



# **Making Kampala Count**

## **Advancing the Global Fight against Impunity**

### **at the ICC Review Conference**

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## I. Summary

From May 31 to June 11, 2010, an extraordinary gathering in support of the global fight against impunity will take place at the first ever review conference of the International Criminal Court (ICC). High-level representatives from the court’s soon-to-be 111 states parties will meet in Kampala, Uganda, joined by court officials, representatives of non-states parties, the United Nations, and other intergovernmental and regional organizations, and civil society activists from every region of the world. In two weeks of debate and discussion, the growing ICC community will affirm the importance of a collective commitment to bringing to justice those responsible for the worst violations of international criminal law.

Twelve years after the signing of the Rome Statute that established the ICC, and as its predecessor international ad hoc tribunals begin to wind down, that affirmation is needed now more than ever.

While the court has opened investigations in five countries and begun its first trials, this is just a start. In too many places—from Congo to Burma, Yemen to Afghanistan—crimes that shock the world’s conscience continue. Relief from renewed cycles of violence and high expectations for justice, raised in part as the system of international criminal justice has taken shape, demand a robust response from the international community.

And yet, new priorities—including the global economic crisis, terrorism, and climate change—have displaced the mid-1990s’ sense of urgency that gave birth to the ICC following genocide in Rwanda and other mass atrocities. Limits on the reach of international justice, a perception of double standards in its application, and the inevitable cost and length of proceedings have tested the commitment of even the court’s strongest supporters and provided succor to its critics.

In Kampala, the world community has the opportunity to re-engage the fight against impunity. Doing so will require high-level attendance and strong public support by states parties for the ICC’s mission and recognition of the steady progress made by the court in realizing its founders’ aspirations. It will also require, through substantive discussions of key challenges, the identification of critical next steps to advance the fight against impunity, including building enhanced capacity for prosecutions at the national level. The latter can energize the practice of international justice and attract new support. Because the review conference will be held in Kampala, stronger links with communities affected by crimes within the court’s jurisdiction can be forged at the same time.

In preparations over the past months, a number of states parties have shown recognition of this unprecedented opportunity. The Bureau of the Assembly of States Parties (ASP), which had already appointed two facilitators for the review conference (currently Brazil and Kenya), appointed additional country focal points to prepare stocktaking exercises addressing cooperation (Costa Rica and Ireland), complementarity (Denmark and South Africa), the impact of the Rome Statute system on victims and affected communities (Chile and Finland), and peace and justice (Argentina, Democratic Republic of Congo, and Switzerland). Strong progress has been made in developing frameworks for these discussions.

Focal points were also appointed to encourage high-level attendance from several of the regional groupings (Netherlands, Slovenia, Uganda, and Venezuela) and pledges by states parties of practical and political support to the ICC (Netherlands and Peru), and to steer the negotiation of a high-level declaration (Mexico) to be adopted at the conclusion of a general debate in Kampala. A separate resolution on enforcing the ICC's sentences of imprisonment, originally proposed by Norway and expected to be adopted in Kampala, would encourage increased assistance between international development agencies and states parties toward making additional facilities available to the court.

ICC officials and civil society have contributed to these preparations and participated in states parties' advance deliberations, and the court and ASP secretariat are preparing public information activities to project conference deliberations and outcomes to a broad audience. Civil society organizations have undertaken a number of projects—including consultations in at least two ICC "situation" countries (countries in which the ICC is investigating) and the preparation of side events for Kampala—in order to bring their perspectives and expertise to bear on discussions. This continues the strong tradition of deep civil society engagement in the development of international justice.

The real tests of these preparations, however, lie ahead.

First, for discussions in Kampala to advance international justice, they must be as substantive as possible. A deepened grasp of these topics and the challenges they present is essential to more effective national and international prosecutions of serious crimes. In the limited time remaining before the review conference, states parties should step up their preparations, building on or convening inter-ministerial consultations. Such preparations and consultations will be important to refine positions and to develop a strategy for making constructive interventions during stocktaking and related side events at the conference. If carried out by a sufficient number of states parties, these advance sessions will enable the discussions in Kampala to be as rich and as productive as possible.

Second, discussions in Kampala must be made to count. A deepened understanding of what more meaningful prosecution of serious international crimes requires from states parties, the ICC, civil society, and other allies must be matched in coming months and years by concrete action on a number of fronts. Resolutions establishing regular ASP discussions on cooperation, giving the ASP a role in facilitating complementarity efforts (that is, helping national court systems take the lead in prosecuting serious international crimes, with the ICC as court of last resort), and increasing the court’s impact in affected communities would each help chart the way. States parties will need to build on discussions in Kampala by reworking national policies to meet the new challenges identified there. States will also need to make good on pledges announced in Kampala. We suggest that the ASP make it a priority to ensure follow-up on pledges and make pledging a regular feature at future ASP sessions.

In order to assist states in fully realizing the review conference as a milestone in the development of the ICC and an emerging system of international justice, this report offers reflections and recommendations on each of the four stocktaking topics.

The ICC’s success is directly related to the **cooperation** it receives from states parties and intergovernmental organizations. Without its own police force to facilitate investigations, locate witnesses, and apprehend suspects, the ICC must rely on the cooperation of states parties to fulfill its mandate. The ICC also requires active political support from states parties to defend its mission, particularly in the face of unprincipled attacks by the court’s opponents. Although there has been broad recognition within the ASP of the importance of cooperation, the requisite support from national authorities and political backing have not always been forthcoming. Substantive discussion during the review conference of relevant experience to date with the ICC and other international tribunals, identification of best practices, and a commitment to carry these discussions forward in the ASP on a regular basis can make a practical difference in ensuring necessary cooperation with the court.

Discussions of **complementarity** in Kampala offer perhaps the greatest opportunity to expand the fight against impunity. Stocktaking on this issue will focus on “positive complementarity,” the concerted international and domestic efforts to strengthen and better enable national jurisdictions to conduct credible and effective national investigations and trials of Rome Statute crimes. Enhanced international assistance toward this end is essential if the ICC is to remain truly a court of last resort, and to bridge the impunity gap that can exist in ICC situations where only a handful of perpetrators are brought to trial by the court. States parties, non-states parties, international organizations, the court, and civil society each have a role to play. Discussions on positive complementarity within the ASP are particularly

appropriate: as a body of states committed to the fight against impunity, the ASP is uniquely positioned to assess current efforts and identify priorities for advancing prosecution of serious international crimes in national systems, a focus that is too often lacking in broader rule-of-law reforms.

Individuals and communities affected by the crimes under the ICC's investigation are the first among the court's many constituencies. Yet, having an **impact** in such communities is a unique challenge for a court based thousands of kilometers away from where the crimes occurred. Discussions on impact at Kampala will usefully focus attention on the unique tools at the ICC's disposal, including victim participation in proceedings, and reparations and assistance to victims through the Trust Fund for Victims. Participants will also examine the progress the court has already made in achieving impact in affected communities. Discussions should address what further progress is needed, while bearing in mind that the court is still in its early phase of development, with the first full cycle of judicial proceedings not yet concluded. Continued attention to outreach and field engagement and greater appreciation of the importance of the prosecutor's selection of cases and charges is needed.

The court's impact, however, does not depend solely on the actions and decisions of court officials and staff. Discussions should recognize that states parties—whether providing additional resources for outreach and public information efforts, contributing to the Trust Fund for Victims, supporting an enhanced ICC presence in situation countries, or engaging with key court strategies—have important contributions to make in maximizing the court's impact in affected communities.

The **peace and justice** nexus is the fourth stocktaking topic. The ICC's mandate to investigate and prosecute war crimes, crimes against humanity, and genocide in the course of ongoing conflicts has often raised questions about the relationship between peace and justice; the call to suspend or “sequence” justice in exchange for a possible end to a conflict has arisen in conjunction with the court's work in a number of country situations. While justice is an important end in its own right, Human Rights Watch's research in many different conflict situations over 20 years has also demonstrated that a decision to ignore atrocities, thus reinforcing a culture of impunity, may carry a high price. While there are sometimes real tensions between peace and justice, the goal of the international community should be the careful management of this tension, rather than its exploitation. While the topic does not lend itself to a resolution or pledges in Kampala, greater clarity on this subject is nonetheless crucial for the future of the court's work.

The stocktaking topics, of course, are often interconnected. Unexecuted arrest warrants may represent a failure of state cooperation, but may also reflect deficits in national capacity. In the absence of arrests and trials, the ICC's impact in affected communities is limited. Similarly, exaggerated claims of a contradiction between peace and justice may dampen support for the ICC's efforts and make officials less likely to fulfill court cooperation requests, including in the execution of arrest warrants. Consideration of these topics on their own and as they relate to each other will help to identify gaps in current practice and chart the way forward.

The review conference has much more on its agenda than stocktaking. Proposed amendments and review of article 124, the Transitional Provision, will dominate discussions in the second half of the conference.

Human Rights Watch supports the amendment proposed initially by Belgium to extend to non-international armed conflicts the criminalization of the use of certain weapons, including poison or poisoned weapons; gases and all analogous liquids, materials or devices; and bullets that expand or flatten easily in the human body (already criminalized under the Rome Statute in international armed conflicts under article 8(2)(b)(xvii-xix)). Human Rights Watch believes that weapons that pose an undue threat to civilian populations should be banned regardless of whether the conflict is international or non-international in character.

We have not participated actively in negotiations on the crime of aggression. We believe that we are most effective as a human rights organization if we do not opine on issues of *jus ad bellum*, the lawfulness of waging war, and instead adopt, like the International Committee of the Red Cross, an approach of strict neutrality during armed conflicts. This neutrality enables us, without taking sides, to focus on the conduct of armed forces in war, or *jus in bello*, and thereby promote our goal of encouraging all parties to a conflict to respect international humanitarian law. But while we have taken no position on the definitional aspects of aggression, from the start of the preparatory committee negotiations in 1996 we have opposed any Security Council control of the crimes within the jurisdiction of the court. We believed then, and still do, that control over the court's jurisdiction—a so-called jurisdictional filter—by a political organ would undermine the ICC's judicial independence.

Regardless of any jurisdictional filter, however, Human Rights Watch has serious concerns about adoption of the crime of aggression in Kampala. Taking up prosecutions of aggression could link the ICC to highly politicized disputes that could undermine the court's credibility and ability to address genocide, war crimes, and crimes against humanity. At the same time,

not taking up an aggression prosecution because of jurisdictional or resource restrictions could also jeopardize the court's work and credibility. On the basis of close observation of the court, including in situation countries, we fear that inclusion of a definition and jurisdictional filter could diminish or appear to diminish the court's role as an impartial judicial arbiter of international criminal law. We urge states parties to conduct their discussions in a way that minimizes divisiveness.

The Kampala review conference caps the first phase of the ICC's development. In stocktaking discussions and careful consideration of amendment proposals, in plenary sessions on the formal agenda and in side events hosted by governments and civil society, there will be important opportunities for states parties to affirm their commitment to the ICC and to hold perpetrators of the world's worst crimes accountable for their actions. But the review conference is also a beginning.

With the work of the international ad hoc tribunals nearing completion, the fight against impunity and the practice of international justice is moving into a new phase. In this next era, the role of the ICC as the keystone of an emerging system of international justice will become increasingly important, and consolidation of its progress is essential. Equally necessary will be enhancing the capacity of national authorities to bring prosecutions that extend the reach of justice. A fully realized review conference will make significant strides on both fronts, propelling the ICC community forward and bringing realization of the aspirations of the Rome Statute within sight.

## II. Key Recommendations

### Cooperation

*In preparations for Kampala and in discussions and statements at the conference, states parties should:*

- Assess and discuss during the review conference lessons learned from national experience of responding to the court’s broad spectrum of cooperation needs. These could include experience with putting in place legislation and national arrangements to facilitate cooperation; responding to direct cooperation requests; concluding framework agreements with the court; and providing political and diplomatic support;
- Consider and discuss during the review conference relevant experience of cooperation with other international tribunals;
- Affirm a commitment to the mission and mandate of the ICC to end impunity for the crimes of most concern to the international community;
- Underscore the obligation of ICC states parties to cooperate fully with the court, including in arrests;
- Adopt a resolution on cooperation, committing to carry forward regular discussions on cooperation within the Assembly of States Parties (ASP), including through an ASP cooperation working group. Such a working group could assist in spreading best practices and undertake targeted initiatives in specific cooperation areas; and
- Identify, on the basis of past experience, steps to strengthen national arrangements on cooperation, and announce these steps as pledges during the review conference. Pledges should indicate concrete timelines.

*Following Kampala, states parties should:*

- Consider reappointing the ASP focal points on pledging selected for the review conference to ensure follow-up on commitments made in Kampala and to develop a regular system of pledging for future ASP sessions.

### Complementarity

*In preparations for Kampala and in discussions and statements at the conference, states parties should:*

- Recognize the central role of the ICC as a court of last resort in the absence of meaningful action by national authorities;

- Affirm that increased international political support and logistical assistance are needed to strengthen national capacity and political will to prosecute serious international crimes. National prosecutions are necessary to put the complementarity principle to work in practice and close existing impunity gaps;
- Recognize the court’s key role in catalyzing national prosecution efforts through its close knowledge of national capacity needs, particularly in “countries under investigation and analysis” (countries in which the ICC is either investigating or considering whether to open an investigation) and through the expertise the court can lend to initiatives funded by states parties;
- Underscore the need for states and funders to incorporate a specific focus on prosecuting serious international crimes in broader rule-of-law reform efforts, particularly in ICC countries under investigation and analysis. States parties should specifically emphasize the necessity of addressing both “inability” and “unwillingness” to prosecute such crimes if further progress at the national level is to be achieved;
- Adopt a resolution at the review conference that recognizes a role for the ASP in facilitating complementarity initiatives and asks the court to report on its role as a catalyst for national proceedings in order to help identify additional complementarity opportunities;
- Identify complementarity initiatives that states parties should consider funding or participating in and bring these initiatives to the review conference for further discussion; and
- Identify other pledges relevant to complementarity and announce these pledges at the review conference. Pledges should indicate concrete timelines.

*Following Kampala, states parties should, as appropriate,*

- Consider how best to position the ASP to strengthen national capacity for the prosecution of serious international crimes. This could include establishing additional ASP mechanisms to promote complementarity initiatives;
- Request annual reporting from the court on its activities to catalyze national prosecution efforts;
- Privately and publicly express political support for national prosecutions, both bilaterally with the states concerned and in key political forums like the EU, the African Union, and the UN Security Council and General Assembly; and
- Support local civil society efforts to press for national prosecutions.

## **Impact of the Rome Statute system on victims and affected communities**

*In preparations for Kampala and in discussions and statements at the conference, states parties should:*

- Reaffirm the central recognition of the rights of victims in the Rome Statute;
- Welcome the progress made by the court in realizing in practice the rights of victims;
- Affirm the fundamental importance of ensuring that investigations and prosecutions carried out at the international level are meaningful and have resonance with communities where the crimes have been committed, while recognizing the challenges inherent in doing so given that ICC procedures are often complex and take place in The Hague, far from the affected communities;
- Commit to supporting, including with the necessary financial resources, the ICC's efforts to increase its impact, including through deepened field engagement, strengthened outreach, and robust investigations that, evidence permitting, resonate with affected communities in terms of the individuals who are targeted and the charges brought against them;
- Adopt a resolution on the impact of the Rome Statute system on victims and affected communities. The resolution should highlight the importance of delivering effective justice to victims in the context of fair and impartial proceedings and should send a powerful message that the ICC community places a high priority on victims' rights and interests; and
- Identify pledges of increased support relevant to increasing such impact and announce these pledges at the review conference. Pledges should indicate concrete timelines.

*Following Kampala, states parties should:*

- Encourage the court to develop as part of its strategic planning process a tool that would periodically assess the court's impact in affected communities and identify steps that could be taken to improve impact; and
- Increase support in the court's budget for outreach and field-based activities.

## **Peace and Justice**

*In preparations for Kampala and in discussions and statements at the conference, states parties should:*

- Confirm that justice is a crucial component of lasting peace, as well as an important international priority in its own right;

- Reflect on experience to date in pursuing these two objectives simultaneously to end conflicts where horrific crimes have been committed; and
- Contribute to meaningful discussion at the review conference on how tensions that may arise between peace and justice can be successfully managed to ensure an outcome that achieves both objectives.

*Following Kampala, states parties should:*

- Continue consultations at home and within regional and intergovernmental organizations to promote policies that maximize the likelihood of achieving both peace and justice in conflict resolution.

### III. Cooperation

#### A. Introduction

The success of the International Criminal Court (ICC) is directly related to the will of states parties and intergovernmental organizations to support its mission. Without its own police force to facilitate investigations, locate witnesses, and apprehend suspects, the ICC must rely on the cooperation of states parties to fulfill its mandate.<sup>1</sup> In addition to judicial cooperation and logistical support, the court needs strong political support from its states parties and allies. This includes mainstreaming support for the court in diplomatic relations, particularly in relation to the situation countries under ICC investigation.

While the Rome Statute delineates an express obligation of states parties to cooperate with the court,<sup>2</sup> the cooperation required by the court is substantially more far-reaching than responding to targeted demands for assistance. It embraces forms of cooperation that are mandatory under the Rome Statute and those that, while discretionary (“non-mandatory”), are every bit as essential to the court’s effective functioning.<sup>3</sup> The court simply cannot succeed without active engagement by states parties across a range of areas, whether obligatory or not, to facilitate the ICC’s objectives.

Eight years after the Rome Statute’s entry into force, securing and maintaining this cooperation and engagement remain key challenges in the fight against impunity at the international level. Although cooperation has been forthcoming in a number of areas and the Office of the Prosecutor reports that around 85 percent of its requests for judicial cooperation are met by states parties, a significant proportion of ICC registry requests for assistance—including in the key area of witness relocation—do not receive a response and some are even rejected. States report a lack of procedures at the national level to facilitate

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<sup>1</sup> Cooperation by other actors, including non-states parties, the United Nations, and other intergovernmental bodies, is also essential. See our full discussion in Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years*, July 2008, <http://www.hrw.org/en/reports/2008/07/10/courting-history-0>, part VIII. We focus here primarily on cooperation by states parties, including the need for states parties to mainstream support for the ICC in the United Nations and regional organizations.

<sup>2</sup> Rome Statute article 86 provides that “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of the crimes within the jurisdiction of the Court.” Rome Statute of the International Criminal Court (“Rome Statute”), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 86.

<sup>3</sup> See, for example, the lists of “forms of mandatory cooperation and assistance” and “contractual forms of cooperation and assistance” included in the appendices to ICC, “Report of the Court on international cooperation and assistance” (“Court Cooperation Report 2009”), annex I to Assembly of States Parties (ASP), “Report of the Bureau on cooperation” (“Bureau Cooperation Report 2009”), ICC-ASP/8/44, November 15, 2009, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/ICC-ASP-8-44-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-44-ENG.pdf) (accessed April 20, 2010).

these requests.<sup>4</sup> Only four of the ICC's 13 arrest warrants have been executed, and the court has identified the mobilization of political and diplomatic support for arrests as a key cooperation need.<sup>5</sup> Such political and diplomatic support has become all the more important as the court faces an increasingly challenging external environment; the arrest warrant issued by the ICC in March 2009 for Sudan's President Omar al-Bashir on charges of crimes against humanity and war crimes fuelled and intensified efforts by ICC opponents to undermine not only that specific warrant, but the court itself.

It is for this reason—the fundamental importance of cooperation—that Human Rights Watch welcomes the planned Kampala stocktaking session on cooperation and the focus on an exchange of best practices. These discussions can build on the reporting done to date by the Bureau of the Assembly of States Parties (ASP) and its focal point on cooperation, as well as the court itself,<sup>6</sup> and should pave the way for ongoing discussions on cooperation within the ASP after the review conference. We also look forward to the robust announcement of pledges by states parties of increased political and practical support for the court, and we encourage states parties to discuss at the review conference how to ensure the follow-through of pledges.

Plans for stocktaking have identified particular areas of cooperation for discussion: (1) “implementing legislation”; (2) “supplementary agreements and arrangements and other forms of cooperation and assistance”; (3) “challenges encountered by States Parties in relation to requests for cooperation”; (4) “cooperation with the United Nations and other intergovernmental bodies, including regional bodies”; and, (5) “enhancing knowledge,

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<sup>4</sup> See ICC, “Court Cooperation Report 2009,” paras. 8, 40, 92. States parties have not been as forthcoming as they could be in reporting on their cooperation or providing the ASP with information that could help to facilitate increased levels of cooperation. In 2006, the ASP adopted a “Plan of Action for the Universality and Full Implementation of the Rome Statute.” Pursuant to that plan, in each subsequent year, the ASP secretariat has requested states parties to provide information under the plan so as to facilitate exchange of information and assistance between states parties. The information requested is relevant to cooperation, such as bilateral cooperation agreements with the court and implementation of Part IX of the Rome Statute on cooperation. See, for example, ASP Secretariat, Note verbale, July 25, 2007 [http://www.icc-cpi.int/Menu/ASP/Sessions/Plan+of+Action/2007+\\_+Plan+of+Action.htm](http://www.icc-cpi.int/Menu/ASP/Sessions/Plan+of+Action/2007+_+Plan+of+Action.htm) (accessed April 22, 2010). But the secretariat’s requests (which include a questionnaire on implementing legislation prepared by the court) have met with only a limited response each year. The 2009 questionnaire has been reissued in advance of the review conference in the hopes of generating additional responses. In addition, the Bureau focal point on cooperation (discussed further below) asked each state party to designate a focal point responsible for cooperation within their diplomatic missions in New York, Brussels, or The Hague, but over 40 states parties failed to respond to this request. ASP, “Bureau Cooperation Report 2009,” para. 6(a).

<sup>5</sup> ICC, “Court Cooperation Report 2009,” para. 7.

<sup>6</sup> See, for example, ASP, “Report of the Bureau on Stocktaking: Cooperation,” ICC-ASP/8/50, March 18, 2010, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8R/ICC-ASP-8-50-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-50-ENG.pdf) (accessed April 20, 2010); ICC, “Update to the Report of the Court on Cooperation,” April 9, 2010 (copy on file with Human Rights Watch) (“Court Cooperation Report Update”); ASP, “Bureau Cooperation Report 2009,” ASP, “Court Cooperation Report 2009”; ASP, “Report of the Bureau on Cooperation,” ICC-ASP/6/21, October 19, 2007, [http://www.icc-cpi.int/iccdocs/asp\\_docs/library/asp/ICC-ASP-6-21\\_English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-21_English.pdf) (accessed April 20, 2010) (“Bureau Cooperation Report 2007”).

awareness, and support for the Court.”<sup>7</sup> Focused, concrete discussion in each of these areas—including as to the challenges presented—could lead to enhanced understanding and state practice. There are two important considerations to bear in mind prior to Kampala; first, about how preparations could be carried out, and, second, about cooperation practices to date.

## B. Discussions in Kampala

In order to make discussions in Kampala as substantive as possible, we urge governments to prepare in advance by consulting internally and across relevant ministries and agencies on their experiences to date. While the depth of experience with court cooperation requests varies, all states parties should have a basis for assessing their cooperation practices to date given the court’s broad need in multiple areas. These include putting in place legislation and national arrangements to facilitate cooperation; responding to direct cooperation requests; concluding framework agreements with the court; and providing political and diplomatic support. The experience of some states parties with other international criminal tribunals may also yield important insights that could inform and improve cooperation practices with the ICC. For those states parties that have not yet done so, responding to the reissued questionnaire on the measures undertaken in respect of implementing legislation of the Rome Statute<sup>8</sup> should assist in their assessment of progress made on providing for cooperation through national implementing legislation.

These consultations should help to advance practice within each state party by identifying areas where improvements could be made, or where further understanding and information is first needed. Lessons learned through these internal consultations should also be shared in statements made from the floor during stocktaking following the opening remarks of the cooperation panelists, as well as during cooperation-related side events at the review conference. Given the limited time on the agenda in Kampala for stocktaking, states may wish to consider preparing a short written assessment of their cooperation with the court that could be included in a report of discussions.

While the focal points have identified some priority areas for discussion in Kampala, we encourage states parties in their consultations and preparations to consider steps taken and challenges encountered in addressing the court’s full range of cooperation needs. Some states parties have pointed to a distinction between non-mandatory and mandatory forms of

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<sup>7</sup> ASP, “Report of the Bureau on Stocktaking: Cooperation,” para. 20.

<sup>8</sup> ASP Secretariat, Note verbale, ICC-ASP/S/PA/07, April 9, 2010, [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/PRE-RC-NV-PoA-questionnaire-ENG-9april2010.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/PRE-RC-NV-PoA-questionnaire-ENG-9april2010.pdf) (accessed April 22, 2010).

cooperation. This distinction, however, has limited bearing on the practical needs of the court. In that spirit, we hope that discussions on cooperation at the review conference can help to demonstrate that an expansive understanding of cooperation is necessary to enhance support to the court.

States parties should give consideration to how discussions on cooperation can be carried forward beyond Kampala. A resolution on cooperation would provide an opportunity not only to affirm the cooperation obligations of states parties, but also to identify steps to be taken after the review conference. These could include putting in place an Assembly working group and standing agenda item on cooperation (discussed above), increasing support to states on putting in place adequate implementing legislation, and committing to support the resources necessary for an enhanced court public information strategy. The resolution could also provide for follow-up on the pledges of increased political and practical support to the court that we anticipate will be announced by most states parties during the review conference. Follow-up will be necessary to ensure that these pledges result in concrete action by states parties; we encourage the resolution to mandate the Bureau to consider mechanisms through which this follow-up could be provided and whether pledging should become a regular feature of future Assembly sessions.

## C. The Assembly of States Parties

The Assembly of States Parties is a body created by the Rome Statute to provide management oversight of the administration of the court. Composed of representatives of each state party, the ASP is required to meet at least once a year but can meet more often as required.<sup>9</sup> Among numerous functions, including administrative responsibilities such as approval of the court's yearly budget, the ASP is mandated under article 87(7) of the Rome Statute to consider questions of a state party's refusal to comply with a request by the court for cooperation.<sup>10</sup> While the ASP's development of an article 87(7) mechanism deserves priority attention, Human Rights Watch believes that the role of the ASP in ensuring that the ICC receives sufficient cooperation and support is not confined to instances of non-cooperation but also includes undertaking targeted initiatives designed to improve cooperation. As discussed below, the ASP has taken important steps toward this end; further developments and the establishment of an ASP working group on cooperation are needed to consolidate this progress.<sup>11</sup>

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<sup>9</sup> Observer states are also invited to attend or participate in certain aspects of the work of the ASP. Rome Statute, art. 112(1).

<sup>10</sup> Rome Statute, arts. 112(2)(f), 87(7).

<sup>11</sup> See, for example, Human Rights Watch, *Memorandum for the Fifth Session of the Assembly of States Parties to the ICC*, November 2006, <http://www.hrw.org/backgrounder/ij/asp1106/asp1106web.pdf>.

### *1. Strengthening ASP procedures*

Over the past four years, the ASP has taken a variety of measures to strengthen its functioning both during and outside of its annual sessions. For example, the ASP Bureau has appointed two permanent working groups, one in The Hague and one in New York. These working groups meet throughout the year and facilitate substantive discussions on ICC issues as they arise in advance of the formal ASP sessions.<sup>12</sup>

The ASP also has moved to longer annual sessions, which allows more in-depth discussion and attention to broader issues like cooperation in addition to technical items that may require decisions. To date, cooperation has not featured on the formal agenda of an ASP session, although informal consultations were held during recent sessions, with those consultations during the eighth session yielding a first-ever stand-alone resolution on cooperation.<sup>13</sup> Of particular significance to cooperation, however, has been the regular addition of a general debate at the opening of ASP sessions. The debate provides an excellent platform for states parties to express their support for the court and to raise matters of overarching importance regarding the ICC. General debates can draw contributions from high-level officials and thus further reinforce political support for the ICC and its mandate.

We expect that the general debate during the review conference will serve a similar function, heightened by the presence of more high-level officials than might otherwise attend an ordinary ASP session. The anticipated adoption of a high-level declaration reaffirming commitment to the ICC at the conclusion of the review conference's general debate will constitute an important source of political support beyond Kampala and would set a positive tone for further interventions in the stocktaking exercise and in subsequent negotiations on amendments.

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<sup>12</sup> See ASP, "Proceedings," in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth session, The Hague, November 28 - December 3, 2005*, ICC-ASP/4/32, Part I, [http://www.icc-cpi.int/library/asp/Part\\_I\\_-\\_Proceedings.pdf](http://www.icc-cpi.int/library/asp/Part_I_-_Proceedings.pdf) (accessed May 13, 2008), para. 21. As part of their functioning, these groups meet regularly; interact with the ICC, nongovernmental organizations and relevant experts; produce reports to facilitate the ASP's work; and assist in preparation for the ASP session. They also appoint focal points and sub-groups to work on specific issues, such as the court's strategic plan, budget, and permanent premises.

<sup>13</sup> See, ASP, "Cooperation," Resolution ICC-ASP/8/Res.2, November 26, 2009, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth Session, The Hague, November 18-26, 2009*, ICC-ASP/8/20, Part II, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Part.II.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Part.II.pdf) ("Eighth ASP Official Records"), pp. 17-19 ("Eighth ASP Cooperation Resolution").

## *2. Targeted initiatives on cooperation*

In the past four years, the ASP has undertaken initiatives to convert broad proclamations of support into sound cooperation policy and practice. These have included preparation of a Bureau report on cooperation, appointment of a Bureau cooperation focal point (now facilitator) with a two-year mandate (see below), and adoption in November 2009 at its eighth session of a first Assembly resolution. The Bureau report, in particular, provides invaluable guidance by identifying a range of steps that states parties should take to improve cooperation with and support for the ICC, and we discuss many of the Bureau's recommendations below.<sup>14</sup>

At its sixth session, the ASP appointed a focal point on cooperation with a two-year mandate,<sup>15</sup> Ambassador Yves Haesendonck of Belgium, and at its eighth session, the ASP acted to put into place a facilitator to succeed the focal point.<sup>16</sup> The new cooperation facilitator—Ambassador Mary Wheelen of Ireland—was tasked, along with a co-focal point, to prepare stocktaking on cooperation for the review conference. A cooperation resolution adopted by the Assembly during the eighth session—the first of its kind specific to cooperation—also provided her with an open-ended list of additional tasks during the remainder of her mandate. These included picking up on work carried out by Haesendonck to promote witness relocation agreements and furthering the court's expertise in financial investigations. In addition, after Haesendonck's request to the court to prepare a report with its assessment of cooperation, the Assembly asked for an updated version in advance of the review conference.<sup>17</sup> The court's report and its update should provide useful information to states parties about its priority needs, and should be keep in mind by states parties in identifying pledges of practical support to the court consistent with meeting those needs.

The cooperation facilitator, like the focal point before her, can play a positive role in fostering cooperation and support by helping to bridge the gap between the court's needs and states parties' knowledge of and capacity to respond to them, and by stimulating discussion among states parties both as to general lessons learned and taking forward

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<sup>14</sup> During its fifth session, the ASP appointed facilitators in New York and The Hague who led consultations and prepared a report on cooperation. In New York, the facilitator was the Dutch legal advisor, while in The Hague, the Danish ambassador served in this role. The report, which was endorsed by the ASP Bureau, provides invaluable guidance by identifying a range of steps that states parties should take to improve cooperation with and support for the ICC. See ASP, "Strengthening the International Criminal court and the Assembly of States Parties," Resolution ICC-ASP/5/Res.3, December 1, 2006, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-ASP5-Res-03-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP5-Res-03-ENG.pdf) (accessed April 20, 2010); ASP, "Bureau Cooperation Report 2007."

<sup>15</sup> ASP, ""Bureau Cooperation Report 2009," para. 1.

<sup>16</sup> ASP, "Eighth ASP Cooperation Resolution," para. 16.

<sup>17</sup> *Ibid.*, paras. 16-17.

specific initiatives. Indeed, in proposals for the review conference, the facilitator has emphasized the need for an exchange of best practices and has proposed a biennial discussion of the progress achieved in cooperation as a standing item on the ASP agenda.

Human Rights Watch fully supports such regular discussion of cooperation, but believes it should take place more frequently than the proposed biennial schedule. Indeed, to complement the efforts of the facilitator and to upgrade institutional support for cooperation within the ASP, we recommend the ASP put in place a permanent, intersessional working group on cooperation.

An intersessional working group would offer a number of advantages. Given the scope of the court's cooperation requirements, a working group is more appropriately suited to take this work forward than a single facilitator acting on her own. The facilitator, however, could chair the working group and take a leadership role, particularly in the development of its first procedures and practices. A working group could also be composed of a number of states parties representatives based in key cities, including The Hague, New York, Brussels, and Addis Ababa. The geographic reach of such a working group would enable it to work closely with institutions providing cooperation to the court, including the UN, the European Union, and the African Union.

Procedurally, the working group could meet intersessionally and prepare a report for discussion and debate at the annual Assembly session, reflecting the activities of the working group over the previous year and proposing an action plan for the coming year. The working group session at the Assembly would also provide an ideal opportunity for presentation of an annual court report on cooperation identifying its needs.

Substantively, the working group could take up specific, targeted initiatives each year, drawing on the recommendations detailed in the Bureau report on cooperation. These initiatives could be identified in consultation with the Bureau, and could include initiatives similar to those set out in the cooperation resolution with regard to the mandate of the facilitator.

A permanent working group on cooperation would secure for this key issue a standing place on the agenda of the ASP, providing cooperation with the profile and attention it deserves from states parties. We recommend debate during the review conference on the merits and structure of a cooperation working group and a review conference resolution on cooperation calling for putting this group in place.

## D. Judicial cooperation and logistical support

Judicial cooperation and logistical support encompass a range of critical assistance, which includes providing evidence, serving documents, executing searches, protecting witnesses, freezing assets, surrendering suspects, and imprisoning convicted persons. In its recent update to its cooperation report, the court noted several areas of particular importance when it comes to judicial cooperation. The Office of the Prosecutor (OTP) pointed to the need for increased access to witnesses, including through the issuance of emergency visas, and to bank records and asset tracing to facilitate financial investigations. The registry noted the continued need for agreements on interim release, enforcement of sentences, and witness relocation, as well as the positive response of states to specific requests in these areas.<sup>18</sup> It is important to bear in mind that judicial cooperation includes assistance to the defense as well as the prosecution.

Key to ensuring judicial cooperation and logistical support is having the proper legal basis and practical arrangements in place to respond in a timely and effective manner. Of course, political will to put the proper legal foundation in place and to provide relevant cooperation and support is of the essence.

A variety of means available to states parties to enhance capacity to provide judicial cooperation and logistical support are discussed below. Human Rights Watch strongly encourages states parties to consider these and to promptly undertake relevant measures where they are not yet in place.

### *1. Implementing legislation*

To give effect to the general obligation of states parties to cooperate with the court, article 88 of the Rome Statute provides that states parties are required to “ensure that there are procedures available under their national law for all of the forms of cooperation” under the statute.<sup>19</sup> Legislation to implement the Rome Statute in national law, often referred to as “implementing legislation,” is vital to meeting this requirement: it lays a clear domestic basis for cooperation.

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<sup>18</sup> Ibid., para. 17. The registry has a pivotal role in the effective functioning of the court. It is responsible for non-judicial aspects of the administration and servicing of the court, including with regard to witness protection, outreach and public information, and facilitating victim participation. It is headed by the registrar, the principal administrative officer of the court.

<sup>19</sup> Rome Statute, art. 88. See also Human Rights Watch, *Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute*, vol. 13, no. 4(G), September 2001, [http://www.hrw.org/campaigns/icc/docs/handbook\\_e.pdf](http://www.hrw.org/campaigns/icc/docs/handbook_e.pdf).

The absence of implementing legislation does not remove states parties' obligations to cooperate with the court, but makes such cooperation dependent on ad hoc arrangements. This is vastly more complicated and burdensome for the ICC. Unfortunately, many states parties have yet to pass implementing legislation. These states parties should take all necessary steps to adopt implementing legislation. This may include engaging in technical consultations with states parties that have similar legal systems (and, therefore, similar approaches to addressing legal issues that may arise), both bilaterally and within regional organizations to facilitate this process. An Assembly cooperation working group could enhance the role presently played by the ASP secretariat (working together with the Bureau facilitators on universality and cooperation) to increase exchange of information between states parties on implementing legislation in order to share lessons learned, match states parties with technical assistance needed, and create sustained political momentum toward implementation.

## *2. Domestic institutional arrangements*

Putting into place effective domestic institutional arrangements is another important way for states parties to facilitate effective cooperation with the court. As the ASP Bureau's report indicates, having adequate procedures in place before an actual request is received fosters a timely and satisfactory response.<sup>20</sup> For states parties that have not previously cooperated with an international criminal tribunal, advance thinking and planning is all the more important. Many states parties have already established institutional arrangements to facilitate cooperation and support. Some of these arrangements, which vary in complexity and scope, are detailed below. We have encouraged those states that have not yet established adequate institutional arrangements on cooperation to identify steps needed to do so and commit to taking these steps as part of pledges announced at the review conference.

Of course, the ICC must provide states parties with adequate information on the cooperation and support that it needs. This is especially important for states with less experience cooperating with tribunals and with less understanding of what is required in practice for cooperation.<sup>21</sup> In March 2007, the ICC prepared a report for the benefit of states parties detailing some of its requests,<sup>22</sup> and, as noted above, at the request of the ASP, the court

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<sup>20</sup>ASP, "Bureau Cooperation Report 2007," para. 4.

<sup>21</sup> Human Rights Watch interview with ICC state party diplomat, The Hague, March 17, 2008.

<sup>22</sup> ICC, Cooperation Report to the Bureau of the Assembly of States Parties, March 2007 (copy on file with Human Rights Watch).

has prepared an update of its fall 2009 report on cooperation in advance of the review conference.

#### **a. National focal points**

A basic arrangement that many states have established is the appointment of a national focal point on ICC cooperation.<sup>23</sup> This focal point receives cooperation requests from the court and channels them to the relevant body within the national authorities. In some countries, the national focal point is responsible for following developments at the ICC and for participating in ASP sessions.<sup>24</sup> In addition, the focal points help their respective national governments define policies regarding specific developments related to the work of the court.

Human Rights Watch believes that these national focal points should play an additional role: proactively working to build support for court issues within and across government institutions.<sup>25</sup> This would increase understanding within governments about the ICC, which in turn will promote more effective cooperation. Efforts toward this end could involve convening discussions and meetings on cooperation and sharing updates with relevant ministries.

Working through a focal point may at times slow response time to cooperation requests. For example, it could seem more efficient for ICC staff to contact the local police in Paris to interview a Congolese citizen residing there who may be a witness in the ICC's investigation in the Congo. However, Human Rights Watch believes there is a major value to working through a central authority: it ensures that the response reflects a government position as opposed to that of an enthusiastic individual who may soon rotate posts.<sup>26</sup>

For a number of states parties, the national focal point is someone appointed from their ministry of foreign affairs, although justice ministries tend to be involved in the practical work of responding to cooperation requests. For other states parties, the Hague-based embassy legal adviser serves this function, working with contact points within ministries. In order to ensure cooperation issues receive the attention that they require, it may be necessary to appoint focal points with senior standing within a government.

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<sup>23</sup> Human Rights Watch separate interviews with several ICC state party diplomats, The Hague, March 17, 2008.

<sup>24</sup> For example, focal points from European Union (EU) states are part of a group of national focal points who participate in regularly convened meetings on the ICC through the Council of the European Union Working Group on International Law (COJUR).

<sup>25</sup> See ASP, "Bureau Cooperation Report 2007," para. 3.

<sup>26</sup> Human Rights Watch interview with Belgian diplomat, Brussels, February 7, 2008.

### **b. Interagency task forces**

Some states parties have also created more detailed internal coordinating arrangements. This tends to be the pattern among states with greater resources and previous experience cooperating with international tribunals. One such arrangement is an inter-ministerial task force.<sup>27</sup> An inter-ministerial task force—which can meet regularly or on an as-needed basis—can foster greater consultation and can enable information exchange among relevant ministries on cooperation. It can also heighten the ICC’s profile within a government.

One of the more developed units is the Belgian Task Force (BTF). The BTF provides a forum in which consideration and discussion of cooperation with the ICC and other international tribunals occurs.<sup>28</sup> The BTF includes representatives from a wide range of governmental departments, including the ministries of foreign affairs, justice, defense, and interior, and meets two or three times a year.<sup>29</sup> While the BTF does not deal with specific cooperation requests or projects, it provides a platform where the relevant Belgian authorities consider and discuss cooperation with the ICC and other international tribunals and helps to keep information about cooperation requests and projects flowing.<sup>30</sup> Notably, through the BTF, each department designates a contact point. This can facilitate response to specific cooperation requests involving these departments as they arise. In addition, while a national focal point unit in the Ministry of Justice helps to move specific requests through the national machinery, a sub-group of the BTF consisting of the most relevant actors can be pulled together to assist as needed on particular projects, such as negotiations on a witness relocation agreement.

As such, the approach reflected by the BTF is valuable in that it helps ensure that officials who should be involved in ICC cooperation are “at the table.” It also raises awareness about international justice and judicial cooperation matters.

### *3. Framework agreements*

There are some areas—such as transport of suspects, witness relocation, provisional release of defendants, and enforcement of sentences—for which agreements prior to specific

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<sup>27</sup> Human Rights Watch separate interviews with Belgian diplomat, Brussels, February 7, several ICC state party diplomats, The Hague, March 17, 2008 and French diplomat, Paris, March 18, 2008.

<sup>28</sup> Human Rights Watch interview with Belgian diplomat, Brussels, February 7, 2008.

<sup>29</sup> These include: the prime minister’s cabinet; the ministries of foreign affairs, justice, defense, and interior; the federal prosecutor, police, and correctional units; and the military and civilian intelligence services. *Ibid.*

<sup>30</sup> In fact, specific requests go to the international judicial cooperation service within the Justice Ministry consistent with Belgium’s ICC implementing law, which appointed the ministry as the contact point for cooperation requests. *Ibid.*

requests for cooperation are especially important.<sup>31</sup> These requests may require quick turnaround and may arise several times. It is simply too onerous and inefficient to “reinvent the wheel” every time.

“Framework agreements” between the ICC and states parties are one important means through which these needs can be properly addressed. Framework agreements provide a broad outline of duties and responsibilities for states parties and provide a basis on which states can react quickly to court requests.<sup>32</sup> Notably, the agreements do not predetermine a specific positive or negative reaction by the state party. However, if a decision is made to move ahead, a foundation is already in place.

While some framework agreements have been concluded, the current number is insufficient.<sup>33</sup> Admittedly, assistance such as witness relocation and imprisonment of convicted individuals involve financial commitments and long-term assistance. At the same time, these are fundamental to the court’s ability to function. Moreover, as the number of cases before the court increases, the demands in these areas will likely grow.<sup>34</sup> The greater the number of states parties that sign framework agreements, the more the burdens can be properly shared and managed.

We urge all states parties to consider concluding agreements regarding witness relocation. Of course, there are advantages to relocating a witness to a geographically proximate and culturally similar environment. However, states that fit those requirements may lack the necessary capacity and expertise in this area.<sup>35</sup> As discussed in the ASP Bureau report on

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<sup>31</sup> See ASP, “Bureau Cooperation Report 2007,” para. 21.

<sup>32</sup> The agreements contain information such as the identity of the national officials who must be contacted; what information should be provided by the court; how much time the state has to reply to a request; what happens if the agreed timeframe is not met; who will bear which costs; and who will give final approval. Human Rights Watch interview with ICC staff, New York, December 11, 2007.

<sup>33</sup> While information on transport agreements is not available, the court to date has been able to conclude only ten witness relocation agreements, two ad hoc witness relocation agreements for specific cases, one agreement where a state party agreed to sponsor witness relocation to a third state, and two enforcement of sentences agreements. ASP, Bureau Cooperation Report 2009, paras. 64, 90. In addition, the court reports that it has reached advanced negotiations with three states parties on enforcement of sentences agreements and is nearing finalization of negotiation of two additional framework agreements on witness relocation. ICC, “Court Cooperation Report Update,” paras. 16, 18.

<sup>34</sup> For example, according to the ASP Bureau’s 2007 report on cooperation, “[i]n 2001 there was one application for protection. That number increased to 36 in 2006. The Court has in the first half of 2007 alone received 25 applications ... [E]ach application for the protection of a witness concerns 5-20 individuals/dependants.” ASP, “Bureau Cooperation Report 2007,” para. 46.

<sup>35</sup> Nevertheless, the investment required is likely less burdensome than some states appear to perceive it to be: according to court officials, some states parties have thought witness relocation would involve hundreds of refugees. Human Rights Watch interview with ICC staff, New York, December 11, 2007. This has not been the case. Witness relocation, especially outside the region where witnesses live, is generally only pursued as a last resort since moving a witness to a country with an unfamiliar language and culture is not desirable for him or her.

cooperation, and pursued by the Bureau focal point on cooperation, it would be useful to explore ways in which states parties with relevant experience and resources can assist states parties that are willing but lacking in capacity.<sup>36</sup> Indeed, the court is in the process of establishing a special fund to facilitate witness relocation for just these purposes.<sup>37</sup> The court has also indicated its intent to explore tripartite agreements with states willing to consider funding requests for the enforcement of the sentence of a convicted person on the territory of another state party.<sup>38</sup>

Other challenges can arise in the interface between the needs of witness relocation and enforcement of sentences, on the one hand, and the requirements of domestic law, on the other. This is especially pronounced in countries with a federal system, where social benefits may flow from a particular provincial or state entity.<sup>39</sup> The process of negotiating a framework agreement in such states can be a valuable way to bring the relevant actors together to resolve challenges to providing assistance. This also avoids such issues becoming repeated roadblocks.

An overarching obstacle is a belief among some state officials that there is little or no popular domestic support for assisting the court with practical tasks that involve costs. Some states parties, as a result, are reluctant to tie themselves down with a framework agreement.<sup>40</sup> Where popular support may appear to be lacking, we see a vital role for officials to develop strategies to change public opinion. Moreover, such assistance should be presented and understood as an integral part of the fight against impunity and consistent with ICC membership. Otherwise, the court will not be able to operate.

## **E. Diplomatic and political support**

Given the challenges that the ICC faces, the need for vigorous diplomatic and political support by states parties cannot be overstated. As the ASP Bureau's report on cooperation

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<sup>36</sup> ASP, "Bureau Cooperation Report 2007," para. 21.

<sup>37</sup> ASP, "Bureau Cooperation Report 2009," para. 93.

<sup>38</sup> See ASP, "Bureau Cooperation Report 2009," § D(2)(g). The proposed review conference resolution on "strengthening the enforcement of sentences," originally proposed by Norway, would usefully call on states to indicate their willingness to accept sentenced persons and would seek to include within the programs of the World and regional banks, the United Nations Development Program, and other relevant multilateral and national agencies assistance to states in the building of prison facilities. See "Draft resolution on strengthening the enforcement of sentences," annex V to ASP, "Review Conference," Resolution ICC-ASP/8/Res.9, March 25, 2010, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf) (accessed April 20, 2010). The draft resolution met with consensus during the ASP's eighth resumed session and we look forward to its adoption in Kampala.

<sup>39</sup> Human Rights Watch interview with ICC state party diplomat, The Hague, March 17, 2008.

<sup>40</sup> Ibid.

points out, “[c]onsistent, strong and long-term political support of states parties is of vital importance for the Court to be able to carry out its functions.”<sup>41</sup> Diplomatic and political support can be key to achieving particular goals, such as arrest and surrender, and also to creating a climate that is generally conducive to facilitating the court’s work.

Active diplomatic and political support is all the more important given that the ICC often operates in situations of instability or ongoing conflict. Investigation and trials of crimes committed in these situations are particularly significant since a credible threat of prosecution may help stem further abuses. At the same time, in these settings the court’s work exists alongside other important objectives, such as peace negotiations and peacekeeping operations.

Human Rights Watch recognizes that states parties manage a range of interests vis-à-vis ICC situation countries. But silence, ambivalence, or muted support regarding the ICC’s mandate in these situations sends an untenable signal about the court and about justice more generally. States parties should give clear, consistent backing to the ICC in these circumstances and also should stress the role of justice in cementing a durable peace and the need for an outcome that include both objectives. Moreover, as discussed below, there are numerous other important opportunities that we urge states parties to seize to provide the court with needed diplomatic and political support.

### *1. Arrest and surrender*

Without its own police unit to execute its arrest warrants, the ICC remains wholly dependent on the assistance of governments—sometimes regimes responsible for the very crimes at issue—to apprehend accused persons. There has been some cooperation on arrest: in 2008, for example, Belgian authorities arrested Jean-Pierre Bemba on the basis of an ICC arrest warrant and transferred him to ICC custody; until early 2009 Democratic Republic of Congo (DRC) authorities provided important cooperation toward the arrest of individuals wanted in the DRC situation (such cooperation ended with the integration of a former rebel commander into the Congolese army, as discussed below). Overall, however, the court has faced significant obstacles with respect to arrest and surrender.

To date, most ICC arrest warrants have not been executed and several arrest warrants have been outstanding for years. President Joseph Kabila of the DRC has claimed that the imperative of peace prevents the arrest of Bosco Ntaganda, a former rebel commander who

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<sup>41</sup> ASP, “Bureau Cooperation Report 2007,” para. 65.

is wanted by the ICC on charges of recruiting children to be combatants.<sup>42</sup> Rather than arrest Ntaganda, the Congolese government has rewarded him with the rank of general in the Congolese army.<sup>43</sup> In the Darfur situation, President al-Bashir overtly flaunted the ICC's two existing warrants of arrest for militia leader Ali Kosheib (a pseudonym for Ali Mohammed Ali) and State Minister for Humanitarian Affairs Ahmed Haroun. We discuss below the backlash experienced by the court in the wake of the arrest warrant issued for President al-Bashir.

Compelling the arrest and surrender of individuals by a recalcitrant government is one of the most difficult tasks for the court. It highlights the broader limitations of a still fledgling system of international justice.

Despite the difficulties, experience from the 15 years of international criminal tribunal practice shows that efforts by states to wield their combined political, diplomatic, and economic clout can be decisive for arrest and surrender. At the International Criminal Tribunal for the former Yugoslavia (ICTY), for example, Serbia's surrender of 20 indicted persons in 2005 and two indictees each in 2007 and 2008 (including former Bosnian Serb leader Radovan Karadzic) was directly related to diplomatic pressure around negotiations over its prospective accession to the European Union.<sup>44</sup> In 2006 increasing diplomatic pressure by states, including the United Kingdom and the United States, helped lead to the surrender of former Liberian president Charles Taylor for trial at the Special Court for Sierra Leone.

These examples underscore the value of principled and active use of diplomacy. To this end, states parties should regularly raise arrest and surrender in bilateral contacts with non-cooperative states, in interactions with influential third-party states, in meetings at regional and international intergovernmental organizations, and at ASP sessions. States parties should also be creative in identifying and utilizing relevant political and economic leverage as appropriate, such as sanctions. Such efforts may not lead to immediate action but are crucial to stigmatization and, ultimately, surrender.

The situation in Uganda presents a more complicated picture, where the main difficulty at present appears to be capacity to execute arrest warrants. The Lord's Resistance Army has

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<sup>42</sup> See Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, <http://www.hrw.org/node/84264>, p. 54.

<sup>43</sup> Ibid., pp. 50-54. See further discussion of the high price paid in the DRC for impunity in Part XX.

<sup>44</sup> The EU similarly made cooperation with the ICTY a precondition to accession negotiations with Croatia, which helped bring about the arrest of Croatian commander Ante Gotovina in the Canary Islands, Spain, in December 2005.

established bases in a remote corner of northeastern DRC and has renewed attacks on civilians, including by committing massacres and forced recruitment through abduction.<sup>45</sup>

These circumstances create special challenges for states parties and the court that are likely to repeat themselves in other situations. Where capacity is inadequate, states parties should be willing to share in the burden of executing arrest warrants as a key component of their cooperation obligations. States parties should consider a variety of forms of assistance—including the strategic planning for arrests—and could do so through intergovernmental and regional organizations.

We recognize that this goes a step beyond what most states currently understand to be their obligations to the ICC and will require development and deepening of those obligations. But where a territorial state in which ICC suspects are located is unable to carry out arrests, it cannot simply become no one's responsibility at all. Instead, responsibility must be shared between states parties.

## *2. Integrating the court in the United Nations system*

It is essential that the ICC become firmly integrated in the United Nations system. The UN is the principal multilateral platform for states parties to channel diplomatic and political support for the ICC. Its involvement in so many conflict and post-conflict situations, including those before the ICC, also means that the UN is in many instances uniquely placed to play a constructive or negative role in relation to the ICC's mandate.

Despite an overall supportive relationship between the UN and the ICC, there has and continues to be some resistance in the UN Secretariat to the ICC. This is most pronounced, not surprisingly, where advancing the ICC's mandate is perceived as a potential obstacle to progress in other UN activities, such as peacekeeping and peace negotiations. This only underscores the need for states parties, as noted below, to convey the importance that they attach to the ICC in interactions with high-level UN officials.

The ASP Bureau report highlights the crucial role of the United Nations and enumerates a number of valuable ways to properly "root" the ICC into the UN machinery. These measures, which should be actively implemented by states parties, are as follows. First, states parties should ensure that the ICC is adequately taken into account in Security Council action,

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<sup>45</sup> See Human Rights Watch, *Trail of Death: LRA Atrocities in Northeastern Congo*, March 2010, <http://www.hrw.org/en/reports/2010/03/29/trail-death-0>; Human Rights Watch, *The Christmas Massacres: LRA Attacks on Civilians in Northern Congo*, February 2009, <http://www.hrw.org/en/reports/2009/02/16/christmas-massacres-0>.

including in relation to peacekeeping mandates, missions, and sanctions. Second, the ICC should be referenced in General Assembly and other resolutions where appropriate. Third, states parties should remind UN member states of their duty to cooperate and should request that states fulfill their obligations, in particular with respect to arrest and surrender. Fourth, when considering candidacies for membership in UN organs, states parties should consider willingness and capacity to ratify the Rome Statute and to cooperate with the court. Fifth, regional groupings should keep the court's needs in mind as appropriate. Sixth, states parties should raise awareness and support for the ICC in appropriate UN fora, including in bilateral meetings with UN officials and in debates in the various UN committees.<sup>46</sup>

In addition, Human Rights Watch urges UN officials and staff to give the ICC essential political support in both private and public contexts, such as in discussions with relevant states and armed groups involved in peace negotiations and in meetings with regional organizations. Two main messages are particularly important: there must be justice where serious crimes in violation of international law have been committed, and justice is vital to establishing a sustainable peace. Indeed, such efforts are consistent with UN policy, practice, and principles.<sup>47</sup>

ICC officials also need to do their part in keeping the UN aware and engaged in the ICC's work. Important practice in this regard, as discussed below, includes the ICC president's annual address to the General Assembly, the prosecutor's briefings to the Security Council on Darfur, and the establishment of the ICC-UN liaison office. The activity that has accompanied briefings by ICC officials at UN headquarters underscores the benefit of regular visits by high-level court officials to foster diplomatic and political support. The visits are, moreover, important opportunities to engage states parties' representatives in strategic dialogue, especially in advance of significant events such as Security Council briefings.<sup>48</sup>

The filing in April 2010 by the prosecutor of the first-ever request from the court's judges of a finding of non-cooperation by the government of Sudan<sup>49</sup> under article 87(7) of the Rome

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<sup>46</sup> ASP, "Bureau Cooperation Report 2007," para. 7, recommendations 42, 45, 48, 49, 50, 51, 65.

<sup>47</sup> See, for example, Report of the U.N. Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616, August 23, 2004, <http://www.un.org/Docs/sc/sgrepo4.html> (accessed May 5, 2007), para. 2.

<sup>48</sup> See, for example, the ASP Bureau report's recommendations 54 and 55 which state, "As much as possible, the organs of the Court should schedule their high level visits to New York in such a way as to ensure an equal spread throughout the year and coincide with the most significant and relevant United Nations events"; and "High-level Court visitors should continue to be available in the margins of such visits to brief the Group of Friends of the International Criminal Court as well as Court membership of regional groups, including on situations and cases." ASP, "Bureau Cooperation Report 2007," recommendations 54, 55.

<sup>49</sup> *Prosecutor v. Harun and Kushayb*, ICC, Case No. 02/05-01/07, "Public Redacted Version of Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of The Prosecutor v Ahmad Harun and Ali Kushayb,

Statute highlights another important role of the Security Council. If the judges make a finding of non-cooperation, that finding may be forwarded to the Security Council for action, which could include resolutions or sanctions to bring about cooperation.

While there are numerous UN fora that states parties can utilize to provide political and diplomatic support to the ICC, several annual opportunities merit special note. These are the General Debate of the General Assembly, in which the ICC was positively featured in 2007,<sup>50</sup> the ICC president's briefing to the General Assembly; and negotiations over the ICC resolution by the General Assembly's sixth committee.

### *3. Integrating the ICC into the work of regional organizations*

Diplomatic and political support to the ICC from regional organizations is also very important. These organizations are influential, and their explicit backing provides added leverage for the court in executing its orders and in endorsing its mandate. This backing also brings geographic support for the court, which may have implications for the practical assistance provided to the ICC on the ground. As indicated in the ASP Bureau report, states parties should promote, where possible, the “mainstreaming” of court-related issues within such organizations.<sup>51</sup>

The ASP report proposes important specific measures that states parties should undertake vis-à-vis regional organizations, which Human Rights Watch fully endorses. These include: initiate and support joint statements and resolutions by regional organizations promoting the court and its general and situational activities, promote cooperation agreements between regional organizations and the ICC, support the establishment of working groups within regional organizations on the ICC, promote meetings within regional organizations to raise awareness and to exchange information on cooperation, and address the ICC at high political levels within the relevant organizations.<sup>52</sup>

The European Union offers a positive model regarding the kind of cooperation that is required from regional organizations. In 2003, the EU adopted a common position on the ICC

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pursuant to Article 87 of the Rome Statute,” April 19, 2010, <http://www.icc-cpi.int/NR/exeres/921C6A9A-8FC2-4866-A36D-7CA4C7D3BB7E.htm> (accessed April 23, 2010).

<sup>50</sup> During the 62<sup>nd</sup> Session of the General Assembly’s general debate, for example, approximately one-third of states parties’ interventions discussed the ICC, with some citing the need for cooperation. Coalition for the ICC, “Excerpts from the General Debate of the 62nd Session of the General Assembly, 25 September – 3 October 2007,” <http://www.iccnow.org/documents/GeneralDebateExcerpts2007.pdf> (accessed June 6, 2008).

<sup>51</sup> ASP, “Bureau Cooperation Report 2007,” recommendation 61.

<sup>52</sup> Ibid., recommendations 62, 63, 64, 65, 66, and para. 69.

that is intended to help guide the 27 member states in their action on the ICC both at the EU and in other fora.<sup>53</sup> Consistent with the position, the EU has undertaken numerous initiatives in support of the court. These include carrying out demarches, raising the ICC in political dialogue and in summits with third states, and including a clause of recognition and support to the ICC in cooperation agreements with non-EU states. The European Parliament has also been a staunch supporter of the court since its inception.

In addition, the EU is endeavoring to mainstream support to the ICC in its various activities. Examples include the mandates of the EU special representatives to Sudan and to the Great Lakes to liaise with the court on their respective areas of competence. The EU has also issued numerous foreign minister conclusions in which the ICC is properly featured.<sup>54</sup> The EU should continue efforts to mainstream the ICC in these and other activities. For example, discussions on complementarity during the review conference provide an ideal opportunity for the EU to consider focusing development aid on assisting national judiciaries in situation countries with the investigation and prosecution of serious international crimes.<sup>55</sup> The EU should also consider adopting guidelines on the ICC. Such guidelines, which exist for other important human rights priorities and for international humanitarian law, would bring together the political commitment of the EU's current common position with the practical points included in the current action plan, allowing these documents to be updated to match the court's needs now that it has become fully operational. Adopting guidelines on the ICC would raise the visibility of EU policies on the ICC, and send a strong signal of continued commitment to the ICC even as the EU undergoes institutional reform pursuant to the Lisbon Treaty.

Similar efforts are required by other regional organizations. Given the court's activities in Africa, increased political and diplomatic support is particularly needed from the African Union, a task made more difficult by backlash against the court in the wake of its arrest warrant for President al-Bashir. We discuss below this backlash and steps that could be taken to address it, including within the African Union.

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<sup>53</sup> Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, [http://www.consilium.europa.eu/uedocs/cmsUpload/I\\_15020030618en00670069.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/I_15020030618en00670069.pdf) (accessed on April 28, 2008).

<sup>54</sup> See Council of the European Union, "The European Union and the International Criminal Court," February 2008, [http://www.consilium.europa.eu/uedocs/cmsUpload/ICC\\_interneto8.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/ICC_interneto8.pdf) (accessed May 13, 2008), annex 2 (collecting relevant Council of the European Union conclusions).

<sup>55</sup> See Chapter IV below.

#### 4. Addressing new challenges: The backlash against the al-Bashir warrant

While backlash against the March 2009 ICC arrest warrant for Sudanese President Omar al-Bashir began almost as soon as the application for the warrant was announced,<sup>56</sup> concerted efforts by allies of al-Bashir to undermine the ICC's mission culminated in a July 2009 decision at the African Union (AU) summit in Sirte, Libya. That decision—which appears to have been engineered by a small number of North African non-states parties—called on AU member states not to cooperate in his arrest and surrender.<sup>57</sup> The decision additionally requested the AU Commission to prepare guidelines and a code of conduct for the exercise of the prosecutor's discretionary powers, particularly in relation to his *proprio motu* authority. This was to be done at a late 2009 meeting of African ICC states parties and non-states parties to prepare for the ICC Review Conference.<sup>58</sup>

The call for non-cooperation, contravening the treaty obligations of the 30 African states parties to the ICC, and suggested interference with the prosecutor's independence—a hard-won independence essential to the effective operation of a court often called on to address the role of state officials in serious crimes—are deeply troubling.

Following the July 2009 decision, several African states—including Botswana, South Africa, and Uganda—were quick to publicly oppose the decision or reiterate their commitment to the ICC.<sup>59</sup> Notwithstanding the Sudanese government's statement that al-Bashir was “free to

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<sup>56</sup> See, for example, African Union Peace and Security Council, “Communiqué of the 142nd Meeting of the Peace and Security Council,” PSC/MIN/Comm (CXLII), July 21, 2008, [http://www.iccnow.org/documents/AU\\_142-communique-eng.pdf](http://www.iccnow.org/documents/AU_142-communique-eng.pdf) (accessed November 4, 2009) (expressing the conviction that pre-trial chamber approval of the al-Bashir warrant application would undermine peace prospects and requesting deferral of the “process initiated by the ICC” under article 16 of the Rome Statute).

<sup>57</sup> Assembly of the African Union, “Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC),” Assembly/AU/Dec. 245 (XII) Rev. 1, July 3, 2009, [http://www.africanunion.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-20267%20\(XII\)%20\\_E.PDF](http://www.africanunion.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-20267%20(XII)%20_E.PDF) (accessed July 29, 2009), para. 10. The stated basis in the AU Decision for withholding cooperation is the UN Security Council's lack of response to the AU's request to suspend the ICC prosecution of President al-Bashir according to article 16 of the Rome Statute. The AU Decision is, therefore, premised on dissatisfaction with the actions of a political body, the UN Security Council, rather than with the ICC. In this context, we note that on July 31, 2008, the UN Security Council acknowledged the AU's request for the suspension of the ICC's case against al-Bashir in resolution 1828. The request for additional or different responses by the UN Security Council is a matter that should be addressed directly with the council under its rules of procedure and has no link to cooperation with the ICC.

<sup>58</sup> *Ibid.*, paras. 8, 11.

<sup>59</sup> Indeed, South Africa was legally bound to arrest al-Bashir because of its ratification of the Rome Statute. See “South Africa is Obliged to Arrest Al-Bashir, Says Ntsaluba,” *AllAfrica.com* (Pretoria), July 31, 2009, <http://allafrica.com/stories/200907310710.html> (accessed May 5, 2010); “Botswana's Position on AU Summit Decision Regarding ICC,” Botswana Ministry of Foreign Affairs and International Cooperation, July 29, 2009, [http://www.mofaic.gov.bw/index.php?option=com\\_content&task=view&id=447](http://www.mofaic.gov.bw/index.php?option=com_content&task=view&id=447) (accessed July 7, 2009); “Uganda Committed to ICC,” Office of the President, Uganda Media Center, July 10, 2009, <http://www.mediacentre.go.ug/details.php?catId=3&item=477> (accessed July 29, 2009).

travel across Africa” following the Sirte summit,<sup>60</sup> he in fact has yet to visit an ICC state party, in or out of Africa, since the issuance of the arrest warrant. Prior to the Sirte summit, several statements reflecting strong support for the ICC from African civil society were issued including in Cape Town, Kampala, and Addis Ababa.<sup>61</sup> In the wake of the Sirte decision, a statement signed by more than 160 African civil society groups explicitly called on ICC African states parties to reaffirm their support for the ICC.<sup>62</sup>

Progress in resisting the efforts of a few to strip meaning from the AU’s rejection of impunity for serious crimes, reflected in article 4 of its Constitutive Act, has been strongly assisted by the efforts of many African ICC states parties. African ICC states parties, for example, reaffirmed their commitment to the ICC and to combating impunity during a meeting convened in preparation for the Sirte summit,<sup>63</sup> and have continued to play a strong role in seeing that African Union discussions on the ICC are grounded in principle and include support for the ICC, such as during the November 2009 AU meeting on the ICC.<sup>64</sup> ICC judges and other officials have also worked to spread accurate information about the court

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<sup>60</sup> Andrew Heavens, “AU ruling means Bashir can travel in Africa: Sudan,” Reuters, July 4, 2009, <http://www.reuters.com/article/worldNews/idUSTRE56315820090704> (accessed July 29, 2009).

<sup>61</sup> See “African Civil Society Calls on Governments to Maintain Firm Commitment to ICC,” Coalition for the International Criminal Court news release, June 8, 2009, [http://www.iccnow.org/documents/Uganda\\_May\\_2009 Regional\\_strategy\\_meeting\\_PR.pdf](http://www.iccnow.org/documents/Uganda_May_2009 Regional_strategy_meeting_PR.pdf) (accessed October 30, 2009); “Statement by representatives of African civil society and the legal profession on the implications of the African Union’s recent decisions on universal jurisdiction and the work of the International Criminal Court in Africa, Cape Town,” May 11, 2009 (copy on file with Human Rights Watch); “African Civic Leaders Statement on the situation in Sudan,” June 26, 2009 (copy on file with Human Rights Watch).

<sup>62</sup> See “Africa: Reaffirm Support for International Criminal Court,” Human Rights Watch news release, July 30, 2009 <http://www.hrw.org/en/news/2009/07/30/africa-reaffirm-support-international-criminal-court> (announcing statement). The statement was originally issued on July 30, 2009; as of August 19, 2009, the statement had 164 signatories.

<sup>63</sup> See African Union, Report of the Meeting of African State Parties to the Rome Statute of the International Criminal Court, Addis Ababa, June 8-9, 2009, MinICC/Rpt (copy on file with Human Rights Watch).

<sup>64</sup> During the eighth ASP session, South Africa, on behalf of the African Union, proposed amending the Rome Statute to extend the article 16 role of the UN Security Council to the UN General Assembly. See ASP, “Report of the Working Group on the Review Conference,” in *Eighth ASP Official Records*, annex II, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Annexes.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Annexes.pdf) (accessed April 22, 2010) (“Review Conference Working Group Report”). This was the only amendment proposal to which the African Union members agreed during the review conference preparatory meeting convened in November 2009 pursuant to the Sirte decision. The proposal may reflect continuing dissatisfaction by some within the African Union with the UN Security Council’s inaction on its ongoing call to defer the al-Bashir case, discussed above. While this amendment, if adopted, would have raised serious concerns about the politicization of the court, the proposal was supported by only two states, Namibia and Senegal, during the Assembly session. As a result of prior decisions with the ASP that only those amendments enjoying consensus would be forward for the review conference’s consideration, it was not forwarded to Kampala. Instead, it will be considered alongside other amendments as to which there was not sufficient consensus in a newly created ASP working group on amendments. A proposal by South Africa, again on behalf of the African Union and pursuant to a decision taken during the November review conference preparatory meeting, that the prosecutor be directed by the Assembly to revise his policies to take considerations of peace into account did not prove wholly acceptable to the Assembly and compromise language was found. See African Union, Report of the Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), EX.CL/568 (XVI), Addis Ababa, January 25-29, 2010, <http://www.ccpau.org/Portals/o/xyiznwk/Rep.%20Conf%20ICC%20Ministerial.pdf> (accessed April 20, 2010) (“Report of the Ministerial Meeting”).

including through visits to key African capitals.<sup>65</sup> And, as indicated above, African civil society organizations are working consistently to ensure that their voices in support of international justice are heard. Perhaps partly as a consequence of these combined efforts, the landscape has seen measured improvement in the most recent period. Notably, a decision on the ICC taken at the AU summit in February 2010 made no reference to the Sirte decision, while also calling on African states parties to participate actively in the review conference.<sup>66</sup>

President al-Bashir's allies, however, are unlikely to be easily dissuaded from efforts to undercut the ICC. Nor do challenges to the court's legitimacy emanate exclusively from certain African states that support impunity for governmental leaders. For example, the absence of stronger voices in support of the ICC by states parties and other international partners at important moments, such as around Sudan's elections in April 2010, has been disappointing.<sup>67</sup> ICC states parties, court officials, civil society, and other international partners should pursue sustained efforts to advance the court's legitimacy and secure a broad base of support for the ICC's mission. As discussed below, in addition to states parties employing a full range of diplomatic and political tools, efforts are needed to bolster the court's public information strategy and to build new links with the African Union.

#### **a. Encouraging a strong ICC public information strategy**

The unprincipled critics of the ICC have disseminated misinformation that should be continually exposed and discredited. For example, while a central charge has been that the ICC is unfairly targeting African officials, in fact, three out of the five African situations currently before the ICC were voluntarily referred by African governments. The fourth situation, Darfur, was referred to the ICC by the UN Security Council in a resolution supported

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<sup>65</sup> See, for example, "ICC First Vice-President begins her official visit to African States Parties," ICC press release, June 26, 2009, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%2oreleases/pr426> (accessed October 30, 2009); "ICC President Song starts his first official visit to African States Parties," ICC press release, June 1, 2009, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%2oreleases/icc%2opresident%2osong%2ostarts%2ohis%2ofirst%2oofficial%2ovisit%2oto%20african%2ostates%2oparties> (accessed October 30, 2009).

<sup>66</sup> Assembly of the African Union, "Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC)," Assembly/AU/Dec.270(XIV), February 2, 2010, [http://www.ccpan.org/Portals/0/xyiznwsk/Assembly%20AU%20Dec.270\(XIV\).pdf](http://www.ccpan.org/Portals/0/xyiznwsk/Assembly%20AU%20Dec.270(XIV).pdf) (accessed April 20, 2010), para. 12. The decision did, however, restate the African Union's call for a UN Security Council deferral of the case against President al-Bashir under article 16 of the Rome Statute. *Ibid.*, para. 10. In addition, it requested that African states parties discuss obligations under the Rome Statute on immunity of non-states parties officials in relation to articles 27 and 98 during stocktaking on cooperation at the review conference. *Ibid.*, para 8. Constructive discussion that can help to advance state practice and is welcome, but we note that there may be limited further understanding that can be reached given that the issue is ultimately a matter of interpretation by the ICC's judges.

<sup>67</sup> See, for example, Human Rights Watch, Letter to High Representative Catherine Ashton on Deployment of EU Election Observation Mission in Sudan, March 29, 2010, <http://www.hrw.org/en/news/2010/03/25/letter-high-representative-catherine-ashton-deployment-eu-election-observation-missi>.

by Benin and Tanzania, both then elected members of the Security Council. Only the Kenya situation was initiated by the prosecutor acting on his own motion and subject to the approval of an ICC chamber of three pre-trial judges.

While states parties and civil society can assist in the dissemination of accurate information about the ICC, the court needs its own strong, strategic approach to public information. As discussed in our chapter on “Impact,”<sup>68</sup> progress has been made in deepening the ICC’s approach to outreach to affected communities in recent years, including through the engaged efforts of states parties, and outreach efforts to affected communities are essential and should continue to be reinforced.

Emphasis on outreach, however, has not permitted the full development of a broader public information strategy for the court tied to its external relations requirements. Ensuring that information about the court reaches a wider audience requires multiple approaches and tools and will require additional resources in the court’s budget for implementation. The registry’s Public Information and Documentation Section (PIDS) is in the process of developing a public information strategy, and is also making preparations to use the review conference to reach new audiences.<sup>69</sup> States parties should be prepared to support the additional resources for the court that will be necessary to carry out essential public information efforts.

### **b. Building new links with the African Union**

Human Rights Watch welcomes the decision taken by the ASP at its eighth session to support the establishment of an ICC liaison office with the African Union in Addis Ababa. This office will permit court officials to engage with AU embassies and AU organs and officials, and ensure ready access by embassy and AU officials and staff to accurate information about the court and its activities. Over time, sustained engagement between the court and the AU and its members can help increase understanding of and support for the ICC, facilitating, in turn, the court’s investigations and activities on the continent.<sup>70</sup>

We look forward to the rapid establishment of the ICC liaison office in Addis Ababa. Notwithstanding the efforts of the ASP president and court officials to secure alternative

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<sup>68</sup> See Chapter V.C below.

<sup>69</sup> See Chapter V.C.7 below.

<sup>70</sup> See ASP, “Report of the Court on the establishment of an office for the International Criminal Court at the African Union Headquarters in Addis Ababa,” November 4 2009, <http://www.icc-cpi.int/NR/rdonlyres/B55EF784-86BC-4169-B5C6-92AF5149C69C/o/ICCASP835ENG.pdf> (accessed April 22, 2010), paras. 3-5.

arrangements, it appears that it will first be necessary for the ICC to sign a memorandum of understanding with the African Union before a headquarters agreement can be reached.<sup>71</sup> Negotiations on a memorandum of understanding between the ICC and the AU have reached an advanced stage, although little progress has been made recently. We urge all African states parties to express to AU officials their strong support for an ICC office in Addis Ababa and a speedy adoption of the memorandum of understanding. Statements during the review conference offer an ideal opportunity for African states parties to make their commitment to integration of the ICC into the African Union publicly known. African states parties should additionally consider pledging their political and practical support to moving forward the memorandum of understanding and opening of the Addis Ababa office. A pledge made by all 30 African states parties toward that end would send a powerful signal about their strong commitment to the fight against impunity and the success of the ICC.

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<sup>71</sup> ICC, “Court Cooperation Report Update,” para. 20.

## IV. Complementarity

### A. Introduction

Complementarity is the bedrock of the Rome Statute system. Under this principle, a state party bears primary responsibility for investigating and prosecuting serious international crimes committed on its territory or by its nationals.<sup>72</sup> The ICC only steps in as a court of last resort where national courts cannot or will not do so.<sup>73</sup> But even when the ICC intervenes, fair and effective investigations and trials at the national level remain essential: the court's reach is generally limited to a handful of individuals considered to be most responsible for the crimes committed. States where ICC crimes are committed, however, are often mired in or have recently emerged from conflict or otherwise lack the capacity and political will to meet the obligation to conduct fair trials.

To make the complementarity regime effective in practice, much more is needed to bolster states' capacity to address these realities and meet their obligation to close the impunity gap. Human Rights Watch therefore welcomes the opportunity provided by discussions at the review conference to take stock of complementarity efforts to date and to discuss how to concretely improve domestic accountability for Rome Statute crimes.

In particular, we appreciate the emphasis on “positive complementarity” in the ASP Bureau’s report. We define positive complementarity as voluntary measures undertaken primarily by states and intergovernmental organizations and facilitated by the ICC. These are aimed at strengthening and enabling national capacity to conduct serious and effective national investigations and trials of Rome Statute crimes and, where necessary, to exert political pressure toward that end. The Bureau report recognizes that positive complementarity should not detract from the primary obligation of the state or states that have jurisdiction over the crimes in question to conduct credible national trials. Its emphasis

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<sup>72</sup> In accordance with article 12 of the Rome Statute.

<sup>73</sup> One of the assumptions underlying the complementarity principle is that states are generally better positioned, because of resources and access to key evidence and witnesses, to carry out proceedings efficiently and effectively. OTP, “Informal expert paper: The Principle of Complementarity in Practice,” 2003, <http://www.icc-cpi.int/iccdocs/doc/doc656350.PDF>, p. 3 (“Informal Expert Paper”). Vesting ICC states parties with the obligation to address allegations of war crimes, crimes against humanity and genocide was considered essential to protect national sovereignty in the negotiation of the Rome Statute. John Holmes, “Complementarity: National Courts versus the ICC,” in Antonio Cassese et al., eds., *The Rome Statute of the International Criminal Court: A Commentary*, vol. I (Oxford: Oxford University Press, 2002), p. 668. See also Sharon Williams, “Article 17: Issues of Admissibility,” in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft Baden-Baden, 1999), p. 384.

is on ways to better position states—by prioritizing the prosecution of serious crimes in rule-of-law development assistance already being offered—to discharge that responsibility.

To facilitate discussions on complementarity at Kampala and in preparation for the review conference, we offer our assessment of what more is needed to put complementarity to work in practice. We look first at how complementarity efforts can address the issue of domestic jurisdictions' inability to conduct prosecutions of serious crimes. We discuss why donor states should prioritize prosecution of serious international crimes as a crucial component of their development programs aimed at rule-of-law reform.

We also believe that stocktaking on complementarity should touch on the limited but essential “catalytic” role the court can play in national prosecutions, particularly in country situations under analysis and investigation. In those countries, ICC staff, especially those based in field offices, can provide essential guidance as “insiders” to pinpoint gaps in the domestic justice system that hinder or preclude trials of serious international crimes. Through focusing the attention of donor states on the areas of greatest need in situations under investigation and analysis, in the leverage that the threat of ICC intervention can provide, and through a number of cost-neutral or low-cost initiatives carried out directly by the court, the ICC can be a catalyst for national prosecutions. We outline the role of the court in this area drawing on its own practices to date as well as lessons learned from other tribunals, notably the International Criminal Tribunal for the former Yugoslavia (ICTY).

Of course, a state’s capacity to end impunity at the national level rests on its political will to conduct credible trials.<sup>74</sup> The reality is that unwillingness may be deeply rooted. For instance, a state may possess the tools to try cases but refuses to do so because government officials are themselves responsible or complicit in ICC crimes. These difficulties only heighten the importance of considering what states can do to tackle unwillingness.

We also discuss the crucial role states should play in addressing unwillingness by consistently prioritizing on the international stage the need for national prosecutions. By both privately and publicly expressing their political support for national prosecutions and raising the political cost of inaction in multilateral fora such as UN Security Council and General Assembly meetings, states can play a pivotal role in eroding a state’s unwillingness to address ICC crimes. This section addresses how undertaking projects focused on inability can play a role in transforming willingness at the local level as well. The court has a part to

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<sup>74</sup> Rome Statute, art. 17.

play in galvanizing political will to carry out national prosecutions, which we also address in this section.

Overall, discussions in Kampala on positive complementarity should, we believe, contribute to increased understanding of the need for such voluntary measures and lead to an increased commitment among states parties and the broader international community to share in such efforts. Review conference adoption of the draft resolution on complementarity forwarded by the resumed eighth session of the ASP is a necessary step towards regularizing discussions on this important topic. Indeed, discussions on positive complementarity within the ASP are particularly appropriate since, as a body of states committed to the fight against impunity, the ASP is uniquely positioned to help prioritize efforts toward the prosecution of serious international crimes, a focus too often lacking in broader rule-of-law reforms. Promoting regular discussions on positive complementarity within the ASP also will ensure that the court can bring its unique experience to bear in discussions on strengthening national accountability efforts, as we discuss below. We look forward to discussions after Kampala on the basis of this resolution about the role of the ASP in assisting complementarity initiatives among states parties.

## **B. Overcoming inability: Bolstering a state's capacity to try serious international crimes**

### *1. The role of states and intergovernmental organizations*

#### **a. Mainstreaming in practice: Prosecuting serious international crimes as an essential component of rule-of-law reform**

The Bureau report on complementarity puts a welcome spotlight on how donor states and intergovernmental organizations such as the UN can mainstream, on a voluntary basis, the prosecution of ICC crimes in the development assistance they are already providing. The Bureau report identifies three main categories of assistance that can be rendered under positive complementarity: legislative assistance, technical assistance and capacity-building, and the construction and sustainable operation of physical infrastructure projects.<sup>75</sup>

Human Rights Watch believes that the primary focus of such efforts should be identifying projects in ICC country situations under investigation and analysis. From a practical standpoint, these are countries where the need to bridge the impunity gap is already

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<sup>75</sup> ASP, "Report of the Bureau on Stocktaking: Complementarity," ICC-ASP/8/51, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8R/ICC-ASP-8-51-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf) (accessed April 23, 2010), para. 17 ("Bureau Complementarity Report").

manifest.<sup>76</sup> Indeed, in countries scarred by grave violations of human rights committed on a massive scale, ensuring a more systematic focus in prosecuting serious international crimes can be vital to the success of broader rule-of-law efforts. In these countries, an important part of restoring confidence in the rule of law includes holding to account individuals suspected of the atrocious crimes that “deeply shock the conscience of humanity”<sup>77</sup> and which characterized the underlying conflict. The early process of rule-of-law reform in northeastern Democratic Republic of Congo (DRC) illustrates the limits of efforts aimed at rebuilding the legitimacy of the justice sector in the eyes of affected communities where serious international crimes are not prosecuted.

Five years of violent conflict in Ituri led to the total collapse of the judicial system, which was already in worse condition than elsewhere in the DRC. In late 2003, a memorandum of understanding was signed by the government of the DRC, the European Commission, and the French cooperation agency (“DRC memorandum of understanding”) to establish an emergency program for the rapid restoration of the Bunia judicial system in Ituri.<sup>78</sup> As is clear from the division of labor outlined in the DRC memorandum of understanding, the factors addressed by the program were those that will commonly feature in complementarity initiatives because they go to the core of what is needed to facilitate prosecutions of serious international crimes. They included: funding and deploying qualified judicial staff; addressing the security of court staff, witnesses and victims; and rehabilitation of the judicial system’s physical infrastructure.

In the program’s first six months, between January and June 2004, Human Right Watch documented notable successes. Many people commented on the impact that the arrival of the investigative judges—sent from Kinshasa—had on the attitude of members of armed

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<sup>76</sup> However, there may be projects identified at the regional level aimed at addressing accountability efforts in ICC countries under investigation or analysis, such as with respect to witness relocation. See Silvana Arbia, “The Three Year Plans & Strategies of the Registry in Respect of Complementarity for an Effective Rome Statute System of International Criminal Justice,” Consultative Conference on International Criminal Justice, 2009 conference, <http://www.internationalcriminaljustice.net/experience/papers/session2.pdf> (accessed April 23, 2010), p. 5 (“Registry Discussion Paper”).

<sup>77</sup> Rome Statute, preamble.

<sup>78</sup> The program was born out of a need to reinforce grassroots reconciliation efforts between Hema and Lendu communities weary of inter-ethnic conflict. It was also a logical consequence of the mandate of the “Interim Emergency Multinational Force” (“the Artemis force”) deployed in Bunia by the European Union between June and September 2003 with the authorization of the UN Security Council. Under their normal policing activities, the troops of the Artemis force – and subsequently those of the United Nations Mission to the Congo (MONUC) – arrested, among others, leaders of armed groups responsible for the crimes that characterized the conflict in Ituri. However, in the absence of courts and judges, suspects were sometimes released immediately, damaging in the eyes of the local population the credibility of the Artemis force and MONUC to restore security and maintain peace. See Human Rights Watch, *Democratic Republic of Congo: Confronting Impunity*, January 2004, <http://www.hrw.org/en/reports/2004/02/02/democratic-republic-congo-confronting-impunity>; Human Rights Watch, *Making Justice Work: Restoration of the Legal System in Ituri, DRC*, September 2004, <http://www.hrw.org/en/reports/2004/09/01/making-justice-work-restoration-legal-system-ituri-drc>.

groups.<sup>79</sup> The prosecution of militia leaders made an important contribution to the slow but gradual normalization of security conditions in Ituri.

But this progress was limited. The program lacked a focus on serious international crimes; its implementation was connected more with the necessity to quell minor crime that was hampering peacekeeping efforts in Ituri than the fight against impunity for ICC offenses. Moreover, the Congolese government did not give the prosecutor in Bunia any specific mandate to pursue war crimes and crimes against humanity, thus ruling out bringing perpetrators of these crimes to account.<sup>80</sup> Nor did the Congolese government take steps to speed up the passage of legislation to implement the Rome Statute, which would also have provided the prosecutor in Ituri with the clear legal basis to pursue serious international crimes.<sup>81</sup>

As a result, while 15 major leaders of armed groups were under arrest by June 2004, none were prosecuted for the serious international crimes that many believed they had committed, ordered, or approved.<sup>82</sup> Many armed militia leaders were instead prosecuted for petty offenses despite evidence of their involvement in mass atrocities. For example, in June 2004, the court sentenced Prince Mugabo Taganda to 48 months' imprisonment for "ordinary theft" of a stereo system, although he was, by his own admission, a commander of the operations of the Union of Congolese Patriots (UPC), a Hema militia operating in Bunia for all or part of the period from August 2002 to June 2003. Under his command in Bunia, the UPC carried out systematic attacks against the Lendu and other groups involving torture, arbitrary arrests, summary executions, and enforced disappearances. Sentencing Prince Mugabo for the theft of a stereo system hardly addressed the need and expectation for justice of a

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<sup>79</sup> Human Rights Watch interviews with civil society groups in Bunia, May 2004.

<sup>80</sup> For instance, Congolese law gives the Minister of Justice the power to issue an "injunction" to the Chief Prosecutor of the DRC to initiate a trial and prosecute certain crimes before any jurisdiction (Article 12 of the Code of Judicial Organization and Competence). The power of injunction is usually exercised by the Minister of Justice to reflect and apply the government's criminal policy. The minister of justice could have used his power of injunction to urge the prosecutor to prosecute serious crimes in cases which he has identified as being of special interest, and, indeed, in a Human Rights Watch telephone interview on July 2, 2004, the Minister of Justice told Human Rights Watch that he intended to exercise this power in a more positive way, to reflect a firm government policy against impunity in Ituri.

<sup>81</sup> This draft law, prepared by the Standing Committee on Reform of Congolese Law in 2002, was submitted to the Minister of Justice in April 2003. Even in the absence of a law to implement the ICC statute, the prosecutor could have applied the ICC Statute directly since it was part of internal Congolese law under the transitional constitution. Human Rights Watch, *Making Justice Work*, p.6. Since then, jurisdiction for trying war crimes, crimes against humanity and genocide cases, has shifted to the military courts (even though these crimes are not well defined in the current military penal code). Draft legislation to implement the Rome Statute of the International Criminal Court into Congolese domestic law remains pending in 2010; once approved, the jurisdiction for such crimes will move to the civilian courts.

<sup>82</sup> Since the beginning of 2003, MONUC has carried out several investigative missions that enabled it to collect information about serious crimes committed during massacres in Ituri. However MONUC did not share with the prosecutor information it had about serious crimes involving these leaders. Human Rights Watch, *Making Justice Work*, p. 6.

population traumatized by years of bloody conflict. This had a negative impact on perceptions of the court’s—and the program’s—credibility and legitimacy in the eyes of the local population.

When militia leaders were charged with more serious ordinary crimes, such as murder, their prosecution tended to expose fundamental weaknesses in the program’s efforts to strengthen the local judicial system. The precarious security situation in Bunia and lack of a witness protection program meant that witnesses were vulnerable to acts of intimidation by armed groups. Since judges had no means of protecting witnesses, it was difficult to secure their testimony in court. This compromised the judges’ ability to try cases effectively.<sup>83</sup>

But simply devoting more resources to the judicial system to try more serious ordinary crimes would not have effectively addressed the widespread climate of impunity in Ituri following years of conflict. This is because trying grave international crimes as serious ordinary crimes does not adequately capture the conduct and level of responsibility of those involved in their commission. Large-scale human rights violations are generally characterized by a division of labor between planners and implementors, as well as a structure designed to make connections between these two levels difficult to pinpoint.<sup>84</sup> While difficult, prosecuting mid-level and senior officials is essential to undercutting the culture of impunity. These prosecutions expose the criminal structure that led to widespread violations. Failure to do so creates impunity for those most responsible at the top. Following the conflict in Croatia, for instance, prosecutors tried war crimes cases as “classic murders” with little or no attention to the state of armed conflict in which they occurred, adopting a piecemeal approach that often led prosecutors to ignore or not sufficiently follow up on evidence relating to the role of the perpetrator’s direct superiors.<sup>85</sup>

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<sup>83</sup> The case against Mathieu Ngudjolo, former chief of staff of the Front for National Integration (FNI) illustrates the consequences of failing to adequately support accountability efforts. Ndudjolo was prosecuted, among other charges, for the kidnapping and murder in September 2003 of a UPC sympathizer. Ultimately, the prosecutor was only able to produce one prosecution witness; the other witnesses who made statements during the investigation withdrew them and refused to appear in court due to pressure from FNI leaders. The sole prosecution witnesses only testified at the court’s first hearing and refused to attend subsequent sessions, citing increasingly insistent threats by FNI supporters. The prosecution had nothing left to support its case, and Ngudjolo was acquitted in June 2004 due to lack of evidence. Human Rights Watch, *Making Justice Work*, p. 8. Justice was delayed until 2008, when Ngudjolo was arrested based on an ICC warrant on charges of war crimes and crimes against humanity. His trial is currently underway in The Hague.

<sup>84</sup> United Nations Office of the High Commissioner for Human Rights, “Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives,” <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf> (accessed April 23, 2010), p. 12.

<sup>85</sup> Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR), “Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer,” 2009, [http://www.osce.org/documents/html/pdftohtml/39685\\_en.pdf.html](http://www.osce.org/documents/html/pdftohtml/39685_en.pdf.html) (accessed April 23, 2010), p. 28 (“Supporting the Transition Process”).

Trying these cases effectively also requires special expertise. For instance, judges, prosecutors and defense counsel must possess substantive knowledge of Rome Statute crimes, the different modes of liability, and relevant defenses to ensure that the cases adequately address the underlying criminal conduct and are tried fairly. Expertise in building cases based on documentary evidence (including the capacity to analyze political and military structures) and witness testimony is essential to successfully try higher level perpetrators.<sup>86</sup> The judicial system should also have the capacity to handle the enormous quantity of evidence typical in war crimes cases.<sup>87</sup> Adequate witness protection and support measures must be put in place to safeguard the physical and mental well-being of witnesses. As the Bureau report rightly recommends, states have a large role to play here in engaging technical and capacity-building initiatives in these specialized areas. These are an important component of their positive complementarity efforts.

Additionally, where insufficient capacity is coupled with serious concerns regarding judicial authorities' independence, donors should consider engaging in more targeted and robust positive complementarity initiatives. Political interference undermines efforts to restore confidence in the judicial sector. Positive efforts could include funding the temporary inclusion of international judges, prosecutors, and defense counsel to work alongside national counterparts, helping them develop the necessary expertise while shielding national staff from actual or perceived political interference.<sup>88</sup> Human Rights Watch has recommended the establishment of "mixed" or specialized chambers with these features in both the DRC and Kenya.<sup>89</sup>

#### **b. Avoiding missed opportunities: Ensuring a consistent focus on ICC crimes in long-term development assistance**

The need for long-term development assistance aimed at ending impunity for war crimes, crimes against humanity, and genocide is acute since these crimes are generally committed

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<sup>86</sup> OSCE/ODIHR, "Supporting the Transition Process," p. 28.

<sup>87</sup> Ibid., p. 23.

<sup>88</sup> The Bosnian War Crimes Chamber offers a positive example of how international assistance can be realized in a domestic judicial institution. Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, February 7, 2006, <http://www.hrw.org/en/reports/2006/02/07/looking-justice>; Human Rights Watch, *Narrowing the Impunity Gap: Trials Before Bosnia's War Crimes Chamber*, February 11, 2007, <http://www.hrw.org/en/node/11032/section/1>.

<sup>89</sup> Human Rights Watch, *A Mixed Chamber for Congo?*, October 5, 2009, <http://www.hrw.org/en/news/2009/11/19/mixed-chamber-congo>; Letter from Human Rights Watch to Kenyan Ministers, "Draft Statute for the Establishment of a Special Tribunal," December 22, 2008, <http://www.hrw.org/en/news/2008/12/22/letter-kenyan-ministers-establishment-special-tribunal>. The principal judge of Uganda has suggested that the special division of the Ugandan high court established to try serious international crimes would also benefit from the inclusion of international judges. See Taddeo Bwambale, "Uganda: Foreign Judges to be on War Crimes Court," *All Africa*, January 26, 2010, <http://allafrica.com/stories/printable/201001270029.html> (accessed April 23, 2010).

on a mass scale and their commission stems from a complete breakdown of the rule of law. This reality underscores why states and intergovernmental organizations should maintain the prosecution of ICC crimes as a common thread in justice sector reform projects. As discussed above, addressing the most serious international crimes is critical to prevent the emergence of a vast impunity gap in relation to senior officials, as well as to promote the legitimacy of justice sector reform efforts in the eyes of the local population. Holding alleged perpetrators to account for the worst crimes can aid in promoting security and stability and contribute to building a more stable foundation for rule-of-law reform efforts overall. We address below the need for donor states and organizations to consistently focus on these crimes in long-term development assistance to avoid missed opportunities. To do otherwise can risk squandering valuable opportunities—and donor funds—to effectively tackle deeply rooted impunity for these crimes.

The experience of justice sector reform in northeastern DRC provides a useful illustration of missed opportunity. Following a multi-year justice audit to compile a comprehensive understanding of the Congolese judicial system, the EU established a €15 million Program for the Restoration of Justice in Eastern Congo (REJUSCO) in 2004. Despite the REJUSCO's exclusive focus on rule-of-law reform, in its early incarnation it lacked a focus on strengthening local capacity to prosecute serious international crimes. Indeed, REJUSCO staff interviewed by Human Rights Watch in 2007 did not believe that promoting accountability for serious international crimes should be one of the program's priorities. Instead, they said that to rebuild trust in the justice sector it was more important to begin by addressing petty crime.<sup>90</sup> At its core, this approach ignores the lessons that might have been learned from past experience about the importance of a focus on serious international crimes. This is an essential part of rule-of-law reform where mass atrocities have been committed.

Fortunately, REJUSCO's mandate has since evolved to include an explicit focus on the prosecution and trial of serious international crimes as part of its broader judicial sector reform efforts.<sup>91</sup> REJUSCO has made significant progress in providing support to the efforts of local authorities to prosecute these crimes, particularly in relation to sexual violence.<sup>92</sup> In

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<sup>90</sup> Human Rights Watch interview with REJUSCO staff, Goma, May 7, 2007.

<sup>91</sup> REJUSCO, "A propos de REJUSCO," undated, <http://www.rejusco.org> (accessed April 23, 2010) ("REJUSCO website").

<sup>92</sup> This assistance extends to the military courts in trying sexual violence crimes. Further study of the factors contributing to what have been some successful prosecutions of serious international crimes in Congolese military courts—and the role of international actors, whether in providing technical assistance or political pressure—could yield important insights to be applied to assistance through positive complementarity efforts to civilian judicial systems in the DRC and elsewhere. Still, while Congolese military courts have in recent years demonstrated progress in applying the Rome Statute, the military justice

addition to the renovation of court and prison buildings, REJUSCO now includes a specialized sexual violence cell and helps to fund the transport of judicial staff and victims for investigations and court sessions. It also arranges for mobile courts (*chambers foraines*) in small cities and rural areas.<sup>93</sup> Given the widespread commission of sexual violence against primarily women and girls in eastern Congo, this focus is both necessary and welcome. At the same time, the positive results stemming from REJUSCO's more recent efforts to tackle impunity only emphasize how much more progress may have been achieved had the prosecution of serious international crimes been prioritized sooner in the program's mandate.

The UN Peacebuilding Commission's involvement in the Central African Republic (CAR) provides yet another example of a missed opportunity. In 2005, the CAR government referred the crimes stemming from the 2002-2003 rebellion to the ICC because of a stated inability of the national courts to try serious international crimes.<sup>94</sup> In May 2007, the ICC opened an investigation into crimes committed in the CAR, focusing specifically on atrocities committed during the 2002-2003 rebellion.<sup>95</sup>

In July 2008, the Peacebuilding Commission placed CAR on its agenda.<sup>96</sup> The Commission, which was established in 2005 to help countries emerging from conflict avoid falling back into war and disorder, allocated US\$10 million from its Peacebuilding Fund to the UN team in Bangui for security sector reform, good governance and rule-of-law promotion, and revitalization of conflict-affected areas.<sup>97</sup> These priorities were determined by the

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system remains a weak institution (to date, almost all prosecutions have focused on mid- and lower-level defendants; there have been very few cases against high-level military and government officials). Serious judicial reform is required.

<sup>93</sup> Human Rights Watch, *Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo*, July 16, 2009, <http://www.hrw.org/en/reports/2009/07/16/soldiers-who-rape-commanders-who-condone>, p. 45; REJUSCO website.

<sup>94</sup> On October 25, 2002, the Central African Republic's former army chief of staff, Gen. Francois Bozize, launched a rebel offensive against then-President Ange-Felix Patasse. Unable to rely on his army, which had been weakened by several mutinies and military coups, Patasse obtained support from forces of Jean-Pierre Bemba's Congo Liberation Movement and a mostly Chadian mercenary force. Both groups committed widespread atrocities, including massacres and rapes, during 2002 and 2003. Fighting continued sporadically from October 2002 to March 15, 2003, when Bozize finally seized power. Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, <http://www.hrw.org/en/reports/2009/07/07/selling-justice-short-0>, p. 99.

<sup>95</sup> See "Prosecutor opens investigation in the Central African Republic," ICC press release, May 22, 2007, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic> (accessed April 23, 2010).

<sup>96</sup> "Peacebuilding Commission Places Central African Republic on Agenda," UN Press Release, PBC/39, July 2, 2008, <http://www.un.org/News/Press/docs/2008/pbc39.doc.htm> (accessed March 16, 2010).

<sup>97</sup> Ibid. See also United Nations Peacebuilding Support Office, *Mapping of Resources and Gaps for Peacebuilding in the Central African Republic*, December 22, 2008, p. 10, <http://www.un.org/peace/peacebuilding/Country-Specific%20Configurations/Central%20African%20Republic/Mapping%20CAR%202008.pdf> (accessed April 23, 2010).

government of CAR “in close cooperation” with the UN country team, with the heaviest emphasis placed on security sector reform and good governance/rule of law.<sup>98</sup>

In a December 2008 review of specific program needs within the priority areas and the funds available to fulfill those needs, the Peacebuilding Commission identified over \$21 million in multilateral and bilateral aid available specifically for strengthening the rule of law (in addition to that portion of the Peacebuilding Fund money to be allocated to rule-of-law projects).<sup>99</sup> Yet nothing in that review identified a specific need for prosecutions of those responsible for serious international crimes.<sup>100</sup> Similarly, while the Commission’s strategic plans for peacebuilding in CAR recognized that “the question of impunity needs to be treated effectively,” accountability for high-level perpetrators of war crimes and crimes against humanity was never specifically identified as an important strategic element of rule-of-law efforts.<sup>101</sup> The most recent review of the Commission’s strategic framework contains no mention of efforts to combat impunity for serious international crimes.<sup>102</sup>

Concerns about the CAR’s inability to prosecute serious international crimes persist. Indeed, victims participating in proceedings before the ICC have recently stressed that the country’s judicial system lacks judges, judicial assistants, work facilities, and even prisons, underscoring its inability to handle complex prosecutions involving serious international crimes. They have also raised concerns about the impartiality of national courts and their ability to properly administer justice.<sup>103</sup> Because the CAR courts are not in a position to effectively prosecute serious international crimes, focusing Peacebuilding Commission coordination efforts and funds on building domestic capacity for investigating and

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<sup>98</sup> Ibid. See also United Nations Peacebuilding Commission, Central African Republic Configuration, *Strategic framework for peacebuilding in the Central African Republic 2009-2011*, PBC/3/CAF/7, June 9, 2009, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/364/29/PDF/N0936429.pdf> (accessed April 23 2010), p. 6.

<sup>99</sup> UN Peacebuilding Support Office, *Mapping of Resources and Gaps for Peacebuilding in the Central African Republic*, p. 15.

<sup>100</sup> Ibid., pp. 20-21, 27-29.

<sup>101</sup> UN Peacebuilding Commission, Central African Republic Configuration, *Strategic framework for peacebuilding in the Central African Republic 2009-2011*, p. 8-9, 20-27. It should be noted that the Peacebuilding Commission called for prosecutions of those responsible for crimes against women and children. Ibid., pp. 9, 25. While this is certainly a step in the right direction, and while humanitarian and human rights law do include prohibitions on crimes against women and children, it is accountability for high-level perpetrators of all Rome Statute crimes that would make it “possible to re-establish confidence in the justice system and reduce frustration.” Ibid., p. 9. Significantly, the most recent review of the Commission’s strategic framework contains no mention of efforts to combat impunity for serious international crimes, including crimes against women and children.

<sup>102</sup> Peacebuilding Commission, Central African Republic Configuration, *Review of progress in the implementation of the Strategic Framework for Peacebuilding in the Central African Republic*, PBC/4/CAF/2, January 7, 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/204/07/PDF/N1020407.pdf?OpenElement> (accessed April 23, 2010), pp. 3, 5-7.

<sup>103</sup> International Criminal Court, Office of Public Counsel for Victims, Response by the Legal Representative of Victims to the Defence’s Challenge on Admissibility of the Case pursuant to articles 17 and 19(2)(a) of the Rome Statute, ICC-01/05-01/08, April 1, 2010.

prosecuting such crimes could go a long way towards this goal while advancing the broader aim of strengthening rule of law generally.<sup>104</sup>

More broadly, mainstreaming the prosecution of ICC crimes on a consistent basis can improve how donor governments and intergovernmental organizations that are active in country situations characterized by mass ICC crimes work together. Promoting better coordination can help reduce the risk that efforts to combat impunity will be inadvertently sabotaged by funding cycles or stunted by duplicative mandates. This can, in essence, help “stretch” donor commitment – and funds – much further. As they pursue complementarity initiatives, donor states and organizations should consider making that assistance conditional on meeting certain benchmarks, such as the establishment of effective witness protection programs or the deployment of prosecutors with special training in pursuing serious international crimes to relevant national courts with the jurisdiction to try such crimes. This would help promote a shared focus among donor governments, recipient governments, and the staff of relevant international and domestic organizations.

#### **c. Maximizing the “spillover” between the prosecution of ICC crimes and broader rule-of-law efforts**

Of course, while measures aimed at prosecuting serious international crimes should be incorporated into broader rule-of-law efforts, there is no single formula for doing so. Overall, initiatives aimed at strengthening a state’s capacity to prosecute Rome Statute crimes should be viewed as a complement to rather than as a competitor of broader rule-of-law efforts. Where possible, soliciting the input of key decision makers such as criminal law practitioners will be essential to direct this assistance to best effect. In the context of efforts to rebuild the judicial system in northeastern Congo, for instance, Human Rights Watch has flagged for donors the importance of taking into account concerns expressed by judicial experts and practitioners in implementing criminal rule-of-law reform projects.<sup>105</sup> Similarly, in the former Yugoslavia, one lesson learned is how important it is to involve key domestic decision makers in identifying capacity needs and tailoring initiatives aimed at addressing them based on local laws and culture.<sup>106</sup>

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<sup>104</sup> CAR Cour de Cassation, decision of April 11, 2006 (“[T]he inability of the Central African justice system to carry out effective investigations and prosecutions is clear . . . the ICC offers the possibility of finding and punishing the perpetrators of the most serious crimes which affect the international community as a whole, in the place of States which are incapable of carrying out effective investigations and prosecutions.”), quoted in Human Rights Watch, *State of Anarchy*, p. 104. When Human Rights Watch visited CAR in 2007, the government had not investigated, prosecuted, punished, or even publicly reprimanded a single military officer for abuses committed against civilians. *Ibid.*, p. 12.

<sup>105</sup> Human Rights Watch, *Making Justice Work*, p. 10.

<sup>106</sup> OSCE/ODIHR, “Supporting the Transition Process,” p. 7.

Indeed, in many instances, capacity-building efforts for ICC crimes can generate a beneficial “spillover” in relation to broader judicial capacity-building. For instance, assisting a state in strengthening its witness protection capacity for ICC crimes can facilitate the protection of witnesses in other sensitive or high-profile criminal cases. Similarly, investigative techniques used to uncover the criminal structure that sanctioned widespread or systematic crimes against humanity can be applied to complex organized crime cases, and vice versa. Further, the successful prosecution of serious international crimes is closely linked to security sector reform efforts; the latter should include a focus on adequately training police officers who can conduct complex investigations and who themselves are not complicit in ICC crimes. Situating capacity-building initiatives for ICC crimes in the context of broader judicial reform efforts (such as by identifying areas where there is an overlap) can help maximize this overflow and effectively extend the reach and long-term impact of donor funds.

## *2. The role of the court*

### **a. The ICC as a catalyst for positive complementarity efforts**

The ICC is not a development agency. At the same time, as states contemplate how to best direct development assistance to states to effectively prosecute ICC crimes, the court’s potential role in devising strategies is hard to ignore, particularly in situations under investigation and analysis, which should be the primary focus of complementarity efforts. The court’s clear knowledge of what is needed to try crimes in its purview coupled with its understanding of the capacity limitations in countries where it is active means it is well placed to help donor states efficiently identify existing gaps and target their assistance to maximum impact. In this way, the court can play an essential “catalytic” role when it comes to strengthening national prosecutions.<sup>107</sup>

Indeed, there are a number of efforts in which court officials are already engaged to boost positive complementarity initiatives in states where the ICC is active. For example, with victim and witness relocation, there is often a disconnect between states with programs and funds but no willingness to accept protected witnesses (because of potential political fallout at home) and states in the region that are willing to accept witnesses but lack capacity and means. While states parties should be willing regardless of political price to accept relocated individuals, relocation to another country within the individual’s region may often be preferable. The registry is developing a voluntary special fund to funnel contributions

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<sup>107</sup> Of course, the court’s involvement in active complementarity efforts should be carefully managed to avoid any potential conflicts that could arise in an admissibility challenge under article 17 of the Rome Statute. Nor should the court’s potential role in directing positive complementarity efforts replace the need to consult and collaborate with national authorities to direct development assistance appropriately.

towards strengthening the capacity of states willing to accept witnesses.<sup>108</sup> While the primary recipients of these efforts would be ICC witnesses, it is not difficult to imagine how strengthening witness protection initiatives domestically or regionally would benefit national prosecutions of ICC crimes as well.

The registry is also involved in efforts to promote the adoption of implementing legislation among ICC states parties. Pushing states to adopt implementing legislation benefits not only the ICC, but in some states can provide the legal basis necessary to prosecute war crimes, crimes against humanity and genocide. In addition to compiling a database of states that have enacted implementing legislation, the registry is already working to match states that need technical assistance to successfully adopt implementing legislation with organizations that can provide this assistance, such as the Commonwealth Secretariat or the International Committee of the Red Cross.<sup>109</sup>

One point worth emphasizing is the crucial role of ICC field staff in brokering positive complementarity efforts. The field offices directly carry out and support the full range of court activities, including investigations of the prosecutor and defense counsel, victim participation, outreach, witness protection, and projects of the Trust Fund for Victims. Field staff are therefore intimately familiar with the needs of the court and the capacity of national authorities to deliver. By extension, field staff can readily identify obstacles to the successful prosecution of ICC crimes and engage actors working on rule-of-law reform issues and the national government to address how these obstacles can be surmounted. Facilitating positive complementarity efforts is a clear way in which the court's impact on affected communities and its legacy in situation countries can be maximized.<sup>110</sup>

**b. More active initiatives to maximize the ICC's catalytic role in positive complementarity efforts**

There are also a number of cost-neutral or low-cost initiatives the ICC can implement directly in situations under investigation and analysis to catalyze national prosecutions of Rome Statute crimes. For example, the EU-funded Visiting Professionals Program already provides national judicial professionals with the opportunity to learn from ICC experts and bring skills and knowledge back to their national systems. The registry has identified a number of other

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<sup>108</sup> Arbia, "Registry Discussion Paper," p. 5.

<sup>109</sup> Ibid., p. 9.

<sup>110</sup> Ibid., p. 8. See further discussion of the role of the ICC's field offices in maximizing the court's impact in affected communities and the resources necessary to support strong field engagement, in Chapter V.C.5.

initiatives that it has undertaken or proposes to execute to bolster its complementarity efforts, some of which are discussed above.<sup>111</sup>

The ICC Office of the Prosecutor (OTP) has also identified positive complementarity as one of the four fundamental principles on which its prosecutorial strategy is based.<sup>112</sup> OTP staff have expressed willingness to share expertise and provide training on issues relating to the prosecution of mass crimes such as modes of liability, elements of crimes, investigative techniques, and defenses.<sup>113</sup> The OTP has also established a Law Enforcement Network (LEN) aimed at bringing together law enforcement officials, including those from ICC situation countries, together with INTERPOL to define concrete investigations and projects that can be undertaken to support efforts to fight ICC crimes.<sup>114</sup>

The OTP has similarly indicated its willingness to share information gathered during its own investigations that it does not intend to use.<sup>115</sup> The extent of information that is shared depends on a national system's capacity to protect witnesses or other vulnerable sources and its ability to provide fair trials, among other factors. Where such concerns exist, the ICC may be limited to sharing non-confidential material or broad pattern analysis of crimes, which can nonetheless be essential to helping national prosecutors tackle impunity at home.

As a state's capacity to try serious international crimes develops, the ICC should consider expanding the information it shares and formalizing how this is done.<sup>116</sup> For instance, the ICTY has a “transition team” in its OTP tasked with transferring confidential and non-confidential information (the former provided there is court authorization) collected during its investigations to national prosecutors in the former Yugoslavia.<sup>117</sup> This team also handles requests for assistance from national prosecutors in the region in relation to cases initiated

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<sup>111</sup> See Arbia, “Registry Discussion Paper.”

<sup>112</sup> OTP, “Prosecutorial Strategy 2009-2012,” February 1 2010, <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>, para. 15.

<sup>113</sup> Ibid., para. 17(a). Indeed, our research confirms there is a real demand for such training. For instance, a local prosecutor in Ituri told Human Rights Watch researchers that he would like to discuss with ICC prosecutors how to pursue the recruitment of child soldiers as a war crime given that this widespread practice is not penalized under Congolese law. Human Rights Watch interview with military prosecutor, Bunia, April 30, 2007; Human Rights Watch interview with military judge, Bunia, May 1, 2007.

<sup>114</sup> OTP, Prosecutorial Strategy 2009-2012, para. 46.

<sup>115</sup> Ibid.

<sup>116</sup> This is a fluid assessment; a state's inability or unwillingness to try senior leaders—thus triggering ICC intervention—may not extend to lower level “foot” soldiers, for example.

<sup>117</sup> ICTY, “Working with the Region,” undated, <http://www.icty.org/sid/96#transition> (accessed April 23, 2010), paras. 6-10, and Human Rights Watch telephone interview with ICTY OTP staff, The Hague, April 7, 2010.

locally but which overlap with cases adjudicated by the ICTY.<sup>118</sup> The process is more than simply passing along documents. In some circumstances, national prosecutors travel to The Hague—using funds from their governments or other external sources—to sit with OTP staff including investigators to go through the file, and discuss the theory of the case and the credibility of the evidence, among other things.<sup>119</sup> In this way, OTP staff transfer not only information but also valuable knowledge about how to prosecute cases effectively.

Another initiative states could consider is the funding of “liaison” prosecutors—essentially prosecutors from the situation countries—within the OTP. The ICTY prosecutor’s office participates in a program funded by the European Commission by which three prosecutors from the region are based in the OTP in The Hague. These prosecutors work on their own cases, and do not have access to confidential information. However, their integration into the OTP provides them with an opportunity to learn about methodologies of searching and reviewing large volumes of material as applied by OTP criminal analysts. They then become the contact points for national officials working on war crimes investigations and cases.<sup>120</sup> They also provide valuable input to OTP staff when questions arise as they try their own cases in The Hague.<sup>121</sup> Similar initiatives aimed at fostering strong and productive working relationships with national prosecutors in country situations where the ICC is engaged can help extend its capacity-building reach.

Overall, the court’s current and potential role in advancing positive complementarity efforts highlights why the input of ICC staff on activities aimed at strengthening national prosecutions should be regularly solicited. The modest cost of pursuing these initiatives—which can also include the sharing of expertise between registry staff and domestic authorities in areas such as witness protection and prison management—should be viewed against their significant potential to yield dividends in building national capacity to address ICC crimes. We therefore appreciate that the draft resolution on complementarity invites the court to report on its activities in that regard at the tenth session of the ASP.

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<sup>118</sup> Human Rights Watch telephone interview with ICTY OTP staff, The Hague, April 7, 2010. This unit also handles requests for assistance from countries outside of the region that are carrying out investigations or trying cases over which that country has jurisdiction.

<sup>119</sup> Human Rights Watch telephone interview with ICTY OTP staff, The Hague, April 8, 2010.

<sup>120</sup> “Office of the Prosecutor of the ICTY Welcomes Liaison Prosecutors from Bosnia and Herzegovina, Croatia and Serbia to the Tribunal,” ICTY press release, July 1, 2009, <http://www.icty.org/sid/10176> (accessed April 23, 2010).

<sup>121</sup> Human Rights Watch telephone interview with ICTY OTP staff, The Hague, April 8, 2010.

## C. Reversing unwillingness: Raising the political cost of failing to prosecute ICC crimes

### 1. The role of states

Overcoming a state's unwillingness to prosecute ICC crimes is more difficult than addressing a state's inability to do so.<sup>122</sup> At the same time, the entire positive complementarity exercise hinges on a state's political will; ultimately, even the most robust efforts aimed at improving the capacity of states to prosecute serious international crimes can be stymied by a state's unwillingness to implement them. The Bureau report recognizes that assistance and cooperation alone will not solve all issues relating to impunity and flags unwillingness as a "special challenge," without elaborating on what can be done to address it.<sup>123</sup>

There are numerous reasons for the unwillingness of states to prosecute serious international crimes. These complexities notwithstanding, Human Rights Watch believes that a common approach can be employed to deal with unwillingness: firm and consistent expressions of diplomatic support for national prosecutions by members of the international community. States—even those which are not ICC states parties—should privately and publicly express their political support for national prosecutions, both bilaterally with the states concerned and also in key political fora like the EU, the African Union, and in the UN Security Council and General Assembly.<sup>124</sup> Through strong expressions of political support, states can play a pivotal role in eroding a state's unwillingness to tackle ICC crimes by raising the political cost of failure to act.<sup>125</sup>

Beyond expressions of political support for national prosecutions at the international level, donor states are well positioned to press national authorities to satisfy specific benchmarks to facilitate domestic trials. One key means is urging states to pass ICC implementing

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<sup>122</sup> As outlined by the OTP, demonstrating unwillingness may be technically difficult, likely involving inferences and circumstantial evidence, and politically sensitive, as it may amount to an accusation against authorities. See OTP, Informal Expert Paper, p. 15.

<sup>123</sup> ASP, Bureau Complementarity Report, para. 11.

<sup>124</sup> Efforts by non-states parties are also important, as evidenced by the US government's recent statements pressing the Congolese government to arrest ICC suspect Bosco Ntaganda and surrender him to The Hague. See, for example, Hereward Holland, "U.S. says Congo should arrest indicted ex-rebel," Reuters, November 10, 2009, <http://www.reuters.com/article/latestCrisis/idUSLA605813> (accessed April 23, 2010).

<sup>125</sup> For instance, the UN Security Council's recognition that the "strengthening of national judicial systems is crucially important to the rule of law in general" in the context of implementing the completion strategies of the international criminal tribunals for the former Yugoslavia and Rwanda helped spur efforts to strengthen national prosecutions in Serbia, Croatia, Bosnia, and Rwanda. United Nations Security Council, Resolution 1503 (2003), S/RES/1503, <http://daccessdds.un.org/doc/UNDOC/GEN/N03/481/70/PDF/No348170.pdf?OpenElement> (accessed May 26, 2009), preamble. Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, <http://www.hrw.org/en/reports/2009/07/07/selling-justice-short>, pp. 94-100.

legislation which, in addition to facilitating cooperation with the court, can in some countries be essential to incorporate ICC crimes into national law. Indeed, had the international community consistently prioritized the prosecution of serious international crimes in the course of justice sector reform in Congo, this could have been an effective pressure point to urge the Congolese authorities to enact the pending ICC implementing legislation. The current version of the legislation is set to be debated by the Congolese Assembly in September 2010, more than seven years after its original introduction.<sup>126</sup>

As discussed above, donors can also consider setting benchmarks and making continued assistance conditional on meeting these targets. Such an approach, if tailored appropriately, could effectively press national authorities to do more to address impunity, such as assigning energetic and motivated national staff to contribute to judicial sector reform efforts, or giving prosecutors a specific mandate to pursue war crimes and crimes against humanity.

Donor states and intergovernmental organizations can also address lack of governmental political will by supporting, where possible, local civil society efforts to press for national prosecutions.<sup>127</sup> This could include buttressing efforts of nongovernmental organizations aimed at galvanizing grassroots support for accountability for the worst crimes. It could also involve supporting or organizing programs to train local journalists on how to identify and effectively report on accountability issues relating to serious international crimes. In addition to challenging a government's unwillingness to conduct national prosecutions, cultivating a climate that supports justice for the worst crimes can help improve a state's cooperation with the ICC, including for the arrest of suspects.

Finally, unwillingness and inability should be understood as closely related. Claims of inability can mask serious problems of political will, while addressing inability can help to chip away at unwillingness. For example, training of judicial professionals can stimulate interest in the prosecution of serious international crimes, and generate political will at a local level. Over time, and with the influence of university law faculties, law societies, and the judiciary, strong support by international donors can have an impact on national policies and priorities. This underscores the importance of addressing both unwillingness and inability in complementarity efforts.

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<sup>126</sup> See Dorian Kisimba, "Plaidoirie des Ong de défense des droits de l'homme pour le vote de la loi de mise en œuvre en RDC du Statut de Rome," Digital Congo, February 17, 2010, <http://www.digitalcongo.net/article/64694> (accessed April 23, 2010).

<sup>127</sup> This would have to be handled sensitively. In some situations, providing assistance openly to local civil society actors or expecting robust civil society engagement is not feasible because of underlying security concerns.

## *2. The role of the ICC*

While more limited than that of states, the court can nonetheless play an essential role when it comes to challenging a state’s unwillingness to carry out national prosecutions, particularly in situations under analysis. In these situations, the ICC can leverage the threat of its intervention to push national authorities to prosecute at the national level. By making its analyses known on a more consistent and transparent basis, the Office of the Prosecutor, in particular, could help to catalyze political will toward prosecution in situations under analysis.

For example, the Office of the Prosecutor has effectively used the missions of its senior officials and staff, as well as visits of authorities from situation countries and correspondence with these authorities, to highlight analyses publicly. In so doing, it generates pressure on national jurisdictions to act. But the period of preliminary examination can be a lengthy process, which may require continued pressure on national authorities to carry out their own accountability efforts. Making available substantive interim reports containing non-confidential information about the status of the OTP’s examination—similar to what the OTP did following the closure of its examinations in Iraq and Venezuela—would help maintain this pressure. Such information can provide a useful “hook” for civil society and other partners, including states, to press the national authorities to do more in key areas and could usefully point national authorities toward the actions required to comply with their international obligations to prosecute serious international crimes.

The regular provision of information about the status of the OTP’s analyses, together with clearer public material about the preliminary examination phase, would also help to better calibrate the court’s possible intervention with public expectations of an ICC intervention that may never materialize. We understand the OTP is preparing a policy paper on positive complementarity, and recommend that it give careful consideration to the role of the preliminary examination phase, including striking this balance for a more strategic approach in its situations under analysis to catalyze national prosecutions.

In both situations under analysis and investigation, the ICC can use its influence to address potential manifestations of a state’s lack of political will. For example, in bilateral contacts, senior ICC officials such as the registrar, the president of the court, and the prosecutor can regularly and publicly stress to the governments of states parties the importance of adopting implementing legislation. Where possible these calls could be made public in ICC press releases about high-level meetings in order to keep or put the item on the domestic agenda

and offer a strong basis for action by civil society to maintain the pressure on national authorities to pass such legislation.

Beyond implementing legislation, the ICC's involvement in situations under analysis and investigation means that it is well positioned to highlight key opportunities for other states to encourage national authorities to adopt specific measures to facilitate domestic prosecutions. This could include legislation on witness protection programs, reforms necessary to ensure fair trial and human rights standards are met (such as the abolition of the death penalty), and prioritizing the assignment of judges and other judicial professionals to post-conflict areas.

More broadly, the ICC's outreach strategy can have an impact on the appetite for justice at the national level. Through the effective dissemination of information about its work, the ICC can help raise expectations about realizing justice at the national level. By stimulating demand for national prosecutions of international crimes, an effective outreach strategy can help wear down political unwillingness at the national level to hold to account perpetrators of the worst crimes.<sup>128</sup>

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<sup>128</sup> Arbia, "Registry Discussion Paper," p. 7.

## **V. Impact of the Rome Statute System on Victims and Affected Communities**

### **A. Introduction**

Less than seven years have passed since the ICC swore in the first court officials and opened its doors. Though much has been accomplished since then, at this point, before even the first judgment has been rendered, it is still too early to assess fully how the court has impacted victims and affected communities.

Yet there is some indication, even at this preliminary stage, that the court is leaving a positive mark on affected communities. In some cases, this is quantifiable: the Trust Fund for Victims, for example, has 31 active projects aimed at rehabilitation and rebuilding communities in northern Uganda and the eastern Democratic Republic of the Congo, reaching an estimated 42,300 victims directly. As of the end of December 2009, nearly 600 victim participants have been recognized, marking real progress in implementing the ICC's unique provisions granting victims the right to partake proactively in its proceedings.

Even beyond the boundaries of its situation countries, the court's impact can be seen. This is as the court's founders had hoped. The preamble of the Rome Statute indicates a desire to end impunity for the perpetrators of grave crimes and thus contribute to their prevention. In the short time that the court has been in existence, it has helped shift expectations of victims around the world about justice. Survivors of crimes once resigned to accepting amnesties are now asking why they too should not see accountability for crimes committed against them. The threat of ICC investigations can and has spurred national prosecutions in places otherwise unwilling to confront their past. The court's case against Thomas Lubanga on charges of child soldier recruitment has helped increase awareness in the DRC and elsewhere that use of child soldiers is a war crime, which may contribute to deterring use of child soldiers in the future.

Ultimately, in affected communities and beyond, the court's success is inescapably linked to its impact. Stocktaking at the review conference offers an exceptional opportunity to assess the preliminary impact of the ICC and the broader fight against impunity on victims and affected communities, and to identify steps that can be taken by the court and its states parties to maximize positive impact.

After first outlining briefly below how discussions in Kampala could contribute to maximizing this goal, we provide some background observations on the importance of outreach (including around the review conference itself), field engagement, and prosecutorial strategy. We have previously assessed the court’s performance in each of these areas in detail,<sup>129</sup> and highlight here only key points most relevant to assessing the impact of the court. We then turn to an assessment of the court’s preliminary contribution to deterrence of serious international crimes and as a catalyst for national prosecutions, two areas which hold out the possibility of achieving impact on victims and affected communities beyond the immediate cases within the court’s docket.

While we do not address them here, victim participation (and the assistance and protection necessary to facilitate that participation) and reparations are unique aspects of the ICC system addressed directly to the rights of victims in justice processes. They also have a clear role to play in maximizing the ICC’s positive impact among victims and affected communities. We welcome the court’s recent development of a victim strategy setting out broad principles and key policy objectives touching on each of these areas.<sup>130</sup> We look forward to discussion in Kampala on how to build on the important progress made by the court in these areas.

## B. Assessing impact at Kampala

The identification of impact on victims and affected communities as a stocktaking topic for the review conference is welcome recognition of the central place the rights and interests of victims deserve in the Rome Statute system. Indeed, plans for stocktaking have identified as an overarching goal the “engage[ment] of victims and affected communities in the [r]eview [c]onference and to recall the importance of the Rome Statute system and the Court for victims and affected communities.”<sup>131</sup> Within this overarching goal, four areas have been identified to frame discussions: the roles in creating impact of (1) outreach; (2) victim’s participation; (3) reparations, and (4) the Trust Fund for Victims.<sup>132</sup>

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<sup>129</sup> See Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years*, July 2008, <http://www.hrw.org/reports/2008/icc0708>.

<sup>130</sup> ASP, “Report of the Court on the strategy in relation to victims,” ICC-ASP/8/45, November 10 2009, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/ICC-ASP-8-45-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf) (accessed April 16, 2010) (“2009 Victim Strategy”).

<sup>131</sup> ASP, “Report of the Bureau on stocktaking: The impact of the Rome Statute system on victims and affected communities,” ICC-ASP/8/49, March 18, 2010, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8R/ICC-ASP-8-49-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-49-ENG.pdf) (accessed May 5 2010), para. 3.

<sup>132</sup> ASP, “Review Conference,” ICC-ASP/8/Res.9, March 25, 2010, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf) annex I, para. 1.

Substantive discussion in Kampala should lead to recognition of the importance of each of these areas to achieving impact and a commitment by states parties to supporting the court and the Trust Fund for Victims to take additional steps toward strengthening their impact. In addition, as discussed below, we recommend consideration of how the ICC's presence in situation countries (and the inclusion of perspectives from the field in its practice and policy), as well as the prosecutor's selection of cases and charges, can contribute to the resonance of the ICC's work with victims and affected communities.

While evaluation of the court's progress is necessary and appropriate, states parties should bear in mind that the ICC remains at an early phase in its development, yet to complete a cycle of judicial proceedings. Discussions should reflect that maximizing and extending the ICC's impact beyond its own investigations and prosecutions is not entirely within the hands of court officials. Responsibility also rests with states parties and other allies of the ICC to ensure the support necessary for building a credible and robust institution and to extend the reach of international justice by strengthening national capacity to prosecute serious crimes.

As with discussions on all of the stocktaking topics, assessment of impact should not be confined to Kampala. Regular discussion of cooperation and complementarity through ASP mechanisms as proposed in pre-review conference discussions on these stocktaking topics would provide fora for continuing engagement in these areas.<sup>133</sup> When it comes to the court's own activities—whether in outreach, victim participation, reparations and other assistance delivered by the Trust Fund for Victims, prosecutorial strategy, and field engagement—consideration should be given to putting in place a mechanism that would regularly assess whether the ICC's policies are making its work as accessible and meaningful to affected communities as possible. This assessment could form part of the court's existing strategic planning, a process recently enhanced by the recruitment of a strategic planning coordinator. In developing an assessment mechanism, lessons could be drawn from the annual performance assessments already carried out by the court's Outreach Unit,<sup>134</sup> and the performance indicators that are to be developed in the context of implementing the court-wide strategy on victims.<sup>135</sup>

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<sup>133</sup> See Chapters III.B and IV.A above.

<sup>134</sup> ICC, "Outreach Report 2009," November 18, 2009, [http://www.icc-cpi.int/NR/rdonlyres/8A3D8107-5421-4238-AA64-D5AB32D33247/281271/OR\\_2009\\_ENG\\_web.pdf](http://www.icc-cpi.int/NR/rdonlyres/8A3D8107-5421-4238-AA64-D5AB32D33247/281271/OR_2009_ENG_web.pdf) (accessed April 15, 2010), p. 2.

<sup>135</sup> ASP, "2009 Victim Strategy", paras. 11, 62.

## C. Outreach and field engagement

Trying suspected perpetrators of serious violations of international law fairly and effectively is the primary mission of international criminal justice mechanisms. To make an impact, however, the work of international courts must be understood in the communities most affected by the crimes in their jurisdiction. In addition, for victims to access the rights of participation and reparations provided under the Rome Statute, they must first be aware of these provisions. For these reasons, there has been increasing recognition by ICC states parties and court officials that outreach, rather than being auxiliary, is a key component of international criminal justice.

Recognition of the importance of outreach came gradually and painfully over time. The International Criminal Tribunal for the former Yugoslavia (ICTY) suffered significant damage from lack of community understanding. An outreach program was initiated in the fall of 1999, five years after investigations had begun, and only after representatives of the ICTY realized how poorly the tribunal was perceived in the former Yugoslavia and how that negative perception impacted its work. As then ICTY President Gabrielle Kirk McDonald reported to the Security Council and General Assembly in 1999, the ICTY's work was "frequently politicised and used for propaganda purposes by its opponents, who portray[ed] the Tribunal as persecuting one or other ethnic groups and mistreating people detained under its authority."<sup>136</sup> The report noted that the Tribunal was viewed as remote and disconnected from the population and that there was little information available about the court.<sup>137</sup> For a significant time, none of the tribunal's documents were even accessible in Serbo-Croatian. Authorities who did not wish to recognize or cooperate with the court exploited the lack of information available about the court, damaging efforts to foster reconciliation and impeding the prosecutor's work. The regional outreach offices that were finally established in 2000 and 2001 have fought an uphill battle to correct public opinion that had been adversely affected by a biased media.

The International Criminal Tribunal for Rwanda (ICTR) began a limited outreach program in 1998, following the conclusion of the first trial and three years after investigations had begun in Rwanda. By that time, public perception of the tribunal in Rwanda had been

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<sup>136</sup> President of the International Criminal Tribunal for the former Yugoslavia, *Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, para. 48, delivered to the Security Council and General Assembly, U.N. Doc. A/54/187-S/1999/846 (August 25, 1999), available at <http://un.org/icty/rappannu-e/1999/index.htm>.

<sup>137</sup> Ibid.

negatively influenced by government criticism.<sup>138</sup> The lack of outreach also resulted in the tribunal's work remaining invisible to most of the population, therefore limiting the ICTR's impact in Rwanda. The Special Court for Sierra Leone implemented a robust outreach program early to avoid the pitfalls experienced by the ad hoc tribunals.

The ICC's view of outreach has evolved significantly since the court began operations. The initial lack of emphasis on outreach has been replaced with a better understanding of outreach's importance in realizing the court's mandate, and increased capacity, with the support of states parties, in the registry's Public Information and Documentation Section (PIDS) and its subsidiary Outreach Unit. For example, the court has employed more staff in both The Hague and in the field to better devise and to implement the court's outreach strategy in affected communities. It has also intensified outreach efforts to make its first trials more accessible to local populations, creatively using ICC-produced audiovisual materials to develop a series of programs and summaries of in-court proceedings for use on radio and in mobile screenings in affected communities.<sup>139</sup>

As the court itself acknowledges,<sup>140</sup> there is more that can and should be done to maximize impact through outreach. We discuss below a number of lessons learned from experiences so far and the progress of the ICC in putting these lessons into practice.

### *1. Early and often*

The problems faced by the ad hoc tribunals demonstrate the importance of starting outreach early. In that regard, it is commendable that the ICC had already initiated public information activities in Kenya even before the March 31, 2010 decision of the pre-trial chamber authorizing the prosecutor's investigation.<sup>141</sup> This stands in contrast to the Central African Republic where an outreach unit only became operational at the end of 2008,<sup>142</sup>

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<sup>138</sup> Victor Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme," *Journal of International Criminal Justice*, vol. 3 (2005), pp. 950-961.

<sup>139</sup> These audiovisual materials can be viewed by the general public through the court's newly launched YouTube channel, <http://www.youtube.com/IntlCriminalCourt>. The court's programs and summaries span all of the situations under investigation and have been prepared for pre-trial proceedings and activities in addition to trials. For more information about the court's outreach activities in connection with its first trial activities, see ICC, "Outreach Report 2009," pp.27-42.

<sup>140</sup> *Ibid.*, p. 3.

<sup>141</sup> See "The role of effective communications in fulfilling the ICC's mandate: challenges, achievements, and the way ahead," Sonia Robla, Supranational Criminal Law Lecture Series, Grotius Centre for International Legal Studies, March 17, 2010, unpublished prepared remarks on file with Human Rights Watch, p. 2.

<sup>142</sup> ICC, "Outreach Report 2009," p. 59. A late start in the Central African Republic can be explained partly by the fact that PIDS only received funds to hire an outreach coordinator for the Bangui office following the ASP session in December 2007. See Human Rights Watch, *Courting History*, p. 130.

approximately eighteen months after investigations were begun and some six months after the first suspect in that situation, Jean-Pierre Bemba, had been taken into custody.

While the early start in Kenya was positive, sustained engagement with affected populations is necessary for outreach to be effective. This involves maintaining a steady flow of relevant information to affected communities about important aspects of the court’s work. It also means repeating this information to ensure that it is fully understood by as many people in target audiences as possible. The key is to avoid significant gaps in time between outreach events, including media events, since it is during those gaps that negative rumors and damaging perceptions can fester. Efforts may need to be intensified to respond to significant developments in ICC proceedings—such as arrests and key trial moments—as well as political developments on the ground—such as peace negotiations or further violence—in order to effectively stay engaged with local communities. Thus, as in all of the ICC’s country situations, the early start to outreach in Kenya will need to be sustained and reinforced over time in order to have meaningful impact.

## *2. Two-way communications*

While the frequency of events is important, the impact of the court’s outreach strategy cannot be measured by simply adding up the number of events planned and executed. It is the extent to which these events effectively address actual questions and concerns among affected populations that will, in large part, determine the strategy’s success. This requires the court to establish a genuine dialogue with people in these communities so that it can assess the way in which its work is being perceived on an ongoing basis and then tailor its strategy accordingly. Outreach should, therefore, be viewed as a fluid process: perceptions among those in affected communities may change with political and judicial developments, and the court’s outreach strategy must be prepared to respond in kind. Similarly, the court should have a creative and flexible strategy in place to respond to misperceptions that arise. This requires a deep knowledge of various aspects of the context in-country (including the historical, cultural, and political context) and intensive efforts to translate this knowledge into targeted action.

Steps taken over the past two years by the Outreach Unit show appreciation for the importance of facilitating this two-way dialogue. The Outreach Unit maintains a database of questions asked during its outreach sessions which can then be used to tailor and direct subsequent efforts. It has also created an “Ask the Court” audiovisual program where questions from country situations receive responses from court officials. A perception survey was recently launched in Central African Republic to determine the landscape of public

knowledge and opinion, and the Outreach Unit has indicated plans in 2010 to conduct a similar survey in DRC to establish a baseline in order to evaluate the impact of future outreach activities.<sup>143</sup> Perception surveys could be a very useful tool in tailoring outreach campaigns and should ideally be undertaken as early as possible following the intervention of the ICC in each situation country. It would be particularly timely, for example, to carry out a perception survey in Kenya now that the pre-trial chamber has only recently authorized investigation there.

Of key importance is the placement of outreach staff in the field, both to sustain communications with the local population and to fully understand the concerns of the affected communities. As noted above, the court has made efforts to strengthen its field-based presence, including through the recruitment of field outreach coordinators for each situation country (all but the coordinator for Darfur are based in the field, and, for the time being, the Uganda coordinator is also covering the Kenya situation).

The breadth of activities carried out, for example, by just six outreach staff in all of DRC—with two trials and an ongoing investigation—strongly suggests that more human resources are required if the court’s outreach activities are to be significantly strengthened, and, as is needed, extended to ICC situations under analysis.

### *3. Creative and engaging communications*

An effective outreach strategy should prioritize developing and using creative means, including but not limited to posters, comic strips, and dramatic performances, to convey important information about the court. Using these tools can help the court overcome some of the obstacles that can arise in communicating with affected communities, such as low rates of literacy and language barriers. These tools are also more culturally relevant to affected communities. As the court’s overall stance on outreach has evolved, so too has its approach to using creative tools in its strategy: while initially absent from its plans, the outreach staff have increasingly recognized the utility of these tools in conveying vital information. For example, the outreach plans for DRC in 2010 include organization of a song contest and production and distribution of a cartoon strip about the ICC to engage youths.<sup>144</sup> These types of initiatives can be effective because they serve two important functions of outreach: enhancing the court’s level of engagement with those involved in the process

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<sup>143</sup> ICC, “Outreach Report 2009,” pp. 40, 66.

<sup>144</sup> Ibid., pp. 106-107.

while creating a tailor-made product that will have a strong impact. Similar types of interactive opportunities should be undertaken in all country situations.

#### *4. Mass media*

Engaging local mass media is also a crucial part of an effective outreach strategy. Radio, print, and visual media play a role in informing and potentially influencing people's perceptions about the ICC. Radio in particular is recognized as an important means of disseminating information in all five countries under investigation. In some areas, such as northern Uganda, radio is the main way affected communities obtain news and information. The ICC's initial absence from the radio in Uganda created a vacuum that was filled by those with different and contrary agendas: the Lord's Resistance Army and local leaders used the radio to air their views on the ICC. In this way misperceptions were created that were not countered by an alternative voice.

In Uganda, the ICC now has four radio partners in LRA affected areas. In DRC, the ICC has partnered in the Ituri district with ten community radio stations to broadcast summaries of court proceedings, while in the Kivus region, where the prosecutor is currently carrying out investigations, the Outreach Unit has also established some partnerships with radio stations there and is exploring additional opportunities.<sup>145</sup>

While not the exclusive means through which outreach activities or engaging local mass media can be carried out, the ICC's in-house production of audiovisual materials has tremendous potential to enhance information efforts about court activities. The court is producing a series of programs, including "ICC at a Glance," "News from the Court," and "Ask the Court." As such, radio stations that would otherwise be unable to produce their own programs on the ICC are now able to broadcast court-produced summaries of proceedings. States parties should recognize the integral role the court's audiovisual programs are playing in advancing outreach and provide the necessary resources to support their production.

#### *5. Field offices and input from field staff*

One of the most important ways to ensure that the ICC has adequate interaction with affected communities and effective outreach is through the establishment of ICC offices in situation countries, ideally both in capitals and closer to affected communities. If security

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<sup>145</sup> Ibid., pp. 35-36.

circumstances make this impossible, such offices should be located as close as possible to the situation country.

Field offices, which support a range of court activities including outreach, victim participation, and investigations, can dramatically enrich the breadth and quality of ICC activities vis-à-vis affected communities. Given the complex and varied cultures, contexts, and languages encompassed by the multiple countries in which the ICC operates simultaneously, a “one size fits all” approach will not be effective. At the same time, it is simply not possible for staff in headquarters to gain deep knowledge of every country situation. Field offices are thus key to enable strategies that are properly tailored to the situation. Field-based staff, especially national staff, can have a more nuanced understanding of the environment in each country. Given the unique context of each country situation, regional offices will not be sufficient for the court’s needs. Local offices can also conduct activities on a far more consistent and regular schedule than if Hague-based or even regional staff are solely responsible for the work.

Field offices can, moreover, serve as a much needed “face of the ICC” in situation countries. As a place that affected communities can look to for basic information about the ICC and as a point of contact with the court, field offices can help the ICC to become less of an abstract, far-flung notion. Field offices also will be well placed to contribute to efforts by the court to leave a legacy in the countries where the court is active, such as through targeted initiatives to promote positive complementarity.<sup>146</sup>

But for field offices to be most effective, they need to be accessible to affected communities. Security and other practical difficulties may make it impossible for the court to open offices close to affected communities. Given these challenges, we encourage ICC staff to think creatively about how to promote an accessible field presence as close as possible to affected communities. ICC staff could consider opening small public outposts in certain locations as a way to create a more public presence close to affected communities without having to face the entire range of obstacles to creating a full office. Separate outposts might also be valuable in locations where a field office is already established, but security considerations do not permit public access and drop-in visits.

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<sup>146</sup> “Positive complementarity” refers to strengthening national capacity to prosecute serious international crimes through assistance by states, intergovernmental organizations, and the ICC. See Part IV.B.2 for a discussion of steps that ICC staff can take to catalyze the strengthening of national capacity in a number of areas. It is of course very early for the court to focus on legacy efforts, and there is still much to be done to make its primary operational phase more effective. Nevertheless, over the longer term, field-based staff will be in the strongest position to undertake legacy efforts, such as through targeted interaction, outreach, and trainings with those in the domestic justice sector.

Devising effective solutions for these, and other problems, requires input from the field. In addition, because much of the court’s activity vis-à-vis affected communities requires a tailored approach that is culturally and politically relevant, field-based staff are better placed to grasp the elements of the local context, which enables them to have important ideas to make programming effective. This applies to a full range of court activities in the field including investigations and witness protection. Limited opportunities have been provided in the past, however, for field-based staff to influence court policies and practices.

In the past year, the court has undertaken efforts to enhance its field presence, and with the support of states parties, to put in place a unit in The Hague to provide strategic guidance to field operations.<sup>147</sup> This unit could take on various roles critical to promoting decentralization and a two-way dialogue between The Hague and field offices. But to achieve this aim, the unit in The Hague needs “registry field coordinators” based in the ICC situation countries. These coordinators—proposed in last year’s court budget request as an upgrading of the current field office manager position but not approved by states parties—can help to communicate the views of field-based staff to headquarters on a range of policies. They also have an essential role to play in coordination, a function presently lacking among the field-based registry staff spread across seven units. Increased coordination would help ensure the efficient completion of important operations key to the ICC’s impact such as conducting site visits to affected communities. States parties are encouraged to support these posts in the court’s 2011 budget request.

## *6. In situ proceedings*

The Rome Statute expressly provides for the possibility of holding proceedings in places other than the seat of the court in The Hague.<sup>148</sup> Holding proceedings in situation countries, known as *in situ* proceedings, is a crucial way to generate progress on a range of important objectives for the court in relation to affected communities: media coverage of ICC activity, focus and debate on the ICC’s work, a sense of what the proceedings involve, and greater respect for rule of law and human rights.

The court and states parties have increasingly recognized the importance of *in situ* proceedings, and the court has taken steps toward this goal. At the 2005 session of the ASP, African states parties expressed that “trials should, as much as possible be carried out in

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<sup>147</sup> See generally ASP, “Report of the Court on the enhancement of the Registry’s field operations for 2010,” ICC-ASP/8/33, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/ICC-ASP-8-33-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-33-ENG.pdf) (accessed April 22, 2010).

<sup>148</sup> Rome Statute, art. 3(3).

the localities or region where the crime took place.”<sup>149</sup> The ICC’s Strategic Plan issued in mid-2006 also rightly recognized that “[h]olding proceedings closer to situations where the crimes occurred may increase the accessibility of proceedings to affected populations, the efficiency of the Court’s different activities and the extent to which the Court can fulfill its mission.”<sup>150</sup> The ICC’s proposed budget for 2007 also included for the first time analysis of potential costs associated with holding hearings *in situ*.<sup>151</sup>

Although ultimately unsuccessful, efforts by the court to hold certain proceedings *in situ* in the DRC in the Lubanga trial were very welcome. The good faith effort by the chambers and registry staff to assess the feasibility of *in situ* proceedings was extremely valuable for laying the groundwork for future *in situ* initiatives. Lessons can be drawn from the experience that may help facilitate future proceedings. For example, there may need to be greater consultation with government officials in situation countries to achieve consensus on a particular location and political support for *in situ* proceedings. We also encourage the ICC judges to think proactively about opportune moments to hold *in situ* hearings in the future and welcome the prosecutor’s application to hold key moments of the trial against Jean-Pierre Bemba for crimes committed in CAR *in situ*.<sup>152</sup>

### *7. Opportunities for impact presented by the Review Conference*

The review conference will provide an opportunity for court officials and staff to project the work of the court to a broad audience. While of a different nature to outreach efforts targeted to those communities directly affected by the crimes under ICC investigation, broad public information efforts on behalf of the ICC are also important to enhance support for the ICC, to counter misperceptions spread by some critics, and to reach victim communities with an interest in justice beyond the immediate scope of the ICC’s current activities. Given the review conference’s venue in Kampala, it may attract substantial press coverage in Africa, including in media outlets that do not ordinarily cover the ICC’s activities.

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<sup>149</sup> Prof. J.A. Ayua, solicitor general of the Federal Republic of Nigeria and Permanent Secretary, “Nigeria Statement on behalf of the African states parties to The Rome Statute of the ICC,” Fourth Session of the ASP, The Hague, December 3, 2005, [http://www.iccnow.org/documents/NigeriaAfricanSPs\\_GeneralDebate\\_3Dec05.pdf](http://www.iccnow.org/documents/NigeriaAfricanSPs_GeneralDebate_3Dec05.pdf) (accessed April 22, 2010). See also Sabelo Sivuyile Maqungo, “Statement on behalf of African Member States to the International Criminal Court Statute before the General Assembly,” New York, October 9, 2006, [http://www.southafrica-newyork.net/pmun/view\\_speech.php?speech=271690](http://www.southafrica-newyork.net/pmun/view_speech.php?speech=271690) (accessed April 16, 2010).

<sup>150</sup> ASP, “Strategic Plan of the International Criminal Court,” ICC-ASP/5/6, August 4, 2006, [http://www.icc-cpi.int/library/asp/ICC-ASP-5-6\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-6_English.pdf) (accessed April 30, 2008), p. 7.

<sup>151</sup> ASP, “Proposed Programme Budget for 2007,” ICC-ASP/5/9, August 22, 2006, [http://www.icc-cpi.int/iccdocs/asp\\_docs/library/asp/ICC-ASP-5-9\\_English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-9_English.pdf) (accessed April 22, 2010), p. 189.

<sup>152</sup> *Prosecutor v. Jean-Pierre Bemba*, ICC, Case No. ICC-01/05-01/08, Prosecution’s Submission to Conduct Part of the Trial *in situ*, October 12 2009, <http://www.icc-cpi.int/iccdocs/doc/doc758831.pdf> (accessed April 22, 2010).

Human Rights Watch welcomes the efforts that the court is undertaking to prepare public information plans specific to the review conference in order to make the most of these opportunities. In connection with the visits of states parties delegates to Uganda organized by No Peace Without Justice and Human Rights Network—Uganda (HURINET), public information events have already been held about the review conference in Uganda.<sup>153</sup> In our view, a public information strategy on the review conference, in addition to highlighting key outcomes of the conference such as adoption of a high-level declaration or pledges of support from states parties, could feature of a variety of court officials and focus usefully on the ICC's most innovative, but less well-understood aspects, including its progress in securing the right of victim participation and the delivery of assistance and ultimately reparations through the Trust Fund for Victims.

#### **D. Prosecutorial strategy**

Prosecutorial strategy is not often directly associated with impact on affected communities, yet it is key to how affected communities ultimately view the court. Because the ICC was established to deliver justice for serious violations of international humanitarian law where national courts are unwilling or able to act, it is expected to adhere to procedural fairness and equality before the law in a way that is not always possible in national courts. Rather than provide “victor’s justice,” the ICC should investigate and prosecute individuals on all sides who committed crimes within its jurisdiction, even where doing so is politically inconvenient or otherwise difficult. Rarely are crimes just committed by one party to a conflict, even if abuses are attributed much more to one side than the other. Affected communities are all too aware of violations committed by various parties and failure to address serious crimes—or to explain why they are not addressed—can undermine the court’s legitimacy. Perceptions of bias or political interference can in this way undermine the ICC’s impact. It is therefore essential for the credibility of the ICC that it not only act impartially, but be seen as impartial. Impartiality is the objective, not parity. Here, too, lessons can be drawn from the experience of the ad hoc tribunals.

Despite facing numerous obstacles with state cooperation from Serbia and Croatia, the ICTY managed to prosecute crimes committed by all factions in the Balkans wars. In Bosnia, for

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<sup>153</sup> See, for example, “Review conference: Stocktaking related visit,” ASP press release, ICC-ASP-20100222-PR498, February 22, 2010, [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%2oreleases/review%20conference\\_%2ostocktaking%2orelated%2ovisit](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%2oreleases/review%20conference_%2ostocktaking%2orelated%2ovisit) (accessed April 22, 2010); “The President of the Assembly of States Parties to the Rome Statute interacts with war-affected communities in the Acholi sub-region of northern Uganda,” ICC press release, ICC-CPI-20100127-PR491, January 27, 2010, [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%2oreleases/the%2opresident%20of%20the%20assembly%20of%20states%20parties%20to%20the%20rome%2ostatute%2ointeracts%20with%20war\\_affected%2ocomm](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%2oreleases/the%2opresident%20of%20the%20assembly%20of%20states%20parties%20to%20the%20rome%2ostatute%2ointeracts%20with%20war_affected%2ocomm) (accessed April 22, 2010).

example, it issued indictments against 85 Bosnian Serbs, 25 Bosnian Croats, as well as more than a dozen Bosnian Muslim government force members and Yugoslav army officers.<sup>154</sup> In Kosovo it pursued both Kosovo Albanians and Serbs in the Yugoslav Army. The tribunal also issued indictments against two Macedonians and three Montenegrins. The fact that individuals from all sides of the conflict were prosecuted made it much easier for the ICTY to respond effectively to those who claimed it was biased against one particular ethnic group.

Similarly, the prosecutor for the Special Court for Sierra Leone opted to issue indictments against leaders of all parties to the conflict including ten from two rebel groups, the Revolutionary United Front and the Armed Forces Revolutionary Council, and three from the Civil Defense Force (CDF), the group that fought on the side of the government. Those in the CDF were viewed as heroes by many in Sierra Leone for protecting civilians from attacks by soldiers and rebels. Thus the arrest of its leader, Samuel Hinga Norman, then serving as interior minister in the Kabbah government, was a shock to many in the community. Although the court was concerned about the effect the arrest would have in the country, it did not cause any unrest. Rather local civil society groups report that it enhanced local understanding of the court's mandate and established the court as different from "business as usual" in notoriously corrupt Sierra Leone.

By contrast, the ICTR has only prosecuted one side, the Hutu, for crimes in Rwanda. Though by far the vast majority of the violence was committed as part of the genocide against Tutsi, many civilians were also killed by the Rwandan Patriotic Front (RPF). RPF crimes included intentional attacks on the civilian population and individual civilians, and extrajudicial executions. The UN High Commission for Refugees estimated that the RPF killed between 25,000 and 45,000 civilians in 1994.<sup>155</sup> The crimes are well-known within Rwanda, though there has been no accountability for them either in national courts or at the ICTR. The tribunal's failure to address these crimes has significantly undermined its impact in Rwanda. Rather than being seen as an impartial arbiter of justice, the ICTR is viewed by many as an example of victor's justice. Thus its legacy, and the hope that it would "contribute to national reconciliation and to the restoration and maintenance of peace," have been undermined.<sup>156</sup>

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<sup>154</sup> ICTY, "Key Figures of ICTY Cases," March 17, 2009, <http://www.icty.org/sections/TheCases/KeyFigures> (accessed April 12, 2010).

<sup>155</sup> See Alison Des Forges, *Leave None to Tell the Story* (New York: Human Rights Watch/Int'l Fed. Of Human Rights, 1999), p. 727.

<sup>156</sup> For a discussion of the ICTR's failure to prosecute the RPF, see Leslie Haskell and Lars Waldorf, "The ICTR's Impunity Gap: Causes and Consequences," unpublished manuscript on file with Human Rights Watch.

The Office of the Prosecutor (OTP) was represented in the court-wide working group charged with developing the ICC's victim strategy, mentioned above. The OTP also recently issued a policy paper on victim participation, designed to consolidate its approach to the range of issues that may arise as the right of participation is implemented in practice. The policy paper is prefaced by a strong acknowledgment that victim participation is a statutory right.<sup>157</sup> While support for effective implementation of the court's unique provisions on victim participation is welcome, prosecutorial strategy is falling short in some ways that may undermine its impact in affected communities.

### *1. Sequencing*

In his 2006 paper on case selection, the prosecutor indicated he would take a sequential approach to his investigations: after completion of field investigations of a particular group, the office would examine whether other groups warrant investigation.<sup>158</sup> As a practical matter, this means warrants for one group may be announced months or years in advance of warrants for other groups.

This approach is, to an extent, a necessity. It is clear that the OTP does not have the capacity or resources to investigate all groups at the same time. However, delays caused by investigating one group at a time can undermine perceptions of his office's impartiality in affected communities, particularly in societies that are ethnically polarized, and can exacerbate ethnic tensions.

Our research in the Ituri district of the DRC suggests that the prosecutor's use of the sequential approach had significant negative implications in the area. The Ituri conflict, the initial focus of the ICC's investigation in the DRC, began in 1999 when a long-standing land dispute between Hema pastoralists and Lendu agriculturalists spiraled out of control, fueled by international and local actors involved in Congo's larger war.<sup>159</sup> In early 2006 the ICC arrested Thomas Lubanga, the head of the Union of Congolese Patriots, a prominent Hema-based militia group. Nearly 18 months later, the ICC arrested Germain Katanga, chief of staff of a Ngiti-based militia (the Ngiti are closely linked to the Lendu). In February 2008, Mathieu

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<sup>157</sup> Office of the Prosecutor, ICC, "Policy Paper on Victims' Participation," April 2010, <http://www.icc-cpi.int/NR/rdonlyres/BC21BFDF-88CD-426B-BAC3-D0981E4ABE02/281751/PolicyPaperonVictimsParticipationApril2010.pdf> (accessed April 16, 2010).

<sup>158</sup> Office of the Prosecutor, ICC, "Criteria for Selection of Situations and Cases," draft policy paper on file with Human Rights Watch, June 2006, pp. 12-13.

<sup>159</sup> During the course of the conflict, ethnic groups like the Nande, Bira, and Alur, previously not associated with either of the contenders, were forced to choose sides. See Human Rights Watch, *Ituri – Covered in Blood: Ethnically Targeted Violence in Northeastern DR Congo*, vol. 15, no. 11(A), July 2003, <http://hrw.org/reports/2003/ituri0703>, p. 14 ("Covered in Blood").

Ngudjolo, former chief of staff of the Nationalist and Integrationist Front (FNI), a Lendu-based militia, was brought into ICC custody.

The arrest of senior officials from both the Hema and Lendu-based militias was an important development. However, field research conducted by Human Rights Watch in the nearly 18-month period following Lubanga's arrest consistently showed that the absence of arrest warrants against Ngiti and Lendu militia leaders led to a strong perception within the Hema community that the ICC is carrying out "selective justice."<sup>160</sup> The arrests of Katanga and Ngudjolo may address these perceptions to an extent. Nonetheless, we are concerned that the extensive delay in moving forward may have caused irreparable damage to perceptions about the ICC's impartiality in the DRC.

There are indications that the prosecutor may be evolving his approach to investigations. The term "sequencing" does not appear in recent statements of OTP strategy.<sup>161</sup> There are also promising indications that the prosecutor intends to investigate both sides implicated in the violence in Kenya simultaneously.<sup>162</sup> Leaders of both parties there were implicated in the violence that began following the disputed December 2007 elections. If in his investigations the prosecutor is thought to favor one side or the other, it could spark violence, particularly as elections are on the horizon for 2012. The OTP's new willingness to broaden its approach to simultaneous investigations is thus particularly welcome. This new approach, if adopted for other situations, including ongoing investigations in the Kivus in eastern DRC, will help maximize the court's impact by reinforcing the impression that it is an impartial, apolitical institution.

## *2. Selection of cases*

The types of cases—meaning specific allegations against individual defendants—that are selected for prosecution will have important implications for the ICC's impact among the

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<sup>160</sup> Human Rights Watch group interview with Hema community leaders, Bunia, May 2, 2007, and separate interviews with Hema community leader, Bunia, May 8, 2007, and Hema intellectual, Goma, May 9, 2007.

<sup>161</sup> See Office of the Prosecutor, ICC, "Prosecutorial Strategy 2009-2012," February 1 2010, <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (accessed April 22, 2010).

<sup>162</sup> For example, the ICC prosecutor submitted a confidential list of possible suspects to the pre-trial chamber, listing names of senior political and business leaders affiliated with both the Party of National Unity (PNU) and the Orange Democratic Movement (ODM). In his subsequent press statement following the pre-trial chamber's authorization of a Kenya investigation, the prosecutor indicated that his office plans to finalize investigations within 2010 and to bring at least two cases against one to two persons in each case. This suggests, evidence permitting, that his office plans investigations against PNU and ODM leaders at the same time. See Transcript of statement given during news conference by the ICC prosecutor, Luis Moreno-Ocampo, The Hague, April 1, 2010, on file with Human Rights Watch.

communities most affected and for its overall influence in limiting impunity. Since senior leaders considered to bear “the greatest responsibility” are often beyond the reach of national judicial authorities because of their official positions, the ICC’s pursuit of them is essential. As discussed earlier, effectively targeting those in senior leadership can also expose the structure of criminality that led to the commission of widespread crimes.<sup>163</sup>

In Congo, the Office of the Prosecutor has so far pursued senior members of rival ethnic militias in Ituri. While we welcome the arrests of Thomas Lubanga, Germain Katanga, and Mathieu Ngudjolo by the ICC, these rebel commanders did not act alone in terrorizing civilians. Indeed, many of those whom we interviewed in Ituri said that in order for justice to be achieved, the court must pursue accountability for those who supported militia groups in Ituri.<sup>164</sup>

Our research in Congo, covering the period from 1998 to this writing, suggests that key political and military figures in Kinshasa, as well as in Uganda and Rwanda, also played a prominent role in creating, supporting, and arming the militias associated with Lubanga, Katanga and Ngudjolo. The availability of political and military support from these external actors encouraged local leaders in Ituri to form more structured movements and significantly increased their military strength. We, therefore, urge the prosecutor to investigate senior officials in Kinshasa,<sup>165</sup> Kampala, and Kigali and, evidence permitting, to bring cases against them. By expanding investigations to reach those most responsible who will not otherwise be held to account, the court will demonstrate the cost of fomenting violence and enhance its deterrent effect.

The selection of incidents and charges against these alleged perpetrators can be just as important to affected communities in measuring the ICC’s ability to bring justice. It is therefore essential to gather sufficient evidence to charge alleged perpetrators with the gravest crimes that are most representative of the victimization. This is crucial in reinforcing the ICC’s capacity to adequately address the suffering experienced in the communities most affected. While the prosecutor’s office appears to have implemented this policy in many of its arrest warrants, the approach was not followed in cases against Thomas Lubanga and Bosco Ntaganda in Congo.

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<sup>163</sup> See Chapter IV.B.1.

<sup>164</sup> Human Rights Watch separate interviews with representatives of local nongovernmental organizations, international observers, and local journalists, Bunia, May 1-3, 5, and 7, 2007

<sup>165</sup> We note the February 2007 public letter by Floribert Njabu, the president of the Lendu-based FNI, where he implicated senior Congolese government officials. Copy on file with Human Rights Watch.

Despite numerous allegations documented by Human Rights Watch and others that Lubanga's UPC militia committed a range of horrific crimes, including murder, torture, and rape,<sup>166</sup> the ICC has only charged him and his fellow former UPC member Ntaganda with the war crimes of enlisting and conscripting children under the age of 15 years as soldiers and of using them to actively participate in hostilities in 2002-2003.<sup>167</sup> In the course of our field research in Ituri, civil society representatives, community leaders, and foreign observers there expressed to us disappointment and disbelief that the prosecutor had at that time only brought charges in relation to the enlistment, recruitment, and use of child soldiers against Lubanga. Our research in Kinshasa revealed a widespread belief that the charges against Lubanga and Ntaganda are too limited and do not reflect the gravity of the crimes that the UPC allegedly committed in Ituri.

Although there are reasons for the initially limited set of charges (namely Lubanga's imminent release from Congolese custody), they are a source of legitimate dissatisfaction among affected communities and have contributed to rumors about the court being biased, a perception worsened by the fact that the ICC pursued a broader set of charges against the opposing militia leaders, Katanga and Ngudjolo. Basing investigative staff in the field may help the OTP avoid some of these problems by strengthening their understanding of the nuances and context of a given situation. Only with a clear understanding of context can an investigative and prosecutorial strategy be developed that will maximize the court's impact.

## **E. Broadening the ICC's impact: ending impunity and preventing future crimes**

The ICC was established with the aim of ending impunity for serious crimes and thus contributing to their prevention. There are some indications that the court in its early phases has had some positive effect in both those areas. However, for the court to realize its potential in this regard states parties need to demonstrate a strong commitment to the court and the enforcement of its orders. In particular, states parties need to ensure ICC arrest warrants are executed. Similarly, for the court to be a catalyst for national prosecutions of grave crimes, it will need to be seen as an effective institution with capacity to handle prosecutions for serious atrocities when they occur. If the court is viewed as a paper tiger, its hoped-for deterrent effect and its impact on spurring domestic prosecutions will diminish.

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<sup>166</sup> Human Rights Watch, *Covered in Blood*; Human Rights Watch, *The Curse of Gold: Democratic Republic of Congo*, June 2005, <http://www.hrw.org/reports/2005/drc0505/>; Letter from the U.N. Secretary General to the President of the Security Council, "Special Report on the Events in Ituri, January 2002-December 2003," July 16, 2004, <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/430/63/img/N0443063.pdf?OpenElement> (accessed June 2, 2008), paras. 68-70.

<sup>167</sup> *Prosecutor v. Lubanga*, ICC, Case No. ICC-01/04-01/06, Warrant of Arrest, February 10, 2006.

### *1. Deterrence*

Extrapolating from national experience, we have seen that the higher the probability of apprehension and punishment the greater the likely deterrent effect on some premeditated crimes. The deterrent effect for the ICC will likely hinge on the degree to which punishment for those crimes becomes more certain. In the international arena that is subject to a greater number of variables and will depend to a large extent on the willingness of states parties to support the court and press for cooperation, in particular with respect to arrest warrants. It likely will be years before the court has established a track record and developed its standing as an effective institution willing to act when national authorities are unwilling or unable to do so. Nonetheless, Human Rights Watch has found some anecdotal evidence indicating that there may be some short-term benefits arising from the threat of prosecution.

The day Thomas Lubanga was transferred to The Hague to face charges before the ICC, March 17, 2006, Human Rights Watch researchers had a meeting with a Congolese army colonel to discuss crimes committed by his own forces against the Mai Mai, a local militia. As the discussion turned to war crimes, the colonel sat up and said, “I don’t want to be like Lubanga! I don’t want to be transferred to The Hague!”<sup>168</sup> Human Rights Watch researchers have heard similar sentiments expressed by militia leaders on other occasions. In a September 2006 discussion with a militia leader in Ituri who was engaged at the time in peace discussions with the Congolese government, the commander asked Human Rights Watch for further information about what constituted war crimes, having heard a broadcast from The Hague on proceedings against Lubanga a few days earlier. When the elements of the crimes were explained to him, he asked, “So could I also be transferred to the Hague if I did those things?” When informed that if he had done such things, it was a possibility; he put his head in his hands and repeatedly said, “I had no idea. I had no idea.”<sup>169</sup>

Similarly, across the continent in the Central African Republic, in meetings with rebel leaders that occurred immediately following Lubanga’s transfer to The Hague, rebel commanders told Human Rights Watch researchers that they “did not want to end up before the ICC.” Before learning of the ICC prosecution of Lubanga on charges of enlisting and conscripting child soldiers, rebel commanders readily admitted that there were many children in their ranks, including some as young as 12, and that many were armed and participated in combat. Upon learning that use of children as combatants is a serious violation of international humanitarian law, one rebel commander spent two days explaining to Human

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<sup>168</sup> Human Rights Watch interview with FARDC colonel (name withheld), Mitwaba (Katanga), March 17, 2006.

<sup>169</sup> Human Rights Watch interview with Ituri militia leader (name withheld), Bunia, August 2006.

Rights Watch researchers that he had not known using child soldiers was a crime, that it was “a misunderstanding,” and that he was not a criminal. He immediately offered to demobilize the child soldiers as long as their security could be guaranteed, and asked Human Rights Watch to contact UNICEF for assistance with the demobilization. The children were in fact demobilized.<sup>170</sup>

The nongovernmental International Center for Transitional Justice, and children’s rights advocates in the DRC, have also found that “Lubanga’s arrest had an enormous educational impact, making clear what was not previously understood: that recruiting, enlisting, and using children to fight is a war crime.”<sup>171</sup> Although the repercussions are not all positive (awareness has negatively affected demobilization since armed groups do not want to be implicated in crimes), Lubanga’s arrest has dramatically increased awareness among Congo warlords and militia leaders that use of children as participants in conflict is unlawful.<sup>172</sup> In the long run, the awareness that recruiting children to be soldiers is a criminal act that may result in prosecution may help discourage use of child soldiers.<sup>173</sup>

## *2. National Prosecutions*

The ICC’s most significant impact may be its role in promoting the development of domestic enforcement tools and the rule of law. Because the ICC only has jurisdiction over cases when national jurisdictions are unwilling or unable genuinely to carry out the investigation or prosecution, states have incentive to bring cases that they might not otherwise pursue. The threat of ICC prosecutions has already played a role in strengthening or galvanizing the establishment of domestic mechanisms to deal with these crimes. In each country in which the ICC is investigating, steps have been taken—at least nominally—to start domestic

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<sup>170</sup> Human Rights Watch interview with Wafio Bertin, advisor to the APRD, Boja, February 15, 2007; and Human Rights Watch, *State of Anarchy*, September 2007, [http://www.hrw.org/sites/default/files/reports/caro07webwcover\\_o.pdf](http://www.hrw.org/sites/default/files/reports/caro07webwcover_o.pdf), pp. 70-71.

<sup>171</sup> Laura Davis and Priscilla Hayner, International Center for Transitional Justice, “Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC,” March 2009, [http://www.ictj.org/static/Africa/DRC/ICTJDavisHayner\\_DRC\\_DifficultPeace\\_pa2009.pdf](http://www.ictj.org/static/Africa/DRC/ICTJDavisHayner_DRC_DifficultPeace_pa2009.pdf), p. 31.

<sup>172</sup> Ibid. Militia leaders have changed their attitude toward child recruitment in a way that indicates new awareness that recruitment and utilization of child soldiers is a crime. In some cases, they have made efforts to cover up use of child soldiers by telling children to lie about their age or by sending children away. The awareness of the illegality of use of child soldiers in conflict also manifested itself in January 2008 peace talks in Goma when language about demobilization of child soldiers was altered so as not to be seen as an admission of having child soldiers for fear that it could lead to prosecution. Although the new awareness has so far resulted in a reluctance to demobilize children for fear of criminal prosecution and other efforts to conceal their use (sometimes called the “Lubanga effect”), children’s rights advocates interviewed by ICTJ concluded the overall effect of the ICC’s action was positive because of its educational impact. Ibid., p. 32.

<sup>173</sup> The ICTJ points out that in the year following Lubanga’s March 2006 arrest, recruitment of child soldiers in the DRC decreased by 8 percent. Ibid., citing Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo, S/2007/391, June 28, 2007, p. 5. However, other reports indicate recruitment of child soldiers continued at its normal rate in 2007. Recruitment declined when it was made clear by the UN and EU that calculation of demobilization benefits would not include child soldiers. Ibid.

proceedings. Even in countries where ICC investigations are being considered but have not yet been opened, steps have been taken to hold perpetrators to account that otherwise would not have occurred, in order to keep the cases in national courts. This progress, described below, can be amplified through the types of initiatives under discussion in the complementarity section of stocktaking, discussed in detail in Chapter V.

In Uganda before the ICC's involvement, the Ugandan Parliament had passed a law providing a blanket amnesty to rebels who surrendered to the government. However, interest in national prosecutions gained momentum during the peace talks between the government and the Lord's Resistance Army (LRA) which began in July 2006 because they were seen as an attractive alternative to ICC prosecutions of LRA leaders. Although the final peace accord was never signed, agreements created as part of that process resulted in legislation providing for a special division of Uganda's High Court to prosecute those who planned or carried out war crimes or other widespread, systematic, or serious attacks on civilians.<sup>174</sup> The agreement also included measures to establish a special investigative unit headed by Uganda's director of public prosecutions, and a registry with authority to facilitate protection of victims and witnesses.<sup>175</sup> Judges, registrars, prosecutors, and investigators have been appointed, and legislation recently passed, but not yet signed into law, will enable a war crimes division in the Ugandan high court to prosecute Rome Statute crimes.<sup>176</sup>

In the DRC, in 2004 the military courts launched their own prosecutions for war crimes and crimes against humanity relying on definitions of crimes contained in the Rome Statute.<sup>177</sup> Although only a handful of trials have been held so far against mainly low-ranking soldiers (and there have been fair trial concerns with those), in each of these cases the court has applied definitions of crimes in the Rome Statute.<sup>178</sup> These cases represent small but significant steps forward in addressing the long-standing culture of impunity in the DRC. In the Central African Republic (CAR), the possibility of ICC prosecution has put pressure on the government to respond to abuses committed by its armed forces as part of a conflict in the north. In September 2008 the CAR government established an office for international

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<sup>174</sup> Annexure to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement on 29<sup>th</sup> June 2007, Juba, Sudan, February 19, 2008, paras. 7, 10-14. Notably, while some close to the peace process have argued that the special division would only try ICC suspects, the agreement does not suggest any such limitation on its mandate.

<sup>175</sup> Ibid., paras. 8, 10-11.

<sup>176</sup> Francis Kagolo, "Amend amnesty law—Ogoola," *The New Vision* (Kampala), April 16, 2010.

<sup>177</sup> Military courts currently have exclusive jurisdiction over international crimes in the DRC because legislation implementing the Rome Statute into domestic law and vesting civilian courts with the jurisdiction to try these crimes has yet to be passed.

<sup>178</sup> Amnesty International, "Amnesty International Report 2008," DRC chapter, <http://www.amnesty.org/en/region/democratic-republic-congo/report-2008> (accessed April 16, 2010).

humanitarian law within the army, which is responsible for conveying the laws of war to its members.<sup>179</sup>

In Darfur, the government of Sudan's refusal to cooperate with the ICC has in part been made on the basis that it has the capacity to try cases in national courts and therefore the cases are inadmissible. To bolster its claim, the government has periodically announced measures ostensibly designed to improve domestic accountability. On June 7, 2005, one day after the ICC prosecutor announced he was opening investigations into the events in Darfur, the Sudanese authorities established the Special Criminal Court on the Events in Darfur to demonstrate the government's ability and willingness to handle prosecutions domestically. On September 18, 2005, a Specialized Prosecution for Crimes against Humanity Office was established in Khartoum by a decree from the acting minister of justice.<sup>180</sup> In November 2008 the government passed amendments to Sudan's criminal code to include international crimes such as crimes against humanity and war crimes.<sup>181</sup> Though no real progress has been made towards ending impunity for atrocities in Darfur and lack of political will remains an obstacle for genuine proceedings, the institution of legal reforms is still a positive step.

In Kenya, the Commission of Inquiry into Post-Election Violence ("Waki commission"), which was appointed by the coalition government as part of the mediation process, recommended in its October 2008 report the creation of a special tribunal with an international component to try those most responsible for the attacks.<sup>182</sup> The commission added teeth to its recommendation by handing a sealed envelope containing a list of leading suspects for the crimes and supporting evidence to the mediator, Kofi Annan, with the instruction that the envelope be passed to the ICC prosecutor should efforts to set up the tribunal fail.<sup>183</sup> Only hours before the commission's initial deadline for names to be handed over to the ICC, the Kenyan prime minister and president signed an agreement to create a special tribunal in

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<sup>179</sup> Human Rights Watch, *World Report 2009* (New York: Human Rights Watch, 2009), Central African Republic chapter, [http://www.hrw.org/sites/default/files/related\\_material/car.pdf](http://www.hrw.org/sites/default/files/related_material/car.pdf). Concerns about the justice system's capacity to deal with these crimes persist, however; see Chapter IV.B.1.

<sup>180</sup> Decree of the Establishment of a Specialized Prosecution for Crimes Against Humanity, September 18, 2005. See also Office of the High Commissioner for Human Rights, "Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan," January 27, 2006, <http://www.ohchr.org/documents/countries/sudanjanuary06.pdf> (accessed April 16, 2010), p. 29

<sup>181</sup> Human Rights Watch et al., "Rhetoric vs. Reality: The Situation in Darfur," report by a coalition of nongovernmental organizations, December 2008, <http://www.darfurconsortium.org/Non-Member/Reports/RhetoricVsReality.Paper.120208.pdf> (accessed April 16, 2010), p. 15.

<sup>182</sup> Kenya's Commission of Inquiry into Post-Election Violence ("the Waki commission"), final report, October 15, 2008, <http://www.dialoguekenya.org/docs/PEV%20Report.pdf> (accessed May 27, 2009), p. 16 ("Waki Report"), p. ix.

<sup>183</sup> Ibid., p. 18.

December 2008.<sup>184</sup> An International Crimes Bill was fast-tracked through parliament in December 2008 in accordance with Waki commission recommendations.<sup>185</sup> Though efforts for national accountability ultimately stalled, the existence of the ICC and the threat of ICC prosecution changed the discussion about accountability in Kenya.

Even in countries where the prosecutor is undertaking preliminary analysis to determine whether to open an investigation, the looming possibility of ICC involvement has spurred national enforcement efforts. For example, at various times, the Colombian government has proposed bills or initiatives that could let paramilitaries or their accomplices off the hook for their crimes. The ICC prosecutor's expressions of interest in the Colombian proceedings have received extensive coverage in the Colombian media, and may have been one reason why the Colombian government has not followed through with those initiatives. For the ICC to continue to have this sort of impact, however, it must be seen as a robust institution with capacity to take on new cases. As long as prosecutions are a credible threat, there is incentive for national courts to exercise preemptive authority over its cases. Full support of states parties for the institution is necessary to make this a reality.

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<sup>184</sup> David Mugonyi, "Secret list: Now Kibaki and Raila sign pact," *Daily Nation* (Nairobi), December 17, 2008, <http://www.nation.co.ke/News/-/1056/503642/-/uomhno/-/index.html> (accessed May 27, 2009).

<sup>185</sup> Judie Kaberia, "The Kenya house Speaker recalled Parliament to save a year old grand coalition gov't from the brink of collapsing," *Majimbo Kenya*, January 8, 2009, <http://majimbokenya.com/home/2009/01/08/the-kenya-house-speaker-recalled-parliament-to-save-a-year-old-grand-coalition-govt-from-the-brink-of-collapsing> (accessed April 16, 2010); and Waki Report, p. 476 (recommending that "The International Crimes Bill 2008 be fast-tracked for enactment by Parliament to facilitate investigation and prosecution of crimes against humanity").

## VI. Peace and Justice

### A. Introduction

The adoption of the Rome Statute, and its speedy entry into force, mark a high point in the battle against impunity. Abusive leaders, whose crimes would have gone unaddressed a mere 20 years ago, now must consider the possibility that they may one day have to answer for their crimes.

But the threat of prosecutions is not without its complications. Because the ICC can, and does, issue arrest warrants while conflicts are ongoing, it has already created considerable controversy over whether the prospect of prosecution stands in the way of peace.

Negotiators and diplomats, under pressure to end a conflict, sometimes view the ICC as an insurmountable obstacle to their work. They fear that the prospect of arrest will cause abusive leaders to cling to power more tenaciously and thus prolong the conflict. The ICC's mandate to investigate and prosecute war crimes, crimes against humanity, and genocide in the course of ongoing conflicts means that this controversy is likely to arise more often in the future. Already the call to suspend or "sequence" justice in exchange for a possible end to a conflict has arisen in conjunction with the court's work in a number of country situations. For this reason, managing tensions that may arise in the context of negotiations is an area that can benefit from closer examination of past experience.

The important question of pursuing justice for grave international crimes and its interface with peace negotiations is the fourth stocktaking topic. While the topic does not lend itself to a resolution or pledges in Kampala, greater clarity on this subject is nonetheless crucial for the future of the court's work.

In preparations for this topic and interventions in Kampala, we urge states parties to consider the relationship between peace and justice with a view toward affirming the integral relationship between peace and justice. It is important to highlight the importance of justice as an objective in its own right and not a tool toward other ends. In addition, the review conference is an opportunity to take note of some of the misperceptions about the relationship between the two important objectives discussed above and reflect on country experience to date pursuing these two objectives simultaneously to end conflicts where horrific crimes have been committed. Finally, we urge states parties to affirm that forgoing accountability often does not result in the hoped-for benefits, while remaining firm on justice can yield short- and long-term benefits for peace.

In terms of concrete outcomes for this topic, our expectation is that serious, substantive consideration of the relationship between peace and justice will be reflected in a summation of the session, and that states parties will move beyond stale conventional wisdom and achieve a better understanding of the relationship between these objectives.

## B. The importance of justice in securing peace

There is ample experience to demonstrate that failing to address serious human rights crimes can lead to unforeseen negative results. Explicit amnesties that grant immunity for war crimes, crimes against humanity, or genocide, may effectively sanction the commission of grave crimes without providing the desired objective of peace. All too often a peace that is conditioned on impunity for serious crimes is not sustainable.<sup>186</sup> Even worse, it can set a precedent of impunity for atrocities that encourages further abuses. Tolerance of impunity can in the longer term also contribute to renewed cycles of violence both by implicitly permitting unlawful acts and by creating an atmosphere of distrust and revenge that may be manipulated by leaders seeking to foment violence for their own political ends. If the objective is more than a brief break in hostilities, then leaving the past in the past is not an option.

In recognition of experience demonstrating that general amnesties covering war crimes, crimes against humanity, and genocide are neither effective nor consistent with efforts to end impunity, the UN Secretary-General issued guidelines prohibiting appointed envoys from associating themselves with agreements that provide amnesties for these crimes. Blanket amnesties are no longer as common as they once were. A recent study by the Humanitarian Dialogue Center shows that general amnesties that cover war crimes, crimes against humanity, and genocide have been used less frequently since 2000 than in previous years.<sup>187</sup>

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<sup>186</sup> Sierra Leone is one example of the failed broad amnesty policies of the past. Three blanket amnesty provisions in different accords failed to consolidate the hoped-for peace during its 11-year civil war. Rather than solidify peace, successive amnesties had the opposite effect. Inclusion of a general amnesty in the initial peace agreement created the expectation that other agreements would contain the same provision, thus further emboldening potential rights abusers. War and war crimes resumed within a short period after each peace agreement had been reached. As the conflict went on, Human Rights Watch observed an increased number of serious abuses (including rape, systematic extortion, looting of villages and torture and summary execution of suspected rebels) by the Civil Defense Forces, a pro-government militia. In the final 1999 Lome accord, rebel leaders associated with horrific atrocities were even rewarded with high-level government positions. The pardons, and ultimately the high government position for rebel leader Foday Sankoh, showed that combatants would pay no price—and, indeed, would even be rewarded—for their horrific crimes. In Angola as well, six successive amnesties failed to end the Angolan civil war. The consistent failure to address violations of international humanitarian law undermined attempts to secure peace. Abuses worsened with each cycle of conflict. See Human Rights Watch, *Selling Justice Short*, pp. 57-68.

<sup>187</sup> Leslie Vinjamuri and Aaron P. Boesenecker, *Accountability and peace agreements: mapping trends from 1980-2006*, HD Centre, Geneva, September, 2007, [http://www.reliefweb.int/rw/lib.nsf/db90osid/EVOD-77MERJ/\\$file/Full\\_Report.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db90osid/EVOD-77MERJ/$file/Full_Report.pdf?openelement) (accessed April 15, 2010), Appendix 1. See also Priscilla Hayner, *Negotiating*

Yet indications that blanket amnesties may be declining is no reason to rest easy. Implicit, or de facto amnesties, can have equally destructive consequences. In Sudan, longstanding impunity for the state's use of brutal ethnic militias to attack civilians in the south set a precedent that suggested that there would be no price to pay for similar atrocities elsewhere. This factored into Khartoum's decision to use the same strategy again with devastating results for civilians in Darfur. The peace agreement that ended the north-south civil war did not include provisions for accountability because negotiators were concerned that raising the issue would disrupt the talks.

De facto amnesties may also take the form of incorporating alleged rights abusers into the government. Negotiators have sometimes opted to include human rights abusers in a coalition government or a unified military in the hope of neutralizing them or enhancing stability. But including alleged perpetrators in government has not proved to be the panacea that it was hoped to be. While efforts to bring human rights abusers to justice undoubtedly present challenges, making deals with criminal suspects in order to achieve peace can have far-reaching negative consequences. Rewarding alleged war criminals with government positions might encourage others to engage in criminal activity with the expectation of receiving similar treatment. It may also erode public confidence in the new order by sending a message to the population about the acceptance of such abuses and by further entrenching impunity.

### *1. Afghanistan*

After the fall of the Taliban in November 2001, the United Nations brought together leaders of Afghan ethnic groups in Germany to create a road map for representative government in Afghanistan.<sup>188</sup> The resulting Bonn Agreement called for creation of a loya jirga (grand council), which was convened in June 2002, to choose an interim government.<sup>189</sup>

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*Justice: Guidance for Mediators, Centre for Humanitarian Dialogue and International Center for Transitional Justice, February 2009.*

<sup>188</sup> The Taliban is a movement started by religious students (*talib*s) from the Pashtun areas of eastern and southern Afghanistan who were educated in traditional Islamic schools in Pakistan.

<sup>189</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions ("Bonn Agreement"), December 5, 2001, <http://www.un.org/News/dh/latest/afghan/afghan-agree.htm> (accessed April 20, 2010); and Joe Havely, "The loya jirga: A very Afghan gathering," *CNN*, June 11, 2002, <http://edition.cnn.com/2002/WORLD/asiapcf/central/06/10/afghan.loyajirga/index.html> (accessed April 20, 2010). The selection process for the Emergency Loya Jirga which took place in May-June 2002 was conducted in two stages. During the first stage, candidates were elected in their home districts by traditional local shuras, or councils; during the second stage, these candidates attended a regional election where they chose a smaller number of delegates from among themselves to attend the loya jirga in Kabul. See Procedures for the Elections of the Members of the Emergency Loya Jirga, UN Assistance Mission in Afghanistan, <http://www.globalpolicy.org/component/content/article/178/33093.html> (accessed April 20, 2010), arts. 6-11.

The loya jirga's selection process explicitly called for the exclusion of delegates who had engaged in human rights abuses, war crimes, looting of public property, or the drug trade.<sup>190</sup> However, the Special Independent Commission for the Convening of the Loya Jirga was unable to monitor and enforce this prohibition. Nor was it made a priority: the warlords' cooperation was seen by the UN facilitator Lakhdar Brahimi as crucial to the success of the loya jirga, so there was little willingness to confront the issue of their past records.<sup>191</sup> The EU special envoy to Afghanistan, Francesc Vendrell, described the sentiment at the time: "In early 2002, the Americans were relying on the warlords and commanders to pursue the War on Terror. There was a lot of emphasis on stability and therefore justice had to wait. These unsavoury characters were seen as providing stability."<sup>192</sup>

In 2005-06 Human Rights Watch documented that many leaders implicated in egregious human rights abuses in the 1990s became Afghan ministry officials or presidential advisors, or controlled puppet subordinates who held official positions.<sup>193</sup> They include several of the worst perpetrators from Afghanistan's recent past, such as Abdul Rabb al Rasul Sayyaf, Mohammed Fahim, Burhanuddin Rabbani, Gen. Abdul Rashid Dostum, and Karim Khalili, who despite having records of war crimes and serious abuses during Afghanistan's civil war in the 1990s have been allowed to hold and exploit positions of power.<sup>194</sup> Mohammed Fahim, whose troops were implicated in abuses such as rape and summary executions in 1993, is now serving as first vice president of Afghanistan.

Abusive actions by local strongmen and their forces have undermined the government's legitimacy and caused widespread fear and cynicism among Afghans.<sup>195</sup> As Afghan human rights activist Nader Nadery said, "The militia leaders became part of the structure and

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<sup>190</sup> Procedures for the Elections of the Members of the Emergency Loya Jirga, art. 14(4).

<sup>191</sup> See Laura Secor, "The Pragmatist," *The Atlantic*, July/August 2004, <http://www.theatlantic.com/doc/200407/secor> (accessed April 20, 2010).

<sup>192</sup> Debbie Whitmont, "Winter in Afghanistan: Travels Through a Hibernating War," *The Monthly* (Melbourne), March 2007, <http://www.themonthly.com.au/tm/node/478> (accessed April 20, 2010) ("Winter in Afghanistan").

<sup>193</sup> Ibid. See also "Afghanistan: Bush, Karzai, Musharraf Must Act Now to Stop Militant Abuses," Human Rights Watch news release, September 26, 2006, <http://www.hrw.org/en/news/2006/09/26/afghanistan-bush-karzai-musharraf-must-act-now-stop-militant-abuses>.

<sup>194</sup> "Afghanistan: Bush, Karzai, Musharraf Must Act Now to Stop Militant Abuses," Human Rights Watch news release, <http://www.hrw.org/en/news/2006/09/26/afghanistan-bush-karzai-musharraf-must-act-now-stop-militant-abuses>. See also Isabel Hilton, "Now We Pay the Warlords to Tyrannise the Afghan People," *Guardian*, July 31, 2003, <http://www.guardian.co.uk/politics/2003/jul/31/afghanistan.world> (accessed April 20, 2010); Ahmed Rashid, "Afghan Human Rights Abuses: A Chance for Change," commentary, *Eurasianet*, August 4, 2005, <http://www.unhcr.org/refworld/docid/46f257fc.html> (accessed April 20, 2010); and Nick Meo, "Afghan Warlords Poised to Take Up Power," *Independent*, October 14, 2004, <http://www.independent.co.uk/news/world/middle-east/afghan-warlords-poised-to-take-up-power-543691.html> (accessed April 20, 2010).

<sup>195</sup> Human Rights Watch, *Afghanistan on the Eve of Parliamentary Elections*, September 2005, <http://www.hrw.org/en/reports/2005/09/15/afghanistan-eve-parliamentary-and-provincial-elections>, p. 9.

began using their powers again. They made institutions unprofessional, unqualified and corrupt. There's a culture of impunity. Everyone thinks they're immune from prosecution, so they do whatever they want.”<sup>196</sup> As a result, by 2006 the Taliban and other insurgent groups in Afghanistan had gained increased public support. A December 2008 International Crisis Group report on policing in Afghanistan concluded that the lack of rule of law lies at the heart of much popular disillusionment and that the weakness of law enforcement has contributed to the appeal of insurgents in Afghanistan.<sup>197</sup> The ongoing lawlessness helps the Taliban portray its rule in the 1990s as one of relative law and order.<sup>198</sup> The Taliban is able to use the presence of warlords in the government and the poor perceptions of police to discredit President Karzai's administration and its domestic backers.

Incorporating warlords into the government also minimizes chances that Afghans will ever see accountability for the crimes they have suffered, despite the fact that large majorities favor prosecutions.<sup>199</sup> The parliament recently enacted a general amnesty which states that all those who were engaged in armed conflict before the formation of the Interim Administration in Afghanistan in December 2001 “shall enjoy all their legal rights and shall not be prosecuted.”<sup>200</sup> Though victims and their families are entitled to bring civil or criminal claims, doing so is dangerous and not likely to be a viable path to justice. The amnesty law is further demonstration of the entrenchment of the culture of impunity in Afghanistan that resulted from choosing not to address crimes from its past.

## *2. Democratic Republic of the Congo*

A pervasive culture of impunity has also been one of the greatest obstacles to sustainable peace in the Democratic Republic of Congo. In an effort to buy compliance with the transition process, the government gave posts of national or local responsibility, including in the army and police, to dozens of people suspected of committing international human rights

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<sup>196</sup> Whitmont, “Winter in Afghanistan.”

<sup>197</sup> See, for example, International Crisis Group (ICG), “Policing in Afghanistan: Still Searching for a Strategy,” December 18, 2008, [http://www.ciaonet.org/pbei/icg/0014389/f\\_0014389\\_11772.pdf](http://www.ciaonet.org/pbei/icg/0014389/f_0014389_11772.pdf) (accessed April 20, 2010) (“there is a general perception in Afghanistan that lawlessness is on the rise”), p. 1.

<sup>198</sup> ICG, “Afghanistan: New U.S. Administration, New Directions,” March 13, 2009, <http://www.unhcr.org/refworld/country,,ICG,,AFG,4562d8cf2,49ba4c53ed,o.html> (accessed April 20, 2009), pp. 5-6.

<sup>199</sup> Afghan Independent Human Rights Commission, “A Call for Justice: A Report on National Consultations on Transitional Justice in Afghanistan,” January 2005. According to the survey (4,151 Afghan respondents), 94 percent found justice for past crimes to be either “very important” (75.9 percent) or “important” (18.5 percent). In addition, almost half believed that war criminals should be brought to justice “now.”

<sup>200</sup> Resolution of National Assembly on National Reconciliation and General Amnesty to the President, No. 44, dated 16/02/1386, published in the official gazette no. 141712, dated 9/9/1387, art. 3(1).

violations.<sup>201</sup> One result of this policy is to create incentives for armed groups to engage in violence in the hope of being rewarded with government or army positions in exchange for laying down their arms. In addition, the decision not to hold perpetrators to account for their crimes has in some cases left them free to continue to wreak havoc in the region. The consistent failure to hold perpetrators to account has created an environment in which former rebels who have been incorporated into the armed forces continue to murder, torture, and rape civilians.<sup>202</sup> A number of other key factors have contributed to the brutal violence in eastern Congo, including competition for control over natural resources, land rights, and ethnic cohabitations, but incorporating warlords into the armed forces in an effort to obtain peace has only worsened the situation.

The 2002 agreement forged in Sun City to establish a transitional government for the DRC excluded the possibility of amnesties for war crimes, crimes against humanity, and genocide. However, individuals with a known record of human rights abuses were integrated into the government and the army, with officials making no serious effort to investigate or prosecute them.<sup>203</sup> Known rights abusers were promoted or granted important posts with few diplomats condemning the promotions.<sup>204</sup> The promotions, the lack of justice, and the failure to launch a credible truth and reconciliation commission (also established by the Sun City accords), sent a clear signal early on that the new government was unwilling or unable to end the culture of impunity.

The signal was a dangerous one as peace remained elusive. Continued violence, with devastating results for civilians, was perceived by armed groups as the best way to

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<sup>201</sup> Human Rights Watch, *World Report 2005* (New York: Human Rights Watch, 2005), Democratic Republic of Congo chapter, <http://www.hrw.org/legacy/wr2k5/wr2005.pdf>.

<sup>202</sup> Anita Powell, “Congo ex-rebels accused of rape and killings,” Associated Press, May 18, 2009 (citing reports by UN peacekeeper commanders in the DRC that the former rebels are now committing human rights violations as part of the Congolese Army).

<sup>203</sup> Amnesty Decree-Law [Democratic Republic of Congo], *Journal Officiel de la République Démocratique du Congo*, No. 03-001, April 15, 2003, <http://www.unhcr.org/refworld/docid/47305aae2.html> (accessed April 20, 2010); Amnesty Law [Democratic Republic of Congo], No. 05/023, December 19, 2005, <http://www.unhcr.org/refworld/docid/47305d032.html> (accessed April 20, 2010). In May 2009 the DRC parliament passed another amnesty law for armed groups in North and South Kivu, providing an amnesty similar to that in the 2005 law but extending it to 2009. The law has not yet been signed by President Joseph Kabila. See “Amnesty law for DR Congo militias,” *BBC News Online*, May 7, 2009, <http://news.bbc.co.uk/2/hi/africa/8037891.stm> (accessed April 20, 2010).

<sup>204</sup> Human Rights Watch, *Renewed Crisis in North Kivu*, vol. 19, no. 17(A), October 2007, <http://www.hrw.org/reports/2007/drc1007/drc1007web.pdf>, pp. 75-77. These included Gabriel Amisi, who was promoted to the rank of general, and Laurent Nkunda, who were responsible for the brutal suppression of a mutiny in Kisangani where at least 80 people were summarily executed. Human Rights Watch, *Democratic Republic of Congo – War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny*, vol. 14, no. 6(G), August 2002, <http://www.hrw.org/legacy/reports/2002/drc2/DRC0802.pdf>, p. 2. The UN later put the figure at 163. See also “Death Toll in Congo Raid,” *New York Times*, July 17, 2002, <http://www.nytimes.com/2002/07/17/world/death-toll-in-congo-raid.html> (accessed April 20, 2010).

strengthen their negotiating position or secure a seat at the table. As one commander told Human Rights Watch in 2003, “Our government only listens to guns and violence and we need to make them hear us.”<sup>205</sup>

The negative consequences of rewarding warlords responsible for serious human rights abuses was most evident in Ituri, often described as the bloodiest corner of Congo, where tens of thousands were brutally slaughtered on an ethnic basis between 1999 and 2009.<sup>206</sup> The transitional government lacked effective control of the area and six armed groups (backed at different times by Uganda, Rwanda, and the Congolese government) vied for control of the region.<sup>207</sup>

In August 2003 President Joseph Kabila called the leaders of the armed groups to Kinshasa to discuss establishing order in Ituri. On December 11, 2004, despite mounting evidence of their abuses, Kabila signed a decree granting five leaders of the Ituri armed groups positions as generals in the newly integrated Congolese army and a further 32 militiamen positions as lieutenant-colonels, colonels, and majors. The generals were welcomed into army ranks in January 2005.<sup>208</sup> The Congolese authorities contended that integrating commanders with abusive records was a way of removing them from Ituri, thus making it easier to end the fighting there.<sup>209</sup> But by doing so the government reinforced the message that brutalities

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<sup>205</sup> Human Rights Watch interview with armed group leader (name withheld), Bunia, September 18, 2003.

<sup>206</sup> At this writing, killings continued in Ituri with at least two militia groups continuing to fight the Congolese army. There has been considerably less violence since 2007 than in previous years. See “Top UN official signals improvement, tough challenges in eastern DR Congo,” United Nations News Service, April 9, 2009, <http://www.un.org/apps/news/story.asp?NewsID=30442&Cr=democratic&Cr1=congo> (accessed April 20, 2010); Médecins Sans Frontières, “DRC: LRA Attacks’ ‘Lasting Effect,’” May 18, 2009, <http://www.doctorswithoutborders.org/news/article.cfm?id=3626&cat=voice-from%20the%20field&ref=home-sidebar-right> (accessed April 20, 2010).

<sup>207</sup> Human Rights Watch, *Ituri: “Covered in Blood”: Ethnically Targeted Violence in Northeastern DR Congo*, vol. 15, no. 11(A), July 2003, <http://www.hrw.org/sites/default/files/reports/DRC0703.pdf>, pp. 14-18; and Human Rights Watch, *The Curse of Gold: Democratic Republic of Congo* (New York: Human Rights Watch, 2005), <http://www.hrw.org/en/node/11733/section/5> and reproduced at <http://www.anglogoldashanti.com/NR/rdonlyres/CBB6C75C-EE9C-439E-962F-DDB5C52FB968/0/HRWDRReport.pdf>, pp. 21-22.

<sup>208</sup> New appointees to the rank of general included Jérôme Kakwatu, the commander of the People’s Armed Forces of the Congo (FAPC) responsible for summary executions (including child soldiers who attempted to flee the ranks), the torture of dozens of civilians, and rape of women and girls in Ituri; and Floribert Kisembo Bahemuka, one of the UPC commanders responsible in late 2002 for a campaign of executions and forced disappearances of civilians in Bunia. “D.R. Congo: Army Should Not Appoint War Criminals,” Human Rights Watch news release, January 13, 2005, <http://www.hrw.org/en/news/2005/01/13/dr-congo-army-should-not-appoint-war-criminals>; Human Rights Watch, *The Curse of Gold*, <http://www.hrw.org/en/node/11733/section/8>, or <http://www.anglogoldashanti.com/NR/rdonlyres/CBB6C75C-EE9C-439E-962F-DDB5C52FB968/0/HRWDRReport.pdf>, pp. 27-34, 84-94.

<sup>209</sup> See, for example, “DR Congo warlord generals accused,” *BBC News Online*, January 14, 2005, <http://news.bbc.co.uk/2/hi/africa/4174811.stm> (accessed April 20, 2010) (quoting Information Minister Henri Mova: “Now we need peace in our country and we decided to appoint them because we can’t condemn them before judgement.”); Human Rights Watch, “Army Should Not Appoint War Criminals.”

would not only go unpunished, but might be rewarded with a government post. The message was clear: violence brings rewards.<sup>210</sup>

Within six months of the appointments, new armed groups were formed in Ituri all claiming, as others had done before, that they represented marginalized communities and demanding high ranks in the army. The failure to adequately disarm combatants and to provide peace dividends for local communities contributed to the emergence of the new armed groups, but so did the perception that violence was an effective route to power. These groups continued the terror tactics that previous armed groups had used so successfully: killing civilians, raping women and girls, and arbitrarily arresting and torturing those who opposed them.

In August 2006, Congolese government officials, supported by the UN, once again held peace discussions with the Ituri armed groups. Two months later, in November 2006, the groups signed a new peace agreement.<sup>211</sup> Their leaders were all granted the rank of colonel in the Congolese army. Dozens of others were appointed as lieutenant-colonels and majors. One of the newly appointed officers later remarked to Human Rights Watch, “Maybe if we had killed more people, I would have become a general.”<sup>212</sup> A similar pattern has emerged in Katanga province.

The Congolese government has yet to demonstrate that it has learned from its failed policy of placating rights abusers. In August 2006, the International Criminal Court issued an arrest warrant against UPC leader Bosco Ntaganda for the war crime of enlisting and conscripting children under the age of 15 and using them in hostilities between 2002 and 2003 in Ituri.<sup>213</sup> The Congolese government, which requested the ICC to investigate crimes in Congo, and which to date has been cooperative with the court, in this case failed dramatically in its legal obligation to arrest Ntaganda. In a televised press conference on January 31, 2009, President Kabila invoked the peace versus justice dilemma, stating that he faced a difficult choice between justice and peace, stability, and security in eastern Congo. He said his choice was to prioritize peace. Congolese authorities attempted to legitimize Ntaganda as a “partner for peace,” reinforcing the perception that those who commit heinous crimes against civilians

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<sup>210</sup> The problem seemed to be acknowledged by presidential spokesman Kudura Kasong who stated, “The big dream of all warlords is to be a general, educated or not, and this is a big problem.” “DR Congo warlord generals accused,” *BBC News Online*, <http://news.bbc.co.uk/2/hi/africa/4174811.stm>.

<sup>211</sup> Accord Cadre Pour La Paix En Ituri entre le Gouvernement de la République Démocratique du Congo et les Groupes Armes de L’Ituri (MRC, FNI, FRPI), Bunia, Democratic Republic of Congo, November 29, 2006, copy on file with Human Rights Watch.

<sup>212</sup> Human Rights Watch interview with former armed group combatant (name withheld), Bunia, September 8, 2006.

<sup>213</sup> *Prosecutor v. Ntaganda*, ICC, Case No. ICC-01/04-02/06, Decision to Unseal the Warrant of Arrest Against Bosco Ntaganda, August 22, 2006, <http://www2.icc-cpi.int/iccdocs/doc/doc305330.PDF> (accessed April 20, 2010).

in Congo will be rewarded rather than punished.<sup>214</sup> Dozens of local human rights organizations condemned the decision. Ntaganda has since served as a high-ranking advisor in the army that has the full backing of UN peacekeeping forces in Congo, despite his status as a wanted man at the ICC.<sup>215</sup>

### *3. Sowing seeds for future violence*

Absence of accountability in fair and impartial trials for those most responsible for crimes leaves the desire for retribution through legitimate channels unsatisfied. Without individualizing guilt, the notion of collective responsibility for crimes has greater resonance and it is easier for blame focused on a group to be passed from one generation to the next.

A well-known example of this is Yugoslavia. Assumptions of collective ethnic guilt rooted in atrocities dating back to the Second World War were important in enabling ultra-nationalist politicians in the 1990s to divide communities in Bosnia, Croatia, and Serbia and help sow the seeds for intercommunal violence. Over 40 years after the end of the Second World War, the lack of accountability for atrocities laid the groundwork for propaganda seeking to instill in Serbs a fear of genocide. Influential academics at the Serbian Academy of Arts and Sciences in 1986 tapped into deeply held sentiments when they proclaimed that except during the Ustasha (Croatian pro-Nazi) period during the Second World War, “Serbs in Croatia have never been as endangered as they are today.”<sup>216</sup> Serbian media gave increasing prominence to this alleged threat facing Serbs in Yugoslavia in the late 1980s and early 1990s.

The ICTY noted that following Slovenia’s and Croatia’s declarations of independence, “[p]ro-Serb propaganda became increasingly visible ... The Serb media propagandised the idea

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<sup>214</sup> Prior to the unsealing of his arrest warrant, Ntaganda had already been implicated in brutal human rights abuses, including leading military operations in which hundreds of civilians were slaughtered on an ethnic basis. Human Rights Watch, *Covered in Blood*, <http://www.hrw.org/sites/default/files/reports/DRC0703.pdf>, pp. 23-27; Human Rights Watch, *The Curse of Gold*, <http://www.hrw.org/en/node/11733/section/6>, or <http://www.hrw.org/en/node/11733/section/6>, or <http://www.anglogoldashanti.com/NR/rdonlyres/CBB6C75C-EE9C-439E-962F-DDB5C52FB968/0/HRWDRCreport.pdf>, pp. 23-34. He was nonetheless one of the five Ituri leaders who in December 2004 had been granted positions as generals in the newly integrated Congolese army though he did not take up the post.

<sup>215</sup> “Congo conflict: ‘The Terminator’ lives in luxury while UN peacekeepers look on,” *Guardian*, February 10, 2010, <http://www.guardian.co.uk/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc> (accessed May 5, 2010).; “Congo ex-Rebel ‘working with UN,’ ” *BBC News Online*, April 29, 2009, <http://news.bbc.co.uk/2/hi/africa/8023978.stm> (accessed April 20, 2010). The government’s inclusion of abusive leaders in the army has also set the stage for further atrocities by its own forces. Human Rights Watch has documented how since late January 2009 soldiers from the integrated Congolese armed forces have attacked villages, killing at least 19 civilians and raping more than 143 women and girls. See “DR Congo: Hold Army to Account for War Crimes,” Human Rights Watch news release, May 19, 2009, <http://www.hrw.org/en/news/2009/05/19/dr-congo-hold-army-account-war-crimes>.

<sup>216</sup> Laura Silber and Allan Little, *Yugoslavia: Death of a Nation* [Rev. Ed.] (New York: Penguin Books, 1997), pp. 31-32.

that the Serbs had to arm themselves in order to avoid a situation similar to that which happened during World War II when the Serbs were massacred. Terms like ‘Ustasa’, ‘Mujahideen’ and ‘Green Berets’ were used widely in the press as synonyms for the non-Serb population.”<sup>217</sup> The failure to establish individual accountability and address the past in Yugoslavia during Tito’s iron-fisted reign created suppressed resentments that were later tapped by ambitious politicians for their own political and nationalistic ends. In other places as well, including Kenya and Burundi, previous unaddressed episodes of violence have been used to foment new cycles of violence.<sup>218</sup> These are some of the reasons why justice is important for securing peace.

### **C. Managing the challenges of integrating justice efforts and peace processes**

In the short term, it is easy to understand the temptation to forego justice in an effort to end a war. Peace negotiations may be carried out almost literally at gunpoint, with war-weary participants desperate to end the conflict at any price. However experience has shown that efforts at justice, so often just assumed to be antagonistic to peace negotiations, do not categorically have the predicted dampening or damaging effect on peace talks.

For example, on May 27, 1999, the ICTY announced its most significant indictment: that of Yugoslav President Slobodan Milosevic and four other top officials for “murder, persecution, and deportation in Kosovo” from January 1 through May 1999.<sup>219</sup> The indictment was announced in the midst of the armed conflict between Serbia and NATO forces over Kosovo. The conventional wisdom at the time was that the indictment would make the situation in Kosovo worse and would likely undercut the prospect of any compromise by Milosevic. The Russian Foreign Ministry said the war crimes indictment “will add to the obstacles to a Yugoslav settlement” and “severely undermine” the authority of the negotiators. Russia’s envoy to the Balkans, Viktor S. Chernomyrdin, denounced the warrant as a “political show” and “incomprehensible and unpleasant.”<sup>220</sup>

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<sup>217</sup> *Prosecutor v. Milomir Stakic*, ICTY, Case No. IT-97-24-T, Judgment, July 31, 2003, para. 52.

<sup>218</sup> Human Rights Watch, *Selling Justice Short*, pp. 77-92.

<sup>219</sup> “President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo,” ICTY Press Release, JL/PIU/403-E, May 27, 1999, <http://www.icty.org/sid/7765> (accessed April 19, 2010).

<sup>220</sup> David Hoffman, “Russia Says Peace Talks Sideswiped,” *Washington Post*, May 28, 1999, <http://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/stories/diplomacy052899.htm> (accessed April 19, 2010); “Despite Milosevic Indictment Peace Talks Continue,” *U.N. Wire*, May 28, 1999, [http://www.unwire.org/unwire/19990528/2885\\_story.asp](http://www.unwire.org/unwire/19990528/2885_story.asp) (accessed April 19, 2010). See also Roger Cohen, “Crisis in the Balkans: The Indictment; Tribunal is Said to Cite Milosevic for War Crimes,” *New York Times*, May 27, 1999, <http://www.nytimes.com/1999/05/27/world/crisis-balkans-indictment-tribunal-said-cite-milosevic-for-war-crimes.html> (accessed April 19, 2010); Marcus Tanner, “War in the Balkans, Milosevic Charge Splits Allies,” *Independent*, May 28, 1999, <http://www.independent.co.uk/news/war-in-the-balkans-milosevic-charge-splits-allies-1096257.html> (accessed April 19, 2010).

Yet less than a week later, on June 3, negotiators announced that Milosevic had accepted the terms of an international peace plan for Kosovo.<sup>221</sup> Despite their strong opposition at the time, when asked about the indictment and its effect on the talks, the Russian and Finnish intermediaries later admitted that the indictment did not affect negotiations and was never on the agenda.<sup>222</sup> Because Milosevic did not travel much and felt secure at home, he did not fear ending up in The Hague.<sup>223</sup>

The ICC prosecutor's request for an arrest warrant against Sudan's President al-Bashir in July 2008 similarly triggered a backlash by numerous actors, including the African Union and the Organization of the Islamic Conference, which asked the UN Security Council to defer the ICC's work in Darfur for 12 months out of concern about the possible impact of the ICC's work on "efforts aimed at promoting lasting peace."<sup>224</sup> Many were also understandably concerned about the potential impact on UNAMID, the AU/UN hybrid peacekeeping mission in Darfur. Shortly after the prosecutor's request for a warrant was made, one of Bashir's top advisors threatened various reprisals including expulsion of UNAMID, stating: "Send them out because the U.N. has declared us Public Enemy No. 1, why shouldn't we?"<sup>225</sup> Sudan experts Alex de Waal and Julie Flint publicly criticized the ICC prosecutor for pressing charges against high officials in the government of Sudan, stating, "Attempts to deploy UNAMID [the AU/UN peacekeeping mission in Sudan] in Darfur are at a critical point. At this sensitive time, to lay charges against senior government officials, and to criminalise the entire government, will derail attempts to pull Sudan from the brink."<sup>226</sup> They argued that justice should wait until after those culpable are no longer in positions of authority.<sup>227</sup>

Following the issuance of arrest warrants, the Sudanese government expelled 13 international aid agencies, putting further at risk millions vulnerable to malnutrition and disease. However, the other anticipated devastating consequences flowing from the warrant

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<sup>221</sup> "Milosevic Accepts Peace Plan, Finnish envoy says," *CNN.com*, June 3, 1999, <http://www.cnn.com/WORLD/europe/9906/03/kosovo.peace.04/> (accessed April 19, 2010).

<sup>222</sup> Herbert Okun, "The Role of International Criminal Justice in Peace Negotiations" (contribution to panel discussion "Future of International Criminal Justice - Evolving Accountability from Nuremberg to the International Criminal Court," October 30, 2006), *Penn State International Law Review*, vol. 25, 4 (2007), p. 788.

<sup>223</sup> *Ibid.*

<sup>224</sup> *Communique of the 142<sup>nd</sup> Meeting of the Peace and Security Council, PSC?MIN/Comm(CXLII)*, July 21, 2008, para. 3.

<sup>225</sup> Sam Dealey, "Sudan: Retaliation Against The Hague?" *Time*, July 15, 2008, <http://www.time.com/time/world/article/0,8599,1822833,00.html> (accessed April 20, 2010).

<sup>226</sup> Julie Flint, Alex de Waal, and Sara Pantuliano, "ICC approach risks peacemaking in Darfur," letter to the editor, *Guardian* (London), June 10, 2008, <http://www.guardian.co.uk/world/2008/jun/10/sudan.unitednations> (accessed April 20, 2010).

<sup>227</sup> Julie Flint and Alex de Waal, "Justice Off Course In Darfur," commentary, *Washington Post*, June 28, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/27/AR2008062702632.html> (accessed April 20, 2010).

have not occurred.<sup>228</sup> Peace talks, which had not been robust before the prosecutor's announcement, continued after the prosecutor's announcement and after the arrest warrant had been issued. On November 12, 2008, al-Bashir announced an immediate unilateral ceasefire and the government of Sudan and the rebel movements pledged to work on a framework agreement for peace talks.<sup>229</sup> In February and May 2009, the government of Sudan and representatives of the Justice and Equality Movement (JEM) met in Qatar for peace talks and on February 23, 2010, agreed to a framework for peace discussions, which committed the two parties to an immediate ceasefire, the release of prisoners, and the negotiation of a final peace agreement.<sup>230</sup>

The warrants also did not slow the government of Sudan's cooperation with deployment of peacekeepers. Indeed, UNAMID deployment rose significantly following the prosecutor's announcement. Between July 31, 2008, and January 21, 2010, deployment of UNAMID's military, civilian, and police personnel rose from 12,341<sup>231</sup> to 24,223.<sup>232</sup> Over 3,000 UNAMID personnel were deployed in the first few months after the prosecutor's announcement.<sup>233</sup> Also in the months following the prosecutor's announcement, the government of Sudan

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<sup>228</sup> United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," April 14, 2009, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/296/93/PDF/N0929693.pdf?OpenElement> (accessed April 20, 2010). The seriousness of the expulsion of aid agencies – who employed 40 percent of humanitarian staff working in Darfur at the time and supplied food, water, and medical care to over a million people – should not be understated. Though emergency measures were undertaken to avert the worst consequences of the expulsion, including a "combination of enhanced government capacity, an increase in responsibility assumed by the remaining humanitarian actors, and new capacities on the ground," humanitarian aid has still not recovered nearly one year later to where it was before the expulsions. See United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," S/2009/297, June 9, 2009, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/363/65/PDF/N0936365.pdf?OpenElement> (accessed April 20, 2010).

<sup>229</sup> United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," December 12, 2008, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No8/640/80/PDF/N0864080.pdf?OpenElement> (accessed April 20, 2010).

<sup>230</sup> United Nations Security Council, "Report of the Secretary-General on the United Nations Mission in Sudan," S/2010/168, April 5, 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/299/70/PDF/N1029970.pdf?OpenElement> (accessed April 20, 2010).

<sup>231</sup> United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," S/2008/558, August 18, 2008, [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2008/558](http://www.un.org/ga/search/view_doc.asp?symbol=S/2008/558) (accessed April 20, 2010).

<sup>232</sup> United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," S/2010/50, January 29, 2010, [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2010/50](http://www.un.org/ga/search/view_doc.asp?symbol=S/2010/50) (accessed April 20, 2010).

<sup>233</sup> On November 30, 2008, total UNAMID personnel numbered 15,444. United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," December 12, 2008, S/2008/781, [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2008/781](http://www.un.org/ga/search/view_doc.asp?symbol=S/2008/781) (accessed April 20, 2010).

agreed to provide blanket clearance for airlift operations and to remove other administrative hurdles to UNAMID.<sup>234</sup>

The Kosovo and Darfur experiences suggest at a minimum that indictments need not upend peace talks.

In other instances, justice may even have helpful side benefits. Justice is an important end in and of itself, and is not an instrument to bring about political marginalization. But arrest warrants sought as a means of bringing to justice leaders responsible for serious international crimes have also at times had the effect of marginalizing those leaders in ways that may benefit peace processes. This was true with Liberian President Charles Taylor and Bosnian Serb leader Radovan Karadzic. The ICC warrants for LRA leaders may have also contributed to the group's at least temporary marginalization from its base of support in Sudan, pushing it towards more serious peace negotiations in Juba in 2006.

### *1. Charles Taylor*

On June 4, 2003, the prosecutor of the Special Court for Sierra Leone "unsealed" an indictment against Charles Taylor as one of those "bearing the greatest responsibility" for war crimes, crimes against humanity, and other serious violations of international humanitarian law committed in Sierra Leone.<sup>235</sup> The unsealing of the indictment against Taylor caused a great deal of consternation at the United Nations Secretariat and elsewhere.<sup>236</sup> The cause of concern was triggered in part by the timing of the announcement, as it coincided with the opening day of Liberian peace talks convened in Accra, Ghana.<sup>237</sup>

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<sup>234</sup> United Nations Security Council, "Report of the Secretary-General on the deployment of the African Union—United Nations Hybrid Operations in Darfur," S/2008/659, October 17, 2008, <http://daccessdds.un.org/doc/UNDOC/DEN/No8/553/95/PDF/No855395.pdf?OpenElement> (accessed April 20, 2010).

<sup>235</sup> Chief Prosecutor for the Sierra Leone Special Court David Crane said he had unsealed the indictment when he learned Taylor would be in Ghana and susceptible to arrest, stating, "To ensure the legitimacy of these negotiations, it is imperative that the attendees know they are dealing with an indicted war criminal." Felicity Barringer and Somini Sengupta, "War Crimes Indictment of Liberian President is Disclosed," *New York Times*, June 5, 2003, <http://www.nytimes.com/2003/06/05/international/africa/05LIBE.html> (accessed April 19, 2010).

<sup>236</sup> Jacqueline Geis and Alex Mundt, "When To Indict? The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action," Brookings report for the World Humanitarian Studies Conference, February 2009, [http://www.brookings.edu/papers/2009/~/media/Files/rc/papers/2009/04\\_peace\\_and\\_justice\\_geis/04\\_peace\\_and\\_justice\\_geis.pdf](http://www.brookings.edu/papers/2009/~/media/Files/rc/papers/2009/04_peace_and_justice_geis/04_peace_and_justice_geis.pdf) (accessed April 19, 2010), pp. 3-4. See also "Liberia chaos as leader returns," *BBC News Online*, June 5, 2003, <http://news.bbc.co.uk/2/hi/africa/2964098.stm> (accessed April 19, 2010); and Charles Cobb Jr. "Liberia: Diplomatic Dismay as Liberia Rebels Poise For Final Push and Foreigners Flee," *allAfrica.com*, June 10, 2003, <http://allafrica.com/stories/20030610002.html> (accessed April 19, 2010).

<sup>237</sup> See, for example, interview with Dapo Oyewole, Center for Democracy and Development, indicating that the timing of the unsealing of the indictment undermined some of the proceedings at the peace talks and that the humanitarian situation in Nigeria needed to be addressed first. Jonathan Mann, "Insight," CNN TV, July 29, 2003, reproduced in writing by CNN Transcripts, [http://transcripts.cnn.com/TRANSCRIPTS/0307/29/i\\_ins.01.html](http://transcripts.cnn.com/TRANSCRIPTS/0307/29/i_ins.01.html) (accessed April 19, 2010). See also Cobb, "Diplomatic Dismay as Liberia Rebels Poise for Final Push and Foreigners Flee," *allAfrica.com*.

Peace, which had mostly been elusive in Liberia since 1989,<sup>238</sup> was a priority, and many felt that the indictment would undermine chances at reaching a negotiated settlement.<sup>239</sup> The African presidents who were meeting in Accra to work on the peace process felt ambushed by the news and betrayed, as they had not been informed of the indictment earlier.<sup>240</sup> Ghanaian Foreign Minister Nana Akufo-Addo expressed his embarrassment and stated a belief held by many that the prosecutor's action "in unsealing the indictment at this particular moment has not been helpful to the peace process."<sup>241</sup>

In retrospect, however, it is clear that the unsealing of Taylor's indictment was a key factor in bringing peace to Liberia. The International Center for Transitional Justice's study of the 2003 peace negotiations concluded that the reason the 2003 agreement ultimately succeeded while over a dozen previous agreements had failed was because Taylor offered to vacate the presidency and not take part in transitional elections. That offer resulted directly from his indictment by the Special Court.<sup>242</sup> The report noted almost universal agreement among those present at the talks—even those who had been skeptical at the time—that the unsealing of the indictment had a largely positive effect.<sup>243</sup> Furthermore, the expected retaliatory violence in Liberia resulting from the indictment never occurred. Although other important factors worked with the indictment to bring about peace in Liberia—including the impending rebel offensive threatening the capital, the involvement of the international community, and blocking by the peacekeeping force the Economic Community of West African States Monitoring Group (ECOMOG) of arms' delivery to Taylor—the Taylor case

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<sup>238</sup> Liberia is also an example of how impunity can lead to more atrocities. In a quick bid to end the first brutal Liberian civil war and in the face of massive crimes committed against civilians, UN and West African leaders agreed to a peace plan that dispensed with justice and rushed an election that installed warlord Charles Taylor as president in 1997. Not surprisingly, within a short time, the country was back at war. The ensuing six years of repressive rule by Taylor, and the next war, were characterized by the same egregious abuses against civilians as the earlier war, and set the country back further. Corinne Dufka, "Combating War Crimes in Africa," Human Rights Watch testimony before the US House International Relations Committee, Africa Subcommittee, June 25, 2004, <http://www.hrw.org/en/news/2004/06/25/combating-war-crimes-africa>.

<sup>239</sup> "The executive secretary [of the Organization of West African States], Mohamed Ibn Chambas, said that announcing the charges against Charles Taylor as he was about to open the peace talks had 'put a damper on the negotiations' where President Taylor was making helpful offers 'opening up tremendous opportunities' to end the Liberian conflict." Virginie Ladisch, "Liberian President Indicted for War Crimes," Crimes of War Project news release, June 16, 2003, <http://www.crimesofwar.org/print/onnews/liberian-print.html> (accessed April 19, 2010).

<sup>240</sup> Barringer and Sengupta, "War Crimes Indictment of Liberian President is Disclosed," *New York Times*; Lansana Gberie, Jarlawah Tonpoh, Efam Dovi, and Osei Boateng, "CHARLES TAYLOR: Why me?" *New African*, May 2006, reproduced at [http://findarticles.com/p/articles/mi\\_qa5391/is\\_200605/ai\\_n21391043](http://findarticles.com/p/articles/mi_qa5391/is_200605/ai_n21391043) (accessed April 19, 2010), p. 13.

<sup>241</sup> Douglas Farah, "Tribunal Indicts Liberia's Leader," *Washington Post*, June 5, 2003, reproduced at [http://www.genocidewatch.org/images/Liberia5Jun03Tribunal\\_Indicts\\_Liberia\\_s\\_Leader.pdf](http://www.genocidewatch.org/images/Liberia5Jun03Tribunal_Indicts_Liberia_s_Leader.pdf) (accessed April 19, 2010).

<sup>242</sup> Priscilla Hayner, (International Center for Transitional Justice) "Negotiating Peace in Liberia: Preserving the possibility for Justice," November 1, 2007, <http://www.ictj.org/static/Africa/Liberia/HaynerLiberia1207.eng.pdf> (accessed April 19, 2010), p. 6.

<sup>243</sup> Ibid., p. 9. See also Priscilla Hayner, "Seeking Justice as War Crimes Rage on," *Chicago Tribune*, July 16, 2008, reproduced at <http://www.ictj.org/en/news/coverage/article/1868.html> (accessed April 19, 2010).

shows that an indictment may inadvertently strengthen peace processes and that the feared consequences resulting from indicting a sitting head of state do not always come to pass.

## 2. Radovan Karadzic

Similarly, the indictment of Radovan Karadzic facilitated peace talks to end the war in Bosnia and Herzegovina. Negotiations to end that conflict opened near Dayton, Ohio, in early November 1995, less than four months after the worst atrocity in Europe since the Second World War: the massacre of over 7,000 men and boys following the fall of the Bosnian Muslim enclave of Srebrenica on July 11, 1995. On July 24, 1995, less than two weeks after the fall of Srebrenica and in the midst of the conflict, the International Criminal Tribunal for the former Yugoslavia confirmed indictments against Bosnian Serb leaders Radovan Karadzic and Ratko Mladic. The charges included genocide, crimes against humanity, and war crimes for crimes alleged to have occurred between 1992 and 1995 in several locations across Bosnia, including Sarajevo. A second indictment against Karadzic and Mladic was confirmed on November 16, 1995, during the Dayton peace negotiations. It charged both men with genocide, crimes against humanity, and war crimes based on the mass execution of civilians after the fall of Srebrenica.

At the time negotiations in Dayton began, a number of politicians and political commentators suggested that the ICTY's work was getting in the way of peace.<sup>244</sup> Indeed, the former ICTY chief prosecutor Richard Goldstone said that after he indicted Karadzic and Mladic, the UN secretary-general was furious, castigating the prosecutor in a meeting shortly afterwards and asking why he had not been consulted.<sup>245</sup>

However, the indictment of Karadzic ultimately aided the Dayton peace accord. If Karadzic, the Bosnian Serbs' political leader, had not been indicted, he would have likely attended the peace conference. Because those meetings began only two months after the massacre at Srebrenica, Bosnian Muslim and Croat leaders would not have entered the same room or sat at the same table with Karadzic.<sup>246</sup> A US State Department official said the tribunal "accidentally served a political purpose: it isolated Karadzic and left us with Slobo [Slobodan Milosevic]."<sup>247</sup> In his memoirs, the US negotiator Richard Holbrooke said he made

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<sup>244</sup> Richard J. Goldstone, "Justice as a Tool for Peacemaking: Truth Commissions and International Tribunals," *NYU Journal of International Law and Politics*, vol. 28: 485 (1996), p. 488.

<sup>245</sup> Okun, "The Role of International Criminal Justice in Peace Negotiations," *Penn State International Law Review*, p. 787.

<sup>246</sup> *Ibid.*, p. 788.

<sup>247</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, (Princeton, NJ: Princeton University Press, 2000), p. 239 ("Stay the Hand of Vengeance").

it very clear to Milosevic that Mladic and Karadzic could not participate in a peace conference. When Milosevic said the attendance of the indicted men was necessary for peace, Holbrooke offered to arrest them personally if they set foot in the United States.<sup>248</sup> Thus the ICTY's indictments, rather than being an obstacle to peace negotiations, helped move them forward.

### *3. The Lord's Resistance Army*

In Uganda as well, community leaders and commentators feared the involvement of the ICC would end all hope for peace talks with the Lord's Resistance Army which had been terrorizing civilians in northern Uganda since 1986. Acholi leaders said that the issuing of "international arrest warrants would practically close once and for all the path to peaceful negotiation as a means to end this long war, crushing whatever little progress has been made during these years."<sup>249</sup> The Roman Catholic Archbishop in northern Uganda saw the ICC's decision to issue indictments against the LRA leadership as "the last nail in the coffin" for efforts to achieve dialogue."<sup>250</sup>

Yet less than a year after the warrants were unsealed, in mid-2006, the LRA sat down at the negotiating table in Juba for the most serious peace talks they had had to date. Many believe that the ICC warrants were one of the factors that pushed the LRA to the table in part by isolating them from their base of support, the government of Sudan. Not long after the ICC referral was announced, Sudan agreed to a protocol allowing Ugandan armed forces to attack LRA camps in Southern Sudan. In October 2005 the government of Sudan signed a memorandum of understanding with the court agreeing to cooperate with the arrest warrants issued against LRA commanders. Because Sudan severed many of its ties with the LRA, it forced them into "survival mode," at least temporarily.<sup>251</sup> A local leader noted that a number of LRA combatants defected following the change in attitude by the government of Sudan.<sup>252</sup>

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<sup>248</sup> Ibid., p. 233; Richard Holbrooke, "The Arrest of Sudan's Bashir Should Proceed," commentary, *Financial Times* (London), September 21, 2008, [http://www.ft.com/cms/s/0/57d9e354-87ee-11dd-b114-0000779fd18c.html?nclick\\_check=1](http://www.ft.com/cms/s/0/57d9e354-87ee-11dd-b114-0000779fd18c.html?nclick_check=1) (accessed April 19, 2010).

<sup>249</sup> "UGANDA: Amnesty and Peace groups urge ICC to probe government army too," *IRINnews*, February 3, 2004, <http://www.globalsecurity.org/military/library/news/2004/02/mil-040203-irino3.htm> (accessed May 15, 2009), quoting a statement issued by a chief negotiator of the Acholi Religious Leaders' Peace Initiative.

<sup>250</sup> "Justice for a Lawless World? Rights and reconciliation in a new era of international law," *IRIN In-Depth*, July 2006, <http://www.irinnews.org/pdf/in-depth/RightsAndReconciliationPart1.pdf> (accessed May 15, 2009), p. 72.

<sup>251</sup> John Prendergast, "End This African Horror Story," *Washington Post*, April 7, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A32735-2005Apr6.html> (accessed May 18, 2009).

<sup>252</sup> Father Carlos Rodriguez, a Spanish missionary who was based in northern Uganda for many years, stated, Between April and September [2004] 500 or so combatants have come out of the bush with their guns including senior officers. So the ICC might not be so discouraging as we thought. Also those who have come out of the bush have told us that the Sudan Government has not been giving them anything since January this year. So the ICC may

The increased attention to the conflict resulting from the ICC's involvement also galvanized international engagement in the peace processes for what has been described as "the biggest forgotten, neglected humanitarian emergency in the world today."<sup>253</sup> This support was crucial in moving the peace process forward. Finally agreements made as part of the peace process may yet help encourage national accountability efforts through the Uganda High Court Special Division agreed at Juba.

Firm conclusions about the impact of the ICC's arrest warrants on peace prospects for northern Uganda are difficult to draw, not least because the conflict remains unresolved and civilians remain at risk. However, there are reasons to believe that the ICC's involvement was not the reason why the final peace agreement was not signed. LRA leaders have never made clear their reasons for refusing to sign the final peace agreement; meanwhile, interim agreements which included justice provisions were successfully concluded over the course of two years of negotiations. The justice provisions called for national proceedings, which if seen as genuine by the ICC's pre-trial chamber, would have rendered the pending ICC cases inadmissible. Thus the ICC had been taken out of the equation, though fear of national prosecutions may have remained an obstacle. Meanwhile, the resumption of LRA attacks on civilians and the failure of the LRA to implement commitments to assemble their forces in specified locations while the talks were ongoing reinforced concerns about the sincerity of the LRA's commitment to conclude peace under any circumstances, despite the robustness of the negotiations.<sup>254</sup> In any event, ICC involvement did not preclude a dialogue with the LRA as many had feared, rather it may have been helpful in some unexpected ways.

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have had an influence on Sudan. The LRA will only reduce violence out of pressure and Sudan has changed its attitude because of the ICC. They are concerned about being prosecuted... Now that Sudan is not involved, it forces the LRA to talk about peace.

Tim Allen, Crisis States Research Center, "War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention," February 2005, <http://www.crisisstates.com/download/others/AllenICCReport.pdf> (accessed May 15, 2009), p. 58.

<sup>253</sup> "War in northern Uganda world's worst forgotten crisis: UN," Agence France-Presse, November 11, 2003, quoting Jan Egeland, UN under-secretary-general for humanitarian affairs and emergency relief coordinator. See also Akhavan, "The Lord's Resistance Army Case," *American Journal of International Law*, p. 420.

<sup>254</sup> See Elise Keppler, "Managing Peace and Justice in the Juba Process," (forthcoming)(manuscript on file with Human Rights Watch). At the same time, communication between LRA representatives in Juba and the LRA leadership appeared to be intermittent and suffered from a relative breakdown in the final months of the talks, raising questions as to the degree of involvement of the LRA leaders in negotiating the agreements, especially the February 2008 agreement on accountability. See International Crisis Group, "Northern Uganda: The Road to Peace, With or Without Kony," Africa Report No. 146, December 2008, pp. 1-4; and Joe Wacha, "Kony Adds to Peace Process Turmoil," Institute for War and Peace Reporting, July 3, 2008, <http://www.globalpolicy.org/component/content/article/207/39840.html> (accessed September 23, 2009).

#### *4. Including accountability in peace negotiations*

This is not to say there is not tension between peace and justice in negotiations. The challenge is to learn from experience where this tension has been handled well. The negotiations to end the conflict in Bosnia and Herzegovina are worth examining more closely for this reason.

The 1996 Dayton Peace Accords is an example of an agreement in which the tension between peace and justice was successfully managed. Despite rumors of amnesties, the Dayton peace talks did not undermine justice. Nor did they include provisions for the immediate arrest of ICTY suspects as Bosnian Muslim leaders had hoped. As one senior US official put it, “The war crimes tribunal isn’t going to mess with our peace talks; we’re not going to mess with the war crimes tribunal.”<sup>255</sup> A negotiator at Dayton pointed out that “the Dayton Framework Agreement, in its Bosnian constitution, implicitly commended the work of the Tribunal by stipulating that ‘no person who is serving a sentence imposed by the ICTY and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear may stand as a candidate or hold any appointed, elective or other public office in the territory of Bosnia and Herzegovina.’”<sup>256</sup> This provision helped speed Karadzic’s removal from his position in July 1996. The ICTY’s activities also did not affect Milosevic’s role in negotiating the agreement: he accepted the Dayton Peace Accord ending the Bosnian conflict without obtaining an amnesty, even though he too was an obvious ICTY target.<sup>257</sup> He (and Karadzic, who signed the agreement) agreed to the above-mentioned clause despite some early misgivings.<sup>258</sup>

The Dayton peace agreement is just one example of an accord that managed to end a conflict and include provisions relating to accountability. Numerous other agreements, including those for Burundi and Liberia, have also contained explicit provisions for accountability or truth and reconciliation measures. These are worth studying for lessons to be applied in future negotiations.

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<sup>255</sup> Bass, “Stay the Hand of Vengeance,” p. 243.

<sup>256</sup> Okun, “The Role of International Criminal Justice in Peace Negotiations,” *Penn State International Law Review*, p. 781.

<sup>257</sup> Kenneth Roth (Human Rights Watch), “It’s Worth Bringing Tyrants to Justice,” commentary, *International Herald Tribune*, August 10, 2005, <http://www.hrw.org/en/news/2005/08/10/its-worth-bringing-tyrants-justice>.

<sup>258</sup> Bass, “Stay the Hand of Vengeance,” p. 233.

## D. Truth-telling and reconciliation processes as a complement to criminal justice

Criminal proceedings, of course, are not the only tool that can assist in addressing the needs of victims. As important as they are, trials only address a small subset of crimes. Broader truth-telling mechanisms, in addition to reparations, vetting of “bad actors” from positions in government and security forces, economic development, and reconstruction are needed as part of the larger toolbox to move society forward in a way that respects human rights.

Victims and their families have a right to know the truth about violations they suffered. The UN General Assembly has endorsed the principle that victims’ right to remedies includes having access to relevant information concerning human rights violations.<sup>259</sup> International principles adopted by the former UN Commission on Human Rights state that “irrespective of any legal proceedings, victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which violations took place.”<sup>260</sup> International human rights bodies have emphasized the state’s obligation to provide information to victims, particularly in cases of enforced disappearance. The UN Human Rights Committee has held that the extreme anguish inflicted upon relatives of the “disappeared” makes them direct victims of the violation as well.<sup>261</sup>

In addition to informing the victims and their families, the state has an obligation to inform society in general about human rights abuses, particularly when the violations are serious.<sup>262</sup> Only by exposing crimes and those responsible can they be avoided in the future. Nor does truth-telling undermine existing judicial mechanisms. Rather they reinforce them both by baring evidence necessary for prosecutions, but also by helping societies understand and address the failings of the judicial institutions that allowed crimes to go unpunished. For these reasons, Human Rights Watch believes truth-telling processes can and should be an important complement to criminal justice mechanisms, whether international or domestic.

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<sup>259</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of international Human Rights Law and Serious Violations of International Humanitarian Law, March 21, 2006, adopted by the 60th session of the United Nations General Assembly, A/RES/60/147, paras. 11 (c) and 24.

<sup>260</sup> Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, October 2, 1997, adopted by the UN Commission on Human Rights, E/CN.4/Sub.2/1997/20/Rev.1, principle 3 (“UN Principles to Combat Impunity”).

<sup>261</sup> The U.N. Human Rights Committee articulated this principle in the case *Quinteros v. Uruguay*, concluding that the mother of a “disappeared” person was entitled to compensation as a victim, for the suffering caused by the failure of the state to provide her with information. *Quinteros v. Uruguay*, U.N. Human Rights Committee, Case No. 107/1981: “The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of Article 7.”

<sup>262</sup> “UN Principles to Combat Impunity,” principle 1.

## E. Safeguarding the interests of victims

Victims of any conflict have a wide range of interests and needs. These may vary over time. While some demand justice immediately, others would prefer to bury the past. Issues such as security and return home for those who have been displaced may be a priority, and justice may be viewed as an obstacle to these other immediate needs. Victims' interests may change after they return home and find their believed abusers living in their communities not having faced any consequences for their alleged crimes. Other factors may also come into play and add to the complexities involved in determining what victims' interests are and how to accommodate their diverse needs.

While consulting victims is an essential part of reconstructing society and determining the appropriate steps to be taken to move forward, international legal obligations place some constraints on what the options are. International law mandates prosecutions for serious crimes, such as crimes against humanity, genocide, and war crimes, which help to ensure individual victims' rights to truth, justice, and an effective remedy, along with combating impunity. Major international treaties, including the Geneva Conventions, and the Convention on the Prevention and Punishment of the Crime of Genocide, place an obligation on states parties to take steps to provide effective penalties for those responsible for certain crimes.

But it is not only international legal obligations that make justice necessary. Apart from the potential contributions justice can make to peace described above, prosecutions send the message to perpetrators and would-be perpetrators that no one is above the law. They also help to consolidate respect for the rule of law by solidifying society's confidence in judicial institutions. This in turn helps cement peace and stability. As former UN Secretary-General Kofi Annan said, "Impunity... can be an even more dangerous recipe for sliding back into conflict."<sup>263</sup> Ensuring that justice is done for the most serious crimes is an important way of safeguarding the interests of victims.

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<sup>263</sup> United Nations Security Council, Report of the Secretary-General to the Security Council on the protection of civilians in armed conflicts, UN Doc. S/2004/431, May 28, 2004, [http://www.re liefweb.int/rw/lib.nsf/db9oosid/LHON-634JZY/\\$file/UNGA\\_Protection\\_civilians\\_Jun2004.pdf?openelement](http://www.re liefweb.int/rw/lib.nsf/db9oosid/LHON-634JZY/$file/UNGA_Protection_civilians_Jun2004.pdf?openelement) (accessed May 27, 2009), para. 55.

## VII. The Crime of Aggression

### A. Introduction

The crime of aggression played a prominent role in the proceedings at Nuremberg and Tokyo following the Second World War. Twelve accused were convicted on the charge of aggression by the International Military Tribunal at Nuremberg.<sup>264</sup> On the other side of the world, the Tokyo International Military Tribunal found 25 defendants guilty of aggression.<sup>265</sup> The trials following World War II were the first and only time that the crime of aggression has been prosecuted before an international criminal tribunal.

At the Rome Diplomatic Conference, negotiators could not agree on a definition of aggression as an individual crime or the role of the Security Council in its activation. As a compromise, the Bureau of the conference decided to insert a reference to the crime in the provision enumerating the court's subject matter jurisdiction.<sup>266</sup> This compromise solution laid the groundwork for the negotiation of a definition and the conditions under which the court would have jurisdiction,<sup>267</sup> as an amendment to the Rome Statute.

In 2002, the ICC's Assembly of States Parties convened a Special Working Group on the Crime of Aggression ("Special Working Group") to take negotiations forward. Under the working group's auspices, delegates have met at formal sessions of the ASP as well as in intersessional meetings. These sessions were open to states parties, non-states parties, as well as nongovernmental organizations. Through this process, delegates have proposed amending article 5 of the Rome Statute to include the following definition:

For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of

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<sup>264</sup> None were convicted solely of the crime of aggression, all having also been convicted of war crimes, the most well-established offenses, and crimes against humanity. See Michael J. Glennon, "The Blank-Prose Crime of Aggression," *Yale Journal of International Law*, vol. 35: 71 at p. 74, citing Judgment of 1 October 1946, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Vol. 1, pp. 279-366 (1947).

<sup>265</sup> Judgment: International Military Tribunal for the Far East, <http://www.ibiblio.org/hyperwar/PTO/IMTFE/index.html> (accessed April 29, 2010).

<sup>266</sup> Rome Statute, art. 5(1); Cassese, International Criminal Law, p152, fn 4); Triferrer, Andreas Zimmerman, pp104-105.

<sup>267</sup> Rome Statute, art 5(2).

an act of aggression which, by its character gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”<sup>268</sup>

The Special Working Group defined an “act of aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”<sup>269</sup>

The fundamental difficulty, however, rested in what became known as the jurisdictional filter—the procedure through which the crime would become operational. The debate is rooted in controversy over the role of the Security Council in determining whether an “act of aggression” has taken place. While linked to interpretation of the UN Charter, which provides a role for the Security Council on aggression, the dispute is essentially a political one. It involves a disagreement as to whether the Council has exclusive authority to determine the existence of an act of aggression.

Human Rights Watch has not participated in the discussions on the crime of aggression over the years. On issues of the lawfulness of waging war, *jus ad bellum*, we have long believed that we are most effective as a human rights organization by an approach of strict neutrality. This neutrality enables us to focus on the conduct of armed forces in war, or *jus in bello*, without taking sides, and thereby promote our goal of encouraging all parties to a conflict to respect international humanitarian law.

## B. Concerns regarding the crime of aggression

### 1. The debate over jurisdictional filters: Consequences for the ICC’s independence

To facilitate negotiations, at the resumed eighth session of the ASP in March 2010 the chair highlighted four general combinations to illustrate possible configurations for the exercise of jurisdiction. In brief, these ran from more to less restrictive regimes. “Combination 1” would require acceptance of jurisdiction by the alleged aggressor state and approval by the Security Council. “Combination 2” would not require acceptance by the alleged aggressor, but would require the Security Council’s approval. “Combination 3” would require acceptance by the alleged aggressor and either no jurisdictional filter or approval by a body other than the Security Council, such as the General Assembly, International Court of Justice,

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<sup>268</sup> Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add.1, Annex II, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ICC-ASP-7-20-Add.1-SWGCA%20English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-20-Add.1-SWGCA%20English.pdf) (accessed April 29, 2010).

<sup>269</sup> The definition of “act of aggression” – referring to a state’s responsibility – tracks the definition adopted in UN General Assembly resolution 3314 (XXIX) of 14 December 1974 (Definition of aggression), [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/3314 \(XXIX\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314 (XXIX)) (accessed April 29, 2010).

or an ICC pre-trial chamber. “Combination 4” would not require acceptance of jurisdiction by the alleged aggressor state, and, like “Combination 3” either no jurisdictional filter or approval by a non-Security Council body.

While taking no position on the definitional aspects of aggression, from the start of the preparatory committee negotiations in 1996 Human Rights Watch has opposed Security Council exclusive control of the court’s jurisdiction over any crime, including the crime of aggression. We believed then—and believe now—that control over the court’s jurisdiction by a political body would undermine the ICC’s judicial independence.

Human Rights Watch remains deeply opposed to any proposal that would make jurisdiction subject to approval by political bodies, including the Security Council and the General Assembly. Making the Security Council or the General Assembly the “gatekeeper” to the court’s exercise of jurisdiction would subordinate the court to the imperatives of politicized decision-making.

While such politicization is less a risk where the filter rests with the International Court of Justice (ICJ), the rationale for relying on the decision-making powers of an entirely separate judicial institution is unclear. While the work of the ICJ may contribute to an emerging norm of *state* conduct with regards to aggression, it does not clarify a definition for an *individual* crime of aggression that meets the requirements of the principle of legality. Any of these three approaches—the Security Council, the General Assembly or the ICJ—would undercut the court’s independence, as well as its legitimacy, authority, and credibility. On this basis, Human Rights Watch urges states to reject any jurisdictional regime that requires approval by any entity external to the ICC itself.

We further note that in Combinations 3 and 4, the Special Working Group also posited pre-trial chamber authorization as an alternative jurisdictional filter. While requiring such authorization is less problematic than a determination by an institution external to the ICC, this proposal would nonetheless depart from the jurisdictional regime codified in the Rome Statute. That statutory framework only requires pre-trial authorization where the prosecutor seeks to open a *proprio motu* investigation under article 15. Such authorization is not presently required where a situation is referred to the ICC prosecutor by either the Security Council or a state. In our view, there is no reason to depart from this regime for the crime of aggression. However, if there must be a jurisdictional filter, a pre-trial chamber mechanism is the only option that would not threaten the court’s independence and credibility.

## *2. Potential negative consequences of adopting the crime of aggression*

On the basis of close observation of the court in situation countries, Human Rights Watch has concerns about adopting the crime of aggression, regardless of the jurisdictional filter. We fear that inclusion of a definition and jurisdictional filter could diminish the court's role—and the perceptions of that role—as an impartial judicial arbiter of international criminal law.

Taking up prosecutions of aggression could link the ICC to highly politicized disputes, such as border incursions, territorial disputes, and secession movements supported by external state actors. Inserting the court into these disputes may well give rise to perceptions of political bias and instrumentalization—even if such perceptions are wholly unfounded. This, in turn, could damage the interested public's trust in the court's legitimacy and ability to address genocide, war crimes, and crimes against humanity.

The court's work and credibility could also be damaged in situations where it does not take up an aggression prosecution. ICC jurisdiction over the crime of aggression would be eagerly welcomed by many. But especially with a complex jurisdictional mechanism, the operation of the court's jurisdiction over the crime would be harder for the interested public to comprehend, especially in the country situations most affected by the alleged crime. This would also be true of the constraints on the court's ability to investigate aggression-like incidents given its limited resources and wide mandate. Thus, situations could arise in which affected communities would have intense expectations for justice, but the ICC would be unable to act due to jurisdictional or resource restrictions. This is already a problem for the court in pursuing the core crimes already operational under its jurisdiction.<sup>270</sup>

When it comes to the crime of aggression, then, the dangers of inaction are much like those of action: disappointing expectations, leaving communities feeling abandoned and disinclined to trust the other work of the court. Moreover, there is a further risk to the court should it decline for whatever reason to take up a particular allegation of aggression: opportunistic and unscrupulous political leaders, seeking to advance their own national agendas, could exploit national dissatisfaction and undercut the court's credibility both domestically and internationally.

## **C. Discussions at Kampala**

Human Rights Watch believes that the decision on whether or not to define and operationalize jurisdiction over the crime of aggression should be taken on the merits, not

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<sup>270</sup> See, for example, Chapter III.E.4.

on the basis of its potential effect on the willingness of non-states parties to support or join the court's treaty. Some non-states parties have insisted that failure to adopt aggression will push them away from the court; others have stated that the likelihood of their joining or supporting the ICC is contingent upon the rejection of the crime of aggression. Neither assertion should sway states parties from careful consideration of the impact of the crime of aggression on the future of the court. Broader ratification and accession is a certainly an important long-term goal, but it is not a constitutive principle of the Rome Statute.

The decision, we believe, should be rooted in considerations of strengthening international criminal law and building a strong judicial institution that can lead the fight against impunity for the worst abuses against civilians. We urge states parties to conduct their discussions in a way to minimize the potential for divisiveness that would otherwise compromise the robust support the court needs from the community of states that helped create it.

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