



Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya



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The Open Society Justice Initiative bears sole responsibility for any errors or misrepresentations.

Executive Summary and Recommendations

In creating the International Criminal Court (ICC), the drafters of the Rome Statute assigned primary responsibility for dealing with its specified crimes to national authorities. The ICC may exercise jurisdiction only where a state is not willing and able to carry out “genuine” investigations and prosecutions of war crimes, crimes against humanity, and genocide.¹ This principle of complementarity not only sets forth a key test for admissibility of cases in The Hague; it also places a heavy burden on individual states to help achieve the Rome Statute’s overarching goal: ending impunity for grave atrocities.

While the ICC plays a critical role as a court of last resort, it will never have the capacity to deal with more than a handful of cases at one time. By supporting the development of political will and legal and functional capacity at the state level, complementarity gives more victims a chance at justice for horrendous crimes, makes proceedings more accessible to affected communities, contributes to deterrence through the promotion of accountability at the national level, and enables national authorities to invest in the creation of functional criminal justice systems capable, ultimately, of ending cycles of mass atrocities. The realization of complementarity in post-conflict states is an important component of conflict resolution and prevention.

Yet realizing complementarity in specific post-conflict situations has proven difficult. Despite the wishes and best efforts of a host of governments, multilateral agencies, and international actors, complementarity remains elusive in many places. This is due to an array of factors, including shortage of resources, lack of technical capacity, and absence of political will.

Thus, over eight years after the Rome Statute came into effect, many questions remain about complementarity and how it can be furthered in countries scarred by mass crimes. These questions include:

- How has the international community supported post-conflict states in developing the capacity and will to carry out fair trials on the basis of genuine investigations and prosecutions?
- Are these efforts integrated into more general rule-of-law programming?
- How well are these efforts coordinated among donors and between donors and recipient governments? and
- What lessons can be learned for ongoing and future efforts to support complementarity?

In February and March 2010 and then again in September and October 2010, the Open Society Foundations conducted assessments in the Democratic Republic of Congo (DRC), Uganda, and Kenya in an attempt to develop more detailed answers to these and related questions. This report seeks to address such questions, and in doing so, to promote complementarity and ultimately help end impunity. The report focuses on DRC, Uganda, and Kenya because all three countries have suffered recently from atrocity crimes that have

¹ “[...]The Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”, Rome Statute, Article 17.

resulted in ICC investigations. Further, all three have barriers to national level prosecutions. However, the three countries also have the potential to conduct prosecutions and trials, if the right mix of resources, technical assistance, and political will were brought to bear. This report, then, seeks to examine the barriers to complementarity in DRC, Uganda, and Kenya, and the changes needed to overcome those barriers.

DRC

In the DRC, there are immense challenges to the realization of complementarity. The country is vast; its conflict, which continues in some parts of the eastern region, has been long, particularly brutal, and complicated; government control over extensive swathes of the country is tenuous; and the UN peacekeeping mission, MONUSCO, is overstretched. Against this backdrop, there have been isolated attempts to prosecute Rome Statute crimes through the military justice system, but parliament has not yet passed legislation establishing a procedure to enable domestic prosecutions within the civilian justice system. Beyond the lack of a legislative framework, major deficiencies present obstacles to genuine and fair proceedings. There are not enough lawyers and judges; many of these have little or no knowledge of international criminal law; investigators are poorly trained; there is no system for protecting witnesses and victims; court management and archiving systems are almost nonexistent; the penal system has deteriorated to an extent that many prisoners escape and those who don't face appalling conditions; the state has no capacity to conduct outreach to affected communities; many journalists don't understand and thus cannot convey the basics of international criminal law; and civil society organizations require further strengthening in order to assist with outreach functions, monitor proceedings, and effectively advocate on complementarity-related issues. The needs are so great that realizing complementarity in the DRC means first focusing on basic development of the criminal justice system.

The international community has undertaken numerous efforts to help meet both general and more specific challenges to the credible prosecution of international crimes in DRC. MONUSCO has provided security, logistical support, and expertise in support of proceedings in the military justice system. Donors have backed various trainings in investigation, prosecution, and judging of international crimes, as well as the building, rehabilitation, and equipping of judicial infrastructure.

Yet a lack of government respect for the independence of the judiciary, the chronic underfunding of the justice sector, an unwillingness to pursue sensitive cases, and a mixed record of cooperation with the ICC all raise questions about the DRC government's commitment to genuine justice for Rome Statute crimes. The country's limited capacity to plan and coordinate policy in the justice sector, including complementarity policy, is compounded by poor coordination among donors active in justice-sector support and a largely dysfunctional mechanism for coordination between relevant government agencies and donors. But perhaps the greatest challenge to realizing complementarity in the DRC is the lack of strategy for complementarity programming. Agreement on a specific complementarity mechanism, perhaps a model court, may be the best way to focus resources in a manner that can build domestic capacity, tap into existing rule-of-law programming, and deliver justice for atrocities in the near term.

Uganda

By contrast, in Uganda the mechanism for domestic war crimes proceedings is clear. The government has established a War Crimes Division (WCD) in its High Court and cases will

be brought by a dedicated team of prosecutors and investigators. A first suspect has been charged and the trial is expected to begin in 2011. Many investigators, prosecutors, and judges associated with this mechanism have undergone numerous specialized trainings in international criminal law and related topics, although officials see a need for additional trainings. Judges at the High Court have generally established a track record of independence and are trusted by Ugandan citizens. There are no shortcomings in judicial or penal infrastructure that would prevent complementarity. The WCD has taken seriously the need for outreach to affected communities and is currently devising a strategy. Civil society is strong and engaged on international criminal law in Kampala, but still needs strengthening in victim communities outside the capital. Journalists, too, need greater familiarization with the principle of complementarity to augment the multiple trainings on the Rome Statute already conducted for the media. Despite the many ways in which Uganda is already quite well prepared to realize complementarity, some significant capacity gaps remain. The justice system is weak in ensuring that accused persons have an adequate defense, and there are few potential defense attorneys with good knowledge of international criminal law. There are also needs in the areas of witness protection, court management, the training of judiciary staff, court interpretation, and archiving.

The Ugandan government's coordination and planning capacity in the justice sector is strong. Although police participation remains weak, Uganda's Justice, Law and Order Sector (JLOS) fosters effective communication among relevant agencies in that area. A JLOS committee system, which includes a working group on transitional justice, allows for efficient consultations. A Development Partners Group (DPG) acts as an adjunct body to JLOS. Most of the main donors involved in justice sector programming coordinate through the DPG, which regularly interacts with JLOS and civil society organizations in various forums. JLOS and the DPG have acknowledged their lack of expertise in determining the precise requirements for genuine and fair war crimes trials in Uganda. Donors have responded by funding a non-profit organization of international criminal law experts to advise JLOS and the WCD, the recruitment of an international and a national expert who will be hired by JLOS, and a needs assessment carried out by a group of international experts in November 2010.

The greatest hurdles to realizing complementarity in Uganda are legislative and political. The International Criminal Court Act, which domesticated Rome Statute crimes in Ugandan law, is prospective from June 25, 2010, and thus cannot be applied to the period of conflict in northern Uganda. The first case before the WCD, against an alleged former member of the Lord's Resistance Army (LRA), is based on the domestic criminal code and the Geneva Conventions. Further, under Uganda's Amnesty Act, any former combatant remains eligible for amnesty unless expressly exempted by the government, which has issued no such exemptions to date. This creates doubts about whether more than a handful of alleged perpetrators could ever be charged before the WCD. And as planning for domestic proceedings has progressed, commitment at the highest political level to impartial and fair justice has been lacking. President Yoweri Museveni has shown a willingness to disregard prominent judicial decisions that displease him. The president's ruling party was slow in passing the ICC Act through parliament, and his relationship with the ICC suggests an understanding of justice as transactional, not principled, impartial, and binding. There is no apparent government will to allow WCD scrutiny of actions by the Ugandan People's Defense Force (UPDF), although UPDF crimes of a serious nature have been alleged. Even as Uganda is poised to implement complementarity at the judicial and technical levels, the

one-sided nature of this justice to date undermines its potential contribution to national reconciliation.

Kenya

Kenya is another country where the hurdles to complementarity are more political than technical. Kenya has more than adequate human capital to achieve complementarity, including a cadre of experienced and well trained judges and lawyers, good and aggressive journalists, and an engaged and skilled civil society sector. Requirements for infrastructure or equipment do not present obstacles to domestic justice for international crimes. To be sure, capacity gaps would need to be overcome before credible proceedings could be launched. There is a lack of knowledge about international criminal law among judges, prosecutors, defense counsel, and police. The police have generally poor investigative skills and suffer from widespread allegations of corruption. There is a severe shortage of professional prosecutors. A newly formed witness protection agency is not yet prepared to take on the protection of witnesses in highly sensitive cases. Kenya requires assistance as well in the areas of court management, judicial archiving, and interpretation and translation.

Although Kenya is highly self-sufficient and donors are interested in helping the country realize complementarity, the political class remains resistant to accountability for the post-election violence of 2007-2008. While an International Crimes Act that domesticated Rome Statute crimes in Kenyan law took effect at the beginning of 2009, over the course of 2009-2010, politicians scuttled efforts to establish a Special Tribunal to deal with allegations including crimes against humanity. This eventually led the ICC prosecutor to open an investigation and to name six suspects in December 2010. Endemic political and judicial corruption, as well as routine political interference in prosecutorial and judicial decision-making further eroded public trust that domestic justice for the post-election violence could work. In August 2010, however, Kenyans approved a new constitution that has the potential to strengthen the professionalism and independence of the police, prosecutors, and judges.

Ensuring the conscientious implementation of the new constitution as it relates to the justice sector is the first step towards establishing a credible complementarity mechanism in Kenya. A good implementation process could re-engage the donor community, which has largely withheld support for the justice sector since withdrawing from Kenya's coordinating mechanism (the Governance, Justice, Law and Order Sector, or GJLOS) in the wake of the post-election violence. Advocates also must decide whether to continue encouraging establishment of a Special Tribunal, or whether pursuing cases related to the post-election violence in the High Court would be a viable and credible option. In the immediate term, there is an urgent need for the international community and Kenyan civil society to develop an ad hoc witness protection program for victims and witnesses who are not under ICC protection but remain at risk, often from state actors. This system would serve as a bridge to the new government Witness Protection Agency once it becomes fully functional and has established its trustworthiness.

Although there are many challenges to realizing complementarity in DRC, Uganda, and Kenya, there are even more compelling reasons to continue working toward it. Achieving complementarity in these countries would deliver justice for the victims of mass atrocities and their families, demonstrate that impunity will not be tolerated, and possibly even prevent future grave crimes. But for this to happen, the following recommendations must be enacted.

Recommendations

In DRC, donors should:

- Work with the government on a complementarity strategy. The aim should be to concentrate currently dispersed complementarity resources on one model court system for war crimes, crimes against humanity, and genocide that spans the entire judicial chain, can have country-wide reach, and deploy to remote locations through mobile courts.
- Work with the government to determine potential needs for temporary international staffing at the model court—whether judges, technical experts, or advisors—and facilitate rapid recruitment of experienced international experts. Alongside a staffing plan, there should be a clear mentorship plan and an exit strategy for courts where there may be international experts deployed.
- Ensure that such promising current initiatives as MONUSCO’s Prosecution Support Cells are fully supported and rapidly deployed.
- Support the *Conseil Superior de la Magistrature* (CSM) in extending the standard magistrates’ training to include a unit on international criminal law. Work with such partners as local and international NGOs, the ICRC, the ICC, and foreign law schools to develop the program and potentially offset costs.
- Explore potential partnerships to improve knowledge of international criminal law and gender justice among members of the legal profession generally, with a specific focus on potential defense counsel.
- Develop a policy coordination mechanism for donors and key international agencies that functions autonomously from the *Comité Mixte de Justice* (CMJ), which would become solely a government coordination body. The new body would interact intensively with the CMJ.
- Encourage the government to provide greater financial resources for the anemic justice sector. But also encourage the World Bank and International Monetary Fund to allow greater DRC budget allocations for the justice sector.
- Explore possibilities for facilitating in-kind contributions from information technology, communications, and biotechnology companies to help train and equip personnel involved in war crimes cases.
- Encourage organizers of trainings related to complementarity to avoid seminars and workshops where possible, and instead pursue mentorship models of hands-on training.

- Develop a basket of media training options on international criminal justice, and work to include these in existing media capacity-building programs.
- Support civil society capacity in the area of international criminal law and gender justice. This should include areas such as capacity building, trainings, court referrals, victim support, witness protection, defense counsel, and facilitating mobile courts.

In DRC, government authorities should:

- Urge the National Assembly to amend the draft Rome Statute implementing legislation to remove obstacles to justice for senior military and police officials, and then pass the bill without further delay.
- Urge rapid approval of legislation necessary to create a model court for war crimes, crimes against humanity and genocide. If the court hearing these cases is to be a division of the High Court (*Tribunaux de grande instance*), amend the law to allow this to sit in more than one province.
- Reorganize the CMJ to ensure effective and regularly held meetings through better preparation, realistic agenda-setting, better communication between meetings, and a committee structure similar to that found in Uganda's JLOS. Ensure that the Interior Ministry and senior police officials participate meaningfully in coordination through the CMJ.
- End the practice of executive interference in court cases.
- Submit incidents of judicial corruption to a well-defined and transparent disciplinary procedure and leave the selection of new judges to the CSM.

In DRC, civil society groups should:

- Formulate common positions on a complementarity strategy for the DRC that delivers genuine justice in the relatively short term, plugs into existing efforts, and builds Congolese capacity in the justice sector, including supporting trainings, investigations, prosecutions, witness protection, and court monitoring. Establishing mobile courts to address atrocity crimes, including gender crimes, should also be explored.
- Encourage adoption of Rome Statute implementing legislation by the National Assembly.
- Encourage the government to provide greater financial resources for the justice sector.

- Work to integrate complementarity information into broader justice-related outreach activities.

In Uganda, donors should:

- Encourage the government to ensure that justice at the WCD not only entails proper prosecutions and trials for suspects from rebel factions, but also applies to suspects who are or were associated with the state.
- Carefully monitor complementarity developments in Uganda and prepare to restrict or reduce support in response to corruption in the justice sector or overt executive interference in war crimes proceedings. If these types of problems arise, or if the government persists in making international justice one-sided, donors should grant Ugandan civil society greater input into their funding decisions, while reducing the government's input.
- Support the recommendations of the international needs assessment mission organized by ICTJ and PILG in November 2010.
- Explore potential partnerships for improving knowledge of international criminal law and gender justice, especially among potential defense counsel.
- Explore the potential for establishing mobile courts in remote areas to try war crimes and crimes against humanity, including gender crimes.
- Provide greater funding for civil society organizations working on international and gender justice issues, and in particular, resources for victim organizations to gain knowledge and capacity to engage on these issues nationally.

In Uganda, government authorities should:

- In the interests of justice, national reconciliation, and transparency, shift national policy on accountability for alleged UPDF atrocities away from courts martial, with the Directorate of Public Prosecutions encouraged to bring UPDF suspects before the WCD.
- Pursue amendment of the Amnesty Act to make it compatible with the ICC Act.
- Amend the law on setting of legal aid fees to ensure adequate pay for defense attorneys taking on complex cases, including crimes under the Rome Statute.
- Prioritize passage of legislation on victim and witness protection.

- Consult more extensively with affected communities in the north about the parameters of domestic investigations, prosecutions, and trials for international crimes related to the conflict, and pursue the possibility of holding WCD hearings in the north.
- Encourage JLOS member agencies to be more responsive to requests from the secretariat, and encourage the police in particular to improve their cooperation with other agencies through JLOS.
- Repeal elements of the NGO Registration Act of 2006 (currently under court-ordered injunction) that threaten NGO independence to undertake advocacy related to complementarity issues (among many others) and limit NGO access to rural communities.
- Refrain from executive interference in judicial processes.
- Consider adopting legislation to allow for establishment of mobile courts.

In Uganda, civil society groups should:

- Undertake trainings for journalists on the Rome Statute, emphasizing complementarity issues.
- Link planned trial monitoring activities with outreach to affected communities in the north.

In Kenya, donors should:

- Remain skeptical of government motivations behind the sudden renewed push for complementarity following the ICC prosecutor's request for six summonses to appear, especially in the context of other moves to undermine the ICC process and against the backdrop of past corruption and politicization of the judiciary. Donors should insist on full implementation of Kenya's ICC obligations, and should take their cues on potential acceptability of a domestic process from respected Kenyan civil society organizations. Donors should only support Kenyan government initiatives for complementarity if they have confidence that the goal is more accountability, not less.
- Firmly encourage the government to appoint courageous, widely respected, skilled, and independent-minded individuals to key justice sector positions under the new constitution. Who is appointed director of public prosecutions, attorney general, and chief justice will be critical to prospects for genuine domestic investigations and prosecutions of crimes under the Rome Statute.

- Support parliamentarians in rapidly building capacity to research and vet nominations for these and other positions by the executive.
- Urgently convene a meeting of relevant stakeholders to plan an effective, temporary mechanism for victims and witnesses of the post-election violence until the new witness protection agency is fully running and has a track record of competence and independence.
- Seek to include complementarity elements into general justice sector support during this period of transition to the new constitution.
- Ensure that justice sector programming is not judged only by technical benchmarks, but also benchmarks for service delivery, feedback, and the functioning of internal and external accountability mechanisms for dealing with complaints.
- Use some of the funds that had been allocated for government initiatives in the justice sector to increase support for Kenyan civil society capacity in the area of international criminal law. Rural and victims' organizations are in particular need of capacity building.
- Increase support to civil society organizations to engage in outreach on the Rome Statute, with an emphasis on complementarity issues.

In Kenya, government authorities should:

- Embrace complementarity as a means of providing greater justice for grave crimes committed during the post-election violence, and reject efforts to abuse complementarity as a ruse to end ICC proceedings in favor of a domestic process that some may hope to rig in favor of powerful suspects.
- Appoint independent, skilled, widely respected, and courageous individuals to the key positions of director of public prosecutions, attorney general, and chief justice.
- Ensure a rigorous vetting process for judges, in accordance with the new constitution, as an early indication that the judiciary will be able to earn the trust of Kenyan citizens.
- Work with civil society on the issue of complementarity, including being open to civil society proposals even when those proposals differ from the government's position.

In Kenya, civil society groups should:

- Work together to prepare a checklist by which the public and donors can measure the intentions of the government's current complementarity efforts, and devise a public relations strategy for the checklist.
- Work together on complementarity advocacy plans for various contingencies.

Introduction

The preamble to the Rome Statute makes clear its drafters' intention that the International Criminal Court (ICC) should be "complementary to national criminal jurisdictions" and notes that the effective prosecution of the most serious crimes "must be ensured by taking measures at the national level."² The preamble further states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

Article 17 provides the legal basis for "complementarity" and describes how the line should be drawn between the default expectation of national jurisdiction and the exercise of ICC jurisdiction as a last resort when states are unwilling or unable to carry out genuine investigations and prosecutions of crimes under the statute. Specifically, Article 17 outlines what "unwilling" and "unable" mean. A state is understood to be "unwilling" where it acts to "[shield] a person from liability." Unwillingness can also be found when a state acts in a way which is "inconsistent with an intent to bring the person concerned to justice," either through failing to conduct proceedings "independently and impartially" or through an "unjustified delay" in proceedings.³ A state is "unable" to investigate and prosecute when, "due to a total or substantial collapse or unavailability of its national judicial system," the state is not able to "obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."⁴

Since the court's inception, much attention has focused on what the ICC could do to foster the willingness and ability of states to carry out this duty, whether through training law enforcement officials or by leveraging its weight during preliminary examinations to push for domestic prosecutions.⁵ This may reflect the prominence that court officials, including the prosecutor, have given to the concept of complementarity since the court's birth. Thus, at his June 2003 swearing in, the prosecutor stated:

As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency . . . [T]he absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.⁶

During the first several years after the Rome Statute came into effect, many actors outside the court, including members of the diplomatic community and civil society, understandably focused on the court's own activities. To the extent complementarity was mentioned, it was often in the context of what the court could do to foster it. Less attention was paid to the potential contributions states and international organizations could make in assisting states in fulfilling their duty to deliver justice for war crimes, crimes against humanity, and genocide.

² Preamble, Rome Statute of the International Criminal Court ('Rome Statute'), U.N. Doc A/CONF.183/9, adopted July 17, 1998, available at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

³ Rome Statute, Article 17(2).

⁴ Rome Statute, Article 17(3).

⁵ See, for example, Informal Expert Paper: The Principle of Complementarity in Practice ('Expert Paper'), ICC Doc ICC-01/04-01/07-1008-AnxA, March 30, 2003, available at <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF>.

⁶ Expert Paper, p. 3.

In the lead-up to the Review Conference of the Rome Statute in May-June 2010, however, this began to change. In part this was due to pressure on the ICC from the Assembly of States Parties (ASP) to reduce spending and thus refrain from expanding on its core mandate of conducting trials in The Hague. Denmark and South Africa—the two designated focal points on complementarity—conducted extensive consultations with other states, the various organs of the ICC, and international and civil society organizations, and then proposed an approach to promoting complementarity by mainstreaming Rome Statute concepts into rule-of-law programming.⁷ This approach recognizes the implicit disconnect to date between donors' general justice sector support and specific efforts in support of domestic investigations, prosecutions, and trials for international crimes.

At the Review Conference in Kampala, states and entities making pledges relevant to complementarity included Finland, France, Ireland, the Netherlands, South Korea, Spain, Uganda, the United Kingdom, and the European Union. The United States, a non-state party, also made a pledge of renewed commitment “to support rule-of-law and capacity building projects which will enhance states’ ability to hold accountable those responsible for war crimes, crimes against humanity and genocide.”⁸

While welcome, the resolution on complementarity that emerged from the Review Conference was of limited scope.⁹ It recognized a need for “the enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community” at the national level.¹⁰ But the main initiative launched to this end was to give the Secretariat of the ASP (SASP), “within existing resources,” a mandate “to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions.”¹¹ The SASP is already an overstretched body, and may not be the best- entity to take on the role of facilitating the advancement of complementarity. Further, it is difficult to imagine it succeeding without additional resources.

The Open Society Foundations share the goal of improving the effectiveness of international support for genuine investigations and trials of Rome Statute crimes at the national level. As part of the overall effort to realize this objective, over the past nine months, OSF¹² set out to assess existing efforts to advance complementarity in three ICC situation countries. The aim

⁷ See Assembly of States Parties, Report of the Bureau on Stocktaking: Complementarity – Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap, ('Bridging the Impunity Gap') ASP Doc ICC-ASP/8/51, March 18, 2010. South Africa and Denmark were the focal points designated to develop materials and design discussions on complementarity as one of the four stocktaking topics slated for the Review Conference (the other topics were cooperation, the impact of the Rome Statute system on victims and affected communities, and peace and justice).

⁸ See e.g.,

http://www.iccnow.org/documents/CICC_member_action_plan_on_pledges_following_the_Review_Conference.pdf.

⁹ RC/9, Pledges, Review Conference of the Rome Statute, July 15, 2010, available at: <http://www.icc-cpi.int/NR/rdonlyres/18B88265-BC63-4DFF-BE56-903F2062B797/0/RC9ENGFRASPA.pdf>.

¹⁰ See ICC Assembly of States Parties, Resolution on Complementarity (Advance copy), ASP Doc. RC/Res.1, adopted by consensus June 8, 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf, para 3.

¹¹ Resolution on Complementarity, para 9.

¹² This report was designed and prepared as a collaborative project of the Open Society Justice Initiative, the Open Society Initiative for Eastern Africa and the Open Society Initiative for Southern Africa, all of which are part of the Open Society Foundations.

was to glean lessons specific to those countries, but also to begin drawing conclusions for effective complementarity support in various settings around the world. Research in the Democratic Republic of Congo, Uganda, and Kenya indicates promising approaches that could be replicated elsewhere. But it also identifies daunting challenges that remain in the fostering of national will and capacity to end impunity for the crimes of greatest concern to the international community as a whole.

The three country assessments in this report are based on numerous interviews with officials of the three governments, representatives of the diplomatic community and civil society organizations, and a review of relevant documents and literature.

For each country, OSF sought to assess the current legislative basis for complementarity, as well as the current status of technical ability, infrastructure and equipment, and political will. Following identification of problem areas, it explored how effectively each of the three governments and donors were working to close those gaps. This report interprets “genuine investigations and prosecutions” to encompass security for court officials and sites, an independent and able judiciary, an effective defense, and adequate protection and support for victims and witnesses, as well as effective outreach, journalistic capacity, and a strong civil society sector to monitor proceedings and identify shortcomings. Each country assessment thus includes all of these elements.

The report concludes by summarizing lessons learned from OSF’s study of complementarity conditions and needs in the three countries. These lessons, coupled with the recommendations offered in the report’s first chapter, are intended to provide the information and guidance needed to further efforts to achieve complementarity in DRC, Uganda, and Kenya.

Democratic Republic of Congo

Throughout its history, Congo has struggled to achieve an effective justice system. Foreign slave raids began in the early 16th century and over some 200 years depleted much of the population and decimated cultures on the territory of today's Democratic Republic of Congo (DRC). In the late 19th century, Belgian King Leopold II claimed the Congo as his personal property and used mass atrocities as a means of maximizing his theft of the territory's natural resources.¹³ Congo shifted from Leopold's personal property to a formal Belgian colony in 1908 in response to mounting international alarm over the killing and brutalization of millions of Congolese. With decreasing viciousness over time, Belgium continued to exploit the Congo.¹⁴ Then in June 1960, at the height of the cold war, the colony gained its independence but quickly fell under the authoritarian and kleptocratic rule of the Western-sponsored Mobutu Sese Seko, who changed the country's name to Zaire. Over this entire stretch of time, from the first slave raids and into the 1990s, the faces of the tormentors changed, but impunity for those in power was constant.

Following the 1994 Rwandan genocide, hundreds of thousands of Hutu refugees fled to eastern Zaire. Among them were perpetrators of the genocide, who with Mobutu's support sought to use the refugee camps as bases for continued attacks on Rwanda. The First Congo War began in November 1996 when rebel forces backed by Rwandan and Ugandan troops began seizing control of villages and towns in the east. The army of the rotted Zairian state collapsed, allowing the eastern rebels to sweep across the country and topple Mobutu by May 1997. In the course of the war, the Rwandan, Ugandan, and rebel forces hunted down not only Hutu extremist guerillas, but also tens of thousands of innocent Rwandan Hutu civilians.¹⁵ The movement installed the previously obscure rebel leader Laurent Kabilas as president, and he renamed the country the Democratic Republic of Congo.

When Kabilas turned on his Rwandan backers, Rwanda and Uganda again supported an invasion by various rebel forces, launching the Second Congo War in August 1998. The rebel forces splintered and multiplied, and side conflicts developed. For his part, Kabilas sought assistance from Angola, Namibia, and Zimbabwe. With Congo's mineral wealth available for the taking, domestic and foreign fighting forces had strong incentives to stay. There were countless atrocities committed by forces on all sides. It is estimated that by the time a peace agreement signed in Sun City, South Africa officially ended the second war in December 2002, over three million Congolese had lost their lives as a direct or indirect result of the conflict.¹⁶ Conflict and atrocities continue to the present day, especially in eastern Congo, where endemic sexual and gender-based violence is one symptom of continued impunity.

¹³ The definitive study on the reign of Leopold over the Congo is Hochschild, Adam, *King Leopold's Ghost: A story of greed, terror, and heroism in colonial Africa*, Mariner Books, New York, 1999.

¹⁴ Although it invested in Congolese infrastructure, notably healthcare infrastructure, Belgium scrupulously avoided the development of Congolese human capital until very late. At independence in June 1960, there were only 17 Congolese citizens with a university degree. (See Wrong, Michela: *In the Footsteps of Mr. Kurtz*, Fourth Estate, London, 2000, p. 50.) This early deficit is relevant to today's many capacity gaps in Congolese governance, including the justice sector.

¹⁵ See French, Howard: *A Continent for the Taking: the tragedy and hope of Africa*, Vintage Books, New York, 2005.

¹⁶ International Rescue Committee, "Mortality in the Democratic Republic of Congo: An Ongoing Crisis", 2007, p. ii, available at: http://www.theirc.org/sites/default/files/resource-file/2006-7_congoMortalitySurvey.pdf.

The peace agreement of 2002 foresaw the creation of mechanisms of transitional justice, including an “International Criminal Court for the DRC” that subsequently never materialized.¹⁷ Instead, the DRC, under President Joseph Kabilà, turned to the International Criminal Court (ICC) in The Hague for justice, although under the Rome Statute the ICC only has jurisdiction for crimes committed after July 1, 2002.¹⁸ The government referred the situation to the ICC in 2004, and the ICC’s Office of the Prosecutor launched investigations that as of January 2011 had led to the issuance of five arrest warrants related to the conflicts in Ituri District of Orientale Province and the provinces of North and South Kivu. As of January 2011, four of these accused were in ICC custody or awaiting transfer to the ICC, and three were on trial.¹⁹

From a sea of grave crimes, the ICC will only ever be able to deal with a handful of the most serious cases. Beginning in 2002, some military prosecutors in the DRC began halting efforts to charge suspected perpetrators with international crimes. In 2006, some military prosecutors began citing the Rome Statute in doing so. As will be seen, these attempts have taken place in the context of deep systemic shortcomings, and many have been noble but flawed.

Over the course of 2010, momentum built in the international community in favor of assisting the DRC in delivering credible domestic justice for war crimes, crimes against humanity, and genocide. The Review Conference of the Rome Statute, held in Kampala in May-June 2010, acknowledged the limits of the ICC and thus the importance of building state will and capacity—realizing the principle of complementarity—if impunity for grave crimes was really to end. Meanwhile in the DRC, horrific atrocities continued. Among them, in July and August 2010 militants attacked villages in eastern Congo, raping hundreds of men, women, and children.²⁰ Some of the atrocities were committed near an outpost of severely overstretched UN peacekeepers, which only underscored the limits of deterrence through security forces alone. Then in August 2010, a draft report from the UN’s Office of the High Commissioner for Human Rights mapping the conflict and atrocities in the DRC between March 1993 and June 2003 created an international furor by naming Rwanda and Uganda for complicity in or even direct responsibility for atrocity crimes in the DRC. The report also emphasized the magnitude of Congolese suffering. A final version of the report (which some claim was softened) was officially released in October 2010.²¹ The UN mapping report has sparked serious domestic and international discussions over how best to structure and support

¹⁷ See Wets’okonda Koso, Marcel, “The Democratic Republic of Congo: Military justice and human rights – an urgent need to complete reforms”, AfriMAP and the Open Society Initiative for Southern Africa June 22, 2009, p. 4, available at: http://www.afrimap.org/english/images/report/AfriMAP_DRC_MilitaryJustice_full_EN.pdf.

¹⁸ Joseph Kabila became president upon the assassination of his father, Laurent Kabila in January 2001.

¹⁹ The three currently on trial are Thomas Lubanga (Ituri), and jointly, Germain Katanga and Mathieu Ngudjolo Chui (Ituri). Callixte Mbarushimana (Kivus) was arrested in France in October 2010, and by January 2011 he had exhausted appeals contesting his transfer to the ICC; his transfer was imminent at the time of writing. Another Congolese citizen, Jean-Pierre Bemba, is currently on trial in The Hague, but the charges relate to alleged crimes committed in the Central African Republic, not the DRC.

²⁰ “DR Congo rebel leader arrested over mass rapes”, BBC News, October 6, 2010, available at: <http://www.bbc.co.uk/news/world-africa-11480809>.

²¹ Office of the High Commissioner for Human Rights: 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, available at: http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf

a new justice mechanism for the DRC. The challenges are daunting. As it attempts to overcome the heavy historical burden of impunity, the DRC must also grapple with the intertwined legacies of authoritarianism and corruption that have left the state depleted of resources, talent and, too often, good will.

Complementarity Needs and Actions

Legislative Framework

The DRC is a monist state, meaning that international treaties carry the same weight as constitutional law and can be directly applied.²² The DRC ratified the Rome Statute in March 2002, and in theory the treaty has been applicable domestically ever since. In November 2002 the DRC adopted new military criminal and criminal procedure codes that included war crimes, crimes against humanity, and genocide, and military prosecutors soon began investigations and prosecutions on this basis. Then in 2006, some judge advocates began directly applying the Rome Statute. Meanwhile, absent mention of international crimes in the regular criminal and criminal procedure codes, civilian courts refrained from efforts to apply the Rome Statute.²³

The application of the Rome Statute through military courts has been controversial, not least because prosecutors have applied the law to civilians as well as to members of the military and police. Especially at the outset, deficiencies in the quality of investigations and prosecutions plagued the proceedings.²⁴ The military procedural code stipulates that no officer can be judged by a panel of judges that doesn't include an officer of superior rank. This provision has blocked the pursuit of cases against senior officers.²⁵ Different prosecutors and judges in the military justice system have handled conflicts between the Rome Statute and domestic law in various and unpredictable ways, a situation described by one official as "random enforcement."²⁶ In part this is because judges are often unaware of treaty law, including the Rome Statute. There are also discrepancies between the Rome Statute and the military criminal and criminal procedure codes that create confusion for judge advocates and magistrates hearing the cases. For example, the Rome Statute provides for

²² The constitution adopted in 2006 states that civilian and military courts may apply ratified treaties, even in the absence of implementing legislation, so long as they are "consistent with law and custom". See Constitution of the Democratic Republic of Congo, February 2006, article 153. Article 215 is also relevant. The constitution is available (in French) at: http://democratie.francophonie.org/IMG/pdf/Constitution_de_la_RDC.pdf. For an analysis of the current legal basis for application of the Rome Statute in the DRC, see Avocats sans Frontières, "Case study: the application of the Rome Statute of the International Criminal Court by the courts of the Democratic Republic of Congo", March 2009, pp. 9-20, available at:

http://www.asf.be/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf.

²³ For an overview, see Wetsh'okonda Koso, Marcel, "The Democratic Republic of Congo: Military justice and human rights – an urgent need to complete reforms", AfriMAP and the Open Society Initiative for Southern Africa June 22, 2009, p. 8, available at: http://www.afrimap.org/english/images/report/AfriMAP_DRC-MilitaryJustice_full_EN.pdf.

²⁴ ASF conducted a definitive analysis in 2009. See Avocats sans Frontières, "Case study: the application of the Rome Statute of the International Criminal Court by the courts of the Democratic Republic of Congo", March 2009, available at: http://www.asf.be/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf.

²⁵ Currently the highest ranking judge in the military justice system is a Brigadier General. Interview with an officer in the military justice system. Among the cases still blocked is that of a general allegedly co-responsible for the killings of nine UN peacekeepers in Ituri in 2005. Interview with officials of the JHRO.

²⁶ Interview with an official in the military justice system.

witness and victim protection, but there is no mechanism for this under current domestic law. And under Article 77, the Rome Statute prescribes penalties for categories of crimes, but the domestic code requires specific penalties for specifically defined crimes.²⁷

In an effort to address these and other shortcomings and to give civilian courts jurisdiction over international crimes, lawmakers first introduced draft implementing legislation on the Rome Statute in 2008. A revised draft came close to adoption in the legislative session that ended in June 2010, and there was again hope that it could be approved in the session beginning September 15, 2010.²⁸ Among technical obstacles to passage during the most recent legislative session, some cite a need to harmonize the bill with overall criminal justice, military justice, and penal reforms, all of which were also at various stages of the legislative pipeline as of late 2010.²⁹

The draft bill amends the criminal code by adding war crimes, crimes against humanity, and genocide as defined in the Rome Statute.³⁰ This includes the elements of crimes falling into these categories. Likewise, the bill adopts the Rome Statute's maximum penalties, which would exclude the possibility of the death penalty for international crimes.³¹ The bill diverges from Rome Statute penalties, however, by more specifically defining which penalties apply to which crimes.

The bill would also amend the criminal procedure code. It would shift jurisdiction for international crimes from the military to the civilian justice system and give it the same post-July 2002 temporal jurisdiction as the ICC. Specifically, civilian Courts of Appeal (*Cour d'Appel*) would be the courts of first instance for war crimes, crimes against humanity, and genocide. The second instance would be at the level of Superior Courts (*Cour de Cassation*). The bill strengthens fair trial rights and draws on the Rome Statute's innovations regarding victims by allowing victim representation, reparations to victims, and specifying measures for victim and witness protection. In addition to these aspects that address complementarity under the Rome Statute, the bill would create mechanisms for the DRC's cooperation with the ICC.

²⁷ Similar problems apply in the area of the DRC's cooperation with the ICC under the Rome Statute. The Statute requires the cooperation of States Parties, but without implementing legislation, DRC judges are currently left at a loss when it comes to identifying which domestic offices could be ordered to carry out cooperation, and through which procedures.

²⁸ Interview with Professor Nyabirungu Mwene Songa, MP. Members of Parliamentarians for Global Action, including Professor Nyabirungu, have been instrumental in drafting the bill and pushing for its passage. For discussion of the political prospects for passage of the bill, see the section later in this report on political rhetoric and legislative support.

²⁹ Interview with representatives of the international community. According to another view, DRC legislators have shown a preference for piecemeal approaches to reform, and there's no reason to believe that implementing legislation will have to wait for a comprehensive approach. Interview with representatives of civil society. For discussion of the political prospects for passage of the bill, see the section later in this report on political rhetoric and legislative support.

³⁰ Details on the contents of the bill come from co-drafter Professor Nyabirungu, MP.

³¹ MPs working to pass implementing legislation have worked assiduously to avoid having the issue hijacked by that of the death penalty, which still has many supporters in the DRC. Interview with representatives of civil society.

Under the draft legislation, five-member judicial panels hearing cases of international crimes would still include a military judge when at least one suspect is from the military or police.³² However, the much-criticized provision of current law—whereby this military judge would have to be of equal or superior rank to the accused person—would remain. Formally the draft legislation states that position is no bar to prosecution. This means that there could be no head of state immunity. Yet with its backdoor to protection from prosecution for the most senior military and police officers, the current draft retains an internal incoherence that leaves it in conflict with Article 27 of the Rome Statute.

One drawback of the draft law is a potential loss of international criminal law knowledge gained by officials working in the military justice sector over the past eight years.³³ This may be offset by the continuing participation of military judges in cases involving military or police personnel.³⁴ One military official also noted that civilian and military magistrates will still be able to cooperate in the conduct of investigations.³⁵ Military magistrates could also be involved in trainings for their civilian counterparts.

Civil society has played a major role in the effort to pass Rome Statute implementing legislation through the National Assembly. The International Center for Transitional Justice (ICTJ) worked in coordination with other NGOs including Avocats sans Frontières (ASF) and the Coalition for the International Criminal Court (CICC) to draft proposed elements of the legislation and educate parliamentarians about the Rome Statute.³⁶ Parliamentarians for Global Action (PGA) has played an educational role and its Congolese membership has provided a core group of MPs from different parties who can push for adoption of the draft law. The United Nations Joint Human Rights Office’s (UNJHRO) “fight against impunity” unit has also advocated passage of the implementing legislation.

Technical Capacity

There have been multiple efforts to enhance domestic capacity in the DRC justice sector, including many focused on complementarity aspects. Indeed, many ongoing trainings rely on the work of Congolese experts. However, these limited efforts in a country of such grand scale and dire need have left the DRC still lacking capacity in every area needed to conduct proper investigations and prosecutions and hold fair trials. The broad scope of United Nations Organization Stabilization Mission in the Democratic Republic of Congo’s (MONUSCO) mandate to support the justice sector reflects this.³⁷

³² Interview with Professor Nyabirungu, MP. This may be necessary because the constitution requires military justice for military and police officials. Interview with a UN official.

³³ Interview with staff of the Open Society Initiative for Southern Africa.

³⁴ Under the DRC constitution, the military justice system is responsible for cases against members of the military and police forces. The draft law’s provision to continue participation of a military magistrate in such cases is intended to satisfy this requirement.

³⁵ Interview with an official in the military justice system.

³⁶ Interviews with ICTJ and ASF staff members.

³⁷ The Security Council mandated MONUSCO to “[d]evelop and implement, in close consultation with the Congolese authorities and in accordance with the Congolese strategy for justice reform, a multi-year joint United Nations justice support programme in order to develop the criminal justice chain, the police, the judiciary and prisons in conflict-affected areas and a strategic programmatic support at the central level in Kinshasa.” S/RES/1925 (2010), point 12(o).

Policing and investigations

Policing in the DRC is in the midst of restructuring, reform, and trainings, but has had to begin from a level of almost no capacity. At the time the new constitution was promulgated in 2006, the police force had only a vague notion of how many officers it had, and without an operational budget, the force relied on ad-hoc provision of funds.³⁸ Persistent problems and a reform process that is perhaps inevitably slow mean that police currently remain ill-prepared and ill-equipped to provide security, support prosecuting magistrates in their investigations, or make arrests in support of domestic war crimes proceedings.

Police ability to provide security for the judiciary is inherently linked to the broader, unpredictable security context in the DRC. Numerous competing militia factions still exist, with some still enjoying the backing of neighboring states. Justice sector personnel and infrastructure face clear danger, especially where there are efforts to hold the members and leaders of armed factions judicially accountable for atrocities. The Armed Forces of the DRC (*Forces armées de la RDC*, or FARDC) is a conglomerate of competing military factions with little to no loyalty to the central government. It is still an undisciplined and underpaid force that too often causes rather than stems instability. Ill-trained and ill-equipped Congolese police offer little in the way of protection from predatory elements of the FARDC. To the contrary, beyond contributing to deficits of competence and motivation, poor police pay and training also lead to rampant corruption and abuse among police.

In the DRC, prosecuting magistrates are in charge of investigations, and police—whether *Officiers de Police Judiciaire* (OPJ), or *Inspecteurs de Police Judiciaires* (IPJ)—play a supporting and subordinate role. Various capacity building efforts to date have begun to lend police investigators a more substantive role than they would have enjoyed in the past, and the extent to which the police should be regarded as part of the justice rather than the security sector is currently a matter of some dispute between the Ministry of Interior and the Ministry of Justice.³⁹

Prosecuting magistrates and the police who support them lack capacity to conduct sound investigations. Although the police are generally good at producing accurate reports, they are particularly weak when it comes to handling evidence and crime scenes, and analyzing cases.⁴⁰ Use of forensic analysis is virtually unknown. As of June 2010, the country had only one forensic laboratory, financed by France and located in the school for police officers. Corruption is also a factor affecting prospects for justice. For example, police officers sometimes ask victims of criminal offenses for fees to conduct investigations.

When it comes to police capacity to make arrests, the situation improves somewhat. Even with a shift of responsibility for international crimes from the military to civilian justice spheres, the military police will remain responsible for arresting military personnel, and may facilitate other arrests, too.⁴¹ Military police, with varying levels of assistance by the United Nations Organization Mission in Congo (MONUC), have already made arrests for the ICC, namely those of Thomas Lubanga, Germain Katanga, and Mathieu Ngudjolo-Chui. But

³⁸ International Crisis Group, “Congo: A Stalled Democratic Agenda”, Africa Briefing No. 73, April 8, 2010, p 5.

³⁹ See the section on national planning and coordination capacity for additional information.

⁴⁰ Interview with civil society and representatives of the international community.

⁴¹ Interview with an official in the military justice system.

because the FARDC consists of a collection of often rival factions, every potential arrest action brings risk. The co-opting of former enemy militias has also resulted in a pool of military police officers with wildly divergent capability: some well trained and educated, and others undisciplined and often illiterate.⁴²

The future ability of Congolese police to provide security, undertake quality investigations, and make arrests in support of domestic war crimes proceedings will depend in large part on security sector reform initiatives being supported by MONUSCO and a variety of other international actors.

Following the Sun City Agreement of 2002, which called for an integrated police force, then President Laurent Kabil created the National Congolese Police (*Police Nationale Congolaise*, or PNC) by decree that same year.⁴³ As with the army, the new force was cobbled together not only from existing state security forces, but also from security forces of former rebel groups. Consolidation of the PNC remains a challenge, in part because a draft organic law setting out its structure has not yet passed parliament. The main obstacle is a dispute between the ministries of interior and justice.⁴⁴

General police reform has received the support of UN police, who since 2002 have also provided training for thousands of PNC officers.⁴⁵ Since 2005, the MONUC Rule of Law section has provided various types of trainings to military justice investigators and attorneys, who have found these useful.⁴⁶ More direct forms of support have also begun to be provided by the United Nations. UNPOL recently began on-site training within police units. And starting in 2010, the UN Joint Human Rights Office (JHRO), working through its field offices, began direct support to military prosecutors through Joint Investigation Team (JIT) missions to interview victims and witnesses of grave crimes. Teams consist of military investigating magistrates, who always remain in charge, and UN human rights officers in an advisory role. In the first half of the year there were 33 JIT missions launched to investigate serious crimes, including rape and murder.⁴⁷

The European Union and its member states have also been active in the area of police reform and training. Since 2005, the European Union has advised the DRC on policing matters through its EU-POL mission. Other activities have been conducted in the framework of large EU-backed programs, such as Reform of the Justice Sector in Congo (REJUSCO) (discussed later in the section on coordination) or a Dutch effort to support the entire judicial chain in Maniema. Implementing partners have included such NGOs as ASF, Réseau de

⁴² Interview with an official in the military justice system.

⁴³ For more detailed background on police reform in the DRC, see Davis, Laura, Justice-sensitive security sector reform in the Democratic Republic of Congo, Initiative for Peacebuilding, February 2009, pp. 19-20, available at: http://www.initiativeforpeacebuilding.eu/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC.pdf and Boshoff, Henri, et al: Supporting SSR in the DRC: between a Rock and a Hard Place, Clingendael Institute, April 2010, pp. 13-18, available at:

http://www.clingendael.nl/publications/2010/20100400_cru_paper_smore.pdf

⁴⁴ Judicial police are not yet integrated into the PNC. They currently fall under the ultimate authority of the ministry of justice, but the draft law calls for them to be joined with the PNC under the authority of the ministry of interior.

⁴⁵ Until 2005, the UN police were known as MONUC Civil Police (CIVPOL) and thereafter as MONUC Police or UNPOL. An overview of UN Police activities is available at

<http://monusco.unmissions.org/Default.aspx?tabid=4152>.

⁴⁶ Interview with an official in the military justice system.

⁴⁷ Interview with JHRO officials, and JHRO document, “Overview of UNJHRO efforts in the Justice Sector”.

Citoyens/Citizen's Network (RCN) and the American Bar Association's Rule of Law Initiative (ABA ROLI). The UK narrowed its focus on rule-of-law issues in 2007-2008, and its Department for International Development (DFID) now concentrates on police reform and capacity building, with particular emphasis on internal and external accountability for the PNC. In 2009, it contracted planners to design a "Security Sector Accountability and Police Reform Program" to be implemented over the following five years.⁴⁸ Others have undertaken more isolated efforts. For example, in coordination with EUPOL, from 2008-2010 the German development agency GTZ engaged in training a 50-person special investigative unit, part of which is to focus on undercover investigations and another part of which is to be a mobile special forces commando. The GTZ program also offers training for police in the investigation of sexual and gender-based violence.⁴⁹

Some efforts have directly targeted police capacity to deal with international crimes. For example, with Dutch and German support, MONUSCO has assisted military magistrates by providing transportation for their investigations.⁵⁰ Included in the MONUSCO mandate of May 2010, the Security Council authorized the establishment of Prosecution Support Cells (PSCs) to back FARDC efforts to bring to justice perpetrators of international humanitarian and human rights laws arrested by the military.⁵¹ The initiative, spearheaded by MONUSCO's Rule of Law section, aims to provide concrete gains for justice in the short term through mentoring that should build capacity and ownership for the long term. The basic model for each of five proposed PSCs would include four international police investigations advisors (two civilian and two military) and two prosecution advisors (one civilian and one military). This makeup could change depending on the backgrounds of the advisors and the specific investigations. The program will include provision of all equipment required by field investigators. The MONUSCO budget that was still pending in New York as of mid-November 2010 included funding for three of five PSCs. The Peacebuilding Fund and bilateral donors, notably Canada, have also offered bilateral support. It is hoped that permanent staff for the first PSCs can be recruited in early 2011. In the meantime Canadian approval of CAD 2.6 million for the project allowed MONUSCO to begin recruitment for a limited number of temporary posts and to begin the procurement process.⁵² The capacity gained by military investigators to conduct investigations of international crimes will not necessarily be lost with adoption of implementing legislation and the shift in jurisdiction over these crimes from military to civilian courts. The military will remain available for cooperation on investigations.⁵³

The ICC has played a modest role in training prosecuting magistrates and police, whether focused on general investigative capacity or more specifically on international crimes. While the ICC's Office of the Prosecutor (OTP) does not organize trainings for police investigators, it has sent representatives to participate in trainings sponsored by others, including the United Nations, European Union, United States, and various NGOs. For example, in October 2010,

⁴⁸ Interview with a DFID representative.

⁴⁹ A project overview is available on the GTZ website at: <http://www.gtz.de/en/praxis/30774.htm>.

⁵⁰ Interview with JHRO officials.

⁵¹ S/RES/1925 (2010), point 12(d), available at: <http://www.securitycouncilreport.org/atf/cf%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%20RES%201925.pdf>. There is also interest in assisting investigations related to pillage of natural resources, which could require advisers with different backgrounds. Interview by e-mail with a MONUSCO official.

⁵² The foregoing is based on telephone and e-mail interviews with a MONUSCO official.

⁵³ Interview with an official in the military justice system.

ICC-OTP staff contributed to a capacity-building workshop on sexual and gender-based violence organized by the United Nations Development Programme (UNDP) in Goma, North Kivu.⁵⁴

Beyond participation in trainings, cooperation with the ICC-OTP is also important to Congolese investigations into crimes under the Rome Statute. One military justice official complained that cooperation with the ICC's Office of the Prosecutor was only working in one direction. According to this official, while the DRC military has always provided immediate assistance to the ICC-OTP, the latter has never responded to requests for information regarding domestic cases.⁵⁵ In response, a representative of the ICC-OTP said that the office has a legal mandate to assist with local investigations in ICC situation countries and is willing to do so, but that constraints arise out of concern for the security of witnesses, sources, and magistrates.⁵⁶ In the second DRC investigation launched by the office, in North and South Kivu, the ICC-OTP has taken a more active approach in assisting military investigators to find relevant information themselves.⁵⁷

Legal education

The DRC has law schools at the public universities of Kinshasa and Lubumbashi and the private *Université Protestante du Congo*, but although some individual instructors have experience in the field, including as practitioners at the ICC and ICTR, none of the schools offers courses in international criminal law.⁵⁸ Law courses on gender justice and women's issues are also lacking. These omissions may create an obstacle to the sustainability of domestic efforts to deliver justice for international crimes.

Models for international assistance in legal education exist. For example, under a cooperation agreement between the universities of Kinshasa and Würzburg, Germany, in 2010 the Würzburg law faculty visited the DRC to hold seminars in legal English, German language, and German law, and in November 2009 the two faculties founded a German-Congolese Jurists Association to facilitate future cooperation.⁵⁹ Law schools that specialize in international criminal law, international humanitarian law, or international human rights law could undertake similar programs with at least one of the three Congolese law schools. Any effort to include international criminal law in law school curricula should include law school professors at an early stage.⁶⁰ The effort should also include the Ministry of Higher Education, which sets university curricula.⁶¹

⁵⁴ Telephone interview with a representative of the ICC-OTP.

⁵⁵ Interview with an official in the military justice system.

⁵⁶ According to this official, there has only ever been one formal request from the DRC, related to the Ituri investigation. The OTP asked Congolese officials to make some clarifications to the request but never received answers.

⁵⁷ Telephone interview with a representative of the ICC-OTP.

⁵⁸ Interviews with officials in the Congolese justice sector. For an overview of legal education in the DRC, see: http://www.nyulawglobal.org/Globalex/Democratic_Republic_Congo.htm#_Toc182803285.

⁵⁹ Interview with an official of the German embassy. More information on the programs is available (in German) at: http://www.jura.uni-wuerzburg.de/studium/fachsprachen_und_auslaendisches_recht/kongo/.

⁶⁰ Interview with CSM Permanent Secretary Jean Ubulu Pungu.

⁶¹ Interview with ICTJ staff members.

Prosecution

As discussed, until Rome Statute implementing legislation is adopted, military courts will maintain jurisdiction over international crimes. Some judge advocates have sought to apply the Rome Statute while others remain unfamiliar with it, leading to a patchwork of enforcement.⁶² In general, however, complementary-related capacity building efforts since 2002 have created a small cadre of personnel within the military justice system who have a base of knowledge on international criminal law.

The Defense Institute of International Legal Studies (DIILS), a program of the U.S. Defense Security Cooperation Agency, has provided trainings and a compendium of legal texts to military tribunals around the country, and hosted a study program for military court officers.⁶³ The ICC outreach office has been involved in some training for prosecuting magistrates in the military justice system, as have ASF, ABA ROLI, RCN, and other NGOs.⁶⁴ As described in the section on policing, above, MONUSCO is preparing to launch Prosecution Support Cells to strengthen investigations and prosecutions of violations of international humanitarian and human rights law. In addition to investigative advisors, the PSCs will include international advisors on prosecution.⁶⁵ The Women's Initiative for Gender Justice (WIGJ) has been heavily involved in supporting gender justice training of women's organizations in particular, and may become more involved in assisting domestic courts in investigating and prosecuting sex crime cases, which could include international crimes.

Once jurisdiction shifts from the military to the civilian justice system, prosecutions for international crimes will take place in the context of a system in flux. Under the 2006 constitution, the position of prosecutor general is to be broken into three offices, with a specific prosecutor for criminal cases tasked to bring cases before the Superior Court (*Cour de Cassation*).⁶⁶ That court has not yet been created, and neither has the corresponding position of Prosecutor General for the Superior Court (*procureur général près la Cour de cassation*). This incomplete structural development is indicative of wider capacity gaps that circumscribe the state's ability to conduct criminal prosecutions. Beyond a simple shortage of courts, there are far too few prosecuting magistrates, and the funding to develop the system is largely lacking.⁶⁷

Defense

⁶² Interview with an official in the military justice system.

⁶³ Participants in U.S.-provided trainings are screened against a U.S. embassy blacklist of individuals implicated in the commission of atrocities. Interviews with a military justice official and an international development official.

⁶⁴ Interviews with an official in the military justice system and with ASF staff members.

⁶⁵ Telephone and e-mail interviews with a MONUSCO official.

⁶⁶ See Zongwe, Dunia, et al: The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview, August/September 2010, available at:

http://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.htm.

⁶⁷ Interview with representatives of civil society. The shortage of magistrates will be discussed in greater detail in the section on the judiciary and funding will be discussed in the section on national planning and coordination capacity.

Congolese law places the burden of providing legal aid at the feet of the bar council, but the state provides no funding to support the defense of indigent suspects or accused.⁶⁸ Few Congolese know about options for legal aid and those who seek it are confronted by a fee for a required declaration of indigence that many cannot afford. The pro bono legal assistance that is provided is often staffed by inexperienced lawyers-in-training. Congolese in need of legal aid often seek advice through NGO-administered legal aid clinics instead.

Defense counsel share in the general problems facing the DRC's legal community: an overall shortage of legal professionals and minimal familiarity with international criminal law. For defense counsel appearing in war crimes cases in the military justice system, there has been no training policy in place. Those trainings that have been conducted by the International Bar Association (IBA) or other NGOs have all been done on an ad hoc basis.⁶⁹

Judiciary

The judiciary is in the midst of a transition to new structures set out in the 2006 constitution. The old Supreme Court of Justice (*Cour Supreme de Justice*) is to be broken into separate high courts for constitutional, public/administrative, and civil/criminal law. But the parliament and government have been slow in implementing the changes and the Superior Court (*Cour de Cassation*), which is responsible for criminal appeals from lower civilian and military courts, does not yet exist.⁷⁰

There is a severe shortage of legal professionals to serve in the DRC legal system, including prosecuting and trial magistrates. Fewer than 1,500 magistrates for the entire country, including military magistrates, mean there is one magistrate for every 45,000 people and 30,000 square miles.⁷¹ Two-thirds of these are located in Kinshasa, neighboring Bas-Congo and the second largest city, Lubumbashi, so the distribution in the rest of the country is markedly worse than even these sobering statistics suggest.⁷² The *Cours d'Apelle* at the provincial level are particularly weak.⁷³

⁶⁸ The following information is drawn from “Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo”, International Bar Association and the International Legal Assistance Consortium, August 2009, pp 33-34, available at:

<http://www.ibanet.org/Document/Default.aspx?DocumentUid=54396461-F637-4842-AD27-416E63413AB9>.

⁶⁹ Interview with an official in the military justice system.

⁷⁰ International Crisis Group, “Congo: A Stalled Democratic Agenda”, Africa Briefing No. 73, April 8, 2010, p 5.

⁷¹ Interview with international development official. See also the 2009 U.S. State Department Human Rights Report for the Democratic Republic of the Congo, March 11, 2010, available at:

<http://www.state.gov/g/drl/rls/hrpt/2009/af/135947.htm> (hereinafter, “2009 U.S. State Department Report on Human Rights in the DRC”). The precise number of magistrates in the DRC is unclear. Plans are under discussion to create a database of active magistrates. According to one anecdote relayed by an international development official, a magistrate who left the country years ago was recently surprised to learn that his magistrate’s salary was still being paid to a person unknown. Without a controlled central register of active magistrates, there could be a number of “ghost magistrates” still on the books.

⁷² 2009 U.S. State Department Report on Human Rights in the DRC. The uneven distribution is largely attributable to the lack of a system of hardship pay for difficult postings. Interview with a representative of the international community.

⁷³ Interview with a representative of the international community.

The government has taken steps to increase the number of magistrates, but financial obstacles have prevented their deployment. After years of no recruitment whatsoever, the government recruited a class of 1,000 magistrates in 2010. These new magistrates went through three months of training but as of October 2010, still had not been assigned and deployed to jurisdictions around the country because the government forgot to include their salaries in the 2010 budget.⁷⁴ There are plans to recruit another 1,000 magistrates in 2011 but funding for their three-month training has not yet been secured.⁷⁵ And according to the magistracy's permanent secretary, three months of training is insufficient in any case.⁷⁶

Judges have limited access to legal texts and the judgments of their peers. Although the DRC has a civil law system, judges have an interest in seeing how their colleagues ruled on similar questions of law. And the new administrative body for the judiciary, the *Conseil Superior de la Magistrature* or CSM, itself lacks funds for magistrates' transportation and security, or for further rounds of recruitment. Internally, the CSM lacks capacity in the areas of administration, human resources, and financial management.⁷⁷

Reports of corruption among the judiciary are widespread. According to some observers, more progress in reforming the bench and the courts has taken place within the military justice system. Magistrates' pay has increased to a level some donors described as quite comfortable for local standards.⁷⁸ But some Congolese officials say it is still insufficient to guarantee financial independence and they point to a pattern of the rich always winning their cases.⁷⁹ Judges' salaries have increased from \$500-\$600 per month three years ago to \$3,000 per month today—a very high salary by DRC standards.⁸⁰ This suggests that ongoing corruption reflects less a struggle to get by than the legacy of a culture of graft. USAID, working through ProJustice, and EUPOL, supported by the UN Joint Human Rights Office (JHRO), have partnered with the Ministry of Justice and CSM to develop a code of ethics for police and magistrates.⁸¹

The European Union has been the main player in financing several justice support initiatives, often together with other donors, that have included trainings for civilian and military magistrates.⁸² Projects sponsored by the EU and its member states have frequently been implemented by NGO partners, including ASF, ABA ROLI and RCN. USAID, in coordination with local bar associations and the CSM, has sponsored trainings and workshops for magistrates in case management.⁸³ Among many other disparate efforts, over 2009-2010 Japan financed trainings for magistrates in Bas Congo.

⁷⁴ Interview with international development official.

⁷⁵ Interviews with an international development official and CSM Permanent Secretary Jean Ubulu Pungu. As of October 2010, the UNDP, EU and MONUSCO were in talks about providing the training budget, but they were reluctant to exceed USD 300,000 and three months for the training.

⁷⁶ Rather, there is a need for a twelve-month training course. The CSM is working with the EU on potential development of a magistrates' training school. Interview with CSM Permanent Secretary Jean Ubulu Pungu.

⁷⁷ Interview with CSM Permanent Secretary Jean Ubulu Pungu.

⁷⁸ Interviews with representatives of the international community.

⁷⁹ Interview with a justice ministry official.

⁸⁰ Interview with an EU official. Magistrates are unhappy that a portion of this salary comes in the form of a stipend that does not count in the setting of their pension rates. Interview with CSM Permanent Secretary Jean Ubulu Pungu.

⁸¹ Interview with international development official. The CSM General Assembly still must approve the code.

⁸² For an overview of several large EU-led programs (REJUSCO, PAG, PARJ and PARJE) see the section on coordination.

⁸³ Interview with international development official.

When it comes to international criminal law, trial magistrates face the same fundamental problem as prosecution magistrates and defense counsel: the lack of any systematic training in the subject. The relatively few magistrates who have gained familiarity with the field have done so through participation in isolated seminars or workshops.⁸⁴ Most magistrates remain unfamiliar with the 1949 Geneva Conventions and other cornerstones of the discipline.⁸⁵

With modest means, systematically adding international criminal law elements to existing training programs would not be difficult.⁸⁶ But to bring about a jump in capacity for Congolese magistrates who may be confronted with atrocity crime cases would require integration of the subject into law school curricula or into the magistrates' supplementary training course.

Court management

Capacity for court management is “close to zero,” according to one official in the military justice system, who said that without information technology systems, officials still use paper and pencils to track the proceedings.⁸⁷ Registrars and other administrative staff are in short supply. Courts often rely on “volunteer” clerks to assist in the administration of proceedings, but the positions are merely perches from which these judicial service entrepreneurs can solicit bribes from the parties.⁸⁸

There has been very little international assistance in the area of court management.⁸⁹ In the four provinces of Bandundu, Katanga, Maniema, and South Kivu, USAID is offering trainings in court management.⁹⁰ And initiatives that seek to strengthen the entire judicial chain in a particular location sometimes include efforts to improve court management in limited ways.⁹¹

A sustainable justice system will require greater resources for court management from the DRC government or the international community. To this end, in their joint assessment of the justice system in August 2009, the International Bar Association Human Rights Institute (IBAHRI) and the International Legal Assistance Consortium (ILAC) recommended the revitalization of the DRC’s defunct school for registrars and other support staff (*École de recyclage et de formation du personnel judiciaire*).⁹²

Witness and victim protection

⁸⁴ Interview with CSM Permanent Secretary Jean Ubulu Pungu.

⁸⁵ Interview with Professor Nyaburinga, MP.

⁸⁶ Multiple interviews with Congolese and donor country officials.

⁸⁷ Interview with an official in the military justice system.

⁸⁸ Interview with international development official.

⁸⁹ Interview with an official in the military justice system.

⁹⁰ Interview with international development official.

⁹¹ See the section on strategy below for an overview of this regional approach to capacity building.

⁹² “Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo”, International Bar Association Human Rights Institute and the International Legal Assistance Consortium, August 2009, p 46, available at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=6C2BE523-F512-48C1-B09C-FC9A8B1D0AAB>.

There is currently no legal basis in the DRC for the protection of victims and witnesses, apart from a 1972 statute that was never implemented. A basis would exist for cases of international crimes if the draft implementing legislation on the Rome Statute becomes law. Yet even once a legal framework is in place, there remain enormous challenges in creating a protection regime.

In many areas of the country, perpetrators remain in positions of power, and frequently government forces are victimizers rather than protectors. Threats to victims and witnesses have accompanied some of the war crimes cases heard before military courts to date. Such was the case in the *Songo Mboyo* trial of 2005-2006, in which 12 FARDC members of a former rebel faction were charged with crimes including rape and looting as crimes against humanity under the Rome Statute. In the slow run-up to the trial, victims and witnesses in the villages that had been targeted were repeatedly threatened by FARDC personnel.⁹³

Even where good intentions exist, the government has practically no capacity to protect victims and witnesses.⁹⁴ Teams of trained police and other protection officials need to be able to move quickly and transport witnesses to safe locations, but funding for salaries is scarce, as is funding for such other essentials as training, communications equipment, safe houses, vehicles, and fuel.

As in so many other areas where the state remains dysfunctional, the international community has been called upon to plug the gap. In 2000, the Security Council gave MONUC a mandate to “protect civilians under imminent threat of physical violence.”⁹⁵ In the rebranding of the mission as MONUSCO in May 2010, the Security Council made this item the mission’s top priority.⁹⁶ Although clearly not limited to the realm of the justice system, this has established a basis for the UN’s leadership role in providing some measure of protection for some victims and witnesses involved in cases before military and civilian tribunals. Accordingly, the UN Joint Human Rights Office has assisted with witness protection and relocation in war crimes cases before military tribunals.⁹⁷ Canada has funded a program implemented by the JHRO, United Nations Population Fund (UNFPA), and United Nations Children’s Fund (UNICEF) to bring justice to victims of sexual violence in North and South Kivu. The program has included victim and witness protection, including relocation from conflict areas.⁹⁸ And throughout, these and other ad hoc efforts have heavily relied on MONUC/MONUSCO for transportation and other logistical needs.

Civil society has played an important role as well. For example, the Open Society Initiative for Southern Africa (OSISA) has supported victims and witnesses in trials related to sexual and gender-based violence. Channeled through local partners, this support ranges from the

⁹³ Information on the case is taken from: Office of the High Commissioner for Human Rights: 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, paras 862, 863 and 922, available at:

http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf.

⁹⁴ Interview with an official in the military justice system.

⁹⁵ S/RES/1291 (2000), point 8.

⁹⁶ S/RES/1925 (2010), point 12(a).

⁹⁷ Interview with an official in the military justice system.

⁹⁸ Interview with Canadian embassy official.

provision of safe houses to medical and psycho-social support.⁹⁹ And ASF has supported war crimes proceedings through the facilitation of witness protection and relocation.¹⁰⁰

Management of detention facilities and prisons

The DRC's capacity to manage prisons and detention units (which are not differentiated in practice) is almost non-existent. The problem is exacerbated by overcrowding, which itself is compounded by the lack of capacity in the judiciary; of some 22,000 inmates, over 80 percent are in pretrial detention.¹⁰¹ Apart from the dire infrastructure needs of the penal system, which will be discussed later, there is a severe shortage of staff, especially in remote areas. Most staff are unskilled and receive poor pay, if any at all. In effect, the penitentiary guard service exists only on paper.¹⁰²

The consequences of this state of affairs for broader rule-of-law development can be devastating. The Dutch government has focused its justice-related development assistance on crimes of sexual and gender-based violence justice in the province of Maniema, in a project led in implementation by the American Bar Association Rule of Law Initiative (ABA ROLI) and Heal Africa. By October 2010, system-wide support for investigations, prosecutions and trials resulted in 70 convictions and the convicts were sent to a refurbished prison. Although prison guards in the province also received some training through the program, they remain poorly paid and susceptible to bribery and indifference: every one of the 70 convicts has escaped.¹⁰³ Such incidents raise security concerns for victims, witnesses, and court officials; shake what fragile trust trial participants may have begun to develop in the judicial system; and make a mockery of justice as a deterrent to future crime. To establish the rule of law in the DRC, including for international crimes, there must be adequate resources and capacity building for penal management.

The international community's response to the dearth of capacity in this area has been slow in coming. For its part, MONUSCO's Rule of Law section has carried out trainings for prison staff since 2006. France backed the drafting of new penal and penal procedure codes, but that project ended in 2008 and the bill has yet to be finalized or adopted by the National Assembly.¹⁰⁴ The creation of a dedicated MONUSCO Corrections Unit in late 2010 suggests a new level of commitment to addressing the problems. With 70 experts in penal issues, the unit aims to move the DRC closer to fulfillment of international standards by providing the government with advice in all areas of management, including organization, security, and the management of sentences.¹⁰⁵ It remains unclear, however, whether the government or international community will share this new commitment when it comes to expanding penal staff and paying them properly.

⁹⁹ Interview with an OSISA staff member.

¹⁰⁰ Interview with an official in the military justice system.

¹⁰¹ This calculation is based on figures of the Joint Prison Coordination, a policy-coordination mechanism that includes MONUSCO and the ministries of justice and defense. See "Corrections Unit: A new section within MONUSCO", October 21, 2010, available at:

<http://monuc.unmissions.org/Default.aspx?tabid=1042&ctl=Details&mid=1096&ItemID=10766>.

¹⁰² Interview with a representative of the international community.

¹⁰³ Interview with an individual involved in the project.

¹⁰⁴ Boshoff, Henri, et al: Supporting SSR in the DRC: between a Rock and a Hard Place, Clingendael Institute, April 2010, p. 8, available at: http://www.clingendael.nl/publications/2010/20100400_cru_paper_smore.pdf.

¹⁰⁵ "Corrections Unit, a new section within MONUSCO", October 21, 2010, available at:

<http://monuc.unmissions.org/Default.aspx?tabid=1042&ctl=Details&mid=1096&ItemID=10766>

Archive management

Capacity to handle judicial archives is practically non-existent. The DRC has no professional archivists and very few court clerks have had even minimal training. Rooms filled with disorganized stacks of papers and files are the norm. Amid these conditions, files are easily lost for years or forever, in some cases meaning that suspects remain in an indefinite purgatory of pretrial detention for reasons long forgotten by anyone but themselves.¹⁰⁶

There are few efforts by the international community to develop the judiciary's capacity to manage archives. Through ProJustice, USAID is supporting the standardization of archiving procedures and France has provided some support for archives and archival technology. Of direct relevance to transitional justice, Sweden is supporting ICTJ to undertake some documentation and archiving activities related to the conflicts in the DRC.¹⁰⁷

Journalism

There is significant journalistic capacity in the Congo, but no culture of investigative journalism. Journalists largely lack knowledge of international criminal justice and tend to cover issues related to the ICC in simplistic or ill-informed terms.¹⁰⁸ Journalists covering human rights issues, especially issues surrounding the ICC, report feeling insecure about their jobs and personal security. Their reports on international justice are prone to alteration by editors, who themselves may have fears or biases.¹⁰⁹

USAID provides extensive support for media training and DFID has a media for democracy project. Germany is a major supporter of Radio Okapi, which has nationwide reach and has been a factor for improving national cohesion.¹¹⁰ Radio Okapi provides journalists with good jobs as well as continuous training. The German embassy also invites select journalists to Germany for study tours on particular topics.¹¹¹ To improve the information available to the Congolese public about complementarity initiatives, these various existing media assistance programs could be augmented with modules on international criminal justice.

Outreach

Anyone conducting outreach on judicial matters in the DRC faces the daunting obstacles of the Congo's vast dimensions, decrepit roads and airlines, poor communications infrastructure, and high illiteracy rates among a population that communicates in many different languages. Compounding problems, the overall lack of resources in the justice sector means that the state has nearly no capacity to explain judicial processes or developments beyond posting these to the justice ministry's website.¹¹²

¹⁰⁶ Interview with DFID official.

¹⁰⁷ Interview with ICTJ staff members.

¹⁰⁸ Interview with representatives of civil society and the international community.

¹⁰⁹ See International Criminal Court, Outreach report 2009, p 40, available at: http://www.icc-cpi.int/NR/rdonlyres/8A3D8107-5421-4238-AA64-D5AB32D33247/281271/OR_2009_ENG_web.pdf.

¹¹⁰ Interview with an official of the German embassy.

¹¹¹ Interview with an official of the German embassy.

¹¹² Interviews with representatives of civil society and the international community.

Numerous international programs, including those aimed at improving access to justice and those supporting justice for sexual and gender-based violence, include elements of public education about the justice system. This element is also quite standard in international programs seeking to comprehensively build judicial capacity in a specific region.¹¹³ Further, outreach efforts are often included in many initiatives that seek to build one particular element of domestic capacity in the justice sector. For example, in 2009 DFID began planning a five-year police accountability and reform program that includes disseminating information on security and justice sector reforms to ordinary DRC citizens.¹¹⁴ These various programs frequently work through such international NGOs as ASF, ABA ROLI and RCN, but also through a multitude of Congolese civil society organizations.

The organization in the DRC that is most focused on outreach specifically related to the Rome Statute is, not surprisingly, the ICC. Based out of ICC field offices in Kinshasa and Bunia (Ituri), the outreach unit of the court's Public Information and Documentation Section has focused its efforts in those two regions as well as the Kivus, the location of the ICC-OTP's second investigation. Its activities include radio programming, the organization of "listening clubs" to follow and discuss updates on the proceedings, screenings of trial summaries in often remote locations, town hall-style meetings—sometimes with senior court officials—and information meetings with specific demographic or interest groups. The office has also begun offering short seminars in international criminal law in four universities in Kinshasa and universities in Lubumbashi, Kisangani, Goma, and Bukavu.¹¹⁵

A report of the International Bar Association Human Rights Institute in 2009 blamed insufficient resources for an inability of the ICC outreach unit to reach all affected communities, let alone the whole country.¹¹⁶ While responsibility for this shortcoming lies with the Assembly of States Parties and its Committee on Budget and Finance, the quality of ICC outreach has also come in for criticism. Specifically, some civil society actors in Kinshasa say that the outreach unit does not always communicate effectively. As an example they say that outreach materials remain too full of legal jargon and need to be simplified in order to be better understood by the general public.¹¹⁷

Regardless of the extent and quality of ICC outreach on the Rome Statute, if domestic proceedings for international crimes are to be understood by victims, affected communities, perpetrators and potential future perpetrators, greater efforts will be needed to emphasize the principle of complementarity, relevant domestic law, and mechanisms for its application. Limited efforts have already been launched in this regard. For example OSISA conducts outreach on international justice issues and ICTJ produces factsheets on individual war crimes cases.¹¹⁸ The government and the international community could ensure that existing

¹¹³ For an overview of such programs, see the section on strategy below.

¹¹⁴ Interview with a representative of DFID.

¹¹⁵ An overview of the ICC's activities in the DRC can be found at: <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Outreach/Democratic+Republic+of+the+Congo/>.

¹¹⁶ International Bar Association Human Rights Institute: The Quest for a Public Face: the public debate on the International Criminal Court and its efforts to develop a vision and coherent strategy on external communications, October 2009, p. 20, available at:

<http://www.ibanet.org/Document/Default.aspx?DocumentUid=5330218e-84c0-4331-959f-217473318b2c>.

¹¹⁷ Interviews with representatives of civil society.

¹¹⁸ Interviews with OSISA and ICTJ staff members.

public information and outreach efforts related to the justice sector always include an overview of complementarity and relevant domestic mechanisms.

Civil society court monitoring and advocacy

The general strength of civil society in the DRC varies by region, and varies greatly among organizations. But in the area of international criminal law, few organizations have extensive knowledge that could serve as a basis for advocacy or court monitoring.

Much of the funding for civil society work on justice reform has come from large EU-led multi-donor programs (REJUSCO, PAG, PARJ, and PARJE) that will be discussed in greater detail later. International NGOs such as ASF and RCN, as well as local organizations, have played a major role as implementing partners in these programs.¹¹⁹ OSISA has been an important source of support for Congolese civil society. Region-specific efforts include those of USAID, which provides small grants to local civil society organizations in Bandundu, Katanga, Maniema, and South Kivu to disseminate information on the justice system and how citizens can gain access to justice.¹²⁰ With Swedish backing from 2008-2010, ICTJ conducted capacity-building for Congolese civil society organizations specifically in the field of transitional justice.¹²¹

Despite these varied sources of support, one of the biggest challenges facing Congolese civil society is a lack of sustainable funding. To help create more predictability in the civil society sector, many donors will begin offering support through a basket fund to be managed by Christian Aid.¹²²

Physical Infrastructure

Even with improved technical capacity, the DRC sorely lacks equipment and physical infrastructure required to carry out investigations and trials of any crimes, let alone handle complex and sensitive cases of international crimes.

Courthouses and judicial offices

One international development official described judicial infrastructure in the DRC as “not great in Kinshasa, hardly existent at the provincial level, and non-existent at the communal level.”¹²³ Where court buildings and offices do exist, they usually lack even the most basic office equipment, and modern case management systems are virtually unknown.

MONUSCO has a mandate, carried over from the MONUC mandate, to mobilize donors for the equipping of military justice institutions and police.¹²⁴ Beginning in 2009, a multilateral stabilization program for eastern DRC (STAREC) included the construction of courts and

¹¹⁹ Interview with a representative of the EU delegation.

¹²⁰ Interview with international development official.

¹²¹ Interview with ICTJ staff members.

¹²² Interview with ICTJ staff members.

¹²³ Interview with DFID official.

¹²⁴ S/RES/1925 (2010), points 12(m) and 12(n).

detention centers by UNOPS. STAREC was designed by Congolese authorities and is supported by a partnership of MONUC, UN agencies, Belgium, the Netherlands, Sweden and Canada.¹²⁵

The European Commission has supported the refurbishment of judicial offices in the Ituri District town of Bunia. And through its €6 million Program for the Support of Justice (*Programme d'appui à la justice* or PAJ) from 2003-2006, the EC supported the construction, refurbishment and equipping of courts in Kinshasa, Bandundu, and Bas Congo.¹²⁶ From 2007 through 2010, the REJUSCO program funded by the EC, Belgium, the UK and the Netherlands has included support for judicial infrastructure in the Ituri District of Orientale Province, as well as North and South Kivu. Other programs funded by the European Commission, Sweden, and Belgium from 2009 through 2014 will include elements for construction, rehabilitation, and equipping of courts in Ituri, the Kivus, Kinshasa, Bakongo, and Kasai Occidental.¹²⁷ In the provinces of Bandundu, Katanga, Maniema, and South Kivu, USAID is assisting the judiciary with office refurbishment, furnishing, and information technology.¹²⁸ Japan has financed the rehabilitation of a magistrates' court in Bas Congo.¹²⁹

Detention facilities and prisons

Prison infrastructure in the DRC barely exists. Prisons frequently lack gates, roofs, and windows, and in some places where prisons nominally should exist, there is only a marker indicating that a prison used to be there.¹³⁰ The prisons that do exist are severely overcrowded. Only Makala prison in Kinshasa has a budget for operating costs, and it amounts to less than one US cent per inmate per day.¹³¹ Government resources are scarce, but have also been wasted through corruption. In one instance, the government budgeted for a prison that did not exist.¹³² Many prisoners rely on family members to bring them food, and some have starved to death.¹³³ Other prisons are unguarded or only nominally guarded, and inmates come and go as they please, returning only for the shelter provided. The dearth of penal infrastructure contributes to the public's lack of trust that the justice system can isolate dangerous perpetrators from society and punish them.¹³⁴

¹²⁵ Interview with Canadian embassy official. See also the MONUC communiqué from November 10, 2009: "The United Nations is supporting the stabilization plan for eastern DRC",

<http://www2.reliefweb.int/rw/rwb.nsf/db900SID/EGUA-7XPR6Z?OpenDocument>.

¹²⁶ The following is based on an interview with a representative of the EU delegation.

¹²⁷ See the section on coordination below for more information on REJUSCO and the other EC-backed multilateral programs alluded to here (PARJ and PARJE, the latter also known as *Uhaki Safi*).

¹²⁸ Interview with international development official.

¹²⁹ See Boshoff, Henri, et al: Supporting SSR in the DRC: between a Rock and a Hard Place, Clingendael Institute, April 2010, p. 7, available at:

http://www.clingendael.nl/publications/2010/20100400_cru_paper_smore.pdf

¹³⁰ Interview with Professor Nyabirungu, MP.

¹³¹ Interview with a UN official.

¹³² Interview with a UN official.

¹³³ Davis, Laura, Justice-sensitive security sector reform in the Democratic Republic of Congo, Initiative for Peacebuilding, February 2009, p. 23, available at:

http://www.initiativeforpeacebuilding.eu/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC.pdf

¹³⁴ This state of affairs creates a serious political impediment to abolishing the death penalty in the DRC. Interview with Professor Nyabirungu, MP.

A smattering of projects has aimed at improving penal system infrastructure. Among these, the European Commission and France funded the refurbishment of detention facilities in the north-eastern town of Bunia, Ituri District in 2003-2004. Since 2006, MONUSCO has spent an average of USD \$2,200 on 50 Quick Impact Projects (QIPs) that have made modest improvements to the infrastructure of central prisons in eleven provinces. In one Dutch-funded QIP, a new military prison was built in Kinshasa.¹³⁵ In the course of supporting the entire judicial chain in Maniema with a focus on sexual and gender-based violence, the Dutch have also supported the refurbishment of a prison there.¹³⁶

Will to Pursue Genuine Domestic Investigations and Prosecutions

Political rhetoric and legislative support

Following the contentious elections of 2006, President Kabila spoke in his inaugural address of “guaranteeing human rights and justice” in the DRC.¹³⁷ Periodically, government and military leaders have rededicated themselves to the notion that grave crimes should be answered by justice. For example, in July 2009, the FARDC proclaimed a policy of “zero tolerance” for the commission of human rights violations committed by its forces and committed to holding those in breach accountable.¹³⁸

Critics say that while the president talks of zero tolerance for crimes, little is done in the way of implementation.¹³⁹ To the contrary, elements of the government tolerate the ongoing practice of military officers who encourage or allow their soldiers to commit sexual and gender based violence—offenses that in some instances may rise to the level of international crimes.

Repeated delays in parliament’s consideration the draft legislation to implement the Rome Statute can partly be explained by the sheer workload facing the legislature.¹⁴⁰ But skeptics say that legislation moves through the parliament if President Kabila wants it to, and infer from the stalled legislation that judicial reform is not a priority for him.¹⁴¹ In response, one co-drafter of the bill stated that it would be inappropriate for the president to interfere in parliamentary affairs by encouraging passage of the bill.¹⁴²

¹³⁵ The new prison in Kinshasa is the only prison in the DRC built after independence. See “Corrections Unit, a new section within MONUSCO”, October 21, 2010, available at:

<http://monuc.unmissions.org/Default.aspx?tabid=1042&ctl=Details&mid=1096&ItemID=10766>.

¹³⁶ Interview with a representative of the international community.

¹³⁷ The full text of Kabila’s inaugural address is available at:

<http://www.irinnews.org/Report.aspx?ReportID=72397>.

¹³⁸ Human Rights Watch: “‘You will be punished’: attacks on civilians in eastern Congo”, December 2009, pp. 131-132, available at: <http://www.hrw.org/en/reports/2009/12/14/you-will-be-punished>.

¹³⁹ Interviews with representatives of civil society and the international community.

¹⁴⁰ For example, the parliament faced immense pressure to pass a raft of legislation required for debt relief under the Highly Indebted Poor Countries Initiative (HIPC) before World Bank and International Monetary Fund (IMF) meetings held at the end of June 2010. E-mail interview with a PGA staff member.

¹⁴¹ Interviews with representatives of civil society and the international community.

¹⁴² Interview with Professor Nyabirungu, an MP from Kabila’s party.

According to some observers, political blockages to prosecutions began to break down over the course of 2009-2010 as a result of intensive UN and NGO work to explain the Rome Statute and advocate for the implementing legislation.¹⁴³ A visit to the DRC by ICC President Sang-Hyun Song in December 2009 also lent momentum to the effort.¹⁴⁴ Supporters of the bill hold out hope that it can be taken up during the session that began on September 15, 2010. Although the session is formally for budget issues, on its opening day the heads of the lower and upper chambers both said that reform of the justice sector would be taken up as priorities before parliament adjourns again.¹⁴⁵ Some of the bill's supporters say there is a need to maintain pressure because there are still some officials who fear accountability and would like to see the effort fail.¹⁴⁶

Government record on judicial independence

For decades under Mobutu, the judiciary of then-Zaire served merely as an extension of executive power. To the extent that there was a judiciary during the regime of Laurent Kabila, magistrates and judges were still expected to follow the president's orders. Although the DRC constitution of 2006 contains explicit provisions on the independence of the judiciary, Joseph Kabila's government has a decidedly poor record in this area, and ongoing political meddling in the judiciary burdens prospects for complementarity. At lower levels, too, challenges to judicial independence persist. Many magistrates in the military and civilian justice systems still follow a practice of clearing case decisions with their superiors before issuing them.¹⁴⁷

Government officials openly admit to occasional political interference in the judiciary in order to preserve peace and national cohesion.¹⁴⁸ In one instance in February 2009, the minister of justice wrote to the attorney general and FARDC judge advocate general with regard to the CNDP militia and other groups recently integrated into the army, telling them “not to engage in proceedings against the members of the aforementioned armed factions and to stop all proceedings that have already been initiated.”¹⁴⁹

Beyond intervention in particular cases or circumstances, the government has resisted institutional reforms aimed at shoring up judicial independence. In this vein, there is an unfolding struggle between the Justice Ministry and the magistrates' relatively new

¹⁴³ Key players in this regard have been the UN Joint Human Rights Office's “fight against impunity” unit, PGA, ICTJ, and ASF.

¹⁴⁴ President Song met with senior government officials in Kinshasa and spoke at a PGA-organized event on peace and justice in the National Assembly, and in each of these forums he advocated adoption of implementing legislation. As an ICC official at the time, the author accompanied the president in these meetings. The view that the trip helped to break down political blockages to the implementing legislation is taken from an interview with staff members of ASF.

¹⁴⁵ Interview with a member of the diplomatic community who attended the opening.

¹⁴⁶ MPs still lack a strong technical understanding of the Rome Statute and the bill's sponsors would like to organize a large training forum for fellow MPs. Meanwhile the international community should continue to press the issue with President Kabila, the president of the National Assembly, and the Ministry of Justice. Interview with representatives of civil society.

¹⁴⁷ Interview with a justice ministry official.

¹⁴⁸ Interview with a justice ministry official.

¹⁴⁹ Quoted in Wetsh'okonda Koso, Marcel, “The Democratic Republic of Congo: Military justice and human rights – an urgent need to complete reforms”, AfriMAP and the Open Society Initiative for Southern Africa June 22, 2009, p. 8, available at: http://www.afriimap.org/english/images/report/AfriMAP_DRC-MilitaryJustice_full_EN.pdf.

administrative body (the *Conseil Superior de la Magistrature* or CSM). Under the 2008 law on the freedom and independence of the magistracy, the CSM as a body of jurists should take over administration of magistrates from the ministry.¹⁵⁰ At the outset, the CSM was threatened by government desire to maintain influence over the judiciary and by infighting in its secretariat.¹⁵¹ In practice it has still not established its operational or financial independence. Despite the CSM's mandate, the executive still makes key judicial appointments and determines the body's budget. That budget is low, leaving the CSM to scrounge for even basic office supplies.¹⁵² According to one international official working on justice sector reform, the minister of justice treats the new CSM permanent secretary as staff.¹⁵³ As troubling as the ongoing struggles are, they represent an improvement over the failed attempt by parliament in November 2007 to amend the constitution in order to allow the president or justice minister to sit on the CSM.¹⁵⁴

In February 2008, Kabila fired around 92 magistrates and named 26 others, including a new chief justice of the Supreme Court and a new prosecutor general. Despite fierce criticism from NGOs and the judges themselves, five months later the president dismissed another 90 magistrates.¹⁵⁵ Kabila accused those he dismissed of corruption, but no evidence was provided to the public, and no judicial proceedings were launched against them. Representatives of civil society and the international community broadly share the assessment of the International Crisis Group (ICG) that “[t]he replacement of judges represented not so much a cleaning up of corruption as the installation of a new judicial client structure, politically docile and subject to the same pressures as its predecessors.”¹⁵⁶

Although it appears to have served as a mere pretext for political interference in these instances, there is no doubt that judicial corruption remains a major problem. There is a common view among Congolese officials, donors, and international implementing partners that corruption in the justice sector (and elsewhere) stems from both a lack of resources and political will.¹⁵⁷ According to some observers, more progress in reforming the bench and the courts has taken place within the military justice system. But even here, some international donors view proceedings as being constrained by political will.¹⁵⁸ Justice Ministry officials

¹⁵⁰ The CSM was foreseen in the constitution of 2006 but its establishment required passage of the 2008 law.

¹⁵¹ International Crisis Group, “Congo: A Stalled Democratic Agenda”, Africa Briefing No. 73, April 8, 2010, p 15.

¹⁵² Interview with CSM Permanent Secretary Jean Ubulu Pungu.

¹⁵³ Interview with an international development official. The CSM has a Permanent Secretariat, headed by a Permanent Secretary who took office in April 2010. Its governing body is a Bureau of four top judiciary officials, and a General Assembly of all magistrates that constitutes a final decision-making body. The CSM General Assembly is supposed to meet yearly but in practice, as of September 2010, this hadn't happened. One official from a donor country questioned a budget in excess of \$1 million to convene a single CSM General Assembly session.

¹⁵⁴ International Crisis Group, “Congo: A Stalled Democratic Agenda”, Africa Briefing No. 73, April 8, 2010, p 9.

¹⁵⁵ International Crisis Group, “Congo: A Stalled Democratic Agenda”, Africa Briefing No. 73, April 8, 2010, p 9. See also, Davis, Laura and Hayner Priscilla, “Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC”, International Center for Transitional Justice, March 2009, p 25.

¹⁵⁶ International Crisis Group, “Congo: A Stalled Democratic Agenda”, Africa Briefing No. 73, April 8, 2010, p 9.

¹⁵⁷ Multiple interviews in Kinshasa.

¹⁵⁸ Interview with a representative of the international community.

can review cases for potential impropriety, but according to one official, corrupt magistrates then complain about political interference in the judicial process.¹⁵⁹

Pursuit of sensitive cases

There is some danger that DRC officials will cite a lack of capacity as a reason to refrain from action when the real problem is political will. The government has allowed prosecution of low-level perpetrators on charges of war crimes and crimes against humanity, but allegations against senior military or government officials have not been pursued. As one civil society representative put it, “everyone in the DRC is waiting for a top-level general to be held accountable.”

Those who have lobbied top officials of the military justice system to take up high-profile cases have been routinely frustrated.¹⁶⁰ Military magistrates are answerable to the military hierarchy, and any arrests must be approved by superiors. Magistrates are also dependent on the Council of Defense for promotions. In practice, cases against senior officers are simply not pursued, except when there is intense international pressure. But even then, justice can be slow in coming. When MONUC referred to the highest levels of government allegations that five commanding officers of the FARDC, including one general, were implicated in the commission of sexual and gender-based violence between 2004 and 2006, there was no reaction.¹⁶¹ Only after a visiting Security Council delegation raised the issue with Kibila in 2009 were there three arrests.¹⁶²

Within the ambit of security sector reform, the FARDC has also resisted a vetting process. MONUSCO has still proceeded in conducting a less intensive screening of soldiers on behalf of donor countries who sponsor military trainings. The government has shown no interest in tapping into this process for investigation and potential prosecution, but MONUSCO continues to gather information on alleged perpetrators for possible later judicial action.¹⁶³

Record of cooperation with the ICC

The government’s record on cooperation with the ICC offers some insight into the level of government commitment to justice for crimes under the Rome Statute. Here the record is mixed.

The DRC ratified the Rome Statute in 2002 and acceded to the Agreement on Privileges and Immunities in 2007. Under Kibila the DRC became the second country to refer its own conflict to the ICC, and subsequently surrendered three suspects to the court who are now on

¹⁵⁹ Interview with a justice ministry official.

¹⁶⁰ Interviews with representatives of the international community.

¹⁶¹ This example is based on interviews with representatives of the international community and on UN Security Council document S/2009/303, “Report of the Security Council mission to the African Union; Rwanda and the Democratic Republic of the Congo; and Liberia”, available at:

<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF%7D/Liberia%20S%202009%20303.pdf>.

¹⁶² As of September 2010, trials for these three were imminent, one of the alleged perpetrators remained at liberty and one had fled. Interview with representatives of the international community.

¹⁶³ Interview with officials of the UN JHRO.

trial. Despite these positive indications of the DRC's commitment to the ICC, skeptics note that none of the arrest warrants issued by the court to date have targeted important government officials or allies, and thus do not constitute a real test of commitment.¹⁶⁴

When it comes to the DRC's cooperation on ICC investigations, the ICC-OTP expresses satisfaction.¹⁶⁵ Responses to judicial cooperation requests can sometimes be slow, especially with regard to such complicated matters as requests for financial information, but the office notes that even so, the DRC responds more quickly to requests for judicial cooperation than do most Western states. The constraints on this type of cooperation are due to limited capacity and logistical hurdles, not a lack of will.

Political will has, however, been the main reason for the government's failure to arrest ICC fugitive Bosco Ntaganda. Ntaganda has been wanted by the ICC since his arrest warrant for alleged war crimes in Ituri was unsealed in April 2008. In January 2009, the Minister of the Interior and head of police appeared at a joint press conference with Ntaganda to announce that his rebel CNDP (National Congress for the Defense of the People) militia faction would integrate into the FARDC. As of October 2010, he could still be openly seen in Goma, claiming in an interview to be directly involved in military operations that had UN backing.¹⁶⁶ When asked about Ntaganda, government (and MONUSCO) officials routinely say that they are committed to full cooperation with the ICC but note that the security situation in the east is still fragile and that this must be weighed against the demands of justice. For example, in January 2010 Kabilo told reporters that in relation to Ntaganda, the country had a choice between "expedited international justice or peace and security for our people in the east. [...] For me, the choice is clear. The choice is stability and security."¹⁶⁷ In terms of short-term stability in the east, this position cannot be lightly dismissed. But it also cannot be squared with Kabilo's citing of improved security to agitate in early 2010 for MONUC to draw down and hand over security to the FARDC.

Stakeholder Policymaking

National Planning and Coordination Capacity

Although engagement in the DRC by the international community, especially the United Nations, remains indispensable across the board, the MONUSCO mandate makes clear that the DRC government has the "leading role" in the reform of security and judicial institutions.¹⁶⁸

¹⁶⁴ To the contrary, many skeptics, especially in the DRC, note that the ICC arrest warrant for former Vice President Jean-Pierre Bemba on charges related to alleged crimes in the Central African Republic very much served President Kabila's interests by sidelining his greatest political rival and the leader of the largest opposition party.

¹⁶⁵ Telephone interview with a representative of the ICC-OTP.

¹⁶⁶ "Congo war indictee says directs UN-backed ops", Reuters, 6 Oct 2010, available at: <http://www.reuters.com/article/idUSTRE6953T120101006>.

¹⁶⁷ Associated Press, "Congo: Rwanda, Uganda troops to leave in February", January 31, 2009, available at: <http://congowatch.blogspot.com/2009/01/african-leaders-meet-on-dr-congo.html>.

¹⁶⁸ S/RES/1925 (2010), point 12(l).

The DRC constitution provides that the Ministry of Justice has the responsibility to define and develop government policies for the justice sector.¹⁶⁹ In practice, the ministry has had tremendous difficulty in fulfilling this role. High turnover at the top has been one problem, with three ministers having passed through over a five year period.¹⁷⁰ Mandates among the various institutions of the judicial sector remain unclear, issues have been personalized, and different agencies in the sector have followed their own priorities.¹⁷¹ The Ministry of Justice is weaker than the Ministry of Interior, and is therefore reluctant to coordinate on police issues.¹⁷² Indeed, the Ministry of Interior is not represented in the nominally sector-wide coordinating body, the *Comité Mixte de la Justice*, or CMJ.¹⁷³ Policing is generally regarded as belonging to the security and not the justice sector, and thus a matter for the Ministry of Interior rather than the Justice Ministry. Since 2008, the Ministry of Interior has led a separate coordinating body, the *Comité de Suivi de la Réforme de la Police*, or CSRP, whose role some say is ill-defined.¹⁷⁴ The ability to plan and coordinate policing suffers as a result. This concern applies to general police performance important to any judicial case, as well as to aspects of particular importance in cases of international crimes, such as the protection of vulnerable victims and witnesses. Another example of rivalries undermining successful national policy coordination, the struggle between the Ministry of Justice and the CSM, was discussed earlier.¹⁷⁵ Apart from problems stemming from these inter-agency disputes, an organizational audit of the ministry conducted in 2009 at the behest of donors concluded that a rationalization within the ministry itself was a pre-requisite to putting in place a new system of national policy coordination in the justice sector.¹⁷⁶

National planning and coordination capacity also suffer because the central government provides minimal resources for the justice sector. Available figures vary, but all put spending for the justice sector at significantly less than one percent of the national budget, or a high-end annual figure of USD \$8.3 million.¹⁷⁷ A Justice Ministry budget document shows disturbing trends from 2007 to 2009: a cut in the budget of the ministry itself by 47 percent, a slight fall in spending on the CSM, and the fact that a fraction of the salaries for ministry officials and magistrates are paid by the government itself, with the bulk being covered by donors. Government officials say that the entire justice budget goes to wages and operating costs, with nothing left over for desperately needed investment in new personnel, training,

¹⁶⁹ Interview with a justice ministry official.

¹⁷⁰ As of January 2011, however, the third minister, Luzolo Bambi Lessa, had been in office for approximately two years, so this could be becoming less of a problem. Interview with a representative of the international community.

¹⁷¹ Interview with representatives of civil society.

¹⁷² Interview with a representative of the international community.

¹⁷³ The CMJ is a forum not just for national coordination, but also coordination with the international community. It is discussed in detail below in the section on coordination.

¹⁷⁴ Davis, Laura, Justice-sensitive security sector reform in the Democratic Republic of Congo, Initiative for Peacebuilding, February 2009, p. 20, available at:

http://www.initiativeforpeacebuilding.eu/pdf/Justice_Sensitive_Security_System_reform_in_the_DRC.pdf.

¹⁷⁵ See the section covering the government's record on judicial independence.

¹⁷⁶ Interview with representatives of civil society.

¹⁷⁷ According to budget figures obtained from an international mission, actual 2009 spending on the justice sector amounted to 0.24% of the national budget. For comparison, some other figures for 2009 were 0.31% for the Foreign Ministry, 16% for the Security Ministry and 5.45% for the Defense Ministry. Figures provided by the Justice Ministry claim 2009 spending on justice as 0.74% of the national budget. Some international officials voiced skepticism that any accurate budget figures exist.

infrastructure, and equipment. Administration in the justice sector remains weak, and few officials have adequate skills to even coordinate basic logistics.¹⁷⁸

According to one official at a Western embassy in Kinshasa, of all the international entities in the DRC, the international financial institutions (IFIs) have had by far the greatest leverage over national budget priorities. For example, in order for the DRC to qualify for USD \$12.3 billion in debt relief under the Heavily Indebted Poor Countries (HIPC) initiative of the International Monetary Fund (IMF) and World Bank in July 2010, it had to meet various budget conditions.¹⁷⁹ The IFIs prioritize revenue-related spending and the justice sector was therefore not prioritized.¹⁸⁰

Despite these obstacles, the Ministry of Justice launched a three-year Priority Action Plan in 2007. It was one of the first sectors in the DRC to articulate a fairly detailed list of needs in this manner.¹⁸¹

Donors, including the European Union and United States, are currently investing in strengthening the administrative capacity of the justice sector. The work includes such basic exercises as creating organizational charts for the Justice Ministry and CSM, a painstaking task that involves identifying all of the officials and describing their positions.¹⁸² USAID is also assisting the CSM to draft a systemic development plan for the judiciary over the next ten years.

Integration of Complementarity into Rule-of-Law Programming

The United Nations integrated complementarity into the mandate of its mission in the DRC and this has been reflected in its actions. Listed among the top four priorities for MONUSCO, the Security Council gave the mission a mandate to “fight impunity, including through the implementation of the Government’s ‘zero-tolerance policy’ with respect to [...] humanitarian law violations, committed by elements of the security forces, in particular its newly integrated elements” and to “support national and international efforts to bring perpetrators to justice.”¹⁸³ MONUSCO’s Rule of Law section and the Joint Human Rights Office (JHRO) have led UN efforts to support complementarity.¹⁸⁴

¹⁷⁸ Interview with representatives of the international community.

¹⁷⁹ “IMF and World Bank Announce US\$12.3 billion in Debt Relief for the Democratic Republic of the Congo”, International Monetary Fund press release no 10/274, July 1, 2010, available at:

<http://www.imf.org/external/np/sec/pr/2010/pr10274.htm>.

¹⁸⁰ Interview with an official at a western embassy in Kinshasa.

¹⁸¹ Interview with a representative of the international community. The Priority Action Plan is available at:
<http://www.justice.gov.cd/j/dmdocuments/pdaction.pdf>.

¹⁸² Interview with a development consultant and CSM Permanent Secretary Jean Ubulu Pungu. The EU element of this was financed through the PAG program, discussed later in the section on coordination. From 2011, EU and Swedish support to build the administrative capacity at the central level of the justice sector will continue under the PARJ program, also discussed later in the section on coordination.

¹⁸³ S/RES/1925 (2010), points 12(c) and 12(d).

¹⁸⁴ JHRO came into being through a merger of MONUC’s human rights section and the DRC office of the Office for the High Commissioner for Human Rights.

While the United Nations was initially reluctant to support military justice, the Rule of Law section has been granted increasing latitude to do just that over the past five years.¹⁸⁵ The section now lists one part of a three-tiered approach as support for “short-term implementation of urgent elements of longer-term reform strategy, including building capacity to investigate and try cases involving international crimes.”¹⁸⁶ Accordingly, the section has directly supported investigations and prosecutions for crimes under the Rome Statute, and the scope of complementarity-relevant work is increasing. As discussed earlier in this report, in May 2010 the Security Council gave MONUSCO an explicit mandate to support military justice prosecutions through establishment of Prosecution Support Cells.¹⁸⁷ Many of the Rule of Law section’s other activities to improve general capacity in the military and civilian justice systems are directly relevant to complementarity, including support for government planning on justice and the improvement of prison infrastructure and management.

For its part, the UN Joint Human Rights Office (JHRO) has a “fight against impunity” unit active at the headquarters office in Kinshasa and through JHRO’s 21 field offices around the country.¹⁸⁸ Its work goes beyond international criminal law, and notably includes the pursuit of justice for sexual and gender-based violence under domestic criminal law. The unit cooperates with other actors in the international community to support the Ministry of Justice and parliament in policies or programs related to transitional justice, including through participation in the CMJ. It has played a significant role in monitoring cases in the civilian and military courts, including the process of justice for five accused FARDC officers discussed earlier. In the field, the unit supports military justice investigations and implements some projects directly supported by donors, including improving access to justice for victims of sexual and gender-based violence.

Bilateral donors have supported some complementarity-related projects, and much of their assistance for general rule-of-law development is relevant to complementarity, but there are few indications of systematic integration of complementarity into their justice-sector support. Among donors’ missions surveyed in Kinshasa, there was only vague familiarity with the ICC Review Conference, and none with the conference’s resolution on complementarity. Staff from the Kinshasa missions of several donors who made complementarity-specific pledges at the Review Conference had no apparent awareness of them. Field-based officials said they had not been consulted or informed about the pledges. This raises questions not only about the effectiveness of communication between officials at headquarters and those in the field, but also the extent of these donors’ internal coordination between political and development arms. Representatives of major donors said that proposed programming was generally formulated through assessments in the field and then sent to headquarters for approval.

The European Union has taken the lead in funding and developing sizeable multi-donor programs in the justice sector, as will be seen in the following section. Some of these programs include elements that are directly relevant to complementarity, and these were elaborated throughout earlier sections of this report. But the integration of complementarity

¹⁸⁵ Interview with MONUSCO official.

¹⁸⁶ See <http://monuc.unmissions.org/Default.aspx?tabid=1892>.

¹⁸⁷ See the section on policing earlier in this report.

¹⁸⁸ The following information is based on an interview with JHRO staff and background documents provided by JHRO.

elements has not been systematic. As of September 2010, planning for one large new initiative (PARJ, described below) was complete, and nearly complete for another new program focused on eastern Congo (PARJE, also described below).¹⁸⁹

Some existing rule of law programs could easily adjust to include an international criminal law component if the National Assembly passes implementing legislation on the Rome Statute. With a shift of jurisdiction for international crimes from military to civilian courts, programs currently supporting the latter could assist them in operationalizing their new mandate. For example, programs focused on justice for the victims of sexual and gender-based violence could assist prosecutors in charging these acts as war crimes or crimes against humanity.¹⁹⁰

Coordination

Coordination between the government and international community

Opinion varies among domestic and international officials about the degree to which government priorities influence donor priorities, decision-making, and program design. The DRC government drafted a Priority Action Plan in 2007 with assistance from donors.¹⁹¹ In practice, this means that projects receive funding where government and donor priorities intersect.¹⁹² In the justice sector, where there is no overarching agreement on strategy, this approach has contributed to duplication and gaps in programming.¹⁹³ This could change if donors agree to targeted sector budget support. In the wake of the decision to grant the DRC debt relief in July 2010, discussions began within the HIPC framework about potential direct budget support to the DRC government. European donors have engaged in a contentious debate about who would fund which sector, and it is unclear when direct budget support might start.¹⁹⁴

The Program to Support the Restoration of Justice in Eastern Congo (*Programme de la Restauration de la Justice à l'Est de la RDC*, or REJUSCO) represented a targeted approach to government-donor coordination in the justice sector. The project grew out of a pilot program in the town of Bunia and was extended to the entire Ituri District of Orientale Province, as well as the provinces of North and South Kivu.¹⁹⁵ Implemented from May 2007

¹⁸⁹ Interview with an official of the EU delegation.

¹⁹⁰ Telephone interview with a staff member of ABA ROLI.

¹⁹¹ The Priority Action Plan is available at: <http://www.justice.gov.cd/j/dmdocuments/pdaction.pdf>. For an assessment of lessons learned from the DRC's Country Assistance Framework and Priority Action Plan, see: Joint World Bank-UN Review of the DRC CAF from May 30, 2008, "The DRC's Country Assistance Framework: A 'Big Tent' Built from 'Big Ideas'?", available at:

http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/MONUC_CAF_LL_2008.pdf.

¹⁹² Interviews with officials in the Ministry of Justice and a Canadian embassy official.

¹⁹³ Interview with a representative of the international community.

¹⁹⁴ Some donors have expressed frustration with the government following the July 2010 World Bank and IMF decision to grant USD \$12.3 billion in debt relief under the HIPC initiative. (See the section above on national planning and coordination capacity.) Since the relief was granted, the government's budget discipline has deteriorated, and some donors expect the problem to get worse in the run-up to general elections in 2011. Interview with a representative of a European government mission.

¹⁹⁵ "The European Commission contributes to the restoration of justice in the East of the Democratic Republic of Congo", European Commission press release, June 26, 2006, available at: http://www.europa-eu-un.org/articles/en/article_6062_en.htm.

to March 2010, with some residual infrastructure projects continuing to the end of 2010, the program had three objectives: strengthening judicial capacity, ensuring the functioning of justice, and increasing public understanding of the system through monitoring and outreach. The European Commission contributed €7.9 million to the overall budget of €11.5 million, with the remainder coming from the Netherlands, the UK, and Belgium, and later Sweden. Although funded by the international community, the project's administration was led by the DRC government. The Ministry of Justice chaired a steering committee that also included representatives of the Ministry of Interior, the CSM, the Bar Association (*Ordre des Avocats*), the EU delegation, DFID, Dutch Cooperation, and Belgian Cooperation.¹⁹⁶ For the third element of the program, monitoring and outreach, REJUSCO partnered with several local NGOs.

As a model for government-donor coordination, the REJUSCO program had shortcomings due to weak government engagement and a lack of coordination among donors themselves.¹⁹⁷ This resulted in duplication and gaps. For example, numerous trainings on sexual and gender-based violence were organized, but other areas of law were never covered. Likewise, great effort went into the refurbishment and equipping of judicial offices, but there was little attention to improving magistrates' accountability. Improving working conditions for judges who remained corrupt led to donor frustration.¹⁹⁸

Beyond ad hoc approaches to coordinate government and international actions in the justice sector, there has also been an effort to institutionalize cooperation. The European Union led an audit of the DRC's justice sector in 2003-2004 and identified a lack of government and donor coordination as a problem.¹⁹⁹ It recommended the formation of a Joint Committee on Justice (*Comité Mixte de la Justice*, or CMJ), which formed in 2005 and was codified in 2009. The minister of justice and head of the EU delegation co-chair the CMJ. Other representatives include other Justice Ministry officials, the judiciary, the national prosecutor, MONUSCO (the Rule of Law section and JHRO), UNDP, USAID, Belgium, France, the United Kingdom, the Kingdom of Belgium, the Netherlands, Sweden, Canada, Japan, South Africa, and Germany.

The formation of the CMJ represented a step forward, but the DRC still has tremendous difficulties with internal coordination and poor capacity to deal with the multifaceted international community, in part because the CMJ has struggled.²⁰⁰ According to some participants, the system of national and international co-chairs has failed, rendering the CMJ merely a forum for discussion rather than true coordination.²⁰¹ The CMJ is supposed to meet monthly, and there is a possibility to call special meetings. Participants say that in fact

¹⁹⁶ For an analysis of REJUSCO and more details on the program, see "Multipart thematic paper on multi-stakeholder partnerships active in the field of good governance, democracy and the rule of law", Multipart Project, May 2010, pp. 189-225, available at: http://www.multipart.eu/index.php?option=com_docman&task=doc_download&gid=79&Itemid=.

¹⁹⁷ For an analysis, see "Multipart thematic paper on multi-stakeholder partnerships active in the field of good governance, democracy and the rule of law", Multipart Project, May 2010, pp. 189-225, available at: http://www.multipart.eu/index.php?option=com_docman&task=doc_download&gid=79&Itemid=.

¹⁹⁸ Interview with an official of one of REJUSCO's sponsors.

¹⁹⁹ Other actors of the international community were also involved, including OHCHR, UNDP, France, Belgium and the UK.

²⁰⁰ Interviews with representatives of civil society and the international community.

²⁰¹ Interviews with representatives of the international community.

meetings have been irregular.²⁰² Some participants say the CMJ's usefulness suffers from the presence of too many attendees, a chronically overambitious agenda that is usually circulated at the last minute, and weak leadership in the secretariat.²⁰³ Because it is the only formal forum for interaction among international donors and implementing partners in the justice sector, the CMJ's general dysfunction contributes to the problem of inadequate donor communication and coordination (discussed in greater depth below). The CMJ has thematic working groups, including one on international crimes. Although the EU delegation states that there were "a few" meetings of the working group on international crimes between March and October 2010, some members of the group were unaware of them.²⁰⁴

In August 2010, the government proceeded to take significant decisions on an institutional framework for domestic prosecution of international crimes.²⁰⁵ But it did so without any prior consultation through the CMJ. Indeed in September, numerous representatives from civil society organizations, the United Nations, and donor countries working in the justice sector were unaware that the Council of Ministers had issued a decision in the previous month (the outline of which is discussed below in the section on strategy).²⁰⁶ Among officials interviewed for this report, only those at the EU delegation were familiar with the government's initiative. Others expressed concern over the lack of coordination.²⁰⁷

Improving coordination between the government and international community

There may be possibilities for improving the CMJ as a vehicle for substantive discussion and coordination, which among other benefits could aid the inclusion of complementarity aspects in overall justice-sector planning.²⁰⁸ Meeting regularly to discuss a realistic number of agenda items circulated well in advance would be just a start. Meetings could be conducted on separate tiers, for example a select ministerial and ambassadorial-level meeting for high-level policy coordination, and working-level preparatory meetings devoted to specific topics.²⁰⁹

Uganda's Justice, Law and Order Sector, which has been quite successful, could serve as a model for the CMJ. Admittedly the situation in the DRC is much more complicated than that in Uganda, in terms of the sheer scale of the country's dimensions, the extent and complexity of the conflict, the capacity needs, and the number of international actors involved. Nevertheless, the CMJ could make significant improvements by adopting some of the lessons of justice sector coordination in Uganda.²¹⁰ Under that model, the CMJ would become a

²⁰² Interviews with CMJ participants in Kinshasa. The CMJ did not meet at all between June 16, 2010 and September 29, 2010.

²⁰³ Interviews with representatives of the international community.

²⁰⁴ Interview by e-mail with an official of the EU delegation and interviews with representatives of donor and implementing organizations listed by the Justice Ministry as being members of the working group on international crimes.

²⁰⁵ Interview with a justice ministry official, Justice Ministry document.

²⁰⁶ Interviews in Kinshasa.

²⁰⁷ Interviews with representatives of the international community.

²⁰⁸ Some of the following ideas were discussed with CMJ member organization representatives.

²⁰⁹ The EU delegation has embraced this idea. Interview by e-mail with an official of the EU delegation. As another international official pointed out, a high-level CMJ forum could only be realized if ambassadors and other senior officials commit to attending themselves and not just sending deputies or lower ranking staff to represent them, as has often been the case with justice-related issues.

²¹⁰ More detail on Uganda's JLOS policy coordination mechanism and its counterpart Development Partners Group can be found in the Uganda section of this report.

purely national coordinating mechanism, and ideally merge with the CSRP to ensure better coordination with the police.²¹¹ Donors would form an adjunct body (in Uganda, called the Development Partners Group). The two groups would interact intensively, but lines of responsibility would be clearer, and there would be greater latitude for donors and other relevant international actors to improve coordination. The CMJ working groups could be given real authority, as they enjoy in Uganda. A functional working group on international crimes that feeds into discussions on general rule-of-law programming would represent an important step forward in mainstreaming complementarity issues. The working group could also provide a substantive counterpart for an international coordinating office on complementarity, should one be developed.

In the immediate term, the CMJ may wish to explore options to improve information sharing among its members. For example, it could consider such simple technical approaches to improve timely circulation of non-sensitive information as e-mail listservs to which CMJ members only could subscribe. These listservs could also prompt informal exchanges of views accessible to any number of stakeholders.

In late 2010 the government and its international partners agreed on a partial restructuring of the CMJ. These changes—which were not fully known when this report was published—may have addressed some of the problems discussed above.

Coordination among donors

Among donors active in the justice sector, EU member states have the highest level of coordination. Some member states have narrowed their focus as the European Union has become a major actor in direct assistance for rule-of-law programming (including complementarity-related aspects). Thus the UK has drastically narrowed its work in the justice sector to focus primarily on police management and accountability issues.²¹² The EU and its members coordinate all political maneuvers and other interventions relating to the justice sector in monthly meetings of delegation and embassy officials responsible for human rights.²¹³

European states and institutions also extensively engaged in the co-funding of various projects. REJUSCO, discussed above, is a prime example of this approach, in which for the most part the EU has taken on a distinct leading role. REJUSCO's successor Program to Support the Reform of Justice in the East (*Programme d'appui à la réforme de la justice à l'est – PARJE* – also known as *Uhaki Safi*, or “good justice” in Swahili) will launch in the first or second quarter of 2011.²¹⁴ With a budget of €18 million (€10 million from the EU, €6 million from Sweden, and €2 million from Belgium), it will also focus on Ituri and the Kivus. A separate, entirely EC-funded Program to Support Governance (*Programme d'appui à la gouvernance*, or PAG) running from 2009 to 2011 devotes €9 million to strengthening the administration of justice (the Ministry of Justice, CSM, and Prosecutor General’s office) and the Kinshasa courts. Running in parallel to PARJE and succeeding PAG in its support to the

²¹¹ See the section above on national planning and coordination capacity for an overview of the CSRP.

²¹² Interview with DFID official.

²¹³ Congolese civil society organizations are often consulted on issues before the human rights officers meet. Interview with an official of an EU member state.

²¹⁴ Except as otherwise noted, this and the following details are based on an interview with a representative of the EU delegation.

central administration of justice, a new four-year €29 million Program to Support the Reform of Justice (*Programme d'appui à la réforme de la justice*, or PARJ) will launch in 2011. It is funded by the EU (€21 million) and Sweden (€8 million), and beyond continued capacity building for the administration of justice, it will focus on access to justice, developing controls and methods of evaluation for the judiciary, sexual and gender-based violence, and trainings and infrastructure in Bas Congo and Kasai Orientale.²¹⁵

While coordination among the EU and its member states has been good, there is only ad hoc coordination between them and other donor states and institutions.²¹⁶ An analysis for DFID conducted in 2007 pointed to poor leadership in the international community when it comes to security and justice sector reform, and cited variance in the approaches of the UN, EU, and various bilateral donors as being a significant problem.²¹⁷ It is troubling that over three years later, the deeply flawed CMJ remains the only institutionalized forum for donor coordination on justice issues.

Policies and practices internal to donor countries can make coordination more difficult. Donor planning often takes place on long timescales, which have the benefits of predictability and follow-through, but can reduce flexibility once a program is launched. DFID, for example, implemented a five-year program in the DRC, which can be revisited and amended after two years.²¹⁸ The requirements of donor country parliaments can also create restraints for implementing agencies or embassies. For example, USAID is barred by law from providing aid to military bodies, so has been unable to assist the military justice system in the DRC.²¹⁹ An official at one Western embassy cited a more specific parliamentary instruction requiring that a certain percentage of aid funding go to sexual and gender based violence programs in eastern Congo. The official said that by reducing donor flexibility, this type of well-intended parliamentary mandate contributes to duplications and gaps in overall programming.²²⁰ An official at another Western embassy cited domestic civil society lobbying as a factor in that country's decision to become more active in support for international justice in the DRC.

Complementarity Strategy

²¹⁵ For further information on the PARJ program (in French) see the following EU document:

http://ec.europa.eu/europeaid/documents/aap/2009/af_aap-spe_2009_cod.pdf.

²¹⁶ Interviews with officials from EU and non-EU donor states. China provides substantial assistance to the DRC but never coordinates with other donors. Interview with a representative of the international community.

²¹⁷ Ball, Nicole, et al: Security and Justice Sector Reform Programming in Africa, DFID Evaluation Working Paper No 23, April 2007, p. 95, available at:

<http://www.dfid.gov.uk/Documents/publications1/evaluation/sjr.pdf>.

²¹⁸ Interview with DFID official.

²¹⁹ The U.S. government has found a way to provide significant assistance for military reform in the DRC, including capacity-building for military justice, by routing the assistance through DIILS. In practice, USAID contractors who are also contracting for DIILS have been able to conduct joint programming, for example the training of civilian and military magistrates, while keeping two separate financial books. Interview with USAID and DIILS implementing partner.

²²⁰ An analysis published by the Clingendael Institute has also pointed to the drawbacks of duplicative focus on sexual and gender-based violence to the detriment of justice for other forms of crime. See Boshoff, Henri, et al: Supporting SSR in the DRC: between a Rock and a Hard Place, Clingendael Institute, April 2010, p. 8, available at: http://www.clingendael.nl/publications/2010/20100400_cru_paper_smore.pdf.

As one official remarked with regard to overall justice sector reform in this country of so many needs, “after years, still no one knows where to start.”²²¹ While not everyone shares this assessment of justice sector development in the broader sense, in the narrower area of programming and reforms related to complementarity, no one interviewed for this report claimed knowledge of a strategy on the part of donors or in joint planning of donors and the DRC government. To the contrary, some in the DRC government and international community expressly lamented that there is no operational framework or strategy defined for complementarity-related assistance.²²² In the absence of a true strategy, the government has begun elaborating a plan for domestic war crimes proceedings, and donors have taken various approaches of support, including the strengthening of justice in particular regions, and supporting mobile courts, including mobile gender justice courts.

A government plan

In August 2010, the Council of Ministers approved a Justice Ministry proposal to create special chambers at the level of the high and appeals courts (*Tribunaux de grande instance* and *Cours d'appel*) that would have “exclusive and universal jurisdiction” over international crimes. Military courts would lose jurisdiction over international crimes, but military judges and prosecutors would bring their experience to the panels. (The summary of the decision does not say how this would work.) Further, the decision outlines the government’s intention to create a unit within the justice minister’s cabinet that would be responsible for functions including referral of cases to specific jurisdictions, witness protection, and victim assistance.²²³ The brief summary begs many questions regarding mandate, structure, and implementation, but states that details are under development and are to be presented to parliament by the end of 2010. The ministry is drafting related laws that will first be reviewed by the Council of Ministers.²²⁴

The proposal appears to have significant overlap with provisions of the draft implementing legislation that could come before parliament during the current session, but the extent of this is unclear.²²⁵ One potential concern is whether giving the justice minister’s office the authority to refer cases to specific jurisdictions could impede the independence of magistrates, making judicial proceedings related to international crimes more prone to political influence. Even if there are reasons why such a concern would be unfounded, an enduring lack of coordination with non-governmental Congolese stakeholders could corrode the proposal’s legitimacy by feeding perceptions that the government only seeks a justice mechanism it can control. And coordination with donors will be critical for the feasibility of any mechanism proposed. This process began at the end of September 2010, when the government belatedly presented its proposal in the CMJ.²²⁶ There could be significant points of intersection between the government’s proposal (which in late 2010 was fleshed out in

²²¹ Interview with a representative of the international community.

²²² Interviews with a justice ministry official and UN officials.

²²³ Justice Ministry summary of the proposal obtained by the Justice Initiative.

²²⁴ Interview with a justice ministry official.

²²⁵ Some international community and civil society representatives shown the document remarked that the proposal appeared to be something quite new, while others expressed less surprise and said it looked to be consistent with the draft implementing legislation. A Justice Ministry official said that the new draft legislation should match up with the existing draft legislation on implementing the Rome Statute.

²²⁶ E-mail interview with a representative of the European Union delegation.

more detail) and new international initiatives, including the UN-backed Prosecution Support Cells.

Regional approaches

Because the country is so large and the needs are so great, donors have often pursued an approach of support in one specified region, often for one particular type of crime. An early example of this was in Bunia, in the Ituri District of Orientale Province over the course of 2003-2004. There, the European Commission and France invested an initial €1 million in supporting judicial and police reform and capacity building, as well as infrastructure improvements to judicial offices and detention facilities. Implemented by the Belgian NGO *Réseau des Citoyens Network* (RCN), and with the cooperation of MONUC, the project eventually helped military prosecutors to secure convictions of several individuals on charges of war crimes and crimes against humanity.²²⁷

Other large EU-backed programs, including REJUSCO, PAG, PARJ and PARJE, are in whole or part also focused on particular regions. Apart from central administrative capacity, in the areas of justice and governance, USAID is currently focusing its capacity-building and infrastructure aid on four provinces: Bandundu, Katanga, Maniema, and South Kivu. These are seen as pilot programs, and there is a possibility that the programs' geographical reach will expand to other areas of the country.²²⁸ From 2006, JHRO has implemented a donor-funded program focused on the Kivus that provides legal assistance to the victims of sexual and gender-based violence, enabling them to bring cases into the justice system. In 2010, the project was being expanded into six western provinces.²²⁹ The Dutch government has taken a holistic approach in Maniema, attempting to support the entire judicial chain to create credible justice for crimes of sexual and gender-based violence. Through its main implementing partner, ABA ROLI, the Dutch project has addressed items including trainings for judges, prosecutors, and lawyers; judicial and penal infrastructure; and the transport of victims.

Donors are attracted to the regional approach because it allows for aid to the justice system as a whole, with outcomes less likely to be jeopardized by weak links in the judicial chain. It also allows them to focus on regions of greatest need. But that is also the greatest disadvantage of the approach. By concentrating resources in certain regions, usually Kinshasa and the east, much of the rest of the country is left out. This can lead to the development of justice systems of varying practice and quality across the country and is not helpful for the DRC's already fragile sense of national cohesion. It is therefore not surprising that the government has expressed to donors its preference for a centralized rather than region-by-region approach to judicial development and reform.²³⁰

²²⁷ Critics charge that the international community played a greater decision-making role in Bunia than would be appropriate today, and that even under conditions at the time, some of the decisions were not compliant with national or international law. For example, the international community supported civilian justice for military and police officers in contravention of Congolese law, and the MONUC SRSG allegedly interfered in proceedings in order to secure certain convictions. Interview with a representative of the international community.

²²⁸ Interview with international development official.

²²⁹ These are Equateur, Bandundu, Kasai Oriental, Kasai Occidental, Maniema and Kinshasa. Interview with JHRO officials.

²³⁰ Interview with a representative of the international community.

Mobile courts

Mobile courts offer an intriguing option for trying international crimes in a manner accessible to remote populations. There have been a number of mobile court initiatives, which are provided for under Congolese law and whose basic operations are similar.²³¹ Following leads, investigators and prosecutors prepare cases related to murder, rape, or other crimes.²³² Court officials prepare the files, and space for hearings is identified—often outdoors or in a private home. Then judges at the level of the superior and appellate courts are brought in to hear the cases. MONUSCO provides security and logistics support. In perhaps the weakest link of the process, convicted persons, usually low or mid-level perpetrators, are sent to various prison facilities that are poorly guarded and in various states of disrepair.²³³

USAID is supporting mobile courts in remote villages throughout four pilot provinces: Bandundu, Katanga, Maniema, and South Kivu. From November 2008 through October 2011, the Dutch government is funding mobile courts for sexual and gender-based violence in Maniema, working through ABA ROLI as the main implementing partner. The Open Society Justice Initiative and OSISA, working through ABA ROLI, conceived, developed, and sponsor mobile gender justice courts in South Kivu.²³⁴ During its first year, the court—which has discretion to hear non-gender crimes cases—tried 115 individuals, including 68 for sex crimes. Of these 68, 51 were convicted and sentenced to 3-20 years imprisonment. The mobile gender justice court has jurisdiction over both military and civilian cases. According to the ABA ROLI, as of September 2010, all of those convicted by the mobile court remain in jail at the Bukavu Central Prison.²³⁵ OHCHR has supported mobile courts in North Kivu, working through ASF. Over several years, ASF has supported mobile courts in various other parts of the DRC, including Kasai Occidental, Maniema, and Equateur. Mobile courts were also one feature of the REJUSCO program in Ituri and the Kivus, including the organization of trials for war crimes and crimes against humanity.²³⁶

Mobile courts are expensive to operate and by removing judges from their normal courts, can contribute to case backlogs there.²³⁷ But in general they have worked quite well and as a bridge to more durable solutions, offer a promising approach for complementarity. Beyond the clear benefit of bringing justice mechanisms to populations in remote areas who have not

²³¹ Law on judicial organization and jurisdiction (*Code d'Organisation et de Compétence Judiciaire*), article 67.

²³² ASF also supports civil cases related to land disputes. Interview with a staff member of ABA ROLI.

²³³ Interview with an international development official and representatives of civil society.

²³⁴ Initial funding was provided for one year, through September 2010 and may be extended for another two years pending a project evaluation. Interview with OSISA staff members.

²³⁵ E-mail exchange with ABA ROLI staff.

²³⁶ In one case in April 2009, at a REJUSCO-supported mobile military court hearing in Walikale, North Kivu, judges of the Goma military garrison convicted 11 accused of rape as a crime against humanity, among other crimes, committed in a nearby village during the previous month. See Office of the High Commissioner for Human Rights: 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, para 884, available at:

http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf. For an analysis of mobile courts conducted by REJUSCO, see “Multipart thematic paper on multi-stakeholder partnerships active in the field of good governance, democracy and the rule of law”, Multipart Project, May 2010, pp. 208-209, available at: http://www.multipart.eu/index.php?option=com_docman&task=doc_download&gid=79&Itemid=.

²³⁷ Costs can vary depending on the location and duration of the hearings. A 14-day session can cost in the range of USD \$25,000 – 30,000. Telephone interview with a staff member of ABA ROLI.

had access to the judicial system, mobile courts offer other advantages. According to one official of a supporting government, the tight timelines involved in choreographing mobile court visits create judicial efficiencies. Judges who are usually reluctant to accept remote postings have eagerly participated in mobile courts for the per diem payments. Further, because they are unfamiliar with local power structures, fewer opportunities arise for judicial corruption.²³⁸ Donor implementing partners, and sometimes donor officials themselves, are present at the hearings and they fulfill a monitoring function that can further encourage properly run proceedings.²³⁹

Options for Realizing Complementarity in the DRC

International Assistance

Some supporters of giving the DRC domestic system jurisdiction over atrocity crimes committed after July 1, 2002 also feel that there should be a robust international mechanism, along the lines of the International Criminal Tribunal for Rwanda (ICTR), for crimes committed prior to this date.²⁴⁰ Proponents say that a tribunal wholly independent of the government and based outside of the country is needed to hold accountable individuals who committed atrocities before this date, and who remain very powerful. The development of such a court, regardless of the temporal jurisdiction, seems highly unlikely given extreme donor fatigue with the existing ad hoc tribunals and concerns that spending on international criminal justice for the DRC should have a capacity-building focus.²⁴¹ Indeed there is a danger that even if donor funds could somehow be approved to build a new “International Criminal Court for the DRC,” it would come at the expense of spending on the country’s anemic justice sector, including mechanisms to deliver justice for post-July 2002 crimes.²⁴²

Although there is no apparent appetite in the international community to launch another ad hoc tribunal, the development of some form of mixed judicial mechanism that would include Congolese and international officials has been gaining momentum. The UN mapping report released in October 2010 strongly recommended some form of mixed mechanism.²⁴³ The models vary, and include an international hybrid tribunal along the lines of the Special Court for Sierra Leone that operates outside the normal judicial system. They also include such models as the War Crimes Chamber in the State Court of Bosnia and Herzegovina, where an international registry organizes judges and other international legal professionals to work temporarily alongside Bosnians, all within the national legal system. The idea of applying

²³⁸ Interview with a representative of the international community.

²³⁹ “Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo”, International Bar Association and the International Legal Assistance Consortium, August 2009, p 27, available at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=6C2BE523-F512-48C1-B09C-FC9A8B1D0AAB>.

²⁴⁰ Interview with Professor Nyaburunga, MP.

²⁴¹ Interviews with a representative of the international community and ASF staff members.

²⁴² This cold calculus leaves unanswered demands for prosecution of pre-Rome Statute atrocities. One approach could be the development of other transitional justice mechanisms with a mandate that would encompass this period, including memorials and a functional truth and reconciliation commission.

²⁴³ Office of the High Commissioner for Human Rights: 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, para 61, available at: http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf.

some variation of a Bosnian-type approach in the DRC has been endorsed by Human Rights Watch, among others.²⁴⁴

The inclusion of international judges could boost public confidence in the independence of the court and make the judges more resistant to political pressure. By working together, experienced international judges could build the capacity of their Congolese colleagues. Congolese officials interviewed for this report seemed open to the idea of international participation, but some common concerns emerged.²⁴⁵ More than one official cited the Paris Declaration on Aid Effectiveness, and specifically what foreign participation would mean for the ownership and sustainability of the process.²⁴⁶ Separately, a common view expressed was that if international personnel come to join a hybrid justice mechanism in the DRC, there should be no discrepancies between pay and living conditions for international and Congolese officials working at the same levels.²⁴⁷ Given the incentives that could be required to bring highly qualified internationals to take positions in the DRC, policy that meets this expectation could make a mixed mechanism prohibitively expensive and cause problems for sustainability following the departure of the internationals.

Some argue that the inclusion of international judges is less important than ensuring adequate support for all aspects of the judicial chain at more technical levels.²⁴⁸ Another approach could be that taken to support Uganda's War Crimes Division, under which donors are hiring one national and one international expert in international criminal law to advise the justice sector coordinating mechanism. Similarly, USAID supports a non-profit international organization (the Public International Law and Policy Group) that provides confidential expert technical advice on matters of international criminal law to the justice sector.²⁴⁹ However, given the vast capacity needs in the DRC, this approach would likely need to be augmented by much more robust forms of assistance.

A Model Court

The debate over how to structure a judicial response to the atrocities laid bare by the UN mapping report is taking place against the backdrop of many disparate efforts to strengthen the overall criminal justice system in the DRC, but also in the absence of any particular vision or strategy for reaching the goal of a functional justice system that could comprehensively handle any crimes, including atrocity crimes. The Congolese government and the international community could constitute a mixed mechanism as another in a long series of ad hoc tactics to strengthen the justice sector. Alternatively, they could craft a mixed mechanism in such a way that it gives focus to efforts at supporting complementarity, plugs into existing initiatives, creates workable justice in the relative short term, and becomes a replicable model for functional criminal justice in the DRC.

²⁴⁴ Human Rights Watch: Tackling Impunity in Congo: Meaningful follow-up to the UN Mapping Report: A Mixed chamber and other accountability measures, October 2010, available at: <http://www.hrw.org/node/93228>.

²⁴⁵ Interviews with officials of the justice ministry and CSM.

²⁴⁶ The Paris Declaration is available at:

http://www.oecd.org/document/18/0_3343.en_2649_3236398_35401554_1_1_1_1.00.html.

²⁴⁷ The GTZ has a team integrated into the Environment Office consisting of German and Congolese nationals. This experience could provide useful lessons on making a hybrid approach work. Interview with an official of the German embassy.

²⁴⁸ Interview with representatives of civil society.

²⁴⁹ See the Uganda section of this report for more details.

A model court for war crimes could be at the level of the high courts and appeals courts (*Tribunaux de grande instance* and *Cours d'appel*) as the government proposed for specialized war crimes chambers in August. The high courts are based at the provincial level, meaning that giving a specialized chamber of the high court jurisdiction over the entire territory of the DRC would require a change in the law.²⁵⁰ A centralized mixed chamber for war crimes could be based in Kinshasa, but would be closer to most conflict-affected communities if based in the east. In order to truly make the court's proceedings visible to victims and conflict-affected communities, it could deploy through mobile courts.

Donors with a particular interest in supporting complementarity initiatives could focus their efforts on this one specialized chamber. Intensive training courses could be offered to investigators, prosecutors, trial magistrates, witness protection officers, case managers, clerks, archivists, and other officials. As in Bosnia, defense counsel could be required to attend set trainings in international criminal law and procedure as prerequisites for qualifying to appear before the specialized chamber.²⁵¹ The government and donors would coordinate to ensure that all of the court officials are properly equipped to carry out their functions, from vehicles, fuel, and forensic tools for investigators to computers and court recording equipment for registry staff. If needed, donors could support a dedicated detention facility and prison for the chamber, and ensure it is adequately staffed by well-trained guards. Donors could support trainings for outreach, either conducted by the court staff or through local NGOs; ensure that local civil society has the capacity to monitor its proceedings; and likewise ensure that journalists are offered opportunities to learn about the court.

Some of this support could be arranged through existing initiatives. For example, MONUSCO's new Prosecution Support Cells could be used to train and support investigators working on cases for the specialized chamber. Certain judicial trainings could be offered through existing programs, or the specialized chamber when deployed through mobile courts could take advantage of court and penal infrastructure that has already been newly build or refurbished.

Focusing resources on one model court within the Congolese system, whether with or without temporary international participation, would allow the specialized chamber to function credibly in a relatively short period of time. Deployable through mobile courts and supported by robust outreach, the court's activities and effectiveness could be seen and understood by many victims. Importantly, as understanding grows that perpetrators can be held accountable for their crimes and locked away in secure prisons if found guilty, justice is more likely to develop a deterrent effect on potential future perpetrators.

By more efficiently allocating resources and tapping into existing initiatives, the concentrating of support on a single complementarity mechanism may not require major new financing or divert funding from existing support for general rule-of-law programming, which are likely to be the main concerns. Indeed, by getting one part of the Congolese justice system into working order across the judicial chain, a war crimes court could serve as a model that could be replicated. After a time, some trained and experienced court officials

²⁵⁰ Telephone interview with a staff member of ABA ROLI.

²⁵¹ This should be done in cooperation with the national bar association. As an incentive, defense counsel appearing before the specialized chamber would have to be paid properly, but also at rates that could realistically be sustainable if applied system-wide.

could transfer out to seed other specialized chambers, perhaps also for war crimes, or focused on such areas as sexual and gender based violence or anti-corruption.

Discrete Ideas in Support of Complementarity

Regardless of which approach, if any, the government and international community decide to pursue for a mixed chamber, there are a number of discrete steps they can take to boost Congolese capacity to undertake domestic war crimes proceedings, including gender crimes:

- The CSM has requested the inclusion of international criminal law in the standard training for magistrates, but so far donors have rejected the request, citing resource limitations.²⁵² Donors should give the request renewed consideration, and consider various forms of partnerships, some of which could mitigate funding concerns. Cooperation with foundations, international and local NGOs, the International Committee of the Red Cross, the ICC, and foreign law schools are all imaginable. Beyond points of substantive law, the additional curriculum could emphasize points of procedure particular to trials for war crimes, crimes against humanity, and genocide, including how to deal with vulnerable victims and witnesses, and victim and witness protection issues.
- As discussed in the section on legal education, the government and international community should explore ways to include international criminal law in the curricula of Congolese law schools. Partnerships with Western law faculties that have specialties in international criminal law, especially as practiced in civil law jurisdictions, could be particularly promising. The effort should include law professors and the Ministry of Higher Education, which sets university curricula.²⁵³
- Classroom trainings, no matter the specific topic, have become problematic because the targeted officials are already stretched thin and then end up spending a high proportion of their time at workshops and seminars. Mentorship models, where trainers advise trainees in the course of their work, are more valuable forms of teaching and don't interfere with officials' workflow (and may even accelerate it).²⁵⁴ There are some indications that donors and their implementing partners are increasingly moving towards this practical approach, and this should be encouraged.
- The international community could develop a basket of media training options on international criminal justice, and work with media-focused donors and media associations to include modules on international criminal justice in existing capacity-building programs.
- The international community should look for openings to tap new resources in the equipping of the justice sector. For example, information technology, communications, and biotechnology companies could be approached about the possibility of donating sorely needed equipment for the investigation of grave crimes in eastern DRC. Such companies could be intrigued by the prospect of positive public relations in exchange for modest in-kind contributions.
- The government and international community should revamp the CMJ in order to improve policy coordination. Several options for this are detailed above in the section

²⁵² Interview with CSM Permanent Secretary Jean Ubulu Pungu.

²⁵³ Interview with ICTJ staff members.

²⁵⁴ Interviews with representatives of civil society and the international community.

on improving coordination between the government and the international community. In addition, consideration should be given to creation of a small office for international crimes within the ministry of justice and/or CSM, or alternatively in the CMJ secretariat. It would be responsible for liaising with other relevant government agencies, civil society, and donors. It would liaise with whatever coordination mechanism might be established by the ASP or UN. Some form of temporary international staffing could be contemplated for such an office.

- And finally, the international community should urge the national government to increase resources for the justice sector, but donor countries should also use their voices in the World Bank and IMF to encourage the IFIs to allow the justice sector higher priority in the DRC national budget.

Uganda

Uganda's history is marked by the scars of atrocities committed during cyclical conflicts that pitted northerners and southerners against each other. The regimes of Milton Obote and Idi Amin were responsible for mass killings, torture, and other acts of unspeakable brutality. Hundreds of thousands of victims of these crimes were never afforded justice, and a climate of impunity prevailed as the two main perpetrators lived out their lives in peaceful exile. When current President Yoweri Museveni took power in 1986, his government was able to consolidate control over most of the country. Over the intervening years much of the country has enjoyed peace and improving standards of living. But with Museveni's ascent to power, a group of army officers fled to northern Uganda to launch a rebellion and the north remained mired in conflict. Over five years the rebellion failed to make headway against the government, but elements of it merged with a local spiritual movement and gave rise to the Lord's Resistance Army (LRA) under the charismatic leadership of Joseph Kony. The LRA's bid to seize power in Uganda and rule the country according to the Ten Commandments quickly manifested itself in the brutal victimization of northern peoples, primarily the Acholi. During over 20 years of conflict, the LRA has abducted tens of thousands of people, mostly children, and forced them to fight or serve as porters and sex slaves. Amputations of limbs, lips, and ears became one gruesome hallmark of its attacks on villages. In response, the government moved between 1.4 and 1.9 million people into camps for the internally displaced, where they were ostensibly to be protected by the Ugandan People's Defense Forces (UPDF). Northerners living in these squalid camps remained prone to attack by the LRA, and also prone to attack by elements of the UPDF.

The government continued with a military response against the LRA, interspersed by periodic attempts to lure the LRA leadership to the negotiating table. Among the enticements offered to end the conflict, Uganda passed an Amnesty Act in 2000, but the fighting and atrocities continued. Under increasing military pressure, the LRA moved its base of operations to southern Sudan. In December 2003, the Ugandan government referred the situation in northern Uganda to the International Criminal Court (ICC), citing its inability to arrest LRA leaders. The ICC prosecutor opened a formal investigation in 2004, and in 2005, the ICC's Pre-Trial Chamber II approved warrants of arrest for Kony and four other LRA leaders on charges of war crimes and crimes against humanity. Two of the suspects have since died, but Kony, Okot Odhiambo, and Dominic Ongwen remain at large and the LRA remains active, moving among the DRC, southern Sudan, and the Central African Republic.

The basis for Uganda's current effort to mount domestic prosecutions and trials for atrocity crimes is rooted in the Juba Peace Talks. These negotiations with the LRA were launched in 2006, after the ICC arrest warrants were issued. The LRA demanded withdrawal of the ICC warrants as a condition for peace, but the ICC prosecutor rejected the possibility and the Ugandan government lacked the authority to meet the demand. But the government did have the option of launching a domestic mechanism for genuine investigation and prosecution of crimes in the north, which would create an opening for the three LRA suspects to challenge ICC jurisdiction on the basis of the principle of complementarity. In an "Agreement on Accountability and Reconciliation" signed in June 2007 and an annex agreed to in February

2008, the government and LRA established the broad outlines of just such a domestic criminal mechanism.²⁵⁵

Although LRA negotiators signed this agreement and a series of others, Joseph Kony balked in November 2008 when it came time to sign the Final Peace Agreement.²⁵⁶ The preliminary agreements may not be binding absent the final agreement, but the Museveni government pledged to implement all of the Juba protocols, including the provisions on domestic justice for atrocities committed during the conflict.

The government created a War Crimes Division in Uganda's High Court in July 2008, as well as dedicated investigations and prosecution teams within the Uganda Police Force and Directorate of Public Prosecutions. After years of domestic impunity for atrocity crimes, months of preparations, and with substantial support from the international community, Uganda now stands at the cusp of its first trial for crimes under international law. The first indictment, against a lower level LRA figure named Thomas Kwoyelo, has been issued and the case has been committed to trial. Ugandan officials expect it to begin in early 2011.²⁵⁷

Complementarity Needs and Actions

Legislative Framework

Uganda's legal framework for domestic investigations, prosecutions, and trials related to war crimes, crimes against humanity, and genocide is built around the International Criminal Court Act (ICC Act). Despite this, the landmark legislation may have no bearing on the first trial, or indeed any trials related to past crimes. It appears that these will rest solely on previously enacted legislation.

The first draft of the ICC Act was assembled in 2004, but legislation was only adopted in the run-up to the Ugandan-hosted Review Conference.²⁵⁸ The Ugandan Parliament adopted the ICC Act unanimously on March 13, 2010. At the Review Conference, the government announced the signing, but the act was not published until mid-August. This caused some to wonder whether President Museveni had really signed it into law.²⁵⁹ Upon publication, the law bore a gazette date of June 25, 2010.²⁶⁰

The ICC Act domesticates crimes under the Rome Statute and the modes of liability are almost all taken directly from that statute. The act makes no mention of the War Crimes Division (WCD) that was established by administrative decree in 2008, but gives the High Court (of which the WCD is a part) first-instance jurisdiction to hear cases of war crimes,

²⁵⁵ The agreement also included provisions on traditional justice mechanisms, reparations, and a truth-telling body. The agreement is available at: <http://www.icc-epi.int/iccdocs/doc/doc589232.pdf>, and the annex at: <http://www.icc-epi.int/iccdocs/doc/doc589233.pdf>.

²⁵⁶ International Crisis Group, "Northern Uganda: The Road to Peace, with or without Kony", Africa Report No 146, December 10, 2008, available at: <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/uganda/146-northern-uganda-the-road-to-peace-with-or-without-kony.aspx>.

²⁵⁷ Interview with a Justice Law and Order Sector (JLOS) official.

²⁵⁸ Interview with Parliamentarians for Global Action (PGA) staff.

²⁵⁹ Interviews with representatives of civil society and the international community.

²⁶⁰ The ICC Act is available online at: http://www.beyondjuba.org/policy_documents/ICC_Act.pdf.

crimes against humanity and genocide. As with other decisions of the High Court, appeals would be heard by the Supreme Court.

In plenary session, legislators removed a provision that, in conflict with the Rome Statute, would have ensured head-of-state immunity by stating that in case of conflicts between the constitution and Rome Statute, the constitution would prevail.²⁶¹ Sitting presidents would still enjoy immunity from domestic prosecution under the legislation. But the ICC Act also sets out mechanisms for cooperation with the ICC, and under these provisions, sitting presidents would not be protected from arrest and transfer to The Hague.

In northern communities, victims want reparations but do not receive them, while funds are available to amnesty applicants. Thus the government must take steps to address local expectations.²⁶² The ICC Act makes no provision for reparations arising from domestic proceedings, but states that the government must implement ICC decisions on reparations related to trials at the ICC in The Hague.²⁶³ The Ugandan Human Rights Commission does have the authority to compensate victims of rights abuses using state funds.²⁶⁴ And under existing Ugandan law victims can sue perpetrators for damages in civil court, which can take criminal trial verdicts into account. Only in these ways could the ICC Act result in an approximation of reparations.²⁶⁵ The act contains no provision for victim representation in the courtroom, but there is some interest among judges of the WCD in examining how the practice of victim participation could be integrated into Ugandan court proceedings.²⁶⁶

The act is prospective from its date of effect, June 25, 2010, which eliminates the possibility of Rome Statute provisions being domestically applied to prior crimes. Among other effects, this would seem to eliminate any use of the act as a basis to challenge the admissibility of the LRA cases at the ICC. It is not clear whether it could have been possible to give the law retroactive effect, as this is prohibited by Uganda's constitution.²⁶⁷

With the ICC Act quite possibly inapplicable to past events, other international instruments are likely to be more relevant than the Rome Statute. Uganda ratified the 1949 Geneva Conventions in 1964, the 1977 Additional Protocols in 1991, and the Genocide Convention in 1995. Of these, however, only the Geneva Conventions have ever been domesticated by parliament. This is important because Ugandan judiciary has generally been conservative in its interpretation of the principle of legality and judges may be unwilling to apply treaty law unless this has been expressly domesticated through such national legislation. Customary international law is virtually unknown in Ugandan courtrooms, although some judges are

²⁶¹ Interview with a staff member of PGA.

²⁶² Interview with representatives of civil society and the international community.

²⁶³ ICC Act, Part VI (64).

²⁶⁴ There have been some awards to victims of torture, but there have also been problems of corruption with this mechanism. Interview with civil society representatives.

²⁶⁵ The Agreement on Accountability and Reconciliation between the government and LRA, in its clause 9, included a provision stating that reparations "may be ordered to be paid to a victim as part of penalties and sanctions in accountability proceedings". It is unclear whether this could form an alternate legal basis for judges to order payment of reparations. See: <http://www.icc-cpi.int/iccdocs/doc/doc589232.pdf>

²⁶⁶ Interview with Judge Elizabeth Nahanya. The 2007 Agreement on Accountability and Reconciliation between the government and LRA could perhaps provide a basis for this. In its clause 8, it states that "[t]he government shall promote the effective and meaningful participation of victims in accountability and reconciliation proceedings". See: <http://www.icc-cpi.int/iccdocs/doc/doc589232.pdf>.

²⁶⁷ Interview with Judge Elizabeth Nahanya. This view is also shared by a recent analysis commissioned by Irish Aid, a draft of which was provided to the author.

open to it.²⁶⁸ Unless this more progressive view prevails, there would remain only a narrow sliver of international humanitarian law—Common Article 3 applicable to internal armed conflicts, or grave breaches of the Geneva Conventions applicable to international armed conflicts—that the WCD could apply to events prior to the June 2010 adoption of the ICC Act. Prosecutors appear reluctant to push for more creative application of the law, at least at the outset. According to officials in the Ugandan justice sector, the first indictment is based on the Geneva Conventions Act and the Penal Code Act.²⁶⁹ Under Ugandan law, the judges could, in theory, instruct prosecutors to apply treaty law that has not been domesticated.²⁷⁰

The Amnesty Act of 2000, as amended in 2006, may complicate prosecutions on the basis of any laws. Under the act, ex-combatants can register for amnesty unless their names appear on an ineligibility list drawn up by the minister of internal affairs and approved by parliament.²⁷¹ To date, parliament has approved no such exemptions.²⁷² The Amnesty Act has been extended until mid-2012, which curiously means that it could apply to crimes committed in current and future conflicts.²⁷³ It is far from clear that individuals who have received amnesty could be prosecuted with offenses under the ICC Act or the Geneva Convention Act. Issues related to the Amnesty Act are sure to be litigated in the Kwoyelo trial, as the accused submitted an application for amnesty following his arrest, and the Amnesty Commission has argued that the request should be granted. The director of public prosecutions is said to be concerned about the blanket amnesty, which could drastically circumscribe the reach of complementarity into Uganda’s recent past.²⁷⁴

The chairman of the Committee on Legal and Parliamentary Affairs, Stephen Tashobya, MP, says that the Amnesty Act undermines the letter and spirit of the ICC Act. He says it will need to be amended “sooner rather than later” in order to make it compatible with the ICC Act. He has already discussed this with the justice minister and attorney general.²⁷⁵

International support for parliamentary capacity appears to have played a role in the passage of the ICC Act. Parliamentarians for Global Action (PGA) conducted seminars and workshops on the Rome Statute for MPs, and facilitated relevant contact for them with other

²⁶⁸ These judges point to instances of application of customary international law and treaty law, even absent domestication legislation, based on Chapter IV of Uganda’s Constitution, “Protection and Promotion of Fundamental and Other Human Rights and Freedoms”. Interview with Judge Elizabeth Nahamya.

²⁶⁹ As of early November 2010, the indictment of Thomas Kwoyelo was not yet publicly available. If it is indeed based in part on the domesticated Geneva Conventions (excluding the Additional Protocols), this raises the question of whether prosecutors will have to argue that the conflict in the north was international in nature – that is, a war between Uganda and Sudan. Interview with an International Center for Transitional Justice (ICTJ) staff member. Or if it is based entirely on Common Article 3, applicable to internal armed conflicts.

²⁷⁰ Interview with an ICTJ staff member.

²⁷¹ Parliament amended the Amnesty Act in 2006, in part, to allow for exceptions. In a new section 2A, the Act reads, “[A] person shall not be eligible for grant of amnesty if he or she is declared not eligible by the Minister by statutory instrument made with the approval of Parliament.” The Amendment is available at: [http://www.beyondjuba.org/policy_documents/Amnesty_\(Amendment\)_Act_2006.pdf](http://www.beyondjuba.org/policy_documents/Amnesty_(Amendment)_Act_2006.pdf). The Amnesty Act of 2000 is available at: http://www.beyondjuba.org/policy_documents/Amnesty_ACT_Chapter_294.pdf.

²⁷² Interview with a representative of the international community.

²⁷³ On May 25, 2010, the minister of internal affairs, applying authority provided by the Amnesty Act, extended the amnesty for another two years. See:

http://www.beyondjuba.org/policy_documents/Amnesty_Act_Instrument.pdf.

²⁷⁴ Interview with a representative of the international community.

²⁷⁵ Interview with Stephen Tashobya, MP.

partners, including the European Union, the ICC, and local civil society.²⁷⁶ The International Committee for the Red Cross (ICRC) also commented on a draft version of the bill.

Technical Capacity

In 2008, the Justice Law and Order Sector (JLOS) composed a transitional justice work plan based on technical requirements listed by each of the participating institutions. But the institutions are not terribly confident in the lists they put together, and at a July 2010 review of the work plan JLOS and donors agreed that the best way to refine the list of needs was through an outside assessment by transitional justice experts, which was slated to take place in November 2010.²⁷⁷

Policing

Police performance will be important for credible domestic justice. Police must be able to provide adequate security for judicial institutions and officials, and critically, carry out the investigations into the alleged crimes.

The police are capable of providing security for domestic trials for international crimes. The security situation in Uganda is stable. Rebel factions in the north haven't attacked since 2006, and there is ongoing, significant return of internally displaced persons from camps to their home villages. Likewise, there has been a steady stream of ex-combatants from the LRA and other factions registering for amnesty and seeking reintegration into their communities. The southern-dominated government and donors have invested in infrastructure in the north, which could be expected to contribute to assuaging north-south tensions. Improved security has led to an increase in commerce along the border with the Democratic Republic of Congo (DRC), which has brought economic benefit to north-western Ugandan communities in particular.²⁷⁸

Despite these positive indications, there are factors that make the security situation unpredictable. Although the government has near full control in the north, some conflict continues in the northeastern Karamoja region. Uganda could also be affected by any potential new instability in the DRC. Perhaps more worrisome is the situation in Sudan following south Sudan's January 2011 referendum on independence. In the past, the government in Khartoum has used proxy militias, including the LRA, to divide and rule in the south. There are indications that this could happen again.

Looking more narrowly at the WCD, the question of how its security should be structured remains unresolved. There has been some suggestion by court officials that a special unit should be developed to protect them and the court's infrastructure.²⁷⁹ But tapping existing police resources could be another option.

²⁷⁶ Interview with Stephen Tashobya, MP. Mr. Tashobya and around 30 other MPs, representing a cross-section of parties, are PGA members.

²⁷⁷ Interview with a JLOS official. More information on the assessment mission follows in the section on strategy.

²⁷⁸ Interview with EU delegation officials.

²⁷⁹ Interviews with representatives of civil society and the international community.

Regarding investigations, observers say that police often exhibit poor skills even in dealing with routine cases.²⁸⁰ The problem is exacerbated because investigations that are not politically prioritized receive fewer resources.²⁸¹ Uganda's elite Joint Anti-Terrorism Task Force (JATT) is well resourced, and in the wake of the July 2010 terrorist bombings in Kampala, it was able to quickly track down those it believed were responsible. But as with regular police, the JATT is reported to rely extensively on torture and forced confessions, with such practices as fingerprinting and DNA analysis virtually unknown.²⁸²

In the realm of domestic justice for international crimes, Ugandan prosecutors work with a dedicated War Crimes Investigation Unit within the Criminal Investigation Directorate of the Uganda Police Force. The Directorate of Public Prosecutions (DPP) has been good in communicating its needs to investigators, and prosecutors have accompanied investigators on travel in the north.²⁸³ Observers say the team has some enthusiastic and good investigators, and that focused trainings and a close relationship with prosecutors have led to a higher degree of professionalism than that found in the broader police force.²⁸⁴ But frequent personnel transfers have resulted in a lack of continuity on the investigative team that has diluted these benefits.²⁸⁵

The Public International Law and Policy Group (PILPG), the Institute for International Criminal Investigations (IICI), and the International Criminal Law Services (ICLS) are among the organizations that have conducted trainings for investigators. All of these trainings also included prosecutors. Despite efforts to date, and especially in light of turnover in the investigation teams, investigators remain in need of continued trainings in general investigative skills and basic international criminal law.²⁸⁶

Other capacity needs exist, particularly regarding witness protection and gender crimes issues, but Ugandan authorities and international donors have found it difficult to define these needs with any precision, both because they too lack experience in the field of war crimes investigation and because the extent of potential investigations remains highly uncertain in light of the Amnesty Act. It was hoped that an international assessment mission in November 2010 would help in defining and prioritizing specific capacity gaps.²⁸⁷ There were many questions for the mission to answer, including the following: Do investigators need greater language capacity? Currently investigators lose nuance in their interviews by relying on local police or prison guards as interpreters.²⁸⁸ To what extent are additional forensics training and equipment necessary for successful investigations? Forensics investigators already have taken part in general investigations trainings, but officials have made specific requests for further assistance in this area.²⁸⁹ And finally, do investigators have the more mundane tools

²⁸⁰ Interview with a representative of the international community.

²⁸¹ Interviews with representatives of civil society and the international community.

²⁸² Interview with representatives of civil society. With regard to the JATT's alleged reliance on torture, see: "Open Secret: Illegal Detention and Torture by the Joint Anti-Terrorism Task Force in Uganda", Human Rights Watch, April 8, 2009, available at: <http://www.hrw.org/en/reports/2009/04/08/open-secret-0>.

²⁸³ Interviews with representatives of civil society and the international community.

²⁸⁴ Interviews with representatives of civil society.

²⁸⁵ Interview with representatives of the international community.

²⁸⁶ Interviews with Ugandan officials and representatives of civil society and the international community.

²⁸⁷ See the section on strategy for more information on the assessment mission.

²⁸⁸ Interview with representatives of the international community.

²⁸⁹ Interview with a JLOS official. The DPP has requested an on-site training in cold crime scene examination, forensic exhumation techniques, and cold case DNA techniques. This would be conducted by the International

to carry out their missions, such as access to vehicles and adequate fuel supplies or computers?²⁹⁰

Legal education

Ugandan law schools do not teach international criminal law (ICL), and there are very limited pockets of ICL knowledge in Uganda—notably among the few attorneys and judges with experience at international tribunals, and in civil society. The ICRC has provided books on international humanitarian law (the law regulating armed conflict) to several universities, and in 2009 signed a memorandum of understanding with the Islamic University in Uganda to launch the teaching of the subject.²⁹¹

Attorneys who are tapped as judges receive only a seven-day training before taking up assignments on the bench.²⁹² According to one person who interacts regularly with Ugandan attorneys, they are quite skilled at procedures with which they are familiar, but tend to become cautious when dealing with new topics. Accordingly, attorneys working on cases of international criminal law need both a better grasp of the field and better research skills and familiarity with precedents from other jurisdictions.²⁹³

There have been a number of efforts to increase awareness of international criminal law within the broader legal community, including trainings conducted by Avocats Sans Frontières (ASF).²⁹⁴

There has been inadequate training for police, lawyers, or judges on investigating, interviewing, or treating victims of gender related violence, or with addressing and responding to cultural stereotypes and misperceptions on gender issues. The Women's Initiative for Gender Justice (WIGJ) has been deeply involved in training and capacity building work in northern Uganda since 2004, with much of their ICC work directly with women's organizations, as well as peace and rights activists. The WIGJ has also facilitated access of these women to meetings at the High Court. Still, more work needs to be done on legal training and gender issues for court staff dealing with atrocity crimes, including sexual violence and gender jurisprudence.²⁹⁵

Dealing with children, including child soldiers, is also a specialized legal issue that requires greater educational focus in Uganda.

Commission for Missing Persons (ICMP) and Physicians for Human Rights (PHR). It has also requested specialized training abroad in forensics for some of its investigators, as well as a three month attachment to the ICMP's forensic lab in Sarajevo. Information taken from a document obtained from a representative of the international community.

²⁹⁰ The DPP and CID have listed needs in this area including three vehicles plus fuel provision and laptops for investigators. Information taken from a document obtained from a representative of the international community and dated August 31, 2010.

²⁹¹ ICRC in Uganda fact sheet 2009, p. 6, available at:

[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/uganda-newsletter-221009/\\$File/ICRC-Uganda-newsletter-2009.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/uganda-newsletter-221009/$File/ICRC-Uganda-newsletter-2009.pdf).

²⁹² Interview with a representative of the international community.

²⁹³ Interview with a civil society representatives.

²⁹⁴ Interview with ASF staff members.

²⁹⁵ Information from WIGJ.

Prosecution

Under Uganda's constitution, decisions on individual prosecutions fall under the authority of the Directorate of Public Prosecutions (DPP), not the attorney general. A dedicated War Crimes Prosecution Unit (WCPU) within the DPP is headed by Joan Kagezi, who is also responsible for terrorism cases. The WCPU has a team of seven prosecutors, some of whom are based outside of Kampala.

Prosecutors face a number of challenges. Ex-combatants in northern Uganda continue to apply for amnesty and seek reintegration into their communities. This could place a great many potential prosecution targets off limits. And it could be difficult for prosecutors to glean evidence from other ex-combatants who are reluctant to draw attention to themselves. Ugandan procedural and evidentiary law could pose an additional challenge for prosecutors. The weak provisions are a matter of primary law and there is only limited scope for these to be amended through secondary law.²⁹⁶

Some observers note that Ugandan prosecutors have successfully pursued complicated terrorism and organized crime cases in the past, but have a lack of confidence when it comes to prosecutions before the WCD. The WCPU reportedly had difficulties in drafting the Kwoyelo indictment.²⁹⁷ Perhaps because it is now working with a concrete case, the DPP-WCPU is credited with being proactive in determining its capacity gaps.²⁹⁸

There have been a number of trainings for prosecutors, including those conducted by PILPG, ICTJ, IICI, and IICI together with ICLS. ASF is also planning to sponsor forums for discussions between prosecutors and international experts on international criminal law.²⁹⁹ In addition to these, prosecutors have requested a number of specific trainings.³⁰⁰ These include a two-week course (that would include investigators) on project planning and evaluation, a one-week course on trial advocacy, and a two-week attachment to the War Crimes Chamber of Bosnia and Herzegovina or alternatively to the International Criminal Tribunal for Rwanda (ICTR) (with the latter option also including investigators).

Defense

Defense is an area of weakness in Uganda.³⁰¹ In capital cases, the state provides representation if the accused person is indigent, using an ad hoc method of circulating notices to legal firms for the work. For common crimes, a low flat rate per case applies, and the law setting this low fee does not differentiate between cases of wildly varying complexity.³⁰² Not surprisingly, most attorneys avoid defense work because it does not pay well, but also because it is viewed as risky. Only a small number of established lawyers are willing to take on controversial criminal cases. Attorneys who do agree to act as defense counsel rarely

²⁹⁶ Interview with representatives of civil society.

²⁹⁷ Interview with a representative of the international community.

²⁹⁸ Interview with representatives of the international community.

²⁹⁹ Interview with ASF staff members.

³⁰⁰ Information based on a document received from a representative of the international community.

³⁰¹ Except as otherwise noted, the following paragraph is based on an interview with ASF staff members.

³⁰² Interview with an ICTJ staff member.

mount a spirited defense of their clients, and those who try are often hamstrung by receiving case files at the last minute.

Donors have been active in building general defense capacity. Austria, Denmark, Sweden, the Netherlands, Ireland, and Norway all contribute to a legal aid basket fund. The proceeds have been used to support NGOs that provide legal aid, for the provision of paralegal advisory services in prisons, and to support the Law Council, a department of the Justice Ministry that regulates the legal profession, in developing regulations on pro-bono work.³⁰³ The Uganda Law Society operates a Legal Aid Project that attempts to fill the gap left by the state when it comes to ensuring defense for indigent suspects and accused.

A general lack of knowledge of international criminal law within the legal community presents an additional challenge for defense before the WCD. As one measure of this shortcoming, although Uganda was the first ICC situation country, only two of its lawyers are on the ICC list of counsel for defense or victims.³⁰⁴ Those attorneys who do take up cases before the WCD may be constrained by a lack of access to UPDF or police documents.³⁰⁵

Among efforts to increase defense capacity for dealing with international crimes, PILPG has conducted two workshops for different groups of defense counsel who have expressed an interest in defending such cases. However, some past trainings for defense on international criminal law, such as those conducted by the ICLS, have had a low response rate.³⁰⁶

Judiciary

Uganda's judiciary faces a severe backlog in the High Courts and Magistrate Courts, and a high percentage of the prison population comprises suspects in remand.³⁰⁷ Especially at the level of Magistrate Courts, critics attribute the causes to a poor work ethic, inefficient practices, corruption, and political influence.³⁰⁸ The High Court recently devoted a special session to reducing the backlog, and succeeded in moving through cases at a significantly faster rate than normal.³⁰⁹ The international community has provided support to enhance administrative and management capacity in the judiciary. Denmark has provided funding for an Inspectorate of Courts, aimed at increasing judicial accountability, and for a Registry for Planning and Development.³¹⁰

The WCD is a division of the High Court that was established by administrative decree in July 2008. Five judges, among them a head of division and a deputy, have been appointed to

³⁰³ Interview with a representative of the international community.

³⁰⁴ Interview with ASF staff members.

³⁰⁵ Interview with a UCICC staff member.

³⁰⁶ Interview with a representative of civil society.

³⁰⁷ Interview with Stephen Tashobya, MP.

³⁰⁸ Interviews with representatives of civil society and the international community. A joint JLOS-DPG monitoring visit to one location found that the local magistrate never showed up for work and pocketed bail money and funds budgeted for the cleaning of the courthouse. Interview with a representative of the international community.

³⁰⁹ This begs the question why the faster pace cannot be maintained during normal sessions. Interview with a representative of the international community.

³¹⁰ Interview with a representative of Danish International Development Agency (DANIDA).

it.³¹¹ Currently there are no foreign judges in the division, but there is potential to include judges from other jurisdictions.³¹² Each WCD case will be heard by a panel of three judges and an alternate. As the WCD's workload and other High Court needs dictate, the chief justice and the principal judge can assign WCD judges to unrelated trials.³¹³ At the time of the first indictment in September 2010, the WCD still had no practice directions in place, and officials were rushing to complete these as the first trial loomed.³¹⁴

The division is administered by a registrar, and the judges have dedicated legal assistants and support staff. For its part, the Registry currently has no staff apart from the acting registrar, who until recently doubled as an assistant to the presiding judge of the High Court.³¹⁵ The extent to which this will be problematic will be proportionate to the WCD's caseload and the degree to which such responsibilities as security, witness protection and outreach are concentrated within the WCD-specific Registry.³¹⁶

Most Ugandan judges have had training in public international law, but not the specific field of international criminal law. The deputy head of the division, Judge Elizabeth Nahamya, is an exception, having served as principal defender at the Special Court for Sierra Leone, and Judge Owiny Dollo has some academic background in the field. Some WCD judges have undergone numerous trainings, including those conducted by the ICRC, ICTJ, and PILPG. Two volunteer legal researchers working for the WCD judges have also participated in a PILPG workshop in The Hague. Similar activities are planned for 2011, including ASF-organized discussions between the WCD judges and experts on international criminal law.³¹⁷ In October 2010, the Ugandan government and ICTJ sponsored a trip by the judges to The Hague for training in substantive procedural law. They have requested extensive additional trainings, including in plea-bargaining, as well as on-going trainings that address other particular challenges.³¹⁸

Donors have sponsored a range of programs to build the capacity of Uganda's judiciary, including most of these multiple trainings for the WCD. But they have begun to question whether further trainings offer a good return on investment. Instead, they wonder whether it might not be better to devote resources to legal assistants with research skills.³¹⁹ It was hoped that an international needs assessment mission in November 2010, described in greater detail later, could help to provide some clarity.

³¹¹ As of November 2010, the five are Dan Akiiki Kiiza (Head of Division), Elizabeth Ibanda Nahamya (Deputy Head of Division), Anup Singh Choudry, Owiny Dollo and Ezekiel Muhangizi.

³¹² In January 2010, the Principal Judge of the High Court, James Ogoal, publicly advocated for the inclusion of foreign judges on the WCD. See "Foreign judges to be on war crimes court", The New Vision, January 26, 2010, available at: <http://www.newvision.co.ug/D/8/13/708187>.

³¹³ Interview with Judge Elizabeth Nahamya and WCD Acting Registrar Alex Ajiji.

³¹⁴ Interview with a representative of the international community.

³¹⁵ Interview with Judge Elizabeth Nahamya and WCD Acting Registrar Alex Ajiji.

³¹⁶ As will be discussed later, Ugandan authorities, and the international community in supporting them, face a fundamental decision about how much to develop compartmentalized WCD capabilities, or alternatively rely on existing structures in the justice sector.

³¹⁷ Interview with ASF staff members.

³¹⁸ Interviews with Judge Elizabeth Nahamya and representatives of the international community.

³¹⁹ Interview with representatives of the international community. WCD officials see a need for additional trainings for both judges and legal assistants. Interview with Judge Elizabeth Nahamya and Acting Registrar Alex Ajiji.

Court management

New information technology equipment and training will be needed to run trials. For example there is a lack of equipment for court recording and expertise in operating such equipment. There is currently no standardized education or training requirement for judiciary support staff.³²⁰ Although there is a need for interpretation in the vast majority of cases in Uganda, there are currently no professional court interpreters.³²¹

As in many other areas, it is not clear whether efforts to address these needs should be specialized for the WCD, or couched in a broader capacity-building effort for the whole judiciary. For its part, Denmark has supported Uganda in introducing case management software, with an aim of gradually linking information from courts in the regions to those in Kampala. The support includes trainings of magistrates and judges in use of the software.³²²

Witness and victim protection

Authorities in the Ugandan justice sector have recognized that witness and victim protection is a need facing the system as a whole. Without a system in place, witnesses and victims have paid a price, and the judicial process has suffered.³²³

The Uganda Law Reform Commission has drafted legislation on victim and witness protection. The Office of the High Commissioner for Human Rights (OHCHR) sponsored a workshop and high-level meeting on the issue in September and October 2010. With funding from the European Commission, ASF will be working to support victims, as well as training civil society organizations that work with victims. But despite these and other efforts it is not yet clear whether Uganda is moving towards a whole new apparatus for victim and witness protection, or will choose to tap into community policing and other existing programs.³²⁴ Compounding the problem, Ugandan authorities currently lack equipment and expertise to protect witnesses, with police in particular need of training.³²⁵

Following a study tour to Freetown, Sarajevo, and The Hague, justice sector representatives identified witness protection as a specific priority for the WCD.³²⁶ According to some, Ugandan officials have assumed that all witnesses who appear in the first trial will need high levels of protection, although there has been no needs assessment.³²⁷ In addition to protection capacity, the division would like international support to develop a capability to offer psychosocial support to vulnerable witnesses.³²⁸

As the Ugandan authorities, supported by the international community, decide how best to construct a national system, they must also determine the extent to which this system might

³²⁰ Interview with a representative of the international community.

³²¹ Interviews with Judge Elizabeth Nahamya and with a representative of the international community.

³²² The software is the Court Case Administration System. Interview with a representative of DANIDA.

³²³ In cases related to torture in Uganda, witnesses have been threatened and even disappeared. Interview with representatives of civil society.

³²⁴ Interview with an ICTJ staff member.

³²⁵ Interview with a JLOS official and representatives of civil society.

³²⁶ Interview with a representative of the international community.

³²⁷ Interview with representatives of the international community.

³²⁸ Interview with Judge Elizabeth Nahamya and Acting Registrar Alex Ajiji.

serve the WCD. If the division anticipates a high caseload (despite the Amnesty Act), then it could make sense to develop an autonomous system. Alternatively, the division's special needs, such as psycho-social assistance to vulnerable witnesses, could be met by developing autonomous capacity only in complement to the services offered by a national system, or perhaps a system that encompasses the WCD and Anti-Corruption Court. Whether shared or dedicated, it will also need a mechanism to assess the level of threats faced by particular victims and witnesses, including women and children, and then to scale services along a corresponding spectrum.

Management of detention facilities and prisons

Ugandan authorities have a successful track record of being able to guard their prisons, and prison breakouts are rare. However, donors see room for improving security, and bemoan prison conditions that are not up to international standards. With the concept of bail little used, and not an option fiscally accessible for most Ugandans in any case, overcrowding remains a major problem.³²⁹

Several donor representatives expressed satisfaction with the attitude of the Uganda Prisons Service (UPS), which they said is open about its shortcomings, welcoming of scrutiny, and eager to make improvements.³³⁰ They note significant progress on human rights standards in prisons, and point to a steady decline in inmates' complaints of torture over the past five years. For its part, the UPS has requested a study visit to Arusha and Kigali to study best practices in establishing and operating detention facilities for war crimes suspects and accused.³³¹

Archive management

There is no clear system for the filing of court records, which makes it very difficult to locate past judgments.³³² WCD officials cite archive management as one area in which the division is in need of trainings.³³³

Journalism

Civil society organizations decry worsening conditions for Ugandan media, and journalists face intimidation and arrest for performing their jobs.³³⁴ For journalists who are critical of the government, such dangers have always existed, but the situation appears to be worsening in the run-up to general elections in 2011.³³⁵

³²⁹ Interview with EU delegation officials.

³³⁰ Interviews with representatives of the international community.

³³¹ Document obtained from a representative of the international community.

³³² Interview with a representative of the international community.

³³³ Interview with Judge Elizabeth Nahamya and Acting Registrar Alex Ajiji.

³³⁴ Press release, "Human Rights Network Uganda concerned about oppression of the media", April 28, 2010, available at: <http://humanrightshouse.org/Articles/14145.html>.

³³⁵ See "Concerns are mounting as Uganda replicates Ethiopia's authoritarian approach in the run-up to elections", The Guardian (UK), May 8, 2010, available at: <http://www.eastafrikaforum.net/2010/05/09/concerns-are-mounting-as-uganda-replicates-ethiopias-authoritarian-approach-in-the-run-up-to-elections/>.

Since the government's referral of the situation in northern Uganda to the ICC in 2004, journalists in the country have become more familiar with the work of the court and the principles of the Rome Statute. Issues related to the statute received extensive local media attention in mid-2010 by virtue of Uganda's hosting the ICC Review Conference. The Uganda Coalition for the International Criminal Court (UCICC) has conducted trainings on the Rome Statute specifically for journalists, but the last of these was in 2007.³³⁶ As the first trial at the WCD approaches with the potential for others to follow, a new round of trainings focused on the principle of complementarity and the specific framework for proceedings at the High Court could help to ensure more accurate media coverage.

Outreach

Since the announcement of arrest warrants for the situation in northern Uganda in 2005, the ICC outreach office has undertaken routine initiatives to educate the public about the Rome Statute. Civil society efforts, notably those of No Peace Without Justice (NPWJ), have been extensive, and have been ongoing for a longer period of time. The UCICC too, has been active in the field of outreach. It has engaged on international justice issues with such groups as students, other NGOs, and in one case, brought representatives of the DPP and WCD to northern Uganda to inform magistrates in the region about their work.³³⁷

Among international missions in Kampala, there is a sense that justice institutions and the WCD need to do much more to consult with stakeholders regarding domestic investigations, prosecutions, and trials for international crimes.³³⁸ Some stakeholders in the north are pursuing traditional justice and truth-telling mechanisms, and it is unclear how the WCD should square with these approaches.

The Uganda Law Reform Commission has drafted a bill on outreach that has had some input from ICTJ.³³⁹ However, according to one source, the draft raises questions without addressing implementation issues.³⁴⁰ The WCD faces a choice about how best to structure and coordinate its outreach work. It could follow the common pattern of other ad hoc and hybrid courts by having its own outreach section that reports to the registrar. Or it could more heavily rely on existing resources within the justice sector or broader government structures. One obstacle to the latter approach could be a lack of willingness on the part of judiciary public relations officers to coordinate with a WCD outreach office.³⁴¹ An official with JLOS described a hybrid approach, in which the WCD registrar would coordinate outreach work with the Law Reform Commission, the Judicial Service Commission, and the judiciary, each of which has its own public relations office. Part of the strategy would entail holding a regular forum with civil society organizations, perhaps on a quarterly basis.³⁴²

³³⁶ Interview with a UCICC staff member.

³³⁷ Interview with a UCICC staff member.

³³⁸ Interview with representatives of the international community.

³³⁹ Interview with an ICTJ staff member.

³⁴⁰ Interview with a representative of the international community.

³⁴¹ Interview with a representative of the international community.

³⁴² Interview with a JLOS official.

No matter which route is taken, holding WCD hearings in the north would be one way to make the proceedings more visible to the most affected population. Doing so would be possible under existing Ugandan law, but could raise security and logistical concerns.³⁴³

Civil society court monitoring and advocacy

Many Ugandan civil society organizations, representing a range of views, are skilled, active, and engaged on issues of transitional justice. UCICC was launched as an initiative of the Uganda Human Rights Network (Hurinet-U) in 2004 and now has 265 members among NGOs and community-based organizations.³⁴⁴ Some have experience in trial monitoring and are planning to monitor trials at the WCD. The UCICC will do so, with support from the MacArthur Foundation, and among international NGOs, ASF (in coordination with the UCICC) and ICTJ will track the proceedings.³⁴⁵ The latter may also file amicus briefs.

Despite this basis of expertise, civil society organizations need greater capacity to assess trial fairness, and importantly, to make their findings accessible to affected populations in the north. They often lack funding to follow through in monitoring the implementation of new laws.³⁴⁶

Although overall civil society capacity is strong, there are areas of weakness. Much of the focus has been on victims' issues, but additional training will be needed to help organizations branch out into other aspects of justice-related issues.³⁴⁷ Victims' organizations in the north, some of which are quite new, lack financial resources and need to be strengthened.³⁴⁸ Their work often focuses on local truth and reconciliation initiatives, but donors could do more to build their capacity to engage on national justice issues.³⁴⁹ Gender justice also needs far more support.

Local civil society organizations have engaged in extensive advocacy on transitional justice issues, including the push to domesticate the Rome Statute, and attempts to strengthen victim provisions of the ICC Act.³⁵⁰ In one area, civil society advocacy has tackled an issue that could be vital to the sector's own future ability to engage critically on issues of domestic proceedings for international crimes.³⁵¹ The NGO Registration Act of 2006, amended in August 2009, requires each civil society organization to re-apply annually to the Ministry of Internal Affairs for an operating license. Among other draconian provisions, the 2009 amendments also require NGOs to receive advance approval from district administrators before undertaking work in rural communities. In April 2009, Hurinet-U filed a petition with

³⁴³ Interview with Judge Elizabeth Nahamya.

³⁴⁴ Interview with UCICC staff member.

³⁴⁵ Interviews with ASF and ICTJ staff members.

³⁴⁶ Interview with civil society representatives.

³⁴⁷ Interview with civil society representatives.

³⁴⁸ Interview with representatives of civil society and the international community.

³⁴⁹ Interview with representatives of civil society and the international community.

³⁵⁰ Interview with UCICC staff member.

³⁵¹ The following is based on interviews with civil society representatives and the following articles: "CSOs in Uganda granted an injunction on filing returns", Hurinet website, available at:

http://www.hurinet.or.ug/index.php?option=com_content&view=article&id=112:csos-in-uganda-granted-an-injunction-on-filing-returns&catid=1:latest-news; "NGOs fight to loosen restrictions", The Monitor, September 14, 2010, available at: <http://www.monitor.co.ug/News/National/-/688334/1010294/-cnqcdrz/-index.html>.

the Constitutional Court, leading to a temporary injunction against the amendments on August 20, 2010. As of October 2010, the final disposition of the matter was unresolved.

Physical Infrastructure

The War Crimes Division and War Crimes Prosecution Unit of the DPP share a rented compound with the Anti-Corruption Division of the High Court. Officials of the WCD would like a permanent building of their own.³⁵² Officials say that a new building would provide needed space for offices, archives, a library, and a teleconferencing room.³⁵³ A new building would also accommodate a larger courtroom than the current cramped room available for the purpose. In the meantime, officials would like to make adjustments to this courtroom, including improved lighting and ventilation and the addition of bullet-proof glass to protect the court from the public gallery. The division currently has no court recording equipment, and although the current premises have modest space available for an archive, equipment for this too is lacking.³⁵⁴

There is some concern that forensic investigators lack the infrastructure they may need to support effective investigations. There is a government analytical lab in Kampala, but it is in need of additional forensic tools.³⁵⁵ Regional forensics labs were under construction as of October 2010, including one in the northern town of Gulu.³⁵⁶ As discussed earlier, it was hoped that the international assessment mission being conducted in November 2010 would provide greater clarity on the extent of the true forensic needs of the police. If it identified forensic capacity is a priority, donors were likely to look more closely at how needs could be addressed.

With regard to prison infrastructure, overcrowding is a problem and conditions are not up to international standards. The WCD will provisionally use Kampala-based facilities of the normal justice system, but JLOS has told donors that it needs a new detention facility and prison that is up to international standards for its suspects and convicts, who, it has argued, should be separated from the general prison population. Further, the division has requested high-security transport capability to move detainees between the detention facility and court. But some donors question the need, saying that no security assessment has yet been conducted that would justify separate institutions or extraordinary security during transport. They also wonder why bringing Uganda's penal system in line with international standards should necessarily begin with the WCD.³⁵⁷

In addition to the factors already discussed, the international community should also weigh the WCD's anticipated caseload when determining how to prioritize requests for assistance for dedicated physical infrastructure. Investment in extensive WCD-specific infrastructure simply does not make sense if there are only to be a handful of cases.

³⁵² Interview with Judge Elizabeth Nahamya and Acting Registrar Alex Ajiji.

³⁵³ In addition to space for a library, the WCD seeks relevant legal texts. The ICRC and the Canadian government have already provided some books on international criminal law. Interview with Judge Elizabeth Nahamya and Acting Registrar Alex Ajiji.

³⁵⁴ Interview with a JLOS official.

³⁵⁵ Interview with a JLOS official and representatives of the international community.

³⁵⁶ Interview with a JLOS official.

³⁵⁷ Interview with a representative of the international community.

Will to Pursue Genuine Domestic Investigations and Prosecutions

Political rhetoric and legislative action

At times, top Ugandan officials have clearly embraced international justice, whether at the ICC or domestically. There is a broad perception that this commitment is real, but that it is also narrow. Bright lines delineate areas where the government will allow and even encourage justice to run its course from areas where justice might threaten the ruling party's power base or prestige.

This dynamic was illustrated by the difficult path that the ICC Act took through the legislature.³⁵⁸ Some MPs felt that the ICC was designed to serve Western interests, even as the United States and other world powers refused to bind themselves to the court, and there were complaints about the warrant of arrest for Sudanese President Omar al-Bashir. Other MPs were reluctant to back the act because they said they preferred traditional to criminal justice mechanisms. But in the end the act received unanimous support once the executive was satisfied that it would uphold presidential immunity at the domestic level.

Government record on judicial independence

Multiple observers noted problems of corruption and political influence at the lower level magistrates' courts. Some of this influence may be structural. Magistrates and judges are technically appointed by parliament, but in practice only those who meet with presidential approval are assigned to the bench.³⁵⁹ OHCHR observed in 2008, however, that "High Court judges are experienced judges who act with professionalism and court proceedings usually respect fair trial requirements."³⁶⁰ This is indeed the perception even among vocal government critics in civil society, who retain substantial trust in judges' integrity at the level of the High and Supreme Courts.³⁶¹ These are the courts that will handle war crimes cases. They noted several past high-profile decisions that went against the interests of the government. In a ruling on the 2006 national elections, justices of the Supreme Court ruled that the balloting had been neither free nor fair. The Supreme Court has also acted to lift government restrictions on the media, and on October 12, 2010, Uganda's Constitutional Court threw out treason charges against one of President Museveni's main political rivals, Kizza Besigye.

Nevertheless, there have been instances of serious political interference in high-profile cases at Uganda's higher courts, which observers say occur when Museveni has perceived that the

³⁵⁸ Interview with Stephen Tashobya, MP.

³⁵⁹ Interview with a representative of the international community.

³⁶⁰ A/HRC/7/38/Add.2, p 13, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/103/57/PDF/G0810357.pdf>.

³⁶¹ One specific exception to this general trust involves a current judge of the High Court who sits on the War Crimes Division. Judge Anup Singh Choudry, who qualified for the bench in the UK, was subsequently disqualified from the UK solicitors list in 2000 in relation to fraud allegations against him. In July 2009, the Judicial Service Commission (JSC) recommended that President Museveni suspend the judge pending a full investigation, and this received strong public backing from the Uganda Law Society in May 2010. Yet as of November 2010, the JSC's recommendation was still festering on President Museveni's desk and Judge Choudry remained on the WCD. See "Law Society asks President to interdict Justice Choudry", The Monitor, May 7, 2010, available at: <http://www.monitor.co.ug/News/National/-/688334/913758/-wyjm2m/-index.html>.

proceedings affect his grip on power.³⁶² And faced with judges who actively assert their independence, his sporadic interference has taken the form of ham-handed tactics, which at least have the benefit of being obvious. In one notorious incident in 2005, during a previous criminal proceeding against Besigye and others before the High Court, elite paramilitary forces stormed the court after the judge granted bail and attempted to put Besigye on trial before a military tribunal instead. The Constitutional Court eventually ruled the military trial unconstitutional and threw out charges against Besigye's co-accused. When they were accordingly granted bail in the High Court in January 2007, the executive again sent paramilitary forces into the courtroom to re-arrest them.³⁶³ In another incident, Museveni appeared on television in army fatigues to berate judges of the Supreme Court after one ruling that went against his government.³⁶⁴

This track record suggests that Ugandan judges can be trusted to seek justice in the war crimes cases brought before them, but that there is a significant threat of overt executive influence if the cases prove politically sensitive. Further, even if the judges do act in the interests of law and justice alone, distrust in the north and east of Uganda could temper the achievement. For example, the fact that until recently none of the WCD judges was from the north or east of Uganda raised some concerns.³⁶⁵

Pursuit of sensitive cases

Presuming that the judges of the WCD would take an independent view of a case against members of the UPDF or government, there are likely other potential systemic hurdles to the pursuit of these politically sensitive cases. Would prosecutors risk the government's ire by seeking to bring such a case? If so, would police conduct a genuine investigation?

Although it applies only prospectively, the ICC Act theoretically applies to the UPDF and there are precedents of soldiers being tried in civilian courts.³⁶⁶ Government forces are also theoretically able to be prosecuted under the Geneva Conventions Act. So far there are no indications of investigations into UPDF actions during the conflict for trial at the WCD. All international actors and civil society representatives interviewed for this report felt that there was no chance of the government allowing transparent judicial scrutiny of UPDF actions.³⁶⁷ In his opening remarks at the ICC Review Conference, Museveni indicated that UPDF abuses are dealt with harshly, and that 22 soldiers have been executed over the last 24 years, with a

³⁶² Interviews with representatives of civil society and the international community.

³⁶³ For a detailed account and analysis, see "Judicial Independence Undermined: A report on Uganda", International Bar Association Human Rights Institute, September 2007, available at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=0ABECB7-BF77-4502-A6E6-A7AC9D0E0675>.

³⁶⁴ Interview with representatives of civil society.

³⁶⁵ Interviews with representatives of civil society and the international community. In October 2010, Judge Owiny Dollo, from northern Uganda, was named to the WCD.

³⁶⁶ Interview with an ICTJ staff member.

³⁶⁷ Even if prosecutors tried, getting adequate evidence would be a major challenge in light of probable extensive resistance. And the attempt could also prove detrimental to UPDF cooperation on cases at the WCD against alleged LRA perpetrators. Often UPDF units were first on the scene following LRA attacks, making the cooperation of UPDF witnesses an important asset for prosecutors. Interview with a representative of civil society.

further 127 awaiting execution.³⁶⁸ In Uganda's parliament, the chairman of the Committee on Legal and Parliamentary Affairs, Stephen Tashobya, MP, echoed this in pointing out that these military executions have also been carried out recently, whereas there have been no executions in the civilian justice system over the past ten years.³⁶⁹ (Under some circumstances, civilians can be tried in military courts, for example, if a civilian is accused of committing a crime using a military gun.³⁷⁰) Setting aside the issue of the death penalty, observers cite other shortcomings of courts marshal. Military court officials are less procedurally minded than their counterparts in civilian courts, for example in failing to notify the defense of procedural developments, and the proceedings are opaque to victims and the general public.³⁷¹ Military justice is based on the UPDF Act, and it is far from clear that courts marshal could apply international law.³⁷² Indeed, the annex to the Agreement on Accountability and Reconciliation between the government and the LRA—the document that established the framework for domestic war crimes proceedings in Uganda—expressly prohibits military courts from dealing with international crimes.³⁷³

All of this amounts to a reality of unevenly applied justice for grave crimes in Uganda. Even if, as many observers agree, the preponderance of atrocities in the north has been committed by the LRA, one-sided justice has already created suspicions in the region that the DPP is merely an agent of an ethnically biased government.³⁷⁴

Record of cooperation with the ICC

The government's track record on cooperation with the ICC offers an additional data point in assessing the depth of its commitment to the principles of international justice, whether internationally or domestically applied.

There have been many indications of Ugandan cooperation with the court, beginning with the government's referral to the ICC of the situation in northern Uganda in 2003, which led to the opening of the court's first investigation and issuance of its first arrest warrants. The ICC prosecutor has been able to carry out investigations in the country without hindrance. As discussed above, Museveni signed into law the ICC Act, which contains comprehensive provisions on cooperation with the court. Additionally, from May 31 through June 11, 2010, Uganda hosted the first Review Conference of the Rome Statute.

However, skeptics argue that Museveni never believed in the ICC and only used it to advance his political goals, including furtherance of a military approach to ending LRA activity in the

³⁶⁸ Remarks by President Museveni at the Review Conference, p 5, available at: http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-Museveni-ENG.pdf.

³⁶⁹ In the interview, Mr. Tashobya said that perceptions of one-sided justice were based on misperceptions, and that there needed to be a public relations campaign to explain the purpose and context of the ICC Act.

³⁷⁰ Interviews with representatives of civil society and the international community.

³⁷¹ Interviews with representatives of civil society and the international community.

³⁷² Interview with an ICTJ staff member.

³⁷³ “[T]he Government shall ensure that serious crimes committed during the conflict are addressed by the special Division of the High Court; traditional justice mechanisms; and any other alternative justice mechanism established under the Principal Agreement, but not the military courts.” Annexure to the Agreement on Accountability and Reconciliation, article 23, available at: <http://www.icc-cpi.int/iccdocs/doc/doc589233.pdf>.

³⁷⁴ The specific complaint is that predominantly Acholi perpetrators are being targeted for what they have done primarily to Acholi people, but that government forces (mostly from southern peoples) who have abused the Acholi are allowed to get away with it. Interviews with representatives of civil society.

north.³⁷⁵ With regard to the ICC's operations in the country, for many months the government failed to intervene on the court's behalf to defend its privileges and immunities when a quasi-governmental company sought to sue the court.³⁷⁶ More seriously, in neighboring DRC, Uganda sought suspension of the ICC investigation in the Ituri region in 2004, a year before the International Court of Justice ruled that Uganda had violated international human rights law and international humanitarian law during its occupation of Ituri.³⁷⁷ As recently as December 2009, the government lobbied the UN Security Council's DRC sanctions committee to refrain from recommending that Bosco Ntaganda—an alleged Ugandan-backed warlord wanted by the ICC on charges of war crimes in Ituri—be removed from the country's armed forces.³⁷⁸

With regard to the ICC's outstanding warrant of arrest against President Omar al-Bashir of Sudan, Museveni has at times wavered over Uganda's obligation to arrest al-Bashir should he enter the country. Museveni and his government have alternately invited the fugitive to attend diplomatic events in Uganda, uninvited him, threatened him with arrest, and apologized for doing so.³⁷⁹

The cumulative record suggests that at top political levels, Ugandan commitments to the ICC are not deeply held. Museveni's repeated admissions of unfamiliarity with basic concepts of the Rome Statute during his opening remarks at the Review Conference he was hosting on the very topic underscore this impression.³⁸⁰ In turn, the government's weak commitment to the ICC is another cause for concern about the depth of its willingness to see through genuine and fair justice for atrocities at the domestic level.

Stakeholder policymaking

National Planning and Coordination Capacity

Below the top political level, the outlook is largely positive for realizing complementarity in Uganda, but many challenges remain. The government has good capacity to draw up plans and set out theoretical approaches to justice sector development, but in terms of the national budget, justice ranks sixth or seventh in spending.³⁸¹ According to the Ministry of Justice

³⁷⁵ According to this view, any arrest of the LRA fugitives for the ICC would in any case involve military operations. Interview with a representative of civil society.

³⁷⁶ The lawsuit was finally withdrawn in early 2010, during the lead-up to the Review Conference. For partial background on the matter, see "ICC in court over rent pay", *The New Vision*, July 27, 2009.

³⁷⁷ President Museveni wrote to then-UN Secretary General Kofi Annan in August 2004 to request provisional amnesty for the leaders of armed factions in Ituri and a suspension of ICC investigations there. See Human Rights Watch, "The Curse of Gold: Democratic Republic of Congo", June 1, 2005, p. 123, available at: <http://www.hrw.org/en/reports/2005/06/01/curse-gold>. See also Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p. 168, available at: <http://www.icj-cij.org/docket/files/116/10455.pdf>.

³⁷⁸ S/AC.43/2009/COMM.64, Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of Congo, Communication dated 17 December 2009 from the Permanent Mission of Uganda

³⁷⁹ For one example, see "Uganda's President apologizes to Sudan's Bashir over ICC remarks", *Sudan Tribune*, July 15, 2009, available at: <http://www.sudantribune.com/spip.php?article31820>.

³⁸⁰ Remarks by President Museveni at the Review Conference, p 5, available at: http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-Museveni-ENG.pdf.

³⁸¹ Interviews with representatives of the international community.

and Constitutional Affairs, the justice sector, including police, accounts for 6.4 percent of the national budget.³⁸² And remaining funding shortfalls in the sector can create problems in the implementation of well-crafted national plans.³⁸³

For the past 11 years, the Justice, Law and Order Sector (JLOS) has acted as the government coordinating body for justice issues. It includes representatives of 15 government agencies.³⁸⁴ A large technical committee prepares items for the JLOS steering committee, which meets once every two months. Over time, these and other JLOS meetings have become more organized.³⁸⁵ Observers credit JLOS with ensuring good coordination and communication within the justice sector.³⁸⁶

Despite this widely-shared sense that it has been a notable achievement that continues to offer tremendous value, JLOS has not reached its full potential for various reasons.³⁸⁷ Notably, the secretariat can find it difficult to coax participating agencies into providing necessary data and documentation. Multiple observers of JLOS were particularly critical of police commitment to coordination, saying that the force often does not send anyone to JLOS meetings, or it sends different representatives from meeting to meeting.³⁸⁸ Participating institutions, perhaps inevitably, find it difficult to agree on sector-wide prioritization of needs, which can lead to prioritization through cattle trading among them. There is a broadly shared view that JLOS is understaffed, leaving its lone technical advisor overwhelmed. And finally, despite the broad representation of justice-related agencies in JLOS, there is poor coordination between it and other relevant government offices. These include the prime minister's office, which is responsible for coordination of national policy on peace, and the UPDF.³⁸⁹

In 2010, JLOS was just at the end of a second five-year plan for the justice sector and in the midst of developing its next five-year plan.³⁹⁰ JLOS members and donors are grappling with how to integrate new priorities of anti-corruption and transitional justice into the new plan.

Integration of Complementarity into Rule-of-Law Programming

³⁸² Interview with a JLOS official. Figures in a document obtained from a representative of the international community put the JLOS share of the national budget at 5.1% for FY 2009/10 and 4.9% for FY 2010/11.

³⁸³ Interview with representatives of the international community.

³⁸⁴ The following agencies are JLOS members: the Ministry of Justice and Constitutional Affairs (MOJCA); the Ministry of Internal Affairs (MIA); the Judiciary; the Uganda Police Force (UPF); the Uganda Prison Service (UPS); the Directorate of Public Prosecutions (DPP); the Judicial Service Commission (JSC); the Ministry of Local Government (Local Council Courts); the Ministry of Gender, Labor and Social Development (Probation and Juvenile Justice); the Uganda Law Reform Commission (ULRC); the Uganda Human Rights Commission (UHRC); the Law Development Centre (LDC); the Tax Appeals Tribunal (TAT); the Uganda Law Society (ULS); the Centre for Arbitration and Dispute Resolution (CADER) and the Uganda Registration Services Bureau (URSB). See <http://www.jlos.go.ug/page.php?p=about>.

³⁸⁵ Interview with a JLOS official.

³⁸⁶ Interviews with representatives of civil society and the international community.

³⁸⁷ The following is taken from an interview with a representative of the international community.

³⁸⁸ Interviews with representatives of civil society and the international community. According to one civil society representative, top management at the Uganda Police Force is at the root of this problem and that of endemic use of torture.

³⁸⁹ Interview with representatives of the international community.

³⁹⁰ Interview with a representative of the international community.

To date, complementarity-specific assistance to Uganda mostly has taken the form of in-kind support.³⁹¹ For example, since mid-2009, the Danish embassy in Kampala has provided around USD \$830,000 in support for specific projects related to transitional justice over a two-year period.³⁹² As the WCD was in the process of establishment, the embassy sponsored a study tour for JLOS members to visit international justice institutions in Sierra Leone, Bosnia and Herzegovina, and The Hague, as well as covering some of the WCD's equipment needs. International donors are also funding the recruitment of two transitional justice advisors for the JLOS secretariat. One international advisor will serve for one year, and a Ugandan expert will be supported for two years, with extension of that position to be funded by the government thereafter.³⁹³ Not surprisingly, the WCD expects to benefit from enhanced JLOS capacity in this area.³⁹⁴ Through its Office of Transition Initiatives, USAID, too, has provided in-kind support. It has backed PILPG, a global pro bono law firm, to assist and advise the government of Uganda on transitional justice since 2008.³⁹⁵ For purposes of this project PILPG does not function as a civil society organization, but regards the government of Uganda, and particularly JLOS, as its client. Thus its policy and legal memoranda on various aspects of transitional justice, from legal to practical topics, including the development of the ICC Act and the establishment of the WCD, are confidential.

In practice, donors have conflated approaches to anti-corruption and transitional justice issues, largely because donors pushing for more emphasis on anti-corruption sought creation of a High Court division for this purpose just as the WCD was coming into being.³⁹⁶

Beyond the WCD, DANIDA is also supporting other efforts at transitional justice.³⁹⁷ These include consultations in conflict-affected regions in November 2010, a pilot project in the north to explore the resolution of war crimes cases through a mechanism similar to Rwanda's *gacaca* process, and examining the question of reparations in Uganda.

The judiciary has been supportive of complementarity initiatives. The chief justice has acknowledged the need to integrate capacity building in the area of transitional justice into broader justice sector reform.³⁹⁸ The principal judge of the High Court, James Ogora, chairs a JLOS working group on transitional justice in which representatives of civil society also take part. It is further divided into five committees: formal criminal justice, truth telling, traditional justice, funding, and an integrated systems committee that looks at the interplay of all transitional justice elements.³⁹⁹ The working group can make specific recommendations, including proposals for legislation, to a joint Leadership and Steering Committee of JLOS; if approved there, the recommendations are presented to the cabinet.⁴⁰⁰ The working group

³⁹¹ Interview with a representative of the international community.

³⁹² The amount is five million Danish Kroner. Interview with a representative of DANIDA.

³⁹³ Interviews for these positions were being conducted in early October 2010, and it was expected that the advisors would take up their work in January 2011. The process of planning for and recruiting these advisors has taken around two years. Interviews with a JLOS official and representatives of the international community.

³⁹⁴ Interview with Judge Elizabeth Nahanya.

³⁹⁵ Interview with PILPG staff.

³⁹⁶ Interview with representatives of the international community.

³⁹⁷ Interview with a representative of DANIDA.

³⁹⁸ Interview with a representative of the international community.

³⁹⁹ Interview with an ICTJ staff member.

⁴⁰⁰ Information is based on the terms of reference for the working group, obtained from a representative of the international community.

meets approximately on a quarterly basis.⁴⁰¹ For its part, JLOS has encouraged donors to coordinate support for transitional justice if not through, then at least with the DPG.⁴⁰²

As of October 2010, JLOS was still in the process of revising transitional justice elements of the next five-year plan for the sector to reflect lessons learned from the JLOS study tour to Freetown, Sarajevo, and The Hague.⁴⁰³ Donors who provide justice sector support have had discussions about including a transitional justice focus in programming from mid-2011, but this would include aspects beyond support for domestic prosecutions and trials.⁴⁰⁴ One challenge is that the donors interested in transitional justice extend beyond the group of donors who provide sector support, which means that there will need to be flexibility built into the funding mechanism.⁴⁰⁵

Coordination

Donors play a critical role in the functioning of Uganda's justice sector, and in fiscal year 2009-2010 provided around USD \$41.45 million in sector budget support and an additional USD \$14.85 million in project support. This amounted to over 21 percent of the JLOS budget.⁴⁰⁶ Coordination between the government and donors appears to function quite well. The Development Partners Group (DPG) serves as a counterpart to JLOS and meets monthly to coordinate donor assistance in the justice sector. Its core members are Austria, Denmark, Ireland, the Netherlands, Norway, and Sweden. Communication between JLOS and the DPG representatives is constant. In addition to joint annual and mid-year reviews of the sector, there are monthly meetings between the DPG chair and the six-person JLOS secretariat, regular technical meetings, DPG meetings to which JLOS members are invited to make presentations, as well as steady informal contact as needed.⁴⁰⁷

Most DPG members, including Ireland, the UK, Austria, Sweden, Norway, the Netherlands, and Germany, provide sector budget support. Others choose not to. Among the latter group are the United States and Denmark, although Denmark will be switching to sector support in 2011.⁴⁰⁸ Some in the donor community still have accountability concerns about sector budget aid, but JLOS and the DPG are attempting to address these.⁴⁰⁹ Sector support from mid-2011 will focus on three areas: democracy; justice, rights and peace; and accountability.

⁴⁰¹ Interview with a JLOS official.

⁴⁰² Interview with a JLOS official.

⁴⁰³ Interview with a JLOS official.

⁴⁰⁴ For example, new support could be provided for traditional justice at the community level. Interview with a representative of the international community.

⁴⁰⁵ Interviews with a JLOS official and representatives of the international community.

⁴⁰⁶ The corresponding figures for FY 2010/2011 are USD 41.92 million and USD 10.52 million, and nearly 24% of the JLOS budget. "Consolidated Sector Budget Support to JLOS", document obtained from a representative of the international community.

⁴⁰⁷ Interview with a JLOS official.

⁴⁰⁸ Interview with a representative of DANIDA.

⁴⁰⁹ In mid-2010, the JLOS Steering Committee adopted a framework for monitoring and evaluation of justice sector support. JLOS and the DPG are working on a mutual accountability mechanism. As part of this, the DPG is prioritizing monitoring and evaluation goals for a three-year period beginning in July 2011. If the goals are not met, the final 40% of sector support for the period could be withheld. Heightened donor attention to accountability stems in part from rampant corruption related to Uganda's hosting of the Commonwealth Heads of Government Meeting (CHOGM) in 2007. In direct response to that scandal, donors have threatened to slash general budget support to the government by whatever amount an investigation determines went missing.

Interview with a representative of the international community. For information on allegations of corruption

In addition to coordinating its assistance to the government, the DPG tries to coordinate its support to civil society organizations.⁴¹⁰ By some accounts, the group had kept civil society at arm's length. But communications improved during 2010, for example through an invitation to civil society organizations to brief a joint meeting of JLOS and the DPG in September 2010. Civil society organizations feel that improved access to donors is one reason that their communication with JLOS also has improved over the course of the year.⁴¹¹

Although the DPG has been an effective and useful mechanism for donor coordination, there may be room for improvement. Some donors, notably USAID, attend DPG meetings but are otherwise not very engaged with other donors. Although multiple EU member states are active in the justice sector, the EU Delegation itself has a limited role, and it does not coordinate with EU-member missions.⁴¹² Where issues of amnesty and justice overlap, as by definition they must, donor coordination has been lacking for purely bureaucratic reasons. The Amnesty Commission is not formally part of the justice sector. It reports to the Ministry of Internal Affairs and is supported through different funding streams, for example the International Organization for Migration.⁴¹³

In the area of transitional justice, JLOS has taken the lead in articulating a vision and the requirements for fulfilling it.⁴¹⁴ Donors then attempt to coordinate relevant assistance. Additionally, donors may make substantive suggestions, such as encouraging the government to engage more intensively in public consultations on transitional justice policy. JLOS does not coordinate with the ICC, a problem that multiple observers attributed to the ICC field office's near invisibility in Kampala.⁴¹⁵

Complementarity Strategy

In contrast to many other countries, the strategy for complementarity in Uganda is settled. The High Court, and specifically the War Crimes Division, will be responsible for trying international crimes. The international community will focus on the needs of the WCD, and donors are undertaking measures to ensure that capacity needs are well defined.

The DPG and JLOS jointly asked PILPG and ICTJ to plan and facilitate a needs assessment mission by several international experts to be carried out over two weeks in November 2010.⁴¹⁶ DPG representatives are frank in acknowledging the body's own lack of capacity to judge what JLOS and the WCD say are their transitional justice capacity needs.⁴¹⁷ The findings of this group can serve as an independent check on the JLOS list of needs and donors' initial appraisal of the list. The assessment is likely to have a heavy influence on the

related to the CHOGM, see: "Museveni Orders CHOGM arrests", The Monitor, May 5, 2010, available at: <http://allAfrica.com/stories/201005050294.html> and "Bishop, Speaker clash over CHOGM report", The New Vision, November 3, 2010, available at: <http://www.newvision.co.ug/D/8/13/737022>.

⁴¹⁰ Interview with representatives of the international community.

⁴¹¹ Interview with civil society representatives.

⁴¹² Interviews with representatives of the international community.

⁴¹³ Interview with representatives of the international community.

⁴¹⁴ The following is based on interviews with representatives of the international community.

⁴¹⁵ One embassy official in Kampala said of the ICC field staff, "no one knows who they even are".

⁴¹⁶ Interview with ICTJ staff member

⁴¹⁷ Multiple interviews with DPG members.

WCD's final budget.⁴¹⁸ The experts were tasked with looking at needs across the board, including protection and support of victims and witnesses, investigations, prosecutions, the judiciary, outreach, detention facilities, and security. They were also to suggest short-, medium-, and long-term steps to enhance the readiness of the relevant JLOS institutions to handle war crimes proceedings, including outreach.

There is also an open question about the degree to which new capacity should be a stand-alone effort for the WCD or be integrated into capacity of the broader justice sector. As discussed individually earlier, this question relates to such areas as witness and victim protection, outreach, archives, IT equipment and training, security, and physical infrastructure.

Options for Realizing Complementarity in Uganda

Despite remaining capacity gaps, officials of the Ugandan judicial system are broadly capable of conducting credible investigations, prosecutions, and trials for atrocity crimes. But under the country's current government, there are no indications that the judicial process will be anything other than selective – applied exclusively to members of anti-government factions. Under these circumstances, there are three broad approaches that donors can take.

Proponents of a **first** possible approach argue that strengthening a flawed system only makes donors complicit in one-sided justice.⁴¹⁹ They argue that the tilt of the current system cements perceptions among some communities in the north and other government critics that justice will be a tool of repression. Without transparent judicial processes for UPDF abuses, a significant part of the conflict remains unacknowledged. These dynamics work against reconciliation.

Following this logic, under the first option, donors would put most of their backing for complementarity on hold until such time as the Ugandan government makes clear in word and deed that it is willing to subject alleged UPDF atrocities to investigations and prosecutions of the same rigor now reserved for members of the LRA. Under this approach, donors would suspend direct budget support as well as assistance for infrastructure, equipment and related technical trainings. Donors might choose to continue development assistance on a project or in-kind basis to strengthen civil society and defense capacity, or expand general awareness of international criminal law.

Proponents of a **second** approach readily acknowledge that the current government is only willing to apply the law selectively.⁴²⁰ There is also a sober awareness of the repercussions this has for reconciliation and the fostering of a culture of the rule of law. But it is thought that it is better to support partial justice for atrocity crimes than no justice at all, and that once a process is in place, domestic and international pressure could build to expand its reach to include alleged crimes perpetrated by government actors, and regardless of rank. This second approach is the one currently being pursued by the international community, and enjoys the backing of many in civil society.

⁴¹⁸ Interview with a JLOS official.

⁴¹⁹ Interviews with civil society figures in Kampala.

⁴²⁰ Interviews with representatives of donor missions.

A **third** approach would be a hybrid of the first two. It would entail proceeding to support the system to get up and running (although putting major infrastructure assistance on the back burner), but constantly monitoring political developments. There is a pattern in Uganda of reforms toward genuine domestic international criminal justice being driven by events on the ground.⁴²¹ The government's decision that it would approve the ICC Act was not announced until the Review Conference, and the judiciary did not begin drafting practice directions for the WCD until the DPP had issued its first indictment.

Under this scenario, if there were problems of aid going to dubious priorities or corruption related to sector funding, donors could suspend sector budget support. A next step could be the routing of support for the justice sector through a basket fund jointly controlled by donors and the government, and managed by an external agency such as the UNDP.⁴²² Crass executive interference in the judiciary could result in a down-scaling or withdrawal of support in areas important to the government (while such items as support to civil society would continue).

In the cases of the second and third approaches, with the first trial looming, there are also immediate needs requiring attention. Among these is an outreach strategy that can reach affected populations before the trial begins. With time running short, civil society organizations who are experienced in conducting outreach in Uganda offer the best solution. Either they or the judiciary could also develop options for reaching populations in the north through radio programming. Local organizations in the region will need assistance ranging from trainings in international criminal law to a budget for transportation.

Absent a more comprehensive solution, there is also a need to assemble an interim witness protection mechanism for those needing it in the first trial. Beyond protection issues, other shortcomings in the handling of victims and witnesses need to be addressed. Although transportation to court for victims and witnesses can in theory be paid for from state funds, the intended beneficiaries usually are not aware of this and either rely on their own means or don't show up. And for those witnesses who do appear, there typically is no one to welcome them, inform them of court procedures, or provide them with basic assistance.⁴²³

⁴²¹ Interview with representatives of the international community.

⁴²² Interview with representatives of the international community.

⁴²³ Interview with an ICTJ staff member.

Kenya

The startling violence of 2007-2008 in Kenya had its roots in ethnicity-based politics. Under colonial rule, the British expropriated the best land from agriculturalist and pastoralist peoples alike. Following independence in 1963, much of the pastoralist land was claimed by members of agriculturalist tribes who had previously been hired to work on British farms. Kenya's first president, Jomo Kenyatta, was a Kikuyu, a farming people from central Kenya who form the country's largest ethnic group. While his government had fairly broad ethnic representation, the police and army under Kenyatta were increasingly dominated by individuals from the Kikuyu and related tribes—a “correction” from their domination by non-Kikuyu tribes during colonial rule. Kalenjin and other pastoralist peoples felt they were excluded from government and business opportunities. When Daniel arap Moi succeeded Kenyatta in 1978, the Kalenjin and related minority tribes were favored over the Kikuyu. Moi came under increasing pressure to ease his authoritarian grip on Kenya, leading to multi-party elections in 1992. In the campaigns leading to the elections of 1992 and 1997, Kenyan politicians played up ethnic rivalries, stoking hopes of patronage for the victorious and fears of exclusion for the defeated. Perhaps not surprisingly, the campaigns were accompanied by violence that was particularly severe before and after the 1992 vote.⁴²⁴

In 2002, opposition leader Mwai Kibaki won over President Moi's favored candidate, Uhuru Kenyatta. Kibaki's platform promised reforms. However, the reform agenda gradually crumbled and massive corruption scandals of the type that had marked the Moi regime enveloped Kibaki's government. The main difference between Moi and Kibaki was that the proceeds of corruption fuelled a largely Kikuyu-based patronage racket.⁴²⁵

By the time of the 2007 elections, Kibaki and his Party of National Unity (PNU) faced a major challenge from Raila Odinga and his Orange Democratic Movement (ODM), which had its power base among the Luo, Luhya, and Kalenjin tribes. ODM hopes for victory were high, and as the announcement of election results was delayed, tensions mounted. When the election commission declared Kibaki the winner, violence erupted. According to the Commission of Inquiry into the Post-Election Violence (CIPEV, also known as the “Waki Commission,” after its chairperson, Philip Waki, a judge of Kenya’s Court of Appeal), the violence in some areas was largely spontaneous; but elsewhere had been planned and organized. Further, the Waki Commission found that by the time the post-election violence abated in March 2008, 1,133 people had been killed, 3,561 injured, and 117,216 private properties and 491 government-owned properties had been destroyed.⁴²⁶ Over 350,000 Kenyans were displaced in the mayhem.

As the violence was still ongoing, the African Union Panel of Eminent African Personalities, under the leadership of former UN Secretary General Kofi Annan, stepped in to mediate. Early in February 2008 the prosecutor of the International Criminal Court (ICC) made clear

⁴²⁴ For more background on the history of political violence in Kenya, see: Human Rights Watch, “Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Governance”, March 2008, available at: <http://www.hrw.org/sites/default/files/reports/kenya0308web.pdf>.

⁴²⁵ See: Wrong, Michela: It’s Our Turn to Eat: The Story of a Kenyan Whistleblower, Harper Collins, 2009.

⁴²⁶ Commission of Inquiry into the Post-Election Violence, Final Report, October 16, 2008, pp. 345-346, available at: http://www.communication.go.ke/Documents/CIPEV_FINAL_REPORT.pdf.

that he was watching events in Kenya.⁴²⁷ On February 28, 2008, facing mounting international and domestic pressure, Kibaki and Odinga struck a far-ranging agreement. Among the items agreed, they would form a coalition government and establish a commission to identify the causes of the violence (the Waki Commission) as well as a Truth, Justice and Reconciliation Commission.

In its final report of October 16, 2008, the Waki Commission recommended the creation of a Special Tribunal for Kenya to “seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya.”⁴²⁸ As will be seen, despite intense domestic and international pressure, over two years later there is still no Special Tribunal or other clear mechanism for such domestic prosecutions and trials. The lack of progress has resulted in a full ICC investigation and the submission on December 15, 2010 by the prosecutor of applications for summonses to appear for six senior figures.⁴²⁹

Kenya has strong capacity in many parts of its justice sector and could muster many of the resources required to fill remaining capacity gaps. Bringing about genuine domestic justice for international crimes in complement to the proceedings underway in The Hague will require assisting Kenyans in overcoming the poor leadership that led to the violence in the first place.

Complementarity Needs and Actions

Legislative Framework

Despite the adoption of legislation domesticating the ICC’s Rome Statute crimes and a new constitution, Kenya’s two most pressing legal questions remain unanswered: What is the applicable law for prosecutions and trials of war crimes, crimes against humanity, and genocide? And what mechanism would be used?

Under the International Crimes Act, approved by parliament on December 12, 2008 and taking effect on January 1, 2009, the High Court has jurisdiction over war crimes, crimes

⁴²⁷ “Kenya is a State Party to the Rome Statute. The OTP considers carefully all information relating to alleged crimes within its jurisdiction committed on the territory of States Parties or by nationals of States Parties, regardless of the individuals or group alleged to have committed the crime.” OTP statement in relation to events in Kenya, February 5, 2008, available at: <http://www.icc-cpi.int/NR/rdonlyres/1BB89202-16AE-4D95-ABBB-4597C416045D/0/ICCOTPST20080205ENG.pdf>.

⁴²⁸ Commission of Inquiry into the Post-Election Violence, Final Report, p. 472, October 16, 2008, available at: http://www.communication.go.ke/Documents/CIPEV_FINAL_REPORT.pdf.

⁴²⁹ The first prosecution case is against William Ruto (a suspended Minister of Education), Henry Kosgey (Minister for Industrialization), and Joshua Sang (a radio broadcaster), all aligned with Prime Minister Raila Odinga’s Orange Democratic Movement (ODM). The prosecutor’s second case is against Francis Muthaura (Head of the Public Service, Secretary to the Cabinet, and Chairman of the National Security Advisory Committee), Uhuru Kenyatta (Deputy Prime Minister and Finance Minister, and son of Kenya’s founding president Jomo Kenyatta), and Mohamed Ali (former Police Commissioner and current Postmaster General). The latter three are all aligned with President Mwai Kibaki’s Party of National Unity (PNU). See “Kenya’s post election violence: ICC Prosecutor presents cases against six individuals for crimes against humanity” (press release), December 15, 2010, available at: <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr615>.

against humanity, and genocide.⁴³⁰ The definitions of these crimes and their elements are incorporated through direct reference to the relevant articles of the Rome Statute. The International Crimes Act contains no equivalent of the Rome Statute's Article 27, which states that official capacity is no bar to prosecution. Kenya's new constitution does provide for head-of-state immunity while including a clear exception for cases of cooperation with the ICC.⁴³¹

It is unclear whether the new law could be applied retroactively to cover the period of post-election violence. Some, including the Permanent Secretary of the Ministry of Justice, National Cohesion and Constitutional Affairs (MOJNCCA), say that it could be applied retroactively.⁴³² In its treatment of crimes under international law, Article 50 of the new constitution hints at this with regard to the rights of the accused.⁴³³ Others say it is only applicable prospectively from January 2009, and with regard to Article 50 of the new constitution, question whether judges would recognize retrospective applicability of the new constitution itself.⁴³⁴

Although the International Crimes Act gives jurisdiction over atrocity crimes to the High Court, a potential Special Tribunal for Kenya represents an alternative for prosecution of alleged crimes against humanity related to the post-election violence. The Waki Commission's final report of October 2008 set out the basic parameters for such a court.⁴³⁵ It called for the enactment of an International Crimes Bill similar to that subsequently adopted, but also a temporary Special Tribunal that would have exclusive jurisdiction over crimes committed in the course of the post-election violence. The tribunal would consist of four organs: chambers, prosecution, a registry, and a defense office.

Applying Kenyan and international law, the Special Tribunal would be composed of a mix of Kenyans and non-Kenyans. The chairs of the three-judge trial chamber and three-judge appeals chamber would be Kenyans selected by the president, in consultation with the prime minister. But the other two judges in each chamber, as well as the prosecutor of the tribunal, would be non-Kenyans from Commonwealth countries, and identified by the African Union (AU) Panel of Eminent African Personalities for appointment by the president. At least four of the investigators, including the head of investigations, would also be non-Kenyan.

⁴³⁰ "International Crimes Act, 2008", available at:

http://www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf

⁴³¹ Constitution of Kenya, Article 143(1) and (4). A final draft of the constitution as subsequently approved is available at: <http://www.nation.co.ke/blob/view/-/913208/data/157983/-/18do0kz/-/published+draft.pdf>.

⁴³² Interview with Ambassador Amina Mohamed, Permanent Secretary of the Ministry of Justice, National Cohesion and Constitutional Affairs.

⁴³³ In enumerating fair trial rights, article 50 of the constitution echoes the ICCPR in stating that "(2) Every accused person has the right to a fair trial, which includes the right - [...] (n) not to be convicted for an act or omission that at the time it was committed or omitted was not – (i) an offence in Kenya; or (ii) a crime under international law" (emphasis added). Crimes against humanity were crimes under international law at the time of the post-election violence.

⁴³⁴ Interview with a representative of civil society. Kenya's old constitution had a similar provision on the non-retroactive application of the law, but with no mention of crimes under international law. Constitution of Kenya, revised edition 2008, article 77(4), available at:

http://www.cabinetoffice.go.ke/index.php?option=com_docman&task=doc_download&gid=5&Itemid=67.

⁴³⁵ Commission of Inquiry into the Post-Election Violence, Final Report, pp. 472-475, October 16, 2008, available at: http://www.communication.go.ke/Documents/CIPEV_FINAL_REPORT.pdf.

Under the Waki Commission’s recommendations, the proposed bill establishing the Special Tribunal was to ensure that ordinary courts could not infringe upon the new court’s jurisdiction. Further, the commission recommended that the bill “shall ensure that the Special Tribunal is insulated against objections on constitutionality and to that end, it shall be anchored in the Constitution of Kenya.”⁴³⁶

Constitutionally anchoring the Special Tribunal meant that it would need a two-thirds majority in Kenya’s parliament to pass. An effort to amend Kenya’s old constitution to this effect in February 2009 fell significantly short. And four further attempts to pass a revised Special Tribunal bill over the course of the year failed due to a lack of quorum in parliament.⁴³⁷ Even if it were to pass in the future, the bill could face constitutional challenges over the issue of retroactivity and the tribunal’s exclusive jurisdiction over the period of post-election violence.⁴³⁸

Technical Capacity

Government officials and representatives of civil society and the international community all agreed that there are no insurmountable technical challenges to the conduct of credible investigations, prosecutions and trials for international crimes in Kenya. To be sure, there are currently significant capacity gaps. But Kenya is a country of tremendous human capital and it has the potential to finance and sustain many of the needed improvements in its justice sector. As with so many other key challenges facing the country, the main determinants of whether the promise of justice can be fulfilled lie in the realm of politics.

Policing

The Waki Commission report found that Kenyan police faced problems of organization, capacity, and will in responding to the outbreak of the post-election violence. Further, many police officers were themselves involved in the commission of crimes, and some broke with their chains of command to follow external leaders.⁴³⁹

Although there were many officers who did act honorably in attempting to protect the public during the crisis, the generally poor police showing was symptomatic of long-festering problems. Police in Kenya suffer a lack of skills, have been poorly organized, are prone to corruption and political influence, and have largely lost the trust of the Kenyan people.

There have been few attempts to prosecute low-level perpetrators for crimes related to the post-election violence. Those investigations that have occurred were plagued by serious flaws. Police investigators mishandled crime scenes and evidence, failed to preserve most forensic evidence, and have hardly any capacity to analyze what forensic material does

⁴³⁶ Commission of Inquiry into the Post-Election Violence, Final Report, p. 473, October 16, 2008.

⁴³⁷ A copy of “The Special Tribunal for Kenya Bill, 2009” is available at:

http://www.kenyalaw.org/Downloads/Bills/2009/The_Special_Tribunal_for_Kenya_Statute_2009.pdf.

⁴³⁸ See Alai, Christine and Mue, Njonjo, Kenya: Impact of the Rome Statute and the International Criminal Court, ICTJ Briefing, May 2010, p. 3, available at: http://www.ictj.org/static/Publications/ICTJ_KE_RSRC-ImpactofICC_bp2010.pdf.

⁴³⁹ Commission of Inquiry into the Post-Election Violence, Final Report, pp. 396-413, October 16, 2008, available at: http://www.communication.go.ke/Documents/CIPEV_FINAL_REPORT.pdf.

exist.⁴⁴⁰ Widely publicized failings in cases related to the post-election violence led many Kenyans to doubt not only the skill of police investigators, but also their integrity.

If police are now to support genuine investigations into the post-election violence, be trusted to carry out related arrests, and provide security for domestic trials, these challenges will have to be overcome. Observers foresee potential problems for all of these tasks if prosecutors train their sights on leading political figures, powerful business elites, or members of the security services themselves.⁴⁴¹

Several elements on police reform were included in the peace and power-sharing agreement entered into by President Kibaki and Raila Odinga in February 2008, among these a review of policing laws and issues. The Waki Commission built on this and made numerous recommendations for the overhaul of policing in Kenya.⁴⁴² These included setting out five basic principles by which the police should operate, the consolidation of the Kenya Police Service and Administration Police into one single police agency, addressing legislative deficiencies with regard to policing, establishing a Police Service Commission, developing a modern code of conduct, reviewing impediments to effective police investigations, and establishing an independent oversight body. The Waki Commission also recommended establishing a police reform group to thoroughly review policing in Kenya with a view to international best practices.

A retired judge of the High Court, Philip Ransley, was tapped in May 2009 to lead a National Task Force on Police Reforms. Its report, presented to President Kibaki on August 25, 2009, contained far-reaching recommendations.⁴⁴³ Among these, it recommended growing the force, improving pay, creating an independent oversight body, creating a commission on the implementation of police reforms, and drafting legislation to enshrine police reforms across the board. It found that problems of corruption, human rights abuses, and inefficiency were not only structural, but also attributable to poor police leadership. It therefore recommended a suitability review for all serving police officers, beginning with the senior most ranks.

Shortly after receiving the Ransley report, President Kibaki removed the police commissioner and other top officers.⁴⁴⁴ Over the course of 2009 and 2010, momentum built toward structural reforms to the police. The new constitution approved by voters in August 2010 established a National Police Service under an operationally independent inspector general as an umbrella for the previously existing Kenya Police Service and Administration Police Service. It also set out principles of ethics and professionalism for the force and established a

⁴⁴⁰ Interviews with representatives of civil society.

⁴⁴¹ Interviews with representatives of the diplomatic community in Kenya.

⁴⁴² Commission of Inquiry into the Post-Election Violence, Final Report, pp. 429-442, October 16, 2008, available at: http://www.communication.go.ke/Documents/CIPEV_FINAL_REPORT.pdf.

⁴⁴³ See Report of the National Task Force on Police Reforms, Abridged Version, December 2009, available at: <http://www.administrationpolice.go.ke/Downloads/REVISED%20ABRIDGED%20VERSION%20OF%20POLICE%20REF%20RPT.doc>. See also: ICTJ Briefing, Security Sector Reform and Transitional Justice in Kenya, International Center for Transitional Justice, January 2010, available at: http://www.ictj.org/static/Africa/Kenya/ICTJ_SSRKenya_bp2010.pdf.

⁴⁴⁴ Kibaki made outgoing Police Commissioner Hussein Ali the new postmaster general, although a UN envoy had accused him of involvement in extrajudicial killings. See “Kibaki moves Ali, names new Kenya police boss”, Daily Nation, September 8, 2009, available at: <http://www.nation.co.ke/News/-/1056/654698/-/umsnbr/-/index.html> and “Kenya sweeps away top-rank police”, BBC News, September 8, 2009, available at: <http://news.bbc.co.uk/2/hi/8244594.stm>.

National Police Service Commission to oversee recruitments, promotions, transfers, and disciplinary proceedings related to the police.⁴⁴⁵ In late 2010, parliamentary committees were working on a raft of police reform legislation called for under the constitution and the Ransley report: the National Police Service Bill, 2010; the National Police Service Commission Bill, 2010; the Independent Policing Oversight Authority Bill, 2010; and the Private Security Industry Regulation Bill, 2010. Legislators estimated that implementation of the reforms would cost 81.4 billion shillings.⁴⁴⁶

Although police reforms are far from complete and could still be undermined in the implementation, there were other reasons for cautious optimism during 2010. In January the government appointed an 18-member Police Reform Implementation Committee as recommended by the Ransley Commission to monitor implementation of police reforms. And in the sometimes tense campaign leading up to the August referendum on the new constitution, during the voting itself, and in its aftermath, Kenyan police won praise for acting efficiently and professionally to deter violence and respond to problems.⁴⁴⁷

International support for policing in Kenya all but ended with the post-election violence but as the reform process has progressed, donors are engaging again. The UK has pledged support for police reform and specifically accountability mechanisms, but until there are real improvements in that area will refrain from providing support for infrastructure or equipment needs.⁴⁴⁸ Finland has also reportedly expressed interest in supporting Kenya's police.⁴⁴⁹

If Kenya continues on the reform path in the area of policing, it can be expected that other donors will show renewed interest in helping to fill gaps in police skills and equipment. Among these gaps are knowledge of international criminal law, knowledge of how to deal with traumatized victims and witnesses, and other techniques and procedures important to the investigation of international crimes, including forensics in cold cases.⁴⁵⁰ To ensure that these elements are included in broader capacity building assistance for Kenyan police, proponents of complementarity should begin discussions with Kenya's government and donor missions now.

Legal education

International criminal justice is generally not taught in Kenyan law schools, or if it is taught, courses include only the very basics. Most freshly-minted lawyers have only superficial understanding of international criminal law, if any.⁴⁵¹

⁴⁴⁵ Constitution of Kenya, Part 4, Articles 243-247.

⁴⁴⁶ "Kenya police reforms to cost Sh 81.4 bn", Daily Nation, November 19, 2010, available at: <http://www.nation.co.ke/News/Kenya%20police%20reforms%20to%20cost%20Sh81bn%20/-/1056/1056990/-/i5xywt/-index.html>. This corresponds to about \$1 billion USD.

⁴⁴⁷ Interviews with representatives of civil society and the international community.

⁴⁴⁸ Interview with a representative of the international community.

⁴⁴⁹ Interview with Ambassador Amina Mohamed, Permanent Secretary of the Ministry of Justice, National Cohesion and Constitutional Affairs.

⁴⁵⁰ Interviews with representatives of civil society.

⁴⁵¹ Interviews with Stella Ndirangu, International Commission of Jurists and Apollo Mboya, Law Society of Kenya.

In discussions with civil society leaders, law school officials have shown an interest in developing courses in human rights and international criminal law. The Law Society of Kenya sets criteria for admission to the Kenyan Bar, and its members could choose to include knowledge of international criminal law and human rights law toward the points needed for admission. This would provide law students with an extra incentive to pursue these course offerings.⁴⁵² This is an area where universities around the world that have well-established international justice programs could provide crucial assistance. Options could include establishment of a full department for international criminal law, multi-week seminars, or visiting professorships.

Additionally, the Law Society of Kenya offers a program in continuing legal education for its membership, with dozens of sessions held around the country throughout the year. Often these are organized in cooperation with donors.⁴⁵³ Sessions on international criminal law could boost basic knowledge of the field among Kenyan attorneys in the short term.

Prosecution

The conduct of sensitive prosecutions in Kenya has been very problematic for reasons that will be discussed later in this report.⁴⁵⁴ But Kenya's current technical capacity to conduct ordinary criminal prosecutions is also poor.⁴⁵⁵ There are very few public prosecutors, and almost all cases are first brought to court by police officers who have undergone only brief training in prosecution. A lack of aptitude among these police prosecutors results in low conviction rates. Although state prosecutors handle criminal appeals, it is often too late in the process to redress mistakes made in the course of the initial prosecution. The State Law Office (Kenya's prosecution office) is severely understaffed. Observers attribute this in part to low pay and poor working conditions for professional prosecutors.

Prosecutors are in need of general capacity building in substantive and procedural criminal law. Over the next two to three years, the practice of using police prosecutors will be phased out. State counsel are to be recruited to take the place of police prosecutors, although some of these recruits will come from the police.⁴⁵⁶ In the framework of police reforms, police prosecutors are being separated from the police force to be retrained as prosecutors in the revamped State Law Office. The US, UK, and Sweden will support legal trainings for these former police officers.

Specific trainings in international criminal law will be necessary for any prosecutors involved in investigations and/or trials related to post-election violence.⁴⁵⁷ In order to provide the office with general familiarity in international criminal law, it would not be difficult to add modules on the subject to existing and future training programs. The government and donors

⁴⁵² Interview with Muthoni Wanyeki, Kenya Human Rights Commission (KHRC).

⁴⁵³ See International Bar Association Human Rights Institute and the International Legal Assistance Consortium, Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya, February 2010, p. 68, available at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DCD20276-7C7C-4321-92A1-DD43531F93A1>.

⁴⁵⁴ See the "Pursuit of sensitive cases" section of this chapter.

⁴⁵⁵ Interview with Apollo Mboya, Law Society of Kenya.

⁴⁵⁶ Interviews with Ambassador Amina Mohamed, Permanent Secretary of the Ministry of Justice, National Cohesion and Constitutional Affairs and Apollo Mboya, Law Society of Kenya.

⁴⁵⁷ Interviews with civil society representatives.

would be open to this, but have not yet made it a priority.⁴⁵⁸ A core group of promising prosecutors could be provided with more advanced training if a credible mechanism for domestic trials for Rome Statute crimes is established.

Defense

Kenya currently has no legal aid scheme.⁴⁵⁹ However, the new constitution for the first time provides a legal underpinning for a right of access to justice.⁴⁶⁰

Kenyan legal professionals have little knowledge of international criminal law, but there appears to be mounting interest. A small number of Kenyan lawyers have developed competence in international criminal justice through those trainings that have been conducted, and these have spurred applications for the ICC list of counsel.⁴⁶¹ One concern is the low rate at which female Kenyan lawyers have applied for the ICC list of counsel. The ICC and Law Society of Kenya joined in organizing a workshop for female attorneys in August 2010 and plan to conduct another one in the future.

Judiciary

The greatest weakness of Kenya's judiciary to date has been its lack of independence. This problem and relevant current reform efforts are described later in this report.⁴⁶²

Kenya has a pool of experienced and well-trained judges, but even these have almost no familiarity with international criminal law. Trainings, starting at a very basic level, will be necessary for any judges dealing with post-election-violence cases.⁴⁶³

Lawyers who are selected to serve in the judiciary undergo only a brief orientation at Kenya's Judicial Training Institute. Donors could support an extension of this training that would provide familiarity with the Rome Statute. Donors could also support more in-depth trainings on international criminal law. As parliament works on implementation of the new constitution and judicial reform, it could create a requirement for judges to pass relevant exams before being eligible for selection to sit on trials related to the post-election violence.

Court management and archiving

Judicial officers still hand-write court records. Resulting errors and omissions, and increased possibilities for tampering, undermine the trial process and reduce confidence in outcomes.⁴⁶⁴

⁴⁵⁸ Interviews with MOJ Permanent Secretary Amina Mohamed and representatives of the international community.

⁴⁵⁹ See International Bar Association Human Rights Institute and the International Legal Assistance Consortium, Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya, February 2010, pp. 68-69, available at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DCD20276-7C7C-4321-92A1-DD43531F93A1>.

⁴⁶⁰ "The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice." Constitution of Kenya, Part 2, Article 48.

⁴⁶¹ Interviews with Stella Ndirangu, International Commission of Jurists and Apollo Mboya, Law Society of Kenya.

⁴⁶² See "Judicial independence" section of this chapter.

⁴⁶³ Interviews with civil society representatives.

There is no good system for judicial archiving in place. Files are prone to disappearance, in part because they are not digitized.⁴⁶⁵ In October 2010, the judiciary put forward an Information Communication Technology Strategic Policy and Plan for the five year period 2010-2015. According to the plan, available technologies are gradually to be introduced into Kenyan courts.⁴⁶⁶

Judicial proceedings also suffer from the absence of trained judicial interpreters. Courts hire interpreters on a case-by-case basis, but these individuals are not necessarily familiar with legal terms.⁴⁶⁷ There is no system of controls for the quality of court interpretation.⁴⁶⁸

Witness and victim protection

Kenya currently has little capacity to protect witnesses and victims. Until very recently the country had a poor framework for victim and witness protection, and Kenya's courtrooms lack the technology to allow witnesses to testify with their identities obscured from the public. This has discouraged vulnerable witnesses from testifying and hindered prosecution of sensitive cases.⁴⁶⁹

Under the Witness Protection Act of 2006, authority for witness protection was vested in the State Law Office. Under this arrangement, the attorney general had personal decision-making authority over whether to grant protection. A large multi-agency task force was involved in operational aspects of protection, including representatives of state institutions alleged to have been involved in grave abuses during the post-election violence. This unwieldy, compromised board was prone to leaking information. Representatives of civil society and the diplomatic community deride this system as having done nothing to give confidence to potential witnesses in sensitive cases.

In March 2009, UN Office on Drugs and Crime (UNODC) and US Agency for International Development (USAID) began providing technical assistance to the State Law Office. UNODC provided an international witness protection expert who spent a year working with the head of the witness protection unit to plan proposed reforms.

In May 2010, amendments to the Witness Protection Act became law. The changes stripped the attorney general of his control over witness protection, and transferred this to a new independent Witness Protection Agency. Despite the loss of operational control, the attorney general chairs the board of the agency. Other members include the government heads of intelligence, police, and prisons, and a representative of the Kenya National Commission on

⁴⁶⁴ Interview with Apollo Mboya, Law Society of Kenya.

⁴⁶⁵ Interview with Apollo Mboya, Law Society of Kenya. See also: International Bar Association Human Rights Institute and the International Legal Assistance Consortium, Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya, February 2010, pp. 78.

⁴⁶⁶ "Revolution in courts as justice goes digital", Daily Nation, October 9, 2010, available at:

<http://www.nation.co.ke/Tech/Revolution%20in%20courts%20as%20justice%20goes%20digital%20-/1017288/1029532/-/qguunj/-/index.html>.

⁴⁶⁷ Interview with Apollo Mboya, Law Society of Kenya.

⁴⁶⁸ The Permanent Secretary of the Ministry of Justice, National Cohesion and Constitutional Affairs thought this wasn't much of a problem because she said that most Kenyans speak more than one local language, and lawyers in court could ensure the accuracy of interpretation and translation.

⁴⁶⁹ Interview with Apollo Mboya, Law Society of Kenya.

Human Rights (KNCHR). A secretariat is to be headed by a director, who will be responsible for making operational decisions, including determining which witnesses are eligible for protection.⁴⁷⁰ The agency will enjoy budget autonomy and be capable of accepting direct donor support. Witness protection officers are scheduled to undergo three months of training abroad and the agency was slated to become operational in January 2011.⁴⁷¹

Although there is great hope for the new organization, there have also been criticisms. In an unpublished analysis, the International Commission of Jurists pointed to a narrow definition of “witnesses,” and specifically to the omission of defense witnesses and individuals who come under threat for working with victims.⁴⁷² Further, there remain questions about potential vulnerability of the new agency to improper interference. These revolve around board participation of the attorney general and head of intelligence, whether the institution will in fact have operational independence, the extent to which it will have to rely on police rather than separately recruited protection officers, and whether it will receive adequate funding.⁴⁷³

Government, civil society, and international supporters agree that immediately upon its launch, the institution would be ill-prepared to protect witnesses in such sensitive cases as those relating to the post-election violence. There is broad agreement that the agency should start slowly by handling lower profile witnesses.⁴⁷⁴

In the interim period, there are already witnesses to the post-election violence who are in need of protection. In 2009, some of those who testified before the Waki Commission reported receiving death threats, and some fled their homes.⁴⁷⁵ Even after the ICC investigation began in earnest and some prosecution witnesses came under the protection of the ICC’s Victim and Witness Unit, there were still victims and witnesses at risk of falling through the cracks. Among these are individuals perceived as possible ICC witnesses, but who are not under ICC protection.⁴⁷⁶ With uncertainty about the potential scope of future complementary prosecutions for the post-election violence, the circle of vulnerable victims and possible witnesses is much larger.

The system of protection for human rights defenders, comprising KNCHR and such NGOs as the Kenya Human Rights Commission (KHRC), has reluctantly engaged in relocation of some vulnerable victims and witnesses related to the post-election violence and other sensitive cases.⁴⁷⁷ They have received support for this from the international community,

⁴⁷⁰ The recruitment process for this position was underway as of early October 2010. Interview with KNCHR Commissioner Winnie Lichuma.

⁴⁷¹ Interview with civil society representative.

⁴⁷² The ICJ Kenya criticism is cited in Alai, Christine and Mue, Njonjo, Kenya: Impact of the Rome Statute and the International Criminal Court, ICTJ Briefing, May 2010, p. 8, endnote 20, available at: http://www.ictj.org/static/Publications/ICTJ_KE_RSRC-ImpactofICC_bp2010.pdf.

⁴⁷³ Interview with a representative of the international community.

⁴⁷⁴ Interviews with government, civil society, and international officials.

⁴⁷⁵ “Waki witnesses on the run,” Daily Nation, October 17, 2009, available at: <http://www.nation.co.ke/News/politics/-/1064/673588/-/xtpqy1z/-/index.html>.

⁴⁷⁶ The ICC prosecutor has stated that all of his witnesses are out of the country, which may help to ease the threat against others whom perpetrators view as potential witnesses against them in The Hague. Interview with a representative of the international community.

⁴⁷⁷ Interviews with representatives of civil society and the international community. See also: “Rights body offers to protect chaos victims”, Daily Nation, May 11, 2010, available at:

including the Netherlands, the United States, and Germany. But the approach has had mixed success, and the KNCHR in particular has been plagued by a lack of capacity and leaks to the government and press.⁴⁷⁸ It was planning to end its involvement in protection activities by the end of October 2010. A new temporary arrangement is urgently needed.

Journalism

Representatives of civil society and the international community generally give high marks to Kenyan media. Many talented reporters and columnists have demonstrated a capacity to accurately cover complex crime stories, notably Kenya's sadly ubiquitous government corruption scandals. Through covering the post-election violence and the ICC's involvement in Kenya, many journalists have developed some familiarity with the Rome Statute. Radio and newspapers lead with stories on the ICC on a weekly and often daily basis. There have also been limited efforts at educating journalists on international criminal law. For example, with German government support, International Criminal Law Services (ICLS) organized a two-week workshop on the topic specifically for journalists in December 2009.⁴⁷⁹

There is still some room for improvement in Kenyan journalists' knowledge of the Rome Statute. Misperceptions about the Rome Statute still regularly creep into the news coverage and could play into efforts to discredit the ICC and domestic accountability mechanisms for the post-election violence.⁴⁸⁰

In October, the ICC's registrar took the useful step of inviting a group of Kenyan editors to visit the court in The Hague. And in November 2010 the ICC's outreach office organized a two-week training for journalists in Nairobi.⁴⁸¹ At some point following the December 2010 announcement of OTP applications for summonses to appear, if it is not seen as undermining the ICC process, civil society organizations may resume advocacy for complementary domestic prosecutions and trials. Early in that campaign, it would be useful for donors to support these organizations in holding a workshop more narrowly focused on complementarity for key editors and journalists from around the country.

Outreach

As reflected in regular media coverage of the ICC, both awareness of, and expectations for, the court are extraordinarily high among the Kenyan public.⁴⁸² Nonetheless, misperceptions persist. It is widely assumed that charges can be brought and trials begun at a pace that is unrealistic for complicated criminal cases at the international level. Many Kenyans also believe that all perpetrators, or at least a large number of them, can be charged and tried at the

<http://www.nation.co.ke/News/Rights%20body%20offers%20to%20protect%20chaos%20victims/-/1056/916174/-/p77g2b/-/index.html>.

⁴⁷⁸ One witness who had been relocated by the KNCHR was shot to death. Interviews with representatives of civil society and the international community.

⁴⁷⁹ See <http://www.iclsfoundation.org/projects>.

⁴⁸⁰ See Wanyeki, Muthoni: "Lack of information on ICC making us vulnerable to spin", The East African, November 15, 2010, available at:

<http://www.theeastfrican.co.ke/OpEd/comment/Lack%20of%20information%20on%20ICC%20making%20us%20vulnerable%20to%20spin/-/434750/1053120/-/item/0/-/f1vnun/-/index.html>.

⁴⁸¹ "December date for six Kenya chaos suspects", Daily Nation, November 16, 2010, available at:

<http://www.nation.co.ke/News/-/1056/1054480/-/11hum5cz/-/index.html>.

⁴⁸² Interviews with civil society representatives.

ICC. This is so, although the prosecutor has repeatedly made clear that the number of persons against whom he will seek to bring charges is strictly limited.⁴⁸³ Indeed, even among Kenyans who strongly favor criminal prosecutions for crimes committed in 2007-8, misconceptions about the scope of the ICC's potential actions can lead to an "either/or" view of the ICC and domestic prosecutions. This confusion potentially erodes support for domestic trials of lower-level perpetrators in complement to the ICC cases,⁴⁸⁴ and may please many in government who fear accountability.⁴⁸⁵

Kenyan civil society organizations lament a lack of effective outreach by the ICC itself. One representative called it "a big letdown."⁴⁸⁶ The ICC's performance in this area could be due to various factors, including steady pressure from states parties to limit the extent and costs of outreach, the lack of a permanent field office in Kenya, poor strategy or implementation, or some combination of these. Whatever the causes, it is doubtful that the court by itself can satisfy a deep thirst in Kenya for information on the Rome Statute.

Organizations including the International Commission of Jurists (ICJ) and International Center for Transitional Justice (ICTJ) are working to fill the gap. Since the post-election violence, many donors have withheld much of their support for Kenya's justice system and are looking for more promising ways to spend this money.⁴⁸⁷ Modest additional investment toward increasing popular understanding of the issues at hand could have outsized policy benefits.

Civil society court monitoring and advocacy

In the aftermath of the 2007 elections, Kenyan and other East African NGOs formed a coalition called Kenyans for Peace, Truth and Justice (KPTJ) to address issues arising from the elections and election-related violence. Approximately 30 member organizations of KPTJ have cooperated in activities including documentation of abuses as well as domestic and international political advocacy.⁴⁸⁸

Nairobi-based civil society organizations have good capacity for trial monitoring. The Kenya branch of the International Commission of Jurists monitored the few trials that have been conducted in relation to the post-election violence. Civil society organizations have also shared legal expertise on the Rome Statute with domestic courts. When a man filed a challenge to ICC jurisdiction in Kenya in a Mombasa court, both the International Commission of Jurists and the Law Society of Kenya filed amicus briefs to assist the court in responding.⁴⁸⁹

Civil society has shown itself to be adept at advocacy related to judicial reform and complementarity. As discussed above, early in 2010 parliament approved amendments to the

⁴⁸³ "December date for six Kenya chaos suspects", Daily Nation, November 16, 2010, available at: <http://www.nation.co.ke/News/-/1056/1054480/-/11hum5cz/-/index.html>.

⁴⁸⁴ Interviews with representatives of civil society and the international community.

⁴⁸⁵ Interview with a representative of the international community.

⁴⁸⁶ Interview, civil society representative.

⁴⁸⁷ Interview with diplomatic community representatives.

⁴⁸⁸ See <http://www.africog.org/partners.php?page=partner&id=1>.

⁴⁸⁹ Interview with Stella Ndirangu, International Commission of Jurists.

Witness Protection Act of 2006 that stripped witness protection from the attorney general's control and created an independent Witness Protection Agency. It was unclear whether the president would sign the bill. At the time, civil society representatives were working closely with the government, providing technical expertise to help it formulate its positions in the lead up to the Review Conference of the Rome Statute. These individuals and organizations impressed upon the government the conference's importance and the need to make a significant pledge in Kampala. At the conference, the government pledged to sign the amendments to the Witness Protection Act.⁴⁹⁰

Over the course of 2008 and 2009, civil society organizations, including the Kenya Human Rights Commission (an NGO, not to be confused with the quasi-governmental Kenya National Commission on Human Rights), engaged in advocacy for passage of the Special Tribunal bill.

Through their development agencies, the UK, Denmark and Canada have joined to launch a "Drivers of Accountability" program with a budget of USD \$48 million over the period 2010-2015. The program will fund oversight agencies, but also civil society and media. Among the goals are: a reduction in impunity for politicians, officials, and public institutions; and implementation of key aspects of the new constitution and electoral reform by the time of the 2012 elections.⁴⁹¹

The European Union and other donors support Kenyan civil society organizations in conducting ICC-related projects carried out by the International Commission of Jurists, International Center for Transitional Justice, and others. ICTJ has conducted trainings for civil society organizations aimed at improving capacity to conduct advocacy and to monitor transitional justice processes in the country.⁴⁹² Adjustments in the agreements between donors and these organizations could encourage activities specifically focused on complementarity.⁴⁹³ This could include greater focus on the principle of complementarity in outreach to the general public, making clear the limited role of the ICC, as well as engaging on issues arising out of the debate over a specific domestic war crimes accountability mechanism.

Physical Infrastructure and Equipment

Those interviewed for this report generally agreed that physical infrastructure is not a large hurdle for Kenyan trials related to the post-election violence. While there are certain shortcomings, particularly with regard to courtroom technology and the country's overcrowded prisons, domestic trials could be launched without large-scale infrastructure investment. One civil society representative said that "with political will, infrastructure will be there."⁴⁹⁴

If the Special Tribunal is created, it could use regional courtrooms and county town halls. Prisons are reliable but exceeding capacity and wardens have had to live and work under

⁴⁹⁰ Interviews with civil society and international community representatives.

⁴⁹¹ For more details, see: DFID, Project memorandum: Drivers of Accountability (2010-2015), March 2010, available at: <http://www.dfid.gov.uk/Documents/procurement/proj-mem-driv-acct-prog-ke.pdf>.

⁴⁹² Interview, Njonjo Mue, International Center for Transitional Justice.

⁴⁹³ Interview, civil society representative.

⁴⁹⁴ Interview, civil society representative.

difficult conditions.⁴⁹⁵ Equipment needs include a forensics laboratory and court recording devices.

Many donors are understandably reluctant to support infrastructure and equipment needs in the justice sector until the government demonstrates sustained commitment to the good-faith pursuit of justice.⁴⁹⁶ Prior to the post-election violence, donor assistance for the Kenyan justice sector largely focused on such infrastructure and equipment needs. The government ostensibly sought to build a police forensics lab in 2004. However, substantial funding disappeared in payments to shell companies with alleged links to government ministers, and the lab was never built.⁴⁹⁷ It took the outbreak of post-election violence for most donors to withdraw funding from other infrastructure and equipment projects in the justice sector, at least until confidence in the Kenyan government is re-established.⁴⁹⁸

Will to Pursue Genuine Domestic Investigations and Prosecutions

Political rhetoric and legislative support

Civil society advocates of a genuine domestic justice process for the post-election violence generally distrust the government's repeated rhetorical commitments to reform and justice. When President Kibaki first came into office in 2002, he brought many individuals with NGO experience into government positions. They were skilled in the language of reform that appeals to many donors. Partly as a consequence, a number of civil society organizations found themselves unable to secure support from the donor community, even as the government failed to meet many reform commitments. Only after the post-election violence did many donors fully grasp the scale of government insincerity on reform.⁴⁹⁹

In the midst of ongoing violence in February 2008, Kibaki and election rival Raila Odinga entered into a power-sharing agreement under heavy international pressure coordinated by former UN Secretary-General Kofi Annan. They also agreed to establishment of the Waki Commission. As previously discussed, when the Waki Commission issued its final report in October 2008, among its recommendations was the establishment of a Special Tribunal for Kenya.

To increase the chances for approval of a strong and credible domestic justice mechanism for dealing with the post-election violence, the Waki Commission leveraged the ICC as a court of last resort. In the event that the government could not agree to establish a Special Tribunal, the commission would submit to the ICC prosecutor "a list containing the names of and relevant information on those suspected to bear the greatest responsibility for crimes

⁴⁹⁵ See Alai, Christine and Mue, Njonjo, Kenya: Impact of the Rome Statute and the International Criminal Court, ICTJ Briefing, May 2010, p. 4, available at: http://www.ictj.org/static/Publications/ICTJ_KE_RSRC_ImpactofICC_bp2010.pdf.

⁴⁹⁶ Interviews with representatives of the international community.

⁴⁹⁷ "When bogus firms wired back Sh1bn", Daily Nation, January 24, 2006, available at: <http://www.africafiles.org/article.asp?ID=10731&ThisURL=/kenya.asp&URLName=Kenya>.

⁴⁹⁸ Interviews with representatives of the international community. For a withering account of donor blindness to high-level corruption in Kenya before the 2007 election, see: Wrong, Michela: It's Our Turn to Eat: The Story of a Kenyan Whistleblower, Harper Collins, 2009.

⁴⁹⁹ Interview with civil society representative.

falling within the jurisdiction of the proposed Special Tribunal [...].”⁵⁰⁰ For the interim, the Waki Commission list was kept under seal by the head of the Panel of Eminent African Personalities, former UN Secretary-General Kofi Annan.

In February 2009 parliament failed to adopt the Special Tribunal Bill by amending the constitution. Four further attempts to pass an amended bill during 2009 failed due to a lack of quorum in parliament, which donors and representatives of civil society regarded as acts of political sabotage by government leaders bent on scuttling justice.⁵⁰¹ A high-ranking delegation led by Justice Minister Mutula Kilonzo visited ICC Prosecutor Luis Moreno-Ocampo in The Hague on July 3, 2009 and pledged that the government of Kenya would refer the situation to the ICC under Article 14 of the Rome Statute if it failed to meet a September deadline laying out in detail how domestic investigations and prosecutions would proceed and how victims and witnesses would be protected.⁵⁰² Six days later, with the government having missed repeated international deadlines for the creation of a Special Tribunal, Kofi Annan forwarded the Waki Commission list of suspects to the ICC prosecutor.⁵⁰³

At the end of July 2009, sparking an outcry by civil society groups, the Kenyan government announced that it would no longer pursue the creation of a Special Tribunal for dealing with the post-election violence and would instead rely on the Truth, Justice and Reconciliation Commission to account for the past.⁵⁰⁴ Politicians nervous about criminal accountability for members of their parties or themselves may have felt more comfortable taking their chances with the still-abstract prospect of prosecution before the ICC, where no formal investigation had yet begun, than with a Special Tribunal that could be expected to pursue a greater number of prosecutions.⁵⁰⁵

The September deadline agreed to with the ICC prosecutor came and went with no domestic mechanism in place for the investigation and prosecution of international crimes related to the post-election violence, and with no Kenyan referral to the ICC. In November 2009, the ICC prosecutor requested permission of an ICC Pre-Trial Chamber to open an investigation in Kenya under his own authority. That permission was eventually granted in March 2010.⁵⁰⁶

⁵⁰⁰ Commission of Inquiry into the Post-Election Violence, Final Report, p. 473, October 16, 2008.

⁵⁰¹ Interviews with representatives of civil society and the international community.

⁵⁰² ICC Office of the Prosecutor, Agreed Minutes of the Meeting between Prosecutor Moreno-Ocampo and the Delegation of the Kenyan Government, The Hague, July 3, 2009, available at: <http://www.icc-cpi.int/NR/rdonlyres/6D005625-2248-477A-9485-FC52B4F1F5AD/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf>.

⁵⁰³ ICC Office of the Prosecutor, ICC Prosecutor receives Sealed Envelope from Kofi Annan on Post-Election Violence in Kenya, press release, July 9, 2009, available at: <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/pr436>.

⁵⁰⁴ “Kenya cabinet agrees on TJRC”, Daily Nation, July 30, 2010, available at: <http://www.nation.co.ke/News-/1056/632382/-/ulj3id/-/index.html>, and “Kenyan cabinet in the eye of the storm”, Daily Nation, August 1, 2009, available at: <http://www.nation.co.ke/News-/1056/633510/-/uljt87/-/index.html>.

⁵⁰⁵ Interviews with Kenyan civil society representatives. One activist said that a small group of MPs who are aware of the legal implications may be misleading and manipulating a larger group that has a poor understanding of the Rome Statute. This suggests that greater outreach to MPs could be an important objective.

⁵⁰⁶ Pre-Trial Chamber II, 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, available at: <http://www.icc-cpi.int/NR/exeres/422F24A9-5A0F-4FD0-BC3E-9FFB24EC7436.htm>.

In early 2010 the country entered a period of intense debate over the new constitution, which occupied the full attention of state actors and civil society representatives engaged in the justice field. Even with realization that the exercise of ICC jurisdiction over the post-election violence would leave a large impunity gap, civil society was preoccupied with the constitutional overhaul. After voters approved the new constitution in August 2010, the government set about implementing a challenging transition, while justice-focused NGOs continued to provide scrutiny to this process.⁵⁰⁷

As of November 2010, a bill on the establishment of a Special Tribunal had been indefinitely shelved. The lack of action over the intervening year may in part be attributable to continued political resistance at the highest levels of government. But civil society organizations involved in the push also noted difficulties in mobilizing public support. Prior to the ICC prosecutor's investigation, much of the diplomatic community preferred the formation of a Special Tribunal to the launching of an ICC case. Broad sections of the public disagreed. So deep was the Kenyan public's distrust of the domestic justice system that, instead of the proposed Special Tribunal—which included provision for participation by a number of international judges and other officials—many Kenyans favored a wholly foreign process that could bring justice to those most responsible for the post-election violence.⁵⁰⁸ A poll conducted in October 2010 found that only 20 percent of Kenyans felt that the new constitution had resulted in sufficient reforms to allow for domestic trial of senior perpetrators of crimes committed during the post-election violence, and two-thirds preferred prosecution at the ICC.⁵⁰⁹

Broad segments of civil society share the public's intense distrust of the government. This has impeded many from revitalizing a push for domestic trials in complement to those at the ICC. In recent months, there has been striking unanimity among Kenyan civil society organizations and international donors that additional impetus for complementarity in Kenya was best delayed until after announcement of the ICC prosecutor's applications in December 2010.

In the wake of that announcement, that uneasiness has intensified as some of the six persons named and their supporters have suddenly come to embrace complementarity as an alternative to the cases going forward in The Hague. The palpable concern of civil society organizations is that the government will put forward proposals for a domestic mechanism that is just "genuine" enough for the six individuals to challenge ICC jurisdiction before pretrial judges in The Hague, but still malleable enough that powerful suspects need not fear true international justice in Kenya.⁵¹⁰ Civil society's concerns seem well founded. In January 2011, the government launched an all-out push to establish the institutions, conduct the vetting, and make the appointments foreseen for the judicial system in the new constitution before the ICC's Pretrial Chamber could rule on admissibility of the two cases sought by the prosecutor. As part of this same effort, the government dispatched emissaries to the African Union and key member states to lobby for the UN Security Council's deferral

⁵⁰⁷ Interview with a civil society representative.

⁵⁰⁸ Interview with a representative of the international community.

⁵⁰⁹ "Kenyans support ICC", Daily Nation, November 12, 2010, available at:

<http://www.nation.co.ke/News/politics/Kenyans%20support%20ICC/-/1064/1052718/-/fd61b9/-/index.html>.

⁵¹⁰ Communication from a civil society representative.

of the ICC proceedings for one year under Article 16 of the Rome Statute.⁵¹¹ Meanwhile, a group of MPs arguing that justice should be local instead of international introduced legislation that would repeal the International Crimes Act and withdraw Kenya from the Rome Statute entirely.⁵¹²

With the government's drive for complementarity seemingly serving the interests of impunity rather than justice, some in civil society seemed understandably set to further defer advocacy for a domestic mechanism until the ICC process could be secured.⁵¹³

Government record on judicial independence

Prior to adoption of the new constitution in August 2010, Kenyans had lost faith in the judiciary across the board. Their distrust was shared at the highest levels and may have contributed to the outbreak of violence in the first place. When the election commission declared the results of the 2007 elections, the ODM party and its leader, Raila Odinga, were sure the elections had been stolen, but did not trust the courts enough to mount a challenge there.⁵¹⁴

Public distrust results from longstanding serial political abuse of the judiciary and outright corruption. Chief Justice Evan Gicheru is perceived to be a close ally of President Kibaki's. Donors and civil society representatives accuse him of scuttling high-profile corruption cases through judicial case assignments.⁵¹⁵ As one member of civil society put it, in Kenya, "the judiciary has perpetuated impunity."

This abuse was made possible by weaknesses in the existing legal framework. A report from the International Bar Association Human Rights Institute and the International Legal Assistance Consortium released in February 2010 catalogued the problems and offered this summary:⁵¹⁶

⁵¹¹ "Kenya seeks Africa support over Hague", Daily Nation, January 12, 2011, available at: <http://www.nation.co.ke/News/politics/Kenya%20seeks%20Africa%20support%20over%20Hague%20/-/1064/1088748/-/lwq8dgz/-/index.html>.

⁵¹² "Kenya MPs in plot to block Hague prosecutions", Daily Nation, January 13, 2011, available at: <http://www.nation.co.ke/News/politics/MPs%20in%20plot%20to%20block%20Hague%20prosecutions%20/-/1064/1089210/-/lk5rqoz/-/index.html>.

⁵¹³ Communication from a civil society member.

⁵¹⁴ Interview with KNCHR Commissioner Winnie Lichuma.

⁵¹⁵ Interviews with donors and civil society representatives. One news item in a respected Nairobi daily noted in May 2010 that "Justice Gicheru has been criticized for the poor performance of the Judiciary and corruption that influences the outcome of cases." See "Wako and Gicheru First to Go If New Law is Passed", Daily Nation, May 10, 2010, available at:

<http://www.nation.co.ke/News/politics/Wako%20and%20Gicheru%20first%20to%20go%20if%20new%20law%20is%20passed%20/-/1064/923876/-/item/1/-/68vkydz/-/index.html>. In November 2010, U.S. Ambassador Michael Ranneberger called for the ouster of the chief justice and attorney general as integral steps in countering Kenya's "culture of impunity". See "US Envoy Calls for Ouster of Top Kenyan Officials", Voice of America, November 29, 2010, available at: <http://www.voanews.com/english/news/africa/US-Envoy-Calls-for-Ouster-of-Top-Kenyan-Officials--110975669.html>.

⁵¹⁶ International Bar Association Human Rights Institute and the International Legal Assistance Consortium, Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya, February 2010, p. 54, available at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DCD20276-7C7C-4321-92A1-DD43531F93A1>.

Under current arrangements, the constitution fails to entrench judicial power exclusively in the judiciary or unambiguously guarantee its independence. The judiciary lacks any sense of financial autonomy and effective court administration is undermined by the centralisation of power within the office of the Chief Justice. The composition of the JSC [Judicial Service Commission] renders it dependent upon the executive, whilst both the criteria and procedure for the appointment of judges remain less than transparent. There is an absence of any effective complaint or disciplinary mechanism to address judicial misconduct, and unethical behaviour on the part of some judicial officers continues to impede the fair and impartial dispensation of justice. For these, and other reasons, there is an overwhelming lack of public confidence in the judicial system as a whole.

The constitution approved by Kenyan voters on August 4, 2010 and promulgated two weeks later made important systemic changes.⁵¹⁷ The new constitution requires the departure of the much-criticized sitting chief justice in February 2011.⁵¹⁸ The new chief justice will be appointed by the president from a list put forward by a new Judicial Service Commission (JSC) and the appointment is subject to approval by the National Assembly.⁵¹⁹ There is active discussion about appointment of a foreigner as chief justice for a transitional period until 2012.⁵²⁰ Regardless of whether this happens, the officeholder will no longer control the judiciary. The president will still appoint other judges to the bench, but also from a list provided by the JSC.⁵²¹ The constitution provides that only the JSC can initiate the process of dismissing a judge of the Supreme, Appeals or High Courts.⁵²² As one of many transitional provisions, the constitution requires sitting magistrates and judges to go through a vetting process.⁵²³ As of early October 2010, a bill defining the vetting process was being debated in parliament and it is up to parliament to determine the timeline for this process. The new constitution contains other provisions that reinforce the principle of judicial independence, including an expanded bill of rights and elimination of tight restrictions on *locus standi*, especially with respect to rights-related issues.⁵²⁴

Pursuit of sensitive cases

⁵¹⁷ A final draft of the new constitution, subsequently approved, is available at:

<http://www.nation.co.ke/blob/view/-/913208/data/157983/-/l8do0kz-/published+draft.pdf>.

⁵¹⁸ Interviews with civil society representatives.

⁵¹⁹ Constitution of Kenya, Article 166 (1)(a).

⁵²⁰ Prime Minister Odinga is said to like the idea because he is confident of winning the 2012 elections and would then be able to select a new chief justice; President Kibaki is said to oppose the idea. Interview with a representative of the international community.

⁵²¹ Constitution of Kenya, Article 166 (1)(b).

⁵²² Constitution of Kenya, Article 168.

⁵²³ Constitution of Kenya, Sixth Schedule, article 23. According to this article, sitting judges and magistrates are to be vetted for suitability in relation to national values and principles of governance elaborated in article 10 and judicial principles listed in Article 159.

⁵²⁴ Interview with Apollo Mboya, Law Society of Kenya. Article 22(2) of the constitution stipulates that when it comes to rights and fundamental freedoms contained in its extensive Bill of Rights, a person can bring court challenges in their own interest, but proceedings may also be launched by “(a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or(d) an association acting in the interest of one or more of its members.”

The Waki Commission noted indications that government officials were among those responsible for organizing the armed gangs who perpetrated many of the crimes during the post-election violence.⁵²⁵ Political rivals President Kibaki and Prime Minister Odinga are widely viewed as acting out of shared interest to undermine attempts at accountability for the post-election violence. At the very least, observers agree, they have shown no political will to make independent and genuine justice mechanisms work.⁵²⁶

Even after the KNCHR and Waki Commission provided substantial evidence of crimes under Kenyan law (setting aside the issue of whether some of these also amounted to crimes of an international nature), Attorney General Amos Wako proved extremely reluctant to pursue prosecutions related to the post-election violence.⁵²⁷ The KNCHR offered the attorney general's office its database of information on crimes and alleged perpetrators but received no response.⁵²⁸

Only six prosecutions against low-level suspects made it to trial, and critics say that the attorney general did not pursue these aggressively. Three alleged perpetrators were brought to trial in one case, accused of participating in the notorious burning of an occupied church on New Year's Day 2008 in Eldoret.⁵²⁹ After a court acquitted the three of murder, the attorney general failed to file an appeal within the required 14-day deadline. Similarly, in the case of a police officer filmed in the fatal shooting of a protestor in the Nyanza region, the attorney general did not appeal the officer's acquittal on murder charges. The police were widely suspected of tampering with key evidence in the case.⁵³⁰ The shooting had been broadcast around the country. The trial outcome and the attorney general's passivity confirmed for many Kenyans that the judicial system could not be trusted.⁵³¹

When it comes to pursuing sensitive prosecutions, the new constitution provides hope for change. The incumbent attorney general will be required to leave office in May 2011. His replacement will be named by the president, but subject to approval by the National Assembly, and will no longer be in charge of prosecution decisions.⁵³² These will fall to the ultimate authority of a director of public prosecutions, who will be appointed by the president to a non-renewable eight-year term, subject to confirmation by the National Assembly.⁵³³

Record of cooperation with the ICC

The Kenyan government has a decidedly mixed record of cooperation with the ICC. This suggests a less-than-full commitment to justice for crimes under the Rome Statute, whether pursued in The Hague or at home.

⁵²⁵ Commission of Inquiry into the Post-Election Violence, Final Report, October 16, 2008, p. 347, available at: http://www.communication.go.ke/Documents/CIPEV_FINAL_REPORT.pdf.

⁵²⁶ Interviews with civil society activists and donors.

⁵²⁷ Interviews with civil society activists.

⁵²⁸ Interview with KNCHR Commissioner Winnie Lichuma.

⁵²⁹ For information on the incident, see KNCHR report, pp. 66-67, paras. 237-244.

⁵³⁰ Interviews with representatives of civil society and the international community. For information on the shooting incident, see KNCHR report, p. 105, para. 407.

⁵³¹ Interviews with civil society representatives.

⁵³² Constitution of Kenya, article 156.

⁵³³ Constitution of Kenya, article 157.

Among positive developments, the International Crimes Act that came into effect in 2009 includes a raft of provisions that detail how the country’s cooperation obligations to the ICC should work in practice. In September 2010, the government signed the Agreement on Privileges and Immunities and entered into an exchange of letters with the ICC’s registrar to further facilitate the court’s operations in the country.⁵³⁴ However, when it comes to the arrest of ICC fugitives, the government has overtly spurned the court. President Kibaki, in a move later publicly condemned by Prime Minister Odinga, invited Sudanese President and ICC fugitive Omar al-Bashir to the promulgation ceremony for Kenya’s new constitution on August 27, 2010. In response to the visit, ICC Pre-Trial Chamber I, which is seized of the situation in Darfur, Sudan, referred Kenya’s non-cooperation to the UN Security Council and the Assembly of States Parties “in order for them to take any measure they may deem appropriate.”⁵³⁵ Bashir’s visit also sparked appeals to the government from some Western diplomatic missions. ASP President Christian Wenaweser registered a complaint with Kenya’s Foreign Minister.⁵³⁶ The government response to these appeals was a claim of competing legal obligations to the ICC and the African Union.⁵³⁷ Despite diplomatic initiatives, some in Kenyan civil society say that a lack of concrete diplomatic consequences sent mixed signals to the government and only emboldened officials to make further attempts to undermine the ICC.⁵³⁸

As the ICC-OTP investigation proceeded during 2010, there were signs of increased worry among some Kenyan politicians.⁵³⁹ Justice Minister Mutula Kilonzo created a stir in September 2010 by stating that with approval of the new constitution and its overhaul of the justice system, domestic mechanisms rendered the ICC no longer necessary.⁵⁴⁰ Even if this was not intended to undercut accountability for high-ranking perpetrators, it was broadly perceived as such.⁵⁴¹ As discussed earlier, since the ICC prosecutor’s announcement of the six suspects in December 2010, the government has overtly said that it wants to establish a domestic justice mechanism that would obviate the need for the ICC, even while some MPs are introducing legislation to rescind the International Crimes Act and withdraw Kenya from the Rome Statute.⁵⁴² Civil society organizations and much of the international community

⁵³⁴ See <http://www.icc-cpi.int/NR/exeres/64EE8950-97D6-480D-8832-257DCE8851FC.htm> and “Kenya allows Hague free run in poll probe”, Daily Nation, September 3, 2010, available at: <http://www.nation.co.ke/News/Govt%20signs%20deal%20for%20ICC%20base%20in%20Kenya/-/1056/1002892/-/item/1/-/6xice0/-/index.html>.

⁵³⁵ Pre-Trial Chamber I: Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir’s presence in the territory of the Republic of Kenya, August 27, 2010, available at: <http://www.icc-cpi.int/iccdocs/doc/doc930979.pdf>.

⁵³⁶ See <http://www.icc-cpi.int/NR/exeres/E2CA7311-DDA1-4DBB-90B2-0FA3318FD056.htm>.

⁵³⁷ “Kenya tells ICC why Bashir was not arrested”, Daily Nation, September 19, 2010, available at: <http://www.nation.co.ke/News/politics/Kenya%20tells%20ICC%20why%20Bashir%20was%20not%20arrested/-/1064/1013798/-/89tgda/-/index.html>.

⁵³⁸ Interviews, civil society representatives.

⁵³⁹ Prime Minister Odinga has refrained from criticizing the ICC. Some international officials ascribe this restraint to political calculation. They say he feels he has nothing to fear from the investigation, but sees his main rival within his own ODM party, William Ruto, as being vulnerable to prosecution. According to this theory, Odinga would be pleased if the ICC sidelined Ruto and senior figures in President Kibaki’s PNU party. Interviews with representatives of the international community. In the event, Ruto was indeed among the six individuals named by the ICC prosecutor in December 2010.

⁵⁴⁰ “Mutula to Ocampo: Quit Kenyan probe”, Daily Nation, September 18, 2010. Available at: <http://www.nation.co.ke/News/politics/Mutula%20to%20Ocampo%20Quit%20Kenyan%20probe%20/-/1064/1013680/-/b1f4rs/-/index.html>.

⁵⁴¹ Interviews with representatives of civil society and the international community.

⁵⁴² See the section on political rhetoric and legislative support.

see these latest actions as part of a pattern of bad faith by the government. In October 2010, a group of parliamentarians from President Kibaki's PNU party and Central Province stronghold claimed that the ICC has a bias against the Kikuyu people.⁵⁴³ Local civil society representatives and many in the diplomatic community viewed this combination of developments as a blatant and coordinated attempt to hinder the OTP investigation and sow doubt about the ICC's credibility before arrest warrants were sought.⁵⁴⁴ In November 2010, a report commissioned by the AU Panel of Eminent African Personalities warned that politicians were mobilizing support in their ethnic communities to defend ICC suspects. The report, which suggested that efforts to claim that potential ICC witnesses had been coached were aimed at discrediting the court, came just days after prominent ODM politician William Ruto had made precisely such claims about ostensible witnesses at the ICC who had initially spoken with the KNCHR.⁵⁴⁵

Compounding apprehensions about the bad faith of government were strong indications in October 2010 that the government was planning a second invitation to Kenya for Sudanese President Omar al-Bashir. Government representatives asked civil society organizations and at least three Western diplomatic missions in Nairobi what the likely consequences of a second visit would be.⁵⁴⁶ The professed reason for a second Bashir visit, which was to take place in November 2010, was participation in Kenyan-hosted talks between northern and southern Sudanese officials ahead of the contentious referendum on southern secession slated for January 2011. But many among civil society and foreign diplomatic missions suspected another motivation behind another possible Bashir visit: to further undermine ICC credibility just weeks before the anticipated announcement of the names of prominent Kenyans who would face summons to the ICC. In the event, resistance from the international community and civil society proved formidable. In November, President Kibaki invited Bashir to Sudan referendum talks hosted by Ethiopia, which has not ratified the Rome Statute.⁵⁴⁷

Stakeholder Policymaking

National Planning and Coordination Capacity

While enlightened political leadership may not always be abundant in Kenya, the country does have strong capacity to assess, plan, and implement reforms. This has been evident in the performance of the Waki and Ransley Commissions, discussed earlier. Similarly, a Task Force on Judicial Reforms, active from May to August 2009, produced many constructive

⁵⁴³ Central Kenya Parliamentary Group chairman Ephraim Maina told reporters, "The ICC is being used for political reasons and Kenyans should not expect any justice from it." See "PNU cries foul over Ocampo probe", Daily Nation, October 1, 2010, available at:

<http://www.nation.co.ke/News/politics/PNU%20cries%20foul%20over%20Ocampo%20probe%20/-/1064/1024432/-/pyjmiq/-/index.html>

⁵⁴⁴ Interviews with representatives of civil society and the international community.

⁵⁴⁵ "Annan team warns of meddling in ICC", Daily Nation, November 11, 2010, available at:

<http://www.nation.co.ke/News/politics/Annan%20team%20warns%20of%20meddling%20in%20ICC%20%20/-/1064/1051942/-/cois5q/-/index.html>

⁵⁴⁶ Interviews with representatives of civil society and the international community.

⁵⁴⁷ "Kibaki invites al-Bashir to Addis talks on South Sudan referendum", Daily Nation, November 13, 2010, available at: <http://www.nation.co.ke/News/africa/-/1066/1053086/-/121njm7/-/index.html>.

proposals for the overhaul of the judiciary.⁵⁴⁸ In the wake of the post-election violence, Kenya also adopted legislation on a constitutional review process. It was Kenyan experts in government, helped and prodded by Kenyan civil society, who led the drafting process that resulted in adoption of the new constitution in August 2010. The Ministry of Justice, National Cohesion and Constitutional Affairs (MOJNCCA) is taking the lead in implementing the new constitution. Many of those interviewed for this report expressed doubts about Kenyan government will to follow through on reforms, but none doubted the country's capacity to do so.

The country is also more self-sufficient than most states in the region, relying on donors for approximately five percent of its national budget.⁵⁴⁹ As a percentage of the Kenyan national budget, the justice sector accounts for 1.1 percent of spending in fiscal year 2010-2011.⁵⁵⁰

Integration of Complementarity into Rule-of-Law Programming

Following the post-election violence, donors recognized a need to support Kenyan capacity in international criminal law. This was made more difficult because international criminal law was not among the priorities previously identified for the civil society basket fund. The EU showed particular interest and encouraged the UNDP to mainstream aspects of complementarity. But a lack of familiarity with complementarity issues among officials of the international community on the ground has made even this more difficult.⁵⁵¹

Governments, donors, and civil society organizations are training their attention on implementation of the new constitution. This saps limited NGO resources and limited international leverage from efforts to ensure domestic criminal accountability for the post-election violence, but is also critical to hopes for eventual genuine domestic investigations, prosecutions, and fair trials. The period of transition may also open targets of opportunity to include complementarity elements in the reconstituted justice sector. One Western embassy official said: "Donors are open to supporting complementarity, but in ways that can't be manipulated."

Coordination

Coordination between the government and donors

Following the 2002 elections, the Kibaki government and donors formed a Governance, Justice, Law and Order Sector (GJLOS) coordination mechanism. Donors contributed to a

⁵⁴⁸ International Bar Association Human Rights Institute and the International Legal Assistance Consortium, Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya, February 2010, p. 54, available at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DCD20276-7C7C-4321-92A1-DD43531F93A1>.

⁵⁴⁹ Presentation to UNCTAD by Governor of the Central Bank of Kenya Njuguna Ndung'u, "Kenya's Development Paradigm and Cooperation with Emerging Economies", September 17, 2010, slide 11, available at: <http://www.centralbank.go.ke/downloads/Presentations/UNCTAD-%20SEPT%202010%20-final%203.ppt>.

⁵⁵⁰ The justice sector budget does not include police. It is limited to MOJNCCA, the State Law Office, the Judicial Service Commission and the Kenya Anti-Corruption Commission. The 2010/2011 budget is 10.617 billion shillings out of an overall national budget of 998.8 billion shillings. Information provided by MOJNCCA.

⁵⁵¹ Interview with a civil society representative.

basket fund for the sector, which they jointly managed with the government. Civil society organizations were partners in GJLOS at the outset, but once evidence of corruption in the new government surfaced, civil society pulled out.⁵⁵²

Civil society representatives regard the GJLOS, in the words of one, as having been “a total flop.” According to one former government official who participated in GJLOS, the government identified areas of priority and then donors were asked for assistance. As a coordination mechanism it proved unwieldy; there were 42 different agencies and donors represented in the group.⁵⁵³ The difficulties of coordination existed despite the development of several GJLOS sub-structures. These included an Inter-Agency Steering Committee, a Technical Coordination Committee, and Thematic Groups.

In practice, GJLOS placed little focus on institutional reform. Rather, the government prioritized procurement of such items as desks, chairs, buses for prisoner transport, and prison uniforms. Perversely, GJLOS may have contributed to the post-election violence. In the lead-up to the 2007 elections, police identified riot gear and non-lethal weapons as priorities. These items received donor support and may have been used in the commission of crimes by police during the melees.⁵⁵⁴

An independent evaluation of the GJLOS program did note some successes.⁵⁵⁵ These included fostering change in some participating institutions; implementing service charters and public complaint mechanisms among some ministries, departments, and agencies; and raising citizen expectations in the institutions of governance, justice, and law and order. However, the report also noted that over time, government agencies’ participation in some GJLOS committees and thematic groups decreased, in part due to changes in the political environment.

The GJLOS mechanism ground to a halt with the withdrawal of donor support in the aftermath of the post-election violence. Indeed, across the board, donors vastly scaled back budget support for Kenya.⁵⁵⁶

For the period from February 2010 through June 2011, the government has designed a Bridging and Coordination Mechanism (BCM) as a slightly modified GJLOS program that draws lessons from the post-election violence.⁵⁵⁷ It is intended as a transitional arrangement until the “next phase of the GJLOS reform program” set to commence from July 2011. Implementing agencies, a program coordination office, thematic groups, a high-level technical committee and an inter-agency policy committee comprise the BCM. According to

⁵⁵² Interview with Muthoni Wanyeki, KHRC.

⁵⁵³ Interview with a representative of the international community.

⁵⁵⁴ Interview with a former participant in GJLOS.

⁵⁵⁵ Deloitte: Governance, Justice, Law and Order Sector Reform Programme: An independent Evaluation of the Current Programme Phase and Design Proposals for the Next Programme Phase, December 2009. A copy of the report was received from a representative of civil society.

⁵⁵⁶ A Sector-Wide Approach (SWAP) for education was undertaken again after the post-election violence, but was suspended in 2009 over indications of large-scale corruption. An audit of the funding is forthcoming. Currently Kenya receives direct budget support only from the World Bank and IMF, which base their decisions on technical criteria rather than outcomes. Interview with a representative of the international community.

⁵⁵⁷ All information in this paragraph is based on written information provided by MOJNCCA in response to queries.

the plan, the latter three elements include participation by donors, the private sector, and civil society representatives.

Civil society organizations and donors remain wary of repeating the experience with GJLOS. Some donors express skepticism that the BCM has taken true account of what went wrong with GJLOS. In the wake of multiple prominent corruption scandals and the post-election violence, almost all donor support for government capacity building in the sector is on a per-project basis.⁵⁵⁸ Until they are persuaded that the government is committed to the reform path, the European Union and other donors are withholding much of their support for the justice sector.⁵⁵⁹ There is a willingness to support implementation of the new constitution, but no large new programs for the judiciary.⁵⁶⁰ The successor mechanism to GJLOS and the BCM may need to be reconceptualized with a broader role for civil society unless the government takes bold interim steps to re-earn the trust it has so thoroughly squandered with Kenyan citizens and the international community.

Coordination among donors

Donor coordination varies by sector and is comparatively high in the justice sector.⁵⁶¹ The most active donors in the sector include Finland, the Netherlands, Norway, and the UK. Donors also coordinate among themselves in applying political pressure for reforms. Key forums for this coordination are the group of EU member states; a Like-Minded Group, which includes EU members, the United States and Canada; and two sub-sets of a governance coordination group that includes civil society: the justice group and human rights group. The justice group, also attended by representatives of the MOJNCCA, meets every month.⁵⁶²

Kenyan civil society receives much of its assistance from donors who contribute to a basket fund administered by the UNDP. Donors set priorities for the fund and the UNDP sends out calls for proposals, handles reporting, and deals with other administrative matters. This arrangement simplifies aid administration for donors, but because of the need for consensus and long lead times, can also reduce creativity and flexibility.⁵⁶³ Complementarity is not a current priority for the fund.

Complementarity Strategy

Now that the prosecutor has publicly submitted two applications for summonses to appear for six persons, the question of complementarity – which many Kenyan justice advocates had deferred so as not to undercut the ICC – is back on the public agenda. As discussed earlier, to the extent that it has been placed on the agenda by politicians whose object is impunity rather than justice, this is a troubling development.

⁵⁵⁸ Interviews with donor representatives.

⁵⁵⁹ Interviews with donor representatives.

⁵⁶⁰ Interview with a representative of the international community.

⁵⁶¹ Interviews with donor representatives.

⁵⁶² Interview with a representative of the international community.

⁵⁶³ Interview with civil society representative.

There are two options to pursue domestic trials for crimes under the Rome Statute. One would be to bring cases within the framework of the normal judicial system, now that it is being reformed in line with the new constitution. The other option could require amending the new constitution and passing the bill to establish the temporary Special Tribunal, as recommended by the Waki Commission.

The Permanent Secretary of the Ministry of Justice, National Cohesion and Constitutional Affairs (MOJNCCA) argues that with the new constitution and overhaul of the justice sector, there is no reason why cases related to the post-election violence shouldn't be pursued through the normal justice system.⁵⁶⁴ As discussed above, there are differing views on whether the International Crimes Act could be applied retroactively to events in 2007-2008 or could only be applied from January 2009 onwards. In any case, if they cannot be prosecuted as international crimes, crimes related to the post-election violence could be prosecuted as offenses under the Kenyan criminal code.⁵⁶⁵

In the aftermath of the post-election violence, many civil society organizations opposed the pursuit of trials for related international crimes through a special division of the High Court out of distrust for the chief justice and attorney general.⁵⁶⁶ Even if the new constitution and the implementation of required judicial reforms successfully inure the judiciary to political influence, bias and corruption, it may take time for the new system to gain the trust of a skeptical Kenyan public. Donors and representatives of Kenyan civil society agree that real and perceived independence of the judiciary will depend greatly on which current judges make it through the vetting process, and who is appointed to the key positions of director of public prosecutions, attorney general and chief justice. The make-up of the Judicial Service Commission will also reflect the level of government commitment to reform.

The constitution allows for the appointment of foreign judges, so long as these have law degrees and the necessary experience from common law countries.⁵⁶⁷ The temporary appointment of reputable foreign officials to key positions could be one way to quickly boost public confidence in domestic trials for international crimes before a special division of the High Court.

Despite some obvious advantages, creating a Special Tribunal could be a considerably more difficult option. Opinions are divided over whether it would require not just passage of a bill in parliament, but also constitutional amendments to place it formally in the structure of the judiciary and to allow retroactive application of the International Crimes Act.⁵⁶⁸ The hurdle to amendment of Kenya's new constitution is higher than that in the constitution it replaced. Amendment through the parliament would require a two-thirds majority in both houses in the second and third readings of the relevant bill.⁵⁶⁹

⁵⁶⁴ Interview with Ambassador Amina Mohamed.

⁵⁶⁵ Thus, for example, killings could still be charged as murder, but a pattern of killings could not be charged as murder as a crime against humanity.

⁵⁶⁶ Interview with Muthoni Wanyeki, KHRC.

⁵⁶⁷ Constitution of the Republic of Kenya, article 166.

⁵⁶⁸ Interviews with civil society and international community representatives.

⁵⁶⁹ Interview with Stella Ndirangu, International Commission of Jurists. For amendment requirements, see the Constitution of Kenya, articles 255-257.

Even those saying that a simple act of parliament would suffice to create the Tribunal fear that without constitutional anchoring, a threat of executive interference would remain. One potential pitfall would arise if there is no constitutional amendment granting the Special Tribunal exclusive jurisdiction over international crimes. In this scenario, it could be possible for an unscrupulous director of public prosecutions to orchestrate prosecutions and acquittals before the High Court in order to scuttle potential Special Tribunal cases on grounds of double jeopardy.⁵⁷⁰

For their part, donors view the realization of complementarity in Kenya as primarily being a matter of political will. For now, the diplomatic community is, on the whole, deeply skeptical that the government will close the impunity gap for crimes related to the post-election violence.⁵⁷¹

Options for Realizing Complementarity in Kenya

Perhaps more than in any other ICC situation country, majority public opinion in Kenya stands clearly behind efforts to hold perpetrators of serious crimes accountable. Surveys specifically of victims also point to strong support for criminal prosecution of perpetrators.⁵⁷² With scant trust in the domestic judiciary, most Kenyans are eager to let the ICC deal with the top perpetrators. Now that the ICC has named six individuals, there is an opening to resume efforts for domestic justice too.

Immediate Needs and Opportunities

On the eve of the ICC prosecutor's announcement, a sense of panic prevailed among some senior Kenyan officials. Now that the names have been published, any victim of the post-election violence, and especially those with knowledge of its organization, could be perceived to be a witness. As of October 2010, the risk facing a number of victims and witnesses was acute, and speculation varied on whether this would continue or abate following the ICC prosecutor's naming of the six suspects.⁵⁷³ Civil society and the international community are at a loss as to how victim and witness protection needs can best be met until the promising new government witness protection agency has firmly established itself. Shortly before announcement of the prosecutor's application for summonses, the Dutch ambassador to Kenya expressed concern that there had been "no significant action" taken to operationalize the new witness protection agency.⁵⁷⁴ There is high donor interest in finding an interim solution, but no desire to support creation of a large bureaucracy to bridge what is hoped to be only a temporary capacity gap. An interim solution that would improve on the current ad

⁵⁷⁰ Interview with Njonjo Mue, ICTJ.

⁵⁷¹ Interviews with representatives of the international community.

⁵⁷² For example, see Backer, David, et. al: Addressing the Post Election Violence: Micro-Level Perspectives on Transitional Justice in Kenya, Oxford Transitional Justice Research Working Paper Series, June 16, 2010.

⁵⁷³ Arrests could remove powerful individuals behind the threats, and those involved in the violence who are not charged at the ICC may ease threats to potential witnesses as their own fear eases. On the other hand, if the suspects who have been summoned do not appear in The Hague and potential warrants for their arrest are not enforced, or if warrants create momentum for complementary domestic trials, threats to victims and witnesses could persist or even expand. Interviews with representatives of civil society and the international community.

⁵⁷⁴ "EU issues warning over ICC Kenya process", Daily Nation, December 7, 2010, available at: <http://www.nation.co.ke/News/politics/EU%20issues%20warning%20over%20ICC%20Kenya%20process/-/1064/1067782/-/1394avbz/-/index.html>.

hoc arrangements while not requiring extensive overhead costs would likely gain generous donor backing.⁵⁷⁵ An urgent meeting of key stakeholders could be convened to identify an alternative interim mechanism that addresses protection gaps without creating a heavy footprint. Participants could include donors, victims' organizations, the KNCHR, Kenyan NGOs involved in protection, independent experts, and relevant ICC offices (the Victim and Witness Unit, the Victim's Participation and Reparations Section, the Office of Public Counsel for Victims, the Office of Public Counsel for Defense, and the Office of the Prosecutor).⁵⁷⁶ A range of options could be explored, including potential use of International Criminal Tribunal for Rwanda (ICTR) personnel and facilities in nearby Arusha, Tanzania.

Beyond witness and victim protection, there is no more urgent complementarity need than pending appointments to key justice-sector positions under the new constitution. Most important of these for any future sensitive prosecutions, including of crimes related to the post-election violence, is the director of public prosecutions. Appointments for attorney general, chief justice, the Commission on Implementation of the Constitution, and the new Judicial Service Commission will also be critical.⁵⁷⁷ Representatives of civil society and the international community are concerned that the ruling parties could simply divide up the key nominations with an eye to political loyalty rather than substantive or reform qualifications, and there are indications that this could already be happening.⁵⁷⁸ By the same token, it is not clear that the fractious parliament would be willing to rubber-stamp such a deal, and after passage of the new constitution MPs may feel more emboldened to insist on fully exercising their proper role.⁵⁷⁹

Opinions vary on how assertive the international community should be in this area. Some advise that donor countries should set out criteria and expectations for these offices, making clear that successful candidates should have not only a strong legal background, but also a track record of independence and courage, while also stressing that the appointment of cronies would have strong negative consequences.⁵⁸⁰ Civil society could provide helpful

⁵⁷⁵ Interviews with representatives of the international community.

⁵⁷⁶ The director of Kenya's Witness Protection Agency, once appointed, would be another possible participant, but government involvement would be a sensitive matter because many vulnerable victims and witnesses are, or perceive themselves to be, under threat from government agents.

⁵⁷⁷ The Judicial Service Commission will consist of the chief justice, one judge each of the Supreme, Appeals and High Courts, the attorney general, two experienced attorneys (one woman and one man) selected by the Law Society of Kenya, one person named by a separate Public Service Commission, and two non-lawyer representatives of the general public (one man and one woman) to be named by the president, subject to approval by the National Assembly. Constitution of Kenya, article 171. Some transitional provisions apply to the selection and membership of the first iteration of the JSC. If the JSC is not established before key nominees are named, candidate lists will simply be drawn up by the executive. See Constitution of Kenya, Sixth Schedule, article 20.

⁵⁷⁸ Interviews with representatives of civil society and the international community. See also: "Is this man Kenya's next Chief Justice?" Daily Nation, October 16, 2010, available at:

<http://www.nation.co.ke/News/politics/Is%20this%20man%20Kenyas%20next%20Chief%20Justice-/1064/1034256/-r4o4fd/-index.html>.

⁵⁷⁹ Interviews with representatives of the international community. The Centre for Multiparty Democracy (CMD-Kenya), created by Kenyan political parties, has funding to build the capacity of MPs on oversight issues and the vetting of nominees. Interview with a representative of the international community. For more on CMD-Kenya, see: <http://www.cmd-kenya.org/>.

⁵⁸⁰ Interviews with civil society representatives.

guidance.⁵⁸¹ In contrast, a top official at the Justice Ministry argues that this type of intervention by outsiders would undermine the system of checks and balances in the new constitution.⁵⁸² Indeed, some foreign diplomats see potential for a backlash if they take an assertive stance, but also note that crass cronyism would – and should - likely provoke an international response of some kind.⁵⁸³

Regardless of where different international actors draw the line on attempting to influence the nomination process, there are steps the international community can take that are well within bounds and would improve the odds of good-faith nominations. Under the new constitution, many of these nominations are subject to confirmation by the National Assembly. Donors could support programs to inform parliamentarians about how confirmation processes work in other countries, and build the independent research capacity of parliamentary offices involved in the vetting of appointees. Critically, donors could also support civil society research and advocacy around the appointments to ensure that all nominees are subjected to rigorous public scrutiny. There is agreement from at least some within government that civil society has an appropriate watchdog role to play.⁵⁸⁴

On November 15, 2010, the government and donors met in a high-level Development Partner Forum to discuss potential donor support for implementation of the new constitution and judicial reform. The meeting came shortly after a parliamentary committee stated that implementation of the constitution will cost 3.6 billion shillings – funds the government has not yet allocated.⁵⁸⁵ As the government seeks support to fill this need, donors will have opportunities to encourage the integration of complementarity into the reform process. For example, donors could offer to support training for judges on international criminal law if a test on this topic could be integrated into the judicial vetting procedures that are still being defined.⁵⁸⁶

So long as a lack of domestic trust in the judicial system and political leadership prevails, donor support to civil society will be especially important. Donors should assist civil society organizations in the affected parts of Kenya, especially victims' organizations, so that they can more effectively make their voices heard by the government. At present, most international assistance for civil society related to transitional justice is channeled through the local branches of such established organizations as the International Commission of Jurists and the International Center for Transitional Justice. Addressing misperceptions about the ICC and complementarity at a grassroots level could be the most effective method of ensuring that harmful and at times willful misperceptions at the levels of government and the African Union don't find popular resonance. In the short term, donors could reallocate to local organizations some of the funds they have held in reserve for justice sector

⁵⁸¹ The International Commission of Jurists and Law Society of Kenya have drawn up a list of people who should be disqualified from appointment as chief justice. Interview with a representative of the international community.

⁵⁸² Interview with Ambassador Amina Mohamed, Permanent Secretary of the Ministry of Justice, National Cohesion and Constitutional Affairs.

⁵⁸³ Interviews with representatives of the international community.

⁵⁸⁴ Interview with Ambassador Amina Mohamed, Permanent Secretary of the Ministry of Justice, National Cohesion and Constitutional Affairs.

⁵⁸⁵ "Taxpayers face new Sh4bn bill for constitution", Daily Nation, October 18, 2010, available at:

<http://www.nation.co.ke/News/Taxpayers%20face%20new%20Sh4bn%20bill%20for%20constitution-/1056/1035580/-/q5mxi9/-/index.html>.

⁵⁸⁶ Interview with Muthoni Wanyeki, KHRC.

development, augmenting assistance for useful programs already run by international NGOs.⁵⁸⁷

For their part, justice-focused civil society organizations could quietly prepare for different contingencies. Which option for domestic prosecutions will they favor if the reform process makes real progress in establishing prosecutorial and judicial independence? What should their advocacy plan be if reforms stall? In the meantime, how should they react to the prosecutor's request for ICC summonses in order to build momentum for genuinely complementary judicial proceedings at the local level while making clear that the overall purpose of complementarity must be more accountability, not less? One representative of the international community noted in October 2010 that it was unclear who would take the lead on complementarity once the ICC prosecutor made his announcement. Somewhat surprisingly, the government has seized that role, although as discussed earlier, its motives are suspect. The needs of genuine justice at the ICC and in Kenya would best be served now through a more assertive civil society sector.

Until – and even after - the government establishes a consistent track record of seriousness with regard to reform, civil society organizations should be given a full seat at the table with the government and donors when it comes to planning implementation of complementarity (and indeed, any justice sector planning).

Especially in the aftermath of the ICC prosecutor's announcement in December, there is a great need for outreach to Kenyans about the Rome Statute as a whole, including complementarity. This would counteract perceptions that justice for the post-election violence is an either/or proposition. The ICC alone cannot fulfill the need for education on the Rome Statute. Its outreach efforts to date have been criticized by representatives of local civil society as inadequate. Donors should also increase support to Kenyan civil society to engage in outreach on the Rome Statute. Donors who support civil society through the UNDP-administered basket fund could take a major step in this direction by agreeing on complementarity as a priority for the fund.⁵⁸⁸

Training Kenyan attorneys in international criminal law is another area in need of immediate attention. If political commitment to justice for the post-election violence is forthcoming, then investigations, prosecutions and even trials could be launched in the course of 2011-12.⁵⁸⁹ It will take time to build up a cadre of judges, investigators, prosecutors, and defense counsel with strong knowledge of international criminal law. Donors could support inclusion of the field into trainings for new prosecutors in the State Law Office, and work with the Law Society of Kenya to develop a training program for defense counsel. Trainings could then also be made available to judges who are successfully vetted in line with the new constitution. To be most effective, trainings should not just be academic, but model real-world situations.⁵⁹⁰ To support sustainable capacity in international criminal law, the international community could facilitate contacts between Kenya's law schools and western law schools active in the field with a view to fostering exchanges, visiting professorships and other forms of capacity-building support.

⁵⁸⁷ Interview with a civil society representative.

⁵⁸⁸ Interview with a representative of civil society.

⁵⁸⁹ Some stress the importance of launching the domestic process before the 2012 elections in order to deter another round of violence. Interview with Muthoni Wanyeki, KHRC.

⁵⁹⁰ Interview with Muthoni Wanyeki, KHRC.

Pressure and Support

Addressing these immediate needs would create improved conditions for domestic trials for crimes under the Rome Statute, but would not alone constitute a plan to realize complementarity. Few expect the government to make the most of justice reform or push in meaningful ways to close the impunity gap for the post-election violence.⁵⁹¹ If skeptics are right, then a more comprehensive approach to complementarity in Kenya will necessarily entail continued use of public and international pressure.

Beyond the most important question of government's good faith, there are other wildcards for complementarity in Kenya. To what extent can reforms put a dent in endemic judicial corruption? If genuine reforms are successfully implemented, how long will it take for Kenyans to develop trust in the system? What will be the political fallout from the ICC summonses to appear? Can civil society organize effectively to press for justice? And will the international community prioritize accountability in its dealings with Kenya? Depending on the answers to these and other questions, resistance to accountability could ease or intensify. Kenya's leaders could embrace a future of justice for the worst crimes or seek to drown the effort in a morass of cronyism, procedural foot-dragging and ethnic demagoguery.

Indeed, to block an investigation of crimes allegedly orchestrated through calls to tribal grievance, those responsible and their allies might seek to resort to this very same manipulation. The push for accountability could be undermined if it takes on an ethnic dimension, or is unfairly smeared as ethnically biased.⁵⁹² This danger suggests benefits from vocal, strong engagement of outside actors that can assist Kenyan civil society in shepherding the process forward. Kenyans have more faith in their civil society and the international community than they do in their own government.

Indeed, even as passage of the new constitution provides hope, there remains a strong sense in Kenyan civil society that donors must be assertive in dealing with a government seen as corrupt and uncaring.⁵⁹³ Some credit international pressure for what small victories there have been in the fight against government corruption and the smooth running of the constitutional referendum. Specifically, civil society members cited U.S. visa bans for government officials, including Attorney General Amos Wako, as a very effective form of targeted leverage that should be contemplated again in ensuring that mid and low-level perpetrators of international crimes face a credible mechanism of criminal justice.⁵⁹⁴ Opinions varied on just how hard the international community should push, with some warning that the government is developing a siege mentality, especially in the run-up to 2012 elections.

⁵⁹¹ A countervailing possibility is that if senior officials are removed on the basis of ICC arrest warrants, parliamentarians will have a freer hand to move forward with the adoption of a bill to create a Special Tribunal. Interview with Muthoni Wanyeki, KHRC.

⁵⁹² Interviews with civil society representatives. See above for discussion of indications that this tactic is being used in an effort to undermine the ICC.

⁵⁹³ Multiple interviews with representatives of civil society and the international community.

⁵⁹⁴ Some civil society representatives felt that visa bans would be more effective if the EU also participated, but with its mix of Schengen and non-Schengen states, the EU lacks authority to impose visa bans as a means of political coercion. The body has more leeway in cooperation on the freezing of assets. Interview with representatives of the EU Delegation.

As donors seek to build the capacity of Kenyan judicial institutions, there could be advantage in prioritizing projects based on institutional leadership as well as need. For example, following the post-election violence, UNODC developed a relationship with the head of witness protection in the State Law Office, a post created by the Witness Protection Act of 2006.⁵⁹⁵ This official was eager to collaborate on strengthening and reforming the institution, and worked together with an international expert provided by UNODC to draft amendments to the Act. Those amendments were approved by parliament and the president in 2010. Identifying and nurturing reformers within other elements of the justice system could help to move these forward too.

Similarly, donors might also give higher priority to supporting elements of the justice sector that have been successfully reformed on paper but still lack capacity to carry out their functions. Here again, the Witness Protection Agency is one such institution. The incentive of donor support for successfully reformed institutions could empower reformers in other areas where reform has been more of a struggle.

The post-election violence served as a wake-up call to bilateral donors, who were forced to acknowledge the extent of rapacious corruption in President Kibaki's NARC government. These donors ended their direct budget support in 2008. Amidst ongoing corruption scandals in the current PNU-ODM coalition government, there is little appetite for resuming direct budget support. (International financial institutions have taken a different approach.⁵⁹⁶) Capacity-building for unreformed elements of the judicial sector could be withheld until the government follows through on necessary reforms that would enable genuine investigations and prosecutions and fair domestic trials. Leverage of this kind is surely limited because Kenya is largely self-sufficient. However, withholding aid would be embarrassing to a government that is conscious of its international reputation and at least to some degree, voter opinion.

In addition to deciding which capacity-building projects should be funded, some in civil society believe that there should be more emphasis on accountability within supported programs.⁵⁹⁷ Rather than just establishing technical benchmarks for programs in the justice sector, there should also be benchmarks for service delivery, feedback, and the functioning of internal and external accountability mechanisms for dealing with complaints. For example, a program to build the capacity of prosecutors would be measured not just by simple indicators such as the number of prosecutions launched, but also by conviction rates, the number of complaints about misconduct or corruption, and whether internal and external accountability mechanisms exist and are actually investigating and punishing instances of prosecutorial malfeasance.⁵⁹⁸ Under this system, if performance against this broader set of benchmarks is poor, donors would withhold their funds.

⁵⁹⁵ Interviews with civil society and donor representatives.

⁵⁹⁶ The World Bank and International Monetary Fund focus on narrow economic criteria rather than the bigger picture. Both continue to provide direct budget support, shrugging off indications that top government officials have continued large-scale looting of Kenya's national budget. Interviews with representatives of the international community. In October 2010, Kenya's Controller and Auditor General issued a damning report on recent corruption scandals, see: "Revealed: Fraud and waste of tax billions", Daily Nation, October 11, 2010, available at: <http://www.nation.co.ke/News/-/1056/1030996/-/11j6d9bz/-/index.html>.

⁵⁹⁷ Interview with Muthoni Wanyeki, KHRC.

⁵⁹⁸ Counter-intuitively, an increase in the number of complaints about a segment of the justice system could offer an early sign of improvement; it could mean that citizens have gained confidence in the ability and

If All Else Fails

If other avenues for domestic investigation are not forthcoming, the KNCHR could harness the state's investigative authorities to launch a detailed criminal investigation. Established in 2002 by an act of parliament, the KNCHR has investigative powers.⁵⁹⁹ Donors have a high level of trust in the institution and provide it with core and project funding.⁶⁰⁰ As already noted, the organization launched a first investigation of the post-election violence that heavily influenced the Waki Commission's report. Donors could provide international experts and focused trainings for the investigators working with the Commission, as well as direct investigative assistance. Investigations would likely take many months and over this time, implementation of judicial reforms under the new constitution could be further advanced. Case files compiled by investigators operating under KNCHR oversight could be handed over to the Director of Public Prosecutions. General findings could be made public in some manner, which could create political momentum for domestic prosecutions, whether before a special panel of the High Court or a Special Tribunal.⁶⁰¹

There would be significant hurdles to placing the KNCHR in charge of a criminal investigation of the post-election violence.⁶⁰² The Commission has human rights investigators, not criminal investigators. It has had organizational problems described by some as rising to the level of "dysfunction", and in line with the new constitution, will be entering a transitional period of merger with the Equality and Gender Commission. The KNCHR has also in the last year experienced leadership challenges with a majority of its commissioners demanding that the Chair step down from that position. Pursuing investigations through the KNCHR would require a large infusion of international assistance.⁶⁰³ Even with such support, the Commission could also face political challenges and legal hurdles.⁶⁰⁴

If political hurdles to domestic prosecution were to become severe, one option could be the establishment of a hybrid court based in Arusha, Tanzania – just a four-hour drive from Nairobi – that could perhaps use ICTR facilities.⁶⁰⁵ However, this option would be less efficient in building Kenya's domestic capacity, render justice more remote to the victims, and come at significantly higher cost. Despite these shortcomings, if political leaders frustrate their citizens' desire for credible domestic justice for the post-election violence, this option could offer a final hope.

willingness of the system to achieve accountability. Interview with a representative of the international community.

⁵⁹⁹ In conducting investigations, the KNCHR can task any pubic servant or government investigation agency and issue subpoenas. See The Kenya National Commission on Human Rights Act, section 20, available at: http://www.knchr.org/dmdocuments/knchr_Act.pdf.

⁶⁰⁰ Interviews with representatives of the international community.

⁶⁰¹ The core idea comes from a local civil society representative (not at the KNCHR).

⁶⁰² Interviews with representatives of civil society and the international community.

⁶⁰³ Interview with a representative of the international community.

⁶⁰⁴ In the past, the outgoing attorney general has challenged KNCHR attempts to exercise quasi-judicial functions through the High Court. Interview with Apollo Mboya, Law Society of Kenya.

⁶⁰⁵ Interview with a civil society representative.

Conclusion: Lessons Learned

Attempting to draw broad lessons for complementarity policymaking from the experiences of the DRC, Uganda, and Kenya is inherently difficult. Surface similarities are obvious: each is an African state and an ICC situation country. But prospects for genuine international criminal justice proceedings in each are more precisely characterized by a unique combination of variables. These include the scale and nature of the conflicts they have experienced; the security situation; the capacity of government, the legal profession, and the judiciary; the strength of civil society; popular attitudes towards international criminal justice and other transitional justice mechanisms; cultural attitudes on gender-related crimes; and the levels of commitment to complementarity by the each government and international community. Thus in formulating what common lessons can be derived, the first is surely that complementarity support must be highly tailored to each individual country.

Certainly there are some types of assistance that could be broadly applied in different contexts. The content of trainings in such diverse topics as international criminal law, gender crimes, and forensics, for example, will largely be the same, even if these should still be adjusted in format and scope to take account of local circumstances and existing levels of knowledge among the trainees. And in seeking to improve general knowledge of international criminal law among legal professionals, the same basic approach could be pursued—encouraging those with expertise and experience to share it with those who can learn from it. Countries attempting to realize complementarity could be supported to share their strengths and experiences with each other, either bilaterally or through regional centers of excellence. Similarly, foreign schools with strength in the field of international criminal law could be encouraged to engage with law faculties in post-conflict countries to develop academic exchanges, courses, and seminars.

Most common lessons emerging from an analysis of the three countries are broader in nature. They tend to be structural, procedural, and political.

Good policy coordination in each country is important for planning complementarity, and indeed all justice sector development. Despite some shortcomings, the JLOS in Uganda offers a good model for bringing relevant government agencies together to articulate needs, coordinate policy, and plan the future development of the sector. Crucially, it also provides a locus for the coordination of justice sector assistance with the adjunct Development Partners Group (DPG). For its part, the DPG offers a venue for true policy coordination among most key donors in-country. The DRC and Kenya have attempted to replicate JLOS in the CMJ and GJLOS, respectively. But as discussed in detail earlier in this report, flaws in each of these models have made them of limited value in ensuring good policy coordination at the national level, among donors, or between both governments and the donor community. It is not enough to have a coordination mechanism. The details of its organization matter.

Effective assistance in support of complementarity also depends on strategy. Again, in Uganda the strategy is clear—alleged perpetrators are to be brought before the War Crimes Chamber. The international community can assist in providing necessary trainings to officials dedicated to the task, and to ensuring that equipment and infrastructure needs are met. By contrast, in Kenya it is not clear whether allegations related to the post-election violence will be heard by a special division of the High Court or a Special Tribunal, or

whether political obstacles to domestic justice can be overcome at all. In the DRC, the lack of strategy is even worse. Parliament’s failure so far to pass Rome Statute implementing legislation has deprived the country of a framework for future domestic proceedings and left in place a patchwork system in which some atrocity crimes are prosecuted in some military courts around the country. While donors have undertaken scattered efforts to strengthen this interim arrangement, their efforts would be more effective if they could focus on the needs of a particular, dedicated civilian court that would try crimes under the Rome Statute.

Another observation that can be derived from looking at the three countries is that efforts to support genuine and fair proceedings for international crimes cannot afford to ignore political context. There are political obstacles to complementarity in each country, but these vary in type and magnitude. International leverage also varies by country, from the DRC, which is very reliant on the international community, to Kenya, which relies less on donor support. Donors must be able to adapt their assistance to meet political realities. For example, if executive interference in judicial proceedings becomes a problem in Uganda, or if the government remains adamant that UPDF actions are beyond the scrutiny of the WCD, donors may need to scale back support for the process, or shift their support to areas such as outreach and the strengthening of civil society. Likewise, in Kenya donors may wish to refrain from direct support for complementarity capacity building until the government agrees on a credible domestic justice mechanism for dealing with the post-election violence. Where the government is clearly not representing popular sentiment with regard to complementarity, donors can seek interim coordination arrangements, in which civil society is afforded a greater role in planning and determining priorities.

And finally, how the international community organizes itself to support those countries seeking to establish a credible domestic justice mechanism to handle crimes under the Rome Statute remains an open question. Clearly, while the ICC has the authority to make determinations about judicial complementarity, the court is in no position to lead in the coordination of complementarity efforts. States parties to the Rome Statute have also made clear to the court that they do not wish it to seek this role. At the Review Conference, the Assembly of States Parties tasked its own secretariat with facilitating complementarity-related contacts among various stakeholders, but only so long as this was “within existing resources.”⁶⁰⁶ While states seem reluctant to invest in coordination of complementarity policy at the international level, they are simultaneously making investments in complementarity in numerous countries around the world. Without the benefit of a clear international focal point for sharing information on complementarity expertise, resources, and best practices, a significant portion of the current investment in complementarity may be inefficiently designed and resources misallocated. Collectively, states may find it more efficient to support a small New York or Hague-based office that could provide individual governments and field-based donors with crucial information and analysis in support of their efforts. Doing so could significantly invigorate the domestic justice processes at the heart of the Rome Statute system.

As these lessons indicate, the process for realizing complementarity in DRC, Uganda, and Kenya is not likely to be simple or linear. Nor can the process be generic; each country requires its own approach. However, if the lessons and recommendations distilled in this

⁶⁰⁶ Resolution RC/Res.1, Complementarity, June 14, 2010, para 9, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf.

report are followed, complementarity can in fact be achieved, and the reach of justice expanded.

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www.justiceinitiative.org

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www.osisa.org