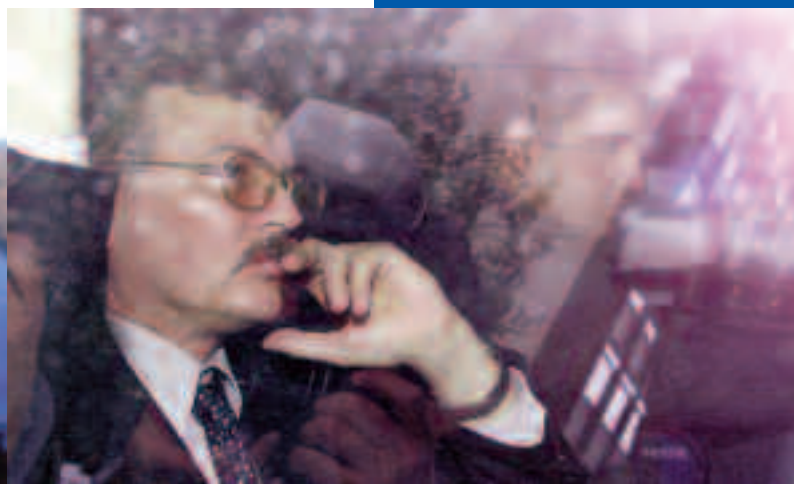




Selling Justice Short

Why Accountability Matters for Peace

HUMAN
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Selling Justice Short

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I. Overview

The long-running debate about whether seeking justice for grave international crimes interferes with prospects for peace has intensified as the possibility of national leaders being brought to trial for human rights violations becomes more likely. The International Criminal Court (ICC) at The Hague, which is mandated to investigate and prosecute war crimes, crimes against humanity, and genocide, has already issued its first arrest warrant for a sitting head of state—Sudan’s president Omar al-Bashir. That the ICC operates while armed conflicts are ongoing fuels the justice and peace debate. The temptation to suspend justice in exchange for promises to end a conflict has already arisen with respect to the ICC’s work in Darfur and Uganda, and threatens to recur in coming years as parties and mediators struggle to negotiate peace deals.

With the functioning of international criminal courts, national tribunals, and, increasingly, trials abroad, the context of amnesty discussions is already very different from several years ago. It is now generally recognized that international law obligates countries to prosecute genocide, crimes against humanity, and war crimes. International tribunals and national courts applying universal jurisdiction are likely to reject *de jure* amnesties for the most serious human rights abuses. The trials of Serbian leader Slobodan Milosevic and Liberia’s Charles Taylor demonstrate that insulation from prosecution is no longer a certainty for former heads of state. The expectations of victims for justice have changed in this evolving context.¹

At the same time, some diplomats tasked with negotiating peace agreements have argued that the prospect of prosecution by the ICC has made achieving their objectives more difficult. Those negotiating peace have tended to view the possibility of prosecution as a dangerous and unfortunate obstacle to their work. Some fear that merely raising the specter of prosecution will bring an end to fragile peace talks. Facing understandable pressure to resolve an armed conflict, negotiators and others often feel pressed to push justice to one side.

¹ One example of how victims’ expectations have changed in this evolving context is that Bangladesh is pressing ahead with plans to try people accused of war crimes during its bloody 1971 liberation struggle from Pakistan. Trying war criminals was a key pledge in the December 2008 elections. “Bangladesh to set up war crimes tribunal,” Agence France-Presse, January 27, 2009, <http://southasia.oneworld.net/todaysh headlines/bangladesh-to-set-up-war-crimes-tribunal> (accessed June 25, 2009). See also Human Rights Watch, *Ignoring Executions and Torture: Impunity for Bangladesh’s Security Forces*, 1-56432-483-4, May 2009, <http://www.hrw.org/node/83149>.

Indeed, to get parties to the table, blanket amnesties have often in the past been offered to those responsible for horrific human rights abuses. Supporters of amnesties argue that those bearing the greatest responsibility for atrocities have no interest in laying down their arms unless they believe that they will not face criminal charges. This point was made by the former United States (US) special envoy to Sudan, Andrew Natsios, who wrote, “They [the leaders of Sudan’s National Congress Party] are prepared to kill anyone, suffer massive civilian casualties, and violate every international norm of human rights to stay in power, no matter the international pressure, because they worry (correctly) that if they are removed from power, they will face both retaliation at home and war crimes trials abroad.”² Some claim that fear of accountability is the reason President Robert Mugabe refuses to relinquish his hold on power in Zimbabwe.³ Known war criminals are even sometimes incorporated into government in an effort to consolidate peace. Often these decisions are made almost literally at gunpoint by people desperate to end years of violence and upheaval.

Others have argued that while justice is important, it should take a back seat to peace. ICC Prosecutor Luis Moreno Ocampo’s request for an arrest warrant against Sudan’s President al-Bashir in July 2008 triggered a backlash by numerous actors, including the African Union (AU) and the Organization of the Islamic Conference, which asked the United Nations (UN) Security Council to defer the ICC’s work in Darfur for 12 months. Alex de Waal and Julie Flint, experts on Sudan, 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.”⁴ They argued that justice should wait until after those culpable are no longer in positions of authority, since seeking to prosecute risks retaliation, including against those who work for humanitarian agencies.⁵ Negotiators and community leaders working for peace in northern Uganda had claimed that the ICC warrants for the rebel Lord’s Resistance Army (LRA) leadership jeopardized the peace process, and

² Andre Natsios, “Beyond Darfur Sudan’s Slide Toward Civil War,” *Foreign Affairs*, May/June 2008, <http://www.foreignaffairs.com/articles/63399/andrew-natsios/beyond-darfur> (accessed June 16, 2009), p. 82.

³ Stephanie Nolen, “Africa’s unjust deserts,” *Globe and Mail* (Toronto), June 14, 2008, <http://www.theglobeandmail.com/news/world/article690940.ece> (accessed June 16, 2009).

⁴ 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 June 16, 2009).

⁵ 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 June 16, 2009).

that starting investigations before the war ended risked both justice and peace.⁶ Variations of these arguments have been used elsewhere.

In the short-term, it is easy to understand the temptation to forego justice in an effort to end armed conflict. However, Human Rights Watch research over the past 20 years in many different countries (only some of which are described in this report) has demonstrated that a decision to ignore atrocities and to reinforce a culture of impunity may carry a high price. While there are undoubtedly many factors that influence the resumption of armed conflict, and we do not assert that impunity is the sole causal factor, Human Rights Watch research shows that the impact of justice is too often undervalued when weighing objectives in resolving a conflict.

In addition, in practice the anticipated negative consequences of pressing for accountability often do not come to pass. Insisting on justice, for example, does not necessarily mean an end to peace talks or result in renewed instability as some predict. Peace agreements and ceasefires in the Democratic Republic of Congo (DRC) did not include amnesty provisions for war crimes, crimes against humanity, and genocide despite the fear of many that not granting total amnesty would mean the collapse of negotiations.⁷ In each of the peace talks (1999, 2002, 2006, and 2008), rebels put forward proposals for broad amnesties covering the worst crimes, but the government successfully resisted these demands without ending the talks. The inclusion of provisions for justice in negotiations with the LRA in Uganda that resulted from the ICC's pursuit of LRA leaders likewise did not scuttle those peace talks, despite the concerns of many who advocated an amnesty. The fear that the International Criminal Tribunal for the former Yugoslavia's (ICTY) indictment of Slobodan Milosevic for crimes in Kosovo during his negotiations to end the conflict with NATO would impede negotiations also proved unfounded. Only days after the warrant for Milosevic was announced, a peace agreement was reached.

Even years after a period of upheaval, some question the wisdom of bringing justice to those responsible for abuses for fear of the consequences. Following former Chilean dictator Augusto Pinochet's arrest in 1998, some Chilean leaders argued that "a giant bomb has

⁶ "Uganda: Acholi leaders in The Hague to meet ICC over LRA probe," *IRINnews*, March 16, 2005, <http://www.globalsecurity.org/military/library/news/2005/03/mil-050316-irin03.htm> (accessed May 11, 2009); "Uganda: ICC indictments to affect northern peace efforts, says mediator," *IRINnews*, October 10, 2005, <http://www.irinnews.org/report.aspx?reportid=56654> (accessed May 11, 2009); Richard Dowden, "ICC in the Dock," commentary, *Prospect Magazine*, May 2007, http://www.prospect-magazine.co.uk/article_details.php?id=9269 (accessed May 12, 2009).

⁷ See 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 (accessed May 12, 2009), pp. 16-20.

been dropped on the [democratic] transition”⁸ and that if not overturned soon, the decision “will inevitably create a climate of instability ... and could lead to a grave deterioration in the national co-existence it cost us so much to construct.”⁹ However, these forebodings were shown to be greatly exaggerated. The predicted apocalypse never occurred, and Chileans adapted to the momentous developments with little overt lawlessness.¹⁰

Instead of impeding negotiations or a peaceful transition, remaining firm on the importance of justice—or at least leaving the possibility for justice open—can yield short- and long-term benefits. Indictments of abusive leaders and the resulting stigmatization can lead to marginalizing a suspected war criminal and may ultimately facilitate peace and stability. In Bosnia and Herzegovina the indictment of Radovan Karadzic by the ICTY marginalized him and prevented his participation in the peace talks leading to the success of the Dayton negotiations to end the Bosnian war. Similarly, the unsealing of the arrest warrant for Liberian President Charles Taylor at the opening of talks to end the Liberian civil war was ultimately viewed as helpful in moving negotiations forward. By delegitimizing Taylor both domestically and internationally, the indictment helped make clear that he would have to leave office, an issue that had been a potential sticking point in negotiations. He left Liberia’s capital, Monrovia, a few months later.

Foregoing accountability, on the other hand, often does not result in the hoped-for benefits. Instead of putting a conflict to rest, an explicit *de jure* amnesty that grants 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 these most serious crimes is not sustainable. Even worse, it sets a precedent of impunity for atrocities that encourages future abuses. The history of the country situations documented in this report make a persuasive case that peace premised on a blanket amnesty may be a short-lived respite before the resumption of further armed conflict and its attendant crimes. In Sierra Leone, for example, three blanket amnesty provisions in different accords failed to consolidate the hoped-for peace, and in Angola six successive amnesties did not lead to the called for “forgiving and forgetting.” In both places,

⁸ Sebastian Rotella, “Pinochet Arrest forces Chile to Revisit Past,” *Los Angeles Times*, October 25, 1998, <http://articles.latimes.com/1998/oct/25/news/mn-36094> (accessed May 12, 2009), quoting Ret. General Ernesto Videla, a former high-ranking diplomat in the Pinochet regime.

⁹ Phil Davison, “The Pinochet Affair: Chile polarised as army grumbles divided by arrest in London,” *Independent* (London), October 21, 1998, <http://www.independent.co.uk/news/the-pinochet-affair-chile-chile-polarised-as-army-grumbles-divided-by-arrest-in-london-1179630.html> (accessed May 12, 2009), quoting head of Chile’s National Chamber of Commerce Fernando Lihn.

¹⁰ Human Rights Watch, *World Report 2000* (New York: Human Rights Watch, 1999), Chile chapter, <http://www.hrw.org/legacy/wr2k/americas-02.htm>.

war and war crimes resumed within a short period after peace agreements had been reached. The precedent of impunity meant that would-be criminals had no reason to curtail their unlawful tactics going forward.

An implicit (or de facto) amnesty may have similar results. 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 likely 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.

In some situations, negotiators feel that turning a blind eye to crimes is not enough and that alleged war criminals must be granted official positions in order to persuade them to lay down their arms. However, we have seen that in places where governments have opted to incorporate such individuals into the government instead of holding them to account for their crimes or marginalizing them, the price has been high. Rather than achieving the hoped-for end of violence, Human Rights Watch has documented how in post-conflict situations, incorporating leaders with records of past abuse into the military or government has resulted in further abuses and has allowed lawlessness to persist or return. In Afghanistan, many of the worst perpetrators from its recent past were brought under the umbrella of the Hamid Karzai government. The result has been continuing violence and abuse of power by some of the warlords who now wield governmental authority. Inclusion of those with blood on their hands in the new order eroded the legitimacy of the government for many Afghans and has been used by opponents of the government to discredit it. In the Democratic Republic of Congo, in an effort to buy compliance with the transition process, dozens of people suspected of committing human rights violations were given posts of national or local responsibility, including in the army.¹¹ Rather than end the conflict, this has resulted in a proliferation of rebel groups who see no downside to taking up arms.

Although under the pressure of trying to negotiate a peace deal justice may seem like a dispensable luxury, there are important benefits to promoting accountability that are worth consideration. In the longer term, lack of accountability can be fertile ground for those who seek to manipulate history to sow seeds of new conflict in order to achieve their own political ends. Assumptions of collective ethnic guilt rooted in atrocities dating back to the

¹¹ Human Rights Watch, *World Report 2005* (New York: Human Rights Watch, 2005), Democratic Republic of Congo chapter, <http://www.hrw.org/legacy/english/docs/2005/01/13/congo9855.htm>.

Second World War were important in enabling ultra-nationalist politicians in Yugoslavia to divide Serb, Croat, and Muslim communities and to trigger cycles of intercommunal violence during the conflicts of the 1990s. In Burundi too, the absence of criminal prosecutions for atrocities committed over a period of decades contributed to periodic explosions of inter-ethnic strife: members of each group feared violence—even potential annihilation—by the other and felt anger for past sufferings. These feelings were then exploited by those with their own political agenda. 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.

The failure of international and regional bodies and donor states to demand accountability can embolden abusive leaders to commit more crimes. In Rwanda, a significant contributing factor to the 1994 slaughter was the willingness of influential governments to overlook crimes that predated the genocide. In Kenya, by taking little action in the face of consistent and chronic patterns of impunity that characterized government practice for the past two decades, international actors contributed to the recurrence of violence following the 2007 elections.

Fair trials also assist in restoring dignity to victims by acknowledging their suffering and help to create a historical record that protects against revisionism by those who will seek to deny that atrocities occurred. The evidentiary rules used at judicial proceedings, and the requirement that judgments be based on proven facts, help confer legitimacy on otherwise contestable facts and make it more difficult for “societies to indulge their fantasies of denial.”¹² Trials also bring forward evidence that might not otherwise be disclosed. The Nuremburg trials performed this important function following the Second World War. Evidence revealed in the trials became insurmountable obstacles to those seeking to deny the crimes of the Nazi regime. In the course of its trials, the ICTY has also accumulated a formidable wealth of documentary evidence and testimony that can serve as a reference point in years to come and help prevent revisionist history that can be used to foment conflict.¹³ Of course, trials are only one of a number of tools that can assist in this process of creating a record and addressing the needs of victims: as important as they are, they will only address a small subset of crimes. Broader truth-telling mechanisms, in addition to reparations, vetting, economic development, and reconstruction are needed as part of the process of moving society forward in a sustainable way.

¹² Michael Ignatieff, “Articles of Faith,” *Index on Censorship*, September/October 1996, pp. 117-18.

¹³ “Keynote Speech by Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, Annual Conference of Political Affairs Division IV, ‘Civilian Peace Building and Human Rights in South-East Europe,’ Bern, 1 September 2005,” UN press release, September 2, 2005, <http://www.un.org/icty/pressreal/2005/p1001-e.htm> (accessed May 12, 2009).

Apart from its importance in helping to create a historical record, we have found that international justice for serious crimes has a positive impact on the development of domestic enforcement tools. Prosecutions in courts even far from the places where the crimes occurred have played a beneficial role in galvanizing establishment of the means in national court systems to deal with these crimes. The arrest of Pinochet in the United Kingdom (UK) and the resulting litigation in Belgium, France, Spain, and Switzerland prompted an opening of the domestic courts in Chile to victims who had previously been denied access to remedies. Trials of military officers responsible for gross violations of human rights during Argentina's "dirty war" were reopened in Buenos Aires in part because of efforts in Europe to hold them to account there. The ad hoc tribunals and the ICC have also directly and indirectly contributed to improved national justice mechanisms or laws in the countries where they are investigating crimes. The desire to have cases transferred from the ad hoc tribunals inspired both Rwanda and the countries of former Yugoslavia to engage in domestic legal reform in order to meet the tribunals' standards for transferring cases. In each country in which the ICC is investigating, steps have been taken—at least nominally—to start domestic proceedings. Even in countries where ICC investigations are being considered but have not been opened, efforts have been made to hold perpetrators to account that otherwise would not have occurred in order to keep the cases in national courts. Thus, international justice can serve to promote rule of law and long-term stability.

Finally, given the nascent development of international criminal justice, we would not expect to see evidence of its deterrent effect. However, we have seen increased awareness of what constitutes criminal behavior as a result of ICC prosecutions. This may result in behavioral changes simply out of fear of prosecution. For example, in the Central African Republic (CAR), a rebel commander demobilized his child soldiers after learning about the ICC's prosecution of Congolese rebel leader Thomas Lubanga on charges of recruitment of child soldiers, claiming he had not known using child soldiers was a crime. In the Democratic Republic of Congo, observers also noted the enormous educational impact of the Lubanga case.

Although this report argues that justice should not be shortchanged in peace negotiations and that the cost of overlooking impunity is high, we acknowledge that there is not one formula that is suitable to all situations. Well-known counter-examples do exist. In Mozambique, for example, there has been no justice for horrendous crimes committed during a lengthy civil war, yet it has remained stable since the peace agreement was signed in 1992.

Although South Africa's Truth and Reconciliation Commission is frequently cited as an alternative to justice, it is a model from another era. Established in 1994, it was an advance

over previous models of truth commissions: unlike Latin American truth commissions, the South African model contained a justice provision. There was no blanket amnesty. Instead individuals had to apply for amnesty and fully disclose human rights violations and, in most cases, had to appear before the truth commission in a public hearing. Only crimes associated with a political objective were eligible, and as a result most amnesty requests were denied. If the same model were applied elsewhere now, it would likely be seen as a step backwards by victims whose expectations for justice have changed as a result of the rise of international criminal law.

In addition, the South African truth commission's effectiveness was in part a result of fear of prosecution, and some trials were held initially. Once the perceived threat of prosecution was lessened (after a high-ranking official was acquitted), far fewer senior officials applied for amnesty, thus undercutting the truth commission's effectiveness.¹⁴ A weakness of the South African approach was the failure to set in place a coherent program to prosecute those who were denied or did not apply for amnesty. The lack of prosecution for crimes continues to be an issue.¹⁵ On March 19, 2009, a coalition of victim and civil society groups filed a complaint seeking to prevent the South African president from issuing pardons for politically motivated crimes without hearing the input of victims and other interested persons.¹⁶

Human Rights Watch believes that international law and practice has evolved over the last 15 years to the point where both peace and justice should be the objectives of negotiations aimed at ending a conflict where the most serious crimes under international law have been committed. At the very least, peace agreements should not foreclose the possibility of justice at a later date. As Archbishop Desmond Tutu has said, "As painful and inconvenient as justice may be, we have seen that the alternative—allowing accountability to fall by the wayside—is worse."¹⁷ Even decades after the crimes have occurred we have seen in places like Spain and Argentina that failing to address the past leaves open wounds that still demand attention.

¹⁴ See, for example, Andrew Rigby, *Justice and Reconciliation: After the Violence* (London: Lynne Rienner, 2001), pp. 133-134; Lyn Graybill, *Truth and Reconciliation in South Africa: Miracle or Model?* (London: Lynne Rienner, 2002), pp. 66-67; and "Civil Society organisations to launch urgent legal proceedings against the President," Khulumani press release, March 17, 2009, <http://www.khulumani.net/in-the-media/media-statements/statements-2009/298-civil-society-organisations-to-launch-urgent-legal-proceedings-against-the-president.html> (accessed May 12, 2009).

¹⁵ On December 12, 2008, the Pretoria High Court struck down amendments to South Africa's Prosecution Policy that provided for an effective rerun of the Truth and Reconciliation Commission's amnesty process under the guise of prosecutorial discretion. See *Nkademeng & Others v. The National Director of Public Prosecutions & Others* (TPD Case No. 32709/07).

¹⁶ "Civil Society organisations to launch urgent legal proceedings against the President," Khulumani, March 17, 2009.

¹⁷ Desmond Tutu, "Will Africa let Sudan off the hook?" commentary, *New York Times*, March 2, 2009, <http://www.nytimes.com/2009/03/03/opinion/03tutu.html> (accessed June 25, 2009).

With this report, Human Rights Watch is seeking to put important facts and analyses on the table to better inform the debate about accountability and peace. Sacrificing justice in the hope of securing peace is often projected as a more realistic route to ending conflict and bringing about stability than holding perpetrators to account. Yet our research shows that most often out-of-hand dismissal of justice proves to be shortsighted. Those who call for forgoing justice need to address the facts, some of which are described in this paper, that contradict their oft-repeated assumptions. Because the consequences for people at risk are so great, decisions on these important issues need to be fully informed.

II. State of the Law

In 1999 a British court stated, “The idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law.”¹⁸ That statement is even truer today with the establishment of a standing international criminal court.

Because the debate about peace and justice is occurring in the context of an evolving system of international criminal justice, some background on the state of law is necessary. States have accepted that some crimes are so heinous that they must not go unpunished. Among other objectives, prosecuting these crimes is recognized as integral to preventing future violations of international law.¹⁹ The duty to prosecute arising from these principles is reflected in both treaty and customary international law that create an obligation to prosecute those responsible for serious international crimes, such as genocide, crimes against humanity, and war crimes. The use of universal jurisdiction and the establishment of international courts and tribunals demonstrate the commitment to this principle in practice. Amnesties for these crimes are increasingly seen as contrary to international law.

A. The obligation in international law to prosecute serious international crimes

As a matter of both treaty and customary international law, there is a duty to prosecute serious international crimes or to extradite to a jurisdiction that will prosecute.²⁰

The obligation to prosecute some crimes derives from international conventions.²¹ The Convention on the Prevention and Punishment of the Crime of Genocide creates a legal

¹⁸ United Kingdom House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)*, March 24, 1999 (citing Arthur Watts, “The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers,” *Recueil des cours de l'Academie de droit international de La Haye*, 1994, vol. 247, pp. 82-84).

¹⁹ See UN Commission on Human Rights, “Impunity,” Resolution 2004/72, E/CN.4/RES/2004/72 (“Reaffirming the duty of all States to put an end to impunity and to prosecute, in accordance with their obligations under international law, those responsible for all violations of human rights and international humanitarian law that constitute crimes ... *Convinced* that impunity for violations of human rights and international humanitarian law that constitute crimes encourages such violations and is a fundamental obstacle to the observance and full implementation of human rights and international humanitarian law ...”). See also Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, adopted December 3, 1973, G.A. Res. 3074, 28 UN GAOR Supp. (No.30) at 78, U.N. Doc. A/9030/(1973) (“War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.”).

²⁰ See Human Rights Watch, *The Meaning of “the Interests of Justice” in Article 53 of the Rome Statute*, June 1, 2005, <http://www.hrw.org/node/83018>, pp. 9-11.

obligation on states parties to take steps to provide effective penalties for those responsible for genocide.²² The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also binds states to prosecute violators.²³ The Geneva Conventions of 1949, applicable during armed conflict, establish a duty to provide “effective penal sanctions for persons committing, or ordering to be committed ... grave breaches of the Conventions.”²⁴ Grave breaches include the following when committed against persons who are not or are no longer taking part in the hostilities: “willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health.”²⁵

The obligation to penalize crimes representing violations of the laws of war was initially considered limited to grave breaches of the Geneva Conventions, which are applicable only during international armed conflicts. However, the subject matter jurisdiction of the International Criminal Tribunal for Rwanda (ICTR) (which includes Common Article 3 of the four Geneva Conventions and its Second Additional Protocol) and decisions by the International Criminal Tribunal for the former Yugoslavia indicate acceptance of the extension of the prohibition to non-international armed conflicts (civil wars).²⁶

This broader applicability of a duty to prosecute war crimes committed during non-international armed conflicts was recognized by the International Committee of the Red

²¹ The obligation to “extradite or prosecute” (*aut dedere aut judicare*), also referred to as universal jurisdiction, can be found in approximately 70 international criminal law conventions. Michael J. Kelly, “Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of *Aut Dedere Aut Judicare* into Customary Law & Refusal to Extradite Based on the Death Penalty,” *Arizona Journal of International & Comparative Law*, vol. 20 (2003), p. 497.

²² The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) states, “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.” Genocide Convention, adopted by Resolution 260(III)A of the United Nations General Assembly, December 9, 1948, G.A. Res. 260 (III) A, entered into force January 12, 1951, arts. 4-5.

²³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

²⁴ Article 146 of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War (Geneva IV) requires that “[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.” Geneva IV, adopted August 12, 1949, 75 U.N.T.S. 287, entered into force October 21, 1950, art. 146.

²⁵ *Ibid.*, art. 147.

²⁶ *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo* (Elebici case), ICTY, Case No. IT-96-21-A, Judgment (Appeals Chamber), February 20, 2001, paras. 163-73; *Prosecutor v. Dusko Tadic*, ICTY, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), October 2, 1995, para. 143. This view was reiterated by the UN Commission on Human Rights (CHR) in 1999 when it reminded all factions in the Sierra Leone conflict “that *all countries* are under the obligation to search for persons alleged to have committed or to have ordered committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts.” CHR, “Situation of human rights in Sierra Leone,” Resolution 1999/1, E.C.N.4.RES.1999.1, para. 2 (emphasis added).

Cross (ICRC) in its 2005 study of customary international humanitarian law.²⁷ The UN Commission on Human Rights (the predecessor to the current Human Rights Council) adopted several resolutions calling for the investigation and prosecution of violations of international humanitarian law in the context of non-international armed conflicts in Burundi, Chechnya, Rwanda, Sierra Leone, Sudan, and the former Yugoslavia.²⁸

Acceptance of the duty to prosecute as a matter of customary international law is evident in a number of places. In 1946 the UN General Assembly during its first session urged that all states, including those not members of the United Nations, arrest persons responsible for war crimes during the Second World War and return them for prosecution in the state where the crimes were committed.²⁹ A number of General Assembly resolutions since have reiterated the obligation of states to ensure the investigation and prosecution of alleged war crimes and crimes against humanity.³⁰

The Rome Statute establishing the International Criminal Court is an important indicator that the obligation to prosecute serious violations of international law is supported by customary law. The obligation to prosecute is expressed in the statute's preamble:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation...

²⁷ See Rule 158 in International Committee of the Red Cross, *Customary International Humanitarian Law* (Cambridge, UK: Cambridge University Press, 2005), p. 607.

²⁸ See, for example, UN Commission on Human Rights, "Situation of human rights in Rwanda," Resolution 2000/21, E/CN.4/RES/2000/21; CHR, "Situation of human rights in the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Croatia and Bosnia and Herzegovina," Resolution 2000/26, E/CN.4/RES/2000/26; CHR, "Situation of human rights in the Sudan," Resolution 2001/18, E/CN.4/RES/2001/18; CHR, "Situation of human rights in Sierra Leone," Resolution 2001/20, E/CN.4/RES/2001/20; CHR, "Situation of human rights in Burundi," Resolution 2001/21, E/CN.4/RES/2001/21; and CHR, "Situation in the Republic of Chechnya of the Russian Federation," Resolution 2001/24, E/CN.4/RES/2001/24. See also Andrew Clapham, "Human rights obligations of non-state actors in conflict situations," *International Review of the Red Cross*, vol. 88/863, September 2006.

²⁹ Extradition and Punishment of War Criminals, adopted February 13, 1946, G.A. Res. 3(1), 1 U.N. GAOR (1st sess.) at 9-10, U.N. Doc. A/RES/3(I) (1946).

³⁰ See Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity (Question of Punishment), adopted December 15, 1969, G.A. Res. 2583(XXIV), 24 U.N. GAOR Supp. (No. 30) at 58, U.N. Doc. A/RES/2583(XXIV) (1969); Question of Punishment, adopted December 15, 1970, G.A. Res. 2712(XXV), 25 U.N. GAOR Supp. (No. 28) at 78-79, U.N. Doc. A/RES/2712(XXV) (1970); Question of Punishment, adopted December 18, 1971, G.A. Res. 2840(XXVI), 26 U.N. GAOR Supp. (No. 29) at 88, U.N. Doc. A/RES/2840(XXVI) (1971); and Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, adopted December 3, 1973, G.A. Res. 3074(XXVIII), 28 U.N. GAOR Supp. (No. 30) at 78-79, U.N. Doc. A/RES/3074(XXVIII) (1973).

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes³¹

The obligation to prosecute can also be seen in article 17 of the Rome Statute. Under the principle of complementarity, national courts not only have the first opportunity to prosecute international crimes, but an *obligation* to prosecute them. In particular, “the point to be emphasized is that the competence to bring the perpetrator(s) of crimes within the jurisdiction of the ICC to justice remains the prime responsibility of national States[;]” provided that the alleged human rights violator is not surrendered to the ICC, *a duty exists* for states subject to the jurisdiction of the ICC to prosecute them in domestic courts.³² That 109 countries to date have ratified the Rome Statute manifesting an intent to enact domestic legislation to punish these crimes domestically or to submit the suspect to ICC prosecution is strong evidence of the widespread recognition of the duty to prosecute.

The UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity³³ also points to the emerging trend toward requiring prosecution of the most serious crimes. The principles, best practices endorsed by the Office of the United Nations High Commissioner for Human Rights (OHCHR), are intended to serve as guidelines to assist states in developing measures to combat impunity for human rights violations.³⁴ The principles indicate that states have a duty to investigate “serious crimes under international law” and to take measures to ensure that those suspected of criminal responsibility “are prosecuted, tried and duly punished.” Crimes falling into this category include violations of the Geneva Conventions, genocide, crimes against humanity, and other violations of international human rights that are crimes under international law or which international law requires states to penalize, such as torture, enforced disappearances, extrajudicial execution, and slavery.

The duty to investigate and prosecute these crimes has also been recognized in international law at the regional level. The Inter-American Court of Human Rights has found that a state must “use the means at its disposal to carry out a serious investigation of

³¹ Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, preamble (emphasis added).

³² Daniel W. Schwartz, “Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the ‘Dirty War’ in International Law,” *Emory International Law Review*, vol. 18 (2004), p. 343 (citing Johan van der Vyver, “The ICC,” ch.10, unpublished document on file with Schwartz, 2000).

³³ UN Commission on Human Rights, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, February 8, 2005, <http://www.unhcr.org/refworld/docid/42d66e78o.html> (accessed June 1, 2009).

³⁴ *Ibid.*, p. 5.

violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”³⁵

The European Court of Human Rights has similarly ruled that in cases of serious human rights violations, an effective remedy for victims may require states to carry out “a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.”³⁶

In recent years, states have been more willing to put the obligation to prosecute into practice. “Universal jurisdiction” refers to the competence of a national court to try a person suspected of a serious international crime—such as genocide, crimes against humanity, war crimes, or torture—even if neither the suspect nor the victims are nationals of the country where the court is located and the crime took place outside of that country. Human Rights Watch has documented that since 2000 there has been “a steady rise in the number of cases prosecuted under universal jurisdiction laws in Western Europe, evidencing a heightened willingness among certain European states to utilize universal jurisdiction.”³⁷ States may have been further motivated to use universal jurisdiction in order to avoid becoming a safe haven for war criminals not likely to be prosecuted by the ICTY or ICTR. (See also Chapter VII.C, for the impact of universal jurisdiction on developments in Chile and Argentina.)

B. No amnesty for the most serious crimes

The trend in international law is that state amnesty provisions must be considered void if they attempt to amnesty the most serious crimes because such provisions are contrary to states’ obligations to combat impunity for serious human rights violations.³⁸ Exempting the perpetrators of the worst crimes from prosecution and allowing these crimes to remain

³⁵ Inter-American Court, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R., (Ser. C) No. 4 (1988), para. 174.

³⁶ ECHR, *Aksoy v. Turkey*, Judgment of 18 December 1996, No. 100/1995/606/694, para. 98. See also UN Commission on Human Rights, Independent Study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity, Diane Orentlicher, E/CN.4/2004/88, February 27, 2004, <http://www.unhcr.ch/pdf/chr60/88AV.pdf> (accessed June 2, 2009), paras. 24-56.

³⁷ See Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, vol. 18, no. 5(D), June 2006, <http://www.hrw.org/sites/default/files/reports/ijo606web.pdf>, pp. 2-3. However, there has also been some backtracking, with Belgium, Germany, and Spain seeking to place more restrictions on the use of universal jurisdiction.

³⁸ See Elizabeth G. Salmón, “Reflections on international humanitarian law and transitional justice: lessons to be learnt from the Latin American experience,” *International Review of the Red Cross*, vol. 88/862, June 2006, pp. 332-333.

unpunished is increasingly viewed as unacceptable. This is as an important reference point for the place of justice alongside other objectives when seeking to end conflicts.

A number of countries including the Democratic Republic of Congo, Côte d'Ivoire, Croatia, Ethiopia, and Venezuela have adopted legislation or constitutions that prohibit amnesties for the most serious crimes or that contain explicit exceptions to general amnesties for crimes under international law.³⁹ And related to the obligation under the universal/extraterritorial jurisdiction principle to prosecute serious international crimes is the rejection of state amnesties in the courts of other states. As the Sierra Leone Special Court held:

Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.⁴⁰

³⁹ **Democratic Republic of Congo** – Décret-loi N°03-001 du 15 avril 2003 portant amnistie pour faits de guerre, infractions politiques et d'opinion, *Journal Officiel de la République Démocratique du Congo*, Numéro Spécial, <http://www.unhcr.org/refworld/country,,NATLEGBOD,,COD,,47305aae2,o.html> (accessed June 2009), art. 1 (“pending adoption of an amnesty law, a temporary amnesty for acts of war and political offenses would apply for the period between 2 August 1998 and 4 April 2003, with the exception of war crimes, genocide and crimes against humanity.”); **Côte d'Ivoire** – Ordonnance No. 2007-457 of 12 April 2007 enacting the Amnesty Law, Ordonnance N° 2007 457 du 12 Avril 2007 portant amnestie, http://www.cotedivoirepr.ci/?action=show_page&id_page=562 (accessed June 2009), art. 3(b) (providing a broad amnesty that explicitly omits crimes which under the Ivorian penal code qualify as crimes and offenses against people's rights, crimes and offenses against persons, crimes and offenses against property other than those listed in Articles 1 and 2: “infractions qualifiées par le code pénal ivoirien de crimes et délits contre le droit des gens, crimes et délits contre les personnes, crimes et délits contre les biens autres que celles énumérées aux articles 1er et 2”); **Croatia** – Law on General Amnesty, HRV-110, 1996, <http://www.unhcr.org/refworld/publisher,NATLEGBOD,,HRV,3ae6b4de2c,o.html> (accessed June 2009), art. 3, and see also UN Human Rights Committee, “Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, CCPR/CO/71/HRV, April 30, 2001, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.71.HRV.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.71.HRV.En?Opendocument) (accessed June 2, 2009), para. 11; **Ethiopia** – Constitution of The Federal Democratic Republic of Ethiopia, 1994, <http://www.ethiopiafirst.com/Election2008/Constitution.pdf> (accessed June 2009), art. 28(1) (“Criminal liability of persons who commit crimes against humanity ... shall not be barred by statute of limitation. Such offenses may not be commuted by amnesty or pardon of the legislature or any other state organ.”); **Venezuela** – Constitution of the Bolivarian Republic of Venezuela, 1999, http://en.wikisource.org/wiki/Constitution_of_Venezuela (accessed June 2009), art. 29 (“The State is obliged to investigate and legally punish offenses against human rights committed by its authorities. Actions to punish the offense of violating humanity rights, serious violations of human rights and war crimes shall not be subject to statute of limitation. Human rights violations and the offense of violating humanity rights shall be investigated and adjudicated by the courts of ordinary competence. These offenses are excluded from any benefit that might render the offenders immune from punishment, including pardons and amnesty.”). See also Amnesty International, “Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law,” October 31, 2003, <http://www.amnestyusa.org/document.php?id=6463542D5D7BFD6980256DD000689A4C&lang=e> (accessed June 2, 2009).

⁴⁰ *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Special Court for Sierra Leone, Case No. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, March 13, 2004, para. 67 (emphasis added). Also, “the amnesty granted by Sierra Leone cannot cover crimes under international law that are the subject of universal jurisdiction” because “it stands to reason that a state cannot sweep such crimes into oblivion and forgetfulness which other

The ICTY has also indicated that amnesties for internationally recognized crimes would not be accorded international legal recognition.⁴¹

United Nations' bodies have repeatedly reflected this position against amnesties regarding the most serious crimes. For example, regarding the 1999 Lomé Peace Accord, despite the opposition of Sierra Leone President Ahmad Tejan Kabbah, the UN special representative attached a reservation to the agreement stating, "The United Nations holds the understanding that *the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.*"⁴² The UN secretary-general also issued a statement that addressed the terms of the Lomé Peace Accord: "Some of the terms under which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity"⁴³

Numerous additional documents and bodies also highlight the developing legal trend opposing amnesty for genocide, crimes against humanity, war crimes, and other violations of international humanitarian law.⁴⁴ The Inter-American Court of Human Rights has held that Peru's blanket amnesty law, which discouraged investigations and denied any remedies to victims, was invalid.⁴⁵ The Court found that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are

states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*." *Ibid.*, para. 71.

⁴¹ *Prosecutor v. Anto Furundzija*, ICTY, Case No. IT-95-17/1-T, Judgment, December 10, 1998, para. 155.

⁴² William A. Schabas, "Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone," *U.C. Davis Journal of International Law & Policy*, vol. 11 (2004), pp. 148-49 (emphasis added).

⁴³ *Ibid.*, p. 149.

⁴⁴ For example, the "Vienna Declaration and Programme of Action" reads, "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law." World Conference on Human Rights, A/CONF.157/23, July 12, 1993, para. 60. In October 2000, the UN secretary-general reported to the Security Council that the United Nations has consistently maintained the position that "amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law." Carsten Stahn, "Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor," *American Journal of International Law*, vol. 95 (2001), p. 955 (citing UN Security Council, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915, October 4, 2000, para. 22). The Report of the Secretary-General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies declares that states should "[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, [and] ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court." UN Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, S/2004/616, August 23, 2004, p. 21. See also CHR, Independent Study on Best Practices, Orentlicher, E/CN.4/2004/88, February 27, 2004, paras. 27-35.

⁴⁵ Inter-American Court, Barrios Altos Case, Judgment of March 14, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 75 (2001), paras. 41-44.

inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations”⁴⁶

The Inter-American Commission on Human Rights has also found that amnesty laws in Chile, Argentina, and El Salvador do not satisfy a state’s duty to prosecute and are incompatible with the American Convention.⁴⁷

⁴⁶ Ibid., para 41.

⁴⁷ Inter-American Court, Garay Hermosilla Case, Case 10.843, Report No. 36/96, Inter-Am.Ct.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 156 (1997), October 15, 1996, <http://www.unhcr.org/refworld/docid/3ae6b71a4.html> (accessed June 18, 2009); Inter-American Court, Consuelo Herrera Cases, Case Nos. 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Report No. 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993), October 2, 1992, <http://www.unhcr.org/refworld/docid/3ae6b6d434.html> (accessed June 18, 2009).

PART ONE: IN THE HEAT OF THE MOMENT: JUSTICE ISSUES DURING PEACE TALKS

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, Human Rights Watch research has shown that efforts at justice, often assumed to be antagonistic to peace negotiations, do not necessarily have the anticipated dampening effect on discussions. At the same time, in situations where a decision is taken to forego justice (either explicitly with a formal amnesty or implicitly by ignoring human rights violations), the desired objective of peace is not always achieved. Those who go even further and attempt to placate human rights abusers by incorporating them into the government have also found that this may not be the panacea that will end the violence.

III. Marginalization

Requests for warrants for high-ranking leaders are often opposed by those who believe that this will result in more violence and a prolonged conflict. They argue that leaders facing the possibility of trial and likely conviction have little incentive to lay down their arms. Instead, they contend, these leaders will cling all the more tenaciously to power. The prospect of arrest may even spur them to continue to fight a war in an effort to maintain their position.⁴⁸ Others express the fear that delicate peace negotiations will be upset by insistence on accountability.

However, in practice, the anticipated negative consequences of pressing for accountability often do not come to pass. For example, on May 27, 1999, the International Criminal Tribunal for the former Yugoslavia 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 1999.⁴⁹ 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

⁴⁸ For a short discussion of the differing reactions to these types of warrants see Helene Cooper, “Waiting for Justice,” *New York Times*, July 27, 2008.

⁴⁹ “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 May 11, 2009).

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.”⁵⁰ Some in the US government were reportedly unhappy about the timing of the indictment and wanted to hold off as a bargaining chip in negotiations with Milosevic.⁵¹ Milosevic himself was contemptuous of the indictment and vowed that he would never face trial in The Hague.

Yet less than a week later, on June 3, negotiators announced that Milosevic had accepted the terms of an international peace plan for Kosovo.⁵² 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.⁵³ Because Milosevic did not travel much and felt secure at home, he did not fear ending up in The Hague.⁵⁴ But Milosevic lost the presidential contest in the September 24, 2000, federal election. He attempted to force a second round of the election but the opposition responded with a series of mass rallies. On October 7, after opposition supporters stormed the parliament, Milosevic conceded electoral defeat.⁵⁵ Six months later he was arrested, and on June 28, 2001, the government of Serbia transferred Milosevic to The Hague.

The International Criminal Court, which has jurisdiction over ongoing conflicts, has already created considerable controversy over whether the prospect of prosecution stands in the way of peace. The issue is likely to arise more and more frequently. Yet limited experience shows that the assumptions made about its effect are not necessarily correct, and that the

⁵⁰ 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 June 18, 2009); “Despite Milosevic Indictment Peace Talks Continue,” *U.N. Wire*, May 28, 1999, http://www.unwire.org/unwire/19990528/2885_story.asp (accessed June 18, 2009). 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 June 16, 2009); 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 May 11, 2009.)

⁵¹ Wesley Clark, *Waging Modern War: Bosnia, Kosovo and the Future of Conflict* (New York: PublicAffairs, 2002), pp. 325-326.

⁵² “Milosevic Accepts Peace Plan, Finnish envoy says,” *CNN.com*, June 3, 1999, <http://www.cnn.com/WORLD/europe/9906/03/kosovo.peace.04/> (accessed May 11, 2009).

⁵³ Herbert Okun, “The Role of International Criminal Justice in Peace Negotiations” (contribution to panel discussion “Future of International Criminal Justice – Evolving Accountability from Nuremburg to the International Criminal Court,” October 30, 2006), published in *Penn State International Law Review*, vol. 25, issue 4 (2007), p. 788.

⁵⁴ *Ibid.*

⁵⁵ Human Rights Watch, *World Report 2001* (New York: Human Rights Watch, 2000), Federal Republic of Yugoslavia chapter, <http://www.hrw.org/legacy/wr2k1/europe/yugoslavia.html>.

potential value of justice has generally been underestimated. Rather than scuttle peace talks or undermine a transition to democracy, an indictment may facilitate them by altering the power dynamics.⁵⁶ Indicting a leader for atrocities makes it harder for him to deny that the crimes have occurred. It may also make it more difficult for the leader to travel or obtain international or national support—his associates may seek to distance themselves from him in an effort to avoid a similar fate. Criminal indictment of abusive leaders and the resulting stigmatization can, therefore, lead to marginalizing a suspected war criminal and may ultimately facilitate peace and stability.

Human Rights Watch has documented the following examples where indictments have helped, rather than hindered, peace processes.

A. Charles Taylor

Elected president of Liberia in 1997 after the ouster of Samuel Doe, Charles Taylor gained international notoriety for the brutal abuse of civilians perpetrated by his forces in Liberia and for his use of child soldiers organized in “Small Boy Units.” Taylor’s logistical and military support for a rebel group in neighboring Sierra Leone, the Revolutionary United Front (RUF), contributed to the death, rape, and mutilation of thousands of Sierra Leonean civilians, and led to United Nations sanctions and embargoes on his regime.⁵⁷ Taylor’s forces were also implicated in conflicts in Guinea and Côte d’Ivoire.

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 (including murder and hostage-taking); crimes against humanity (rape, murder, extermination, sexual slavery); and other serious violations of international humanitarian law (use of child soldiers) committed in Sierra Leone.⁵⁸ The indictment charged that Taylor

⁵⁶ See Kenneth Roth (Human Rights Watch), “Milosevic’s Indictment Sets Much Needed Precedent,” commentary, *Miami Herald*, July 13, 2001, <http://www.hrw.org/en/news/2001/07/12/milosevics-indictment-sets-much-needed-precedent>; Steve Crawshaw (Human Rights Watch), “Serbia’s Lessons for Sudan,” commentary, *Guardian*, July 24, 2008 <http://www.guardian.co.uk/commentisfree/2008/jul/24/radovankaradzic.serbia?gusrc=rss&feed=worldnews> (accessed May 11, 2009). See also discussion of Chile at Chapter VII.C.

⁵⁷ These included a weapons embargo (1992), sanctions against importing Liberian diamonds and timber (2001, 2003) and a travel ban on Taylor, his family, and members of his government (2001). United Nations Security Council, Resolution 788 (1992), S/RES/788 (1992) <http://daccessdds.un.org/doc/UNDOC/GEN/N93/010/46/IMG/N9301046.pdf?OpenElement> (accessed May 12, 2009), para.8; United Nations Security Council, Resolution 1343 (2001), S/RES/1343 (2001) <http://daccessdds.un.org/doc/UNDOC/GEN/No1/276/o8/PDF/No1276o8.pdf?OpenElement> (accessed May 12, 2009), paras. 6-7; United Nations Security Council, Resolution 1521 (2003), S/RES/1521 (2003) <http://daccessdds.un.org/doc/UNDOC/GEN/No3/669/60/PDF/No366960.pdf?OpenElement> (accessed May 12, 2009), para. 10.

⁵⁸ Chief Prosecutor for the Sierra Leone Special Court David Crane said that he had unsealed the indictment when he learned that 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,

actively financed and trained the RUF before and during Sierra Leone's 10-year civil war. It also alleged that Taylor assisted and encouraged members of the RUF/Armed Forces Revolutionary Council rebel alliance, who were accused of horrific crimes.⁵⁹

The unsealing of the indictment against Taylor caused a great deal of consternation at the United Nations Secretariat and elsewhere.⁶⁰ 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.⁶¹ Peace, which had mostly been elusive in Liberia since 1989,⁶² was a priority, and many felt that the indictment would undermine chances at reaching a negotiated settlement.⁶³ 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.⁶⁴ Ghanaian Foreign Minister Nana Akufo-Addo expressed his embarrassment and stated a belief held by many that the prosecutor's action "in unsealing

"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 June 16, 2009).

⁵⁹ Janet Fleischman, "Liberia: A Case for Intervention?" Human Rights Watch testimony before the US Congressional Human Rights Caucus, July 9, 2003, <http://www.hrw.org/en/news/2003/07/09/liberia-case-intervention>.

⁶⁰ 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 (accessed May 13, 2009), 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 May 13, 2009); 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/200306100002.html> (accessed May 13, 2009).

⁶¹ 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/030729/i_ins.01.html (accessed May 13, 2009). See also Cobb, "Diplomatic Dismay as Liberia Rebels Poise for Final Push and Foreigners Flee," *allAfrica.com*.

⁶² 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>.

⁶³ "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 May 13, 2009).

⁶⁴ Barringer and Sengupta, "War Crimes Indictment of Liberian President is Disclosed," *New York Times*, <http://www.nytimes.com/2003/06/05/international/africa/05LIBE.html>; 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/ (accessed June 16, 2009), p. 13.

the indictment at this particular moment has not been helpful to the peace process.”⁶⁵ Observers thought that the indictment would undermine diplomatic efforts to achieve peace because Taylor would be less likely to relinquish his position as president.⁶⁶ Taylor himself initially vowed the peace process would fail unless the indictment was lifted.⁶⁷ The chargé d’affaires in Liberia’s Washington DC embassy called for the prosecutor to “be arrested and put on trial.”⁶⁸ Many in Monrovia feared that the unsealing of the indictment risked further violence by both the rebels and the supporters of Taylor intent on revenge.

In retrospect, however, it is clear that the unsealing of Taylor’s indictment was a key factor in bringing peace to Liberia. Taylor’s government had committed systematic abuses of civil and political rights. There was little reason to hope that a negotiated settlement that left him in office would have resulted in an improved situation on the ground.⁶⁹

The International Center for Transitional Justice’s (ICTJ) 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 for Sierra Leone.⁷⁰ 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 on the talks.⁷¹ It de-legitimized Taylor both domestically and internationally: Liberians expressed their concern to Human Rights Watch researchers that having a president who could not travel would undermine Liberia’s international standing and would make it difficult to get donor monies,⁷² and it also affected

⁶⁵ Douglas Farah, “Tribunal Indicts Liberia’s Leader,” *Washington Post*, June 5, 2003, reproduced at <http://www.genocidewatch.org/TribunalIndictsTaylor.htm> (accessed June 16, 2009).

⁶⁶ Priscilla Hayner, International Center for Transitional Justice, “Negotiating peace in Liberia: Preserving the possibility for Justice,” November 2007, <http://www.ictj.org/static/Africa/Liberia/HaynerLiberia1207.eng.pdf> (accessed May 13, 2009), p. 8. See also Morton Abramowitz and Paul Williams, “Peace before Prosecution?” *Washington Post*, August 25, 2003, reproduced at <http://www.publicinternationallaw.org/news/peacebeforeprosecution.html> (accessed June 16, 2009). Some even felt the announcement was intended to scupper the negotiations. Lansana, et al., “Charles Taylor: Why me?” *New African*, p. 13.

⁶⁷ Nico Colombant, “Pressure Grows on Liberian President to Step Down,” radio report, Voice of America, June 19, 2003, <http://www.voanews.com/english/archive/2003-06/a-2003-06-19-28-Pressure.cfm> (accessed May 13, 2009).

⁶⁸ Cobb, “Diplomatic Dismay as Liberia Rebels Poise For Final Push and Foreigners Flee,” *allAfrica.com*.

⁶⁹ Human Rights Watch interview with Corinne Dufka, Human Rights Watch senior researcher, Africa Division, September 17, 2008. See also William Reno, “Reconstructing Peace in Liberia,” in Taiser Ali and Robert Matthews, eds., *Durable Peace: Challenges for Peacebuilding in Africa* (Toronto: University of Toronto Press, 2004), pp. 127, 129, 134-135.

⁷⁰ Hayner, ICTJ, “Negotiating Peace in Liberia: Preserving the possibility for Justice,” p. 6.

⁷¹ *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 June 16, 2009).

⁷² Human Rights Watch interview with Corinne Dufka, September 17, 2008. See also “Liberia: More Decry Travel Ban,” *The Inquirer* (Morovia), June 11, 2007, <http://allafrica.com/stories/200706110917.html> (accessed May 14, 2009).

the morale of his troops (already low because they had not been paid in months).⁷³ That delegitimization helped make it clear to Taylor that he would have to leave office.

The results were all the more significant because initial expectations for the peace talks had been low. The talks came about after rebel groups made significant inroads toward taking the Liberian capital Monrovia in 2003.⁷⁴ Civil society leaders, anxious to avoid another violent overthrow of the government, successfully pressed for peace talks. The ICTJ report found that most participants arrived at the talks in Ghana believing that Taylor would not leave the presidency. However, that was the one issue over which the Liberian rebel factions would not compromise.⁷⁵ The unsealing of the indictment changed that dynamic. Shortly after the warrant was unsealed Taylor said, “I will strongly consider a process of transition that will not include me. If President Taylor removes himself for the Liberians, will that bring peace? If so, I will remove myself.”⁷⁶ According to a participant, the parties were eventually able to negotiate a critical ceasefire agreement because it included a clause indicating that Taylor would not be a part of the transitional government. It took two weeks to negotiate that clause but it could not have been done without the public unsealing of the indictment.⁷⁷ Taylor was not present for the negotiations because he had returned to Liberia on a Ghanaian government plane just hours after the indictment was unsealed. He ultimately stepped down from office and left Liberia on August 11, 2003, after his military options ran out. The offer of safe haven in Nigeria was also undoubtedly a factor contributing to his decision to leave.⁷⁸

The ICTJ study further notes that the expected retaliatory violence in Liberia resulting from the indictment never occurred (Taylor’s supporters had threatened to attack Ghanaians in

⁷³ Hayner, ICTJ, “Negotiating peace in Liberia: Preserving the possibility for Justice,” p. 9.

⁷⁴ Taylor’s abusive regime in Liberia and ongoing support for rebels in neighboring countries sparked the 1999 formation of a rebel group, the Liberians United for Reconciliation and Democracy (LURD). A splinter group, the Movement for Democracy in Liberia (MODEL), formed in 2003.

⁷⁵ Hayner, ICTJ, “Negotiating peace in Liberia: Preserving the possibility for Justice,” p. 7.

⁷⁶ Clar Ni Chonghaile, “Liberian President offers to step down as UN indicts him,” *Independent*, June 5, 2003, reproduced at http://findarticles.com/p/articles/mi_qn4158/is_20030605/ai_n12696612/ (accessed May 14, 2009).

⁷⁷ Hayner, ICTJ, “Negotiating peace in Liberia: Preserving the possibility for Justice,” p. 9. The ceasefire did not hold, but it was still important for ongoing negotiations.

⁷⁸ Our argument is not that Taylor left office solely because of the unsealing of the warrant. Rather, he left office once he was unable to procure arms and a military defeat was imminent. However, the unsealing of his indictment made it more difficult for him to secure support from the United States. Furthermore, it caused his physical removal from peace negotiations underway in Ghana and undermined the influence he could have yielded from Monrovia, thus allowing the negotiations to reach a successful conclusion that did not include him. Also, the indictment and mandate of the Special Court for Sierra Leone (which included investigation of those providing logistical and military support to Sierra Leonean rebel groups) increased pressure on those involved in the arms trade. In this way, the indictment may have had bearing on Taylor’s ability to secure arms.

Liberia,⁷⁹ and more general revenge attacks were also believed imminent). Although the atmosphere in Monrovia was tense in the hours following the news,⁸⁰ the situation remained relatively calm. The US embassy in Monrovia responded to threats against US citizens and the embassy by making it clear to senior government and military officials and to rebels that they would be held responsible for any breakdown in law and order. An influential Liberian general made a statement on the radio urging calm.⁸¹

The rebels attacked Monrovia shortly after the indictment was announced, but the attack had been planned beforehand. According to the head of the responsible rebel group, the offensive, which resulted in hundreds of civilian casualties, would have occurred regardless—only if Taylor had been arrested instead of returned to Liberia would the attack have been canceled.⁸² Thus, there is a possibility that rather than prolong the conflict, a more active pursuit of justice, notably the immediate arrest and transfer of Taylor to the Special Court for Sierra Leone, would have shortened the conflict by two months.⁸³

Taylor's eventual detention in Nigeria in March 2006 and subsequent transfer to the Special Court was a relief to many who were concerned that he might continue to play a destabilizing role in Liberia and in the region.⁸⁴ Indeed, there were indications that while in Nigeria he continued to destabilize Liberia: the UN secretary-general reported to the Security Council that Taylor influenced the elections in Liberia from exile.⁸⁵ Despite warnings from Taylor's spiritual advisor that "there will be tremendous destabilization in Liberia if the extradition takes place," Taylor's transfer to The Hague did not provoke the anticipated "violent unrest."⁸⁶ His trial before the Special Court for Sierra Leone in The Hague began in June 2007.

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 the blocking by the peacekeeping force the Economic

⁷⁹ Hayner, ICTJ, "Negotiating peace in Liberia: Preserving the possibility for Justice," pp. 9-10.

⁸⁰ Farah, "Tribunal Indicts Liberia's Leader," *Washington Post*.

⁸¹ Hayner, ICTJ, "Negotiating peace in Liberia: Preserving the possibility for Justice," p. 10. See also Cobb, "Diplomatic Dismay as Liberia Rebels Poise For Final Push and Foreigners Flee," *allAfrica.com*.

⁸² Hayner, ICTJ, "Negotiating peace in Liberia: Preserving the possibility for Justice," pp. 10-11.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, p. 24.

⁸⁵ United Nations Mission in Liberia, "Seventh progress report of the Secretary-General on the United Nations Mission in Liberia," S/2005/391, June 16, 2005, <http://daccessdds.un.org/doc/UNDOC/GEN/No5/383/78/PDF/No538378.pdf?OpenElement> (accessed May 14, 2009), para. 12.

⁸⁶ David Clark, "Taylor warns of Liberia 'destabilization' if extradited: spiritual advisor," Agence France-Presse, March 21, 2006.

Community of West African States Monitoring Group (ECOMOG) of arms' delivery to Taylor—the Taylor case shows that an indictment may strengthen peace processes and that the feared consequences resulting from indicting a sitting head of state do not always come to pass.

B. Radovan Karadzic

Rejecting Bosnia's moves toward independence as Yugoslavia broke apart, from April 1992 onwards Bosnian Serbs began seizing control of large areas in Bosnia and Herzegovina, "ethnically cleansing" non-Serbs and subjecting them to systematic violence and persecution. Non-Serbs also committed violations of international humanitarian law. The conflict, which lasted from 1992 to 1995, was characterized by grave violations of human rights such as mass killings, rapes, widespread destruction, and displacement of populations.⁸⁷ These violations, due to their brutality and scale and because they were taking place in Europe, drew the attention of the international community. Following intensified NATO air strikes on Bosnian Serb forces in August 1995, the parties to the conflict agreed to attend peace negotiations outside of Dayton, Ohio, in the United States.

The negotiations opened 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. Eyewitnesses interviewed by Human Rights Watch at the time described their horror as the victims were lined up in front of mass graves and shot.⁸⁸ Women, children, and elderly persons deported from the area were also terrorized.

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 acts alleged to have occurred between 1992 and 1995 in several locations across Bosnia, including Sarajevo. At the time of this indictment, Western diplomats were negotiating with Karadzic and Mladic (two days before, a British, French, and US delegation had personally met with Mladic in Belgrade).⁸⁹ A

⁸⁷ See, for example, *Prosecutor v. Blagojevic and Jokic*, ICTY, Case No. IT-02-60-T, Judgment (Trial Chamber), January 17, 2005, paras. 568-569, 577, 616-618; *Prosecutor v. Brdjanin*, ICTY, Case No. IT-99-36-T, Judgment (Trial Chamber), September 1, 2004, paras. 1010-1013.

⁸⁸ "Bosnia: Arrest of Srebrenica Indictee Hailed," Human Rights Watch news release, April 16, 2001, <http://www.hrw.org/en/news/2001/04/16/bosnia-arrest-srebrenica-indictee-hailed>.

⁸⁹ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, (Princeton, NJ: Princeton University Press, 2000), p. 230.

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.⁹⁰ 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.⁹¹

However, the indictment of Karadzic ultimately facilitated the Dayton Peace Accords. 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 have sat at the same table with Karadzic.⁹² A US State Department official said that the tribunal "accidentally served a political purpose: it isolated Karadzic and left us with Sloba [Slobodan Milosevic]."⁹³ In his memoirs, the US negotiator Richard Holbrooke said that he made it very clear to Milosevic that Mladic and Karadzic could not participate in a peace conference. When Milosevic said that the attendance of the indicted men was necessary for peace, Holbrooke offered to arrest them personally if they set foot in the United States.⁹⁴

Despite rumors of amnesties, the Dayton peace talks were not negatively affected by the ICTY indictments against Karadzic and Mladic. 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."⁹⁵ A negotiator at Dayton confirmed that the activities of the ICTY did not hinder negotiators seeking the peace agreement, but in fact helped to cement it. He pointed out that "the Dayton Framework Agreement, in its Bosnian constitution, implicitly

⁹⁰ Richard J. Goldstone, "Justice as a Tool for Peacemaking: Truth Commissions and International Tribunals," *N.Y.U. Journal of International Law and Politics*, vol. 28: 485 (1996), p. 488.

⁹¹ Okun, "The Role of International Criminal Justice in Peace Negotiations," *25 Penn State International Law Review*, p. 787.

⁹² *Ibid.*, p. 788.

⁹³ Bass, *Stay the Hand of Vengeance*, p. 239.

⁹⁴ *Ibid.* p. 233; and 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?ncklick_check=1 (accessed June 16, 2009).

⁹⁵ Bass, *Stay the Hand of Vengeance*, p. 243.

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.’”⁹⁶ This provision helped speed Karadzic’s removal from his position in July 1996. Nor did the ICTY’s activities affect Milosevic’s role in negotiating the agreement: he accepted the Dayton Peace Accords ending the Bosnian conflict without obtaining an amnesty, even though he too was an obvious ICTY target.⁹⁷ He (and Karadzic, who signed the agreement) also agreed to the abovementioned clause despite some early misgivings.⁹⁸

Following a hearing at the ICTY in which the full trial chamber examined the indictment and supporting evidence in public, on July 11, 1996, an international arrest warrant was issued for Karadzic and Mladic.⁹⁹ In part because of the Dayton Peace Accords’ prohibition on suspected war criminals serving in office, eight days later Karadzic officially stepped down as president of the Republika Srpska. Mladic was dismissed as head of the armed forces in November 1996.¹⁰⁰ The removal of both Karadzic and Mladic resulted from their marginalization and their pariah status following their indictment.¹⁰¹ Their having to lay low to avoid arrest ultimately contributed to resolving the conflict and to creating a more stable situation in Bosnia.

An earlier willingness by NATO and governments in the region to apprehend the suspects would have further helped with implementation of the Dayton Peace Accords (see Chapter IV.C). Karadzic was not handed over by Serbia until 2008, more than a decade after the end of the war. Mladic remains at large.

⁹⁶ Okun, “The Role of International Criminal Justice in Peace Negotiations,” 25 *Penn State International Law Review*, p. 781.

⁹⁷ 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>.

⁹⁸ Bass, *Stay the Hand of Vengeance*, p. 233.

⁹⁹ *Prosecutor v. Radovan Karadzic and Ratko Mladic*, ICTY, Case No. IT-95-5-R61, IT 9518-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Evidence and Procedure, July 11, 1996.

¹⁰⁰ See Vince Crawley, “Dayton a ‘Seminal Moment’ in Diplomacy, State’s Burns Says,” *Washington File*, December 21, 2005 (“‘Dayton chased from power the despicable war criminals Radovan Karadzic and Ratko Mladic ...’ said under secretary of state Nicholas Burns who was a member of the negotiating team in Dayton”), <http://www.globalsecurity.org/military/library/news/2005/11/mil-051121-usia04.htm> (accessed May 12, 2009).

¹⁰¹ Goldstone, “Justice as a Tool for Peacemaking,” 28 *N.Y.U. Journal of International Law and Politics*, p. 501.

C. Lord's Resistance Army

In Uganda as well, many commentators feared that justice and the involvement of the International Criminal Court would prove an obstacle to peace. Although (unlike in the other cases) leaders of the Lord's Resistance Army have not been apprehended and the ultimate effect of the warrants is unknown, the warrants did not have any immediate devastating impact. The ICC's involvement may even have yielded unexpected short-term positive benefits including encouraging the parties to engage in peace talks, prompting some LRA defections, and raising the political costs to those supporting the LRA.

Driven by regional inequality, the conflict in northern Uganda to depose President Yoweri Museveni began immediately after he took power by force in 1986. The rebel LRA, rooted in northern Uganda, struck fear in the civilian population by carrying out mutilations, killings, and forced recruitment of child soldiers mostly from their own Acholi people. Ugandan soldiers of the Ugandan People's Defense Forces (UPDF) committed numerous human rights violations during the war as well, including willful killing, torture, and rape of civilians, and the government forcibly displaced the civilian population of Acholi-land into squalid camps, arguing that the move was needed to protect the population from the LRA and to cut off any civilian assistance to the LRA. Human Rights Watch has documented the numerous grave abuses by both sides in this long conflict.¹⁰²

Efforts to end the conflict decisively failed, and in 2000, following lobbying efforts by "elders and religious leaders from the [worst affected] Acholi region[,]""¹⁰³ the Ugandan Parliament passed a blanket amnesty for rebels who renounced violence and surrendered to the government. The chairman of the Amnesty Commission, Justice Peter Onega, described the passage of the Amnesty Act as "a deliberate effort to try and find a peaceful way of ending the conflicts and rebellions the country has had."¹⁰⁴ Though the population had suffered

¹⁰² Human Rights Watch/Africa, *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (New York: Human Rights Watch, 1997), <http://www.hrw.org/en/reports/1997/09/18/scars-death>; Human Rights Watch, *Stolen Children: Abduction and Recruitment in Northern Uganda*, vol. 15, no. 7(A), March 2003, <http://www.hrw.org/reports/2003/ugandao303/ugandao403.pdf>; *Abducted and Abused: Renewed Conflict in Northern Uganda*, vol. 15, no. 12(A), July 2003, <http://www.hrw.org/sites/default/files/reports/ugandao703.pdf>; *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, vol. 17, no. 12(A), September 2005, <http://www.hrw.org/sites/default/files/reports/ugandao905.pdf>.

¹⁰³ "UGANDA: Forgiveness as an instrument of peace," *IRINnews*, June 9, 2005, <http://www.irinnews.org/report.aspx?reportid=54859> (accessed May 15, 2009), quoting Justice Peter Onega, chairman of Uganda's Amnesty Commission.

¹⁰⁴ *Ibid.* Two years later, however, Justice Onega called for an end to blanket amnesty because "former rebels granted amnesty were going back into rebel activities and committing greater crimes against humanity." Josephine Maseruka and Charles Ariko, "Scrap blanket amnesty, says Onega," *New Vision* (Kampala), August 14, 2007, <http://www.newvision.co.ug/D/8/13/581394> (accessed May 26, 2009). See also The Uganda Human Rights Commission, Fifth Annual Report to parliament for the period of January 2001-September 2002, <http://www.uhrc.ug/uploads/Chapter3-8.pdf> (accessed May 15, 2009), p. 56 ("The passing of the amnesty law showed the government's desire [to] implement a policy of

enormously at the hands of the LRA, many supported a full amnesty out of desperation to put an end to the conflict.¹⁰⁵ Although a significant number of people benefitted from the amnesty, violence against civilians continued to worsen in the years following the Amnesty Act, particularly after each effort by the Ugandan armed forces to wipe out the LRA.¹⁰⁶

In December 2003 Museveni tried a new tack. He invited the International Criminal Court to investigate the LRA. In July 2005 the court issued sealed warrants for the arrest of the top five LRA leaders—Joseph Kony (head of the LRA), Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen—for crimes including widespread or systematic murder, sexual enslavement, rape, and war crimes such as intentionally attacking civilians and abducting and enlisting children under the age of 15.¹⁰⁷

The announcement of the referral to the ICC in January 2004 and the ICC's unsealing of warrants in October 2005 were met with a great deal of criticism. Numerous local nongovernmental organizations (NGO), international humanitarian organizations, academics, mediators, and others argued that ICC warrants would destroy the LRA's will to negotiate since they would ultimately end up on trial.¹⁰⁸ From March 16 to 18, 2005, Acholi leaders met with the ICC prosecutor in The Hague in an effort to dissuade him from requesting arrest warrants.¹⁰⁹ Later, 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."¹¹⁰ The Roman Catholic Archbishop in northern Uganda, John Baptist Odama, saw the ICC's decision to issue indictments against the LRA leadership as "the last nail in the coffin" for efforts to

reconciliation to establish peace, security and tranquility"); and Amnesty International Report 2001, Uganda chapter, reproduced at <http://www.unhcr.org/refworld/pdfid/3b1de3914.pdf> (accessed May 15, 2009).

¹⁰⁵ Lucy Hovil and Zachary Lomo, Refugee Law Project, "Whose Justice? Perceptions of Uganda's Amnesty Act 2000: the potential for conflict resolution and long-term reconciliation," working paper no. 15, February 2005, http://www.refugeelawproject.org/working_papers/RLP.WP15.pdf (accessed May 15, 2009), p. 24.

¹⁰⁶ See Human Rights Watch, *Abducted and Abused*, pp. 12, 41-58.

¹⁰⁷ *Prosecutor v. Kony, Otti, Odhiambo and Ongwen*, ICC, Case No. ICC-02/04-01/05, Decision on the prosecutor's application for the warrants of arrest under Article 58, July 8, 2005. Lukwiya died in 2006 and Otti in 2007. Once the court exercises its jurisdiction, it has the authority to prosecute crimes by any individual, regardless of affiliation, provided the crimes were committed after 2002.

¹⁰⁸ For a summary of the many criticisms, see 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), pp. 49-64.

¹⁰⁹ "UGANDA: Acholi leaders in The Hague to meet ICC over LRA probe," *IRINnews*, March 16, 2005, <http://www.globalsecurity.org/military/library/news/2005/03/mil-050316-irino3.htm> (accessed May 15, 2009).

¹¹⁰ "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.

achieve dialogue.¹¹¹ One-time chief mediator between the government and the rebels Betty Bigombe responded to the news of the warrants in October 2005 by saying, “There is now no hope of getting them to surrender. I have told the court that they have rushed too much.”¹¹² Others feared defenseless, displaced northern Ugandans would become prey to further LRA attacks.¹¹³ Justice Onega said that the ICC’s decision could encourage more atrocities as the LRA leadership could act as “desperately as a wounded buffalo.”¹¹⁴ He was also among those who argued that the ICC’s involvement was inconsistent with the 2000 Amnesty Act and Acholi principles of traditional justice.¹¹⁵ At the very least, many felt that the timing was “ill-conceived.”¹¹⁶ (For our part, Human Rights Watch expressed frustration that the prosecutor had not also made public investigations into crimes by the UPDF.¹¹⁷)

Two-and-a-half years after the referral, following changed circumstances in southern Sudan and an LRA attack that killed eight UN peacekeepers in the Democratic Republic of Congo, it has turned out that the warrants have not proved to be the detriment that many had feared.

¹¹¹ “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.

¹¹² “LRA talks over, says Bigombe,” *New Vision*, October 10, 2005, <http://www.newvision.co.ug/D/8/12/460057> (accessed May 15, 2009).

¹¹³ Cassandra Veney, “Between the Devil and the Deep Blue Sea: Internally Displaced Women and Girls in Liberia and Uganda and the Role of the International Community,” *Journal of International Women’s Studies*, vol. 7 (May 2006), p. 214; Adam O’Brien, “The impact of international justice on local peace initiatives: The case of Northern Uganda,” International Crisis Group (ICG) expert paper for International conference: Building a Future on Peace and Justice, June 2007, <http://www.crisisgroup.org/home/index.cfm?id=4927> (accessed June 18, 2009).

¹¹⁴ “ICC Indictment to affect northern peace efforts, says mediator,” *IRINnews*, October 10, 2005, <http://www.irinnews.org/report.aspx?reportid=56654> (accessed May 19, 2009).

¹¹⁵ Ibid.; Frank Nyakairu, “Uganda: Victims Want Special Court for Kony,” *Monitor* (Kampala), August 30, 2007, <http://allafrica.com/stories/200708291083.html> (accessed May 18, 2009); and Refugee Law Project, “ICC statement: position paper on the announcement of formal investigations of the Lord’s Resistance Army by the Chief Prosecutor of the International Criminal Court and its implications on the search for peaceful solutions to the war in northern Uganda,” July 28, 2004, <http://www.refugeelawproject.org/archive/2004/RLP.ICC.investig.pdf> (accessed May 15, 2009), pp. 7-9. Despite the calls for traditional justice, a survey (and Human Rights Watch’s own research) indicates only a small percentage of people in northern Uganda believe that traditional justice mechanisms are the most appropriate mechanism for dealing with those responsible for human rights violations. Patrick Vinck et al., “Research Note on Attitudes about Peace and Justice in Northern Uganda,” Human Rights Center at UC Berkeley report, August, 2007, <http://hrc.berkeley.edu/pdfs/Uganda-survey-research-note.pdf> (accessed May 18, 2009). See also Allen, Crisis States Research Center, “War and Justice in Northern Uganda,” p. 87 (“Many individuals we interviewed are very interested in the punishment of Kony and his commanders, and forgiveness is by no means as prevalent as is asserted by some activists and interest groups.”).

¹¹⁶ Refugee Law Project, “ICC statement: position paper,” July 28, 2004.

¹¹⁷ Human Rights Watch has called for the ICC Office of the Prosecutor to look into crimes by all sides, and if it determines that abuses by the government forces do not meet the criteria for ICC cases, to encourage the national authorities to investigate and prosecute them. See, for example, “ICC: Investigate All Sides in Uganda,” Human Rights Watch news release, February 4, 2004, <http://www.hrw.org/en/news/2004/02/04/icc-investigate-all-sides-uganda> (“Human Rights Watch has documented many shocking abuses by the LRA in Uganda,” said Richard Dicker, director of the International Justice program at Human Rights Watch. “But the ICC prosecutor cannot ignore the crimes that Ugandan government troops allegedly have committed.”). See also Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years*, 1-56432-358-7, July 2008, http://www.hrw.org/sites/default/files/reports/icc0708_1.pdf, p. 42, which recognizes that as a result of the prosecutor’s failure to investigate these crimes or adequately explain why he is not doing so, “the prosecutor’s work in Uganda is perceived by many of those in affected communities as one-sided and biased.”

Rather, the warrants have contributed to a number of fairly positive events, including isolating the LRA from some of its support base, bringing international attention to the plight of the northern Ugandans, encouraging the most promising talks since the start of the 20-year conflict, and ensuring that accountability formed a major part of the agenda for those talks.

Some analysts argue that Uganda's referral contributed to the LRA's isolation.¹¹⁸ Since the mid-1990s the LRA's only state supporter has been the Sudanese government in Khartoum, reportedly in retaliation for the Ugandan government's support of the rebel Sudan People's Liberation Movement/Army (SPLM/A).¹¹⁹ Not long after the referral was announced, Sudan agreed to a protocol allowing Ugandan armed forces to attack LRA camps in southern Sudan.¹²⁰ This access weakened the LRA's military capability. Following the signing of the Comprehensive Peace Agreement in January 2005, which ended hostilities between the Khartoum government and the SPLA, Sudanese armed forces withdrew from Southern Sudan, further weakening the LRA by depriving it of bases and support that it had enjoyed for years.¹²¹ The International Crisis Group (ICG) notes that the ICC's involvement raised the stakes for Khartoum as it could fall within the ICC's criminal investigation in Uganda for supporting the LRA.¹²² In October 2005 the government of Sudan signed a memorandum of understanding with the court agreeing to cooperate with arrest warrants issued against LRA commanders.¹²³ Though Sudan continued to support the LRA to some degree, it did so in a

¹¹⁸ Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *American Journal of International Law*, vol. 99 (April 2005), p. 404; Nick Grono and Adam O'Brien, "Justice in Conflict? The ICC and Peace Processes," in Nicholas Waddell and Phil Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, March 2008), pp. 15-16; and O'Brien, ICG, "The impact of international justice on local peace initiatives." See also Gareth Evans, "Justice, Peace and the International Criminal Court," International Crisis Group presentation to the Second Public Hearing of the Office of the Prosecutor, September 25, 2006, <http://www.crisisgroup.org/home/index.cfm?id=4431&l=1> (accessed May 18, 2009).

¹¹⁹ See Gerard Prunier, "Rebel Movements and Proxy Warfare: Uganda, Sudan and the Congo (1986-99)," *African Affairs*, vol. 103 (July 2004).

¹²⁰ Robert Smith, "Consolidated Appeals Process 2004: Mid-Year Review Uganda," UN Office for the Coordination of Humanitarian Affairs, May 2004, [http://ochadms.unog.ch/QuickPlace/cap/Main.nsf/h_398ED03FoBFE3FDCC1256DC2004EAC51/02DAEC2B53577A41C1256EA1004D2140/\\$FILE/MYR_2004_Uganda_PRINT.pdf?OpenElement](http://ochadms.unog.ch/QuickPlace/cap/Main.nsf/h_398ED03FoBFE3FDCC1256DC2004EAC51/02DAEC2B53577A41C1256EA1004D2140/$FILE/MYR_2004_Uganda_PRINT.pdf?OpenElement) (accessed May 18, 2009), p. 3; and "Uganda thanks Sudan for allowing its army to pursue rebels over border," *Sudan Tribune*, April 16, 2004, http://www.sudantribune.com/spip.php?page=imprimable&id_article=2511 (accessed May 18, 2009).

¹²¹ "UGANDA-SUDAN: Optimism that Sudanese peace deal could help pacify northern Uganda," *IRINnews*, January 11, 2005, <http://www.irinnews.org/Report.aspx?ReportId=52628> (accessed May 18, 2009).

¹²² O'Brien, ICG, "The impact of international justice on local peace initiatives."

¹²³ Grono and O'Brien, "Justice in Conflict? The ICC and Peace Processes," in Waddell and Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa*, p. 16.

much more surreptitious manner.¹²⁴ By severing most of its ties, Sudan significantly weakened the group, forcing it into “survival mode” at least temporarily.¹²⁵

The increased isolation of the LRA may have also contributed to significant defections, including by two members of Kony’s negotiating team.¹²⁶ 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 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.”¹²⁷

However, many of these defectors were given amnesty under the Amnesty Act of 2000, which had not been used frequently up to that point.¹²⁸ (For discussion as to why there should be no amnesty for the most serious crimes, see Chapter II.B; for analysis of problematic amnesties in other African conflicts, see Chapter V.)

The issuing of arrest warrants has been deemed one of a number of factors (including the US government decision to list the LRA as a terrorist group) that helped push the LRA and the Ugandan government to the negotiating table in Juba, Sudan, in mid-2006. Despite rebel leaders’ claims to the contrary,¹²⁹ people close to the peace process believe that LRA leaders

¹²⁴ Ibid.; and O’Brien, ICG, “The impact of international justice on local peace initiatives.”

¹²⁵ 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).

¹²⁶ Akhavan, “The Lord’s Resistance Army Case,” *American Journal of International Law*, pp. 404, 417-418.

¹²⁷ Allen, Crisis States Research Center, “War and Justice in Northern Uganda,” p. 58.

¹²⁸ Abigail Moy, “The International Criminal Court’s Arrest Warrants and Uganda’s Lord’s Resistance Army: Renewing the Debate over Amnesty and Complementarity,” *Harvard Human Rights Journal*, vol. 19 (2006), p. 271. Between January 1, 2000, and January 19, 2009, 12,503 former LRA combatants have received amnesty. Statistics provided by the Amnesty Commission, Kampala, January 19, 2009.

¹²⁹ Peter Clotey, “Uganda’s LRA Rebels Say ICC Arrest Warrants Obstacles to Peace,” radio report, Voice of America, November 13, 2007, <http://www.voanews.com/english/archive/2007-11/2007-11-13-voa2.cfm?CFID=201871731&CFTOKEN=11796895&jsessionid=8830a01d1ac6a00475005f774865744b5f39> (accessed May 18, 2009); and Peter Clotey, “Uganda’s LRA Rebels Displeased with ICC Chief Prosecutor,” radio report, Voice of America, October 15, 2007, <http://www.voanews.com/english/archive/2007-10/2007-10-15-voa2.cfm?moddate=2007-10-15> (accessed May 18, 2009).

decided to enter talks in part as a result of the ICC warrants.¹³⁰ The International Crisis Group's investigation into the peace talks led it to conclude that the threat of prosecution, and the issuance of warrants in particular, provided pivotal pressure propelling the rebels to peace talks. In speaking with commanders in the bush or their delegates at the negotiations, they found that "ICC' is usually the first and last word out of their mouths."¹³¹

Another benefit of the warrants that observers discerned was that the increased attention to the conflict resulting from the ICC's involvement galvanized international engagement in the peace processes for what has been described as "the biggest forgotten, neglected humanitarian emergency in the world today."¹³² Financial and political support from the international community for both humanitarian needs in northern Uganda and for the peace talks has been crucial.¹³³

In addition, the prospect of prosecution by the ICC helped insert the issue of accountability into the Juba peace negotiations and resulted in an important framework for holding all parties accountable for their actions. In February 2008 the parties agreed to pursue domestic trials of the ICC cases in Uganda via a special division of the Ugandan High Court created to try war crimes committed during the conflict.¹³⁴ This was an approach that, at least in principle, could satisfy LRA demands to avoid trial in The Hague while meeting

¹³⁰ Human Rights Watch interview with western diplomats (names withheld), Kampala, March 2 and 15, 2007.

¹³¹ O'Brien, ICG, "The impact of international justice on local peace initiatives." See also Grono and O'Brien, "Justice in Conflict? The ICC and Peace Processes," in Waddell and Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa*, pp. 15, 19; and Evans, ICG, "Justice, Peace and the International Criminal Court." Ironically, shortly before these peace talks, Museveni had again offered LRA leader Kony amnesty. "U.S. Position on LRA Amnesty," US Department of State press release, <http://northernuganda.usvpp.gov/lraamnesty.html> (accessed May 19, 2009); and Frank Nyakairu, "Uganda: Museveni amnesty to Kony illegal - ICC," *Monitor*, July 6, 2006, <http://www.afrika.no/Detailed/12493.html> (accessed May 18, 2009). This offer, however, did not become the focus of accountability discussions in Juba. Negotiations instead centered on the possibility of national alternatives—including the use of traditional justice measures—to trial by the ICC.

¹³² "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.

¹³³ O'Brien, ICG, "The impact of international justice on local peace initiatives;" Grono and O'Brien, "Justice in Conflict? The ICC and Peace Processes," in Waddell and Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa*, p. 17; Paul Seils, "The Impact of the ICC on Peace Negotiations," expert paper for International conference: Building a Future on Peace and Justice, June 2007; and Refugee Law Project "Only Peace can restore the confidence of the displaced," 2nd edition, October 2006, <http://www.refugeelawproject.org/others/RLP.IDMC2.pdf> (accessed May 18, 2009), p. III (noting that "the range of people involved in these [2006 peace] processes to date, and the level of media coverage, has been qualitatively different from earlier attempts"). See also Allen, Crisis States Research Center, "War and Justice in Northern Uganda," pp. 58-59.

¹³⁴ Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, June 29, 2007, paras. 4.1-4.2, 6.1-6.2; and Annexure to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement on 29th June 2007, Juba, Sudan, February 19, 2008, paras. 7, 10-14.

requirements under the ICC statute.¹³⁵ The parties concluded negotiations on all agenda items in March 2008, but Kony failed to appear to sign the final agreement. The conflict remains unresolved, and although violence has subsided in northern Uganda, civilians in the DRC (where the LRA is now based) continue to be victimized by the insurgents.¹³⁶

¹³⁵ For a more detailed discussion of these issues, see Human Rights Watch, *Benchmarks for Justice for Serious Crimes in Northern Uganda: Human Rights Watch Memoranda on Justice Standards and the Juba Peace Talks*, May 2007 – February 2008, http://www.hrw.org/legacy/pub/2008/ij/uganda_memos_cover.pdf.

¹³⁶ Uganda, Sudan, and the Democratic Republic of Congo launched a joint operation on December 14, 2008, against the LRA. Due to poor planning and logistical challenges, the operation failed to apprehend LRA leaders indicted by the ICC. The LRA responded by killing at least 865 civilians and abducting several hundred people. See, *The Christmas Massacres: LRA attacks on Civilians in Northern Congo*, 1-56432-438-9, February 2009, http://www.hrw.org/sites/default/files/reports/drco209web_o.pdf.

IV. The Price of Inclusion

Impunity ... can be an even more dangerous recipe for sliding back into conflict.

—UN Secretary-General Kofi Annan¹³⁷

In contrast to situations where alleged war criminals have been marginalized through indictments or arrest warrants, negotiators elsewhere have opted to include human rights abusers in a coalition government or a unified military in the hope of neutralizing them or enhancing stability (in effect granting them a de facto amnesty). Unlike the situations above where there are positive effects resulting from marginalization, inclusion of alleged perpetrators in government has not proved to be the panacea that it was thought 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. Human Rights Watch has documented how in post-conflict situations, leaders with records of past abuse have continued to commit abuses and have allowed lawlessness to persist or return. Rewarding alleged war criminals with government positions might actually encourage others to engage in criminal activity in the hope of receiving similar treatment. Furthermore, inclusion of criminal suspects in government erodes public confidence in the new order by sending a message to the population about the acceptance of such abuses and by further entrenching impunity. The following are examples of situations where this form of impunity has carried a high price.

A. Afghanistan

From 2001 onwards various international military powers, in particular the United States, relied upon mujahedin leaders and other warlords and regional strongmen to defeat the Taliban regime. Rather than marginalize the worst perpetrators from Afghanistan's recent past, key international actors assisted in bringing them under the umbrella of the new post-Taliban government. Justice was viewed as a luxury that could be sacrificed in favor of stability. Serious past human rights abuses including abduction, summary execution, torture of detainees, rape, and looting were overlooked.¹³⁸ The result has been continuing violence

¹³⁷ 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.reliefweb.int/rw/lib.nsf/db900sid/LHON-634JZY/\\$file/UNGA_Protection_civilians_Jun2004.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/LHON-634JZY/$file/UNGA_Protection_civilians_Jun2004.pdf?openelement) (accessed May 27, 2009), para. 55.

¹³⁸ Human Rights Watch, *Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity* (New York: Human Rights Watch, 2005), <http://www.hrw.org/reports/2005/afghanistano605/afghanistano605.pdf>.

and abuse of power by some of the warlords who now wield government power. Inclusion of those with blood on their hands in the new order eroded the legitimacy of the Afghan government in the eyes of Afghan people and has been used by opponents of the government to discredit it. Ignoring abuses has also fostered a culture of impunity and increasing lawlessness.

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.¹³⁹ The resulting Bonn Agreement called for the creation of a *loya jirga* (grand council), which was convened in June 2002, to choose an interim government.¹⁴⁰

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.¹⁴¹ The loya jirga also excluded anyone with links to terrorist organizations or who, "in the eyes of the people," had "been involved indirectly or directly in the killing of innocent people."¹⁴² 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.¹⁴³ The European Union (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."¹⁴⁴

¹³⁹ The Taliban is a movement started by religious students (*talibs*) from the Pashtun areas of eastern and southern Afghanistan who were educated in traditional Islamic schools in Pakistan.

¹⁴⁰ 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 23, 2009); and Joe Havelly, "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 23, 2009). 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 May 29, 2009), arts. 6-11.

¹⁴¹ Procedures for the Elections of the Members of the Emergency Loya Jirga, art. 14(4).

¹⁴² *Ibid.*, art. 14.

¹⁴³ See Laura Secor, "The Pragmatist," *The Atlantic*, July/August 2004, <http://www.theatlantic.com/doc/200407/secor> (accessed June 19, 2009).

¹⁴⁴ Debbie Whitmont, "Winter in Afghanistan: Travels Through a Hibernating War," *The Monthly* (Melbourne), March 2007, <http://www.themonthly.com.au/tm/node/478> (accessed May 29, 2009).

The Afghan government, intergovernmental organizations, and international military powers—in particular the United States—thus relied on alleged war criminals, human rights abusers, and drug-traffickers by including them in the government instead of prosecuting them. The result was reinforcement of a culture of impunity that worked against peace and stability and that fueled public disillusionment with the new Afghan government.¹⁴⁵

A Human Rights Watch mission looking at the loya jirga found that alleged war criminals in many areas were able to manipulate the process of delegate selection.¹⁴⁶ In several cases in northern and western Afghanistan, well-known regional warlords selected themselves to participate as delegates. In other areas, through shootings, threats, beatings, and arbitrary arrest, warlords and provincial government leaders were able to monopolize the selection processes and to hand-pick their own candidates.¹⁴⁷

During the loya jirga several powerful military and party leaders threatened and spied on less powerful delegates. Human Rights Watch documented numerous cases of threats, arbitrary arrests, and killings that took place at the time. The intimidation experienced during the loya jirga had a chilling effect on political activity as events remained fresh in the minds of former delegates and political party leaders.¹⁴⁸

During the September 2005 national assembly and local council elections, Human Rights Watch reported that the continuing “warlord problem” compromised participation in the election process.¹⁴⁹ The fear inspired by commanders whose past abuses remained fresh in the minds of ordinary Afghans had an impact on the election processes. Local commanders told voters and community leaders for whom to vote, sometimes with direct threats.¹⁵⁰ Several candidates exercised self-censorship and did not campaign outside of urban areas for fear of harassment or attack. Many voters and candidates told Human Rights Watch that they were frustrated by the fact that candidates with records of past abuse could not be

¹⁴⁵ Aryn Baker, “The Warlords of Afghanistan,” *Time Magazine*, February 23, 2009, <http://www.time.com/time/magazine/article/0,9171,1879167,00.html> (accessed June 26, 2009), p. 40.

¹⁴⁶ Such interference with the delegate selection process violated the loya jirga’s express prohibition of “[a]ll forms of coercion, intimidation, bribery, corruption, use of force and weapons during the elections.” See Procedures for the Elections of the Members of the Emergency Loya Jirga, art. 15.

¹⁴⁷ Human Rights Watch, *Afghanistan: Return of the Warlords*, June 2002, <http://www.hrw.org/en/reports/2002/06/06/afghanistan-return-warlords>.

¹⁴⁸ Human Rights Watch, “*Killing You is a Very Easy Thing for Us*”: *Human Rights Abuses in Southeast Afghanistan*, vol. 15, no. 5(C), July 2003, <http://www.hrw.org/sites/default/files/reports/afghanistano703.pdf>.

¹⁴⁹ Human Rights Watch, *Afghanistan on the Eve of Parliamentary and Provincial Elections*, September 2005, <http://www.hrw.org/en/reports/2005/09/15/afghanistan-eve-parliamentary-and-provincial-elections>, p. 17.

¹⁵⁰ *Ibid.*, p. 9.

sidelined from the process, and there was cynicism about claims that the democratic process would weaken and marginalize unpopular abusers: as one Pashtun elder said, “Until the government in Kabul says to them that they cannot take part in elections, until there is justice for all that they did to us, we cannot trust this process.”¹⁵¹ A candidate running for office commented,

The government says it has to let these men be candidates because they could make problems. That is not true, but that is what they say. Well, if the central government cannot stand up to them, how can they expect the people here—who live with these bloodthirsty commanders every day—to vote against them? We should not have to bear the pressure. It is the job of government.¹⁵²

The 2005 elections had been an opportunity to deepen the legitimacy of Afghanistan’s governmental institutions and hasten the end of the rule of warlords and gunmen, but they did not fulfill their promise. Instead, warlords and their proxies were elected.

In 2005-06 Human Rights Watch documented that many leaders implicated in egregious human rights abuses in the 1990s had become Afghan ministry officials or presidential advisors, or controlled puppet subordinates who held official positions.¹⁵³ They included 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 current vice president Karim Khalili, who despite having records of war crimes and serious abuses during Afghanistan’s civil war in the 1990s were allowed to hold and exploit positions of power.¹⁵⁴ A February 2009 *Time Magazine* article describes how General Dostum, implicated in the suffocation deaths of hundreds of captives inside shipping containers, acts as an emissary for President Karzai.¹⁵⁵ On May 4, 2009, Karzai selected Mohammed

¹⁵¹ Ibid., p. 17.

¹⁵² Ibid., p. 17.

¹⁵³ Ibid.; and “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>.

¹⁵⁴ “Afghanistan: Bush, Karzai, Musharraf Must Act Now to Stop Militant Abuses,” Human Rights Watch news release. 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 24, 2009); Ahmed Rashid, “Afghan Human Rights Abuses: A Chance for Change,” commentary, *Eurasianet*, August 4, 2005, <http://www.unhcr.org/refworld/docid/46f257f9c.html> (accessed April 24, 2009); 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 24, 2009).

¹⁵⁵ Baker, “The Warlords of Afghanistan,” *Time Magazine*, p. 41.

Fahim, whose troops were implicated in abuses such as rape and summary executions in 1993, to be one of his vice-presidential running mates in the next elections.¹⁵⁶

Persistent and recurring human rights violations have been carried out by officials such as Dostum and Sayyef who would not have come to power without the intervention and support of the international community in 2001.¹⁵⁷ As a researcher with the Afghanistan Human Rights Commission put it, “Right after the collapse of the Taliban, the government had the opportunity to go after these commanders because they were scared and weak. Instead, the international community and the government supported them and made them stronger. They didn’t bring them to justice. They waited until they committed more crimes. For this we ousted the Taliban?”¹⁵⁸

In 2003 another observer noted, “A very short-term compromise was made in 2001 after the collapse of the Taliban that we need stability, therefore let’s bring all these warlords into the tent and keep them on our side.”¹⁵⁹ Years on, the “short-term compromise” is entrenched in Afghanistan’s political dynamics. A former NATO official in Afghanistan stated in 2009 in regard to alleged major war criminals, “There are so many other things we have to worry about so why go and open this can of worms?” This is an attitude shared by many.¹⁶⁰ Although bringing warlords implicated in crimes to trial presented significant challenges in post-Taliban Afghanistan, the decision not to take on that challenge and instead to include them in government has been costly. Abusive actions by local strongmen and their forces have undermined the government’s legitimacy and caused widespread fear and cynicism among Afghans.¹⁶¹ As Afghan human rights activist Nader Nadery said, “The militia leaders became part of the structure and 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.”¹⁶²

¹⁵⁶ Abdul Waheed Wafa, “Karzai Enlists Former Warlord as Running Mate,” *New York Times*, May 5, 2009, http://www.nytimes.com/2009/05/05/world/asia/05afghan.html?_r=1&scp=1&sq=vice%20president%20warlord%20afghanistan&st=cse (accessed May 6, 2009); and Meo, “Afghan Warlords Poised to Take Up Power,” *Independent*.

¹⁵⁷ Human Rights Watch, “*Killing You is a Very Easy Thing for Us*,” pp. 10-11.

¹⁵⁸ Baker, “The Warlords of Afghanistan,” *Time Magazine*, p. 41.

¹⁵⁹ Paul Anderson, “Afghan War Criminals Still Unpunished,” *BBC News Online*, December 9, 2003, http://news.bbc.co.uk/1/hi/world/south_asia/3301335.stm (accessed May 29, 2009), quoting Andrew Wilder of the Afghanistan Research and Evaluation Unit, an independent research organization based in Kabul.

¹⁶⁰ Baker, “The Warlords of Afghanistan,” *Time Magazine*, p. 41.

¹⁶¹ Human Rights Watch, *Afghanistan on the Eve of Parliamentary and Provincial Elections*, p. 9.

¹⁶² Whitmont, “Winter in Afghanistan: Travels Through a Hibernating War,” *Monthly*.

By 2006 the Taliban and other insurgent groups in Afghanistan had gained increased public support due to the government's failure to provide essential security and development. 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.¹⁶³ The ongoing lawlessness helps the Taliban portray its rule in the 1990s as one of relative law and order.¹⁶⁴ 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. Taliban leader Mullah Omar said in a communiqué, "If the police of a state consist of people who are immoral and irreligious ... how can they protect the property, dignity and honor of the people?"¹⁶⁵ The same argument could be made with respect to the militia leaders holding power in government. Thus, the accommodation of warlords and failure to secure justice for their misdeeds have ultimately served to tarnish public perception of the Afghan government and, in turn, may contribute to ongoing instability.¹⁶⁶ As Francesc Vendrell stated,

In Muslim society, justice is the most essential element, and here in Afghanistan, people simply don't see it exist. They see impunity, they see a few people become extremely wealthy and they see cruelty. Therefore I think many of them are fence sitters. And you can't hope to win an insurgency when the civilians are sitting on the fence.¹⁶⁷

An extensive survey by the Afghan Human Rights Commission conducted in 2004 found that the vast majority of Afghans considered justice for crimes very important and felt that bringing suspected war criminals to justice—and soon—would improve stability.¹⁶⁸ Little progress has been made, however, notwithstanding the Afghan citizenry's emphatic support for justice initiatives. A positive development occurred in December 2006 when the Afghan

¹⁶³ See, for example, International Crisis Group, "Policing in Afghanistan: Still Searching for a Strategy," December 18, 2008, <http://www.crisisgroup.org/home/index.cfm?id=5824&l=1> (accessed April 24, 2009) ("there is a general perception in Afghanistan that lawlessness is on the rise"), p. 1.

¹⁶⁴ ICG, "Afghanistan: New U.S. Administration, New Directions," March 13, 2009, <http://www.crisisgroup.org/home/index.cfm?id=6007&l=1> (accessed April 24, 2009), pp. 5-6.

¹⁶⁵ *Ibid.*, p. 6.

¹⁶⁶ "Afghanistan: Justice for War Criminals Essential to Peace," Human Rights Watch news release, December 12, 2006, <http://hrw.org/english/docs/2006/12/11/afghan14826.htm>.

¹⁶⁷ Baker, "The Warlords of Afghanistan," *Time Magazine*.

¹⁶⁸ 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."

government approved an Action Plan on Peace, Reconciliation and Justice that included establishment of a justice and accountability mechanism. However, following the announcement of the action plan, a coalition of former warlords, ex-Taliban officials, and former communist leaders pushed a highly controversial resolution through both houses of the parliament. The bill provided full amnesty for all war criminals and banned public criticism of government authorities and militia leaders who ruled Afghanistan after the demise of the communist government. In March 2007 the Afghan parliament passed a revised resolution granting itself a general amnesty, yet recognized the rights of victims and their families to bring civil or criminal claims. The president did not sign the resolution into law so it is unlikely ever to become operative.¹⁶⁹ Nonetheless, the effort to secure amnesties demonstrates another peril of including alleged war criminals in the government: the entrenchment of impunity.

Gulbuddin Hekmatyar

The 2001 Bonn Agreement was not the first time accommodation with alleged war criminals was used in an effort to procure peace in Afghanistan. Repeated efforts in the 1990s to accommodate Gulbuddin Hekmatyar show how, on an individual level, the decision to forego justice in favor of inclusion can be costly.

Hekmatyar is one of Afghanistan's most notorious and destructive warlords. He is the head of the Hezb-e Islami, a predominantly Pashtun faction that was one of the primary recipients of military assistance from the United States and Pakistan throughout the 1980s and early 1990s. Hezb-e Islami began as a resistance movement based in Pakistan fighting the Soviet occupation of Afghanistan. In the 1980s Hezb-e Islami was associated with abuses including indiscriminate attacks on civilians and summary executions of prisoners from a rival mujahedin group.¹⁷⁰ The United States and others chose to disregard evidence of abuses by Hekmatyar, despite the fact that his group was backed by millions of dollars of US military aid.

In 1992, the year following the collapse of the Soviet-backed government in Afghanistan, Kabul was the scene of almost constant armed conflict among belligerent Afghan military forces. Various factions, including Hekmatyar's, battled over the city and committed atrocities against the civilian population. Human Rights Watch gathered accounts showing

¹⁶⁹ See, for example, Ron Synovitz, "Afghanistan: Amnesty Law Draws Criticism, Praise," *Radio Free Europe/Radio Liberty*, March 14, 2007, <http://www.rferl.org/content/article/1075272.html> (accessed May 11, 2009).

¹⁷⁰ Human Rights Watch, *World Report 1990* (New York: Human Rights Watch, 1991), Afghanistan chapter, <http://www.hrw.org/legacy/reports/1990/WR90/>.

that Hezb-e Islami forces used artillery and rockets in apparently intentional attacks on populated civilian areas, failing to properly aim (with respect to artillery guns), recklessly using weapons that could not be aimed in a dense civilian setting (with respect to rockets), and unlawfully treating the city as one unified military target.¹⁷¹ In the summer of 1992 alone, shelling and rocket attacks by Hekmatyar's forces killed at least 2,000 people, mainly civilians.¹⁷² In addition, Hezb-e Islami troops were involved in murder, rape, and looting in Kabul during 1992-93.¹⁷³

As the head of Hezb-e Islami, Hekmatyar had command responsibility for the forces under his control that were implicated in crimes. He was unambiguously the sole military and political leader of Hezb-e Islami forces and was in command during its attack on Kabul.¹⁷⁴ Nonetheless, Hekmatyar was named prime minister as part of the March 1993 Islamabad Accord. He served as prime minister from March 1993 until early 1994, when he again attempted to overthrow the government. His forces launched indiscriminate rocket attacks on Kabul intermittently until February 1995.¹⁷⁵ After his rocket attacks had almost completely destroyed Kabul, the Afghanistan government tried to settle peacefully with Hekmatyar again and for a third time offered him a position as prime minister for the purpose of joining forces against the Taliban. He accepted and served as prime minister from June 26 to September 27, 1996, when the Taliban took over Kabul and forced him to flee.

Hekmatyar and the Taliban were initially bitter rivals. However, on December 25, 2002, Hekmatyar and the Taliban publicly announced that they were coordinating their activities against the Afghan government and its international supporters. Media reports from 2006 indicate that Hekmatyar's son, Jamaluddin, has represented Hezb-e Islami at meetings with the Taliban.¹⁷⁶

¹⁷¹ Many commanders and troops were trained by US, UK, and Pakistani experts on the use of rocket and artillery systems. Footage from the period shows that when they wanted to, Hezb-e Islami forces could precisely aim artillery. However, the prolonged timeframe in which attacks took place, their scope, and continued inaccuracy indicated that Hezb-e Islami and Hekmatyar were deliberately targeting Kabul as a whole entity to kill and terrorize civilians. Human Rights Watch, *Blood-Stained Hands*, pp. 41-42.

¹⁷² Human Rights Watch, *World Report 1993* (New York: Human Rights Watch 1992), Afghanistan chapter, http://www.hrw.org/legacy/reports/1993/WR93/Asw-01.htm#P40_15369.

¹⁷³ Human Rights Watch, *Blood-Stained Hands*, pp. 53-60, 63, 116-118.

¹⁷⁴ *Ibid.*, pp. 116-118.

¹⁷⁵ Human Rights Watch, *Backgrounder on Afghanistan: History of the War*, October 2001, <http://www.hrw.org/legacy/backgrounder/asia/afghan-bck1023.htm>.

¹⁷⁶ The relationship between Hekmatyar and the Taliban is complicated, and not believed currently to be close. Peter Lee, "The Worst-Best Hope in Afghanistan: Meet Gulbuddin Hekmatyar," *Counterpunch*, March 9, 2009, <http://www.counterpunch.org/lee03092009.html> (accessed April 29, 2009).

Since then, Hekmatyar's group has been implicated in many other attacks. For example, Human Rights Watch documented 204 attacks against schools between January 1, 2005, and June 21, 2006, and named Hekmatyar as one of those responsible.¹⁷⁷ During the attacks teachers were beheaded, schools were blown up, and students were warned against attending school. The attacks had a serious impact on education, particularly for girls.¹⁷⁸ In addition, since early 2006 the Taliban and Hezb-e Islami have carried out an increasing number of armed attacks that have either targeted civilians or disregarded the impact on civilian life. Human Rights Watch counted at least 699 civilian casualties from insurgent attacks in 2006, including 189 bomb attacks.¹⁷⁹ Insurgent attacks killed at least 950 civilians in 2007 and intensified in 2008, killing 1,160 civilians.¹⁸⁰

On February 19, 2003, the US government designated Hekmatyar as a "Specially Designated Global Terrorist" because of his participation in and support for Taliban and al-Qaeda terrorist activity.¹⁸¹ If Hekmatyar had been called to account for crimes committed in the early 1990s, instead of handed government appointments, then some of this suffering may have been averted. Instead, he may soon be back at the negotiation table.¹⁸²

B. Democratic Republic of Congo

A pervasive culture of impunity has 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

¹⁷⁷ Human Rights Watch, *Lessons in Terror: Attacks on Education in Afghanistan*, vol. 18, no. 6(C), July 10, 2006, <http://www.hrw.org/en/reports/2006/07/10/lessons-terror>, pp. 31-32.

¹⁷⁸ Ibid., p. 51; Human Rights Watch, *The Human Cost: The Consequences of Insurgent Attacks in Afghanistan*, vol. 19, no. 6(C), April 15, 2007, <http://www.hrw.org/sites/default/files/reports/afghanistano407webwcover.pdf>, pp. 74-75.

¹⁷⁹ Human Rights Watch, *Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan*, 1-56432-362-5, September 2008, <http://www.hrw.org/en/reports/2008/09/08/troops-contact>; and *The Human Cost*, p. 3.

¹⁸⁰ Human Rights Watch, *Troops in Contact*; and "Number of Afghan civilian deaths in 2008 highest since Taliban ouster, says UN," *UN News Service*, February 17, 2009, <http://www.un.org/apps/news/story.asp?NewsID=29918&Cr=Afghan&Cr1=civilian+rights> (accessed April 24, 2009). In 2008, UN monitors observed a shift in the insurgents' focus from direct attacks on international troops to more "civilian-blind" measures, such as bombs and suicide attacks. See "Afghan Civilian Deaths Rise Sharply in 2008," *CNN.com*, June 29, 2008, <http://www.cnn.com/2008/WORLD/asiapcf/06/29/afghanistan/index.html> (accessed April 24, 2009).

¹⁸¹ "U.S. Designates Gulbuddin Hekmatyar a 'Global Terrorist,'" *Voice of America news*, February 20, 2003, <http://www.voanews.com/english/archive/2003-02/a-2003-02-20-9-US.cfm?moddate=2003-02-20> (accessed May 13, 2009).

¹⁸² Carlotta Gall, "As U.S. Weighs Taliban Negotiations, Afghans are Already Talking," *New York Times*, March 11, 2009, http://www.nytimes.com/2009/03/11/world/asia/11taliban.html?_r=1 (accessed April 23, 2009).

violations.¹⁸³ A Congolese lawyer, dismayed by such promotions, remarked, “In Congo we reward those who kill, we don’t punish them.”¹⁸⁴

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.¹⁸⁵ 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.

Congo has been wracked by two wars over the past dozen years. The first, from 1996 to 1997, ousted long-time ruler Mobutu Sese Seko and brought to power Laurent Desire Kabila, the leader of a rebel alliance supported by the Rwandan and Ugandan armies. A year later, Laurent Kabila turned on his former backers Rwanda and Uganda who in turn launched the second Congo war, which lasted from 1998 to 2003. Sometimes referred to as “Africa’s first World War,” the second war drew in six other African countries, spawned a host of rebel groups and local militias, and ultimately resulted in the deaths of an estimated 5.4 million people.¹⁸⁶ In 2002, international pressure led to peace discussions between the national government and the major rebel groups in Sun City, South Africa, which paved the way for the establishment of a transitional government in June 2003.

¹⁸³ Human Rights Watch, *World Report 2005*, Democratic Republic of Congo chapter, <http://www.hrw.org/legacy/wr2k5/wr2005.pdf>.

¹⁸⁴ Human Rights Watch, *Democratic Republic of Congo – Renewed Crisis in North Kivu*, vol. 19, no. 17(A), October 2007, <http://www.hrw.org/reports/2007/drc1007/drc1007web.pdf>, p. 59. Despite the government’s policy of appeasing human rights abusers, an August 2008 survey by the Berkeley-Tulane Initiative on Vulnerable Populations found that in eastern DRC 85 percent of the population believes that it is important to hold those who committed war crimes accountable and that accountability is necessary to secure peace. Patrick Vinck, Phuong Pham, Suliman Baldo, and Rachel Shigekane, “Living With Fear: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo,” August 2008, <http://hrc.berkeley.edu/pdfs/LivingWithFear-DRC.pdf> (accessed May 20, 2009), p. 2.

¹⁸⁵ 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).

¹⁸⁶ Many of the deaths were due to hunger and lack of medical care, others due to direct violence. Benjamin Coghlan et al., International Rescue Committee and Burnet Institute, “Mortality in the Democratic Republic of Congo: An Ongoing Crisis,” January 2008, http://www.theirc.org/resources/2007/2006-7_congomortalitysurvey.pdf (accessed May 20, 2009), pp. ii, 16.

1. Incorporating abusers in the transitional government

As agreed during the 2002 Sun City peace talks, the transitional government passed an amnesty law that granted amnesty for engaging in acts of war, but specifically excluded amnesty for war crimes, crimes against humanity, and genocide.¹⁸⁷ Despite setting a marker that such crimes were punishable, 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.

One such individual was Gabriel Amisi, promoted to the rank of general. Amisi, also known as “Tango Fort,” had been a senior commander in the Rwandan-backed Congolese Rally for Democracy-Goma (Rassemblement Congolais pour la Democratie-Goma, RCD-Goma), one of the main rebel groups fighting in the DRC from 1998 to 2003. According to research by Human Rights Watch, in May 2002 Amisi and another RCD-Goma commander, Laurent Nkunda (see below), were responsible for the brutal suppression of a mutiny in Kisangani where at least 80 people were summarily executed.¹⁸⁸ This included over two dozen people who were beaten, bound, and gagged before being executed and their weighted bodies thrown off a bridge into the water below.¹⁸⁹

The UN high commissioner for human rights and the under-secretary-general for peacekeeping operations briefed the Security Council on the Kisangani killings following their own investigations. The high commissioner called on the Congolese authorities to arrest those who were involved in the massacre and warned of further bloodshed if those responsible for the May massacre were not brought to justice.¹⁹⁰ In response, the Security Council issued a presidential statement demanding that RCD-Goma “take the necessary measures to bring the perpetrators and those among them who ordered or were involved in

¹⁸⁷ Amnesty Decree-Law [Democratic Republic of Congo], *Journal Officiel de la République Démocratique du Congo*, No. 03-001 of 15 April 2003, <http://www.unhcr.org/refworld/docid/47305aae2.html> (accessed May 20, 2009); Amnesty Law [Democratic Republic of Congo], No. 05/023 of 19 December 2005, <http://www.unhcr.org/refworld/docid/47305d032.html> (accessed May 20, 2009). In May 2009 the DRC parliament passed another amnesty law for armed groups in North and South Kivu, providing for similar amnesty provisions as 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 May 20, 2009).

¹⁸⁸ 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/DRCo802.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 May 20, 2009).

¹⁸⁹ Human Rights Watch, *War Crimes in Kisangani*, p. 19.

¹⁹⁰ United Nations Security Council, “Report of the UN High Commissioner for Human Rights on the events that occurred in Kisangani, DR Congo,” United Nations report, S/2002/764, July 16, 2002, <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/c7e77bb921b2d120c1256coe002fccd7> (accessed May 20, 2009).

the massacres to justice.”¹⁹¹ Despite the international condemnation of the crimes, neither Amisi, Nkunda, nor other officers believed to be responsible were investigated or charged. Less than a year later, Amisi and Nkunda were promoted to generals in the new Congolese army. At this writing, Amisi is the chief of staff of the Congolese army. Other individuals with a known track record of human rights abuses were also granted important posts. Few diplomats condemned the promotions.¹⁹²

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. Violence continued in the Ituri district of Oriental province, in North and South Kivu provinces, and in parts of Katanga province where splinter factions emerged or new armed groups were created. Continued violence, with devastating results for civilians, was perceived by armed groups as the best way to 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.”¹⁹³

2. New armed groups want official appointments

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 2009.¹⁹⁴ 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.¹⁹⁵

¹⁹¹ “Security Council Demands the Rebel Group in Democratic Republic of Congo Bring Perpetrators of Kisangani Massacres to Justice”, UN press release, SC/7462, including Presidential Statement S/PRST/2002/22, July 23, 2002, <http://www.un.org/News/Press/docs/2002/SC7462.doc.htm> (accessed June 16, 2009).

¹⁹² Human Rights Watch, *Renewed Crisis in North Kivu*, pp. 75-77.

¹⁹³ Human Rights Watch interview with armed group leader (name withheld), Bunia, September 18, 2003.

¹⁹⁴ 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,” *UN News Service*, April 9, 2009, <http://www.un.org/apps/news/story.asp?NewsID=30442&Cr=democratic&Cr1=congo> (accessed May 20, 2009); 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 May 20, 2009).

¹⁹⁵ 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 *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/HRWDRCreport.pdf>, pp. 21-22.

In August 2003 President Joseph Kabila (the son and successor of Laurent Kabila, who was assassinated in 2001) called the leaders of the armed groups to Kinshasa to discuss establishing order in Ituri. All parties signed a memorandum of understanding to end hostilities, and then the government instructed them not to return to Ituri, placing them under a form of loosely policed “house arrest” at a Kinshasa hotel, where they were placated with promises of possible positions in the government or the army.¹⁹⁶

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.

One of those appointed to the rank of general was Jerome Kakwavu, the commander of the People’s Armed Forces of the Congo (Forces Armées du Peuple Congolais, 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.¹⁹⁷ In late 2004 and early 2005 evidence of Kakwavu’s crimes was uncovered by the United Nations Mission in Congo (Mission de l’Organisation des Nations Unies en République démocratique du Congo, MONUC) when it took physical control of a former FAPC military base at Ndrele. A judicial investigation, with the assistance of MONUC, alleged that Kakwavu had committed war crimes, but no arrest warrant was issued. At this writing Kakwavu remains a general in the Congolese Army.¹⁹⁸

In the same round of appointments, Floribert Kisembo Bahemuka was appointed a general. Kisembo had been the military chief of staff of the Union of Congolese Patriots (Union des Patriotes Congolais, UPC) and was one of the commanders responsible in late 2002 for a campaign of executions and forced disappearances of civilians who opposed UPC policies in Bunia. UPC troops under Kisembo’s command also participated in ethnic slaughter of civilians at more than a dozen places across Ituri.¹⁹⁹ Despite warrants from the ICC for the arrest of two of his colleagues in the UPC, one of whom was a subordinate, Kisembo has to

¹⁹⁶ Human Rights Watch interviews with Floribert Njabu, October 7, 2003, and other government officials (names withheld), October 7-9, 2003. See also Human Rights Watch, *The Curse of Gold*, p. 61.

¹⁹⁷ “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>; and Human Rights Watch, *The Curse of Gold*, pp. 84-94.

¹⁹⁸ Human Rights Watch interview with Congolese justice officials, Kinshasa, June 2007. Congolese government, Judicial documents on Gen. Jerome Kakwavu, December 2004 to July 2005, copies on file with Human Rights Watch.

¹⁹⁹ “D.R. Congo: Army Should Not Appoint War Criminals,” Human Rights Watch news release; and Human Rights Watch, *The Curse of Gold*, pp. 27-34.

date not been charged and instead is the deputy commander of the military region of Maniema province, in eastern Congo.

The Congolese authorities contended that integrating these and other commanders with abusive records was a way of removing them from Ituri, thus making it easier to end the fighting there.²⁰⁰ But by doing so the government reinforced the message that brutalities would not only go unpunished, but might be rewarded with a government post. The message was clear: violence brings rewards.²⁰¹

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 May 2006, one of these groups, the Front for National Integration (Front Nationalist et Integrationist, FNI), killed a UN peacekeeper and took seven others hostage. As part of negotiations to free the peacekeepers, FNI's leader, Peter Karim, demanded a position as a general in the Congolese army. According to a UN official involved in the negotiations, Karim was given verbal assurances that a high ranking position would be offered to him.²⁰² It set the direction for a further round of promoting warlords to positions of power.

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.²⁰³ Their leaders—including Peter Karim—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

²⁰⁰ 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 June 3, 2009), 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;" "D.R. Congo: Army Should Not Appoint War Criminals," Human Rights Watch news release.

²⁰¹ 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*.

²⁰² Human Rights Watch interview with United Nations official involved in the negotiations (name withheld), Goma, July 2006.

²⁰³ Accord Cadre Pour La Paix En Ituri entre le Gouvernement de la République Démocratique du Congo et les Groupes Armés de L'Ituri (MRC, FNI, FRPI), Bunia, Democratic Republic of Congo, November 29, 2006, copy on file with Human Rights Watch.

Human Rights Watch, “Maybe if we had killed more people, I would have become a general.”²⁰⁴

A similar pattern emerged in Katanga province. Between 2003 and 2006 a local defense force known as the Mai Mai, which had been allied to the Congolese government during the second Congo war, turned against its former backer when salaries and logistical support were no longer forthcoming and few of their commanders received important positions in the transitional government. Commanded by Gedeon Kyungu Mutanga, the Mai Mai killed, raped, and abused civilians. In some cases they publicly tortured victims before killing and cannibalizing them in ceremonies intended to terrorize the local population. When the government launched military operations against the group, the violations by both sides intensified. The suffering and brutalities were so widespread that local residents called the region “the triangle of death.”²⁰⁵

As with rebel groups in Ituri, Mai Mai used violence as a means to impose their control over the area and to gain leverage in negotiations. Mai Mai combatants deliberately killed more than 40 local chiefs and state representatives in various localities and threatened others. When the government organized peace talks with some of the Mai Mai leadership, they presented a list of demands including military and other positions for their commanders. Some Mai Mai leaders surrendered, were named colonels and majors in the national army, and have never faced justice.²⁰⁶

In May 2006 Gedeon surrendered to UN peacekeeping forces believing that he was being taken to a meeting with President Kabila. Following intense pressure from the UN and civil society organizations, the government broke from previous practice and detained Gedeon rather than promoting him. A year later he and 20 other co-accused were brought to trial in what became the largest trial involving crimes against humanity in Congo’s history. He was found guilty on March 5, 2009.²⁰⁷

²⁰⁴ Human Rights Watch interview with former armed group combatant (name withheld), Bunia, September 8, 2006.

²⁰⁵ Legal Submission from Human Rights Watch to Congolese Minister of Justice Kisimba Ngoy, “War Crimes Allegedly Committed by the Mai Mai in Katanga,” July 21, 2006, <http://www.hrw.org/legacy/campaigns/drc/2006/katanga/pdfs/DRC%20Mai%20Mai%20Submission%20En.pdf>, pp. 3-15.

²⁰⁶ “DR Congo: Mai Mai Warlord Must Face Justice,” Human Rights Watch news release, May 18, 2006, <http://www.hrw.org/en/news/2006/05/18/dr-congo-mai-mai-warlord-must-face-justice>.

²⁰⁷ “DR Congo: Militia Leader Guilty in Landmark Trial,” Human Rights Watch news release, March 10, 2009, <http://www.hrw.org/en/news/2009/03/10/dr-congo-militia-leader-guilty-landmark-trial>.

At times, Congolese judicial officials with the help of UN human rights specialists did try to stem the wave of impunity, as evidenced by the trial against Gedeon, but too often their efforts were undermined by political interference, corruption, or prison breaks where some militia leaders who had been arrested managed to escape.²⁰⁸ The ongoing impunity left alleged war criminals free to continue to commit crimes. Two stark examples of the vicious circle are Laurent Nkunda and Bosco Ntaganda.

3. Repeat offenders, contrasting fortunes – Laurent Nkunda and Bosco Ntaganda

In the years following the 2003 peace agreement that established Congo's transitional government, new armed groups also emerged in North and South Kivu provinces claiming their grievances had not been addressed, with some seeking positions in government or the army or a redistribution of power to the local level. By January 2008 there were 22 such armed groups.

One of the most important leaders in the new batch of armed groups that emerged in North Kivu was Laurent Nkunda. In June 2003 the transitional government named Nkunda as a general in the new Congolese army despite his track record of abuses in Kisangani as described above.²⁰⁹ Unlike his former colleague Gabriel Amisi, Nkunda, a Congolese Tutsi, refused to take up his post citing concerns for his own safety.²¹⁰ The next year, following a dispute between military commanders in South Kivu, he joined another former RCD-Goma commander, Jules Mutebutsi, and marched on Bukavu with some 1,000 troops. Nkunda claimed he “wanted to protect his people”²¹¹ (while there had been targeted killings of some 15 individuals, mostly Tutsi,²¹² his claim that the military operation he mounted was motivated solely by this concern seems unlikely). Human Rights Watch researchers

²⁰⁸ The UN special rapporteur on the independence of judges and lawyers, after a visit to the DRC in April 2007, concluded that interference by the executive and the army in judicial proceedings was “very common” and that the DRC’s judicial system was rarely effective, with human rights violations generally going unpunished. UN Commission on Human Rights, Report of the Special Rapporteur on the independence of judges and lawyers: Preliminary note on the mission to the Democratic Republic of Congo, Leandro Despouy, A/HRC/4/25/Add.3, May 24, 2007, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/4session/A.HRC.4.25.Add.3.pdf> (accessed May 21, 2009), p. 3.

²⁰⁹ “DRC: Controversy Surrounds Certain Military Appointees,” *IRINnews*, August 26, 2003. The UN special rapporteur indicated her unhappiness at seeing Nkunda, who had been accused of crimes and human rights violations, being appointed to government institutions. See “DRC: Three RDC-Goma officers summoned before military court,” *IRINnews*, September 10, 2003, <http://www.irinnews.org/PrintReport.aspx?ReportId=46037> (accessed May 21, 2009).

²¹⁰ The new military leader called for the arrest of Nkunda and two other officers who refused to attend the ceremony. “Congo’s army orders arrest of three rebel officers,” Reuters, September 10, 2003.

²¹¹ Human Rights Watch, *Briefing to the African Union Member States: Third Summit of the African Union*, July 2004, <http://www.hrw.org/legacy/background/africa/africanunion/africanunion0704.pdf>, p. 11.

²¹² Those who were targeted were Banyamulenge, Congolese people whose ancestors migrated from Rwanda and Burundi generations ago to the high plateau area in South Kivu, and who are often referred to as Congolese Tutsi.

documented that forces under Nkunda's command killed civilians and carried out widespread sexual violence during their operations.²¹³

UN peacekeepers were unable to stop Nkunda's offensive on Bukavu and the resulting crisis nearly derailed an already weak transitional government. In October 2004 the Security Council directed UN forces to cooperate with Congolese authorities "to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice."²¹⁴ A year later, in September 2005, the Congolese authorities issued a warrant for the arrest of Nkunda.²¹⁵ Again, on December 21, 2005, the Security Council reiterated its call "*stressing the urgent need* for those responsible for [violations of human rights and international humanitarian law] to be brought to justice."²¹⁶ But no action was taken, and diplomats did not follow up the Council's requests with any concerted effort.

Throughout 2005 and into 2006, the international community's attention was focused on presidential and parliamentary elections in Congo, the first democratic elections in over 40 years. Caught up in the political and logistical challenges of the election process, many Congolese leaders, as well as representatives of the donor community and MONUC, accepted that little progress would be made on such major issues as army reform or establishing a functioning judicial system. Diplomatic representatives stated that it would be unproductive to push too hard on such issues, including seeking to arrest those responsible for serious crimes, preferring not to "rock the boat."²¹⁷ On Nkunda, MONUC decided to pursue a strategy of containment: take no action to arrest or confront him, but use deterrent action to contain his activities and zone of influence to minimize possible disruptions to the elections.²¹⁸ The strategy was ill-advised and short-sighted.

²¹³ Human Rights Watch also documented serious crimes committed by the Congolese army during the Bukavu crisis. See Human Rights Watch, *D.R. Congo: War Crimes in Bukavu*, June 2004, http://www.kongo-kinshasa.de/dokumente/ngo/hrw_110604_en.pdf.

²¹⁴ United Nations Security Council, Resolution 1565 (2004), S/RES/1565(2004), <http://daccessdds.un.org/doc/UNDOC/GEN/No4/531/89/PDF/No453189.pdf?OpenElement> (accessed May 21, 2009), para. 5(g).

²¹⁵ The warrant for Nkunda and Jules Mutebesi included war crimes and crimes against humanity. It was issued by the government but was not supported by appropriate substantive judicial investigation. Implementation of the warrants without additional legal procedures would not have met necessary fair trial standards. Human Rights Watch, *Renewed Crisis in North Kivu*, pp. 59-60.

²¹⁶ United Nations Security Council, Resolution 1649 (2005), S/RES/1649(2005), <http://daccessdds.un.org/doc/UNDOC/GEN/No5/658/00/PDF/No565800.pdf?OpenElement> (accessed May 21, 2009), preamble.

²¹⁷ Human Rights Watch, *Democratic Republic of Congo – Elections in sight: "Don't Rock the Boat"?* December 15, 2005, <http://www.hrw.org/legacy/background/africa/drc1205/drc1205.pdf>, p. 3.

²¹⁸ Human Rights Watch interview with MONUC officials (names withheld), Goma, February 9 and May 12, 2007.

Nkunda used the time to found the National Congress for the Defense of the People (Congrès National pour la Défense du Peuple, CNDP) with a program of preventing the exclusion of Tutsi from national political life and assuring their security.²¹⁹ Like rebels in other parts of Congo, Nkunda believed that launching an armed group would ensure his voice was heard. In August 2006 he told Human Rights Watch researchers, “We need to make sure our cries are heard. We must be listened to.”²²⁰

Throughout 2006-07 Nkunda’s CNDP enlarged the area that it controlled, effectively creating a state within a state. Human rights abuses by the CNDP and other armed groups increased, especially when the Congolese government launched failed military operations to attempt to defeat Nkunda. Horrific attacks on civilians—including murders, widespread rape, and the forced recruitment and use of child soldiers—by all sides to the conflict followed. Hundreds of thousands of people were forced to flee their homes.²²¹

The Congolese government, unable to defeat Nkunda militarily, decided to enter into peace discussions with him. On January 23, 2008, after weeks of talks, the government signed a peace agreement in Goma, North Kivu, with 22 armed groups of which the CNDP was the most influential. While the agreement committed all parties to an immediate ceasefire, disengagement of forces from frontline positions, and respect for international human rights law, it did not hold. Conflict resumed and Nkunda stated that Joseph Kabila, elected as president only two years earlier, should resign.²²² Faced with the possibility of losing eastern Congo and with no support coming from other African allies or the European Union, Kabila struck a secret deal with his former enemy, the Rwandan government. Congo would allow Rwandan troops to return briefly to eastern Congo to pursue their enemy—the Rwandan Hutu militia the Democratic Forces for the Liberation of Rwanda (Forces Démocratiques de

²¹⁹ He claimed that other ethnic groups too had a role in his new movement. See, for example, Congrès National pour la Défense du Peuple, “Cahier de Charges du Congrès National pour la Défense du Peuple (CNDP),” October 2006, condensed version available in French at http://www.cndp-congo.org/index-fr.php?subaction=showfull&id=1220528453&archive=&start_from=&ucat=6& (accessed May 21, 2009).

²²⁰ Human Rights Watch interview with Laurent Nkunda, Kirolirwe, August 26, 2006.

²²¹ In a report to the UN Security Council in June 2007, the UN secretary-general noted with concern increased recruitment of children in the DRC and Rwanda for service with Nkunda’s units. He remarked that “commanders loyal to Laurent Nkunda” and Nkunda himself actively obstructed efforts to remove children from military ranks. He called for the arrest of Nkunda and others involved in recruiting and using child soldiers and asked MONUC to assist in making such arrests if necessary. Human Rights Watch, *Renewed Crisis in North Kivu*, pp. 49-54; and United Nations Security Council, “Report of the Secretary-General on children and armed conflict in the Democratic Republic of the Congo,” S/2007/391, June 28, 2007, <http://daccessdds.un.org/doc/UNDOC/GEN/No7/390/16/PDF/No739016.pdf?OpenElement> (accessed May 21, 2009), paras. 22-23, 29, 72.

²²² Human Rights Watch interview with CNDP officials (names withheld), Rutshuru, November 30, 2008.

Libération du Rwanda, FDLR)—in exchange for arresting Nkunda. On January 22, 2009, Nkunda was called to a meeting in Gisenyi, Rwanda, and detained by Rwandan officials.²²³

Instrumental in Nkunda's downfall was Bosco Ntaganda, formerly a senior military commander from the UPC armed group who had fallen out with the UPC and had joined Nkunda sometime in 2006. Ntaganda, also a Congolese Tutsi, became Nkunda's new military chief of staff. He had already been implicated in brutal human rights abuses, but was one of the five Ituri leaders who in December 2004 had been granted positions as generals in the newly integrated Congolese army (see above). (He had not taken up this post: fearing for his security in the capital, Kinshasa, Ntaganda had refused to attend the swearing-in ceremony.) In January 2009, in an effort to divide Nkunda's CNDP, Ntaganda with support from Rwanda led a putsch to oust Nkunda from leadership and to install himself as the group's military commander. In exchange, the Congolese government rewarded him for a second time with the post of general in the Congolese army.

Ntaganda's track record is one of widespread human rights abuses. In November 2002, Ntaganda, then in charge of military operations for the UPC in Ituri, led troops in attacks on the gold mining town of Mongbwalu, where at least 800 civilians were brutally slaughtered on an ethnic basis. Such attacks were repeated in dozens of other locations.²²⁴ According to UN peacekeepers, troops commanded by Ntaganda were responsible for killing a Kenyan UN peacekeeper in January 2004 and for kidnapping a Moroccan peacekeeper later that year.²²⁵ He was placed on the UN sanctions list in November 2005 for breaching a UN arms embargo.²²⁶ While acting as military chief of staff in Nkunda's CNDP, troops under Ntaganda's command were responsible for the November 4-5, 2008 massacre of 150 civilians in Kiwanja in North Kivu.²²⁷

²²³ John Kanyunyu and Joe Bavier, "Congo rebel leader Nkunda arrested in Rwanda," Reuters, January 23, 2009, <http://www.reuters.com/article/worldNews/idUSTRE5oM14N2o09o123> (accessed June 26, 2009). To date, no charges have been brought against him. The DRC requested his extradition to stand trial for war crimes and crimes against humanity, but without the establishment of an ad-hoc court or major reform to the DRC judicial system, Nkunda is unlikely to get a fair trial there.

²²⁴ Human Rights Watch, *Ituri: "Covered in Blood,"* pp. 23-27; and *The Curse of Gold*, pp. 23-34.

²²⁵ Letter from Human Rights Watch to all EU Foreign Ministers, "Urge Congolese Government to Enforce ICC Arrest Warrant on War Crimes Charges," February 2, 2009, <http://www.hrw.org/en/news/2009/02/02/urge-congolese-government-enforce-icc-arrest-warrant-war-crimes-charges>.

²²⁶ *Ibid.* See also United Nations Security Council, Resolution 1857 (2008), S/RES/1857(2008), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%20RES%201857.pdf> (accessed May 21, 2009), para. 5.

²²⁷ Human Rights Watch, *Democratic Republic of Congo – Killings in Kiwanja: The UN's Inability to Protect Civilians*, 1-56432-422-2, December 2008, <http://www.hrw.org/sites/default/files/reports/drc12o8web.pdf>, p. 10.

Nkunda's removal appeared to open up new possibilities to finding peace in eastern Congo, but political expediency rather than the interests of justice have determined both his and Ntaganda's recent, contrasting fates. Laurent Nkunda has been implicated in numerous serious crimes since May 2002, but despite repeated calls by the UN and others for those responsible for the crimes in Kisangani to be brought to justice, Nkunda was not investigated or prosecuted. The government sought to accommodate him, but the accommodation did not work: rather than preventing further crimes, the opposite occurred. Nkunda's forces went on to commit additional crimes and to contribute to a major political, military, and humanitarian crisis. The political and diplomatic costs of arresting Nkunda in 2002 when he was first implicated in perpetrating war crimes would have been substantially less.

As for Bosco Ntaganda, in August 2006, the International Criminal Court issued an arrest warrant against him 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.²²⁸ 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 in Congo will be rewarded rather than punished. Dozens of local human rights nongovernmental organizations condemned the decision. Ntaganda is now reportedly serving as a high-ranking advisor to UN peacekeeping forces on their operations in Congo, despite his status as a wanted man at the ICC.²²⁹

C. Bosnia and Herzegovina

In a new administration, alleged war criminals in the ranks of even lower-level officials can impede stability and obstruct the implementation of peace agreements. This was demonstrated in Bosnian towns immediately following the Balkan wars in the 1990s. For

²²⁸ *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 May 21, 2009).

²²⁹ "Congo ex-Rebel 'working with UN,'" *BBC News Online*, April 29, 2009, <http://news.bbc.co.uk/2/hi/africa/8023978.stm> (accessed May 21, 2009). 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>.

example, the Bosnian administrative district of Prijedor, located west of the city of Banja Luka in what is now Republika Srpska, was before 1992 a multi-ethnic area with a non-Serb population of well over 50,000. After Bosnian Serb forces took control of the region in April 1992, the communities and homes of non-Serbs were destroyed, families were separated, and thousands of people were held in concentration camps, where many were tortured and executed. Tens of thousands were forcibly deported under inhumane conditions. After the war, only about 600 Bosniaks (Bosnian Muslims) and 2,700 Bosnian Croats remained in Prijedor. The Catholic church and all mosques in Prijedor were destroyed in 1992.²³⁰

Notably the same Serb individuals who took control of Prijedor through systematic policies of “ethnic cleansing”—including deliberate killings, concentration camps, mass rape, and the takeover of businesses, government offices, and all communal property—retained total control over key security, economic, infrastructure, and humanitarian sectors of the community after the war.²³¹ The architects of the “ethnic cleansing,” many of whom were under investigation by the International Criminal Tribunal for the former Yugoslavia, were interacting daily with representatives of international organizations and receiving a wholly undeserved legitimacy.

Despite the requirements of the 1995 Dayton agreement, these same local authorities refused to protect non-Serbs or to investigate crimes against them. Civilian and police authorities worked in tandem to prevent the return of non-Serb refugees and displaced persons by organizing or inciting violence against those who attempted to return and by orchestrating (with the assistance of the Bosnian Serb Army, according to NATO) the destruction of houses. For example, local authorities used radio broadcasts to encourage the residents of Prijedor to believe that returning refugees posed a threat and that they must meet the returnees with violence in order to “defend” themselves. The fear this generated brought crossings into Bosnian Serb territory to a standstill. Restrictions on freedom of movement, destruction of other property, and ethnically-based eviction through the application of discriminatory laws were also carried out. The Bosnian Serb authorities continued to implement their goal of an ethnically pure entity, the same goal that led to massive “ethnic cleansing” campaigns during the war. Despite serious non-compliance with the Dayton agreement and failure to cooperate with organizations charged with

²³⁰ Human Rights Watch/Helsinki, *Bosnia and Herzegovina – The Unindicted: Reaping the Rewards of “Ethnic Cleansing,”* vol. 9, no. 1 (D), January 1997, <http://www.hrw.org/legacy/reports/1997/bosnia/>, and *Bosnia Herzegovina: No Justice No Peace*, vol. 8, no. 15(D), September 1996.

²³¹ See, for example, Human Rights Watch, *The Unindicted*, describing how the police chief in Prijedor, Simo Drljaca, implicated in crimes during the war, continued to serve as police chief after Dayton. See *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-T, Judgment, July 31, 2003 (describing Drljaca’s role in Prijedor during the war.)

implementing Dayton, international actors failed to confront the problem and continued to provide large sums of reconstruction money to people who had engaged in or advocated for “ethnic cleansing” during the war and then actively obstructed the Dayton agreement.²³²

In the Doboï-Teslic area as well, Human Rights Watch found evidence that the national and local political leadership of the Republika Srpska as well as the state organs and agencies under its control—including the Ministry of Internal Affairs and the local police force—were responsible for directing, aiding, and abetting ongoing widespread human rights abuses against non-Serb minorities, and for blocking implementation of Dayton. In particular, Human Rights Watch documented that Republika Srpska forces and agencies, along with underground Bosnian Serb paramilitary organizations, committed acts of deliberate killings, “ethnic cleansing,” expulsions, obstruction of freedom of movement, obstruction of the right to remain, continued practice of forced labor, beating and torture in detention, threats and intimidation, looting and destruction of property. These acts revealed the continuing control exerted by wartime organizers of “ethnic cleansing” despite the fact that the whereabouts and identity of the persons involved were well known to the international representatives in the region.²³³

The international community’s failure following Dayton to detain indicted war crime suspects or to control ongoing abuses by unindicted alleged war criminals left in place many of the very people most responsible for genocide and “ethnic cleansing” in the former Yugoslavia. Key governments remained silent about many of the abuses and the identity of the abusers in the post-Dayton period. In addition, these war crimes suspects acted to block implementation of the Dayton agreement and thereby slowed the establishment of a functioning state that respects human rights. Beginning in 1998, and particularly between 1999 and 2004, the Office of the High Representative in Bosnia did remove from office a number of obstructionist politicians.²³⁴ A number of war crimes suspects were eventually arrested and transferred to The Hague. Nonetheless, ongoing concerns about continuing ethnic divisions in Bosnia can be traced back, in part, to the early failure to purge the Republika Srpska of leaders implicated in war crimes.²³⁵

²³² Human Rights Watch, *The Unindicted*.

²³³ Human Rights Watch/Helsinki, *The Continuing Influence of Bosnia’s Warlords*, vol. 8, no. 17 (D), December 1996, <http://www.hrw.org/legacy/summaries/s.bosnia96d.html>. See also Human Rights Watch/Helsinki, *No Justice No Peace*.

²³⁴ See Office of the High Representative and EU Special Representative, “Decisions Relating to individuals indicted for war crimes in the former Yugoslavia,” <http://www.ohr.int/decisions/removalsdec/archive.asp> (accessed May 19, 2009).

²³⁵ Bosnian Serb Prime Minister Milorad Dodik does not fall into this category.

V. Explicit and Implicit Amnesties in Peace Agreements

Foregoing accountability does not necessarily result in the hoped-for benefits. Instead of putting a conflict to rest, inserting in a peace agreement an explicit amnesty—which may grant immunity from prosecution for war crimes, crimes against humanity, or genocide—sanctions the commission of crimes of most concern to the international community without resulting in the desired objective of peace. Even without an explicit amnesty provision in a peace agreement, turning a blind eye to international crimes (a de facto amnesty) can be an important contributing factor to ongoing human rights abuses. All too often a peace that is conditioned on providing immunity for these most serious crimes is not sustainable. Worse, it sets a precedent of immunity for atrocities that encourages even more abuses.

In the situations described below, Human Rights Watch has documented ongoing violence after implementation of peace agreements that explicitly or implicitly provided immunity from prosecution for serious crimes. Doubtless other factors fueled these conflicts, and it is beyond the scope of this paper to touch on all the causes of the violence. However, on the basis of our research in the following situations, we believe that de jure or de facto amnesties were important contributing factors to the ongoing commission of crimes after peace agreements were signed.

A. Sierra Leone

The attack on Sierra Leone by Revolutionary United Front rebels crossing from Liberia on March 23, 1991, triggered an 11-year civil war in Sierra Leone. The conflict was characterized by extreme brutality and widespread atrocities against the civilian population. In particular, the RUF notoriously cut off the hands, arms, lips, legs, or other body parts of some civilians in their custody. RUF rebels systematically committed rape and other forms of sexual violence against girls and women, and abducted thousands of women and children to take part in their forces.

Despite the horrific nature of their crimes, a peace agreement signed in Abidjan in November 1996 granted the RUF an amnesty in order to “consolidate the peace and promote the cause of national reconciliation.”²³⁶

²³⁶ Abidjan Peace Accord, between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, November 30, 1996, art. 14 (“To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement. In addition, legislative and other measures necessary to guarantee former RUF/SL combatants, exiles and

In a stark demonstration of *de jure* immunity failing to “consolidate peace,” the ceasefire provided for in the Abidjan accords was broken less than two months later when serious fighting broke out in southern Moyamba district. On May 25, 1997, the elected president, Ahmad Tejan Kabbah, was overthrown in a coup by the Armed Forces Revolutionary Council (AFRC) which consisted primarily of disgruntled former Sierra Leonean army soldiers.²³⁷

From exile in Guinea, President Kabbah mobilized international condemnation of the coup. In response to his request, hundreds of Nigerian troops based in Liberia as part of the Economic Community of West African States Monitoring Group were transferred to Freetown to reinforce troops already stationed in the capital to protect the airport.²³⁸ After months of international military and diplomatic pressure (including strict sanctions imposed by the United Nations and the Economic Community of West African States, ECOWAS), the Kabbah government-in-exile and the RUF/AFRC signed an agreement in Conakry on October 23, 1997. The agreement also included an amnesty provision for those involved in the military coup.²³⁹

Once again, the hoped-for effect of the amnesty—lasting peace—did not occur. The RUF/AFRC undermined the agreement by stockpiling weapons and attacking ECOMOG forces. In February 1998 ECOMOG forces, together with the pro-government Kamajor militia, launched an operation that drove the RUF/AFRC forces from Freetown. After losing power, members of the RUF and AFRC engaged in a campaign to terrorize civilians in Sierra Leone. Between February and June 1998 their forces raped, mutilated, or killed thousands of civilians. They abducted men, women, and children for use as combatants, forced laborers, and sexual slaves.²⁴⁰

In July 1998 Nigeria transferred RUF leader Foday Sankoh (who had been arrested in 1997 at Lagos airport in Nigeria on arms charges) to Sierra Leone where the Supreme Court tried and sentenced him to death for treason for his role in the 1997 coup.²⁴¹ By the end of 1998, after

other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to reintegration within the framework of full legality.”).

²³⁷ The AFRC formalized an alliance with the RUF in June 1997 when they invited the RUF to join the government.

²³⁸ Human Rights Watch, *“We’ll Kill You if You Cry”: Sexual Violence in the Sierra Leone Conflict*, vol. 15, no. 1(A), January 2003, <http://www.hrw.org/en/reports/2003/01/16/well-kill-you-if-you-cry>, p. 11.

²³⁹ Article 8 provides, “It is considered essential that unconditional immunities and guarantees from prosecution be extended to all involved in the events of 25 May 1997 with effect from 22 April 1998.” The Economic Community of West African States, Conakry peace plan, ECOWAS six-month peace plan for Sierra Leone, October 23, 1997.

²⁴⁰ Human Rights Watch, *Sowing Terror: Atrocities against Civilians in Sierra Leone*, vol. 10, no. 3(A), July 1998, <http://www.hrw.org/legacy/reports98/sierra/>, p. 4.

²⁴¹ Human Rights Watch, *We’ll Kill You if You Cry*, p. 12. The efforts at justice that had been made prior to 1999—charging RUF leader Sankoh and others with treason—should be differentiated from proceedings that are and are seen to be fair and impartial. The treason trials were politically motivated and not seen as credible.

a series of offenses enabled them to gain control of the diamond producing area of Kono and other strategic areas, the RUF/AFRC had gained the upper hand militarily and from that position of strength launched a major offensive on Freetown in January 1999.²⁴²

The battle for Freetown and the ensuing three-week occupation of the capital were again characterized by the systematic and widespread perpetration of abuses against the civilian population. At least 4,000 civilians were killed.²⁴³ As the RUF forces were driven out of Freetown in February 1999, they abducted thousands of civilians. As they moved eastward from Freetown into the bush, the rebels continued to commit egregious human rights abuses, including killings and amputations.²⁴⁴ Human Rights Watch extensively documented rebel atrocities committed during the January rebel offensive and in the following months.²⁴⁵

Government and ECOMOG forces also committed serious human rights abuses, though on a lesser scale, including over 180 summary executions of rebels and their suspected collaborators.²⁴⁶

After intense international pressure in the months following the January invasion, Kabbah's government and the RUF rebels signed a ceasefire agreement on May 18, 1999, followed by a peace agreement in Lomé, Togo, on July 7, 1999. The accord, brokered by the UN, the Organization of African Unity, and ECOWAS, committed the RUF/AFRC to lay down its arms in exchange for representation in a new government. Rather than being held to account for abuses, RUF leader Foday Sankoh (who had been released from jail provisionally to attend the peace talks) was rewarded with the chairmanship of the board of the Commission for the Management of Strategic Resources, National Reconstruction and Development (which gave him access to the country's extremely lucrative diamond mines) and the status of vice-president. AFRC leader Johnny Paul Koroma was made the chairman of the Commission for the Consolidation of Peace provided for under article 6 of the peace agreement.

Although amnesty had previously failed to bring "lasting peace" to Sierra Leone, negotiators did not change their stance towards accountability.²⁴⁷ The agreement again included a

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ "Rebel Atrocities Against Civilians In Sierra Leone: Multiple Eyewitnesses Confirm Reports," Human Rights Watch news release, May 17, 1999, <http://www.hrw.org/en/news/1999/05/17/rebel-atrocities-against-civilians-sierra-leone>.

²⁴⁶ Human Rights Watch, *Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone*, vol. 11, no. 3(A), June 1999, <http://www.hrw.org/legacy/reports/1999/sierra/>, p. 45.

general amnesty for all crimes committed by all parties in the war up to the signing of the peace agreement.²⁴⁸ Despite the fact that Sankoh's RUF was responsible for some of the most brutal violence seen in a civil war in Africa, he was granted a pardon and his forces were granted an amnesty for the third time. Indeed, in these negotiations the issue of amnesty was considered "a foregone conclusion."²⁴⁹ The lack of discussion about amnesty provisions was due in part to the use of earlier agreements as a reference point.²⁵⁰

As mentioned in Chapter II.B, at the last minute, the UN secretary-general's special representative attending the talks added a handwritten caveat that the UN held the understanding that the amnesty and pardon provision did not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.²⁵¹ This, however, did little to counteract the impression that the RUF would not be prosecuted for its many crimes against humanity. The very belated mention of justice also caused some to question the commitment to accountability and justice held by those involved in the negotiation process, most notably the United Nations.

Within two months of signing the accord, Human Rights Watch documented numerous new rebel abuses including rape, torture, attempted amputation, shooting, abduction, vehicle ambush, and extensive looting of property in the central and western parts of the country.²⁵² The rebels largely refused to comply with the disarmament provisions, and in May 2000 hostilities resumed when the RUF took several hundred UN peacekeeping troops hostage.

Over the course of 2000, in addition to abuses by the RUF, Human Rights Watch observed an increased number of serious abuses by the civil defense forces, a pro-government militia.

²⁴⁷ Other major factors contributing to the breakdown of the various peace agreements included the continued support for the RUF by Charles Taylor and the relative inability of the government to defend itself from rebel attacks.

²⁴⁸ Article IX, entitled "Pardon and Amnesty," provides, "1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon. 2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives up to the time of the signing of the present Agreement." The Lomé Peace Accord, Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999.

²⁴⁹ Priscilla Hayner, International Center for Transitional Justice, "Negotiating peace in Sierra Leone: Confronting the justice challenge," December 2007, <http://www.ictj.org/static/Africa/SierraLeone/HaynerSL1207.eng.pdf> (accessed May 14, 2009), pp. 13-14.

²⁵⁰ Ibid.

²⁵¹ Ibid., p. 17.

²⁵² "Sierra Leone Rebels Violating Peace Accord: Rebel Leaders Urged to Punish Perpetrators," Human Rights Watch news release, October 27, 1999, <http://www.hrw.org/en/news/1999/10/27/sierra-leone-rebels-violating-peace-accord>.

Their crimes included rape, systematic extortion, looting of villages, commandeering of vehicles, recruitment of children, and torture and summary execution of suspected rebels.²⁵³

On May 8, 2000, armed men in Sankoh's Freetown residence opened fire on a crowd of civilian demonstrators, killing 19.²⁵⁴ Following this attack, Sankoh was arrested. Some have argued that his arrest and the resulting change of leadership in the RUF helped encourage the eventual implementation of the peace accord.²⁵⁵

Rather than solidify peace, successive amnesties had the opposite effect in Sierra Leone. Inclusion of a general amnesty in the initial peace agreement created the expectation that other agreements would include the same provision, thus further emboldening potential rights abusers. The pardons and ultimately the high government position for rebel leader Sankoh showed that combatants would pay no price—and indeed would even be rewarded—for their horrific crimes.²⁵⁶

B. Angola

The Angolan civil war, which began in 1975, continued through six successive amnesties. The war's long duration, intensity, and scope eventually involved most Angolans either as participants or victims.²⁵⁷ The failure of influential states to address serious international crimes committed by the warring parties greatly contributed to the resumption of conflict. While we do not contend that lack of accountability (either nationally or internationally) was the sole cause of renewed hostilities, the certainty that serious international law violations would go unpunished was a contributing factor in how events unfolded.

²⁵³ See, for example, "New Evidence of Atrocities in Sierra Leone and Guinea," Human Rights Watch news release, November 30, 2000, <http://www.hrw.org/en/news/2000/11/30/new-evidence-atrocities-sierra-leone-and-guinea>.

²⁵⁴ Human Rights Watch, *World Report 2001*, Sierra Leone chapter, <http://www.hrw.org/legacy/wr2k1/africa/sierraleone.html>.

²⁵⁵ Hayner, ICTJ, "Negotiating peace in Sierra Leone," p. 30.

²⁵⁶ Some have argued that the 1999 peace agreement would not have been possible without the amnesty provision. See, for example, Hayner, ICTJ, "Negotiating peace in Sierra Leone," p. 35 ("there is virtually unanimous agreement now that a peace agreement would not have been possible without an amnesty"). However, the 1996 and 1997 amnesties made negotiations on the matter—already being conducted virtually at gunpoint—more difficult. With increased recognition that amnesty for serious international crimes is not acceptable and victims' corresponding expectations for justice, the 1996 amnesty, which came at a high price, may not be as feasible today, even under the strained circumstances.

²⁵⁷ International Center for Transitional Justice, "Southern African Regional Assessment Mission Report: Angola," 2009, http://www.humansecuritygateway.info/documents/CSV_SouthAfricanRegionalAssessmentMissionReport_Angola.pdf (accessed May 18, 2009), p. 3.

1. The Bicesse Accords

Internal armed conflict in Angola started shortly before independence from Portugal in 1975 when three nationalist groups that had been fighting colonial rule battled each other for control of the capital, Luanda.²⁵⁸ In the years following independence, the war spread and outside forces became involved as the conflict became a proxy arena for the Cold War stand-off between the United States and the Soviet Union.²⁵⁹

In January 1989 Angolan President Jose Eduardo Dos Santos made an overture to rebel National Union for the Total Independence of Angola (União Nacional pela Independência Total de Angola, UNITA) leader Jonas Savimbi that led to a ceasefire in June 1989. The offer was reportedly for Savimbi to agree to temporary exile in exchange for amnesty and national reconciliation. Although the ceasefire collapsed quickly, the following 18 months saw sustained efforts to achieve a peaceful settlement even as fierce fighting continued. In May 1991 talks resulted in an agreement known as the Bicesse Accords.

The Bicesse Accords ratified the ceasefire, called for integration of government and UNITA forces into the Angolan Armed Forces, and prohibited either side from purchasing weapons. It also set the terms for Angola's first nationwide elections. Despite the widespread human rights abuses committed by both sides (including deliberate killing, destruction of villages, and forcible conscription of children into the armed forces), no provisions for accountability

²⁵⁸ The armed liberation struggle in Angola ended with a negotiated agreement to end 500 years of Portuguese colonial rule on January 15, 1975. The Alvor Agreement, signed by Portugal and three nationalist movements, was intended to provide a framework for a peaceful transfer of power. It included a general amnesty provision. Apart from the larger civil war, beginning in 1975 a separatist guerilla movement, the Front for the Liberation of the Enclave in Cabinda (FLEC), has been fighting for independence of Cabinda, which today supplies half of Angola's oil. The Angolan government claims the war ended in 2006, when the government signed a peace agreement with a faction of the rebel group. That agreement also included an amnesty. However, sporadic attacks continue in the area because only a faction of FLEC signed the agreement and the root causes of the conflict were not tackled. See "Angola: End Torture and Unfair Trials in Cabinda," Human Rights Watch news release, December 10, 2008, <http://www.hrw.org/en/news/2008/12/05/angola-end-torture-and-unfair-trials-cabinda>; Human Rights Watch, *Angola – Between War and Peace in Cabinda: A Human Rights Watch Briefing Paper*, December 23, 2004, <http://www.hrw.org/legacy/background/africa/angola/2004/1204/cabinda122104.pdf>, p. 1, and *Angola – "They put me in the Hole:" Military Detention, Torture and Lack of Due Process in Cabinda*, 1-56432-503-2, June 22, 2009, <http://www.hrw.org/en/reports/2009/06/22/they-put-me-hole-o>.

²⁵⁹ South African forces occupied parts of extreme southern Angola and, along with the US, supported the National Union for the Total Independence of Angola (UNITA). Cuba and the Soviet Union backed the government Movement for the Popular Liberation of Angola (MPLA). After the repeal of the Clark amendment prohibiting covert aid to UNITA in 1985, the US resumed assistance to UNITA; between 1986 and 1991 US covert aid to UNITA totaled about \$250 million. See Human Rights Watch/Africa, *Angola: Arms Trade and Violations of the Laws of War since the 1992 Elections* (New York: Human Rights Watch, 1994), <http://www.hrw.org/sites/default/files/reports/ANGOLA94N.PDF>, pp. 48-59. The US provided aid to UNITA despite public reports of human rights abuses including torture and extrajudicial executions. See, for example, Craig Whitney and Jill Jolliffe, "Ex-Allies Say Angola Rebels Torture and Slay Dissenters," *New York Times*, March 11, 1989, <http://query.nytimes.com/gst/fullpage.html?res=950DEFDE1639F932A25750CoA96F948260&sec=&spon=&pagewanted=1> (accessed May 18, 2009).

were included.²⁶⁰ On the contrary, shortly after the accords were signed, an amnesty law was passed by parliament.²⁶¹

Although the Bicesse Accords had required UNITA and government (led by the Movement for the Popular Liberation of Angola (MPLA)) forces to demobilize, both sides were uncooperative and retained secret armies. The ultimate failure of the accords was a result, in part, of the inability of the major international actors, notably the US and Soviet Union, to effectively ensure that they were implemented. The UN mission that was established for Angola, the UN Angola Verification Mission II (UNAVEM II), was ineffectual in ensuring that demobilization was taking place: its mandate was limited to monitoring and verifying actions taken by the government and UNITA to implement the accords.²⁶² UNAVEM II was unable to adequately investigate violations of the accords and reports of political killings or intimidation. As a result, UNAVEM II was virtually silent on human rights abuses, including the much publicized 1991 murders of senior UNITA leaders Tito Chingunji and Wilson dos Santos and their families. Although then-US Secretary of State James Baker requested a detailed explanation of the deaths, little was done to demand accountability for the brutal murders.²⁶³ This contributed to both sides increasingly feeling confident enough to violate the peace accords by intimidating suspected opposition sympathizers and by not properly disarming and demobilizing their armed forces.²⁶⁴

The elections called for by the Bicesse Accords were held in late September 1992. After Savimbi lost the election, UNITA rejected the results and returned the country to civil war by

²⁶⁰ Africa Watch (now Human Rights Watch/Africa), *Land Mines in Angola: An Africa Watch Report* (New York: Human Rights Watch, 1993), <http://www.hrw.org/legacy/reports/1993/angola/>, pp. 9, 26; *Angola: Violations of the Laws of War by Both Sides* (New York: Human Rights Watch, 1989).

²⁶¹ Amnesty Law [Angola], No. 24/1991 of 12 July 1991, reproduced in unofficial translation at <http://www.unhcr.org/refworld/docid/3ed8a0174.html> (accessed May 19, 2009). This states in the preamble and article 1 that amnesty is granted by the People's Assembly in order "to create psychological conditions needed to introduce a multiparty democracy," and applies "to all crimes against the internal security of the State and all others [other crimes] so related" committed up to the signing of the Bicesse Accords. It covered common crimes committed by military personnel and civilians as well as most military crimes. *Ibid.*, arts. 2-3.

²⁶² United Nations Security Council, Resolution 696 (1991), S/RES/696 (1991), <http://daccessdds.un.org/doc/RESOLUTION/GEN/NRo/596/32/IMG/NRo59632.pdf?OpenElement> (accessed May 19, 2009).

²⁶³ Clifford Krauss, "Angolan Rebel Lays Killings to a C.I.A. Plot," *New York Times*, May 5, 1992, <http://query.nytimes.com/gst/fullpage.html?res=9E0CE1D6133BF936A35756CoA964958260> (accessed May 19, 2009).

²⁶⁴ Human Rights Watch/Africa, *Arms Trade and Violations of the Laws of War since the 1992 Elections*, pp. 14-17. Further evidence of the parties' confidence that they could commit human rights abuses without repercussions is the January 22, 1993 massacre of an estimated 4,000 to 6,000 civilians of Bakongo ethnicity by Angolan military, national police, and civilians in what is known as "Bloody Friday." Although the government condemned those who took part, little action was taken to hold perpetrators to account. The massacre was in response to rumors of a plot to kill the Angolan president. See Immigration and Refugee Board of Canada, "Angola: Update on the KIMVUKA, MAKO and CANGOLAK organizations and situation of the Bakongo and treatment by the government authorities," AGO 36914.E, April 18, 2001, <http://www.unhcr.org/refworld/docid/3df4bdf838.html> (accessed May 19, 2009).

remobilizing its forces. In response, MPLA-armed civilians conducted a witch hunt of supposed UNITA supporters in Luanda, murdering thousands, a memory which still invokes fear in Angolans.²⁶⁵ Less than a month after the elections, the conflict resumed. It lasted until November 1994 with the signing of the Lusaka Protocol.

2. *The next war and the Lusaka Protocol*

The next phase of war, from 1992 to 1994, was notable for systematic violations of the laws of war by both the government and UNITA rebels. Indiscriminate shelling of starving, besieged cities by UNITA resulted in massive destruction and loss of civilian life. Indiscriminate bombing by the government also took a high civilian toll. In two years of fighting, it is estimated that 300,000 Angolans died, probably more than during the preceding 16 years of conflict. The UN reported that as many as 1,000 people were dying daily between May and October 1993, more than any other conflict in the world at that time.²⁶⁶

Despite widespread war crimes, again little effort was made to hold perpetrators to account. Apparently fearing that public attention to human rights abuses by the government and UNITA might jeopardize the peace process, the US State Department largely kept silent. State Department officials testifying before Congress during this period concentrated on developments in the peace process and on humanitarian concerns, but there was little public censure of the warring parties for abuses against noncombatants.²⁶⁷

Significant military gains by the government during this cycle of war forced UNITA to make greater concessions in the Lusaka peace process than it had at Bicesse.²⁶⁸ Nonetheless, a general amnesty for “illegal acts” perpetrated before the ceasefire was the first issue agreed upon by both sides during the 1993-1994 Lusaka peace talks.²⁶⁹ Angolans were called upon to “forgive and forget the offenses resulting from the Angolan conflict.”²⁷⁰

²⁶⁵ ICTJ, “Southern African Regional Assessment Mission Report: Angola,” p. 14.

²⁶⁶ Human Rights Watch/Africa, *Angola – Between War and Peace: Arms Trade and Human Rights Abuses since the Lusaka Protocol*, vol. 8, no. 1(A), February 1996, <http://www.hrw.org/legacy/reports/1996/Angola.htm>, p. 2.

²⁶⁷ Human Rights Watch/Africa, *Arms Trade and Violations of the Laws of War since the 1992 Elections*, pp. 140-141.

²⁶⁸ Human Rights Watch, *Angola Unravels: The Rise and Fall of the Lusaka Peace Process* (New York: Human Rights Watch, 1999), <http://www.hrw.org/legacy/reports/1999/angola/>, p. 15.

²⁶⁹ Human Rights Watch/Africa, *Between War and Peace*, p. 2. See also The Lusaka Protocol, between the Government of the Republic of Angola (GRA) and the Union for the Total Independence of Angola (UNITA), Lusaka, Zambia, November 15, 1994, reproduced at <http://www.c-r.org/our-work/accord/angola/lusaka-protocol.php> (accessed May 19, 2009).

²⁷⁰ The Lusaka Protocol, Annex 6, sec. I(5), provided that “all Angolans should forgive and forget the offences resulting from the Angolan conflict and face the future with tolerance and confidence. Furthermore, the competent institutions will grant an

Both sides initialed the Lusaka Protocol on October 31, 1994. On November 10, 1994, the National Assembly passed an amnesty law covering crimes committed in the military conflict from October 1, 1992, up to the signature of the Lusaka Protocol.²⁷¹

Despite the signing of the Lusaka Protocol, both parties continued to prepare for resumption of hostilities. International prohibitions on arms shipments were neither comprehensive nor enforced.²⁷²

The UN also overlooked the ongoing human rights abuses that continued to occur between 1994 and 1998.²⁷³ Although the United Nations missions established a Human Rights Division following the Lusaka protocol, a lack of transparency and public reporting on violations of that agreement hampered its implementation. The UN's strategy of refraining from disclosure of public action against violations of the accords and failure to implement the accords once again undermined any respect that UNITA or the government had for the Lusaka Protocol. Even when the head of UNITA's delegation to the UN commission that oversaw implementation of the Lusaka protocol was assaulted on camera by UNITA cadres while on official duties, the UN turned a blind eye.²⁷⁴

National courts were also unable to establish accountability for violations of the Lusaka Protocol. A 1994 law provided that military authorities had discretion in deciding whether soldiers suspected of committing crimes against the civilian population would be tried before military or civilian courts. In practice, military personnel alleged to be responsible for violations against civilians were rarely investigated, much less referred to civilian courts.²⁷⁵

amnesty ... for illegal acts committed by anyone prior to the signing of the Lusaka Protocol, in the context of the current conflict."

²⁷¹ Amnesty Law [Angola], No. 18/1994 of 10 November 1994, November 15, 1994, reproduced in unofficial translation at <http://www.unhcr.org/refworld/docid/3ae6b4da17.html> (accessed May 19, 2009). The amnesty was effective as of the date of the signature of the Lusaka Protocol.

²⁷² The United States, Russia, and Portugal (members of the observing troika in the peace process) had lifted national prohibitions on military sales to the government in summer 1993, thereby legitimizing the government's unilateral decision to opt out of the arms embargo clause in the Bicesse Accords. Human Rights Watch, *Angola Unravels*, p. 92. As a result, the government was able to use oil to finance hundreds of millions of dollars worth of weapons purchases. Using money from smuggled diamonds, UNITA also conducted numerous cross-border sanctions-busting operations bringing in new weapons and supplies both overland and on secret flights from neighboring countries.

²⁷³ This period was marked by sporadic fighting and violations of the protocol by both sides. Forced conscription and recruitment of child soldiers continued after the 1994 agreement as did occasional attacks on civilians. See Human Rights Watch/Africa, *Between War and Peace*, pp. 27-28; and Human Rights Watch Children's Rights Project, *Children in Combat*, vol. 8, no. 1(G), January 1996, <http://www.hrw.org/reports/pdfs/c/crd/general961.pdf>, p. 7. Both sides continued to lay landmines after the Lusaka Protocol. Human Rights Watch/Africa, *Between War and Peace*, pp. 32-33.

²⁷⁴ Human Rights Watch, *Angola Unravels*, pp. 18-19.

²⁷⁵ Even if a case was referred to a civilian court, sanctions were unlikely because civilian courts were virtually nonexistent. See United Nations Development Program and Angolan Government, "Judicial Reform," www.sdn.org/undp.org/perl-bin/ttf/proposal.pl?do=get_proposal_doc&prodoc_document_id=2 (accessed May 19, 2009), p. 3 ("only 13 municipal courts are

The small possibility of accountability ended when, in May 1996, the National Assembly formally approved another amnesty law—“to underline the spirit of tolerance and the guarantee of harmonious relationship between Angolan nationals”—for all human rights abuses committed between May 31, 1991, and May 9, 1996.²⁷⁶

3. *The final phase of conflict*

Impunity eroded confidence in the peace process and created a vicious cycle of rights abuses that steadily worsened and ultimately undermined the Lusaka Accords.²⁷⁷ The resumption of full-scale fighting in December 1998 demonstrated the failure of the UN’s “see no evil, speak no evil” strategy. This final period of fighting, between 1998 and 2002, was the most brutal and was marked by widespread laws of war violations by both sides.²⁷⁸ Both the government and UNITA targeted the civilian population, shelling densely populated areas and planting anti-personnel mines across the countryside. In November 2000 Médecins Sans Frontières (MSF) issued a report that documented acts of terror, mutilation, and unlawful reprisals against civilians, including pregnant women, children, and the elderly. The report indicated that the displaced persons MSF interviewed distinguished between how the war was fought “before” the 1994 Lusaka agreement and afterwards, affirming that executions and acts of great cruelty perpetrated by armed groups on both sides had become increasingly common as part of a policy of terrorizing the civilian population.²⁷⁹ Whole cities were reduced to ruins and hundreds of thousands of people were killed or died from war-related deprivation and disease.²⁸⁰ Between 1998 and 2002 the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) estimated that 3.1 million people were forced from their homes as a result of indiscriminate tactics used by both government and UNITA forces against the civilian population. This number greatly exceeded the approximately 1 to 2 million people who were displaced during the previous war.

operating, for a total of 164 municipalities, and around 12 million habitants. This indicator shows by itself the limited access to Justice in Angola”).

²⁷⁶ Amnesty Law [Angola], No. 11/1996 of 9 May 1996, available in unofficial translation at <http://www.unhcr.org/refworld/docid/3ae6b4df44.html> (accessed May 19, 2009), preamble and art. 1.

²⁷⁷ Human Rights Watch, *Angola Unravels*, p. 2.

²⁷⁸ ICTJ, “Southern African Regional Assessment Mission Report: Angola,” p.5.

²⁷⁹ Médecins Sans Frontières, “Angola: Behind the façade of ‘normalization’: Manipulation, violence and abandoned populations,” MSF-USA special report, November 9, 2000, http://doctorswithoutborders.org/publications/reports/2000/angola_11-2000.pdf (accessed May 19, 2009), p. 4. Human Rights Watch also documented an increasing number of reports in 1999 of deliberate mutilations, which were not commonplace in the prior history of the conflict. Human Rights Watch, *Angola Unravels*, pp. 44, 48, 51, 62-63.

²⁸⁰ Guus Meijer and David Birmingham, “Angola from past to present,” in Guus Meijer, ed., *Conciliation Resources*, “From military peace to social justice? The Angolan peace process,” *Accord*, issue 15, 2004, <http://www.c-r.org/our-work/accord/angola/past-present.php> (accessed May 19, 2009).

Although in 1999 the Angolan National Assembly declared UNITA leader Savimbi a “war criminal and international terrorist” and sought his arrest,²⁸¹ the following year, in September 2000, the National Assembly reversed course and offered a pardon to Savimbi “if he were to ask for [it] and ask for the forgiveness of the Angolan people.”²⁸² In December 2000 the government again granted amnesty to all those who laid down their arms and intended to embrace the peace process, including Savimbi. A year later the Angolan government still held open the possibility of a pardon for Savimbi, suggesting three possible scenarios for him: capture and trial as a war criminal, surrender and pardon, or death in combat. On February 22, 2002, he was killed in combat.²⁸³

It is clear that the removal of Savimbi from the situation played an important role in ending the conflict. His death in February 2002 prompted UNITA to return to the negotiating table.²⁸⁴ Two days before signing the Memorandum of Understanding between UNITA and the government (also known as the Luena Accord after the eastern Angola city in which it was signed) in April 2002, the National Assembly unanimously approved a blanket amnesty law for UNITA and the Angolan Armed Forces for all infractions of military discipline and crimes against the state security forces committed during the conflict.²⁸⁵ The Luena Accord itself contains a general amnesty law for all crimes committed during the conflict.²⁸⁶

²⁸¹ On January 27, 1999, the Angolan National Assembly passed a resolution declaring Jonas Savimbi a “war criminal and international terrorist.” It called for legal procedures leading to Savimbi and his direct collaborators being held accountable in criminal and civil law, both nationally and internationally. On July 24 the Angolan authorities issued an arrest warrant for Savimbi on charges including rebellion, sabotage, murder, and torture. The warrant also accused Savimbi of kidnapping, robbery, and the use of explosives—including planting landmines at sites used by civilians. UN Secretary-General Kofi Annan criticized the warrant, saying it was “wrong” and that “you make peace with enemies, and to make peace you have to have communications, either directly or through third parties.” Human Rights Watch, *World Report 2000*, Angola chapter, http://www.hrw.org/legacy/wr2k/Africa.htm#P288_98792, pp. 29-30. See also “UN Chief Criticizes Arrest Warrant for UNITA Leader,” South African Press Association/Agence France-Presse, July 27, 1999, reproduced at <http://www.undp.org.za/docs/news/1999/nzo727a.html> (accessed May 19, 2009).

²⁸² “Angolan Government offers Savimbi pardon,” *afrol.com*, September 2, 2000, http://www.afrol.com/html/News/angoo4b_santos_pardon.htm (accessed May 20, 2009).

²⁸³ Mario de Queiroz, “Savimbi’s death a chance for Angolan peace,” Inter Press Service, February 25, 2002, http://www.afrol.com/html/News2002/angoo4_savimbis_death.htm (accessed May 20, 2009).

²⁸⁴ Had Savimbi been brought to justice following peace talks in 1989, 1991, or 1994, rather than being granted amnesty, it is possible that the conflict would have ended earlier and numerous lives would have been saved.

²⁸⁵ Angolan Government’s Peace Plan, Luanda, Angola, March 13, 2002, reproduced in unofficial translation by Conciliation Resources at <http://www.c-r.org/our-work/accord/angola/angolan-government-plan.php> (accessed May 20, 2009): “The government will propose to the National Assembly the approval of an amnesty for all crimes committed within the framework of the armed conflict, the aim of this measure being to ensure the requisite legal and political guarantees for promoting and achieving the process of national reconciliation.”

²⁸⁶ Memorandum of Understanding: addendum to the Lusaka Protocol for the cessation of hostilities and the resolution of the outstanding military issues under the Lusaka Protocol, reproduced in unofficial translation by Conciliation Resources at <http://www.c-r.org/our-work/accord/angola/memorandum-of-understanding.php> (accessed May 20, 2009), chapter II, art. 2.1: “The Government guarantees, in the interest of peace and national reconciliation, the approval and publication, by the competent organs and institutions of the State of the Republic of Angola, of an Amnesty Law for all crimes committed within the framework of the armed conflict between the UNITA military forces and the Government.” United Nations Under-Secretary-General and Special Advisor on Africa Ibrahim Gambari reported to the UN Security Council on April 23 that, in signing the

The successive failed efforts to broker peace with promises of amnesty in Angola are another example of impunity failing to achieve the desired results. Nonetheless, in this instance, after 27 years of bloodletting, the Luena Accord did bring an end to the conflict.

C. Sudan

In Sudan, longstanding impunity for the state's use of abusive ethnic militias to attack civilians has contributed to the repeated use of this tactic with devastating results for civilians in different areas across the country. The tactics used in recent years in Darfur—including the widespread targeting of civilians—were first employed during the country's civil war in the south. Notably, the UN Security Council remained silent and never once condemned Khartoum or rebel factions for human rights abuses throughout that conflict in the 1980s and 1990s; nor did the peace agreement that ended the civil war include provisions for accountability. Lack of consequences for committing international crimes in the south likely affected government decisions about waging war in Darfur since 2003.²⁸⁷

1. North-south conflict

The 21-year civil war between the Sudan People's Liberation Army/Movement and the central Sudanese government ended with the signing of the January 2005 Comprehensive Peace Agreement.²⁸⁸ More than two million civilians are estimated to have died during the conflict and four million people were displaced.²⁸⁹

To stem the rebel tide in south Sudan, the government used “scorched earth” tactics to target rural communities perceived to be sympathetic to the SPLA. From the mid-1980s, ethnic militia known as *muraheleen* (or *murahilin*) were a key part of this counterinsurgency campaign.²⁹⁰ The militia, armed with government-supplied weapons, were allowed full

memorandum relating to amnesty, he had entered a reservation that the UN did not recognize any amnesty as applicable to genocide, crimes against humanity, and war crimes, reinforcing that these amnesties were not acceptable under international law. “Secretary-General's Special Adviser Briefs Security Council on Angola: Says Recent Agreement Creates Brighter Prospects for Lasting Peace,” UN press release, SC/7372, April 23, 2002, <http://www.un.org/News/Press/docs/2002/sc7372.doc.htm> (accessed May 20, 2009).

²⁸⁷ Human Rights Watch, *Darfur in Flames: Atrocities in Western Sudan*, vol. 16, no. 5(A), April 2004, <http://www.hrw.org/reports/2004/sudano404/sudano404.pdf>, p. 16; *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, vol. 16, no. 6(A), May 2004, <http://www.hrw.org/sites/default/files/reports/sudano504full.pdf>, p. 44.

²⁸⁸ Human Rights Watch, *Sudan, Oil and Human Rights* (Brussels: Human Rights Watch, 2003), <http://www.hrw.org/reports/2003/sudan1103/sudanprint.pdf>, p. 69.

²⁸⁹ Human Rights Watch, *Sudan – Human Rights Accountability Must Be Part of North-South Peace Agreement*, November 18, 2004, <http://www.hrw.org/ru/news/2004/11/18/sudan-human-rights-accountability-must-be-part-north-south-peace-agreement>.

²⁹⁰ Muraheleen is a Misseriya word for “travelers” and originally referred to young armed men on horseback who would accompany and guard the family livestock. Although the muraheleen were originally of Misseriya ethnicity and were known for

license to loot cattle, to burn villages, and to kill, injure, or capture Nuer and Dinka civilians for use as slave labor.²⁹¹ Along with government forces, the muraheleen destroyed granaries, fields, and wells, rendering villages uninhabitable.²⁹² As the war continued, the Sudanese government launched offensives in which hundreds of muraheleen on horseback raided villages as part of an effort to displace the population.²⁹³ The government also undertook extensive aerial bombing campaigns, sometimes backing ground operations by the muraheleen, which killed civilians and displaced tens of thousands of people.²⁹⁴ In the south, the government denied humanitarian access to areas of assessed civilian need without regard to human deprivation.²⁹⁵ Militia raiding, government bombing, and the simultaneous denial of humanitarian relief caused tens of thousands of deaths from famine and disease in Bahr el Ghazal in 1998 alone.²⁹⁶

Human Rights Watch also documented abuses by the SPLA, particularly after the movement splintered, including targeted and indiscriminate attacks on civilians, destruction of homes, and pillage of grain and livestock. The SPLA and its offshoots also did not pursue accountability for these abuses but rather included amnesty provisions in ceasefire agreements or conventions aimed at resolving disputes between the rival factions. In some

their role accompanying the military supply train through Bahr el Ghazal to Wau town, over time the term muraheleen became used to refer to any northern Arab ethnic militia deployed in southern Sudan. See Human Rights Watch, *Famine in Sudan, 1998: The Human Rights Causes* (New York: Human Rights Watch, 1999), <http://www.hrw.org/legacy/reports/1999/sudan/>, pp. 27-29. In November 1989, a few months after the National Islamic Front came to power through a military coup, the new government promulgated the Popular Defense Forces Act by which preexisting tribal militia such as the muraheleen were incorporated into the armed forces, in effect as paramilitaries. See Human Rights Watch/Africa, *Behind the Red Line: Political Repression in Sudan* (New York: Human Rights Watch, 1996), <http://www.hrw.org/legacy/reports/1996/Sudan.htm>, pp. 274-75; and *Famine in Sudan*, p. 29.

²⁹¹ See, for example, Human Rights Watch, *Famine in Sudan*, pp. 101-106; *Sudan, Oil and Human Rights*, p. 68; and Human Rights Watch/Africa, *Civilian Devastation: Abuses by All Parties in the War in Southern Sudan*, (New York: Human Rights Watch, 1994), p. 72. The captured civilians and property were war booty used as a financial incentive for the impoverished militia to participate in the conflict. See Human Rights Watch, *World Report 2001*, Sudan chapter, <http://www.hrw.org/legacy/wr2k1/africa/sudan.html> (citing the government's deliberate decision not to prosecute or even record the identity of the abductors or forced labor owners).

²⁹² See Human Rights Watch, *Sudan, Oil and Human Rights*, pp. 67-71; Human Rights Watch/Africa, *Civilian Devastation*, pp. 70-73; Human Rights Watch, *Famine in Sudan*, pp. 104-106.

²⁹³ Human Rights Watch/Africa, *Civilian Devastation*, pp. 70-74; Human Rights Watch, *Sudan, Oil and Human Rights*, pp. 76-78.

²⁹⁴ Human Rights Watch/Africa, *Civilian Devastation*, pp. 73-85.

²⁹⁵ See Human Rights Watch, *World Report 1998* (New York: Human Rights Watch, 1997), Sudan chapter, http://www.hrw.org/legacy/worldreport/Africa-12.htm#P972_267375; Human Rights Watch/Africa, *Civilian Devastation*, pp. 80-82; and Human Rights Watch, *Famine in Sudan*, pp. 41-46.

²⁹⁶ Human Rights Watch, *HRW Background Paper On The 1998 Famine In Bahr El Ghazal, Sudan*, <http://www.hrw.org/legacy/campaigns/sudan98/sudfam.htm>; *World Report 1999* (New York: Human Rights Watch, 1998), Sudan chapter, <http://www.hrw.org/legacy/worldreport99/africa/sudan.html>; *Famine in Sudan*, pp. 2-5.

cases, this resulted in freeing military commanders who had been convicted of abusing their positions and of attacking civilians.²⁹⁷

2. Darfur

From the early 1980s until mid-2003 a combination of extended periods of drought, competition for dwindling resources, lack of good governance and the rule of law, impunity for crimes, and the easy availability of guns made local clashes between Arab nomads and ethnic Fur increasingly bloody and politicized.²⁹⁸ A wide-reaching 1994 administrative reorganization by the government of President Omar al-Bashir in Darfur gave members of Arab ethnic groups new positions of power that the Masalit, like their Fur and Zaghawa neighbors, saw as an attempt to undermine their traditional leadership role and power of their communities in their homeland.²⁹⁹ Communal hostilities broke out in 1998 and 1999 when Arab nomads began moving south with their flocks earlier than usual.³⁰⁰ Starting in early 2003, rebel movements emerged calling for a power-sharing arrangement with the government and an end to tribal militias.³⁰¹

²⁹⁷ Human Rights Watch/Africa, *Civilian Devastation*, pp. 2-3; and *Behind the Red Line*, pp. 340-42. At the October 1994 South Sudan Independence Movement/Army (SSIM/A) convention at Akobo, amnesty for all persons in SSIM/A custody was declared. This included amnesty for SSIA rebel military commanders who were being held or had been convicted in connection with the fighting among Nuer groups in February 1994, which had resulted in the burning and destruction of many villages in Upper Nile and in the deaths of almost 1,400 civilians. One of the Lou Nuer commanders, Gordon Kong Banypiny, who had been sentenced for his role in attacking civilians and destroying civilian property, was released as a result of the amnesty and then later went on to commit more crimes, including taking 11 relief workers hostage in February 1995. Human Rights Watch/Africa, *Behind the Red Line*, pp. 341-42. On April 27, 1995, rival factions of the SPLA signed the Lafon Declaration agreeing to a ceasefire between their forces. The agreement also provided "a general and unconditional amnesty covering the period from 28/8/1991 to 27/4/95, to all sides of the split so that nobody may be prosecuted or punished for actions committed during this period." The rebels remained unaccountable to the civilian population that they governed, and Human Rights Watch documented gross abuses against civilians committed by the SPLM, including murder, looting, and rape, long after the Lafon Declaration. Human Rights Watch, *World Report 1998*, Sudan chapter, http://www.hrw.org/legacy/worldreport/Africa-12.htm#P972_267375.

²⁹⁸ The drought and famine of 1984-85 heightened tensions in Darfur as Arab and Zaghawa nomads traveled southward into Fur areas in search of areas to graze. The Arabs were also aggrieved over their alleged under-representation in the regional government and their being neglected in distribution of famine relief supplies. The loss of animals from drought led to increased banditry. The land disputes and political tension (further complicated by the presence of Chadian rebels and support from Libya) escalated into full-scale civil war in the late 1980s. In 1988 and early 1989 numerous villages were burned, hundreds killed, and thousands left homeless. Requests for protection from the army were rebuffed by army officers. After the Fur acquired some arms, the raids turned into a pitched battle and the government convened a peace conference in June 1989 to settle the disputes. The resulting peace agreement in Darfur contained a general amnesty provision, though it included some reparations (in cattle) to be made by each side. Fighting resumed a few months later after the government once again failed to neutrally monitor and implement the peace agreement. This time, in addition to attacks by militia, Sudanese army units became actively involved on the side of the Arabs. In early 1990 several villages were destroyed and wells contaminated. Africa Watch (now Human Rights Watch/Africa), *Sudan: The Forgotten War in Darfur Flares Again*, vol. 2, no. 11(A), April 1990, pp. 1-7.

²⁹⁹ Human Rights Watch, *Darfur Destroyed*, p. 6.

³⁰⁰ *Ibid.*

³⁰¹ The Sudan Liberation Army/Movement (SLA/M) emerged in February 2003 calling for power sharing with the central government and for an end to tribal militias. A second rebel group, the Justice and Equality Movement (JEM), emerged later in 2003. In part the emergence of rebel groups was a result of allegations in the Fur, Zaghawa, and Masalit communities that the

From April 2003 the government of Sudan pursued a strategy in Darfur strikingly similar to that which it had pursued in the south. The lack of consequences for the crimes in the north-south war, and the silence of the Security Council in the face of those atrocities, sent the message to Khartoum that there would be no consequences for using the same tactics in Darfur.

In Darfur, as in the south, the government relied on the practice of providing selected Arab nomads (who had easier access to small villages in rural areas than cars and tanks) with automatic weapons and free rein to target civilians in the name of government counterinsurgency. Janjaweed militias, like the murahleen, were provided the opportunity to loot and to access grazing that they had long coveted. This was an incentive to pursue Khartoum's policy of "ethnic cleansing." The government paid and armed the Janjaweed just as it had the murahleen.³⁰² In both situations, the government used militias to increase the deniability of government involvement in atrocities, despite the fact that the militia was an essential part of the government's counterinsurgency strategy. Moreover, both militias were armed and officered by the army, were officially part of its Popular Defense Forces, and benefited from immunity from prosecution as a result of a presidential decree prohibiting prosecution of armed forces without permission of "the General Commander."³⁰³

Some of the same personnel who had organized the earlier counterinsurgency operations in the south were redeployed in Darfur. For example, Ahmed Haroun, the first target of an International Criminal Court warrant for crimes in Darfur, was the chief of staff for the governor of North Kordofan in the late 1990s. While working in Kordofan, Haroun was allegedly responsible for mobilizing the murahleen and for planning and supplying military operations against rebel targets in that area. He later applied this experience to coordinate Janjaweed militia activities in Darfur as state minister of the interior responsible for Darfur.³⁰⁴

Sudanese government was pursuing a policy of support to Arab nomadic groups based on a national agenda of Arabization and the creation of an "Arab belt" that would claim the lands of "non-Arab" ethnic groups in the region. The timing of the Darfur rebellion was also almost certainly linked to the peace negotiations between the Sudanese government and the SPLA, which were ongoing in Kenya and would divide political power and oil revenues. See Human Rights Watch, *Empty Promises? Continuing Abuses in Darfur, Sudan*, August 11, 2004, <http://www.hrw.org/legacy/background/africa/sudan/2004/sudano804.pdf>, pp. 6-11.

³⁰² Human Rights Watch, *Darfur in Flames*, pp. 24-26.

³⁰³ See Human Rights Watch, *Lack of Conviction: The Special Criminal Court on the Events in Darfur*, no. 1, June 2006, <http://www.hrw.org/legacy/background/ij/sudano606/sudano606.pdf>, p. 18 (citing Temporary Decree, People's Armed Forces Act 1986, Amendment 2005, "Seeking Permission to Institute Criminal Proceedings Against Any Officer, Ranker or Soldier," August 4, 2005). See also Human Rights Watch, *Famine in Sudan*, pp 27-29; *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, vol. 17, no. 17(A), December 2005, <http://www.hrw.org/sites/default/files/reports/darfur1205webwcover.pdf>, p. 9; and *Empty Promises*, pp. 6-11.

³⁰⁴ *Situation in Darfur, Sudan*, International Criminal Court, No. ICC-02/05, Prosecutor's Application under Article 58(7), February 27, 2007, <http://www.icc-cpi.int/iccdocs/doc/doc259838.PDF> (accessed May 13, 2009), paras. 35, 65, 66.

The pattern of conflict is also quite similar, only much larger in scale. The government and its proxy militia forces targeted the civilian population through a combination of indiscriminate and targeted aerial bombardment, a scorched earth campaign, and a denial of access to humanitarian assistance. In northern Darfur, aggressive aerial bombardment was followed by ground attacks by Sudanese army troops and Janjaweed. The bombing by Soviet-designed Antonov cargo planes in north Darfur was similar to the pattern of Antonov bombing in southern Sudan.³⁰⁵ Key elements of the government's campaigns in both southern Sudan and Darfur included destruction of water sources, burning of crops, and theft of livestock.

One purpose of both campaigns was, among other objectives, to destroy any real or potential support base for the rebels in the civilian population. The government's strategy in Darfur, as it was in the south, was to remove rural populations from large areas of the region, that is, "draining the sea from the fish."³⁰⁶ Within a year, hundreds of villages in Darfur were destroyed, 750,000 people were displaced, and more than 110,000 fled across the border to Chad.³⁰⁷ Five years later, attacks continue, over 2.5 million people are displaced, and civilian casualties number in the hundreds of thousands.³⁰⁸

3. Naivasha peace talks

Peace talks between the north and south began in June 2002 in Naivasha, Kenya, and continued until January 2005. While the negotiations were underway in early 2003, a Darfur rebel movement, the Sudan Liberation Army (SLA) launched an attack on El Fashir airport and in response the Sudanese government began committing large-scale attacks against civilians in Darfur. Throughout the north-south talks, the participants and international negotiators did not insist that the peace agreement include provisions to hold the government and rebel SPLM/A accountable for the massive human rights abuses that were committed during the war.³⁰⁹ The United States and other countries involved in the Naivasha

³⁰⁵ Human Rights Watch, *Darfur in Flames*, pp. 18-19.

³⁰⁶ Human Rights Watch, *Darfur Destroyed*, p. 40.

³⁰⁷ Human Rights Watch, *Darfur in Flames*, p. 14.

³⁰⁸ "Darfur: Ban welcomes Sudanese ceasefire, plan to disarm militias," *UN News Service*, November 12, 2008, <http://www.un.org/apps/news/story.asp?NewsID=28915&Cr=Darfur&Cr1=> (accessed May 10, 2009) (estimating that from 2003 to 2008, 300,000 people were killed and 2.7 million were displaced).

³⁰⁹ The presumption of impunity was also reflected in other earlier agreements between the government and rebel factions in the north. In 1996 the government signed a Political Charter with the head of the SPLA rival faction, the South Sudan Independence Movement. The Charter provided for a referendum "to determine the political aspirations of the people of southern Sudan." One year later, the Political Charter was incorporated into a peace agreement between the SSIM and the government. A number of other small rebel factions also sign the 1997 Khartoum Peace Agreement. See Human Rights Watch, *Sudan, Oil and Human Rights*, pp. 171-174. The Peace Agreement was premised upon and incorporated a general amnesty

talks were reluctant to raise the ongoing crimes in Darfur for fear of jeopardizing the talks.³¹⁰ Ultimately, the Comprehensive Peace Agreement did not contain provisions relating to justice or reparations for victims.

By failing to put accountability on the agenda, negotiators demonstrated that there were no consequences for the massive atrocities that had taken place in the south—the implication being that there would be no consequences for similar attacks on civilians in Darfur or for ongoing attacks in the south. In early 2004, in addition to the abuses in Darfur, the government conducted a scorched-earth campaign that displaced 100,000 civilians from the Shilluk lands in the Upper Nile.³¹¹

4. Ongoing impunity

The Sudanese government has maintained its policy of impunity with respect to Darfur. Despite the establishment of the Special Criminal Courts on the events in Darfur in 2005, no senior official has been prosecuted for atrocities in Darfur, and no one has been charged for war crimes or crimes against humanity.³¹² Despite occasional proclamations about seeking justice (made when the threat of being held to account at the ICC seems imminent), the Sudanese government has failed to prosecute local, regional, and national officials who planned, coordinated, and implemented “ethnic cleansing” or were otherwise implicated in war crimes and crimes against humanity. Instead of being investigated, these individuals have been rewarded. A notorious Janjaweed leader, Musa Hilal, who is subject to sanctions by the Security Council, was appointed to a post as a presidential advisor. Another Janjaweed leader who is the subject of an ICC arrest warrant, Ali Kosheib, was in Sudanese custody in relation to other events in Darfur, but was released from custody without a trial in October 2007. Ahmed Haroun served until May 2009 as state minister for humanitarian affairs tasked with coordinating humanitarian assistance for the very people that he is charged with victimizing. He has been given a series of high-profile appointments, including co-chairing a committee designated to hear human rights complaints as part of the

proclamation. Khartoum Peace Agreement of April 21, 1997, reproduced at www.simonrgd.com/THE%20SUDAN.htm (accessed May 14, 2009), General Principles (3), Chapter Six (i-k), Annex 2. Until the end of the war, and during peace negotiations, the government continued its policy of arming tribal militias to use as proxy fighting forces, and using scorched earth tactics. Rebels too committed serious abuses over these years, including summary executions and destruction of villages.

³¹⁰ Human Rights Watch, *Human Rights Accountability Must Be Part of North-South Peace Agreement*.

³¹¹ *Ibid.*

³¹² See also Chapter VII.B.3.

Comprehensive Peace Agreement. Recently he was reassigned to the position of governor of the sensitive oil-rich north-south border province South Kordofan.³¹³

Meanwhile, in another reprise of scorched earth tactics, large-scale attacks on villages by Janjaweed militia and Sudanese ground troops, supported by attack helicopters and aerial bombardments, erupted in February 2008.³¹⁴ In addition, in December 2007 and May 2008, clashes were reported in Abyei, a disputed oil-rich region that both north and south Sudan would like to incorporate.³¹⁵ In those cases the government was again reported to have been using government-backed Arab militias to drive other ethnic groups out of areas with oil.³¹⁶

The absence of real consequences for its unlawful tactics likely encouraged government officials in Khartoum to believe that they could wage a similar war against civilians in Darfur with impunity. Although there were a number of causes of the conflict in Darfur, the climate of impunity in Sudan for these offenses doubtless was a contributing factor. There was no obstacle to the government adopting the same strategy that they had used in the south, and Arab nomadic groups had no reason to fear participating in the commission of crimes, particularly if promised the opportunity to loot and pillage with impunity. The failure of UN bodies and influential states to demand accountability for war crimes and crimes against humanity in southern Sudan showed that there was little to fear by deploying such unlawful tactics and encouraged their use in later conflicts on an even larger scale. As one Darfuri refugee interviewed in a camp along the Chad border said, “If there were justice in Sudan, we wouldn’t be here.”³¹⁷

³¹³ “Sudan’s president removes ICC-wanted minister in a mini cabinet reshuffle,” *Sudan Tribune*, May 8, 2009, <http://www.sudantribune.com/spip.php?article31103> (accessed May 8, 2009).

³¹⁴ “Sudan: Government Must End Attacks on Civilians,” Human Rights Watch news release, February 10, 2009, <http://www.hrw.org/en/news/2008/02/10/sudan-government-must-end-attacks-civilians>; and Lydia Polgreen, “Scorched-Earth Strategy Returns to Darfur,” *New York Times*, March 2, 2008, <http://www.nytimes.com/2008/03/02/world/africa/02darfur.html> (accessed May 12, 2009).

³¹⁵ Scott Baldauf, “In Sudan, another conflict could eclipse Darfur,” *Christian Science Monitor*, February 27, 2008, <http://www.csmonitor.com/2008/0227/p06s01-woaf.html> (accessed May 13, 2009).

³¹⁶ See Human Rights Watch, *Sudan – Abandoning Abyei: Destruction and Displacement, May 2008*, 1-56432-364-1, July 2008, <http://www.hrw.org/en/reports/2008/07/21/abandoning-abyei-o>; and Nicholas D. Kristof, “Africa’s Next Slaughter,” commentary, *New York Times*, March 2, 2008, <http://www.nytimes.com/2008/03/02/opinion/02kristof.html> (accessed May 13, 2009).

³¹⁷ Human Rights Watch interview, D’Jabal camp, Chad, July 23, 2007.

PART TWO: LONG-TERM IMPACT

Even outside the immediate pressures of peace talks, governments and other international actors may find it more expedient not to demand accountability for gross human rights violations. Human Rights Watch has documented several situations in which this decision to ignore grave abuses has had very damaging long-term consequences. Tolerance of impunity can contribute to renewed cycles of violence, both by implicitly permitting unlawful acts and by creating an atmosphere of distrust and revenge that may later be manipulated by leaders seeking to foment violence for their own political ends. By contrast, pursuing justice in the long run may help strengthen rule of law by enhancing domestic criminal enforcement mechanisms. Holding trials can help combat revisionist versions of events by those who seek to deny that crimes occurred. An accurate account can enhance future generations' understanding of these events. Ultimately, successful investigations and prosecutions may have some deterrent effect by, at a minimum, increasing awareness of the types of acts that are likely to be punishable offenses.

VI. Renewed Cycles of Violence

Peace without justice cannot be sustainable. It is a terrible mistake to believe that people will simply forget. Even after a hundred years, sometimes even after several hundred years, unpunished crimes continue to represent huge stumbling blocks in establishing peaceful, normal relations between some states.

— Carla Del Ponte, former International Criminal Tribunal for the former Yugoslavia prosecutor³¹⁸

While there are undoubtedly many factors that influence the resumption of armed conflict, and we do not assert that impunity is the sole causal factor, Human Rights Watch research demonstrates the negative effects of the international community's failure to confront abuses outside the context of peace negotiations. 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

³¹⁸ "European Values and National Interests in the enlarging Europe," Keynote Speech by Carla Del Ponte, former ICTY prosecutor, at the International Conference: Values and Interests in International Politics, Tallinn, October 30, 2006, http://www.riigikogu.ee/public/Riigikogu/Valissuhted/del_ponte301006.doc (accessed June 29, 2009).

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.”³¹⁹ Slobodan Milosevic, in his opening statement for his defense before the ICTY, also invoked “the Ustasha genocide over the Serbs[, ...]this terrible mass crime from the not so distant past” to try to explain Serbia’s reaction to the February 1990 rally at which Croatian leader Franjo Tudjman said that the creation of an independent Croatia was an expression of “the historical aspirations of the Croatian people.”³²⁰ Milosevic characterized the response of the Serbian people (such as placing barricades to the entrances of their settlements during the “log revolution” and other acts in defense of Vukovar characterized by the ICTY as criminal) as collective defense in response to the “recurring Ustasha terror and ideology.”³²¹

Serbian media gave increasing prominence to this alleged threat facing Serbs in Yugoslavia in the late 1980s and early 1990s. Years later 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 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.”³²² A Serb leader from Croatia, Milan Babic, admitted to making ethnically-based inflammatory speeches, stating that he was strongly influenced by Serbian propaganda that repeatedly referred to an imminent threat of genocide by the Croatian authorities against the Serbs in Croatia.³²³

³¹⁹ Laura Silber and Allan Little, *Yugoslavia: Death of a Nation* [Rev. Ed.] (New York: Penguin Books, 1997), pp. 31-32.

³²⁰ *Prosecutor v. Slobodan Milosevic*, ICTY, Case No. IT-02-54, Defense Opening Statement, Trial Transcript, September 1, 2004, pp. 32266-67. See Part One for further discussion of Milosevic’s surrender to the ICTY.

³²¹ *Ibid*, pp. 32269-73.

³²² *Prosecutor v. Milomir Stakic*, ICTY, Case No. IT-97-24-T, Judgment, July 31, 2003, para. 52.

³²³ *Prosecutor v. Milan Babic*, ICTY, Case No. IT-03-72-S, Sentencing Judgment, June 29, 2004, para. 24(g).

The failure to establish individual accountability and to 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. The following are other examples of situations in which ethnic tension fostered by impunity contributed to cycles of violence.

A. Kenya

Following the December 27, 2007, elections in Kenya, violence erupted throughout the Rift Valley and in the west of the country as angry citizens burned and looted factories, shops, and homes, and chased those perceived to be supporters of President Mwai Kibaki (the declared winner of the disputed election) away. Members of Kibaki's Kikuyu tribe in particular were targeted. Kikuyu militias then struck back. In the two months after the election, over 1,100 people were killed.

The violence echoed previous episodes of political violence in Kenya for which no one was held accountable. Many of those implicated in the post-election violence were high-ranking politicians who had been implicated in organizing political violence surrounding the 1992 and 1997 elections but have never been brought to account and continued to commit offenses with impunity. By failing to take action against those most responsible for violence, successive Kenyan governments sent the message that organizing or inciting political and ethnic violence carried no penalty. By taking little action in the face of consistent and chronic patterns of impunity that characterized Kenya's governments for the past two decades, influential states and international bodies contributed to the recurrence of violence.

By late 1991, concerted domestic and international pressure on the government of President Daniel Arap Moi, including the suspension of aid by the World Bank and bilateral donations conditioned on economic and human rights reforms, forced Kenya to legalize a multiparty system. One year later, in December 1992, elections took place. The return to a multiparty system coincided with the eruption of ethnic violence in Kenya's Rift Valley, Nyanza and Western provinces. Although the government first portrayed the "tribal clashes" as the result of longstanding conflict over land or the spontaneous response of ethnically divided communities to the heated election campaign, it soon became clear that the violence was being coordinated and that high-ranking government officials had been involved in training and arming "warriors" from President Moi's ethnic group, the Kalenjin, to attack those from other ethnic groups.

The violence was fomented by “majimbo” rallies held by certain Kalenjin and Maasai politicians who were members of the president’s party. The politicians asserted that the Rift Valley was traditionally Kalenjin/Maasai territory. “Majimboism” was a way to demand the expulsion of all ethnic groups except those who resided in the area before colonialism.³²⁴ Not coincidentally, the groups to be expelled were those predominantly perceived as those who supported the political opposition.³²⁵ It was a kind of ethnic cleansing by constituency.

Kalenjin warriors in numerous similar attacks killed civilians and looted and burned farms inhabited by Kikuyus, Luhyas, or Luos. Some less organized retaliatory attacks against the Kalenjin also occurred, creating an escalating cycle of violence and a growing atmosphere of hatred and suspicion between communities that had lived together more or less peacefully for years.³²⁶ About 300,000 people were driven from their land. The changing demographics caused by the displacement had significant political impact: the Rift Valley province, which was repopulated with government supporters, contains the largest number of seats in Parliament.³²⁷

Refugees from the 1992 election violence reported that the police and army stood by and did nothing during attacks. Although the government claimed that over 1,000 charges had been brought for the violence, many of the cases were not pursued and those arrested were disproportionately non-Kalenjin.³²⁸

Although foreign governments expressed dissatisfaction with aspects of Moi’s rule, they did not make it a priority to press him to hold perpetrators responsible for politically motivated violence to account.³²⁹ United States officials made several statements throughout 1993 protesting actions taken by the Kenyan government against freedom of expression, but the United States failed to take a strong position regarding the Kenyan government’s responsibility for the Rift Valley violence: the only US government statement on the violence, in September 1993, publicly welcomed the government’s decision to declare security zones,

³²⁴ Africa Watch (now Human Rights Watch/Africa), *Divide and Rule: State Sponsored Ethnic Violence in Kenya* (New York: Human Rights Watch, 1993), p. 16.

³²⁵ *Ibid.*, p. 17.

³²⁶ In Kenya, as in Rwanda, Burundi, and the Balkans, politicians exploited ethnic divisions to preserve and expand their own power. Drawing on the reserve of ethnic hatred that they fomented, politicians mobilized supporters to carry out acts of targeted violence with impunity. See Human Rights Watch, *Playing with Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya*, (New York: Human Rights Watch, 2002), <http://www.hrw.org/legacy/reports/2002/kenya/>, p. 4.

³²⁷ Human Rights Watch, *Divide and Rule*, pp. 1-4.

³²⁸ *Ibid.*, pp. 2, 67-71.

³²⁹ See Human Rights Watch, *Playing with Fire*, p. 69.

showing unwarranted faith in security forces acting properly in these circumstances, and saying nothing about accountability.³³⁰ In December 1994 Kenya's bilateral and multilateral donors expressed satisfaction with Kenya's economic and human rights record and pledged \$800 million in new aid commitments. The resumption of aid without human rights cautions seemed to embolden the government, which appeared to perceive the new aid commitments as tacit consent from the international community to revert to past practices of repression.³³¹

Levels of violence rose again in the period leading up to the 1997 elections. In August 1997, a series of attacks in the Coast province killed 40 people and displaced over 120,000. Leaflets were distributed that proclaimed, "The time has come for us original inhabitants of the coast to claim what is rightly ours. We must remove these invaders from our land."³³² The warnings and attacks were strikingly similar to the "ethnic" violence that had taken place prior to the 1992 elections in the Rift Valley and had targeted some of the same ethnic groups, and they occurred shortly after voter registration indicated that the government would lose the province.³³³ The Coast raiders targeted members of ethnic communities that had voted disproportionately against the ruling Kenya African National Union (KANU) party in the 1992 election causing KANU to lose two of the four parliamentary seats in one district that year. As a result of the 1997 attacks, by some estimates 75 percent of likely opposition voters were displaced by the violence and many lost identity documents, making it impossible for them to vote even if they returned to the Coast province constituency where they were registered.³³⁴ As a result, Moi captured the vote that he needed in the violence-stricken province in order to retain the presidency.³³⁵

Once again, the government response to the violence was inaction. Despite advance warnings, the police took no action to stop the raids. Police investigations when they did occur were seriously inadequate, leading courts to eventually acquit all but a tiny handful of the accused raiders. Coast province leaders intervened to secure the release of arrested politicians. In the end, despite hundreds of arrests and a long governmental inquiry, no one

³³⁰ Human Rights Watch, *World Report 1994* (New York: Human Rights Watch, 1993), Kenya chapter, http://www.hrw.org/legacy/reports/1994/WR94/Africa-02.htm#P71_31637.

³³¹ See Human Rights Watch/Africa, *Kenya: Old Habits Die Hard: Rights Abuses Follow Renewed Foreign Aid Commitments*, vol. 7, no. 6, July 1995.

³³² See Human Rights Watch, *World Report 1998*, Kenya chapter, http://www.hrw.org/legacy/worldreport/Africa-06.htm#P540_141683.

³³³ Ibid.

³³⁴ Human Rights Watch, *Playing with Fire*, pp. 2, 57-59.

³³⁵ Ibid.

was brought to justice for organizing the attacks.³³⁶ A delegation of human rights groups including Human Rights Watch found that following the failure of the government to act, there were increasing acts of ethnic hatred and violence. Members of the Kikuyu community retaliated against attacks in an organized fashion for the first time.³³⁷

In July 1998 the Akiwumi Commission (named for the commission's chair) was established to investigate the so-called "tribal clashes" that occurred in Kenya between 1991 and 1998 and to recommend further investigation or prosecution of perpetrators. The commission sat for 11 months and heard considerable evidence linking ruling party politicians to the violence. It submitted its final report to the president in August 1999. The president refused to release the report publicly for over three years, even in defiance of a court order—the report was finally released in October 2002. Though many high government officials were implicated, no action was taken to prosecute them.³³⁸ Donor nations and the World Bank, while conditioning financial aid on anti-corruption and good governance, failed to press for accountability for past injustices including the release of the commission report and prosecution of major crimes.

The 2007-08 violence continued the pattern of one party's supporters targeting members of ethnic groups associated with the political opposition. In this case, in the wake of disputed election results, Human Rights Watch found that local leaders in several Kalenjin communities backing the opposition Orange Democratic Movement actively fomented violence against Kikuyu communities that they assumed voted for the ruling Party of National Unity, and which in response fought back.³³⁹ Reprisals by militia groups on both sides of the political divide and excessive use of force by police resulted in hundreds of deaths in late December 2007 and early January 2008. National leaders did little to rein in the abuses of their supporters.³⁴⁰

³³⁶ Ibid., pp. 4, 39-55.

³³⁷ "Kenya: Urgent Need for Action on Human Rights," Human Rights Watch news release, April 8, 1998, http://www.hrw.org/english/docs/1998/04/08/kenya1094_txt.htm.

³³⁸ Human Rights Watch, *World Report 2003* (New York: Human Rights Watch, 2003), <http://www.hrw.org/legacy/wr2k3/africa6.html>; and *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance*, vol. 20, no. 1(A), March 2008, <http://hrw.org/reports/2008/kenya0308/>, p. 32-33.

³³⁹ "Kenya: Opposition Officials Helped Plan Rift Valley Violence," Human Rights Watch news release, January 24, 2008, <http://www.hrw.org/en/news/2008/01/23/kenya-opposition-officials-helped-plan-rift-valley-violence>; Human Rights Watch, *Ballots to Bullets*, pp. 10-11.

³⁴⁰ "Kenya: Justice Key to Securing Lasting Peace," Human Rights Watch news release, February 17, 2008, <http://www.hrw.org/en/news/2008/02/16/kenya-justice-key-securing-lasting-peace>.

In the months leading up to the December 2007 election, European Union observers noted 34 election-related deaths and catalogued 190 violent incidents ranging from intimidation to murder. The EU mission noted that, “In most cases, abuses did not receive an appropriate response from the police and the judiciary and there was therefore impunity towards perpetrators. Candidates were also observed using hate speech on a limited number of occasions.”³⁴¹

This time, the international community played a positive role in stopping the violence. Foreign governments, the African Union, and United Nations agencies placed significant diplomatic pressure on the Kenyan government and the opposition to control violence, respect the human rights of Kenyans, and reach a political settlement.³⁴² On February 28, 2008, an agreement was reached between the ruling party and the opposition party that paved the way for a coalition government. The agreement, brokered by former UN Secretary-General Kofi Annan, included a provision establishing a Commission of Inquiry into the post-election violence. The Commission made recommendations for bringing those responsible for post-election violence to justice, including the establishment of a special tribunal to investigate and prosecute those most responsible for the violence.

Once again, however, Kenya’s leaders have so far failed to end impunity. The Kenyan parliament in February 2009 rejected legislation that would set up the special tribunal (for more on the special tribunal see Chapter VII.C).

The repeated failure to stem the ethnically-based political violence and hold perpetrators of human rights abuses to account created a climate of impunity in Kenya that led to cycles of violence. The atmosphere of distrust and division created by the longstanding lack of justice has been repeatedly manipulated by leaders in support of their own political agendas. As with Sudan and Rwanda, because the violence was state-sponsored, concerted international pressure offered the only hope for ensuring accountability for massive crimes. While in Kenya the pressure stopped the violence, failure to sustain that pressure and to actually end impunity is likely to result in more violence sometime in the future. The Kenyan government’s failure to establish a special tribunal to address 2007-08’s post-electoral violence risks creating a precedent of impunity that threatens renewed violence in the next electoral season.

³⁴¹ Human Rights Watch, *Ballots to Bullets*, p. 33 (citing European Union Election Observation Mission, Kenya 2007, “Preliminary Statement,” Nairobi, January 1, 2008).

³⁴² Human Rights Watch, *Ballots to Bullets*, p. 81.

B. Rwanda

In the 13 weeks after April 6, 1994, at least a half a million people perished in Rwanda, including perhaps as many as three-quarters of the Tutsi population and thousands of Hutu who opposed the killing campaign and the forces directing it. The stage was set for the genocide by years of violence for which no one was held accountable. Lack of accountability was a contributing factor to the 1994 events on a number of levels. In particular, a significant contributing factor to the mass atrocities was the international community's willingness to overlook massacres that occurred between 1990 and 1993. Because the government sponsored the violence, the role of international bodies and influential states in demanding accountability was essential.

The population in Rwanda was comprised of three groups: the Hutu, by far the largest group; the Tutsi; and the Twa, a group so small that it played no political role. Historically, Hutu and Tutsi shared a common culture and occasionally intermarried, though as the state developed, an elite took shape and its members were called the Tutsi; the masses became known as Hutu. During the years of colonial rule, first German, then Belgian, the categories of Hutu and Tutsi became increasingly clearly defined and opposed to each other, with the Tutsi elite seeing itself as superior and having the right to rule, and the Hutu seeing themselves as an oppressed people. In the mid-twentieth century, as the colonialists were preparing to leave, Hutu overthrew the Tutsi elite and established a Hutu-led republic. In the process they killed some 20,000 Tutsi and drove another 300,000 to exile. This event, known as the 1959 revolution, was remembered by Tutsi as a tragic and criminal event, while for Hutu it was seen as a heroic battle for liberation.

During the 1960s some of the Tutsi in exile led incursions into Rwanda, seeking to unseat the new Hutu leadership. Within Rwanda officials incited and, in some cases, led attacks against Tutsi still resident in the country, accusing them of supporting the incursions. Most of the 20,000 counted as victims of the revolution actually died in these reprisal attacks and not in the early combat surrounding the change of power.³⁴³

Following the 1991 introduction of a multiparty system, authorities tolerated or even encouraged political violence against rivals. Some of the practices used by political parties against opponents (such as apprehending persons at checkpoints, using whistles to signal attacks, and perpetrators covering their faces with chalk) were used again during the

³⁴³ See Human Rights Watch, *The Rwandan Genocide: How It Was Prepared*, no. 1, April 2006, <http://www.hrw.org/legacy/background/africa/rwanda0406/rwanda0406.pdf>.

genocide. More importantly, the tolerance of violence during this period led to an acceptance of violence in pursuit of political ends as “normal.”³⁴⁴

In addition, in the three-and-a-half years prior to the genocide, some 2,000 Tutsi and dozens of Hutu were slaughtered in what was effectively a rehearsal for what was to come. Playing upon memories of past domination by Tutsi and the legacy of revolution that overthrew their rule, President Juvenal Habyarimana and his circle campaigned to create hatred and fear of the Tutsi as a way of pulling dissident Hutu back to his side.³⁴⁵ Propagandists echoed and magnified the suspicion sown by Habyarimana and the officials around him both before and during the genocide.³⁴⁶ In more than a dozen communes, in the years 1990-93, there were 17 incidents of serious violence. Authorities tolerated and incited small-scale sporadic killings of Tutsi throughout this period and also initiated attacks in reaction to challenges that threatened Habyarimana’s control. In particular, massacres of Tutsi occurred in Kibilira 10 days after the October 1, 1990, invasion by the Tutsi Rwandan Patriotic Front (RPF) (led by children of the Tutsi who fled the 1959 revolution) and again immediately following the RPF strike at Ruhengeri on January 22, 1991. By organizing reprisals against Tutsi civilians, the government was able to rid itself of some of its declared “enemies.”³⁴⁷

Local officials directed the early massacres of Tutsi in several places, telling people that participating in the attacks was their “*umuganda*” or monthly communal work obligation. These attacks were well-orchestrated by the government. For example, in January 1993 two burgomasters halted the attacks during the visit of an international commission investigating human rights violations, saying that the slaughter would resume when the group left. Killings did in fact begin again within several hours of the commission’s departure.³⁴⁸ This type of control indicates that the violence could have been prevented.

³⁴⁴ Human Rights Watch, *Rwanda – Leave None to Tell the Story* (New York: Human Rights Watch, 1999), <http://www.hrw.org/legacy/reports/1999/rwanda/rwanda0399.htm>, pp. 54-59.

³⁴⁵ The tactic of resolving political differences among Hutu at the expense of Tutsi is one that characterized Rwandan politics since at least 1973, when “Public Safety Committees” and other groups began a campaign of intimidation and assaults on Tutsi after there was a growing split between Hutu of the north and Hutu of the south. *Ibid.*, p. 40.

³⁴⁶ Hutu fear was exacerbated by the slaughter of tens of thousands of Tutsi in neighboring Burundi in 1972, 1998, and 1991, and they dreaded killings on a similar scale by the RPF. No one was held accountable for these crimes. See *Ibid.*, p. 65. For more on the violence in Burundi, see Chapter VI.C of this report.

³⁴⁷ These attacks were similar to attacks against Tutsi in the 1960s. Following a series of attacks on Rwanda by Tutsi refugees between 1961 and 1967, Hutu officials led reprisal attacks on Tutsi still within the country, killing 20,000 and forcing over 300,000 to flee abroad out of fear they would be targeted again. No one was held accountable for these crimes. Human Rights Watch, *Leave None to Tell the Story*, pp. 38-40.

³⁴⁸ *Ibid.*, p. 90.

No one, neither officials nor ordinary citizens, was ever convicted of any crime in connection with the massacres that took place between 1991 and 1993.³⁴⁹ The prefect of the prefecture next to Kibilira (where the first massacre occurred in 1990) warned in early 1991 that the killings might begin again because those involved in the killings had been released from prison and “were boasting of ‘brave deeds’ that had gone unpunished.”³⁵⁰

The lack of accountability (and indeed the official support for the violence) sent a clear message that not only would such atrocities be tolerated, but also encouraged. Impunity for earlier crimes made it easier to mobilize the masses for the greater slaughter that took place in April 1994.

Because there was no justice in national courts for the state sponsored violence, the primary hope for accountability for these crimes was pressure from the international community. Relative silence on an international level, therefore, played an important role in enabling the genocide to occur.

In pursuing ethnic violence as a way to keep political power, Habyarimana and his supporters stayed alert to any international reaction to the killings. Mindful of Rwanda’s dependence on foreign aid, Rwandan activists pressed international human rights organizations to form the International Commission of Inquiry into Human Rights Abuse in Rwanda.³⁵¹ The International Commission amassed substantial data to show that “President Habyarimana and his immediate entourage bear heavy responsibility for these massacres [from October 1990 through January 1993] and other abuses against Tutsi and members of the political opposition.” The report, published March 8, 1993, was widely distributed among donor nations. International donors accepted its conclusions and expressed concern but took no effective action to insist that the guilty be brought to justice or that such abuses stop.

The UN special rapporteur on summary, arbitrary, and extrajudicial executions undertook a mission to Rwanda in 1993 and produced a report in August 1993 that largely confirmed the

³⁴⁹ The government removed several officials from their posts in areas where attacks had occurred, particularly after foreign criticism of the killings and after the installation of the coalition government when officials opposed to Habyarimana could influence appointment of personnel. But, more discreetly, national authorities also removed local officials who had protected Tutsi or tried to prevent the spread of violence against them. Africa Watch (now Human Rights Watch/Africa), *Beyond the Rhetoric: Continuing Human Rights Abuse in Rwanda*, vol. 5, no. 7(A), June 1993, reproduced at <http://www.unhcr.org/refworld/docid/3ae6a8017.html> (accessed 7 May 2009), pp. 18-19.

³⁵⁰ Human Rights Watch, *Leave None to Tell the Story*, p. 91.

³⁵¹ The members of this commission were Human Rights Watch, the International Federation of Human Rights Leagues (Paris), the International Center for Human Rights and Democratic Development (Montreal), and the Inter-African Union of Human and People’s Rights (Ouagadougou).

report of the International Commission and concluded that in his judgment the killings were genocide under the terms of the 1948 Convention for the Suppression and Punishment of Genocide. In response, Habyarimana issued a formal statement in which the government “recognizes and regrets the human rights violations committed in our country,” but the government denied that officials took the initiative in the abuses, and declared only that it had failed to assure the security of those attacked and promised to undertake a series of human rights reforms.³⁵² This profession of good intentions was enough to secure the continuing favor of donors.

The international community’s willingness to accept excuses for “lesser” massacres and its continuing acceptance of impunity for killers in official positions contributed to further slaughter that was unambiguously genocidal in nature. The attacks between 1990 and 1994 allowed Habyarimana’s supporters to perfect some of the organizational and logistical methods that they would use during the 1994 genocide. The lack of a strong response from abroad demonstrated that this type of slaughter would be tolerated by the international community.³⁵³

In the first few weeks of the 1994 genocide, international leaders again failed to condemn the mass killings that were taking place in Rwanda. The impact that an international response might have had was only seen once the genocide was well underway. After the US communicated its disapproval in late April, Rwandan authorities cared enough to send orders down to the hills that killings should be brought under control (albeit not ceased altogether; the orders also mentioned conducting killings out of sight). The day after a phone call by Deputy Assistant Secretary of State for African Affairs Prudence Bushnell to the Rwandan army’s Chief of Staff Col. Augustin Bizimungu telling him his officers would be held responsible if they did not stop the massacres, he wrote to the Ministry of Defense saying, “it [is] urgent ... to stop the massacres everywhere in the country.”³⁵⁴ Similarly, following international censure of the killing of orphans in Butare, Bizimungu directed his subordinates in that town “to do everything necessary to stop the barbarities.”³⁵⁵ At a communal council meeting in a remote area, the burgomaster warned local leaders that satellites passing overhead could track continued violence and that such displays would

³⁵² Africa Watch (now Human Rights Watch/Africa), *Beyond the Rhetoric*, p. 19.

³⁵³ Another factor contributing to the Rwanda slaughter was international tolerance for the impunity associated with the assassination of Burundian President Melchior Ndadaye in 1993 by Tutsi army officers. In the aftermath of the slaughter, thousands were killed but the international community did little to demand accountability for those abuses. For more on Burundi, see Chapter VI.C of this report.

³⁵⁴ Human Rights Watch, *Leave None to Tell the Story*, p. 286.

³⁵⁵ *Ibid.*, p. 290.

make re-establishment of good relations with the US impossible. Thus, it was seen that international censure, timid and tardy as it was, prompted Rwandan authorities to restrict and hide killings.³⁵⁶

C. Burundi

In Burundi, the absence of criminal prosecutions has contributed to periodic explosions of inter-ethnic strife and, more recently, intra-ethnic political conflict. For decades the conflict in Burundi, as in Rwanda, has taken the shape of a struggle between two ethnic groups: the Hutu (approximately 85 percent of the population) and the Tutsi (who make up around 15 percent). Most Burundians have suffered some kind of ethnically motivated attack or have family members who have so suffered, yet few have seen justice for these crimes.³⁵⁷ Extremists exploited the resulting anger and fear between the two ethnic groups to instigate violence for their own ends. The ethnic nature of the conflict disguised and embittered what was fundamentally a battle over economic and political power. After 2003, a Hutu rebel group continued fighting a Hutu-led government, exposing the political nature of the conflict.

Lack of access to justice for war crimes was one factor that pushed rebel movements to take up arms and was then used by them to justify their own abuses. An absence of accountability has also created a situation in which leading politicians, as well as senior officials and lower-ranking members of the police, army, and intelligence service, may have committed war crimes against the very citizens that they are obligated to protect.

Cycles of ethnically linked violence began in Burundi under the reign of a Tutsi king, Mwambutsa, not long after it regained its independence from Belgium in 1962. A Rwandan Tutsi refugee was accused of assassinating the first Hutu prime minister three days after his appointment in January 1965. When Mwambutsa appointed a Ganwa³⁵⁸ rather than a Hutu to succeed him the following October, Hutu soldiers and gendarmes attempted a coup.³⁵⁹ The army subsequently executed several Hutu military officers and nearly all prominent Hutu politicians. They also began to purge Hutu from the ranks of the armed forces. Hutu in Muramvya province attacked Tutsi residents and soldiers, and militia responded by

³⁵⁶ Ibid., p. 26.

³⁵⁷ For further discussion of the cycles of violence and impunity in Burundi, see, generally, Stef Vandeginste, *Transitional Justice for Burundi: A Long and Winding Road*, presented at Building a Future on Peace and Justice Workshop, June 25-27, 2007, <http://www.peace-justice-conference.info/download/WS10-Vandeginste%20report.pdf> (accessed May 16, 2009).

³⁵⁸ The Ganwa, often referred to as “a princely class,” are descendants of previous kings of Burundi. They are considered by some to be a Tutsi subgroup, though others consider them a separate ethnic group.

³⁵⁹ Mwambutsa refused to name a Hutu prime minister despite the fact that Hutu won a decisive majority in the legislative elections that followed the assassination.

massacring some 5,000 Hutu.³⁶⁰ An amnesty law, passed in 1967, protected the perpetrators of this violence.³⁶¹

Violence was rekindled in April 1972 when Hutu insurgents attacked and captured two southern Burundi towns and killed many Tutsi residents. The army of the Tutsi-led government easily quelled the uprising but used it as a pretext for a massive slaughter of Hutu: the army and Tutsi militia killed an estimated 200,000 people, targeting in particular teachers, students, clergy, and other Hutu intellectuals as well as Hutu soldiers. There was no accountability for the perpetrators of these atrocities, which have been termed “selective genocide.”³⁶² In the following two decades, Tutsi government leaders continued the policy of systematic discrimination against Hutu.³⁶³

Lack of accountability for the 1972 massacres and events in neighboring Rwanda powerfully shaped subsequent political thought and action.³⁶⁴ Members of each group feared violence—even potential annihilation—by the other and felt anger for past sufferings. Burundian Tutsi viewed the slaughter of Tutsi in Rwanda following the Tutsi loss of power there in 1959 as a warning and feared that sharing power with Hutu in Burundi would also lead to large-scale killing of Tutsi. Hutu keenly remembered the “selective genocide” of Hutu intellectuals in 1972 and feared and distrusted both civilian and military authorities. They felt that they remained vulnerable to similar attacks as long as Tutsi retained a monopoly on political and military power. Hundreds of thousands of Hutus fled the country after the massacres in 1972; it was a group of these refugees who founded the rebel movement Party for the Liberation of the Hutu People–National Liberation Forces (Parti pour la libération du peuple hutu–Forces nationales de libération, Palipehutu-FNL), in a Tanzanian refugee camp in 1980.

When Hutu rose up in 1988 in provinces along the Rwandan border and killed several thousand Tutsi, President Pierre Buyoya permitted the army to restore “peace and order” by

³⁶⁰ Human Rights Watch, *Proxy Targets: Civilians in the War in Burundi* (New York: Human Rights Watch, 1998), <http://www.hrw.org/sites/default/files/reports/BURU983.PDF>, pp. 11-12 (citing Rene Lemarchand, *Burundi: Ethnocide as Discourse and Practice* (Cambridge: Cambridge University Press, 1994), pp. 58-75).

³⁶¹ See Décret-Loi N° 1/119 du 27 novembre 1967 portant actes de clémence en faveur de détenus et auteurs de certaines infractions, *Bulletin Officiel du Burundi*, 8 (1968) 51.

³⁶² Human Rights Watch, *Proxy Targets*, p. 12 (citing Rene Lemarchand and David Martin, *Selective Genocide in Burundi* (London: Minority Rights Group, 1973), pp. 18-19).

³⁶³ Human Rights Watch, *Proxy Targets*, pp. 12-13.

³⁶⁴ See Rwanda section at Chapter VI.B.

using helicopters and armored vehicles to massacre some 20,000 Hutu.³⁶⁵ Buyoya rejected calls for an independent investigation into the 1988 massacres and passed another amnesty law in 1990.³⁶⁶ Palipehutu-FNL launched several attacks in northwestern provinces of Burundi in 1991 and 1992 killing a number of Tutsi. In each case, the army retaliated against the Hutu population, killing an estimated thousand civilians.³⁶⁷

On July 10, 1993, Melchior Ndadaye became the first Hutu president of Burundi. To avert changes the president was planning, a small group of Tutsi soldiers attempted to seize power on October 21, 1993. They captured and later executed Ndadaye along with a number of other high-ranking civilian political officials. Following the assassination, Hutu bands massacred thousands of Tutsi. Burundian soldiers and national police, sometimes aided by Tutsi civilians, massacred thousands of Hutu, including in areas where few or no Tutsi had been killed. In a period of only a few weeks, between 30,000 and 50,000 people from both groups were slain.³⁶⁸

In response to Burundian and international outcry, the UN Security Council established a commission to inquire into these crimes. The commission found that “impunity has, without any doubt, been an important contributing factor in the aggravation of the ongoing crisis.” It concluded that acts of genocide had been committed against the Tutsi and that indiscriminate killing had occurred against Hutu.³⁶⁹ Although the commission recommended in 1995 that international jurisdiction should be asserted with respect to the genocide committed against the Tutsi in 1993 and should extend to other acts committed in the past, including the effort to exterminate educated Hutu in 1972, the Security Council did not take action to create a court (as it had done for the former Yugoslavia in 1993 and Rwanda in 1994), and those responsible remained in power, with devastating consequences. Donor nations also did nothing to insist that those responsible be brought to trial—neither army officers responsible for the assassinations of political leaders and the killings of Hutu civilians, nor the Hutu officials and ordinary people who had slaughtered Tutsi. Those most

³⁶⁵ Human Rights Watch, *Proxy Targets*, p. 13.

³⁶⁶ See Décret-Loi N°1/034/90 du 30 août 1990 portant mesure d’amnistie en faveur de prévenus ou condamnés de certaines infractions, *Bulletin Officiel du Burundi*(1990) 287. Three years later, another amnesty law was passed, Loi du 9 Septembre 1993 portant amnistie, *Bulletin Officiel du Burundi*(1993) 543.

³⁶⁷ Amnesty International, “Burundi: Leaders are changing, but human rights abuses continue unabated,” AI Index: AFR 16/21/96, August 1996, <http://www.grandslacs.net/doc/o265.pdf> (accessed May 14, 2009).

³⁶⁸ Human Rights Watch, *Proxy Targets*, pp. 15-16; *Burundi – Neglecting Justice in Making Peace*, vol. 12, no. 2(A), April 2000, <http://www.hrw.org/legacy/reports/2000/burundi/>, p. 10.

³⁶⁹ United Nations Security Council, “Letter dated 25 July 1996 from the Secretary-General addressed to the President of the Security Council” (enclosing the final report of the International Commission of Inquiry for Burundi), S/1996/682, August 22, 1996, <http://daccess-ods.un.org/TMP/7231199.html> (accessed June 29, 2009), para. 490.

implicated in the killings continued to exercise power as they had before. This demonstrated to people in both Burundi and Rwanda that influential governments were willing to tolerate slaughter in a region that was not of strategic concern.³⁷⁰

Burundian courts also failed to deliver satisfactory justice for most of the 1993 crimes. The judges who tried persons accused of having assassinated Ndadaye found guilty a number of lower-ranking military officers but acquitted others of senior rank or more political importance. Other courts tried only about 20 percent of the 9,500 persons jailed for supposedly having participated in the 1993 crimes. Most of the accused were Hutu and virtually all of the judges were Tutsi, leading many to question the credibility of the proceedings and verdicts in these cases.³⁷¹

The years following the 1993 massacres were characterized by continuing cycles of ethnic violence and civil war. Two Hutu guerilla groups, the Palipehutu-FNL and the National Council for the Defense of Democracy–Forces for the Defense of Democracy (Conseil national pour la défense de la démocratie–Forces pour la défense de la démocratie, CNDD-FDD), attacked military targets and Tutsi civilians in Burundi with support from the broader Hutu population; in response, the armed forces and militia retaliated strongly against Hutu civilians, killing hundreds of non-combatants in “pacification campaigns.”³⁷²

Impunity for atrocities committed by Tutsi civilians and soldiers remained the norm. Because so few Tutsi were brought to justice for crimes against Hutu, Hutu did not expect justice from the Tutsi-dominated courts. For example, a military court sentenced two officers to four months in prison for involvement in the massacre of 173 civilians in Itaba commune, Gitega province, in 2002. The officers were not convicted of murder but rather of failing to report the situation accurately and were immediately released from prison since they had spent five months in jail awaiting trial.³⁷³ Prosecutors in the military justice system later used an

³⁷⁰ Human Rights Watch, *Leave None to Tell the Story*, pp. 134-137.

³⁷¹ Human Rights Watch, *Burundi – Neglecting Justice in Making Peace*, p. 10.

³⁷² Human Rights Watch, *Proxy Targets*, p. 19. For example, in early November 1998 government troops killed at least 100 people in Mutambu commune near Bujumbura after rebels killed five people in the area. Shortly after rebels also attacked and murdered dozens near Bujumbura and in the south of the country. Human Rights Watch, *World Report 2000*, Burundi chapter, <http://www.hrw.org/legacy/wr2k/Africa-01.htm#TopOfPage>. Some members of the Burundian forces trained and armed Tutsi civilians and used them to further their own interests and ethnic agenda. See Human Rights Watch, *To Protect the People: The Government-sponsored “self-defense” program in Burundi*, vol. 13, no. 7(A), December 2001, <http://www.hrw.org/legacy/reports/2001/burundi/burundi1201.pdf>, p. 4. Hutu civilians feared that “Tutsis were being trained to shoot them.” *Ibid.*, p. 14. Tutsi militia used the opportunity to take revenge on the Hutu populations for the death of their family members and loss of property. Human Rights Watch, *Proxy Targets*, p. 18.

³⁷³ Human Rights Watch, *Transition in Burundi: Time to Deliver*, April 30, 2003, <http://www.hrw.org/legacy/backgrounders/africa/burundi/burundi043003-bck.pdf>, p. 2.

immunity provision in a 2003 agreement between a holdout rebel group and the government to justify not prosecuting Tutsi soldiers.

Even after a series of peace agreements between 2000 and 2003 brought other Hutu rebel groups into the government, one group, the National Liberation Forces, continued to use ethnic rhetoric to inflame violence. The FNL sometimes invoked impunity for past crimes against Hutu as a supposed justification for the FNL's own abuses, as in the case of the FNL's slaughter of more than 150 Congolese Banyamulenge (a group identified with Tutsi) at Gatumba refugee camp on August 13, 2004.³⁷⁴ In an August 30, 2004, press release, the FNL professed to want to know "why the same compassion [as shown for the Gatumba victims] was not shown when there were massacres of millions of Burundian Hutus and Rwandan refugees in the Congo." The release also specifically referred to the 2002 Itaba commune massacre, in which the head of the Gatumba military camp had been implicated.³⁷⁵

The 2000 Arusha Accord and subsequent agreements between the government and various rebels groups included provisions for the eventual establishment of a truth and reconciliation commission as well as a special tribunal for the prosecution of conflict-related crimes. However, a 2003 ceasefire agreement between the government and the strongest Hutu rebel group, the CNDD-FDD, provided for "provisional immunity" for all parties to the conflict.³⁷⁶ According to the agreement, provisional immunity would last until a truth and reconciliation commission was in place and could establish responsibility for past crimes. A similar provision was included in an agreement with Palipehutu-FNL in 2006.³⁷⁷

After the CNDD-FDD entered government and subsequently won national elections in 2005, former rebels were integrated into the reformed police and army with no vetting process. Tutsi soldiers and gendarmes were also integrated with no regard for their past abuses. Nor was there vetting of FNL rebels integrated into the security forces in April 2009. The likely presence within the forces of individuals who had committed war crimes contributes to ongoing mistrust, particularly between the population and the police, as police officers, among others, continue to commit abuses. Others implicated in serious abuses hold

³⁷⁴ Human Rights Watch, *Burundi: The Gatumba Massacre*, September 2004, <http://www.hrw.org/legacy/backgrounder/africa/burundi/2004/0904/burundi0904.pdf>, pp. 3, 20-21, 31.

³⁷⁵ *Ibid.*, p. 32 (citing FNL National Secretariat for Foreign Relations, COMMUNIQUE PH-FNL 010/08/2004, "A Qui Profite les Evénements de Gatumba?").

³⁷⁶ The Pretoria Protocol on Outstanding Political Defense and Security Issues in Burundi, November 2, 2003, <http://www.pcr.uu.se/gpdatabase/peace/Bur%2020031102.pdf>, art. 2.

³⁷⁷ Comprehensive Cease-Fire Agreement Between the Government and the Palipehutu-FNL, Dar Es Salaam, Tanzania, September 7, 2006, http://www.iss.co.za/dynamic/administration/file_manager/file_links/ANNEXE1.PDF?link_id=29&slink_id=3596&link_type=12&slink_type=13&tmpl_id=3 (accessed May 19, 2009), annexure 1.

political office. The current FNL leader, Agathon Rwasa, a possible presidential candidate in 2010, was indicted for the Garumba massacre in 2004 but has not been tried. Burundians frequently cite some senior members of other major political parties, including Front for Democracy in Burundi (Front pour la Démocratie au Burundi, FRODEBU) and Union for National Progress (Union pour le Progrès national, UPRONA), as having incited past political violence, particularly between 1993 and 1996.

Given this political landscape, it is not surprising that virtually no progress has been made in establishing the accountability mechanisms that Burundi committed to in agreements with the United Nations. Both CNDD-FDD and the FNL have an interest in promoting “amnesty” and “pardon” over justice, though a recent study showed that the majority of Burundian citizens support the implementation of justice initiatives.³⁷⁸ A UN commission sent in 2004 to investigate possible mechanisms to address impunity for serious crimes in Burundi concluded, “In an ethnically divided society, where little agreement exists on any of the issues relating to the major events in Burundi since its independence in 1962, there was unanimous support for the establishment of an international judicial commission of inquiry to ... investigate the crimes and, should it classify the crimes as genocide, war crimes and other crimes against humanity, serve also as a trigger mechanism for the establishment of an international criminal tribunal.”³⁷⁹ Support for such mechanisms among political leaders, however, appeared to diminish as they became aware that they themselves could be subject to prosecution. The international community, perhaps suffering from donor fatigue after creation of the ad hoc tribunals for the former Yugoslavia and Rwanda, has failed to press sufficiently for the establishment of truth and justice mechanisms.

As Neil Kritz pointed out as early as 1996, “Some observers would suggest that the best way to achieve reconciliation in a situation such as that present in Burundi is to leave the past in the past. ... If the goal, however, is something more than a tenuous, temporary pause in the violence, dealing in a clear and determined manner with past atrocities is essential.”³⁸⁰

The risk of armed conflict is fed by heightened fear and hatred between ethnic groups and political factions, emotions that are both real and manipulated by political leaders for their

³⁷⁸ BBC World Service Trust, “Ready to Talk About the Past: A Survey of Knowledge and Attitudes toward Transitional Justice in Burundi,” December 2008, <http://www.communicatingjustice.org/files/content/file/Project%20News/Burundi.pdf> (accessed June 29, 2009).

³⁷⁹ UN Security Council, “Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi,” S/2005/158, March 11, 2005, <http://www.ictj.org/static/Africa/Burundi/s2005.158.kalomoh.eng.pdf> (accessed May 18, 2009), para. 12.

³⁸⁰ Neil J. Kritz, The United States Institute of Peace, “The Problem of Impunity and Judicial Reform in Burundi,” 1996, <http://www.grandslacs.net/doc/o817.pdf> (accessed May 18, 2009), p. 1.

own ends. The failure of the justice system to establish individual guilt enabled politicians to assign responsibility for past crimes to the totality of the opposing ethnic group, thus reinforcing hatred and fear among Hutu and Tutsi alike. As the conflict's ethnic dimensions gradually diminished and gave way to political conflict, impunity for past crimes also contributed to conflicts between Hutu groups. Without credible court judgments, it is easier for politicians to establish guilt by appealing to their own version of history.³⁸¹ Justice for all victims of serious crimes—regardless of the perpetrator—could blunt use of ethnic hatred as a powerful tool to mobilize followers for violence.³⁸²

³⁸¹ Human Rights Watch, *Burundi – Neglecting Justice in Making Peace*, p. 10-11.

³⁸² Human Rights Watch, *Burundi: The Gatumba Massacre*, p. 32.

VII. Strengthening the Rule of Law: Enhanced Domestic Criminal Enforcement

When confronted with an apparent tension between peace and justice, the longer-term potential benefits of accountability are unlikely to be given much weight. However, we have seen that one underappreciated benefit resulting from the promotion of international justice for serious crimes is its positive impact on the development of domestic enforcement tools and the rule of law. Prosecutions in courts far from the places where the crimes occurred have played a role in strengthening or galvanizing the establishment of domestic mechanisms to deal with these crimes. In part this has been done by facilitating an environment in which confronting past atrocities became expected and acceptable. International tribunals have also become a yardstick by which fair trial proceedings can be measured. They have also on occasion provided some direct assistance with capacity-building in domestic war crimes courts.

In various other ways the rise of international judicial mechanisms has contributed both directly and indirectly to development of rule of law. The desire to obtain and try cases handled by the ad hoc tribunals propelled both Rwanda and the countries of former Yugoslavia to create specialized chambers and prosecutorial mechanisms in order to meet the tribunals' standards for transferring cases.³⁸³ In each country in which the International Criminal Court is investigating, steps have been taken—at least nominally—to start domestic proceedings. Even in countries where ICC investigations are being considered but have not yet been opened, efforts have been made to hold perpetrators to account that otherwise would not have occurred in order to keep the cases in national courts. Finally, one other way in which the prospect of international justice has promoted rule of law is by increasing awareness of crimes that fall under international jurisdiction. As leaders keep one eye on the court, they have a new incentive to educate their troops about what conduct constitutes a prosecutable offense.

A. Ad hoc tribunals

International tribunals have advanced efforts to prosecute in national courts. The scale and brutality of crimes in the former Yugoslavia and Rwanda led the Security Council to establish ad hoc tribunals to bring perpetrators to justice for the human rights violations committed

³⁸³ In Serbia, Croatia, and Bosnia and Herzegovina, the issue of the judicial system's capacity to try war crimes domestically and the willingness to cooperate with the International Criminal Tribunal for the former Yugoslavia are linked to the European Union accession process. This has been an important motivator for change.

during these conflicts. In establishing the ICTY, the UN secretary-general stressed that it was “not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts” and encouraged national courts to exercise jurisdiction in accordance with their national laws and procedures.³⁸⁴ Nonetheless, there was limited capacity or public support for war crimes prosecutions in the former Yugoslavia at that time. Over the years, this has changed to some degree. The tribunals assisted in creating an environment in which, at a minimum, there was recognition that if war crimes prosecutions had to happen, it was preferable for them to take place in domestic courts. As the ad hoc tribunals began preparations for closure, improving national courts became a priority. In 2003, the Security Council noted that the “strengthening of national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular.”³⁸⁵

In order to give effect to the broad strategy for winding down operations endorsed by the Security Council, the ICTY’s rules were amended in September 2002 to grant the tribunal broader powers for referring cases and dossiers to national jurisdictions.³⁸⁶ The same strategy was adopted at the International Criminal Tribunal for Rwanda. This strategy spurred positive legal change in the states of the former Yugoslavia and in Rwanda, even if the actual impact of the change is not always clear.

1. Bosnia and Herzegovina

Profound deficiencies in Bosnia’s justice system during and following the conflict severely limited local efforts to combat the rampant impunity for war crimes. Although legal reform was underway as the country recovered from the conflict, the ICTY was a catalyst for additional changes. The tribunal was instrumental both in creating the War Crimes Chamber in Bosnia and in ensuring its effectiveness as an institution.

As the ICTY began to contemplate how to close its operations, its focus on creating the capacity to fairly prosecute war crimes cases in Bosnia sharpened. A key component of the ICTY’s strategy to clear its docket was transferring cases of mid- and lower-level accused to

³⁸⁴ Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704, May 3, 1993, <http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm> (accessed May 28, 2009), para.64.

³⁸⁵ United Nations Security Council, Resolution 1503 (2003), S/RES/1503, <http://daccessdds.un.org/doc/UNDOC/GEN/No3/481/70/PDF/No348170.pdf?OpenElement> (accessed May 26, 2009), preamble. See also United Nations Security Council, Resolution 1534 (2004), S/RES/1534 (2004) <http://69.94.11.53/ENGLISH/Resolutions/s-res-1534e.pdf> (accessed May 26, 2009), para. 9.

³⁸⁶ *Prosecutor v. Radovan Stankovic*, ICTY, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11 *bis* Referral (Trial Chamber), May 17, 2005, para. 2.

national courts in Bosnia.³⁸⁷ However, it could only transfer cases if its officials were confident that Bosnia's courts would be able to handle the cases in an effective way consistent with internationally recognized fair trial standards.

Although legal reform had begun, there were still deficiencies that needed to be addressed before the ICTY cases could be transferred. To address these concerns, a 2002 report prepared by the ICTY for the Security Council recommended the creation of a special division within the State Court to handle war crimes cases. The report recommended that the division, for a limited time, be composed of both international and national judges. It also suggested a number of reforms to the Bosnian legal system (as well as practical arrangements) that would need to be in place before transfers could occur.³⁸⁸ The Security Council endorsed the ICTY's recommendations.³⁸⁹ The following year the ICTY and the Office of the High Representative for Bosnia and Herzegovina issued conclusions recommending the creation of a specialized chamber within the Court of Bosnia and Herzegovina to try the most sensitive war crimes cases. The joint recommendations resulted in a series of laws adopted in 2004 by the Bosnian Assembly that ultimately created the court. The ICTY was heavily involved in drafting this legislation and the laws creating a specialized war crimes unit in the prosecutor's office.³⁹⁰

On March 9, 2005, the War Crimes Chamber in Sarajevo began operations. The ICTY Appeals Chamber referred its first-ever case to the War Crimes Chamber on September 1, 2005. In doing so, it confirmed that the War Crimes Chamber was fully capable of providing the accused, Radovan Stankovic, with a fair trial.³⁹¹ Further referrals have been made since then.

³⁸⁷ Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2002/678, June 19, 2002, <http://daccessdds.un.org/doc/UNDOC/GEN/No2/434/47/IMG/No243447.pdf?OpenElement> (accessed May 28, 2009) ("UNSG Statement to the Security Council"); Statement by the President of the Security Council, UN Doc. S/PRST/2002/21, July 23, 2002, <http://daccessdds.un.org/doc/UNDOC/GEN/No2/491/47/PDF/No249147.pdf?OpenElement> (accessed May 28, 2002) ("Security Council Presidential Statement").

³⁸⁸ UNSG Statement to the Security Council. Recommended reforms included minimizing the risk of partiality of judges and corruption, improving witness protection measures, training in conducting war crimes investigations and judicial proceedings, improving financial resources and efficiency, and improving compatibility of national substantive law with international law. For a description of the effect of legal reform on domestic courts, see Human Rights Watch, *Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity and Genocide in Bosnia and Herzegovina's Cantonal and District Courts*, 1-56432-341-2, July 2008, http://www.hrw.org/sites/default/files/reports/bosniao7o8_1.pdf, pp. 16-17.

³⁸⁹ Security Council Presidential Statement.

³⁹⁰ International Criminal Tribunal for the former Yugoslavia, Outreach—capacity building webpage: <http://www.icty.org/sid/240> (accessed May 20, 2009).

³⁹¹ *Prosecutor v. Radovan Stankovic*, ICTY, Case No. IT-96-23/2-AR11 bis.1, Decision on Rule 11 bis Referral (Appeals Chamber), September 1, 2005, para. 30.

The War Crimes Chamber and the ICTY Registry and Office of the Prosecutor remain in close contact. Officials within the War Crimes Chamber registry and the ICTY are designated to facilitate transfer of case material and evidence from the ICTY to the War Crimes Chamber. The prosecution teams at the Special Department for War Crimes in Sarajevo have been provided with access to the ICTY's database of evidence.³⁹² Defense counsel for the court also has access to the ICTY's database on a more ad hoc basis.³⁹³

In addition to cases referred to it by judges at the ICTY, the War Crimes Chamber is responsible for dossiers submitted to it by the ICTY's Office of the Prosecutor where investigations have not yet been completed. Most of its caseload, however, consists of cases initiated locally. Although the court was initially staffed by both nationals and internationals, the chamber is essentially a domestic institution operating under national law and international involvement is being phased out. The court has enhanced the capacity of professionals and institutions in Bosnia to conduct fair and effective war crimes trials and is playing an important role in bringing justice for the atrocities committed during the war and restoring confidence in the rule of law. Although the court confronts a number of difficulties, including an extensive caseload and a lack of resources, the establishment of the court is a step forward.³⁹⁴

Prospects of international justice also may have increased awareness, to some extent, of crimes that fall under international jurisdiction. The ICTY's prosecutions prompted Bosnian military leaders to broadcast definitions of Geneva Convention offenses to their troops in the midst of the conflict, even if this was only done to provide cover for unlawful actions.

2. Serbia

Although the ICTY did not play a direct role in establishing Serbia's War Crimes Chamber, the ICTY did help spur the creation of the chamber indirectly. Government officials who supported domestic prosecutions did so to bolster the argument against holding trials at the ICTY, rather than out of a genuine commitment to accountability.³⁹⁵ As a Serbian journalist

³⁹² Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, vol. 18, no. 1(D), February 2006, <http://www.hrw.org/sites/default/files/reports/ijo206webwcover.pdf>, pp. 17-19.

³⁹³ Human Rights Watch, *Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber*, vol. 19, no. 1(D), February 2007, <http://www.hrw.org/sites/default/files/reports/ijo207webwcover.pdf>, pp. 24-26.

³⁹⁴ See Human Rights Watch, *Narrowing the Impunity Gap* and *Looking for Justice*.

³⁹⁵ Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina and Serbia and Montenegro*, vol. 16, no. 7(D), October 2004, <http://www.hrw.org/reports/2004/icty1004/icty1004.pdf>, p. 5.

told the Open Society Institute, “It’s simple. If not for the Hague Tribunal, no one [in Serbia] would ever actually bring to trial anyone who committed these crimes.”³⁹⁶

Some in government supported the establishment of a War Crimes Chamber in Serbia because they believed that it would result in the transfer of a number of cases to Serbia as part of the ICTY’s completion strategy.³⁹⁷ Serbian Prime Minister Kostunica tried to convince the tribunal that Serbia could prosecute cases of indictees who had not yet been arrested and surrendered to The Hague. Anti-Hague sentiment may have also made the idea of domestic prosecutions more palatable to the Serbian population. A public opinion survey taken in late 2004 found that 71 percent of the people surveyed thought that it would be better to institute war crimes prosecutions in local courts rather than in The Hague.³⁹⁸ The Serbian War Crimes Prosecutor himself was motivated in part because the alternative to national prosecutions was The Hague, though his incentive was more a matter of professional and national pride.³⁹⁹

Despite opposition from extreme nationalists, the chamber came into existence after a change in government resulted in a period of reformist advances. Strong international engagement helped ensure that the chamber was eventually created.⁴⁰⁰ The War Crimes Chamber has since had some positive impact in Serbia: its prosecutions have been seen by the public as more legitimate than those conducted in The Hague, where defendants are sometimes viewed as “heroes” or “patriots,”⁴⁰¹ though many still view prosecutions as the price that has to be paid for EU ties.

After the War Crimes Chamber was established, the ICTY played an important role in helping it become effective. Under a 2006 Memorandum of Understanding between the ICTY Office

³⁹⁶ Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, (New York: Open Society Institute 2008), p. 17.

³⁹⁷ Human Rights Watch interview with US government official (name withheld), Belgrade, March 30, 2007; and Orentlicher, *Shrinking the Space for Denial*, p. 47. There have not been many referrals to Serbia because the Serbian defendants are too high-profile to be tried domestically. Also many of the referrals have been to the territory where the crimes occurred, which is mainly Bosnia.

³⁹⁸ Orentlicher, *Shrinking the Space for Denial*, p. 47 (citing a survey conducted by the Organization for Security and Co-operation in Europe, the Belgrade Centre for Human Rights, and Strategic Marketing Research).

³⁹⁹ Tatjana Tagirov, “Confidence is the Key to Cooperation,” *Justice in Transition*, September 2006 (Special Edition), p. 56, quoting Serbian War Crimes Prosecutor Vladimir Vukcevic: “[A]t the moment when I accepted this post I did so also because of the fact that the only alternative, if we do not want to organize trials, is The Hague Tribunal We are a European country in which there are able people, judges and prosecutors, prepared for such work My first challenge was to form a team of prosecutors ... who will demonstrate to both The Hague and the international and domestic public, that we are capable and prepared to face the problems of war crimes.”

⁴⁰⁰ Orentlicher, *Shrinking the Space for Denial*, p. 47.

⁴⁰¹ *Ibid.*, p. 56.

of the Prosecutor and the War Crimes Prosecutor's Office in Serbia, Serbian war crimes prosecutors have access to the ICTY's database.⁴⁰² Former and current ICTY staff have been engaged in facilitating contacts with ethnic Albanian witnesses for cases involving crimes in Kosovo being handed over to Serbia from the ICTY; without this link, it may have been hard for the office to establish a relationship with witnesses because of suspicions of bias against ethnic Albanians.⁴⁰³ In addition, the ICTY has participated in extensive training programs for Serbian war crimes prosecutors and judges both in Serbia and in The Hague.⁴⁰⁴ The ICTY inspired a number of innovations including the establishment of a victim and witness support unit, the authorization of the use of video links, and the preparation of audio recordings of trial proceedings.⁴⁰⁵ The tribunal has also had a positive impact on domestic courts by serving as a model of fair process.⁴⁰⁶

The court still suffers from an inability or unwillingness to prosecute high-level leaders. In addition, a string of reversals by the predominantly Milosevic-appointed Supreme Court demoralized victims who participated in proceedings. Despite these flaws, the court is a critical forum ensuring accountability for the crimes committed during the Balkans conflicts.

3. Croatia

In the years following the Security Council statements supporting transfer of cases from the ICTY to national courts, Croatia also made changes to its legal system. In October 2003 the Croatian parliament passed legislation providing for the establishment of new specialized chambers for war crimes in four county courts in Croatia (Osijek, Split, Zagreb, and Rijeka).⁴⁰⁷ Croatian courts hear about 30 cases a year relating to crimes committed during the 1991-95 war in Croatia.⁴⁰⁸ Croatia also adopted a Law on Witness Protection in October 2003 and created a Department for Support to Witnesses and Participants in War Crimes Proceedings within the Ministry of Justice two years later. These laws, as well as the act incorporating the

⁴⁰² "Memorandum of understanding on access to Documents through the electronic disclosure suite between the Office of the Prosecutor of the ICTY and the Office of the War Crimes Prosecutor of the Republic of Serbia," reprinted in Center for Transitional Processes (Belgrade), *Justice in Transition*, September 2006 (Special Edition), pp. 152-153.

⁴⁰³ Human Rights Watch, *Unfinished Business: Serbia's War Crimes Chamber*, June 2007, <http://www.hrw.org/legacy/backgrounder/eca/serbiao607/serbiao607web.pdf>, p. 23.

⁴⁰⁴ See International Criminal Tribunal for the former Yugoslavia, Outreach-transfer of expertise webpage: <http://www.icty.org/sid/244#serbia> (accessed May 27, 2009).

⁴⁰⁵ Orentlicher, *Shrinking the Space for Denial*, pp. 50-51.

⁴⁰⁶ *Ibid.*, pp. 51-52.

⁴⁰⁷ Law on the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against International Law on War and Humanitarian Law, *Narodne novine* (Official Gazette of the Republic of Croatia), No. 175/2003, November 4, 2003, art. 13(2).

⁴⁰⁸ Elitsa Vucheva, "Time running out for Croatia's EU reforms," *EU Observer* (Brussels), April 22, 2009.

International Criminal Court statute into domestic law, include witness protection measures similar to those used by the ICTY such as use of pseudonyms, witness relocation, and testifying with image and voice distortion. In 2004 Croatia amended its penal code to conform more closely to the ICTY statute by providing for liability based on command responsibility.

In 2005, citing these developments, ICTY's referral bench ordered its first case to be transferred to one of the specialized courts in Croatia.⁴⁰⁹ Since then, ethnic bias in court proceedings has limited the effectiveness of these proceedings, and the practical effect of the changes to the law is unclear.⁴¹⁰ However, legal reform is a first step towards improved national enforcement mechanisms.

4. Rwanda

The Rwandan justice system, feeble and poorly staffed before the genocide, was further crippled by wartime losses. In the aftermath of the conflict, the justice system faced the daunting task of prosecuting hundreds of thousands of participants in the genocide. Over the following years, with substantial assistance from the international community, the staff and infrastructure of the national system was rebuilt. Laws were adopted to increase the independence of the judiciary, raise the standards for hiring judges, and improve efficiency in the handling of cases.⁴¹¹ The code of criminal procedure was changed in 2004 to grant all persons the right to have counsel at all stages of proceedings, including interrogations. The new code also grants judges habeas corpus powers to compel police and prosecutors to present before them detained persons who might have been illegally held, and authorizes them to punish those state agents who have detained persons illegally.⁴¹²

Significant legal reform was also undertaken by Rwanda in 2007 to facilitate the transfer of cases from the ICTR to its national courts. Because the tribunal could not transfer cases to

⁴⁰⁹ *Prosecutor v. Rahim Ademi and Mirko Norac*, ICTY, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis* (Trial Chamber), September 14, 2005, para. 52.

⁴¹⁰ See International Center for Transitional Justice, "Croatia: Selected Developments in Transitional Justice," Occasional Paper Series, December 2006, <http://www.ictj.org/static/Europe/TJdevelopments.eng.pdf> (accessed May 26, 2009), pp. 2, 17-21.

⁴¹¹ See Human Rights Watch, *Law and Reality: Progress on Judicial Reform in Rwanda*, 1-5643-566-8, July 2008, <http://www.hrw.org/sites/default/files/reports/rwanda0708webwcover.pdf>, pp. 26-28 (citing Organic Law No. 07/2004 of 25/04/2004 Determining the Organization, Functioning and Jurisdiction of Courts, arts. 6, 64, 143, and 168; and Law No. 06 bis/2004 of 14/04/2004 on Statutes for Judges and other Judicial Personnel, arts. 8 and 22).

⁴¹² *Ibid.*, pp. 32-33 (citing Official Journal of the Republic of Rwanda, July 30, 2004, Law No. 13/2004 of 17/5/2004 concerning the Code of Criminal Procedure, arts. 64, 89, 96; and Law No. 20/2006 of 22/4/2006 modifying and completing the law No. 13/2004 of May 17, 2004 on the criminal procedure, art. 19).

jurisdictions with the death penalty, Rwanda abolished the death penalty. As a result, 1,365 persons had their sentences commuted to life in prison.⁴⁴³ Also as part of its efforts to get ICTR cases referred to Rwanda, the parliament adopted a Transfer Law that included a number of procedures to strengthen the rights of the accused, constructed a new prison that meets international standards, and developed witness protection and assistance programs.⁴⁴⁴

Despite these reforms, significant concerns remain about the ability of the defendants to obtain a fair trial in Rwanda.⁴⁴⁵ So far, the ICTR has not allowed any cases to be transferred to Rwandan national courts, citing, in part, difficulties in obtaining and securing witnesses for the defense.⁴⁴⁶ Following a decision by the Appeals Chamber denying transfer to Rwanda in part because of Rwanda's penalty structure,⁴⁴⁷ the Rwandan parliament passed a law removing the possibility of a life sentence in solitary confinement for all cases transferred from the ICTR or extradited from other countries.⁴⁴⁸ Rwandan officials have also indicated an intent to make further reforms to satisfy the concerns of the judges about defendants' rights at trial, in order to obtain cases from the ICTR under the tribunal's rules.⁴⁴⁹ Thus, the tribunal has acted as a catalyst for improving laws in Rwanda that has resulted in improved domestic mechanisms for accountability.

B. International Criminal Court

Unlike the ad hoc tribunals, the ICC only has jurisdiction over cases when national jurisdictions are unwilling or unable genuinely to carry out the investigation or prosecution.

⁴⁴³ Ibid., p. 31. The death penalty was replaced by life imprisonment and life imprisonment with special conditions, which was only defined as keeping a prisoner in "isolation." Official Journal of the Republic of Rwanda, July 25, 2007, Organic Law No. 31/2007 of July 25, 2007 regarding the Abolition of the Death Penalty.

⁴⁴⁴ *Prosecutor v. Yussuf Munyakazi*, ICTR, Case No. ICTR-97-36-R11bis, *Amicus Curiae* Brief on Behalf of the Government of Rwanda (Appeals Chamber), July 28, 2002, para. 2.

⁴⁴⁵ In part, defense witnesses refuse to testify out of fear that anyone who testifies against the government position risks being perceived as making common cause with accused persons and thus being charged with promoting "genocide ideology." The government also has been unwilling to pursue cases against Rwandan Patriotic Army soldiers for crimes against humanity committed between 1994 and 1995. See Human Rights Watch, *Law and Reality*, pp. 76-77, 89-84.

⁴⁴⁶ See, for example, *Prosecutor v. Gatete*, ICTR, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, November 17, 2008, paras 54-64; *Prosecutor v. Munyakazi*, ICTR, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, May 28, 2008, paras. 59-66 (affirmed on appeal at *Prosecutor v. Munyakazi*, ICTR, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11 bis (Appeals Chamber), October 8, 2008, paras. 32-39).

⁴⁴⁷ *Prosecutor v. Munyakazi*, ICTR, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11 bis (Appeals Chamber), October 8, 2008, paras. 8-21.

⁴⁴⁸ "ICTR Prosecutor to Apply for Further Referral Cases once Kigali Removes Judicial Obstacles," Hironde News Agency, November 20, 2008, <http://www.hirondellenews.com/content/view/2652/288/> (accessed May 18, 2009).

⁴⁴⁹ "Transfer of Genocide Cases: Kigali gives in to make legal amendments," Hironde News Agency, November 20, 2008, <http://allafrica.com/stories/200811210199.html> (accessed May 18, 2009).

Because national courts have priority, states have the opportunity to bring cases that they might not otherwise pursue. In each of the situations that the ICC is investigating, at least nominal efforts have been made to improve domestic justice mechanisms for serious international crimes as a result of ICC involvement.

1. Uganda

The ICC's involvement in Uganda sparked an increased focus on prosecution of war crimes and crimes against humanity domestically. As mentioned in Chapter III.D, before the ICC's involvement, the Ugandan Parliament had passed a law providing a blanket amnesty to rebels who surrendered to the government. However, during the peace talks between the government and the Lord's Resistance Army which began in July 2006, interest in national prosecutions gained momentum because they were seen as an attractive alternative to ICC prosecutions of LRA leaders. The agreement signed between the LRA and the Ugandan government in February 2008 ultimately provided 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.⁴²⁰ 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.⁴²¹ Although the final peace accord was never signed by LRA leader Joseph Kony, the conclusion of the accountability agreements reflected increased attention to prosecutions for serious crimes at the national level and creates the possibility of LRA prosecutions beyond ICC suspects. Though legislation to establish the war crimes division of the High Court and amend Uganda's law to allow prosecution of international crimes is still pending, judges and a registrar have been appointed.⁴²²

2. Democratic Republic of Congo

In 2004, the same year Congo referred the situation in its country to the ICC for investigation and prosecution, the military courts launched their own prosecutions for war crimes and crimes against humanity relying on definitions of crimes contained in the Rome Statute.⁴²³ In

⁴²⁰ Annexure to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement on 29th 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.

⁴²¹ *Ibid.*, paras. 8, 10-11.

⁴²² Rachel Irwin, "Uganda's Ability to Try Rebels Questioned," Institute for War and Peace Reporting news release, November 21, 2008, <http://www.ictj.org/en/news/coverage/article/2150.html> (accessed May 27, 2009).

⁴²³ The military courts currently have exclusive jurisdiction over international crimes in the DRC because legislation implementing the Rome Statute into domestic law has yet to be passed.

April 2006 a military court in Mbandaka (in northwest DRC) found seven army officers guilty of mass rape of more than 100 women at Songo Myobo in 2003, the first time rape was tried as a crime against humanity in Congo. In August 2006 a militia leader was sentenced to 20 years' imprisonment for war crimes committed in Ituri.⁴²⁴ A military court in Katanga convicted Gedeon Kyungu Mutanga and others of crimes against humanity between 2004 and 2006, the largest trial of this kind in Congo's history.⁴²⁵ 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.⁴²⁶ These cases represent small but significant steps forward in addressing the longstanding culture of impunity in the DRC.

The ICC's work in Congo has also helped raise awareness of what acts constitute war crimes. As in Bosnia, the ICC's investigation in Congo sparked radio broadcasts by military leaders in 2004 defining international crimes for the soldiers. In addition, the arrest of rebel commander Thomas Lubanga on charges of recruitment and use of child soldiers in March 2006 dramatically increased awareness among leaders of armed groups and the general public that using child soldiers was unlawful.⁴²⁷

3. Sudan

The government of Sudan's refusal to cooperate with the ICC has been made in part 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 that 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. When establishing the court, a government official stated that it was "considered a substitute to the International Criminal Court."⁴²⁸ A Ministry of Justice statement challenging the ICC's jurisdiction made explicit reference to the provision of the Rome Statute, article 17,

⁴²⁴ Human Rights Watch, *World Report 2007* (New York: Human Rights Watch, 2007), Democratic Republic of Congo chapter, <http://www.hrw.org/legacy/wr2k7/wr2007master.pdf>.

⁴²⁵ "DR Congo: Militia Leader found Guilty in Landmark Trial," Human Rights Watch news release, March 10, 2009, <http://www.hrw.org/en/news/2009/03/10/dr-congo-militia-leader-guilty-landmark-trial>.

⁴²⁶ Amnesty International, "Report 2008: Human Rights in Democratic Republic of the Congo," <http://www.amnesty.org/en/region/democratic-republic-congo/report-2008> (accessed May 27, 2009).

⁴²⁷ Davis and Hayner, ICTJ, "Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC," March 2009, pp. 31-32.

⁴²⁸ "Sudan: Judiciary challenges ICC over Darfur cases," *IRINnews*, June 24, 2005, <http://www.globalpolicy.org/component/content/article/164/28521.html> (accessed May 28, 2009), quoting Sudan's justice minister, Ali Mohamed Osman Yassin.

which allows the court to determine that a case is inadmissible if national authorities are prosecuting the case.⁴²⁹ Later that year, additional decrees broadened the court's jurisdiction to include crimes under "international humanitarian law" and established three permanent seats for the court in Nyala, Fashir, and Geneina, the state capitals respectively of South Darfur, North Darfur, and West Darfur.⁴³⁰ Although these courts have been ineffective, in one of the handful of cases that they have tried, a defendant faced the charge of looting as defined in the Rome Statute. Although the defendant was not convicted for this crime, it marked the first time that the Rome Statute (which Sudan has signed but not ratified) was used in proceedings in Sudan.⁴³¹

Apart from the establishment of special courts, the Sudanese government has taken additional steps to outwardly improve national accountability mechanisms as a way of possibly avoiding ICC jurisdiction. 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.⁴³² In the time since the ICC prosecutor announced that he was seeking his first arrest warrants for Ahmed Haroun and Ali Kosheib, the government has periodically indicated that it was investigating Kosheib for crimes in Darfur.⁴³³ Additional efforts have been undertaken to reform Sudan's criminal code. In November 2008 the government passed amendments to the code to include international crimes such as crimes against humanity and war crimes, though no one has been charged under these provisions.⁴³⁴ 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.

⁴²⁹ Ibid., quoting a June 15, 2005 statement by the Sudanese Ministry of Justice.

⁴³⁰ Amendment of the Order Establishing Darfur Special Criminal Court, November 10, 2005, Sudan Judiciary news release, <http://www.sudanjudiciary.org/newse/news.php?id=9> (accessed May 27, 2009); Human Rights Watch, *Lack of Conviction*, p. 9.

⁴³¹ Human Rights Watch, *Lack of Conviction*, pp. 14, 16.

⁴³² 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 May 27, 2009), p. 29.

⁴³³ See, for example, "Sudan to try three people on Darfur crimes," Associated Press, March 7, 2007, <http://www.sudantribune.com/spip.php?article20618> (accessed May 27, 2009); "Sudan to try Janjaweed militia leader for war crimes," Agence France-Presse, October 15, 2008, <http://www.france24.com/en/20081015-sudan-janjaweed-militia-leader-kosheib-war-crimes-sudan-darfur> (accessed May 27, 2009) ("A Sudanese special prosecutor investigating atrocities in Darfur has decided there are grounds to try a leader of the feared Janjaweed militia ... Idris Suleiman, deputy head of Sudan's mission in Cairo, told AFP that state-backed Sudanese militia leader Ali Kosheib will be brought to court in Darfur at a date set by a judge, 'likely in the next week'").

⁴³⁴ 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 May 27, 2009), p. 15.

4. Central African Republic

On October 25, 2005, 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 the Congolese rebel 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. On December 22, 2004, the CAR government referred the events in 2002-03 to the Office of the Prosecutor after CAR's Court of Appeal recognized the inability of domestic courts to investigate and prosecute war criminals effectively. Two-and-a-half years later the ICC prosecutor announced that he would investigate crimes committed during the 2002-03 fighting and would monitor more recent events to determine whether crimes committed in the north as part of a counterinsurgency campaign would warrant investigation.

The possibility of ICC prosecution (an issue stressed by victims' associations calling for justice) increased pressure on the CAR government to respond to abuses committed in the north as part of a conflict that began following the May 2005 elections. Human Rights Watch's September 2007 report on violence in the CAR,⁴³⁵ which named suspects and emphasized ICC jurisdiction, generated a great deal of publicity around the question of whether the ICC would investigate leaders of the elite Presidential Guard (which is under the president's control) and made it more difficult for the government to turn a blind eye to crimes. Following the publication of Human Rights Watch's report, President Bozize admitted that CAR forces had committed abuses and said that those responsible will be held to account.⁴³⁶ The ICC prosecutor put direct pressure on the CAR authorities to follow up on prosecution for the more recent crimes. On June 10, 2008, the ICC prosecutor addressed a letter to President Bozize noting that "sustained attention needed to be paid to the acts of violence committed in the north of the Central African Republic."⁴³⁷ In response Bozize sought the United Nations' assistance in suspending ICC investigations, arguing in a letter to

⁴³⁵ Human Rights Watch, *Central African Republic – State of Anarchy: Rebellion and Abuses against Civilians*, vol. 19, no. 14(A), September 2007, http://www.hrw.org/sites/default/files/reports/car0907webwcover_o.pdf.

⁴³⁶ Human Rights Watch, *World Report 2008* (New York: Human Rights Watch, 2008), Central African Republic chapter, <http://www.hrw.org/legacy/englishwr2k8/docs/2008/01/31/carepu17887.htm>.

⁴³⁷ Letter from ICC Prosecutor Luis Moreno Ocampo to President Francois Bozize, June 10, 2008, on file with Human Rights Watch. See also 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.

the UN secretary-general that the CAR justice system is competent to investigate and prosecute more recent crimes itself.⁴³⁸

Though there has been little evidence of genuine will to prosecute in CAR (by mid-2009 only individual low-ranking members of the CAR security forces had been prosecuted and convicted of ordinary crimes such as assault, battery and manslaughter), in September 2008 the CAR government established an office for international humanitarian law within the army, which is responsible for conveying the laws of war to its members.⁴³⁹ Abuses in the north diminished after international pressure caused the government to withdraw much of the Presidential Guard from the area.⁴⁴⁰ The involvement of the ICC has at least served to increase awareness of crimes, which may be the first step in preventing them.

5. Situations under analysis: Kenya and Colombia

Even in countries where the prosecutor is undertaking preliminary analysis to determine whether to open an investigation, the looming possibility of ICC involvement has been enough to spur national enforcement efforts.

Kenya

Violence has been a regular feature of Kenyan elections since the restoration of multiparty politics in 1991. Yet, as discussed in Chapter VI.A, no one has been held to account for these crimes. The results of investigations into political violence were routinely swept under the rug, with the result that impunity became the order of the day.⁴⁴¹ The explosion of an even greater level of violence following elections in late 2007 resulted in calls to break the cycle of impunity. This time, in the context of Kenya's status as a party to the ICC and as a result of greater international involvement, the demands for justice appear more promising. 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

⁴³⁸ In August 2008 the president of the CAR, Francois Bozize, submitted a letter to the UN secretary-general asking the United Nations to intercede in any possible ICC investigations of crimes in the north of the country, on the basis that the courts of the Central African Republic are competent to try cases involving acts committed during the period covered by the amnesty laws. Letter from Francois Bozize to Ban Ki-moon, August 1, 2008, on file with Human Rights Watch. See also Human Rights Watch, *World Report 2009*, Central African Republic chapter, http://www.hrw.org/sites/default/files/related_material/car.pdf.

⁴³⁹ Human Rights Watch, *World Report 2009*, Central African Republic chapter, http://www.hrw.org/sites/default/files/related_material/car.pdf.

⁴⁴⁰ Ibid.; and Human Rights Watch, *World Report 2008*, Central African Republic chapter, <http://www.hrw.org/legacy/englishwr2k8/docs/2008/01/31/carepu17887.htm>.

⁴⁴¹ 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").

those most responsible for the attacks.⁴⁴² 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.⁴⁴³ In this way, the commission sought to ensure that the results of their inquiry would not be ignored. The ICC prosecutor has also made statements indicating that he is analyzing the post-election violence in Kenya to determine whether crimes under his jurisdiction were committed.⁴⁴⁴

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 December 2008.⁴⁴⁵ A truth commission had already been established in late 2008 to look into crimes since independence in 1963,⁴⁴⁶ and an International Crimes Bill was fast-tracked through parliament in December 2008 in accordance with Waki commission recommendations.⁴⁴⁷ Since then, however, a draft statute establishing the special tribunal was voted down in parliament, and although the government claims to be working to ensure that justice is done, it appears to be doing no more than stalling on this point.⁴⁴⁸ Although the ultimate fate of the special tribunal has not yet been determined (and hence the envelope containing the list of leading suspects has not yet been unsealed), the existence of the ICC and the threat of ICC prosecution have changed the discussion about accountability in Kenya.

⁴⁴² Ibid., p. ix.

⁴⁴³ Ibid., p. 18.

⁴⁴⁴ Office of the Prosecutor, "OTP statement in relation to events in Kenya," February 5, 2008, <http://www.icc-cpi.int/NR/rdonlyres/1BB89202-16AE-4D95-ABBB-4597C416045D/o/ICCOTPST20080205ENG.pdf> (accessed May 27, 2009); and "ICC Prosecutor reaffirms that the situation in Kenya is monitored by his office," ICC press release, February 11, 2009, <http://www.icc-cpi.int/NR/rdonlyres/06455318-783E-403B-8C9F-8E2056720C15/279793/KenyaOTPubliccommunication20090211.pdf> (accessed May 27, 2009).

⁴⁴⁵ 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).

⁴⁴⁶ "Kenya set to get truth commission," *BBC News Online*, October 24, 2008, <http://news.bbc.co.uk/2/hi/africa/7688505.stm> (accessed May 27, 2009).

⁴⁴⁷ 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 May 27, 2009); 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").

⁴⁴⁸ The Special Tribunal for Kenya Bill, 2009, January 28, 2009, http://www.kenyalaw.org/Downloads/Bills/2009/The_Special_Tribunal_for_Kenya_Statute_2009.pdf (accessed May 27, 2009); and Kenya National Assembly, Bill Tracker 2009, 10th Parliament, 2nd Session, February 24, 2009, <http://www.bunge.go.ke/parliament/downloads/Tenth%20Parl%201st%20Session/Bill%20Tracker%202008-2009.pdf> (accessed May 27, 2009). See also Bernard Namunane, Njeri Rugene, and Lucas Barasa, "Hague beckons for Kenya violence chiefs," *Daily Nation* (Nairobi), February 12, 2009, <http://www.nation.co.ke/News/-/1056/529756/-/item/o/-/w88ygrz/-/index.html> (accessed May 27, 2009).

Colombia

Colombia has kept one eye on the ICC as it decides how to handle human rights abuses committed by paramilitary death squads. Colombia ratified the Rome Statute on August 5, 2002, with a declaration that it would not accept the ICC's jurisdiction over war crimes until 2009. The possibility of ICC involvement has had some influence on decisions made about national accountability in the meantime.

For the last three decades, paramilitary groups allied with powerful political, military, and economic elites have ravaged Colombia with almost complete impunity while purporting to fight left-wing guerrillas. Despite massacres, torture, enforced disappearances, and murders of thousands of civilians, human rights defenders, and local leaders, the paramilitaries and their accomplices were consistently able to avoid investigation, prosecution, and punishment.⁴⁴⁹ Extradition requests in 2002 from the United States spurred paramilitary leaders to negotiate a deal with the Colombian administration in the hopes of avoiding lengthy prison terms in the United States for drug trafficking. The negotiations resulted in Law 975 (commonly known as the "Justice and Peace Law") which was the country's first transitional justice law.⁴⁵⁰ In exchange for their groups' supposed demobilization, the law offered paramilitary commanders responsible for horrific atrocities reduced sentences of five to eight years (they could be reduced further to less than three years) that were grossly disproportionate to their crimes. The law contained serious flaws, but was improved after the Colombian Constitutional Court reviewed it in 2006, citing international standards on truth and justice.⁴⁵¹

The ICC prosecutor has from the start of the demobilization and the negotiations over the Justice and Peace Law expressed an interest in the process. He sent a letter to the Colombian government in March 2005 requesting information about the draft law then being considered.⁴⁵² The prosecutor followed up by posing questions about the law's implementation and about the investigation of paramilitary accomplices in the political system, noting that his office is "monitoring the open proceedings against the paramilitary

⁴⁴⁹ Human Rights Watch, *Breaking the Grip? Obstacles to Justice for Paramilitary Mafias in Colombia*, 1-56432-385-4, October 2008, <http://www.hrw.org/sites/default/files/reports/colombia1008webwcover.pdf>, pp. 25-26.

⁴⁵⁰ *Ibid.*, pp. 26-28. See also Human Rights Watch, *Smoke and Mirrors: Colombia's demobilization of paramilitary groups*, vol. 17, no. 3(B), July 31, 2005, <http://www.hrw.org/reports/2005/colombia0805/>.

⁴⁵¹ Human Rights Watch, *Breaking the Grip?* pp. 29-32.

⁴⁵² *Ibid.*, p. 137 (citing a letter from ICC Prosecutor Luis Moreno Ocampo to the Colombian ambassador accredited before the ICC, Guillermo Fernandez de Soto, March 2, 2005).

leaders, an issue that implicates members of Congress.”⁴⁵³ During a visit to Colombia in 2007 he stated, “Information has come up that implicates other people who are being investigated. These people could also have greater responsibility for the crimes, and so we are interested in them. We are watching how Colombia processes this type of case. We’re checking.”⁴⁵⁴ Again in 2008 the prosecutor sought information on how those most responsible for crimes within the ICC’s jurisdiction will be brought to trial.⁴⁵⁵

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.

C. Universal Jurisdiction

Over the past two decades, several European states began to pursue suspects abroad who had committed serious international crimes against their citizens. These efforts to bring justice in domestic courts through universal jurisdiction laws or “passive nationality” (where the victim is a citizen of the country bringing charges) created profoundly important “spillover effects” in national courts of states where the crimes occurred: they sparked investigations and prosecutions in Latin America. The arrest of Augusto Pinochet in the United Kingdom and the resulting litigation in Belgium, France, Spain, and Switzerland prompted an opening of the domestic courts in Chile to victims who had previously been denied access to effective remedies. In Buenos Aires, Argentina, a Spanish judicial order contributed to the August 2003 reopening of trials of military officers responsible for gross violations of human rights during Argentina’s “dirty war.” The Spanish judge had issued warrants for the extradition of 48 former military officers and a civilian accused of torture and “disappearances” in Argentina so that they could stand trial in Spain. These cases created a renewed interest in domestic accountability and increased pressure on national courts to

⁴⁵³ “Corte Penal Internacional analiza posibilidad de investigar crímenes de Farc y ‘paras,’” *El Tiempo* (Bogotá), March 14, 2008, http://www.eltiempo.com/justicia/2008-03-15/ARTICULO-WEB-NOTA_INTERIOR-4013520.html (accessed May 27, 2009).

⁴⁵⁴ “Corte Penal Internacional sigue pista a la parapolítica, asegura su fiscal jefe, Luis Moreno Ocampo,” *El Tiempo* (Bogotá), Oct. 20, 2007, <http://www.eltiempo.com/archivo/documento/CMS-3775574> (accessed May 27, 2009).

⁴⁵⁵ See Human Rights Watch, *Breaking the Grip?* pp.136-138 (citing Letter from ICC Prosecutor Luis Moreno Ocampo to the Colombian Ambassador in The Hague, Francisco Jose Lloreda, undated, transcribed in “Corte Penal Internacional Hace Requerimientos a Gobierno Uribe,” *El Nuevo Siglo* (Bogotá), August 15, 2008, <http://www.elnuevosiglo.com.co/noticia.php>, and “A verificar si Colombia investiga y juzga a criminales vino fiscal de Corte Penal Internacional,” *El Tiempo* (Bogotá), August 25, 2008, <http://www.eltiempo.com/archivo/documento/CMS-4465892>).

handle these cases at home. In this way prosecutions by foreign courts have helped jumpstart use of national courts to try leaders for abuses committed in their own country.

1. Chile

On October 16, 1998, officers of the London Metropolitan Police, acting at the request of Spanish magistrate Baltasar Garzon, arrested former Chilean dictator Gen. Augusto Pinochet while he was recovering from back surgery in a private London clinic. The arrest shocked Chile and gave rise to concerns that efforts to prosecute Pinochet would destabilize, if not destroy, the country's fragile democracy.

During Pinochet's 17-year rule in Chile, more than 2,600 people were killed or "disappeared" by his security forces, more than 28,000 were tortured, and hundreds of thousands were exiled or fled the country in fear of their lives. Despite the regime's crimes, Pinochet and his colleagues had seemed untouchable by the law. Even following his return to civilian life in March 1998 after a quarter-century as Chile's supreme military leader, Pinochet had never been prosecuted by Chilean courts for any offense: his position as senator-for-life gave him constitutional immunity from arrest or criminal process. In addition, in 1978 he had granted his government a self-amnesty for the period of September 11, 1973, through March 10, 1978, when military repression and human rights violations were at their height. Furthermore, he continued to have great political influence with former military associates in parliament and with the judiciary, some of whose senior members he had appointed.⁴⁵⁶ His arrest on charges of egregious human rights violations as a result of an investigation conducted by a Spanish magistrate seemed inconceivable.

Ultimately, the "Pinochet affair" had important and largely unforeseen consequences in Chile. The arrest made it obvious that Chile's decision to evade human rights obligations under international law was seriously out of step with world opinion. It also spread concern for the first time across the political spectrum that the families of the dead and "disappeared" were owed answers about the fate of their relatives from those responsible, and that the success of Chile's transition to democracy depended on answers being provided. As Socialist Party leader Ricardo Lagos expressed it, "The international community ... handed us a yellow card."⁴⁵⁷ That some politicians on the political right were

⁴⁵⁶ Human Rights Watch, *When Tyrants Tremble: The Pinochet Case*, vol. 11, no. 1(B), October 1999, <http://www.hrw.org/legacy/reports/1999/chile/>, pp. 23-24.

⁴⁵⁷ A soccer referee's warning card displayed to an offending player. *Ibid.*, p. 29.

willing to consider that human rights violations were the result of government policy would not have been a possibility prior to the arrest.⁴⁵⁸

At the same time, Pinochet's arrest and the charges against him were highly controversial. Some Chilean leaders argued that "a giant bomb had been dropped on the [democratic] transition"⁴⁵⁹ and that if not overturned soon, the decision "will inevitably create a climate of instability ... and could lead to a grave deterioration in the national co-existence it cost us so much to construct."⁴⁶⁰ However, the forebodings expressed by opponents of Pinochet's prosecution that "reopening old wounds" would destabilize Chile's fragile democracy were shown to be greatly exaggerated. Those who claimed Pinochet's arrest would bring chaos and instability to Chile, upsetting Chile's progress toward full democracy, were proved wrong as the predicted apocalypse never occurred. Chileans adapted to the momentous developments with little overt lawlessness.⁴⁶¹ Except for moments of political tension and noisy street demonstrations when decisions went against Pinochet, there were only isolated incidents of violence.⁴⁶² Opinion polls conducted at explosive moments of the Pinochet crisis showed that more than two-thirds of the respondents did not think that democracy was in danger or that the arrest affected their lives; a solid majority wanted Pinochet to face justice and most wanted him to face justice in Chile.⁴⁶³

The Chilean government's opposition to the warrant was based on the principle of territorial jurisdiction. As President Eduardo Frei stated at the time, "All our efforts to get Senator Pinochet home have had a sole objective: that it should be Chilean courts not those of another country that apply the law."⁴⁶⁴ Indeed, the law favors domestic courts over foreign ones for extraditable crimes committed by an individual in their home country. However, under the principle of *aut dedere aut judicare* (either extradite or prosecute), governments

⁴⁵⁸ Ibid, pp. 4-5. In 1991 the National Commission of Truth and Reconciliation (known as the Rettig Commission) published its 2,000-page report. This report and a successor report published in 1996 established an official record of 3,197 persons who lost their lives due to human rights violations under the military regime. It did not have a mandate to investigate torture or other abuses. The political climate made it impossible to implement many of the Rettig Commission's most important recommendations for the protection of human rights. Ibid.

⁴⁵⁹ Sebastian Rotella, "Pinochet Arrest Forces Chile to Revisit Past," *Los Angeles Times*, October 25, 1998, <http://articles.latimes.com/1998/oct/25/news/mn-36094> (accessed May 20, 2009), quoting Ret. General Ernesto Videla, a former high-ranking diplomat in the Pinochet regime.

⁴⁶⁰ Davison, "The Pinochet Affair: Chile polarized as army grumbles divided by arrest in London," *Independent*, quoting Fernando Lihn, head of Chile's National Chamber of Commerce.

⁴⁶¹ Human Rights Watch, *World Report 2000*, Chile chapter, <http://www.hrw.org/legacy/wr2k/americas-02.htm>.

⁴⁶² Human Rights Watch, *When Tyrants Tremble*, p. 1.

⁴⁶³ Ibid., p. 32.

⁴⁶⁴ Human Rights Watch, *World Report 2001*, Chile chapter, <http://www.hrw.org/legacy/wr2k1/americas/chile.html>.

that refuse to extradite persons wanted for human rights abuses are obliged to try them themselves.

But, as already noted, little had been done nationally to prosecute him. The Chilean government's initial efforts to show Britain that Chile was seriously investigating Pinochet's criminal responsibility in Chile were unsuccessful.⁴⁶⁵ Yet under the surface, the Pinochet affair wrought important changes: it helped spur efforts in Chile to prosecute the atrocities committed while Pinochet was in power. When Pinochet returned to Chile after the United Kingdom then-Home Secretary Jack Straw decided to deny Spain's request for extradition on medical grounds in March 2000, he came back to a changed legal landscape.

In the first year following the arrest, three generals, including a former member of the military junta, and at least 30 officers and former officers of the army and air force were charged for grave human rights crimes in Chile. The Supreme Court allowed prosecutions to proceed despite the 1978 amnesty law due to a new doctrine which in theory permitted the prosecution of "disappearances."⁴⁶⁶ By the time that Pinochet returned to Chile, he faced more than 60 domestic criminal complaints lodged since January 1998 by relatives of victims of extrajudicial executions, "disappearances," and torture.⁴⁶⁷ Three months later, the Santiago Appeals Court voted to remove his immunity, finding sufficient grounds for him to be prosecuted. The decision was confirmed by a wide margin by the Supreme Court. With this decision, Pinochet's claim of immunity, which had seemed impenetrable, was in tatters. This decision contributed to a more favorable climate for other human rights cases (though some uncertainty remains because court rulings in Chile are not binding on cases other than the one under review).⁴⁶⁸ Pressure to prosecute resulting from extradition requests has also resulted in the reopening of previously closed cases.⁴⁶⁹ However, a bill promoted by the

⁴⁶⁵ The government shrank from taking steps that would remove hurdles to Pinochet's prosecution in Chile. On November 11, 1998, the foreign minister asked the Supreme Court to designate one of its members as a "special judge" to take over investigations into Pinochet's case begun by an appeals court judge, but the Supreme Court refused. The government also requested the Council for the Defense of the State to intervene as a party to the case, which would have given the government greater ability to participate in the case and also to raise its profile, but the council refused to be a party to the case. Human Rights Watch, *When Tyrants Tremble*, pp. 29-30.

⁴⁶⁶ *Ibid.*, pp. 1, 39-40.

⁴⁶⁷ Human Rights Watch, *World Report 2001*, Chile chapter, <http://www.hrw.org/legacy/wr2k1/americas/chile.html>.

⁴⁶⁸ Human Rights Watch, *World Report 2009*, Chile chapter, <http://www.hrw.org/en/node/79211>.

⁴⁶⁹ For example, the Chilean Supreme Court ordered that local investigations into the murder of Gen. Carlos Prats, Pinochet's predecessor, in Argentina be reopened in response to an Argentine extradition request and named suspects who were charged and arrested in March 2003. See Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005), p. 162.

government to amend the criminal code so that crimes against humanity are not subject to amnesties or statutes of limitation remains deadlocked in Congress at this writing.⁴⁷⁰

At the time of Pinochet's death in December 2006, he was facing trial in three human rights cases and others were in the pipeline. Despite litigation over his fitness to stand trial, judges placed him on several occasions under house arrest and in October 2006 accused him personally of torture. As of July 2008, 482 former military personnel and civilian collaborators were facing charges for enforced disappearances, extrajudicial executions, and torture; 256 had been convicted (of whom 83 had had their conviction confirmed on appeal); and 38 were serving prison sentences.⁴⁷¹

2. Argentina

For many years Argentina seemed to have closed the books on the numerous systematic human rights violations committed under the military juntas that ruled the country from 1976 to 1983. However, as in Chile, efforts to bring to account human rights violators were revitalized, in part, by efforts of victims and human rights groups to bring perpetrators to justice in various European countries.

From 1976 to 1983 Argentina was governed by a military dictatorship that committed horrendous human right violations. After the armed forces took power in a March 1976 coup, a "dirty war" was conducted in which the military and police abducted at least 14,000 suspected leftists, tortured them in secret detention centers, executed them, and disposed of their bodies in secrecy (many victims were dropped from planes into the ocean). After democracy was reestablished in 1983, prosecutors began trying members of the military juntas. Ten senior military officers were convicted in Buenos Aires of crimes such as murder and torture. However, the trials and sentencing of junta leaders and military and police officers led to a backlash among military officers. Then-President Raul Alfonsín rushed two laws through Congress on December 24, 1986, and June 5, 1987, hoping to appease military objections to the prosecutions.⁴⁷²

The full-stop law of 1986 (Law No. 23,492) set a 60-day deadline for the initiation of new prosecutions. When that law failed to thwart the prosecution of large numbers of defendants, the 1987 due obedience law (Law No. 23,521) was passed, granting automatic immunity from

⁴⁷⁰ Ibid.

⁴⁷¹ Human Rights Watch, *World Report 2009*, Chile chapter, <http://www.hrw.org/en/node/79211>.

⁴⁷² See Human Rights Watch, *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators*, vol. 13, no. 5(B), December 2001, <http://www.hrw.org/legacy/reports/2001/argentina/index.html>, pp. 8-12.

prosecution to all members of the military except top commanders.⁴⁷³ The Supreme Court's ruling later that year that the due obedience law was constitutional effectively put a stop to the prosecution of "dirty war" crimes for years.⁴⁷⁴ The only crime that could be prosecuted was baby-snatching—the theft of babies born to mothers held in secret detention and subsequently killed was considered too abhorrent to absolve.⁴⁷⁵ Those who had been convicted in trials prior to passage of the immunity laws were granted pardons in 1989 and 1990 by then-President Carlos Menem, ostensibly as a reconciliation measure.⁴⁷⁶ In the early 1990s any possibility of successful prosecution of the thousands of human rights crimes facing the courts seemed to have been foreclosed.

During the 1990s, human rights groups campaigned and litigated to ensure that judicial investigations into human rights crimes continued even though prosecution was barred. "Truth trials" to establish the truth about the fate of the missing were held, but the full-stop and due obedience laws continued to protect perpetrators from prosecution.⁴⁷⁷ As one of the complainants' lawyers explained, "When the Truth Trials began, we had no possibility of demanding trial and punishment of the guilty, because Pinochet was not then detained, the [UK] House of Lords had not yet ruled, Baltazar [sic] Garzon had not yet asked for the extradition of the Argentine military officers. All of this created a universal jurisdiction consciousness, an understanding that crimes against humanity can be prosecuted anywhere in the world."⁴⁷⁸

Following the Pinochet case, foreign efforts at prosecution of Argentines for crimes committed during military rule picked up speed. Cases in Italy, France, Spain, Sweden, and Germany were brought for crimes committed in Argentina against citizens of those countries.⁴⁷⁹ On December 30, 1999, Spanish judge Baltasar Garzon issued an international arrest warrant for 48 former military officers.⁴⁸⁰ A former Argentine military official, Ricardo Miguel Cavallo, was arrested in Mexico in August 2000 and extradited to Spain, the first time

⁴⁷³ Ibid., p. 11.

⁴⁷⁴ "Argentina: Amnesty Laws Struck Down," Human Rights Watch news release, June 13, 2005, <http://www.hrw.org/en/news/2005/06/14/argentina-amnesty-laws-struck-down>.

⁴⁷⁵ Human Rights Watch, *Reluctant Partner*, p. 19.

⁴⁷⁶ Ibid., p. 12.

⁴⁷⁷ Ibid., pp. 15-19.

⁴⁷⁸ Roht-Arriaza, *The Pinochet Effect*, p. 107.

⁴⁷⁹ Human Rights Watch, *Reluctant Partner*, pp. 3-4.

⁴⁸⁰ Human Rights Watch, *World Report 2001*, Argentina chapter, <http://www.hrw.org/legacy/wr2k1/americas/argentina3.html>.

a suspect would be sent to a third country to face charges for human rights abuses committed in their home country.⁴⁸¹ These cases helped increase pressure to repeal the amnesty laws in Argentina.

Initially the government refused to cooperate with investigations being conducted abroad, on grounds of national sovereignty, and even issued orders to block the investigations.⁴⁸² Although one Argentine judge ordered arrests of suspects on the basis of another Garzon request, they were subsequently released on the basis of decisions made in the executive branch. Argentina's ministers of foreign relations and defense rejected extradition requests asserting that only Argentina has the right to try those responsible for crimes committed on its territory.⁴⁸³

However the principle of "extradite or prosecute" created additional pressure to pursue these cases in domestic courts. Thus, the government under then-President Fernando de la Rúa undertook to submit the extradition cases to national courts for possible prosecution in Argentina.⁴⁸⁴ The defense minister who rejected a 2001 request by Spanish judge Garzon for 18 Argentines referred the cases to the attorney general for prosecution.⁴⁸⁵

The watershed moment came with a landmark decision by Argentine Federal Judge Gabriel Cavallo in 2001 declaring the amnesty laws unconstitutional and without legal effect. In his decision, he drew on facts established in Garzon's investigation in Spain as well as on US extradition proceedings. He cited the Pinochet case and other international decisions to show that these cases were of international concern and that Argentina had an international legal obligation to prosecute.⁴⁸⁶ When asked why Argentine judges waited so long to overturn the amnesty laws, Cavallo stated,

⁴⁸¹ Because of a clerical error, Cavallo had been excluded from the initial Spanish indictments. A separate arrest warrant was issued for him in late August 2000. Roht-Arriaza, *The Pinochet Effect*, pp. 141-145.

⁴⁸² On January 26, 1998, President Carlos Menem issued a decree denying judicial assistance on grounds that the Spanish prosecution entailed a violation of Argentina's sovereignty. Human Rights Watch, *Reluctant Partner*, pp. 3, 6-7, 32. See also *World Report 1999*, Argentina chapter, <http://www.hrw.org/legacy/worldreport99/americas/argentina.html>.

⁴⁸³ Human Rights Watch, *Reluctant Partner*, p. 32-33; and Human Rights Watch, *World Report 2001*, Argentina chapter, <http://www.hrw.org/legacy/wr2k1/americas/argentina3.html>.

⁴⁸⁴ Human Rights Watch, *World Report 2003*, Argentina chapter, <http://www.hrw.org/legacy/wr2k3/americas1.html>; and "Argentina: Decision not to Extradite Astiz Condemned," Human Rights Watch news release, August 15, 2001, <http://www.hrw.org/en/news/2001/08/15/argentina-decision-not-extradite-astiz-condemned>. This stance is contrary to fundamental principles of universal and other bases of jurisdiction, which do not limit prosecution of criminal offenses to the locale where the crimes took place.

⁴⁸⁵ "Argentina: Support Human Rights Trials," Human Rights Watch news release, December 12, 2001, <http://www.hrw.org/en/news/2001/12/12/argentina-support-human-rights-trials>.

⁴⁸⁶ See Roht-Arriaza, *The Pinochet Effect*, pp. 114-115; and Human Rights Watch, *Reluctant Partner*, pp. 23-25.

External and internal pressure was growing and public opinion was changing. Then foreign judges began making concrete detention requests, and those of us working in the area began to think “This won’t be considered a serious country until we solve this problem.” Foreign governments didn’t want to be bothered with having these cases in their courts, and they put pressure on the Argentine government to not stand in the way of the local trials so that foreign judges would not end up doing these investigations. That changed the pressures on judges.⁴⁸⁷

In affirming this decision, the Federal Court of Buenos Aires found, “To do justice is not an option, but an obligation.”⁴⁸⁸ In 2005 the Supreme Court affirmed once and for all the unconstitutionality of the immunity laws, which by then had been annulled by the Argentine Congress.⁴⁸⁹

Since 2005 several federal judges have struck down the pardons that President Menem granted in 1989 and 1990 to former officials convicted of or facing human rights violations.⁴⁹⁰ As of late 2008, nearly 400 people were facing charges for crimes committed during the last military dictatorship, the majority of whom were in pretrial detention.⁴⁹¹ Those detained include former Navy Capt. Alfredo Astiz (“the angel of death”) who was sentenced to life imprisonment in absentia by French and Italian courts after his extradition was refused by Argentina, for the “disappearance” of two French nuns and three Italian citizens.⁴⁹²

The other issue illustrated by the experience of Chile and Argentina is that even decades after crimes are committed, the wounds do not heal if the past is not confronted. Years after

⁴⁸⁷ Roht-Arriaza, *The Pinochet Effect*, p. 115.

⁴⁸⁸ “Argentina: Support Human Rights Trials,” Human Rights Watch news release.

⁴⁸⁹ Human Rights Watch, *World Report 2006* (New York: Human Rights Watch, 2006), Argentina chapter, <http://www.hrw.org/legacy/english/docs/2006/01/18/argent12203.htm>. In an opinion to the court, Attorney General Nicolas Becerra argued for a finding of unconstitutionality, stressing the link between present-day violence and Argentina’s legacy of human rights violations: “the violence which still breaks out within some institutions and is now invading the daily life of our country in a generalized way must be halted by a clear message that the rule of law is in force.” Human Rights Watch, *World Report 2003*, Argentina chapter, <http://www.hrw.org/legacy/wr2k3/americas1.html>.

⁴⁹⁰ Human Rights Watch, *World Report 2008*, Argentina chapter, <http://www.hrw.org/legacy/englishwr2k8/docs/2008/01/31/argent17764.htm>.

⁴⁹¹ Human Rights Watch, *World Report 2009*, Argentina chapter, <http://www.hrw.org/en/node/79336>.

⁴⁹² Human Rights Watch, *Reluctant Partner*, pp. 35-36; and *World Report 2002* (New York: Human Rights Watch, 2002), Argentina chapter, <http://www.hrw.org/legacy/wr2k2/americas1.html>. See also “Italy convicts ‘Dirty War’ five,” *BBC News Online*, March 15, 2007, <http://news.bbc.co.uk/2/hi/europe/6454443.stm>; and Roht-Arriaza, *The Pinochet Effect*, pp. 122-124, 133-134.

the military coup in Argentina, tens of thousands still take to the streets to demand justice for the crimes.⁴⁹³

⁴⁹³ John Catalinotto, "Argentina: Massive marches demand 1976 militarists be punished," *Workers World*, March 27, 2007, <http://www.workers.org/2007/world/argentina-0405/> (accessed May 26, 2009); and James Reynolds, "Argentina remembers Dirty War," *BBC News Online*, March 25, 2001, <http://news.bbc.co.uk/2/hi/americas/1240921.stm> (accessed May 26, 2009).

VIII. Protection against Revisionism

*If you do not deal with a dark past ..., effectively look the beast in the eye, that beast is not going to lie down quietly; it is going, as sure as anything, to come back and haunt you horrendously.*⁴⁹⁴

—Archbishop Desmond Tutu

Another long-term benefit of accountability relates to the importance of confronting the past. Trials make a particular contribution to establishing a record of past events. The evidentiary rules used at judicial proceedings, and the requirement that judgments be based on proven facts, help confer legitimacy on otherwise contestable facts and make it more difficult for “societies to indulge their fantasies of denial.”⁴⁹⁵ Thus, one of the important benefits of trials is that they preserve a more accurate record of the crimes than might otherwise be the case, though they are not necessarily as comprehensive as a truth commission. This can help a community more readily come to grips with its past by publicly acknowledging the victims and by exposing (at least for the cases it covers) the truth about what happened. It is, therefore, a crucial tool for combating denial and revisionism. The Nuremburg trials, for example, have made it more difficult for subsequent generations of Holocaust deniers to make their claim even decades later. Evidence revealed in the trials became an insurmountable obstacle to those seeking to disprove that the crimes of the Nazi regime took place.

The value of trials both for bringing forward evidence that might otherwise not be disclosed and for refuting those who deny the existence of crimes can be seen in aspects of the work of the International Criminal Tribunal for the former Yugoslavia.

A. International Criminal Tribunal for the former Yugoslavia

Over the course of its trials, the ICTY accumulated a formidable wealth of documentary evidence and testimony that can serve as a reference point and help prevent the manipulation of history to sow the seeds of new conflicts.⁴⁹⁶ Without the work of the ICTY, state secrets may have remained secrets and government efforts to misinform the public may not have been so effectively exposed. A recent study also shows that the work of the

⁴⁹⁴ Desmond Tutu, “Healing a Nation,” *Index on Censorship*, vol. 25 (1996), p. 39.

⁴⁹⁵ Ignatieff, “Articles of Faith,” *Index on Censorship*, pp. 117-18.

⁴⁹⁶ “Keynote Speech by Carla Del Ponte,” UN press release, September 2, 2005.

ICTY may have some small effect on attitudes toward the Balkans war crimes in Serbia, though coming to terms with the crimes will be a long-term process.

1. *Milosevic trial*

The trial of Slobodan Milosevic was the first ICTY case in which evidence was introduced relating to the three main conflicts in the breakup of Yugoslavia: Bosnia, Croatia, and Kosovo. Though Milosevic's death kept it from ending in a verdict, Human Rights Watch found that the lengthy trial consolidated a great deal of information about the conflicts in the region that will help future generations understand how the wars came to pass.⁴⁹⁷ Because much of Belgrade's involvement had been kept secret, its exposure during the Milosevic trial shed important new light on the events. The fact that Milosevic had the opportunity to test the prosecutor's evidence in cross-examination enhances its value as a historical record.

Although it was widely assumed that Serbia supported the Serb combatants in the conflicts in Bosnia and Croatia, the full extent of the support and the mechanisms by which it was accomplished did not become public until the Milosevic trial.⁴⁹⁸ Milosevic himself discussed the secrecy involved, in a statement to a Belgrade investigating judge who was looking into allegations of misappropriation of customs funds in 2001. In his statement, admitted as an exhibit at trial, Milosevic admitted that the money was used to help rebel Serbs in Bosnia and Croatia:

As regards the resources spent for weapons, ammunition and other needs of the Army of Republika Srpska [in Bosnia and Herzegovina] and the Republic of Serbian Krajina [in Croatia], these expenditures constituted a state secret and because of state interests could not be indicated in the Law on the Budget, which is a public document. The same applies to the expenditures incurred by providing equipment, from a needle to an anchor, for the security forces and special anti-terrorist forces in particular, from light weapons and equipment to helicopters and other weapons which still remain where they are today, and this was not made public because it was a state secret, as

⁴⁹⁷ See Human Rights Watch, *Weighing the Evidence: Lessons from the Slobodan Milosevic Trial*, vol 18, no. 10(D), December 2006, <http://www.hrw.org/sites/default/files/reports/milosevic1206webwcover.pdf>, p. 1.

⁴⁹⁸ See, for example, Testimony of Milan Babic, former Prime Minister/President of the government of the self-declared Serbian Autonomous District of Krajina, later the so-called Republic of Serbian Krajina. *Prosecutor v. Milosevic*, ICTY, Case No. IT-02-54, Trial Transcript, November 20, 2002, http://www.icty.org/x/cases/slobodan_milosevic/trans/en/021120ED.htm (accessed May 22, 2009), p. 13116 (describing how Milosevic told him to describe the Krajina as coming out in favor of the Federal Republic of Yugoslavia, not Serbia, "so that his direct links and links with Serbia would not be seen, links to what was happening in Krajina").

was everything else that was provided for the Army of Republika Srpska. In my opinion, these matters should still constitute a state secret.⁴⁹⁹

The Milosevic trial opened the door on these state secrets. Evidence introduced at trial showed exactly how those in Belgrade and the Federal Republic of Yugoslavia (FRY) financed the war, how they provided weapons and material support to Bosnian and Croatian Serbs, and how the administrative and personnel structures were set up to support the Bosnian Serb and Croatian Serb forces.

Court proceedings that required disclosure of material by the Serbian government revealed previously unknown information about how the war was managed from Serbia. For example, Supreme Defense Council minutes acknowledging the need to hide from the public the massive assistance to the wartime Republika Srpska and the Republic of Serbian Krajina were made public for the first time as part of the Milosevic trial.⁵⁰⁰ The Supreme Defense Council was comprised of the presidents of Serbia, Montenegro, and the Federal Republic of Yugoslavia. It met from 1992 to 2000 to make decisions about Yugoslavia's defense and security. The meetings' minutes and shorthand notes were introduced at trial as a result of the prosecutor's pursuit of court orders requiring Serbia and Montenegro to comply with outstanding requests for documents under a court rule that allows the parties to obtain documents from states.⁵⁰¹ Although not all of the financing was done in secret,⁵⁰² the Milosevic trial was important in that evidence introduced at trial shed new light on both the financial structures set up to facilitate support for the new entities and on the sources of the money used to fund the conflicts.

⁴⁹⁹ Statement of April 2, 2001, admitted into evidence at the Milosevic trial as Exhibit P427.3(a). *Prosecutor v. Milosevic*, ICTY, Case No. IT-02-54, Mr. Torkildsen: Exhibit 427, tab 3, p. 2.

⁵⁰⁰ *Prosecutor v. Milosevic*, ICTY, Case No. IT-02-54, Exhibit 667 (SDC minutes). See also Letter from Branislav Kuzmanovic, Deputy Minister of Defense, to the Secretary of the Republic of the Serbian Government, dated November 1, 1991, in which it is proposed that a meeting relating to a report on assisting Serb areas in Croatia be discussed at a "session closed to the public" given its "level of confidentiality." *Prosecutor v. Milosevic*, ICTY, Case No. IT-02-54, Exhibit 352, tab 4, para. a.

⁵⁰¹ See Rules of Procedure and Evidence of the ICTY, IT/32/Rev. 38, June 13, 2006, <http://www.un.org/icty/legaldocs/basic/rpe/IT032Rev38e.pdf> (accessed June 1, 2009), Rule 54 *bis*. The proceedings to obtain documents from Serbia and Montenegro were primarily confidential. See, for example, *Prosecutor v. Milosevic*, ICTY, Case No. IT-02-54, Preliminary Order on Prosecution Application for an Order Pursuant to Rule 54 *bis* Directing Serbia and Montenegro to Comply with Outstanding Requests for Assistance and Prosecution Second Motion for Further Action in Relation to Previous Rule 54 *bis* Applications, December 16, 2005; and *Prosecutor v. Milosevic*, ICTY, Case No. IT-02-54, Decision on Prosecution Application for Further Action in Relation to Previous Rule 54 *bis* Applications, October 31, 2005.

⁵⁰² In his cross-examination of Morten Torkildsen, Milosevic noted the April 25, 1993 Official Gazette of the Republika Srpska Krajina, number 3, which on page 205 publicly states that additional funds from the FRY are used as a source of finances. *Prosecutor v. Milosevic*, ICTY, Case No. IT-02-54, Trial Transcript, April 11, 2003, http://www.icty.org/x/cases/slobodan_milosevic/trans/en/030411ED.htm (accessed May 26, 2009), pp. 19117-19.

Other new material was revealed for the first time in the Milosevic trial, including the “Scorpion video” that showed members of the notorious “Scorpion” unit, believed to have been acting under the aegis of the Serbian police, executing men and boys from Srebrenica at Trnovo. The video had an enormous impact on Serbia. As part of trial coverage, it was aired as news on a number of Serbian national television stations and reached a broad audience, sending shockwaves through society. The airing of the video engendered a great deal of national discussion about atrocities that many people in Serbia had previously denied.

In addition, the trial also examined Serbian government officials’ attempts to hide evidence of massacres. For example, witnesses described for the first time how the Minister of the Interior Vlatko Stojiljkovic, ordered a cover-up of the discovery of the decomposing remains of 86 Kosovo Albanians in a refrigerated truck driven into the Danube river in 1999.⁵⁰³

2. Srebrenica

In addition to bringing forward new historical information about the conflicts, evidence at the ICTY trials helped undermine the Bosnian Serb government’s denial of crimes. Following the massacre at Srebrenica in July 1995, the Bosnian Serb government attempted to obscure the extent of the carnage both through a report and through its public statements. Shortly after the attacks, Ratko Mladic insisted that Bosnian Serb soldiers treated the people of Srebrenica “correctly” but said a considerable number of soldiers and police had put on plainclothes and “merged with civilians.”⁵⁰⁴ In September 2005 the government issued a report contending that exhausted Muslim men under extreme pressure imagined a massacre or invented stories to attract the attention of the international community. It called a Serbian soldier who admitted taking part in the killings “mentally disturbed.”⁵⁰⁵

In response to photos taken by the US government showing bodies lying in the vicinity of a grave on the day of the shooting and then the grave freshly covered with earth, the Bosnian Serb army spokesperson said that the grave contained the bodies of soldiers killed during battle. Exhumations conducted by the ICTY’s prosecutor’s office, however, starkly exposed the spokesperson’s lie.

⁵⁰³ “Serbs Ordered Cover-Up of Massacre, Witness Says,” *Los Angeles Times*, September 4, 2002, <http://articles.latimes.com/2002/sep/04/world/fg-milo4> (accessed June 29, 2009).

⁵⁰⁴ “General Says Serb Army Ready to Take ‘Safe Areas,’” Reuters, July 22, 1995.

⁵⁰⁵ Patrick Moore, “Balkan Report: September 6, 2002: Blame and Denial,” Radio Free Europe/Radio Liberty, September 6, 2002, <http://www.rferl.org/content/article/1341079.html> (accessed May 26, 2009).

Evidence from the exhumations introduced in court created a record of what happened in Srebrenica with a degree of certainty that would have otherwise been absent.⁵⁰⁶ For example, extensive forensic evidence introduced during the trial of Gen. Radislav Krstic showed that over 400 ligatures and blindfolds were found in exhumations of 13 different gravesites. The majority of victims for whom a cause of death could be determined were killed by gunshot wounds; some of the victims were severely handicapped and, therefore, unlikely to have been combatants.⁵⁰⁷ The voluminous forensic evidence corroborated witness testimony from survivors and a participant in the massacre. Based on the evidence, the court concluded that thousands of Bosnian Muslim men from Srebrenica were killed in careful and methodical mass executions.⁵⁰⁸ Rather than being killed in battle as the government had claimed, the court found that most of the executions followed a well-established pattern whereby the men, who were unarmed and often blindfolded with their wrists tied behind their backs, were lined up and shot at execution fields in isolated locations.⁵⁰⁹

The confessions or guilty pleas of war criminals also help to establish the occurrence of events. Drazan Erdemovic's confession to killing over 70 Muslim civilians outside of Srebrenica helped verify what happened there.⁵¹⁰

An examination of the ICTY's impact in Serbia by Diane Orentlicher reveals signs that its work may be having a modest positive effect in changing public perception of the conflict after years of propaganda. For a long time, nationalist figures claimed that the number of deaths in Srebrenica was much lower than other estimates and blamed many of the killings on intra-Muslim violence. In Serbian society, the mere existence of a crime in Srebrenica was denied by a third of the Serbian population and the fact that it constituted genocide was rejected by an overwhelming majority.⁵¹¹ Although surveys show that most Serb citizens are not persuaded that Serbs committed a majority of war crimes during the conflict and believe that the ICTY is biased against Serbs because of the preponderance of Serb defendants,

⁵⁰⁶ Richard Goldstone, "Justice as a Tool for Peace-making: Truth Commissions and International Criminal Tribunals," *N.Y.U. Journal of International Law and Politics*, vol. 28 (1996), p. 489.

⁵⁰⁷ *Prosecutor v. Krstic*, ICTY, Case No. IT-98-33, Judgment (Trial Chamber), August 2, 2001, <http://www.icty.org/x/cases/krstic/tjug/en/krs-tjo10802e.pdf> (accessed May 26, 2009), paras. 71-79.

⁵⁰⁸ *Ibid.*, para. 79.

⁵⁰⁹ *Ibid.*, paras. 66-70.

⁵¹⁰ Goldstone, "Justice as a Tool for Peace-making," *N.Y.U. Journal of International Law and Politics*, p. 489. Former prosecutor Louise Arbour has also recognized the impact of guilty pleas on public perception, stating that "when Jean Kambanda [former Rwandan prime minister] pleaded guilty, his public admission of guilt was a major blow to the revisionism which was already implanting itself, not so much in Rwanda, but in neighboring communities." Louise Arbour, "Friedmann Award Address: Litigation Before the ICC: Not If and When, But How?" *Columbia Journal of Transnational Law*, vol. 40 (2001), p. 6.

⁵¹¹ "Keynote Speech by Carla Del Ponte," UN press release, September 2, 2005.

those numbers may slowly be changing.⁵¹² Orentlicher's study concludes that while the level of disbelief about the massacre in Srebrenica is high, between 2004 and 2006 there was a modest increase in Serbian respondents' belief in the truth of reports of atrocities committed by Serbs and more acknowledgment of the core facts underlying the Srebrenica genocide.⁵¹³ She found that many "believe that the evidence adduced in The Hague has significantly 'shrunk the public space' in which political leaders can credibly deny the truth about notorious atrocities."⁵¹⁴ Although the process of accepting what happened is a long-term one (as demonstrated in Germany after the Second World War), the trials may assist with that process.

The investigations and prosecutions at the ICTY mark the first time in the long history of the Balkans that impartial investigations have been conducted into the conflicts. Evidence brought out at trials lays a foundation for a better understanding of the conflict in the region which may foster enhanced stability in years to come.

⁵¹² Orentlicher, *Shrinking the Space for Denial*, pp. 59-61. See also Mirko Klarin, "The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia," *Journal of International Criminal Justice*, vol. 7 (2009), pp. 91-94.

⁵¹³ Orentlicher, *Shrinking the Space for Denial*, pp. 60-61.

⁵¹⁴ *Ibid.*, p. 63.

IX. Deterrence

One of the reasons for pursuing justice, and a reason cited for the establishment of the International Criminal Court, is the belief that ending impunity for the most serious crimes will lead to their prevention.⁵¹⁵ Critics have pointed to commission of crimes in countries where an international court already had jurisdiction as evidence that these courts do not have the hoped-for impact (though in the oft-cited examples of Srebrenica and Kosovo, at the time of those events few suspects then being pursued by the International Criminal Tribunal for the former Yugoslavia had been apprehended, so the court's reach and impact was not yet evident).⁵¹⁶ 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 here will likely hinge on the degree to which punishment for those crimes becomes more certain, and in the international arena that is subject to a greater number of variables. It will depend to a large extent on the willingness of states parties to the ICC to support the court and to 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, without overstating the significance, Human Rights Watch has found some anecdotal evidence that indicates that there may be some short-term deterrence benefits arising from the threat of prosecution, even at the current development of international criminal law.

A. Afghanistan

A perceived threat of prosecution has been seen to have some short-term effect on at least one warlord in Afghanistan. In May 2002 the *Christian Science Monitor* reported that a key warlord in northern Afghanistan, Gen. Abdul Rashid Dostum, forced more than 90 commanders to listen to a reading of a 52-page Human Rights Watch report alleging

⁵¹⁵ Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, preamble.

⁵¹⁶ See Helena Cobban, "Think Again: International Courts," *Foreign Policy*, March/April 2006, p. 22-28. The impact of ICTY prosecution on deterring crimes is a hotly contested one. In the midst of the Kosovo conflict, the ICTY prosecutor reminded Serbian officials of their obligations under international law and warned them of their accountability with the hope that it might have an impact on the severity of the crimes. "Statement by the Prosecutor," ICTY press release, CC/PIU/391-E, March 31, 1999, <http://www.un.org/icty/pressreal/p391e.htm> (accessed May 29, 2009).

atrocities committed by his forces after the fall of the Taliban.⁵¹⁷ The report, entitled “Paying for the Taliban’s Crimes,” described widespread abuses including killings, sexual violence, beatings, and extortion committed against Pashtuns, targeted because their ethnic group was closely associated with the Taliban regime. The report called for Afghan commanders and combatants responsible for war crimes to be held to account.⁵¹⁸

During the meeting, the warlord warned his men, “You must be careful in the future. These [investigators] are very dangerous men. They can take you to an international court of justice if they can prove your actions.” He also said, “I am dying of these accusations from the international community If any one of my commanders commits these kind of acts, I will kill him tomorrow.”⁵¹⁹ The previous day, the general signed an agreement with a rival group to remove heavy weaponry from the city of Mazar-e Sharif and to create a combined 600-member multi-ethnic force to police the city to discourage abuse of minority ethnic groups. A UN official suggested that the Human Rights Watch report was provided to both forces as “incentive” for the deal.⁵²⁰

Given Dostum’s evident sensitivity to the threat of prosecution, the failure to follow through with him and others on issues of accountability (as discussed in Chapter IV.A) was also a missed opportunity to turn short-term effects into something more lasting.

B. Côte d’Ivoire

On November 16, 2004, the Côte d’Ivoire government-controlled National Radio and Television aired messages that replaced earlier appeals to ethnic hatred with ones of restraint, a day after the UN special advisor on the prevention of genocide warned that the situation could be referred to the International Criminal Court. After an arms embargo was imposed by the UN Security Council in response to the government’s violation of a ceasefire agreement, anti-French rioting and ethnic clashes occurred. With thousands of Ivoirians and foreigners fleeing the country, the special advisor stated that xenophobic hate speech could exacerbate already widespread human rights violations. In particular, the special advisor warned that “the Ivoirian authorities have an obligation to end impunity and to curb public expressions of racial or religious hatred especially those aimed at inciting violence” and

⁵¹⁷ Ilene Prusher, “Battling Warlords Try Civility,” *Christian Science Monitor*, May 9, 2002, <http://www.csmonitor.com/2002/0509/p01s03-wosc.html> (accessed May 28, 2009).

⁵¹⁸ Human Rights Watch, *Paying for the Taliban’s Crimes: Abuses Against Ethnic Pashtuns in Northern Afghanistan*, vol 14, no. 2(C), April 2002, <http://www.hrw.org/legacy/reports/2002/afghan2/>.

⁵¹⁹ Prusher, “Battling Warlords Try Civility,” *Christian Science Monitor*.

⁵²⁰ Ibid.

noted that Côte d'Ivoire had lodged a declaration with the ICC registrar accepting the exercise of the court's jurisdiction.⁵²¹ The pro-government media's sudden change of message was a factor in allowing the situation to grow quieter quickly.⁵²²

C. Democratic Republic of Congo

On March 17, 2006, the Democratic Republic of Congo transferred Thomas Lubanga Dyilo to The Hague pursuant to an ICC arrest warrant on charges of enlisting and conscripting children as soldiers and using them to participate actively in conflict in Ituri. That day Human Rights Watch researchers had a meeting with a Congolese army colonel to discuss crimes committed by his 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!"⁵²³ 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 [T]he Hague if I did those things?" When informed that if he had done such things that was a possibility, he put his head in his hands and repeatedly said, "I had no idea. I had no idea."⁵²⁴

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."⁵²⁵ 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

⁵²¹ Statement by the Special Advisor on the Prevention of Genocide, November 15, 2004, <http://www.un.org/News/dh/infocus/westafrica/mendez-15nov2004.htm> (accessed May 29, 2009).

⁵²² "Despite relative calm UN-patrolled separation zone in Côte d'Ivoire reported tense," *UN News Service*, November 17, 2004, <http://www.un.org/apps/news/printnewsAr.asp?nid=12560> (accessed May 29, 2009); and "'Hate messages ending' in Côte d'Ivoire," *afrol News*, November 16, 2004, <http://www.afrol.com/articles/14817> (accessed May 29, 2009).

⁵²³ Human Rights Watch interview with Armed Forces of the Democratic Republic of Congo, (Forces Armées de la République Démocratique du Congo, FARDC) colonel (name withheld), Mitwaba (Katanga), March 17, 2006.

⁵²⁴ Human Rights Watch interview with Ituri militia leader (name withheld), Bunia, August 2006.

⁵²⁵ Davis and Hayner, ICTJ, "Difficult Peace, Limited Justice," March 2009, p. 31.

warlords and militia leaders that the use of children as participants in conflict is unlawful.⁵²⁶ 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.⁵²⁷

D. Central African Republic

On May 22, 2007, the ICC prosecutor announced the opening of an investigation into the CAR. The CAR government had referred the events of 2002-03 to the Office of the Prosecutor on December 22, 2004. Although the prosecutor has focused on crimes mainly committed during that time, because the CAR is a party to the Rome Statute and is under ICC investigation, officials and rebels are concerned that the prosecutor will also turn his attention to crimes committed as part of the 2007 counterinsurgency campaign. An active human rights community in the CAR representing the victims and pushing for accountability has increased civil society's awareness of the ICC and has helped make it a part of the debate surrounding more recent crimes.⁵²⁸

Human Rights Watch documented hundreds of unlawful killings and burning of villages committed as part of a counterinsurgency campaign in northern CAR by government troops and members of the Presidential Guard in a September 2007 report. Human Rights Watch also documented human rights abuses and violations of laws of war committed by rebel groups. In meetings with rebel leaders that occurred immediately following Congolese rebel leader Thomas Lubanga's transfer to The Hague (see above), 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

⁵²⁶ 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 in other efforts to conceal their use (sometimes called the "Lubanga effect"), children's rights advocates interviewed by ICTJ concluded that the overall effect of the ICC's action was positive because of its educational impact. Ibid., p. 32.

⁵²⁷ Ibid. 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 (citing United Nations Security Council, 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.

⁵²⁸ See Fédération internationale des ligues des droits de l'Homme, "International Fact-finding Mission, Central African Republic – Forgotten, stigmatized: the double suffering of victims of international crimes," No. 457/2, October 12, 2006, <http://www.fidh.org/IMG/pdf/RCA457ang-2007.pdf> (accessed May 29, 2009), pp. 58-59.

that the use of children as combatants is a serious violation of international humanitarian law, one rebel commander spent two days explaining to Human Rights Watch researchers that he had not known using child soldiers was a crime, that it was “a misunderstanding,” and that he was not a criminal. He immediately offered to demobilize the child soldiers as long as their security could be guaranteed, and asked Human Rights Watch to contact United Nations Children's Fund (UNICEF) for assistance with the demobilization. The children were in fact demobilized.⁵²⁹

⁵²⁹ Human Rights Watch interview with Wafio Bertin, advisor to the APRD, Boja, February 15, 2007; and Human Rights Watch, *State of Anarchy*, pp. 70-71.

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Selling Justice Short

Why Accountability Matters for Peace

Concerns about whether justice will interfere with peace have intensified as the possibility of leaders being brought to trial for serious human rights violations becomes more common. Those negotiating peace agreements have often viewed justice as a dangerous obstacle to their work. Some fear that merely raising the specter of prosecution will end fragile peace talks. Facing pressure to resolve an armed conflict, negotiators often feel pressed to push justice aside.

The temptation to forego accountability in an effort to attain peace is understandable. However, sidestepping prosecutions may carry a high price. In *Selling Justice Short: Why Accountability Matters for Peace*, Human Rights Watch reviews its experience in nearly 20 countries and finds that instead of impeding negotiations or a transition to peace, remaining firm on justice—or at least leaving the possibility for justice open—can yield short- and long-term benefits.

Indictments of abusive leaders and the resulting stigmatization can marginalize a suspected war criminal and may ultimately facilitate peace and stability. In contrast, granting amnesties or incorporating suspected war criminals into governments in order to achieve peace often does not have the hoped-for effect. An explicit amnesty for war crimes, crimes against humanity, or genocide, may set a precedent that encourages future abuses. All too often a peace conditioned on immunity for these most serious crimes is not sustainable. Including those with records of abuse into the government further reinforces a culture of impunity and can erode the government's legitimacy.

Other long-term benefits of justice, including promoting prosecutions in national courts and contributing to a widely accepted historical record, are also examined. Although many factors contribute to resumption of armed conflict apart from impunity, Human Rights Watch's research shows that the impact of justice is too often sold short when weighing objectives in resolving a conflict.

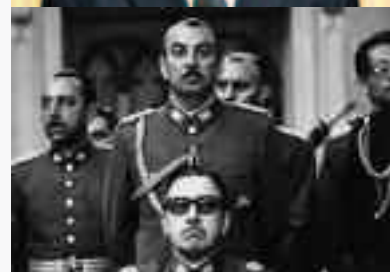
Bosnian Serb leader Radovan Karadzic.

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Chilean army general and head of state Augusto Pinochet.

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