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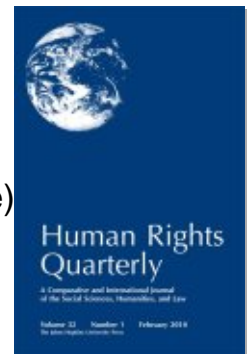
## **What is Global Justice and Who Decides?: Civil Society and Victim Responses to the International Criminal Court's First Investigations**

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# What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations

Marlies Glasius\*

## ABSTRACT

As a new institution, the International Criminal Court needs to gain legitimacy not just with states, but also in global civil society. This article surveys current debates in civil society about whether the interests of the victims are being served and whether justice is being done, in relation to the ICC's current investigations. It will discuss the most salient sources of debate and controversy under four headings: perceived selectivity or even bias of the Court, whether ICC investigations are detrimental to peace-building efforts, the detachment of the Court from the lived reality of local populations and victims, and the issue of compensation to victims.

## INTRODUCTION

The successful negotiation of the statute for an International Criminal Court in 1998 gave rise to some extraordinarily utopian end-of-millennium comments by cosmopolitan-minded politicians, activists, and academics. UN Secretary-General Kofi Annan called it "a gift of hope to future generations, and a giant step forward in the march towards universal human rights and

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the rule of law."<sup>1</sup> Bill Pace, coordinator of the NGO Coalition for an ICC, predicted that the "ICC will save millions of humans from suffering unspeakably horrible and inhumane death in the coming decades."<sup>2</sup> Judged against these benchmarks, the Court was bound to fall short. Its existence has not spelled the end of impunity everywhere, nor has it brought solace to victims of human rights violations around the globe.

Nonetheless, it is an unprecedented institution, and the actions of the different organs of the Court are having a social and political impact on the situations on which it focuses. As I have argued elsewhere, while the ICC could not have been established without the support of states, it is a creation of global civil society.<sup>3</sup> As such, it needs to work much harder than national courts to gain legitimacy. In each of its early cases, it will be not just the suspect but also the Court itself which is on trial. This battle for legitimacy takes place again in the realm of global civil society. Elsewhere I have discussed at length the definitional debates surrounding the concept of global civil society, and the appropriateness of using this term in relation to an international legal institution such as the ICC.<sup>4</sup> For the purposes of this article, the term is applied empirically: actors in global civil society include international and local human rights groups, tribal and religious leaders, victims' organizations, lawyers, researchers, aid workers, and journalists who have voiced their opinions on the ICC.

This article discusses the debates currently raging amongst these actors in global civil society about whether the interests of the victims are being served, and whether justice is being done, in relation to the current indictments. The nature of these debates will provide some clues as to the benchmarks by which the Court's legitimacy will be judged, and whether it is pursuing the politics of justice in a manner likely to win hearts and minds. In this early phase, it is necessarily the Office of the Prosecutor that takes center-stage in these considerations.

For reasons of space it focuses on Uganda, the Democratic Republic of Congo (DRC) and the Central African Republic (CAR), leaving out the Darfur investigation, which has more recently sparked similarly heated controversy in response to the prosecutor's request for an arrest warrant for President al-Bashir on the count of genocide.<sup>5</sup>

1. Kofi Annan, Secretary-General, United Nations, Statement at the Ceremony Celebrating the Adoption of the Statute of the International Criminal Court (18 July 1998), available at <http://www.un.org/icc/speeches/718sg.htm>.
2. William R. Pace, Convenor, Statement for the World Federalist Movement on Behalf of the Coalition for an International Criminal Court (17 July 1998), available at <http://www.un.org/icc/speeches/n717wfm.htm>.
3. MARLIES GLASIUS, *THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT* (2006).
4. *Id.* at 2–5.
5. Alex de Waal, *Sudan and the International Criminal Court: A Guide to the Controversy*, OPENDEMOCRACY.NET, 14 July 2008, available at <http://www.opendemocracy.net/article/sudan-and-the-international-criminal-court-a-guide-to-the-controversy>.

In its discussion of Uganda and the DRC, this article relies on considerable civil society documentation and an emerging academic literature on the ICC investigations, with additional input from interviews with some of the most intensely involved international NGO staff. The discussion of the CAR, on which there is very little literature, is primarily based on fieldwork, including participatory observation of meetings and semi-structured interviews with human rights lawyers, with victims affiliated with the national victims' association Organization for Compassion and Development for Families in Distress, with the president of that association, and with people representing a wider civil society perspective such as journalists, religious leaders, and a retired politician. For safety reasons, the fieldwork was conducted only in the capital Bangui, which is also the focal point for the ICC investigation.<sup>6</sup>

The article first outlines very briefly the basic facts concerning these three situations. Subsequently it discusses the most salient sources of debate and controversy under four headings: perceived selectivity or even bias of the Court, whether the pursuit of justice by the Court may be detrimental to peace-building efforts, the detachment of the Court from the lived reality of local populations and victims, and the issue of compensation to victims. In the conclusion, it assesses the consequences of the Court's investigations for civil society and victims, and the Court's own attitudes and policies.

## II. THE CURRENT CASES

### A. Democratic Republic of Congo

In July 2003, one month after being sworn in, Chief Prosecutor Moreno-Ocampo announced that he had "selected the situation in Ituri, DRC, as the most urgent situation to be followed."<sup>7</sup> In April 2004, the transitional Congolese government led by Joseph Kabila referred "crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC" to the prosecutor.<sup>8</sup> In March 2005, Thomas Lubanga Dyilo, leader of the Ituri-based Union of Congolese Patriots (UPC), was arrested by the Congolese authorities. The ICC prosecutor secretly requested an arrest warrant, and on 17 March 2006 Lubanga was transferred from a Kinshasa prison to The Hague. He is charged with conscription and use of child soldiers.

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6. For a more extensive discussion of findings from the fieldwork in the Central African Republic, see Marlies Glasius, *"We Ourselves: We Are Part of the Functioning": The ICC, Victims, and Civil Society in the Central African Republic*, 108 *AFRICAN AFF.* 49 (2009).

7. Press Release, Office of the Prosecutor of the ICC (ICC OTP), Communications Received by the Office of the Prosecutor of the ICC (16 July 2003).

8. Press Release, ICC OTP, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (19 Apr. 2004).

In January 2007, the pre-trial chamber decided that there was sufficient evidence against Lubanga to proceed with prosecution.<sup>9</sup> However, the beginning of the case was repeatedly delayed, then temporarily frozen by a stay of proceedings ordered by the trial chamber because the prosecutor was unwilling to disclose potentially exculpatory documents to the defense due to confidentiality agreements with his sources.<sup>10</sup> The chamber also ordered Lubanga's release, against which the prosecutor successfully applied. Since then, confidentiality of the documents has been lifted, and at the time of writing the trial has just begun.<sup>11</sup>

On 18 October 2007, a second suspect was transferred to The Hague. Germain Katanga is charged with murder, inhumane acts, sexual slavery, using child soldiers, intentionally attacking civilians, and pillage, primarily in relation to an attack on the village of Bogoro in February 2003. In February 2008, his associate Mathieu Ngudjolo Chui was arrested on similar charges in what is to be a combined case.<sup>12</sup> At the time of writing, the trial had not yet begun. In April 2008, an arrest warrant was unsealed for Bosco Ntaganda, a former associate of Lubanga who subsequently became a commander of Laurent Nkunda's group in North Kivu. Like Lubanga, he is charged with conscription and use of child soldiers.<sup>13</sup> At the time of writing he had not been arrested.

## B. Uganda

In January 2004, Ugandan president Museveni referred the situation in Northern Uganda to the ICC prosecutor.<sup>14</sup> In July 2004, the prosecutor announced that he would proceed with an investigation,<sup>15</sup> and in May 2005, he made a secret application to the pre-trial chamber for five arrest warrants.

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9. Prosecutor v. Dyllo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges 153 (29 Jan. 2007).
  10. *Dyllo*, 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).
  11. *Dyllo*, The Situation in Democratic Republic of the Congo (18 Nov. 2008).
  12. ICC OTP, Combined Factsheet: Situation in the Democratic Republic of the Congo, Germain Katanga and Mathieu Ngudjolo Chui (7 Feb. 2008).
  13. Press Release, ICC OTP, Warrant of Arrest Against Bosco Ntaganda Unsealed (29 Apr. 2008).
  14. Press Release, ICC, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (29 Jan. 2004).
  15. Press Release, ICC OTP, Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda (29 July 2004).

In October 2005, the pre-trial chamber unsealed the warrants, deciding that there were sufficient safety guarantees for victims and witnesses to do so.<sup>16</sup> Since then, two of the indictees have died, leaving arrest warrants outstanding for Joseph Kony, leader of the Lord's Resistance Army, Vincent Otti, his deputy, and two other key commanders, Dominic Ongwen and Okot Odhiambo.<sup>17</sup> In July 2007, peace negotiations between the Ugandan government and the LRA entered a new phase with the signing of an agreement that foresees national legal arrangements to apply to crimes related to the conflict, but the LRA again abandoned the negotiations.<sup>18</sup> At the time of writing, Ongwen and Odhiambo are rumoured to be willing to surrender to the Ugandan authorities.<sup>19</sup> The prosecutor has so far refused to withdraw the arrest warrants.

### C. Central African Republic

In May 2007, the prosecutor announced an investigation into atrocities committed in the CAR, focusing on the period 2002–2003 but also monitoring more recent violence. The situation had been referred to him by the government in December 2004, but he awaited the decision by the country's central court of appeal that it was unable to deal with the scale and complexity of the crimes before taking it up.<sup>20</sup> The context of the violence the prosecutor is investigating is the power struggle between former President Patassé and then General Bozizé, who failed in a coup attempt in October 2002, followed by a successful coup in March 2003. He was subsequently elected president in 2005. A year after the opening of the investigation, on 24 May 2008, the Congolese warlord Jean-Pierre Bemba, who had engaged his troops on behalf of Patassé, was arrested in Belgium on an indictment focusing on rape, torture, and pillage,<sup>21</sup> and later expanded to include murder.<sup>22</sup>

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16. Situation in Uganda, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest ¶ 22 (13 Oct. 2005).
  17. Situation in Uganda, Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision to Terminate the Proceedings Against Raska Lukwiya (11 July 2007). Vincent Otti has almost certainly died after an altercation with Kony in late 2007, but at the time of writing the ICC has not acknowledged his death.
  18. INTERNATIONAL CRISIS GROUP (ICG), NORTHERN UGANDA: THE ROAD TO PEACE, WITH OR WITHOUT KONY, Africa Report No. 146 (10 Dec. 2008).
  19. Grace Matsiko, *I'm Ready to Surrender – Odhiambo*, THE DAILY MONITOR (Kampala), 6 Feb. 2009, available at [http://www.monitor.co.ug/artman/publish/news/l\\_m\\_ready\\_to\\_surrender\\_-\\_Odhiambo\\_79562.shtml](http://www.monitor.co.ug/artman/publish/news/l_m_ready_to_surrender_-_Odhiambo_79562.shtml).
  20. ICC OTP, Background: Situation in the Central African Republic (22 May 2007).
  21. Press Release, ICC, Jean-Pierre Bemba Gombo Arrested for Crimes Allegedly Committed in the Central African Republic (24 May 2008).
  22. Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, ¶ 10 (10 June 2008).

### III. SELECTIVITY

This article does not discuss the limitations imposed by the statute, and the choices made by the prosecutor, in terms of the situations that are under investigation. A limitation of the statute salient to the situations the prosecutor *has* selected is the time limit on the Court's jurisdiction: it can only consider crimes committed after the ICC statute entered into force on 1 July 2002. At the time of the ICC negotiations, the notion that the Court would only have a forward-looking, not a retroactive, mandate was widely agreed upon by states and not seriously challenged by civil society representatives.<sup>23</sup> However, while a timeline starting on 1 July 2002 makes perfect sense from the perspective of the negotiating history of the statute, from the point of view of the situations under investigation it seems very artificial. Sudan and Northern Uganda have experienced civil war for decades, the DRC for ten years. The CAR is perhaps still best-known for the notorious reign of Emperor Bokassa, and military violence against civilians has been endemic ever since. An arbitrary starting date of 1 July 2002 seems, to many people affected, to privilege certain crimes and certain suspects over others.

In Uganda, many Acholi, the people living at the heart of the conflict area, date the beginning of the conflict back to 1986, when a succession of Northern rulers over the country were supplanted by the Southern-based NRA, and reprisal killings were carried out against Acholi soldiers and civilians.<sup>24</sup> The Ugandan government has pursued a policy of interning the Acholi population in camps since 1996.<sup>25</sup>

In the DRC, the nature of the complex civil war changed after the negotiation of the Sun City agreements in 2002. Local warlords in the province of Ituri continued to practice ethnic cleansing while fighting over resources, but the involvement of the neighboring countries, Uganda and Rwanda, became less overt.<sup>26</sup>

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23. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 57 (2001).

24. TIM ALLEN, *TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY* 29–30 (2005); Kasajja Phillip Apuuli, *The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda*, 4 J. INT'L CRIM. JUST. 179, 181 (2006).

25. Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT'L AFF. 179, 181 (2007).

26. HUMAN RIGHTS WATCH (HRW), *DEMOCRATIC REPUBLIC OF CONGO, ITURI: "COVERED IN BLOOD" ETHNICALLY TARGETED VIOLENCE IN NORTHEASTERN DR CONGO* (July 2003); STEPHANIE WOLTERS, INST. FOR SEC. STUD., *SITUATION REPORT: IS ITURI ON THE ROAD TO STABILITY? AN UPDATE ON THE CURRENT SECURITY SITUATION IN THE DISTRICT* (2005).



## A. SELECTION OF SUSPECTS

At the time of writing, the ICC has eight arrest warrants outstanding,<sup>27</sup> and four suspects in custody. Clearly there are more than eleven people in the world suspected of the types of crimes the ICC handles. It is hardly surprising then that the prosecutor is accused of being selective in his choice of suspects, but the accusations take a different form in different situations.

In Uganda, there are just two significant parties to the conflict, the LRA and the army, and only one side has been served with arrest warrants. The LRA, as has been well-documented, has been responsible for abduction of children and adults, forcing boys to be child soldiers and girls into sexual slavery, and it has perpetrated spectacular violence against civilians including torture, mutilation, and killings. It is generally accepted that the army has killed or tortured civilians more sporadically.<sup>28</sup> But it has been responsible for implementing the policy of forcing nearly two million people in the region to live in displacement camps, indirectly causing thousands of deaths through lack of hygiene, health services, or adequate nutrition.<sup>29</sup> The army has generally failed to do anything to protect the camp-dwellers from the LRA and has contributed to the level of brutality in the camps. But no ICC indictments have been issued against any army or government figures.<sup>30</sup>

In response to questions, the prosecutor invariably states that the investigation concerns all actors in the Northern Uganda situation and that his office takes into account the gravity of violations in determining whether to proceed. On this basis, he gave priority to the LRA leadership.<sup>31</sup> From such statements, Northern Ugandans and others have drawn the inference that the prosecutor rates the forced displacement of hundreds of thousands as less grave than the killing, maltreatment, and abduction of thousands. This may be a sound legal judgment, but its moral justice is contested.<sup>32</sup>

In the DRC investigation on the other hand, the transfer of Thomas Lubanga to The Hague was initially applauded by all except fellow extremists of Lubanga's own ethnic group, the Hema. In Ituri there have been many

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27. This includes Vincent Otti, whose warrant has not been officially withdrawn although he is generally believed to have died.

28. ALLEN, *supra* note 24, at 100–01.

29. Branch, *supra* note 25, at 181; ALLEN, *supra* note 24, at 53–59.

30. HRW, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda* (Sept. 2005).

31. ICC OTP, Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague 7 (14 Oct. 2005); Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo*, in *Courting Conflict? Justice, Peace & the ICC in Africa* 42 (Nicholas Waddell & Phil Clark eds., 2008).

32. Branch, *supra* note 25, at 188–89; ALLEN, *supra* note 24, at 96–99.

parties to the conflict, operating in fluid coalitions, and many perpetrators of heinous crimes. However, the forces of Thomas Lubanga, who operated from Bunia town, were particularly notorious.<sup>33</sup>

Further arrest warrants took a long time to materialize. With every passing month, the sole arrest of Lubanga began to look more peculiar against the backdrop of years of widespread murder, rape, kidnapping, and brutality in the Eastern Congo.<sup>34</sup> Since then, other local warlords have been arrested, but there is an increasing sense amongst both local and international organizations that the investigations do not go high enough up the chain of command.<sup>35</sup> While Lubanga is an important warlord in his own right, he does appear at times to have acted on orders of Uganda and Rwanda.<sup>36</sup> This is even more true for Katanga, who has publicly acknowledged that his group had contacts with and, at times, support from high-ranking officials in Kinshasa and Kampala.<sup>37</sup> Iturians appear to be well aware that the conflict is related to the regions' resources and that local ethnic tensions have been deliberately fuelled by political leaders in Kampala, Kigali, and Kinshasa.<sup>38</sup> Moreover, the failure to respond in a judicial way to the renewed violence in the adjacent Kivu provinces makes the Court seem increasingly feeble and irrelevant in relation to the ongoing conflict.<sup>39</sup> The temporary stay of proceedings in the case of Lubanga and the order for his release shocked victims and caused confusion in Ituri.<sup>40</sup>

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33. AMNESTY INT'L, DEMOCRATIC REPUBLIC OF CONGO: ITURI, A NEED FOR PROTECTION, A THIRST FOR JUSTICE (2003); HRW, UPROOTED AND FORGOTTEN, *supra* note 30; JUSTICE-PLUS, CYCLES DES VIOLENCES EN ITURI: LA POLITIQUE DE LAXISME ET D'ATTENTISME SACRIFIE DES VIES HUMAINES (2005), available at <http://storage.paxchristi.net/AF19F05.pdf>.
  34. INT'L CTR. FOR TRANSITIONAL JUST. (ICTJ), SENSIBILISATION À LA CPI EN RDC: SORTIR DU « PROFIL BAS » 12 (Mar. 2007), available at <http://www.ictj.org/images/content/6/3/638.pdf>.
  35. Press Release, Association pour la promotion et la défense de la dignité des victimes (Aprodivi), Transfert A La Haye D'un Des Commandants De FRPI: Le General Germain Katanga (18 Oct. 2008), available at [http://www.vrwg.org/Aprodivi/APRODIVI\\_PR\\_14%20Nov%2007\\_fr.pdf](http://www.vrwg.org/Aprodivi/APRODIVI_PR_14%20Nov%2007_fr.pdf); Désiré Baere, *Encore un chef milicien congolais transféré devant la justice internationale*, AFRIK.COM, 19 Oct. 2007, available at <http://www.afrik.com/article12722.html>; Press Release, Federation International des Ligues de Droits de l'Homme (FIDH), A Second Case Before the International Criminal Court on the Situation in Democratic Republic of Congo: Germain Katanga Transferred to The Hague (19 Oct. 2007). The arrest of Jean-Pierre Bemba may do something to mitigate this complaint, but he has been indicted for crimes in the CAR, not in the DRC, which throws up new problems of selective justice.
  36. HRW, The International Criminal Court Trial of Thomas Lubanga, 23 Jan. 2009, available at [http://www.hrw.org/en/news/2009/01/22/international-criminal-court-trial-thomas-lubanga#\\_ls\\_Lubanga's\\_UPC](http://www.hrw.org/en/news/2009/01/22/international-criminal-court-trial-thomas-lubanga#_ls_Lubanga's_UPC).
  37. Press Release, HRW, ICC/DRC: Second War Crimes Suspect to Face Justice in The Hague: Investigation Should Expand to Include Senior Officials in the Region (17 Oct. 2007).
  38. Radio Broadcast: Interactive Radio for Justice, Series Programs Archives: 1–20, 2005 & 2006, transcripts 8, 14, 18, available at <http://www.irfj.org/drc/RP/archives1.html>.
  39. Lisa Clifford, *ICC North Kivu Probe Urged*, AFR. REP. NO. 145 (INST. FOR WAR & PEACE REPORTING: 29 Nov. 2007), available at [http://www.iwpr.net/?p=acr&s=f&o=341009&apc\\_state=henh](http://www.iwpr.net/?p=acr&s=f&o=341009&apc_state=henh).
  40. Press Release, Redress, War Victims in DRC Shocked at ICC Decision to Release Lubanga (3 July 2008); Xan Rice, *Court Orders Release of Congo War Crimes Suspect Thomas*

In the CAR situation, the prosecutor has announced that he will focus on crimes committed around the time of the two Bozizé coup attempts, in October 2002 and March 2003.<sup>41</sup> The behavior of Jean-Pierre Bemba's troops, who fought on the outgoing government's side in this period, was particularly atrocious and his arrest was therefore unsurprising. Other likely indictees include Patassé himself, the commander of his presidential guard Abdoulaye Miskine, and French mercenary Paul Barril.<sup>42</sup> If the prosecutions stop there, it will seem like another case of prosecuting the vanquished, not the sitting government. But the prosecutor also indicated that he would be "closely monitoring" subsequent conflicts in the Northwest and Northeast of the country, which broke out in 2005<sup>43</sup> and ended in a fragile peace agreement in 2008.<sup>44</sup> In both of these conflicts, the burden of violations seems to lie overwhelmingly with the army, for which the Bozizé government is ultimately responsible.<sup>45</sup> Various events in the summer of 2008 resulted in representations by Bozizé to the prosecutor to the effect that any prosecutions should refrain from endangering the peace agreement. Unlike in Uganda, local journalists have not taken this as a serious argument but rather as an "admission of guilt" from the President. The almost palpable apprehension betrayed by the sitting President has further laid to rest criticisms of "one-sided justice," even though there have been no arrest warrants since Bemba.<sup>46</sup>

However, while civil society representatives and some of the victims support the ICC's policy of focusing on the big fish,<sup>47</sup> others want to see the ordinary soldiers directly responsible for crimes against them prosecuted.<sup>48</sup>

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*Lubanga*, GUARDIAN.CO.UK, 3 July 2008, available at <http://www.guardian.co.uk/world/2008/jul/03/congo.warcrimes>.

41. ICC OTP, BACKGROUND: SITUATION IN THE CENTRAL AFRICAN REPUBLIC (22 May 2007).
42. See FIDH, REPORT OF AN INTERNATIONAL FACT-FINDING MISSION: FORGOTTEN, STIGMATISED: THE DOUBLE SUFFERING OF VICTIMS OF INTERNATIONAL CRIMES (Oct. 2006), for detailed evidence.
43. ICC OTP, CENTRAL AFRICAN REPUBLIC, *supra* note 41.
44. Nancy Snauwaert, *Comprehensive Peace Accord Signed*, HUMANITARIAN AND DEVELOPMENT PARTNERSHIP TEAM CENTRAL AFRICAN REPUBLIC, News bulletin No. 65 (16–23 June 2008), available at <http://hdptcar.net/blog/2008/06/23/news-bulletin-65-16-23-june-2008/>.
45. HRW, STATE OF ANARCHY: REBELLION AND ABUSES AGAINST CIVILIANS (14 Sept. 2007).
46. Glasius, *supra* note 6, at 56.
47. Interview, Mathias Morouba, President, Observatoire Centrafricain des Droits de l'Homme (OCDH), Bangui, Cent. Afr. Rep. (14 Sept. 2007); Interview, Bernadette Sayo Nzale, President, Organisation pour la Compassion et le Développement des Familles en Détresse, Bangui (14 Sept. 2007); Interview 6, Female rape victim, widowed, Bangui (15 Sept. 2007); Interview 7, Female rape victim infected with HIV/Aids, Bangui (15 Sept. 2007); Interview 9, Young female rape victim, overcome mental breakdown, Bangui (18 Sept. 2007); Interview 13, Male rape and looting victim, Bangui (15 Sept. 2007).
48. Interview 4, Female rape victim, Bangui (18 Sept. 2007); Interview 5, Young female rape victim, Bangui (15 Sept. 2007); Interview 10, Male rape victim, Bangui (15 Sept. 2007).

## B. Selection of Crimes

In the Ugandan case, the prosecutor has indicted the suspects for a spectrum of “representative crimes” including murder, inhumane acts of bodily injury, enslavement, sexual enslavement, rape, pillage, deliberate attacks on civilians, and forced enlistment of child soldiers.<sup>49</sup>

By contrast, Thomas Lubanga, the first suspect who was actually taken into custody, has only been charged with the conscription and use of child soldiers.<sup>50</sup> These narrow charges are surprising as a host of local and international human rights groups have documented the involvement of Lubanga’s UPC in episodes of ethnic cleansing involving very similar crimes to those the Ugandan suspects have been charged with.<sup>51</sup> Civil society groups, while welcoming the first ICC arrest, universally condemned the narrowness of the charges.<sup>52</sup>

This specific focus has had some positive and many negative reverberations. It has thrown the spotlight on a practice that has been widespread, and not always recognized as particularly criminal, in the conflicts in the DRC and the wider region. Thus in Eastern Congo, military commanders from all factions began to dismiss or hide child soldiers in the wake of the Lubanga arrest or instructed them to lie about their age.<sup>53</sup> By contrast, a leader of the ARDC rebels in the northwest of the CAR was unaware in early 2007 that the use of child soldiers was a war crime; however, upon hearing of the Lubanga trial he was immediately eager to get UNICEF involved in a demobilization scheme.<sup>54</sup>

On the other hand, Congolese people must marvel at the apparent priorities of international justice, putting the use of child soldiers above mass murder, torture, and rape as the only one deserving of immediate prosecution.<sup>55</sup> More specifically, in Ituri the charges against Lubanga are already being interpreted as suggesting that the UPC’s other crimes are not very serious, or at least taken less than seriously by the international com-

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49. ICC Press Release, Warrant of Arrest Unsealed Against Five LRA Commanders (14 Oct. 2005).

50. Prosecutor v. Dyllo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, at 6–7 (29 Jan. 2007).

51. AMNESTY INT’L, *supra* note 33; HRW, COVERED IN BLOOD, *supra* note 26; JUSTICE-PLUS, *supra* note 33.

52. See, e.g., Joint Letter from ASF, Cent. for Just. & Reconciliation, DRC Coalition for the ICC, FIDH, HRW, REDRESS, and the Women’s Initiative for Gender Just., to Luis Moreno Ocampo, Chief Prosecutor, ICC, on the Narrow Scope of the Charges Brought Against Mr. Lubanga (31 July 2006), available at <http://www.vrwg.org/Publications/02/DRC%20joint%20letter%20english%201-8-2006.pdf>.

53. Géraldine Mattioli & Anneke van Woudenberg, *Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo*, in *COURTING CONFLICT?*, *supra* note 31, at 56.

54. HRW, STATE OF ANARCHY, *supra* note 45, at 71 n.119.

55. ICTJ, SENSIBILISATON À LA CPI, *supra* note 34.

munity.<sup>56</sup> This impression was further strengthened by the stay of proceedings and subsequently superseded release order. It remains to be seen whether the eventual trial can dislodge it.

The second and third warrants, including much wider charges, do not necessarily rectify the impression made by the first case. On the contrary, the fact that leaders of rival Ituri factions are accused on wider charges could further inflame ethnic tensions by allowing the interpretation that crimes perpetrated by the Hema, historically the dominant ethnic group, are not as serious as crimes by other groups such as the Lendu.<sup>57</sup> This may be even more sensitive when it comes to gender-related violence, leading to inferences concerning the relative honor and value of women from the different groups.<sup>58</sup>

The Women's Initiative for Gender Justice has sought to correct the prosecutor's policy by asking the judges of the Trial Chamber to instruct the prosecutor to widen his investigation.<sup>59</sup> This would be a legal novelty, and it is doubtful that the Chamber will interpret its own authority to stretch to giving the prosecutor such instructions.

In the CAR, the prosecutor has announced that he will concentrate on gender-related crimes.<sup>60</sup> This decision may partly be a response to the criticism leveled at the Lubanga case, as well as relating to the exceptional willingness of members of the highly mobilized victims' group OCODEFAD to testify to these crimes.<sup>61</sup> However, civil society groups are already warning that the prosecutor should not single this out as "the gender case."<sup>62</sup> Gender crimes have also been prevalent in the other three situations, and it would be an affront to victims there to portray the CAR as the unique situation where all the rapes took place.

#### IV. PEACE VERSUS JUSTICE

The involvement of the ICC in conflict areas has revived longstanding debates over whether transitional societies are most in need of peace or of justice. These debates become all the more heated where the ICC is involved be-

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56. Interview with Karine Bonneau, Dir. of Int'l Justice, FIDH, in Paris, Fr. (6 Aug. 2007).

57. FIDH, *CRIMES OF SEXUAL VIOLENCE: OVERCOMING TABOOS, ENDING STIGMATISATION, FIGHTING IMPUNITY* (29 Oct. 2007), available at [http://www.fidh.org/IMG/pdf/Note\\_crimes\\_sexuels\\_EN.pdf](http://www.fidh.org/IMG/pdf/Note_crimes_sexuels_EN.pdf); Aproduvi, *supra* note 35.

58. Interview with Brigid Inder, Executive Dir., Women's Initiative for Gender Justice, in London, Eng. (14 Aug. 2007).

59. Situation in the Democratic Republic of the Congo, Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Request Submitted Pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings (7 Sept. 2006).

60. ICC OTP, *CENTRAL AFRICAN REPUBLIC*, *supra* note 41.

61. Interview Sayo Nzale, *supra* note 47; Victim Interviews, *supra* notes 47, 58.

62. FIDH, *CRIMES OF SEXUAL VIOLENCE*, *supra* note 57; Inder Interview, *supra* note 58.

cause the justice solution is seen as imposed from the outside rather than following from a choice made by the people directly affected. In the Uganda case, the reaction has been particularly vehement.

Initially, "civil society" in Northern Uganda appeared to turn almost unanimously against the Court's investigation. Religious leaders, tribal leaders, and international NGOs spoke against the Court for a variety of reasons, but the paramount argument was that the investigation would keep Joseph Kony and the LRA in the bush and away from the negotiating table.<sup>63</sup> Since then, two research projects, one ethnographic and one quantitative, have adjusted this picture. They demonstrate that people in Northern Uganda do not necessarily see peace and justice as irreconcilable, and that at the very least, a sizeable minority prioritizes some form of justice over peace at any cost.<sup>64</sup>

Moreover, subsequent developments have somewhat placated the fiercest opponents. On the one hand, the prosecutor, after an unfortunate joint press conference with President Museveni announcing the referral, mended fences by personally inviting the main religious and tribal leaders to The Hague, giving serious attention to their concerns, and investing heavily in outreach activities in Northern Uganda.<sup>65</sup> On the other hand, the LRA did in fact engage in the most serious peace negotiations to date<sup>66</sup> after the arrest warrants were issued. Thus, the theory that arrest warrants preclude negotiations is no longer tenable.

In the summer of 2007, the negotiating parties concluded an "Agreement on Accountability and Reconciliation,"<sup>67</sup> which is full of laudable phrases concerning the need to combine peace with justice. The crucial clause of the agreement reads: "The Parties shall promote national legal arrangements, consisting of formal and non formal institutions and measures for ensuring justice and reconciliation with respect to the conflict."<sup>68</sup> The Agreement prominently figures the possibility of utilizing forms of "traditional justice" to deal with past violations, an issue discussed in more detail below.<sup>69</sup>

In relation to the peace versus justice debate, the most pessimistic assessment of these developments would be that either because of or regardless of the ICC, peace negotiations have failed, and there has not been any form of

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63. ALLEN, *supra* note 24, at 103.

64. *Id.*; PHUONG PHAM ET AL., ICTJ AND HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY, FORGOTTEN VOICES: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE AND JUSTICE IN NORTHERN UGANDA (2005).

65. ICC OTP, REPORT ON THE ACTIVITIES PERFORMED DURING THE FIRST THREE YEARS (June 2000–2006) (12 Sept. 2006).

66. See ICG, *supra* note 18, for an analysis of the Juba peace process and its demise.

67. Agreement on Accountability and Reconciliation, Republic of Uganda-The Lord's Resistance Army/Movement, § 2, 29 June 2007, available at [http://northernuganda.usvpp.gov/uploads/images/OCyYvXLxG4ke9KST0jh\\_7w/agendaitem3\\_296.pdf](http://northernuganda.usvpp.gov/uploads/images/OCyYvXLxG4ke9KST0jh_7w/agendaitem3_296.pdf).

68. *Id.* at 2.1.

69. *Id.* at 5.3.

justice, whether traditional, national, or international. On this reading, the ICC has wasted resources on the Uganda case, and raised the hackles of local civil society leaders, yet it has been unable to counter impunity and deliver justice to the victims of the conflict.

However, a much more optimistic interpretation of the influence of the Court is also possible: regardless of whether the arrest warrants were an important factor in driving the LRA to the negotiating table, there is little doubt that it was the existence of the warrants which necessitated negotiations on accountability. Moreover, whether LRA leaders surrender or not, the arrest warrants will not be revoked unless and until there is a form of justice deemed sufficient by the judges of the Court.<sup>70</sup> Finally, the agreement promised “the widest possible consultations” with “state institutions, civil society, academia, community leaders, traditional and religious leaders, and victims” about accountability and reconciliation.<sup>71</sup> Even if the parties’ intentions were merely to go through the motions of consultation, this clause has opened a real debate on these issues. Although it was not one of the founding intentions of the ICC to foster national debates about accountability and justice, this has been precisely its most tangible achievement in Uganda to date.<sup>72</sup>

In the DRC, amnesty had been a condition of the peace negotiations. Moreover, the national judicial system has been eroded virtually to the point of collapse by a decade of war.<sup>73</sup> ICC prosecutions were therefore hailed by human rights advocates as the only mechanism capable of breaking through the general rule of impunity,<sup>74</sup> and until the recent arrest of Jean-Pierre Bemba, there was no vocal civil society opposition to the Court’s investigations. The National Coalition for the ICC conducted a poll of approximately 2500

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70. INT’L BAR ASS’N—HUMAN RIGHTS INST. (IBA-HRI), ICC MONITORING AND OUTREACH PROGRAMME: SECOND OUTREACH REPORT 18 (May 2007)

71. Agreement on Accountability and Reconciliation, *supra* note 67, at 2.4.

72. See, e.g., GREATER N. WOMEN’S VOICES FOR PEACE NETWORK, UGANDAN WOMEN’S COAL. FOR PEACE AND WOMEN’S INITIATIVES FOR GENDER JUST., POSITION PAPER: VIEWS OF WOMEN FROM NORTH AND NORTH EASTERN UGANDA ON THE PEACE TALKS: MECHANISMS FOR ACCOUNTABILITY AND RECONCILIATION (2007), available at [http://www.iccnw.org/documents/WIGJ\\_VIEWSofWomenUganda\\_aug07.pdf](http://www.iccnw.org/documents/WIGJ_VIEWSofWomenUganda_aug07.pdf); UGANDAN COALITION FOR THE INTERNATIONAL CRIMINAL COURT, APPROACHING NATIONAL RECONCILIATION IN UGANDA; PERSPECTIVES ON APPLICABLE JUSTICE SYSTEMS (2007), available at [http://www.iccnw.org/documents/ApproachingNationalReconciliationInUganda\\_07aug13.pdf](http://www.iccnw.org/documents/ApproachingNationalReconciliationInUganda_07aug13.pdf); Press Release, Civil Society Organisations for Peace in Northern Uganda, Community Recommendations on Accountability and Reconciliation in Northern Uganda (Oct. 2007), available at <http://www.csopnu.net/Community%20Recomm%20on%20Agenda%20III%20Press%20Statement%20Oct%2007.pdf>.

73. HRW, MAKING JUSTICE WORK: RESTORATION OF THE LEGAL SYSTEM IN ITURI, DRC (2004); COALITION CONGOLAISE POUR LA JUSTICE TRANSITIONNELLE, MEMORANDUM SUR LA SITUATION DE LA JUSTICE EN REPUBLIQUE DEMOCRATIQUE DU CONGO (2006), available at <http://storage.paxchristi.net/AF3F06.pdf>.

74. Theodore Kasongo Kamwimbi, *The DRC Elections, Reconciliation and Justice*, PAMBAZUKA NEWS (27 July 2006), available at <http://www.pambazuka.org/en/category/features/36231#comments>.

people including students, parliamentarians, civil servants, politicians, NGO leaders, soldiers, policemen, market women, and women's groups in five parts of the country just before the 2006 elections. It found that 72 percent supported the arrest of Lubanga, 85 percent supported further investigations, and only 22 percent feared this might disturb the election process, with similar figures in Ituri province itself.<sup>75</sup> Even allowing for the possible bias of the interviewers, it is clear that only a minority believed that the ICC had a destabilizing influence on the fragile Congolese peace. The fact that this is not an important concern is further evidenced by a Bunia-based weekly radio program called "Interactive Radio for Justice," where listeners ask questions of ICC officials. Since it began broadcasting in June 2005, many critical questions have been raised, but listeners have never suggested that the ICC investigation was a threat to peace.<sup>76</sup>

In the CAR, the issue is more hypothetical. While hostilities and alliances are fluid, reconciliation between Bozizé and Patassé currently seems unlikely. Nor is it a priority for the Central African people. The more recent conflicts in the northeast and northwest, which resulted in a fragile peace agreement in the summer of 2008, are only tangentially related to the rivalry between Bozizé and Patassé. Hence, while there are differences of opinion between civil society figures, with religious leaders generally prioritizing peace, human rights defenders generally prioritizing justice, and journalists divided, these are not passionate controversies. Even Bernadette Sayo, the president of the victims' organization, in principle favored a scenario where the ICC would withdraw in the case of a peace accord, provided credible national proceedings would take its place.<sup>77</sup>

## V. DISTANT JUSTICE

### A. Outreach

One of the most widespread criticisms of the Court so far has concerned its lack of outreach to general populations in the situation countries and to victims in particular. In December 2005, this criticism found its way into

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75. COALITION NATIONALE POUR LA COUR PÉNALE INTERNATIONALE—RDC, *SONDAGE D'OPINION: AFFAIRE PROCUREUR DE LA COUR PÉNALE INTERNATIONALE CONTRE THOMAS LUBANGA. RÉSULTATS GLOBAUX SUIVIS DES RÉSULTATS DE L'ITURI* (26 May 2006), available at <http://www.vrwg.org/Publications/02/Sondage%20sur%20l'affaire%20Thomas%20Lubanga.pdf>.

76. Interactive Radio for Justice, Series Transcripts 1–43, Bunia, DRC 2005–2008, available at <http://www.irfj.org/drc/RP/archives1.html>, and <http://www.irfj.org/drc/RP/archives2.html>.

77. Sayo Nzale Interview, *supra* note 47.



the Assembly of States that governs the ICC as an institution,<sup>78</sup> and a Strategic Plan for Outreach of the International Criminal Court was produced, with the budget for outreach substantially increased.<sup>79</sup> However, changes on the ground have been limited. In October 2007, a Delegation of human rights defenders from all four affected regions meeting with Court officials “[above all . . . emphasised that the Court remains too far removed from the field and from the concerns of affected communities. Largely absent from the regions where victims live, the ICC has not as yet succeeded in making itself known.”<sup>80</sup>

In Uganda, the prosecutor has suffered the most from this lack of outreach, initially reaping a storm of almost unanimous civil society opposition to his investigation. Since then, both the prosecutors and the other organs of the Court have invested a great deal of time and resources into outreach in Northern Uganda.<sup>81</sup> While substantial differences of opinion remain, this effort does appear to have taken the sting out of the initial hostility, which was partly informed by a sense of having been ignored by the Court. But even now, the ICC has what it calls a “field office” in the capital Kampala, but not in the regional centre Gulu, more than three hundred kilometers north, let alone a permanent presence in the displacement camps.

In the DRC, the Court has not met with the same level of hostility, but there has been similar disquiet over the “invisibility” of the Court. Court officials travel regularly to Kinshasa, but rarely to Bunia, and do not make public appearances.<sup>82</sup> Local human rights NGOs in Ituri “are extremely perplexed at not having an interlocutor.”<sup>83</sup>

In the CAR, the Court had a chance to rectify its previous neglect of immediate outreach. There was ample time to learn from the mistakes made in earlier cases and prepare an outreach strategy, there were no substantial security concerns, and there was no need to choose between prioritizing an office in the capital or closer to the investigation, since the initial investigation focuses on violations committed in and around the capital.

But outreach activities and the establishment of an office in Bangui were held up because the Court felt it needed to await the passing of a law regarding the status and immunities of ICC personnel by the Central Afri-

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78. COALITION FOR THE INT’L CRIM. CT., CICC REPORT ON THE FOURTH SESSION OF THE ASSEMBLY OF STATES PARTIES, 28 NOV.–3 DEC. 2005, 26–27 JAN. 2006 (28 Jan. 2006).

79. INTERNATIONAL CRIMINAL COURT ASSEMBLY OF STATES PARTIES, STRATEGIC PLAN FOR OUTREACH OF THE INTERNATIONAL CRIMINAL COURT (29 Sept. 2006).

80. FIDH, CRIMES OF SEXUAL VIOLENCE, *supra* note 57.

81. ICC Outreach Section, Uganda, Press Releases and Calendar of Activities, available at [http://www.icc-cpi.int/outreach/o\\_uganda/ou\\_pr.html](http://www.icc-cpi.int/outreach/o_uganda/ou_pr.html), [www.icc-cpi.int/outreach/o\\_uganda/ou\\_calendar.html](http://www.icc-cpi.int/outreach/o_uganda/ou_calendar.html).

82. ICTJ, SENSIBILISATON À LA CPI, *supra* note 34.

83. *Id.* at 15 (author’s translation).

can parliament.<sup>84</sup> Victims and their sympathizers were extremely impatient for the establishment of such an office.<sup>85</sup> Again, they expressed the need for an interlocutor. In the words of a victim: “First we need to touch the ICC, to touch its representative here.”<sup>86</sup> The ICC office was finally opened in October 2007, and a series of workshops for journalists, lawyers, victim groups, women’s groups, and religious leaders was organized in early 2008. But by the outreach section’s own admission, outreach remained “limited and sporadic” throughout 2008, as no permanent staff had been found to man the office.<sup>87</sup>

The people living in the Court’s areas of involvement are generally unfamiliar with the Court, traumatized by conflicts with the civilian population as their main target, and acquainted only with their own largely dysfunctional legal system. They cannot be expected to comprehend the ICC’s intentions, procedures, and limitations without an extensive effort to have these explained to them. Moreover, as Mariana Pena of FIDH puts it “the time after the announcement of the investigation is actually critical because people start talking about the Court, and all sorts of rumors are created, and then it becomes much more difficult, you are not just informing, but also having to counter all the misperceptions.”<sup>88</sup>

In the absence of sufficient outreach by the ICC itself, various international and local NGOs have taken it upon themselves to do their own outreach, informing local populations about the investigations of the Court and more particularly about the legal possibility of participating in Court procedure in an independent capacity as victims.<sup>89</sup> The Court has indicated its inclination to work with and through different types of civil society groups.<sup>90</sup> This kind of collaboration increases the Court’s capacity at no cost to itself, but it does raise issues about independence on both sides. It can put the NGOs in question in an awkward position, as they are in effect representing the Court to the affected population. On the other hand, as

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84. Morouba Interview, *supra* note 47; Sayo Nzale Interview, *supra* note 47.

85. Morouba Interview, *supra* note 47; Sayo Nzale Interview, *supra* note 47; Interview with Angele Kinouani, Dir., Human Rights Section, United Nations Mission in Central African Republic (BONUCA), in Bangui, Central African Republic (19 Sept. 2007); Interview 1, Elderly male rape victim, lost wife and two children, in Bangui (15 Sept. 2007); Interview 2, Male rape and mutilation victim, in Bangui (15 Sept. 2008); Interview 13, *supra* note 47.

86. Interview 1, *supra* note 85.

87. ICC OUTREACH SECTION, ICC OUTREACH REPORT 2008, at 61 (2008).

88. Interview, Mariana Pena, Permanent Representative of the Federation Internationale des Ligues de Droits de l’Homme (FIDH) to the International Criminal Court, The Hague (17 Aug. 2007).

89. See, e.g., ICTJ, SENSIBILISATION À LA CPI, *supra* note 34, at 19–20; IBA-HRI, *supra* note 70; FAITH AND ETHICS NETWORK FOR THE ICC (FENICC), AFRICAN FAITH-BASED COMMUNITIES: ADVANCING JUSTICE AND RECONCILIATION IN RELATION TO THE ICC (2006).

90. ICTJ, SENSIBILISATION À LA CPI, *supra* note 34, at 17.

Human Rights Watch has pointed out, “[t]argeting elite groups is important, but such groups may have interests that affect how they relay information to others. This can make them inappropriate intermediaries between the ICC and the general public.”<sup>91</sup>

## B. Pace

While the physical distance of the Court from the affected populations is generally recognized as a problem, less attention is given to the amount of time the procedures of the Court take. In Uganda, discussions about timing of the prosecutor’s actions always take place in the context of the peace process. In late 2005, when there were no credible peace negotiations, Tim Allen argued that “for the ICC, the clock is now ticking,” both to make arrests and to issue warrants against army officers.<sup>92</sup> In 2007, in the context of ongoing negotiations, the lack of progress on the Uganda file appeared more permissible. But after the LRA abandoned the negotiating table, the ICC’s inability to make arrests once again put its credibility under pressure.

In the DRC, the glacial pace at which the Court moves has been a major source of anxiety and disappointment for civil society figures and victims.<sup>93</sup> Five years have passed since the opening of the investigation and the first substantial trial has only just begun. Justice undoubtedly always appears slow to victims, but time is more pressing when the average life expectancy is about forty-three and HIV infection rates are very high.

In the CAR, the timetable is in fact four years behind that of Uganda and the DRC: the crimes under investigation date from 2002 to 2003, but the investigation was only opened in 2007. Victims were pleasantly surprised at the announcement, but now they almost universally point at speedy trials as a priority concern.<sup>94</sup> In the words of one victim:

With regards to the trial’s delay, we are really not pleased . . . the length of the trial, it really impedes us. It brings us handicaps into our lives. Related to what we lived, we lost our high spirits, we lost many things in our lives so we are reduced, we became destitute and we want justice to be done immediately.<sup>95</sup>

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91. HRW, MEMORANDUM FOR THE FIFTH SESSION OF THE ASSEMBLY OF STATES PARTIES TO THE ICC 11 (Nov. 2006).

92. ALLEN, *supra* note 24, at 195.

93. FENICC, *supra* note 89, at 56; Bonneau Interview, *supra* note 56; Inder Interview, *supra* note 58.

94. Interview 1, *supra* note 85; Interview 3, Middle-aged female rape victim, widowed, in Bangui, Cent. Afr. Rep. (14 Sept. 2007); Interviews 4, 5, 10, *supra* note 48; Interviews 6, 7, 9 *supra* note 47; Interview 11, Middle-aged female rape victim, widowed, son with mental health problems, in Bangui, Cent. Afr. Rep. (15 Sept. 2007); Interview 12, Female double rape victim and widowed, in Bangui, Cent. Afr. Rep. (18 Sept. 2007); Interview 14, Teenage girl, lost father while mother raped (14 Sept. 2007).

95. Interview 4, *supra* note 48.

These hopes are likely to be disappointed. The prosecutor has done well to make a high-profile arrest exactly one year after opening the investigation, but it has since taken eight months just to get to confirmation of charges hearings, and now the judges have instructed the prosecutor to amend the charges which is bound to further delay the trial. Even when the trial goes ahead, it remains to be seen whether the prosecutor can successfully link a high-level official to rape charges.

### C. Complementarity in Practice

One of the most important tenets of the statute of the ICC is complementarity: the ICC only steps in when it is needed, namely when the local judicial authorities are either unable or unwilling to prosecute cases.<sup>96</sup> Since the Court has actually come into action, it has also acquired a more specific meaning: even within the situation countries the prosecutor will only prosecute “those with the greatest responsibility” for the crimes within the jurisdiction of the Court.<sup>97</sup> All others are the concern of the local judicial system. Human rights organizations and legal experts have hastened to confirm this view in order to temper expectations: the ICC cannot be expected to tackle impunity single-handedly; the bulk of lower profile cases will have to be handled at the national level.<sup>98</sup> But these theoretical pronouncements have little bearing on the realities in the situation countries.

In Uganda, since 2000, a law has offered amnesty to all LRA members who would give themselves up. The implementation of the law has been messy, but it has prompted thousands of combatants to come out of the bush.<sup>99</sup> While this law had strong support from local civil society figures, and indeed was the product of their lobbying,<sup>100</sup> it clearly shows that the ICC prosecutions are not embedded in a complementarity regime handling smaller cases. Similarly, on the government side, there have been no significant prosecutions of military officials for human rights abuses.<sup>101</sup>

In the DRC, most former warlords have been integrated into the national army, including some notorious perpetrators of violations who have been rewarded with promotions to colonel or even general. Some, most notoriously Laurent Nkunda in the Kivu provinces, have continued to fight.<sup>102</sup> More

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96. IBA-HRI, *supra* note 70, at 18.

97. ICC OTP, Report on Prosecutorial Strategy 5 (14 Sept. 2006).

98. *See, eg.*, JUSTICE-PLUS, *supra* note 33, at 12; HRW, MAKING JUSTICE WORK, *supra* note 73; ICTJ, SENSIBILISATION À LA CPI, *supra* note 34, at 14.

99. ALLEN, *supra* note 24, at 75, 81.

100. *Id.* at 78.

101. HRW, UPROOTED AND FORGOTTEN, *supra* note 30.

102. HRW, RENEWED CRISIS IN NORTH KIVU (Oct. 2007). Nkunda was arrested in Rwanda in 2009, and the DRC has requested an arrest warrant for him. Josh Kron, *Deal Is Reached on Congo Rebel*, N.Y. TIMES, §A, Foreign Desk at 8 (7 Feb. 2009).

generally, there are not enough judges, they are underpaid or not paid at all, and government officials have wide discretionary powers.<sup>103</sup> Even the court in Bunia, Ituri, which thanks to a substantial investment by the European Union is functioning better than others, does not have the clout to try war criminals.<sup>104</sup> In this climate, the notion of complementarity between the ICC handling only the top cases and the national system prosecuting all others is again primarily theoretical.

In the CAR, members of the army, and in particular the presidential guard, are held responsible for numerous crimes, including manslaughter, torture, rape, and in particular the burning of houses both during the 2003 coup and in the current conflicts.<sup>105</sup> Nor have the national courts taken up the politically less sensitive task of prosecuting lower level perpetrators of violations who were on the side of President Patassé.<sup>106</sup> Again, complementarity is more illusory than real.

#### D. International v. Traditional Justice

The limitations of the ICC, both in terms of its nature (abstract and far away) and its capacity, have given rise to a discussion as to how it relates not just to national judicial systems, but also to “traditional,” community level justice. This discussion has particularly come to the fore in the Ugandan case. Tribal and religious leaders there have, with international support, been promoting such solutions for years.<sup>107</sup> In the case of religious leaders, it sits well with the Christian tenet of reconciliation—although there are strong differences of opinion within the churches about the relation between international and traditional justice.<sup>108</sup>

Tim Allen has critiqued this enthusiasm for traditional justice, pointing out that the crimes committed by the LRA have no parallel in traditional community level arguments and that the rituals invoked were never intended to fulfill such a role. He argues that the rituals now proposed are not really

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103. Federico Borello, *A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of the Congo*, ICTJ OCCASIONAL PAPER SERIES 24 (Oct. 2004).

104. HRW, *MAKING JUSTICE WORK*, *supra* note 73; JUSTICE-PLUS, *LA JUSTICE EN ITURI: LES ENTORSES DE PROCEDURE FRAGILISENT LES POURSUITES* (2004), available at <http://storage.paxchristi.net/AF49F04.pdf>.

105. FIDH, *CRIMES OF SEXUAL VIOLENCE*, *supra* note 42, at 43–56; HRW, *STATE OF ANARCHY*, *supra* note 45.

106. FIDH, *CRIMES OF SEXUAL VIOLENCE*, *supra* note 42, at 28–30.

107. ALLEN, *supra* note 24, at 132–38.

108. FENICC, *supra* note 89, at 70–75; ALLEN, *supra* note 24, at 135–38; Interview, Pasteur Josué Binoua, Embassy of Christians Church, Bangui (17 Sept. 2007); Interview, Pasteur Franco Mbaye-Bondoï, Secretary-General of the Evangelical Alliance, Bangui (18 Sept. 2007).

traditional at all, but rather a reinvention of tradition.<sup>109</sup> Phil Clark, basing himself on the *gacaca* courts set up by the Rwandan government in response to the genocide, has in turn argued that there is nothing wrong with such a reworking of tradition, provided it meets local needs.<sup>110</sup> Human rights organizations like Human Rights Watch, on the other hand, have argued that they do not disapprove of traditional justice in principle, provided that it meets international standards of justice. Such standards, the organization contends on the basis of a survey of different national (but not traditional) justice systems, would necessarily involve long prison sentences for the worst offenders.<sup>111</sup>

In the DRC there has not been any extensive advocacy for the advancement of traditional justice over international justice. Instead, local human rights groups, international human rights organizations, and aid organizations agree on the problematic nature of traditional justice from human rights and gender perspectives.<sup>112</sup> In the CAR, traditional justice does not currently play a part in discussions on how to deal with war crimes and crimes against humanity, but since the national judicial system is equally insufficient in providing access to justice, particularly outside the capital, the same discussion may be had in the future.

## VI. COMPENSATION

All the areas in which the ICC currently works are characterized by immense poverty, to the point where food security is a serious concern for large swathes of the population. The limited information available suggests that the priorities of victims in these situations are marked by a paradox.

On the one hand, a thirst for justice clearly dominates the interest victims take in the ICC cases. In Uganda for instance, in response to a survey amongst the conflict-affected population asking “What would you like to see happen to those LRA leaders who are responsible for violations?,” only 1 percent responded “compensate victims.”<sup>113</sup> In the DRC too, according

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109. ALLEN, *supra* note 24, at 160–68.

110. Phil Clark, *Hybridity, Holism and “Traditional” Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT’L L. REV. 765 (2007).

111. HRW, BENCHMARKS FOR ASSESSING POSSIBLE NATIONAL ALTERNATIVES TO INTERNATIONAL CRIMINAL COURT CASES AGAINST LRA LEADERS: A HUMAN RIGHTS WATCH MEMORANDUM (May 2007).

112. FIDH, DEMOCRATIC REPUBLIC OF CONGO: JUSTICE IS OVERLOOKED BY THE TRANSITION 17 (June 2004); CHRISTIAN ACTION FOR THE ABOLITION OF TORTURE, SUD-KIVU BRANCH, EASTERN PROVINCE OF THE DEMOCRATIC REPUBLIC OF CONGO, CUSTOMARY COURTS IN THE CONGOLESE JUDICIARY SYSTEM: A REFORM FOR BETTER ADMINISTRATION OF JUSTICE (Sept. 2006), available at [http://www.afrimap.org/english/images/paper/Customary\\_Jurisdictions\\_DRCongo\\_EN.pdf](http://www.afrimap.org/english/images/paper/Customary_Jurisdictions_DRCongo_EN.pdf); ACTION AID, MONUC: DDRRR, DDR, MILITARY AND RULE OF LAW REFORM-REDUCING VIOLENCE AGAINST WOMEN: RECOMMENDATIONS FOR CHANGE 19 (Oct. 2006).

113. PHUONG PHAM ET AL., *supra* note 64, at 26.

to one of the lawyers representing victims in the Lubanga case, “[f]or my limited experience, the first thing victims of crimes against humanity and war crimes want is generally not compensation, but justice.”<sup>114</sup> In the CAR, victims sometimes had difficulty understanding terms like “compensation” or damages, but one responded vehemently to the question whether she expected compensation: “Justice must be done. Justice must be done. Because it’s true, poverty is here. But if there is no justice and the Criminal Court only brings us financial means, but we are still together with them [the perpetrators] what will we do with all these things?”<sup>115</sup>

On the other hand, victims in all these situations quite literally struggle to survive, and they do expect the Court to assist them in that struggle—they just do not think of this in terms of compensation for past wrongs. In the same survey in Uganda, in response to the question, “What are your most immediate needs and concerns?” 33 percent of respondents answered food and another 11 percent cited health and education.<sup>116</sup> In response to the question, “What should be done for the victims in Northern Uganda?” a majority did mention compensation, but most defined this in terms of food aid.<sup>117</sup>

In the CAR, while emphasizing their hopes for justice, nearly all victims interviewed also expressed a desperate need for food aid, medication, enrolment of children in school, and income-generating schemes. They appeared to expect that, once an ICC office was opened in Bangui, the Court could begin to provide them with such necessities.<sup>118</sup> In this, they are likely to be disappointed. It is very unlikely that the organs of the Court itself will authorize financial help to victims unless their testimonies are crucial to the case.

However, a sister organization to the Court has come into being: the Trust Fund for Victims. In the future, the Fund may disburse assets of convicted suspects, but it currently relies on voluntary contributions and holds about €3 million at present. The Fund’s director was only appointed in 2007, so it has not been operating for very long, and, like the Court itself, it largely needs to invent its own rules of engagement.<sup>119</sup>

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114. Luc Walleyn, *Incorporating Victims’ Views in Reparation Cases: A Challenge for Lawyers*, Speech at Peace Palace Conference: Reparations for Genocide, Crimes Against Humanity and War Crimes: Identifying Best Practice and Learning Lessons (1–2 Mar. 2007), available at <http://www.redress.org/PeacePalace/IncorporatingVictimsLW.pdf>.

115. Interview 4, *supra* note 48.

116. PHUONG PHAM ET AL., *supra* note 64, at 25.

117. *Id.* at 37.

118. Interviews 1, 2, *supra* note 85; Interviews 3, 11, 12, *supra* note 94; Interviews 4, 10, *supra* note 48; Interviews 7, 9, 13, *supra* note 47; Interview 8, Male rape victim, in Bangui, Cent. Afr. Rep. (15 Sept 2007).

119. Interview with Andre Laperriere, Director of the Trust Fund for Victims, in The Hague, Neth. (25 Oct. 2007); Anaga Dalal, *New Head of Trust Fund for Victims Has Sights Set on the Future*, ICC MONITOR No. 35 (Coalition for the Int’l Crim. Ct.) Nov. 2007, at 8.

A positive development is that the Fund does not, as originally envisaged, have to wait for convictions to become involved. It can operate as soon as an investigation into a particular situation is announced.<sup>120</sup> The difficulty the Fund has, in these desperately poor environments, where it is not necessarily clear-cut who is a victim and who is not, is to think through how it differs from normal development actors. On the one hand, the executive director is disinclined to become involved in food aid, medical aid, or school enrolment, characterizing these as development problems, not victim problems, even when the victims themselves identify them as priorities. On the other hand, while some of the awards made to date are specific to victimhood, such as plastic surgery for victims of facial mutilation in Uganda, other awards including microcredit schemes and seeds-for-work schemes are typical development projects.<sup>121</sup> Such schemes would appear less appropriate to victims who have a right to reparation. It is too early to assess the work of the Fund, but its role may be crucial in closing the gap between expectations of victims, who typically have both an urgent psychological need for justice and an urgent material need for support, and what the ICC itself can offer them.

## VII. CONCLUSION

### A. Impacts on Civil Society and Victims

Despite the barrage of criticisms that have been outlined in these pages, there is no doubt that the actions of the ICC, and more specifically its prosecutor, are having certain positive socio-political effects in the situations under investigation, and perhaps even beyond.

First, it is clear that the idea of achieving justice through international trial and punishment of perpetrators of massive crimes is not too abstract or too remote from the experiences of victims to be understood and appreciated by them. Both secondary sources in Uganda and the DRC and primary research for this article in the CAR suggest that victims have a distinct and sometimes passionate interest in the doings of the Court. It is of course doubtful how this interest will be sustained in the face of very few, very slow trials, or no arrests at all.

Second, in all the situations, the ICC has had the unintended effect of opening debates in local civil society that might otherwise have remained

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120. *Regulations of the Trust Fund for Victims*, ICC Assembly of States Parties, 4th plenary mtg., art. 50(a), (3 Dec. 2005).

121. Laperriere Interview, *supra* note 119.



closed. In the Ugandan case, while it remains uncertain to what extent there will actually be accountability for past crimes on either side of the conflict, the ICC involvement has opened the space for local and national debates about desirable forms of accountability. In the DRC, the use of children in war has been put on the agenda. In the CAR, while the taboo on discussing rape was broken by the country's most active victims' association, its cause was further publicized and legitimized by the ICC's focus on sexual violence.<sup>122</sup>

Finally, while further research needs to be done in this area, anecdotal evidence suggests that the investigations of the ICC may be having some effect on the behavior of would-be perpetrators of war crimes and crimes against humanity, in particular African warlords. However, this effect may wane if the ICC continues to be unable to serve its arrest warrants in Uganda and Sudan.

## B. Capacity Constraints

The ICC is a very small and very young institution. With a staff of a few hundred, it is reliant on the goodwill of states and civil society organizations for all aspects of its operations: its budget, executing arrest warrants, conducting outreach, tracing evidence, and finding witnesses willing to testify.

To anyone who is not a legal professional, the number of arrest warrants after five years of investigation does seem very small, and the investigations and trials seem to be proceeding extremely slowly. The organs of the Court need to make much more of an effort to admit and explain from the outset of an investigation that arrests will be few and that any convictions will take many years to achieve. Equally, instead of invoking the fiction of complementarity when it comes to all the perpetrators it cannot try, they need to admit that the Court does not have the capacity to reform societies where the rule of law has been absent. Finally, it needs to be frank with victims, including potentially valuable witnesses, about its lack of capacity to provide financial support, whilst pointing to the Victims' Trust Fund as a possible alternative source of relief.

The problem with all this, of course, is that outreach activities suffer from capacity constraints like everything else. Even with an increased budget and a very different mindset, adequately informing the population of the DRC, with its mainly rural, largely illiterate population of 65 million, astounding linguistic diversity, and impassable roads, will always be beyond the Court's outreach capabilities. It will need to focus on priority regions and seek

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122. Sayo Nzale Interview, *supra* note 47; Bonneau Interview, *supra* note 56.

strategic intermediaries. But one of the main messages must be a candid avowal of its own inadequacies. In fairness to victims, it is only after such a disclaimer that the functionaries of the Court should begin to explain that in very occasional circumstances it may be able to reward their patience and deliver a blow to impunity and a sense of justice done.

### C. Attitudes and Policies

As stated at the outset, the ICC, unlike domestic courts, needs to establish its legitimacy. The prosecutor's actions are particularly crucial in this respect. On one level, the first prosecutor of the ICC, Luis Moreno-Ocampo, appears to be well aware of this. He has avoided controversial investigations in Afghanistan or against British soldiers in Iraq. Moreover, against expectations, he has not yet opened a single investigation on his own authority, an authority civil society groups fought hard to establish. (This is not to say his so-called *proprio motu* powers are irrelevant—the possibility of an unreferral investigation may help convince a government to take the more gracious route of referral instead.) None of his early actions could cause his legitimacy to be called into question by governments, be they African or Western. The arrest warrant for Omar Al-Bashir is the first that strikes at the heart of a sitting government. Still, this is the government of Sudan, an international pariah state against which the Security Council ordered an investigation.<sup>123</sup> In his prudential considerations, the prosecutor has interpreted the legitimacy of the Court primarily in terms of realpolitik, as emanating from powerful states. As this article has suggested, he has not worked as hard to seek legitimacy within civil society. As a result, the prosecutor has been seen as biased by the conflict-afflicted population in Northern Uganda, and as timid and negligent by human rights activists in the DRC.

On the basis of his current indictments he could even be accused of exercising victor's justice, the precise accusation the ICC, by being a permanent and universal institution, was supposed to avoid. In more academic terms, he could be accused of being an instrument of "global governmentality."<sup>124</sup> He has helped governments, including some that are none too friendly to human rights, to constrain rebels and rogue states under the banner of international law.

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123. This is not to say the prosecutor's request for an arrest warrant is uncontroversial. See Alex de Waal, *supra* note 5.

124. WENDY LARNER & WILLIAM WALTERS, *GLOBAL GOVERNMENTALITY: GOVERNING INTERNATIONAL SPACES* (2004).

It is not only the indictments thus far, which are after all only a handful, that have contributed to the impression that the prosecutor serves governments and not civil society or victims. From the outset, the activities of the organs of the Court, not just the prosecutor, have been characterized by what one commentator has called an “aloof and secretive demeanor.”<sup>125</sup> Most victims have not seen much of the Court at all. Field offices are established in capitals and do not foster relations with local civil society groups. Visits and even announcements by high officials to situation countries are rare, and outreach activities, though expanding, are meager. It seems unlikely that this is the result of a deliberate policy of snubbing local civil society groups and victims. More probably, it is simply unfamiliar territory to the Court’s officials. In domestic courts, publicity and outreach would not be part of their job description. The law has its own jargon and procedures in which victims, witnesses, and bystanders are to some extent reduced to abstractions. Discussing the rationale and merits of one’s actions might even be considered as breaching the ethos of impartiality.

However, after widespread criticism of the lack of outreach, and particularly after the (for the Court) unexpected initial hostility to the investigation in Northern Uganda, there has been a recognition of the shortcomings in this respect. The Court now has both the will and the budget to address them. At present, outreach is still the domain of fairly low-level personnel, and the “shift towards the conception of outreach as a participatory dialogue rather than simple information provision” pleaded for by the International Bar Association will not happen overnight.<sup>126</sup> But it must occur if the ICC is to establish its legitimacy with those who are supposed to be its beneficiaries—victims and their champions in civil society. In this respect, the mission statement of the Special Court in Sierra Leone may be an inspiration. The outreach section defined its core aim as acting “as a catalyst for informed and reasoned dialogue about the Special Court and transitional justice.”<sup>127</sup> With such a horizon, reaching beyond legal preoccupations, the ICC could hope to make its form of justice meaningful both for victims and for civil society.

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125. Branch, *supra* note 25, at 188.

126. IBA-HRI, *supra* note 70, at 9.

127. SPECIAL COURT FOR SIERRA LEONE, OUTREACH REPORT 2003–2005, at 13 (2006), *cited in* IBA-HRI, *supra* note 70, at 9.