

# The International Criminal Court as a Human Security Agent

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## **Abstract**

**T**he Rome Statute and the International Criminal Court (ICC) are considered successful examples of the “human security agenda,” endorsed by both states and non-states alike. While the ICC was no doubt born from the human security community, its advancement of the human security agenda requires both an embrace of this role and an institutional assessment of the ways in which it is carried out by the ICC’s actions. To be an effective agent of human security, the ICC’s involvement in a country’s conflict in order to pursue justice cannot be decoupled from its responsibility to promote the securities of people through the establishment of rule of law. As such, the ICC’s work needs to be informed by how well it manages these trade-offs while performing as an agent of human security. This paper discusses the Court’s precarious role as a human security agent and offers a preliminary assessment of its work in fostering human security. While the Court must negotiate political realities, investigate ongoing human rights abuses around the world, and do both on a limited budget and resources, it is ultimately about the experience of the participants (alleged perpetrators, witnesses, and victims) engaged in its process that will determine theirs’ and others’ perceptions of the Court’s legitimacy—and that will enable its success to establish justice. Hence, in order to successfully complete its goal of dispensing justice, the ICC must also embrace its role as a human security agent—applying the protection and empowerment dimensions of human security to the people who participate throughout its processes. To do so, the Court must ensure that its mission of achieving justice is done without diminishing the security of the very people it seeks to represent. To dismiss such responsibilities as outside its purview will not only compromise the very justice it seeks to sustain, but also diminish its claims to be an apolitical actor within the international system.

## **Introduction**

In 1998, Lloyd Axworthy, former Canadian minister of Foreign Affairs, announced, “the

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international community is currently engaged in negotiations towards an agreement that would revolutionize our approach to human security and humanitarian law—negotiations on an International Criminal Court.<sup>1</sup> Some herald the establishment of the International Criminal Court (ICC) in 2002 as a success of the human security agenda.<sup>2</sup> Indeed, the discourse and the politics of human security lie at the heart of this institution.<sup>3</sup> As we reflect on its first decade of existence, scholars and policymakers need to take into account this origin when assessing the Court's role.<sup>4</sup> A closer look at the ICC shows that it does not consistently embrace human security as a guiding principle in its agenda and practices, and therefore does not routinely assess how its work advances human security. Scholars too miss an opportunity to assess more comprehensively the mission of the ICC to pursue justice by not drawing out the human security implications of the Court's mandate and practices. At times representatives of the ICC, human security scholars, and practitioners talk past each other. Human security scholars view the Court as a human security success predicated on its commitment to advance justice by fostering rule of law and deterring future génocidaires. Practitioners, however, tend to be critical of the ICC's work on the ground and how it impacts the security of vulnerable populations—especially regarding the Court's relationship to the humanitarian community, its legal procedures, and its reparations programs (the Trust Fund for Victims). The Court retorts that its priority is the mandate of retributive justice, entrusted first and foremost to pursue alleged perpetrators of war crimes, crimes against humanity, and genocide and punish them accordingly.

How do we reconcile the clashing views of those who see the ICC as a “success” of the human security agenda and those who are concerned about the Court's actions on the ground and its embrace of what they regard as the narrow mandate of retributive justice? Instead of assuming uncritically that the Court advances human security simply because it dispenses justice or may be effective in deterring future aggressors, we should examine empirically how well the ICC actually executes the principles of human security—and note where it falls short. This paper offers both a critique of the scholarship on the ICC and the practices of the ICC. I argue that we can re-center the academic debate on this institution by using the promotion of human security as the yardstick to assess its accomplishments. This effort will help us not only address some of the literature's shortcomings by highlighting the inherent tension between the ICC as a human security agent and as a rule of law institution, but also offer policy recommendations to improve the work of this pioneering Court.

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The ICC was created to not only hold individuals' accountable for their actions but also to provide those affected by violent conflict with the means to redress their situation.

While concerns about its budgetary constraints, its potential politicization, and the severity of ongoing conflicts under its investigation are proper areas of examination,<sup>5</sup> it is important to recognize that there is indeed a tension between the Court's mandate in dispensing justice and its role in protecting human security. In evaluating its record, we need to examine how well the Court works in ensuring the protection and welfare of victims in cases under its purview, or simply put, how effective the Court is as a human security agent. By "human security agent," I refer to a court that fully embraces the twin principles of protection and empowerment of human individuals who are participating, and are also affected by, the Court's proceedings. If either principle is critically compromised, the Court must seriously consider whether its ultimate goal of dispensing justice in a particular case is compromised as a result.

The mission of the ICC is to dispense justice, but the Court must also consider the opportunity it has to advance the human security agenda by being both sensitive and proactive regarding the security risks that it may produce or exacerbate when intervening in a given country. In what follows, I briefly describe the human security agenda as it pertains to the ICC, discuss the Court's potentiality as a human security agent, and identify some areas where its work in fostering human security can be improved. I show that the ICC's overall performance in advancing the human security agenda is poor and this weakness could compromise its ultimate goal of securing global justice, which is understood as holding perpetrators accountable for their actions and offering meaningful remedies to those affected by conflict. Ultimately, the Court must ensure that its mission of achieving justice is done while promoting the security of the very people it seeks to represent.

## **The Human Security Agenda**

In the *1994 Human Development Report*, the traditional notion of security was expanded to include "safety from the constant threats of hunger, disease, crime, and repression."<sup>6</sup> As a concept, human security emphasizes the security and development of a population, which if exploited or undernourished, risks the destabilization of both the state and society as a whole. In a widely accepted version, human security includes three dimensions, namely, the safety of peoples, rule of law, and sustainable development.<sup>7</sup> For the purposes of this paper, I refer to Alkire's conceptualization: "The objective of human security is to safeguard the vital core of all human lives from critical and pervasive threats, in a way that is consistent with a long-term human fulfillment... Institutions that undertake to protect human security will not be able to promote every aspect of human well-being. But at the very least they must protect this core of people's lives."<sup>8</sup> According to Alkire, the "vital core" is not meant to be a precise set of needs; just the basic or fundamental set of functions related to survival, livelihood, and dignity of the individual. This definition not only includes the three dimensions of human security mentioned above, but it also encapsulates the different time horizons of human security initiatives. This is implied in the concepts of protection (actions that require immediate, short-term attention) and empowerment (actions that tend to

require a longer time horizon for effective implementation), as introduced in the *2003 Human Security Now* report.<sup>9</sup> Protection (the removal of threats to core human values) and empowerment practices (initiatives that enable people to act on their behalf) can sometimes intersect, or run parallel to each other, as long term empowerment initiatives need not wait for the culmination of short-term protection. They both stem from the original conflict at hand and may occur simultaneously through the engagement of various actors and mechanisms.

The establishment of the ICC is considered a significant accomplishment for human security advocates, especially “middle powers” like Canada, Sweden, and Norway who formed the Human Security Network,<sup>10</sup> but the advancement of their agenda requires much more than the dispensation of international justice to victims. In instances where the Court decides to open an investigation and proceeds with a case while hostilities and violence are ongoing, or tensions from the past conflict are still palpable, its practices need to be informed by a human security-based approach.

The Rome Statute preamble recognizes that peace and security are threatened by “grave crimes” and that ending the impunity of those who commit them will act as a deterrent against future violations. As suggested in much of the transitional justice literature regarding this mandate, the work of the ICC is not only about redressing past crimes but also contributing to peace by its “deterrent” effect on future human rights violations. However, measuring whether domestic and international trials improve human rights is difficult to do, and the literature offers mixed results.<sup>11</sup> Human security should also be utilized to complement deterrence as measures of the Court’s impact. This is not to argue that the principles of human security are not integrated into the ICC’s practices, but rather that both the Court and scholars can do a better job at drawing them out as a way to assess the Court’s short-term and long-term effect on both the states and the populations subject to its work.

An ICC assessed by scholars and practitioners using human security principles would ensure that from the moment of its initial investigation into state or conflict-inflicted abuses in a given country, to the process by which it gathers evidences, witnesses, and victim testimonies, to the last stage of delivering reparations to victims, the Court acts as a human security agent. The work of human security has an inherent time dimension implied in the concepts of protection and empowerment of peoples. The protection and the safety of peoples require immediate action by the ICC, which can be ensured through its procedural components and the cooperation with humanitarian organizations on the ground. The empowerment of peoples requires a presence and practice sustained over time to build trust and increase the legitimacy of the ICC among the local population.

### **The International Criminal Court: A Danger to—or Promoter of—Human Security?**

Arguably, the ICC’s pursuit of justice—with a limited mandate of prosecutions and

reparations for victims—will provide or contribute to international peace and security, but it will be able to do so only if it carries out this mandate in a way that is consistent with broader human security. The ICC is the first permanent international criminal tribunal and covers the following crimes: genocide, crimes against humanity, war crimes, and starting in 2017, crimes of aggression.<sup>12</sup> While the purpose of the ICC is to uphold the rule of law through its investigations and prosecutions of alleged human rights offenders, it is not meant to be the sole institution to address such abuses and atrocities. Under the principle of complementarity, the ICC acts as a last resort in the presence of “any of the three disabling circumstances: 1) a total collapse of the national judicial system; 2) a substantial collapse of the national judicial system; or 3) the unavailability [or unwillingness] of the national judicial system.”<sup>13</sup> But the Court is more than just a rule of law institution. The Rome Statute strongly endorses the notion that ending a reign of impunity will contribute to the prevention of future crimes.<sup>14</sup> Emphasizing that the ICC will contribute to international peace and security is crucial for it indicates that the purpose of retributive justice is both to prosecute past wrongs and to increase the security of peoples by deterring future violence. Thus, the Court is responsible not only for producing an end result that is based in justice, but also for adhering to a process that ensures the safety and protection of people. This double consideration embodies the dictum that “justice today can help protect the potential victims of tomorrow.”<sup>15</sup> These twin concerns of peace and security need to be kept in mind when assessing the work of the Court.

The ICC has routinely asserted that its selection of cases is based on the “interests of justice.”<sup>16</sup> The Court is responsible for pursuing justice, and other institutions, such as the United Nations Security Council (UNSC) and state parties to the ICC, are responsible for pursuing the interests of peace and security.<sup>17</sup> Current ICC Prosecutor Fatou Bensouda recently stated that it is the responsibilities of other actors to be

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involved in development and peace-building initiatives—goals that, according to her, expand far beyond the Court’s mandate.<sup>18</sup> The argument I advance here, however, is that it is possible and even necessary for the ICC to openly adopt a human security approach as part of its “interests of justice.” Adopting such a framework does not overextend the Court’s responsibilities or mandate, but rather reframes its goal of justice in a context that accounts for the security and empowerment of those it chooses to represent and protect throughout the legal process. The ICC occasionally

adheres to this process, but would now use the principles embedded in the human security discourse more consciously.

The irony is that despite the ICC’s origins in the discourse and politics of human security, scholars primarily focus on the ICC’s engagement in the international arena

and at the state level. As I hope to show here, a more balanced approach to the ICC's role requires a reassertion of the individual as the referent of the Court's actions. The ICC is an international criminal law institution; it holds individuals, not states, legally accountable for their actions. As such, it is reasonable to demand that an interpretation of the Court's impact should not be limited to its "deterrent effect." This does not mean that deterrence contradicts the human security agenda, only that it offers a very limited yardstick by which to assess the work of the ICC. The Court should also pay significant attention to how its actions and practices influence the welfare and insecurities of the populations it seeks to protect. For instance, when the ICC holds political leaders accountable for their actions, it should also consider how its prosecutions are conducted in a way that protect and empower the victims of violence. The Court's actions should be assessed not only by their legal verdicts, but also by the processes that they set in place to defend the security of those affected. By reasserting the primacy of the individual, scholars would be in a better position to reflect on how the ICC addresses the different types of insecurities that it is expected to redress.

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The following sections flesh out what "reasserting the primacy of the individual" means for certain practices and relationships established by the ICC. Each section provides some insights about how the ICC can embrace the opportunity to further the human security agenda by better serving those affected by violence. Finally, I analyze the potential long-term impact of the ICC's human security initiatives by examining the case of non-pecuniary reparations issued by the Trust Fund for Victims (TFV).

### **Protections of People**

A substantial amount of work addresses the question of whether trials and prosecutions improve the situation of human rights in a given country. Conclusions vary; while some scholars argue that trials have a positive effect,<sup>19</sup> others contend that only when there is a combination of truth commissions, amnesties, and trials can a positive correlation with human rights and democracy be found.<sup>20</sup> Scholars have also examined whether the timing of a retributive mechanism, such as an ICC indictment, interferes with potential peace agreements, and whether despots are more willing or resilient to removing themselves from power because of such an institution. Those studies too, offer mixed results.<sup>21</sup> As Vinjamuri suggests, what would replace a dictatorship is almost as important as its removal.<sup>22</sup> Not enough time has passed, nor has the ICC had enough cases, and this makes it difficult to assess the record of the ICC and offer a substantial conclusion about its overall impact in the improvement of human rights. Preliminary analysis does suggest that the ICC must delicately balance its relationships with governments in countries in which it has opened an investigation. While the ICC

proclaims the state is not exempt from investigation, the reality is that it must also maintain the state's cooperation in order to gain the access it needs to collect evidence and make arrests. In some cases, the ICC has been criticized for the choices it has made in terms of investigation and prosecution.<sup>23</sup>

These questions fall under the general theme of what is considered the “peace vs. justice debate:” a dichotomy that synthesizes the question of whether the implementation of justice jeopardizes the potential success of peace negotiations and peace in the future. There is no settled agreement on this debate, in part because it hinges on the false notion that bringing perpetrators to justice and achieving peace are mutually exclusive goals. Rather, as Clark contends, peace and justice can mutually reinforce each other.<sup>24</sup> For example, in regards to the ICC's arrest warrant for Joseph Kony in Uganda, Clark argues that to claim peace is dependent upon the ICC lifting its arrest warrants against him is to give too much power and control to Kony and top LRA leadership.<sup>25</sup> Similarly, Goldstone emphasizes that to place the burden/responsibility on a court to deliver peace is both inaccurate and misleading for “justice is merely one aspect of a many faceted approach needed to secure enduring peace in a transitional society.”<sup>26</sup>

The term “peace” in this ongoing debate about the ICC's impact on ending a civil conflict or state abuses can be broad and far-reaching; in fact, it does not capture the short term and long term considerations the ICC should take into account when deciding when and how to open an investigation in a given country. The human insecurities prevalent during an ongoing conflict inevitably force practitioners and scholars to question whether the intervention of the ICC and the relationship it establishes with states would actually exacerbate the conflict. It is not the objective of the ICC to broker peace. But as an institution that should also be devoted to fostering human security, it should have the responsibility to cooperate more vigorously with actors engaged in humanitarian relief and human security concerns, ensuring that the universal dictum “First, do no harm” is faithfully adhered to during the initial investigation and posterior prosecution.

From a humanitarian perspective, the ICC has not effectively considered the unintended consequences of its actions and in some cases has interfered with the goal of protecting people. One way in which the human security impact of the ICC may be evaluated is through its interaction with the humanitarian community, particularly those organizations on the ground dedicated to monitoring and assessing conflict situations. The relationship between the humanitarian aid community and the ICC is complex; while many can agree that victims of human rights violations deserve some form of justice, the timing and type of justice administered may influence the security crisis and the resources available for those in need. After all, civil society was a major impetus for why the ICC was established.<sup>27</sup> Oxfam stated in the 1990s that the ICC “can play a vital role in the effective protection of civilians, the consolidation of long-term peace, and the prevention of future atrocities and renewed conflict.”<sup>28</sup> But humanitarian advocates have recently become wearier of the unintended consequences

of the ICC's involvement into ongoing conflicts. In a recent case, and as a reprisal for his indictment by the ICC, Omar al-Bashir of Sudan expelled humanitarian aid workers, including those from Save the Children and Oxfam. According to Charles McCormack, former President of Save the Children, the organization was the largest provider of education, healthcare, and protection services to vulnerable populations in the Sudan (with approximately 830,000 internally-displaced people served). McCormack claims that, because of the indictment of President Bashir, the Sudanese president removed NGOs based on the false assumption that such humanitarian aid organizations were cooperating with the ICC to prosecute him as a war criminal. In defense of the ICC's actions, former Prosecutor Moreno-Ocampo contends that he did not solicit any of the agencies to gain access to potential witnesses, nor were they used to gather information on the ICC's behalf.<sup>29</sup> But the reality is that the humanitarian crisis worsened in the aftermath of the ICC intervention.

The potential conflict between the humanitarian community and the ICC arises from their different roles in conflict situations, but the ICC can learn from the humanitarian community in developing a human security framework. Furthermore, there are ways in which the two communities can work together. Humanitarian aid organizations act as a paramedic response to the immediate vulnerabilities of human rights violations, and they are not working to challenge the power of the perpetrators. The ICC, however, is seeking to remove those perpetrators from power, and as a result its actions might further deepen the violence occurring on the ground if the state institutions or neighboring states refuse to cooperate with arrest warrants. If the trade-offs associated with the ICC's intervention are framed in human security terms, if we reassert the primacy of the individual, we may be able to develop a better assessment regarding the short-term and long-term impacts it has on the greater field of post-conflict reconstruction. One way to do so is to recommend ways in which the relationship the ICC has with other organizations on the ground can be improved. Mackintosh and La Rosa flesh out these tensions and support recommendations that can be summed up as followed: prevention, protection, and prosecution.<sup>30</sup>

The first regards the issue of prevention – the initiatives in place to deter violent acts against humanitarian aid workers or victims who seek assistance or resources from them. As Mackintosh suggests, the ICC could give humanitarian organizations “leverage in negotiating with those in control—either for better treatment of the civilians in their power (because they could be prosecuted for any violence or ill-treatment), or for permission to provide humanitarian assistance to those populations. In particular, where there is a blatant attempt to block humanitarian access to civilians as part of a war strategy, this is a crime within the jurisdiction of the court.”<sup>31</sup>

Second, given its lack of a police force, the ICC needs to collaborate more with humanitarian organizations that offer protection measures. This is important because, as La Rosa notes, in an era where global justice is the norm, the emphasis to collaborate on achieving such a goal places new pressures on humanitarian organizations and might turn them into unwilling witnesses in trial proceedings. For this reason, La

Rosa recommends that organizations whose sole mission is “to relieve the suffering of individuals” should not in fact involve themselves with international criminal tribunals even if they share common ideals.<sup>32</sup> As such, the ICC should have a stronger presence on the ground to help victims separate organizations that assist the ICC in collecting evidence from those that choose to remain completely neutral. Victims should be able to decide where they seek help, and fully understand what organizations will do with the information they collect when assisting vulnerable populations.

The last recommendation concerns the ability of the ICC to prosecute on behalf of humanitarian aid workers. Mackintosh argues that the ICC should also be vigorous about documenting and collecting evidence regarding attacks against humanitarian aid organizations, which may be construed as attacks on civilians under the Rome Statute.<sup>33</sup> Greater publicity of the Court’s efforts to protect both civilians and humanitarian aid workers could lead to greater cooperation on the ground with those organizations reluctant to work with the ICC.

Even if the Court adheres to a narrow definition of its role in dispensing global justice, there is no reason to disregard the impact of its actions on the securities of the people affected by conflict. This is because the path toward achieving that goal is laden with actors and contextual factors, which the Court must, at the very least, consider into its strategy of prosecution. Although a full assessment of the Court’s impact on the issues just raised is beyond the scope of this paper, there are some important questions that need to be investigated more thoroughly in order to understand the ICC’s relationship to the situation of human rights in a given country, the prospects for peace settlements, and the work of the humanitarian community at large. For example, what are the indirect effects that the ICC has on the commitment by states under investigation to improve their record on human rights? Does the presence of the ICC in an investigated country lead to domestic reforms that mirror the values of the Rome Statute? Likewise, how can the ICC coordinate activities with humanitarian organizations working on the ground in order to address any human insecurities?

Both the ICC and the humanitarian community can utilize population-based surveys conducted by organizations such as the International Center for Transitional Justice and UC-Berkeley’s Human Rights Center to determine what fears or insecurities might be preventing people from participating in ICC proceedings – and strategize how humanitarian aid can meet the needs of those engaged in the justice process. For example, experts argue that the ICC needs to “improve its information campaign and outreach for trials that will be conducted” and “review the possibility of holding its trials in situ.”<sup>34</sup> In both cases of redirecting aid or reaching out to the local population, the ICC needs to work closely with humanitarian organizations to carry out its mission.

## **Rule of Law**

According to Hampson, the individual’s relationship to the state is based on the promotion of human rights, as well as the right to self-determination. The rule of law

regulates the interactions between the state and the individual.<sup>35</sup> For Franceschet, only under the rule of law “will actors be free to interact and influence each other in ways that challenge the powerful to justify the inequalities and injustices that have created human insecurities.”<sup>36</sup> Accordingly, the absence of law, as Hampson rightly contends, constitutes a serious threat to human security. The ICC has the unique opportunity to foster the human security agenda by ensuring that its intervention not only castigates those guilty of egregious crimes, but also does so in a manner that fosters the establishment of the rule of law. Scholars have spent considerable time addressing the reasons as to why and how states use international agreements and institutions (such as the ICC) to bolster the domestic perception of rule of law or actually reform it.<sup>37</sup> But attention must also be directed toward the question of how the ICC fosters the rule of law while it is intervening in active conflicts, regardless of whether the abuses are state-induced or waged by non-state actors.

As previously mentioned, under the principle of complementarity, the ICC steps in when the domestic judicial system is unwilling or unable to do so.<sup>38</sup> Its intervention, consequently, disrupts the existing relationship between the state and its citizens, and the Court is therefore anticipated to provide the rule of law that is expected from the international community, to protect and support citizens’ rights and safety. This in an important expectation, as the ICC takes on that responsibility when it decides to open an investigation in a given country. Hence it is critical to assess not only how the ICC acts as an advocate and purveyor of civil rights, but also how well it protects people’s safety when active conflicts and/or state abuses may make it extremely dangerous for people to participate in the Court’s proceedings. A human security-based approach not only focuses on the legitimacy and stability of rule of law that the ICC strives to achieve, but also on what insecurities may emerge from its efforts to achieve them. As an influential gender rights’ group explains, “The Court has an overarching responsibility ‘to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses,’ taking into account all relevant factors including age, gender, health, and the nature of the crime, in particular sexual or gender-based crimes.”<sup>39</sup> This is particularly important, as many victims, witnesses, and even those under investigation, may not trust or even acknowledge the procedures they are expected to abide by in order for their claims to be heard. A significant component of strengthening the rule of law is affording the protections and security that these participants need in order to see the Court as a legitimate institution and as one that does not potentially re-victimize them through their participation in its proceedings. To work toward

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enhancing the security of people, the Court needs to carefully consider the rights it affords to individuals seeking redress, as well as the safeguards it puts in place to offer protections for its victims and witnesses.

### **Victim/Witness Protection and Participation**

Anecdotal evidence suggests that unfortunately the ICC has occasionally failed to provide the needed protection for those involved in its proceedings. Prosecution is the ICC's mandate, but increasing human security is its responsibility. Unlike the criminal tribunals for the former Yugoslavia and Rwanda, where the only role for victims was to serve as witnesses for the prosecution, the ICC embraces a broader, more dynamic and inclusive role for victims. As Wemmers notes, based on Article 68(3) of the Rome Statute, "The ICC recognizes victims' rights to *participation, reparation, protection, and legal representation*" (emphasis added).<sup>40</sup> Three main issues emerge in the relationship between victims and the ICC: protection, representation, and reparation.<sup>41</sup> Each of these issues are clearly related to human security/rule of law because each addresses the needed short-term protections of victims willing to come forward, as well as the long-term impact of their participation in court proceedings (both through personal experience with the judicial process, and reparations received).

To its credit, the Court has made significant progress in ensuring that victims are afforded the legal protections and advocacy needed to prevent re-victimization and psychological trauma that can occur from testifying and serving as witnesses. For instance, the Registry and Trust Fund for Victims Fact Sheet (March 2011) proudly asserts, "All victims . . . have been represented by a lawyer and all victims who needed it have benefited from legal aid."<sup>42</sup> The Victims and Witnesses Unit (VWU) supports victims and witnesses at all stages of the process including "psychosocial support under the direction of the Psychologist and Support Officer, information and debriefings before and after testimony, and access to medical care when needed. The VWU ensures that victims and witnesses appearing before the Court feel secure and comfortable during all stages of the trial."<sup>43</sup> Furthermore, victims and witnesses are provided full protection for their security and a Post Testimony Assessment is administered to ensure that "it is safe for the victim or witness to return to their normal place of residence."<sup>44</sup> They report to have facilitated the appointments of legal representatives by the Court for 2,647 victims.<sup>45</sup> However, some argue that the Court has not done all that is needed to protect victims. For instance, the Victims Participation and Reparation Section (VPRS) of the ICC has been criticized for not being informative enough in providing choices regarding legal representation and in disclosing the ICC's ability to provide for their protection.<sup>46</sup> In addition to legal advocacy, the Court also has procedures in place for those requesting that their testimony remains anonymous if they feel that their lives may be at risk from testifying against an alleged perpetrator.

Despite the ICC's recognition for victims' rights, Wemmers cautions that the participatory roles assigned to them are still in its early formation, for existing rules of procedures do not specify how their expanded rights are to be translated into practice.

As she warns, “The exercise of the right to participation is left up to the Court to determine [and] there is a great deal of ambiguity regarding the mechanisms applicable to victims’ participation.”<sup>47</sup> All too frequently, the reality of what is promised often falls short of expectation: the risks people take in participating with the Court’s proceedings are high, and the Court is often accused of failing to offer the protections necessary to ensure that their lives will not be at risk upon returning from testifying or participating in Court proceedings. As the same gender rights organization explains: “Currently victims and intermediaries are excluded from the security provisions of the Court and as such participate or assist the ICC at great risk to themselves, their families, and their communities . . . Many victims expressed grave concern about their personal security situation as a result of having applied as a victim before the ICC.”<sup>48</sup> For this reason, it is recommended that the Court should institute a “comprehensive security framework,” especially when women are concerned, to assure that their protection is tailored “to their particular status, level of risk and specific circumstances.”<sup>49</sup>

### **Fair Trials and Rule of Law**

The events surrounding the trial of Thomas Lubanga Dyilo of the Democratic Republic of Congo clearly illustrate why the ICC needs to be cognizant of its role as a human security agent when it tries to establish the rule of law in an active conflict zone. This case raises the question of the proper balance between procedural assurances for the accused and the protection of witnesses and their intermediaries, and it illustrates the difficult choices that the Court confronts as it follows its mission of achieving justice while protecting the very people it seeks to represent. Lubanga, former president of the Union of Congolese Patriots, is the first person to be successfully tried and convicted by the ICC for the war crimes of enlisting and conscripting children under the age of 15 years. The trial initially began in 2006 but over the years it became mired in controversy and delays, due to several procedural errors committed by the Prosecutor. As a result, the Court has ordered twice a stay in the proceedings, in June 2008 and again in July 2010. The issue at hand was the failure of the prosecutor to comply with the judge’s order to reveal the identity of one of his intermediaries, a failure which, according to the court, made it not possible to hold a fair trial for Lubanga.<sup>50</sup>

The Court needs to be legitimate; therefore if the Prosecutor does not follow rules of procedures in place, the accused is not afforded his or her rights. It is crucial for the Court not to be perceived as unfair towards the accused, biased in favor of victims, or an instrument of foreign intervention. Likewise, when trials stall and the possibility of releasing the accused is discussed—or the accused is released due to procedural mistakes—the safety and security of victims and their families is threatened. For instance, when the Court released Lubanga in June 2008 due to procedural mistakes (a decision later reversed), one organization expressed in a press release: “The survivors, in particular those who chose to participate in the proceedings against Lubanga, but also members of local civil society groups who are tirelessly assisting them, are now terrified. The people in Ituri fear that the release of the ex-militia commander will exacerbate ethnic tensions in Ituri.”<sup>51</sup>

Victim participation in ICC judicial proceedings is unprecedented, and consequently, the ICC and its advocates have spent considerable time and resources debating the way in which victims can most effectively and efficiently participate in proceedings.<sup>52</sup> The results so far have been mixed; a substantial amount of financial resources are devoted to victim participation (particularly towards international travel and salaries of ICC employees), despite the financial strain the Court currently faces.<sup>53</sup>

An alternative method to include victims in proceedings has been invoked by the Trial Chamber V in two Kenyan cases. Instead of all victims filing an application to appear in court or do it via video conference (an option still in place for those who

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prefer it), victims also may collaborate with a Common Legal Representative (CLR) based in Kenya and who would represent them in the Hague and will be present for only critical portions of the trials. The goal behind this new approach is to be as comprehensive as possible in collecting victim testimonies, protect them but also not strain the resources of the Chamber.<sup>54</sup>

The complexity behind such a procedural move requires more than the hope that CLR's are well-trained and that any civil disruptions within the process will not destabilize local communities. More examination is necessary as to what research, investigations, and trainings are needed on behalf of the Court in order to ensure that the transition to a new way of acquiring testimony will not in fact exacerbate the local hostilities that may still

exist in Kenya. If the local population perceives that the Court is not only fair, but also cognizant of the human security vulnerabilities, this could only have beneficial effects for the long-term health of rule of law. The ICC can have this lasting effect by its “demonstration effects,” exhibiting how judicial institutions can actually advocate and secure people’s rights and protection.

### **Reparations and Post-Conflict Development**

The “sustainable development” dimension of human security stresses the “non-military threats to human security and the threats to human survival that have arisen from a wide variety of largely human-induced problems, such as unchecked population growth, migration, and disparities in economic opportunities.”<sup>55</sup> In understanding the relationship between justice and development in a post-conflict setting, three main themes have emerged: structural economic inequality, rehabilitation and community programs, and resource (re)distribution. The ICC can play a role here, if it addresses the short- and long-term policies that seek to empower local populations. Recognizing that justice requires compensation, the international community has pushed for the

establishment of reparations programs to deal with the aftermath of conflict. The contributions of a reparations program are not only limited to individual monetary settlements, but also structural reforms that address the destruction and disparities that existed both prior and during a conflict.<sup>56</sup> However, a word of caution proceeds regarding the relationship between development and reparations. Reparations should not be considered a replacement for development programs, nor should they substitute any development strategies devised for post-conflict restructuring.<sup>57</sup> An international institution responsible for devising a reparations program (such as the Trust Fund for Victims) that includes comprehensive and non-pecuniary measures should align its efforts with the local post-conflict goals of reconstruction and development to prevent arousing unsettled hostilities amongst the local populations.

As part of the Rome Statute, but distinct from the International Criminal Court, the Trust Fund for Victims (TFV) has taken an active role in creating and supporting programs that suggest reparations play a strong role in the development of peoples in a post-conflict context. To contextualize how the work of the ICC and the TFV fits within the nexus of justice and reparations, one may refer to Articles 75 and 79 of the Rome Statute. Article 79 states that:

1. A Trust Fund shall be established by decision of the Assembly of States Parties for benefit of victims of crimes within jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.<sup>58</sup>

Currently, the Trust Fund is involved in a total of 31 active projects, with 15 in the Democratic Republic of Congo and 16 in northern Uganda, with over 80,000 beneficiaries in total.<sup>59</sup> The TFV distinguishes between “direct beneficiaries”—those who received immediate assistance—and ‘indirect’ beneficiaries—those family and community members who benefit from the direct recipient’s rehabilitation.<sup>59</sup> In this sense, TFV is derived from the perceived inadequacies of past international tribunals, with victims not getting remedies for their plight: “In light of past experiences before the International Criminal Tribunal for Rwanda, where many victims of sexual violence were left without medical care for the diseases they had contracted through sexual violence, especially HIV/AIDS, the ICC Trust Fund now plays an important role by making interim relief for victims a possibility.”<sup>60</sup>

To state that the ICC should not miss the opportunity to act as an agent of human security does not mean that it should stretch its original mandate and assert a development-based agenda. Rather, it is to approach post-conflict scenarios with the goal of asserting the primacy of the individual, and of securing as much human security as possible while pursuing justice. In the case of the TVF, it has a responsibility to not only dispense reparations, but to do so in a manner that assists in rebuilding a post-conflict society, and reduces human insecurities through development and community-based reparative efforts. These initiatives include those promoting the empowerment and sustainability of individuals in both short-term emergency healthcare and long-term

rehabilitative efforts through community-wide programming. In regards to physical rehabilitation, the TFV short-term protection initiatives would refer to the immediate medical emergencies that are in need of repair, particularly those situations where the life of the individual is in immediate danger. Long-term (empowerment) initiatives would be focused on reintegration and into the community, as well as the maintenance and care for any long-term injuries sustained. Psychological rehabilitation addresses the immediate concerns of one's mental capacity to process the trauma of violence, and there is also a long-term (empowerment) practice of rehabilitating individuals through restorative justice mechanisms including the integration of music, arts, and performance. The TFV has been actively involved in all of these initiatives, incorporating local customs and culture with its resources to offer rehabilitative resources to victims and survivors. The Trust Fund itself asserts: "Countries emerging from violent conflict are troubled societies that may develop destructive social and political patterns . . . If we do not get it right through justice, reparations and rehabilitation initiatives, we will not be able to secure peace, security, and development for future generations."<sup>61</sup> Given this mandate, framing these practices in the context of human security allows both policymakers and scholars to understand how the ICC, both as a transitional justice and human security mechanism, continues to embody the values associated with each.

The intersecting practice of transitional justice and human security can be clearly seen in the local ties established between the TFV and local farming organization in the DRC and in northern Uganda. Since 2008, the Northeast Chili Producers Association (NECPA) has collaborated with the TFV in Lira and Tesa (sub-regions of northern Uganda), supporting approximately 2,700 victims based in communities ravaged by displacement, torture, abduction, and massacre.<sup>62</sup> NECPA's work reflects the multidimensional needs of populations in transitioning societies. They provide agricultural support (sorghum, cassava, chili seeds, and farm tools) in addition to collective and individual counselling. To date, NECPA has organized victims into 180 cooperatives. It is through these initiatives that the ICC and its affiliated institutions can gain more support from local communities. Local engagement demonstrates that while the ICC is not meant to have a permanent presence in countries with which it becomes involved, it can build local coalitions that will hopefully be sustainable and leave a lasting (positive) legacy to those individuals and organizations that have cooperated with its mandate.

Despite these efforts to create more holistic and locally-driven compensatory programs, the ICC and TFV still have a number of obstacles to address. The ICC confronts great resistance from local communities in which investigations and prosecutions are taking place. In some circumstances, violence against those working on behalf of the TFV may arise because people loyal to the leaders being prosecuted by the ICC live in communities where the TFV operates. Not surprisingly, the TFV has agreed to situations where local projects are funded anonymously, rather than advertising their ties with the Trust Fund. This is because individuals collaborating with the TFV have been potential victims of violence as a result of their work.<sup>63</sup>

Another area of concern derives from the Coalition for the International Criminal Court (CICC), which is critical of the Trust Fund's advocacy and facilitation of reconciliation. The CICC is a network of civil society groups devoted to the promotion, legitimacy, and sustainability of the ICC. It contends that this goal is beyond the Fund's mandate because reconciliation is not part of the ICC mandate.<sup>64</sup> CICC believes that the Fund's engagement should focus solely on "providing redress for victims, restoring victims' dignity, and facilitating their reintegration into society"<sup>65</sup> because that would be more aligned with the mandate stated in the Rome Statute. This raises the need for a more critical assessment as to the conditions in which the ICC can still play a role in supporting the human security of the populations it seeks to represent, without expanding its mandate to missions it cannot adequately fulfill. The reparations provided by the Victims Trust Fund seem to be designed to contribute to post-conflict development programs. A human security-based approach to understanding the ICC and TVF's impact ensures that reparations do not exacerbate conflicts or hostilities. Reparations may assist in restorative justice but should not be the end-all solution to deeper structural inequalities. The Court should not expand its mission in order to be a human security agent, but it should complete its mandate in a responsible manner that is consistent with human security principles.

## Conclusion

Despite being born out of the human security community,<sup>66</sup> the International Criminal Court's ultimate pursuit of justice does not entitle it to be automatically labelled as a human security agent. Scholars and practitioners who view the Court as a human security agent conservatively assume that the provision of justice itself is enacting human security because it promotes accountability and deterrence against grave human rights violations and crimes against humanity. What I argue, however, is that the Court has the potential to be a human security agent and that it needs to orient its work to embrace more consciously human security concerns. Accordingly, any effort to assess the ICC's role and performance must not be limited to its pursuit of justice, and must also take into account its ability to pursue a human security agenda. To be a human security agent, the ICC needs to pay close attention to the protection and empowerment of the people the Court engages in its quest for justice. The Court's inability to fulfill a human security mandate is not because the people and institutions surrounding it are not supportive of human security. It is because the Court's noble mission has been construed too narrowly, and in its pursuit of justice it tends to inconsistently embrace human security concerns.

***To be a human security agent, the ICC needs to pay close attention to the protection and empowerment of the people the Court engages in its quest for justice.***

This paper also argues that we need to reassert the primacy of the individual when assessing the Court's record in order to promote the human security agenda. The bulk of existing scholarship on the Court focuses on its impact and influence on the behavior of

***We need to reassert the primacy of the individual when assessing the Court's record in order to promote the human security agenda.***

states and the international community as well as its deterrent effect on future human rights violations. While these are indeed worthy areas of inquiry, it is imperative that we rebalance our examination of the Court's effectiveness by paying attention to how its actions and practices influence the welfare and insecurities of the populations it seeks to protect. We need a Court that acts as an agent of human security and measure its success accordingly. This paper offers a first attempt at mapping out how the ICC can act as a more effective agent of human

security in pursuing the institutional responsibilities that support the larger mission of establishing justice in areas of the world where the rule of law is absent and violence is rampant.

While the mandate of the ICC is very clear, it also operates in multiple domains where equally valid claims compete. The investigation and prosecutions of perpetrators are conducted in environments that in many cases are still affected by violence and fear. The demands for retributive justice compete with the concerns for the security of victims and families. The work of the ICC faces unavoidable trade-offs that emanate not only from the claims of justice and peace, but also from the multi-dimensionality of the human security agenda and from the different timings of its instruments. Trying to adjudicate among competing claims is a difficult task and to the extent that a criterion is needed to determine specific courses of action, I argue here that the ICC's decisions should be informed by human security preoccupations. The prosecution of perpetrators is the primary role of the ICC. But the ICC has the opportunity to assume the responsibility of being a human security agent, and in the process offer better short-term protections for those who risk their lives to engage with it, and empower civil society to pressure their own state institutions toward reform and improvement in the rule of law. Scholars should assess the Court's effectiveness in carrying out this twin agenda of justice and human security, not just prosecution. Ultimately, human security is the intersection between justice and peace. Justice that is derived from the protection and empowerment of the peoples it serves will be much more effective in aiding peace processes in post-conflict settings.

Some minor institutional changes can be considered to improve the record of the Court in sustaining the human security agenda. The ICC does have an office of public council for victims, but its primary role is to provide legal assistance and representation for victims. Maybe what is also needed is an independent ombudsman to advocate for victims and witnesses, ensuring that the Court's proceedings take into account the insecurities we have examined in this paper. A similar office dedicated to deal with

gender issues may also be needed.

Few would probably contest the fact that the Court's indictments are important milestones in the Court's growth, although it is still too early to determine how effective the ICC has been in acting as a deterrent against future human rights atrocities, and whether or not it has (de)stabilized peace processes. The Court's overall record in advancing the human security agenda, however, leaves much to be desired in regard to the protection and empowerment of the peoples it wishes to represent. As the paper has shown, there are concerns about how carefully it has protected witnesses and their families, how helpful it has been in alleviating humanitarian crises, and how effective its reparations programs have been. While some may dispute that these are proper areas of concerns for the Court, I would argue that an institution that is embedded in the human security agenda needs to be keenly aware of these insecurities. The effectiveness of the Court's behavior cannot be reduced to legal successes or "deterrent" effects. It must include its ability to protect and increase the securities of the populations it seeks to represent.

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