



The Selection of Situations and Cases for Trial before the International Criminal Court

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I. Introduction

The personal, temporal and territorial jurisdiction of the International Criminal Court (ICC) enables it to be engaged in a number of country situations simultaneously. To date, the prosecutor of the ICC has opened investigations in Uganda, the Democratic Republic of Congo (DRC) and the Darfur region of Sudan. In light of the court's jurisdiction, it is essential to ensure, to the greatest extent possible, objectivity and transparency in the selection of situations and cases by the prosecutor. Such transparency enhances the ICC's credibility and maximizes its role in the fight against impunity.

Human Rights Watch therefore welcomes the ICC prosecutor's recent draft Policy Paper, "Criteria for Selection of Situations and Cases."¹ We have outlined below several recommendations regarding the criteria put forward by the prosecutor in that paper. The recommendations are not meant to be exhaustive; rather, we have focused on a limited number of issues of pressing concern. To ensure thorough consideration of these issues, in making our recommendations we have gone beyond the parameters of the paper to address the challenges we see in implementing the criteria enumerated. In doing so, we have referenced, where appropriate, the "Report on the activities performed during the first three years (June 2003-June 2006)" recently issued by the Office of the Prosecutor.²

Part II of our paper addresses issues in relation to the selection of situations. We highlight particular challenges for the prosecutor in the selection of situations that may have implications for his independence. The recommendations address factors that could infringe on the prosecutor's independence, including the perception of his independence.

Part III of our paper emphasizes issues in relation to the selection of cases. We outline concerns regarding the prosecutor's "sequential" approach, which refers to his policy of investigating groups in a situation one at a time, and its implications for the perception of his impartiality. We include recommendations to address these concerns. We also include recommendations to preserve his impartiality, and the perception of it, when

¹ Office of the Prosecutor, International Criminal Court, "Criteria for Selection of Situations and Cases," draft policy paper on file with Human Rights Watch, June 2006 ("Policy Paper").

² Office of the Prosecutor, International Criminal Court, "Report on the activities performed during the first three years (June 2003 – June 2006)," September 12, 2006, http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf (accessed October 18, 2006) ("Activities Report").

perpetrators from all sides in a conflict have not been selected for prosecution. In addition, we provide recommendations regarding the manner in which individual perpetrators should be selected for prosecution to maximize the impact of the ICC in the communities most affected by the crimes in its jurisdiction.

II. Selection of Situations

In his paper, the prosecutor outlines the four guiding principles of his office in the selection of situations and cases: independence, impartiality, objectivity, and non-discrimination.³ We welcome the prosecutor's enumeration of these four important principles to ensure his maximum effectiveness. Indeed, these principles should be highlighted as part of the prosecutor's outreach and communications strategy, especially with the communities most affected by the crimes within the ICC's jurisdiction.

Preserving the integrity of these principles requires making every effort to preempt potentially negative perceptions concerning their application and, as they arise, to effectively address such perceptions. In that regard, with respect to the principle of independence, we have concerns that the prosecutor's Policy Paper does not adequately address the practical challenges he may face in preserving his independence and/or the perception of it as he selects situations. The failure to address these challenges at the situation stage may also have a detrimental impact on the perception of his independence in his selection of cases.

In particular, according to the prosecutor's Policy Paper, the principle of independence requires that he avoid seeking or acting on instructions from other sources. In addition, he states that independence means ensuring that the "the selection process is not influenced by the presumed wishes of any external source, nor the importance of the cooperation of any particular party, nor the quality of cooperation provided."⁴ At the same time, the prosecutor in his "Activities Report" has adopted a policy of inviting voluntary referrals from states because this "increases the likelihood of important cooperation and support on the ground."⁵

³ Policy Paper, pp. 1-2.

⁴ Ibid., p. 1.

⁵ Activities Report., pp. 2, 7.

Human Rights Watch is not opposed to the voluntary referral of situations (self-referrals) where the other criteria under the Rome Statute have been satisfied.⁶ Indeed, there may be practical advantages associated with conducting investigations in situations that have been self-referred. These include securing state cooperation and support in gathering evidence in the course of an investigation, as well as in executing arrest warrants. However, to ensure compatibility between the prosecutor's independence and his policy of inviting self-referrals, the prosecutor should clearly state that the possibility of voluntary referral will not be given preference in determining which situations should be selected for investigation.

We believe it is important for the prosecutor to acknowledge that systematically selecting situations that have been voluntarily referred may ultimately carry significant negative implications regarding his perceived and actual independence. For example, there is a risk that the prosecutor may be perceived as a tool of the referring government. Further, waiting for states to refer situations can create delays that could have an impact on the integrity and availability of evidence of ICC crimes on the ground. In the worst case scenario, it could risk subjecting the prosecutor to manipulation by a state party wanting to use the prospect of voluntary referral as a stalling tactic to destroy any evidence of its own involvement in crimes that may be in the jurisdiction of the ICC.

The negative implications arising from relying on the voluntary referral of situations underscore the importance of the prosecutor's using other avenues available to gather information about a particular situation, such as his proprio motu power. Pursuant to this power, the prosecutor can actively monitor a country situation on his own initiative to gather information in order to determine whether to pursue an investigation there.⁷ With the authorization of the Pre-Trial Chamber, this information can lead to the opening of an investigation.⁸ The proprio motu power is therefore an important tool in the

⁶ The prosecutor highlights the requirements under Article 53 of the Rome Statute that must be satisfied before opening a formal investigation. First, there must be a "reasonable basis to believe" that a crime within the jurisdiction of the court has been or is being committed. Second, there is a determination of admissibility (gravity and complementarity), and finally, consideration of the interests of justice. The prosecutor also puts forward a brief overview of factors his office considers necessary to satisfy each of the above mentioned requirements. Pursuant to Article 15(3) of the Rome Statute, if the Pre-Trial Chamber is satisfied that these requirements have been met, the prosecutor can open a formal investigation in a situation. See Policy Paper, pp. 3-8.

⁷ Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 15(1).

⁸ Rome Statute, art. 15(3).

prosecutor's exercise of his independence in the execution of his mandate, which he has acknowledged in his Activities Report.⁹

The prosecutor's use of his proprio motu powers is particularly important in those situations where a state has expressed, either explicitly or implicitly, its unwillingness to cooperate with the ICC. Of course, the prosecutor may face difficulties in the short term in gathering evidence during an investigation, enforcing arrest warrants, and building cases for prosecution. However, the use of his proprio motu powers in such a situation could reinforce his actual and perceived independence, especially among those communities most affected by the crimes. Further, proceeding in this manner could provide the prosecutor with the opportunity to build the requisite support from the international community to pressure the otherwise unwilling government to cooperate with his investigation over the longer term.

III. Selection of Cases

A. Preserving impartiality in the investigation of groups

Once a situation has been selected for further investigation, the prosecutor must determine which specific cases warrant prosecution by the ICC.¹⁰ This involves investigating all sides involved in a situation to determine which parties have committed crimes subject to ICC jurisdiction. In his paper, the prosecutor has expressed the commitment of his office to conducting its selection process impartially and to applying the same methodology and standards for all groups. Accordingly, the application of objective criteria in assessing whether the level of criminality meets the threshold for an investigation or prosecution may result in different outcomes for different groups.¹¹

Utilizing objective criteria to assess whether certain cases merit investigation or prosecution is important to ensure that prosecutions before the ICC do not appear selective. Relying on an objective threshold in assessing criminality avoids the danger of making comparisons between groups or individual perpetrators, and provides a clear rationale for the decision about whether to prosecute a specific case. In particular, once

⁹ Activities Report, pp. 2, 8. We note, however, that the prosecutor's Policy Paper does not reference the role of his proprio motu authority.

¹⁰ Rome Statute, art. 53. For the purpose of this paper, "cases" refers to those instances where a particular crime(s) and suspect(s) allegedly involved in the crime(s) have been identified for trial.

¹¹ Policy Paper, p. 2.

a determination is made that an individual accused meets the objective threshold for prosecution, then in principle a case should be brought forward even if the scale of the underlying crimes is not of the same magnitude as those of other defendants before the ICC.

As a preliminary matter, we note the prosecutor's use of the term "groups" in referring to all parties in a conflict that may be under investigation. Because of the prosecutor's reliance on state cooperation to carry out his mandate, especially in those situations that have been voluntarily referred, we believe the prosecutor should be sensitive to the risks to his impartiality. We therefore urge a change in terminology to reduce such risks. The prosecutor should indicate in his policy that "groups" refers to state actors as well as armed insurgents. We note that efforts have been made by the prosecutor since the initial referral of the Ugandan government to emphasize the impartiality of his investigation in Northern Uganda and to provide a context for the decision to issue arrest warrants against the Lord's Resistance Army (LRA) leaders.¹² We welcome such statements.

The prosecutor's Policy Paper states that his office will investigate all groups in a situation "in sequence," suggesting that one group will be investigated at a time. After completion of an investigation of a particular group, the prosecutor's office examines whether other groups warrant investigation.¹³ We can appreciate that in some instances it may be necessary to operate in sequence in the investigation of groups. For example, there may be delays in taking action in certain circumstances because of practical considerations, such as the protection of victims or witnesses. However, we are concerned that the formal adoption of this approach as a policy may have negative implications for the perception of the prosecutor's impartiality.

For example, in the context of the DRC, we note the recent arrest warrant against the head of the Union of Congolese Patriots (UPC), a prominent Hema-based militia group.¹⁴

¹² "Statement by the Chief Prosecutor on the Uganda Arrest Warrants," Office of the Prosecutor, International Criminal Court, The Hague, October 14, 2005, http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051014_English.pdf (accessed October 18, 2006), p. 2.

¹³ Policy Paper, pp. 12-13; "First arrest for the International Criminal Court," International Criminal Court press release, March 18, 2006, <http://www.icc-cpi.int/press/pressreleases/132.html> (accessed October 18, 2006).

¹⁴ The warrant for the arrest of Thomas Lubanga Dyilo was issued under seal on February 10, 2006; see *Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, Case No. ICC-01/04-01/06, Warrant of Arrest, February 10, 2006. Lubanga was arrested in the DRC and subsequently transferred to The Hague on March 17, 2006.

To date, however, no arrest warrants have been issued by the ICC for those involved in Lendu-based militias, despite their suspected involvement in a number of serious crimes within the ICC's jurisdiction.¹⁵ Our recent field research in the DRC indicates that the absence of ICC arrest warrants against those associated with the Lendu-based militias has led to a strong perception within the Hema community in Ituri that the ICC is carrying out "selective justice."¹⁶ This perception is also held by other groups, including the Congolese Tutsi, who view the arrest of the head of the UPC as increasing the risk of persecution of their community.¹⁷

We urge sensitivity to the implications of mechanically pursuing a policy of proceeding sequentially in all situations. In the context of the DRC, our field research suggests that this approach may have already undermined the perception of the ICC as an impartial institution. As such, to the greatest extent possible, we urge the prosecutor to avoid delays in investigating other groups alleged to have committed crimes within the ICC's jurisdiction. In that regard, we have noted elsewhere our views on the importance of adequate staffing, and we encourage the prosecutor to ensure the investigative teams are sufficiently staffed in all country situations under investigation.¹⁸

The prosecutor should bring forward charges against members of all relevant groups upon satisfaction of the objective evidentiary and criminality thresholds in a timely manner to ensure the ICC is perceived as a balanced institution. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone have prosecuted perpetrators from all of the major parties to the respective conflicts. This contributed to their credibility among the communities most affected.

We recognize, however, that there may be occasions when the crimes of one group do not meet the objective thresholds for prosecution by the ICC. There may also be other tactical considerations that recommend an approach other than ICC prosecution. We therefore believe it is essential to provide reasons for the decision not to prosecute

¹⁵ Human Rights Watch, *Ituri: "Covered in Blood," Ethnically Targeted Violence in Northeastern DR Congo*, vol. 15, no. 11(A), July 2003, <http://hrw.org/reports/2003/iturio703/>; Human Rights Watch, *Democratic Republic of Congo – The Curse of Gold* (New York: Human Rights Watch, 2005), <http://hrw.org/reports/2005/drc0505/>.

¹⁶ Human Rights Watch interview with a civil society representative, Bunia, July 31, 2006.

¹⁷ Human Rights Watch interviews with Congolese Tutsi community representatives, Goma, August 24, 26 and 29, 2006.

¹⁸ Joint letter from Human Rights Watch and other groups to Luis Moreno-Ocampo, chief prosecutor, International Criminal Court, July 31, 2006, <http://hrw.org/english/docs/2006/08/01/congo13891.htm>.

other parties in a situation. Providing reasons could also create a valuable opportunity for the prosecutor to urge the national authorities to address cases involving serious crimes that are not assumed by the ICC.

In providing reasons, we note the level of detail offered by the prosecutor in executing his statutory obligation to provide explanation for his decision not to open investigations in Iraq and Venezuela.¹⁹ While we appreciate the difficulties of sharing detailed information with the public regarding specific alleged perpetrators, we believe the prosecutor can still provide general information regarding, for example, the reasons underlying a decision not to choose a particular group for prosecution by the ICC. This is especially important in relation to those groups that are perceived to have committed serious crimes that do not meet the gravity threshold as applied by the prosecutor. Moreover, these reasons must be effectively communicated to the communities most affected by the crimes at issue. Ensuring transparency in the form of comprehensive reasons behind the decision not to prosecute and subsequent wide dissemination of this message preserves the prosecutor's—and the ICC's—credibility.²⁰

B. Selection of individual perpetrators

1. General

The types of cases that are selected for prosecution will have important implications for the ICC's impact among the communities most affected and for its overall impact in the struggle against impunity. In selecting individual cases for prosecution, once there is a sufficient basis to satisfy the jurisdictional requirements of the court, the case is subject to an admissibility assessment. Specifically, under Article 17(1) of the Rome Statute, a case will be considered inadmissible if it is genuinely being or has been subject to proceedings²¹ in a state that has jurisdiction over the case in question.²² In the event that

¹⁹ Rome Statute, art. 15(6); "Response to communication concerning the situation in Iraq," Office of the Prosecutor of the ICC, February 9, 2006, http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (accessed October 18, 2006); "Response to communication concerning the situation in Venezuela," Office of the Prosecutor of the ICC, February 9, 2006, http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf (accessed October 18, 2006).

²⁰ The prosecutor has an obligation, under limited circumstances, to provide reasons for a decision not to prosecute. Pursuant to Article 53(2)(c) of the Rome Statute, the prosecutor has an obligation to provide to the Pre-Trial Chamber and the state making a referral or the Security Council reasons for a decision not to prosecute where such a decision is based on "the interests of justice." However, it is uncertain whether the reasons provided to the Pre-Trial Chamber and the state or the Security Council would be publicly available. Moreover, the prosecutor's obligation to provide reasons for a decision not to prosecute on grounds other than "the interests of justice" is unclear.

²¹ The term "proceedings" encompasses investigations and prosecutions.

there are no genuine proceedings, the case must still be of “sufficient gravity” to justify further action by the court pursuant to Article 17(1)(d) of the Rome Statute.

As noted by the prosecutor in his Policy Paper, gravity is therefore a central factor in determining which cases will be selected for trial before the ICC. In assessing the gravity of the act that constituted the crime, the prosecutor has indicated that the scale, nature, manner of commission, and impact of the crimes committed will be relevant.²³ Of course, not all suspected perpetrators involved in committing grave crimes under the jurisdiction of the ICC will be selected for prosecution. The prosecutor has therefore indicated that in addition to the act that constituted the crime, gravity encompasses the degree of participation in its commission.²⁴

In assessing the degree of participation as a factor in selecting alleged perpetrators for trial before the ICC, we believe that the prosecutor should emphasize the ICC’s important role in pursuing senior officials who may have committed crimes within the jurisdiction of the Rome Statute. At the same time, however, we believe it is essential that flexibility be maintained in identifying suspected perpetrators for trial before the ICC, in order to include individuals outside of the class of senior leaders, as appropriate. Indeed, there may be circumstances where the investigation and prosecution of such individuals could have a significant impact for victims on the ground, in addition to facilitating the implementation of an effective prosecutorial strategy in a given country situation. These recommendations are discussed in more detail below.

2. The importance of pursuing senior officials

In identifying suspected individuals for prosecution, we note that the Rome Statute refers simply to the “perpetrators” of “the most serious crimes of concern to the international community as a whole.”²⁵ The scope of potential accused is therefore broad. To narrow this otherwise broad class of perpetrators who would be eligible for

²² To be considered inadmissible, the national proceedings must encompass both the person and the conduct that is the subject of proceedings before the ICC. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, February 24, 2006, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf (accessed October 18, 2006), para. 31 (“Lubanga Arrest Warrant Decision”).

²³ Policy Paper, p. 5.

²⁴ Office of the Prosecutor, International Criminal Court, “Paper on some policy issues before the Office of the Prosecutor,” September 2003, http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (accessed October 18, 2006), p. 7.

²⁵ Rome Statute, preamble, art. 5.

trial by the ICC, the prosecutor has adopted a policy of pursuing “those who bear the greatest responsibility” for crimes within the ICC’s jurisdiction.²⁶ In a report on the establishment of the Special Court for Sierra Leone, the United Nations secretary-general indicated that the phrase “those who bear the greatest responsibility” is understood as a limitation on the number of accused by reference to their command authority and the gravity and scale of the crime.²⁷ “Those who bear the greatest responsibility” therefore refers to those who played a leadership role in the conflict.²⁸

Selecting cases involving those in the upper echelons of power who may be responsible for crimes within the ICC’s jurisdiction can be essential. Indeed, Article 27 of the Rome Statute emphasizes the irrelevance of official capacity (that may entail, for example, domestic immunities from prosecution or other ex officio protected status) to its application, stating that it shall “apply equally to all persons without any distinction based on official capacity”: in particular, a person shall not be exempt from criminal responsibility based on his or her “official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official.” Further, this official capacity does not, in and of itself, constitute a ground for the reduction of a sentence.²⁹ Similar provisions are found in the statutes of the Special Court for Sierra Leone, the ICTY, the International Criminal Tribunal for Rwanda (ICTR), as well as the Nuremberg Charter.³⁰

In determining the degree of participation of suspected perpetrators to be tried by the ICC, Pre-Trial Chamber I has expressed its support of pursuing those in senior leadership positions. In particular, in addition to focusing on conduct that is either systematic or

²⁶ Office of the Prosecutor, International Criminal Court, “Paper on some policy issues before the Office of the Prosecutor,” p. 7; Policy Paper, p. 13.

²⁷ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, October 4, 2000, para. 29.

²⁸ Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234, para. 1; Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, S/2001/40, para. 2.

²⁹ Rome Statute, art. 27(1).

³⁰ Charter of the International Military Tribunal, art. 7, reprinted in *Trial of the Major War Criminals before the International Military Tribunal: Proceedings Volumes (Nuremberg, 1947-49)*, vol. 1; Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), S.C. Res. 827, U.N. Doc. S/RES/827 (1993), as amended, <http://www.un.org/icty/legaldoc-e/index.htm> (accessed October 18, 2006), art. 7(2); Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), S.C. Res. 955, U.N. Doc. S/RES/955 (1994), as amended, <http://69.94.11.53/ENGLISH/basicdocs/statute.html> (accessed October 18, 2006), art. 6(2); Statute of the Special Court for Sierra Leone (SCSL Statute), January 16, 2002, <http://www.scsl.org/scsl-statute.html> (accessed October 18, 2006), art. 6(2).

large scale that raises social alarm,³¹ the chamber has indicated that only the “most senior leaders suspected of being the most responsible” for crimes within the jurisdiction of the ICC should be tried before the court.³² The Pre-Trial Chamber stated that focusing on those in leadership positions is a core component of the gravity threshold in the Rome Statute.³³

According to the chamber, the “most senior leaders suspected of being the most responsible” play a major role by acts or omissions in the commission of crimes within the jurisdiction of the court. Moreover, they are the individuals who can most effectively stop or prevent their commission. Concentrating on this type of individual maximizes the deterrent effect of the court. In particular, other senior leaders in similar circumstances will know that by doing what they can to prevent the systematic or large-scale commission of such crimes, they could be insulated from prosecutions by the court.³⁴

In light of the above, it is essential that the prosecutor underscore his statutory mandate to bring senior officials suspected of ICC crimes to justice. This is particularly important given the issues that may arise about the perception of his independence and impartiality in the selection of cases due to his reliance on state cooperation. The prosecutor should also clearly and regularly emphasize that his mandate under Article 27 includes pursuing all of those in de jure and de facto leadership positions who may have committed such crimes, including those outside of the physical territory of the situation under investigation.

For example, we welcome the action taken to date by the ICC prosecutor in the DRC. However, the crimes committed in the DRC are part of a broader conflict in the Great Lakes region. We believe that the prosecutor’s investigation should include those who armed and supported militia groups operating in Ituri, which may extend to senior

³¹ We note that Pre-Trial Chamber I does not offer a definition of “social alarm” in its decision.

³² Lubanga Arrest Warrant Decision, para. 50.

³³ Ibid., paras. 62-63. In assessing those who should be considered the “most senior leaders suspected of being the most responsible,” Pre-Trial Chamber I indicated that there are three main elements. First, the court will consider the position of the person alleged to have committed the crime(s) within the jurisdiction of the ICC. This includes an assessment of those who are in de jure as well as de facto positions of authority pursuant to Article 28 of the Rome Statute. Second, the court will assess the roles that such individuals play, through acts or omissions, when the state entities, organizations or armed groups to which they belong commit systematic or widespread crimes within the jurisdiction of the court. Third, the court will determine the role played by these state entities, organizations or armed groups in the overall commission of crimes within the jurisdiction of the court in the relevant situation.

³⁴ Ibid., paras. 53-54.

officials in Kinshasa, Kampala and Kigali.³⁵ Such targeting is crucial to maximize the impact of the court in the struggle to end impunity in the DRC and in the Great Lakes region overall.

3. Ensuring flexibility in identifying suspected perpetrators

Pursuing those holding de jure and de facto senior leadership positions, including those who are not necessarily in the formal chain of command but who are influential or powerful beyond their official position,³⁶ is a fundamental component of an effective prosecutorial policy. However, in emphasizing the importance of choosing those in senior leadership positions, we note that both the prosecutor and Pre-Trial Chamber I have adopted a restrictive interpretation aimed at prosecuting *only* those who meet the criterion of senior leadership. Because of this restrictive criterion, it appears that those in other positions who may have committed crimes enumerated in the Rome Statute would not likely be identified for prosecution before the ICC.

In support of the more restrictive criterion, the Pre-Trial Chamber draws from Security Council resolution 1534, which calls on both the International Criminal Tribunals for Rwanda and the former Yugoslavia to focus on the “most senior leaders suspected of being most responsible” for crimes in the jurisdiction of the respective courts.³⁷ In the context of the ICTY, in practical terms, this senior category refers to a small group of military, civilian or paramilitary leaders who bear the main responsibility for the criminal acts committed under the statute. The fact that a defendant may have been in command of others on a local level is not a sufficient basis to characterize him as a “leader.”³⁸ Further, we note that the Special Court for Sierra Leone has adopted the term “persons

³⁵ “D.R. Congo: ICC Arrest First Step to Justice,” Human Rights Watch news release, March 17, 2006, <http://hrw.org/english/docs/2006/03/17/congo13026.htm>.

³⁶ See *Prosecutor v. Musema*, International Criminal Tribunal for Rwanda, Case No. ICTR-96-13-T, Judgment (Trial Chamber), January 27, 2000, para. 880; *Prosecutor v. Kayishema*, ICTR, Case No. ICTR-95-1, Judgment (Trial Chamber), May 21, 1999, paras. 501-504.

³⁷ United Nations Security Council, Resolution 1534 (2004), S/RES/1534. In implementing this mandate, the judges of the ICTY revised Rule 28(a) of the Rules of Procedure and Evidence. Accordingly, the Bureau, which is a body comprised of persons elected by the judges, reviews all indictments submitted by the prosecutor to ensure that it concentrates prima facie on one or more senior leaders suspected of being most responsible for crimes committed within the jurisdiction of the tribunal. A similar rule was not incorporated in the Rules of Procedure and Evidence of the ICTR.

³⁸ *Prosecutor v. Radovan Stankovic*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11 bis Referral (Trial Chamber), May 17, 2005, paras. 15, 19.

who bear the greatest responsibility” in its statute in light of concerns relating to the limited timeframe and budget of the court.³⁹

We are concerned that adherence by the ICC to such a restrictive policy may undercut the valuable impact of the court in different country situations. In that regard, we believe that the ICC should be distinguished from the Special Court for Sierra Leone and the ad hoc tribunals. Unlike the Statute of the Special Court for Sierra Leone, the Rome Statute does not explicitly limit the mandate of the ICC. Moreover, the concerns of the Special Court and the ad hoc tribunals relating to their respective limited timeframes do not extend to the ICC. The decision to limit the work of the ad hoc tribunals in the context of their respective completion strategies came after both tribunals established a rich body of evidence and jurisprudence, an important part of which resulted from trying lower- and mid-level perpetrators. The ICC’s open mandate and existence as a permanent institution should support a flexible approach in determining which individuals should be prosecuted by the ICC.

Therefore, we recommend the consistent use of the more flexible criterion inherent in the term “persons most responsible” in identifying suspects for ICC prosecution.⁴⁰ According to the United Nations secretary-general, the term “persons most responsible” includes those in the political or military leadership, but would also comprise others down the chain of command who may be regarded as “most responsible” judging by the severity of the crime or its massive scale. As such, “most responsible” denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime.⁴¹

We note the Pre-Trial Chamber’s observation that focusing on those “most senior leaders suspected of being the most responsible” is considered the most effective manner of stopping and/or preventing crimes, thereby maximizing the deterrent effect of the court. However, we believe maximizing the court’s impact in ending impunity may in

³⁹ See “Challenges in Prosecutions before the Special Court of Sierra Leone,” presented by Mr. David Crane, in *Colloquium of Prosecutors of International Criminal Tribunals on “The Challenges of International Criminal Justice,”* Report of Proceedings, November 2004, http://69.94.11.53/ENGLISH/colloquium04/reports/final_report.pdf (accessed October 18, 2006), p. 13; SCSL Statute, art. 1.

⁴⁰ We note that the prosecutor uses the terms “persons most responsible” and “those who bear the greatest responsibility” interchangeably in his policy paper. See Policy Paper, pp. 7, 10, 12-13.

⁴¹ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, October 4, 2000, para. 30.

practice mean different things in different country situations and should therefore be interpreted flexibly. Indeed, strict adherence to a policy of only pursuing those in senior leadership positions may have the effect of fostering a sense of impunity among lower-ranking perpetrators and encouraging them to continue committing abuses. By contrast, in some contexts, pursuing those officials further down the chain of command could have a significant impact for victims on the ground, and/or may be necessary for the implementation of an effective prosecutorial strategy in a particular country situation.

For example, in Darfur we believe it may be important for the ICC to prosecute state governors and provincial commissioners, in addition to senior leaders, who are responsible for war crimes and crimes against humanity.⁴² The state governors and provincial commissioners are the highest-ranking civilian representatives of the Sudanese government in the states and provinces of Darfur.⁴³ These figures have played a pivotal role in the implementation and perpetuation of the abusive policies put in place by senior officials in Khartoum.

Under a restrictive interpretation of the current criterion of senior leadership, lower-ranking individuals such as these state governors and provincial commissioners may not be included for prosecution by the ICC. However, prosecuting these civilian authorities for implementing the abusive policies formulated by senior officials in Khartoum could set an example for other similarly-positioned authorities, as well as for those even further down the chain of command. The importance of the ICC's role in doing this is all the more relevant in the context of Darfur, which lacks an effective judicial system.⁴⁴

Our research also suggests that their prosecution would have tremendous impact for victims on the ground. For example, this could allow victims who have been displaced as a result of the "ethnic cleansing" campaign to return to their villages. Since these officials have a more direct link with the victims, their prosecution may also have a greater impact in bolstering the sense among victims that justice is being done by the ICC.

⁴² Human Rights Watch, *Sudan - Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, vol. 17, no. 17(A), December 2005, <http://hrw.org/reports/2005/darfur1205/>, p. 5.

⁴³ *Ibid.*, p. 22.

⁴⁴ Human Rights Watch, *Sudan - Lack of Conviction: The Special Criminal Court on the Events in Darfur*, June 2006, <http://hrw.org/backgrounder/ij/sudano606/>.

Further, in many circumstances, building cases against those in senior leadership positions may be extremely difficult due to challenges associated with establishing links between crimes committed on the ground and decisions made by senior officials. The negative consequences for victims due to this delay could be significant, particularly in country situations where the conflict is ongoing. Therefore, it may be beneficial—at least initially—to bring forward for prosecution cases involving suspected perpetrators other than those holding senior leadership positions.

The nature of the alleged crime may also favor employing a flexible approach in selecting alleged perpetrators for trial. For example, in cases involving sexual violence, to make a meaningful impact on those communities most affected it may be necessary for the ICC to pursue more than a select few senior leaders and include those lower down the chain of command who perpetrated the abuses. Moreover, in cases involving genocide, it may be necessary to prosecute more than a handful of senior leaders to clearly demonstrate how genocide operated in a particular country situation.

There are other practical benefits to ensuring flexibility in identifying suspected perpetrators for prosecution before the ICC. The prosecution of alleged perpetrators who directly engaged in the commission of acts within the ICC’s jurisdiction could lead to the identification of those higher in the chain of command in which they operated. Prosecuting these “direct” perpetrators could therefore facilitate the prosecution of high-level perpetrators.⁴⁵

The prosecutor has indicated that an investigation may go beyond high-ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case.⁴⁶ To that end, Human Rights Watch believes that the prosecutor should also select cases of those suspects further down the chain of command for prosecution when doing so would facilitate the success of the overall prosecutorial strategy in a particular country situation. In addition, we encourage the Pre-Trial Chamber to adopt the criterion of pursuing “persons most responsible” in

⁴⁵ Nicola Piacente, “Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy,” *Journal of International Criminal Justice*, vol. 2 (2004), pp. 447-448.

⁴⁶ Office of the Prosecutor, International Criminal Court, “Paper on some policy issues before the Office of the Prosecutor,” p. 3; Policy Paper, p. 13.

its subsequent assessments and/or decisions regarding who is eligible for trial before the ICC.⁴⁷

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Human Rights Watch welcomes the publication by the Office of the Prosecutor of the criteria used in the selection of situations for investigation and cases for prosecution before the ICC. Promoting transparency through the publication of these criteria is essential to maintaining the objectivity and impartiality surrounding the complex and important decisions of the prosecutor. This is all the more relevant since the decisions involved are often taken in a highly politically charged context.

⁴⁷ Pursuant to Article 21(2) of the Rome Statute, the court “may apply principles and rules of law as interpreted in its previous decisions” (emphasis added). The permissive language suggests that it is not mandatory for other chambers to follow Pre-Trial Chamber I’s holding. Further, we note that in *Prosecutor v. Aleksovski*, ICTY, Case No. IT-95-14/1-A, Judgment (Appeals Chamber), March 24, 2000, para. 114, the ICTY Appeals Chamber stated that “decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.”