the profits from illegal appropriation of national resources', as amply documented by the UN.[65] Accountability for crimes in these wars has been 'extremely limited, with a widespread presumption of impunity' due to agreements of *brassage*, *mixage* – the latter being a lighter form of integration whereby armed factions are not relocated to other regions as is the case with the former – and amnesties (with the exclusion of international crimes) in peace agreements between the (transitional) government and rebel groups.[66] HRW commented on this practice which will be further discussed in Chapter 3 that 'integrating abusive commanders into a new army may buy their compliance with the transitional process in the short term, but only prepares the way for future instability'.[67]

North and South Kivu

Violence also continued in the provinces of North and South Kivu and was caused among others by the continuing presence of large numbers of (militant) Rwandan Hutu refugees and the available natural resources. Crimes were most notably committed by the FDLR, in which militant Hutu refugees were organized, by Laurent Nkunda's and later Ntaganda's *Congrès National pour la Défense du Peuple* (CNDP), by the integrated government's army: the *Forces Armées de la République Démocratique du Congo* (FARDC) and by various Mai Mai militias.[68] Nkunda, a Banyamulenge and former RCD commander who had been integrated

[62] Office of the Prosecutor (OTP), 'Communications Received by the Office of the Prosecutor of the ICC', Press Release, ICC Doc. pids.009.2003-EN (16 July 2003) para. III. a.
[63] Aaron Ezekiel, 'The Application of International Criminal Law to Resource Exploitation: Ituri, Democratic Republic of the Congo', in: *Natural Resources Journal*, 47 (2007) 225-245, there 229-231.
[64] Turner, *The Congo Wars*, 9.
[65] Ezekiel, 'The Application of International Criminal Law', 227.
[66] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice,* 5.
[67] Human Rights Watch (HRW), *World Report 2005: Events of 2004*, (New York 2005) 118-119.
[68] Vinck, et al., *Living With Fear*, 20.

into the army with the official end of the war in 2003, left the army in 2004, attacked the South Kivu town of Bukavu and founded the CNDP allegedly to protect the Banyamulenge as they had lost political influence in the elections and as he supposed them to be threatened by both the army and the FDLR.[69] The CNDP was supported by Rwanda, because they were fighting the Hutu FDLR, just like the AFDL and the RCD(-Goma).[70] The FDLR that the CNDP was fighting was in turn supported by the DRC.

The CNDP managed from 2006 onwards 'to take control over several villages in North Kivu and set up a state apparatus with their own taxation system, administrators, police and intelligence services'.[71] As Davis and Hayner of the International Center for Transitional Justice (ICTJ) explained, the difficulty in bringing the CNDP to the talking table was the presence of the FDLR, 'providing a constant (and some would say, convenient) justification for the CNDP to resist disarming'.[72] Several attempts to stop the CNDP by force or by *mixage* failed.[73]

In 2009 Bosco Ntaganda, who had fought in the Rwandan Patriotic Front, had been the third person and chief of military operations of Lubanga's FPLC of the UPC, had refused integration into the FARDC and joined the CNDP in 2006, dismissed Nkunda as leader of the CNDP and declared a ceasefire, noteworthy 'after the group had been promised to integrate in FARDC and join Rwanda and Congo in their upcoming [joint] military operations to disarm FDLR'.[74] The governments of rivalling DRC and Rwanda had struck a deal to 'rid each other of their enemies', in which Rwanda arrested Laurent Nkunda of the CNDP they had always supported, in exchange for which 'Rwandan soldiers could enter eastern Congo for five weeks of joint military operations' against the FDLR'.[75] The FDLR responded to this offensive and this shift in political alliances of the Congolese government, which had previously supported the FDLR, by launching a retaliatory offensive targeting the civilian population of the Kivus

[69] Uppsala Conflict Data Program (UCDP), 'Conflict continues in North Kivu (2006-2009)', part of 'Congo, Democratic Republic of (Zaire)', online available at: www.ucdp.uu.se/gpdatabase/gpcountry.php?id=38&regionSelect=2-Southern_Africa#, last retrieved on 11 August 2011.
[70] Human Rights Watch (HRW), *You will be punished: Attacks on Civilians in Eastern Congo* (December 2009) 30.
[71] UCDP, 'Conflict continues in North Kivu (2006-2009)'.
[72] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice,* 9.
[73] UCDP, 'Conflict continues in North Kivu (2006-2009)'.
[74] Human Rights Watch, 'DR Congo: Suspected War Criminal Wanted: International Court Unseals Arrest Warrant Against Bosco Ntaganda' (29 April 2008) online available at: www.hrw.org/en/news/2008/04/29/dr-congo-suspected-war-criminal-wanted, last retrieved on 12 August 2011; UCDP, 'Conflict continues in North Kivu (2006-2009)'.
[75] Human Rights Watch (HRW), 'Democratic Republic of Congo (DRC): Events of 2009', World Report 2010, online available at: www.hrw.org/world-report-2010/democratic-republic-congo-drc, last retrieved on 11 August 2011.

'to punish the population for their government's change in policy toward them' and 'in order to ultimately obtain political concessions'.[76]

On 23 March 2009 Bosco Ntaganda's CNDP concluded a peace agreement with the government and was integrated into the army.[77] However, although the CNDP nominally is in the Congolese army, Ntaganda maintains a parallel chain of command 'operating outside the army's military hierarchy'.[78] Moreover, 'some former CNDP units' have allegedly ended their participation in the integration process.[79] In December 2010 HRW reported that forced recruitment of children under the age of 18 continues by 'Congolese army general and former rebel leader Bosco Ntaganda and officers loyal to him' for his parallel command structure, by the FDLR and by various Mai Mai militias.[80] HRW noted that this 'wave of military recruitment', signals 'a possible collapse of eastern Congo's peace process'.[81] So, although the UCDP states that the armed conflict terminated on 29 October 2008[82], tensions continue and a stable peace has not yet been achieved. In this complex context the ICC started its first work on 23 June 2004.

The International Criminal Court in the DRC

The ICC was established at the Rome Conference in 1998 and entered into force on 1 July 2002 with the sixtieth ratification of the Rome Statute. It was founded 'to put an end to impunity for the perpetrators of these crimes [the most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes'.[83] As of 1 July 2002 the ICC has jurisdiction over crimes of genocide, crimes against humanity and war crimes that have been committed on the territory of a State Party to the Rome Statute or by perpetrators with the nationality of a State Party. The Court may exercise this jurisdiction if a

[76] HRW, *You will be punished*, 10; HRW, 'Democratic Republic of Congo (DRC): Events of 2009'; *Case Information Sheet: Situation in Democratic Republic of the Congo, The Prosecutor v. Callixte Mbarushimana,* ICC Doc. ICC-PIDS-CIS-DRC-04-002/11_Eng (31 January 2011).
[77] UCDP, 'Conflict continues in North Kivu (2006-2009)'.
[78] Human Rights Watch (HRW), 'DR Congo: Rogue Leaders, Rebels Forcibly Recruit Youth: Tensions Rise as Armed Groups Expand Their Ranks' (December 20, 2010) online available at: www.hrw.org/en/news/2010/12/20/dr-congo-rogue-leaders-rebels-forcibly-recruit-youth, retrieved on 3 May 2011.
[79] Ibidem.
[80] Ibidem.
[81] Ibidem.
[82] UCDP applies the following definition of armed conflict: 'An armed conflict is a contested incompatibility that concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths in one calendar year'. UCDP, 'Congo, Democratic Republic of (Zaire)', general conflict information, online available at www.ucdp.uu.se/gpdatabase/gpcountry.php?id=38&regionSelect=2-Southern_Africa#.
[83] *Rome Statute of the International Criminal Court* (*Rome Statute*), ICC Doc. A/CONF.183/9 (17 July 1998) Preamble.

situation in which one or more of such crimes appears to have been committed is 1) referred to the Prosecutor by a State Party, 2) referred to the Prosecutor by the Security Council under Chapter VII of the UN Charter, or 3) if the Prosecutor has initiated investigations *propio motu*, authorised by the Pre-Trial Chamber of the Court. The Court's jurisdiction is further based on complementarity, meaning that the ICC only has jurisdiction if a state is unable or unwilling to prosecute the perpetrators of the crimes that fall under the Rome Statute.

The DRC was an early party to the Rome Statute, which it signed in September 2000 and ratified in April 2002.[84] On 16 July 2003 the OTP announced that it had 'selected the situation in Ituri, Democratic Republic of the Congo, as the most urgent situation to be followed', because, as Moreno-Ocampo explained later, allegedly 3000 killings were committed there after the Court became operational, making it the worst situation under his jurisdiction.[85] The OTP also stated that it would use all powers at its disposal to contribute to the prevention of future crimes and the investigations and punishment of these crimes, including seeking authorisation from a Pre-Trial Chamber to start investigation *propio motu*.[86] When the Prosecutor informed the States Parties that he was ready to request authorization to start investigation, he emphasized however that 'a referral and active support from the DRC would assist his work'.[87] The government of the DRC was thus strongly encouraged to refer the situation to the ICC. On 19 April 2004 Kabila's transitional government referred the situation of the DRC to the ICC following significant international pressure.[88] Some even argue that Kabila referred the situation of the DRC as a political tool to eradicate his political opponents as they were in greater danger to be the subject of ICC investigations.[89]

On 23 June 2004 the ICC opened investigations, its first ever, in the DRC. During these investigations, Thomas Lubanga Dyilo, founder and leader of the UPC was arrested by Congolese authorities, after the killing of nine UN peacekeepers in Ituri in Feburary 2005.[90] In order to use this arrest to secure the surrender and transfer of Lubanga to the Court because

[84] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 27.
[85] OTP, 'Communications Received', para. III.; Pamela Yates, Paco de Onís, and Peter Kinoy, *The Reckoning: The Epic Story of the Battle for the International Criminal Court*, Skylight Pictures (New York 2009).
[86] OTP, 'Communications Received', para. III.
[87] Office of the Prosecutor, 'The Office of the Prosecutor of the International Criminal Court opens its first investigation', Press Release, ICC Doc. ICC-OTP-20040623-59 (23 June 2004).
[88] Phil Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda', in: Nicholas Waddell and Phil Clark (eds.), *Courting Conflict: Justice, Peace and the ICC in Africa*, Royal African Society (London 2008) 37-46, there 39.
[89] William W. Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo', in: *Leiden Journal of International Law*, 18 (2005) 557-590, there 565.
[90] Human Rights Watch, 'D.R. Congo: ICC Arrest First Step to Justice: Prosecutor Says First Accused Sent to Hague' (17 March 17 2006), online available at www.hrw.org/en/news/2006/03/17/dr-congo-icc-arrest-first-step-justice, visited at 6 December 2010.

of the 'possible imminent release from Congolese custody after approximately one year of detention', the OTP had to move fast.[91] As the OTP had strong evidence about child soldiers, but was not yet ready to prove the connection between Lubanga and some of the killings and rapes, the Prosecutor decided to move along just with the case on child soldiers.[92] The arrest warrant was issued under seal on 10 February 2006 on charges of conscripting, recruiting and using child soldiers (two counts of war crimes) and Lubanga was transferred to The Hague on 17 March 2006. The trial of Lubanga, the first trial of the ICC ever, was stayed twice, in June 2008 and July 2010 due to procedural problems that will be further discussed in Chapter 2. The trial is still ongoing, meaning that none of the trials before the ICC have been completed yet.

The second case of the ICC in the situation of the DRC is the case against Bosco Ntaganda, former Deputy Chief of General Staff for Military Operations in Lubanga's FPLC and former Chief of Staff of the CNDP of Laurent Nkunda. Although his arrest warrant for the war crimes of conscripting, enlisting and using children under the age of fifteen to participate actively in hostilities in the period between July 2002 and December 2003 was issued under seal already in August 2006 and was unsealed in April 2008, Bosco Ntaganda has not been arrested. As mentioned earlier, Ntaganda was, as part of a peace agreement between the CNDP and the government, integrated into the Congolese military on 16 January 2009 and was promoted to the position of general.[93] The Congolese authorities have since refused to hand Ntaganda over on the grounds that 'domestic peace was best served by his remaining free'.[94] Emmanuel-Janvier Luzolo, the country's justice minister, explained that 'in the judicial practice of any state, there are moments when the demands of peace override the traditional needs of justice'.[95] Ntaganda thus remains at large.

The third case is the case against Germain Katanga, commander of the FRPI and Mathieu Ngudjolo Chui, former leader of the FNI. Sealed arrest warrants were issued in July 2007 and they were transferred to The Hague by the Congolese authorities in October 2007 and February 2008 respectively. They are both accused of seven war crimes and three crimes against humanity, including murder, sexual slavery, rape, attacking the civilian population,

[91] HRW, *Courting History*, 63; Yates, De Onís, Kinoy, *The Reckoning* (2009).
[92] Yates, De Onís, Kinoy, *The Reckoning* (2009).
[93] Human Rights Watch (HRW), 'DR Congo: Brutal Rapes by Rebels and Army Over 180 Civilians Killed, Most by Rwandan Rebels' (8 April 2009), online available at: www.hrw.org/en/news/2009/04/08/dr-congo-brutal-rapes-rebels-and-army, last retrieved on 11 August 2010.
[94] AFP News Agency, 'Peace before justice, Congo minister tells ICC' (12 February 2009) online available at: www.google.com/hostednews/afp/article/ALeqM5hbGnGCoztEJHzIf5HMghzIMfjv6w, last retrieved on 9 July 2011.
[95] Ibidem.

pillaging and using children under the age of 15 to take active part in hostilities, allegedly committed in the village of Bogoro in the Ituri district from January to March 2003 during a joint attack. Their cases were joined in March 2008 and their trial commenced in November 2009.[96] It is still in progress.

In November 2008, Moreno-Ocampo announced that the OTP started its third investigation in the DRC which would focus on the Kivus, ten days after he expressed his concern about the situation in the Kivus.[97] In addition, he stated that 'this will not be the last investigation related to the DRC' as the OTP 'also plans to bring a case against those who organized and financed militias active in the DRC'.[98] Recently, on 11 October 2010 French authorities arrested Callixte Mbarushimana, who has been the executive secretary of the FDLR since July 2007 and allegedly took over part of the decision-making powers of the president after his arrest in November 2009. He was charged with five counts of crimes against humanity and six counts of war crimes including murder, rape, attacks against civilian populations and destruction of property, committed by the FDLR during most of 2009.[99] His arrest warrant was issued under seal on 28 September 2010. He has been transferred to The Hague in December 2010. His case will be the fourth case of the ICC in the situation of the DRC. With four accused at The Hague, of whose trials three are already at trial stage, the situation of the DRC is the most advanced situation at the Court.

In addition to these accused under the situation in the DRC, Jean Pierre Bemba Gombo, one of the four vice-Presidents in the transitional government of Kabila, his main electoral opponent in the 2006 elections and leader of the former Congolese rebel group MLC, has been arrested in 2008 for three war crimes and two crimes against humanity, including murder, rape and pillaging, committed in the Central African Republic (CAR) between October 2002 and March 2003. During this period Bemba's MLC assisted then CAR president Ange-Félix Patassé in fighting a rebel movement led by current president of the CAR François Bozizé, who was then the Chief-of-Staff of the Central African armed forces.[100] The MLC, led by Bemba, committed in the context of this conflict crimes against

[96] Coalition for the International Criminal Court, 'Katanga - Ngudjolo Chui Case', online available at: www.iccnow.org/?mod=drctimelinekatanga, last retrieved on 11 August 2011.
[97] Office of the Prosecutor, 'ICC Prosecutor recalls ICC has jurisdiction over crimes against the civilian population in the Kivus', Press Release, ICC Doc. ICC-OTP-20081104-PR369 (4 November 2008).
[98] Prosecutor Luis Moreno-Ocampo, 'Address to the Assembly of State Parties', (14 November 2008) 2 and 7. Online available at: www.icc-cpi.int/NR/rdonlyres/50F9D0FA-33A0-48B3-942E-4CFF88CA3A27/0/ICCASPASP7StatementProsecutor.pdf, last retrieved on 11 August 2011.
[99] The Hague Justice Portal, 'French Court approves Mbarushimana extradition', (3 November 2010), online available at: www.haguejusticeportal.net/smartsite.html?id=12230, last retrieved at 11 August 2011.
[100] *Case Information Sheet: Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo (Bemba)*, ICC Doc. ICC-PIDS-CIS-CAR-01-005/10_Eng (30 December 2010).

the civilian population 'in particular, rape, murder and pillaging'.[101] The case against Bemba is at trial stage.

Overall, the ICC is currently active in six situations in Uganda, the DRC, the Central African Republic (CAR), Darfur, Kenya and recently Libya. In addition, the ICC is conducting preliminary analysis in Colombia, Afghanistan, Cote d'Ivoire, Georgia, Palestine, Guinea, Honduras, Korea and Nigeria.[102]

Transitional Justice

The creation of the Rome Statute in 1998 was part of the trend and the development of the practical and scholarly field of transitional justice that arose in the 1980s and 1990s as a result of the transitions from authoritarian rule in Eastern Europe and Central America.[103] In the beginning transitional justice was the study of 'how emerging democracies reckon with former regimes'.[104] In time, the definition was broadened to 'how successor regimes should deal with the human rights abuses of their authoritarian predecessors', and thereby to a 'much broader terrain than transitions to democracy, addressing transitions in a range of societies, most notably those attempting negotiated settlement in protracted social conflicts' as the DRC could be defined.[105] Kofi Annan described transitional justice in 2004 as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[106]

In the field of transitional justice, criticism has been expressed not only on the workings of the ICC, but also on the effectiveness and legitimacy of (international) trials as instruments of transitional justice and even on transitional justice itself.[107] Moreover, there is a significant debate in the field of retributive justice, including the ICC, on the question whether justice has a deterrent effect on future crimes and thereby contributes to peace or is rather a disincentive to peace by standing in the way of peace negotiations. The question is

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[101] *Case Information Sheet: Bemba*.
[102] Office of the Prosecutor, 'Communications, Referrals and Preliminary Examinations', online available at: www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref, last retrieved on 11 August 2011.
[103] Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'', in: *International Journal of Transitional Justice*, 3 (2009) 5-27, there 7.
[104] Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington 1995).
[105] Bell, 'Transitional Justice', 7-8.
[106] *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc. S/2004/616 (23 August 2004) para. III.8.
[107] See: Laurel E. Fletcher, Weinstein, Harvey, M. and Rowen, Jamie, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective' in: *Human Rights Quarterly* 31, 1 (2009) 136-220.

then whether justice stands in the way of peace and whether peace should take precedence, if necessary at the expense of justice, or whether justice is a precondition to long lasting peace. Although, the term transitional justice assumes that a new government is dealing with an old regime from before a transition, the ICC often works on situations where the conflict has not yet (fully) ended as in the case of Uganda and Darfur. In the DRC a peace agreement was signed in 2003, but violence continued to occur.[108] This research on the ICC's effectiveness in the DRC might therefore also provide insights for this peace versus justice debate, next to possible insights for the debate on the work and effectiveness of the ICC in particular, the debate on trials as instruments of transitional justice and perhaps even on the legitimacy of transitional justice in general. These four current scholarly debates in the field of transitional justice will be shortly introduced here. Also, an introduction will be presented on the status of the literature on the ICC in the DRC specifically.

Transitional Justice in General

With this study on the effectiveness of the ICC, conclusions might be drawn on the legitimacy of the use of transitional justice. If the ICC proves to be effective in ending impunity and contributing to the prevention of those crimes, then the use of transitional justice might be called legitimate. The question remains whether the objectives of the ICC coincide with the purposes of transitional justice. Fletcher, Weinstein and Rowen, for example, state that the question of effective transitional justice is 'what is most beneficial to the people whose lives have been disrupted or even destroyed by the perpetrators of violence'.[109] This objective does not necessarily coincide with those of the ICC.

The main criticism on transitional justice is that it is actively pursued by governments, international organisations and NGO's, while there is no proof that it works and is necessary.[110] This is especially important as transitional justice mechanisms often come at the expense of other policy goals and thereby can be counterproductive as the idea is that 'new regimes should reserve their energies exclusively for forward-looking measures that contribute to state-building, economic growth, and political cohesion'.[111] According to Christine Bell, the problem with transitional justice is that the field of transitional justice straddles three different conceptions: 'transitional justice as an ongoing battle against

[108] Kenneth A. Rodman, 'Is Peace in the Interest of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court', in: *Leiden Journal of International Law*, 22 (2009) 99-126, there 116.
[109] Ibidem, 165.
[110] Fletcher, et al., 'Context, Timing and the Dynamics', 136-220.
[111] Eric A. Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice', in: *Harvard Law Review*, Vol. 117, Iss. 3 (2004) 762-826.

impunity rooted in human rights discourse, a set of conflict resolution techniques related to constitution making, and a tool for international state building in the aftermath of mass atrocity'.[112] A call for papers on post-conflict justice noted also that:

> International criminal justice interventions are increasingly seen as necessary components of a broader peace-building process. They are conceived not only as a tool for criminal punishment but also as a means to facilitate the end of hostilities and strengthen domestic legal institutions in post-conflict societies. Moreover, international criminal justice interventions remain largely founded on the assumption that pursuing prosecutions and other forms of accountability has beneficial effects for local constituencies affected by violence and on domestic legal systems more generally.[113]

It could be added that transitional justice is used by the international community as a relatively neutral instrument and as a sign of care and action, if any other form of action is prevented by a deadlock of political interests or disinterests and unwillingness to act militarily as in the case of Darfur and to some extent the former Yugoslavia. As long as the practice is supposed to serve all these conceptions, it will never be working properly. If this paper finds that the ICC is effective, it still depends on the view on transitional justice whether we can conclude that transitional justice works.

(International) Tribunals as Instruments of Transitional Justice

Successor regimes and the international community have created a number of different instruments to deal with the human rights violations of predecessor regimes or to respond to collective atrocities. These mechanisms of transitional justice include trials, truth commissions, amnesties, reparations, commissions of inquiry, public access to files of former secret police, institutional change, lustration, rehabilitation, apologies, production of new historical narratives and memorialisation, depending on goals such as providing for retributive justice, restorative justice or reconciliation. Trials or tribunals are thus only one of many mechanisms at hand for successor regimes, but as Fletcher, Weinstein and Rowen noticed, there is a strong focus of scholars and the international community on trials.[114] The ICC is proof of this development. Moreover, the creation of the ICC has institutionalised this

[112] Bell, 'Transitional Justice', 13.
[113] Grotius Centre for International Legal Studies, 'Call for Papers: Post-conflict Justice and "Local Ownership", Assessing the Impact of the International Criminal Court', The Peace Palace / Leiden University (The Hague Campus) (The Hague May 5-6 2010) online available at: www.grotiuscentre.org/resources/1/CALL_FOR_PAPERS_LaunchWorkshop.pdf, last retrieved on 12 August 2011.
[114] Fletcher, et al., 'Context, Timing and the Dynamics', 166-167.

emphasis and has replaced the 'moral exhortation' that accountability used to be, with 'a legal obligation owed by states party to the agreement to try those accountable for international crimes'.[115] They question this road that the international community has taken with its focus on legal responses and the presumption that legal process is 'necessary, if not a precondition for societies affected by mass violence to transition into a new period of peace and stability'.[116]

Martha Minow identified in her work of 1998 on transitional justice mechanisms, three critiques on, and limitations of, the trial response to atrocities, namely: retroactivity, politicization and selectivity.[117] Although the ICC was created to overcome retroactivity (as occurred at the Nuremberg trials) and selectivity (for example the case with the creation by the UN of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)), selectivity remains a limitation at the ICC as it can only prosecute a few of those most responsible and can not reach perpetrators of non states parties to the Rome Statute that commit crimes in states that are also not a party to the Statute. Politicization, and the resulting partiality, is a criticism also heard on the Court, which will be discussed later. Moreover, Minow believes that trials are imperfect to establish the truth, to let victims tell their whole story without legal demands and are poorly able to heal and reconcile affected individuals and communities. She therefore gives preference to truth commissions, which are according to her reflection better qualified to achieve such objectives.[118] The lack of focus on victims, to which Minow attributes these inabilities, might be outdated by the ICC's options of victim participation and reparations. Kingsley Chiedu Moghulu is of the opinion, for example, that the ICC, 'by providing in its statute for restorative justice for victims of crimes under the court's jurisdiction in addition to retribution against perpetrators, has a good chance of fully meeting the aspirations of victims'.[119]

Chandra Lekha Sriram noted two other downsides to tribunals: that they promote victor's justice and that they overlook the 'victim's need for restitution or reconciliation as well as the broader needs of society to heal and rebuild', which are claims very similar to

[115] Fletcher, et al., 'Context, Timing and the Dynamics', 166.
[116] Ibidem, 164.
[117] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston 1998) 29-47.
[118] Ibidem, 52-83.
[119] Kingsley Chiedu Moghalu, 'Reconciling fractured societies: An African perspective on the role of judicial prosecutions', in: Ramesh Thakur and Peter Malcontent (eds.), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (New York 2004) 197-223, there 216.

those of Minow.[120] Moreover, she believes, a notion that was mentioned before, that they are an 'unnecessary drain upon resources that should instead have been devoted to rebuilding national judicial capacity, as with the Sierra Leonean court'.[121]

Helena Cobban, a severe critic of international courts, believes and criticises that international courts do not take into account what victims really want.[122] The international courts believe them to want prosecutions, while, Cobban argues, 'most survivors seek first and foremost an end to the fighting and to regain basic economic and social stability'.[123] She believes most victims would be quite satisfied with amnesties if they bring an end to violence, based on experiences in Mozambique and South Africa that are often used as examples of successful amnesties bringing peace and still improving the rule of law.[124] She therefore concludes that 'those who want to help the survivors of atrocities should first ask broad sections of society in an open-ended way how they define their own needs and how they define justice'.[125] This definition of justice is also important, as it varies throughout the world and among various cultures. Grono and O'Brien found for example that in Uganda, also an example often used in this context, the 'Court's brand of retributive punishment was fundamentally at odds with local values, enshrined culturally in traditional reconciliation ceremonies'.[126] There is also debate on whether universal human rights are in fact universal or merely western.[127] If they are not than international tribunals would impose western legal norms on the countries they aim to help.[128] Some would even accuse them of Western dominance.

Moghalu presented the following reasons why international tribunals are 'less than perfect mechanisms for dealing with mass atrocities':

> … only a relatively small number of people can be tried, though even trying the modest numbers of persons may contribute significantly to the reconciliation process if those tried are the planners and leading perpetrators of mass crimes as opposed to minor culprits; and trials are unavoidably lengthy because of the intricacies of judicial proceedings conducted in several languages. These

[120] Sriram, Chandra Lekha and Suren Pillay (eds.), *Peace versus Justice: The Dilemmas of Transitional Justice in Africa* (Woodbridge and Durban 2010) 3.
[121] Ibidem, 3.
[122] Helena Cobban, 'Think Again: International Courts', in: *Foreign Policy* (2006) 22-28, there 24-25.
[123] Ibidem, 24-25.
[124] Ibidem.
[125] Ibidem, 25.
[126] Nick Grono and Adam O'Brien, 'Justice in Conflict? The ICC and Peace Processes' , in: Nicolas Waddell and Phil Clark, *Courting Conflict: Justice, Peace and the ICC in Africa*, (2008) 13-20, there 15.
[127] See for example: Emmanuelle Jouannet, E., 'Universalism and Imperialism: The True-False Paradox of International Law', in: *The European Journal of International Law*, Vol. 18, No. 3 (2007) 379–407.
[128] Graeme Simpson, 'One among Many: The ICC as a Tool of Justice during Transition', in: Nicolas Waddell and Phil Clark, *Courting Conflict: Justice, Peace and the ICC in Africa*, (2008) 73-80, there 73.

> trials also tend to be perfectionist in aspiration because of the need to respect due process and the accused's rights to a fair trial. All this can tax the patience of victims and observers and raise questions about the true deterrent effect of trials.[129]

Other critiques he mentions are, the 'perception of arbitrariness (…) and arguments against the assignment of individual responsibility for acts described by law professor Marl Osiel as "administrative massacre"'.[130] Osiel also mentions the criticism that the 'intellectual architects' of these administrative massacres 'may possess an evil so "radical" as to exceed our capacity to punish it'.[131]

On the other hand, Moghalu states three arguments that may make trials 'a superior route, or, at the very least, a necessary component of long-term conflict resolution and reconciliation in fractured societies'.[132] These three arguments are that, firstly, 'justice and accountability have deep and psychological impact on individuals and by extent societies', that they, secondly, 'establish individual responsibility for the crimes adjudicated, thus negating the notion of collective guilt, which can be a significant obstacle to genuine reconciliation', and thirdly, that they 'establish an indisputable historical record of events with legally binding consequences where guilt is established, thus banishing extremists from political space and giving room for the growth of a democratic culture'.[133] The first argument and the last argument actually are among the arguments Minow used to explain her preference for truth commissions. In addition, Moghalu formulated the requirements for the international tribunals', in reference to the ICTY and the ICTR, to 'more effective contributions to conflict resolution'.[134] The first is the need to address the slow pace of the trials. The second is the need to address the 'perception that they have limited relevance to the societies whose wounds they seek to address' by improving the effectiveness and reach of their outreach activities, as the ICTY and the ICTR, according to him, 'suffer from the absence of a sense of ownership by these societies'.[135] The third issue concerns the global publicity, as much of this publicity, especially in the case of the ICTR has focused on its problems rather than providing

[129] Moghalu, 'Reconciling Fractured Societies', 215.
[130] Ibidem,
[131] Mark Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity', in: *Human Rights Quarterly*, Vol. 22, No. 1 (February 2000) 118-147, there 120.
[132] Moghalu, 'Reconciling Fractured Societies', 216
[133] Ibidem, 216-217.
[134] Ibidem, 217.
[135] Ibidem, 217.

a balanced view. The final and most interesting requirement is that international criminal tribunals must not only be impartial, but must also 'be *seen* to be impartial'.[136]

A final, and according to Akhavan, leading criticism of international criminal tribunals is that they impede peace settlements and thus prolong atrocities, but this will be discussed in the peace versus justice debate.[137] These criticisms, which are often the result of different notions of what international tribunals should do and how they should be evaluated, form the debate on whether (international) tribunals are the right transitional justice mechanisms. What almost all scholars agree on is that international tribunals are one mechanism of many, as social, political and economic reforms are also necessary, and that they should be accompanied by (such) other forms of transition, captured by Thakur:

> Crime and human rights violations emerge from causes deeply embedded in the structure of societies, poverty, deprivation, social injustice. When courts deal with massive human rights violations arising in connection with civil conflict, they are considering only the visible surface of underlying social problems. Criminal law, however effective, cannot replace the social policies needed to combat deprivation and social injustice.[138]

This question on tribunals as the right and effective transitional justice instruments affects the legitimacy of the ICC as a permanent international tribunal. Therefore, this study on the effectiveness may provide insights for this part of the debate as well.

The Effectiveness of the International Criminal Court

There is also debate on the existence, the work and the effectiveness of the ICC. This debate started long before the ICC came into being. Points of skepticism included possible politicization, possible frivolous and politically motivated investigations and prosecutions, the threat to sovereignty, a lack of resources and support because of the expected United States (US) boycott of the ICC, the lack of support and enforcement abilities to secure cooperation and arrests, the limited impact on the occurrence of international humanitarian law violations, the limited ability to prosecute crimes committed in internal conflicts due to jurisdiction

[136] Moghalu, 'Reconciling Fractured Societies', 218.
[137] Payam Akhavan 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism', in: *Human Rights Quarterly*, Vol. 31 (2009) 624-654, there 625.
[138] Martii Ahtisaari, 'Preface: Justice and Accountability: Local or International?', in: Ramesh Thakur and Peter Malcontent (eds.), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (New York 2004) xii-xvi, there xv.

matters and the limited expectations of Security Council or self referrals and as 'most crimes are now committed in internal conflicts' a limited possible impact overall.[139]

Cobban, predicted in 2006 that the ICC 'will be no more effective' than the ICTY and the ICTR 'in improving the lives of war-zone residents who are its primary stakeholders', which she perceived as 'not very effective at all'.[140] More specifically she predicted from her experience with the ICTY and the ICTR that trials at the ICC, when concerning 'events that took place in recent memory, in a society that's still highly divided and deeply traumatized', will likewise exacerbate existing political rifts.[141] Furthermore, she expected that the ICC, like the ICTY and the ICTR, will not be able to help check the power of governments, because it needs their cooperation. She also argued that this has already been the case in Uganda, where 'the Ugandan government has similarly been able to deter the [P]rosecutor from pursuing cases against pro-government forces'.[142] This would make the ICC a partial institution. She finally expressed concerns on the fact that the ICC, in the absence of any broader administrative body that is responsible for the welfare of the people within its domain, merely answers to the Assembly of States, which gives the Court only 'an indirect line of accountability, if any, to the communities they aim to serve'.[143] These concerns of partiality and lack of a higher authority controlling the Court's action, which both could lead to politicization, were pronounced frequently in the running up to the Court's establishment and commencement and were among the main concerns of the US.

One of the main criticisms heard after the first few years of the Court's existence is its focus on Africa, while other situations involving major powers or their interests, such as Afghanistan, Iraq and Israel remain unaddressed.[144] Waddell and Clark noted that this focus on Africa 'has stirred African sensitivities about sovereignty and self-determination – not least because of the continent's history of colonisation and a pattern of decisions made for Africa by outsiders'.[145]

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[139] Jennifer Trahan and Andrew Egan, 'U.S. Opposition to the International Criminal Court', in: *Human Rights*, Vol. 30, Iss. 1 (January 2003) 10. David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', in: *Fordham International Law Journal*, Vol. 23, Iss. 2 (1999) 473-488, there 484-485.
[140] Cobban, 'Think Again', 28.
[141] Ibidem.
[142] Ibidem.
[143] Ibidem.
[144] Godrey M. Musila, *Monograph 164: Between Rhetoric and Action: The Politics, Processes and Practice of the ICC's Work in the DRC*, Institute for Security Issues Africa (July 2009) vii. Downloadable from www.issafrica.org; Sriram and Pillay, *Peace versus Justice?*, 3.
[145] Nicholas Waddell and Phil Clark, 'Introduction', in: Nicholas Waddell and Phil Clark (eds.), *Courting Conflict: Justice, Peace and the ICC in Africa*, Royal African Society (London 2008) 7-12, there 8-9.

In 2008 HRW published a 244-pages long report on the landmark of the ICC first ten years that assessed the progress, the failings and challenges. In addition, it provided recommendations aimed at improving the Court's effectiveness, particularly of course in relation to human rights issues.[146] The different chapters of the report cover the successes and problems of all aspects of the Court. From this examination, the main recommendation made is that the ICC should 'more proactively engage with affected communities to make its work meaningful and relevant to them' and therefore adopt an approach that 'fully embraces the importance of communities in realizing the court's mandate'.[147] This recommendation is made, because HRW believes that the ICC was created to serve the communities of the situations they work in.[148] Of course, this debate on the effectiveness of the ICC is the first and foremost debate that this research would like to contribute to.

Deterrence and the Peace versus Justice Debate

The peace versus justice debate appears to be one of the largest controversies in the field of transitional justice. The main question in this debate is whether transitional justice mechanisms, and mostly international criminal tribunals, are a disincentive to peace and risk prolonging conflict by jeopardizing peace deals or contribute to peace by preventing future atrocities and thereby serve as agents of (wartime) deterrence. As the ICC works in situations that can be defined as ongoing conflicts where larger or smaller peace negotiations are in process, the work of the ICC is subjected to this discussion.

The question that is the starting point of this discussion is whether the ICC can in fact prevent future crimes as its second objective assumes. This question is essential for all international criminal tribunals as the argument of deterrence is often used as a justification for their existence. Deterrence is 'the ability of a legal system to discourage or prevent certain conduct through threats of punishment or other expressions of disapproval'.[149] This deterrence argument suggests therefore that criminal prosecution will deter future crimes, because the threat of punishment raises the costs of committing crimes and thereby changes the cost-benefit calculation of the perpetrator who can then decide to avoid committing crimes to escape prosecution.[150] Other forms of deterrence and prevention of future atrocities that are

[146] HRW, *Courting History*, 6.
[147] Ibidem, 5.
[148] Ibidem.
[149] Payam Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', in: *Human Rights Quarterly*, Vol. 20, Issue 4 (November 1998) 737-816, there 741.
[150] Wippman, 'Atrocities, Deterrence', 476.

mentioned in the literature can occur by removing the perpetrator from society through punishment thereby preventing him from committing further crimes, by the punishment of one single perpetrator that deters other potential perpetrators from committing future crimes and by meeting the community's need for reaction to the crimes and thereby discouraging vengeance by 'making calls for vigilantism less forceful among survivors'.[151] The deterrence argument was even part of the reasoning of creating the ICC as a permanent institution, because it would reduce the selectivity of *ad hoc* tribunals such as the ICTY and the ICTR and thereby advance the probability of prosecution.[152]

On the other hand, many scholars argue that it is unlikely that a person involved in massive human rights violations engages in a 'rational cost-benefit analysis of his conduct'.[153] Others also argue that even if they do make a rational cost-benefit calculation, the ICC is unable to deter violations of international criminal law, because 'the certainty of prosecution is low given the realism of states' commitments to the Court, the limitations of jurisdiction [temporal and territorial jurisdiction, complementarity and prosecuting only those most responsible], capacity, enforcement, as well as the overall lack of empirical support for general deterrence overall'.[154] This lack of empirical documentation is the major challenge of the deterrence argument as 'very few of the proponents of the deterrence argument undertake to illustrate their case by citing what they consider to be concrete examples an international tribunal or court had a deterrent effect on the course of a conflict'.[155] Payam Akhavan, one of the firm believers that international tribunals and the ICC can make important contributions to achieving peace and preventing atrocities, is one of the few exceptions according to Mennecke.[156]

The peace versus justice debate started with the establishment of the ICTY, because unlike predecessors of Nuremburg and Tokyo, it was created during an ongoing conflict and with the objective of deterring further atrocities during this ongoing war. Kenneth Rodman believes, however, that international tribunals cannot deter criminal violence in an ongoing war 'as long as states and international institutions are unwilling to take enforcement action against perpetrators', because 'ending impunity in an ongoing war lies less in legal deterrence

[151] Martin Mennecke, 'Punishing Genocidaires: A Deterrent Effect or Not?', in: *Human Rigths Review* (July 2007) 319-339, there 320 and 328.
[152] Ibidem, 322.
[153] Ibidem, 325 and 332. Wippman, 'Atrocities, Deterrence', 476.
[154] C.W. Mullins and D.L. Rothe, 'The Abililty of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment', in: *International Criminal Law Review* 10 (2010) 771-786, there 781.
[155] Mennecke, 'Punishing Genocidaires', 323.
[156] Ibidem.

than in political strategies of diplomacy, coercion, or force'.[157] He adds to this that 'the contribution of criminal justice in aftermath of mass atrocity is dependent on which strategies are used to put it to an end'.[158] These lessons learned from the ICTY, he translates to the practices of the ICC in Darfur.

Although Akhavan's stance is situated at the other end of the debate by believing that 'tribunals can make important contributions to achieving peace and preventing atrocities', he actually agrees more with Rodman than expected as he makes a distinction between two levels of deterrence: general and specific. He namely also believes that 'once mass violence has erupted, threats of punishment can do little to achieve immediate deterrence' and that 'the ICTY was sure to be a disappointment' with the 'unrealistic expectation' with which the ICTY was created as a way to 'mask the reluctance of Western powers to take resolute action'.[159] However, this is only specific deterrence, 'directed at the specific perpetrator and his propensity to repeat a crime that he has already committed' and according to Akhavan the primary function of tribunals lies at the level of general deterrence, which is 'aimed at the discouragement of potential criminal behaviour in society at large as distinct from the individual offender'.[160] This general deterrence is also referred to as sending a message that atrocities will not go unpunished or transforming the culture of impunity to a culture of accountability. Rodman does not disagree with that either, but he focuses on the inability of specific deterrence, whereas Akhavan focuses on the ability of general deterrence.

The actual peace versus justice debate goes a step further, though, as after situations of transitional justice in post-Second World War Germany and Japan where former leaders were already defeated and in no condition to negotiate immunity from prosecution, it was the situation of the former Yugoslavia where 'the international community had to resign itself to negotiating a peace agreement with the very same leaders – still in positions of authority – to put an end to an armed conflict replete with atrocities'.[161] These leaders were expected 'not [to] lay down their weapons unless defeated or offered an amnesty, the argument goes, and the prospect of standing trial does not exactly serve as incentive to enter into negotiations'.[162] In other words, immunity is seen as the incentive to negotiate a peace deal and as the prospect

[157] Kenneth A. Rodman, 'Darfur and the Limits of Legal Deterrence', in: *Human Rights Quarterly*, Vol. 30 (2008) 529-560, there 529.
[158] Ibidem, 529.
[159] Akhavan, 'Justice in The Hague', 744; Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', in: *The American Journal of International Law*, Vol. 95, No. 1 (January 2001) 7-31, there 9.
[160] Akhavan, 'Justice in The Hague', 746.
[161] Akhavan, 'Are International Criminal Tribunals', 626.
[162] Mennecke, 'Punishing Genocidaires', 327.

of prosecution does not provide such an incentive, it is assumed to prolong conflict as 'the assumption is that leaders facing threats of prosecution are more likely to prolong atrocities that keep them in power whereas immunity increases the incentives to end atrocities'.[163] Justice could stand in the way of peace by prosecuting and removing individuals 'whose political cooperation is critical to successful peace negotiations in weak or failed states' or 'whose cooperation is (…) necessary for political stability'.[164] This created the actual peace versus justice debate where opponents of international criminal justice not only do not believe that such tribunals can deter future crimes, but believe that by trying to do so these institutions stand in the way of peace, because with the threat of prosecution these leaders have a reason to continue the violence, namely to stay in power and avoid arrest, or are removed from the scene while they are needed for political stability. Some authors also argue that prosecution exacerbates conflict, instead of creating peace, because perpetrators might return to the use of violence if their leaders are threatened with prosecution and thereby the pursuit of justice could bring about a backlash or provoke a resumption of violence, or because it could fuel inter-ethnic tensions.[165] For example, in the case of Rwanda it was thought that 'a shift in the political fortunes of the ethnic communities … might lead to a catastrophic renewal of hostilities'.[166]

There are also scholars who place themselves in the middle. Immunities and negotiations might stop violence in the short term, but justice is a precondition to a durable, sustainable or permanent peace. Jan Pronk, UN Special Representative of the Secretary-General in Sudan from 2004 to 2007, believes that an end to impunity is a precondition to a sustainable peace, but justice should only be pursued after peace has been achieved by negotiating with the perpetrators that are needed for the peace.[167]

The most frequently used example of justice standing in the way of peace is the situation of Uganda, where LRA leaders who are wanted by the ICC, demanded the ICC arrest warrants being withdrawn as a precondition to a peace settlement. With this request they fed the assumption that justice, in this case the ICC, stands in the way of peace in Northern Uganda.[168] Akhavan, however, uses the case of Uganda as one of three recent situations in African countries on which the ICC's impacts 'suggests that judicial intervention

[163] Akhavan, 'Are International Criminal Tribunals', 625.
[164] Julian Ku and Jide Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?', in: *Washington University Law Review*, Vol. 84, No. 4 (2006) 777-834, there 781.
[165] Ibidem; Wippman, 'Atrocities, Deterrence', 483.
[166] Wippman, 'Atrocities, Deterrence', 483.
[167] Expressed during a master class on transitional justice at Utrecht University on 13 December 2010.
[168] See for example: Rodman, 'Is Peace in the Interest of Justice?', 111-115.

is more likely to help prevent atrocities rather than impede peace'.[169] This impact of the ICC in Uganda is in the shape of stigmatizing those responsible, resulting in international isolation, eroding political influence and eroding military influence by pressuring neighbouring Sudan 'to eliminate a long-standing safe haven for the rebels' and drawing attention to a situation that the international community 'had disregarded for almost two decades'.[170] The other two situations that Akhavan uses to make his point are Cote d'Ivoire where he states 'the mere threat of an ICC investigation contributed to preventing escalation of an inter-ethnic war by putting an end to state-sponsored incitement to hatred' and Darfur, where the 'diplomatic maneuverings and internal political divisions', caused by the attempts to use each other as scapegoats, indicate that arrest warrants have at the very least made the continuation of atrocities more costly than before'.[171] From these examples, Akhavan concludes:

> The mere threat of prosecution during a critical time of escalating violence, the political isolation and military decline that result from being stigmatized as an international fugitive, a weakened bargaining position after the issuance of an arrest warrant and the consequent search for scapegoats – these scenarios illustrate the manifold ways, some subtle and others blunt, in which accountability can impact the cost-benefit calculus of using atrocities as an instrument of power.[172]

So, Akhavan is quite positive that justice contributes to peace instead of impeding it. However, the three cases he uses in this context are all ICC situations where no indictee is on trial yet. The DRC is therefore an interesting case, as it is the first country where can be examined whether trials, not merely the presence or threat of the ICC, have an impact. What is its impact in the DRC where perpetrators are actually on trial and months away from being prosecuted? Has the ICC changed the cost-benefit calculus of perpetrators in the DRC? This question is especially interesting for the case of the DRC as the benefits as mentioned above are high in the DRC due to the presence of valuable natural resources and have earlier provided an incentive to keep the war going.

The only scholar who reviews the ICC in the DRC on the matter of peace versus justice is Rodman. He believes that the debate is latent there, because the peace process that ended the war 'subordinated prosecution to power-sharing'.[173] The intervention in Ituri did not risk destabilizing the transitional government as the militias there were not part of the power-sharing accord in Kinshasa. Moreover, he argues the presence of MONUC in the

[169] Akhavan, 'Are International Criminal Tribunals', 625.
[170] Ibidem, 625, 641 and 645.
[171] Ibidem, 625.
[172] Ibidem.
[173] Rodman, 'Is Peace in the Interest of Justice?', 115-116.

region created an enforcement arm for the Court that 'does not exist in Uganda (or elsewhere in the DRC)'.[174] Yet the danger of impeding peace or stimulating the resumption of violence remains according to Rodman, as 'virtually all the politicians and militia leaders who have been co-opted into the government are complicit in substantial human rights abuses, including support for warlords in Ituri', which was the result of the fact that 'none of the parties won a military victory and many retained forces under their control who could return to political violence should they be threatened'.[175] As mentioned above, in the case of Bosco Ntaganda it is the argument of peace that Congolese authorities used to refuse to hand over now General Ntaganda over to the ICC, apparently afraid that his arrest might cause a reoccurrence of violence.

As the ICC is, in the situation in the DRC, working in an environment where peace has been reached, but where violence is still occurring and stability has therefore not returned yet making the DRC an environment of ongoing conflict, this study on the effectiveness of the ICC in the DRC might give some insights in the debate on peace versus justice and whether the ICC's action stand in the way of peace in the DRC or rather provide an incentive to peace by preventing future atrocities.

The ICC in the DRC

As scholars have written about the work of the ICC and its effectiveness, some have also written specifically about the ICC's work and effectiveness in the DRC. William W. Burke-White wrote already in 2005 on the ICC in the DRC, but focused not specifically on the effectiveness, but on the complementarity principle in practice and the ICC as part of a system of multi-level global governance in the DRC, discussing the influence of the presence of the ICC in the DRC on national politics.[176] Through his analysis of the role of the ICC in the DRC he identified 'four key areas of interaction where the ICC is already having or can easily have a pronounced effect beyond serving as a direct mechanism of prosecution: altering the preferences and policies of the national government catalyzing reform efforts; offering benchmarks for judicial effectiveness; and providing a deterrent from future crimes'.[177] From these findings in the DRC, Burke-White came to the significant conclusion on the general

[174] Rodman, 'Is Peace in the Interest of Justice?', 116.
[175] Ibidem, 116-117.
[176] Burke-White, 'Complementarity in Practice', 557-590.
[177] Ibidem, 590.

effectiveness of the ICC that 'the global governance model indicates a far larger role and broader effect for the ICC and complementarity than previously envisioned'.[178]

In 2008, ten years after the Rome Conference, several texts were published on the ICC. In March *Courting Conflic*t was published, which includes a chapter by Mattioli and Van Woudenberg on the ICC in the DRC that concerns the notion of positive complementarity whereby the court should actively catalyse domestic processes.[179] It examines whether the ICC is succeeding in encouraging national prosecutions and how it is contributing to deterring future crimes and building respect for the law.[180] Their conclusion is that 'inherent difficulties and contradictions exist in the ICC pursuing a strategy of positive complementarity', but 'exciting prospects exist' if it pushes for broader accountability and begin to work on guiding principles for supporting national prosecutions.[181] As mentioned above, HRW also published its report on the landmark of the ICC first ten years that year. Both works will also be valuable to this research.

In 2009 Eric K. Leonard and Steven C. Roach provided a theoretical framework of the ICC's effectiveness in the DRC for the international relations theories of realism and legalisation.[182] They investigated the 'relationship between institutional effectiveness and the interests of states, or in the case of the ICC, non-State Parties and State Parties'.[183] They found that realists are wrong 'to assume that there are fixed limits to an institution's capacity to promote long-term peace through accountability'.[184] However, despite the 'high levels of delegation, transparency, precision, and obligation', as part of legalisation theory that they found and that according to legalisation theory would create an effective institution, this theory 'while helping to limit the imposition of realpolitik on the ICC's actions, cannot fully explain why states will cooperate with the Court'.[185] They conclude by stating that 'constructivism and critical theory will thus need to play a role in helping us to move beyond some of the limits of scientific theories'.[186]

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[178] Burke-White, 'Complementarity in Practice', 590.
[179] Géraldine Mattioli and Anneke van Woudenberg, 'Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo', in: Nicolas Waddell and Phil Clark, *Courting Conflict: Justice, Peace and the ICC in Africa*, (2008) 55-64, there 55.
[180] Ibidem, 55.
[181] Ibidem, 62.
[182] Eric K. Leonard and Steven C. Roach, 'From Realism to Legalization: A Rationalist Assessment of the International Criminal Court in the Democratic Republic of Congo', in: Steven C. Roach, *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (2009).
[183] Ibidem, 55.
[184] Ibidem, 70.
[185] Ibidem, 62 and 70.
[186] Ibidem, 70.

That same year, Godfrey M. Musila published the most extensive study on the politics, processes and practice of the ICC's work in the DRC.[187] His work focuses on the cooperation relationship between the ICC and the DRC, the role of politics in the work of the ICC, the perceptions around the work of the ICC in various sectors of Congolese society and addresses some of the questions that the work of the ICC in Africa has raised.[188] Musila concluded on the cooperation between the ICC and the DRC that it is perceived by the government as being 'too demanding' and that the assistance the DRC is obligated to offer under the Agreement on Judicial Cooperation 'impose heavy burdens' on the ill-equipped law enforcement agencies.[189] On the perceptions of the Congolese on the ICC's work Musila found that they vary for the different sections. As his findings on this subject are valuable to this research, they will be addressed here later. He concludes with ten recommendations to improve the effectiveness of the ICC in the DRC, mostly by improving cooperation with authorities and NGO's, improving interactions with the communities and prosecuting in a wider geographical scope and political spectrum. He does not provide a general conclusion on the effectiveness on the ICC in the DRC, but considering his conclusions and recommendations, it can be assumed that he is hopeful for the potential of the Court, but has a sceptical view about its work and approach so far.

As will be discussed under the methodology, this paper uses a different approach than any of the articles discussed above. What can be concluded is that the articles dealing with the ICC in the DRC focus on a specific theme and thereby only discuss a small aspect of the effectiveness of the ICC in the DRC, with the exception of Musila's work. His work focuses, however, more on the practice than on the effectiveness.

Methodology

As Barria and Roper have noted in the introduction to their analysis of the effectiveness of the ICTR and the ICTY, 'there is no accepted standard for measuring the effectiveness or success of these tribunals', despite the fact that 'much of the literature has regarded these tribunals as ineffective institutions for the promotion of international justice'.[190] They noted that '[s]ome argue that these tribunals should be judged by their ability to provide for international peace and security or to deter future atrocities or even to reintegrate societies', and decide that while

[187] Musila, *Monograph 164: Between Rhetoric and Action*, cover page.
[188] Ibidem, vii.
[189] Ibidem.
[190] Lilian A. Barria and Steven D. Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR', in: *International Journal of Human Rights*, 9, 3 (2005) 349-368, there 349.

it is understandable that there are varying standards used to judge the tribunals, they choose not to rely on a subjective standard.[191] To find an answer to the question to what extent the ICC has been effective in the situation in the DRC, this thesis will use the objectives of the ICC as a starting point, as Barria and Roper have used the objectives of the ICTY and the ICTR as named in their mandates to test their effectiveness: 'If these are the goals, then they should be the basis upon which we judge the relative success and failure of these tribunals'.[192]

As the objectives of the ICC are to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and thus to contribute to the prevention of such crimes, this is what needs to be tested in examining the effectiveness of the ICC in the DRC.[193] For the objective of ending impunity, this research will examine the judicial progress and examine, explain and weigh up the difficulties and successes that have occurred, in Chapter 2. The effectiveness of contributing to the prevention of crimes will be examined in Chapter 3 by critically examining reported effects by organisations in the field on their actual prevention and whether they are the actual result of the actions of the ICC. Special attention will be given to the (illegal) exploitation of natural resources as this is crucial to the conflict and hence also to the prevention of future crimes as Moreno-Ocampo acknowledged himself. The chapter will conclude with an analysis of peace and justice in the DRC situation, to be able to conclude whether the ICC has impeded peace or has rather promoted peace by contributing to the prevention of crimes.

While the ICC has only two objectives, I believe, to thoroughly examine the effectiveness of the ICC in the DRC so far and to be able to draw conclusions on this, it is also necessary to include the view of the victims and affected communities to whom the Court is supposed to bring justice. With this I distinguish myself from the approach of Barria and Roper, who have focused on the objectives only. This is not only examined here because the local perception can act as an indicator of the Court's effectiveness, but more importantly because the Court's effectiveness is dependent on its perception by *all* stakeholders; not only the alleged perpetrators but also by the victims and communities at large. To determine and understand this perception, Chapter 4 will examine the ICC's outreach programme and the participation of victims as they may influence the local perception, followed by the description of the local perception, based on the accounts of surveys and interviews from the field of various authors and organisations.

[191] Barria and Roper, 'How Effective are International Criminal Tribunals?', 349-350.
[192] Ibidem, 357.
[193] *Rome Statute*, preamble.

From these examinations I will conclude to what extent the ICC has been effective in the situation in the DRC. In this conclusion I will also include the consequences of this research' findings on the above discussed scholarly debates on the effectiveness of the ICC in general, of (international) tribunals as transitional justice mechanisms, the idea of transitional justice in general and the peace versus justice debate.

2 Ending Impunity

The Judicial Progress

The first and foremost objective of ICC, as stated in the preamble of the Court's founding document, the Rome Statute, is to end impunity of the most serious crimes of concern to the international community.[194] Impunity is 'exemption from punishment' and in international human rights law it refers to the failure to bring perpetrators of human rights violations to account.[195] The updated *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, of the United Nations Commission on Human Rights of 8 February 2005, offers the following definition of impunity:

> "Impunity" means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[196]

Thus, ending impunity means holding those responsible of committing atrocities accountable by means of prosecutions and suitable punishments. This chapter explores whether the ICC has been effective so far in achieving this objective in the DRC.

In order to investigate to what extent the ICC has been successful in ending impunity for the most serious crimes in the DRC, this chapter will examine the judicial progress, the successes and difficulties that have arisen. I will first set out the current situation by exploring some of the statistics, as Barria and Roper also did in their assessment of the effectiveness of the ICTY and the ICTR and compare their figures with those of the ICC.[197] I will then follow my own approach by examining, explaining and evaluating the successes and the difficulties in the ICC's judicial process. With these two assessments, I will determine the effectiveness of the ICC in ending impunity in the DRC.

Current Situation and Comparison with the ICTY and ICTR

[194] *Rome Statute*, preamble.
[195] Definition retrieved from online dictionary: Dictionary.com, online available at: dictionary.reference.com/browse/impunity.
[196] *Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, Addendum, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, United Nations Commission on Human Rights, UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005) 6.
[197] Barria and Roper, 'How Effective are International Criminal Tribunals?', 359-362.

Barria and Roper used two measurements to investigate the success of the ICTY and the ICTR in providing justice – which is one of the two objectives of the ICTY and one of the three objectives of the ICTR – and which can be defined as ending impunity. First, to explore apprehension and extradition rates that indicate the level of impunity or accountability, they counted the number of individuals indicted, the number of individuals arrested and the number of individuals at large and calculated the percentage that has been arrested. Secondly, they investigated the speed of the trials by counting the number of trials in progress, the number of trials completed, and the number of convictions and acquittals.[198] I will apply this approach to the ICC and compare the ICC's statistics to the records of its predecessors in order to see whether this can provide an insight into the ICC's effectiveness in ending impunity, before I continue with my own approach.

Apprehension and Extradition

Barria and Roper started their examination of apprehension and extradition rates by noting that both the ICTY and the ICTR initially encountered difficulties in the field of apprehension and extradition.[199] The ICTY encountered 'continual resistance apprehending and extraditing indictees, both from the parties to the conflict and by other states', and at the ICTR 'the initial effectiveness (...) was also greatly undermined by the lack of cooperation from other countries' that refused requests to extradite suspects.[200] In time, these problems were resolved and both tribunals became more effective in ensuring the arrests of suspects, as evidenced by the figures for 2002 in Table 1. As the data used by Barria and Roper is from 2002, updated numbers have also been included. Note that, in 2002, the ICTR and ICTY had been up and running for almost eight and nine years respectively. The ICC has now been in existence for almost nine years and its investigation in the DRC, its first investigation, was opened on 23 June 2004. Therefore, as of 2011, the situation in the DRC has been ongoing for almost seven years. Table 1 also contains general data on the ICC, including all its situations and cases since its start in 2002, as the number of other ongoing investigations could influence the ICC's data in the DRC.

As Table 1 shows, the overall percentage of apprehension of (publicly) indicted individuals by the ICC in general is low (29 per cent), compared to the ICTY and ICTR in 2002. This would indicate that the ICC has encountered difficulties in the field of

[198] Barria and Roper, 'How Effective are International Criminal Tribunals?', 357-362.
[199] Ibidem, 359-360.
[200] Ibidem.

Table 1: Comparison of Indictments and Arrests [201]

	ICTY		ICTR		ICC	DRC
	2002	**2011**	**2002**	**2011**	**2011**	**2011**
Individuals indicted	106	161	80	82	17	5
Individuals arrested	83	159	60	72	5*	4
Individuals at large	23	2	20	10	9 **	1
Percentage arrested	78%	99%	75%	88%	29%	80%

* In addition to these arrests, three suspects of the situation in Darfur appeared voluntarily in compliance with the summonses to appear. They are not in custody.[202]

** Only 9 of the indictees remain at large, as three suspects appeared voluntarily (see *) and as Raska Lukwiya of the LRA in the situation in Uganda is deceased.

apprehension and extradition that have not yet been resolved like those at the ICTY and the ICTR in 2002. In the situations in Uganda and Darfur namely, no arrests have been made yet. The percentage of arrests in the situation in the DRC, on the other hand, is 80 per cent: that is, higher than the ICTY and ICTR in 2002. It appears that the ICC has not encountered similar difficulties in the situation in the DRC to those the ICTY and the ICTR encountered, except for the arrest of Bosco Ntaganda, who remains at large. As this arrest percentage is so high, it can be seen as a success for the Court and will therefore be further discussed and critically examined in the next paragraph.

However, even though this percentage is high, there have been only five indictments in the situation in the DRC, compared to 106 at the ICTY after approximately nine years and 80 indictments at the ICTR after approximately eight years. Although the situation in the DRC has been ongoing for just seven years, the number of indictments is significantly lower and it is unreasonable to believe that the ICC will reach a number close to that of the ICTY and ICTR by the time it reaches its eighth or ninth year of investigations. It is possible that more indictments remain under seal, and that more individuals have been indicted, but it is

[201] Figures of the ICTY and ICTR in 2002 retrieved from: Barria and Roper, 'How Effective are International Criminal Tribunals?', 361; Figures of 2011 retrieved from the websites of the ICTY, ICTR and ICC, respectively: www.icty.org/sections/TheCases/KeyFigures, www.unictr.org/Cases/tabid/204/Default.aspx, www.icc-cpi.int/Menus/ICC/Situations+and+Cases/, last visited on 3 March 2011.

[202] International Criminal Court Website (ICC Website), 'Situations and Cases', online available at: www.icc-cpi.int/Menus/ICC/Situations+and+Cases/, last retrieved on 11 March 2011; ICC Website, 'Information on the confirmation of charges hearing in the case The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus', online available at: www.icc-cpi.int/nr/exeres/cdfad7f0-19b9-49bd-a70e-f4ea4166f6de.html, last retrieved on 22 February 2011.

unlikely that these could account for such high numbers. However, this comparison of the number of indictments can be disputed.

Firstly, the ICC is an international institution, whereas the ICTY and ICTR are regional tribunals which hold jurisdiction over a specific regional or national area. They each have one situation to work on, whereas the ICC has several at the same time, which means that it has to divide its time and resources across different investigations all over the world. Purely from a logistics perspective, this constitutes an enormous challenge and must impact on the possible number of indictments.

Secondly, the comparison is only fair if the resources of these three institutions are equal or similar. Christine Chung, a former senior trial attorney from the OTP observed in 2008 that 'so far, the ICC has opened investigations arising from four vast and distinct conflicts, based on a smaller budget than the current budgets of the ICTY or ICTR', in light of which, those 17 indictments are quite an achievement.[203] Chung also explained that the number of cases that the ICC is able to open is dependent on the resources available and those resources are unlikely to be increased:

> States determine the budgets of internationalized courts and it is both rational and likely that States will not fund more than a limited number of representative prosecutions in any single judicial organ. In the ICC's case, the member States approve the anticipated number of situations and trials during the budgeting process, and thus the workload of the Court and the number of cases it can commence are regulated—not by the Prosecutor or the judges—but by the funders.[204]

As she came to the conclusion that it is unlikely that the ICC's resources are to be increased by multiples in upcoming years, she argued that 'one must also accept that the ICC is unlikely to pursue anything near the number of prosecutions, in any one situation, that the ICTY or ICTR achieved'.[205] Therefore, Chung concluded that in order to maximize its impact, the ICC should spread its work across numerous different situations, but within each situation, focus on the perpetrators who bear the most responsibility, which brings us to the third and final point.[206]

The ICC's mandate obligates it to consider only the most serious crimes and those most responsible. Article 5 of the Rome Statute states that the Court's jurisdiction 'shall be

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[203] Christine H. Chung, 'The Punishment and Prevention of Genocide: The International Criminal Court as a Benchmark of Progress and Need', in: *Case Western Reserve Journal of International Law*, Vol. 40 (2008) 227-242, there 236.
[204] Ibidem.
[205] Ibidem, 236-237.
[206] Ibidem, 237.

limited to the most serious crimes of concern to the international criminal community as a whole'.[207] Article 17, pertaining to the issue of admissibility, further states that a case is inadmissible if the case is not of sufficient gravity to justify further action by the Court.[208] In a paper on policy issues dated September 2003, the OTP further defined the meaning of 'sufficient gravity' to denote those who bear the greatest responsibility:

> The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.[209]

In view of this mandate to prosecute only those most responsible, it is only logical that the ICC will have just a few indictments per situation and fewer indictments in total than the ICTY and the ICTR. Despite the fact that those Courts have similar mandates and their value is ultimately based on their ability to successfully prosecute those at the highest level, they only have to focus on one situation rather than several at once.[210] In view of this consideration, it could be argued that there is no need for a large increase in indictments as long as the most responsible perpetrators for the most serious crimes and violence are prosecuted.[211]

In addition, Moreno-Ocampo stated in the solemn undertaking that he made upon assuming office on 16 June 2003 that the number of cases before the Court should not be used as a measure of its efficiency and, as re-emphasised in the OTP's September 2003 policy paper: 'the effectiveness of the International Criminal Court should not be measured only by the number of cases that reach the Court'. [212] In fact, he explained that due to the principle of complementarity 'the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success'.[213]

Thus, several convincing arguments can be made against criticism of the number of indictments the ICC has made and will make in the situation in the DRC. Since the ICC's

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[207] *Rome Statute*, Article 5(1).
[208] Ibidem, Article 17(1)(d).
[209] Office of the Prosecutor of the International Criminal Court (OTP), *Paper on Some Policy Issues before the Office of the Prosecutor* (September 2003) 7.
[210] Barria and Roper, 'How Effective are International Criminal Tribunals?', 360.
[211] Chung, 'The Punishment and Prevention of Genocide', 235-236.
[212] OTP, *Paper on Some Policy Issues*, 4.
[213] William A. Schabas, '"Complementarity in Practice": Some Uncomplimentary Thoughts', (For presentation at the 20th Anniversary Conference of the International Society for the Reform of Criminal Law, Vancouver) ICC Doc. ICC-01/05-01/09-721-ANX11 (23 June 2007) 1, online available at www.isrcl.org/Papers/2007/Schabas.pdf, last retrieved on 11 March 2011.

rates of apprehension and extradition in the DRC thus far may be viewed as a success, I will examine this further in my discussion on the ICC's successes in ending impunity in the DRC.

Range of Indictees

Another interesting comparison that can be made in relation to apprehension and extradition rates that was not used by Barria and Roper is the range of indictments across society. Interestingly, the ICTR has divided the defendants before the Court into five different categories. The defendants have been categorised as political leaders, military leaders, media leaders, senior government administrators or religious leaders.[214] In the situation in the DRC before the ICC, the indictees are all militia leaders. There are no political leaders, or senior government administrators, which could also be viewed as a weakness. This is actually the case in all the voluntary referral situations.[215]

In line with this observation, the ICC has also focused only on the region of Ituri for the first four years. Whereas this focus is understandable considering the violence that occurred there in 2002-2003, the question arose to what extent the ICC could put an end to impunity in the DRC if only militia leaders of the Ituri region were prosecuted. In 2008, Moreno-Ocampo annnouced further investigations into the Kivus region and at last at the end of 2010 the first public indictment was made and Callixte Mbarushimana arrested. Although this is a step forward, the question can still be asked to what extent impunity will be achieved if the instigators and financiers of the conflict are not prosecuted. Thus, although most of the indictees of the DRC situation have been captured, the ICC indictments have focused only on rebel leaders and for a very long time only on the Ituri region. The consequences of this approach will be discussed further in Chapters 3 and 4.

Expeditious Trial

In addition to the number of arrests, Barria and Roper investigated the performances of both the ICTY and the ICTR in terms of the speed of the trials by measuring the number of the trials in progress, the number of trials completed, and the number of convictions and acquittals, as shown in Table 2, since the issue of ensuring the defendants rights to an expeditious trial has been much criticized at these tribunals.[216]

[214] Barria and Roper, 'How Effective are International Criminal Tribunals?', 360.
[215] HRW, *Courting History*, 41.
[216] Barria and Roper, 'How Effective are International Criminal Tribunals?', 361-362.

Table 2: Comparison of Trials, Convictions and Acquittals[217]

	ICTY		ICTR		ICC	DRC
	2002	**2011**	**2002**	**2011**	**2011**	**2011**
Trials in progress	23	36	22	31	6	3 **
Trials completed	22	75	9	44	0	0
Convictions	17	64 *	8	36 *	0	0
Acquittals	5	12 *	1	8 *	0	0

* Those not acquitted or convicted have either been referred to national jurisdiction (13 at the ICTY, 2 at the ICTR), had their indictments withdrawn (20 at the ICTY and 2 at the ICTR), are deceased (16 at the ICTY and 2 at the ICTR), or are awaiting trial (1 at the ICTR). They have not been included under completed trials.

** The cases of Germain Katanga and Mathieu Ngudjolo Chui have been joined to form one case, therefore there are only three trials for four accused.

As table 2 shows, and as mentioned in Chapter 1, the ICC has not completed any trials yet. The first trial, that of Thomas Lubanga Dyilo, who first appeared in March 2006, could have and was expected to have been finished by now, as evidenced by the proposed programme budget for 2010: 'In the case of *The Prosecutor v. Thomas Lubanga Dyilo*, it is expected that the Court will render its first ever judgment in 2010'.[218] According to this document, the case against Germain Katanga and Mathieu Ngudjolo Chui could also have 'potentially' reached the 'judgment and reparations stages' in 2010.[219] However, none of the trials has been completed. The trials before the ICTY and the ICTR that have been completed have taken on average three and a half years and four and a half years respectively, from arrest through to appeal.[220] The Lubanga case, now in its fifth year has not even pronounced its first judgement.

It is frequently argued that trials for international crimes are generally protracted and as these are the Courts' first cases, it is understandable that they take so long. HRW for example, mentions this argument in an information sheet on recent developments in the Lubanga trial in answer to the question why the trial is taking so long and whether the court is inefficient:

[217] Figures of the ICTY and ICTR in 2002 retrieved from: Barria and Roper, 'How Effective are International Criminal Tribunals?', 361; Figures of 2011 retrieved from the websites of the ICTY, ICTR and ICC, respectively: www.icty.org/sections/TheCases/KeyFigures, www.unictr.org/Cases/tabid/204/Default.aspx, www.icc-cpi.int/Menus/ICC/Situations+and+Cases/, last visited on 3 March 2011.
[218] *Proposed Programme Budget for 2010 of the International Criminal Court*, Assembly of States Parties (ASP), ICC Doc. ICC-ASP/8/10 (30 July 2009) 6.
[219] Ibidem.
[220] Barria and Roper, 'How Effective are International Criminal Tribunals?', 362.

> In the normal course of things, trials of international crimes do take time, with the prosecution and the defense entitled to vigorously present and defend their positions. In addition, some delays in the ICC's first trials are also to be expected. The ICC is a new institution with innovative pre-trial procedures and a clear recognition of the right of victims to participate in proceedings. These innovations need to be worked out in practice.[221]

Reinhold Gallmetzer also mentions this in his examination of the Trial Chamber's discretionary power to devise the proceedings before it and the exercise of this power in the Lubanga trial:

> Obviously, this process [Trial Chamber I adopting procedures to facilitate the conduct of proceedings] is a time-consuming one. This is especially the case for the first trial proceedings before the International Criminal Court, where most procedural issues must be settled without relying on a body of case-law or previous practice. The preparation of future proceedings should be more expeditious, as the first set of decisions can later be used as precedent (...).[222]

While it is valid to argue that as a new and innovative Court, the ICC's first cases will take a long time, the question then arises how long the first – or similarly complex – trials before other Courts took. As none of the ICC trials has finished yet and the total length of the trials can therefore not be compared to other trials, it is perhaps more useful to focus on the pre-trial stage, which has been completed in the cases of Lubanga and Katanga-Ngudjolo. The pre-trial stage of both trials took a problematically long time, because several delays occurred. The trial of Thomas Lubanga, who was arrested and transferred to the ICC in March 2006, did not begin until January 2009.[223] Stuart made such a comparison and came to the conclusion that indeed this pre-trial stage took much longer than cases of the ICTY:

> The first ever case before the ICC has already gone through a record breaking pre-trial stage of well over 800 days from Thomas Lubanga's first appearance on 20 March 2006. Even the ICTY, not exactly famed for its expeditious procedures, took – only – 376 pre-trial days for its first defendant, Duško Tadić, while the Milosović case took less, from the initial appearance on 3 July 2001 till 12 February 2002 to get started.[224]

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[221] Human Rights Watch (HRW), 'Recent Developments in the ICC Trial of Thomas Lubanga' (16 July 2010) 5.
[222] Reinhold Gallmetzer, 'The Trial Chamber's Discretionary Power to Devise the Proceedings before It and Its Exercise in the Trial of Thomas Lubanga Dyilo', in: Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden 2009) 501-524, there 524.
[223] HRW, 'Recent Developments in the ICC Trial of Thomas Lubanga', 5.
[224] Heikelina Verrijn Stuart, 'The ICC in Trouble: Editorial Comment on Stay of Proceedings in *Lubanga*', in: *Journal of International Criminal Justice* 6 (2008) 409-417, there 410.

Thus, notwithstanding the new and innovative element, the ICC has been significantly slower than its predecessor. Even if the pre-trial stage of the ICC is more innovative than its predecessors, making this trial for that reason so much lengthier, it can be questioned if it is still a fair trial, taking unproportionally long. Gallmetzer recalls, however, that future cases are expected to be more expeditious.[225] As the ICC trials in the situation in the DRC take so long, the speed of the trial can be seen as the major challenge to the ICC's effectiveness in ending impunity in that country and will therefore be further discussed in the paragraph on difficulties.

What can be concluded from this comparison with Barria and Roper's approach in their investigation into the effectiveness of the ICTY and the ICTR, is that the apprehension and extradition can, so far, be seen as a success for the ICC in the situation in the DRC, whereas the speed of the trial is a major challenge to the effectiveness of the ICC in ending impunity. As the above numbers do not tell the whole story and do not provide a sufficient basis upon which to determine whether the ICC has been effective in achieving its objective of ending impunity in the situation in the DRC, it is valuable to critically examine and weigh these successes and difficulties. The following two paragraphs provide both sides of this scale.

Successes

As seen in the previous paragraph, four of the five individuals indicted in the situation in the DRC have been arrested and only one, Bosco Ntaganda, remains at large, which gives a high apprehension rate of 80 per cent. This can be seen as the ICC's greatest success in the DRC thus far. This is especially an achievement if compared to the situations of Uganda and Darfur, where no arrests have been made, due to a lack of cooperation. As the ICC does not have any enforcement capability, it depends solely on the cooperation of states for the apprehension and extradition of perpetrators.

However, two of the four suspects apprehended and extradited in the situation in the DRC were already being held by the Congolese authorities. Consequently, the ICC only achieved the arrest of two individuals named in an ICC warrant of arrest who were not already in state custody.[226] Mathieu Ngudjolo Chui was arrested following the issue of an ICC arrest warrant in February 2008 and Callixte Mbarushimana was recently arrested and extradited by French authorities. Thomas Lubanga Dyilo and Germain Katanga, however,

[225] Gallmetzer, 'The Trial Chamber's Discretionary Power', 524.
[226] Chung, 'The Punishment and Prevention of Genocide', 238.

were transferred into ICC custody following domestic detention in the DRC. The OTP even rushed the issue of Lubanga's arrest warrant and included fewer charges in order to take advantage of the fact that he was in detention and thereby ensure his arrest.[227]

Although this approach ensured the arrests of Lubanga and Katanga, resulting in a high apprehension percentage, it has been criticised on grounds of the principle of complementarity. If national courts were already investigating the cases of Lubanga, Katanga and Ngudjolo, had managed to capture Lubanga and Katanga, and Lubanga was already awaiting prosecution before the national courts on charges of genocide and crimes against humanity, is the ICC then able to justify taking on these cases?[228] Especially since Phil Clark argued that Ituri has 'the best-functioning local judiciary' in the DRC. [229] Therefore, the ICC was not only given a head-start because major militia leaders were already in custody, but also because 'significant evidence of crimes had already been gathered by the local civilian and military courts'.[230] Clark noted that this led observers to 'question the validity of the ICC's strategy in Ituri'.[231] They have asked why a global court is focusing its energies and resources 'where the judicial task is more straightforward due to substantial local capacity, while mass atrocities continue in provinces where judicial resources are severely lacking'.[232] It is probable that the OTP has decided to focus on these perpetrators in order to ensure a result and avoid a repetition of Uganda, where non of the indictees were arrested and the ICC is now being accused of standing in the way of peace.

As mentioned, in order to secure Lubanga's arrest, the OTP focused on a limited number of charges and a narrow geographical area. Clark identified these facts as two other main problems in the OTP's choices to pursue the cases of Lubanga, Katanga and Ngudjolo. On the narrow geographical approach, Clark noted that the OTP had 'resisted investigating the wider dimensions of Lubanga's crimes, notably the alleged training and financing of Lubanga's UPC by the Ugandan and Rwandan governments'.[233] HRW made the same observation in 2008 in a report on the first years of the ICC:

> Our research in Congo, covering the period from 1998 to this writing, suggests that key political and military figures in Kinshasa, as well as in Uganda and Rwanda, also played a prominent role in

[227] Office of the Prosecutor of the International Criminal Court, *Report on the Activities Performed during the First Three Years (June 2003 – June 2006)* (12 September 2006) 8.
[228] Schabas, '"Complementarity in Practice"', 6.
[229] Clark, 'Law, Politics and Pragmatism', 40.
[230] Ibidem, 40.
[231] Ibidem.
[232] Ibidem, 40-41.
[233] Ibidem, 41.

> creating, supporting, and arming Lubanga's Union of Congolese Patriots, Katanga's Nationalist and Integrationist Front, and Ngudjolo's Ituri Patriotic Resistance Forces. The availability of political and military support from these external actors encouraged local leaders in Ituri to form more structured movements and significantly increased their military strength.[234]

HRW therefore urged the ICC Prosecutor to investigate senior officials in Kinshasa, Kampala and Kigali and bring cases against them if there proved to be sufficient evidence.[235] If the OTP has a mandate to investigate and prosecute those most responsible as representatives for the most serious crimes and violence as previously mentioned, the individuals who supported and funded the perpetrators should also be investigated by the ICC. However, in order to proceed with the case against Lubanga, the OTP was obliged to remove any reference to crimes in the 'international' conflict dimension from the charges against Lubanga because the evidence the OTP had gathered only related to crimes committed in the 'internal' conflict.[236]

There has been further criticism of the limited charges brought against Lubanga before the Court. Lubanga was only charged with two counts of war crimes for enlisting and conscripting children under the age of 15 as soldiers and using them to actively participate in the hostilities of 2002-2003, whereas it is alleged that he actually committed 'a range of horrific crimes, including murder, torture and rape'.[237] Bosco Ntaganda was later charged with the same limited set of crimes.[238] HRW believes, however, that the charges brought by the ICC should reflect the 'full range of serious crimes under ICC jurisdiction committed by perpetrators against civilians'.[239] Research conducted by HRW in Kinshasa has revealed a 'general consensus' that the charges against Lubanga and Ntaganda are 'too limited and do not reflect the gravity of the crimes that the UPC allegedly committed in Ituri'.[240] Moreover, this failure has, according to HRW, led 'many victims in Ituri to question the credibility of the ICC and its relevance in addressing their suffering'.[241]

Clark also identified this problem, but went on to note that this strategy suggests that the OTP would rather convict these perpetrators for lesser crimes more quickly rather than charge them with serious crimes and risk a long and protracted trial like the Milosović case before the ICTY. This highlights the tension that exists in international justice between 'the

[234] HRW, *Courting History*, 60-61.
[235] Ibidem.
[236] Clark, 'Law, Politics and Pragmatism', 41.
[237] HRW, *Courting History*, 63.
[238] Ibidem.
[239] HRW, 'The International Criminal Court Trial of Thomas Lubanga'.
[240] HRW, *Courting History*, 63.
[241] HRW, 'The International Criminal Court Trial of Thomas Lubanga'.

need to conduct expeditious investigations and prosecutions and the need to pursue representative cases involving those most responsible for crimes'.[242] If Lubanga is only prosecuted for conscripting and using child soldiers, does that constitute an end to impunity? He might be convicted and punished, but some trace of impunity would remain if he is not prosecuted for the worst of his crimes. Of course, the OTP's ability to prosecute Lubanga for his worst crimes depends on the judicial reality of the availability of sufficient evidence, a point also acknowledged by HRW several times: 'Again, we can appreciate that the OTP can only pursue more representative charges where there is sufficient evidence to do so'.[243]

In the situation in the DRC, the ICC does not appear to have had the same slow-start problems in apprehension and extradition as the ICTY, the ICTR and its own work in Uganda and Darfur. The apprehension rate can therefore be seen as a success. However, this success comes at the expense of the geographical range and the number and seriousness of the charges laid in the cases of Lubanga and Ntaganda.

Furthermore, Bosco Ntaganda remains at large. The argument of Akhavan that 'the difficulty in capturing indicted individuals should not be considered a failure, since "interim justice" can take place through the restriction of travel and deprivation of freedom of movement, as well as their removal from public office and stigmatisation of indicted individuals', does not apply here either as HRW reported that Ntaganda has been integrated into the Congolese military, was promoted to the position of General and the Congolese authorities have since refused to hand him over, contending that peace comes before justice.[244]

Moreover, the indictments handed down by the ICC only include rebel leaders and for long focused only on the Ituri region, whereas serious crimes occurred in the Kivu regions and research has revealed links to key figures in neighboring countries. This may be attributed to the fact that the ICC began prosecuting lower ranking perpetrators to ensure quick results, as was the case with Dragan Nikolić or later Duško Tadić at the ICTY, and that higher ranking perpetrators, such as Slobodan Milosović at the ICTY, will follow later.[245] As Schabas noted, we might look back on the Lubanga case in a decade 'in much the same way as we view Nikolić and Tadić', and the failure to pursue (governmental) supporters and

[242] Clark, 'Law, Politics and Pragmatism', 41.
[243] HRW, *Courting History*, 66.
[244] Barria and Roper, 'How Effective are International Criminal Tribunals?', 359; HRW, 'DR Congo: Brutal Rapes'; AFP, 'Peace before justice'.
[245] Schabas, '"Complementarity in Practice"', 26-27.

financiers of Congolese rebel groups in the way we view the ICTY's long silence on Milosović.[246] So, the ICC's major success to date is subject to several points of criticism.

Difficulties

As we have seen, the major challenge the ICC is facing is the speed of trials since the ICC has not completed any of its trials in the situations in the DRC, while the most advanced, the Lubanga trial, could have and was expected to have been finished by now. In evaluating the ICC's progress in ending impunity, it is important to consider the problems that have caused so much delay and have hindered the ICC in prosecuting the defendants and thereby in ending impunity. This paragraph sets out the problems that have caused these difficulties.

Summary of Events

On 13 June 2008, just ten days before the designated start of the trial of Thomas Lubanga Dyilo, Trial Chamber I stayed the proceedings against Lubanga on grounds that it was 'impossible for the trial to be fair since the Prosecutor had not disclosed to the Defence, or made available to the judges, important potentially exculpatory evidence'.[247] According to the ICC's case information sheet, the reason for this was that the Prosecutor had 'obtained the evidence in question on a confidential basis from several sources, including the UN, and these sources had refused to disclose it to the Defence and, in most cases, to the Trial Chamber'.[248] On 2 July 2008 Trial Chamber I subsequently ordered the unconditional release of Lubanga, which was not executed due to the appeal filed by the Prosecutor. The Appeals Chamber reversed the decision to release Lubanga on 21 October 2008, but decided to uphold the decision to stay the proceedings. The Appeals Chamber also remanded the case for a new ruling in light of the fact that the sources had agreed to submit the documents to the judges.[249] On 18 November 2008 the stay was lifted entirely by Trial Chamber I given that the reasons for suspension were no longer at issue. The trial commenced on 26 January 2009, after a delay of more than seven months. However, this was not the end of the matter.

The ICC expected that the Court would render its first ever judgement, in the Lubanga case, in 2010.[250] On 8 July 2010, however, Trial Chamber I once more ordered the stay of the proceedings in the Lubanga case, because it could no longer guarantee a fair trial for the

[246] Schabas, '"Complementarity in Practice"', 26-27.
[247] *Case Information Sheet: Situation in Democratic Republic of the Congo*, *The Prosecutor v. Thomas Lubanga Dyilo*', ICC Doc. ICC-PIDS-CIS-DRC-01-004/10_Eng (15 October 2010).
[248] Ibidem.
[249] Ibidem..
[250] *Proposed Programme Budget for 2010*, ASP, 6.

accused due to non-implementation of the Chamber's orders by the prosecution to confidentially disclose the names and other necessary identifying information of intermediary 143, which will be explained further on.[251] On 8 October 2010, the stay was reversed because the Appeals Chamber said that the Trial Chamber had immediately resorted to a stay of proceedings without first imposing sanctions to bring about the Prosecutor's compliance with its orders.[252] The problems that occurred here have been identified by several scholars as problems of disclosure that will be explained hereunder.[253]

Disclosure

A key element of a fair trial is the so-called equality of arms between the prosecution and the defence. As Sabina Swoboda observed, it is the experience of international criminal proceedings that it is 'much easier for the prosecution to gather incriminating evidence than it is for the defence to collect exculpatory material'.[254] To compensate the disadvantages of the defence, the Rome Statute compels the prosecution under Article 67 (2) to 'disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence', also referred to as (potentially) exculpatory or mitigating evidence.[255]

However, there are exceptions to these rules of disclosure for the protection of witnesses and victims and for evidence provided on condition of confidentiality.[256] Article 54(3)(e) allows the Prosecutor 'not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents'.[257] The Prosecutor is thus allowed to receive material on a confidential basis, a grant that serves, according to Swoboda, as an incentive for cooperation, making holders of information more willing to share their information with the Court.[258] This confidential evidence can only be used, though, as so-called springboard evidence for generating further new evidence as Article 54(3)(e) states as well. However, the use of confidential evidence in a trial can

[251] *Case Information Sheet: Lubanga.*.
[252] Ibidem.
[253] Stuart, 'The ICC in Trouble', 409.
[254] Sabina Swoboda, 'The ICC Disclosure Regime – A Defence Perspective', in: *Criminal Law Forum* 19 (2008) 449–472, there 450.
[255] *Rome Statute*, Article 67 (2).
[256] Swoboda, 'The ICC Disclosure Regime', 463-467.
[257] *Rome Statute*, Article 54(3)(e).
[258] Swoboda, 'The ICC Disclosure Regime', 467.

jeopardize the balance between the defence and the prosecution and thereby compromise the fairness of the trial, especially if this confidential evidence is of an 'exculpatory nature'.[259] Fifty per cent of the evidence used in the Lubanga case was gathered by the prosecution via confidentiality agreements and the prosecution 'admitted that this included a considerable amount of (potentially) exculpatory or mitigating evidence (that should be disclosed to the defence)'.[260]

Trial Chamber I noted in its decision of 13 June that the prosecution had indeed done this routinely rather than exceptionally 'and for the purpose of gathering springboard and lead evidence alike':[261]

> The prosecution has given Article 54(3)(e) a broad and incorrect interpretation: it has utilised the provision routinely, in inappropriate circumstances, instead of resorting to it exceptionally, when particular, restrictive circumstances apply. Indeed, the prosecution conceded in open court that agreements reached under Article 54(3) (e) have been used generally to gather information, unconnected with its springboard or lead potential (emphasis added).[262]

This problem is thus rooted in the approach of the prosecution and Trial Chamber I emphasized in a decision on 3 September 2008 that the responsibility for the continuing problems 'does not rest with the information providers, who have sought to discharge their respective mandates'.[263]

Heikelina Verrijn Stuart moreover suggested that this habit does not stem from a misinterpretation of the Rome Statute and the Rules of Procedure, but rather seems to point at so-called prosecutorial mismanagement and disregard for the fundamental rights of the accused.[264] In addition, she argued that 'the core of the disclosure conflicts is rooted in the approach by the Prosecutor to cooperation with the UN and, even deeper maybe, in the question who controls the Prosecutor'.[265] This argument is based on the fact that the prosecution mostly relied on documents obtained from the UN and NGO's, instead of their own independent investigations. The UN provided 156 of 212 documents, creating a degree of

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[259] Swoboda, 'The ICC Disclosure Regime', 468.
[260] Ibidem.
[261] Stuart, 'The ICC in Trouble', 411; Swoboda, 'The ICC Disclosure Regime', 469.
[262] *Prosecutor v. Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06-1401, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, together with certain other issues raised at the Status Conference on 10 June 2008 (13 June 2008).
[263] *Prosecutor v. Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06-1467, Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings" (3 September 2008) 17.
[264] Stuart, 'The ICC in Trouble', 413.
[265] Ibidem, 413.

dependence upon the UN, because its consent is needed before disclosure under Article 18(3) of the Relationship Agreement that states that the UN and the Prosecutor may agree that the UN provides documents and information to the Prosecutor on condition of confidentiality and that they shall not be disclosed without the consent of the UN.[266]

The fact that the OTP has not conducted many independent investigations and has relied on documents from the UN may be attributed to the security challenges that witnesses, victims and investigating staff face in zones of ongoing conflict. As the UN's MONUC has been stationed there since 2000 and there are numerous NGO's on the spot, there is already a considerable amount of information at hand. As these organisations provided the information on confidential basis and their consent is needed for disclosure, these organisations now control the fate of the proceedings. The consequences of this approach of the OTP were delays, as the Trial Chamber kept ordering disclosure and delayed the proceedings until the disadvantages of the defence were rectified. Stuart criticizes the OTP for having been 'unable' to carry out 'solid and independent investigations and for relying on materials provided by the UN, NGOs or other agencies'.[267] Because of this, the first case ever of the ICC is still not finished, whereas the defendant has been in custody since 2006.

Single Judge Sylvia Steiner expressed a similar view during the proceedings against Katanga and Ngudjolo, where comparable problems occurred. During the confirmation stage of this second DRC case she 'repeatedly and unequivocally expressed her concern about what she called ". . . the reckless investigative techniques during the first two years of the investigation into DRC"'.[268] She stated also in this decision that this practice is 'at the root of the problems that have arisen in the present case [Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui], as well as in the case of the Prosecutor v. Thomas Lubanga Dyilo'.[269]

In 2010 the case against *Lubanga* was stayed again, because of the prosecution's refusal to implement the repeated orders of the Trial Chamber I to disclose the identity of intermediary 143.[270] So again the problem involved disclosure, the context was, however, slightly different. As HRW explained on 16 July 2010, intermediaries are used by the OTP to facilitate contacts between investigators and possible witnesses.[271] In the difficult security

[266] *Negotiated Relationship Agreement between the International Criminal Court and the United Nations Relationship Agreement*, Assembly of States Parties, ICC Doc. ICC-ASP/3/Res.1 (2004).
[267] Stuart, 'The ICC in Trouble', 409.
[268] Ibidem, 412.
[269] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing (20 June 2008) 22.
[270] *Lubanga*, Redacted Decision on the Prosecution's Urgent Request (8 July 2010).
[271] HRW, 'Recent Developments in the ICC Trial of Thomas Lubanga'.

situation in Ituri during the investigations this has enabled the investigators to contact potential witnesses 'in a more discreet and secure manner'.[272] However, as Lubanga's defence is attempting to discredit prosecution witnesses who claim to have been child soldiers in the UPC, some of the defence witnesses have testified that they had been paid or coached by intermediaries of the OTP to lie.[273] To enable the defence to investigate this further, the judges ordered the prosecution to disclose the identity of three intermediaries, including that of intermediary 143. However, after repeated orders to this effect, the Prosecutor refused to disclose the latter's identity, presenting the following argument:

> The Prosecutor is sensitive to its obligation to comply with the Chamber's instructions. However, it also has an independent statutory obligation to protect persons put at risk on account of the Prosecution's actions. It should not comply, or be asked to comply, with an Order that may require it to violate its separate statutory obligation by subjecting the person to foreseeable risk.[274]

Trial Chamber I responded to this refusal by staying the proceedings as an abuse of the process of the Court not only on grounds of 'material non-compliance', but also on grounds of the Prosecutor's 'clearly evinced intention not to implement the Chamber's orders'.[275] The following three remarks of that decision very clearly show the discontent of Trial Chamber I towards the reasoning of the Prosecutor and the OTP in this situation:

> Essentially, for the issues covered by Article 68 in this way, he appears to argue that the prosecution has autonomy to comply with, or disregard, the orders of the Chamber, depending on its interpretation of its responsibilities under the Rome Statute framework.
>
> (…)
>
> No criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations.
>
> (…)
>
> In the Chamber's judgement, he cannot be allowed to continue with this prosecution if he seeks to reserve to himself the right to avoid the Court's orders whenever he decides that they are inconsistent with his interpretation of his other obligations.[276]

These problems have endangered the expeditious, and thereby, fair trial of the accused and furthermore have caused tension between the various organs of the ICC.[277] This lack of a

[272] HRW, 'Recent Developments in the ICC Trial of Thomas Lubanga'.
[273] Ibidem, 2.
[274] *Lubanga*, Redacted Decision on the Prosecutor's Urgent Request (8 July 2010)12.
[275] Ibidem, 22.
[276] Ibidem, 18 and 21.

speedy trial is, according to Barria and Roper, 'not only problematic for the defendant but also for the victim as it compounds the problem of national reconciliation'.[278]

The problems of disclosure explained above are rooted in the Prosecutor's investigative methods. The problem is that the Prosecutor has mainly relied on documents obtained from the UN that he cannot disclose without the latter's consent, or relied on intermediaries that he does not want to put at stake. This, in turn, is rooted in the fact that the OTP has to operate and investigate in an ongoing conflict, making independent investigation by the OTP difficult and dangerous for witnesses, victims and its staff. Phil Clark therefore noted that 'many of the ICC's challenges so far reflect the inherent difficulties of delivering international justice amid ongoing conflict and political upheaval'.[279] Swoboda also concluded 'conducting criminal investigations during an ongoing conflict takes its toll'.[280] Moreover, she added that she believes therefore that efforts of the international community to bring perpetrators to justice should be deferred if investigations cannot be conducted without endangering victims and witnesses, because 'the international community has no legitimate interest in taking a person to trial when it is impossible to guarantee fair proceedings'.[281]

Conclusion

In this chapter I have attempted to assess the ICC's effectiveness in the context of the DRC in achieving its principal objective: ending impunity. Evidently, since no trial at the ICC has reached a conclusion, this objective has not yet been achieved. However, the arrests and the ongoing trials account for some progress from which the effectiveness so far needed to be examined further.

When comparing the ICC's progress to the achievements of the ICTY and the ICTR, the ICC appeared to have been successful in ensuring apprehension and extradition in the situation in the DRC, but to have performed poorly in ensuring expeditious trials when compared to the ICTY and ICTR averages, and even when compared to the ICTY's first and most complex trials. A closer examination of the apprehension and extradition rates of the ICC even raises questions about the ICC's success in that field. Firstly, the validity can be questioned concerning complementarity as national authorities were already conducting

[277] Stuart, 'The ICC in Trouble', 409.
[278] Barria and Roper, 'How Effective are International Criminal Tribunals?', 362.
[279] Clark, 'Law, Politics and Pragmatism', 39.
[280] Swoboda, 'The ICC Disclosure Regime', 471.
[281] Ibidem, 472.

investigations, arresting perpetrators and preparing prosecution cases. Secondly, to ensure quick results, the prosecution chose to pursue Lubanga and Ntaganda on a limited set of charges, with a narrow geographical range. Although the OTP depends on the availability of sufficient evidence, it is doubtful whether this narrow and limited approach will achieve a real end to impunity when the current trials have been completed, because only a limited set of crimes and a narrow context of the conflict will have been addressed, and therefore only a small number of victims will have received justice. Moreover, the fact that only militia leaders and for many years only perpetrators from the Ituri region had been indicted, adds weight to that question. The arrest of Mbarushimana positively broadened the geographical reach, but as he is also a militia leader, the wider conflict and the financiers of the conflict still remain untouched. In weighing the successes and difficulties it has therefore become clear that serious comments can be made on the side of the successes of apprehension, making the scale lean over towards the side of the ICC being not so effective in achieving the objective of ending impunity in the situations of the DRC so far.

Further examination of the problems that occurred and caused difficulties in ensuring expeditious trials shows that it is the investigative approach of the prosecution and its dependence on material of outside sources and intermediaries that is causing delays and jeopardizes the fair trial. These problems are rooted in the environment of ongoing conflict in which the OTP has to work. Ongoing conflict apparently makes it much more difficult to ensure effective transitional justice.

Despite the ineffectiveness of the ICC to date in ending impunity it is often argued that what has been achieved – arrests and some trials in progress – has already influenced the idea that crimes cannot go unpunished. This impact is what the next chapter will focus on when investigating the second objective of the ICC: contributing to the prevention of the most serious crimes of concern to the international community.

3 Contributing to Prevention of Crimes

The Impact

While some assess the success of tribunals by the number of trials or apprehensions and extraditions, others prefer to assess the success or effectiveness of such transitional justice mechanisms by considering the impact on the conflict or post conflict situation, because transitional justice is seen by some, as Christine Bell examined, as a conflict resolution technique or a tool of international state building in the aftermath of mass atrocity.[282] Akhavan for example stated on the ICTY and the ICTR that 'even if all the senior accused are arrested and prosecuted, the hardest test of their effectiveness is whether the tribunals have contributed to postconflict peace building and reconciliation'.[283] Another example is Moreno-Ocampo himself who stated that 'the measurement [of the Court] is not just what happens inside [the Court], the measurement of this Court is how the Court impacts in the world'.[284] Another reason for examining the impact to assess the success is simply because it is part of the mandate and its justification.

The ICC's second objective is to contribute to the prevention of the most serious crimes of concern to the international community. It is mentioned in the same sentence as the first objective of ending impunity: 'Determined to put an end to impunity for the perpetrators of these [(most serious crimes of concern to the international community)] crimes and thus to contribute to the prevention of such crimes (emphasis added)', thereby implicating a positive causal relation between the ending of impunity and the prevention of crimes, also referred to as deterrence. As seen in Chapter 1, a debate is ongoing on whether deterrence can actually be achieved by prosecutions. The OTP referred to the possible deterrence effect in its strategy:

> Massive crimes are planned; the announcement of an investigation could have a preventative impact. The mere monitoring of a situation could deter future crimes from being committed. It increases the risk of punishment even before trials have begun. Interestingly, this effect is not limited to the situation under investigation but extends to different countries around the world.[285]

[282] Bell, 'Transitional Justice', 13.
[283] Akhavan, 'Beyond Impunity', 8.
[284] Yates, De Onis, and Kinoy, *The Reckoning* (2009).
[285] Office of the Prosecutor (OTP), *Report on Prosecutorial Strategy* (14 September 2006) 6.

However, successful prevention is difficult to assess as it, as Akhavan noted, 'is measured by what does not happen'.[286] Moreover, if data show a decrease in a certain crime, it is still difficult to prove that it was caused by ICC's deterrence, especially with all the different programs aimed at resolving a conflict.[287] Finally, due to limited access to conflict regions, data are scarce. Despite these difficulties, effects have been observed and can be evaluated.

This chapter will examine to what extent the ICC has been effective in contributing to the prevention of crimes of concern to the international community. In the same way as we used the research of Barria and Roper on the effectiveness of the ICTY and the ICTR in providing justice to gain insights on the effectiveness of the ICC on this matter, this chapter will start with a similar comparison to the approach and the results of the research of Barria and Roper on the effectiveness of the second objective. Then I expand the investigation with my own approach. As it is most difficult to examine the prevention of crimes because it is the absence that needs to be investigated and the link to the judicial institution is very difficult to prove, I will use the already reported effects as a starting point and critically examine the actual prevention of crimes and whether the ICC investigations and prosecutions are the actual cause of that prevention.

I will first address the general reported effect and then concentrate on the crimes that have been addressed most in the charges, as a contribution to the prevention of crimes would be most likely in those crimes. In this part I will pay special attention to the (illegal) exploitation of natural resources as it is central to the conflict and Moreno-Ocampo himself has admitted that the key to stop the crime is to stop the money flows.[288] I will examine how the ICC has addressed this issue and with what effect. I will conclude with an analysis of peace and justice in the DRC situation, to be able to conclude whether the ICC has impeded peace or has rather promoted peace by contributing to the prevention of crimes.

Comparison with the ICTY and ICTR

As discussed earlier, Barria and Roper have used the goals of the ICTY and the ICTR as the basis upon which they judge the relative success and failure of these tribunals.[289] One of those goals was providing justice, which was used in Chapter 2. Another goal is to contribute to the 'maintenance of peace' as Barria and Roper describe it. To investigate this they have made a

[286] Akhavan, 'Are International Criminal Tribunals', 636.
[287] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice,* 33.
[288] BBC News, 'Firms face 'blood diamond' probe' (23 September 2003) online available at: http://news.bbc.co.uk/2/hi/business/3133108.stm, last retrieved on 1 July 2011.
[289] Barria and Roper, 'How Effective are International Criminal Tribunals?', 357.

distinction between the circumstances of both tribunals, as the ICTY was created during the conflict, whereas the ICTR was established in a post-conflict environment, and have analysed whether war or violence was absence in both situations. For the ICTY this analysis found that it was not successful at maintaining peace, because 'even though the Tribunal began operations in mid-November 1993, the conflict within Bosnia continued until the end of 1995' and 'the existence of the Tribunal and the possibility of being indicted did not seem to encourage an ending of hostilities (…)'.[290] In addition, they noted that the ICTY also did not avoid the Kosovo war from happening and that '[e]ven though this was an internal Serbian conflict, it appears that the Serbs were not concerned about the possibility of a change in the mandate of the ICTY to include this conflict even when the Bosnian conflict included elements of an internal war'.[291] They also quoted Adam Roberts who has concluded as well that the ICTY did not contribute to peace-building efforts.[292]

The ICTR was on the other hand established in a post-conflict environment, but it was hoped that it could maintain the peace by preventing the revenge killings that would undermine the peace and which were of great concern to the international community. However, Barria and Roper found that 'since the establishment of the ICTR, estimates are that ten of thousands have perished in clashes between Hutu insurgents and Tutsi revenge killings'.[293] Roberts noted on this case that the 'continuing bitter conflicts in the African Great Lakes region, including Hutu-Tutsi killings within Rwanda, do not suggest that the Tribunal has yet had a significant effect'.[294] The description in Chapter 1 of the spill-over of the Rwandan genocide into eastern Congo and the revenge killings that were committed there underlines that conclusion. This would mean that the ICTR was not effective in maintaining peace. Barria and Roper conclude the case of the ICTR, however, by questioning what would be the peace-building and security level without the ICTR and quote Akhavan who, they state, 'argues that while conflict continues in Rwanda, the extent of revenge killings would be far greater in the absence of the ICTR'.[295]

Comparing these thoughts with the situation in the DRC, what needs to be determined is that the ICC's situation in the DRC was established in a post-conflict environment as the case was referred to the ICC by the transitional government in 2004 that was installed by the

[290] Barria and Roper, 'How Effective are International Criminal Tribunals?', 358.
[291] Ibidem.
[292] Barria and Roper quote on page 358: Adam Roberts 'Implementation of the Laws of War in Late 20th - Century Conflicts Part II', Security Dialogue, Vol. 29 (1998) 277.
[293] Barria and Roper, 'How Effective are International Criminal Tribunals?', 358.
[294] Barria and Roper quote on page 358: Adam Roberts 'Implementation of the Laws of War in Late 20th – Century Conflicts Part II', Security Dialogue, Vol. 29 (1998) 277.
[295] Barria and Roper, 'How Effective are International Criminal Tribunals?', 358.

peace agreement of 2002/2003 that ended the Second Congo War. However, as already determined in Chapter 1, this did not mean the end of the atrocities in eastern Congo, where violence continued in the Ituri district and the Kivu provinces. Therefore, the situation in the DRC is mostly referred to in the literature as an ongoing conflict, meaning that in the DRC situation, the ICC has to work in ongoing conflict.[296]

Because the conflict in the DRC is in fact ongoing and the violence has continued, it might be concluded that the ICC was also not successful in contributing to the maintenance of peace as there is no complete peace yet. Also, in the way the ICTY did not prevent the Kosovo war, the ICC's investigations in Ituri did not prevent violence from escalating in the Kivu region in 2007/2008 or 2009. However, the mandate of the ICC is not to contribute to the maintenance of peace (which is much easier to measure by the absence of war) but to contribute to the prevention of crimes and therefore this needs much more investigation than the limited analyses of Barria and Roper on this subject.

In their conclusion, however, Barria and Roper link the information of their more detailed and thorough paragraph on the provision of justice to the maintenance of peace and conclude that 'the lack of effective apprehension has reduced the deterrent effect of the tribunals and provided one of the primary justifications for the creation of an international criminal court'.[297] Translating this to the ICC, which as seen in Chapter 2 obtained a high percentage of apprehension – although perhaps at the expense of the strict appliance of the concept of complementarity and the range of charges – it would mean that the ICC should have a strong deterrence effect as it has effectively apprehended indictees. However, in the previous chapter it was also shown that so far, none have been convicted, which could strongly reduce the deterrence effect. Moreover, the limited number of (public) indictments and the fact that only those most responsible are being persecuted, might also limit this deterrence effect, as practice shows that only a limited number of perpetrators is actually threatened by the ICC. Thus, considering this reasoning, it would be most likely that the deterrence effect of the ICC in the DRC is only limited. As this examination only gives limited insights of a possible outcome and this complicated task of evaluating the effectiveness of the Court in contributing to the prevention of crimes is obviously in need of more examination, I will continue with a more thorough approach, considering and critically examining reported effects and the specific crimes investigated by the ICC.

[296] See for example: Thomas Unger and Marieke Wierda, 'Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice', in: K. Ambos et al. (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (2009) 263-302, there 264 .
[297] Barria and Roper, 'How Effective are International Criminal Tribunals?', 349 (Abstract).

Reported Effects and Actual Impact

This paragraph will first explore the findings of the field. Before investigating effects of crimes related to child soldiers, sexual violence and the illegal exploitation of resources specifically, I first want to explore some general reported effects, which can be brought together under the denominator of fear.

Fear

In 2005 William Burke-White published a paper on the ICC in the DRC which included a paragraph on the deterrent effect in Congo based on interviews performed already in late 2003, right after Moreno-Ocampo announced his plan to investigate Ituri, but before the actual referral or decision to start investigations.[298] Burke-White interviewed Lubanga in October 2003 during which Lubanga was interested in and analysed the Rome Statute, and recognized the ICC's possible deterrent effect.[299] Lubanga noted in the interview that 'with the Prosecutor's announcement, "there is a palpable pressure not to do certain things" and "those responsible are now very worried"'.[300] Although Burke-White acknowledges that this does not prove change of Lubanga's actual behaviour or his actual prevention of crimes, he argues that 'for one of the principle suspects of international crimes in the region to be actively interested in the text of the Rome Statute and to claim the Court was altering the behaviour of suspected criminals is, at the very least, noteworthy'.[301]

Burke-White also interviewed another warlord, former rebel leader of the RCD-Goma Ciribanya, who spoke of fear for the ICC as well by stating that 'many here in the East are afraid the Court will come' and 'we all now are thinking twice. We do not know what this Court can and will do.'[302] The question is whether these warlords are still so afraid now that it has become clear that only a few can be prosecuted and whether this fear has actually deterred them. Congolese officials such as the Congolese Human Rights Minister, as well as MONUC officials acknowledged the deterrent effect of the ICC in Congo in interviews with Burke-White. The Special Representative of the Secretary General in Congo, who is the head of MONUC, even admitted to use the ICC as a threat in negotiations with rebel groups.[303] However, critically examined, such officials are bound to state their positive view on the

[298] Burke-White, 'Complementarity in Practice', 586-589.
[299] Ibidem, 588.
[300] Ibidem, 587.
[301] Ibidem, 587-588.
[302] Ibidem, 588.
[303] Ibidem, 588-589.

matter. Moreover, the fact that MONUC officials use the threat of the ICC in negotiations, does not show that this is effective or has any influence on the actual number of crimes.

With all these considerations Burke-White draws the conclusion that these interviews show a deterrent effect:

> The recent experience of Congo suggests – at least in a very preliminary and anecdotal way - that the ICC may well be serving as a deterrent to further international crimes. This is not to claim that the investigation in Congo has brought about an end to international crimes in the region. Nonetheless, interviews with high-level suspects of crimes in Ituri do suggest that the ICC investigation is altering the thinking and possibly the behaviour of criminal actors.[304]

Although Burke-White acknowledges that crime statistics are imperfect and often unavailable, that crimes have not ceased altogether, and that 'it may never be possible to show a causal relationship between the Court and decreased violence', he does conclude from these interviews that 'change is afoot' and that his findings suggest that the ICC 'may be playing an important part in this process'.[305] Despite the fact that I agree that these comments do show an altering in thinking very early in the ICC's intervention in the DRC, it mostly constitutes fear and does not yet prove that the ICC contributed to the prevention of crimes.

HRW found similar sentiments of fear during its years of research. After the Prosecutor's opening of investigations in Congo in June 2004, HRW researchers were told that 'some armed group commanders warned their troops to refrain from attacking civilians or committing human rights violations' as the 2008 report notes, 'perhaps out of fear that they might be investigated by the court'.[306] However, the footnote added that '[t]he continued abuses … suggest that such orders, if given, did not have the effect of ending attacks against civilians'.[307] In other words, this fear has not prevented future crimes.

More expressions of fear followed after the transfer of Lubanga to The Hague in March 2006. HRW reported that during a meeting with a Congolese army colonel allegedly 'to discuss crimes committed by his own forces against the Mai Mai', on the day Lubanga was transferred to The Hague, the colonel apparently 'sat up and said "I don't want to be like Lubanga! I don't want to be transferred to The Hague!"'.[308] In September 2006, in a

[304] Burke-White, 'Complementarity in Practice', 587.
[305] Ibidem, 589.
[306] HRW, *Courting History,* 67.
[307] Ibidem*,* 68.
[308] Human Rights Watch (HRW), *Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference* (May 2010) 71.

discussion with an Ituri militia leader 'who was engaged at the time in peace discussions with the Congolese government', similar sentiments were experienced:

> …the commander asked Human Rights Watch for further information about what constituted war crimes, having heard a broadcast from The Hague on proceedings against Lubanga a few days earlier. When the elements of the crimes were explained to him, he asked, "So could I also be transferred to the Hague if I did those things?" When informed that if he had done such things, it was a possibility; he put his head in his hands and repeatedly said, "I had no idea. I had no idea.[309]

While this account shows this fear as well, it also reveals the apparent lack of awareness. HRW found that such fears even extended to other regions and across the boarder. During research on serious human rights violations in the Katanga province, Congolese army and Mai Mai rebel commanders expressed that 'they did not want to "end up like Lubanga" and would, therefore, initiate inquiries into crimes committed by their troops'.[310] They even came across such sentiments in the CAR, where rebel commanders told HRW researchers that they 'did not want to end up before the ICC'.[311] The reported general effects mostly constitute fear and some of these accounts reveal a significant previous lack of awareness of the accountability of crimes. The actual effect on the change of behaviour, a deterrence effect or the prevention of crimes, however, remains vague.

Child Soldiers

The conflict of the DRC has been characterised by the use of child soldiers since the overthrow of Mobutu by Laurent Kabila's forces in 1996 which was 'largely carried out by "kadogas", or child soldiers'.[312] After this precedent, all of the parties in the Second Congo War and in the violence thereafter have used child soldiers, non-state armed groups as well as government forces.[313] Moreover, the DRC is thought to have the largest concentration of child soldiers in the world and estimates are that at the height of the war as many as 30,000 children were participating as soldiers.[314] In addition, the crimes of conscripting, enlisting and using child soldiers to participate actively in hostilities occur in the charges against four out of the five ICC indictees in the DRC situation and are the only charges against Thomas Lubanga Dyilo and Bosco Ntaganda. The army of their UPC has sometimes also been referred to as the

[309] HRW, *Making Kampala Count*, 71.
[310] HRW, *Courting History*, 68.
[311] HRW, *Making Kampala Count*, 71
[312] HRW, 'The International Criminal Court Trial of Thomas Lubanga'.
[313] Ibidem.
[314] Ibidem.

'army of children', reportedly including children as young as seven years old.[315] As both the conflict and the trials are strongly characterized by the crimes related to the use of child soldiers, this deserves to be examined individually in measuring the ICC's contribution to the prevention of crimes. Furthermore, positive signs have been reported on the effect of the ICC's apprehension and trial of Thomas Lubanga on the crime of using child soldiers in the DRC and these effects are the most mentioned in discussions on the ICC's impact.

A UN Secretary-General (SG) report to the Security Council on children and armed conflict in the DRC and a HRW mission to eastern Congo in 2007, showed some changes in the awareness and behaviour of perpetrators of these crimes.[316] The SG report was based on information collected by child protection advisers and officers of MONUC and UNICEF covering the period from June 2006 to May 2007. This is the period immediately after the transfer of Thomas Lubanga to The Hague (16 March 2006) and the confirmation of charges hearing and decision (9-28 November 2006 and 29 January 2007 respectively).

The positive effect reported is the increased awareness that using child soldiers is a serious (war) crime, all the more so, since it has not been perceived in that manner up until the apprehension of Thomas Lubanga. After Laurent Kabila's kadogas, the use of child soldiers became common. Parents sometimes even gave their children voluntarily 'as an act of solidarity to the relevant militia, which they felt represented their own interests' or 'to help protect the community'.[317] Most common, however, was the conscription of children by force, through abduction, which was considered by most army commanders as a normal part of war.[318] Moreover, recruitment rates were extra high during disarmament, demobilization, and reintegration (DDR) processes, because higher troop numbers resulted in higher ranks in the army for the militia leaders once they were integrated.[319] HRW noted that after the confirmation of charges against Lubanga, 'it became apparent that there was an increased awareness among the population at large that the enlistment, recruitment and use of child soldiers are in fact crimes'.[320] So, there was a positive and important educational effect. In relation to the problem of parents giving away their children to armed groups, they even reported that child protection agencies admitted that the Lubanga case seemed to have

[315] Jo Becker, 'Paying for Sending Children to War: The Significance of the ICC trial of Thomas Lubanga must not be Underestimated: Child Soldiers Worldwide could Benefit', in: The Guardian (27 January 2009) online available at: www.guardian.co.uk/commentisfree/2009/jan/27/warcrimes-humanrights, last retrieved on 6 July 2011.
[316] HRW, *Courting History*, 68; Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 31.
[317] Ibidem.
[318] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 31.
[319] Ibidem, 32;
[320] HRW, *Courting History*, 68.

'reached out to families in the region much more effectively than years of their own campaigning', which is certainly meaningful. [321]

One anecdotal instance clearly shows the change of unawareness as a result of the ICC prosecution of Lubanga on charges of enlisting and conscripting child soldiers:

> Upon learning that use of children as combatants is a serious violation of international humanitarian law, one rebel commander spent two days explaining to Human Rights Watch researchers that he had not known using child soldiers was a crime, that it was "a misunderstanding," and that he was not a criminal. He immediately offered to demobilize the child soldiers as long as their security could be guaranteed, and asked Human Rights Watch to contact UNICEF for assistance with the demobilization. The children were in fact demobilized.[322]

Such a positive reaction of demobilization is, however, an exception. Mostly, this awareness had a downside, since it also made militia leaders aware of their own vulnerability to prosecution and that they 'could be at risk of arrest if they were caught with children in their ranks'.[323] As the International Center for Transitional Justice (ICTJ) explained, this presented a problem for the armed groups, 'as there was no apparent way to release the child soldiers without, in so doing, admitting to the crime'.[324] Consequently, militia leaders started denying the presence of children among their ranks. Human Rights reported on this phenomenon:

> (...) at the time of our field mission there, militia leaders in Ituri appeared to be changing their approach to child soldiers because of the charges against Lubanga. Previously, these leaders openly admitted approximate numbers of children in their ranks and handed children over to the United Nations Mission in the Democratic Republic of Congo (MONUC) and the United Nations Children's Fund (UNICEF) as part of the demobilization process. Following the confirmation of charges against Lubanga, however, many denied having any children under their command.[325]

Because of this new pattern of denial, many children were also briefed to lie about their age and claim to be older than 18 years.[326] Worse, children were hidden, chased from the ranks or even abandoned, instead of being brought to demobilization centres, hindering the work of child protection officials and the demobilization of child soldiers.[327] Child protection workers in Ituri for example found 'hundreds' of child soldiers in their communities after 'being

[321] HRW, *Courting History*, 68.
[322] HRW, *Making Kampala Count*, 71-72.
[323] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 31.
[324] Ibidem.
[325] HRW, *Courting History*, 68.
[326] Ibidem, 69.
[327] Ibidem, 68-69.

instructed to return to their families by themselves by commanders who hoped to avoid accountability for child recruitment', making it much more difficult to provide them with reintegration support.[328] According to the ICTJ there were even families that refused to take the sons back that they had given voluntarily to armed groups, out of fear of an ICC arrest for complicity in a crime.[329]

There is also some anecdotal evidence in interviews of HRW, the ICTJ and the UN, that these changes were a direct result of the ICC's actions. Despite not mentioning the ICC as one of the reasons for the 8 per cent decrease in the recruitment of children, an account of the report of the UN Secretary General to the Security Council on children and armed conflict in the DRC of 2007 is most mentioned in this case and acknowledges the link of the case of Thomas Lubanga to the practice of hiding children throughout the DDR or *mixage* (integration without relocation) process in North Kivu:

> In some instances, commanders reportedly cited the capture and trial of Thomas Lubanga by the International Criminal Court as reasons for not taking them to the mixage centres. When children are brought along with the adults to the mixage centres they are often forced to declare an age above 18 years.[330]

HRW found a similar explanation in that same year in Bunia, Ituri:

> One source from a child protection organization whom we interviewed reported that many children refused to admit that they were under age 18, saying "we know that you want to try our commander like you tried Lubanga".[331]

The ICTJ also reported that youth entering the demobilization centres began to insist they were adults and 'would sometimes mention the Lubanga case, saying that they "didn't want what happened to Lubanga to happen to their commander."'[332] This effect is referred to as the "Lubanga effect" by children's rights workers in the field.[333]

Children's rights workers were also increasingly being attacked and all these forms of denial and obstruction became frequent as the SG report of 2007 pointed out:

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[328] *Report of the Secretary-General on children and armed conflict in the Democratic Republic of the Congo*, UN Doc. S/2008/693 (10 November 2008) para. 93.
[329] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 31.
[330] *Report of the Secretary-General on children and armed conflict in the Democratic Republic of the Congo,* United Nations Security Council, UN Doc. S/2007/391 (28 June 2007) para. 29.
[331] HRW, *Courting History*, 69.
[332] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 31.
[333] Ibidem.

> Denial of the presence of children among the ranks, active obstruction of the separation of children, and threats made against child protection agents working to separate children have become frequent in Ituri and North Kivu.[334]

The ICTJ report of 2009 stated, however, that the children's rights advocates interviewed for their report 'nevertheless … concluded that the educational impact of the ICC outweighed these factors, and [that] they saw the overall effect of the ICC's action as positive'.[335]

Despite these (positive) effects, a critical note must be expressed as to whether these effects constitute an actual prevention of crimes as the second objective of the ICC demands and therefore count as prove of a deterrent effect of the ICC. Reports and statistics show, namely, that the Lubanga effect reported by the UN occurred in an environment of increasing recruitment, that decreasing numbers were observed before the arrest of Lubanga, making it difficult to prove the actual causal relation, that recruitment rates are more related to the changing dynamics of conflict and that recruitments continued.

Although the Secretary-General reported in 2007 that the recruitment of children into the armed groups decreased 8 per cent overall, he also found a surge in recruitment in North Kivu by commanders loyal to Laurent Nkunda.[336] However, it was in North Kivu and within the armed groups of Nkunda that the Secretary-General found the capture of Lubanga being cited by commanders as a reason not to take children to the *mixage* centres. So, in the region where effects of the ICC have been observed by the UN, the recruitment rates have increased instead of decreased, meaning that in these cases there was no link between the awareness and the change in behaviour in the form of denying to have child soldiers among the ranks on the one hand, and the actual reduction of recruitment or the prevention of such crimes on the other.

The Secretary-General also noted in the 2007 report that children had been compelled by their commanders to declare themselves to be over 18 years during *brassage* processes already in 2004 and 2005.[337] This would mean that the signs of denial were perceptible before the apprehension or the confirmation of the charges of Lubanga, undermining the idea that the patterns of denial were a result of his apprehension. Moreover, the reduction in the recruitment and use of child soldiers was reported already in 2005 by the Secretary General according to his 2006 report, which covered the period from July 2005 to May 2006, and stated that 'a significant reduction … has occurred over the past 12 months', which was due to

[334] *Report of the Secretary-General on children*, UN Doc. S/2007/391 (2007) para. 18.
[335] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 31-32.
[336] *Report of the Secretary-General on children*, UN Doc. S/2007/391 (2007) para. 17 and 22.
[337] Ibidem, para. 35.

'a combination of factors such as the implementation of the disarmament, demobilization and reintegration program for children, the army integration process as well as the constant decrease in the number of active fighting zones'.[338] The 2008 Child Soldiers Global Report noted this as well:

> From 2005 the UN reported an overall reduction in child-soldier recruitment and use by armed forces and groups – a consequence of a decrease in the numbers of active fighting zones, the progressive incorporation of armed groups in to the national army and the associated demobilization process for adults and children.[339]

So, the general acknowledged moment of the start of the decreasing numbers in child recruitment appeared before the arrest of Lubanga, undermining the causal relation between the ICC intervention and the reduction.

Thirdly, several reports reveal that changes in the levels of child recruitment appear to be more related to the changing dynamics of the conflict than to the ICC intervention.[340] An example given of this relationship is the earlier mentioned increase of recruitment by commanders loyal to Nkunda which was attributed to the 'strategy (…) to increase the number of troops to be mixed and to increase the strength of forces prior to engaging in combat operations against FDLR and the Mai-Mai in North Kivu'.[341] Another example is a 38 per cent increase in child recruitment between September 2007 and 2008, attributed to fighting between the FARDC and the FDLR against the CDNP.[342] Another report stated that 'in the context of the deteriorating security situation in eastern DRC from late 2007, an increase in child recruitment by Mai Mai elements, as well as by CNDP and FDLR was reported'.[343] The ICTJ also notes that 'there also seemed to be no deterrent effect on the recruitment of child soldiers when fighting loomed again in late 2007'.[344] Moreover, the Secretary-General literally acknowledged this relation in his 2008 report on children and armed conflict, stating that '[i]n most cases, the recruitment of children is directly related to active conflict, with new outbreaks of hostilities typically resulting in higher trends in child

[338] Office of the Special Representative of the Secretary General for Children Affected by Armed Conflict, 'DRC: Serious violations of children's rights with impunity continues', Press Release (26 June 2006) online available at: www.un.org/children/conflict/english/pr/2006-06-26124.html, last retrieved on 11 July 2011.
[339] Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report: Democratic Republic of the Congo* (2008) 1.
[340] Coalition to Stop the Use of Child Soldiers, *Briefing Paper, Democratic Republic of the Congo: Mai Mai Child Soldier Recruitment and Use: Entrenched and Unending* (February 2010) 5.
[341] *Report of the Secretary-General on children*, UN Doc. S/2007/391 (2007) para. 23.
[342] Coalition to Stop the Use of Child Soldiers, *Briefing Paper*, 5.
[343] Ibidem.
[344] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 32.

recruitment'.[345] This undermines the idea that changes can be attributed to an ICC deterrent effect or that this deterrent effect is able to sustain on the long run as fighting recurs.

Finally, further examination shows that recruitment continued. First of all, not all sources agree that a reduction occurred in 2007 after the first apprehension, mostly due to the upsurge of child recruitment in North Kivu and of child recruitment from refugee camps and communities in Rwanda in 2007.[346] The ICTJ noted that 'numerous NGO and UN rights advocates confirm that recruitment of child soldiers continued at its normal, fairly high, rate in mid- to late 2007'.[347] More recent reports of the UN do not show a decrease either. A 2008 SG report stated for example that 'child recruitment by armed groups increased during the reporting period'.[348] In explaining how child recruitment rates relate to the change of conflict dynamics in another 2008 report, he also noted that 'child recruitment intensified at the end of 2007 and since September 2008' due to escalated fighting between FARDC and CNDP forces.[349] In fact in North Kivu this resulted in the earlier mentioned 38 per cent increase as compared to 2007.[350] Moreover, despite the fact that officially in Ituri, 'no recruitment of minors was confirmed', the report also states that '[r]eports of new recruitment have also resurfaced in the Ituri district, coinciding with heightened activities by splinter groups of the FNI and FRPI militia groups and FPJC'.[351] Another 2008 UN report of the Group of Experts, also speaks of a new wave of child recruitment, also in Ituri: 'The resurgence of recent violence and active fighting in Masisi and Rutshuru territories, as well as in Ituri district since August 2008, contributed to a new wave of child recruitment'.[352] These recent reports also reveal the strong relation between recruitment rates and conflict dynamics discussed earlier.

A 2009 UN report also spoke of an explosion of child recruitment in late 2008, early 2009: 'child protection actors indicate that there has been an explosion of child recruitment by non-state armed groups in recent months'.[353] Although in 2009 a slight decrease was measured by the UN overall as stated in the July 2010 report, HRW reported later that year on a new wave of child recruitment since September 2010: 'Rogue Congolese army officers and armed

[345] *Report of the Secretary-General on children*, UN Doc. S/2007/391 (2007) para. 19.
[346] Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report,* 2-3.
[347] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 32.
[348] *Fourth special report of the Secretary-General on the United Nations Organization Mission in the DemocraticRepublic of the Congo*, UN Doc. S/2008/728 (21 November 2008) para. 33.
[349] *Report of the Secretary-General on children*, UN Doc. S/2008/693 (2008) para. 19.
[350] Ibidem, para. 24.
[351] *Report of the Secretary-General on children*, UN Doc. S/2008/693 (2008) para. 19.
[352] *Final report of the Group of Experts on the Democratic Republic of the Congo,* UN Doc. S/2008/773 (12 December 2008) No. 169.
[353] *Technical Assistance and Capacity-Building: Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country,* UN doc. A/HRC/10/59 (5 March 2009) para. 54.

groups in eastern Democratic Republic of Congo are forcibly recruiting and training for combat hundreds of young men and boys in new efforts to expand their ranks'.[354] So, if a decrease of recruitment occurred at all, it was only temporal as new waves of recruitment have been reported in recent years. Thus, reports and statistics undermine the idea of a deterrent effect of the ICC on the perpetrators of crimes related to child recruitment for armed conflict, as Lubanga effects were found in regions with increasing rates, as decreasing rates occurred before the charges of Lubanga became known, as new waves of recruitment occurred and as the reported recruitment rates changed in conjunction with the changing dynamics of the conflict. The ICTJ also concluded that despite the Lubanga effect, 'there is little evidence that armed groups have been deterred from recruiting more children in Eastern DRC'.[355]

Thus, despite the fact that interviews have shown significant change in awareness, some change in behaviour and release or demobilization in a few cases - which in fact made the work of child protection officials more difficult - it mostly led to obstruction demobilization and a pattern of hiding the evidence of their crimes. Moreover, new recruitment continued in other regions and recurred in Ituri as well, as a response to the changing dynamics of the conflict, which shows the 'fragile and limited nature of the impact of the Court'.[356] However, it must be acknowledged that the ICC 'dramatically increased awareness among Congo warlords and militia leaders that use of children as participants in conflict is unlawful', which is very important considering the lack of awareness before.[357] Although it cannot be proved that this has led to an actual significant impact on the prevention of such crimes in the short term, this awareness might influence the long term and contribute to the prevention of crimes in the future in the DRC or other conflicts. Moreno-Ocampo also concluded: 'Thomas Lubanga case is a normal criminal case against Lubanga, is he guilty or innocent, that is the point. In addition, it's a message to the world, child soldiers is a war crime, you cannot do it'.[358] A stronger impact might also follow after the first conviction, revealing for the first time the actual power of the ICC. HRW also noted: 'In the long run, the awareness that recruiting children to be soldiers is a criminal act that may result in

[354] *Report of the Secretary-General on children and armed conflict in the Democratic Republic of the Congo*, UN. Doc. S/2010/369 (9 July 2010) para. 17; HRW, 'DR Congo: Rogue Leaders'.
[355] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 41.
[356] HRW, *Courting History*, 69.
[357] HRW, *Making Kampala Count*, 72.
[358] Yates, De Onis and Kinoy, *The Reckoning* (2009).

prosecution may help discourage use of child soldiers'.[359] If this is the case, then the ICC has already made a small contribution to the prevention of such crimes.

Sexual Violence

Crimes of sexual violence, including rape (as a war crime and as a crime against humanity) and sexual slavery, occur in all charges of the ICC in the DRC situation, except those against Lubanga and Ntaganda, and thereby count as the most addressed crime by the ICC in the DRC. Yet, no effects such as the ones described above in relation to the crimes of recruiting and using child soldiers have been reported on the crimes of sexual violence. HRW suggested indirectly in 2008 that this is related to the fact that no charges of this sort were part of the charges of the first case of the Court against Lubanga that as a first case, strongly stirred the minds of perpetrators in the field. As the charges of the first case were only on crimes of child recruitment, the impact was only on the awareness that recruitment of child soldiers is a crime and on general fear of prosecution as discussed above. According to HRW that impact could have been more significant, and I would like to add, broader, if it had 'pursued a more representative set of charges against Lubanga'.[360] Apparently, a Prosecutor in Bunia linked this to sexual violence, wishing a strong message could have been sent against it as well, because 'numerous cases of rape continue to be brought to his attention on a daily basis'.[361]

Sexual violence is generally acknowledged as a defining feature of the conflict in the DRC and is often used as an instrument of war to 'humiliate, intimidate and tear apart families and entire communities'.[362] The situation is worst in the Kivus, particularly South-Kivu.[363] Vinck, Pham, Baldo and Shigekane noted in their survey that 'according to the UN, in 2006, 27,000 sexual assaults were reported in South Kivu alone' and in one town surveyed '70 percent of the women reported being sexually brutalized'.[364] Perpetrators are from all parties of the conflict, including government forces.

In fact, most reports find that state security forces, such as the FARDC and the national police, are among the main perpetrators. HRW for example called the government army in 2009 'one of the main perpetrators' and also the single largest group of perpetrators: 'Although other armed groups also commit brutal acts of sexual violence against women and

[359] HRW, *Making Kampala Count*, 72.
[360] HRW, *Courting History*, 69.
[361] Ibidem.
[362] *Report of the Secretary-General on children*, UN Doc. S/2007/391 (2007) para. 12; Martin Bell, *Child Alert: Democratic Republic of the Congo. Martin Bell reports on Children Caught in War,* UNICEF (July 2006) 3.
[363] *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk*, UN Doc. A/HRC/7/6/Add.4 (28 February 2008) para. 17 and Summary.
[364] Vinck, et al., *Living with Fear,* 13.

girls, the sheer size of the Congolese army and its deployment throughout the country make it the single largest group of perpetrators'.[365] This is, among other reasons, due to the integration of armed groups into the army. The UN Special Rapporteur on violence against women reported that data 'provided by various sources' indicates that 'one in five rapes is committed by the State security forces'.[366] Furthermore, the human rights division of MONUC found that '54 per cent of all sexual violence cases documented in the first six months of 2007 were committed by the FARDC and 43 per cent by the PNC [Congolese police]'.[367]

The effect the ICC had on the crime of recruitment of child soldiers has not been seen in the case of sexual violence. All reports express a continued concern on sexual violence as the rate of sexual violence remains high, increases and expands, even while such crimes remain underreported because of stigma, shame and fear of being raped again at the police station.[368] In 2007 the earlier mentioned Special Rapporteur noted that in Ituri 'sexual violence had continued at alarming levels despite improvements in the overall security level'.[369] A more recent UN report noted in 2009 that the Special Rapporteur 'has continued to receive disturbing reports about a new wave of sexual violence against women as well as attacks on women human rights defenders in the eastern region, especially in North Kivu'.[370] This new wave was the result of the joint military operations of the Congolese and Rwandan army against the FDLR and the retaliatory attacks the FDLR launched on civilians.[371] In 2009 HRW also documented this strong increase of sexual violence:

> Since the start of Congolese army operations in January, rape cases in many conflict areas have doubled or even tripled compared to 2008. While the exact number of victims is unknown, the United Nations Population Fund (UNFPA), the UN agency responsible for coordinating efforts on tackling sexual violence in Congo, recorded that 7,540 women and girls were raped in North and South Kivu provinces between January and September 2009 … nearly surpassing the figures recorded during all of last year.[372]

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[365] Human Rights Watch, *Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo* (July 2009) 4.
[366] *Report of the Special Rapporteur on violence against women,* UN Doc. A/HRC/7/6/Add.4 (2008) para. 33.
[367] Ibidem, para. 13.
[368] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 27; Reports that express concern:
UN Doc. S/2008/693, para. 40; UN Doc. S/2009/158, para. 22; UN Doc. S/2010/369, para. 35; UN Doc. A/65/820–S/2011/25087, para 87.
[369] *Technical Assistance and Capacity-Building*, UN Doc. A/HRC/10/59 (2009) para. 35.
[370] *Technical Assistance and Capacity-Building*, UN Doc. A/HRC/10/59 (2009), para. 36.
[371] HRW, 'Democratic Republic of Congo(DRC): Events of 2009'.
[372] HRW, *You will be punished,* 46.

These numbers show that (rebel) commanders, despite the charges of sexual violence crimes against Congolese warlords at the ICC, 'continue to believe such acts are an acceptable part of war'.[373] A 2011 research on estimates of sexual violence in the DRC, in an attempt to overcome the disclaimer that the 'actual magnitude of violence is unknown', calculated that '[a]pproximately 1.69 to 1.80 million women reported having been raped in their lifetime' and '407397 - 433785 women reporting having been raped in the preceding 12 months'.[374] Thus, evidently, the rate of sexual violence remains high.

Most of the reports also find that it is the impunity for sexual crimes that has contributed to these epidemic levels and the widespread nature with which these crimes are occurring.[375] The ICTJ stated for example that the years of impunity for sexual crimes in the armed conflict have contributed to sexual violence 'now occurring at epidemic levels across society as a whole'.[376] Moreover, the Special Rapporteur of the UN on sexual violence has reported that civilians are increasingly 'among the perpetrators of rape, which indicates a normalization of the war-related violence'.[377] She also noted that the number of rapes committed by civilians, some of whom are demobilized militiamen 'who were reintegrated without any rehabilitation measures and continue their wartime conduct', is on the rise.[378] However, even in regions in the country where war has ended, violence against women continues to occur.[379] The example that the Special Rapporteur used is the Equateur province where the conflict 'ended several years ago', but the sexual violence continues.[380] Another indicator that the situation is deteriorating is that victims are increasingly young girls.[381] Finally, the Special Rapporteur found that the atrocities have 'eroded all protective social mechanisms that would constrain the extensive use of violence', which she explains with a statement of a woman's rights activist that stated: 'In the past, burglars would rob a house and then leave. Today, they will first rape all the women in the house and then steal'.[382]

Thus, the situation in the DRC sexual violence has deteriorated, meaning that the ICC has not contributed to the prevention of sexual crimes, despite the fact that sexual crimes are

[373] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 27.
[374] Amber Peterman, Tia Palermo and Caryn Bredenkamp, 'Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo', in: *American Journal of Public Health*, Vol. 101, No. 6 (June 2011)1060-167, there 1060-1062.
[375] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 27; *Report of the Secretary-General on children*, UN Doc. S/2007/391 (2007) para. 47.
[376] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 27.
[377] *Report of the Special Rapporteur on violence against women,* UN Doc. A/HRC/7/6/Add.4 (2008) para. 106.
[378] *Report of the Special Rapporteur on violence against women,* UN Doc. A/HRC/7/6/Add.4 (2008), para. 15.
[379] *Technical Assistance and Capacity-Building*, UN Doc. A/HRC/10/59 (2009) para.21.
[380] *Report of the Special Rapporteur on violence against women,* UN Doc. A/HRC/7/6/Add.4 (2008) para. 37.
[381] Ibidem, para. 16.
[382] Ibidem, para. 15.

the most mentioned crimes in the charges. No effects on awareness have occurred either as the normalization, the spread to peaceful provinces and the fact that perpetrators include all groups involved including state security forces and civilians, show. Perhaps this changes after the first conviction of the ICC on the basis of sexual crimes. However, as sexual crimes have so far always been among other serious charges and have not been isolated such as the charges against Lubanga and Ntaganda this remains to be seen. Moreover, as government forces have been identified as one of the main perpetrators and in order to contribute to the prevention of these crimes, the ICC should investigate these crimes committed or condoned by high ranking commanders. The argument that the ICC has to focus on those most responsible only, which was used to explain its lack of indictment on the government side, is also no longer applicable in this situation.

Illegal Exploitation of Natural Resources

The illegal exploitation of natural resources is a driving force behind the conflict in the Congo as both a motivator and the financing source as has been defined by the UN Panel of Experts on the Illegal Exploitation and Other Forms of Wealth of the Democratic Republic of the Congo. Therefore, a significant impact on the conflict or the prevention of crimes by the Court would depend on the Court's dealing with this aspect. Moreno-Ocampo has acknowledged this fact on several occasions as will be discussed hereunder, making this subject essential to this study of the impact of the Court and the general effectiveness of the Court in the Congo.

When Moreno-Ocampo announced on 16 July 2003 that his office was closely following the situation in Ituri, this announcement specifically mentioned the aspect of the exploitation of natural resources fuelling the conflict:

> Various reports have pointed to links between the activities of some African, European and Middle Eastern companies and the atrocities taking place in the Democratic Republic of Congo. The alleged involvement of organised crime groups from Eastern Europe has also been mentioned. Their activities allegedly include gold mining, the illegal exploitation of oil, and the arms trade. There is general concern that the atrocities allegedly committed in the country may be fuelled by the exploitation of natural resources there and the arms trade, which are enabled through the international banking system.[383]

[383] The Prosecutor, 'Communications Received'.

In addition to acknowledging the central role of illegal exploitation of natural resources, the announcement professed the importance to address this issue in order to prevent future crimes: 'Although the specific findings of these reports have not been confirmed, the [P]rosecutor believes that investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed' (emphasis added).[384] He even stated that without the prosecution of such crimes, the deterrence effect on future atrocities will be minimal or non existent: 'If the alleged illegal business practices continue to fuel atrocities, these will not be stopped, even if material perpetrators were arrested and prosecuted'.[385] This acknowledgement, combined with the role of illegal exploitation in the DRC conflict, is the essential reason for this paragraph in this chapter.

A similar comment was made by Moreno-Ocampo in an interview with the BBC in September 2003 in which he stated again the importance of addressing the (illegal) exploitation of natural resources in preventing future crimes and impacting the conflict: 'If we are not stopping the money flow, killing will not stop in Ituri. (…) Follow the trail of the money and you will find the criminals. If you stop the money then you stop the crime'.[386] These remarks proved the Prosecutor's intent to investigate such cases with the objective of increasing the Court's impact and the possibility of preventing further crimes. In a documentary of 2009, five years after the start of investigations in Ituri, three years after the first apprehension and one year after the start of investigations in the Kivus, Moreno-Ocampo still acknowledged the importance of prosecuting the fuelling factors proving his continued believe in its necessity and intent to investigate such crimes:

> We have to stop not just the criminals, [but] also those who are fuelling the conflict. There's a business there, so people are trying to make money with this. So they are trying to control gold mines in Ituri; different businesses. But at the end the same method is use the natural resources to buy weapons and then control the territory to do more business.[387]

This shows that despite the fact that no cases have yet been started against any business representatives, the Prosecutor still believes in their necessity.

[384] The Prosecutor, 'Communications Received'.
[385] Ibidem.; Office of the Prosecutor (OTP), 'The Prosecutor on the co-operation with Congo and other States regarding the situation in Ituri, DRC', Press Release, Doc. ICC-OTP-20030926-37 (26 september 2003).
[386] BBC News, 'Firms face 'blood diamond' probe'.
[387] Yates, De Onis and Kinoy, *The Reckoning* (2009).

Central Role in the Conflict

As Moreno-Ocampo points out and as noted in Chapter 1, (illegal) exploitation of natural resources is central to the conflict as it has financed the armed conflict. The link between exploitation of natural resources and the continuation of the conflict has been first determined by research of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC from 2000 to 2003.[388] They found that the violence is 'both in aid of and financed by the profits from illegal appropriation of natural resources'.[389] Moreover, they identified elite networks in the Rwanda and Uganda controlled areas that involved 'top army commanders, businessmen and government structures' and that were put in place to transform the mass scale looting of the Second Congolese War into systematic exploitation of natural resources.[390] The Panel also demonstrated how the defence budgets of Rwanda and Uganda that could not cover the costs of the war were complemented with benefits from the exploitation, making the conflict as Rwandese President Kagame described it a 'self-financing war'.[391] The following example, derived from a Panel report explains the vicious circle of the war with the example of coltan:

> Coltan has permitted the Rwandan army to sustain its presence in the Democratic Republic of the Congo. The army has provided protection and security to the individuals and companies extracting the mineral. These have made money which is shared with the army, which in turn continues to provide the enabling environment to continue the exploitation.[392]

Uganda has applied a similar system. Moreover, the Panel of Experts found that the central conflict in Ituri, between Hema and Lendu, was instigated by Uganda by providing arms to both sides of the conflict in order to increase ethnic fighting and thereby creating conditions that require the presence of Ugandan troops to continue exploitation. In fact, they found that the ethnic conflict was only a minor issue in the local conflict, subordinated to business motivations. The Panel's report also included lists of companies from all over the world 'that were ready to do business regardless of elements of unlawfulness and irregularities', importing minerals from the DRC (via Rwanda).[393] In 2005, the International Court of Justice in the case of Congo v. Uganda on the Ugandan armed activities on Congolese territory confirmed the 'looting, plundering and exploitation of Congolese natural resources committed

[388] *Report of the Panel of Experts*, UN Doc. S/2001/357 (2001); and following reports.
[389] Ezekiel, 'The Application of International Criminal Law', 227.
[390]; *Report of the Special Rapporteur on violence against women,* UN Doc. A/HRC/7/6/Add.4 (2008) para. 9.
[391] *Report of the Panel of Experts,* UN Doc. S/2001/357 (2001) para. 114.
[392] Ibidem, para. 130.
[393] *Report of the Panel of Experts,* UN Doc. S/2001/357 (2001) para. 184 (b) and Annex I.

by members of the Ugandan armed forces'. [394] Furthermore, the Security Council identified the illicit exploitation of natural resources as a root cause of the conflict and 'the basis of human rights violations and the humanitarian crisis in the region'.[395]

Legal Possibilities

Holding individuals accountable for their companies' involvement in war is not new. In a press release on the Prosecutor seeking cooperation with Congo and other states regarding the situation in Ituri of September 2003, Moreno-Ocampo referred to the prosecutions of German industrialists at the Nuremberg Tribunals for their contribution to the Nazi war effort in explaining that investigations of the financial aspects of war crimes and crimes against humanity is not a new idea as 'one of these Tribunals held that it was a settled principle of law that persons knowingly contributing – with their influence and money – to the support of criminal enterprises can be held responsible for the commission of such crimes'.[396] A recently presented manual on the prosecution of pillage of natural resources, also noted this:

> (…) the most important precedents derive from World War Two. In the wake of that conflict, a significant number of business representatives were prosecuted for pillaging natural resources in circumstances that are often strikingly similar to corporate practices in modern resource wars.[397]

Although it is thus not new to prosecute business representatives, it is new for the ICC to do so and also to do so in relation to the exploitation of natural resources.

Several scholars have described the possibility of applying international criminal law to resource exploitation and how the ICC could do so. First, article 25 (3) of the Rome Statute extends the criminal responsibility to an individual who 'aids, abets or otherwise assists' in the commission of a crime for the purpose of facilitating its commission.[398] As the American Coalition for the International Criminal Court (AMICC) pointed out, this means that 'individual executives of corporations who knowingly assist or deal with such groups in the mineral trade may be prosecuted by the ICC'.[399] Secondly, the key of prosecuting resource exploitation lies in the war crime of 'pillaging a town or place, even when taken by assault' as

[394] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports* (19 December 2005) para. 116-117.
[395] *Technical Assistance and Capacity-Building,* UN doc. A/HRC/10/59 (2009) para. 73. (Resolution S-8/2, 4 December 2008, UN Doc. A/HRC/S-8/2, para. 9 (a))
[396] OTP, 'The Prosecutor on the co-operation with Congo'.
[397] James G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (2010) 10.
[398] The American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), *The Current Investigation by the ICC of the Situation in the Democratic Republic of the Congo* (April 2006) 13.; *Rome Statute*, article 25 (3).
[399] Ibidem, 13.

in article 8(2)(b)(xvi) of the Rome Statute for violations in the context of an international armed conflict and 8(2)(e)(v) for violations in the context of an armed conflict not of an international character.[400] The Elements of Crimes of the ICC define the following criteria of pillaging in both international and non-international armed conflicts:

> 1. The perpetrator appropriated certain property;
> 2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use; [*]
> 3. The appropriation was without the consent of the owner;
> 4. The conduct took place in the context of and was associated with an international or non-international armed conflict; and
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.
> [*] As indicated by the use of the term "private or personal use," appropriations justified by military necessity cannot constitute the crime of pillaging.[401]

The 157 pages long pillage manual of Stewart shows that these requirements for the crime of pillaging provide a significant legal challenge.[402] Aaron Ezekiel, however, is very positive about this possibility, because he believes that 'the elements of the crime are so simple' and it is 'likely' to be easier to prove than traditional war crimes or crimes against humanity, because theft 'tend[s] to leave a forensic trial of bills of lading, shipping orders, wire transfers, contracts, etc.'.[403] Despite the fact that the pillage manual shows the difficulties in prosecuting such crimes, Stewart believes it would be rewarding as his belief is that 'the deterrent effect created by even a single case is likely to transform conflict financing in a large number of ongoing conflicts'.[404] In Chapter 1 it was noted that the argument of deterrence assumes that the (future) perpetrators operate with a cost benefit rational and that some scholars doubt that perpetrators of gross human rights violations have such a cost benefit rational, making the likeliness of a deterrence effect smaller. As business representatives deal with companies that most definitely work with such a cost benefit rational, it is more likely that these actors have such a rational. Therefore these cases might indeed have more deterrence potential, making it extra important to pursue them.

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[400] *Rome Statute*, article 8(2)(b)(xvi) and 8(2)(e)(v).
[401] Stewart, *Corporate War Crimes*, 19-20; *Elements of Crimes*, ICC Doc. ICC-ASP/1/3 (part II-B) (9 September 2002) 26 and 36.
[402] Stewart, *Corporate War Crimes*.
[403] Ezekiel, 'The Application of International Criminal Law', 239.
[404] Stewart, *Corporate War Crimes*, 10.

Execution and Impact

However, as Ezekiel pointed out, nearly a year after the referral of the situation in the DRC to the ICC, the Prosecutor 'sought and received permission from ICC Pre-Trial Chamber I to "request the services of the Netherlands Forensic Institute" in examining unspecified evidence', which unveiled that the upcoming prosecutions would concern traditional war crimes and crimes against humanity, instead of prosecutions concerning the financial side of the atrocities.[405] So although Moreno-Ocampo referred to companies in his first announcement on the situation in Ituri of 16 July 2003 mentioned earlier, no actual arrest warrants have been (publicly) issued for business representatives.

Despite the fact that no arrest warrants have been issued for commercial actors involved in the money trail, the war crime of pillage does appear in the charges of two of the five indictments. Katanga and Ngudjolo are both charged with the war crime of pillaging in the context of an international armed conflict. However, examination of their act of pillage as described in the decisions on the confirmation of charges shows that this concerns the pillage of roofing sheets, doors, furniture and tables removed from houses, shops, businesses, a school and a church.[406] So, these cases do not constitute an attempt in prosecuting pillage of natural resources. Thus, no use has been made of the opportunity of the war crime of pillage in the above discussed manner yet.

After the final report of the Panel of Experts, the Security Council established a Group of Experts in charge of examining information concerning the imposed measures on the illegal exploitation of Congolese natural resources.[407] The mere fact that this Group of Experts is still in place today and the Security Council continues to try halt the exploitation, signals that this exploitation is still occurring.[408] In July 2007, the Group of Experts 'confirmed that the most profitable financing source for armed groups remained the exploitation, trade and transportation of natural resources'.[409]

Wider Conflict

Besides the companies Moreno-Ocampo spoke of, the Panel of Experts identified, as mentioned, Ugandan and Rwandan elite networks that made systematic exploitation possible

[405] Ezekiel, 'The Application of International Criminal Law', 236-237.
[406] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, (30 September 2008).
[407] See Security Council 1533, UN Doc. S/RES/1533 (2004).
[408] Security Council resolution 1952 of 2010 (UN Doc. S/RES/1952, 29 November 2010) extended the DRC sanctions and the mandate of the group of experts to 30 November 2011.
[409] *Report of the Special Rapporteur on violence against women,* UN Doc. A/HRC/7/6/Add.4 (2008) para. 9.

and included military and government officials of both former occupying states as explained hereunder by the AMICC:

> The withdrawal of foreign troops proved to be largely symbolic, as the various state militaries left behind well-organized proxy networks to act on their behalf. These operations, which the UN coined "Elite Networks," are fundamentally designed to exploit the rich supply of natural resources in the DRC.[410]

The withdrawal of Uganda and Rwanda in 2003 thus did not end their involvement, exploitation or complicity in the crimes. Still, as the ICTJ notes, the Prosecutor 'has shown no intention to investigate this higher level of involvement'.[411] Although the recent apprehended Callixte Mbarushimana appears to show some engagement into the regional dimensions of the conflict, as he is Rwandese, his arrest addresses the results of the spillover of the Rwandan genocide, rather than the illegal exploitation of resources by neighbouring countries. Moreover, Mbarushimana is from of the Hutu militia FDLR; the militia group Rwanda has used as an excuse for its interference with the DRC.

The only organisation that reported on an impact of the ICC on the behaviour of these neighbouring countries is the AMICC. This organisation believed already in 2006 that the ICC, by starting investigations in the DRC, had sent 'a clear signal to the DRC's neighbours that their involvement in the DRC conflict is also under scrutiny' and that they 'will likely reconsider the risks of their actions' in providing support for elite networks, because the ICC has jurisdiction over crimes within the territory of a state party regardless of the perpetrators nationality.[412] Eventually, AMICC argued, 'this may result in steps to halt Elite Network operations'.[413] The organisation based its assumption on an indication of a change in approach in August 2005 by DRC's neighbouring countries. At first, those neighbours were unwilling to assist in ending the conflict as the article explains with some examples:

> For instance, Ugandan President Yoweri Museveni attempted to put pressure on the ICC prosecutor not to investigate crimes by leaders of armed groups supported by Uganda; members of armed groups from [the] DRC met openly in Uganda in June 2005; and UN-appointed monitors were faced with delays from both Rwanda and Uganda in providing information on security and economic matters relating to the DRC.[414]

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[410] AMICC, *The Current Investigation*, 3-4.
[411] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 29
[412] AMICC, *The Current Investigation*, 12.
[413] Ibidem.
[414] Ibidem.

AMICC argued that in August 2005 the following actions indicated a change in this approach:

> The Ugandan government ordered six members of the Congolese Revolutionary Movement to leave the country or face arrest and prosecution: "[i]n the spirit of supporting security in the Great Lakes region and in support of the interim arrangement in the DRC." In addition, ministers from the DRC, Rwanda and Uganda have been working together to combat the problem of Rwandan rebels operating in the DRC, ordering the rebels to disarm by September 30, 2005 or face "severe" consequences.[415]

In 2008, however, the Group of Experts found evidence of the Rwandan (material) support to the CNDP and the complicity of Rwandan authorities in 'the recruitment of soldiers, including children' and sending 'officers and units from the Rwandan Defence Force to the DRC in support of the CNDP' demonstrating the continuance of Rwandan complicity.[416] They also found evidence of FARDC support to the FDLR in their fight against the CNDP.[417] HRW emphasized the involvement of Ugandan, Rwandan and Congolese authorities in supporting and arming the militia groups of Lubanga, Katanga and Ngudjolo:

> Our research in Congo, covering the period from 1998 to this writing, suggests that key political and military figures in Kinshasa, as well as in Uganda and Rwanda, also played a prominent role in creating, supporting, and arming Lubanga's Union of Congolese Patriots, Katanga's Nationalist and Integrationist Front, and Ngudjolo's Ituri Patriotic Resistance Forces.[418]

As they believe that this support has encouraged and helped the militias' structuring and strength, HRW has urged the Prosecutor 'to investigate senior officials in Kinshasa, Kampala and Kigali'.[419] They even reported that many interviewees in Ituri said that 'in order for justice to be achieved, the court must pursue accountability for those who supported militia groups in Ituri'.[420]

However, the ICTJ did note that 'the logic and perceived options of international involvement' have changed because of the ICC's engagement, as 'it has become more difficult for states that subscribe to international law to offer exile in good faith to persons who may be indicted for international crimes'. They come to this conclusion, because South

[415] AMICC, *The Current Investigation*, 12.
[416] United Nations News Centre, 'DR Congo: UN-mandated group finds evidence Rwanda, army aiding rival rebels' (12 December 2008) online available at: www.un.org/apps/news/story.asp?NewsID=29299, last retrieved on 8 July 2011; *Final report of the Group of Experts*, UN Doc. S/2008/773 (2008) para. 61.
[417] United Nations News Centre, 'DR Congo: UN-mandated group'; *Final report of the Group of Experts*, UN Doc. S/2008/773 (2008) para. 61.
[418] HRW, *Courting History*, 61.
[419] Ibidem.
[420] Ibidem, 60.

Africa, offering exile to Laurent Nkunda before the Goma negotiations in 2008, withdrew the offer as 'it became increasingly clear that Nkunda could be the target of ICC investigations in the future' and then would be obliged to transfer him to The Hague.[421] This does show that, despite continued complicity of Rwanda and Uganda, some form of international stigmatization and isolation of perpetrators – although only of warlords in this case – is occurring, which according to Akhavan could contribute to peace (see Chapter 1).

By acknowledging that atrocities are not stopped even if 'current perpetrators' were arrested and prosecuted, Moreno-Ocampo already admitted that without the prosecution of the representatives of the businesses that fuel those atrocities, the impact on the atrocities is minimal. He would, thus, agree that the ICC's impact, is limited so far and that with its current approach it will never effectively prevent crimes in the DRC. Even though the mandate is not to stop the atrocities entirely, but to contribute to the prevention of crimes, no such contribution has been made, since the issue remains unaddressed. While pillage appeared in the charges of Katanga and Ngudjolo, this pillage referred to the looting of goods, not natural resources.

Still, this is very important, as the highest possible impact lies in the prosecution of both company representatives and actors of the chains in the Ugandan and Rwandan elite networks. Not least, because victims in Ituri believe, according to HRW, that accountability for those who supported militia groups in Ituri must be pursued by the Court. This will be further discussed in Chapter 4. The ICTJ even states that '[c]riminal accountability that does not address the complicity in crimes on all sides of a conflict and at all levels – including the government as well as regional leaders deeply involved in a conflict – will have a limited effect'.[422]

Finally and similar to crimes related to child soldiers and sexual violence, it is important that the ICC also investigates crimes committed by the Congolese government as the UN Group of Experts found that 'FARDC itself is heavily involved in the minerals trade' and that 'it is not in the interest of certain FARDC commanders to end the conflict in eastern Democratic Republic of the Congo as long as their units are able to deploy to, and profit from, mining areas'.[423] So, the benefits of FARDC officers of prolonging the conflict are higher than

[421] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 30.
[422] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 41.
[423] *Final report of the Group of Experts*, UN Doc. S/2008/773 (2008) 135.

the costs due to impunity. An ICC prosecution of a high ranking and responsible officer could raise those costs.

Charges and Ethnicity

Besides the effects of the specific crimes of the charges on the conflict, the range of the charges and the differences in that range between the various indictments have been reported to have an effect as well. HRW is the only source that mentions this effect, which relates to the ethnicity of perpetrators and their role in the conflict in Ituri. As discussed in Chapter 2, merely a limited set of charges, only relating to the recruitment of child soldiers, were pursued by the ICC against Thomas Lubanga and Bosco Ntaganda, who are both of Hema origin. These charges do not embody the full extent of their actual crimes. On the other hand, the charges against Germain Katanga, who is partly of Ngiti origin, affiliated with Lendu, and Mathieu Ngudjolo, a Lendu, are much more extensive and better encompass the range of their crimes. While these more extensive charges can be seen as a 'welcome development' and a success for the ICC, this contrast in the extent of charges between different sides of the conflict, 'contributes to existing tensions between the Lendu and Hema communities', as HRW found in their report of 2008:[424]

> Among the Hema, opinion leaders claim that the absence of other charges against Lubanga (and now Ntaganda) shows that the Office of the Prosecutor was not able to find evidence of other crimes, thus implying his innocence. The ICC's more comprehensive charges against Katanga and Ngudjolo feed the perception that the Lendu committed more crimes and, hence, carry a larger burden for the horrific abuses committed during the Ituri conflict, a perception that is false.[425]

Thus, these unbalanced charges feed a false perception of guilt. This discrepancy is especially problematic, as HRW also argued, in a situation where ethnic violence forms a significant component of the conflict and is longstanding, as in the case of Ituri.[426] Since Hema have been favoured in colonial and post colonial times over Lendu, this 'feeds the historic narrative of Hema superiority by portraying Lendu as more brutal.[427] HRW believes that this could have 'significant long-term negative consequences'.[428]

Moreover, HRW pointed out how this means that the ICC has 'not addressed the suffering of Lendu victims', because the victims of the charges against Lubanga are Hema

[424] HRW, *Courting History*, 65.
[425] Ibidem.
[426] Ibidem.
[427] Ibidem.
[428] Ibidem.

children as the UPC's practice was to enlist and conscript children 'from within the Hema community', and because the charges against Katanga and Ngudjolo focus on crimes committed in attacks against Hema.[429] As a link to the ICC crimes is necessary for victims to participate, Lendu victims are 'not eligible to participate in proceedings' and thus, HRW argues that a 'significant category of victims' is completely excluded from the justice process at the ICC which 'seriously undermines the ICC's credibility in Ituri'.[430] I will return to this last point in Chapter 4.

This case shows that not only specific charges, but also the range of charges in relation to the conflict can influence notions of guilt and the historical narrative and jeopardize the truth in the collective memory, which could influence long term peace and reconciliation. Despite the fact that this is indeed very unfortunate, HRW has not provided any proof that this has indeed already deteriorated the violence or jeopardized the peace. Either way, this discrepancy has not contributed to the prevention of crimes. As the ethnic tensions were instigated and manipulated by Uganda according to the Panel and the Group of Experts as expressed earlier, perhaps the best approach to deal with the ethnic aspect of the conflict in Ituri is to prosecute those Ugandan financers that instigated and exploited the ethnic tensions.

National Prosecutions

Much has been written on the ICC's effect on national prosecutions, because the ICC can prosecute only a few and only those most responsible, which would leave the majority of lower ranking perpetrators unpunished without national prosecutions to address this impunity gap. In order for the ICC to have a genuine impact on (post) conflict societies it is often argued that the ICC must pursue a strategy of positive complementarity; encouraging national proceedings. This notion is acknowledged by the OTP as a key principle of its prosecutorial strategy: '(…) the Office has adopted a *positive approach* to complementarity, meaning that it encourages genuine national proceedings where possible (…)'.[431] The ICC can also encourage national prosecutions more passively through the principal of complementarity, as it can only investigate if states are unwilling or unable to carry out the investigation or prosecution, thereby creating an incentive for states to start national prosecutions in order to avoid an intervention by the Court. This can influence states that are already under investigation, as

[429] HRW, *Courting History*, 65-66.
[430] Ibidem, 66.
[431] OTP, *Report on Prosecutorial Strategy*, 5.

well as states that might be subjected to ICC intervention in the future, as was the case with Colombia.

The impact on national prosecutions is seen by many as essential to the ICC's impact, its success in the situation under investigation and its contribution to the prevention of crimes. Mattioli and Van Woudenberg for example note that 'the ICC's success in the DRC and elsewhere will depend on its ability to encourage national prosecutions, to help build respect for the rule of law, and thus to contribute to deterring future crimes'.[432] HRW even believes that the ICC's 'most significant impact may be its role in promoting the development of domestic enforcement tools and the rule of law'.[433] As the promotion of national prosecutions is seen as an important aspect of the impact of an international tribunal, this paragraph will examine shortly the reported influence of the ICC's intervention on national prosecutions in Congo and see to what extent this constitutes a contribution to the prevention of crimes.

The early research of Burke-White found that since the Prosecutor's announcement in 2003, 'elements within the Congolese government have responded launching reforms of the national judiciary and establishing a Truth and Reconciliation Commission', in order to 'make a case for assertion of primacy over the ICC'.[434] He also noted that then Vice Presidents Bemba and Ruberwa, being among the most likely to be investigated or implicated by ICC action according to him, were extremely active in 'attempting to enhance the capacity of the national judiciary'.[435] We now know, however, that the TRC failed and that the reforms hardly made a difference as will be described hereunder.

The most important and most mentioned effect, however, is that since 2004 military courts have been launching their own prosecutions for war crimes and crimes against humanity, have relied on and applied the definition of crimes of the Rome Statute and judges have made 'explicit reference's to the Rome Statute in their decisions.[436] However, as the Congolese parliament has not yet passed the draft legislation to implement the Rome Statute into Congolese domestic law, only military courts can prosecute the crimes of the Rome Statute. This means, for example, that there is little chance of prosecution of high ranking officers.[437] Moreover, the number of such cases remains limited, they mostly targeted low ranking soldiers, fair trial concerns have been expressed frequently and if convicted, perpetrators often escaped 'in dubious circumstances or because correctional facilities are not

[432] Mattioli and Van Woudenberg, 'Global Catalyst for National Prosecutions?', 55.
[433] HRW, *Making Kampala Count*, 71.
[434] Burke-White, 'Complementarity in Practice', 570.
[435] Ibidem, 569.
[436] Mattioli and Van Woudenberg, 'Global Catalyst for National Prosecutions?', 59.
[437] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 26.

adequate'.[438] Several sources confirm that political interference and corruption are very common and often determine the outcome of cases.[439] The two following examples underline these points:

> In 2006, 12 soldiers were found guilty of crimes against humanity by a military tribunal for the gangrape of 119 women and girls in 2003. Known as the Nsongo Mboyo case, it raised expectations for implementation of the rule of law and for some justice for victims of rape. But all those found guilty were low-ranking officers (the most senior was a captain), doing little to affect the broader culture of impunity. Moreover, all those convicted escaped from jail and are now at large.[440]

> Another notorious case is that of Iturian militia leader Yves Kahwa, accused of numerous killings and of burning down schools and clinics. Sentenced to 20 years in prison in 2006 for crimes against humanity, he had his sentence overturned on appeal in February 2008. In a widely-criticized ruling, the judge recategorized Kahwa's crime as murder and then applied the amnesty law. Many suspect that a bribe might have been paid, as is not uncommon.[441]

The first case shows that despite important convictions, perpetrators escape. The second demonstrates an "escape" by bribing the Congolese justice system.

Finally, a 2010 UN report expressed concern on the influence of the 2009 law that granted amnesty to militias on future national prosecutions, as the first perpetrator has already been released on its grounds despite the seriousness of his crime:

> (…) although the law promulgated on 7 May 2009 granting amnesty to militias in the east excludes genocide, war crimes and crimes against humanity, in practice its implementation could result in the release of perpetrators of child rights violations. One case has already been reported in South Kivu in which a police officer condemned for the rape of a girl was released on the grounds of the amnesty law.[442]

So, despite the small but significant impact on national prosecution that the ICC had, those national prosecutions have had only limited results, as trials are few, are manipulated and most importantly, the convicted escape from prison. In addition, a new amnesty law, while excluding the ICC crimes, has already been used to escape conviction for those crimes.

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[438] *Report of the Secretary-General on children*, UN Doc. S/2007/391 (2007) para. 47.
[439] Mattioli and Van Woudenberg, 'Global Catalyst for National Prosecutions?', 57; *Technical Assistance and Capacity-Building*, UN Doc. A/HRC/10/59 (2009) para. 61.
[440] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 27.
[441] Ibidem, 26.
[442] *Report of the Secretary-General on children*, UN. Doc. S/2010/369 (2010) para. 70.

Moreover, the reported effects are not only positive. The ICTJ reported on how the ICC's presence could also reduce the likelihood of national prosecutions, as allegedly in one case the national justice sector used the ICC as an excuse for not pursuing such cases: 'UN officials working to strengthen national capacities have been frustrated when, in at least one case, a judge insisted he should not take up a case if there were a chance that the ICC might prosecute it'.[443] So although the ICC intervention has encouraged some attempts at reforms and a few first cases, the Rome Statute is still not implemented into Congolese law and the cases have limited results. Accordingly, they cannot prevent future crimes. The known possibility to bribe judges in the judicial process or escape from prison also reduces the deterrent effect.

Peace versus Justice

The ICC intervention has revealed positive as well as negative effects on the conflict. The question that remains then is whether the ICC intervention has, as suggested in the peace versus justice debate, stood in the way of peace by providing an incentive for high level perpetrators to continue fighting or by threatening or removing individuals whose cooperation is necessary to conclude successful peace negotiations or to keep that peace and political stability afterwards, especially in ethnic communities where ethnic tensions have occurred. The idea is often that only amnesties provide an incentive to stop the fighting and that trials only jeopardize the peace deals. As the ICC operates in ongoing conflict where peace has yet to be achieved or where peace is still fragile, the ICC is subjected to the peace versus justice debate as discussed in Chapter 1. This paragraph explores the experiences of the ICC in the DRC on this subject. This is important, because, as the ICTJ noted as well, the DRC 'provides an important early example of the ICC acting in a context of ongoing conflict'.[444]

Some scholars believe that the ICC has actively avoided jeopardizing the peace process, in the beginning of its work in the DRC. For example, Rodman argues that with the decision to start in Ituri, the ICC avoided the risk of destabilizing the transitional government, as the militias in Ituri were not part of the 'power-sharing accord in Kinshasa'.[445] Clark agrees and adds that Ituri in particular displayed the least capacity to destabilise the transitional government, as 'there is less clear evidence to connect President Kabila to atrocities committed in Ituri', which 'differs from violence in other provinces, particularly North and

[443] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 30.
[444] Ibidem, 32.
[445] Kenneth A. Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court', in: *Leiden Journal of International Law*, 22(2009) 99-126, there 116.

South Kivu and Katanga, where government forces and Mai Mai militias backed by Kabila are directly implicated in serious crimes'.[446] Moreover, he believed that foreign donors financing the 2006 elections pressured the ICC to do so:

> Foreign donor pressure on the ICC to avoid causing political instability was severe, as the international community (principally the UN and the European Union) poured US$500m. towards the elections, the most expensive in the UN's history.[447]

Musila notes that the low profile and limited visibility of the Court on the ground are 'arguably attributable to these influences'.[448] The ICTJ reported that even the limited outreach, as Moreno-Ocampo said himself, was 'initially intentional, to avoid jeopardizing the peace process and to protect the safety of witnesses'.[449]

Another moment where the ICC allegedly avoided jeopardizing the peace was with the arrest of Mathieu Ngudjolo. The ICTJ found that the Court had planned to have Ngudjolo arrested during peace talks, but was urged to delay the unsealing of the arrest warrant in order not to disturb the signing of the Goma agreement of 2008, and obeyed:

> Apparently the Court had planned to have Ngudjolo arrested in Kinshasa even while peace talks were under way in Goma in January 2008. It was feared that this arrest might alarm militia leaders who were poised to sign the Goma agreement (especially since Ngudjolo had himself signed the 2006 Ituri Agreement just 14 months earlier). Key international participants at the Goma talks reportedly urged the ICC to delay unsealing the warrant for his arrest. The ICC accepted these concerns, and the arrest took place shortly after the signing of the Goma agreement. [450]

If this is true, then the ICC actively delayed justice shortly, in order not to derail the peace negotiations.

A more discussed moment that apparently 'highlights tensions between the ongoing conflict, peace efforts, and the fledgling democratic process in DRC' is the arrest of political heavyweight Bemba, for crimes committed in the CAR, that allegedly caused anger, outrage and confusion, and accusations of politicization of the ICC.[451] While proponents of pursuing peace through amnesties rather than justice in (post) conflict societies could oppose the arrest

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[446] Clark, 'Law, Politics and Pragmatism' 40.
[447] Ibidem.
[448] Musila, *Monograph 164: Between Rhetoric and Action,* 42.
[449] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 30.
[450] Ibidem, 33.
[451] Mirna Adjami and Guy Mushiata (International Center for Transitional Justice), 'ICTJ Briefing: Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court' (May 2010) 4. Downloadable from www.ictj.org.

as it removed an important political figure and elected Senator from the delicate political stability which could perhaps lead to a backlash of violence, Bemba's political influence and importance had already been sidelined when he went into exile in 2007.[452] A western diplomat in Kinshasa told Reuters: 'He's been out of the country for over a year, and parliament and the opposition have been getting along with business without him. So I don't think it will really affect the political landscape'.[453] His arrest, thus, did not really jeopardize the peace.

The issue of the tension between peace and justice is most obvious, however, in the case against Bosco Ntaganda, who remains at large. His arrest warrant, issued under seal already in August 2006, was unsealed in April 2008. The CNDP, allegedly under Ntaganda's command, continued to commit crimes in September 2008 unravelling an earlier peace deal.[454] Musila also reports that the choice between peace and justice in the Kivus has left the Congolese government frustrated, as the entry of the ICC has not persuaded perpetrators to abide by the peace agreement and now it no longer has the option of full and more attractive amnesty to bring peace. While the government has had to limit the amnesties of the Goma agreement, it failed again as clashes between the CNDP, FDLR and Mai Mai occurred 'only a few days after the Goma signing'.[455]

On 16 January 2009, however, Ntaganda was integrated into the national army and promoted to the rank of general. Although Katanga and Ngudjolo also held high ranks in the FARDC when they were arrested, the Congolese authorities officially refused to hand over Ntaganda a month later, on 12 February 2009, to the ICC 'on the grounds that domestic peace was best served by his remaining free'.[456] Even the international community did not press strongly for his arrest 'reluctant to raise concerns' that might upset the 'historic rapprochement between Congo and Rwanda' that had led to the peace deal with Ntaganda, revealing the influence of such international pressure.[457] Here, peace preceded over justice, as Ntaganda and his CNDP, just integrated in the FARDC, were needed for the joint operations of the Congolese and Rwandan armies against the FDLR, that were part of a deal struck between Kabila and Kagame:

> In January 2009 the political landscape changed dramatically in eastern Congo. Congolese President Joseph Kabila and Rwandan President Paul Kagame struck a deal to rid each other of

[452] Joe Bavier, 'Bemba arrest removes rival to Congo president', Reuters (25 May 2008) online available at: www.reuters.com/article/2008/05/25/idUSL2550628, last retrieved on 10 July 2011.
[453] Ibidem.
[454] Adjami and Mushiata (ICTJ), 'ICTJ Briefing' 4.
[455] Musila, *Monograph 164: Between Rhetoric and Action,* 42.
[456] AFP, 'Peace before justice'.
[457] HRW, 'Democratic Republic of Congo(DRC): Events of 2009'.

> their enemies. Rwanda put a stop to the rebellion of the Congolese Tutsi-led National Congress for the Defense of the People (CNDP) by arresting its leader, Laurent Nkunda, and forcing its fighters to integrate into the Congolese army. In exchange, the Congolese government agreed that Rwandan soldiers could enter eastern Congo for five weeks of joint military operations against the Democratic Forces for the Liberation of Rwanda (FDLR).[458]

Thus, Ntaganda's cooperation was needed to be a partner, rather than an enemy in the upcoming operations to end the conflict. As his arrest could cause Ntaganda's loyal troops to turn against the FARDC and create that extra enemy, the DRC decided not to apprehend and extradite him to the ICC. Thus, indirectly he was needed to create the peace.

However, since 2009, Ntaganda has, as a commanding officer of the Congolese military, continued to commit atrocities. He was even responsible for the earlier mentioned upsurge of child recruitment in 2010, according to HRW:

> The Congolese army general and former rebel leader Bosco Ntaganda and officers loyal to him, (…) have been responsible for the forced recruitment of hundreds of young men and boys in recent months in North and South Kivu provinces, witnesses told Human Rights Watch. At least 121 of the new recruits are children, under age 18, although reports received by Human Rights Watch indicate that there are probably many more. [459]

While officially in the Congolese army, Ntaganda maintained a 'parallel chain of command operating outside the army's military hierarchy', HRW explained.[460] They also reported that some former CNDP units have even ended their participation in the integration process. In recruitment meetings, held under the pretext of discussing development, they promised on top of the salary additional benefits 'as soon as the war [against the government] is won'.[461] HRW therefore concludes that this 'signals a possible collapse of eastern Congo's peace process'.[462] Thus, the argument of the government not to arrest Ntaganda because he is necessary to maintain the peace is not legitimate. As a General he is jeopardizing the peace himself and committing the exact crimes he is indicted for by the ICC.

This also proves that the amnesties preferred by one side of the peace versus justice debate because they would be the only incentive for perpetrators to engage in the peace process, do not stop the violence or bring durable peace. In fact, the experience in the DRC of the practice of integrating armed forces into the national army and the impunity that comes

[458] HRW, 'Democratic Republic of Congo(DRC): Events of 2009'.
[459] HRW, 'DR Congo: Rogue Leaders'.
[460] Ibidem.
[461] Ibidem.
[462] Ibidem.

with it shows that this integration strategy is more an incentive to continue fighting than to stop committing crimes.

HRW observed for example already in 2003 that after the signing of the 2002 peace and the forming of the transitional government, the armed groups that were not included perceived that violence was the best way to 'strengthen their negotiating position or secure a seat at the table'.[463] A commander told HRW that: "Our government only listens to guns and violence and we need to make them hear us'.[464] The perception that violence is rewarding was only reinforced by the integration processes that followed. After the granting of high military positions in the national army to five militia leaders from Ituri in 2004 in order to remove them from the region and making it easier to stop the fighting, new armed groups were formed within six months claiming to represent marginalized communities and demanding high ranks in the army. Because violence had proved to bring rewards, they 'continued the terror tactics that previous armed groups had used so successfully'.[465] When in November 2006, HRW observed, new peace agreements were signed granting their leaders the rank of colonel in the national army, 'one of the newly appointed officers later remarked to Human Rights Watch, "Maybe if we had killed more people, I would have become a general"'.[466] According to HRW this pattern spread to the Katanga province as well.[467]

The idea that violence is rewarding presided during the surge of violence in 2009, as the FDLR launched 'an offensive targeting the civilian population of the Kivus in order to ultimately obtain political concessions.'[468] Moreover, the Group of Experts reported a surge in Mai Mai recruitment in January 2008, which they attributed to the Goma peace agreement that month, as smaller armed parties 'sought to strengthen their leverage in the peace negotiations' and therefore 'had been actively recruiting since the signing of the peace deal'.[469] This does not only show the continued believe in the political power of violence, but also demonstrates that peace agreements do not necessarily bring peace, but create an incentive to fight and commit crimes. Although all the peace agreements signed since 2002 included amnesties that excluded crimes of genocide, crimes against humanity and war crimes, the approach of awarding human rights violators with positions in government or the army does not build a sustainable peace.

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[463] HRW, *Making Kampala Count*, 82.
[464] Ibidem.
[465] Ibidem, 83.
[466] Ibidem.
[467] Ibidem.
[468] *Case Information Sheet: Callixte Mbarushimana*.
[469] Coalition to Stop the Use of Child Soldiers, *Briefing Paper*, 5.

So, although concerns have been expressed on the impact of the ICC intervention on the fragile peace and the several peace negotiations and agreements, it does not appear to have disrupted or stood in the way of peace as the ICTJ also noted:

> Despite worries at various points along the way, as suggested above the Court's involvement in the country has not seemed to have a particularly negative impact on the peace process. Once physically removed from their support base and cut off from their networks, the targeted militia leaders have seemingly not been able to retain the intense support that might lead to a backlash of violence upon their arrest.[470]

The low profile of the Court in the period before the 2006 elections, whether intended or not, avoided jeopardizing the fragile transitional period. The arrest of Bemba also occurred at a time that his political influence had already been reduced. The arrest of Ngudjolo was allegedly delayed in order not to disturb the signing of the 2008 Goma agreement. Lubanga and Katanga had already been arrested when their arrest warrants were issued. The only ICC arrest warrant that made the President Kabila invoke the peace versus justice dilemma was that of Ntaganda, as he was believed to be necessary to achieve peace in the east. However, his participation in the conflict has only deteriorated as he continued to commit crimes. Moreover, with his parallel chain of command and CNDP troops still loyal to him, he seems to be preparing for another war against the government. So as for the idea that only amnesties provide an incentive to stop the fighting, the early example of the ICC in the DRC proves the opposite. Moreover, the ICC appears to have been cautious not to jeopardize the peace deals.

Conclusion

The second objective of the ICC is to contribute to the prevention of crimes. A comparison with the conclusion of Barria and Roper on the effectiveness of the ICTY and the ICTR on the maintenance of peace, would suspect that the ICC has not contributed to such prevention of crimes as the violence has continued and the presence of the ICC did also not prevent the escalation of violence in the Kivus from 2007 onwards. Further examinations of the reported effects from the field and their actual prevention of crimes, show mixed results of positive effects, limited effects and negative side effects.

The main achievement and most important impact of the Court in the DRC is the educational impact: the raising of awareness, including general awareness of accountability and the fact that crimes committed in the course of war can be prosecuted, and the awareness

[470] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 32.

that recruiting and using children in armed conflict is a serious human rights violations that can lead to prosecution in The Hague. Especially this specific awareness of child soldiers is very important, because until the ICC intervention it was not viewed as a (serious) crime and was therefore used abundantly as a common practice of war. Despite the fact that this is a very welcome development, one of great importance, and can be seen as a success for the ICC, there is little evidence that this awareness has actually led to the prevention of such crimes, as recruitment continues and increases with surges of violence. The impact observed here seems to have been the result of a first shock, which does not endure in heavy recurrence of violence or in the long run. Perhaps this impact might be renewed after the first conviction, as it will finally show the true power of the ICC.

The awareness did affect the behaviour of perpetrators, but rather constituted a negative side effect, as it encouraged perpetrators to hide the evidence of their complicity, to obstruct demobilization and integration processes of child soldiers and attack children's rights workers. Only in a few cases this has actually led to demobilization and yet re-recruitment remains common practice as well. So, scepticism is in order, as the main change in behaviour is to hide the evidence, not to stop committing crimes. No such negative side effects occurred as a response to prosecutions of sexual violence, as in fact no reaction was reported at all, even though sexual violence is the most mentioned crime in the charges. It did not even increase awareness as the charges of child soldiers did, while this would be so much needed as the situation in sexual violence still deteriorates with a normalization of the crime and a spread to civilian life. Especially important seems to be failure to pursue perpetrators of state security forces as they are one of the main perpetrators of such crimes and impunity is the standard as human rights violations get rewarded for their crimes once they integrate into the army.

The limited set of charges against the two Hema warlords as opposed to the extended charges of two Ngiti and Lendu, continues to haunt the ICC's performance as it has negatively affected the truth and thereby possibly the long term sustainability of the peace in Ituri. Moreover, it has left aside one entire side of the conflict, the victims of Lendu origin, of the proceedings: a circumstance that might affect the local perception of the Court as will be investigated in Chapter 4. Furthermore, the overall failure to prosecute government or FARDC officials, acknowledged for complicity in the atrocities, does not only affect the impact negatively, but can feed perceptions of selectivity and thereby damage the international legitimacy and the local perception of the Court. This will be examined in Chapter 4.

On the other hand, the ICC's presence has positively affected the rise of national prosecution on gross human rights violations. However, this too has hardly indirectly contributed to the prevention of crimes as experience, as their performance is weak with still a limited amount of trials that often do not meet the criteria of a fair trial and with large escape and corruption rates. Therefore, impunity remains rampant for the majority of perpetrators, making it extra difficult for the ICC to have any impact on the conflict or the prevention of future crimes.

This is, however, also due to the unaddressed issue of illegal exploitation of natural resources. As this has been the motivator as well as the financing source behind the conflict, the ICC will not significantly contribute to the prevention of crimes until it has addressed the actors that make the fighting possible by providing the money in exchange for resources, as Moreno-Ocampo acknowledged himself. Unless the ICC pursues business representatives of involved companies and holds elements of the elite networks of neighbouring Uganda and Rwanda accountable, no prosecution of any human rights violator will have the significant impact the ICC's objective supposes.

However, while the ICC has not yet contributed to peace, it cannot be said either that it has stood in the way of or impeded peace as moments of possible tension have cautiously been avoided in order to jeopardize the fragile situation and no backlash of violence has occurred. In fact, a close examination of the peace versus justice dilemma surrounding the arrest warrant of Bosco Ntaganda, reveals that the government practice of providing amnesties and integrating human rights violators has only encouraged further fighting and therefore may in fact be the impediment to peace.

Thus, while the ICC's contribution to the prevention of crimes is extremely minimal and sometimes has a counteractive effect, there is potential for the future, if the strategy is moved in the direction of the prosecution of the illegal exploitation of natural resources and expanded to include the government's share in the violations.

4 Local Perception

Outreach, Victim Participation and Local Perceptions

While the ICC has only two objectives, on the basis of which the effectiveness has been measured in the previous two chapters, I believe, to thoroughly examine the effectiveness of the ICC in the DRC so far and to be able to draw conclusions on this, it is also necessary to include the view of the victims and affected communities to whom the Court is supposed to bring justice. This is not only examined here because the local perception can act as an indicator of the Court's effectiveness, but more importantly because the Court's effectiveness is dependent on its perception by all stakeholders, including victims and communities at large.

This chapter will first shortly make the comparison with the research of Barria and Roper on the effectiveness of the ICTY and the ICTR again. Then, it will review the work of the ICC on its relationship with the community at large through its outreach programme and the participation of victims as these may have influenced the local perception. Finally, it will define the local perception of the ICC and its work in the DRC, by examining the accounts of surveys and interviews from the field.

Comparison with the ICTY and ICTR

As the ICTR has a third goal of contributing to the process of national reconciliation, the third pillar of the research of Barria and Roper focused on the achievement of national reconciliation.[471] Despite the fact that Barria and Roper point out that this goal was not expressly mentioned in the mandate of the ICTY and the Security Council did not address the link between international peace and national reconciliation through such a tribunal, Barria and Roper did attach importance to this, because they believe that 'national reconciliation is a precondition to a permanent peace'.[472] Although the Rome Statute makes no reference at all to national reconciliation and this chapter focuses on the local perception rather than national reconciliation making the comparison to this part of Barria and Roper's research somewhat problematic, their reflections on the subject include local perceptions and thus can give some first insights into aspects that are also of concern for the ICC.

[471] Security Council Resolution 955, UN Doc. S/RES/955 (8 November 1994) stated: '*Convinced* that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace (…)'.
[472] Barria and Roper, 'How Effective are International Criminal Tribunals?', 362.

Barria and Roper defined national reconciliation as 'the ability of individuals involved in the conflict to return to a normal life, living side by side with those they once fought' and this is, they believe, 'as important as maintaining peace'.[473] Then in their reflections on the issue, they distinguished three aspects to measure the contribution: the number of refugees that return, the credibility of the tribunal in the country of concern and the extent to which both sides feel that justice is being achieved.[474] These last two aspects are also important for the examination of the relation of the ICC with communities at large and the perception of those communities.

The return of refugees signifies a return to normal life according to Barria and Roper. They noted that while nearly 2 million refugees returned to their countries and homes in the former Yugoslavia, some 1.3 million people remain displaced.[475] In Rwanda, the situation is slightly more complicated as 'hundreds of thousands' of Tutsi refugees have been fleeing the country since the 1960s and started returning after the return of Tutsi leadership in July 1994, while by that time the genocide had occurred and more than 2 million Hutus fled the country.[476] Hutus started returning in 1995 and 1996 and so, estimates are, that 'approximately 2.5 million Hutu and Tutsi refugees have re-entered the country since 1994'.[477] So, Rwandans have returned home in large numbers, more than in the former Yugoslavia and on this basis Barria and Roper concluded that 'national reconciliation has been occurring and has been much more successful than in the former Yugoslavia where refugees have been much slower to return'.[478] Despite this conclusion, Barria and Roper also acknowledged that it is uncertain whether the tribunal can be accounted for this occurrence of national reconciliation.[479]

Although national reconciliation is not an objective of the ICC, it is interesting to see what the amount of (returned) refugees, and in the case of the DRC especially the numbers of internally displaced persons (IDPs), states about the extent of national reconciliation in the DRC. The number of IDPs in the DRC was at its highpoint in 2003, when it had increased from 2.7 million at the end of 2002 to 3.4 million in August 2003.[480] The number of IDPs 'fell for the first time since the mid-1990s' in 2004, the year that the ICC started its investigations,

[473] Barria and Roper, 'How Effective are International Criminal Tribunals?', 362.
[474] Ibidem, 362-363.
[475] Ibidem, 362.
[476] Ibidem, 363.
[477] Ibidem.
[478] Ibidem.
[479] Ibidem.
[480] Internal Displacement Monitoring Centre (iDMC), *Democratic Republic of the Congo: IDPs pay an unacceptable price: A profile of the internal displacement situation* (21 December 2010).

to 2.33 million,.[481] By 2005 almost 1.7 million IDPs had returned. While, numbers decreased after the elections of 2006, after a short rise in 2007 and after an explosion in 2009 when a high number of 2.1 million was reached again, the return of IDPs was never as high as in 2004.[482] According to recent statistics of the UN refugee agency (Office of the United Nations Commissioner for Refugees: UNHRC) there are currently nearly half a million Congolese refugees outside the DRC and over 1.7 million IDPs.[483] This means that still half of the IDPs of the 2003 highpoint remain displaced. On refugees, the UNHRC reports that, the total number of refugees that returned to the DRC between 2004 and 2011 is over two hundred and twenty thousand.[484] The numbers of returning refugees (and IDPs) are therefore not as high as in Rwanda, but also not as low as in the former Yugoslavia. However, as Barria and Roper noted as well regarding the ICTR, these numbers or the high decrease of IDPs since 2004, despite the start of the ICC investigation in the DRC in that year, cannot be attributed to the ICC as their impact remains limited as seen in chapter 2. They are more likely related to the 2002 Sun City peace agreement that ended the Second Congolese War and the establishment of the transitional government in 2003.

The second aspect of the reflections of Barria and Roper on national reconciliation is the credibility of the tribunal in the country of concern, which is especially important because fundamentally, they state, national reconciliation is an 'internal, domestic process'.[485] As the ICTR represents 'an *international* attempt to forge national reconciliation, because national courts and government are either institutionally weak or not disposed to healing the society', the relationship with those national institutions and the perception of the communities at large are important.[486] However, Barria and Roper believe that the ICTR has struggled here, because well-publicised conflicts between the national courts and the ICTR have, 'in the eyes of many Rwandans' undermined the credibility of the ICTR, because the ICTR is accused of being 'too remote from the people (both Tutsis and Hutus) to facilitate national reconciliation' and because it has been criticized for the fact that the convicted have not served sentences in Rwanda.[487]

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[481] (iDMC), *Democratic Republic of the Congo*.
[482] Ibidem.
[483] United Nations High Commisioner for Refugees, 'Statistical Snapshot (as at January 2011)' on the UNHRC/DRC homepage, online available at: www.unhcr.org/cgi-bin/texis/vtx/page?page=49e45c366#, last retrieved on 14 July 2011.
[484] *D.R.Congo: Fact Sheet*, UNHCR (28 February 2010).
[485] Barria and Roper, 'How Effective are International Criminal Tribunals?', 363.
[486] Ibidem.
[487] Ibidem.

In the DRC similar problems occur as the Congolese government has refused to arrest and extradite Bosco Ntaganda, as national judicial officials have become disappointed and frustrated that this cooperation has turned out to be only a one way partnership and because a survey conducted in 2007 revealed that the majority of the Congolese population would prefer to hold trials close to home; within the DRC.

As discussed in the previous chapter, the relationship between the ICC and the Congolese government has been fruitful, up until the arrest warrant against Ntaganda, who was presumed by the government to be necessary to achieve peace in eastern Congo. Musila argued that the fact that the ICC had not affected the conflict as the Congelese government had hoped, had left it frustrated as it could no longer use amnesties to achieve the peace that was not achieved by the ICC intervention.[488] So, some tension has occurred between the ICC and the national government of the DRC as well.

Furthermore, Mattioli and Van Woudenberg found in 2008 that national judicial officials in Ituri and Kinshasa expressed disappointment and frustration because cooperation had, until then, been 'in only one direction' as they had 'not received any assistance from the OTP'.[489] Musila also found dissatisfaction in the cooperation in 2009, as Congolese government officials perceived the ICC to be 'too demanding', attributed to the fact that the Rome Statute envisioned for this cooperation 'a well endowed and developed judicial and law enforcement system with relevant capacity', which the DRC does not have.[490] These tensions and frustrations could undermine the credibility of the ICC in the same way as the conflicts between the ICTR and the Rwandan government have undermined the ICTR's credibility.

Moreover, the 2007 survey of Vinck, Pham, Baldo and Shigekane, *Living with Fear,* conducted primarily in Ituri and North and South Kivu (2,620 individuals), but also among a sample population in Kinshasa and Kisangani (1,133 individuals), showed that 85 percent of the surveyed population preferred that trials be held in the DRC:

> Among the various trial options to hold war criminals accountable, there is a clear preference for national trials (45%), followed by internationalized trials in the DRC (40%). There is little support for no trials (8%) and international trials abroad (7%). In other words, 85 percent prefers that trials be held in the DRC, whether national or internationalized trials.[491]

[488] Musila, *Monograph 164: Between Rhetoric and Action*, 54.
[489] Mattioli and Van Woudenberg, 'Global Catalyst for National Prosecutions?', 58.
[490] Musila, *Monograph 164: Between Rhetoric and Action*, 46, 64. 65 and viii.
[491] Vinck, et. al., *Living with Fear,* 2.

In fact, only 7 per cent supported international trials abroad in this 2007 survey. Therefore, it would be probable that the Congolese, like Rwandans, find the ICC to be too remote from the people to facilitate national reconciliation. Although, only one per cent viewed encouraging such reconciliation among their immediate priorities, 51 per cent viewed peace as their highest priority which was primarily defined by the people of this survey as 'national unity and togetherness (49 per cent)', before definitions such as 'the end of fear (47%)' and 'the absence of violence (41%)'.[492]

The assumption that the Congolese perceive the ICC as too remote is correct, as several sources underline this sentiment. One of the frequently asked questions (FAQs) asked during outreach activities in the DRC, documented in the ICC outreach reports, showed this sentiment: 'Why can't the seat of the Court be in Bunia?'.[493] Musila found that 'many victims as well as victim NGOs find the location of the Court in The Hague problematic as it poses serious problems of access for victims'.[494] HRW also noted that the ICC 'runs the risk of seeming remote' and added the risk of seeming 'of little consequence to the communities most affected'.[495]

Notably, holding the proceedings in situation countries, *in situ*, a possibility provided by article 3 (3) of the Rome Statute 'whenever it considers it desirable', has been considered.[496] Already in 2005 African states parties 'expressed that that "trials should, as much as possible be carried out in the localities or region where the crime took place"'.[497] Then, the ICC 2006 Strategic Plan also recognized this as follows:

> Holding proceedings closer to situations where the crimes occurred may increase the accessibility of proceedings to affected populations, the efficiency of the Court's different activities and the extent to which the Court can fulfil its mission.[498]

HRW also found that 'a court's proximity to where the crimes were committed can significantly enhance local interest and attention among the media and public'.[499] On the other hand, there were also voices against it. Musila notes that 'some victims and victim NGOs' did

[492] Vinck, et. al., *Living with Fear,* 2.
[493] *Outreach Report 2007*, International Criminal Court, Public Information and Documentation Section: Outreach Unit, ICC Doc. ICC-PIDS-RT-13/07_En (2007) 23.
[494] Musila, *Monograph 164: Between Rhetoric and Action*, 54.
[495] HRW, *Courting History*, 99.
[496] *Rome Statute*, article 3 (3).
[497] HRW, *Courting History*, 112.
[498] *Strategic Plan of the International Criminal Court,* Assembly of States Parties, ICC Doc. ASP-06-0223 (4 August 2006) para. 34.
[499] HRW, *Courting History*, 112.

not seem enthusiastic about relocation, out of fear that the ICC located in the DRC could be 'co-opted by politicians for their own ends'.[500] To avoid this or the perception of this, they suggested allegedly, that the ICC could be seated in a neighbouring country. Given the role of some of those countries in the conflict, this might also be problematic. One NGO representative interviewed by Musila also suggested that 'testifying in The Hague might offer greater protection to witnesses', as they would be removed from those 'who may want to harm them on account of their testimony before the Court'.[501]

While the ICC did indeed consider the *in situ* option, the trial chamber decided to conduct the trial in its entirety in The Hague, because the Congolese government felt that the location selected by the Court was 'inappropriate because it could lead to ethnic tensions in an area that is considered to be potentially unstable'.[502] A later ICC newsletter explained in other words: '(…) the presence of an ICC trial in the location we had identified - which was a region of the country to which peace had been only relatively recently restored - could risk destabilising that peace'.[503] So, the ICC's remoteness has been considered, but remains an issue that could influence - together with the tensions and frustrations in the relationship between the ICC and the DRC government and its judicial system - the ability of the ICC to provide national reconciliation or to create a positive local perception of the Court.

The third aspect considered by Barria and Roper to measure the possibility of national reconciliation, is the extent to which both sides feel that justice is being achieved, as they state that '[f]undamentally, national reconciliation can only occur in an environment in which both sides feel that justice is being achieved'.[504] This means, according to Barria and Roper that 'as long as individuals perceive that international as well as domestic judicial institutions are systematically biased towards one group, reconciliation will never occur'.[505]

As discussed in chapter 2, the ICC has by focusing on the Ituri region, encountered such problems with the rival Hema and Lendu. Here, at first, the 18 months delay in pursuing Ngiti and Lendu militia leaders after the arrest warrant for Hema militia leader Thomas Lubanga, HRW reported, 'led to a strong perception within the Hema community that the ICC [was] carrying out "selective justice"', thereby damaging its credibility and undermining

[500] Musila, *Monograph 164: Between Rhetoric and Action*, 54-55.
[501] Ibidem, 55.
[502] *Prosecutor v. Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06, Status Conference (Hearing Transcript) (12 March 2008) 4.
[503] *Newsletter March 2008 #20*, International Criminal Court, ICC Doc. ICC-PIDS-NL-20/08_En.
[504] Barria and Roper, 'How Effective are International Criminal Tribunals?', 363.
[505] Ibidem.

perceptions of impartiality.[506] Two FAQs in the 2007 outreach report revealed this perception of partiality too: 'Isn't the ICC just targeting one single community in Ituri?' and 'Is the ICC biased? It is seen as targeting one single community in Ituri'.[507] Secondly, as discussed in chapter 2, the limited charges against Lubanga and later Ntaganda, were not only perceived as too limited and 'not serious' creating a sense of dissatisfaction and the perception that the ICC has 'broken promises' in Ituri, they also fed the false perception that the Lendu 'committed more crimes' and 'carry a larger burden' than the Hema.[508] Obviously, both sides do not feel that justice is being achieved in this manner.

Furthermore, French authorities' involvement in the transportation of Lubanga fed rumours in the Hema community, according to HRW, that his arrest was 'part of a conspiracy by the international community against the Tutsi people', as Hema is an ethnic group linked to the Tutsi.[509] The fact that only Lubanga was indicted fed, in addition, to rumours that 'the ICC's arrest warrants required further "confirmation" from the Congolese government and, hence, that the court was only going after "Kabila's enemies"'.[510] Such a perception of a biased Court has been heard more often. Musila reported for example on the lingering idea that Kabila referred the situation of the DRC in order to sideline his political opponents.[511] The fact that Bemba was arrested, even though only for crimes committed in the CAR, confirmed to some the view that the ICC is on Kabila's side.[512] HRW also reported on 'damaging rumors circulating about the court's independence' in Ituri and Kinshasa, which according to their researchers 'have likely been influenced by a widespread perception in the DRC that justice is simply a tool to be manipulated by those in power'.[513] As these rumours and perceptions attack the Court's 'defining principles – its independence and impartiality', they undermine the Court's legitimacy 'in the very communities that it is supposed to serve'.[514] These perceptions also reveal the necessity of a well functioning outreach programme. HRW emphasized that this is 'especially important in societies divided along ethnic or political lines, and where there are allegations of ICC crimes against more than one

[506] HRW, *Courting History*, 51 and 52.
[507] *Outreach Report 2007*, 23 and 56.
[508] HRW, *Courting History*, 64-65.
[509] Ibidem, 128. French authorities had been pro-Hutu and thus anti-Tutsi before and during the 1994 genocide.
[510] Ibidem.
[511] Musila, *Monograph 164: Between Rhetoric and Action*, 53.
[512] Ibidem.
[513] HRW, *Courting History*, 41.
[514] Ibidem, 128.

group', as its research found that the Lendu community is 'not as well' informed about the Court's work as the Hema community'.[515]

Moreover, HRW has suggested that victims participation and their possible right to submit evidence could make victims 'second prosecutors' and thereby create victims' justice.[516] While such concerns have been expressed more, for example by the earlier mentioned Sabina Swoboda, the first major decision on victims participation of January 2006, 'noted that the Rome Statute grants victims an independent voice and role in the proceedings and that it should not be assumed that victims would be an ally of the Prosecutor'.[517] The Appeals Chamber that decided in July 2010 in the case against Katanga and Ngudjolo that the Trial Chamber can request participating victims to submit evidence, also emphasized that participating victims are not parties to the proceedings as in the civil law tradition and that 'they may only present their "views and concerns", and this only if their personal interests are affected' and always in consideration of the rights of the accused and a fair and impartial trial.[518] So, in the third aspect there also seem to be difficulties for the Court.

Thus, a comparison to Barria and Roper's third pillar reveals some important and interesting issues that are applicable to the case of the ICC intervention in the DRC as well. However, as discussed Barria and Roper use national reconciliation as a starting point, whereas I would like to use the local perception as the third pillar to evaluate the effectiveness of the ICC in the DRC. It also does not investigate the efforts of the tribunal(s) in question to affect that perception. This will be examined in the following two paragraphs.

Outreach

In order to understand the local perception it is essential to review the outreach efforts of the ICC as they can and may have had an influence on the perception of the Congolese population. Outreach is an essential part of the ICC's work, as according to HRW, it will help the short lived influence found in chapter 2 to sustain over the longer term.[519] Outreach, HRW believes, can make the proceedings meaningful and relevant and can 'have the practical

[515] HRW, *Courting History*, 134.
[516] Ibidem, 191.
[517] Fiona McKay (Chief of the Victims Participation and Reparations Section in the Registry of the International Criminal Court), 'Victim Participation in Proceedings before the International Criminal Court', available at the website of the American University Washington College of Law at: www.wcl.american.edu/hrbrief/15/3mckay.pdf?rd=1, last retrieved on 8 August 2011.
[518] Swoboda, 'The ICC Disclosure Regime', 462; *Prosecutor v. Germain Katanga and Mathieu Ngodjolo Chui*, Case No. ICC-01/04-01/07 O A 11, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial" (16 July 2010) para. 38 and 39.
[519] HRW, *Courting History*, 70.

benefit of making people more willing to cooperate and assist the ICC in conducting its work on the ground and ultimately, 'increase the court's impact in affected communities overall'.[520] The prosecutorial strategy of 2006 also acknowledged that outreach can 'enhance the understanding and impact of the Office's activities'.[521] The ICC website explains what outreach is as follows:

> Outreach is a process of establishing sustainable, two-way communication between the Court and communities affected by the situations that are subject to investigations or proceedings, and to promote understanding and support of the judicial process at various stages as well as the different roles of the organs of the ICC. Outreach aims to clarify misperceptions and misunderstandings and to enable affected communities to follow trials.[522]

So, outreach is to promote understanding and support of the Court's activities, clarify misperceptions and misunderstandings and enable affected communities to follow trials. Outreach is especially important for the ICC, as it is dealing with cases far from where the crimes were committed – whereby it risks 'seeming remote and of little consequence to the communities' – and because it will only conduct a limited number of trials.[523] In order for those few trials to have a positive affect on the communities, the trials must be complemented with an effective outreach strategy that informs and involves the affected communities. This will also show the commitment of the Court to 'bringing a measure of justice to them for the suffering that they have endured, which can help the ICC foster a sense of trust and can enhance its credibility'.[524] As seen in the above reflections, however, the ICC credibility was already diminished, making outreach all the more necessary.

A Slow Start

Despite previous experiences of the ICTY, the ICTR and the Special Court for Sierra Leone (SCSL) that showed the importance of starting outreach in affected communities early, the outreach efforts of the ICC started slow. The outreach programme of the ICTY for example, did not start until late 1999 when it realized 'how poorly it was perceived' in the affected communities, while its first indictments were issued already in late 1994 and early 1995.[525] Staff members of the outreach offices that were established in 2000 and 2001, allegedly 'had

[520] HRW, *Courting History*, 117.
[521] OTP, *Report on Prosecutorial Strategy*, 8.
[522] ICC Website: Structure of the Court: Outreach. Available at: www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/, last retrieved on 24 July 2010.
[523] HRW, *Courting History*, 99.
[524] HRW, *Courting History*, 137.
[525] Ibidem, 126.

to work hard to address public opinion that had already been adversely affected by biased national media'.[526] The ICTR started a limited outreach programme in late 1998, after the first indictments had been issued in 1995. Here, HRW reports, 'public perception of the tribunal in Rwanda had been negatively influenced by government criticism'.[527] The SCSL started early to avoid such problems and extra work in repairing already negatively influenced perceptions. As noted earlier, the limited outreach of the ICC in the beginning was, as Moreno-Ocampo explained, intentional to 'avoid jeopardizing the peace process and to protect the safety of witnesses'.[528] However, as seen in the comparison with Barria and Roper's reflections, this so-called low profile approach has also enabled rumours and misperceptions to arise and root.[529] HRW also found that this lack of public profile in the field offices that were established in Kinshasa in 2005 and Bunia in 2007, frustrated local civil society:

> The lack of public profile of field offices has frustrated local civil society. In Bunia, for example, some nongovernmental organization representatives in April 2007 referred to the ICC field office there as "Guantanamo" because of its secrecy, isolation, and a perceived bunker mentality.[530]

Frustration was also reported in Uganda, where civil society representatives criticized the 'court's limited level of engagement with affected communities at the early stage in the court's involvement in the north', because as some believed, 'the court's work at the outset could have helped avoid at least some of the hostility to the ICC that developed'.[531] One civil society representative allegedly suggested that 'secrecy breeds suspicion'.[532] Musila also found that some NGO representatives suggested that 'the limited and speculative reporting on ICC issues is perhaps attributable to the fact that the Court has not been very visible on the ground'.[533] Thus, while the ICC's intention may have been genuine in wanting to avoid destabilising the fragile peace, the low profile strategy caused misinformation, especially after the arrest of Lubanga, after which it would still take a year before the ICC started outreach in Ituri.

Two examples of such misunderstandings have been mentioned above and included the idea that the Court was only pursuing Kabila's enemies and that his arrest was part of an

[526] HRW, *Courting History*, 126.
[527] Ibidem.
[528] Davis and Hayner (ICTJ), *Difficult Peace, Limited Justice*, 30; Frank Petit, S*ensibilisation à la CPI en RDC: Sortir du « Profil bas, »*, International Center for Transitional Justice (March 2007).
[529] HRW, *Courting History*, 118.
[530] Ibidem, 104.
[531] Ibidem, 127.
[532] Ibidem.
[533] Musila, *Monograph 164: Between Rhetoric and Action*, 58.

international conspiracy against the Tutsi people. Another rumour, caused mostly by the disbelief that someone could actually be arrested by an international court 'only' for the recruitment of child soldiers, was that he was arrested for 'killing "white people"'.[534] These rumours strongly undermined the Court's legitimacy as they affected its key principles of independence and impartiality. HRW even argues that these misunderstandings required 'far more corrective outreach than would have been necessary had a more proactive approach been taken at an earlier stage'.[535] The ICC staff has actually acknowledged that an outreach campaign 'should have been conducted before the arrest warrant against Lubanga'.[536]

When an outreach programme was finally set up, however, it primarily consisted of seminars or workshops until 2007, only targeting a confined and elitist group of 'local NGOs, journalists, members of parliament, and the judiciary'.[537] Musila also noted the ICC almost exclusively targeted the educated sectors, 'to the exclusion of the wider population who are perhaps most affected by atrocities under inquiry'.[538] The expectation was that the information would be disseminated, but HRW found that this did not always occur.[539] In Uganda, workshop participants allegedly pointed out that they were unfit to do so being from organisations that focus on peace while 'the ICC is seen as a possible obstacle to its achievement' or that they believed more in depth discussion was needed, 'since the ICC is a sensitive issue'.[540] Some also complained, in the DRC as well, about 'the court's unrealistic expectations of what they could achieve without financial assistance'.[541] Moreover, rather than organizing its own activities, in this phase, the ICC 'for the most part joined events organized by international and local NGOs'.[542]

This approach was slowly shifted into 'engaging more directly with affected communities' and because this 'initial lack of prioritization' was replaced with 'a better understanding of outreach's importance in realizing the court's mandate', the first outreach activities started in Ituri early 2007 – although almost a year after the extradition of Lubanga – with the broadcast of Lubanga's confirmation hearing and decision on Congolese television,

[534] HRW, *Courting History*, 128.
[535] Ibidem, 127.
[536] Ibidem, 128.
[537] Ibidem, 124.
[538] Musila, *Monograph 164: Between Rhetoric and Action*, 51.
[539] HRW, *Courting History*, 124.
[540] Ibidem, 140.
[541] Ibidem, 144.
[542] Ibidem, 124.

on the web and by inviting 'NGOs and journalists in Bunia to watch the broadcast of the decision in a local café'.[543]

Even though in the end progress was made on outreach and acknowledged to be important for the Court's impact and the local perception, many negative perceptions had to be corrected and much had to be learned still. HRW field research in 2007 namely 'revealed that misinformation and negative perceptions surrounding the court's work are deeply-rooted and will require more intense and creative efforts by the court to address them effectively'.[544] An example of what needed to be learned was the importance of a two way interaction with the affected populations. In May 2007 HRW found namely, that local activists complained that 'ICC speakers were more interested in covering their own agendas rather than addressing the questions and concerns of the audience' and that the content was 'too legal and inaccessible'.[545]

Outreach Reports

In 2007 the ICC, however, started to publish outreach reports that not only documented the activities of the Court, but evaluated their work, its results and the local perceptions by examining the FAQs, internal surveys hold among the participants of the outreach activities and external surveys. This is important, because, as HRW noted, the effectiveness and impact of the outreach should be measured by the extent to which the activities address the actual demand of the affected communities:

> While the frequency of events is important, the impact of the court's outreach strategy cannot be measured by simply adding up the number of events planned and executed. It is the extent to which these events effectively address actual questions and concerns among affected populations that will, in large part, determine the strategy's success.[546]

The outreach strategy of the Court was thus now able to improve, by identifying the questions, perceptions and concerns of the populations. HRW also concluded this in 2008:

> By identifying the real questions being posed about the court, including tough questions about the intersection of justice and peace negotiations, it appears that the court is starting to take notice, at least to some extent, of the actual concerns of people in affected communities. [547]

[543] HRW, *Courting History*, 124.
[544] Ibidem, 126.
[545] Ibidem, 130-131.
[546] Ibidem, 130.
[547] Ibidem, 131.

The 2007 outreach report noted that the outreach approach had changed, as mentioned earlier, 'from targeting mainly in Kinshasa to increased efforts in Ituri', in order to address the 'concerns of the population at a grassroots level'.[548] The report also stated that this was 'in an attempt to restore the confidence in justice', thereby acknowledging that confidence needed to be restored at this grassroots level.[549] From the examination of the FAQs, the report concluded that people had an increased understanding of the ICC's work and were 'developing a deeper understanding of the issues and situation', because basic questions were less frequently asked and more probing questions arose.[550] Finally, four surveys conducted by the National Coalition for the International Criminal Court in partnership with the ICC, found that 86 per cent of the 2,122 people interviewed in Ituri, Katanga, Bunia and Kinshasa had heard about the ICC, 55 per cent viewed the Court as fair and independent and the same amount of people thought that the Court will be able to provide justice. From all these observations the Outreach Unit concluded that it had made progress throughout 2007 through: 'an increased understanding and awareness amongst key stakeholders, greater participation of local communities and more trust in the Court amongst the affected communities'.[551]

In addition, the external study results of the 2007 outreach report, and all the following outreach reports, found that the majority of surveyed people (in 2007 57 per cent) named radio as the best channel to receive information.[552] The *Living with Fear* survey found as well that 'radio serves as the primary means of accessing information, as 54 per cent of the population of eastern DRC listens to radio on a daily basis'.[553] HRW also acknowledged the importance of the use of local media, especially radio, but critically noted that there are limits to the reach of radio as their researchers were told that 'many people in villages in eastern Congo do not have radios because they cannot afford the batteries'.[554] HRW also found that in 2007 local NGO's indicated that the radio program broadcast on the main radio station in Ituri was 'too short and infrequent'.[555]

[548] *Outreach Report 2007*, 7.
[549] Ibidem, 7.
[550] Ibidem, 24.
[551] Ibidem.
[552] *Outreach Report 2007*, 24.
[553] Vinck, et al., *Living with Fear*, 3.
[554] HRW, *Courting History*, 139.
[555] Ibidem, 144.

> Local activists and journalists whom we interviewed in Ituri and in the Kivus indicated that the distribution list for press releases from The Hague appeared to be limited. This compounded general difficulties that they experienced in obtaining information about the court.[556]

This, while journalists expressed an interest in 'attending regular meetings with court officials to get updates on developments in The Hague and to stay more involved in the court's work'.[557] HRW argued that engaging the local mass media is 'a crucial part of an effective outreach strategy' because of its 'power to inform and to potentially influence people's perceptions.[558] It used the example of Uganda, where the vacuum of the ICC's radio silence was filled by the opposite party to support this:

> The vacuum left by the ICC's radio silence was deftly filled by those with different and often contrary agendas: according to NGO, CBO, and journalist sources with whom we consulted, the LRA leadership and local leaders in northern Uganda have used the radio to air their views on the ICC.[559]

This means that even in moments of low activity in the specific cases, outreach must continue at its normal rate to avoid misinformation. One Congolese participant stated that outreach did indeed help to do so, as the 2008 outreach report points out: 'Radio news reports might inform us wrongly, but Nicolas' [the outreach official] presence here in Kasenyi allows us to learn what really happens in The Hague […]'.[560] So, despite this positive view and optimism of the 2007 outreach report, it is important to remain critical, as need for improvement remained.

The 2008 outreach report found on the actual reach of the outreach that 'in the course of 116 outreach activities (37 in 2007) some 17,736 people were directly targeted compared to 3,600 in 2007 and 2,025 individuals in 2006'.[561] In addition, through radio and television broadcasts, an estimated audience of 1.8 million in Ituri was reached which according to the report was 'approximately 50 per cent of the total population of the province'.[562] However, the report also admits that 'the percentage of people who have heard about the Court is still limited'.[563] In 2009, the number of participants decreased slightly to 13,369 in 76 interactive

[556] HRW, *Courting History*, 144.
[557] Ibidem.
[558] Ibidem.
[559] Ibidem, 145.
[560] *Outreach Report 2008*, International Criminal Court, Public Information and Documentation Section: Outreach Unit (2008) 37.
[561] Ibidem, 7.
[562] Ibidem.
[563] Ibidem, 32.

sessions in Ituri, Kinsangani, North and South Kivu and Kinshasa, and a 'potential audience' of 25 million was allegedly reached through television and radio out of a total population of 62.6 million.[564] In Ituri, the audience grew as well during that year to 2.3 million of the total 3.5 million population, thereby reaching 65 per cent instead of the 50 per cent of 2008, reached via ten local community radio stations compared to seven in 2008.[565] In 2010 16,990 people, of which 6,976 women, were engaged in 190 activities, potentially 30 million received information via radio and television and the number of listening clubs – where participants listen to key news and participate in discussions – increased from 30 to 40.[566] The reach of the outreach activities thus appeared to be increasing throughout the years.

In 2008 unforeseen developments in the judicial activities also demanded quick responses from the Court as they had a 'great impact' on the population of the DRC and in order to avoid rumours and misinformation on them. These developments were the decision of Trial Chamber I to order a stay of proceedings and the release of the accused in the case against Lubanga, the arrest and surrender of Bemba that concerning a high profile figure in the DRC generated great interest and confusion, and the announcement of the OTP of the decision to move onto new cases in North and South Kivu.[567] Especially the first two incidents caused confusion, showing how outreach goes beyond just explaining how the Court works.

The FAQs of 2008 reflected these events, but also, according to the outreach report, demonstrated a 'deeper understanding of the complex judicial process of the ICC', because the participants started using terms like 'confirmation of charges', 'disclosure of evidence' and 'right of the accused'.[568] Despite this positivism, the Outreach Unit also recorded concerns from the participants on the role for national courts in prosecuting the lower level perpetrators of war crimes, as they believed that 'the national system of justice does not operate properly and is not always trustworthy'.[569]

Every outreach report also includes statistics or internal and sometimes external surveys. In 2008, internal surveys conducted at the end of each activity, found that 45 per cent of the participants stated that they had heard about the ICC before.[570] However, this does not

[564] *Outreach Report 2009*, International Criminal Court, Public Information and Documentation Section: Outreach Unit (2009) 2.
[565] Ibidem, 27.
[566] *Outreach Report 2010*, International Criminal Court, Public Information and Documentation Section: Outreach Unit (2010) 25.
[567] *Outreach Report 2008,* 33.
[568] *Outreach Report 2008,* 41-42.
[569] Ibidem, 42.
[570] Ibidem, 40.

necessarily show that 45 per cent of the *affected* people were aware of the ICC, as these numbers are solely retrieved from participants of the ICC's outreach activities. Indeed, the *Living with Fear* survey published the same year and conducted among a sample population primarily in Ituri and North and South Kivu and to a lesser extent in Kinshasa and Kisangani, found that 'only a quarter of the respondents had heard of the ICC (27%)'.[571] Moreover, this survey found that 'surprisingly respondents in Ituri were no more familiar with the Lubanga proceedings or the ICC than those in North and South Kivu', showing the lack of influence of the proceedings on the directly affected communities until then.[572] Finally, this survey also found that while 67 per cent stated they would like to participate in ICC activities, only 12 per cent knew how to access the ICC.[573]

The 2008 outreach report also referred to this survey in the evaluation of external surveys, but did not mention these poor results except the last and cited mostly positive aspects. For example it points out that the survey found that a majority of 80 per cent believes that justice can be achieved, but this does not necessarily relate to the ICC, as 51 per cent endorsed the national court system as the means to be used to achieve that justice and only a quarter (26 per cent) referred to the ICC, which the outreach report perceives as positive. When asked to choose between various trial options, however, only 7 per cent chose international trials abroad, while 45 per cent preferred national trials and 40 per cent preferred international trials in the DRC. The outreach report referred only to these last two numbers, while it should have focused on the 7 per cent preferring international trials abroad, as the ICC trials constitute international trials abroad, because proceedings were not held *in situ*. The outreach report pointed out, on the other hand, how 'there is a strong desire for the international community to assist national prosecutions', something that is the ICC is no yet doing and is rather complicated in the DRC due to the weak and corrupt national justice system.[574] So, while the outreach reports have taken the effort to include external study results, they are selectively and subjectively used, giving warning that they should be used cautiously as external study results contain much less positive findings.

Other statistics focused on the knowledge gained in the outreach activities. For example, a majority of the participants in 2008 knew more about the ICC after participating an outreach activity and '76 per cent stated that they had learnt something important to them',

[571] Vinck, et al., *Living with Fear*, 47.
[572] Ibidem.
[573] Ibidem.
[574] *Outreach Report 2008,* 42; Vinck, et al., *Living with Fear*, 45-46.

while 36 per cent 'felt that there were still some issues that should be further explained'.[575] More interestingly, the 2008 Outreach Unit survey found that 54 per cent of the respondents felt happy with the presence of the ICC in the DRC, while 46 per cent 'were of the opinion that the perpetrators of war crimes should be prosecuted in their own country'.[576] This first number is noteworthy, as it is high compared to any of the relating numbers found in the *Living with Fear* survey and thereby suggests that the outreach has indeed positively changed the minds of the participants about the ICC presence.

The 2009 outreach report presented a number of improving statistics:

> In 2009, 69 per cent of participants who took part in Outreach activities said that they had heard about the ICC before, as compared with only 45 per cent in 2008; (…) Eighty-three (83) per cent of participants said they learned something important to them, as compared with 76 per cent in 2008, and 85 per cent said they would share what they had learned with other people. (…) Fifty-one (51) per cent said they understood more about how the ICC works after attending the meeting, but 29 per cent said there were still issues they did not understand (as opposed to 36 per cent in 2008).[577]

Also, more people expressed contentment with the presence of the ICC in the DRC: 72 per cent as opposed to only 54 per cent in 2008. Still, 28 per cent said they were unhappy, compared to 46 per cent in 2008 that were of the opinion that the perpetrators of war crimes should be prosecuted in their own country. However, these Outreach Unit surveys only studied the opinions of people participating in outreach activities. They do not represent the whole society as especially those who do not participate, are the ones that have no knowledge of or faith in the ICC. Moreover, the 2009 outreach report did not include any external survey results that filled that research gap, leaving those who did not participate out of account.

On the FAQs the 2009 report concluded that in general, they tended to be 'more technical and in-depth than those asked in 2007 and 2008', which, the report argued, 'demonstrates that the population is beginning to understand more clearly both the Court's mission and the legal processes that the Court follows'.[578] Specifically, regarding the case of Lubanga, the report found that 'people manifested less impatience with the length of the trial and more curiosity about the actual proceedings'.[579] This was not the case in the trial against Katanga and Ngudjolo, as there the Unit found that 'a general feeling of disappointment came

[575] *Outreach Report 2008*, 40.
[576] Ibidem.
[577] *Outreach Report 2009*, 37.
[578] *Outreach Report 2009*, 38.
[579] Ibidem.

through in questions about why the trial was postponed, and why the whole process seems to be taking so long'.[580] Moreover, it found that the population 'exposed to Outreach activities for more than one year' was beginning to improve its understanding of both the Court's mission and its legal processes and especially Ituri allegedly demonstrated 'a deeper understanding and awareness (…) than in previous years'.[581]

Finally and interestingly, the 2009 report spoke of the use of a bottom-up approach that takes into account the information needs of the audience and thereby aims to give the communities 'ownership over the Court, rendering it an institution that works for them and in their name'.[582] This choice of approach and words constitutes a great change in the Court's attitude towards the affected communities.

So, despite the fact that the outreach reports are overly positive, the Court has, as HRW also noted, 'undoubtedly' made progress in its outreach since 2007. HRW also concluded in their 2008 ten year review report, that based on their research in Congo, Uganda and Chad, the ICC's efforts 'have been welcome and have already contributed to improving perceptions of the court among affected communities'.[583] Still, it is wise to maintain an objective and critical view of these reports and the actual positive effects they claim.

A Critical View

In June 2009 American journalist and author of among others a popular history book on King Leopold's role in Congo, Adam Hochschild, visited north-eastern Congo to explore what the Congolese people thought about the Lubanga trial, whether it deterred other warlords and whether it could bring a sense of justice 'to a place where there has been none'.[584] During this journey he visited two ICC outreach activities and developed a critical view that counters the increasingly positive view of the above mentioned outreach reports and is worth mentioning in this examination of the ICC's outreach.

The first outreach activity he visited was one for former child soldiers from different and opposing armed groups who were gathered by a local NGO that had been working with them, to learn about the ICC.[585] It started with a 20 minutes video – a form of presentation that has been praised by the outreach reports – that according to Hochschild show a world that

[580] *Outreach Report 2009*, 38.
[581] Ibidem, 41.
[582] Ibidem, 6.
[583] HRW, *Courting History*, 147-148.
[584] Adam Hochschild, 'The Trial of Thomas Lubanga', in: *Atlantic Monthly*, Vol. 304, Iss. 5 (December 2009) 76-82, there 78.
[585] Ibidem.

could not be more different than their world with a 'brightly lit courtroom full of some two dozen people' with suits, ties, black robes and white jabots, 'an impassive Lubanga in a suit and tie in the dock, witnesses who testify about his use of child soldiers' and more.[586] Furthermore, he noted that the ICC's logo (the scales of justice) that was almost constantly in the upper right-hand corner of the TV screen must have mystified this audience as they look to anyone in Ituri like the 'small, handheld scales' that weigh the exploited gold, perhaps even gathered by some of those former child soldiers.[587]

Moreover, he noted that the videos were in French, while only few of the participants spoke it well. The outreach officials talking after the video on the other hand did not speak Swahili, the 'eastern Congo's lingua franca', but a mixture of French and Lingala, which according to Hochschild only 'a sprinkling' of the participants knew, while an assistant translated a few sentences into Swahili.[588] In a country which has, next to the official language of French, four national languages (Lingala, Swahili, Kikongo and Tshiluba), has over 200 other spoken languages, and where estimates are that 55 per cent of the population is illiterate, considerations of language are important. Then the officials explained how the ICC charged Lubanga only with conscripting or enlisting child soldiers, in order to simplify matters as 'complex war-crimes cases can drag on' and to 'help highlight this practice as a violation of international law', goals that Hochchild expected to resonate with 'this particular audience'.[589] These examples make one wonder whether the specific audience has been taken into consideration at all. Indeed, Hochschild observed, when the Question and Answer period began, 'most of the teenagers' who spoke up were 'anything but enthusiastic'.[590] While one wondered why Lubanga is on trial 'when "others who did the same thing are working within the government"', others stated Lubanga did not conscript forcibly and admitted they joined voluntarily:

> "Lubanga did not conscript forcibly," (…) "We went voluntarily. I myself went voluntarily. It was to defend my community. Why is he being judged for this?" A comrade adds: "I also was not forced to enter [Lubanga's army]. All our houses were burned. We had nowhere to go—and Lubanga accepted me."[591]

[586] Hochschild, 'The Trial of Thomas Lubanga', 78.
[587] Ibidem.
[588] Ibidem.
[589] Ibidem, 79.
[590] Ibidem.
[591] Ibidem.

Another boy, Hochschild added, asked: '"What about those who killed Saddam Hussein?" (…) "Why are they not at The Hague?"'.[592] This shows frustration and a lack of understanding of the entire situation. Hochschild's experiences do not appear to coincide with the positive accounts of the outreach reports.

Moreover, at the end of the meeting it became clear, Hochschild wrote, that not all participants were ex-combatants and some were 'just Bunia street kids who've heard that free food and clothing will be distributed', which was underscored by the 'eagerness with which young hands grab[bed] for the bottles of soda being handed out'.[593] While it is difficult to draw any conclusions from such incidents, it does give some insight into the reality in which such outreach activities have to work and of what the result can be.

At the second outreach activity for Bunia municipal officials, Hochschild found himself wondering once again about the 'sheer visuals on the screen', where the viewers could see 'the court's headquarters in Holland, in two high-rise towers with an all-glass sky bridge between them' and 'the spacious, wood-paneled courtroom itself, every official or attorney sitting in a comfortable rolling chair in front of a computer screen', and remarks that computers are a luxury in Bunia and electricity erratic, implicating the differences of both worlds and the remoteness of the Court. In addition, he comments on the extravagance that comes with the Western idea of 'a humane and enlightened judiciary', such as funds for Lubanga's lawyers and visits by his family: 'Africans are so desperate to migrate to Europe that thousands have drowned at sea trying, yet an accused war criminal's wife and kids get a free trip?'.[594] While this might be an subjective and exaggerated or far fetched point of view, it does shine some light on how far these two worlds are apart and how remote the ICC practically is for these local communities. The perception of the Court being a Western institution was confirmed by one of the local officials who while shaking his head at the screen that showed three white judges from Britain, Bolivia and Costa Rica, said that the trial is '*justice à l'occidentale*', Western justice.[595] Thus, despite the fact that Hochschild has made hasty assumptions and subjective insinuations, his observations do reveal an atmosphere and provide an insight into the actual practice of outreach that goes beyond FAQs or survey results at the end of meetings that the outreach reports provided. His experiences mostly show a practical remoteness of the Court as it constitutes a completely distant and different world for local communities.

[592] Hochschild, 'The Trial of Thomas Lubanga', 80.
[593] Ibidem.
[594] Ibidem.
[595] Ibidem.

As the outreach efforts are the main tool of communication between the affected communities and the Court, as they are able to influence the perception of those communities and because they can possibly help sustain their short lived impact discussed in Chapter 3, they are significant and need to be examined. This examination has found that the initial low profile approach enabled rumours, misperceptions and high expectations to arise, gain momentum and spread. This has most likely affected the local perception in a negative way. While outreach reports increased in positivity due to alleged improvements in reach, awareness, understanding and content with the Court, and while the language of the Court on the matter shifted more towards a bottom-up approach and incorporated the idea of local ownership, these reports appear to be somewhat subjective and other reports remain critical.

Victim Participation

The ICC is the first international tribunal in which victims can participate and play a role in the proceedings 'beyond giving testimony as witnesses for the parties'.[596] The ICC website section on victims states:

> One of the great innovations of the Statute of the International Criminal Court and its Rules of Procedure and Evidence is the series of rights granted to victims. For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court .[597]

This option has been identified by HRW as the possible link between the proceedings in The Hague and the affected communities that could make the proceedings more relevant to them.[598] Participation of victims in the judicial process is seen by HRW as one of the tools available to the Court, next to outreach and communications, to 'effectively maximize its impact with local populations'.[599] In addition, the ICC provides for some possibilities of reparations. The ICC website section on victims even appears to make some reference to some form of reconciliation with these options:

> The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It

[596] HRW, *Courting History*, 177.
[597] ICC website, Structure of the Court, Victims, online available at: www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/, last visited on 25 July 2011.
[598] HRW, *Courting History*, 177.
[599] Ibidem, 99.

> is this balance between retributive and restorative justice that will enable the ICC to not only bring criminals to justice but also to help the victims themselves rebuild their lives.[600]

In assessing the relationship of the ICC with the situation in question and the perception of the population, the participation of victims, the possibility of reparations and the influence on the local perception should not be left unaddressed.

Article 68 (3) of the Rome Statute provides for this participation of victims, their role and the conditions as follows:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.[601]

These provisions were challenged by the defence as well as by the prosecution, but the Chambers have overruled these objections. Already in the first major decision on victim participation the Chambers made a stance in favour of a wide definition of victim participation at the Court, as this decision of 17 January 2006 allowed victims to be 'involved in ICC proceedings at an early stage of the investigation', despite the objection of the defence and the prosecution.[602] Victims can therefore participate at the situation investigations phase, as well as in the various cases in particular. Many scholars have also expressed concern of the legal challenges victim participation causes to ensure a fair trial.

The information booklet of the Victims Participation and Reparations Section (VPRS) of the Court, which explains the rights of victims and helps victims or the intermediaries who assist them in applying for participation, includes a paragraph on what victims might expect from participating in proceedings and explains their role and influence as follows:

> By presenting their own views and concerns to the judges, victims are given a voice in the proceedings that is independent of the Prosecutor. This will help the judges to obtain a clear picture of what happened to them or how they suffered, which they may decide to take into

[600] ICC website, Structure of the Court, Victims.
[601] *Rome Statute*, Article 68 (3).
[602] Jérôme de Hemptinne and Francesco Rindi, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings', in: *Journal of International Criminal Justice*, Vol. 4, Iss. 2 (May 2006) abstract.

> account at certain stages in the proceedings. This may lead to having an impact on the way proceedings are conducted and in the outcomes.[603]

It does, however, also note that 'it is important to be aware' that these views and concerns will not always result in 'the Court following the wishes of the victims' and that 'it will be up to the judges to give directions as to the timing and manner of participation'.[604]

Currently, 118 victims are participating in the Lubanga trial and 365 victims in the trial against Katanga and Ngudjolo. The Bemba trial has the largest number of participating victims and recently expanded to 1620 after judges approved new application at the beginning of July.[605]

The Number of Victims

Apart from the legal challenges the participation of victims causes in relation to the fairness of the trial, it could also cause logistical challenges because, as HRW noted, given the nature of the crimes of the Rome Statute, 'there may eventually be hundreds, and possibly thousands, of victims in a particular case'.[606] This is now even more concerning, since the definition was broadened in a decision in January 2008, that defined that rule 85 'does not have the effect of restricting the participation of victims to the crimes contained in the charges' and as such, 'a victim of any crime falling within the jurisdiction of the Court can potentially participate'.[607] This meant that the harm of participating victims no longer had to be linked to crimes mentioned in the charges of the specific case, but could include any crime of the Rome Statute, hugely expanding the number of eligible victims. HRW suggests that this decision 'may in part be an effort to mitigate the negative consequences of the limited set of charges of the Thomas Lubanga case', as otherwise only child soldiers and their families were eligible in that case.[608] However, HRW expected that this decision would cause additional confusion for victims and NGOs and that additional application that would be needed could 'result in

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[603] *Booklet: Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*, International Criminal Court, Victims Participation and Reparations Section, downloadable from: www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/ Participation/Booklet.htm, last retrieved on 25 July 2011.
[604] Ibidem.
[605] Wakabi Wairagala, 'Victims Participating in Bemba Trial Now Reach 1,600', on 'The Trial of Jean-Pierre Bemba Gombo'-website, a project of the Open Society Justice Initiative (14 July 2011) online available at: www.bembatrial.org/2011/07/victims-participating-in-bemba-trial-now-reach-1600/, retrieved last on 28 July 2011.
[606] HRW, *Courting History*, 178.
[607] HRW, *Courting History*, 188-189.
[608] Ibidem, 189.

disenfranchising victims'.[609] Moreover, this raises expectations, while still logistically, the Court can only include a limited number of victims. Moreover, HRW noted that '[i]n practice, however, the need to protect the rights of the accused may ultimately result in rendering this participation ineffective or meaningless', which could 'add to existing frustrations about participation among potential victims in affected communities'.[610] Another problem regarding expectations is the civil law tradition the DRC has, that allows victims to be parties to the proceedings. This could raise expectations that cannot be met as the ICC is based on a mix of civil law and common law legal traditions and does not allow for victims to be a party to the proceedings.[611]

The Practice

Much has been written on the impact of victim participation on the fairness of the trial, the equality of arms and on the outcome, for example sentencing, but not much has been written on the impact on the affected communities and on their perception on the Court. HRW, however, has evaluated the practice of the Court on victim participation and reparations in their ten year evaluation report, from which we can gain some insight into the problems and the impact on communities.[612]

The most important point noted by HRW is probably the lack of knowledge that they found in the field on the possibility of participation in proceedings and the lack of detailed knowledge of the intermediaries that the ICC uses in its contact with victims. HRW documented in 2007 a 'marked lack of information about victims' participation and reparations at the ICC in villages surrounding Bunia, even on the part of educated individuals'.[613] Musila also found through his interviews with victims and NGOs in June and July 2008 that 'in general, victims do not seem to be aware of the roles they could play in the proceedings', and those who did receive information seemed 'dissatisfied with the established procedures for their involvement, which limit those who may participate to only a few victims'.[614] So, awareness of the possibility was low and Musila even found that victims were dissatisfied with the limited number of victims that can actually participate.

Furthermore, not only had many people never heard of the possibility of participation and reparations, but there were rumours that 'NGOs were being paid to find victims and

[609] HRW, *Courting History*, 190.
[610] Ibidem, 191-192.
[611] Ibidem, 108.
[612] Ibidem, 177-209.
[613] Ibidem, 196-197.
[614] Musila, *Monograph 164: Between Rhetoric and Action*, x.

would fabricate victims if necessary to get funding from the court or international NGOs'.[615] HRW also found confusion among the intermediaries who are supposed to help victims with their participation and reparation explications. For example, they did not know the difference between participation at the situation investigation phase and the case phases or they had questions about 'whether the application form would be shared with the defense, which can have implications for the security of the victims that they are assisting'.[616] HRW found that most of the representatives still had questions after the training they received and 'would welcome further training'.[617] One representative even thought it necessary to '"make a little gesture" – meaning providing gifts – to encourage victims to participate', which would 'feed the perception that the ICC is trying to "buy" victims in affected communities'.[618] These are all concerning developments that can affect the local perceptions and thereby diminish any of the possible impacts discussed above on the empowerment of victims.

More problems have occurred with the use of intermediaries as they complain about having to work for free or with limited resources. HRW found that 'the general perception is that "they are always looking to us to do the work" (…) implying that the court is always asking them to work for free', a criticism that was apparently echoed among intermediaries in Uganda.[619] This is especially problematic as these intermediaries encounter risks in their work and have reported to be subjected to threats because of this work. Because the ICC operates in 'situations of instability or ongoing conflict, often in highly polarized societies where feelings about the justice process are similarly divided', HRW noted, that 'those perceived to be collaborating with the court (…) can become targets of threats'.[620] Several intermediaries report in fact that they 'have been verbally threatened (in person or by phone)'.[621] HRW explained this as follows in 2008 in relation to the Lubanga case:

> This is in part because working with victims is viewed by the Hema community in Ituri as gathering evidence against Lubanga (a Hema). For example, one NGO representative reported having been approached at his house by a militia officer and told that he had better "drop what I was doing, because the white men would leave and they would stay among themselves, Iturians, and settle scores.[622]

[615] HRW, *Courting History*, 197.
[616] Ibidem, 198.
[617] Ibidem.
[618] Ibidem, 200.
[619] Ibidem, 201.
[620] Ibidem, 202.
[621] Ibidem.
[622] Ibidem.

Such incidents reveal the danger for intermediaries to work with victims and also point out the problems of having initially only one case against one side of the conflict.

Another point of concern noted by HRW and similar to a point of attention mentioned in the outreach strategy, is the problem of language.[623] The application forms for participation and reparation, and the earlier mentioned booklet that serves as a guide for victims and the intermediaries that assist these victims, are only available in English and French: the two languages of the Court. However, as discussed before, while French is the official language of the DRC, it is not widely spoken as there are also four national languages and many other local languages. While it is innovative that victims can participate, they should be able in the first place to read, and fill in, the application. Intermediaries report that they 'often needed to translate the questions for the victims that they are assisting' and more disturbingly: 'often in a approximate way'.[624] Considering the trauma and fear victims may have, it is probably difficult enough to fill in such a form. Not knowing what the questions say exactly, does not make it any easier, does not take away the fear in dealing with the Court, nor does it increase the trust the victim has in the Court. A local NGO representative also told HRW that 'it would increase the confidence of victims in the process if the questions on the form were in a language that they could understand'.[625]

The following process after applying has caused further frustration among victims, due to the length of the process and the delay between filing the application and the decisions on the applications by the Chambers.[626] HRW found that 'in some instances in the DRC' one-and-a-half or two years had elapsed since the intermediaries had sent in application forms.[627] From all these experiences we can only conclude that frustration has been felt by both victims and the intermediaries helping the victims in their attempt to gain the official status of victim in the proceedings.

However, there is some positive experience of the role that victims have played in the ICC intervention in the DRC, which should also be mentioned here. According to Musila, victims have played a significant role in bringing about the ICC investigations in the DRC: 'Contrary to views that victims and victim organisations in the DRC are latecomers to the ICC proceedings in that country, victims played a key role in triggering the referral by the DRC to

[623] HRW, *Courting History*, 194-195; *Strategic Plan of the International Criminal Court*, para. 17(b).
[624] HRW, *Courting History*, 195.
[625] Ibidem.
[626] Ibidem, 200-201.
[627] Ibidem, 201.

the ICC'.[628] As discussed in the introduction the Prosecutor informed the States Parties in September 2003 that he was ready to request authorization to start investigation *proprio motu*, which is based on received information. Musila points out that victims, acting through various NGOs, had 'on various occasions in 2003 conveyed communications to the Prosecutor of the ICC, informing him of crimes in Ituri' and requesting, given the absence of a referral by a State Party of the Security Council, to initiate investigations himself.[629] Musila also notes that on the basis of this and additional information of for example the media, 'the Prosecutor is said to have approached the DRC government to find a way forward'.[630] Moreover, a government source claimed that 'the fact that victims had approached the ICC partly influenced the government's decision to make a referral to the Court'.[631] This would mean that victims not only fulfilled an important role in bringing the situation of Ituri to the attention of the Prosecutor, but also in bringing about the referral of the DRC government to the ICC. However, it must be noted that this influence occurred before the start of the proceedings and thus is not a result of the option of victim participation during the proceedings themselves.

HRW also found that although only a limited number of victims have participated so far, 'their interventions have made an important impact', notably in the opening of the confirmation of charges hearing in the case of Lubanga, by 'grounding the proceedings in the real experiences of victims of ICC crimes and in the suffering that they must endure in their daily lives because of these crimes'.[632] HRW concluded by stating: 'Their participation was a strong reminder for the court of its purpose: to bring justice to victims of the worst crimes'.[633] While this role is in fact a result of the possibility of victim participation, the impact is only limited compared to the impact victims had in bringing about the investigations. After such an achievement, the diminishment of influence of the actual victim participation in proceedings could be a disappointing experience, hampering enthusiasm and affecting the local perception.

Musila found indeed such disappointment and disillusions caused by high expectations as victims seemed 'particularly unhappy with the mechanisms of identifying and selecting victims to participate in the proceedings and the permissible modes and scope of participation in these proceedings, which according to them are very limited'.[634] He furthermore concluded:

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[628] Musila, *Monograph 164: Between Rhetoric and Action*, 50.
[629] Ibidem.
[630] Ibidem, 51.
[631] Ibidem.
[632] HRW, *Courting History*, 193.
[633] Ibidem, 194.
[634] Musila, *Monograph 164: Between Rhetoric and Action*, 52.

> Victims seem to be coming to the painful realisation that only a few of them can participate in any process. (…) It appears that victims may have been under the illusion that the ICC process would be an open process where they will all have a voice.[635]

So, despite the positive influences of victims on the ICC intervention, practice has showed that victims are dissatisfied and disappointed with their role during proceedings and that thus the practice of victim participation has not positively changed the local perception of affected communities towards the Court.

Local Perception

As the main purpose of this chapter is to find the perception of affected communities towards the ICC and its work, this paragraph will examine the different findings from the field of these perceptions.

Perceptions of Accountability, Justice and Such Mechanisms

A comment on transitional justice mechanisms is that they do not inquire after what the victims or the affected communities want. The 2008 *Living with Fear* survey, attempted among others to map the needs, priorities and attitudes of affected communities, with an emphasis on eastern Congo, towards issues such as peace, justice, accountability and transitional justice mechanisms and thereby found the wishes of those most affected regarding these issues. This information of the wishes of affected communities can then be compared to the ICC action. After this comparison I will continue with mapping the perceptions found by the Outreach Unit and by external researchers visiting the field, such as Adam Hochschild, Godfrey Musila and HRW.

While one of the most mentioned statistics of this report is the fact that the majority of eastern DRC (80 per cent of the respondents) believed that justice could be achieved, only 2,3 per cent sees justice as their top priority, after peace, security and livelihood concerns such as money, education, food and water, health, employment, housing and returning home.[636] On the other hand, when asked about accountability, 85 per cent 'deemed it important to hold accountable those who committed war crimes in eastern Congo' and 82 per cent believed that accountability is necessary to secure peace.[637] Still, when asked what peace is, 'having

[635] Musila, *Monograph 164: Between Rhetoric and Action*, 52.
[636] Vinck, et al., *Living with Fear*, 23.
[637] Ibidem, 40.

justice' was only mentioned fourth in line, with 20 per cent, after 'absence of violence'(41 per cent), no more fear (47 per cent) and 'living together, untied, reconciled' (49 per cent).[638] Most respondents also favoured peace with trials (62 per cent) over peace with amnesty (38 per cent), making a better case for the ICC intervention than for the government approach to end the conflict. Still, 68 per cent of the population would forgive war criminals if it was the only way to have peace.[639] To achieve peace, respondents perceived the arrest of those responsible for crimes, however, most important (28 per cent) with a military victory only in fifth place with 17 per cent. The other mentioned options, dialogue between ethnic groups (22 per cent), with the militias (22 per cent) and establishing the truth (20 per cent), would suggest a truth commission to be an important complementary mechanism, next to prosecutions. Only 3 percent, however, perceived apologies and forgiveness to constitute justice, as opposed to 21 per cent who perceive that punishment constitutes justice, underlining an understanding of justice as being predominantly retributive.[640] As for the means to achieve justice, most of the respondents, 51 per cent, mentioned the national court system, with the ICC in the second place with 26 per cent, before the military courts mentioned by 20 per cent. Only a few respondents cited traditional justice mechanisms of as a means of holding people accountable.[641] While these findings show that justice is important to some extent, but does not necessarily appear to be a high priority for the affected communities per se, this also shows that these findings should be used carefully, as the outcome depends on the manner of asking the question.

As discussed in the comparison with the reflections of Barria and Roper, when asked about trial options to hold war criminals accountable, there was a 'clear preference for national trials (45%), followed by internationalized trials in the DRC (40%)', thereby forming a large majority (85 per cent) for trials to hold in the DRC, while international trials abroad, in which scope the ICC falls, was only supported by 7 per cent.[642] This preference for trials close to home would suggest a negative perception of the ICC trials as they are held in The Hague. On the other hand, when asked about what they thought about the Lubanga trial, only 7 per cent noted that it ought to be held in the DRC, which would assume that they more content

[638] Vinck, et al., *Living with Fear*, 36.
[639] Ibidem, 3.
[640] Ibidem, 44.
[641] Ibidem, 42.
[642] Ibidem, 2.

with any trial, even abroad, than no trial at all and was attributed by the authors to the lack of awareness that trials could be held *in situ*.[643]

Another important point is the sort of crimes that the respondents of this survey believed to be most important to be made accountable. The most frequent responses were allegedly murder/killing (92%) and sexual violence (70%).[644] While these crimes are also the most mentioned in the charges overall, they were both not part of the charges of the first case against Lubanga. Therefore, an amount of disappointment and frustration can be expected after this first case. Interestingly, while still 22 per cent mentioned forced recruitment of children as a crime that should be made accountable, it appears in the list, which is in order of importance, only after stealing cattle, displacement of populations and destruction or looting of properties.[645] So, it is important to be very cautious with these findings because of the contradicting outcomes resulting from the manner in which the question has been asked. It is therefore difficult to draw conclusions from it. What should be remembered, though, is the preference of trials being held within the DRC and the preference of peace with trials over peace with amnesty. Another point is the importance of truth and dialogue besides the arrest of perpetrators, suggesting the importance of a truth commission as a complementary mechanism. The final points are the high importance of accountability for sexual violence and the low importance of that matter for forced recruitment of children.

Perception of the ICC and its Work

As discussed victims played a role in bringing about the ICC intervention in the DRC, which would suggest a certain belief in its work and a possible intervention in the DRC. The accounts of Musila and HRW both confirm this. HRW reported that 'most people' they spoke with had felt 'great optimism and excitement at the commencement of the court's investigation'.[646] Musila speaks of high expectations and optimism:

> With respect to victims, the monograph finds that victims viewed the Court with high expectations, expressing optimism that they would finally receive justice for atrocities suffered.[647]

[643] Vinck, et al., *Living with Fear*, 48.
[644] Ibidem, 40-41.
[645] Ibidem, 41.
[646] HRW, *Courting History*, 132.
[647] Musila, *Monograph 164: Between Rhetoric and Action*, x.

However, Musila also notes that these expectations are 'rather high in view of the modest achievements that the Court may actually reach'.[648] These high expectations are not always realistic and can dissolve into disappointment when outreach activities to manage these expectations are insufficient and when the limits of the ICC's abilities become clear. I have identified a number of such disappointments, frustrations and other negative perceptions.

Slow Pace

One of the recurring questions asked in the outreach activities, was why it is all taking so long: why it was taking so long for the trial against Lubanga to start, why the trials (both against Lubanga and Katanga and Ngudjolo) are taking so long and why the Court waited so long to begin investigations in North and South Kivu, revealing disappointment and frustration.[649] HRW also found a 'general sense of frustration regarding the slow pace of investigations and prosecutions'.[650] In addition, Musila found that 'in general victims have lamented the slow pace with which the ICC's judicial processes are proceeding'.[651]

Next to this general sense of frustration regarding the slow pace of the Court's work, frustration was also expressed specifically on the numerous delays in the trials. This occurred for the first time with the ordering of the stay of proceedings and the release of the accused on 16 June 2008. HRW reported on this event: 'The Trial Chamber's decision has caused significant confusion and disappointment among affected communities in the Ituri district of northeastern Congo, who were anxiously expecting the beginning of Lubanga's trial'.[652] Questions asked during outreach activities also reflect this confusion and disappointment. In 2008 questions on the Lubanga case focused on why the Court imposed a stay and whether it was imposed because of a lack of evidence, thereby doubting his guilt.[653] Again, this underlines how important outreach is.

The 2009 outreach report acknowledged such disappointment in relation to the delay in the Katanga and Ngudjolo trial by stating that '[a] general feeling of disappointment came through in questions about why the trial was postponed and why the whole process seems to be taking so long'.[654] In 2010, when the trial against Lubanga was stayed again, another wave of confusion and frustration occurred as one of the FAQs in outreach activities was: 'Why is

[648] Musila, *Monograph 164: Between Rhetoric and Action*, x.
[649] *Outreach Report 2008*, 41; *Outreach Report 2009*, 39 and 40.
[650] HRW, *Courting History*, 133.
[651] Musila, *Monograph 164: Between Rhetoric and Action*, 52-53.
[652] Human Rights Watch, 'The Status of the ICC Trial of Thomas Lubanga' (12 November 2008) online available at: http://www.hrw.org/node/79857, last retrieved on 19 August 2011.
[653] *Outreach Report 2008,* 41.
[654] *Outreach Report 2009*, 38.

the Court complicating things by announcing Mr. Lubanga's release twice now, without ever actually releasing him?'.[655] The 2010 outreach report also found that 'frustration was expressed about the decisions on Mr Lubanga's release, neither of which actually culminated in his actual release'.[656] So, the affected communities perceive the ICC's work as slow and have expressed disappointment and frustration on this slow pace and the many delays frequently.

Narrowness: Case Selection

Furthermore, much of the frustrations and disappointments concern the case and charge selection of the Court and the narrowness of these selections. HRW also concluded that 'many of the concerns among affected populations' that they encountered related to the prosecutorial strategy for case and charge selection, which they attributed to the fact that during their research this was the 'most visible "marker" for affected communities of the ICC's work'.[657] These concerns, included the focus on Ituri, the earlier mentioned assumed targeting of only one community in Ituri, the assumed targeting of lower ranking perpetrators while high ranking perpetrators go unpunished, the exclusion of perpetrators from neighbouring countries and the narrow charges in the cases of Lubanga and Ntaganda.

The first frustration on case selection is the initial focus on Ituri while crimes were committed in other provinces as well. The 2010 outreach report even still reported on this: 'Frustration continued as to why the Court seems to have States arresting and surrendering only people from Ituri, whereas alleged criminals from other parts of the DRC appear to enjoy immunity'.[658] One of the FAQs was for example: 'Why has the Court only arrested Iturians and not other Congolese who have also committed crimes?'.[659] Even when the ICC expanded its investigation to crimes committed in North and South Kivu, a frequent question became: 'Why has the Court waited so long to begin investigations in North and South Kivu, where people have been getting killed for such a long time?'.[660]

As discussed earlier, in the beginning, it was also perceived that the ICC was 'just targeting one single community in Ituri', because only a Hema militia leader was pursued by the Court.[661] HRW found in 2007 that there was a strong perception of selective justice within

[655] *Outreach Report 2010*, 33.
[656] Ibidem.
[657] HRW, *Courting History*, 131-132.
[658] *Outreach Report 2010*, 33.
[659] *Outreach Report 2010*, 33.
[660] *Outreach Report 2009*, 40.
[661] *Outreach Report 2007*, 23.

the Hema community.[662] In that year, many questions were asked on whether the ICC is biased.[663] The *Living with Fear* survey also found in 2007 that '[p]erceptions of a lack of neutrality or impartiality are an issue for the ICC' as '[n]early one third (28%) of respondents believed the ICC was not neutral because it did not do anything to help (27%), worked with the government (24%), was only after one ethnic group (14%), or did not arrest the criminals (12%)'.[664]

Moreover, affected communities also expressed frustration about the fact that so far, the ICC has only targeted Africans. Adam Hochschild witnessed this during an outreach activity when one of the former child soldier participants asked: 'What about those who killed Saddam Hussein? (…) Why are they not at The Hague?'.[665] In addition, one of the FAQs in 2010 was, according to the 2010 outreach report, why there is still no arrest warrant for a non-African.[666] Musila also identified such frustrations and allegations on partiality for this matter, but attributed them to the media as will be discussed later.[667]

Another issue of frustration relating to the case selection was the perception that the ICC only pursues lower ranking perpetrators, while high ranking perpetrators, within Congo, within the Congolese government, and from neighbouring countries, appear to enjoy immunity. This first concern is related to the impunity as a result of the Sun City agreement that established the transitional government in which high level perpetrators were given high positions and the DDR programs for militia leaders they applied later to achieve peace in eastern Congo. Musila, for example, stated that some victims 'expressed concern about why the ICC seems to "target only the small people" while the high-ranking members of the Congolese political class, who were once antagonists during the war, still walk free'.[668] Hochschild experienced the second form of impunity during one of the outreach activities he attended. A Lendu man who's wife and children were raped and murdered in front of him because she was a Hema by Peter Karim and his men of the FNI, with whom, soon after this experience, the government struck a peace deal in which Karim was made a colonel in the Congolese army, said: 'whenever I see him on television, I tremble again. Why is he a colonel?'.[669] Hochschild reflected on this as follows:

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[662] HRW, *Courting History*, 52.
[663] *Outreach Report 2007*, 23 and 56.
[664] Vinck, et al., *Living with Fear*, 48.
[665] Hochschild, 'The Trial of Thomas Lubanga', 80.
[666] *Outreach Report 2010,* 34.
[667] Musila, *Monograph 164: Between Rhetoric and Action*, vii, 2 and 58.
[668] Musila, *Monograph 164: Between Rhetoric and Action*, 53.
[669] Hochschild, 'The Trial of Thomas Lubanga', 80.

> No one has a good answer for him, and his question hangs in the air, not only indicting the government's attempt to gain peace here by incorporating warlords, but clouding the very idea of justice itself. For even if those who raped and killed his family could be brought to trial, as Ngabu so desperately wants, no such grief could be assuaged or horror undone.[670]

Another example is the frequently asked question on why Laurent Nkunda has not been indicted by the Court.[671]

During a week in Ituri, Hochschild encountered more frustration with the Lubanga trial. One critic noted, for example that '[t]he ICC has taken the small fish (…) leaving the big fish because they're in positions of power'.[672] Those big fish, Hochschild 'would include generals and cabinet ministers from Uganda and Rwanda whose support of the militias here [in Ituri] did much to prolong and intensify the fighting, while their countries helped themselves to Ituri gold'.[673] The fact that the ICC has not pursued these big fish of neighbouring countries, Hochschild attributes to the fact that both regimes are 'big favorites of the United States' and that the ICC 'in choosing whom to indict (…) has trod carefully to avoid antagonizing the U.S.'.[674] HRW also found, as mentioned in the previous chapter, that many in Ituri that they interviewed, said that 'in order for justice to be achieved, the court must pursue accountability for those who supported militia groups in Ituri', which includes high ranking officials in Uganda and Rwanda.[675] As it is apparently the wish of many to hold them accountable, not doing so will diminish the perception of these people towards the Court and thereby diminish its credibility.

A final point of disappointment in the selection of cases and charges, are the limited charges brought against Lubanga and later also Ntaganda. One of the FAQs of the outreach activities as reported in the 2007 outreach report was for example: 'Why hasn't Lubanga been prosecuted for the more serious crimes that these militias committed: murders, rapes, pillaging, etc.?'.[676] Furthermore, during field research of HRW in Ituri, 'civil society representatives, community leaders, and foreign observers there expressed (…) disappointment and disbelief that the [P]rosecutor had at that time only brought charges in relation to the enlistment, recruitment, and use of child soldiers' against Lubanga.[677] As noted

[670] Hochschild, 'The Trial of Thomas Lubanga', 80.
[671] *Outreach Report 2009*, 40; Musila, *Monograph 164: Between Rhetoric and Action*, 53
[672] Hochschild, 'The Trial of Thomas Lubanga', 80.
[673] Ibidem.
[674] Ibidem.
[675] HRW, *Courting History*, 60.
[676] *Outreach Report 2007,* 23.
[677] HRW, *Courting History*, 63.

earlier this later also affected the perception that the Lendu, whose indicted militia leaders were charged with more and weightier crimes, carried a larger burden of the guilt than the Hema.

Similar disappointment was experienced after the arrest of Bemba for crimes committed in the CAR. The question why Bemba had been arrested 'for crimes committed in the CAR only' was one of the FAQs mentioned in the 2008 outreach report.[678] Especially, because such a 'high-profile arrest' renewed victims' belief that 'the ICC could still be expected to bring justice to many of them':[679]

> The fact that the ICC has obtained custody of such a high-profile individual, who cast a wide shadow on Congolese political and social life, has raised hopes among victims that the ICC can indeed bring to justice perpetrators of crimes.[680]

However, Musila also found that while some were excited about his arrest, others remained sceptical and were not comforted by the mere fact that Bemba was in custody, 'believing that, somehow, Bemba will find a way to escape being tried', probably, Musila noted, because his arrest came 'just after the ICC had ordered Lubanga's release'.[681] His arrest also caused an uproar in the media and confusion among victims, as he was an official Senator at the time of his arrest.[682]

Expectations versus the Actual Abilities of the Court

Then, there have also been some disappointments, expressed in the outreach activities and described in the outreach reports that are related to unrealistic expectations of the abilities of the Court, others than the ones mentioned above. One of the FAQs in 2007 for example was: 'The enlistment of children in the armed forces and armed groups seems to be continuing. What is the ICC doing about it?'.[683] This reveals an unrealistic expectation that the task of the ICC is literally and without doubt to stop the crimes. The *Living with Fear* survey found in that same year that of those who had heard about the ICC, '[o]ver three quarters believed it had the power to arrest suspected criminals (77%), the belief being strongest in Ituri (84%)'.[684] Such believes account for the disappointments found.

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[678] *Outreach Report 2008,* 41.
[679] Musila, *Monograph 164: Between Rhetoric and Action*, 51.
[680] Ibidem, 56.
[681] Ibidem.
[682] *Outreach Report 2008,* 41; *Outreach Report 2009,* 39; *Outreach Report 2010,* 33-34.
[683] *Outreach Report 2007,* 23.
[684] Vinck, et al., *Living with Fear*, 48.

Similar disappointment surfaced when the arrest warrant for Bosco Ntaganda was in 2009 officially and publicly ignored. These three FAQs reflect this:.

> • Isn't it contradictory that the DRC government invited the Court to investigate and now refuses to arrest Bosco Ntaganda in the name of peace?
> • Why can't the ICC ask MONUC to arrest Bosco Ntaganda since the DRC government won't?
> • How can the Court let a suspect roam free when they know exactly where he is? (This refers to Bosco Ntaganda, currently in Goma, North Kivu, for whom a warrant of arrest has been issued by the ICC.) [685]

More of such questions were asked in relation to the situation in Darfur and the arrest warrant of Sudanese President Al Bashir, but also relate to the situation of Ntaganda in the DRC:

> • If State Parties do not cooperate in arresting suspects and the ICC does not have its own police force, how is the ICC going to arrest anyone?
> • What can the ICC do about a State Party that refuses to arrest a suspect in its territory when there is a warrant of arrest? [686]

These FAQs reveal the disenchantment of victims with the Court after their expectations proved to be high and unrealistic, similar to the earlier disappointment on the field of victim participation. Musila came to the same conclusion on the disappointment he had encountered: 'The current disappointment among victims seems to be informed by the fact that, initially, they (victims) pinned all their hopes on the Court to deliver justice in the absence of other viable avenues in the DRC'.[687] These hopes should have been contained through early and efficient outreach activities.

Other Layers of Society

While the above findings have focused on the perceptions of victims and affected communities, Musila has also investigated the perceptions of the ICC's involvement in the DRC in other sectors of the Congolese society besides victims, namely the government, civil society and independent commentators, including the media, and African commentators at continental level.[688] Although I chose to focus on victims and affected communities, these other sectors are either to a certain extent part of the affected communities or can influence

[685] *Outreach Report 2010*, 33.
[686] Ibidem, 34.
[687] Musila, *Monograph 164: Between Rhetoric and Action*, 51.
[688] Ibidem, 33.

their perceptions and their evaluation can thus add interesting insights to this debate. They will therefore be shortly evaluated here.

Musila found that in essence the government fully supports the Court and believes that the Court plays an important role, not only in ending impunity or bringing justice for victims, but also in 'sending a message to those who are still actively involved in armed conflict and various forms of violence that they have to choose the path of peace'.[689] This is in fact, Musila suggests rightly, assigning too much responsibility to the ICC or putting the expectations too high, as the victims have done as well. So when these expectations proved idle, this left the government frustrated as it had then also lost its option of offering amnesties to gross human rights violators in order to achieve peace. This disappointment of the government as a result of unmanaged high expectations is thus very similar to those of victims mentioned earlier. Moreover, Musila found that on the issue of cooperation the government had underestimated its own contribution and that 'the shortfalls in the capacity of law enforcement agencies (…) have elicited negative sentiment from these agencies whose members feel "burdened" by a "demanding" court'.[690] As discussed, Mattioli and Van Woudenberg added to this that national judicial officials expressed 'disappointment and frustration' that cooperation was only 'one way'.[691] Moreover, it is also a strong wish of the affected communities, according to the 2007 *Living with Fear* survey, that the international community helps domestic courts.[692]

Civil society has been crucial for the ICC's work in campaigning for the referral, in raising awareness and mostly in their contact with victims. Its perception is thus important for the Court and for this examination of the local perception. On civil society, Musila found that 'the initial high expectations were lowered over time'.[693] The NGOs expressed frustration about the initial low profile of the Court, the failure to provide them with relevant information, making them uncertain about what to tell to victims, especially regarding victim participation'.[694] Because of this 'perceived reticence', together with disappointment of the earlier mentioned unanswered and perhaps unrealistic expectations of receiving funding from the ICC in order to facilitate their contributions to achieving the ICC's objectives, Musila found that 'many seem to have lost enthusiasm for the Court and its work'.[695]

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[689] Musila, *Monograph 164: Between Rhetoric and Action*, 65.
[690] Ibidem, 46.
[691] Mattioli and Van Woudenberg, 'Global Catalyst for National Prosecutions?', 58.
[692] Vinck, et al., *Living with Fear*, 46-47.
[693] Musila, *Monograph 164: Between Rhetoric and Action*, 49.
[694] Ibidem, 48.
[695] Ibidem, 48-49.

The media, Musila found, are critical of the Court's work in Africa and the DRC 'in particular'.[696] They suggest that the ICC is selective and 'has been used for partisan purposes in the DRC' and claim that the ICC 'seems to have an eye for perpetrators in Africa and not elsewhere'.[697] These are perceptions that seem to be reflected in the perceptions of victims and affected communities, confirming the importance of outreach targeted at the media. Especially since some NGO representatives, Musila reports, 'suggested that the limited and speculative reporting on ICC issues is perhaps attributable to the fact that the Court has not been very visible on the ground'.[698] So, while the media are generally critical towards the ICC's work, this most probably influences the perceptions of victims and affected communities which once again underlines the importance of sufficient outreach, including to the media as this is attributed as one of the reasons for the negative perception.

All these concerns, perceptions, frustrations and disappointment, together with the earlier mentioned concerns on the remoteness and the independence and impartiality of the Court described in the paragraph on Barria and Roper's reflections, provide a picture of the local perception. This picture shows that there were high (and unrealistic and unmanaged) expectations and enthusiasm in all layers of society at first, but disappointment and frustration on all sides too after the ICC's intervention started to take shape.

Conclusion

Although the ICC has only two objectives, I thought it would also be very valuable and important to examine the local perception in determining the Court's effectiveness. The comparison with the Barria and Roper's reflections on the contribution of the ICTY and ICTR on national reconciliation, although not the aim of this chapter, revealed already some insights into this perception. First, the credibility of the Court has been affected by its relationship with the DRC, because the Congolese authorities refuse to arrest Ntaganda, because these authorities are disappointed with the limited effect of the ICC's intervention and frustrated about the opportunities it has left them with, and because they are disappointed with the one-sided cooperation between the two. In addition, it appeared that the Congolese population might perceive the ICC as being too remote. Furthermore, it does not appear that in the situation in the DRC all sides feel that justice is being achieved, because it took so long after the first arrest before another arrest warrant was issued for someone of the other side. This

[696] Musila, *Monograph 164: Between Rhetoric and Action*, 57.
[697] Ibidem, 57-58.
[698] Ibidem, 58.

time and the limited outreach during that period, led to rumours and misperception that needed much work to be repaired.

The outreach that was used for this started late and was implemented slowly, despite the experience of predecessor Courts that outreach should start early, in order to avoid high expectations and misperceptions taking root. Moreover, it mistakenly first focused primarily on educated elites, instead of the populations most affected, and for long applied a didactic, one way approach, instead of an interactive and receptive conduct. Although outreach reports show an improvement in activities, outreach, awareness and contentment with the Court, much is still to be learned and done as other reports and the current perception point out.

While scholars have praised the possibility of victim participation at the ICC, it has not necessarily brought the sense of ownership to the affected communities: awareness is low, while frustration on the long process of application and disappointment on the number that can participate and the role that they fulfil is high. Moreover, problems occur with intermediaries who are not informed enough and sometimes even believe it necessary to pay victims to encourage participation, feeding the perception that the Court is trying to "buy" victims. They are frustrated with the lack of training or financial support, given the risks, and actual threats, they face. While some remain optimistic and emphasize the influence victims have had on the process by bringing about the investigations or by reminding the Court of its purpose, I wonder to what extent affected communities are aware of that success. Rather than improving the local perception, victim participation has thus been yet another source of disappointment and dissatisfaction.

Initial enthusiasm and high expectations – that were not managed by the late and low profile outreach – have caused disappointment in all layers of society, including the government, civil society, victims and the media, who were sceptic from the start. Disappointment, dissatisfaction and frustration among victims and affected communities were results of the low profile of the Court in the beginning of its investigations, the remoteness of the Court, the slow speed of investigations and trials, the delays in the trials, the focus on Ituri, the targeting of only one community there (before the second arrest warrant), the pursuance of militia leaders only (as opposed to government officials from Kinshasa, Kampala and Kigali), the focus on situations and perpetrators in Africa, the limited charges brought against Lubanga and Ntaganda, that Bemba was only charged with crimes committed in the CAR (especially since his arrest brought back hopes), the Court's inability to stop the crimes and its inability to arrest, or have the government, arrest Ntaganda. The government

and civil society are likewise disappointed in the Court after (too) high expectations and are furthermore dissatisfied with the cooperation with the Court.

Despite all this negativity, and for good reasons, I do believe that the affected communities are to some extent content that at least *something* is happening. I base this belief on the fact that after the outreach activities in 2008 72 per cent of the participants expressed contentment with the Court. Moreover, even though this survey only included participants of such activities who do not represent the whole society, it is generally acknowledged that there was initial enthusiasm in the DRC. Although the practice of the Court has brought disappointment on their high expectations, they do not seem to be rejecting the ICC and its work entirely. The finalising of the first case and conviction of the first perpetrator might reinstall some of that enthusiasm and improve the perception of the Court. Still, my conclusion remains that the local perception is negative now and that outreach needs to be improved.

Conclusion

In this research I have attempted to find to what extent the ICC has been effective in the situation in the DRC, by examining its effectiveness in achieving its two objectives of ending impunity and contributing to the prevention of crimes and by additionally examining the affected communities' perception of it. From these examinations I can conclude that the ICC has performed moderately to poorly in all three fields.

Judicial Progress

The ICC has not ended impunity, as no trials have been finished yet and even if Lubanga will be convicted impunity will only be partially ended as just a limited set of crimes and a narrow context of the conflict will have been addressed. While successes appear to have been achieved in a relatively high apprehension and extradition rate, they were ensured at the expense of the range of charges brought against Lubanga and Ntaganda and the strict concept of complementarity, and thereby lose much of their worth.

These limited charges brought against Lubanga, and to a lesser extent Ntaganda as he remains at large, is the first of the two main causes for the ICC's ineffectiveness in the DRC. The limited charges haunt the OTP and the ICC in consequence, as this strategy to ensure Lubanga's arrest has affected the extent to which impunity will be achieved, has prevented the positive impact of awareness to reach other crimes, such as sexual violence, has unbalanced the two sides of the Ituri conflict, has negatively affected the truth, has left aside one entire side of the conflict and has disappointed victims and civil society alike, affecting the local perception. The only positive effect is that it has ensured the effect of raising specific awareness that enlisting, conscripting and using child soldiers to actively participate in hostilities are serious war crimes that will not go unpunished.

The second main cause of the ICC's ineffectiveness in the DRC is the sole focus on Congolese militia leaders. One of the points of scepticism in the debate on the ICC's effectiveness was the possibility of its starting frivolous and politically motivated cases. The ICC's experience in the situation in the DRC reveals that to some extent this first scepticism is justified, because although the leaders of militias have been indicted, they do not represent the central cause of the conflict. Militia leaders have been pursued instead of the planners and financiers. This is especially alarming since only a few can be prosecuted by the Court, making it extra important that these few represent the greatest causes of the conflict.

Moreover, affected communities are found to be disappointed in these indictments of what they perceive as merely the 'small fish'. Some have even expressed that in order for justice to be achieved, the OTP must hold those who financed the militias accountable. In addition, the limited charges of Lubanga failed to recognise the international nature of the conflict. This scepticism thus appears to be justified so far.

Both failures have, moreover, led to perceptions of the Court's partiality and weakness, underscoring doubts of scholars of politicization. While there is no proof of politically motivated investigations and prosecutions, Kabila's referral, the arrest of his political opponent Bemba and the absence of cases against the government side of the conflict, do create the appearance of it. This says, however, perhaps more about the failing outreach of the Court, than of the actual politicization of it. The absence of cases against government officials that appears to be motivated by an attempt to avoid antagonizing the government and ensuring its continued support, does seem to validate, however, the argument that tribunals are unable to check the power of governments because their cooperation is needed. While this is not certain, the refusal of the Congolese government to arrest Ntaganda does seem to confirm its opportunism. As the perception of partiality can harm not only its local but also its international credibility and thereby endanger its legitimacy and international support, the ICC should be very cautious in appearing partial. It is therefore essential that the ICC investigates the government side of the conflict as well if the judicial reality, whether they are indeed among the most responsible of the most serious crimes, allows it.

The pace of the proceedings, furthermore, leaves much to be desired for. Allegations that tribunals are ill qualified as instruments of transitional justice because they are lengthy and slow, are also justified in this situation as trials are taking long and are perceived as slow which has disappointed the affected communities. The delays that occurred were the result of the prosecutorial mismanagement, disregard for rights of the accused and in the words of one of the single judges: 'reckless' investigative techniques. Because of the difficult security situation attached to investigating in an ongoing conflict, the prosecution has relied too much on external confidential material and intermediaries, making it dependent on these sources during the process, and has conducted too little independent investigations. Its misconduct in refusing the Court's orders and its argumentation for it can, moreover, be described as arrogant.

Deterrence and Peace versus Justice

As mentioned in Chapter 1 Moghalu noted that this slow pace can raise questions about the deterrent effect of trials, which considering the performance of the Court in contributing to the prevention of crimes, appears to be true as well. Indeed, the ICC has to date, as far as I could determine with the information available, contributed only very little to the prevention of crimes in the DRC. The ICC did raise awareness that crimes committed in the course of war can and will be prosecuted and especially that conscripting, enlisting and using children in armed conflict – not previously considered as a (serious) crime and therefore committed as common practice – are in fact serious human rights violations. There was little evidence, however, that this awareness had actually led to the prevention of such crimes, as recruitment continued and related to surges of violence as normal. The awareness did affect the behaviour of perpetrators, but this rather constitutes a negative side effect, as it encouraged perpetrators to hide the evidence of their complicity, to obstruct demobilization and integration processes of child soldiers and attack children's rights workers. Only in a few cases this has actually led to demobilization (constituting the very little contribution to the prevention of crimes the ICC did make). Re-recruitment remained common practice, though, and it is not certain that those who yielded to the threat of an ICC prosecution did not relapse into committing crimes.

Regarding the deterrence argument, it can be concluded therefore that the ICC's action did have an effect on the cost-benefit rational of perpetrators by raising the costs of crimes, but it did not make them stop the crimes, but merely hide the evidence. Furthermore, the short endurance of this impact, perhaps caused by the fact that the Court's power proved not so great as for long no others were arrested and Lubanga was not convicted, might make the argument that the certainty of prosecution of the ICC is too low to deter violations of international criminal law plausible. The idea on which Akhavan and Rodman actually agreed, that once mass violence has erupted threats of punishment can do little to achieve immediate deterrence, seems to be confirmed. This inability might, however, also be a result of its failings in its practice to end impunity and have expeditious trials. Akhavan's arguments in favour of the ICC's ability of deterrence through stigmatization, international isolation, eroding political and military influence and drawing international attention to situations long forgotten do not seem applicable in this situation.

As the Lubanga case that had such a visible effect on the situation, was limited to crimes on child soldiers only, it missed the opportunity of affecting other crimes as well. This is especially regretful for crimes of sexual violence as they still increase, are normalized, spread to civilian life and terrorize even peaceful regions. Moreover, they are the second most important crimes that should be hold accountable according to surveyed affected

communities. While the ICC's presence has positively affected the rise of national prosecution of gross human rights violations, this too has hardly indirectly contributed to the prevention of crimes as experience, as their performance is weak with still a limited amount of trials that often do not meet the criteria of a fair trial and with large escape and corruption rates.

The two main reasons why the ICC has not had any significant impact on the conflict in the DRC and has thereby not been very effective so far, is that OTP has not started any cases concerning the illegal exploitation of national resources and the financing of militias. As natural resources have been the motivator as well as the financing source behind the conflict, the ICC will not significantly contribute to the prevention of crimes until it has addressed the actors that make the fighting possible by providing the money in exchange for resources, as Moreno-Ocampo acknowledged himself. The second reason is that it has not indicted any perpetrators from the side of the government, specifically of the state security forces, who are among the main perpetrators of sexual violence crimes and the illegal exploitation of resources.

However, the conclusion was also that the ICC did not impede peace or exacerbated the violence. The ICC appeared to have acted cautiously in order to avoid jeopardizing the fragile stability and peace. The ICC also did not remove leaders needed for the stability, as most notably Bemba had already lost most of his political power. Furthermore, there is no evidence that the Court's work caused a backlash of violence. The obstruction of children's rights workers was the only negative effect that appeared, besides the tendency of perpetrators to hide their evidence, but it merely made their demobilization work more difficult, rather than intensifying the conflict itself or the violence among warring parties. The imbalance in prosecution of the two rival ethnic groups did not fuel ethnic violence either, but merely affected the perception of the Court's impartiality and the perception of the truth. This last point could in the future still cause ethnic tensions, but at the present there is no reason to believe it will. Successful outreach and additional transitional justice mechanisms designed to provide dialogue might avoid it.

Only the arrest of Ntaganda was perceived by the Congolese authorities as conflicting with the peace. The fact that the ICC was unable to deter the violence as it had hoped left the government frustrated as it could now not legitimately turn back to its old policy of offering positions in the army accompanied by amnesties. It would thus seem that the ICC did impede the peace here. However, what was also found in this research, is that amnesties have not brought peace, or provided incentives to stop the violence, in the past. In fact, integrated

rebels continued to commit crimes once integrated into the army and the amnesties that accompanied their integration only provided an incentive for others to start, or continue, fighting in order to strengthen their negotiating position and gain political or military power. The amnesties, therefore, are the real incentive to violence and thus, the ICC does not stand in the way of peace by obstructing the use of amnesties. In fact, since the intervention, the threat of an ICC arrest has been used as an extra tool in negotiations. Moreover, the ICC stepped aside shortly during the Goma peace agreement to avoid obstructing its signing.

So, the findings of this research invalidate the arguments of opponents of international tribunals' intervention that they impede or exacerbate conflict by taking away the incentive to stop the violence, by providing an incentive to continue fighting or by provoking a resumption of violence or fuelling ethnic tensions. On the other hand, justice, although not achieved yet, has not really deterred violence or created peace either. This would validate for now the scepticism of the ICC's effectiveness for having a limited impact on the occurrence of international humanitarian law violations.

So, while the ICC's contribution to the prevention of crimes is extremely minimal and sometimes has a counteractive effect, there is potential for the future, if the strategy is moved in the direction of the prosecution of the illegal exploitation of natural resources and expanded to include the government's share in the violations.

Victims and Affected Communities

The accusation that transitional justice mechanisms do not take into account what the affected communities want or that retributive justice and tribunals are at odds with local values and traditions, does not really apply to this situation. Although no surveys were conducted before the ICC intervened, it started its investigations on the basis of information received from victims and the survey *Living with Fear* conducted in 2007 found a predominant support for retributive justice as, among other statistics, people preferred peace with trials over peace with amnesty. This undermines Cobban's believe that victims would be satisfied with amnesties, although a majority would forgive war criminals if it was the only way to achieve peace. While they also strongly preferred domestic trials over the ICC or international tribunals abroad, their trust and faith in the domestic judicial system is low and they are concerned about its ability to provide justice in a proper manner. Although victims would prefer that the ICC would help the domestic judiciary to gain that ability or that the ICC would hold trials in the DRC, it was the Congolese government that withheld the ICC of holding its trials *in situ*.

The argument against international tribunals for their constituting western dominance is also not applicable in this situation as the DRC referred the situation itself.

Other points of concern and criticism towards tribunals as instruments of transitional justice regarding victims were that they do not provide the ability for victims to tell their story or that they overlook the victim's need for restitution and reconciliation. The former does not seem to be applicable to the ICC, as the possibility of victim participation gives them the opportunity to present their views and concerns. However, only a limited number of victims can participate in the proceedings, despite expansion of the criteria, and their opportunity to express these views and concerns depends on the Court's judgement of its appropriateness. Moreover, victims seemed dissatisfied with the practice of victim participation at the Court. To some extent the ICC's practice thus seems to underline this point. The other accusation, of tribunals overlooking the victim's need for restitution and reconciliation, is not validated as the ICC provides, as a first international tribunal in history, for both the participation of victims and the possibility of reparations. It is this balance between retributive and restorative justice, the ICC believes, that will enable the ICC to not only bring criminals to justice but also to help the victims themselves rebuild their lives. Whether the ICC can actually heal and reconcile communities is another criticism of which this research cannot determine its accuracy as it intended to investigate its effectiveness in the objectives of its mandate and its perception by affected communities.

Establishing the truth or creating a historical record, appears to be problematic for the ICC as the realities of judicial capabilities make it impossible to prosecute more than only a few and have caused the limited charges in the cases of Lubanga and Ntaganda, which has altered the perception of the truth as people started to believe that the Lendu, charged with more and more serious crimes, were indeed more brutal. As such it can be concluded that the ICC is indeed ill qualified to establish the truth, especially in the short term. Furthermore, the fact that only militia leaders and no financiers or individuals of the elite networks have been pursued, would make it appear as if militia leaders are the cause of conflict, while they actually are only to a lesser extent. The experience of the ICC thus validates the argument that tribunals are ill qualified to establish the truth or create a historical record. This is alarming in the situation in the DRC, as most people perceive according to the *Living with Fear* survey that justice means establishing the truth. This underlines the need for additional transitional justice mechanisms.

So, some criticisms of (international) tribunals as instruments of transitional justice can be viewed as true with the findings of this research, notably the length of trials, the

inability to let victims tell their story or the ability to establish the truth or a historical record. Others, however, are unfounded in regard to the ICC. These include the ideas that tribunals do not take into account the desires of victims, that they conflict with local justice values and efforts, that they are a form of western dominance or that they overlook the victim's need of restitution and reconciliation. As these mostly concern victims and are countered by the ICC innovative role for victims, these are, however, not necessarily applicable to tribunals in general.

That does not take away that the local perception of the ICC and its work is dominated by disappointments, dissatisfactions and frustrations, and is therefore quite negative at the time. While initially there was enthusiasm and high expectations in all layers of society, the practice of the Court changed these into disappointments and frustrations. This was the result of the slow speed of investigations and trials, the delays in the trials, the focus on Ituri, the targeting of only one community in Ituri, the pursuance of militia leaders only (as opposed to government officials from Kinshasa, Kampala and Kigali), the focus on situations and perpetrators in Africa, the limited charges brought against Lubanga and Ntaganda, the fact that Bemba was only charged with crimes committed in the CAR, the inability of the Court to stop the crimes and the inability to arrest, or have the government, arrest Ntaganda. The initial and intentional low profile of the outreach partly caused this negative perception as it enabled misperceptions and (unrealistic) high expectations to take the lead. The improvements in outreach, although they are starting to show effects in increased awareness and contentment with the Court, were unable to change the negative general perception to a positive one. Victim participation did not positively influence the local perception either, but rather added to the list of disappointments and frustrations because of its limited role and the limited number of victims that can participate. The finalising of the first case and conviction of the first perpetrator might reinstall some of the initial enthusiasm and improve the perception of the Court. In fact, the conviction of the first accused will have an effect on all three of these fields.

This research also concludes that complementary policies to rebuild the judiciary, the economy and society, and other transitional justice mechanisms, such as a TRC, are essential in the DRC, because the ICC does not have the objective of reconciliation – even though it is believed by itself and others that it might; because the desires of the affected communities include finding the truth and starting a dialogue with militias and ethnic groups; because the priorities of the Congolese people constitute peace and security, which the ICC is not

particularly bound to bring; because their other priorities are more materially bound; and finally because the ICC can prosecute only the most responsible of the most serious crimes.

In short, this research finds that the ICC is largely ineffective in the DRC mostly due to the mistake of bringing on limited charges in its first cases and not persecuting perpetrators of illegal exploitation of national resources, of neighbouring countries and of the government's ranks. This validates some of the scepticism of the effectiveness of the ICC in theory and to some extent the scepticism of (international) tribunals as effective instruments of transitional justice. In regard to the peace versus justice debate, this research finds that justice can be pursued without jeopardizing peace or peace negotiations, but ongoing conflict does make it more difficult to achieve that justice.

Transitional Justice

The main criticism on transitional justice I found – that it appears to be actively pursued by governments, international organisations and NGO's, while there is no proof that it works or is necessary – cannot be hold against the ICC, as Congolese authorities referred the situation to the ICC themselves. Their main reason to do so, the expectation that it would help end the atrocities and bring peace was, however, too high. The government was also persuaded by intense international pressure, which would show the preference of the international community for transitional (and retributive) justice. This preference is what Fletcher, Rowen and Weinstein questioned, because the lack of proof for its foundation. This lack of foundation may have been the case here as well, as there was no proof that ICC's interventions work, as it had not started any investigations at the time. The reasoning of both might be similar to the situation of Darfur to do something rather than nothing and casting the responsibility to resolve the conflict on to someone else. The idea that the ICC would bring peace underlines Bell's point that the problem with transitional justice is that it straddles three different conceptions. Unless all parties agree on what the ICC can and should do and who or what purpose it serves, the ICC will never be effective. I would like to repeat that as long as the Court is supposed to serve all the conceptions of transitional justice, it will never be possible to be considered effective. If this research would have found that the ICC had been effective in ending impunity for those most responsible of the most serious crimes and had contributed to the prevention of crimes, it would still depend on the conception of what transitional justice is and what its purpose is whether we can conclude that transitional justice works.

In Chapter 1 I noted that if the ICC would prove to be effective in ending impunity and contributing to the prevention of crimes, the use of transitional justice might be called legitimate as the success in one situation would be enough reason to try transitional justice in other cases. While the opposite appears to be true at the moment, this knowledge is insufficient to dismiss the legitimacy of transitional justice at once, because this process is still ongoing and can hold some positive change as the ICC will most likely have prosecuted and convicted up to four accused in the near future, and because the Prosecutor has announced that the OTP plans to bring a case against those who organized and financed militias active in the DRC.

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