



INTERNATIONAL JUSTICE

# Unfinished Business

Closing Gaps in the Selection of ICC Cases

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# Introduction

In March 2011 the prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, opened the court's latest investigation—in Libya. The previous month, the United Nations (UN) Security Council had referred the situation in Libya to the ICC prosecutor by a unanimous vote in the midst of a brutal crackdown by government forces against protesters. In June 2011, the prosecutor filed an application before an ICC pre-trial chamber to open an investigation into the situation in Côte d'Ivoire. This followed a request from the new Ivorian president, Alassane Ouattara, that the ICC investigate crimes committed in the wake of the country's November 2010 disputed election. If the prosecutor's application is granted, Côte d'Ivoire will become the ICC's seventh "situation under investigation."

For a court less than a decade old, the ICC is already managing a large investigative docket and caseload. Libya and Côte d'Ivoire follow the opening of investigations in Democratic Republic of Congo (DRC), northern Uganda, the Darfur region of Sudan, Central African Republic (CAR), and Kenya. The recent additions of Kenya (where investigations opened in March 2010) and Libya, and the likely addition of Côte d'Ivoire in the near future, mark a considerable increase in the workload of the court.

Severe government crackdowns continue against protesters in a number of countries in the Middle East and North Africa. While none of these countries are party to the Rome Statute of the ICC and therefore remain for the time being beyond its reach absent a UN Security Council referral, it seems likely that demands for justice in the region will grow. Eight other situations—Colombia, Afghanistan, Guinea, Honduras, Nigeria, Georgia, South Korea, and Gaza—already await determination by the ICC prosecutor as to whether he will seek to open investigations. Some, like Colombia and Afghanistan, have been under analysis for several years.

Increasing demands on the ICC come at a critical juncture for the court. Moreno-Ocampo was elected by the ICC states parties to serve a term of nine years and took office in June 2003. His term has less than a year to run. ICC states parties are expected to elect a new prosecutor at their next annual session in December 2011.

As Moreno-Ocampo prepares to leave office and hand over to a new prosecutor, states parties must confront the challenge of equipping the ICC to meet heightened expectations. As the court is asked to take on more situations, there is a risk that the ICC and its prosecutor will increasingly "hollow out" the court's approach to its situations under

investigation. That is, the ICC may take on more situations, but do less and less in each situation to square demand with limited resources—especially in difficult economic times.

In fact, experience in the ICC's existing situations shows just the opposite is required—more investigations and prosecutions are needed in each of these situations in order to deliver on the court's mandate. This will likely require additional resources, but, more fundamentally, it will require a shift in the practice of the Office of the Prosecutor.

The task of the ICC's first prosecutor to build a credible new institution, while also getting to work in bringing perpetrators of the world's worst crimes to justice in the sui generis context of the Rome Statute, was always going to be a difficult one. Moreno-Ocampo has made important progress. Investigations in six countries have yielded arrest warrants for 17 individuals and voluntary summonses to appear for nine others. In August 2011, the court heard closing arguments in the ICC's first trial, that of Thomas Lubanga Dyilo, a former Congolese militia leader, and trials are ongoing in two additional cases. The Office of the Prosecutor (OTP) has also issued a number of important policy and strategic documents to guide its work.

However, under Moreno-Ocampo the ICC's investigations and prosecutions have failed to demonstrate coherent and effective strategies for delivering meaningful justice to affected communities. Such strategies would, in the view of Human Rights Watch, require multiple investigations, deeply rooted in the country-specific context and designed to bring to trial those most responsible for the gravest crimes representative of underlying patterns of ICC crimes. While the ICC may not act alone—and indeed ICC prosecutions should be supplemented by additional national prosecutions—its intervention comes with high expectations from affected communities. As the leading edge of international justice, the ICC has a responsibility to meet those expectations.

Gaps remain in delivering on the ICC's mandate in situations where the court is pursuing investigations and prosecutions. In four situations—DRC, Uganda, CAR, and Darfur—the absence of more coherent and effective strategies has undermined perceptions of independence and impartiality, threatening the court's credibility.

This report assesses the Office of the Prosecutor's choice of cases in the court's first five investigations. In particular we evaluate these choices in an effort to determine the extent to which they have been the right ones to best help the court to deliver meaningful and credible justice. We first set out what constitutes meaningful justice, and highlight the

importance of upholding impartiality and independence in achieving this goal. We then turn to a country-by-country analysis, with recommendations for action needed in each situation. Our recommendations are based on our close observation of the work of the Office of the Prosecutor over the past eight years, as well as our expertise in the countries in which crimes under ICC investigation have been committed.

Putting our recommendations into practice will take time. It will likely also require additional resources and strict prioritization, especially given that some ICC states parties increasingly insist on “zero-growth” in the court’s budget. In our conclusion, we make broader recommendations as to how the OTP might consider selecting priorities, underlining the need for states parties to support the ICC with additional resources and in the execution of arrest warrants.

# I. Meaningful, Impartial, and Independent Justice

At the core of the ICC prosecutor’s mandate is the delivery of meaningful justice for crimes within the court’s jurisdiction. Delivering meaningful justice requires coherent and effective strategies designed to ensure that investigations and prosecutions resonate with the concerns of victims and affected communities. The exercise of the prosecutor’s discretion to select cases that will best lead to meaningful justice should be guided by two bedrock principles: impartiality—that is, investigating allegations against all parties; and independence—that is, being free from external influence. While impartiality and independence are of fundamental importance to any credible process of justice, they are all the more important for the ICC. As a still-new international institution, situated outside domestic systems of justice, perceptions of impartiality and independence have critical bearing on the ICC’s credibility and, in turn, its ability to fulfill its mandate to deliver meaningful justice.

## Meaningful Justice

When it comes to the interests of those most affected by the crimes under investigation—the first among the court’s many constituencies—the prosecutor should ensure that the cases he chooses to take on address the underlying patterns of ICC crimes committed in affected communities. Where cases brought do not address these patterns, the ICC risks irrelevancy even if its impartiality and independence remain intact. The concern to do meaningful justice should guide the prosecutor in his choice of cases to pursue.

In practice, this means that the ICC should try those most responsible for the most serious crimes on charges representative of the underlying patterns of ICC crimes. This will usually mean investigation and trial of several cases in a given situation. Identification of these cases should emerge from investigations grounded in a deep appreciation of the context in which the ICC operates, with a focus on perpetrators and incidents that match up with underlying crime patterns, and with particular attention given to those cases—whether because they are the most complex or because they target high-level defendants—least likely to be effectively pursued by national authorities.<sup>1</sup>

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<sup>1</sup> This will usually mean those bearing the greatest responsibility for crimes and who are among the most difficult for national authorities to pursue. This standard, however, should be applied flexibly at times, where, for example, pursuing lower-ranking officials could deter other similarly situated officials from committing ICC crimes, with an immediate impact for victims on the ground. For further discussion see Human Rights Watch, *Selection of Situations and Cases for Trial before the International Criminal Court: A Human Rights Watch Policy Paper*, no. 1, October 2006, <http://www.hrw.org/en/news/2006/10/26/selection-situations-and-cases-trial-international-criminal-court>, pp. 7-15.

## Impartiality

The ICC was established to deliver justice for serious violations of international criminal law where national courts are unwilling or unable genuinely to investigate or prosecute. The court is therefore expected to adhere to procedural fairness and equality before the law in a way that is not always possible in national courts. Rather than provide “victor’s justice,” the ICC should investigate and prosecute crimes committed by all sides within its jurisdiction, even where doing so is politically inconvenient or otherwise difficult. Rarely are crimes only committed by members of one party to a violent conflict, even if abuses are often attributed more to one side than the other. Not surprisingly, ICC investigations are likely to occur in highly polarized situations with sharp divisions between communities. Affected communities are all too aware of violations committed by various parties, so failure to address serious crimes—or to explain why they are not being addressed—can undermine the court’s legitimacy in the eyes of those communities. It is therefore essential for the credibility of the ICC in its delivery of meaningful justice that it act impartially and be seen to be doing so.

The experience of other international criminal tribunals underscores the importance of impartiality.<sup>2</sup> That the International Criminal Tribunal for the former Yugoslavia (ICTY) managed to prosecute crimes committed by all factions in the Balkan wars stands as a record against claims that it was biased against one particular group. At the Special Court for Sierra Leone, indictments were also brought against all parties to the conflict. The case against Sam Hinga Norman, the leader of the Civil Defense Force, a group that fought on the side of the government, enhanced local understanding of the court’s mandate and the credibility of the court, in a country where justice had long been compromised by political interference and partiality.<sup>3</sup>

By contrast, the International Criminal Tribunal for Rwanda (ICTR) has only prosecuted members from one side, ethnic Hutu, for crimes in Rwanda. Though by far most of the violence was committed as part of the genocide against ethnic Tutsi, many civilians were also killed by the Rwandan Patriotic Front (RPF). RPF crimes included intentional attacks on the civilian population and individual civilians, and extrajudicial executions. The UN High Commissioner for Refugees estimated that the RPF killed between 25,000 and 45,000

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<sup>2</sup> See discussion in Leslie Haskell and Lars Waldorf, “The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences,” *Hastings International and Comparative Law Review*, vol. 34 (2011), pp. 70-76.

<sup>3</sup> See Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone*, September 7, 2004, <http://www.hrw.org/reports/2004/09/08/bringing-justice-special-court-sierra-leone>, pp. 18-19 & n.75. Civil society members explained that the court “gained credibility with the indictments of Sam Hinga Norman” and that “no one was ever thinking Sam Hinga Norman would ever be indicted. We thought [he] would have [been spared by] intervention by Kabbah.” *Ibid.* n.75.

civilians in 1994.<sup>4</sup> The crimes are well-known within Rwanda, although there has been no accountability for them either in Rwandan national courts or at the ICTR. The tribunal's failure to address these crimes risks leaving the impression that the ICTR is an example of victor's justice.<sup>5</sup>

## Independence

The credibility of the ICC also depends on the extent to which it is perceived to carry out its mandate in an independent manner. For the prosecutor, this obligation is spelled out in article 42(1) of the Rome Statute, which provides that “a member of the Office [of the Prosecutor] shall not seek or act on instructions from any external source.” The prosecutor has further expanded on the meaning of “independence”:

[T]he duty of independence goes beyond simply not seeking or acting on instructions. It also means that the selection process is not influenced by the presumed wishes of any external source, nor the importance of cooperation of any particular party, nor the quality of cooperation provided. The selection process is independent of the cooperation-seeking process.<sup>6</sup>

Safeguarding perceptions of the court's independence is not an easy task. There are limits on the court's jurisdiction. For example, the court's ability to reach crimes in countries not yet party to the ICC statute is circumscribed, and the court cannot reach back in time to crimes committed before 2002 when the Rome Statute came into effect. These limits can lead to accusations of bias in the selection of situations for investigation. Indeed, concerns that impunity is not being tackled consistently around the world have a factual basis. Officials from or supported by powerful states have been able to avoid international prosecutions. Victims of the most serious international crimes in Burma, southern Lebanon, Gaza, Chechnya, Iraq, and Sri Lanka, for example, have lacked access to justice.

In addition, the ICC depends on states' cooperation to provide practical assistance for its investigations and prosecutions and in the enforcement of its decisions, including the execution of arrest warrants. The reliance on states' cooperation, particularly the cooperation and assistance of officials of states in which the ICC is conducting

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<sup>4</sup> See Alison Des Forges, *Leave None to Tell the Story* (New York: Human Rights Watch/Int'l Fed. Of Human Rights, 1999), p. 727.

<sup>5</sup> See Haskell and Waldorf, “The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences,” pp. 75-76; see also Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF Crimes from Human Rights Watch, May 26, 2009, <http://www.hrw.org/node/83536>.

<sup>6</sup> Office of the Prosecutor, International Criminal Court (OTP), “Criteria for Selection of Situations and Cases,” draft policy paper on file with Human Rights Watch, June 2006, pp. 1-2 (“Draft Policy Paper”).

investigations, carries significant risks for the ICC's credibility. It can undercut perceptions about the ICC's independence, especially where state officials themselves have allegedly committed abuses. Targeting officials for prosecution may well result in compromising the willingness of the national government to lend cooperation to the ICC, thus jeopardizing its investigations and ability to act within a given situation.

These are difficult and real challenges for the court. One strategy for maintaining cooperation may lie in the timing of investigations, that is, deferring investigation of senior government officials until after other investigations have been completed. But this requires strong outreach and public information efforts to signal that the court's investigations could ultimately target crimes committed by government forces and to reinforce perceptions of the court's independence. At a certain point, however, the prolonged absence of any investigation of government officials alleged to have committed abuses—or adequate explanation as to why these cases are not being pursued—risks jeopardizing the court's independence.

The need to rely on states' cooperation makes it all the more important for the ICC prosecutor to manage investigations, and public information about those investigations, in a manner that signals clearly the court's independence. Given the many global challenges to the ICC's legitimacy, this is the best, and a necessary, antidote to allegations of political interference or influence.

\* \* \*

In a 2006 draft policy on “Criteria for Selection of Situations and Cases,” the OTP articulated similar “guiding principles”: independence, impartiality, objectivity, and non-discrimination.<sup>7</sup> More recently, in a draft policy on preliminary examinations leading to the selection of situations for investigation, the OTP reiterated the first three of these as “general principles.”<sup>8</sup> In addition, the OTP states in a strategy paper that “focused investigations and prosecutions” are one of four “fundamental principles” of the OTP's prosecutorial strategy in order to make efficient use of limited resources. In selecting incidents for trial, the OTP's stated goal is “to provide a sample that reflects the gravest

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<sup>7</sup> *Ibid.*, pp. 1-3.

<sup>8</sup> OTP, “Policy Paper on Preliminary Examinations (DRAFT),” October 4, 2010, [http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP\\_Draftpolicypaperonpreliminaryexaminations04101.pdf](http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf) (accessed April 26, 2011), paras. 33-44.

incidents and the main types of victimization.”<sup>9</sup> These policy choices should positively affect the ICC’s delivery of meaningful justice to affected communities and are consistent with another fundamental principle identified by the OTP for its prosecutorial strategy, namely, “addressing the interests of victims.”<sup>10</sup>

The difficulty has come in the implementation of these principles against a backdrop of many competing pressures. The ICC’s broad geographic jurisdiction means that the prosecutor can, and does, act in a number of unrelated country situations simultaneously. This risks the adoption of a shallow approach. Within each country situation, the practical difficulties are considerable and resource constraints real. To conduct effective investigations on the ground, to build cases for trial, and to communicate with victims and witnesses, staff in the prosecutor’s office should become intimately familiar with the history of the respective conflicts, the applicable national criminal law, and relevant cultural norms. Ongoing conflict in some situations presents logistical hurdles, genuine risks to staff, and challenges in relation to the protection of witnesses, victims, and others at risk because of their interaction with the court. While prosecutors of other international tribunals have faced similar challenges, the task of the ICC prosecutor is even more complex. The global reach of the court’s jurisdiction means that his decision making is subjected to far greater scrutiny.

In this difficult landscape, the delivery of meaningful justice in a manner that upholds impartiality and independence becomes all the more important to establishing the ICC’s legitimacy. As we explain below, in DRC, Uganda, CAR, Darfur, and Kenya, choices made to date in ICC investigations have yet to reflect coherent and effective strategies toward this end, and have, in four of these situations, undermined perceptions of the ICC’s impartiality and independence.

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<sup>9</sup> OTP, “Prosecutorial Strategy 2009-2012,” February 1, 2010, <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (accessed April 26, 2011), paras. 18-21

<sup>10</sup> *Ibid.*, para. 22.

## II. Democratic Republic of Congo

Years of violence in Congo have left a legacy of horrific abuses committed against civilians, including mass killing, torture, sexual violence and the forced recruitment and use of child soldiers.<sup>11</sup> Impunity for these grave international crimes has been one of the major obstacles to peace and stability in the Democratic Republic of Congo.<sup>12</sup> New acts of violence continue to be committed, including killings and rape in North and South Kivu in eastern Congo by the largely Rwandan Hutu rebel group, the Democratic Forces for the Liberation of Rwanda (FDLR), by other armed groups, and also by soldiers of the Congolese national army, including those newly integrated from the National Congress for the Defense of the People (CNDP) and other armed groups. In the remote region where the borders of DRC, CAR, and South Sudan meet, the Lord's Resistance Army from Uganda continues to carry out mass abductions and killings.<sup>13</sup>

The ICC prosecutor opened investigations in the DRC in June 2004, following a referral by the Congolese government of any crime falling within the ICC's jurisdiction committed on its territory since the ICC statute entered into force on July 1, 2002. The OTP has since conducted three investigations.

The office focused initially on the Ituri district, where the conflict began in 1999 when a longstanding land dispute between Hema pastoralists and Lendu agriculturalists spiraled out of control, fueled by international and local actors involved in Congo's larger war.<sup>14</sup> The OTP first investigated crimes committed by the Union of Congolese Patriots (UPC), a prominent Hema-based militia group in Ituri, leading in 2006 to arrest warrants for the head of the UPC, Thomas Lubanga Dyilo, and his former deputy chief of staff for military operations, Bosco Ntaganda. Lubanga was transferred to The Hague in 2006, and his trial

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<sup>11</sup> Human Rights Watch has issued numerous reports documenting human rights abuses in eastern Congo, including in the Ituri district of Oriental province, where tens of thousands were slaughtered on an ethnic basis between 1999 and 2009, and in the North and South Kivu provinces, where conflict continues to this day. See, for example, Human Rights Watch, *You Will be Punished: Attacks on Civilians in Eastern Congo*, December 2009, <http://www.hrw.org/en/reports/2009/12/14/you-will-be-punished-o>; *Soldiers who Rape, Commanders who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo—Killings in Kiwanja: The UN's Inability to Protect Civilians*, December 2008, <http://www.hrw.org/en/reports/2008/12/11/killings-kiwanja-o>; *Renewed Crisis in North Kivu*, October 2007, <http://www.hrw.org/en/reports/2007/10/22/renewed-crisis-north-kivu>; *The Curse of Gold: Democratic Republic of Congo*, July 2005, <http://www.hrw.org/en/reports/2005/06/01/curse-gold-o>; *Ituri: "Covered in Blood"; Ethnically Targeted Violence in Northeastern DR Congo*, July 2003, <http://www.hrw.org/en/reports/2003/07/07/covered-blood-o>.

<sup>12</sup> See Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, <http://www.hrw.org/en/reports/2009/07/07/selling-justice-short-o>, pp. 43-54.

<sup>13</sup> See part III below.

<sup>14</sup> See Human Rights Watch, *Covered in Blood*, pp. 5-19.

began in The Hague in January 2009. Ntaganda—who went on to join Laurent Nkunda’s CNDP, before ousting Nkunda in 2009 in exchange for the post of general in the Congolese army—remains at large.

Arrest warrants were next issued in 2007 for leaders of two Lendu militias, Germain Katanga, chief of staff of the Ituri Patriotic Resistance Forces (FRPI), an Ngiti-based militia but with close links to the Lendu, and Mathieu Ngudjolo Chui, former chief of staff of the Lendu-based Nationalist and Integrationist Front (FNI). Katanga was arrested in 2007, and Ngudjolo in 2008; their joint trial began in late 2009.

The OTP is currently conducting investigations in the Kivus. As in Ituri, widespread violence against civilians has occurred in North and South Kivu, two provinces heavily affected by Congo’s destructive wars since 1996. The violence in these two eastern provinces has been marked by horrific attacks on civilians, including murders, widespread rape, torture, and the use of child soldiers. All armed groups who have operated in the Kivus, both foreign and domestic, have been responsible for serious human rights abuses.<sup>15</sup>

The OTP’s investigations in the Kivus appear to have focused on crimes committed by the Rwandan Hutu rebel group, the FDLR. In October 2010, French police executed the ICC’s first arrest warrant in the Kivus investigation, arresting Callixte Mbarushimana, the FDLR’s executive secretary. A decision by an ICC pre-trial chamber as to whether the case against Mbarushimana—on charges of war crimes and crimes against humanity committed in eastern DRC in 2009—should be sent to trial, is expected before the end of 2011. At the time of Mbarushimana’s transfer to The Hague, the prosecutor indicated that he is considering including additional charges against him for the August 2010 mass rapes in Walikale territory, evidence permitting.<sup>16</sup> The ICC’s Kivus investigations are ongoing.

OTP investigations in DRC have already contributed to checking a pervasive culture of impunity in Congo. For example, our research indicates that the ICC’s Congolese investigations raised awareness among the population that the enlistment, recruitment, and use of child soldiers are criminal offenses.<sup>17</sup> The October 2010 United Nations report

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<sup>15</sup> See, for example, Human Rights Watch, *You Will be Punished*; Human Rights Watch, *Renewed Crisis in North Kivu*.

<sup>16</sup> See “Statement by ICC Prosecutor on transfer of Callixte Mbarushimana to the Hague,” OTP press release, January 25, 2011, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/statement%20by%20icc%20prosecutor%20on%20transfer%20of%20callixte%20mbarushimana%20to%20the%20hague> (accessed July 17, 2011).

<sup>17</sup> The effect has not been entirely positive, however. The Lubanga case at least initially changed the approach of militia leaders to child soldiers. Previously, these leaders openly admitted approximate numbers of children in their ranks and handed children over to the United Nations (UN) Mission in the Democratic Republic of Congo and the UN Children’s Fund as part of the demobilization process. Following the confirmation of charges against Lubanga in early 2007, however, many

mapping atrocities committed in the DRC between 1993 and 2003 (“UN Mapping Report”), while critical of some aspects of the ICC’s performance in Congo, notes that the ICC’s activities in Congo have “contributed to reopening the debate on the fight against impunity in DRC. The tribunal has thus given a great deal of hope to all the victims of the violations, even those committed prior to July 2002. The Court has also inspired some actors in the Congolese judicial system, who have looked to the provisions of the ICC’s Rome Statute for material to supplement and clarify Congolese law in that area.”<sup>18</sup>

So far, however, the ICC’s record in DRC has been mixed, at best. The trials of those DRC suspects in custody still need to be successfully concluded in accordance with international fair trial standards, and the arrest warrant for Bosco Ntaganda still needs to be executed. Investigations in Ituri and the Kivus have not yet demonstrated a coherent strategy for bringing those most responsible to account for the gravest ICC crimes committed in these regions. The ICC’s prosecutorial strategies in DRC have also raised questions as to the ICC’s independence and impartiality. Additional investigations are

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denied having any children under their command. They also negotiated the provision on child soldiers in the November 2006 peace agreement so that it could not be construed as an admission of this practice. Of concern is the fact that children were hidden or chased from the ranks, and some were abandoned rather than being brought to the demobilization ceremonies. In addition, there were threats against child protection workers by armed group leaders following Lubanga’s arrest. These developments pose significant challenges to agencies working for child welfare in the region. But they are also indicative of the ICC’s potential to change the behavior of alleged perpetrators in relation to crimes in its jurisdiction. See discussion in Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years*, July 2008, <http://www.hrw.org/reports/2008/07/10/courting-history-0>, pp. 68-69.

<sup>18</sup> UN Office of the High Commissioner for Human Rights (OHCHR), “Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003,” August 2010, [http://www.ohchr.org/Documents/Countries/ZR/DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf) (accessed July 19, 2011), para. 1022 (unofficial translation from French original) (“UN Mapping Report”). This report comprehensively maps gross human rights violations committed in DRC between 1999 and 2003, therefore including some violations that occurred after July 1, 2002, the date from which the ICC’s jurisdiction in DRC runs. The report points to the need to amplify these national efforts through so-called “complementarity” initiatives undertaken by the ICC, including “exchanges of information, training sessions and possibly joint investigations with Congolese judicial staff.” (Ibid., para. 1024; see also Géraldine Mattioli and Anneke Van Woudenberg, “Global Catalyst for national prosecutions? The ICC in the Democratic Republic of Congo,” in Nicholas Waddell and Phil Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008), pp. 57-61.) We fully agree that national efforts are needed to complement the work of the ICC in bringing those responsible for crimes in Congo to account. To that end, Human Rights Watch has called for the establishment of a specialized mixed court within the Congolese judicial system, which, with international assistance, could prosecute international crimes (including those dating back to before the ICC’s jurisdiction began) and help close the many existing gaps in accountability. We believe international assistance is necessary for a temporary period of time in order to bolster the independence and capacity of national courts to deal in particular with high-level defendants who have escaped prosecution to date. Human Rights Watch has been actively engaged in advocating for the strongest possible legal framework for an independent, mixed court. See “DR Congo: Establishment of a Specialized Mixed Court for the Prosecution of Serious International Crimes Common Position Resulting from the Workshop Held in Goma on April 6-8, 2011,” <http://www.hrw.org/en/news/2011/04/15/dr-congo-establishment-specialized-mixed-court-prosecution-serious-international-cri>; “DR Congo: Pass Mixed Court Law,” Human Rights Watch news release, August 17, 2011, <http://www.hrw.org/news/2011/08/17/dr-congo-pass-mixed-court-law> (calling for removal of the death penalty as the applicable punishment for those convicted of crimes by the mixed court); Letter from Human Rights Watch to Minister of Justice H.E. Luzolo Bambi Lessa, March 14, 2011, <http://www.hrw.org/news/2011/03/14/dr-congo-amend-draft-specialized-chamber-legislation-ensure-meaningful-accountabilit>.

necessary to ensure that the ICC's legacy in DRC will be one of meaningful and credible justice.

## Following the Chain of Command in Ituri

While the ICC's arrest warrants for four leaders of rival ethnic militias in Ituri (and the arrest of three of these leaders, Thomas Lubanga, Germain Katanga, and Mathieu Ngudjolo) are welcome contributions to bringing justice in the DRC, these rebel commanders did not act alone in terrorizing civilians. Our research in Congo, covering the period from 1998 to the present, suggests that key political and military figures in Kinshasa, as well as in Uganda and Rwanda, played a prominent role in creating, supporting, and arming the militias associated with Lubanga, Ntaganda, Katanga, and Ngudjolo, among others.

Uganda, the occupying power in Ituri between August 1998 and May 2003, directed important changes in the armed groups there. This included changing the leadership of one rebel group, supporting the creation of two coalitions of rebel movements and groups, and, as discussed below, supporting the removal of one rebel group in favor of the installation of a rival group in Bunia. Ituri leaders went to Kampala for political negotiations more than 15 times and met frequently with either President Yoweri Museveni or his brother Gen. Caleb Akandwanaho, also known as Salim Saleh.<sup>19</sup> The final report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC ("UN Panel of Experts") concludes that an elite network of Ugandan soldiers, officials, and politicians, local rebels, and international businesses—led by Salim Saleh and former Ugandan army Maj. Gen. James Kazini—plundered the Congo for their own benefit and to finance the war.<sup>20</sup>

The Ugandan army based in Bunia worked together with the UPC to dislodge a rival armed group in August 2002. A large number of civilians were deliberately killed by UPC combatants during the operation. The Ugandan army supported the UPC with heavy weapons and tanks. They also failed in most cases to provide protection to civilians who were being targeted for killing by the UPC in and around the town, despite having large numbers of troops available less than a mile away.<sup>21</sup>

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<sup>19</sup> Human Rights Watch, *Covered in Blood*, p. 7.

<sup>20</sup> UN Security Council, "Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC," S/2002/1146, October 16, 2002, [http://www.smartsanctions.se/stockholm\\_process/reports/congo\\_20021031.pdf](http://www.smartsanctions.se/stockholm_process/reports/congo_20021031.pdf) (accessed August 29, 2011), paras. 97-131. Kazini was killed in Kampala in November 2009. See "Kazini killed," *New Vision*, November 10, 2009, <http://www.newvision.co.ug/D/8/12/700754> (accessed August 12, 2011).

<sup>21</sup> Human Rights Watch, *Covered in Blood*, pp. 19-21

The Ugandan army later turned on its former ally and in March 2003 drove the UPC out of Bunia with the assistance of Lendu militias, including the FNI. One former Lendu leader who participated in the operation said that he and his men had participated at the request of Ugandan army Brig. (now Maj. Gen.) Kale Kayihura (currently the inspector general of police).<sup>22</sup> Hundreds of civilians died in the battle, many of them targeted by the FNI because of their ethnicity.

Ugandan and Lendu forces subsequently attacked other towns as they sought to push the UPC from areas outside of Bunia. One of the towns attacked was Kilo. The Ugandan army planned the assault on Kilo and organized for its ally, the FNI, to take the southern access road into the town, while Ugandan army forces took the western access road. The Lendu forces arrived several hours before the Ugandans, and began killing civilians. After their arrival, Ugandan soldiers tried to stop FNI killings, but they took no significant steps to prevent the FNI from committing further atrocities or punish perpetrators. The Ugandan army forces continued their assault on other UPC held towns and locations in collaboration with the FNI.

During their joint military operations, the Ugandan army maintained responsibility for command control over FNI Lendu forces. Ugandan commanders attempted at times to minimize FNI abuses by organizing joint patrols and requesting that FNI combatants lay down their traditional weapons. But they did not carry out any further steps to deter abuses or ensure accountability for serious abuses.<sup>23</sup> These are just some examples of Ugandan involvement, either directly or indirectly, in war crimes and crimes against humanity committed in Ituri since the beginning of the ICC's jurisdiction in July 2002.<sup>24</sup>

Lubanga's UPC shifted its allegiance from Uganda to Rwanda towards the end of 2002. The UN Panel of Experts reported to the Security Council in November 2003 that UPC commanders reported directly to the Rwandan army high command, including the Rwandan army's Chief of Staff, Gen. James Kabarebe, and the Chief of Intelligence, Gen. Jack Nziza. According to a confidential supplement prepared by the UN Panel of Experts, Rwanda trained more than 100 UPC combatants in the Gabiro training center in Rwanda between September and December 2002, and trained other intelligence officers directly in

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<sup>22</sup> Human Rights Watch, *The Curse of Gold*, pp. 37.

<sup>23</sup> *Ibid.*, pp. 37-40.

<sup>24</sup> The International Court of Justice found that the Ugandan army committed massive human rights violations and grave breaches of international humanitarian law in DRC, and cited some incidents that would fall within the ICC's temporal jurisdiction. See *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, International Court of Justice, Judgment, I.C.J. Reports 2005, p. 168, <http://www.icj-cij.org/docket/files/116/10455.pdf> (accessed September 4, 2011), pp. 239-45.

Bunia. The panel also confirmed that mortars, machine guns, and ammunition were sent from Rwanda to the UPC in Mongbwalu between November 2002 and January 2003.<sup>25</sup> Rwandan support was crucial to the UPC efforts to take Mongbwalu in November 2002 and in attacking and taking the nearby villages of Kilo, Kobu, Lipri, Bambu, and Mbijo in early December 2002 and early 2003. During these military operations, UPC forces slaughtered Lendu and other civilians on account of their ethnicity, chasing down those who fled to the forest, and catching and killing others at roadblocks.<sup>26</sup>

The DRC government in Kinshasa worked closely with the Congolese Rally for Democracy – Liberation Movement (RCD-ML), a rebel group led by Mbusa Nyamwisi based out of Beni in North Kivu. Nyamwisi was later the Congolese minister of foreign affairs and is today the minister for decentralization and urban and regional planning. In September 2002, Ngiti combatants working jointly with the soldiers of RCD-ML systematically massacred at least 1,200 Hema, Gegere, and Bira civilians over a 10-day period in Nyakunde. The dead included many patients and workers at the large church-supported hospital. Nyamwisi was apparently aware of the attack and after a few days sent one of his officers to assess the situation and to help evacuate the doctors and medical staff at the hospital. But those evacuated included only a few Hema, Gegere, or Bira individuals who were able to hide their ethnic identities. After the evacuation, the ethnic slaughter continued and Nyamwisi appears to have taken no further effective steps to halt it.<sup>27</sup>

The availability of political and military support from these external actors significantly increased the military strength of local militias in Ituri and encouraged their leaders to form more structured movements, thereby increasing the death toll and the extent of human rights abuses. In providing political and military support, and in failing to exercise their influence over the groups to bring human rights abuses to an end, we believe political and military figures in Kinshasa, Kampala, and Kigali may share responsibility for the crimes committed in Ituri pursuant to articles 25 and 28 of the Rome Statute on individual and command responsibility, respectively. We have consistently urged the prosecutor to investigate the manner and scope of support provided by these senior officials and, evidence permitting, to bring cases against them for the crimes committed in Ituri.<sup>28</sup>

Senior leaders considered to bear the greatest responsibility are often beyond the reach of national judicial authorities because of their official positions, making the ICC's pursuit of

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<sup>25</sup> Human Rights Watch, *The Curse of Gold*, pp. 24-27.

<sup>26</sup> *Ibid.*, pp. 27-31.

<sup>27</sup> Human Rights Watch, *Covered in Blood*, pp. 30-35.

<sup>28</sup> See, for example, Human Rights Watch, *Courting History*, p. 61.

them all the more essential, and the OTP has, in fact, adopted a policy of focusing on “those bearing the greatest responsibility.”<sup>29</sup> These officials are often not directly involved in committing crimes—they are not the “trigger pullers”—so building cases to show their responsibility is a complex task. Proving the culpability of these actors requires tracing the chain of command to their level of responsibility, often through indirect evidence. While this is a complex task, it is nonetheless one that is central to the successful fulfilment of the ICC’s mandate.

As stated in the UN Mapping Report:

[T]he ICC must address the most serious crimes, which could be difficult to prosecute in the DRC due to their complexity or the impossibility of having the perpetrators extradited. The Prosecutor had declared that once in office he would address the networks that fund and arm the groups involved in the crimes within his mandate. Such an investigation is particularly complex. The people involved in these activities are indirectly implicated in the crimes and benefit from considerable political, military and economic support in their own countries. The same is true of individuals, whether nationals or foreigners, who bear the greatest responsibility for the crimes committed in the DRC but are today outside the territory and hence beyond the reach of national justice. It therefore appears important for the ICC’s Prosecutor to pay particular attention to these cases, if they are not to evade justice.<sup>30</sup>

The OTP did indicate in early 2008 at the time of Ngudjolo’s transfer to The Hague that it “ha[d] completed the first phase of its DRC investigation,” and that “actions of armed groups still operating and reportedly still committing crimes in the East of the DRC, and in particular in the Kivu provinces, and the situation of those individuals who may have played a role in supporting and backing DRC armed groups, are among the principal options upon which the OTP is focusing for this third investigation.”<sup>31</sup> As indicated above, however, it chose the first of these two options for its third DRC investigation. While it is

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<sup>29</sup> OTP, “Draft Policy Paper,” p. 13.

<sup>30</sup> OHCHR, “UN Mapping Report,” para. 1025.

<sup>31</sup> “Statement by the Office of the Prosecutor following the transfer to The Hague of Mathieu Ngudjolo Chui,” OTP press release, February 7, 2008, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/press%20releases/statement%20by%20the%20office%20of%20the%20prosecutor%20following%20the%20transfer%20to%20the%20hague%20of%20mathieu%20ngudjolo%20chui?lan=en-GB> (accessed December 8, 2010). The UN Mapping Report notes that the OTP’s “declaration that the first phase of the DRC investigation has been completed was disappointing, largely because the networks that funded and armed the armed groups in Ituri were not implicated although he had suggested that he would investigate them.” OHCHR, “UN Mapping Report,” para. 1023.

unclear whether the OTP is actively considering an investigation of “individuals who may have played a role in supporting and backing DRC armed groups” in Ituri, many of those we have interviewed in Ituri said that in order for justice to be achieved, the court needs to do just this.<sup>32</sup>

The ICC prosecutor has demonstrated his willingness to tackle crimes committed by government officials in the Darfur, Kenya, and Libya situations, but in the DRC situation—as in Uganda and CAR—there have been no investigations leading to charges against such officials. In these three situations, a total of 11 arrest warrants have been issued, but the targets of these warrants are, in effect, all rebel leaders. The absence of charges against government officials has given credence to the perception that the ICC is powerless to take on those on whom it must rely for its investigations. Even if the problem is one of perception rather than actual compromised independence, it has nonetheless created a profound credibility gap for the ICC in each of the three situations.

We therefore urge the prosecutor to indicate at the earliest opportunity plans for an additional investigation going higher up the chain of command in Ituri—an investigation which would likely need to be continued under his successor—or explain why such an investigation is not being pursued by his office. We discuss Uganda and CAR below.

## Investigating All Parties to the Conflict in the Kivus

Our research in the Kivus indicates that combatants of four main groups have been responsible for war crimes and crimes against humanity in North and South Kivu since 2002:

- Democratic Forces for the Liberation of Rwanda (FDLR);
- Mai Mai (a generic term that includes numerous smaller armed groups who often operate independently in North and South Kivu);
- forces loyal at one time to Laurent Nkunda, including those of the National Congress for the Defence of the People (CNDP), later under the command of Bosco Ntaganda, who is already wanted on an ICC arrest warrant for crimes committed in Ituri and who is now integrated into the Congolese army<sup>33</sup>; and
- Congolese armed forces, the FARDC.

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<sup>32</sup> Human Rights Watch separate interviews with representatives of local nongovernmental organizations, international observers, and local journalists, Bunia, May 1-3, 5, and 7, 2007.

<sup>33</sup> Bosco Ntaganda commanded CNDP troops accused of massacring 150 civilians in Kiwanja in North Kivu province in November 2008. See Human Rights Watch, *Democratic Republic of Congo—Killings in Kiwanja*, pp 8-10. Human Rights Watch also documented a wave of forced recruitment, including of children, by Ntaganda and officers loyal to him between September and December 2010, marking a repeat of the same crimes for which Ntaganda has been sought by the ICC since 2006. See “DR Congo: Rogue Leaders, Rebels Forcibly Recruit Youth,” Human Rights Watch news release, December 20, 2010, <http://www.hrw.org/news/2010/12/20/dr-congo-rogue-leaders-rebels-forcibly-recruit-youth>.

We have urged the OTP to investigate all groups responsible for crimes in the Kivus,<sup>34</sup> but so far, ICC investigations appear, at least from information publicly available, to have focused on crimes committed by the FDLR. As noted above, since opening the Kivus investigation in September 2008, one arrest warrant has been issued leading to the arrest in October 2010 by French authorities of Callixte Mbarushimana.

It is unclear whether the OTP plans additional investigations into crimes committed by other groups in the region. Early statements by the OTP indicated that it “[is] working on all the groups active in the region.”<sup>35</sup> More recent statements have focused exclusively on the FDLR.<sup>36</sup> The OTP has also described its Kivus investigation as an example of “complementarity,” meaning that the OTP is seeking out other judicial authorities to deal with additional cases:

In this DRC 3 case, we are aiming at a coordinated approach whereby national judicial authorities in the region and beyond as appropriate will take over cases in order to ensure that all perpetrators are prosecuted. The possibility for us to transfer information collected in the course of our investigations will depend on the development locally of protection for witnesses and judges.<sup>37</sup>

In addition to encouraging cooperation with authorities in the region, the OTP has referred publicly to its cooperation with German authorities in their cases against the FDLR’s leaders—Ignace Murwanashyaka and Straton Musoni—who had been living in Germany for several years and were arrested by the German authorities on November 17, 2009 on charges including terrorism and crimes against humanity related to their involvement in the FDLR’s activities in eastern Congo.<sup>38</sup> Trial of the two leaders began in Stuttgart in May 2011.<sup>39</sup>

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<sup>34</sup> See, for example, “France: Rwanda Rebel’s Arrest Sends Strong Message: First ICC Warrant for Crimes in Kivus, Eastern Congo,” Human Rights Watch news release, October 11, 2010, <http://www.hrw.org/en/news/2010/10/11/france-rwanda-rebel-s-arrest-sends-strong-message>.

<sup>35</sup> “Statement of Mrs Fatou Bensouda, Deputy Prosecutor of the International Criminal Court to the Sixteenth Diplomatic Briefing,” Brussels, May 26, 2009, [http://www.icc-cpi.int/NR/rdonlyres/302CA5E0-E2B5-4663-96DE-93E55B1FD26C/280424/DP\\_ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/302CA5E0-E2B5-4663-96DE-93E55B1FD26C/280424/DP_ENG.pdf) (accessed December 8, 2010), p. 2.

<sup>36</sup> See, for example, “Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the ICC to the Ninth Session of the Assembly of States Parties,” New York, December 6, 2010, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP9/Statements/ICC-ASP9-statements-LuisMorenoOcampo-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/Statements/ICC-ASP9-statements-LuisMorenoOcampo-ENG.pdf) (accessed July 17, 2011), pp. 2-3.

<sup>37</sup> “Statement of Mrs Fatou Bensouda, Deputy Prosecutor of the International Criminal Court to the Sixteenth Diplomatic Briefing,” p. 2.

<sup>38</sup> See, for example, “Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the ICC to the Ninth Session of the Assembly of States Parties,” p. 3.

<sup>39</sup> See Human Rights Watch, “Germany: Q&A on Trial of Two Rwandan Leaders,” May 2, 2011, <http://www.hrw.org/en/news/2011/05/02/germany-qa-trial-two-rwandan-rebel-leaders>. The trial is the first in Germany

In theory, a division-of-labor approach that makes use of national jurisdictions where they are able and willing to act is consistent with the ICC statute and could bring about prosecution of persons most responsible for the gravest crimes committed in the Kivus. Indeed, the justice needs in DRC are so great that ICC investigations of all parties to the conflict alone will still be inadequate; as discussed above, efforts by relevant national authorities will be required to close gaps in accountability.

As a practical matter, however, this division-of-labor approach—particularly if the OTP were to prosecute perpetrators affiliated with one group, while leaving prosecution of those affiliated with other groups wholly to national authorities—poses serious risks to ensuring meaningful justice in the Kivus and to perceptions of the ICC’s independence and impartiality, and would repeat critical mistakes made in the Ituri investigation.

### *Ensuring Justice for Victims*

The Rome Statute’s complementarity principle—that is, that the ICC is a court of last resort stepping in only where national authorities do not conduct credible investigations and trials—does not require the ICC to refrain from acting just on the prospect that there may be national prosecutions. Indeed, given the opposition to trials of international crimes that often exists among national political leaders, the ICC may need to carry out a significant number of investigations in order to help catalyze sufficient political will for such national trials. If national authorities are aware that the ICC will do only a very limited number of investigations or will not investigate crimes by some groups at all, there is very little incentive for national authorities to expand the circle of accountability. By contrast, investigations at the ICC that expose crime patterns, preserve evidence, and reveal chains of command or authority through targeting those most responsible can help to create conditions more favourable to domestic prosecutions.

The ICC also has a particular duty when acting in a given situation to take on those cases that are least likely to be addressed by national authorities, because, for example, of the high level of defendants, or because of limited national capacity to prosecute serious international crimes. There is good reason to be sceptical that either Rwandan or Congolese authorities will move quickly on accountability for crimes committed in the Kivus, in particular with regard to high-level defendants.<sup>40</sup> As the above statement from the

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under its Code of Crimes Against International Law, adopted in June 2002, which integrates the crimes in the statute of the ICC into German criminal law, and allows German courts to investigate and prosecute them wherever they are committed in the world, because of their sheer gravity.

<sup>40</sup> Alliances between the Congolese and Rwandan governments and the various groups alleged to be responsible for crimes in the Kivus dim prospects for accountability. For example, the Congolese authorities have refused to execute the ICC’s arrest

OTP acknowledges, there also may be significant witness protection concerns that would limit its ability to actively share information from its investigations with authorities in the region. The ICC prosecutor should therefore target all parties to the conflict in the court's investigations in the Kivus in order to ensure that as many victims as possible can see justice for the crimes committed in their communities.

### *Targeting Government Crimes Key to Safeguarding Perceptions of Independence*

Groups alleged to have committed crimes in the Kivus include the Congolese army and forces loyal at one time to Laurent Nkunda, such as those of the CNDP. Nkunda, in turn, enjoyed the backing of the Rwandese authorities.<sup>41</sup> The absence of ICC investigations into government officials or those backed by officials threatens to repeat the mistake the court made in the Ituri investigation by not going higher up the chain of command. That is, it risks reinforcing perceptions that the ICC cannot prosecute officials of those governments on which it relies for cooperation, in turn, compromising perceptions of its independence.

### *Upholding Impartiality*

The experience of the ICC's investigation in Ituri so far suggests that targeting or being seen to target only one of multiple groups responsible for atrocities is a strategy which carries serious risks. Impartiality is essential to the ICC's legitimacy and credibility. The prosecutor's practice of "sequencing" investigations—the completion of field investigations of a particular group, before examining whether other groups warrant investigations—has posed a significant challenge to maintaining perceptions of impartiality.<sup>42</sup>

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warrant for Bosco Ntaganda. While the ICC charges against Ntaganda concern crimes committed during the earlier conflict in Ituri, Ntaganda went on to become Laurent Nkunda's CNDP military chief of staff. Ntaganda ousted Nkunda with Rwanda's support as part of a deal that saw Rwanda arrest Nkunda, whose forces Kabila had been unable to defeat militarily, in exchange for permission to send their troops into Congo to pursue their enemy, the FDLR, and installed himself as the CNDP's military commander. He was rewarded with a position as general in the Congolese army. Kabila has said his liberty is the necessary price for a still-elusive peace in the Kivus. Nkunda, meanwhile, remains under house arrest in Rwanda without access to lawyers; no charges have been brought against him. The DRC requested his extradition to stand trial for war crimes and crimes against humanity, but so far Rwanda has refused. See Human Rights Watch, *Selling Justice Short*, pp. 50-54.

<sup>41</sup> "Final Report of the Group of Experts on the Democratic Republic of the Congo," November 21, 2008, annexed to Letter dated 10 December 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, S/2008/773, [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2008/773](http://www.un.org/ga/search/view_doc.asp?symbol=S/2008/773) (accessed August 12, 2011), paras. 61-68.

<sup>42</sup> OTP, "Draft Policy Paper," pp. 12-13. The term "sequencing" does not appear in recent statements of OTP policy and it seems to have been rejected as a strategy in the Kenya situation, where the prosecutor has simultaneously brought two cases against individuals affiliated with both sides of the 2007-2008 post-election violence. (See part VI below.) In the ICC's second Libya investigation encompassing possible war crimes committed after the suppression of protests sparked civil war, and, looking ahead to a possible investigation in Côte d'Ivoire, it will be important that the ICC prosecutor investigate all parties to the conflict and avoid or explain any sequencing necessitated by resource constraints in a manner that safeguards perceptions of impartiality.

As noted above, in early 2006 Congolese authorities carried out an ICC arrest warrant against Thomas Lubanga, the head of the UPC, a prominent Hema-based militia group. Nearly 18 months later, the ICC arrested Germain Katanga, chief of staff of a Ngiti-based militia (the Ngiti are closely linked to the Lendu). In February 2008, Mathieu Ngudjolo, former chief of staff of the FNI, a Lendu-based militia, was brought into ICC custody.<sup>43</sup>

The arrest of senior officials from both the Hema and Lendu-based militias was an important development. However, field research conducted by Human Rights Watch in the nearly 18-month period following Lubanga's arrest consistently showed that the absence of arrest warrants against Ngiti and Lendu militia leaders led to a strong perception within the Hema community that the ICC is carrying out "selective justice."<sup>44</sup> Perceptions that the ICC is pursuing "selective justice," in turn, may have exacerbated ethnic tensions in Ituri. While the arrests of Katanga and Ngudjolo may have gone some way to correct these perceptions, the limited charges brought against Lubanga and Ntaganda as compared to those brought against Katanga and Ngudjolo continue to raise questions about the impartiality of the court.

Despite numerous allegations documented by Human Rights Watch and others that Lubanga's UPC militia committed a range of horrific crimes, including murder, torture, and rape,<sup>45</sup> the ICC has only charged him and his fellow former UPC member Ntaganda with the war crimes of enlisting and conscripting children under the age of 15 years as soldiers and of using them to actively participate in hostilities in 2002-2003.<sup>46</sup> Meanwhile, the ICC has

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<sup>43</sup> The court subsequently unsealed the OTP's arrest warrant against Bosco Ntaganda, the former chief of military operations for the UPC. See "DR Congo: Suspected War Criminal Wanted," Human Rights Watch news release, April 29, 2008, <http://www.hrw.org/english/docs/2008/04/29/congo18670.htm>.

<sup>44</sup> Human Rights Watch group interview with Hema community leaders, Bunia, May 2, 2007, and separate interviews with Hema community leader, Bunia, May 8, 2007, and Hema intellectual, Goma, May 9, 2007.

<sup>45</sup> See Human Rights Watch, *Covered in Blood; The Curse of Gold*; Letter from the UN Secretary General to the President of the Security Council, "Special Report on the Events in Ituri, January 2002-December 2003," S/2004/573, July 16, 2004, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No4/430/63/IMG/No443063.pdf?OpenElement> (accessed June 2, 2008), paras. 68-70.

<sup>46</sup> According to the OTP, the decision to focus on a limited set of charges for Lubanga was triggered by his possible imminent release from Congolese custody after approximately one year of detention in relation to other charges. But the prosecutor announced the opening of an investigation in Congo in July 2004; Lubanga was arrested in March 2006. After nearly two years of investigation, it is disappointing that there was not enough evidence to include more charges in the initial arrest warrant. Many sources with whom we consulted pointed to the shortage of investigators to gather sufficient evidence of other crimes, among other factors, to explain the limited charges. (Human Rights Watch interviews with former OTP staff, January 2, 2006, May 12, 2007, and May 1, 2008.) Following the arrest and surrender of Lubanga to the court, the prosecutor indicated on several occasions that he wanted to include additional charges against Lubanga, but this has yet to occur. See, for example, Katy Glassborow, "NGOs defend ICC role in Lubanga case," Institute for War and Peace Reporting, December 1, 2006, <http://iwpr.net/report-news/ngos-defend-icc-role-lubanga-case> (accessed June 3, 2008); "International Prosecutor says Congolese warlord may face additional war crimes charges," Associated Press, August 7, 2006, on file with Human Rights Watch.

pursued a more comprehensive set of charges against Katanga and Ngudjolo. This unbalanced approach risks exacerbating existing tensions between the Lendu and Hema communities. Among the Hema, opinion leaders claim that the absence of other charges against Lubanga (and, by implication, Ntaganda) shows that the Office of the Prosecutor was not able to find evidence of other crimes, thus implying their innocence.<sup>47</sup> The ICC's more comprehensive charges against Katanga and Ngudjolo feed the perception that the Lendu committed more crimes, and, hence, carry a larger burden for the horrific abuses committed during the Ituri conflict, a perception that is false and particularly problematic in an environment where ethnic hostilities are longstanding.

There is a sense that the ICC has “broken promises” in Ituri.<sup>48</sup> In the course of our field research, civil society representatives, community leaders, and foreign observers in the region expressed disappointment and disbelief that the prosecutor had at that time only brought charges in relation to the enlistment, recruitment, and use of child soldiers against Lubanga.<sup>49</sup> Our research in Kinshasa revealed a widespread belief that the charges against Lubanga and Ntaganda are too limited and do not reflect the gravity of the crimes that the UPC allegedly committed. The UN Mapping Report criticizes the limited charges in the Lubanga and Ntaganda cases as “fail[ing] to provide justice to the hundreds or even thousands of civilians killed by the UPC and ... not reflect[ing] the true scale of the criminal activities of the accused.”<sup>50</sup>

The extensive delay in moving forward with charges against leaders of the rival militias coupled with this imbalance in charges may have caused irreparable damage to perceptions about the ICC's impartiality in the DRC. The initial and exclusive focus on FDLR

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<sup>47</sup> Human Rights Watch group interview with Hema community leaders, Bunia, May 2, 2007.

<sup>48</sup> In addition, the prosecutor's decision not to pursue additional charges has the consequence of excluding the suffering of Lendu victims: the primary victims of the ICC's allegations against Lubanga are Hema children because of the UPC's practice of enlisting and conscripting children within the Hema community (see Human Rights Watch, *Covered in Blood*, p. 47), while the charges against Katanga and Ngudjolo also relate to crimes allegedly committed against Hema victims. According to the court's caselaw, without a link to the ICC crimes alleged, the Lendu victims of the conflict are not eligible to participate in proceedings. (See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, “Judgment On the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008,” July 11, 2008, <http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF> (accessed July 19, 2011) paras. 57-58.) The exclusion of a significant category of victims from the justice process at the ICC is another factor that seriously undermines the ICC's credibility in Ituri.

<sup>49</sup> Indeed, in 2009, victims participating in the Lubanga trial successfully petitioned the ICC chamber to consider making use of a unique ICC regulation to permit legal recharacterization of the facts presented at trial as sexual slavery and inhuman and/or cruel treatment, in light of the limited charges sought by the prosecutor. But the chamber's 2-1 decision was overruled on appeal. See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court,” December 8, 2009, <http://www.icc-cpi.int/iccdocs/doc/doc790147.pdf> (accessed July 19, 2011).

<sup>50</sup> OHCHR, “UN Mapping Report,” para 1023.

crimes in the Kivus investigation—even if followed subsequently by the investigation of other groups—threatens to compound this damage.

To avoid further undermining perceptions of the ICC’s independence and impartiality in DRC, and to ensure meaningful justice to victims of serious international crimes in the Kivus, we believe it is essential that the OTP devise a strategy to pursue all four groups. This should include senior commanders of the FARDC in collaboration with the specialized mixed court (see above), should that court be established by Congolese law. To the extent that it may not be possible—given the ongoing FDLR investigations—to investigate different groups simultaneously, the prosecutor should formulate plans to explain gaps in investigations against different groups. The prosecutor also should seek to repair some of the damage done by his limited Ituri investigations through opening up the investigation on Bosco Ntaganda, whose arrest warrant only reflects the recruitment of child soldiers in Ituri when he was a senior commander in the UPC and who remains at large. Adding additional charges for crimes Ntaganda committed with the UPC in Ituri, as well as crimes he later committed as chief of staff of the CNDP in the Kivus and currently as a general in the Congolese army, would significantly help to redress the imbalance in both the Kivu and the Ituri investigations.

### III. Uganda

The ICC prosecutor opened an investigation in northern Uganda in 2004 following a referral by Ugandan President Yoweri Museveni at the end of 2003.

The conflict between Ugandan government forces and the Lord's Resistance Army (LRA) led by Joseph Kony has continued at varying levels of intensity for more than 20 years. The conflict has been notable for the LRA's horrific atrocities, but government forces have also committed serious human rights abuses. In Uganda, the LRA has abducted thousands of children, and carried out countless acts of wilful killing, torture, and mutilation as part of its strategy to enforce compliance on the civilian population through terror.<sup>51</sup> It has also extended these tactics across Uganda's borders to neighboring DRC, CAR, and South Sudan.<sup>52</sup> For its part the Ugandan government used a strategy of forced displacement between 1996 and 2008 to cut the LRA off from the civilian population. In doing so it forced its citizens into insecure and squalid camps, where they were exposed to LRA attacks and routine abuses by government forces.<sup>53</sup> Civilians alleged to be "rebel collaborators" were commonly detained and sometimes tortured or severely beaten with sticks as part of the interrogation process.<sup>54</sup>

After approximately a year of investigations, the ICC issued sealed warrants in July 2005 for the arrest of five LRA leaders for war crimes and crimes against humanity: Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen. These arrest warrants have yet to be executed. Lukwiya was killed in 2006 and Otti in 2007. While the LRA has moved out of northern Uganda, as discussed below, Human Rights Watch's research shows that Kony, Odhiambo, and Ongwen, among others, continue to be implicated in atrocities against the civilian populations in northeastern DRC, CAR, and South Sudan.<sup>55</sup>

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<sup>51</sup> See Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, September 2005, <http://www.hrw.org/en/reports/2005/09/19/uprooted-and-forgotten-o>; *Abducted and Abused: Renewed War in Northern Uganda*, July 2003, <http://www.hrw.org/en/reports/2003/07/14/abducted-and-abused-o>; *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda*, September 1997, <http://www.hrw.org/en/reports/1997/09/18/scars-death>.

<sup>52</sup> See, for example, Human Rights Watch, *Trail of Death: LRA Atrocities in Northeastern Congo*, March 2010, <http://www.hrw.org/en/reports/2010/03/29/trail-death-o>; *Christmas Massacres: LRA attacks on Civilians in Northern Congo*, February 2009, <http://www.hrw.org/en/reports/2009/02/16/christmas-massacres-o>.

<sup>53</sup> Human Rights Watch, *Uprooted and Forgotten*, p. 8.

<sup>54</sup> *Ibid.*, pp. 30-32.

<sup>55</sup> See, for example, "US/Central Africa: Protect Civilians From LRA Abuses," Human Rights Watch news release, May 23, 2011, <http://www.hrw.org/en/news/2011/05/23/uscentral-africa-protect-civilians-lra-abuses>; "CAR/DR Congo: LRA Conducts Massive Abduction Campaign," Human Rights Watch news release, August 11, 2010, <http://www.hrw.org/en/news/2010/08/11/cardr-congo-lra-conducts-massive-abduction-campaign>.

The arrest and trial of the three LRA leaders wanted by the ICC is necessary to deliver justice for victims of LRA atrocities in northern Uganda. But the ICC is entirely dependent on states to execute its warrants. We have repeatedly urged regional governments and their international partners, including ICC states parties, the United States, and the United Nations, to help end LRA crimes by putting in place a comprehensive strategy to protect civilians and secure the arrest of its leadership.<sup>56</sup> To date, an effective strategy has yet to materialize.

Until the LRA leaders sought by the ICC are arrested the legacy of the ICC in Uganda will remain in jeopardy.<sup>57</sup> But the implementation of the ICC arrest warrants is not the only factor that will determine whether or not the court will achieve the goal of delivering meaningful justice in Uganda. As we discuss in the following sections the court also needs to address head on two other accountability gaps: justice for crimes committed by Ugandan security forces and for the LRA's new generation of victims in DRC, CAR, and South Sudan. In light of the serious perception problems that have been created in Uganda by the absence of charges against government forces, as we explain below, the prosecutor should now make filling these gaps a priority.

## Investigation of Ugandan Forces

In their counterinsurgency campaigns against the LRA, soldiers of the Uganda Peoples' Defence Forces (UPDF) committed serious human rights violations. While these violations may have been on a considerably lesser scale than those perpetrated by the LRA, government forces carried out deliberate killings, routine beatings, rapes, and prolonged arbitrary detentions of civilians. In addition, through a combination of a government policy of forced displacement and the actions of the LRA, by 2005, nearly the entire rural population of the three Acholi districts of northern Uganda—some 1.9 million people—were living in internally displaced persons camps. For many years, those living in camps were

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<sup>56</sup> See, for example, "US/Central Africa: Protect Civilians From LRA Abuses," Human Rights Watch news release.

<sup>57</sup> The ICC process did serve to give increased national attention to accountability for serious crimes committed during the LRA conflict. During the 2006-2008 Juba peace talks between the government and the LRA, the ICC warrants for the LRA leaders were painted as an obstacle to peace. Pressure to find an alternative to the ICC warrants led to extensive and unprecedented consultations across the country to determine local preferences for justice. While a final peace agreement was never signed, the parties did agree at Juba to the establishment of a special division within the high court as a possible alternative to ICC trial of LRA crimes. The special division—now termed the International Crimes Division (ICD)—was created in 2009, and its first trial—that of LRA fighter Thomas Kwoyelo—began in July 2011 for grave breaches of the Geneva Conventions. A number of challenges must be confronted to ensure that trials conducted by the ICD are credible, fair, and grounded in national and international law. (See Human Rights Watch, "Uganda: Q&A on the trial of Thomas Kwoyelo," July 7, 2011, [http://www.hrw.org/en/news/2011/07/07/uganda-qa-trial-thomas-kwoyelo#\\_Toc297802923](http://www.hrw.org/en/news/2011/07/07/uganda-qa-trial-thomas-kwoyelo#_Toc297802923).) It remains to be seen whether the Ugandan government will demonstrate the political will and commitment to justice necessary to overcome these challenges. But as in Congo, these national efforts are critical to expanding accountability beyond just those individuals sought by the ICC.

without basic services, such as education and health, and the camps were far from secure; they remained vulnerable to attacks and abuses by both the LRA and the Ugandan military.<sup>58</sup>

The brutality of the LRA's attacks notwithstanding, in light of abuses by government personnel and a failure of the government to protect its citizens in the north, it is not surprising that Uganda's referral to the ICC of the situation in 2003 struck many as nothing more than a ploy to strengthen its hand in a rebellion it had been unable to end over nearly two decades.<sup>59</sup> The ICC prosecutor's decision to announce the government's voluntary referral at a joint press conference with President Museveni only fuelled suspicions that the ICC was a tool of the Ugandan government and that it would not ensure impartial accountability.<sup>60</sup> This undermined from the outset perceptions of the ICC's independence and impartiality.

The prosecutor has made some efforts to combat these damaging perceptions, but these efforts have not been sufficient. The prosecutor's decision to open an investigation in Uganda references the "situation in [n]orthern Uganda," as opposed to the "situation concerning the Lord's Resistance Army" as proposed in Uganda's referral, thus clarifying that the scope of the ICC's investigation is not limited to alleged perpetrators from one group.<sup>61</sup> When arrest warrants were issued for the LRA leaders, the prosecutor stressed the impartiality of his investigation and indicated that the collection of information on

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<sup>58</sup> See Human Rights Watch, *Uprooted and Forgotten*, pp. 13, 24-37, 62-71; see also Chris Dolan, *Social Torture, The Case of Northern Uganda 1986-2006* (New York: Berghahn Books, 2009); Sverker Finnstrom, *Living with bad surroundings: war, history, and everyday moments in northern Uganda* (Durham: Duke University Press, 2008).

<sup>59</sup> Chris Dolan, "Understanding War and its Continuation: The Case of Northern Uganda," submitted for the degree of PhD, Development Studies Institute, London School of Economics and Political Science, University of London, 2005, on file with Human Rights Watch, pp. 125-30, 347; Adam Branch, "International Justice, Local Injustice," Summer 2004, <http://www.dissentmagazine.org/article/?article=336> (accessed August 12, 2011). Branch argued that ICC arrest warrants were likely to provide Museveni with "international legitimacy" for the government's counterinsurgency efforts, which, as noted above, were marked by human rights violations. For Dolan, the government of Uganda's resort to the ICC was an extension of its refusal to negotiate an end to the LRA conflict and its strategy to prolong the war for political gain.

<sup>60</sup> See Dolan, "Understanding War and its Continuation," p. 125; see also Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006), pp. 96-102.

<sup>61</sup> See "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC," ICC press release, January 29, 2004, [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord\\_s%20resistance%20army%20\\_lra\\_%20to%20the%20icc?lan=en-GB](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB) (accessed December 13, 2010); "Prosecutor of the International Criminal Court opens an investigation into Northern Uganda," OTP press release, July 29, 2004, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda?lan=en-GB> (accessed December 13, 2010).

allegations against all groups continued.<sup>62</sup> The court's outreach team has worked inside Uganda to correct inaccurate reports in the national media that, for example, the ICC's investigations have exonerated government officials.<sup>63</sup> The court's 2011 budget proposal referred to ongoing investigations in Uganda, "including all crimes within the Court's jurisdiction, regardless of who is alleged to have perpetrated them,"<sup>64</sup> although this language has not been repeated in the court's most recent budget proposal.<sup>65</sup> On occasion—although not in recent years—the prosecutor has also indicated more explicitly his intention to continue to explore or look into UPDF abuses.<sup>66</sup>

For many in Uganda and other observers of the ICC, however, oft-repeated assurances that the Uganda investigations have not ended or are not limited to the LRA arrest warrants have worn thin. The lack of justice for crimes by both sides to the conflict seriously compromises perceptions of the ICC's independence and has undermined its credibility among affected communities in Uganda. Resources allocated to the OTP for the Ugandan situation have dropped from €3.5 million and 27 staff members in 2006 to a request of €111,200 and one staff member for 2012.<sup>67</sup> This does not mean that all investigative activity has ceased, and the OTP has a clear policy of rotating resources between investigations and situations as needed. But the drop in resources, coupled with public statements that investigations are "ongoing" without an accessible and substantive explanation of the status or nature of those investigations, raises questions about the rigor with which allegations against Ugandan forces continue to be pursued by the ICC prosecutor.

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<sup>62</sup> "Statement by the Chief Prosecutor on the Uganda Arrest Warrants," The Hague, October 14, 2005, [http://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO\\_20051014\\_English1.pdf](http://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO_20051014_English1.pdf) (accessed December 13, 2010), p. 2 ("Statement on Uganda Arrest Warrants").

<sup>63</sup> "Corrections Column," *New Vision*, September 1, 2008, copy on file with Human Rights Watch (retracting reporting that ICC investigations had cleared UPDF of crimes in northern Uganda).

<sup>64</sup> Assembly of States Parties of the International Criminal Court (ASP), "Proposed Programme Budget for 2011 of the International Criminal Court," ICC-ASP/9/10, August 2, 2010, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP9/ICC-ASP-9-10-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-10-ENG.pdf) (accessed August 21, 2011), para. 15.

<sup>65</sup> ASP, "Proposed Programme Budget for 2012 of the International Criminal Court," ICC-ASP/10/10, July 21, 2011, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-10-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf) (accessed August 21, 2011) ("Proposed 2012 Budget").

<sup>66</sup> See "Address to the Assembly of States Parties by Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court," November 30, 2007, [http://www2.icc-cpi.int/iccdocs/asp\\_docs/library/asp/Statement\\_Prosecutor\\_en\\_30Nov2007.pdf](http://www2.icc-cpi.int/iccdocs/asp_docs/library/asp/Statement_Prosecutor_en_30Nov2007.pdf) (accessed December 13, 2010), p. 4; *Situation in Uganda*, ICC-02/04, "OTP Submission Providing Information on Status of the Investigation in Anticipation of the Status Conference To Be Held on 13 January 2006," January 11, 2006, <http://www.icc-cpi.int/iccdocs/doc/doc97243.PDF> (accessed July 19, 2011), paras. 7-8; Luis Moreno-Ocampo, "Integrating the Work of the ICC into Local Justice Initiatives," *American University International Law Review*, vol. 21 (2006), p. 501. More recently, in press interviews during the ICC review conference held by ICC states parties in Kampala, the prosecutor did state that his office was open to receiving allegations of crimes committed by Ugandan security forces, provided they related to events after 2002, when the court's jurisdiction in Uganda began. See Samson Ntale, "ICC to investigate Ugandan army," CNN, June 3, 2010, <http://edition.cnn.com/2010/WORLD/africa/06/03/uganda.army.icc> (accessed July 17, 2011).

<sup>67</sup> ASP, "Proposed 2012 Budget," p. 26 table 12.

The OTP can, of course, only bring charges where the evidence permits and where the court's admissibility requirements have been met. There are legitimate questions that may be asked about whether alleged crimes by members of the Ugandan army fall within the ICC's jurisdiction. The OTP's investigations may have revealed, for example, that while crimes were committed by UPDF forces, these crimes fell outside the court's temporal jurisdiction—which began only in 2002, fairly late in the course of the LRA conflict and after some of the most serious abuses allegedly implicating Ugandan forces may have been committed. It is possible that investigations may have suggested that the crimes were insufficiently grave to merit the court's attention.<sup>68</sup>

The prosecutor has pointed to some of these issues in explaining a focus on LRA crimes. For example, the OTP has indicated that crimes committed by the Ugandan forces were of less gravity than those committed by the LRA, and, consistent with its “sequencing” approach, it therefore focused first on LRA crimes.<sup>69</sup> Nonetheless, six years have already passed since the issuance of arrest warrants for the LRA leaders, time enough, it would seem, to reach some determination about whether to pursue charges against Ugandan security forces as well.

In the absence of clearer, more widely available public explanations, it is easy to understand how some have reached the conclusion that the prosecutor has deliberately chosen not to target Ugandan military and civilian authorities for prosecution for political reasons. Considerable damage has been done to the ICC's reputation in Uganda due to these perceptions.<sup>70</sup> The ICC's relative silence about possible investigation of UPDF crimes has not helped to check a prevailing culture of impunity for crimes committed at the hands of government forces, both in northern Uganda and in more recent operations elsewhere.<sup>71</sup>

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<sup>68</sup> A case is inadmissible where it is “not of sufficient gravity to justify further action by the Court.” (Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 17(1)(d).) The OTP has indicated that it looks to the scale, nature, manner of commission, and impact of the crimes in assessing gravity. These criteria are considered jointly, and a gravity determination is reached on the facts and circumstances. OTP, “Draft Policy Paper,” pp. 5-6.

<sup>69</sup> See “Statement on Uganda Arrest Warrants,” pp. 2-3, Luis Moreno-Ocampo, “Integrating the Work of the ICC into Local Justice Initiatives,” p. 501.

<sup>70</sup> For example, representatives of civil society and community-based organizations whom we interviewed in Kampala and northern Uganda in March 2007, consistently criticized the ICC's failure to investigate and prosecute UPDF abuses or to explain why this was not being done. Human Rights Watch separate interviews with seven representatives of Ugandan civil society, Kampala, February 27 and March 1, Gulu, March 7, and Lira, March 11 and 13, 2007.

<sup>71</sup> For Human Rights Watch research on human rights violations committed by Ugandan security forces beyond the LRA context, see Human Rights Watch, “Uganda: Launch Independent Inquiry into Killings,” Human Rights Watch news release, May 8, 2011, <http://www.hrw.org/news/2011/05/08/uganda-launch-independent-inquiry-killings>; *Violence Instead of Vigilance: Torture and Illegal Detention by Uganda's Rapid Response Unit*, March 2011, <http://www.hrw.org/en/reports/2011/03/23/violence-instead-vigilance>; “Uganda: Investigate Use of Lethal Force during Riots,” Human Rights Watch news release, October 1, 2009, <http://www.hrw.org/news/2009/10/01/uganda-troops-killed>.

Significant gaps in accountability for serious crimes by government officials remain, which have done little to reverse a decline in human rights protection.<sup>72</sup> This ongoing and longstanding impunity for high-ranking members of the Ugandan military who have led operations, particularly in the war with the LRA, continues to undermine the reputation of the UPDF as a credible and professional army. For example, there are serious questions as to why Brig. Charles Awany Otema, who currently heads the Fourth Military Division and remains the commander of the Ugandan troops pursuing the LRA outside Uganda, has never faced criminal charges for ordering the extrajudicial killing of a prisoner in Gulu in 2002, despite a finding of the High Court.<sup>73</sup>

Furthermore, it is unclear whether the government will seek to institute prosecutions against state actors for crimes committed in the war in northern Uganda before the newly established International Crimes Division (ICD), although officials have indicated that members of the Ugandan military will not be tried before the ICD, but could face trials before the military courts.<sup>74</sup>

Human Rights Watch has repeatedly urged the OTP to provide a public explanation of the status of its investigations into the actions of UPDF forces.<sup>75</sup> While many aspects of investigations are confidential, it should be possible to share basic information about efforts to investigate allegations of UPDF abuses. If the OTP has reached the conclusion that crimes falling within the ICC's jurisdiction were not committed by government forces in northern Uganda, or that there are other legal justifications for not pursuing cases against government officials or forces, this should be made clear. No amount of explanation can eliminate all criticism, but if a decision not to pursue charges is seen to flow clearly from

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unarmed-people-riot-period; *Open Secret: Illegal Detention and Torture by the Joint Anti-terrorism Task Force in Uganda*, April 2009, <http://www.hrw.org/en/reports/2009/04/08/open-secret-0>; *Get the Gun: Human Rights Violations by Uganda's National Army in Law Enforcement Operations in Karamoja Region*, September 2007, <http://www.hrw.org/en/reports/2007/09/10/get-gun>.

<sup>72</sup> President Museveni often asserts that 22 Ugandan soldiers have been executed for killings and 127 have been condemned to death. (See, for example, Speech by H.E. Yoweri Kaguta Museveni, President of the Republic of Uganda, at the Opening Ceremony of the International Criminal Court Review Conference, May 31, 2010, [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-statements-Museveni-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-Museveni-ENG.pdf) (accessed August 12, 2011), p.2.) Human Rights Watch has inquired with the UPDF Office of Legal Counsel about details of those cases, mostly recently on July 5, 2011. No information has so far been forthcoming.

<sup>73</sup> See Human Rights Watch, *Abducted and Abused*, p. 42; *Mao vs. The Attorney General*, Constitutional Petition 9 of 2002, Republic of Uganda, March 17, 2003, [http://www.kituoachakatika.org/index2.php?option=com\\_docman&task=doc\\_view&gid=511&Itemid=36](http://www.kituoachakatika.org/index2.php?option=com_docman&task=doc_view&gid=511&Itemid=36) (accessed August 12, 2011).

<sup>74</sup> See Paul Amuro, "Local War Crimes Court Excludes UPDF from Trial," *The Monitor*, September 18, 2008 <http://allafrica.com/stories/200809180042.html> (accessed August 12, 2011).

<sup>75</sup> See, for example, Human Rights Watch, *Courting History*, p. 42; *Benchmarks for Justice for Serious Crimes in Northern Uganda*, September 2, 2008, <http://www.hrw.org/en/news/2008/09/01/benchmarks-justice-serious-crimes-northern-uganda>, pp. 24-25, 33, 44; *Uprooted and Forgotten*, p. 57.

objective criteria it could help rehabilitate perceptions of the ICC's independence. Clarity on the ICC's plans regarding UPDF abuses could also help bring adequate pressure to bear on the national authorities to provide transparent accountability for what are well-documented human rights violations, even if they fall outside the scope of the ICC's jurisdiction. Indeed, if the OTP decides not to proceed with UPDF cases, but collects evidence of crimes that could be prosecuted domestically, it should consider sharing that information with the ICD or other relevant national authorities. While this should be subject to important safeguards, including ensuring the safety of witnesses, and should extend to defense counsel, it could provide an important stimulus for national proceedings.<sup>76</sup>

## Responding to New Victims of the Lord's Resistance Army

The LRA has committed crimes beyond the borders of northern Uganda. For a significant part of its history, the LRA had frequently moved between northern Uganda and southern Sudan, carrying out attacks in both countries. In 2005 and 2006, renewed Ugandan military campaigns compelled the LRA to relocate its forces from Uganda and southern Sudan to the remote region of the Garamba National Park in northeastern Congo. The LRA has since become a regional threat operating in the remote border areas between South Sudan, DRC, and CAR.

The LRA has retained its ability to carry out devastating and widespread attacks against civilian populations. Since September 2008, the LRA has killed nearly 2,400 civilians and abducted about 3,400 others, according to documentation by Human Rights Watch and the UN. These atrocities are continuing in northern DRC, eastern CAR, and South Sudan. In the first four months of 2011, the LRA carried out at least 120 attacks, killing 81 civilians and abducting 193, many of them children. Ninety-seven of these attacks were in Congo, representing nearly half the total number of attacks reported in 2010. More than 38,000 Congolese civilians were newly displaced in 2011 due to LRA attacks, adding to the hundreds of thousands in the region who had already fled their homes.<sup>77</sup>

Civil society groups in LRA-affected areas in Congo and victims of LRA crimes have expressed a strong desire to see LRA commanders brought to account.<sup>78</sup> So far these demands have largely gone unanswered.<sup>79</sup>

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<sup>76</sup> The OTP has already indicated that it has provided cooperation to the prosecution in the Kwoyelo case. See OTP, "Weekly Briefing," November 23-29, 2010, <http://www.icc-cpi.int/NR/rdonlyres/7105B39A-2F30-43FF-9222-D7349BF15502/282732/OTPWBENG.pdf> (accessed August 12, 2011).

<sup>77</sup> See "US/Central Africa: Protect Civilians from LRA Abuses," Human Rights Watch news release.

<sup>78</sup> See, for example, Human Rights Watch, *Trail of Death*, pp. 18, 48-51.

The ICC prosecutor should investigate these recent crimes with a view to expanding the charges for those LRA leaders already subject to ICC arrest warrants and to bringing charges against additional commanders, evidence permitting. Some may query whether conducting additional investigations while Kony remains at large represents the best use of the ICC's resources. But new charges are necessary to ensure that ICC cases remain representative of those most responsible for the most serious crimes committed by this group. Massacres committed in recent years in DRC are among the worst in the LRA's bloody history. New commanders also have emerged within the LRA's leadership structure. In addition to Dominic Ongwen, our research implicates Lt. Col. Binansio Okumu, also known as Binany, and a commander known as Obol in a four-day attack in December 2009 that killed 321 civilians and resulted in the abduction of more than 250.<sup>80</sup> According to Ugandan army officials, Lt. Col. Charles Arop commanded the group of LRA combatants that attacked the town of Faradje on December 25, 2008, killing at least 143 people, mostly men, and abducting 160 children and dozens of adults.<sup>81</sup>

While there may be some national options through the Congolese or Ugandan courts to bring prosecutions against LRA commanders, there are serious capacity limits in both jurisdictions.<sup>82</sup> The ICC is uniquely positioned to provide accountability for crimes crossing international borders, and to ensure that a new generation of LRA victims have access to justice.<sup>83</sup>

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<sup>79</sup> As indicated above, the trial of Thomas Kwoyelo, an LRA commander who was captured by Ugandan forces in DRC in early 2009, has recently begun in Uganda. But the charges are for crimes committed in Uganda, and not those committed more recently in Congo. See Human Rights Watch, "Uganda: Q&A on the Trial of Thomas Kwoyelo."

<sup>80</sup> Human Rights Watch, *Trail of Death*, pp. 42-44.

<sup>81</sup> See Human Rights Watch, *The Christmas Massacres*, pp. 34-38. In 2009, Arop surrendered to Ugandan soldiers and was transferred to Uganda. He has since been amnestied and is fighting against the LRA in UPDF operations. See Ledio Cakaj, "Too Far from Home: Demobilizing the Lord's Resistance Army," *Enough*, February 2011, <http://www.enoughproject.org/files/Too%20Far%20From%20Home%20FINAL.pdf> (accessed August 22, 2011), p. 9 n. 20.

<sup>82</sup> Human Rights Watch, *Trail of Death*, pp. 45-52.

<sup>83</sup> If the parameters of existing referrals for Uganda, CAR, and DRC are insufficient to support these investigations, the prosecutor could seek authorization from the pre-trial chamber to open a new investigation on his own motion. These three states are party to the ICC, while crimes committed in South Sudan could be investigated where committed by nationals of ICC state parties. See Rome Statute, arts. 12(2)(b), 13(c), 15.

## IV. Central African Republic

As in DRC and Uganda, the ICC prosecutor opened an investigation in the Central African Republic following a referral by the government. From the prosecutor's announcement at the time the investigation was opened in 2007, it was clear that he intended to focus on crimes committed during the 2002-2003 coup led by François Bozizé, the army chief of staff of then-President Ange-Félix Patassé. Bozizé made the referral to the ICC prosecutor after he took power following the success of his coup.<sup>84</sup>

The ICC investigation in CAR has led to just one arrest warrant, for Jean-Pierre Bemba Gombo.

Bemba, a Congolese national and former vice-president of the DRC, was in the CAR after Patasse invited him and his Ugandan-backed Movement for the Liberation of Congo (MLC) forces, as well as Chadian mercenaries, to put down Bozizé's coup attempt. In CAR, Bemba's MLC forces allegedly carried out mass rapes, killings, and looting against the civilian population. Bemba was arrested in Belgium in 2008 and his trial began in The Hague in November 2010.<sup>85</sup>

Repeated questions have been raised about the OTP's decision not to charge Bemba with crimes committed by his forces in Congo, where MLC forces also allegedly carried out widespread attacks on the civilian population.<sup>86</sup> Indeed, two victims petitioned the pre-trial chamber to review the prosecutor's decision not to charge Bemba with crimes

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<sup>84</sup> "Prosecutor opens investigation in the Central African Republic," OTP press release, May 22, 2007, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB> (accessed July 17, 2011). The press release announcing the decision to open an investigation said investigations would focus on crimes allegedly committed in 2002 and 2003 in the context of the armed conflict between the government and rebel forces. It also indicated that the OTP was also monitoring violence and crimes being committed in the northern areas of the country bordering Chad and Sudan. (Ibid.) Human Rights Watch's research there in 2007 indicates that government troops—particularly those in the presidential guard—have carried out hundreds of unlawful killings and have burned thousands of homes during the counterinsurgency campaign there. This campaign forced tens of thousands to flee their villages. (See Human Rights Watch, *State of Anarchy: Rebellion and Abuses against Civilians*, September 2007, <http://www.hrw.org/en/reports/2007/09/13/state-anarchy>, pp. 45-69, 84-90.) In a letter to President Bozizé, the prosecutor indicated that his government needs to pay "sustained attention" to the acts of violence committed in the north. This prompted an August 2008 letter from Bozizé to the UN secretary-general asking the United Nations to intercede in any possible ICC investigations of crimes in the north of the country, on the basis that the courts of the Central African Republic are competent to try these crimes. (Letter from Francois Bozizé to Ban Ki-moon, August 1, 2008, on file with Human Rights Watch.) If no action is taken, however, and the crimes are sufficiently grave to fall under the ICC's jurisdiction, ICC intervention may be appropriate.

<sup>85</sup> See Human Rights Watch, "ICC: Q&A on the Trial against Jean-Pierre Bemba," November 2010, [http://www.hrw.org/en/news/2010/11/18/bemba-qa#\\_Toc278190573](http://www.hrw.org/en/news/2010/11/18/bemba-qa#_Toc278190573).

<sup>86</sup> See Human Rights Watch, *Covered in Blood*, pp. 36-38.

committed in DRC. Their petition cites the prosecutor's reliance on evidence during pre-trial proceedings to confirm charges against Bemba showing that forces under his command were responsible for atrocities during an October 2002 campaign in Ituri. This was evidence the prosecutor introduced to show that a pattern of atrocities in DRC meant that Bemba knew or should have known that his forces would commit similar crimes in CAR.<sup>87</sup> The petition was denied on the ground that the prosecutor had not taken an affirmative decision against the investigation of Bemba for crimes committed in DRC, and therefore there was no decision for the pre-trial chamber to review.<sup>88</sup> However, it demonstrates the strong interest among victims in seeing justice for these crimes.<sup>89</sup>

Until Patasse's death in April 2011, many also questioned the prosecutor's decision not to bring charges against him in addition to those brought against Bemba.<sup>90</sup> Indeed, during Bemba's trial and shortly before Patasse's death, the CAR Prosecutor-General Firmin Feindiro testified that a national investigation had implicated both Bemba and Patasse, although neither was tried in CAR.<sup>91</sup>

Human Rights Watch did not document human rights violations committed during the 2002-2003 rebellion in CAR, though we did document abuses by MLC troops in Congo. We do not have first-hand knowledge of the crime pattern or the identity of possible perpetrators. But, as discussed above, the OTP has an obligation with regard to each situation in which it intervenes to put in place an investigative and prosecutorial strategy designed to bring to trial those most responsible for the most serious crimes on charges representative of the underlying patterns of ICC crimes. It is hard to see how this goal could be achieved in the case of CAR through the issuance of just one arrest warrant.

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<sup>87</sup> *Situation in the Democratic Republic of Congo*, ICC-01/04, "Demande du représentant legal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l'article 28-a du Statut pour les crimes dont ses troupes sont présumées coupables en Ituri," June 28, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc902732.pdf> (accessed July 19, 2011).

<sup>88</sup> *Situation in the Democratic Republic of Congo*, ICC-01/04, "Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed," October 25, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc957796.pdf> (accessed July 19, 2011).

<sup>89</sup> See "Victims question the ICC about lack of proceedings against Jean-Pierre Bemba for crimes committed in the DRC: Judges dismiss the request considering that the Prosecutor's investigation is still open," International Federation for Human Rights press release, November 3, 2010, <http://fidh.org/Victims-question-the-ICC-about-lack-of> (accessed December 9, 2010).

<sup>90</sup> See, for example, Katy Glassborow, "Locals Want Patasse to Face Justice," Institute for War and Peace Reporting, May 18, 2009 <http://iwpr.net/report-news/locals-want-patasse-face-justice> (accessed July 17, 2011).

<sup>91</sup> Wakabi Wairagala, "Central African Probe Found Patassé And Bemba Culpable For Bangui Crimes," April 8, 2011, [www.bembatrial.org](http://www.bembatrial.org), <http://www.bembatrial.org/2011/04/central-african-probe-found-patasse-and-bemba-culpable-for-bangui-crimes/> (accessed July 17, 2011).

In addition, there is a perception in the DRC that the prosecutor targeted Bemba because he wanted the cooperation of Congolese President Joseph Kabila in the ICC's investigations in DRC. Bemba was Kabila's chief political rival in DRC at the time of his arrest, which closely followed attacks against him and his supporters in Kinshasa. The damage to perceptions of the ICC's independence and impartiality has been compounded by the absence, so far, of ICC scrutiny of crimes committed by Bozizé's own troops. This echoes the shortcomings of the ICC's approach to DRC and Uganda, where security forces affiliated with the referring government appear to have avoided ICC scrutiny.

The case against Bemba for crimes committed in CAR is important in its own right. But viewed in the context both of other crimes committed in CAR and regional dynamics, it has added to concerns about the court's independence and impartiality, and its commitment to do meaningful justice for crimes committed in both CAR and DRC. We therefore recommend that the OTP revisit its strategy for CAR and begin additional investigations, or communicate clearly to the affected communities and the broader public its reasons for concluding that no further cases should be brought at this time.

## V. Darfur

Since early 2003, Sudanese government forces and militia forces known as Janjaweed have committed crimes against humanity and war crimes on a massive scale in the context of counterinsurgency operations against rebel movements in Darfur, Sudan's western region bordering Chad.<sup>92</sup> More than two million of Darfur's estimated population of six million people have been forcibly displaced from their homes since February 2003 as a result of a government-supported campaign of "ethnic cleansing" carried out in the context of an internal armed conflict. Despite overwhelming evidence of the Sudanese government's role in committing atrocities alongside allied Janjaweed militia, the government has denied its role in the abuses and minimized the scale of the crisis. While the conflict has subsided, since December 2010, a surge in government-led attacks on populated areas and a campaign of aerial bombing have killed and injured scores of civilians, destroyed property, and displaced more than 70,000 people, largely from ethnic Zaghawa and Fur communities linked to rebel groups.<sup>93</sup>

The UN Security Council referred the situation in Darfur to the ICC in March 2005, allowing the ICC to assume jurisdiction even though Sudan is not a party to the court. After determining that the crimes in Darfur fell under ICC jurisdiction, the prosecutor opened his investigations in June 2005.

The OTP has since conducted two investigations of government officials leading to four arrest warrants: two warrants for Sudanese President Omar Hassan Ahmad al-Bashir on charges of genocide, war crimes, and crimes against humanity; and one warrant each for Ahmed Muhammad Haroun, governor of Southern Kordofan state, and Ali Muhammad Ali Abd-Al-Rahman (Ali Kosheib), a Janjaweed militia leader on charges of war crimes and crimes against humanity. The OTP has also conducted an investigation into the rebel attack on an African Union peacekeeping mission in the town of Haskanita, leading to three summonses to appear for rebel leaders Bahr Idriss Abu Garda, Abdallah Banda Abakaer Nourain, and Saleh Mohammed Jerbo Jamuson. All three have appeared voluntarily in The Hague to respond to the allegations against them, although a pre-trial

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<sup>92</sup> See, for example, Human Rights Watch, *"They Shot at Us as We Fled": Government Attacks on Civilians in West Darfur in February 2008*, May 2008, <http://www.hrw.org/reports/2008/05/18/they-shot-us-we-fled-o>; *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, May 2004, <http://www.hrw.org/sites/default/files/reports/sudano504full.pdf>.

<sup>93</sup> See Human Rights Watch, *Darfur in the Shadows: The Sudanese Government's Ongoing Attacks on Civilians and Human Rights*, June 2011, <http://www.hrw.org/node/99396>.

chamber declined to confirm the charges against Abu Garda.<sup>94</sup> Trial preparations are underway in the case against Banda and Jerbo.

Following the arrest warrants (initially issued as summonses) for Haroun and Kosheib, Human Rights Watch urged the ICC prosecutor to continue his investigation and investigate those in the military and political hierarchy responsible for the most serious atrocities in Darfur.<sup>95</sup> According to our research, responsibility for widespread and systematic abuses in Darfur lay at the highest level. Senior Sudanese policymakers played a key role in initiating and implementing a campaign that involved the use of civilian and military officials to recruit, support, and coordinate the Janjaweed militias.<sup>96</sup>

The first arrest warrant for al-Bashir was issued in 2008 and represented the prosecutor's commitment to pursuing responsibility up the chain of command. Human Rights Watch's research indicated that al-Bashir, as commander-in-chief of the Sudanese Armed Forces, played a pivotal leadership role in the military campaign in Darfur. His public statements were precursors to military operations and to peaks in abuses by Sudanese security forces. There are indications that they echoed private directives given to officials of the civilian administration, the military, and the security services.<sup>97</sup>

However, the arrest warrants for al-Bashir have failed to capture the extent of senior leadership involvement in the crimes. In addition to al-Bashir, we recommended a number of other senior officials should be investigated, including Second Vice-President Ali Osman Taha, Maj. Gen. Abduraheem M. Hussein, Maj. Gen. Bakri Hassan Salih, Gen. Salah Abdallah Ghosh and Abbas Arabi.<sup>98</sup>

As with the CAR situation, targeting a single senior individual—even where that individual is the head of state—does not secure the goal of accountability for those most responsible for grave crimes committed in Darfur. Moving from individuals at the mid-level of

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<sup>94</sup> *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, “Decision on the Confirmation of Charges (Public Redacted Version),” February 8, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf> (accessed August 29, 2011).

<sup>95</sup> See “ICC Prosecutor Identifies First Darfur Suspects,” Human Rights Watch news release, February 27, 2007, <http://www.hrw.org/news/2007/02/27/icc-prosecutor-identifies-first-darfur-suspects>; “Q & A: ICC Prosecutor Identifies Suspects in First Darfur Case,”

February 26, 2007, <http://www.hrw.org/news/2007/02/25/q-icc-prosecutor-identifies-suspects-first-darfur-case>.

<sup>96</sup> See Human Rights Watch, *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, December 2005, <http://www.hrw.org/en/reports/2005/12/08/entrenching-impunity>, pp. 58-64.

<sup>97</sup> *Ibid.*, p. 58.

<sup>98</sup> Human Rights Watch named individuals potentially liable for crimes in Darfur in its report, *Entrenching Impunity*, and recommended these individuals for investigation by the ICC. (See *ibid.*, pp. 87-89.) But additional individuals not named in that report should also be investigated and prosecuted for crimes in Darfur.

responsibility, such as Haroun and Kosheib, directly to al-Bashir without enlarging the circle of accountability does not reflect a coherent strategy to bring to trial those most responsible for the grave crimes in Darfur. This, in turn, calls into question the credibility of the OTP's strategy in Sudan.

In his most recent briefing to the Security Council on the Darfur situation, the ICC prosecutor indicated that his office is considering presenting a fourth Darfur case to the ICC judges following completion of investigations in October 2011.<sup>99</sup> This is a welcome development and demonstrates the prosecutor's commitment to expanding the scope of those held responsible for atrocities in Darfur. We urge the prosecutor to follow through on this commitment and seek to bring additional cases against senior government officials, evidence permitting.

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<sup>99</sup> "Thirteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)," June 8, 2011, <http://www.icc-cpi.int/NR/rdonlyres/39DF4E29-7AD6-4348-B261-8270F9BE21F5/283420/UNSCreportDarfurJune2011ENGfinal.pdf> (accessed July 17, 2011), para. 85

## VI. Kenya

ICC investigations in Kenya—opened in March 2010—have focused on crimes committed in three of the country’s eight provinces during violence that followed Kenya’s presidential election in December 2007. Violence broke out amidst widespread allegations that the election was rigged in favor of the incumbent president, Mwai Kibaki. Human Rights Watch researchers documented several patterns of abuse, including extrajudicial killings and excessive use of force by the police, and ethnic-based attacks and reprisals by militia groups on both sides of the political divide.<sup>100</sup> Over 1,100 people were killed<sup>101</sup> and at least 650,000 were forced from their homes.<sup>102</sup>

The ICC investigation is the first serious effort to bring to account those responsible for post-election violence in Kenya. Perpetrators of past episodes of election-related violence—in 1992 and 1997—went unpunished.<sup>103</sup> The ICC investigation in Kenya also marks the first use of the prosecutor’s “*proprio motu*” power, that is, his power to open an investigation on his own motion with the consent of an ICC pre-trial chamber under article 15 of the Rome Statute. Kenya ratified the Rome Statute in 2005, and, at one point, Kenyan officials committed to try those responsible for the 2007-2008 violence nationally or to refer the situation to the ICC.<sup>104</sup> When Kenya’s leaders failed to make good on either promise, the ICC prosecutor stepped in.<sup>105</sup>

Investigations have resulted in summonses to appear for six individuals on charges of crimes against humanity: William Samoei Ruto, Henry Kiprono Kosgey, Joshua arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali.<sup>106</sup> All six

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<sup>100</sup> See Human Rights Watch, *Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Governance*, April 2008, <http://www.hrw.org/en/reports/2008/03/16/ballots-bullets>.

<sup>101</sup> Report of the Commission of Inquiry into the Post-Election Violence, October 15, 2008, <http://www.dialoguekenya.org/docs/PEVReport1.pdf> (accessed July 17, 2011), pp. 384 (“CIPEV Report”).

<sup>102</sup> See Ministry of State for Special Programmes, Office of the President, “Progress Report on IDP Resettlement as at 18<sup>th</sup> July, 2011,” on file with Human Rights Watch, p.1 (663,921 persons displaced). The CIPEV report initially estimated that approximately 350,000 persons were displaced in the violence. (CIPEV Report, p. 351.) This number corresponded to those displaced into camps according to the Ministry of State for Special Programmes, in addition to the 313,921 people the ministry estimates were displaced and integrated into other communities.

<sup>103</sup> See CIPEV Report, pp. 445-454; Human Rights Watch, *Ballots to Bullets*, pp. 17-19.

<sup>104</sup> Agreed Minutes of the meeting between Prosecutor Moreno-Ocampo and the delegation of the Kenyan Government, The Hague, July 3, 2009, <http://www.icc-cpi.int/NR/rdonlyres/6D005625-2248-477A-9485-FC52B4F1F5AD/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf> (accessed July 17, 2011).

<sup>105</sup> *Situation in Kenya*, ICC-01/09, “Request for authorization of an investigation pursuant to Article 15,” November 26, 2009, <http://www.icc-cpi.int/iccdocs/doc/doc785972.pdf> (accessed July 17, 2011).

<sup>106</sup> *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,”

appeared voluntarily in The Hague during initial proceedings in the case in April 2011, and hearings to determine whether to send the cases to trial are expected to be held in September 2011.

The ICC's Kenya investigations have diverged in significant ways from the prosecutor's practice in other situations. First, since this is the prosecutor's first *proprio motu* investigation, he has had less work to do in Kenya than in the self-referred DRC, Uganda, and CAR situations in order to establish the court's independence from government authorities. Second, the ICC prosecutor seems to have rejected a "sequencing" approach. The six individuals who have been summoned include those affiliated with both Kibaki's Party of National Unity (PNU) (Muthaura, Kenyatta, and Ali) and the Orange Democratic Movement (ODM) (Ruto, Kosgey, and Sang), the political party of Kibaki's rival for the presidency, Raila Odinga. Third, prosecutions have targeted senior leaders from the outset. Ruto and Kosgey are senior ODM members, as well as members of parliament, and, until recently, cabinet ministers in the PNU-ODM coalition government. In the PNU case, Muthaura is the head of the public service and secretary to the cabinet, while Kenyatta is the deputy prime minister and finance minister. Ali was the Kenyan police commissioner at the time of the violence.

By targeting government actors, including two leading contenders in the next presidential elections, Kenyatta and Ruto, the prosecutor reinforced perceptions of independence. And in his even-handed examination of crimes committed on both sides of the political divide, he has reinforced perceptions of impartiality. According to a poll conducted in December 2010, an overwhelming majority (78 percent) of Kenyans supported the ICC's investigations.<sup>107</sup> While this poll was conducted before or at the same time as the prosecutor's December request for summonses, the OTP had stressed from the outset plans to investigate both senior ODM and PNU leaders.<sup>108</sup> This may have contributed to the high level of support recorded at that time. The level of support recorded has since dropped to 51 percent. Those conducting the poll attribute this drop to a number of factors,

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March 8, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf> (accessed July 17, 2011); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali," March 8, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf> (accessed July 17, 2011).

<sup>107</sup> The Kenya National Dialogue and Reconciliation Monitoring Project, "National Baseline Survey April 2011 Report," (accessed July 17, 2011), <http://www.dialoguekenya.org/docs/Annex%201.pdf>, p. 7.

<sup>108</sup> See, for example, OTP, "Weekly Briefing," March 30-April 5, 2010, Issue no. 31, [http://www.icc-cpi.int/NR/rdonlyres/1BDCAFF0-3766-4AB1-9F84-5AA03A28B9CB/281722/Issue\\_31ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/1BDCAFF0-3766-4AB1-9F84-5AA03A28B9CB/281722/Issue_31ENG.pdf) (accessed July 17, 2011).

including public fatigue with the length of proceedings, the failure to bring additional perpetrators to account, and the politicization of the ICC process within Kenya.<sup>109</sup>

Seeing the existing cases through to their completion could help turn the page on Kenya's culture of impunity. But there is still more work for the OTP to do to ensure that the ICC lives up to its responsibilities in Kenya. More investigations are needed to deliver justice for the most serious crimes representative of underlying patterns of ICC crimes and which target those least likely to be held to account domestically. As discussed further below, this means the ICC prosecutor should continue investigations into crimes committed by the Kenyan police during the post-election violence. It also means the ICC prosecutor should consider extending investigations to crimes against humanity and war crimes committed by a local militia and the Kenyan security forces in Mt. Elgon, violence that shares many of the hallmarks of the post-election violence currently under investigation.

## Ensuring Accountability for Police Abuses

A significant number of killings during the 2007-2008 post-election violence are alleged to have been committed by the police. According to the Commission of Inquiry into the Post-Election Violence (also known as the Waki Commission after its chair, Justice Philip Waki), the police killed 405 out of a total of 1,100 persons killed during the violence and injured an additional 557.<sup>110</sup>

Demand in Kenya for police accountability is high. Victims of the post-election violence petitioned the pre-trial chamber, during its deliberations on whether to authorize an investigation, to make the police and “police brutality” or “shootings by the police” targets of the ICC's investigation.<sup>111</sup>

Accountability of the police has a larger significance for Kenya and the Kenyan public, however, because of a history of longstanding police criminality beyond the context of the post-election violence. Extrajudicial executions by the police are endemic. The UN special rapporteur on extrajudicial, arbitrary or summary executions during a 2009 mission collected evidence of the “existence of systematic, widespread, and carefully planned

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<sup>109</sup> The Kenya National Dialogue and Reconciliation Monitoring Project, “Review Report,” June 2011, <http://www.dialoguekenya.org/docs/June2011ReviewReport.pdf> (accessed August 12, 2011), para. 41. Dissatisfaction with the ICC is higher in the home regions of the six individuals summoned by the ICC. *Ibid.* para. 42.

<sup>110</sup> CIPEV Report, p.336.

<sup>111</sup> Victim Participation and Reparations Section, ICC, “Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exp-Corr) and annexes 1 and 5,” (Public Redacted Version), ICC-01/09-17-Corr-Red, March 29, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc853218.pdf> (accessed July 19, 2011), para. 127.

extrajudicial executions undertaken on a regular basis by the Kenyan police,” including but not limited to “death squads” specially constituted to kill members of a criminal organization, known as the Mungiki.<sup>112</sup>

The special rapporteur also documented the absence of accountability for police shootings. As he put it, “the Kenyan police are a law unto themselves and they kill often and with impunity, except in those rare instances where their actions are caught on film or otherwise recorded by outsiders in ways that cannot be dismissed.”<sup>113</sup> Our own research suggests that police shootings resulting in injury or death during the post-election violence were rarely investigated, even when reported to the police.<sup>114</sup> In light of this longstanding impunity for police violence, it is particularly important that, in addition to senior political and business leaders, members of the police are brought to account for crimes committed during the post-election violence.

Bringing Kenyan police before the ICC presents clear challenges. Individual acts of police brutality do not necessarily fall within the court’s jurisdiction. Rather, they must amount to crimes against humanity, which requires that they be committed as part of a widespread or systematic attack on a civilian population, pursuant to a state or organizational policy. Human Rights Watch documented a selective or partial police response to the violence. Police in some areas were willing to shoot to kill without justification, while in other areas the police stood by and failed to prevent attacks even in circumstances where they might have been justified in using lethal force to protect lives.<sup>115</sup> While this uneven response may have many different sources, it might reflect a policy by the police to commit unlawful killings and refuse to protect citizens from violence. This could satisfy the requirement under the Rome Statute definition of a crime against humanity that attacks against a civilian population further a state or organizational policy.<sup>116</sup> We recommended further investigation of a connection between PNU or ODM leaders and the response of the police.

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<sup>112</sup> UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions, “Mission to Kenya 16-25 February 2009,” February 25, 2009, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=8673&LangID=E> (accessed July 17, 2011) (announcing preliminary findings). For the final report of Alston’s mission, see UN Human Rights Council, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Kenya” A/HRC/11/2/Add.6, May 26, 2009, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.6.pdf> (accessed September 4, 2011).

<sup>113</sup> UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions, “Mission to Kenya 16-25 February 2009”.

<sup>114</sup> Human Rights Watch interviews, Kisumu, Eldoret, Mombasa, and Nairobi, May 2011.

<sup>115</sup> Human Rights Watch, *Ballots to Bullets*, pp. 59-61.

<sup>116</sup> Rome Statute, articles 7(1) and (2).

In a welcome move, the OTP did signal early on that it would examine police violence.<sup>117</sup> It attempted to interview nine senior police officials as part of the investigation.<sup>118</sup> As indicated above, one of the six individuals ultimately summoned, Mohammed Hussein Ali, was the police commissioner at the time of the post-election violence. Indeed, the OTP's application for summonses in the case against individuals affiliated with the PNU contained charges related to the role of the police in the violence. The prosecutor alleged that Muthaura and Ali instructed the police to target perceived ODM supporters and to suppress their protests in Kisumu, a city in Nyanza province and a traditional stronghold of Raila Odinga, and Kibera, an informal settlement in Nairobi. The prosecutor also alleged that Muthaura and Ali instructed the police not to interfere with attacks by Mungiki members and other pro-PNU youth in Nakuru and Naivasha.<sup>119</sup> In the ODM case, the prosecutor alleged that "*former* members and leaders of Kenyan police and military sectors" constituted part of the criminal network that carried out attacks on PNU supporters in the Rift Valley, but did not appear to allege the direct mobilization of the police force as part of an attack against the civilian population, in contrast to the PNU case.<sup>120</sup>

In considering the prosecutor's summonses applications in the PNU case, the pre-trial chamber did not find reasonable grounds to support the charges related to the police response in Kisumu and Kibera. The pre-trial chamber did, however, find reasonable grounds to believe that Ali had instructed the police not to intervene in Naivasha and Nakuru, thus keeping an important hook to the police role in the post-election violence.<sup>121</sup>

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<sup>117</sup> See, for example, OTP, "Weekly Briefing," May 11-17, 2010, issue no. 37, <http://www.icc-cpi.int/NR/rdonlyres/C8C4A802-89F8-4C99-8816-566A83291E41/281944/OTPWBMay.pdf> (accessed July 17, 2011), p. 1 ("The Prosecutor presented his plans to present at least two cases against three individuals, including allegations of police involvement in crimes attributed to some of the organizations which are allegedly involved in the crimes.").

<sup>118</sup> See "ICC team to start taking evidence," *The Standard* (Kenya), October 6, 2010, <http://www.standardmedia.co.ke/archives/InsidePage.php?id=2000019812&cid=4> (accessed August 21, 2011). The OTP's efforts were blocked by the police officials, who insisted that their statements be taken by a Kenyan judge as provided in Kenya's ICC implementing legislation. Although the Kenyan authorities appointed a judge for this purpose, the process was halted pending the hearing of a constitutional challenge to that implementing legislation. See "Taking of statements by ICC from security officials suspended," *The Standard* (Kenya), January 31, 2011, <http://www.standardmedia.co.ke/InsidePage.php?id=2000027964&cid=4&> (accessed on June 17, 2011).

<sup>119</sup> See *Situation in the Republic of Kenya*, ICC-01/09, "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali," December 15, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc1050845.pdf> (accessed August 31, 2011), paras. 17-18, 24, 27-29.

<sup>120</sup> See *Situation in the Republic of Kenya*, ICC-01/09, "Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang," December 15, 2010, <http://www2.icc-cpi.int/iccdocs/doc/doc1050835.pdf> (accessed July 19, 2011), para. 19 (emphasis added).

<sup>121</sup> See *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali*, ICC-01/09-02/11, "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali," March 8, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf> (accessed July 19, 2011), paras. 31-33, 49. Although the prosecutor had alleged that crimes in Kisumu and Kibera were part of the same plan as those in Naivasha and Nakuru, the pre-trial chamber did not find a sufficient link between the two sets of crimes. It therefore considered them separately. The pre-trial chamber found reasonable grounds to believe that the Kenyan police used

But the counts in the summonses for PNU suspects do not encompass police use of excessive force. While police failure to stop the violence remains a feature of the case, the Office of the Prosecutor has not sought to reintroduce charges related to police use of excessive force in advance of the September 2011 hearing to determine whether the case will be sent for trial.<sup>122</sup>

The pre-trial chamber's decision shows the difficulty of linking individual acts of excessive force to policy and attributing responsibility. Nonetheless given the significant role of the police in the post-election violence and the high number of victims of police shootings, we urge the Office of the Prosecutor to continue its investigations of police violence, and, evidence permitting, to reintroduce relevant charges. If the prosecutor ultimately concludes that there is insufficient evidence to charge the police's excessive use of force as crimes against humanity, the prosecutor should nonetheless state clearly that the Kenyan authorities have a responsibility to investigate allegations of unlawful police killings and bring to account those responsible in national proceedings.

## Expanding Investigation to Mt. Elgon

As noted in the majority decision of the pre-trial chamber, when authorizing the Kenya investigation, the crimes that have been at the core of the prosecutor's analysis and investigation are not the only crimes against humanity alleged to have taken place in Kenya since its 2005 ratification of the Rome Statute.<sup>123</sup> The scale and nature of violence in the Mt. Elgon region in western Kenya stands out.

Conflict in Mt. Elgon began in 2006 when the Saboat Land Defense Forces (SLDF), a local militia group, began to resist government attempts to evict squatters in the Chebyuk area

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excessive force in Kisumu; that they raided Kibera, resulting in deaths, injuries, and rapes; and that the Mungiki also committed acts of violence in Kibera. But it faulted the prosecutor for failing to provide a legal or factual submission that would require it to consider whether these acts of violence were committed under state policy. In addition, the pre-trial chamber found it "even more compelling" that there were not reasonable grounds to find any of the three people accused—Kenyatta, Muthaura, or Ali—responsible for events in Kisumu and Kibera. It therefore declined to include counts related to Kisumu and Kibera in the summonses. In its decision denying the prosecutor's application to appeal the exclusion of counts relating to Kibera and Kisumu, the pre-trial chamber clarified that it had found the latter dispositive. See *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali*, ICC-01/09-02/11, "Decision on the 'Prosecution's Application for Leave to Appeal the 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali,'" April 1, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1050257.pdf> (accessed July 19, 2011), paras. 11-12.

<sup>122</sup> *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali*, ICC-01/09-02/11, "Document Containing the Charges," August 19, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1207443.pdf> (accessed August 31, 2011).

<sup>123</sup> See *Situation in the Republic of Kenya*, ICC-01/09, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," March 31, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (accessed July 19, 2011) (referring throughout to police operations against Mungiki members and in Mt. Elgon) ("Authorization Decision").

of the region. Very quickly, the SLDF set its sights on the upcoming December 2007 elections as an opportunity to seize land by force, as well as a chance to ensure that candidates favorable to its cause were elected. The SLDF was financed and controlled by opposition ODM candidates. It did their bidding, intimidating opponents and voters prior to the elections of December 2007 and punishing them afterwards if they failed to vote for the ODM.<sup>124</sup> In March 2008, the military and police conducted a heavy-handed joint operation, called Okoa Maisha (Save Lives), to crush the SLDF militia.

Both SLDF and the Kenyan security forces committed numerous atrocities in Mt. Elgon between 2006 and 2008. The SLDF killed, raped and mutilated thousands of people. In the Okoa Maisha operation, security forces carried out hundreds of extrajudicial killings and the torture and arbitrary detention of thousands, including in the course of mass round-ups of men and boys.<sup>125</sup> Since 2008, victims' families, despite themselves facing threats and intimidation, have gradually begun to come forward, informing local human rights organizations that their family members have been either abducted by the SLDF or forcibly disappeared by the army in the course of Okoa Maisha.<sup>126</sup>

The atrocities in Mt. Elgon ceased in mid-2008, after national and international human rights organizations drew attention to the insurgency and the army's brutality in addressing it. The Kenyan government announced that the military would withdraw from active operations in Kenya's Mt. Elgon region, a decision spurred by the British government's announcement that it would suspend military training to Kenya as urged by Human Rights Watch.<sup>127</sup> The army and police claimed they opened investigations into the conduct of units operating at Mt. Elgon, but ultimately dismissed the allegations of abuse, and no one was ever held accountable.<sup>128</sup> In addition, over 3,000 men were rounded up

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<sup>124</sup> See Human Rights Watch, *"All the Men Have Gone": War Crimes in Kenya's Mt Elgon Conflict*, July 2008, <http://www.hrw.org/en/reports/2008/07/27/all-men-have-gone>, pp. 10-14, 22-23; interviews with former SLDF members and human rights activists, Cheptais and Bungoma, June 2011.

<sup>125</sup> See Human Rights Watch, *"All the Men Have Gone,"* pp. 19-25, 28-35.

<sup>126</sup> Human Rights Watch interviews, Bungoma, February 2011; telephone interview with Western Kenya Human Rights Watch, April 6, 2011.

<sup>127</sup> See "Kenya Pulls Abusive Military Forces from Security Operation in Mt. Elgon," Human Rights Watch news release, August 9, 2008, <http://www.hrw.org/en/news/2008/08/09/kenya-pulls-abusive-military-forces-security-operation-mt-elgon>; see also Robert Wanyonyi, "Kenya Army withdraws from Mt Elgon amid torture claims," *The Standard* (Kenya), September 1, 2008, <http://majimbokenya.com/home/2008/09/01/kenya-army-withdraws-from-mt-elgon-amid-torture-claims/> (accessed April 9, 2011).

<sup>128</sup> In May 2008, the commissioner of police appointed a team of four police officers to conduct an inquiry into human rights violations in Mt. Elgon. The police did not publish any formal findings, but an undated and untitled internal report was leaked to journalists and NGOs in August 2008. The report dismissed every one of the reports produced by five national and international organizations regarding human rights abuses in Mt. Elgon. The report was termed a "whitewash" by UN Special Rapporteur on Extrajudicial Executions Philip Alston. (UN Human Rights Council, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Kenya" pp. 22-23.) An undated statement by the

and detained (on suspicion of being members or supporters of the SLDF), of whom some 800 were charged with crimes.<sup>129</sup> Most have been acquitted or had charges withdrawn due to lack of evidence.<sup>130</sup> The hundreds of killings, forced disappearances, rape, and torture committed by the SLDF in Mt. Elgon between 2006 and 2008 have gone unpunished, except for four who were convicted on charges of manslaughter.<sup>131</sup>

The history, organization, and funding of the SLDF is an example of the relationship between land grievances and the manipulation of ethnicity and violence for political ends that is a disturbingly deep-rooted and longstanding element of the Kenyan political process. This dynamic came to prominence in the post-election violence currently under investigation by the ICC. Nonetheless, while the government devoted significant resources to investigating the post-election violence through the Waki Commission—albeit without ultimately bringing prosecutions against those most responsible—it did not investigate abuses in Mt. Elgon nor consider the situation in Mt. Elgon as part of the post-election violence.<sup>132</sup>

In the absence of credible national investigations, Human Rights Watch recommends that the ICC prosecutor analyze whether crimes falling within the ICC’s jurisdiction were also committed in Mt. Elgon, and consider opening additional investigations to bring to account the persons most responsible for crimes committed by both the SLDF and the Kenyan security forces.<sup>133</sup> The crimes committed in Mt. Elgon share a number of hallmarks with those currently under ICC investigation. First, the crimes committed in Mt. Elgon were

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ministry of state for defense dismissed allegations of torture and detentions in military facilities. See Ministry of State for Defense, “Allegations against the Military Unfounded,” undated statement, [http://www.mod.go.ke/?page\\_link=Mt%20Elgon%20%28SLDF%29](http://www.mod.go.ke/?page_link=Mt%20Elgon%20%28SLDF%29) (accessed June 8, 2011).

<sup>129</sup> The UN special rapporteur on extrajudicial executions received official reports according to which 3,839 persons were “screened” at Kapkota military camp; another report stated that 3,265 persons were detained there. (UN Human Rights Council, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Kenya,” p. 20.) Others were detained at Chepkube military camp. Of these, 758 suspects were arraigned in court on charges of “promoting war-like activities. (See Ministry of State for Defence, “Clarification on the military operation in Mt. Elgon,” circular from Lieutenant Colonel W.S. Wesonga on behalf of the Chief of General Staff, April 29, 2008; Bongita Onyeri, “The Military has won hearts and minds in Mt. Elgon, not tortured,” *The Standard* (Kenya), June 25, 2008.) But according to human rights organizations, many of those initially detained were quickly released on bail. Human Rights Watch telephone interviews with Mwatikho Torture Survivors Organization and Western Kenya Human Rights Watch, July 9 and 10, 2008.

<sup>130</sup> Human Rights Watch interview with Bungoma-based lawyer, February 2011.

<sup>131</sup> Human Rights Watch interview with visiting justice officer, Bungoma Prison, June 13, 2011.

<sup>132</sup> The Waki Commission did not investigate the Mt. Elgon violence because it could not establish a link to the 2007 post-election violence, given that the problems in Mt. Elgon leading to violence pre-dated the election. In addition, the commission considered that the “issues concerning Mt. Elgon were of such magnitude that the Commission could not delve into them, given its limited mandate, time and resources.” See CIPEV Report, pp. 162.

<sup>133</sup> The ICC prosecutor is currently authorized to investigate only crimes against humanity. (See *Situation in the Republic of Kenya*, ICC-01/09, “Authorization Decision,” para. 209.) To investigate war crimes committed in Mt. Elgon, the prosecutor would need to seek additional authorization from the pre-trial chamber.

orchestrated by political figures. Second, the government's brutal effort to suppress the insurgency involved the use of security forces against a militia affiliated to the ODM party.

The scale of the crimes in Mt. Elgon, and the impunity enjoyed both by the politicians behind the SLDF and the government officials who countenanced military abuses, warrant action by the ICC to afford meaningful justice to victims. Seen in the context of existing investigations, Mt. Elgon also offers an opportunity to expand accountability for crimes that share significant links with the post-election violence, and to bring meaningful justice for victims not currently within the scope of these investigations. Investigation of crimes committed by security forces could, in addition, provide new evidence about chain of command that might provide the basis for prosecution of police for possible crimes against humanity during the post-election violence. The OTP should ensure that if evidence shows that police abuses during the post-election violence constituted crimes against humanity then these crimes are prosecuted as such by the ICC.

## Conclusion

In order to complete the work started by the Office of the Prosecutor in DRC, Uganda, CAR, Darfur, and Kenya and to deepen the ICC's prosecutorial strategy, there is a need for additional investigations in each of these situations. Without further investigations or, in some cases, clear explanations of decisions not to prosecute, the ICC will fall short of delivering credible and meaningful justice. Decisions made to date in the DRC, Uganda, CAR, and Darfur situations have already damaged the ICC's credibility and legitimacy, especially in Africa, and could undermine its long-term mission to fight against impunity. Some decisions have led to a sense that the OTP is not responding adequately to the justice needs identified by affected communities—that is to say, that the OTP simply “doesn't get” what is needed to redress the serious crimes committed.

To be sure, the selection of specific cases is not the only determinant of the court's legacy in a given country. The execution of the court's arrest warrants, for which it must rely entirely on states, is of great importance. So too is the ability of the court to communicate its activities in a manner that ensures justice is not only done, but is seen to be done by affected communities, and which permits victims to access their rights of participation. The court should also tailor its activities to each new situation: in order to do so it must improve its field presence and the involvement of its field-based staff in policy setting. But the Office of the Prosecutor's investigations and prosecutions are the peg upon which the rest of the court's work must hang. Success or failure in delivering meaningful justice to affected communities in a manner that also builds the court's credibility ultimately depends on the investigative and prosecutorial strategy.

It is therefore essential for the OTP to take stock of progress and develop more coherent and effective strategies in each situation. As we recognized at the outset of this paper, putting our recommendations into practice will take time and resources. Nor are the recommendations we set out here exhaustive or comprehensive. However, in our view they represent the most pressing needs for additional investigations and explanations.

While we welcomed the prosecutor's opening of an investigation in Libya and his move to seek authorization to open an investigation in Côte d'Ivoire, and recognize that this responds to genuine needs for accountability for serious crimes committed in those countries, finishing the work of the ICC in existing investigations and prosecutions must be squared with decisions to open new ones. To do the job properly will require more not only

from the Office of the Prosecutor, but also from states parties and other concerned governments.

States parties need to provide greater support in the implementation of ICC arrest warrants. Nine fugitives remain at large in four of the ICC's situations. While different challenges underlie the execution of arrest warrants in different situations and require different strategies, there can certainly be no justice without arrests, regardless of how well the ICC prosecutor conducts his investigations.

States parties also need to provide more resources for the court's budget. ICC states parties should be willing to support the realization of the ICC's mandate in all the situations under investigation, and not demand compromises in the quality of justice that the court delivers in order to satisfy arbitrary budget allocations. Some states parties over the last three years have pressured the court to present budgets reflecting "zero-growth," in spite of its increasing workload. The court's members need to understand the magnitude of the work the court has undertaken in each situation under investigation and to see to it that the court is properly funded so that it can successfully continue and, ultimately, conclude that work.

Even with additional resources, however, it will be necessary to prioritize among additional and current investigations. In our view, the most pressing needs remain in the DRC, and we urge the prosecutor to look first at his strategy for continuing the Ituri investigations and ensuring investigation of all armed groups responsible for crimes committed in the Kivus. In addition, it should require few resources to provide a clear, public explanation of decisions regarding the investigation of Ugandan forces in the course of their military operations against the LRA. This should also be given attention as a matter of priority. While deferral of additional investigations in other situations is not ideal, should such further delay be necessary, the OTP should put in place clear communications strategies—including through court-wide outreach and public information efforts—to explain future plans.

# Recommendations to the ICC Office of the Prosecutor

## Democratic Republic of Congo

- Investigate impartially serious international crimes committed by all four armed groups (FDLR, CNDP, Mai Mai, FARDC) implicated in abuses in the Kivu region of DRC. Seek to bring cases against perpetrators in all four groups as close in time as possible to one another, including through the use of arrest warrants that may remain sealed until cases against perpetrators from different groups are ready. Where investigative resources or other circumstances render it impossible to bring all cases at once, carry out a communications strategy to explain delays between cases.
- Carry out additional investigations in order to go higher up the chain of command for crimes committed in the Ituri region, including to consider whether Ugandan, Rwandan, and Congolese officials are liable pursuant to articles 25 and 28 of the Rome Statute as a matter of individual or command responsibility, respectively. Indicate at the earliest opportunity plans for these additional cases or explain why such cases are not being pursued.
- Reopen the investigation on Bosco Ntaganda and, evidence permitting, add additional charges for war crimes and crimes against humanity allegedly committed in Ituri from 2002 to 2005, in North Kivu from 2006 to 2008, and as a general in the Congolese army in eastern Congo from 2009 to present.

## Uganda

- Provide—as a matter of priority—an explanation of the decisions taken with regard to investigation of Ugandan government forces and the prospects of future cases against government officials.
- Investigate recent international crimes allegedly committed by forces of the Lord's Resistance Army in northeastern DRC, Central African Republic, and South Sudan with a view to expanding the charges for those LRA leaders already subject to ICC arrest warrant and bringing new charges against additional commanders.

## Central African Republic

- Expand the scope of CAR investigations in order to bring cases against additional individuals most responsible for international crimes committed during the 2002-2003 rebellion.

- Continue monitoring alleged international crimes committed by government forces in northern CAR in 2007.

## Darfur, Sudan

- Expand the scope of the Darfur investigations in order to bring cases against additional senior government officials, evidence permitting.

## Kenya

- Continue investigations into links between police response to the post-election violence and PNU and ODM leaders. Where insufficient evidence exists to charge the excessive use of force by police as crimes against humanity, urge the Kenyan authorities to ensure accountability for what are nonetheless serious human rights violations.
- Analyze whether crimes falling within the ICC's jurisdiction were committed in the Mt. Elgon region, and, if so, consider opening additional investigations to expand the reach of justice to victims.

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# Unfinished Business

## Closing Gaps in the Selection of ICC Cases

In December 2011, International Criminal Court (ICC) member countries will elect the court's next prosecutor. The court's first prosecutor, Luis Moreno-Ocampo, has made hard-won progress since taking office in June 2003. Investigations in Central African Republic, Darfur, Democratic Republic of Congo, Kenya, Libya, and Uganda have yielded arrest warrants for 17 individuals and summonses for nine others. In August 2011, closing arguments were heard in the court's first trial and trials are ongoing in two additional cases.

The ICC's investigations and prosecutions, however, have failed to demonstrate coherent and effective strategies for delivering justice. In *Unfinished Business*, Human Rights Watch draws on its country expertise and close monitoring of the ICC to assess the prosecutor's selection of cases in the court's first five investigations. It concludes that significant gaps remain in delivering on the ICC's mandate in each country. In some countries, the absence of such strategies has undermined perceptions of the ICC's independence and impartiality.

The report makes recommendations to the Office of the Prosecutor to close key gaps. Putting these recommendations into practice will take time, posing a particular challenge in the context of heightened demand for justice around the world. Human Rights Watch calls on ICC member countries to ensure that the court has the resources and support it needs to meet existing and new demands.

*In the Ituri region of war-torn eastern Democratic Republic of Congo, community members watch the opening of the International Criminal Court's first trial—that of Congolese militia leader Thomas Lubanga Dyilo—in January 2009.*

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