



Seductions of “Sequencing”: The Risks of Putting Justice Aside for Peace

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Introduction

Since the end of the Cold War in the early 1990s, the belief that those responsible for serious human rights abuses should be brought to justice has increasingly taken root in the international community. The establishment of several ad hoc international courts and the International Criminal Court (ICC) to prosecute war crimes, crimes against humanity, and genocide, as well as more frequent efforts to prosecute the most serious international crimes in national courts, has meant that impunity from prosecution is less assured for those responsible for the worst offenses.

Justice and peace, once seen as antagonistic, are now widely viewed (at least in theory) as complementary goals. The preamble of the Rome Statute that created the ICC affirms that member states are “determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.” In his report on the rule of law in post-conflict societies, then-United Nations (UN) Secretary-General Kofi Annan stated, “Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.”¹

This understanding has been reflected in comments by many government leaders. The European Union has stated that it “remains convinced that peace and justice are not contradictory aims. On the contrary, in our view lasting peace cannot be achieved without a suitable response to calls for individuals to be held accountable for the most serious international crimes.”² The African Union too has reiterated its “unflinching commitment to combating impunity” and has acknowledged the link between accountability and lasting peace.³ Or as US Secretary of State Hillary Clinton put it when

¹ UN Security Council, *The Rule of Law and Transitional in Conflict and Post-Conflict Societies: Report of the Secretary-General, S/2004/616, August 23, 2004*, <http://www.undp.org/cpr/documents/jssr/ssr/rule%20of%20law%20and%20transitional%20justice.pdf> (accessed on December 2, 2010).

² European Union, *Declaration by the Presidency on behalf of the EU to mark the tenth anniversary of the Rome Statute of the International Criminal Court, Brussels, Belgium, July 16, 2008*, http://www.europa-eu-un.org/articles/en/article_8025_en.htm (accessed December 2, 2010).

³ African Union, *Statement by Mr. Ben Kioko, Legal Counsel of the African Union Commission on behalf of the AU Commission at the Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31 to June 11, 2010*.

discussing the Extraordinary Chambers in the Courts of Cambodia, established to try Khmer Rouge leaders for atrocities in the 1970s: “Countries that are held prisoner to their past can never break those chains and build the kind of future that their children deserve.”⁴

The acceptance of this premise is sufficiently widespread that in September 2009 the UN Secretary-General Ban Ki-moon noted: “the debate is no longer between peace and justice, but between peace and what kind of justice.”⁵

Despite this linkage between lasting peace and justice, tensions between the two can arise during negotiations to end an armed conflict. In an effort to circumvent this tension, some argue that peace must be secured before any other process may be successfully undertaken.⁶ As a Ugandan diplomat stated, “It is obvious that you cannot operate until the patient’s condition is stabilized; the same goes for justice.” The thought is that by postponing sticky questions of accountability, the tensions between peace and justice may be eased long enough to secure peace. This is sometimes referred to as “sequencing.” This position is often put forward with the best intentions, though it is also an argument that can and has been exploited by those with other more self-serving interests, even outside the context of peace talks.

This paper addresses the potential dangers of postponing justice, examining four case studies: Afghanistan, the Democratic Republic of the Congo, Burundi, and Indonesia. In each of these countries, there has been at least some recognition that impunity is a serious problem that needs to be addressed. In three of the countries, peace agreements contained provisions evincing an intent to address the past through a combination of a truth commission and a court. Yet in each place, efforts at accountability have been sidelined, ostensibly in the interest of peace, with unfortunate consequences. Human Rights Watch recognizes that countries in transition or negotiating peace deals face difficult choices, but believes that neglecting accountability for egregious crimes in the aftermath of concluding a peace agreement can be and often is detrimental to long-term stability.

The peace-justice nexus, of course, has been further complicated by the establishment of the ICC. Where the ICC has jurisdiction over cases in an ongoing conflict, as in the Democratic Republic of the Congo, postponing justice until there is peace may not be a legally viable option. In such circumstances, government attempts to postpone justice in favor of stability, such as by choosing

<http://www.africa-union.org/.../Statement%20of%20LC-ICC%20-%20Rview%20Cfce-1%20June%202010.doc> (accessed December 2, 2010).

⁴ Seth Mydans, “Clinton Urges Khmer Rouge Trials,” *New York Times*, November 1, 2010.

⁵ “Honouring Geneva Conventions, Secretary-General says debate no longer between peace and justice but between peace and what kind of justice,” SG/SM/12494, September 26, 2009, <http://www.un.org/News/Press/docs/2009/sgsm12494.doc.htm> (accessed December 3, 2010).

⁶ Refugee Law Project, “Peace First, Justice Later: Traditional Justice in Northern Uganda,” Working Paper No. 17, July 2005, http://www.refugeelawproject.org/working_papers/RLP.WP17.pdf (accessed December 2, 2002). Similar arguments were made during the peace and justice stocktaking session held during the Review Conference for the Rome Statute in Kampala on June 2, 2010.

not to execute an ICC arrest warrant or by seeking to invoke the ICC's deferral provision, risk undermining a key purpose of the court—to deter crimes—and its credibility. Refusing to execute a warrant or cooperate with investigations may violate governments' legal obligations if they are parties to the Rome Statute.

There is some room for maneuver, however. Quite apart from sequencing, the ICC prosecutor has discretion with respect to timing and whether or not the indictment is sealed or unsealed, and may factor in considerations about what is happening on the ground in making such decisions.⁷ Moreover, the Rome Statute gives the UN Security Council, an outside political actor, authority to decide whether an investigation or prosecution conflicts with international peace and security.⁸

Unlike with cases before the ICC, sequencing in national courts is to a certain extent inevitable. Transitional justice processes are complex and may include truth-telling mechanisms, reparations, vetting of alleged war criminals from positions in government and security forces, and other forms of traditional justice in addition to criminal measures. The details of transitional justice processes are unlikely to be included in a peace agreement. Peace agreements may sensibly leave questions of transitional justice subject to future negotiations, ideally after broad consultations with affected communities.

Criminal justice aspects of transitional justice processes present particular challenges. Countries emerging from conflict rarely have the domestic capacity or resources to initiate complicated judicial proceedings for international crimes. Even if there is political will to try these cases (which is often a serious problem if, as is often the case, the government has been implicated in abuses), legislation may need to be enacted to establish a legal basis or a special mechanism for prosecutions; staff need to be assigned and trained; witness protection and support measures considered; and evidence gathered. National courts may lack independence and the local community may not have confidence in the judiciary. Police and prison systems may also require serious institutional reform. All of this takes time, particularly given the complexity of such cases.

If delays persist, other practical problems may arise that could render justice even more difficult to achieve. Memories fade over time, witnesses move or pass away, documentary or physical evidence

⁷ For example, the ICC delayed the unsealing of Congolese military commander Mathieu Ngudjolo's warrant of arrest for crimes in the DRC until after the signing of the Goma agreement after international participants in the negotiations expressed concern about how the news would impact parties to the agreement. 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 December 2, 2010), p. 33.

⁸ Article 16 of the Rome Statute provides that the Security Council may take action to defer an investigation or prosecution for a 12-month period. Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, article 16. Because the Security Council has itself repeatedly emphasized that justice is linked to peace and because of the risks associated with political interference with the independence of the court, this article should be used sparingly. The Security Council's twelve-month deferrals under Article 16 should also not be repeatedly renewed in order to create an indefinite deferral, as that would result in de facto immunity and undermine both international law and the purpose of the Rome Statute. 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>, fn. 31.

can be lost, and suspects may no longer be available for prosecution. In Argentina it was not possible to bring cases of abuse committed during its last military dictatorship (1976 to 1983) until 2003 when Congress annulled laws that had forced an end to prosecutions. By October 2010, 253 people implicated in crimes committed during the dictatorship died before being brought to justice.⁹ In Cambodia, delaying justice for nearly three decades after the end of the Khmer Rouge regime meant that key figures, including its leader Pol Pot, military commander Ta Mok, and defense minister Son Sen, died without being tried by an independent court. The remaining defendants are elderly and in deteriorating health. Though Cambodia enjoys relative peace and stability, the legacy of impunity has other less quantifiable effects. Former Khmer Rouge cadres were integrated into civilian life without being held to account, contributing to a belief among many young people that the mass killings never took place. And impunity continues to mar the rule of law in Cambodia.¹⁰ In other places that tried to bury the past, the culture of impunity has also left its mark. When asked about peace and justice issues, survivors of abuses in El Salvador, where crimes from its civil war more than two decades ago remain unaddressed, in effect responded, “What peace?” referring to El Salvador’s extraordinarily high crime rate.¹¹

The danger is that the strategy of “peace first, justice later” in practice means no justice. Once the imperative of resolving a conflict is over, the international community’s attention may wander and there will be less pressure to establish credible institutions and mechanisms to deal with the past. Where political will may be waning, the lack of outside pressure can be fatal. In Afghanistan, Burundi, the Democratic Republic of the Congo, Indonesia and elsewhere, the “peace first, justice later” strategy has yielded little on the justice front. This has been major source of frustration for victims and does not build confidence in the post-conflict regimes. Ultimately, the failure to follow through on justice measures may undermine the hard-won peace.

I. Afghanistan

The UN secretary-general’s strategy in Afghanistan was to wait until there was lasting peace—defined as stability and security—before dealing with justice. After the fall of the Taliban in November 2001, the UN secretary-general’s special representative brought leaders of Afghan ethnic groups together in Germany to create a road map for representative government in Afghanistan.¹² The resulting Bonn Agreement called for creation of a *loya jirga* (grand council), which was convened

⁹ State Report on Trials for Crimes Against Humanity, Data from CELS, October 15, 2010, <http://www.cels.org.ar/common/documentos/InformeJuiciosLlesaHumanidad.pdf>, p. 5.

¹⁰ The extent of problems such as domestic violence, youth gangs, and drug addiction has also been considered at least partly linked to the failure to address the trauma older generations endured during the Khmer Rouge period. See Virorth Doung and Sophal Ear, “Transitional Justice Dilemma: The Case of Cambodia,” *Peace & Conflict Review*, Volume 4, Issue 1, Fall 2009, <http://www.review.upeace.org/index.cfm?opcion=o&ejemplar=18&entrada=89> (accessed December 2, 2010), p. 15.

¹¹ Human Rights Watch interviews, San Salvador, November 14-15, 2009 (notes on file at Human Rights Watch).

¹² 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.

in June 2002, to choose an interim government.¹³ The agreement was silent on issues of accountability for war crimes.

Though 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, the Special Independent Commission for the Convening of the Loya Jirga did not monitor and enforce this prohibition.¹⁴ The warlords' cooperation was seen as crucial to the success of the loya jirga, so there was little willingness to confront the issue of their past records.¹⁵

When addressing the UN Security Council, the special representative of the secretary-general, Lakhdar Brahimi, acknowledged the compromise, stating:

The processes being proposed are not perfect. The provisional institutions whose creation is suggested will not include everyone who should be there and it may include some whose credentials many in Afghanistan may have doubt about. PLEASE REMEMBER THAT WHAT IS HOPEFULLY TO BE ACHIEVED IS THE ELUSIVE PEACE the people of Afghanistan have been longing for so long. The provisional institutions being discussed, including the broad based interim administration, are the beginning, not the end of the road [Emphasis in original].¹⁶

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."¹⁷

Ironically, the decision to postpone addressing justice issues in the interest of peace and security had the opposite effect. In 2005-2006, Human Rights Watch documented that many leaders implicated in egregious human rights abuses in the 1990s became Afghan ministry officials or presidential advisors, or controlled puppet subordinates who held official positions.¹⁸ They include several of the worst perpetrators from Afghanistan's recent past, such as Abdul Rabb al Rasul

¹³ 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 December 2, 2010).

¹⁴ 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 December 2, 2010), art. 14(4).

¹⁵ See Laura Secor, "The Pragmatist," *The Atlantic*, July/August 2004, <http://www.theatlantic.com/doc/200407/secor> (accessed December 2, 2010).

¹⁶ UN Security Council, Briefing by the Special Representative of the Secretary-General for Afghanistan, Lakhdar Brahimi, November 13, 2001, <http://www.un.org/News/dh/latest/afghan/brahimi-sc-briefing.htm> (accessed December 2, 2010).

¹⁷ Debbie Whitmont, "Winter in Afghanistan: Travels Through a Hibernating War," *The Monthly* (Melbourne), March 2007, <http://www.themonthly.com.au/tm/node/478> (accessed December 2, 2010) ("Winter in Afghanistan").

¹⁸ *Ibid.*

Sayyaf, Mohammed Fahim, Burhanuddin Rabbani, Gen. Abdul Rashid Dostum, and Karim Khalili, who despite having records of war crimes and serious abuses during Afghanistan's civil war in the 1990s have been allowed to hold and exploit positions of power.¹⁹ Mohammed Fahim, whose troops were implicated in abuses such as rape and summary executions in 1993, is now serving as first vice president of Afghanistan.

Abusive actions by local warlords and their forces have undermined the government's legitimacy and caused widespread fear and cynicism among Afghans.²⁰ 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."²¹ Partly as a result, by 2006 the Taliban and other insurgent groups in Afghanistan had gained increased public support. A December 2008 International Crisis Group report on policing in Afghanistan concluded that the lack of rule of law lies at the heart of much popular disillusionment and that the weakness of law enforcement has contributed to the appeal of insurgents in Afghanistan.²² The ongoing lawlessness helps the Taliban portray its rule in the 1990s as one of relative law and order.²³ The Taliban is able to use the presence of warlords in the government and the poor perceptions of police to discredit President Hamid Karzai's administration and its domestic backers.

Incorporating warlords into the government also minimizes chances that Afghans will ever see accountability for the crimes they have suffered, despite the fact that large majorities favor prosecutions.²⁴ Although an "Action Plan" for peace and justice was adopted by the Afghan cabinet in December 2005 following public consultations, it is increasingly unlikely to be put into effect. The parliament enacted a general amnesty stating that all those who were engaged in armed conflict

¹⁹ "Afghanistan: Bush, Karzai, Musharraf Must Act Now to Stop Militant Abuses," Human Rights Watch news release, <http://www.hrw.org/en/news/2006/09/26/afghanistan-bush-karzai-musharraf-must-act-now-stop-militant-abuses>. See also Isabel Hilton, "Now We Pay the Warlords to Tyrannise the Afghan People," *The Guardian*, July 31, 2003, <http://www.guardian.co.uk/politics/2003/jul/31/afghanistan.world> (accessed December 2, 2010); Ahmed Rashid, "Afghan Human Rights Abuses: A Chance for Change," commentary, Eurasianet, August 4, 2005, <http://www.unhcr.org/refworld/docid/46f257f9c.html> (accessed December 2, 2010); and Nick Meo, "Afghan Warlords Poised to Take Up Power," *Independent*, October 14, 2004, <http://www.independent.co.uk/news/world/middle-east/afghan-warlords-poised-to-take-up-power-543691.html> (accessed December 2, 2010).

²⁰ Human Rights Watch, *Afghanistan on the Eve of Parliamentary Elections*, September 2005, <http://www.hrw.org/en/reports/2005/09/15/afghanistan-eve-parliamentary-and-provincial-elections>, p. 9.

²¹ Whitmont, "Winter in Afghanistan." See also Ahmad Nader Nadery, "Peace or Justice? Transitional Justice in Afghanistan," *The International Journal of Transitional Justice*, Vol. 1, Issue 1, 2007, pp. 173-179, <http://ssrn.com/abstract=1405080> (accessed December 2, 2010).

²² See International Crisis Group (ICG), "Policing in Afghanistan: Still Searching for a Strategy," December 18, 2008, http://www.ciaonet.org/pbei/icg/0014389/f_0014389_11772.pdf (accessed December 2, 2010) ("there is a general perception in Afghanistan that lawlessness is on the rise"), p. 5.

²³ International Crisis Group, "Afghanistan: New U.S. Administration, New Directions," March 13, 2009, <http://www.unhcr.org/refworld/country,,ICG,,AFG,4562d8cf2,49ba4c53ed,o.html> (accessed December 2, 2010), pp. 5-6.

²⁴ 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). Almost half believed that war criminals should be brought to justice "now."

before the formation of the Interim Administration in Afghanistan in December 2001 (or current combatants who agree to reconcile with the government) “shall enjoy all their legal rights and shall not be prosecuted.”²⁵ Though victims and their families are entitled to bring civil or criminal claims, doing so is dangerous and not likely to be a viable path to justice.²⁶ The amnesty law is further demonstration of the entrenchment of the culture of impunity in Afghanistan that resulted from choosing to hold off on addressing crimes from its past. It is also a clear illustration of the potential costs of putting off justice.

II. Burundi

In Burundi, explosions of inter-ethnic strife—and, more recently, intra-ethnic political conflict—periodically have marred the political landscape since independence in 1962. Ongoing impunity for widespread human rights abuses has long been recognized as a root cause of the violence and instability. Several UN reports after the 1993 massacres note that the culture of impunity has jeopardized peace and been used to spur further violence.²⁷ A 1996 Commission of Inquiry noted that “Impunity has, without any doubt, been an important contributing factor in the aggravation of the ongoing crisis.”²⁸ It concluded that acts of genocide had been committed against ethnic Tutsi in Burundi and that indiscriminate killing had occurred against ethnic Hutu.²⁹ However, the time was not deemed right for justice as the situation was still not secure. The Commission noted that

Impunity can only be suppressed through a fair and effective administration of justice. The Commission can find no way in which such an administration of justice can be established while the present situation of the country has not been brought under a minimum of control... No amount of reforms or resources can have any effect [on the Burundian justice system] as long as every citizen is convinced that his own ethnic group is under attack by people who have repeatedly shown that they do not

²⁵ Resolution of National Assembly on National Reconciliation and General Amnesty to the President, No. 44, dated 16/02/1386, published in the official gazette no. 141712, dated 9/9/1387, art. 3(1).

²⁶ See e.g. Human Rights Watch, *Afghanistan – The “Ten-Dollar Taliban” and Women’s Rights*, July 13, 2010, <http://www.hrw.org/en/node/91463/section/6>.

²⁷ UN Security Council, Report of the Security Council Mission to Burundi on 10 and 11 February 1995, S/1995/163, February 28, 1995, <http://www.unhcr.org/refworld/docid/4c4d45002.html> (accessed December 2, 2002), para. 18; UN Security Council, Report of the Security Council Mission to Burundi, S/1994/1039, September 9, 1994, para. 26 (“impunity from justice is one of the most serious problems Burundi is facing...The delay in efforts to bring to justice the perpetrators of the violence ...are lowering the barriers to criminal conduct, including that of political extremists.”); UN Security Council, “Letter dated 28 July 1995 from the Secretary-General addressed to the President of the Security Council” (enclosing the report of Dr. Pedro Nikken), S/1995/631, July 28, 1995, <http://www.undemocracy.com/S-1995-631.pdf> (accessed December 2, 2002), para. 2 (“the impunity which the perpetrators, instigators and abettors of these crimes have enjoyed ... is, in turn, cited as the pretext or justification for obtaining justice through the vengeance and senseless violence organized by the militias.”).

²⁸ 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://www.undemocracy.com/S-1996-682.pdf> (accessed December 2, 2010), para. 490.

²⁹ *Ibid.*

hesitate to commit mass murder. It is clearly impossible for any system of justice to function under such conditions.³⁰

Following this report, the Security Council did not take action to create an international criminal 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 prosecuted. Those most implicated in the killings continued to exercise power as they had before.

Negotiations to end the civil war began in Arusha, Tanzania, in June 1998. Negotiators included provisions designed to end the pervasive impunity in the resulting 2000 Arusha Peace and Reconciliation Agreement for Burundi. The Agreement called for “enactment of legislation to counter genocide, war crimes, and other crimes against humanity, as well as human rights violations” and required the government of Burundi to request the UN Security Council to establish an international criminal tribunal to try and punish those responsible for war crimes, genocide, and other crimes against humanity.³¹

The Arusha Agreement did not end the civil war as two remaining rebel groups held out and did not sign the agreement. In order to lure the remaining rebel groups into putting down their arms and to convince political leaders outside the country to return to Burundi, the Arusha Agreement included a provision requiring the national assembly to pass “such legislation as is necessary for the granting of temporary immunity against prosecution for politically motivated crimes.” A 2003 ceasefire agreement between the government and the strongest holdout rebel group, 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), provided for even broader “provisional immunity” for all parties to the conflict that was not limited to politically motivated crimes.³² According to the agreement, provisional immunity would last until a truth and reconciliation commission was in place and could establish responsibility for past crimes. Prosecutors in the military justice system later used the immunity provision to justify not prosecuting Tutsi soldiers.³³ A similar provision was included in an agreement with Palipehutu-FNL in 2006.³⁴ Over 3,000 political prisoners were released on the basis of provisional immunity in 2006 without mechanisms to determine who had actually been involved in serious crimes. The exclusion from the immunity provision of war crimes, crimes against humanity, and genocide, while important

³⁰ *Ibid.*, paras. 491-92.

³¹ Arusha Peace and Reconciliation Agreement for Burundi, Arusha, Tanzania, August 28, 2000, paras. I.II.6. 9-11.

³² The Pretoria Protocol on Outstanding Political Defense and Security Power Sharing Issues in Burundi, November 2, 2003, <http://www.iss.co.za/cdburundipeaceagreements/No%205%20optaprot.pdf> (accessed December 2, 2010), art. 2.

³³ Human Rights Watch, *World Report 2005* (New York: Human Rights Watch, 2005), Burundi chapter, <http://www.hrw.org/en/world-report-2005/burundi>.

³⁴ Comprehensive Cease-Fire Agreement Between the Government and the Palipehutu-FNL, Dar Es Salaam, Tanzania, September 7, 2006, annexure 1.

symbolically, had little practical effect as these charges were not used by prosecutors in Burundi. By leaving the international crimes to be dealt with by a UN mechanism, the parties were able to postpone dealing with justice issues.

After the CNDD-FDD entered government in 2004, 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 National Liberation Forces (Forces Nationales de la Liberation, 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 political office.

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. Though the then-president of Burundi submitted a request for the establishment of an international judicial commission of inquiry to the UN secretary-general in 2002 as per the terms of the Arusha Agreement, an assessment mission to Burundi was not conducted until 2004. The delay at the Security Council was consistent with its strategy of prioritizing peace and stability over transitional justice. As the former human rights minister for Burundi, Eugene Nindorera, stated, “There is an analysis that says an inquiry might stir up political instability. Many leaders in the country have some alleged link to crimes of war, but these are the very people involved in negotiating peace... And for donor countries, the top priority is the ceasefire, not justice. They are after all politicians, not human rights activists.”³⁵ The decision by the Security Council to go ahead with the mission to assess transitional justice options in Burundi in 2004 was made a month after the facilitator of the peace process reported to the Security Council that “We can now say without fear of contradiction that the peace process has entered a decisive and irreversible stage.”³⁶

In 2005, acting upon the report’s recommendations, the Security Council requested the secretary-general to initiate negotiations with the Government and consultations within Burundi on the establishment of a Truth Commission and a Special Chamber within the court system of Burundi.³⁷ By then, support for such mechanisms among political leaders diminished as they became aware that they themselves could be subject to prosecution. On May 5, 2007, the ruling CNDD-FDD party issued a statement indicating it favored reconciliation over prosecution for all crimes, in contravention of the international requirements that those accused of genocide, war crimes, and

³⁵ William Maclean, “Justice Remains a Dream in Blood-Soaked Burundi,” Reuters, May 2, 2003.

³⁶ See “Transitional Justice for Burundi: A Long and Winding Road,” Stef Vanderginste, presented at “Building a Future on Peace and Justice” workshop, Nuremberg, June 25-27, 2007, report at <http://www.peace-justice-conference.info/download/WS10-Vandeginste%20report.pdf> (accessed December 2, 2002), p. 13, citing United Nations Security Council, Report of the meeting of 4 December 2003, S/PV.4876 and UN mission reports mentioned above.

³⁷ UN Security Council, Resolution 1606 (2005), S/RES/1606 (2005), June 20, 2005 <http://www.ictj.org/static/Africa/Burundi/sres.1606.2005.eng.pdf> (accessed December 2, 2010).

crimes against humanity be prosecuted. During the 2010 election campaign, President Pierre Nkurunziza made frequent promises that the government would soon put in place a truth commission, at one point, in April 2010, claiming unrealistically that such a commission would be in place “within months.”³⁸ However, at no point did he mention prosecutions within a special chamber. The FNL, having transitioned from rebel group to opposition party, reiterated its demand first set forth at the 2006 peace talks that the proposed “Truth and Reconciliation Commission” be renamed the “Reconciliation and Pardon Commission,” and categorically opposed prosecutions.³⁹ Though smaller political parties have spoken out in favor of prosecutorial mechanisms, CNDD-FDD’s landslide victory in elections in 2010 renders slim the likelihood that serious measures to counter impunity will be undertaken in the next five years.

The UN has been unable to work out details of the proposed justice mechanisms with the government of Burundi, which is resistant to giving the prosecutor of the special court authority over which cases to bring to trial. Faced with gridlock, the UN and the government in Burundi agreed in early 2007 to conduct “national consultations” on transitional justice, seeking perspectives of Burundian citizens. Originally scheduled to begin in late 2007 but held up by both lack of political will and bureaucratic hiccups at the UN, the consultations—carried out by a “Tripartite Steering Committee” including representatives of the UN, the Burundian government, and civil society organizations—only kicked off in mid-2009. The committee’s report, submitted to president Nkurunziza in April 2010, had not to date been made public.

Concerned governments, perhaps suffering from donor fatigue after creation of the ad hoc tribunals for the former Yugoslavia and Rwanda, have failed to press sufficiently for the establishment of truth and justice mechanisms. The root causes of violence in Burundi remain unaddressed.

III. Democratic Republic of the Congo

In the Democratic Republic of the Congo (DRC), though some efforts have been made at pursuing justice, the emphasis has also been ostensible stability at the expense of accountability. As in Burundi, a pervasive culture of impunity has been one of the greatest obstacles to sustainable peace in the DRC. Although numerous peace agreements have taken care to use language explicitly excluding amnesties for war crimes, genocide, and crimes against humanity in an effort to comply with international law, limited efforts have been made to investigate or prosecute these crimes. Instead the government has sought to buy compliance with the transition process by awarding posts of national or local responsibility, including in the army and police, to dozens of people suspected

³⁸ “Le Burundi souhaite l’accompagnement du Burkina pour ses élections générales fin mai,” Xinhuanet, April 8, 2010.

³⁹ “Les perspectives de la justice transitionnelle au Burundi vues par la ligue Iteka,” Agence Burundaise de Presse, January 22, 2010.

of committing war crimes and other abuses.⁴⁰ The decision to put justice aside for peace was made most explicitly in the case of military commander Bosco Ntaganda, an ICC suspect, in January 2009.

One perverse result of this policy has been 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.⁴¹ A number of other key factors have contributed to the brutal violence in eastern Congo, including competition for control over natural resources, land rights, and ethnic cohabitations, but incorporating warlords into the armed forces in an effort to obtain peace has only worsened the situation.

The 2002 agreement forged in Sun City, South Africa to establish a transitional government for the DRC excluded the possibility of amnesties for war crimes, crimes against humanity, and genocide. The Sun City Agreement also included provisions to establish a truth and reconciliation commission and resolved “that a request be made to the UN Security Council by the Transitional Government with a view to establishing an International Criminal Court for the Democratic Republic of the Congo, endowed with the necessary competence to take cognisance of crimes of genocide, crimes against humanity, war crimes, and mass violations of human rights committed or presumed committed since 30 June 1960 as well as those committed or presumed committed during the two wars of 1996 and 1998.”⁴² However, individuals with a known record of human rights abuses were integrated into the government and the army.⁴³ Known rights abusers were promoted or granted important posts with few diplomats condemning the promotions.⁴⁴ No formal request was made to the Security

⁴⁰ Human Rights Watch, *World Report 2005* (New York: Human Rights Watch, 2005), Democratic Republic of Congo chapter, <http://www.hrw.org/legacy/wr2k5/wr2005.pdf>.

⁴¹ 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).

⁴² UN General Assembly, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Office of the United Nations High Commissioner for Human Rights (Analytical study on human rights and transitional justice: Addendum—Inventory of human rights and transitional justice aspects of recent peace agreements), A/HRC/12/18/Add.1, August 21, 2009, http://www.unrol.org/files/96199_A-HRC-12-18-Add1.pdf (accessed December 2, 2010).

⁴³ Amnesty Decree-Law [Democratic Republic of Congo], *Journal Officiel de la République Démocratique du Congo*, No. 03-001, April 15, 2003, <http://www.unhcr.org/refworld/docid/47305aae2.html> (accessed December 2, 2010); Amnesty Law [Democratic Republic of Congo], No. 05/023, December 19, 2005, <http://www.unhcr.org/refworld/docid/47305d032.html> (accessed December 2, 2010). In May 2009 the DRC parliament passed another amnesty law for armed groups in North and South Kivu, providing an amnesty similar to that in the 2005 law but extending it to 2009. The law has not yet been signed by President Joseph Kabila. See “Amnesty law for DR Congo militias,” *BBC News Online*, May 7, 2009, <http://news.bbc.co.uk/2/hi/africa/8037891.stm> (accessed December 2, 2010).

⁴⁴ Human Rights Watch, *Renewed Crisis in North Kivu*, vol. 19, no. 17(A), October 2007, <http://www.hrw.org/reports/2007/drc1007/drc1007web.pdf>, pp. 75-77. These included Gabriel Amisi, who was promoted to the rank of general, and Laurent Nkunda, who were responsible for the brutal suppression of a mutiny in Kisangani where at least 80 people were summarily executed. Human Rights Watch, *Democratic Republic of Congo – War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny*, vol. 14, no. 6(G), August 2002, <http://www.hrw.org/legacy/reports/2002/drc2/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.

Council for a court, despite the language of the Sun City Agreement.⁴⁵ The promotions, the lack of justice, and the failure to launch a credible truth and reconciliation commission sent a clear signal early on that the new government was unwilling or unable to end the culture of impunity.

The signal was a dangerous one as peace remained elusive. Continued violence, with devastating results for civilians, was perceived by armed groups as the best way to 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.”⁴⁶

The negative consequences of failing to follow through on justice and instead reward warlords responsible for serious human rights abuses was most evident in Ituri province, often described as the bloodiest corner of Congo, where tens of thousands were brutally slaughtered on an ethnic basis between 1999 and 2009. 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.⁴⁷

In August 2003 President Joseph Kabila called the leaders of the armed groups to the capital Kinshasa to discuss establishing order in Ituri. On June 23, 2004, the ICC prosecutor announced his decision to open an investigation into crimes committed in the DRC following a referral to his office by President Kabila. 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 majors, lieutenant-colonels, and colonels. The generals were welcomed into army ranks in January 2005.⁴⁸ The Congolese authorities contended that integrating commanders with abusive records was a way of removing them from Ituri, thus making it easier to end the fighting there.⁴⁹ In response to concerns about appointing warlords implicated in murder to these positions, Information Minister Henri Mova said “Now we

⁴⁵ Although no formal request for an international court was made, the Minister of Foreign Affairs and International Cooperation Leonard She Okitundu had previously raised the possibility of an international criminal court for the DRC in an intervention at a UN Security Council meeting. United Nations Security Council, 57th Year, 4634th meeting, October 24, 2002, S/PV.4634, http://www.undemocracy.com/securitycouncil/meeting_4634/highlight_S-2002-1146#pg005-bko2 (accessed December 2, 2010).

⁴⁶ Human Rights Watch interview with armed group leader (name withheld), Bunia, September 18, 2003.

⁴⁷ 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/DRCo703.pdf>, pp. 14-18; and Human Rights Watch, *The Curse of Gold: Democratic Republic of Congo* (New York: Human Rights Watch, 2005), <http://www.hrw.org/en/node/11733/section/5> and reproduced at <http://www.anglogoldashanti.com/NR/rdonlyres/CBB6C75C-EE9C-439E-962F-DDB5C52FB968/o/HRWDRCreport.pdf>, pp. 21-22.

⁴⁸ New appointees to the rank of general included Jérôme Kakwavu, the commander of the People’s Armed Forces of the Congo (FAPC) who has been implicated in summary executions (including child soldiers who attempted to flee the ranks), the torture of dozens of civilians, and rape of women and girls in Ituri; and Floribert Kisembo Bahemuka, one of the UPC commanders allegedly responsible in late 2002 for a campaign of summary executions and forced disappearances of civilians in Bunia. “D.R. Congo: Army Should Not Appoint War Criminals.” Human Rights Watch news release, January 13, 2005, <http://www.hrw.org/en/news/2005/01/13/dr-congo-army-should-not-appoint-war-criminals>; Human Rights Watch, *The Curse of Gold*, pp. 27-34, 84-94.

⁴⁹ 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 December 2, 2010); Human Rights Watch, “Army Should Not Appoint War Criminals.”

need peace in our country and we decided to appoint them because we can't condemn them before judgment." But by not investigating warlords implicated in rape and murder, the government reinforced the message that brutalities would not only go unpunished, but might be rewarded with a government post.⁵⁰

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 participating in armed conflict was an effective route to power. These groups continued the terror tactics that previous armed groups had used: killing civilians, raping women and girls, and abducting and torturing those who opposed them.

In August 2006 Congolese government officials, supported by the UN, once again held peace discussions with the Ituri armed groups. Two months later, in November 2006, the groups signed a new peace agreement.⁵¹ Their leaders were all granted the rank of colonel in the Congolese army. Dozens of others were appointed as lieutenant-colonels and majors. One of the newly appointed officers later remarked to Human Rights Watch, "Maybe if we had killed more people, I would have become a general."⁵²

A similar pattern has emerged in Katanga province. Between 2003 and 2006 a local militia 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 pay 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 mistreated civilians. In some cases they publicly tortured victims before killing and consuming their body parts in ceremonies intended to terrorize the local population. When the government launched military operations against the group, abuses by both sides intensified. The suffering and brutalities were so widespread that local residents called the region "the triangle of death."⁵³

As with rebel groups in Ituri, the 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

⁵⁰ The problem seemed to be acknowledged by presidential spokesman Kudura Kasong who stated, "The big dream of all warlords is to be a general, educated or not, and this is a big problem." "DR Congo warlord generals accused," *BBC News Online*, <http://news.bbc.co.uk/2/hi/africa/4174811.stm>.

⁵¹ 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. The agreement included an amnesty limited to non-international crimes.

⁵² Human Rights Watch interview with former armed group combatant (name withheld), Bunia, September 8, 2006.

⁵³ 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.

chiefs and state representatives in various localities and threatened others. When the government organized peace talks with some of the Mai Mai leadership, the Mai Mai 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.⁵⁴

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 arrested 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, 2009.⁵⁵

At times, Congolese judicial officials with the help of UN human rights experts 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.⁵⁶ The ongoing impunity left alleged war criminals free to continue to commit crimes.

The involvement of the International Criminal Court in the DRC means that to some extent, justice cannot be delayed. However, even here the government has opted to ignore its legal obligation to enforce an ICC arrest warrant on purported grounds that postponing justice was in the interest of peace. In August 2006, the ICC issued an arrest warrant against UPC leader Bosco Ntaganda for the war crime of enlisting and conscripting children under the age of 15 and using them in hostilities between 2002 and 2003 in Ituri.⁵⁷ 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. The Congolese justice minister

⁵⁴ "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>.

⁵⁵ "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>.

⁵⁶ The UN special rapporteur on the independence of judges and lawyers, Leandro Despouy, 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://www.universalhumanrightsindex.org/documents/842/1134/document/en/pdf/text.pdf> (accessed December 2, 2010), p. 3.

⁵⁷ *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 December 2, 2010).

said the “demands of peace override the traditional needs of justice.”⁵⁸ 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 organizations condemned the decision. Ntaganda has since served as a general in the army and played a role in joint military operations with the UN peacekeeping force in Congo, despite his status as a wanted man at the ICC and the peacekeepers’ mandate to support national and international justice efforts. In explaining Ntaganda’s position, President Kabila stated bluntly: “Why do we choose to work with Mr. Bosco, a person sought by the ICC? Because we want peace now. In Congo, peace must come before justice.”⁵⁹

The decision to integrate Ntaganda in the army rather than arrest him has contributed to further abuses and undermined the hoped-for deterrent effect of the ICC. Human Rights Watch has documented extensive crimes committed in DRC by forces under Ntaganda’s command since January 2009. Operation Kimia II, which began on March 2, 2009, was a joint military operation between UN peacekeeping forces and the Congolese army to disarm the Democratic Forces for the Liberation of Rwanda (FDLR), a Rwandan Hutu militia group. Hundreds of civilians have been killed or raped by Congolese armed forces since the beginning of the operation.⁶⁰ Bosco Ntaganda was the de facto deputy commander of some of the forces linked to these crimes.⁶¹

As UN Special Rapporteur in extrajudicial executions Philip Alston stated following a mission in the DRC:

Permitting key members of the military who are alleged to have committed war crimes, crimes against humanity and other serious offences to serve in the armed forces sends an immensely powerful message to the rest of the military. The message is that impunity rules and that brutality and power prevail over law. The slogan that peace will come first and justice later fundamentally misunderstands the

⁵⁸ “Peace before justice, Congo minister tells ICC,” Agence-France Presse, February 12, 2009. Prior to the unsealing of his arrest warrant, Ntaganda had already been implicated in brutal human rights abuses, including leading military operations in which hundreds of civilians were slaughtered on an ethnic basis. Human Rights Watch, *Covered in Blood*, <http://www.hrw.org/sites/default/files/reports/DRCo703.pdf>, pp. 23-27; Human Rights Watch, *The Curse of Gold*, pp. 23-34. He was nonetheless one of the five Ituri leaders who in December 2004 had been granted positions as generals in the newly integrated Congolese army, though he did not take up the post.

⁵⁹ “Congo conflict: ‘The Terminator’ lives in luxury while UN peacekeepers look on,” *Guardian*, February 10, 2010, <http://www.guardian.co.uk/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc> (accessed December 2, 2010); “Congo ex-Rebel ‘working with UN,’” *BBC News Online*, April 29, 2009, <http://news.bbc.co.uk/2/hi/africa/8023978.stm> (accessed December 2, 2010).

⁶⁰ See e.g. “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>; Human Rights Watch, “*You Will Be Punished*”: *Attacks on Civilians in Eastern Congo*, 1-56432-582-2, December 2009, <http://www.hrw.org/en/reports/2009/12/14/you-will-be-punished>.

⁶¹ Because of his status as an ICC fugitive, the Congolese government kept Ntaganda’s name out of the official organizational structure. Yet interviews with officers, documents, his frequent visits to troops on the frontline, and his presence at the command center indicate his significant leadership role in Kimia II. *Ibid.*, pp. 43-44.

dynamic involved. Peace will not come, nor will justice, until the Government and the international community take seriously the notion that those accused of heinous crimes must be indicted immediately. Giving individuals like Bosco Ntaganda, Innocent Zimulinda, Sultani Makenga, Bernard Byamungu and Salumu Mulenda a get out of jail free card, even if ostensibly “just for a few years,” only serves to mock human rights. No amount of sophisticated strategic rationalization should be permitted to obscure that fact.⁶²

Justice in the DRC is undoubtedly an extremely difficult issue. The lack of domestic capacity in a war-devastated country, a severe shortage of resources, lack of faith in the justice system, and no tradition of judicial independence are but a few of the obstacles to accountability. The fact that atrocities are ongoing makes it even more difficult to address past crimes. Yet the failure to grapple in a serious, sustained way with these issues is costly as well. While giving priority to stability is understandable, doing so by flouting ICC obligations, one of the few credible options for justice in the DRC, is not. The repeated failure to follow up on accountability and address the root causes of the conflict exacerbates the existing problems.

IV. Indonesia

The three-decade-long conflict in Aceh was a brutal war, with both government and rebel forces violating international humanitarian law with impunity. Human Rights Watch and others extensively documented atrocities perpetrated by both the Indonesian military and the Free Aceh Movement (GAM). Serious human rights abuses and war crimes committed in the province affected almost the entire population at one time or another and included extrajudicial killings, torture, arbitrary arrests and detention, “enforced disappearances,” extortion, and forced displacement of civilians. The conflict ended in August 2005 with a peace agreement in Helsinki that included seemingly groundbreaking provisions for the establishment of an ad hoc court in Aceh to hear cases of human rights violations in the province. However, five years after the agreement was signed, the justice provisions have not been implemented.

The Helsinki Memorandum of Understanding (MoU) that ended the conflict included the following articles:

- Article 2.2: “A Human Rights Court will be established for Aceh.”

⁶² Press statement by Philip Alston, UN Special Rapporteur on extrajudicial executions. Mission to the Democratic Republic of the Congo, 5-15 October 2009, http://www2.ohchr.org/english/issues/executions/docs/PressStatement_SumEx_DRC.pdf (accessed December 2, 2010), p. 8.

- Article 2.3: “A Commission for Truth and Reconciliation will be established for Aceh by the Indonesian Commission of Truth and Reconciliation with the task of formulating and determining reconciliation measures.”⁶³

Other provisions provided amnesty for political prisoners and support for ex-combatants, former political prisoners, and “affected civilians.”

Though the justice provisions were welcomed by local human rights organizations at the time, controversy over their meaning quickly arose. The day after the MoU was signed, the GAM negotiator said that the court would have retroactive authority and would be able to rule on past human rights abuses.⁶⁴ Government military leaders, however, said that “scratching open” the old sores left from the past would “endanger the peace” and made it clear that the Indonesian military should not be facing a human rights court for their role in the conflict.⁶⁵

The military’s position prevailed. A year later, in July 2006, the Indonesian parliament passed the Law on the Governing of Aceh, which implemented many of the provisions of the MoU, including provisions relating to the establishment of a human rights court. Though the law mandates establishment of the court, it explicitly states that the court will only be able to rule on prospective human rights cases that occurred *after* the passage of the law itself. Thus the court will not be able to address any of the numerous past human rights cases that accompanied three decades of armed conflict in the province. Though victims groups are still campaigning for justice, few believe that there will be prosecutions.⁶⁶

The establishment of a truth commission has also been stalled. The Law on the Governing of Aceh stated that the Aceh truth commission is an “inseparable part” of the national Truth and Reconciliation Commission (TRC). A national truth and reconciliation commission had been provided for in a 2004 law, prior to the Helsinki negotiations. However, at the end of 2006, the Constitutional Court revoked the law establishing the truth commission before its members were even appointed. Because the law empowered the TRC to award amnesties to perpetrators of past crimes and barred victims from taking any legal action against them and made reparations contingent upon victims

⁶³ UN General Assembly, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Office of the United Nations High Commissioner for Human Rights (Analytical study on human rights and transitional justice: Addendum—Inventory of human rights and transitional justice aspects of recent peace agreements), A/HRC/12/18/Add.1, August 21, 2009, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-18-Add1.pdf>, p. 9.

⁶⁴ “Indonesia and GAM Still Have Difference of Opinion on Human Rights Trials,” *Tempo Interactive*, August 16, 2005, <http://www.tempointeractive.com/hg/nasional/2005/08/16/brk,20050816-65375,uk.html> (accessed December 2, 2010).

⁶⁵ Edward Aspinall, “Peace without Justice? The Helsinki peace process in Aceh,” Centre for Humanitarian Dialogue, April 2008, <http://www.hdcentre.org/files/justice%20Aceh%20final%20rev%20June%2008.pdf> (accessed December 2, 2010), pp. 18, 27-28.

⁶⁶ A human rights court based in nearby Medan may arguably have jurisdiction over crimes committed in Aceh after 2000 but official investigations have been stalled due to lack of political will. International Center for Transitional Justice, “Considering Victims: The Aceh Peace Process from a Transitional Justice Perspective,” January 2008, <http://www.ictj.org/images/content/7/7/771.pdf> (accessed December 2, 2010), pp. 33-35.

signing formal statements exonerating the perpetrators, the Constitutional Court declared that provisions of the TRC law violated Indonesia's international obligations and domestic laws. As a result of the link between the national truth commissions and the truth commission for Aceh in the MoU and in the implementing legislation, government officials have interpreted the court's decision to preclude creation of a local truth commission until after a national truth and reconciliation commission has been established. Civil society and victims' groups have sent a draft law to the Aceh parliament to establish a truth and reconciliation commission but no action has been taken on it.⁶⁷

Analysis of post-conflict peace-building efforts in Aceh have indicated that despite successes with demobilization, disarmament, and reintegration of former combatants, the failure to address issues of accountability and truth-telling is problematic and may be contributing to rising tensions in Aceh.⁶⁸ The International Center for Transitional Justice undertook a study in 2008 with civil society and victims across Indonesia. They found that victims, while relieved to have increased security, are increasingly unhappy with the post-conflict situation in Aceh. They do not feel their suffering has been recognized and they desire to know the truth about particular violent incidents and the location of disappeared or killed loved ones. Many believe justice should be done through criminal prosecutions and punishments and seek assurance that these abuses will never happen again.⁶⁹

The failure to address the past has also been linked to continuing violence against civilians.⁷⁰ Elite Indonesian military forces, long the beneficiaries of the policy of impunity, continue to commit abuses elsewhere in Indonesia.⁷¹ Few members of the security forces have ever been prosecuted for abuses committed against civilians whether committed in Aceh, Timor-Leste (then East Timor), Papua or Jakarta. The small number of cases that have been brought in military tribunals (which lack transparency and independence) have resulted in light sentences, if any at all, for low-ranking members of the military with convicted offenders continuing to serve in the military. The long standing practice of allowing human rights abusers to continue to serve and be promoted through the ranks of the Indonesian National Armed Forces (TNI) obstructs institutional reform and sends a signal that committing abuses is not an obstacle to continued service and even promotion. A draft

⁶⁷ International Center for Transitional Justice, "The Need for Accountability: The Helsinki Memorandum Five Years On," August 2010, <http://www.ictj.org/en/news/features/3966.html> (accessed December 2, 2010); International Center for Transitional Justice, "Considering Victims: The Aceh Peace Process from a Transitional Justice Perspective," January 2008.

⁶⁸ *Ibid.*, pp. 5, 6.

⁶⁹ *Ibid.*, pp. 17-26. See also International Center for Transitional Justice, "Negotiating Peace in Indonesia: Prospects for Building Peace and Upholding Justice in Maluku and Aceh," June 2009, http://www.ictj.org/static/Publications/ICTJ-IFP_IDN_Negotiating-Peace-Indonesia_pb2009.pdf (accessed December 2, 2010).

⁷⁰ International Center for Transitional Justice, "The Need for Accountability: The Helsinki Memorandum Five Years On," August 2010.

⁷¹ Human Rights Watch, *World Report 2010*, (New York: Human Rights Watch 2010), Indonesia chapter, <http://www.hrw.org/en/node/87395>; "Indonesia: Investigate Torture Video from Papua," Human Rights Watch news release, October 20, 2010, <http://www.hrw.org/en/news/2010/10/20/indonesia-investigate-torture-video-papua>; Human Rights Watch, *What Did I Do Wrong?: Papuans in Merauke Face Abuses by Indonesian Special Forces*, 1-56432-507-5, June 2009, <http://www.hrw.org/en/reports/2009/06/24/what-did-i-do-wrong>; Human Rights Watch, *Out of Sight: Endemic Abuse and Impunity in Papua's Central Highlands*, Vol. 19, No. 10(C), July 2007, <http://www.hrw.org/en/reports/2007/07/04/out-sight-o>.

bill that would allow civilian courts to try members of the military for abuses against civilians has been stalled in Parliament for several years.⁷² Even when Parliament does seek accountability, such as when it recommended an ad hoc court to investigate the enforced disappearances of student activists that took place in 1997-1998 after the fall of President Suharto, the president has not followed through. Indonesia has continually failed to hold its military accountable for crimes against humanity that have taken place in its various military operations and, as a result, abusive practices have continued. Though those who press for accountability for past crimes have been accused of threatening peace processes, long term stability would be strengthened by confronting the past.

Conclusion

There are no easy solutions to obtaining both justice and peace. Accountability in war-torn countries presents enormous challenges and the temptation to postpone dealing with those issues is understandable. But failing to signal the intent to implement accountability measures in a serious way and failure to follow through sends a dangerous message and may ultimately be counterproductive. Though in the short term difficult choices will have to be made, an ongoing commitment to justice, bolstered by concrete steps toward ending impunity at each stage along the way, will help build a foundation that will benefit future generations. While some people have warned that justice can impede peace efforts, former UN Secretary-General Kofi Annan wisely cautioned that “[i]mpunity... can be an even more dangerous recipe for sliding back into conflict.”⁷³

⁷² See Letter from Human Rights Watch to Defense Secretary Robert M. Gates, “Letter to US Department of Defense Regarding US Military Assistance to Indonesia,” February 4, 2010, <http://www.hrw.org/en/news/2010/02/04/letter-us-department-defense-regarding-us-military-assistance-indonesia>.

⁷³ 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.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Civilians%20S2004431.pdf> (accessed December 2, 2010), para. 55.