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Peace, Justice, and the International Criminal Court

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I. Introduction

The long-running debate about whether seeking justice for grave international crimes interferes with prospects for peace has intensified as the possibility of national leaders being brought to trial for human rights violations becomes more likely. The International Criminal Court (ICC), which is mandated to investigate and prosecute war crimes, crimes against humanity, and genocide, began operations in 2003 and has already issued its first arrest warrant for a sitting head of state—Sudan’s President Omar al-Bashir. That the ICC operates while armed conflicts are ongoing fuels the justice versus peace debate.

Notwithstanding the general recognition that international law obliges countries to prosecute genocide, crimes against humanity, and war crimes, some diplomats tasked with negotiating peace agreements have argued that the prospect of prosecution by the ICC has made achieving their objectives more difficult.¹ Those negotiating peace have tended to view the possibility of prosecution as a dangerous and unfortunate obstacle to their work. Some fear that merely raising the spectre of prosecution will bring an end to fragile peace talks. The temptation to suspend justice in exchange for promises to end a conflict has already arisen with respect to the ICC’s work in Darfur and Uganda, and threatens to recur in coming years as parties and mediators struggle to negotiate peace deals.

*. This article is adapted from a lengthier Human Rights Watch report, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, <http://www.hrw.org/node/84264>. The report relies heavily on past reports by numerous Human Rights Watch researchers across the organization and over many years.

¹ Former United States special envoy to Sudan, Andrew Natsios, for example, writes “They [the leaders of Sudan’s National Congress Party] are prepared to kill anyone, suffer massive civilian casualties, and violate every international norm of human rights to stay in power, no matter the international pressure, because they worry (correctly) that if they are removed from power, they will face both retaliation at home and war crimes trials abroad.” Andrew Natsios, “Beyond Darfur: Sudan’s Slide Toward Civil War,” *Foreign Affairs*, May/June 2008, <http://www.foreignaffairs.com/articles/63399/andrew-natsios/beyond-darfur> (accessed December 14, 2009), p. 82.

In the short term, it is easy to understand the temptation to forego justice in an effort to end armed conflict. However, Human Rights Watch's (HRW) research demonstrates that a decision to ignore atrocities and to reinforce a culture of impunity may carry a high price. Indeed, instead of impeding negotiations or stalling a peaceful transition, remaining firm on the importance of justice — or at least leaving the possibility for justice open, whether meted out by national or international prosecutions — can yield short- and long-term benefits. HRW findings about the relationship between peace and justice are discussed at length in a July 2009 report “Selling Justice Short: Why Accountability Matters for Peace.” While there are many factors that influence the resumption of armed conflict, and we do not assert that impunity is the sole causal factor, a review of HRW experience shows that the impact of justice is too often undervalued when weighing objectives in resolving a conflict.

Case studies in the HRW 2009 report are drawn from 20 years of research in as many countries. The ICC's reach has understandably been more limited to date. Six years after the court's operations began, its prosecutor is carrying out investigations in four situations (Uganda; Democratic Republic of Congo; Central African Republic; and Darfur, Sudan) and the ICC's first trial began in January 2009. The prosecutor's request to open a fifth investigation—in Kenya—is pending before a pre-trial chamber at the time of writing.

Thus far, however, the ICC's engagement in these countries lends support to the themes identified in HRW's broader review of the impact of national and international justice processes on — and, critically, their absence from — peace processes. Drawing on the findings of “Selling Justice Short”, we illustrate below three of these themes with examples drawn from the ICC's experience to date.

First, arrest warrants do not necessarily hinder, and have at times benefited, peace processes through the marginalization of leaders suspected of serious crimes. Justice is an important objective in its own right and this marginalization effect should not motivate the commencement of justice processes. At the same time it has been a side effect of the issuance of arrest warrants in some cases. In the Uganda situation before the ICC, arrest warrants for leaders of the rebel Lord's Resistance Army (LRA) appear to have played a role in marginalizing the LRA by isolating it from its base of support in Khartoum. This, as well as an interest in seeing the ICC arrest warrants lifted, appears to have increased the LRA's interest in participating in peace talks held in Juba, Sudan between 2006-2008. While the Juba talks did not ultimately lead to a final peace agreement, interim agreements—including on the issue of justice for crimes committed during the conflict —

were successfully concluded over the course of the talks, suggesting that peace processes can be conducted in the shadow of ICC arrest warrants.

Second, foregoing accountability does not always bring hoped-for benefits. In the Democratic Republic of Congo (DRC), the inclusion of alleged perpetrators in government —granting *de facto* amnesties, including to Bosco Ntaganda, a former rebel commander wanted by the ICC but integrated into the Congolese army in early 2009 — has had far-reaching negative consequences. Successive attempts to buy compliance with post-conflict transition processes by rewarding criminal suspects with positions of power and authority have only allowed these individuals to continue committing crimes or encouraged others to engage in criminal activity in the hope of receiving similar treatment. Far from bringing peace, this has instead allowed lawlessness and human rights violations to persist.

Third, pursuing international justice can have long-term benefits necessary to sustainable peace, including the reinstatement of the rule of law through domestic prosecutions. ICC investigations in the Central African Republic, for example, have placed pressure on national authorities to take at least nominal steps toward enforcing international humanitarian law. While this has not yet yielded domestic prosecutions, it seems to have at least raised awareness of serious international crimes and the rule of law, which may be the first step toward preventing future crimes. These three themes and examples are dealt with one by one in the three sections below.

II. Impact of Arrest Warrants on Peace Talks

Requests for warrants for high-ranking leaders are often opposed by those who believe that these will result in more violence and a prolonged conflict. They argue that leaders facing the possibility of trial and likely conviction have little incentive to lay down their arms. Instead, they contend, these leaders will cling all the more tenaciously to power. The prospect of arrest may even spur them to continue to fight a war in an effort to maintain their position.²

The International Criminal Court has already created considerable controversy over whether its arrest warrants stand in the way of peace. ICC Prosecutor Luis Moreno Ocampo's request for an arrest warrant against Sudan's President al-Bashir in July 2008 triggered a backlash by numerous actors, including the African Union (AU) and the Organization of the Islamic Conference, which asked the United Nations (UN) Security Council to defer the ICC's work in Darfur for

² For a short discussion of the differing reactions to these types of warrants see Helene Cooper, "Waiting for Justice," *New York Times*, July 27, 2008.

12 months.³ Alex de Waal and Julie Flint, experts on Sudan, publicly criticized the ICC prosecutor for pressing charges against high officials in the government of Sudan, stating that, “[a]ttempts to deploy UNAMID [the AU/UN peacekeeping mission in Sudan] in Darfur are at a critical point. At this sensitive time, to lay charges against senior government officials, and to criminalise the entire government, will derail attempts to pull Sudan from the brink.”⁴ They argued that justice should wait until after those culpable are no longer in positions of authority, since seeking to prosecute while al-Bashir is still in control risks retaliation, including against those who work for humanitarian agencies.⁵

Negotiators and community leaders working for peace in northern Uganda had claimed that the ICC warrants for the rebel Lord’s Resistance Army (LRA) leadership jeopardized peace prospects, and that starting investigations before the war ended risked both justice and peace.⁶ Variations of these arguments have been used elsewhere, and as the ICC’s operations increase, particularly in situations of ongoing conflict, the issue is likely to continue to arise.

However, limited experience — primarily outside the ICC context — shows that the assumptions made about the effect of an arrest warrant are not necessarily correct. Rather than scuttle peace talks or undermine a transition to democracy, an indictment may facilitate these processes by altering the power dynamics. The fear that the International Criminal Tribunal for the former Yugoslavia’s (ICTY) indictment of Slobodan Milosevic for crimes in Kosovo during his negotiations to end the conflict with NATO would impede negotiations proved unfounded. Only days after the warrant for Milosevic was announced, a peace agreement was

³ See, for example, African Union Peace and Security Council, "Communique of the 142nd Meeting of the Peace and Security Council," PSC/MIN/Comm (CXLII), July 21, 2008, http://www.iccnw.org/documents/AU_142-communicue-eng.pdf (accessed November 4, 2009); Letter from the Permanent Representative of Uganda to the United Nations addressed to the President of the Security Council, July 22, 2008 (copy on file with Human Rights Watch).

⁴ Julie Flint, Alex de Waal, and Sara Pantuliano, "ICC approach risks peacemaking in Darfur," letter to the editor, *Guardian* (London), June 10, 2008, <http://www.guardian.co.uk/world/2008/jun/10/sudan.unitednations> (accessed June 16, 2009).

⁵ Julie Flint and Alex de Waal, "Justice Off Course In Darfur," commentary, *Washington Post*, June 28, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/27/AR2008062702632.html> (accessed June 16, 2009).

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

reached.⁷ In Bosnia and Herzegovina, the indictment of Radovan Karadzic by the ICTY marginalized him and prevented his participation in the peace talks, leading to the success of the Dayton negotiations to end the Bosnian war.⁸ Similarly, the unsealing of the arrest warrant for Liberian President Charles Taylor for crimes in Sierra Leone at the opening of talks to end the Liberian civil war was ultimately viewed as helpful in moving negotiations forward.⁹

Within the ICC context, arrest warrants for LRA leaders in Uganda coincided with peace initiatives, including the Juba talks that began in mid-2006. The Juba talks did not lead to a final peace agreement; although violence has subsided in northern Uganda, the LRA continues to carry out attacks on civilians in the DRC. In light of these realities, claims about the positive impact of the ICC's involvement must necessarily be limited. At the same time, the ICC's arrest warrants did not block peace negotiations despite fears to the contrary. Moreover, the warrants appear to have contributed to isolating the LRA from some of its support base,¹⁰ encouraging, at Juba, the most promising talks since the start of the 20-year conflict in Northern Uganda, and ensuring that accountability formed a major part of the agenda for those talks.

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

⁷ Human Rights Watch, *Selling Justice Short*, pp. 18-19.

⁸ *Ibid.*, pp. 25-27.

⁹ *Ibid.*, pp. 20-25.

¹⁰ Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *American Journal of International Law*, vol. 99 (April 2005), p. 404; Nick Grono and Adam O'Brien, "Justice in Conflict? The ICC and Peace Processes," in Nicholas Waddell and Phil Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, March 2008), pp. 15-16; and O'Brien, ICG, "The impact of international justice on local peace initiatives." See also Gareth Evans, "Justice, Peace and the International Criminal Court," International Crisis Group presentation to the Second Public Hearing of the Office of the Prosecutor, September 25, 2006, <http://www.crisisgroup.org/home/index.cfm?id=4431&l=1> (accessed May 18, 2009).

and to cut off any civilian assistance to the LRA. Both sides committed numerous grave abuses during this protracted conflict.¹¹

Efforts — including a national amnesty act in 2000¹² — to end the conflict decisively failed, and in December 2003 Museveni tried a new tack. He invited the International Criminal Court to investigate the LRA. In July 2005 the Court issued sealed warrants for the arrest of the top five LRA leaders—Joseph Kony (head of the LRA), Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen—for crimes including widespread or systematic murder, sexual enslavement, rape, and war crimes such as intentionally attacking civilians and abducting and enlisting children under the age of 15.¹³

¹¹ Human Rights Watch/Africa, *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (New York: Human Rights Watch, 1997), <http://www.hrw.org/en/reports/1997/09/18/scars-death>; Human Rights Watch, *Stolen Children: Abduction and Recruitment in Northern Uganda*, vol. 15, no. 7(A), March 2003, <http://www.hrw.org/reports/2003/uganda0303/uganda0403.pdf>; *Abducted and Abused: Renewed Conflict in Northern Uganda*, vol. 15, no. 12(A), July 2003, <http://www.hrw.org/sites/default/files/reports/uganda0703.pdf>; *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, vol. 17, no. 12(A), September 2005, <http://www.hrw.org/sites/default/files/reports/uganda0905.pdf>.

¹² Lucy Hovil and Zachary Lomo, Refugee Law Project, “Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: the potential for conflict resolution and long-term reconciliation,” working paper no. 15, February 2005, http://www.refugeelawproject.org/working_papers/RLP.WP15.pdf (accessed May 15, 2009), p. 24. The chairman of the Amnesty Commission, Justice Peter Onega, described the passage of the Amnesty Act as “a deliberate effort to try and find a peaceful way of ending the conflicts and rebellions the country has had.” See “UGANDA: Forgiveness as an instrument of peace,” *IRINnews*, June 9, 2005, <http://www.irinnews.org/report.aspx?reportid=54859> (accessed May 15, 2009). Two years later, however, Justice Onega called for an end to blanket amnesty because “former rebels granted amnesty were going back into rebel activities and committing greater crimes against humanity.” Josephine Maseruka and Charles Ariko, “Scrap blanket amnesty, says Onega,” *New Vision* (Kampala), August 14, 2007, <http://www.newvision.co.ug/D/8/13/581394> (accessed May 26, 2009). See also The Uganda Human Rights Commission, Fifth Annual Report to parliament for the period of January 2001-September 2002, <http://www.uhrc.ug/uploads/Chapter3-8.pdf> (accessed May 15, 2009), p. 56 (“The passing of the amnesty law showed the government’s desire [to] implement a policy of reconciliation to establish peace, security and tranquility”); and *Amnesty International Report 2001*, Uganda chapter, reproduced at <http://www.unhcr.org/refworld/pdfid/3b1de3914.pdf> (accessed May 15, 2009).

¹³ *Prosecutor v. Kony, Otti, Odhiambo and Ongwen*, ICC, Case No. ICC-02/04-01/05, Decision on the prosecutor’s application for the warrants of arrest under Article 58, July 8, 2005. Lukwiya died in 2006 and Otti in 2007. Once the court exercises its jurisdiction, it has the authority to prosecute crimes by any individual, regardless of affiliation, provided the crimes were committed after 2002.

The announcement of the referral to the ICC in January 2004 and the ICC's unsealing of warrants in October 2005 were met with a great deal of criticism. Numerous local nongovernmental organizations, international humanitarian organizations, academics, mediators, and others argued that ICC warrants would destroy the LRA's will to negotiate since they would ultimately end up on trial.¹⁴ From 16 March to 18 March 2005, Acholi leaders met with the ICC prosecutor in The Hague in an effort to dissuade him from requesting arrest warrants.¹⁵ Later, Acholi leaders said that the issuing of "international arrest warrants would practically close once and for all the path to peaceful negotiation as a means to end this long war, crushing whatever little progress has been made during these years."¹⁶ The Roman Catholic Archbishop in northern Uganda, John Baptist Odama, saw the ICC's decision to issue indictments against the LRA leadership as "the last nail in the coffin" of efforts to achieve dialogue.¹⁷ One-time Chief Mediator between the government and the rebels, Betty Bigombe, responded to the news of the warrants in October 2005 by saying, "[t]here is now no hope of getting them to surrender. I have told the court that they have rushed too much."¹⁸ Others feared that defenceless, displaced northern Ugandans would become prey to further LRA attacks.¹⁹ The Chairman of the Amnesty Commission, Justice Peter Onega, said that the ICC's decision could encourage more atrocities as the

¹⁴ For a summary of the many criticisms, see Tim Allen, Crisis States Research Center, "War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention," February 2005, <http://www.crisisstates.com/download/others/AllenICCReport.pdf> (accessed May 15, 2009), pp. 49-64.

¹⁵ "UGANDA: Acholi leaders in The Hague to meet ICC over LRA probe," *IRINnews*, March 16, 2005, <http://www.globalsecurity.org/military/library/news/2005/03/mil-050316-irin03.htm> (accessed May 15, 2009).

¹⁶ "UGANDA: Amnesty and Peace groups urge ICC to probe government army too," *IRINnews*, February 3, 2004, <http://www.globalsecurity.org/military/library/news/2004/02/mil-040203-irin03.htm> (accessed May 15, 2009), quoting a statement issued by a chief negotiator of the Acholi Religious Leaders' Peace Initiative.

¹⁷ "Justice for a Lawless World? Rights and reconciliation in a new era of international law," *IRIN In-Depth*, July 2006, <http://www.irinnews.org/pdf/in-depth/RightsAndReconciliationPart1.pdf> (accessed May 15, 2009), p. 72.

¹⁸ "LRA talks over, says Bigombe," *New Vision*, October 10, 2005, <http://www.newvision.co.ug/D/8/12/460057> (accessed May 15, 2009).

¹⁹ Cassandra Veney, "Between the Devil and the Deep Blue Sea: Internally Displaced Women and Girls in Liberia and Uganda and the Role of the International Community," *Journal of International Women's Studies*, vol. 7 (May 2006), p. 214; Adam O'Brien, "The impact of international justice on local peace initiatives: The case of Northern Uganda," International Crisis Group (ICG) expert paper for International conference: Building a Future on Peace and Justice, June 2007, <http://www.crisisgroup.org/home/index.cfm?id=4927> (accessed June 18, 2009).

LRA leadership could act as “desperately as a wounded buffalo.”²⁰ Indeed, LRA attacks on international humanitarian workers in October 2005 were linked by some to the ICC’s arrest warrants.²¹ Justice Onega was also among those who argued that the ICC’s involvement was inconsistent with the 2000 Amnesty Act and Acholi principles of traditional justice.²² At the very least, many felt that the timing was “ill-conceived.”²³ Human Rights Watch expressed frustration that the prosecutor had not also adequately explained his mandate to investigate crimes by the UPDF.²⁴

²⁰ “ICC Indictment to affect northern peace efforts, says mediator,” *IRINnews*, October 10, 2005, <http://www.irinnews.org/report.aspx?reportid=56654> (accessed May 19, 2009).

²¹ See, for example, “NGO attacks condemned in Uganda,” *BBC News Online*, October 27, 2005, <http://news.bbc.co.uk/2/hi/africa/4383150.stm> (accessed June 11, 2008); “Uganda: Two aid workers killed in north by suspected LRA rebels,” *IRINnews*, October 27, 2005, <http://www.globalsecurity.org/military/library/news/2005/10/mil-051027-irin01.htm> (accessed May 30, 2008); Jason Beaubien, “Uganda rebels step up attacks while offering talks,” *NPR*, January 3, 2006, <http://www.npr.org/templates/story/story.php?storyID=5080409> (accessed May 30, 2008).

²² “ICC Indictment to affect northern peace efforts, says mediator,” *IRINnews*, October 10, 2005; Frank Nyakairu, “Uganda: Victims Want Special Court for Kony,” *Monitor* (Kampala), August 30, 2007, <http://allafrica.com/stories/200708291083.html> (accessed May 18, 2009); and Refugee Law Project, “ICC statement: position paper on the announcement of formal investigations of the Lord’s Resistance Army by the Chief Prosecutor of the International Criminal Court and its implications on the search for peaceful solutions to the war in northern Uganda,” July 28, 2004, <http://www.refugeelawproject.org/archive/2004/RLP.ICC.investig.pdf> (accessed May 15, 2009), pp. 7-9. Despite the calls for traditional justice, a survey (and Human Rights Watch’s own research) indicates only a small percentage of people in northern Uganda believe that traditional justice mechanisms are the most appropriate means for dealing with those responsible for human rights violations. See Patrick Vinck et al., “Research Note on Attitudes about Peace and Justice in Northern Uganda,” Human Rights Center at UC Berkeley report, August, 2007, <http://hrc.berkeley.edu/pdfs/Uganda-survey-research-note.pdf> (accessed May 18, 2009). See also Allen, Crisis States Research Center, “War and Justice in Northern Uganda,” p. 87 (“Many individuals we interviewed are very interested in the punishment of Kony and his commanders, and forgiveness is by no means as prevalent as is asserted by some activists and interest groups.”).

²³ Refugee Law Project, “ICC statement: position paper,” July 28, 2004.

²⁴ Human Rights Watch has called for the ICC Office of the Prosecutor to look into crimes by all sides, and if it determines that abuses by the government forces do not meet the criteria for ICC cases, to encourage the national authorities to investigate and prosecute them. See, for example, “ICC: Investigate All Sides in Uganda,” Human Rights Watch news release, February 4, 2004, <http://www.hrw.org/en/news/2004/02/04/icc-investigate-all-sides-uganda> (“‘Human Rights Watch has documented many shocking abuses by the LRA in Uganda,’ said Richard Dicker, director of the International Justice program at Human Rights Watch. ‘But the ICC prosecutor cannot ignore the crimes that Ugandan government troops allegedly have committed.’”). See also Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years*, 1-56432-358-7, July 2008, http://www.hrw.org/sites/default/files/reports/icc0708_1.pdf, p. 42, which recognizes that as a result of the prosecutor’s failure to adequately explain his investigation of

In fact, the warrants have not proved to be as detrimental as many had feared. Since the mid-1990s the LRA's only state supporter has been the Sudanese government in Khartoum, support reportedly offered in retaliation for the Ugandan government's support of the rebel Sudan People's Liberation Movement/Army (SPLM/A).²⁵ Not long after the ICC referral was announced, Sudan agreed to a protocol allowing Ugandan armed forces to attack LRA camps in southern Sudan.²⁶ This access weakened the LRA's military capability. Following the signing of the Comprehensive Peace Agreement in January 2005, which ended hostilities between the Khartoum government and the SPLA, Sudanese armed forces withdrew from Southern Sudan, further weakening the LRA by depriving it of bases and support that it had enjoyed for years.²⁷ The International Crisis Group (ICG) notes that the ICC's involvement "upped the stakes" for Khartoum as it could fall within the ICC's criminal investigation in Uganda for supporting the LRA.²⁸ In October 2005 the government of Sudan signed a memorandum of understanding with the court agreeing to cooperate with arrest warrants issued against LRA commanders.²⁹ Though the Sudanese government continued to support the LRA to some degree, it did so in a much more surreptitious manner.³⁰ By severing most of its ties, Sudan significantly weakened the LRA, forcing it – at least temporarily – into "survival mode."³¹

UPDF crimes, "the prosecutor's work in Uganda is perceived by many of those in affected communities as one-sided and biased."

²⁵ See Gerard Prunier, "Rebel Movements and Proxy Warfare: Uganda, Sudan and the Congo (1986-99)," *African Affairs*, vol. 103 (July 2004).

²⁶ Robert Smith, "Consolidated Appeals Process 2004: Mid-Year Review Uganda," UN Office for the Coordination of Humanitarian Affairs, May 2004, [http://ochadms.unog.ch/QuickPlace/cap/Main.nsf/h_398ED03F0BFE3FDCC1256DC2004EAC51/02DAEC2B53577A41C1256EA1004D2140/\\$FILE/MYR_2004_Uganda_PRINT.pdf?OpenElement](http://ochadms.unog.ch/QuickPlace/cap/Main.nsf/h_398ED03F0BFE3FDCC1256DC2004EAC51/02DAEC2B53577A41C1256EA1004D2140/$FILE/MYR_2004_Uganda_PRINT.pdf?OpenElement) (accessed May 18, 2009), p. 3; and "Uganda thanks Sudan for allowing its army to pursue rebels over border," *Sudan Tribune*, April 16, 2004, http://www.sudantribune.com/spip.php?page=imprimable&id_article=2511 (accessed May 18, 2009).

²⁷ "UGANDA-SUDAN: Optimism that Sudanese peace deal could help pacify northern Uganda," *IRINnews*, January 11, 2005, <http://www.irinnews.org/Report.aspx?ReportId=52628> (accessed May 18, 2009).

²⁸ O'Brien, ICG, "The impact of international justice on local peace initiatives."

²⁹ Grono and O'Brien, "Justice in Conflict? The ICC and Peace Processes," in Waddell and Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa*, p. 16.

³⁰ *Ibid.*; and O'Brien, ICG, "The impact of international justice on local peace initiatives."

³¹ John Prendergast, "End This African Horror Story," *Washington Post*, April 7, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A32735-2005Apr6.html> (accessed May 18, 2009).

The increased isolation of the LRA may have also contributed to significant defections, including by two members of Kony's negotiating team.³² Father Carlos Rodriguez, a Spanish missionary who was based in northern Uganda for many years, stated:

“Between April and September [2004] 500 or so combatants have come out of the bush with their guns including senior officers. So the ICC might not be so discouraging as we thought. Also those who have come out of the bush have told us that the Sudan Government has not been giving them anything since January this year. So the ICC may have had an influence on Sudan. The LRA will only reduce violence out of pressure and Sudan has changed its attitude because of the ICC. They are concerned about being prosecuted.... Now that Sudan is not involved, it forces the LRA to talk about peace.”³³

However, many of these defectors were given amnesty under the Amnesty Act of 2000, a provision with broad applicability within Uganda and which had not been used frequently up to that point in time in the context of the LRA insurgency.³⁴

The issuance of arrest warrants has been cited as one of a number of factors (including the US government decision to list the LRA as a terrorist group) that helped to push the LRA and the Ugandan government to the negotiating table in Juba, Sudan, in mid-2006. Despite rebel leaders' claims to the contrary,³⁵ individuals close to the peace process believe that LRA leaders decided to enter

³² Akhavan, “The Lord’s Resistance Army Case,” *American Journal of International Law*, pp. 404, 417-418.

³³ Allen, Crisis States Research Center, “War and Justice in Northern Uganda,” p. 58.

³⁴ Abigail Moy, “The International Criminal Court’s Arrest Warrants and Uganda’s Lord’s Resistance Army: Renewing the Debate over Amnesty and Complementarity,” *Harvard Human Rights Journal*, vol. 19 (2006), p. 271. Between January 1, 2000, and January 19, 2009, 12,503 former LRA combatants have received amnesty. Statistics provided by the Amnesty Commission, Kampala, January 19, 2009.

³⁵ Peter Clotey, “Uganda’s LRA Rebels Say ICC Arrest Warrants Obstacles to Peace,” radio report, Voice of America, November 13, 2007, <http://www.voanews.com/english/archive/2007-11/2007-11-13-voa2.cfm?CFID=201871731&CFTOKEN=11796895&jsessionid=8830a01d1ac6a00475005f774865744b5f39> (accessed May 18, 2009); and Peter Clotey, “Uganda’s LRA Rebels Displeased with ICC Chief Prosecutor,” radio report, Voice of America, October 15, 2007, <http://www.voanews.com/english/archive/2007-10/2007-10-15-voa2.cfm?moddate=2007-10-15> (accessed May 18, 2009).

talks in part as a result of the ICC warrants.³⁶ The investigation by ICG into the peace talks led it to conclude that the threat of prosecution, and the issuance of warrants in particular, provided pivotal pressure propelling the rebels towards peace talks. In speaking with commanders in the bush or their delegates at the negotiations, ICG found that “‘ICC’ is usually the first and last word out of their mouths.”³⁷

In addition, the prospect of prosecution by the ICC helped to insert the issue of accountability into the Juba peace negotiations and resulted in an important framework for holding all parties accountable for their actions. In February 2008 the parties agreed to pursue domestic trials of the ICC cases in Uganda via a special division of the Ugandan High Court created to try war crimes committed during the conflict.³⁸ This was an approach that, at least in principle, could satisfy LRA demands to avoid trial in The Hague while meeting requirements under the ICC statute.³⁹

The parties concluded negotiations on all agenda items in March 2008, but Kony failed to appear to sign the final agreement. Although violence has subsided in northern Uganda, civilians in the DRC (where the LRA is now based) continue to be victimized by the insurgents.⁴⁰

³⁶ Human Rights Watch interview with western diplomats (names withheld), Kampala, March 2 and 15, 2007.

³⁷ O’Brien, ICG, “The impact of international justice on local peace initiatives.” See also Grono and O’Brien, “Justice in Conflict? The ICC and Peace Processes,” in Waddell and Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa*, pp. 15, 19; and Evans, ICG, “Justice, Peace and the International Criminal Court.” Ironically, shortly before these peace talks, Museveni had again offered LRA leader Kony amnesty. “U.S. Position on LRA Amnesty,” US Department of State press release, <http://northernuganda.usvpp.gov/lraamnesty.html> (accessed May 19, 2009); and Frank Nyakairu, “Uganda: Museveni amnesty to Kony illegal - ICC,” *Monitor*, July 6, 2006, <http://www.afrika.no/Detailed/12493.html> (accessed May 18, 2009). This offer, however, did not become the focus of accountability discussions in Juba. Negotiations instead centered on the possibility of national alternatives—including the use of traditional justice measures—to trial by the ICC.

³⁸ Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement, Juba, Sudan, June 29, 2007, paras. 4.1-4.2, 6.1-6.2; and Annexure to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement on 29th June 2007, Juba, Sudan, February 19, 2008, paras. 7, 10-14.

³⁹ For a more detailed discussion of these issues, see Human Rights Watch, *Benchmarks for Justice for Serious Crimes in Northern Uganda: Human Rights Watch Memoranda on Justice Standards and the Juba Peace Talks*, May 2007 – February 2008, http://www.hrw.org/legacy/pub/2008/ij/uganda_memos_cover.pdf.

⁴⁰ Uganda, Sudan, and the Democratic Republic of Congo launched a joint operation on December 14, 2008, against the LRA. Due to poor planning and logistical challenges, the operation failed to

The LRA's demands at Juba that the ICC arrest warrants be removed, and the prominence given to accountability in the final agreement, raise important questions as to whether the ICC is to blame for the ultimate breakdown of the peace talks. In our view, discussed in greater detail elsewhere, several important factors mitigate against this conclusion, including that LRA leaders have never made clear their reasons for refusing to sign the final peace agreement, and that interim agreements including justice provisions were successfully concluded over the course of two years of negotiations.⁴¹ The impact of the insistence on prosecutions more generally (as opposed to ICC prosecutions) is less clear. Meanwhile, the resumption of LRA attacks on civilians and the failure of the LRA to implement commitments to assemble their forces in specified locations while the talks were ongoing reinforced concerns about the sincerity of the LRA's commitment to conclude peace under any circumstances, despite the robustness of the negotiations.⁴²

Firm conclusions about the impact of the ICC's arrest warrants on peace prospects for northern Uganda are difficult to draw, not least because the conflict remains unresolved and civilians remain at risk. Contrary to some fears, however, the ICC's arrest warrants did appear to benefit the Juba talks in the ways described above and may yet help encourage national accountability efforts through the Uganda High Court Special Division agreed at Juba.⁴³ The Uganda experience—and the several examples from outside the ICC context touched on above—suggests at a minimum that indictments have not precluded peace talks. Justice is an important end in and of itself, and we do not advocate for the issuance of arrest

apprehend LRA leaders indicted by the ICC. The LRA responded by killing at least 865 civilians and abducting several hundred people. See Human Rights Watch, *The Christmas Massacres: LRA attacks on Civilians in Northern Congo*, 1-56432-438-9, February 2009, http://www.hrw.org/sites/default/files/reports/drc0209web_0.pdf.

⁴¹ See Elise Keppler, "Managing Peace and Justice in the Juba Process," (forthcoming) (manuscript on file with Human Rights Watch). At the same time, communication between LRA representatives in Juba and the LRA leadership appeared to be intermittent and suffered from a relative breakdown in the final months of the talks, raising questions as to the degree of involvement of the LRA leaders in negotiating the agreements, especially the February 2008 agreement on accountability. See International Crisis Group, "Northern Uganda: The Road to Peace, With or Without Kony," Africa Report No. 146, December 2008, pp. 1-4; and Joe Wacha, Institute for War and Peace Reporting, "Kony Adds to Peace Process Turmoil," July 3, 2008, <http://www.globalpolicy.org/component/content/article/207/39840.html> (accessed September 23, 2009).

⁴² Keppler, "Managing Peace and Justice in the Juba Process."

⁴³ Ibid.

warrants as a means of bringing about marginalization. Rather, we note that arrest warrants sought primarily as a means of bringing to account leaders responsible for serious international crimes have also at times had the side effect of marginalizing those leaders in ways that may benefit peace processes.

III. The Price of Inclusion

In contrast to situations where alleged war criminals have been marginalized through indictments or arrest warrants, negotiators elsewhere have opted to include human rights abusers in a coalition government or a unified military in the hope of neutralizing them or enhancing stability (in effect granting them a *de facto* amnesty). In situations as diverse as Afghanistan, the DRC, and Bosnia and Herzegovina, however, Human Rights Watch has documented how, in post-conflict situations, leaders with records of past abuse have continued to commit abuses or have allowed lawlessness to persist or return.⁴⁴ Far from bringing peace, this strategy instead encourages renewed cycles of violence.

The DRC has paid a particularly high price. While a number of other key factors have contributed to the brutal violence in eastern DRC, including competition for control over natural resources, land rights, and ethnic cohabitation, a pervasive culture of impunity has been one of the greatest obstacles to sustainable peace.

The DRC has been wracked by two wars over the past dozen years. The first, from 1996 to 1997, ousted long-time ruler Mobutu Sese Seko and brought to power Laurent Désiré Kabila, the leader of a rebel alliance supported by the Rwandan and Ugandan armies. A year later, Laurent Kabila turned on his former backers Rwanda and Uganda, who in turn launched the second Congo war, which lasted from 1998 to 2003. Sometimes referred to as “Africa’s first World War,” the second war drew in six other African countries, spawned a host of rebel groups and local militias, and ultimately resulted in the deaths of an estimated 5.4 million people.⁴⁵ In 2002, international pressure led to peace talks between the national government and the major rebel groups in Sun City, South Africa, which paved the way for the establishment of a transitional government in June 2003.

⁴⁴ See Human Rights Watch, *Selling Justice Short*, part IV.

⁴⁵ Many of the deaths were due to hunger and lack of medical care, others due to direct violence. Benjamin Coghlan et al., International Rescue Committee and Burnet Institute, “Mortality in the Democratic Republic of Congo: An Ongoing Crisis,” January 2008, http://www.theirc.org/resources/2007/2006-7_congomortalitysurvey.pdf (accessed May 20, 2009), pp. ii, 16.

While the ICC has carried out two investigations and issued four arrest warrants for crimes committed in Ituri, often described as the bloodiest corner of the DRC,⁴⁶ — and has launched an investigation in the Kivu provinces⁴⁷ — Congolese authorities have rarely conducted their own investigations and prosecutions.⁴⁸ Instead, the government gave posts of national or local responsibility, including in the army and police, to dozens of people suspected of committing international human rights violations in an effort to buy compliance with the transition process.⁴⁹ A Congolese lawyer, dismayed by such promotions, remarked, “In Congo we reward those who kill, we don’t punish them.”⁵⁰

⁴⁶ Tens of thousands were brutally slaughtered on an ethnic basis between 1999 and 2009. At this writing, killings continue in Ituri with at least two militia groups continuing to fight the Congolese army. There has been considerably less violence since 2007 than in previous years. See “Top UN official signals improvement, tough challenges in eastern DR Congo,” *UN News Service*, April 9, 2009, <http://www.un.org/apps/news/story.asp?NewsID=30442&Cr=democratic&Cr1=congo> (accessed May 20, 2009); Médecins Sans Frontières, “DRC: LRA Attacks’ ‘Lasting Effect,’” May 18, 2009, <http://www.doctorswithoutborders.org/news/article.cfm?id=3626&cat=voice-from%20the%20field&ref=home-sidebar-right> (accessed May 20, 2009).

⁴⁷ Office of the Prosecutor, International Criminal Court, Statement of Mrs Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, Sixteenth Diplomatic Briefing, Brussels, May 26, 2009, http://www.icc-cpi.int/NR/rdonlyres/302CA5E0-E2B5-4663-96DE-93E55B1FD26C/280424/DP_ENG.pdf, p. 2.

⁴⁸ At times, Congolese judicial officials with the help of UN human rights specialists tried to stem the wave of impunity, notably including the March 2009 conviction of Mai Mai commander Gedeon Kyungu Mutanga on charges that included crimes against humanity. See “DR Congo: Militia Leader Guilty in Landmark Trial,” Human Rights Watch news release, March 10, 2009, <http://www.hrw.org/en/news/2009/03/10/dr-congo-militia-leader-guilty-landmark-trial>. But too often their efforts were undermined by political interference, corruption, or prison breaks where some militia leaders who had been arrested managed to escape. See further discussion in Human Rights Watch, *Selling Justice Short*, pp. 49-50.

⁴⁹ See extended discussion of several such cases—including those of Gabriel Amisi, Jerome Kakwavu, Floribert Kisembo Bahemuka, and Peter Karim—in Human Rights Watch, *Selling Justice Short*, pp. 45-40.

⁵⁰ Human Rights Watch, *Democratic Republic of Congo – Renewed Crisis in North Kivu*, vol. 19, no. 17(A), October 2007, <http://www.hrw.org/reports/2007/drc1007/drc1007web.pdf>, p. 59. Despite the government’s policy of appeasing human rights abusers, an August 2008 survey by the Berkeley-Tulane Initiative on Vulnerable Populations found that in eastern DRC, 85 percent of the population believes that it is important to hold those who committed war crimes accountable and that accountability is necessary to secure peace. Patrick Vinck, Phuong Pham, Suliman Baldo, and Rachel Shigekane, “Living With Fear: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo,” August 2008, <http://hrc.berkeley.edu/pdfs/LivingWithFear-DRC.pdf> (accessed May 20, 2009), p. 2.

By offering to integrate commanders with abusive records into the government and armed forces, however, the government has reinforced the message that brutalities would not only go unpunished, but might be rewarded with a government post. The examples of Bosco Ntaganda, wanted by the ICC since August 2006 for the alleged use of child soldiers by his militia during the Ituri conflict in 2002-2003, and Laurent Nkunda, for whom Ntaganda served as chief of staff in military operations in the Kivu provinces in 2006-2009, illustrate the potential dangers of choosing to overlook abuses.

In June 2003, for example, the transitional government named Laurent Nkunda as a general in the new Congolese army despite his track record of abuses. Among other things Nkunda had been responsible the previous year for the brutal suppression of a mutiny in which at least 80 people were summarily executed.⁵¹ This included over two dozen people who were beaten, bound, and gagged before being executed and their weighted bodies thrown off a bridge into the water below.⁵² Nkunda, a Congolese Tutsi, refused to take up his post citing concerns for his own safety.⁵³ In subsequent military operations commanded by Nkunda, Human Rights Watch researchers documented that forces under Nkunda's command in a military operation in Bukavu killed civilians and carried out widespread sexual violence during their operations.⁵⁴

UN peacekeepers were unable to stop Nkunda's offensive on Bukavu and the resulting crisis nearly derailed an already weak transitional government. In October 2004 the Security Council directed UN forces to cooperate with

⁵¹ "DRC: Controversy Surrounds Certain Military Appointees," *IRINnews*, August 26, 2003. The UN special rapporteur indicated her unhappiness at seeing Nkunda, who had been accused of crimes and human rights violations, being appointed to government institutions. See "DRC: Three RDC-Goma officers summoned before military court," *IRINnews*, September 10, 2003, <http://www.irinnews.org/PrintReport.aspx?ReportId=46037> (accessed May 21, 2009). On the crimes committed in Kisangani, see Human Rights Watch, *Democratic Republic of Congo – War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny*, vol. 14, no. 6(G), August 2002, <http://www.hrw.org/legacy/reports/2002/drc2/DRC0802.pdf>, p. 2. The UN later put the figure at 163, including civilians. See also "Death Toll in Congo Raid," *New York Times*, July 17, 2002, <http://www.nytimes.com/2002/07/17/world/death-toll-in-congo-raid.html> (accessed May 20, 2009).

⁵² Human Rights Watch, *War Crimes in Kisangani*, p. 19.

⁵³ The new military leader called for the arrest of Nkunda and two other officers who refused to attend the ceremony. "Congo's army orders arrest of three rebel officers," Reuters, September 10, 2003.

⁵⁴ Human Rights Watch also documented serious crimes committed by the Congolese army during the Bukavu crisis. See Human Rights Watch, *D.R. Congo: War Crimes in Bukavu*, June 2004, http://www.kongo-kinshasa.de/dokumente/ngo/hrw_110604_en.pdf.

Congolese authorities “to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice,”⁵⁵ and a year later, in September 2005, the Congolese authorities issued a warrant for the arrest of Nkunda.⁵⁶ However, international diplomats made no concerted efforts to follow up on the Security Council’s request.⁵⁷

Throughout 2005 and into 2006, the international community’s attention was focused on presidential and parliamentary elections in DRC, the first democratic elections in over 40 years. Caught up in the political and logistical challenges of the election process, many Congolese leaders, as well as representatives of the donor community and the United Nations Organization Mission in the Democratic Republic of Congo (Mission de l’Organisation des Nations Unies en République démocratique du Congo, MONUC), accepted that little progress would be made on such major issues as army reform or establishing a functioning judicial system. Diplomatic representatives stated that it would be unproductive to push too hard on such issues, including seeking to arrest those suspected of serious crimes, preferring not to “rock the boat.”⁵⁸ With respect to Nkunda, MONUC decided to pursue a strategy of containment: take no action to arrest or confront him, but use deterrent action to contain his activities and zone of influence to minimise possible disruptions to the elections.⁵⁹ The strategy was ill-advised and short-sighted.

Nkunda used the time to found the National Congress for the Defense of the People (Congrès National pour la Défense du Peuple, CNDP) with a program of preventing the exclusion of Tutsi from national political life and assuring their

⁵⁵ United Nations Security Council, Resolution 1565 (2004), S/RES/1565(2004), <http://daccessdds.un.org/doc/UNDOC/GEN/N04/531/89/PDF/N0453189.pdf?OpenElement> (accessed May 21, 2009), para. 5(g).

⁵⁶ The warrants for Nkunda and Jules Mutebesi included war crimes and crimes against humanity. They were issued by the government but were not supported by appropriate substantive judicial investigation. Implementation of the warrants without additional legal procedures would not have met necessary fair trial standards. Human Rights Watch, *Renewed Crisis in North Kivu*, pp. 59-60.

⁵⁷ The Security Council repeated its call to bring those responsible for violations of human rights and international humanitarian law to justice on 21 December 2005. United Nations Security Council, Resolution 1649 (2005), S/RES/1649(2005), <http://daccessdds.un.org/doc/UNDOC/GEN/N05/658/00/PDF/N0565800.pdf?OpenElement> (accessed May 21, 2009), preamble.

⁵⁸ Human Rights Watch, *Democratic Republic of Congo – Elections in sight: “Don’t Rock the Boat”?* December 15, 2005, <http://www.hrw.org/legacy/background/africa/drc1205/drc1205.pdf>, p. 3.

⁵⁹ Human Rights Watch interview with MONUC officials (names withheld), Goma, February 9 and May 12, 2007.

security.⁶⁰ In 2006 and 2007, Nkunda's CNDP enlarged the area that it controlled, effectively creating a state within a state. Human rights abuses by the CNDP and other armed groups increased, especially when the Congolese government launched failed military operations to attempt to defeat Nkunda. Horrific attacks on civilians—including murders, widespread rape, and the forced recruitment and use of child soldiers—by all sides to the conflict followed. Hundreds of thousands of people were forced to flee their homes.⁶¹ A peace agreement negotiated in Goma, North Kivu on 23 January 2008, with 22 armed groups, of which the CNDP was the most influential, did not hold. Conflict resumed, and, so too did attacks on civilians in the Kivus (see below).

Faced with the possibility of losing eastern DRC, and with no support coming from other African allies or the European Union, Congolese President Joseph Kabila struck a secret deal with his former enemy, the Rwandan government. DRC would allow Rwandan troops to return briefly to eastern DRC to pursue their enemy—the Rwandan Hutu militia the Democratic Forces for the Liberation of Rwanda (Forces Démocratiques de Libération du Rwanda, FDLR)—in exchange for arresting Nkunda. On 22 January 2009, Nkunda was called to a meeting in Gisenyi, Rwanda, and detained by Rwandan officials.⁶²

Instrumental in Nkunda's downfall was Ntaganda, formerly a senior military commander from the Union of Congolese Patriots (Union des Patriotes Congolais,

⁶⁰ He claimed that other ethnic groups too had a role in his new movement. See, for example, Congrès National pour la Défense du Peuple, "Cahier de Charges du Congrès National pour la Défense du Peuple (CNDP)," October 2006, condensed version available in French at http://www.cndp-congo.org/index-fr.php?subaction=showfull&id=1220528453&archive=&start_from=&ucat=6& (accessed May 21, 2009).

⁶¹ In a report to the UN Security Council in June 2007, the UN secretary-general noted with concern increased recruitment of children in the DRC and Rwanda for service with Nkunda's units. He remarked that "commanders loyal to Laurent Nkunda" and Nkunda himself actively obstructed efforts to remove children from military ranks. He called for the arrest of Nkunda and others involved in recruiting and using child soldiers and asked MONUC to assist in making such arrests if necessary. Human Rights Watch, *Renewed Crisis in North Kivu*, pp. 49-54; and United Nations Security Council, "Report of the Secretary-General on children and armed conflict in the Democratic Republic of the Congo," S/2007/391, June 28, 2007, <http://daccessdds.un.org/doc/UNDOC/GEN/N07/390/16/PDF/N0739016.pdf?OpenElement> (accessed May 21, 2009), paras. 22-23, 29, 72.

⁶² John Kanyunyu and Joe Bavier, "Congo rebel leader Nkunda arrested in Rwanda," Reuters, January 23, 2009, <http://www.reuters.com/article/worldNews/idUSTRE50M14N20090123> (accessed June 26, 2009). To date, no charges have been brought against him. The DRC requested his extradition to stand trial for war crimes and crimes against humanity, but without the establishment of an ad hoc court or major reform to the DRC judicial system, Nkunda is unlikely to get a fair trial there.

UPC) armed group in Ituri who had fallen out with the UPC and had joined Nkunda in 2006, becoming his military Chief of Staff. Ntaganda had already been implicated in brutal human rights abuses, but was one of five Ituri leaders who in December 2004 had been granted positions as generals in the newly integrated Congolese army. Ntaganda had not taken up this post: fearing for his security in the capital, Kinshasa, he had refused to attend the swearing-in ceremony.

In January 2009, in an effort to divide Nkunda's CNDP, Ntaganda, with support from Rwanda, led a putsch to oust Nkunda from leadership and to install himself as the group's military commander. In exchange, the Congolese government rewarded him for a second time with the post of general in the Congolese army.

Like Nkunda, Ntaganda's track record is one of widespread human rights abuses. In November 2002, Ntaganda, then in charge of military operations for the UPC in Ituri, led troops in attacks on the gold mining town of Mongbwalu, where at least 800 civilians were brutally slaughtered on an ethnic basis. Such attacks were repeated in dozens of other locations.⁶³ According to UN peacekeepers, troops commanded by Ntaganda were responsible for killing a Kenyan UN peacekeeper in January 2004 and for kidnapping a Moroccan peacekeeper later that year.⁶⁴ Ntaganda was placed on the UN sanctions list in November 2005 for breaching a UN arms embargo.⁶⁵ While Ntaganda acted as military Chief of Staff in the CNDP, troops under his command were responsible for the 4-5 November 2008 massacre of 150 civilians in Kiwanja in North Kivu.⁶⁶

⁶³ Human Rights Watch, *Ituri: "Covered in Blood": Ethnically Targeted Violence in Northeastern DR Congo*, vol. 15, no. 11(A), July 2003, <http://www.hrw.org/sites/default/files/reports/DRC0703.pdf>, pp. 23-27; and *The Curse of Gold: Democratic*

Republic of Congo (New York: Human Rights Watch, 2005), <http://www.hrw.org/en/node/11733>, pp. 23-34.

⁶⁴ Letter from Human Rights Watch to all EU Foreign Ministers, "Urge Congolese Government to Enforce ICC Arrest Warrant on War Crimes Charges," February 2, 2009, <http://www.hrw.org/en/news/2009/02/02/urge-congolese-government-enforce-icc-arrest-warrant-war-crimes-charges>.

⁶⁵ Ibid. See also United Nations Security Council, Resolution 1857 (2008), S/RES/1857(2008), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/>

DRC%20S%20RES%201857.pdf (accessed May 21, 2009), para. 5.

⁶⁶ Human Rights Watch, *Democratic Republic of Congo – Killings in Kiwanja: The UN's Inability to Protect Civilians*, 1-56432-422-2, December 2008, <http://www.hrw.org/sites/default/files/reports/drc1208web.pdf>, p. 10.

While Nkunda's removal might have opened up new possibilities for finding peace in eastern DRC, political expediency rather than the interests of justice have determined both his and Ntaganda's contrasting fates.

As indicated above, Laurent Nkunda has been implicated in numerous serious crimes since May 2002, and, in spite of repeated calls by the UN and others for those responsible for the crimes in Kisangani to be brought to justice, Nkunda was not investigated or prosecuted. The government sought to accommodate him, but that accommodation was unsuccessful: rather than preventing further crimes, the opposite occurred. Nkunda's forces went on to commit additional crimes and to contribute to a major political, military, and humanitarian crisis. Arresting Nkunda in 2002 when he was first implicated in perpetrating war crimes would likely have had substantially lower political and diplomatic costs.

As for Bosco Ntaganda, in August 2006 the International Criminal Court issued an arrest warrant against him for the war crime of enlisting and conscripting children under the age of 15 and using them in hostilities between 2002 and 2003 in Ituri.⁶⁷ The Congolese government, which requested that the ICC investigate crimes in DRC, and which to date has been cooperative with the Court, in this case failed dramatically in its legal obligation to arrest Ntaganda. In a televised press conference on 31 January 2009, President Joseph Kabila invoked the peace versus justice dilemma, stating that he faced a difficult choice between justice or peace, stability, and security in eastern DRC. He said his choice was to prioritize peace. Ntaganda is reported to have served as a high-ranking advisor to UN peacekeeping forces on their operations in DRC, despite his status as a wanted man at the ICC.⁶⁸

Congolese authorities attempted to legitimize Ntaganda as a "partner for peace," reinforcing the perception that those who commit heinous crimes against civilians in Congo will be rewarded rather than punished. Dozens of local human rights nongovernmental organizations condemned the decision. HRW experience in the

⁶⁷ *Prosecutor v. Ntaganda*, ICC, Case No. ICC-01/04-02/06, Warrant of Arrest, August 22, 2006, <http://www2.icc-cpi.int/iccdocs/doc/doc305330.PDF> (accessed May 21, 2009).

⁶⁸ "Congo ex-Rebel 'working with UN,'" *BBC News Online*, April 29, 2009, <http://news.bbc.co.uk/2/hi/africa/8023978.stm> (accessed May 21, 2009). The government's inclusion of abusive leaders in the army has also set the stage for further atrocities by its own forces. Human Rights Watch research over the course of 2009 has documented the deliberate killing of more than 1,400 civilians between January and September 2009 during two successive Congolese army operations against a Rwandan Hutu militia, the Democratic Forces for the Liberation of Rwanda (FDLR). Ntaganda served as the *de facto* deputy commander of the second operation, *Kimia II*. See Human Rights Watch, "You Will Be Punished": Attacks on Civilians in Eastern Congo, December 2009, http://www.hrw.org/sites/default/files/reports/drc1209web_1.pdf.

Congo and elsewhere suggests that rewarding human rights abusers does not tend to bring the hoped-for peace or a cessation of abuses.

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

As the examples cited above suggest, demurring on justice issues in the context of peace processes does not necessarily bring hoped-for benefits in terms of lasting peace, while remaining firm on the importance of justice — including where international arrest warrants are at stake — may ultimately facilitate peace and security. The latter appears to be particularly true in the long run: HRW research suggests that the promotion of international justice for serious crimes may have a positive impact on the development of domestic law enforcement tools.⁶⁹ Prosecutions in courts far from the places where the crimes occurred — whether at ad hoc international tribunals for the former Yugoslavia and Rwanda or through universal jurisdiction — have played a role in strengthening or galvanizing the establishment of domestic mechanisms to deal with these crimes, in turn consolidating the rule of law and fostering stability.⁷⁰ Even at this early phase of its development, the International Criminal Court has spurred at least nominal steps toward domestic proceedings in each country in which it is investigating.

The experience in Central African Republic (CAR) is illustrative.⁷¹ On 25 October 2002, the Central African Republic's former army Chief of Staff, Gen. Francois Bozize, launched a rebel offensive against then-President Ange-Felix Patasse. Unable to rely on his army, which had been weakened by several mutinies and military coups, Patasse obtained support from forces of the Congolese rebel Jean-Pierre Bemba's Congo Liberation Movement and a mostly Chadian mercenary force. Both groups committed widespread atrocities, including massacres and rapes. Fighting continued sporadically from October 2002 to 15 March 2003, when Bozize finally seized power.

⁶⁹Our research indicates that other long-term benefits include protecting against revisionism. In addition, successful investigations and prosecutions may ultimately have some deterrent effect in the long term by, at a minimum, increasing awareness of the types of acts that are likely to be punishable offenses. See Human Rights Watch, *Selling Justice Short*, pp. 117-27.

⁷⁰ Ibid. pp. 93-100 (ad hoc tribunals), 108-16 (universal jurisdiction).

⁷¹ The impact on national proceedings of ICC investigations in Uganda, Democratic Republic of Congo, and Darfur, Sudan, as well as on two situations under preliminary examination by the ICC prosecutor—Kenya and Colombia—are discussed in Human Rights Watch, *Selling Justice Short*, pp. 100-03, 105-08.

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

The possibility of ICC prosecution (an issue stressed by victims' associations calling for justice) increased pressure on the CAR government to respond to abuses committed in the north as part of a conflict that began following the May 2005 elections. Human Rights Watch's September 2007 report on violence in the CAR,⁷² which named suspects and emphasized ICC jurisdiction, generated a great deal of publicity around the question of whether the ICC would investigate leaders of the elite Presidential Guard (which is under the president's control) and made it more difficult for the government to turn a blind eye to crimes. Following the publication of Human Rights Watch's report, President Bozize admitted that CAR forces had committed abuses and said that those responsible will be held to account.⁷³ The ICC prosecutor put direct pressure on the CAR authorities to follow up on prosecution for the more recent crimes, including in a 10 June 2008 letter. In response Bozize sought the United Nations' assistance in suspending ICC investigations, arguing in a letter to the UN Secretary General that the CAR justice system is competent to investigate and prosecute more recent crimes itself.⁷⁴

Though there has been little evidence of genuine will to prosecute in CAR (by mid-2009 only individual low-ranking members of the CAR security forces had been prosecuted and convicted of ordinary crimes such as assault, battery, and manslaughter), in September 2008 the CAR government established an office for international humanitarian law within the army, which is responsible for

⁷² Human Rights Watch, *Central African Republic – State of Anarchy: Rebellion and Abuses against Civilians*, vol. 19, no. 14(A), September 2007, http://www.hrw.org/sites/default/files/reports/car0907webwcover_0.pdf.

⁷³ Human Rights Watch, *World Report 2008* (New York: Human Rights Watch, 2008), Central African Republic chapter, <http://www.hrw.org/legacy/englishwr2k8/docs/2008/01/31/carepu17887.htm>.

⁷⁴ Letter from Francois Bozize to Ban Ki-moon, August 1, 2008, on file with Human Rights Watch. See also Human Rights Watch, *World Report 2009*, Central African Republic chapter, http://www.hrw.org/sites/default/files/related_material/car.pdf.

conveying the laws of war to its members.⁷⁵ Abuses in the north diminished after international pressure caused the government to withdraw much of the Presidential Guard from the area.⁷⁶ The involvement of the ICC has at least served to increase awareness of crimes, which may be the first step in preventing them.

V. Conclusion

While limited, the experience of the ICC to date bears out three important findings of Human Rights Watch's broader survey of the impact of justice efforts on peace processes. First, the existence of arrest warrants for leaders suspected of war crimes does not necessarily preclude peace talks. ICC arrest warrants played a role in isolating Uganda's LRA from its base of support in Khartoum; this, along with the LRA leaders' interest in leveraging peace talks to have the ICC arrest warrants rescinded, may have increased the willingness of LRA leaders to engage in peace talks with the government of Uganda. While the talks were ultimately unsuccessful, a number of interim agreements — including provision for national cases as a possible substitute for those brought by the ICC — were concluded during the talks notwithstanding the existence of the arrest warrants.

Second, ignoring justice does not necessarily benefit peace processes. In the DRC, incorporating suspected war criminals into positions of power in order to buy compliance with transitional processes has done little to stem cycles of human rights violations. Instead, pervasive impunity has been a key factor in renewed cycles of violence that continue to this day.

Third, pursuing international justice can translate into enhanced domestic law enforcement efforts. This can reassert and strengthen the rule of law, a key factor in long-term stability. In the CAR, ICC investigations appear to have been a factor in decisions by authorities there to commit rhetorically (if not yet in practice) to holding those responsible for crimes to account and to raise awareness of crimes, including through the establishment of an office for humanitarian law within the army. At least nominal steps toward national prosecutions have been undertaken in all other ICC country situations under investigation as well.

⁷⁵ Human Rights Watch, *World Report 2009*, Central African Republic chapter, http://www.hrw.org/sites/default/files/related_material/car.pdf.

⁷⁶ *Ibid.*; and Human Rights Watch, *World Report 2008*, Central African Republic chapter, <http://www.hrw.org/legacy/englishwr2k8/docs/2008/01/31/carepu17887.htm>.

We recognize that it remains too early to draw firm conclusions about the ICC's legacy in countries where its investigations are ongoing. Justice — regardless of the contributions it makes to peace and stability — is an important objective in its own right. At the same time, given that sacrificing justice in the hope of securing peace is often projected as a more realistic route to ending conflict and bringing about stability than holding perpetrators to account, we find it useful to put important facts and analyses on the table to better inform the debate about accountability and peace. Those who call for forgoing justice in or out of the ICC context need to address the facts that contradict their oft-repeated assumptions and the evidence that suggests that pursuing justice can contribute in many ways towards building and sustaining peace. Because the consequences for people at risk are so great, decisions on these important issues need to be fully informed.

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