Beyond the Hague: The Challenges of International Justice

By Richard Dicker and Elise Keppler

During the 1990s, the international community took unprecedented steps to limit the impunity all too often associated with mass slaughter, forced dislocation of ethnic groups, torture, and rape as a weapon of war. Along with two genocides and many other widespread crimes, the decade was marked by the creation of international criminal justice mechanisms and the application of universal jurisdiction to hold perpetrators of the most serious crimes to account. Due to inherent difficulties in rendering justice for these crimes, there have been failings, but the new approaches have nonetheless made great strides.

In the last few years, opposition to this nascent “system” of international justice has intensified and today the landscape is less hospitable to the types of advances that took place in the 1990s. In this context, those supporting efforts to hold the world’s worst abusers to account need to take a hard look at recent experiences to chart the path forward. The victims who suffer these crimes, their families, and the people in whose names such crimes are committed deserve nothing less. In so doing, it is necessary to emphasize that although international justice mechanisms provide imperfect remedies, they are a vitally necessary alternative to impunity. This essay proposes a perspective of the road ahead in light of both the successes of the recent past and current obstacles to further progress.
A Developing System of International Justice

Soon after the end of the Cold War, with the horrors in the former Yugoslavia and Rwanda and the stark failures of national court systems freshly in mind, the United Nations, a number of governments, and many citizens groups and international nongovernmental organizations (NGOs) worked to create international criminal courts. The Security Council created two ad-hoc international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, to try alleged perpetrators of genocide, war crimes, crimes against humanity, and other serious violations of international humanitarian law in those particular conflicts.

Affirming the viability of international criminal mechanisms after a fifty-year hiatus, the tribunals held perpetrators of crimes in the former Yugoslavia and Rwanda accountable. Suspects were arrested and tried before these tribunals regardless of their official status, leading to the first indictment of a sitting head of state, namely Slobodan Milosevic by the ICTY, as well as the indictment of the former Prime Minister of Rwanda, Jean Kambanda, by the ICTR. The Rwandan and Yugoslav tribunals revitalized an international criminal jurisprudence that had not developed since the Nuremberg and Tokyo trials.

In response to shortcomings in their performance, described in more detail below, the ICTY and ICTR improved their practice over time. By 2002, between four and six trials were taking place each day in the three courtrooms at the ICTY. Changes were also implemented to improve the functioning of the ICTR where major problems had persisted. In
2002, the capacity of the Rwandan tribunal increased when the Security Council amended the ICTR Statute to permit ad litem judges to serve in trial chambers. After a long delay, two senior posts in the ICTR Office of the Prosecutor were filled and a new president and vice-president were elected. In September 2003, the Security Council separated the ICTY and ICTR prosecutor posts and appointed a separate ICTR prosecutor.

The experience of the ad hoc tribunals revived an idea that first gained currency after World War II: the creation of a standing forum where justice can be rendered for the gravest crimes when national courts are unwilling or unable to do so (the latter limitation on jurisdiction is known as the “complementarity principle”). In 1998, more than 150 countries completed negotiations to establish the International Criminal Court (ICC), a permanent international court charged with prosecuting war crimes, crimes against humanity, and genocide in such circumstances. Reflecting the dynamism of efforts to limit impunity during this period, the necessary sixty states ratified the court’s treaty—known as the Rome Statute—to bring it into force in July 2002, less than four years after it had been opened for signature. The establishment of the ICC, a huge step forward for human rights, has the potential to focus international attention on impunity for the “most serious crimes of concern to the international community,” as noted in the preamble of the Rome Statute. The court has engendered great expectations.

While the ICC will face many obstacles in bringing justice, the most immediate threat to its effectiveness comes from the ideologically
motivated hostility of the Bush administration. The U.S. government’s campaign against the court, while both shameful and damaging, has nevertheless failed to derail the considerable momentum behind the ICC’s establishment. To date, ninety-two states have ratified the Rome Statute and nearly fifty more have signed it.

In the brief period since the Rome Statute’s entry into force, the ICC has moved from an institution on paper to a permanent court staffed with highly qualified judges and an experienced prosecutor and registrar. ICC officials familiar with the experience of the two ad hoc tribunals consciously drew on the lessons of those mechanisms to create a more efficient court. In July 2003, one month after taking office, the prosecutor announced he was following closely the situation in Ituri province of the Democratic Republic of Congo (DRC). Since there is incontrovertible evidence that the DRC currently lacks capacity to adjudicate cases involving serious human rights crimes, the situation there is precisely one of the scenarios the ICC was intended to address.

Over the past decade, several European states also began to meet their obligations to prosecute those found on their territory accused of atrocities. Using domestic universal jurisdiction laws in domestic courts, Switzerland, Denmark, Belgium, Germany and other states have tried such individuals far from the countries where the crimes were committed.

In October 1998, the United Kingdom arrested former President Augusto Pinochet on a Spanish warrant charging the former dictator
with human rights crimes committed in Chile during his seventeen-year rule. As a result, four states, Belgium, France, Spain, and Switzerland, litigated the right of their courts to try Pinochet. The arrest of Pinochet sparked litigation before the United Kingdom’s highest court, the House of Lords, that resulted in the landmark decision that Pinochet, as a former head of state, could face prosecution for acts of torture in relation to crimes committed after 1988, when the United Kingdom became a party to the U.N. Convention against Torture.

A synergy developed between efforts to bring justice at the international level and access to national courts where the crimes occurred. There was a profoundly important “spillover” effect: national courts began to take on litigation of previously barred cases. The Pinochet litigation prompted an opening of the domestic courts in Chile to victims who had been denied access to remedies. In August 2003, trials of military officers responsible for gross violations of human rights during Argentina’s “dirty war” were reopened in Buenos Aires. A Spanish judge prompted this development when he issued warrants for the extradition of forty-five former military officers and a civilian accused of torture and “disappearances” in Argentina so that they could stand trial in Spain.

The spillover effect has been particularly pronounced in countries that have undergone a thorough transition from authoritarian rule to democracy, such as in Chile and Argentina. But also in Chad, victims were emboldened by international efforts to indict former dictator Hissène Habré, leading them to bring cases before their national court against former Habré associates.
These different developments taken together have formed the components of a new, fragile, yet unprecedented system of international justice consisting of ad hoc tribunals, the permanent ICC, and various other international mechanisms. These institutions promise an end to the impunity that perpetrators of some of the world’s worst crimes have long enjoyed.

**A Changing Landscape**

By 2001, steps to enhance international justice began to encounter broadening political opposition. Electoral changes on both sides of the Atlantic brought in political leaders less supportive of these courts. The Bush administration’s unilateralist policies were hostile to international institutions. The election of several new governments in Europe reduced the willingness of the European Union to stand up to such hostility. The attacks of September 11, 2001 further contributed to a shift away from support for international justice, with efforts to combat terrorism taking precedence over international law.

In May 2002, the Bush administration launched a worldwide campaign to undermine and marginalize the ICC. After repudiating the U.S. signature of the Rome Statute, the Bush administration threatened to veto all U.N. peacekeeping operations unless Security Council members passed a resolution exempting citizens of non-ICC states parties involved in U.N. operations, such as the United States, from the reach of the ICC. The Bush administration also played hardball to pressure individual ICC states parties to sign bilateral immunity agreements exempting U.S. citizens—and foreign nationals working under contract
with the U.S. government—from ICC jurisdiction. These agreements put states parties in violation of their treaty obligations to the court. The actions of the United States—in effect threatening economically vulnerable states with sanctions for supporting the rule of law through the ICC—marked a perverse low point in U.S. human rights policy.

Washington’s efforts to undermine the ICC coincided with a rising level of disenchantment among some powerful Security Council members towards the ad hoc tribunals it had created due to their cost and slow-moving procedures. As entirely new entities with only the Nuremberg and Tokyo tribunals as institutional precedents, the ad hoc tribunals for the former Yugoslavia and Rwanda, not surprisingly, had their share of difficulties. With Security Council members increasingly skeptical of the utility of the tribunals and concerned with rising costs, political and financial support waned. This culminated in pressure to adopt a “completion strategy” with a 2010 deadline regardless of whether this date allows the tribunals to fulfill their mandates.

Imposing increased political and financial constraints, the U.N. Security Council then made efforts to bring international expertise to bear on questions of justice in ways that were less politically controversial and costly. These factors prompted the emergence of a diverse “second generation” of international criminal justice mechanisms: “hybrid” national/international tribunals that utilized varying degrees of international involvement.
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A U.N. International Commission of Inquiry on East Timor recommended that an international tribunal be created to try those responsible for atrocities committed by the Indonesian army and Timorese militias backed by Indonesia at the time of the vote for independence in 1999. However, Indonesia promised to prosecute individuals responsible for these crimes. As a result, Secretary-General Kofi Annan did not endorse and the Security Council did not implement the Commission’s recommendation. In August 2001, an Ad Hoc Human Rights Court on East Timor was established in Indonesia. To try alleged perpetrators who remained in East Timor, the U.N. transitional administration appointed international judges to the newly created Dili District courts. Even after East Timorese independence on May 20, 2002, panels comprised of one East Timorese and two international judges, known as the Special Panels for Serious Crimes, adjudicate these cases.

The U.N. Mission in Kosovo took a similar approach to try serious crimes committed during the armed conflict in 1999. The ICTY lacked the resources and the mandate to act as the main venue to bring justice for these crimes. Although a justice system was reestablished in Kosovo following the conflict, underfunding, poor organization, and political manipulation plagued the newly ethnic-Albanian-dominated system. The new U.N. administration initially appointed a limited number of international judges to sit on panels with a majority of Kosovar judges without restrictions on the cases that these panels could adjudicate. Subsequently, the U.N. administration provided, pursuant to Regulation 2000/64, for panels comprised of at least two international judges and one Kosovar judge to adjudicate cases where “necessary to ensure the independence and impartiality of the judiciary or the proper
administration of justice.” These panels are known as Regulation 64 Panels after the regulation that created them. They generally adjudicate cases involving serious crimes committed during the conflict. As discussed in the following section, the hybrid mechanisms in East Timor and Kosovo have faced serious difficulties in administering justice in such cases.

In 2002, taking a different “hybrid” approach, the United Nations signed an agreement with the government of Sierra Leone to create the Special Court for Sierra Leone. The Special Court was mandated to bring to justice those “most responsible” for atrocities committed during the country’s internal armed conflict. Like the two ad hoc international tribunals, the Special Court has its own statute and rules of procedure. It does not operate as part of the national courts of Sierra Leone. Unlike the Rwandan and Yugoslav tribunals, the court is situated in Sierra Leone, has jurisdiction over some crimes under Sierra Leonean law, and has judicial panels composed of international and Sierra Leonean judges. The court is expected to try between fifteen and twenty alleged perpetrators of the horrific crimes of the conflict.

Due to Herculean efforts by the staff of the Registry and Office of the Prosecutor, the Special Court was established in war-ravaged Freetown, Sierra Leone, in the space of a few months in 2002 and 2003. To date, the prosecutor has issued nine indictments. While the Special Court aroused great expectations, including strong support from the United States due to its low cost and enhanced national character, it too has encountered disenchantment among some Security Council members and the U.N. Secretariat. These attitudes congealed as the cost of the
court’s operations began to rise beyond initial budget projections. The reservations took a qualitative leap when the prosecutor unsealed an indictment against former Liberian President Charles Taylor while the latter was attending peace talks in Ghana in June 2003. The appropriateness of unsealing the indictment during peace talks generated considerable objections, although no one denies that Taylor’s long awaited departure took place soon thereafter. At this writing, the Special Court was facing serious budgetary problems due to the voluntary nature of its financial support.

In Cambodia, efforts to create a stand-alone “hybrid” court to bring members of the Khmer Rouge to justice have been less successful. The United States, France, Japan, and others pressured the United Nations to conclude an agreement with Cambodia to establish a Khmer Rouge Tribunal that lacked fundamental protections to ensure that the tribunal would be independent and impartial. The proposed tribunal would have a majority of Cambodian judges and a minority of international judges, working alongside Cambodian and international co-prosecutors. Cambodia’s judiciary has been widely condemned by the United Nations and many of its member states for lack of independence, low levels of competence, and corruption. There are serious concerns about this mechanism.

There are other post-conflict situations where the permanent members of the Security Council have yet to address impunity. These include Afghanistan, Liberia, Côte d’Ivoire, as well as the Democratic Republic of the Congo. In Afghanistan, a national human rights commission, rather than an international commission of inquiry, was given the task of
addressing past abuses committed during two decades of war despite its very limited capacity. This was largely due to resistance by the newly established Afghan government, the U.S. government, and the U.N. Assistance Mission in Afghanistan to a serious accountability process that might upset the political transition. To date, the national human rights commission has not made meaningful progress to address past crimes, a result of inadequate training, resources, and equipment, and threats against commission members.

The accountability process in Iraq marks another missed opportunity for the international community. The Iraqi Governing Council has drafted a law to establish a domestic war crimes tribunal to prosecute the former Iraqi leadership for crimes including genocide, crimes against humanity, war crimes, torture, “disappearances,” and summary and arbitrary executions committed during Ba’th Party rule. The United States has backed such an “Iraqi-led” tribunal to try these crimes and many Iraqis have expressed support for this approach. However, Iraqi jurists have not had experience in complex criminal trials applying international standards. In the face of very limited United Nations involvement in post-war Iraq, the Security Council, for its part, even shied away from a proposal to establish an expert group comprised of Iraqi and international experts to assess how to best bring justice for Iraq. There is real concern that the projected trials in Baghdad could end up as highly politicized proceedings, undercutting the fairness and legitimacy of the process.

In the last several years, although some states continued to meet their obligation to prosecute the most serious international crimes through
their national courts, the application of universal jurisdiction laws also has been scaled back somewhat. While there are a number of pending cases involving mid-level officials before national courts in Europe, there has been no increase in prosecutions of senior officials.

In the so-called Yerodia case of February 2002, the International Court of Justice (ICJ) held that a sitting foreign minister was immune from prosecution in another country’s court system regardless of the seriousness of the crimes with which he was charged. Although the ICJ noted that such officials would not be immune to prosecution before international criminal courts where these courts have jurisdiction, its decision went against recent trends to deny immunity for serious human rights crimes.

In 2003, Belgium was forced to revise its universal jurisdiction law in response to intense economic and diplomatic threats by the Bush administration. This included the Bush administration raising the possibility of moving NATO headquarters elsewhere unless Belgium capitulated to its demands. The Belgian law had a particularly expansive reach: the absence of a jurisdictional “presence” requirement in the law together with a provision allowing private individuals, known as “parties civiles,” to file complaints directly with an investigating judge resulted in the indiscriminate filing of a spate of cases against high profile officials from around the world. This attracted enormous media attention and opposition even though the investigative judge had the power to, and undoubtedly would have, ultimately dismissed patently unfounded complaints. The revised law restricts the reach of universal jurisdiction to cases where either the accused or victim has ties to Belgium, making
it similar to or more restrictive than the laws of most countries that recognize universal jurisdiction.

**A Way Forward**

The backlash against the developing international justice system, while dismaying, is hardly surprising given the extent to which the significant advances of the past decade have begun to constrain the prerogatives of abusive state officials. The challenge now is to work effectively in a more difficult international environment while many national courts remain unable and unwilling to prosecute the most serious human rights crimes. The gains engendered by international justice institutions need to be preserved and the international system strengthened until many more national courts assume their front-line role in combating impunity.

We see three critical steps: make a sober assessment of the challenges facing international justice today; analyze and draw lessons from experience to date; and take strategic, measured steps forward. This essay concludes with separate descriptions of each of these steps, including specific recommendations on how to implement them to maximize the effectiveness of existing institutions.

**Assessing the Challenges Facing International Justice Today**

The system of international justice has made several singular advances. At the same time, as described below, the ad hoc international tribunals
have not been as effective or as efficient as envisioned. The achievements of the courts in Kosovo and East Timor have been similarly mixed. Grasping the combination of the inherent institutional limitations and the objective difficulties to international justice is crucial in evaluating the performance of these tribunals and continuing efforts to more fully assure justice for atrocities.

Prosecuting senior officials for serious human rights crimes where there are a large number of victims is a complex and expensive process regardless of whether the cases are tried before national or international courts. These prosecutions tend to involve massive amounts of evidence that must be analyzed and classified by crime scene, type of crime, and alleged perpetrator. Such cases require a sophisticated prosecution strategy. Trials must comply with international human rights standards to ensure their legitimacy and credibility. Ensuring the fairness of these trials—including their compliance with human rights standards—often results in a slow process.

Cases brought before international criminal tribunals or in national courts (based on universal jurisdiction) are often tried far away from the crime scene and thus are less accessible to victims and those in whose name the crimes were committed. These trials sometimes lack the visibility in the country where the crimes occurred that a local trial would have. The state where the crimes occurred, whose government may include accused war criminals or their confederates, may oppose the prosecutions, resisting cooperation and making it difficult to obtain custody of the defendants or obtain evidence. Gathering evidence for crimes that occurred hundreds or thousands of miles away makes it
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more difficult to meet the level of proof required for a conviction and for the accused to develop a comprehensive defense. Another downside to distance includes a lack of familiarity with the cultural and historical context in which the crimes occurred. The need for translation services also slows the pace of trials and makes them more costly.

International criminal tribunals, as global institutions, also face their own unique institutional challenges. Bringing together judges, prosecutors, and other court personnel from different backgrounds and legal cultures creates obstacles to efficient trials. Reconciling the civil and common law traditions to establish and implement rules of procedure and evidence is time-consuming and costly.

The Yugoslav and Rwandan tribunals are illustrative of some of these problems. After approximately seven years of work, the ICTR has completed only fifteen trials. This is due to a variety of factors including an overly ambitious prosecution strategy that pursued too many suspects; poor coordination between investigators and prosecutors; and failure to fill some long vacant posts. The slow pace of trials has resulted in unusually long pre-trial detentions that raise human rights concerns. Although significantly more efficient, cases at the ICTY have also progressed slowly, in some part due to indictments overloaded with numerous counts. The cost of the tribunals has been extraordinarily high, reaching U.S. $100 million a year.

At the ICTR, there have also been ongoing problems with witness and victim protection. Witnesses and victims have described being treated
with a lack of sensitivity due in part to lack of communication with victims and witnesses and inadequate follow-up. Major indicted war criminals of both tribunals remain at-large due to a failure of cooperation and assistance by the states where they are located and other states with the capacity to arrest them.

The national component of the hybrid mechanisms offers the potential advantage that the trials will leave a more lasting legacy in the countries where the crimes occurred. In theory, the existence of national staff working alongside internationals with expertise in adjudicating complex criminal trials could over time enhance the capacity of national courts. The proximity of the court to the site of the crimes could make the trials more accessible to victims and those in whose name the crimes were committed. However, the local component of these mechanisms also presents particular challenges. Security risks may be increased, local staff hired to work on these cases may be linked to past abuses, thereby re-traumatizing victims and witnesses, and national staff may be subject to political interference or lack the expertise to ensure that cases are tried fairly and effectively.

The work of the hybrid mechanisms in East Timor and Kosovo up to this point has been far from ideal. Representing “justice on the cheap,” they have been seriously under funded by the international community. In both situations, cases have progressed slowly and the administration of justice has suffered from a range of problems including: lack of qualified staff to investigate, prosecute, and adjudicate cases; arbitrary or lengthy pre-trial detention and ineffective defense counsel; lack of
effective translation services and support staff; and allegations of political interference or intimidation.

As the Special Court for Sierra Leone has yet to begin trials, it is too soon to evaluate its success as an accountability model. However, it appears so far to be operating efficiently.

In establishing the Yugoslav and Rwandan tribunals, the international community faced specific challenges that resulted from their *sui generis* nature. The only models from which they had to work were the Nuremberg and Tokyo tribunals, courts conducted by the victors of World War II, fifty years ago, and in which trials and sentences were quickly carried out. While not absent, fair trial safeguards in these prosecutions would probably not pass muster under today’s standards. Most strikingly, there was no right to appeal. The establishment of the Yugoslav and Rwandan tribunals thus occurred without any pre-existing adequate model and high start-up costs could have been expected.

Objective institutional problems have also been aggravated by a tendency to misunderstand the immediate impact of the Nuremberg trials. The short-term effect of Nuremberg has, unfortunately, been inflated over the years. At the time the trials were conducted, they were enormously controversial among Germans. While illuminating to the international audience, the German people initially dismissed the proceedings as political show trials. The International Military Tribunal (IMT) that conducted the Nuremberg trials did not significantly enable Germans to come to grips with the horrific crimes that were committed.
by the Nazi government. This reckoning only occurred decades later when a new generation began to ask questions about individual responsibility during the Third Reich. At that time, the IMT’s record provided an invaluable and incontrovertible reference point of past crimes. Nevertheless, conventional wisdom about the Nuremberg trials is that they quickly enabled the population of Germany to confront what had happened under the Nazi Party. This idealized view has led to unrealistic expectations for war crimes trials. We need to better calibrate our expectations given the experience of the last half-century.

The international community, moreover, is only beginning to reap the benefits of its investment in the Yugoslav and Rwandan tribunals. It has drawn on the lessons of the two tribunals in establishing the ICC and hybrid mechanisms, and can also be expected to benefit from this experience in structuring future justice mechanisms.

**Learning from Experience**

National courts are not about to become uniformly capable or willing to bring justice for atrocities in the immediate future. This is particularly true in post-conflict situations where justice systems have been either partially or completely destroyed. As a result, international justice will remain a crucial last resort that must continue to be fortified against efforts to undermine it.

The achievements and failings of the ICTY and ICTR need to be thoroughly assessed. While it may be unrealistic to expect that full-scale
ad hoc international tribunals will be created in the current environment, the lessons of these tribunals can help inform other efforts, including the development of hybrid justice mechanisms. Similarly, the record of existing hybrid mechanisms must be evaluated so that the benefits of national participation can be fully realized while better achieving fair and effective trials. The effects of differences between existing hybrid courts, including the extent to which they operate more as national courts, as do the Regulation 64 Panels in Kosovo, or as international courts, as does the Special Court for Sierra Leone, should receive particular scrutiny. Hybrid mechanisms should not be established simply because they are an inexpensive alternative if an international mechanism would be more appropriate.

In addition, we need to evaluate situations in which international mechanisms are rejected notwithstanding serious concerns about national capacity and willingness to pursue justice, as in Indonesia for crimes in East Timor and as is likely to be the case in Iraq. The consequences of failing to address impunity at all, as appears likely in Afghanistan, must also be documented. Such efforts will help build support for international justice.

More countries should be encouraged to adopt and implement universal jurisdiction laws. This could be accomplished as part of their adoption of ICC implementing legislation. Politicized use of universal jurisdiction against high profile figures, however, will only weaken the credibility of international justice efforts and should be avoided. In general, prosecutors and investigating judges should initiate cases against lower-rank defendants found on their territories. This will allow the
jurisprudence and practice to be built from the bottom up. This could lead over time to the successful application of extra-territorial jurisdiction against more prominent figures. However, where a strong legal basis exists, cases against more prominent figures must also be pursued.

The United Nations must play a more central and systematic role in post-conflict situations. Although the United Nations has often been pivotal in forging the international response to serious human rights crimes in such settings, the “justice gap” in countries such as Liberia, the Democratic Republic of Congo, and Côte d’Ivoire underscores the need for more systematic U.N. efforts. Over the last decade, the Security Council, the secretary-general, and the General Assembly have convened several commissions of experts to assess evidence of serious human rights crimes and recommend appropriate mechanisms. Such commissions were created for the former Yugoslavia, Rwanda, East Timor, and Cambodia. The U.N. Secretariat should create a permanent post or entity charged with analyzing the work of such commissions, identifying successes and failures, and advising future commissions. Creation of such commissions should become a regular part of the Security Council’s response to post-conflict situations.

**Taking Strategic Steps Forward**

The ICC will only realize its potential with the concerted assistance of states, intergovernmental organizations, and NGOs. States parties need to strengthen and defend the integrity of the ICC statute. They should find ways to diffuse attacks on the court by the Bush administration, and
continue to provide additional financial and diplomatic support for the court. States parties must also adopt strong legislation implementing the provisions of the Rome Statute into national law.

There likely will be intense scrutiny of the ICC’s performance in the first cases it adjudicates. It will be difficult work to do well and there will be shortcomings. However, the ICC should make every effort to conduct the most fair, impartial, effective, and efficient trials possible so that the court gains legitimacy and credibility.

Even if the ICC achieves its full potential, it realistically will not be able to address all situations in which national courts are unwilling or unable to prosecute perpetrators. Among other factors, there are temporal and other jurisdictional limitations on what cases the ICC can hear. The ICC’s jurisdiction is also restricted to cases in which the state where the crimes occurred is a party to the Rome Statute, the state of the nationality of the accused is a party to the Rome Statute, or the Security Council refers the situation. Even where these requirements are satisfied, the ICC will be able to prosecute only a small percentage of the highest-level alleged perpetrators. Cases of mid-level perpetrators and cases where there are numerous perpetrators bearing significant responsibility, as in many post-conflict situations, are unlikely to be fully addressed by the ICC.

In light of the constraints on the ICC and other international justice mechanisms, efforts to strengthen weak but politically willing national courts are all the more important. The ICC’s operations must leverage
the complementarity provisions of the Rome Statute to create a synergy between its work and prosecutions for serious human rights crimes by national courts. The ICC should strive to focus international attention on situations where serious human rights crimes have occurred, both where it is pursuing cases and not pursuing cases. Where it is pursuing cases, such attention could help garner support to enhance the capacity of national courts to prosecute mid-level and lower-level perpetrators effectively and in accordance with fair trial standards. Where it is unable to pursue cases involving serious crimes due to jurisdictional limitations or some other obstacle, such attention could help garner support to enhance the capacity of national courts to prosecute the highest-level perpetrators. This will maximize the ICC’s catalytic effect on international support for fair and effective prosecutions at the national level.

Hybrid mechanisms, universal jurisdiction, and other solutions will be essential to filling justice gaps where the ICC and national courts are unable to address serious crimes. The international community should apply the lessons learned from existing hybrid mechanisms to develop new models that are able to bring justice more fairly, effectively, and efficiently. Universal jurisdiction should be applied where appropriate.

The work of the ICTY and ICTR should effectively draw on the lessons of experience to date to complete their work. Given the emphasis the Security Council has placed on a completion strategy for these tribunals to cease operations by 2010, states and intergovernmental organizations should work assiduously to arrest key suspects and prosecute them. The tribunals should continue to amend their rules and improve courtroom
management to increase efficiency and effectiveness. Some cases are likely to be referred back to the national courts of the former Yugoslavia and Rwanda as part of the completion strategy. The lessons of the tribunals should be used to increase the capacity of the national courts to adjudicate these cases fairly and effectively by conditioning referral on national courts’ compliance with international fair trial and human rights standards.

**Conclusion**

The development of a system of international justice to limit impunity for serious human rights crimes has struck at outmoded notions of national sovereignty and the absolute prerogative of states. It would have been unrealistic to expect that progress would occur in a straight line. To address today’s more difficult environment, recent achievements must be secured and the system must be refined so that perpetrators of the most serious crimes are increasingly held to account.
Children as Weapons of War
By Jo Becker

Over the last five years, the global campaign to stop the use of child soldiers has garnered an impressive series of successes, including new international legal standards, action by the UN Security Council and regional bodies, and pledges from various armed groups and governments to end the use of child soldiers. Despite gains in awareness and better understanding of practical policies that can help reduce the use of children in war, the practice persists in at least twenty countries, and globally, the number of child soldiers—about 300,000—is believed to have remained fairly constant.

As the end of wars in Sierra Leone, Angola, and elsewhere freed thousands of former child soldiers from active armed conflict, new conflicts in Liberia and Côte d'Ivoire drew in thousands of new child recruits, including former child soldiers from neighboring countries. In some continuing armed conflicts, child recruitment increased alarmingly. In Northern Uganda, abduction rates reached record levels in late 2002 and 2003 as over 8,000 boys and girls were forced by the Lord’s Resistance Army to become soldiers, laborers, and sexual slaves. In the neighboring Democratic Republic of Congo (DRC), where all parties to the armed conflict recruit and use children, some as young as seven, the forced recruitment of children increased so dramatically in late 2002 and early 2003 that observers described the fighting forces as “armies of children.”
In many conflicts, commanders see children as cheap, compliant, and effective fighters. They may be unlikely to stop recruiting child soldiers or demobilize their young fighters unless they perceive that the benefits of doing so outweigh the military advantage the children provide, or that the costs of continuing to use child soldiers are unacceptably high.

In theory, the benefits of ending child soldier use can include an enhanced reputation and legitimacy within the international community, and practical support for rehabilitation of former child soldiers, including educational and vocational opportunities. Possible negative consequences of continued child soldier use can include “shaming” in international fora and the media, restrictions on military and other assistance, exclusion from governance structures or amnesty agreements, and prosecution by the International Criminal Court or other justice mechanisms.

In practice, however, the use of child soldiers all too often fails to elicit action by the international community at all, apart from general statements of condemnation. Human Rights Watch is aware of no examples of military aid being cut off or other sanctions imposed on a government or armed group for its use of child soldiers. Conversely, when armed forces or groups do improve their practices, benefits also frequently fail to materialize. Although governments and armed groups receive public attention for commitments to end use of child soldiers, concrete support for demobilization and rehabilitation efforts often does not follow.
Children as Weapons of War

If the international community is serious about ending the use of child soldiers, it needs to build on the successes of the past five years, but with a sober eye for the obstacles that have stymied further progress. This essay gives an overview of developments over that period, both positive and negative, and offers suggestions on the way forward.

Renewed progress will depend on clearly and publicly identifying the responsible parties; providing financial and other assistance for demobilization and rehabilitation; and, most importantly, ensuring that violators pay a price should they continue to recruit and deploy child soldiers. Some concrete suggestions on how these remedies should be pursued, including the critical role that the U.N. Security Council is poised to play, are described in the concluding section of the essay.

New Visibility and the Emergence of New Legal Norms

In a span of just two years, but following years of campaigning, three important new treaties were adopted that significantly strengthened legal norms regarding the use of child soldiers. In July 1998, 120 governments adopted the Rome Statute for the International Criminal Court, defining the conscription, enlistment, or use in hostilities of children under the age of fifteen as a war crime. Less than a year later, in June of 1999, the member states of the International Labor Organization (ILO) acted to prohibit the forced recruitment of children under age eighteen for use in armed conflict as part of the Worst Forms of Child Labor Convention (Convention 182). And in May 2000, the U.N. adopted the Optional Protocol to the Convention on the Rights of the Child, establishing eighteen as the minimum age for participation in armed conflict, for
compulsory or forced recruitment, and for any recruitment by nongovernmental armed groups.

The treaties were embraced rapidly. The Worst Forms of Child Labor Convention quickly became the most rapidly ratified labor convention in history, with 147 states parties by November 2003. In April 2002, the Rome Statute reached the threshold of sixty ratifications needed to bring the International Criminal Court into being, and by November 2003, sixty-six nations had ratified the Optional Protocol.

Intensive lobbying by nongovernmental organizations, (NGOs) notably the Coalition to Stop the Use of Child Soldiers and the coalition’s national partners, helped build a global consensus against the use of child soldiers, and brought new attention to the issue. The coalition spearheaded the campaign for the adoption, ratification, and implementation of the Optional Protocol, holding a series of high-profile regional conferences, documenting child recruitment policies and practices worldwide, lobbying the Security Council and other international actors, and supporting regional networks working to end the use of child soldiers. The coalition’s national partners launched public awareness campaigns, lobbied for changes in national policy and practice, and in many countries, helped drive forward the ratification and implementation of the optional protocol.

Attention to child soldiers has emerged in numerous other fora, including the Organization for Security and Cooperation in Europe, the European Parliament, the Organization of American States, the
European Union-African, Caribbean and Pacific group (E.U.-ACP), and the Economic Community of West African States (ECOWAS), resulting in resolutions, joint strategies to address children and armed conflict, and the establishment of regional child protection mechanisms.

**Government Forces and Child Soldiers**

While some governments have taken concrete steps to end child soldier use, others flout the new norms by continuing to use children in conflict. Between 1999 and 2001, South Africa, Portugal, Denmark, and Finland each adopted new national legislation, raising the minimum age for voluntary recruitment to eighteen. In early 2003, the National Security Council of Afghanistan established a new minimum recruitment age of twenty-two.

Some governments raised their recruitment age even in the midst of conflict. In May of 2000, the government of Sierra Leone announced government policy setting eighteen as the minimum age for bearing arms. Previously, military law had set the age at seventeen. The government of Colombia, engaged in a thirty-year civil war, adopted legislation in December 1999 prohibiting all recruitment of children under the age of eighteen, and discharged over 600 children from the army and more than 200 from other government forces.

The ratification of the optional protocol has brought additional changes by other governments. Until 2002, the United States routinely recruited seventeen-year-olds on a volunteer basis, and deployed them into

The United Kingdom recruits at age sixteen—one of the lowest official voluntary recruitment ages of any country—and has been the only European country to send under-eighteens routinely into battle. When ratifying the optional protocol in early 2003, the U.K. made a declaration stating that it would continue to deploy under-eighteens in situations of “genuine military need” when withdrawing them is deemed “impractical.” The Coalition to Stop the Use of Child Soldiers and other human rights advocates sharply criticized the declaration, stating that it was contrary to the object and purpose of the protocol, and that the U.K.’s declaration should be considered null and void. A change in practice became evident when the U.K. government announced that it would not deploy under-eighteens in the U.S.-led military operation against Saddam Hussein’s forces in Iraq, and removed under-age soldiers from ships being sent to the region. In contrast, over 200 British under-eighteens participated in the 1991 Gulf War, two of whom died during the war.

Other governments have continued to recruit and use children in armed conflict, including Burma, Burundi, the DRC, Liberia, Sudan, and Uganda. Burma’s national army alone includes an estimated 70,000 child soldiers (nearly one-quarter of the world’s total) and routinely sends children as young as twelve into battle against armed ethnic opposition
groups. Both Uganda and the DRC have ratified the optional protocol, but flout their obligations by using child soldiers. The Ugandan People’s Defense Force has recruited children who escaped or were captured from the rebel Lord’s Resistance Army, and has trained and deployed children recruited into local defense units. The government of DRC maintains children in its ranks despite a 2000 presidential decree calling for the demobilization of child soldiers.

Paramilitaries or civil defense forces that are linked to the government frequently recruit children as well. As many as 20,000 children may serve in militias supported by the government of Sudan. In Colombia, the paramilitary United Self-Defense Forces of Colombia (Autodefensas Unidas de Colombia, AUC) receive support from some army units, and often work in close collaboration with the Colombian military, which prohibits the recruitment of children. The AUC includes over 2,000 children, including many girls and children as young as age seven. In other countries, including the DRC and Rwanda, child recruitment by government-linked militias is also common.

**Child Soldiers and Opposition Forces**

Child soldier use is endemic among non-state armed groups. In nearly every conflict where government forces use child soldiers, opposition forces do as well. But even when governments do not recruit children, as in Nepal, the Philippines, or Sri Lanka, use of child soldiers by opposition forces may be routine. The use of child soldiers by nongovernmental armed groups is perceived as a more intractable problem than such use by states, due to the more limited range of
Many armed groups are sensitive to world opinion, however, and heightened attention to the issue of child soldiers has prompted a growing number of non-governmental armed groups to make public commitments to end the use of child soldiers. Among these are the Rassemblement Congolais pour la Démocratie-Goma (RCD-Goma) in the DRC, Revolutionary Armed Forces of Colombia-People’s Army (Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo, FARC-EP) in Colombia, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, Liberians United for Reconciliation and Democracy (LURD) in Liberia, the Sudan People’s Liberation Army (SPLA) in Sudan, and several ethnic armed opposition groups in Burma (Myanmar).

One of the most recent commitments by non-state actors was contained in a statement by the Liberians United for Reconciliation and Democracy (LURD) on June 30, 2003. The LURD statement instructed all military commanders to refrain from the “unwholesome” act of recruiting children under the age of eighteen for active combat, and to release all children under the age of eighteen to LURD headquarters for demobilization and social reintegration. Several factors may have precipitated the announcement. Human rights advocates had raised the child soldiers issue with LURD’s political leadership, suggesting that the LURD demobilize child soldiers not only for principled reasons, but also pointing out the indictment of then-president of Liberia Charles Taylor by the Sierra Leone special court for crimes including the use of
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child soldiers. The advocates suggested that the LURD would not want similar charges hanging over their heads should they eventually take power. Members of the U.N. Security Council delegation led by Sir Jeremy Greenstock of the U.K. also urged an end to the use of child soldiers during meetings with parties to the Liberian peace talks in Accra in late June 2003. Like many other parties to armed conflict that have made similar pledges, however, the LURD has not implemented its commitment, and has continued its use of child soldiers.

The U.N. secretary-general's special representative on children and armed conflict, Olara Otunnu, has secured a number of high-profile commitments from non-state armed groups. Although highly touted, few of these commitments have been kept in practice. During a June 1999 visit to Colombia by the special representative, the FARC agreed not to recruit children under the age of fifteen. However, the FARC's recruitment practices remained unchanged, and Human Rights Watch estimates that over 7,400 children (including those in urban-based militias) serve in its ranks, including many under the age of fifteen. Of seventy-two former child soldiers from the FARC interviewed by Human Rights Watch in 2002, fifty-seven (nearly 80 percent) were recruited before the age of fifteen.

In May of 1998, Otunnu traveled to Sri Lanka and received a commitment from the LTTE to end its use of children under eighteen in combat, and not to recruit children below the age of seventeen. In 2001, UNICEF reported that child recruitment had actually increased in the interim. The LTTE reaffirmed its commitment during a February 2001 visit by UNICEF’s deputy director, but child recruitment by the
LTTE continued unabated, including the kidnapping of school children traveling home from school. In June 2003, the government and LTTE agreed on an action plan for children affected by war, including mechanisms for the release and reintegration of former child soldiers, primarily the establishment of transit centers co-managed by the Tamils Rehabilitation Organization and UNICEF. At this writing, child recruitment by the LTTE was continuing, and it was unclear whether the agreement would prompt significant progress.

The continuing pressure by the U.N. to induce the LTTE to fulfill its commitment is more the exception than the rule. The special representative has not made follow-up visits to either Sri Lanka or Colombia, and a UNICEF representative told Human Rights Watch that the commitments are “not systematically monitored.” The representative cited a general lack of coordination between the special representative and UNICEF in following up the commitments.

Another underlying problem is that armed groups perceive a public relations benefit from making public commitments not to recruit child soldiers, but often lack the political will or resources to actually demobilize children from their ranks. Commanders who are concerned with maintaining military strength may be reluctant to release young soldiers, particularly when alternatives for the children, including school or vocational training, are not available.

In many cases, assistance in creating educational and vocational alternatives for child soldiers is critical in ensuring compliance by armed
groups with their commitments. Top-ranking commanders in the Karenni Army, one of Burma’s armed ethnic opposition groups, admit that 20 percent of the group’s ranks are children despite policies prohibiting the recruitment of children under the age of eighteen. A Karenni Army general told Human Rights Watch that he was aware of international standards and would prefer to exclude children from his forces, but that many of the children who seek to join are displaced or refugee children with no access to school. He said that if viable educational or vocational alternatives were available to young volunteers, it would be easier to comply with international standards:

“We have some ideas for projects for some of our young boys in the army, but we can’t get any support from outside organizations. . . . No resources means no skills. . . . The only option for child soldiers is if we can have a special school for them, not only for reading and writing but also for vocational skills like carpentry or auto mechanics. We can’t send fourteen and fifteen-year-olds to ordinary kindergarten. The most important thing for these young people is education.”

In eastern DRC, complementary efforts by the U.N. and NGOs resulted in the demobilization of more than 1,200 children from RCD-Goma and other armed groups in North and South Kivu from 1999 to early 2003. Following a massive recruitment drive by the RCD-Goma in 2000, Save the Children U.K. sought the agreement of RCD-Goma commanders to hold a series of workshops for military personnel on international law related to child soldiers, and the demobilization and
rehabilitation programs operated by Save the Children. Seven workshops were held in 2001, prompting a noticeable increase in the number of children demobilized. During the same period, UNICEF held a series of meetings with the RCD-Goma political leadership, culminating in a formal plan of action for the demobilization of child soldiers that was agreed in December of 2001. In April of 2002, RCD-Goma formally demobilized 104 children from a military training camp near Goma. However, thousands of additional child soldiers remain in RCD-Goma’s ranks.

**Transitioning Children Out of War**

By late 2003, demobilization and rehabilitation programs for former child soldiers were operating in a half-dozen countries, including Colombia, the DRC, Rwanda, Sierra Leone, Somalia, Sudan, and Uganda, and new programs were beginning in Afghanistan, Burundi, Liberia, and Sri Lanka. However, with few exceptions, these programs were available to only a small percentage of the children who needed them, and in some countries, including Myanmar, Nepal, and the Philippines, such programs were practically nonexistent.

Rehabilitation assistance for child soldiers is often delayed. In Afghanistan, parties to conflict regularly used child soldiers during more than two decades of civil war, and one survey of over 3000 Afghans found that up to 30 percent had participated in military activities as children. However, it was nearly two years after the Afghan conflict had officially ended before a UNICEF program for the rehabilitation and reintegration of former child soldiers was established. In Angola, a peace
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agreement was reached in April of 2002, but child soldiers were excluded from formal demobilization programs and, at this writing, no special rehabilitation services had been set up for an estimated 7,000-11,000 children who served with UNITA or government forces. In the DRC, the government issued a decree in June of 2000 to demobilize child soldiers from government forces. It subsequently developed a plan for demobilization, rehabilitation, and reintegration, but complained that it was unable to implement the plan because donors had not provided sufficient resources. Between July 2001 and November 2002, only 280 child soldiers were reportedly released from the government’s forces.

Not surprisingly, the most significant reductions in child soldier use have accompanied the end of conflicts themselves. From May 2001 through January 2002, the U.N. mission in Sierra Leone disarmed and demobilized close to 48,000 combatants from rebel forces and government-allied militias, including 6,845 child soldiers. Most former child soldiers were reunited with their families, and about half were either enrolled in educational support or skills training programs.

A significant weakness of the Sierra Leone program and many others is the exclusion of girls from demobilization, rehabilitation, and reintegration processes. In Sierra Leone, hundreds of girls were left out of the demobilization program and remained with their rebel captors. In the DRC, thousands of girls are thought to be involved in armed groups, but the demobilization of over 1000 children in North and South Kivu by Save the Children and other partners since 1999 included only nine girls. The exclusion of girls is due to multiple factors. Girls who do not serve in visible combatant roles are often overlooked. Some may be
reluctant to participate in demobilization programs because of the stigma of being associated with military forces, particularly when sexual abuse is common. In other cases, programs are not designed with girls or their particular needs in mind, despite the significant numbers of girls involved in many armed conflicts.

Demobilization of children during an active armed conflict is particularly challenging. Southern Sudan is one of the few examples of such efforts. In 2000, the SPLA made a commitment to UNICEF executive director Carol Bellamy to end its use of child soldiers. The following year, the SPLA cooperated with UNICEF and other organizations in the demobilization of over 3,500 children from its forces and their reunification with their families. By 2003, however, the process of demobilization had stagnated. UNICEF estimates that 7,000-8,000 children remain with the SPLA, and that some recruitment continues, including re-recruitment of children who had been previously demobilized.

Re-recruitment of some former child soldiers occurs in nearly all cases where demobilization of children is attempted during a continuing armed conflict. In Northern Uganda, where the Lord’s Resistance Army has abducted an estimated 20,000 children for use as slaves and soldiers, programs operated by World Vision and Gulu Save Our Children Organization (GUSCO) provide rehabilitation support for many former child soldiers who manage to escape or are released. However, the World Vision center reports that since 2000, at least eighteen children who had passed through the center were reabducted and escaped for a second time. GUSCO reported that ten children from their program
were reabducted between September and December 2002. For many former child soldiers, fear of reabduction prevents them from returning to their homes, making social reintegration and the resumption of civilian life very difficult.

Re-recruitment of previously demobilized children has also been reported in the Democratic Republic of Congo, Sierra Leone, and Sudan. In early 2001, 163 Congolese children were demobilized and returned to Eastern DRC by UNICEF after being discovered in a military training camp in Uganda. However, by mid-2003, local NGOs reported that the majority had been recruited again by an opposition group, the Union of Congolese Patriots (UPC), and that some had been killed during fighting.

The risk of re-recruitment underlines the need for adequate security in areas where forced recruitment takes place, support mechanisms in the child’s community to facilitate their reintegration, and advocacy networks to follow up any cases of re-recruitment.

The Role of the U.N. Security Council

Beginning in 1998, the U.N. Security Council began a series of annual debates and resolutions on children and armed conflict, and more broadly on the protection of civilians and human security. On the issue of child soldiers in particular, the Council has taken progressively stronger measures. The Council’s first resolutions on the issue (in 1999 and 2000) simply urged U.N. member states and parties to armed
conflict to abide by international standards on the issue and support rehabilitation efforts for former child soldiers. However, in November 2001, the Council took the unusual step of asking the secretary-general to compile and publish a list of specific parties to armed conflict that were recruiting or using child soldiers in violation of their international obligations. This “name and shame” initiative was the first time that the Council had specifically named abusive parties, and was intended to hold violators accountable for their actions. In addressing the Council, the secretary-general said of the list, “By exposing those who violate standards for the protection of children to the light of public scrutiny, we are serving notice that the international community is finally willing to back expressions of concern with action.”

The list of violators produced by the secretary-general in November of 2002 included twenty-three parties in five countries—Liberia, Somalia, Democratic Republic of Congo, Afghanistan and Burundi. Because the list was confined to the situations on the Security Council’s agenda, it excluded some of the countries with the most severe child soldier problems, including Colombia, Burma, and Sri Lanka. However, the text of the secretary-general’s report raised concerns about child recruitment and use in nine additional countries not on the Security Council’s agenda, including the three just mentioned.

Following the receipt of the report, the Council took several additional steps. First, it indicated its intention to enter into dialogue with parties using child soldiers in order to develop action plans to end the practice. Secondly, it requested specific information from the parties named on steps taken to end their use of child soldiers. Third, it requested a
progress report on the parties named in the secretary-general’s report (including parties in situations not on the Security Council’s agenda) by October 31, 2003. Finally, it indicated its intention to consider additional steps (which could include sanctions) against parties that demonstrated “insufficient progress” in ending their use of child soldiers.

In two missions to Africa in 2003, Security Council members raised concerns about the use of child soldiers. In June, members traveled to Central Africa, where the delegation raised the recruitment and use of child soldiers with parties to the conflict in the DRC. Shortly afterwards, in late June and early July, another Security Council delegation raised similar concerns with parties to conflicts in Côte d’Ivoire and Liberia. On that mission, the council also urged parties to those conflicts to arrest and prosecute anyone responsible for recruitment of child soldiers.

The council’s “name and shame” strategy, however, has yet to yield concrete results. From late 2002 to mid-2003, the list of violators actually expanded with the addition of both governmental and opposition forces in Côte d’Ivoire, and additional parties to the conflicts in Burundi, DRC, and Liberia. In addition, several of the parties included in the secretary-general’s list or report significantly escalated their use of child soldiers during 2003. These include both government and opposition forces in Liberia, the UPC and other armed groups in the DRC, and the Lord’s Resistance Army in Northern Uganda.
The limited impact of the list to date is rooted in several factors. According to U.N. workers, the list has not been used extensively as an advocacy tool at the field level, where its potential may not be understood, or it may be seen as irrelevant to the local situation. The limited scope of the 2002 list—covering only countries on the Security Council’s agenda, and excluding others with extensive child soldier problems—has caused some to question its validity (although this concern was largely addressed with the publication of two lists in late 2003, one encompassing situations on the Security Council’s agenda and the other covering all other situations). Most importantly, at this writing, the council has not yet demonstrated its willingness to take concrete action against parties on the list that show no improvement.

**The Way Forward**

Ending the use of child soldiers demands strategic and sustained efforts by national, regional and international actors, utilizing and strengthening the tools and norms that have developed over the past few years.

**The U.N. Security Council**

The recent initiatives taken by the Security Council hold promise for prompting positive change. However, these initiatives require systematic application and follow-through. To be more effective, the U.N. must ensure that all parties that are “named” by the Security Council for recruiting or using child soldiers in violation of their obligations are promptly and officially notified of the fact, and should pursue systematic
dialogue with all such parties regarding the creation of action plans and concrete steps to end child recruitment and demobilize child soldiers.

The council should commit to systematic monitoring, and annual reviews of progress (or backsliding) by parties named. Most importantly, it must be clear to governments and armed groups that continued recruitment and use of child soldiers will result in decisive and negative consequences.

At a minimum, the council should impose strict bans on the supply of arms or any military assistance to any party recruiting or using child soldiers in violation of international obligations, for as long as such recruitment and use continues. Other targeted measures should also be employed, including financial restrictions (such as the freezing of assets), travel restrictions on leaders of government or armed groups, and their exclusion from any governance structures or amnesty provisions. Demobilization and rehabilitation assistance should be assured for governments and groups that effectively end new recruitment and demonstrate a clear willingness to demobilize children from their forces.

Third-party Governments

The actions of third party governments are also critical. For example, arms-supplying countries bear a measure of responsibility for the abuses carried out with the weapons they furnish and, as a matter of principle, countries should commit to and stop weapons transfers to parties known to use child soldiers. Countries such as Ukraine, Yugoslavia, the
Russian Federation, and China have provided arms or other military equipment to Burma, despite that government’s widespread recruitment of children. Since 1999, Angola (which used child soldiers against UNITA during the country’s civil war) received arms from Belarus, Bulgaria, the Czech Republic, Kazakhstan, Slovakia, Russia, and Ukraine. The U.K. approved licenses for exports of military equipment to Angola during the same period.

Bilateral agreements regarding other military assistance should be conditioned on recruitment practices that exclude children. One positive example of such engagement is that of the U.K. and Sierra Leone. In early 1999, the U.K. reached an agreement with the government of Sierra Leone to provide a £10 million package of assistance to promote stability and reconciliation in the country. Among the conditions for the program, the U.K. government sought and secured an assurance from President Kabbah that children would not be used by the Sierra Leone Armed Forces or the Civil Defense Forces. Later in 1999, and again in 2000, Human Rights Watch provided the U.K. government with information regarding child recruitment by civil defense forces. In both instances, the U.K. government raised the issue with Kabbah. There are currently no indications of child soldier use by government armed forces.

Another positive example is the Belgian Parliament, which adopted legislation in March 2003 barring arms transfers to forces that use child soldiers. The new law entered into force in July 2003. Belgium’s law and the U.K.’s agreement with the Sierra Leone government, though unfortunately all too rare examples of governments conditioning
assistance on performance related to child soldiers, provide a model for future initiatives.

Other tools exist, but are not well-utilized. For example, the U.S. Congress has adopted legislation (the Trade and Development Act of 2000) that conditions trade benefits to developing countries on implementation of their commitments to eliminate the worst forms of child labor, including the forced recruitment of children for use in armed conflict. The U.S. Department of Labor publishes an annual report describing the child labor laws, policies, and practices of nearly 150 beneficiary countries, including the use of child soldiers. To date, however, this has not consistently led to negative consequences for countries found to have used child soldiers. The 2002 report, for example, listed both DRC and Burundi as beneficiaries of U.S. trade benefits, even though both governments had been cited by the U.N. for child soldier use during the same year. To date, only one country—Pakistan—has had its trade benefits partially suspended because of a failure to address child labor issues adequately. No country has had its trade preferences revoked by the U.S. government because of failure to end the use of child soldiers.

**National-level Initiatives**

At the national level, greater investments must be made in both preventing recruitment of children and rehabilitating former child soldiers. For either to succeed, alternatives to military service are essential. Without access to quality education, or vocational training that can support a viable livelihood, children are much more likely to join
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armies or armed groups. Keeping families together and reunifying separated children with family members also reduces recruitment risks and facilitates social reintegration of former child soldiers.

Effective prevention also includes sensitizing children, their families, and community leaders to international norms and the negative impact of child soldiering, and engaging local communities in identifying local risk factors for recruitment. At the national level, birth registration, to ensure that children can produce proof of age, and close monitoring of recruitment practices are key. In areas where abduction or forced recruitment of children takes place, increased security at and near schools is needed to ensure that children can pursue their education in safety.

Significant improvements are possible when civil society and national authorities take responsibility for addressing child recruitment. In Paraguay, forced recruitment of children between ages twelve and seventeen was common in the late 1990’s, despite legal prohibitions against any recruitment of children below age eighteen. A local non-governmental organization estimated in 2000 that 80 percent of conscripts (more than 10,000 people) were under age eighteen. Between 1996 and 2000, a total of fifty-six under-age soldiers died during military service, often due to training accidents and ill treatment. Local NGOs organized a national campaign, documenting and publicizing cases of under-age recruitment, and filing cases with the Inter-American Commission on Human Rights. In response, the Senate formed an investigatory commission (including both governmental and nongovernmental representatives) to monitor conditions in military
The commission visited sixty-five military barracks in 2001 and 2002, identifying the presence of nearly 200 children. By 2003, local organizations reported that under-age recruitment had essentially stopped. For the first time, official recruitment documents now clearly stipulate the eighteen-year minimum age.

**Justice**

Finally, stronger efforts must be made to address impunity. In countries where child soldier use is routine, recruiters are rarely, if ever, held to account for recruiting children under the age prescribed by law or policy. In Burma, government law sets the recruitment age at eighteen and recruiters are subject to imprisonment for up to seven years for recruiting children under age. However, not only are these laws routinely flouted, but recruiters receive incentives in the form of cash and bags of rice for every recruit—regardless of age—that they deliver to recruitment centers. In response to requests, the government could provide Human Rights Watch with no information regarding any individuals who had been sanctioned for child recruitment.

This pattern of impunity fuels the cycle of child recruitment. Without a credible threat of criminal or disciplinary action, many recruiters will continue to seek out children, who are easily intimidated by threats, and easily lured by promises.

Impunity can be challenged through national courts, ad hoc tribunals, the International Criminal Court (ICC), and other justice mechanisms.
To date, the most active pursuit of child recruitment cases has come through the Special Court for Sierra Leone, which has one investigator—a specialist in child rights issues—dedicated to investigating these crimes. Investigating crimes related to the use of child soldiers was included in the investigative and prosecutorial strategy from the very inception of operations at the court. The use of child soldiers is included in each of the court’s thirteen indictments against defendants linked to abuses by the Civil Defense Forces or the Armed Forces Revolutionary Council/Revolutionary United Front, including, as noted above, former Liberian President Charles Taylor. If convicted, these defendants will likely face lengthy prison terms.

The ICC has great potential for pursuing high profile cases against those responsible for child recruitment. The ICC prosecutor has identified the DRC as a likely source of first cases for the court. Child recruitment has been a hallmark of the war in the DRC, and the country is probably second only to Burma in numbers of child soldiers. Prosecuting the top leadership of RCD-Goma, the UPC, the MLC, and other armed groups for their recruitment and use of children would send a powerful message to others who seek children for their forces.

National justice mechanisms must also hold recruiters to account. Laws on the books are not enough. Colombian law, for example, punishes the recruitment of children under age eighteen by armed groups with a six to ten-year prison sentence for those responsible. Yet the government has failed to enforce the law energetically.
Children as Weapons of War

The persistent recruitment and use of child soldiers presents the international community with a formidable, but not insurmountable challenge. The efforts of the past five years have established strong new norms and developed promising new avenues for addressing the problem. But these efforts are clearly not sufficient. Stronger, more concerted pressure is needed to persuade governments and armed groups to abandon their use of children as weapons of war. Success will depend on continued monitoring and advocacy, practical assistance for demobilization and rehabilitation, effective use of political and military leverage by international actors, and an uncompromising commitment by local, national, and international authorities to hold perpetrators accountable.
A father holds his son who was wounded and lost his right foot during the 2003 invasion into Iraq by coalition forces. © 2003 Bruno Stevens
Cluster Munitions: Toward a Global Solution
By Steve Goose

On March 31, 2003, a United States cluster munition attack on al-Hilla in central Iraq killed at least thirty-three civilians and injured 109. While an egregious incident, this was not an anomaly in the conflict in Iraq, or in Afghanistan in 2001 and 2002, or in Yugoslavia in 1999. In all of these recent conflicts, and others as well, cluster munition strikes caused significant civilian casualties—casualties that could have been avoided had greater care been taken. Worse still, the vast number of explosive “duds” these weapons left behind have continued to kill and maim civilians long after the attacks, and the conflicts, have ended.

In the past decade the international community has banned two weapons—antipersonnel landmines and blinding lasers—on humanitarian grounds. Cluster munitions now stand out as the weapon category most in need of stronger national and international regulation in order to protect civilians during armed conflict. The

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61 The author gratefully acknowledges significant contributions from Bonnie Docherty and Mark Hiznay to the writing of this essay.

62 Human Rights Watch was at the forefront of both these efforts, which resulted in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and Their Destruction (also known as the Mine Ban Treaty), and the 1995 Protocol on Blinding Laser Weapons (Protocol IV) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (also known as the Convention on Conventional Weapons, or CCW).
immediate danger that cluster munitions pose to civilians during attacks due to their inaccuracy and wide dispersal pattern, the long-term danger they pose after conflict due to the high number of landmine-like submunition duds, and the potential future dangers of widespread proliferation demand urgent action to bring the threat of cluster munitions under control.

Governments and civil society have an opportunity to deal with cluster munitions before they become a global crisis that could easily exceed that posed by antipersonnel landmines. Thus far, cluster munitions have been used in about sixteen countries. But nearly sixty countries have stockpiles of cluster munitions, and the numbers in stockpiles are staggering. The United States alone has cluster munitions containing more than one billion submunitions. Russia and China are likely to have similar quantities. Most of the submunitions now in stockpiles are not sophisticated weapons, but rather those that are known to be highly inaccurate and to have high failure rates, thus producing many hazardous duds.

It is imperative to deal effectively with cluster munitions before they wreak further havoc throughout the world. There is hope for a timely solution because there is already a keen awareness of the problems posed by cluster munitions among governments and nongovernmental organizations (NGOs), and some efforts to resolve the problems are already underway. Most notably, more than eighty NGOs, including Human Rights Watch, on November 13, 2003, launched a new Cluster Munition Coalition to stop the use of these weapons. Moreover, governments have been considering submunitions—if somewhat
obliquely—as part of negotiations during the past year on new international law dealing with “explosive remnants of war” (ERW). There is also reason for optimism because humanitarian and military interests largely coincide in the desire to eliminate, or at least decrease dramatically, the indiscriminate effects of the weapon.

What Are Cluster Munitions?
Cluster munitions are large weapons that open in mid-air and scatter widely smaller submunitions, which usually number in the dozens or hundreds. Cluster munitions can be launched from the air by a variety of aircraft, including fighters, bombers, and helicopters. On the ground, cluster munitions can be shot out of artillery, rockets, and missile systems. Air-dropped cluster bombs release submunitions most often called “bomblets,” while surface-delivered cluster weapons release submunitions most often called “grenades.”

The military values cluster munitions because of their wide dispersal and versatile submunitions. These munitions are “area” weapons that spread their contents over a large field, or “footprint.” They can destroy broad

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63 “Cluster bombs” is a more common term, but “cluster munitions” is preferable because it encompasses both air- and ground-delivered cluster weapons. For a more in-depth discussion of cluster munitions, see Human Rights Watch, Off Target: The Conduct of the War and Civilian Casualties in Iraq (New York: Human Rights Watch, November 2003), and Human Rights Watch, “Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan,” A Human Rights Watch Report, vol. 14, no. 7 (G), December 2002. For a complete list of Human Rights Watch documents on cluster munitions, see http://www.hrw.org/arms/clusterbombs.htm.
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targets like airfields and surface-to-air missile sites. They are also effective against targets that move or do not have precise locations, such as enemy troops or vehicles; the submunitions themselves often have both anti-armor and antipersonnel effects.

The submunitions are designed to explode on impact, which differentiates them from antipersonnel mines, which are designed to be activated by the victim. However, when submunitions fail to explode as expected, the “duds” usually remain hazardous and will explode when touched or disturbed in some manner, thus becoming de facto antipersonnel mines. While all weapons have a dud rate, also called the initial failure rate, cluster munitions are more dangerous for a number of reasons. First and foremost is the large numbers of submunitions that are released. Nearly every cluster munition will leave behind significant amounts of hazardous unexploded ordnance. Certain types of submunition duds are considered even more volatile and difficult to clear and destroy than most antipersonnel mines. Submunition duds are more lethal than antipersonnel mines; incidents involving submunition duds are much more likely to cause death than injury.

Most models, whether air-dropped or ground-launched, are unguided, and even the few with guidance mechanisms are not precision-guided. Unguided cluster munitions can miss their mark and hit nearby civilian objects. The numerous submunitions are also unguided and disperse
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over an area that is not always predictable. Although other types of unguided bombs can miss their target, the humanitarian effects of a cluster attack are often more serious because of the number of submunitions and their wide dispersal. Even if a cluster munition hits its target, the submunitions may kill civilians within the footprint. The inherent risks to civilian life and property increase when these weapons are used in or near populated areas. If cluster munitions are used in an area where combatants and civilians commingle, civilian casualties are almost assured.

Scope of the Problem: Use, Stockpiling, Production, and Trade of Cluster Munitions

Cluster munitions have been used in at least sixteen countries by at least eleven nations. The affected countries include Afghanistan, Albania, Bosnia and Herzegovina, Cambodia, Chad, Eritrea, Ethiopia, Iraq, Kuwait, Laos, Lebanon, Russia (Chechnya), Saudi Arabia, Serbia and Montenegro (including Kosovo), Sudan, and Vietnam. Cluster munitions were also used in the Falklands/Malvinas conflict. In

64 There are exceptions to this. In the Iraq conflict in 2003, the United States for the first time employed cluster munitions containing submunitions that have sensors to guide them, the air-delivered Sensor Fuzed Weapon and the SADARM (“search and destroy armor”) artillery projectile.

addition, unconfirmed reports cite use of cluster munitions in Colombia, Morocco (Western Sahara), Sierra Leone, and Turkey.

Nations known to have used cluster munitions include Eritrea, Ethiopia, France, Israel, the Netherlands, Russia, Saudi Arabia, the former Yugoslavia, Sudan, the United Kingdom, and the United States.

At least fifty-seven countries stockpile cluster munitions. Broken down regionally, these countries include:

- Five in Africa—Eritrea, Ethiopia, Nigeria, South Africa, and Sudan;
- Five in the Americas—Argentina, Brazil, Canada, Chile, and the United States;
- Seven in Asia—China, India, Japan, North Korea, South Korea, Pakistan, and Singapore;
- Twenty-two in Europe—Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Norway, Poland, Romania, Serbia and Montenegro, Slovakia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom;
- Seven in the Former Soviet Union region—Belarus, Kazakhstan, Moldova, Russia, Turkmenistan, Ukraine, and Uzbekistan;
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- Eleven in the Middle East/North Africa—Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Oman, Saudi Arabia, and United Arab Emirates.

The United States alone has more than one billion submunitions in stockpiles. Other nations are likely to have billions more. While cluster munitions are often thought of as sophisticated weapons for advanced armed forces, the vast majority of the world’s stockpiles consist of weapons based on decades-old technology that did not take concerns about accuracy and failure rate very much into account. Indeed, because cluster munitions are by nature wide-area weapons, accuracy was not seen as a particularly important attribute. Moreover, until very recently the trend was not to spend money to improve the reliability of submunitions, but rather to put more of the high-failure-rate submunitions into each cluster weapon in order to assure a successful strike.

The large stocks of unreliable early generation cluster munitions in the successor states of the Soviet Union and countries of the former Warsaw Pact are of particular concern. The effects of prolonged storage could contribute to extremely high failure rates, and thus high numbers of hazardous duds, if these weapons are used.

Thirty-three countries have produced at least 208 different types of cluster munitions that contain a wide variety of submunitions. The largest producers are likely to be the United States, Russia, and China. Outside of NATO and former Warsaw Pact nations, producers have
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included Argentina, Brazil, Chile, Egypt, India, Iran, Iraq, Israel, North Korea, South Korea, Pakistan, Singapore, and South Africa.

The full scope of the global trade in cluster munitions is not known. At least nine countries have transferred thirty different types of cluster munitions to at least forty-six other countries. The nine known exporters are Brazil, Chile, Egypt, Germany, Israel, Russia, the former Yugoslavia, the United Kingdom, and the United States. It appears that some older cluster munitions (and their delivery systems) have been transferred as surplus weapons from more to less technologically advanced armed forces. This could be a dangerous trend in the future.

Impact on Civilians

While the number of conflicts in which cluster munitions have been used is still relatively limited, the harm to the civilian population is striking in nearly every case. The attacks have caused civilian deaths and injuries that could have been avoided with better targeting and weapon choices. In most cases, large numbers of explosive submunition duds have taken even more civilian lives and limbs after the cluster munition strikes than during the attacks. The impact can go beyond needless civilian casualties, as extensive submunition contamination can have far-reaching socio-economic ramifications, hindering post-conflict reconstruction and development.

The long-term devastation that cluster munitions can cause is most evident in Southeast Asia, as Laos, Cambodia, and Vietnam still struggle
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to cope with the threat posed by cluster munitions dropped by the United States from 1964 to 1973. The International Committee of the Red Cross estimates that in Laos alone, nine to twenty-seven million unexploded submunitions remain, and some 11,000 people have been killed or injured, of which more than 30 percent have been children.\(^6\)


**Gulf War 1991**

In more recent years, the most widespread use of cluster munitions was in the Gulf War of 1991.\(^6\) Between January 17 and February 28, 1991, the United States and its allies dropped 61,000 cluster bombs containing some twenty million submunitions. Cluster bombs accounted for about one-quarter of the bombs dropped on Iraq and Kuwait. A significant number of surface-delivered cluster munitions were also used. The number of civilian casualties caused by the cluster strikes is not known.

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\(^6\) Most of the information in this section was first published in Human Rights Watch, “U.S. Cluster Bombs for Turkey?,” *A Human Rights Watch Report*, vol. 6, no. 19, December 1994, pp. 15-19.
A U.S. Air Force post-war study cited an “excessively high dud rate” due to the high altitude from which cluster bombs were dropped and the sand and water on which they landed. Even using a conservative 5 percent dud rate, more than one million unexploded submunitions were left behind by cluster bombs, and a similar number by ground cluster systems. By February 2003, these had killed 1,600 civilians, and injured more than 2,500 in Iraq and Kuwait. Despite one of the most extensive and expensive clearance operations in history following the war, there were still 2,400 cluster munition duds detected and destroyed in Kuwait in 2002, and a similar number in 2001.

Cluster bombs were used extensively in urban areas, particularly in southern Iraq. The plethora of unexploded bomblets on major roads put both refugees and foreign relief groups at risk. The bomblets particularly endangered children; 60 percent of the victims were under the age of fifteen. Unexploded bomblets slowed economic recovery because industrial plants, communication facilities, and neighborhoods had to be cleared before they could be restored. Iraqi authorities said that they removed tens of thousands of bomblets from such areas. Submunitions also needed to be cleared before people could extinguish the oil fires in Kuwait.

In Yugoslavia, the United States, the United Kingdom, and the Netherlands dropped 1,765 cluster bombs, containing about 295,000 bomblets, from March to June 1999. Human Rights Watch documented that cluster strikes killed ninety to 150 civilians and injured many more. This constituted 18 to 30 percent of the total civilian deaths in the conflict, even though cluster bombs amounted to just 7 percent of the total number of bombs dropped. The most notable case of civilian deaths occurred in Nis on May 7, 1999, when bomblets mistakenly fell on an urban area, killing fourteen and wounding twenty-eight civilians. The incident led President Clinton to suspend temporarily U.S. use of cluster bombs in the campaign.

The U.N. Mine Action Coordination Center estimated that a dud rate between 7 percent and 11 percent, depending on bomb model, left more than 20,000 unexploded bomblets threatening civilians. Some bomblets penetrated up to twenty inches deep, making clearance slow and difficult. In the year after the war’s end, bomblets killed at least fifty civilians and injured 101, with children being frequent victims. Bomblets also interfered with the return of refugees and slowed agricultural and economic recovery.

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Afghanistan 2001-2002

The United States dropped about 1,228 cluster bombs containing 248,056 bomblets in Afghanistan between October 2001 and March 2002. Cluster bombs represented about 5 percent of the U.S. bombs dropped during that time period. In a limited sampling of the country, Human Rights Watch confirmed that at least twenty-five civilians died and many more were injured during cluster strikes in or near populated areas. These casualty figures do not represent the total for the country because some deaths and injuries go unreported and because Human Rights Watch did not attempt to identify every civilian casualty due to cluster bombs. The United States learned some targeting lessons from its experience in the Gulf War and Yugoslavia, but it continued to make costly cluster bomb strikes on populated areas. The thirteen deaths from an errant cluster bomb in Qala Shater were reminiscent of the fourteen deaths from a stray bomb in Nis, Serbia. While Afghan villages are smaller than Yugoslavian cities, such targets accounted for most, if not all, civilian casualties during cluster bomb strikes in Afghanistan.

Using a conservative estimate of a 5 percent dud rate, the cluster bombs dropped by the United States likely left more than 12,400 explosive duds. From October 2001 to November 2002, at least 127 civilians as well as two deminers were killed or injured by these cluster duds. Common post-strike victims in Afghanistan have included shepherds grazing their flocks, farmers plowing their fields, and children gathering...
wood. Duds have also interfered with the economic recovery of the country, as they litter farmland, orchards, and grazing areas, which provide Afghans sustenance.

**Iraq 2003**

The United States and the United Kingdom dropped nearly 13,000 cluster munitions, containing an estimated 1.8 to 2 million submunitions, in the three weeks of major combat in March and April 2003. While only air-dropped cluster bombs were used in Yugoslavia and Afghanistan, far more surface-delivered than air-dropped cluster munitions were used in Iraq. A total of at least 1,276 air-dropped cluster munitions were used, containing more than 245,000 submunitions. A total of some 11,600 surface-delivered cluster munitions were used, containing at least 1.6 million submunitions. Human Rights Watch’s field investigation concluded that cluster munition strikes, particularly ground attacks on populated areas, were a major cause of civilian casualties; hospital records show cluster strikes caused hundreds of civilians deaths and injuries in Baghdad, al-Hilla, al-Najaf, Basra, and elsewhere.

The United States and the United Kingdom have not revealed full details about the cluster munitions they used, especially with respect to U.S. artillery projectile cluster munitions. However, based on available

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information on numbers, types, and reported failure rates, it is clear that Coalition cluster strikes have left many tens of thousands, and perhaps 200,000 or more, submunition duds. While the United States and the United Kingdom both used new types of more technologically advanced cluster munitions in Iraq, they also continued to use older types known to be inaccurate and to have high failure rates. Again, hospital records in a handful of cities indicated that by the end of May, submunition duds had already caused hundreds of civilian casualties.

Toward a Global Solution

The immediate effect and long-term impact of the use of cluster munitions over the past forty years have demonstrated that cluster munitions pose unacceptable risks to civilians. This is particularly evident from their increased use around the globe in the past thirteen years, with the two conflicts in Iraq as bookends. Having reached that conclusion, the question becomes, what can be done? Governments and NGOs—at long last—have been attempting to address that question in recent years, taking a number of different approaches to the issue.

A small number of NGOs have called for a complete ban on all cluster munitions, most notably the Mennonite Central Committee. While support for a ban has grown, particularly in the wake of the Iraq conflict, most NGOs have not advocated for a total prohibition.
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Human Rights Watch has been raising concerns about cluster munitions since the early 1990s, and in 1999 it was the first NGO to call for a global moratorium on use of cluster weapons. Although Human Rights Watch has not called for a permanent ban on cluster munitions, believing that a blanket prohibition is not justified under existing international humanitarian law, it strongly urges a moratorium based on the humanitarian impact of the weapons. In conflict after conflict, the cost to civilians of cluster munition use has been and continues to be unacceptably high. Human Rights Watch has called for no further use of cluster munitions until their humanitarian problems have been resolved.

The new global Cluster Munition Coalition launched on November 12, 2003, and endorsed by more than eighty NGOs has taken a position similar to that of Human Rights Watch. (See below for additional details). It is a loose and diverse coalition, and different members of the coalition have different ideas about how the humanitarian problems can and should be addressed; some believe that they will not and cannot be resolved.

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73 Human Rights Watch was one of the leading NGOs in bringing about the new coalition and sits on its initial steering committee.
Indeed, the solution to the cluster munition problem will likely require pursuing many different avenues simultaneously. Any solution will have to have both international and national components. A legally binding international agreement is a desirable, and necessary, future objective. But in the short term, development of model policies, practices, and regulations at the national level is essential. Any solution will have to address both the technical problems associated with cluster munitions, most notably the failure rate and high number of duds, and the targeting and use issues, most notably use in or near populated areas. It will have to address both air- and ground-delivered cluster munitions. It may require the flexibility to take different approaches to different types of cluster munitions, including the notion of a ban on the “worst offenders”—those cluster munitions known to have especially high failure rates, to produce large numbers of hazardous duds, or to be very inaccurate.

Cluster Munitions and International Humanitarian Law

In many if not most cases the use of cluster munitions raises concerns under international humanitarian law (IHL). This body of law, which governs conduct during armed conflict, requires belligerents to distinguish between combatants and non-combatants and prohibits as “indiscriminate” any attacks that fail to do so. Human Rights Watch has not called for a prohibition on all cluster munitions under international humanitarian law because, unlike antipersonnel mines, cluster munitions are not inherently indiscriminate; they can be used in such a way as to respect the legal distinction between military targets and civilians.
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However, some uses of cluster munitions consistently rise to the level of being indiscriminate. Particularly troublesome are strikes in or near populated areas, which regularly cause civilian casualties both during strikes, due to the difficulty in precisely targeting cluster submunitions, and after strikes, due to the large number of explosive duds inevitably left behind. An attack is disproportionate, and therefore prohibited, if it “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Based on research in Iraq, Afghanistan, and Yugoslavia, Human Rights Watch believes that when cluster munitions are used in any type of populated area, there should be a strong, if rebuttable, presumption that an attack is disproportionate. Furthermore, given the foreseeable dangers of using cluster munitions in certain circumstances, an attacker could be judged to have failed to “take all feasible precautions” to avoid civilian harm as required under international humanitarian law.

Convention on Conventional Weapons

Given the devastation already caused by cluster munitions, and the potential for much more far-reaching harm, it seems clear that the

74 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, article 51(5)(b). Protocol I codified and in some measure expanded upon existing law, particularly relating to the conduct of hostilities. Today, many, if not most, of its provisions are considered reflective of customary international law.

75 Protocol I, art. 57(2)(a)(ii).
international community should formally regulate cluster munitions as it has other problematic weapons, such as anti-vehicle landmines and incendiary weapons. Specific new international law could clarify and strengthen the IHL restrictions noted above relevant to cluster munitions.

The logical venue for dealing with cluster munitions is the 1980 Convention on Conventional Weapons (CCW), which has four protocols addressing different weapons. In December 2001, the Second Review Conference of the CCW agreed to evaluate ways to deal with explosive remnants of war (ERW). In December 2002, the CCW States Parties decided to draft a new instrument, and on November 28, 2003, they reached agreement on Protocol V on Explosive Remnants of War.

Human Rights Watch welcomed the new protocol, though lamenting the weakness of much of the language. The protocol makes a state responsible for clearance of all ERW in territory under its control; it is also to provide warnings and education and take other measures to protect the civilian population. The user of weapons that leave explosive remnants is to provide assistance for clearance of such ERW in territory not under its control.

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76 Explosive remnants of war include cluster munition duds and all other types of explosive ordnance (such as bombs, rockets, mortars, grenades, and ammunition) that have been used in an armed conflict but failed to explode as intended, thereby posing ongoing dangers. ERW also include abandoned explosive ordnance that has been left behind or dumped by a party to an armed conflict.
Regrettably, the protocol covers only post-conflict measures. Delegates opted not to negotiate on “preventive measures,” such as technical improvements or use restrictions, or specific weapons systems, such as cluster munitions. Instead of making these the subject of negotiations, governments agreed only to discuss possible technical improvements for submunitions and whether or not existing international humanitarian law is sufficient to address issues related to submunitions. While the discussions on the latter topic were limited, most states seemed content with the conclusion that the rules of IHL are adequate and that the main challenge is finding way to improve observance and implementation of the rules. Some states, most notably Norway, questioned this conclusion, noting that IHL is ever evolving, and called for further examination of the way IHL has been applied thus far to the use of cluster munitions.

What seems most telling in this regard is the “ground truth” from recent conflicts. Nations such as the United States, the United Kingdom, and the Netherlands that consider themselves to have among the most sophisticated militaries in the world, with a great understanding of and respect for international humanitarian law, have used cluster munitions and done so in a fashion that has caused extensive civilian casualties and other civilian harm. This calls into question the adequacy of existing international humanitarian law and points to the need to strengthen existing rules or create new rules in order to offer adequate protections to civilians from the effects of cluster munitions.

As the negotiations on ERW progressed, a number of countries stressed the need to tackle more directly the issue of submunitions. In June
2003, Switzerland called for the establishment of a mandate as soon as possible to negotiate a new protocol on submunitions. Supportive countries included Austria, Belgium, Canada, Denmark, France, Ireland, Mexico, the Netherlands, New Zealand, Norway, and Sweden. Those opposed to further work on submunitions included China, Pakistan, Russia, and the United States. In the end, when concluding Protocol V, CCW States Parties agreed only to continue discussions on preventive measures and specific weapons.  

It is not difficult to envision key elements of any future instrument on cluster munitions. It should address both technical and targeting issues. It should contain a prohibition on use in or near populated areas. It should have requirements regarding accuracy and circumstances of use. It should require a very high reliability rate, one that should be determined by military and humanitarian experts, perhaps with 99 percent as a starting point. It should require that old stocks that do not meet the new standards be retrofitted or destroyed. It should prohibit the transfer of cluster munitions that do not meet new standards. It should require detailed transparency reporting on existing types and technical characteristics of cluster munitions, (for example, number of submunitions, fuze type, estimated footprint, and known failure rate).

77 In the compromise language, States Parties agree: “To continue to consider the implementation of existing principles of international humanitarian law and to further study, on an open-ended basis and initially with particular emphasis on meetings of military and technical experts, possible preventative measures aimed at improving the design of certain types of munitions, including submunitions, with a view to minimizing the humanitarian risk of these munitions becoming ERW. Exchange of information, assistance and cooperation would be part of this work.” CCW document, “Recommendation of the Working Group on Explosive Remnants of War,” CCW/MSP/2003/CRP.1, November 27, 2003.
Technological Approaches

Among many militaries, there is an increasing willingness to attempt to deal with cluster munition problems through technological improvements that lower the failure rate and increase accuracy. As noted, an explicit part of the mandate of the CCW Group of Governmental Experts working on explosive remnants of war was to discuss preventive measures to decrease failure rates. Commonly cited were self-destruct mechanisms (those will cause the submunition to explode after a certain period of time if it fails to explode on contact) or other secondary fuzes that serve as a back-up to ensure detonation.

The new CCW Protocol V on Explosive Remnants of War in Article 9 encourages States Parties “to take generic preventive measures, aimed at minimising the occurrence of explosive remnants of war, including, but not limited to, those referred to in part 3 of the technical annex.” The annex, which contains “suggested best practice” to be implemented on a voluntary basis, states that, among other measures, “A State should examine ways and means of improving the reliability of explosive ordnance that it intends to produce or procure, with a view to achieving the highest possible reliability.” An earlier draft called for a reliability rate of 99 percent. During the CCW ERW process, Switzerland led the way in pushing for agreement on a reliability standard for submunitions.

In 2001, then-U.S. Secretary of Defense William Cohen issued a policy decision that all future submunitions must have a dud rate of less than 1 percent. In August 2003, General Richard Myers, chairman of the Joint Chiefs of Staff, said the U.S. Army planned to produce self-destruct fuzes for submunitions in some ground-launched cluster munitions.
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(Dual Purpose Improved Conventional Munitions, DPICMs) in 2005.\textsuperscript{78} In Iraq, the United States used for the first time air-dropped CBU-105 Sensor Fuzed Weapons and surface-launched M898 SADARM artillery projectiles, both of which contained submunitions with self-destruct features. Likewise, the United Kingdom introduced the L20A1 artillery projectile with an Israeli-designed self-destructing submunition. Other countries that are reported to have developed or deployed cluster munitions with a self-destruct or self-neutralizing capability include France, Germany, Italy, Romania, Russia, Singapore, and Slovakia.

In Iraq, the United States also made greater use of the Wind Corrected Munitions Dispenser, first seen in Afghanistan, in order to increase the accuracy of air-dropped cluster bombs. In perhaps the greatest technological advance, the submunitions in the CBU-105 and SADARM Sensor Fuzed Weapon are capable of independently sensing and attacking specific targets like armored vehicles. Thus, these weapons are designed to address the multiple problems associated with cluster munitions: the inaccuracy of both the munition and the submunition, and the large number of persistent duds.

\textsuperscript{78} Letter from General Richard B. Myers, chairman, Joint Chiefs of Staff, to Sen. Patrick Leahy, August 11, 2003. Myers said the U.S. Army plans to add a self-destruct fuze to the 155mm extended-range DPICM in 2005. It "is also developing a self-destruct fuze to reduce the dud rate to below 1 percent for its cluster munitions in rocket and other cannon artillery systems. This new fuze may be available for future production of Army cluster munitions as soon as 2005."
While each of these technological developments needs to be further studied and assessed in order to determine their effectiveness and the degree to which they improve protections for civilian populations, the trend is encouraging and should be continued.

At the same time that nations continue efforts to improve the reliability and accuracy of cluster munitions, they should also consider if weapons with fewer humanitarian side effects can replace them. For example, air-dropped cluster bombs appear to be of diminishing importance to the U.S. military, given the prevalence of less expensive precision-guided munitions and the existing and emerging alternatives to cluster munitions.

While technological improvements present one avenue to help remedy the cluster munition problem, there is also reason to question whether a technical “fix” is truly feasible, and whether it is a valid approach on a global scale. There is reason to question whether even the most advanced military will be able to lower the dud rate sufficiently to offset the dangers posed by the release of hundreds, or even thousands, of submunitions at a time. There is reason to question whether low reliability rates that may be achieved in testing will ever be duplicated under battle conditions or in environments that may increase failure rates (such as sand, soft ground, trees, high winds, etc.). There is reason to question how accurate a weapon can be that is designed to cover a broad area.
Apart from technical feasibility, there is very much reason to doubt that a technological solution will ever be pursued by the less advanced and less wealthy militaries, who may not have the know-how or money to do so. Countries with major armed forces such as Russia and China have said they could not afford such an approach for all submunitions. Finally, there is the question of the fate of existing stocks. While the United States introduced new technologically improved cluster munitions in Iraq, it also continued to use large quantities of old, unreliable, inaccurate cluster munitions. The new U.S. standard for reliability applies only to future (post-2005) submunition production, and permits use of all the “legacy” submunitions in stock—those that have already proven to be of great danger to civilian populations.

**Targeting and Use Issues**

While lowering the failure rate could mitigate the negative impact of cluster munitions following a strike, it would not address the danger posed to civilians during cluster attacks. There is also a need for regulations on the circumstances in which cluster munitions are used. Human Rights Watch field investigations in Yugoslavia, Afghanistan, and Iraq have shown that use of cluster munitions in or near populated areas almost inevitably leads to civilian casualties. If an armed force chooses to use cluster munitions, the most important operational constraint should be no use in or near populated areas.

Like Human Rights Watch and other NGOs, the International Committee of the Red Cross has formally called for a prohibition on the use of submunitions against any military object located in or near civilian
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areas. However, this proposal has received the support of only a few governments. It remains under discussion within the CCW. In June 2003, Norway submitted a paper to CCW delegates suggesting appropriate measures for the use and targeting of cluster munitions and posing a set of questions on submunition use and targeting to be considered by other governments.

In addition to the prohibition on use in populated areas, there should also be a requirement to record and report information regarding cluster munition strikes, in order to facilitate risk education and rapid clearance. Such information should include location of the strike, number, and type of munitions and submunitions, and technical information to ensure safe clearance operations.

Governments should also assess the feasibility and effectiveness of other potential restrictions on use aimed at avoiding civilian harm, including restrictions related to delivery parameters (such as excessively high or low altitude delivery) and use in environments prone to increase the failure rate of submunitions.

“Worst Offenders”

While Human Rights Watch has not called for a comprehensive prohibition on cluster munitions, it believes that the vast majority of cluster munitions in existing stockpiles of nearly sixty nations should never be used. These weapons are so inaccurate and/or so unreliable as to pose unacceptable risks to civilians, either during strikes, post-conflict
or both. A number of NGOs, including Human Rights Watch, are working to develop a list of “worst offenders”—those cluster munitions that are especially dangerous for civilian populations and thus should either be modified or withdrawn from military service and destroyed.

While a good deal of research still needs to be done to identify the worst offenders, prior to the 2003 Iraq conflict Human Rights Watch called on the United States not to use four types of cluster munitions because of the foreseeable dangers to civilians: CBU-99/ CBU-100 Rockeye cluster bombs, CBU-87 Combined Effects Munitions (cluster bombs), Multiple Launch Rocket Systems (MLRS) with M77 submunitions, and 155mm artillery projectiles with M42 and M46 Dual Purpose Improved Conventional Munition submunitions. It is important to note that, except for the Vietnam-era Rockeye, these are relatively new types of cluster munitions, first used extensively in the 1991 Gulf War. Most of the world’s cluster munitions would pose even more dangers to civilians than these that Human Rights Watch has already put on a “no use” list.

Some nations might invest the funds to improve the reliability and accuracy of their old cluster munitions. As noted above, the United States is retrofitting some of its ground-delivered submunitions with self-destruct devices. However, it is likely that most nations will find this step too expensive, or not cost-effective compared to purchase of other weapons that could accomplish the same military objective.

Air- vs. Ground-Delivered Cluster Munitions

Because the only cluster munitions used by allied forces in the Kosovo and Afghanistan conflicts were air-dropped, international attention (both government and NGO) has been focused on cluster bombs rather than surface-delivered cluster weapons. The 2003 war in Iraq has changed that. Far more ground submunitions (at least 1.6 million) were used than air (about 245,000), and the great preponderance of civilian casualties caused by cluster munitions were due to ground systems.

While the sheer number of ground-delivered cluster submunitions is daunting, the fact that they were used extensively in populated areas is equally disturbing. It appears that in Iraq, the U.S. and U.K. air forces learned a lesson from previous conflicts and largely heeded the call of Human Rights Watch, the ICRC, and others in greatly restricting the use of cluster munitions in or near populated areas. There were only a few known instances of civilian casualties due to air cluster attacks, notably in al-Hilla. The air forces for the most part avoided civilian concentrations and in some instances used more accurate and reliable cluster bombs.

It seems the same rules did not apply to ground forces. While a vetting process to determine the legality and appropriateness of cluster strikes was in place for both the United States and the United Kingdom, it did not prevent widespread attacks in Baghdad, al-Hilla, al-Najaf, Basra, and elsewhere that killed and injured hundreds of civilians. In the case of the United States, cluster strikes in populated areas were often made using radar to remotely hone in on targets, without any visual confirmation whether civilians were present in the target area. U.S.
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combatants told Human Rights Watch that cluster munition warheads were often the only weapon choice available, particularly in the case of the MLRS, and that it was often a choice they did not like. U.S. after-action reports have highlighted the need for non-submunition alternatives.

Sensitivity to the dangers to civilians must extend to ground forces using cluster munitions as well as air forces. Uniform standards should apply, particularly with respect to no use in populated areas. Armed forces should develop a vetting process for cluster munition strikes, particularly for surface-launched cluster munitions, that successfully reduces the harm to civilians. Ground forces need to catch up to air forces when it comes to cluster munition targeting and technology.

Intersection of Humanitarian Concerns and Military Interests

The effort to reduce the risk to civilians posed by cluster munitions may significantly benefit from recent concerns in some military circles about the weapons. The armed forces of some nations are increasingly seeing a military advantage to addressing the problems of reliability and accuracy.

Reports after the Gulf War, Kosovo, Afghanistan, and Iraq have all cited the negative impact of cluster munition duds on U.S. and allied forces, as well as peacekeepers: the duds have killed and injured numerous military personnel and have directly affected military
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operations. The presence of duds can decrease the mobility of one’s own troops. Concerns about such dangers and impediments have compelled some coalition forces in Iraq to join those who question use of the weapon. In particular, U.S. and U.K. combat experiences with artillery and MLRS submunitions led some soldiers and Marines to call for an alternative weapon with fewer deadly side effects. A post-conflict “lessons learned” presentation by the U.S. Third Infantry Division echoed the concerns of its field officers. The division described dud-producing submunitions, particularly the DPICM, as among the “losers” of the war. “Is DPICM munition a Cold War relic?” the presentation asked. The dud rate of the DPICM, which represented more than half of the available arsenal, was higher than expected, especially when not used on roads. Commanders were “hesitant to use it . . . but had to.” The presentation specifically noted that these weapons are “not for use in urban areas.”

It is essential that NGOs and international organizations seeking solutions to the cluster munition problem engage directly and extensively with armed forces and take advantage of this space where military necessity and humanitarian concern coincide.

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National, Regional and International Steps

It is likely that before an international instrument can be seriously contemplated, there will need to be some model positions, policies, and practices established at the national level that will show the way for others. To date, not a single government that possesses cluster munitions has yet formally endorsed the call for a moratorium on use until the humanitarian problems are resolved. However, as noted above, there has been some positive momentum in the past several years—momentum reflected in part by the efforts by the United States and others to improve the reliability and accuracy of cluster weapons, and in part by the activity at the CCW.

In addition, there have been a number of steps taken at the national level deserving mention. Norway has foresworn the use of air-dropped cluster munitions in international conflicts (and prohibited their use in Afghanistan). Belgium has reportedly destroyed all of its obsolescent BL-755 cluster bombs (a type used by the United Kingdom in Iraq). Sweden has reportedly removed from service obsolescent Rockeye cluster bombs (a type used by the United States in Iraq). Australia said in April 2003 that it does not use cluster munitions; and in October 2003, the Australian Senate passed a motion calling for a moratorium on use.

Regional and international bodies have expressed opposition to cluster munitions. During the Afghanistan conflict, the European Parliament passed a resolution calling for an “immediate moratorium” on use of cluster bombs until an international agreement addressing the weapon
Cluster Munitions

was reached. On the final day of the CCW negotiations in November, the United Nations agencies issued a statement calling for a freeze on use of cluster munitions until humanitarian concerns are addressed.

A key challenge for NGOs is to promote a core group of governments that can provide leadership on this issue, for that is sorely lacking at this time.

Cluster Munition Coalition

On November 13, 2003, nongovernmental organizations came together to launch the Cluster Munition Coalition (CMC) in the Hague, the Netherlands. At its birth, the CMC was endorsed by eighty-five NGOs from forty-two countries. The coalition was formed as a global response to cluster munitions and to the humanitarian crisis caused by explosive remnants of war more generally.

The Cluster Munition Coalition calls for:

- No use, production, or trade of cluster munitions until their humanitarian problems have been resolved.

- Increased resources for assistance to communities and individuals affected by unexploded cluster munitions and all other explosive remnants of war.

- Users of cluster munitions and other munitions that become ERW to accept special responsibility for clearance, warnings, risk education, provision of information, and victim assistance.
Human Rights Watch and a handful of other NGOs took the lead in forming the coalition not just out of concern for the negative humanitarian effects of cluster munitions and ERW, but out of recognition that nongovernmental organizations needed to be more active and more organized to have an impact. The Cluster Munition Coalition has many challenges before it, but its very existence has put governments on notice that this is not an issue that will be ignored, or only lamented with the next war; an ongoing and ever-growing effort is underway to ensure that cluster munitions do not create their own global crisis.

It is abundantly clear that dealing with cluster munitions effectively will require much greater effort on the part of governments, international organizations, and NGOs. Thus far, few, if any, have devoted the time, energy, and passion to the cluster munition issue that was brought to bear, for example, on the antipersonnel mine issue. Now is the time for those with vision to seize the moment.
Introduction

From Rwanda’s genocide to massacres by paramilitaries and rebels in Colombia, the provision of arms, ammunition, and other forms of military support to known human rights abusers has enabled them to carry out atrocities against civilians. The perpetrators of war crimes, crimes against humanity, and genocide are on notice that they may be hauled before a national or international criminal tribunal to face charges. Yet the individuals and states who provide the weapons used in massive human rights abuses have so far been let off the hook for their central role in facilitating these crimes.

Individual arms traffickers and the states who use their services reject out of hand the idea that they bear some responsibility for fueling abuses. Human rights organizations and their allies in the humanitarian, public health, development, conflict prevention, and disarmament communities have set out to prove otherwise. These activists have long worked to develop strong norms to prevent arms transfers in certain circumstances, including transfers that would facilitate the commission of human rights abuses and war crimes, the concern here. Increasingly, they are turning to the obligations of states and individuals under international law, especially concepts akin to complicity, to establish a norm against arms supplies to abusers that has teeth.
Arms and Human Rights Abuses

In the early hours of January 6, 1999, rebels of the Revolutionary United Front (RUF) launched an offensive against the Sierra Leonian capital, Freetown. As the rebels took control of the city, they turned their weapons on the civilian population. The rebels gunned down civilians within their houses, rounded them up and massacred them on the streets, hacked off the hands of children and adults, burned people alive in their houses and cars, and systematically sexually assaulted women and girls. Before withdrawing from the city later that month, the rebels set fire to neighborhoods, leaving entire city blocks in ashes and over 51,000 people homeless. On their way back to the hills, the RUF took with them thousands of abductees, mostly children and young women. All told, several thousands of civilians were killed in Freetown by the end of January.

The RUF was heavily backed by the government of Charles Taylor in Liberia, which provided arms, troops, and other support in exchange for diamonds and other riches that were under the RUF's control in Sierra Leone. Never mind that both Liberia and the RUF were subject to mandatory United Nations arms embargoes. All Taylor needed were regional allies such as Burkina Faso willing to provide false cover for weapons deliveries, arms suppliers such as Ukraine willing to sell weapons with no questions asked, and the vast networks provided by private traffickers such as Victor Bout to acquire and move the goods from Point A to Point B, falsifying the paperwork along the way. The private actors involved and the governments they worked with were exposed, including in detailed reports by U.N. investigators. But in spite of about a dozen U.N. investigative reports on violations of arms
embargoes imposed on gross abusers—in Angola, Liberia, Rwanda, Sierra Leone, and Somalia—not one of the persons named in the reports has been convicted in national courts for having breached these embargoes and thus having facilitated horrific abuses.

Against this backdrop of impunity, the indictment of Liberia’s Charles Taylor by the U.N.-backed Special Court for Sierra Leone represents a watershed. It helps illustrate the concept of responsibility for atrocities committed by abusive forces whom one has supported by furnishing weapons or through other means. The indictment charges Taylor with “individual criminal responsibility” for crimes against humanity, war crimes, and other serious violations of international humanitarian law committed in Sierra Leone by the RUF and allied forces. His responsibility, as detailed in the indictment, is based in part on his role in providing “financial support, military training, personnel, arms, ammunition and other support and encouragement” to these notoriously brutal rebels. By pointing to legal responsibility under international criminal law, the indictment is emblematic of an important approach. Arms campaigners are increasingly turning to human rights and humanitarian law as a basis to assert the responsibilities of both states and individuals.

Arms Transfers and the Responsibility of States

Recognition of states’ responsibility to control arms transfers has evolved over time. Affected communities, activists, and progressive governments have moved the debate toward a greater recognition of the human rights consequences of weapons flows and greater consideration
of the obligations this imposes on suppliers. This suggests important opportunities to strengthen the emerging norm against arms supplies to abusers.

**Building Norms From the Bottom Up**

For many years, ethical arguments have been a backbone of efforts to prevent arms from getting into the wrong hands. Nongovernmental organizations (NGOs) have long called for an end to government-authorized military assistance to gross abusers and decried the lack of control on private traffickers. Research has helped spotlight the problem. Groundbreaking investigative reports by Human Rights Watch and Amnesty International in the mid-1990s exposed the role of France, South Africa, Israel, Albania, Bulgaria, and others in arms supplies to Rwanda before and immediately after the 1994 genocide. As events in Rwanda tragically unfolded, the U.N. arms embargo imposed in the midst of the genocide went unheeded. Responding to such concerns, the U.N. Security Council in 1995 formed a commission of inquiry, known as UNICOI, to investigate violations of the Rwanda arms embargo. The Security Council largely buried the work of this commission, however, as its findings were deemed to be too politically sensitive. Little will existed to embarrass states, let alone hold anyone accountable.

Awareness of the human cost of uncontrolled transfers grew throughout the 1990s, as civil wars were spread in many parts of the world. Civilians have been caught in the crossfire or directly targeted by armed attackers. Journalists, humanitarian workers, and peacekeepers have
witnessed this violence and often themselves been victims of it. Spurred by such atrocities and by continued civil society research and campaigning, states progressively adopted minimum arms-transfer criteria at the national, regional, and international level. For example, as a new spirit of ethics in foreign policy took hold—in principle if considerably less firmly in practice—in South Africa in 1994 and in the United Kingdom in 1997, these states pledged to halt arms transfers to human rights abusers. By the late 1990s, growing pressure helped lead to a number of voluntary regional and sub-regional measures that built on such national-level commitments. For example, in 1998 the European Union adopted a Code of Conduct on Arms Exports. That same year, the Economic Community of West African States adopted a three-year moratorium, since extended, on the import, export, and manufacture of small arms and light weapons. These and other measures have marked progress, but have fallen woefully short of the mark. A key weakness is that they are not binding and are thus often disregarded in practice.

Much attention has focused on the widespread availability and devastating misuse of one category of conventional weapon: small arms and light weapons, which are personal weapons such as pistols, assault rifles, and rocket-propelled grenade launchers. Some of this attention has been directed to ensuring that minimum arms transfer criteria are in place to keep such weapons out of the hands of abusers. But there also has been resistance to the idea of the responsibility of states with regard to authorized transfers—so called “legal” transfers—and many governments have insisted on discussing small arms only with respect to their illicit traffic—i.e., in cases where there is no state authorization. In July 2001, the U.N. hosted the first-ever international conference on
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small arms. It drew needed attention to this global scourge and helped motivate states to begin to tackle it. The conference resulted in a “Program of Action” document specifying actions that should be taken at the national, regional, and international level. Unfortunately, this was a watered-down consensus document focused on preventing and combating illicit small arms transfers, and it largely leaves aside the issue of government-authorized arms deals.

Since 2001, states in some regions have been able to find common ground and have agreed on measures to restrain authorized arms transfers. An ever-growing number of states have promised not to approve arms transfers where there is reason to believe these will contribute to human rights abuses and violations of international law. Such commitments are in keeping with the duty of states to respect and ensure respect for international human rights and humanitarian law.

Toward Legally Binding Measures

Despite pledges to the contrary, weapons continue to find their way all too readily to areas—from the Democratic Republic of Congo to Sri Lanka—where they are used to commit serious human rights abuses and violations of international humanitarian law. There have been many calls from civil society to give binding legal status to existing commitments. State practice is slowly developing in this area, in part in response to scandals. In 2002, for example, Belgium—in contravention of the E.U. Code of Conduct—approved an arms transfer to Nepal, a country in conflict whose government had been implicated in a pattern of serious human rights abuses involving abduction, torture, and
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summary executions. The Nepal arms affair led a Belgian government minister to resign and prompted the federal parliament to pass a landmark law making national arms export criteria binding. These criteria are largely based on the E.U. Code of Conduct—and include a requirement that recipients of arms must comply with human rights and international humanitarian law.

Another important trend has been greater, if still uneven, attention to the enforcement of arms embargoes on gross human rights abusers. The efforts of UNICOI in the mid-1990s to document arms supplies to the forces that committed genocide in Rwanda were downplayed at the time. But the UNICOI experience helped open the door to a series of hard-hitting U.N. investigations that garnered greater public attention. Beginning with a March 2000 report on violations of an embargo then in place against Angolan rebels, various U.N. investigations by panels of experts have given new legitimacy and a name—“naming and shaming”—to efforts to hold arms suppliers and traffickers responsible for their behavior. These investigations have largely focused on the private traffickers who are a crucial link in the sanctions-busting chain. But the panels also have named governments, including heads of governments. For example, the president of Burkina Faso was accused of directly facilitating Liberia’s arms-for-diamonds trade, to the benefit of the RUF in Sierra Leone.

U.N. arms embargoes are binding on states, but in reality this means little if there are no consequences for their violation. Beginning with the first Angola panel report, the U.N. has considered imposing secondary sanctions on governments found to have breached the embargoes. This
was done once, in the case of Liberia, which was subjected to a strengthened arms embargo as well as a travel ban, diamond sanctions, and later timber sanctions, in response to its support for rebels in Sierra Leone in violation of the U.N. embargo.

**International Law and the Role of States in Arms Transfers**

Beyond respecting arms embargoes, states have other international legal responsibilities they should consider when weighing weapons transfer decisions. For example, the 2001 U.N. Program of Action on small arms included an important reference to states’ obligations. It acknowledged that national arms export controls must be “consistent with existing obligations of states under relevant international law.” It offered no further elaboration. Arms campaigners have called on states to affirm that those obligations encompass international human rights and humanitarian law. In these and other ways, states have been forced to consider their responsibility under international law for the consequences of their arms transfers.

States involved in arms transfers bear a measure of responsibility for the abuses carried out with the weapons they furnish. This is true of arms-supplying states that approve arms deals where they have reason to believe the weapons may be misused. Exporting states in particular—as well as those that serve as transshipment points or as bases for arms brokering, transport, and financing—also must share in the responsibility for abuses when they fail to exercise adequate control over private traffickers who make weapons available to anyone who can pay.
The notion that one state can bear legal responsibility for helping another state breach international law has been recognized by a leading international body that promotes and codifies developments in international law. The International Law Commission, in its Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001, concluded that: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.” In its commentary to the articles, the ILC applied this legal concept to the question of arms transfers: “[A] State may incur responsibility if it assists another State to circumvent [U.N.] sanctions … or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations. Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State was aware of and intended to facilitate the commission of the internationally wrongful conduct.”

The question of the “secondary responsibility” of governments for armed atrocities has recently been examined by a special rapporteur on human rights and small arms with the U.N. Sub-Commission on the Protection and Promotion of Human Rights. In a May 2002 working
paper, she highlighted that: “States are prohibited from aiding another State in the commission of internationally wrongful acts. That prohibition could be invoked in situations where a transferring State supplies small arms to another State with knowledge that those arms are likely to be used in a violation of human rights or humanitarian law … States do have important obligations under international human rights and humanitarian law that could be interpreted to prohibit them from transferring small arms knowing they will be used to violate human rights.” Her work has stressed, as noted in her June 2003 preliminary report, that “[t]o prevent transfer of small arms into situations where they will be used to commit serious violations of international human rights and humanitarian law, the international community should … further articulate principles regarding State responsibility in the transfer of small arms.”

This approach is at the core of a proposed international Arms Trade Treaty, which would be a binding instrument containing strong human rights and international humanitarian law criteria to govern the arms transfer decisions of states. The Arms Trade Treaty grew out of an earlier initiative by Nobel Peace Laureates, led by former Costa Rican president Oscar Arias, to promote international standards on arms transfers. The draft treaty addresses the existing obligations of states under international law and applies them to decisions to authorize arms transfers. Its central provisions would prohibit arms transfers where the authorizing government knows or ought reasonably to know that the weapons will be used to commit genocide, crimes against humanity, serious human rights abuses, or serious violations of international humanitarian law.
In October 2003, Amnesty International, Oxfam, and the International Action Network on Small Arms—consisting of more than 500 organizations, including Human Rights Watch—launched the “Control Arms” campaign in some seventy countries. The centerpiece of this effort is a push to promote negotiation of an Arms Trade Treaty by 2006, when the U.N. will host a follow-up to the 2001 small arms conference. The proposed Arms Trade Treaty is intended to cover all conventional arms and would apply to all manner of arms transfers, including transshipment and re-exports, not only direct exports. Some states have begun to step forward to champion the treaty idea, with Mali and Costa Rica taking an early lead. Negotiating such a binding international instrument on arms transfers would represent a major step forward in defining state responsibility for the human rights consequences of arms transfers.

Arms Transfers and Individual Responsibility

Just as there is a major push to hold states responsible for authorizing transfers of arms used to commit violations of human rights and international humanitarian law, there is also an impetus towards holding individuals accountable for their involvement in such arms transfers under international criminal law. Private arms trafficking to gross human rights abusers is in part an issue of state responsibility, in that such transfers often can be traced to governments that fail to implement and enforce adequate controls on private traffickers. In some cases, governments knowingly take part in illicit arms trafficking, as when officials provide false cover for arms shipments they know are destined elsewhere. But arms traffickers often do not work on behalf of specific states and instead have multiple clients, sometimes arming opposing
sides in a given conflict. As arms traffickers establish transnational
criminal enterprises, they seek to avoid the reach of national law. To
address this widespread problem, nongovernmental groups have pressed
for states to impose controls on arms brokers, licensing their activities
using strict human rights criteria, and to move forward to negotiate
binding international treaties on arms brokering and marking and tracing
of weapons.

There is also scope to consider the individual responsibility of arms
traffickers under international law. A review of the recent practice of
international criminal tribunals suggests how this could come about.
Under international criminal law, there are various ways in which a
person may incur individual criminal responsibility. The most obvious
way is as perpetrator, the person who directly commits the crime, as in
the case of an individual soldier who slaughters civilians. A second
possibility involves a person who holds a position of superior authority.
Under the principle of “command responsibility,” this person can be
held responsible for crimes committed by a subordinate, where the
superior knew or had reason to know of the subordinate’s intended or
actual crimes and failed to take the necessary and reasonable measures to
prevent the crime or to punish the perpetrator. Neither of these two
theories is likely to cover the activities of the arms trafficker who
supplies the weapons used by the perpetrators.

The legal concept of complicity may be relevant in such cases. In lay
terms, complicity relates to knowingly helping someone commit a crime
without necessarily sharing the intent of the perpetrator. The Special
Court in Sierra Leone drew on this legal concept in its indictment of
Charles Taylor. Among other things, Taylor stands indicted for having “aided and abetted” abuses perpetrated by Sierra Leonean rebels—including acts that terrorized the civilian population, unlawful killings, widespread sexual violence, extensive physical violence, the use of child soldiers, abductions and forced labor, looting and burning, and attacks on peacekeepers and humanitarian workers—through the provision of financing, training, weapons, and other support and encouragement to the rebels. Taylor is also accused of more direct involvement in crimes in Sierra Leone and so it is not clear to what extent the Special Court will examine complicity theory even if Taylor is apprehended and tried, but the indictment itself is nonetheless an intriguing development for those looking for new ways to hold arms suppliers accountable.

Relevant Case Law

An examination of case law from other international criminal tribunals illuminates the potential for prosecuting arms suppliers for providing weapons to known abusers.

The concept of individual criminal responsibility for assisting in the commission of a crime without directly committing that crime is a general principle of criminal law. Indeed, one can be prosecuted for aiding many types of crimes recognized under international law. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has elaborated this point in the context of cases involving accessories to war crimes and crimes against humanity. “Aiding” in international criminal law entails providing practical assistance that has a substantial effect on
the commission of the crime. According to the ICTY, an “aider” must intentionally provide assistance to the perpetrator with knowledge of the perpetrator’s intent to commit a crime, but need not himself or herself support the aim of the perpetrator. Moreover, the ICTY has stated that a person may be liable as an accessory whether the assistance is provided before, during, or after the specific crime in question is committed.

In the case of the crimes of genocide and torture, international conventions outlawing those acts explicitly state that acts of complicity in those crimes are punishable. The International Criminal Tribunal for Rwanda (ICTR) has further outlined what the specific crime of complicity in genocide entails. As elaborated by the ICTR, there are three elements of complicity in genocide: complicity by procuring means to commit genocide, by knowingly aiding and abetting genocide, or by

81 See, for example, Prosecutor v. Furundzija, Case No. IT-95-17/1 (Trial Chamber), December 10, 1998, para. 234-5, 249; Prosecutor v. Vasiljevic, Case No. IT-98-32-T (Trial Chamber), November 29, 2002, para. 70; and Prosecutor v. Blaskic, Case No. IT-95-14 (Trial Chamber), March 3, 2000, para. 285.
82 See, for example, Blaskic, (Trial Chamber), March 3, 2000, para. 286; Furundzija, (Trial Chamber), December 10, 1998, para. 246; and Furundzija, (Trial Chamber), December 10, 1998, para. 245, 249.
83 See, for example, Vasiljevic, (Trial Chamber), November 29, 2002, para. 70; and Blaskic, (Trial Chamber), March 3, 2000, para. 285.
84 Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, Article 3 (e); and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, Article 4 (1).
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instigating genocide. The first element is the one most likely to apply in relation to arms transfers, though the second could conceivably apply as well in some circumstances.

The ICTR trial chamber explicitly linked weapons to genocide, by stating that one may be complicit in genocide “by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose.” Thus, a person who knowingly provides weapons to a group that he or she was aware was carrying out a genocidal campaign could in principle be tried as an accomplice to acts of genocide. This could be true of someone who distributed the weapons in Rwanda, as has been alleged in several cases brought before the ICTR. An arms trafficker based outside a country in which genocide takes place could also in principle be prosecuted as an accomplice to genocide for making weapons available to genocidal forces.

The Potential to Prosecute: Illustrative Examples

The statutes of neither the ICTR nor ICTY specifically identify the provision of weapons or other concrete military assistance as constituting practical assistance for the purposes of establishing criminal

85 Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998, para. 533-537. See also, for example, Prosecutor v. Semanza, Case No. ICTR-97-20 (Trial Chamber), May 15, 2003, para. 393, 395.

86 Akayesu, (Trial Chamber), September 2, 1998, para. 533-537. The Chamber defined complicity “per the Rwandan Penal Code.”
liability for “aiding” in the commission of a crime, yet the case law cited above suggests it is reasonable to interpret them as such. It would be interesting to push this approach further and explore the possibilities of prosecuting an arms supplier under this theory. Persons involved in arms supply networks, by providing such assistance, may in some circumstances make a contribution to the crimes committed with those weapons. Where there is also evidence that these persons were aware of the intent of their clients to commit certain crimes, then they too might be held legally responsible.

In the case of the crime of complicity in genocide, to date no international prosecution has been attempted against an arms trafficker outside the country for making weapons available to genocidal forces. One illustrative example, however, suggests some of the elements a prosecution along those lines might entail. The case is that of Mil-Tec, a British company that delivered weapons to the Rwandan armed forces, including in air deliveries after the genocide was underway. The government that led the Rwandan genocide took power following the April 6, 1994, killing of then President Juvenal Habyarimana. One of the first acts of the new interim government was to make contact with Mil-Tec to place an urgent order for U.S.$854,000 worth of arms and ammunition. Ultimately, Rwandan records show, Mil-Tec provided a total U.S.$5.5 million worth of ammunition and grenades in five separate deliveries on April 18, April 25, May 5, May 9, and May 20. The last of these violated a mandatory U.N. arms embargo imposed on May 17,

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87 See, for example, Human Rights Watch, Leave None to Tell the Story: Genocide in Rwanda (New York: Human Rights Watch, 1999), pp. 649-53.
1994. The genocide was underway during the time of the arms deliveries—and was widely reported—so one could try to establish that arms traffickers supplying the interim Rwandan government knew how the weapons would be used.

One might also be able to prosecute individuals who supply arms to forces known to be responsible for crimes other than genocide, namely war crimes and crimes against humanity. Here the example of Victor Bout, described by one expert as “the McDonald’s of arms trafficking—the brand name” is perhaps apt as an illustration. A string of U.N. reports have accused Bout, a Russian citizen, of playing a key role in illicit weapons deliveries to Angola, Sierra Leone, and Liberia, and of involvement in military transport and the illegal plunder of natural resources in the DRC. In order to establish criminal liability under a complicity theory, one would also need to show that Bout was aware of the circumstances in the recipient countries, the human rights records of the parties he supplied, and their intent to commit more crimes. Bout, who denies being involved in sanctions-busting, is currently in Moscow, successfully avoiding arrest under an international arrest warrant issued by Belgium.

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88 Mil-Tec was registered in the Isle of Man, which at the time was not covered in the U.K. legislation codifying the U.N. arms embargo into British law. Due to another loophole, the company also escaped scrutiny under U.K. arms export controls. Thus the activities of Mil-Tec were technically legal and could not be the basis for a prosecution under national law. See, for example, “Human Rights Watch Calls on Britain to Crack Down on Violators of International Arms Embargoes,” Press Release, November 25, 1996.
Legal Theories in Action

The indictment of Charles Taylor by the Sierra Leone Special Court (SCSL) explicitly treats the cross-border provision of weapons and other military support to known violators as a prosecutable offense. The case against Charles Taylor rests on much more than the transfer of weapons, and a trial against him would be important in many respects. But to the extent that he is found criminally responsible for providing material support to the RUF, it could serve as an important precedent and wake-up call to arms traffickers the world over.

The Taylor indictment is not the only opportunity to send that message. The SCSL has ongoing investigations related to the arming of the RUF. The Court is actively investigating cases involving those who orchestrated arms shipments. Consistent with its mandate, it is focused on those who thus bear the “greatest responsibility” for the atrocities committed in Sierra Leone, meaning in this case those who played a central role in the provision of arms. As confirmed to Human Rights Watch by the SCSL’s Chief of Investigations, Alan White: “If a person is the principal supplier of arms and knows that and also knows that the weapons will be misused, then this person certainly would have individual criminal responsibility and would be prosecuted [by the Court].” The statute of the SCSL specifically provides for prosecution of “a person who planned, instigated, ordered, committed or otherwise aided and abetted” the crimes it sets forth.

While the Special Court is focused on the masterminds of the atrocities in Sierra Leone and their main backers, a Truth and Reconciliation Commission also is examining who took part in gross abuses in Sierra
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Leone and who assisted them in the commission of those crimes. To the extent that it looks at the role of arms traffickers, the work of this commission also would help ensure greater accountability for their actions.

The International Criminal Court provides a key possible venue for holding individuals responsible for “the most serious crimes of concern to the international community.” The statute of the International Criminal Court explicitly asserts the responsibility of someone who “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”

The chief prosecutor of the International Criminal Court, Luis Moreno-Ocampo, has expressed interest in the role of private actors in fueling war crimes and crimes against humanity, with special reference to the illegal exploitation of resources in the Democratic Republic of Congo. If and when the Court prosecutes persons who have been complicit in or conspired in the commission of gross abuses, it will help further elaborate the legal basis to hold individuals criminally responsible for fanning the flames of armed conflict and associated abuses.

Another possibility, as yet unexplored by the international community, would be to allow international courts to prosecute arms traffickers for violating arms embargoes. Such action would address only those human rights crises that are covered by an arms embargo, but would be an important complement to other efforts. It could be accomplished if an
international or hybrid court created to prosecute atrocities in a country subject to a U.N. arms embargo, such as Liberia, were to include violations of that embargo in the list of crimes in its statute. Foreseeing such a possibility, the Security Council could note in its resolutions that violations by governments and individuals of the embargoes it imposes might be prosecuted before international criminal courts with jurisdiction.

**Conclusion**

Examination and possibly further development of existing legal theories may shed some light on the responsibilities of both states and individuals with respect to the transfer of weapons to gross abusers. Progress to date has been slow, however, and there is a need to push these concepts further to secure change. The governments and private traffickers who dismiss the very notion that they might be held responsible for supplying weapons to known abusers need to learn that they are wrong: they can and should be held accountable for their role in facilitating atrocities.
At the Rubaya Sunday market miners sell a highly lucrative powder called coltan, which is used by U.S., European, and Canadian manufacturers of chips for cellular phones and computers. Kivu region, Democratic Republic of Congo. © 2003 Alex Majoli/Magnum Photos
Engine of War: Resources, Greed, and the Predatory State

By Arvind Ganesan and Alex Vines

Internal armed conflict in resource-rich countries is a major cause of human rights violations around the world. An influential World Bank thesis states that the availability of portable, high-value resources is an important reason that rebel groups form and civil wars break out, and that to end the abuses one needs to target rebel group financing. The focus is on rebel groups, and the thesis is that greed, rather than grievance alone, impels peoples toward internal armed conflict.

Although examination of the nexus between resources, revenues, and civil war is critically important, the picture as presented in the just-described “greed vs. grievance” theory is distorted by an overemphasis on the impact of resources on rebel group behavior and insufficient attention to how government mismanagement of resources and revenues fuels conflict and human rights abuses. As argued here, if the international community is serious about curbing conflict and related rights abuses in resource-rich countries, it should insist on greater transparency in government revenues and expenditures and more rigorous enforcement of punitive measures against governments that seek to profit from conflict.
The “Greed vs. Grievance” Theory

Civil wars and conflict have taken a horrific toll on civilians throughout the world. Killings, maiming, forced conscription, the use of child soldiers, sexual abuse, and other atrocities characterize numerous past and ongoing conflicts. The level of violence has prompted increased scrutiny of the causes of such wars. In this context, the financing of conflict through natural resource exploitation has received increased scrutiny over the last few years.

One theory influential in World Bank circles is that countries with abundant natural resources are more prone to violent conflict than those without, and that insurgent groups are more likely motivated by control over resources than by actual political differences with government authorities, ethnic divisions, or other factors typically viewed as root causes of civil war. Paul Collier, formerly the head of the World Bank’s development research group, now a professor at Oxford University and one of the strongest proponents of this theory, says, “[e]thnic tensions and ancient political feuds are not starting civil wars around the world…economic forces such as entrenched poverty and the trade in natural resources are the true culprits. The solution? Curb rebel financing, jump-start economic growth in vulnerable regions, and provide a robust military presence in nations emerging from conflict.”

The civil wars in Angola, Colombia, Democratic Republic of Congo (DRC), Liberia, and Sierra Leone are often cited as examples of this dynamic. In Angola, the National Union for the Total Independence of Angola (União Nacional para a Independência Total de Angola, UNITA) financed its war largely through the taxation and
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encouragement of the illicit trade in diamonds from the mid-1990s until the war ended in 2002. The Revolutionary United Front (RUF) in Sierra Leone also financed itself by trading in illicit diamonds. In the DRC, control of diamonds, coltan, and timber has been a powerful incentive to prolong the country’s vicious civil war. Collier has also classified the illegal drug trade and kidnapping for profit—predominantly by rebel groups in Colombia—as part of this equation. It is undeniable that non-state actors have financed warfare through trade in resources. Successive U.N. investigative panels monitoring UNITA’s sanctions-busting in Angola, for example, reported that UNITA earned approximately U.S.$300 million a year from illicit diamond sales between 1999 and 2002.

The greed vs. grievance theory is provocative and compelling to a point. Even on its own terms, however, there are weaknesses. First, there is evidence that greed is often not the determinative motive for rebel group behavior. El Salvador and Sri Lanka, for example, have endured brutal civil wars where resources were not a factor. Cynical exploitation of ethnicity has been a driving force behind conflicts in Rwanda and Côte d’Ivoire. Colombia’s civil war existed long before the cocaine boom in the late 1970s and kidnapping in the 1990s, and even the civil war in resource-rich Angola began some twenty years before UNITA started to finance itself with illicit diamond sales in the mid-1990s. Indeed, UNITA agreed to a ceasefire roughly two months after the death of Jonas Savimbi in February 2002, even though U.N. investigators estimated that UNITA was still able to earn as much as U.S. $1 million per day from illicit diamond sales. Had greed been the primary motive of the rebels, they could have continued to fight for much longer to the detriment of the country and civilians caught in the
middle of the conflict. This suggests that funding from commodities was secondary to Savimbi’s larger goal of defeating the Angolan government, and was not much of a factor in UNITA’s choice to end the war after Savimbi’s death.

Another aspect of the problem is that many of the actions and aims of armed groups engaged in combat with a government are by definition illegal, and so such groups are naturally prone to seek extralegal financing for their activities. Absent an international patron state willing to finance weapons purchases and the like (as was common during the Cold War), they tap into illicit sources of financing in much the same way as organized criminal and terrorist networks smuggle and trade in contraband. UNITA’s leader Jonas Savimbi only in 1994 authorized significant centralized investment in diamond mining, following a complete cessation of U.S. and South African overt and covert aid that had been given to the rebels since the mid-1970s.

A missing element in this greed vs. grievance theory, however, is the role that governments of resource-rich states play. Too often, government control of important resources and the revenues that flow from those resources goes hand-in-hand with endemic corruption, a culture of impunity, weak rule of law, and inequitable distribution of public resources. These factors often lead to governments with unaccountable power that routinely commit human rights abuses; they can also make prolonged armed conflict more likely. The remainder of this essay examines three different aspects of this dynamic.
First, control over resources gives such governments a strong incentive to maintain power, even at the expense of public welfare and the rights of the population. In many resource-rich countries, governments are abusive, unaccountable, and corrupt, and they grossly mismanage the economy. Rather than representing the citizenry, the government becomes predatory, committing abuses to maintain power and controlling the resources of the state for the benefit of a few. Researchers at the World Bank sometimes refer to these governments as “Predatory Autocracies,” where:

[S]tate power faces few constraints and the exploitation of public and private resources for the gain of elite interests is embedded in institutionalized practices with greater continuity of individual leaders. Such regimes are nontransparent and corrupt...little financial and human capital flows into productive occupations, whose returns are depressed by a dysfunctional environment.

The government of Angola, largely dependent on oil during the latter years of its war with UNITA, is one example of such an unaccountable, predatory state. The roots of the Angolan civil war were political, influenced by the dynamics of the Cold War and divisions among the former nationalist movements. The Angolan government enjoyed significant military assistance from the Soviet Union and Cuba and conducted a semi-conventional war against UNITA, which in turn was supported by its apartheid South Africa backers and encouraged by the West. However, this conflict had been transformed into a low intensity conflict by the end of 1998, and the government of Angola increasingly
took on the attributes of a predatory state. During the last years of the war, huge sums of money simply unaccountably disappeared from government coffers, and the population grew ever more impoverished.

Second, unaccountable governments with large revenue streams at their disposal have multiple opportunities to divert funds for illegal purposes. When such a government is involved in armed conflict, the resulting rights abuses can be horrific. The example of the Liberian government under Charles Taylor, as explained below, is a case in point. Relying on off-budget accounts, the Taylor government funded both illegal arms purchases and illegal supplies of arms to rebels in neighboring Sierra Leone, who at the time were subject to a U.N. arms embargo. It took stringent international enforcement of the embargo to put an end to the Liberian government’s illegal activities.

Third, armed conflict can be exacerbated by the actions of third-party governments seeking to profit from resource-rich neighbors. A prime example, detailed below, is the way in which both Ugandan and Rwandan governments have intervened in the conflict in DRC, a conflict that itself has been impelled by competition for lucrative resources. (The involvement of Charles Taylor’s forces in Sierra Leone’s conflict and in western Côte d'Ivoire from September 2002 to mid-2003 was also driven in part by a desire to obtain control of such resources. The incursion into Côte d'Ivoire also fostered individual greed: Taylor’s forces resorted to looting in lieu of pay.)
The international community has an important role to play in combating such abuse. Because the problem of abusive, resource-rich states has both economic and political dimensions, a solution requires action by international financial institutions, governments, and corporations to ensure greater transparency and accountability, and, during active conflict, to strengthen enforcement of arms embargoes and sanctions regimes that target known abusers—governments and non-state actors alike.

**Angola: Lack of Transparency and Accountability**

The Angolan government is notorious for having long mismanaged its substantial oil revenues, especially during the final years of its long conflict with UNITA, when oil was the main source of government funding. In 1999, for example, at a time of a renewed offensives, about 88 percent of the government’s total revenue came from oil—more than U.S.$4 billion. In addition to the substantial revenues that went into the war effort, some U.S.$1.1 billion, nearly 20 percent of the country’s Gross Domestic Product (GDP), simply disappeared from government coffers in the same year, much of it likely siphoned off through corruption. In its *Country Reports on Human Rights Practices* for 1999, the U.S. State Department noted, “[t]he country’s wealth continued to be concentrated in the hands of a small elite whose members used government positions for massive personal enrichment, and corruption continued to be a common practice at all levels.”

Despite the substantial revenue inflows, the government in these last years did little for the Angolan population during these years and
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showed little respect for human rights. Living conditions for millions of
Angolans were dismal, and the government made little effort to win
over civilians through any type of hearts-and-minds tactics. Government
forces routinely resorted to arbitrary arrests and detentions; restricted
freedom of expression, assembly, association, and movement;
committed extrajudicial killings; “disappeared” people; and engaged in
torture and rape.

Essential services and institutions also suffered. The country ranked
160th out of 174 countries in the United Nations Development
Programme’s Human Development Index (HDI). Some one million
people were internally displaced. In 1999 alone, some 3.7 million
people, including internally displaced persons, required U.N. or NGO
humanitarian assistance, as government assistance was woefully
inadequate. Few courts actually functioned. As recently as 2003, the
International Bar Association found that only twenty-three municipal
courts physically functioned out of the 168 that were supposed to exist.
The government even routinely failed to pay salaries of many of its
security forces and allowed security personnel to extort the civilian
population with virtual impunity.

In recent years, funds lost to corruption or otherwise unaccounted for
far exceeded the amount spent on the population. For example, if one
combines all government social spending in 1999 with funds spent
under the U.N. Interagency Appeal (which funded U.N. programs in the
country and most NGO humanitarian programs), the total comes to
approximately U.S.$320 million. That is about U.S.$780 million less than
the amount of money that disappeared in 1999. The lives of millions of
Angolans could have been improved if at least some of those funds had been used for humanitarian purposes, to reconstitute the judiciary, or pay salaries of security forces. The diversion of funds on such a scale violated the government’s commitments under the International Covenant on Economic, Social, and Cultural Rights to “progressively realize” the population’s rights to health and education. Throughout the conflict, moreover, it was difficult if not impossible for Angolans to exercise any control over the government’s use of public funds because freedom of expression was restricted and basic information simply was not made available.

Although the war with UNITA has ended, a conflict in Cabinda province continues. A major concern is that if Angolans do not see the benefits of their sizable natural wealth, the country may not slide into war, but into lawlessness. Angola has a great potential for improvements in human rights and social development, but if the status quo persists, then that squandered potential could lead to future grievances and prevent the resolution of current ones.

**Liberia: Misuse of Resource Revenues for Sanctions-Busting**

Unaccountable governments with large revenue streams at their disposal have multiple opportunities to divert funds for illegal purposes. Relying on off-budget accounts, the Taylor government in Liberia fomented national and regional instability by providing arms and other support to a vicious rebel group, the Revolutionary United Front (RUF), in neighboring Sierra Leone and rebel groups in western Côte D’Ivoire, as
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well as to fund its own war within Liberia. Meanwhile, Liberia remained one of the poorest countries in the world.

Despite international arms embargoes, the Taylor government spent millions for his own wars and to supply the RUF, using revenue from government-controlled diamond and timber sales, and from monies diverted from Liberia’s lucrative maritime registry. An arms embargo was placed on all parties to the civil war in Liberia in 1992 after the Economic Community of West African States intervened militarily in large part to prevent Taylor, at the time leader of rebel forces known as the National Patriotic Front for Liberia, from taking power. The sanctions remained in effect when Taylor subsequently was elected president of Liberia in 1997 but were largely ineffective because they were poorly enforced. It was only after the U.N. Security Council introduced a new expanded package of sanctions in May 2001, this time accompanied by a serious international enforcement effort, that Taylor’s predatory behavior was checked.

For years, Taylor used illicit funds to pay for the illegal weapons. Liberia’s weapons purchases from 1999 to 2003, for example, were mainly financed by off-budget spending by the Liberian government. Taylor favored maintaining major off-budget agencies—the Bureau of Maritime Affairs (BMA), the Forestry Development Authority (FDA) and the Liberia Petroleum Refining Company — headed by his close associates. While neither the BMA nor FDA published its financial accounts or provided financial information, the IMF estimated that, in 2002, off-budget revenues from shipping and timber totaled about
U.S.$26 million, some 36 percent of the government’s total revenue and almost six times what the government spent on education and health.

Taylor was able to secretly divert these funds until U.N. investigative panels were constituted to monitor sanctions-busting by the government. In March 2001, the U.N. Security Council decided to approve new sanctions on Liberia to start in May 2001. The sanctions were in response to a report presented by the Panel of Experts on Liberia established to monitor sanctions applied to the RUF and other forces operating in Sierra Leone. The basis for these sanctions was President Taylor’s support for the RUF in Sierra Leone in violation of the existing sanctions. Security Council Resolution 1343, passed in March 2001, reauthorized the arms embargo on Liberia; imposed a travel ban on key officials, their spouses, and business associates; called on U.N. member states to freeze all financial assets of the RUF; and called for the expulsion of RUF members from Liberia. An embargo was also imposed on all of Liberia’s diamond exports, and in July 2003 a timber embargo was added.

The panel examined the Taylor government’s misuse of maritime revenues in order to violate sanctions. Liberia today has the second-largest maritime fleet in the world, and in 2002, maritime revenue constituted about 18 percent of government revenue—about U.S.$13 million. The U.S.-based Liberian International Shipping and Corporate Registry used off-budget accounts to pay U.S.$925,000 for illegal arms and other prohibited items at the request of the government in 2000, a period when Liberia was still deeply involved in supporting the RUF and had also launched incursions into neighboring Guinea. Nathaniel
Barnes, finance minister from September 1999 to July 2002, admitted, “revenue was largely diverted,” for the “war effort. But there was no kind of accountability.” At least U.S.$1.6 million of maritime revenue was used for sanctions-busting from 2000 through 2001.

Timber revenue was also problematic. The U.N. Liberia panel of experts was able to document how Taylor used these resources to violate sanctions. In one case, the panel documented nine payment instructions for a total of U.S.$7.5 million from 1999 to 2001 to nine different bank accounts. These were all off-budget expenditures from the timber industry. Two of these were used as payments for defense-related expenditure.

On May 6, 2002, prior to the introduction of timber sanctions in July 2003, the U.N. Security Council passed Resolution 1408 (2002). That resolution included a requirement to audit revenues derived from the shipping registry and the Liberian timber industry in order to ensure that the revenue is used for “legitimate social, humanitarian and development purposes.” It represents the first time that the Security Council has insisted upon an audit. The Security Council formally linked misuse of government revenues and sanctions busting to reducing human rights abuses and spending more resources on social programs by calling for an audit.

The Liberian government did very little in response to the resolution. It commissioned a systems and management audit, one that avoided any financial analysis. There remains an important opportunity to ensure
that the timber revenues are appropriately audited and managed. The international community should encourage and provide technical assistance for a full audit and the creation of a system to ensure appropriate use of this revenue.

**The Role of Uganda and Burundi in the DRC**

An overlooked aspect of resources and conflict is the role of foreign governments who provide political, material, financial, or military support to rebel groups and governments in furtherance of their own economic interests. The presence of natural resources, particularly strategically important resources such as oil, colors the way foreign governments deal with resource-rich states and rebel groups. They may downplay human rights abuses or poor governance in order to maintaining cordial relations with a commodity provider. In some cases, they may engage in the conflict directly or through proxies in order to secure resources. This is nothing new; it was a mainstay of colonial and Cold War politics. For example, in a 1975 National Security Council meeting during the Nixon presidency, senior U.S. officials discussed which of the various factions in Angola to support, either directly or through allies such as Zaire’s dictator Mobutu Sese Seko, once the Portuguese withdrew from the country. In considering options, Secretary of Defense James Schlesinger suggested, “[w]e might wish to encourage the disintegration of Angola. Cabinda in the clutches of Mobutu would mean far greater security of the petroleum resources.” The enclave Cabinda was and remains Angola’s largest area of oil production.
While Mobutu did not end up with Cabinda, his plunder of state resources in Zaire (now the Democratic Republic of Congo) helped create the conditions that led to the country’s civil war. The cycle continues. In the DRC today, warring factions backed by neighboring Uganda and Rwanda, among other governments, have ruthlessly exploited the country’s natural resources and in some cases, repatriated them. More than three million people have died directly or indirectly as a consequence of war since 1998, and all parties to this complex conflict have been implicated in gross and systematic abuses.

Uganda has benefited from the DRC’s gold and diamonds. According to the U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC, Uganda has no diamonds but became a diamond exporter after it had occupied diamond-rich areas in the DRC. Similarly, the panel reported that Uganda’s gold exports dramatically increased after its involvement in the conflict. Uganda also backed insurgents in the eastern Ituri region and played a direct role in combat there. Ituri is rich in gold reserves, and the dispute in part involved control of those resources. The Ugandan economy significantly benefited from the re-exportation of gold, diamonds, coltan, timber, and coffee, and commodity sales significantly improved the country’s balance of payments. Uganda is often cited as an economic success story in Africa, a model of economic growth and a country committed to poverty reduction, but there has been little scrutiny by international financial institutions (IFIs) regarding the role of its illegal exploitation of resources in the DRC in bolstering its economy. The U.N. Panel reported in 2001:
The illegal exploitation of gold in the Democratic Republic of the Congo brought a significant improvement in the balance of payments of Uganda. This in turn gave multilateral donors, especially the IMF, which was monitoring the Ugandan treasury situation, more confidence in the Ugandan economy … [illegal exploitation of resources in the DRC] brought more money to the treasury through various taxes on goods, services and international trade … A detailed analysis of the structure and the evolution of the fiscal operations reveals that some sectors have done better than others, and most of those tend to be related to the agricultural and forestry sector in the Democratic Republic of the Congo.

This problem has not been publicly acknowledged by the IFIs. Thomas Dawson, the director of the IMF’s External Relations Department, wrote in June 2002, “in recent years, the Ugandan government’s economic policies have proven quite successful in containing inflation and promoting strong economic growth … The IMF has fully supported this program with advice and lending.” In a September 2003 review of Uganda’s performance under the Poverty Reduction Strategy Paper (PRSP) process, the IMF and World Bank praised the country for its export-led growth. Although the report raised concerns about human rights and the humanitarian situation in northern Uganda, it was silent on the country’s role in the DRC. Overall, it found that “the staffs of the Bank and Fund consider that, based on the PRSP annual progress report, Uganda’s efforts toward implementation of the poverty reduction strategy provide adequate evidence of its continued
commitment to poverty reduction, and therefore the strategy remains a sound basis for Bank and Fund concessional assistance.”

The U.N. panel mentioned above also found that Rwanda, which has no diamond reserves of its own, began to export diamonds after it became involved in the war. It found that the Rwandan military financed its involvement in the DRC through commercial exploitation of resources, shareholding in businesses operating in the DRC, payments from the rebel group RCD-Goma, and taxation and protection payments from businesses operating in Rwandan-controlled areas in the DRC. Most of the revenues generated from these activities are opaque and off-budget. Uganda has been more brazen and has kept this revenue on-budget, even though the source of that revenue is considered to be illegal exploitation of another country’s resources; funds are brought in through formal channels and openly included as a source of government revenue. The panel of experts further concluded that the nature of combat in the DRC was intertwined with control over resources. It noted in 2001:

Current big battles have been fought in areas of major economic importance, towards the cobalt- and copper-rich area of Katanga and the diamond area of Mbuji Mayi. Military specialists argue that the Rwandan objective is to capture these mineral-rich areas to deprive the Government of the Democratic Republic of the Congo of the financial sources of its war effort. Without the control of this area, the Government of the Democratic Republic of the Congo cannot sustain the
war. This rationale confirms that the availability of
natural resources permits the continuation of the war
…. In view of the current experience of the illegal
exploitation of the resources of the eastern Democratic
Republic of the Congo by Rwanda and Uganda, it could
also be thought that the capturing of this mineral-rich
area would lead to the exploitation of those resources.
In that case, control of those areas by Rwanda could be
seen primarily as an economic and financial objective
rather than a security objective for the Rwandan
borders.

The Ugandan Government established the Porter Commission on May
23, 2001 to look into the allegations of Ugandan involvement in illegal
exploitation of Congolese resources. The final report was produced in
November 2002, but only made public in 2003. The report exonerated
the Ugandan government and its army of official involvement in such
exploitation up to 2002. The Commission did, however, support the
U.N. panel's findings in relation to senior Ugandan military officials. The
Commission strongly recommended further investigation of diamond
smuggling, stating that there was a link between senior Ugandan army
members, known diamond smugglers, and a Ugandan business.

Despite these activities, no punitive measures have been taken against
either Rwanda or Uganda. Nor have international financial institutions
demanded audits or other scrutiny of the sources of the countries’
contentious revenues.
What Can be Done

The international community should be more consistent in demanding that governments manage their resources soundly, and it should insist on compliance with arms embargoes against known abusers. International financial institutions, the U.N. Security Council, governments, and companies all have important roles to play in pressing for transparency. Each of these actors has taken some steps recently, but many current proposals either depend on voluntary compliance by the government in question or are too limited to be fully effective in promoting greater transparency and accountability.

To its credit, the IMF has been a forceful proponent of such measures in Angola and Liberia. Human Rights Watch does not take a position on the work of the international financial institutions per se but can and does examine the positive or negative impact their activities can have on human rights. Whatever one thinks of the IMF’s economic prescriptions, its efforts to promote transparency in Angola and Liberia have been an important source of leverage for those interested in human rights improvements in the country. It has so far refused to enter into a program with the Angolan government until more transparency is evidenced. In Liberia, which has had its IMF voting rights and related privileges suspended, the fund has insisted that greater transparency in the use of timber and maritime revenues will be a key component of any future cooperation with the government.

However, the IMF has been inconsistent regarding transparency globally. As noted above, the IMF has been silent on Uganda’s role in the DRC. It has pressed the issue with most of Africa’s oil-producing...
countries but less so in Sudan. Even though there is considerable controversy over the government’s use of its oil revenue and control over the country’s southern oil fields has led to widespread human rights abuses. It has been less forceful with oil-rich Kazakhstan. The IMF urgently needs to adopt a consistent strategy to promote transparency and accountability in order to address ongoing and potential conflicts throughout the world.

The World Bank has also been moving towards a consistent approach on transparency. A two-year-long review by the World Bank assessing its role in the extractive industries has largely concluded that the bank should consistently address these issues. The Chad-Cameroon pipeline has promising transparency measures built in to it, but it is too early to tell whether they will be consistently enforced. The bank is also providing technical assistance to countries like Angola in order to help them better manage revenue. Recently, the bank approved financing for the Baku-Tbilisi-Ceyhan pipeline and has required government disclosure of oil revenues as a condition of financing. But it is less forceful in Central Asia or in Uganda on these issues. By requiring audits, accurate public disclosure of revenues and expenditures, the public in resource-rich countries could have an opportunity to exercise oversight over governments’ use of public funds.

Third-party governments also have a critical role to play, particularly where institutions such as the IMF and World Bank have no leverage. Oil-producing governments often generate far more revenue than IFIs can provide, and many of those governments choose not to enter into programs with them. For example, Nigeria, Venezuela, Equatorial
Guinea, Angola, and Kazakhstan do not have formal IMF programs. The U.K. government has led the Extractive Industries Transparency Initiative (EITI). The EITI is a voluntary effort that would allow for the publication of such data by both governments and companies. It involves governments, companies, IFIs, and NGOs. But as a voluntary initiative, it is wholly reliant on opaque governments to cooperate. Unless there is forceful diplomatic pressure on governments and commitment by the sponsoring governments, such as the U.K., this mechanism may not yield the desired level of transparency in countries where management of revenues has been most problematic. While some governments have been quick to support voluntary measures, there is a real need for mandatory measures and constant diplomatic pressure to promote transparency.

Companies also have a role to play. They should voluntarily endeavor to publish their payments to governments. Royal Dutch/Shell has begun to do this in Nigeria, but many companies resist voluntary disclosure out of fear of antagonizing host governments. The Publish What You Pay campaign is an NGO-led effort to make such disclosure mandatory. Although corporate disclosure without government disclosure may not yield full transparency, it would definitely enhance transparency. At a minimum, disclosure would allow interested parties to determine different sources of revenue in order to begin to determine how it is spent. However, no government has embraced mandatory disclosure at this writing. The International Finance Corporation (IFC), the private-sector lending arm of the World Bank, is considering mandatory disclosure as part of its loan agreements with extractive industry companies.
Perhaps the most important aspect of responsibly managing revenue is ensuring that it takes place regardless of whether a country is at peace, preparing for war, or engaged in conflict. Although the war in Sierra Leone is over, the misuse of diamond revenue and related corruption still means that the population is not experiencing the full benefits of its country’s natural wealth. Nigeria’s oil-producing Niger Delta may not be at conflict or war in the technical sense of those words; it is nonetheless anarchic and riddled with violence that stems from the fact that oil revenue has not benefited communities in the oil producing regions. Under successive dictatorships, billions of dollars of oil revenue were diverted into private hands. Moreover, oil theft and black-market sales drain tens of millions of dollars from public coffers. Such theft cannot occur without some official acquiescence because of the scale of the operations involved. Those revenues are also used to arm and equip private actors who engage in violence, in part to maintain control over those resources.

Sanctions need better monitoring and enforcement. UNITA was able to profit from illicit diamond revenue while sanctions were in force. Charles Taylor flouted longstanding arms embargoes and was not deterred until the U.N. Security Council enhanced monitoring of sanctions busting and increased enforcement of the embargoes. The international community should adopt a rigorous approach toward monitoring and enforcement of sanctions wherever a conflict takes place. A positive development is the use of investigative panels to monitor misuse of resources and sanctions busting in Angola, the Democratic Republic of Congo, Liberia, and Sierra Leone. The international community may want to consider a permanent roster of
experts that can investigate these issues throughout the world, rather than ad hoc panels.

When governments actively break sanctions or embargoes, or illegally exploit the resources of a third country, the Security Council’s treatment of Liberia provides a model. Security Resolution 1343 was the first time that the council imposed sanctions on one country for its refusal to comply with sanctions on another. The Liberia sanctions were essentially designed to assist the peace process in Sierra Leone. They fully achieved this objective. The diamond embargo in particular resulted in an almost complete cessation of the trade in illicit diamonds from Sierra Leone to Liberia and helped realign the trade axis to Freetown. In conjunction with sanctions, IFIs should require audits of questionable commodity flows, which they are already empowered to do by their existing mandates, and should push for compensation of or repayment to countries from which resources have been illegally extracted.

**Conclusion**

When unaccountable, resource-rich governments go to war with rebels who often seek control over the same resources, pervasive rights abuse is all but inevitable. Such abuse, in turn, can further destabilize conditions, fueling continued conflict. Factoring the greed of governments and systemic rights abuse into the “greed vs. grievance” equation does not minimize the need to hold rebel groups accountable, but it does highlight the need to ensure that governments too are transparent and accountable. Fundamentally, proper management of revenues is an economic problem, and that is why the role of IFIs is so
important. But it is an economic problem that also has political
dimensions and requires political solutions. Political will and pressure,
including targeted U.N. sanctions where appropriate, can motivate
opaque, corrupt governments to be more open and transparent. Where
such pressure is lacking, as in Liberia prior to enforcement of sanctions,
continued conflict, rights abuse, and extreme deprivation of civilians all
too commonly are the result.
A woman receives psychological and medical treatment in a clinic to assist rape victims in Freetown. In January 1999, she was gang-raped by seven rebels in her village in northern Sierra Leone. After raping her, the rebels tied her down and placed burning charcoal on her body. © 1999 Corinne Dufka/Human Rights Watch
In War as in Peace: Sexual Violence and Women’s Status

By LaShawn R. Jefferson

More than ten years after the commencement of wars in the former Yugoslavia, and almost a decade after the Rwandan genocide—conflicts notorious for attacks on women and girls—combatants continue to use sexual violence as a tactic of war to terrorize and control civilian populations. Sexual violence targeting women and girls has been used in all recent conflicts, including in the former Yugoslavia, Sierra Leone, India (Kashmir), Rwanda, Sri Lanka, the Democratic Republic of Congo (DRC), Angola, Sudan, Côte d’Ivoire, East Timor, Liberia, Algeria, the Russian Federation (Chechnya), and northern Uganda.

Rape has always meant direct physical harm, trauma, and social ostracism for the victim. Now, it may also be a death sentence for many women. Women are increasingly, and sometimes deliberately, being infected with HIV through wartime rape. By disrupting normal economic activity and destroying bases of economic support, armed conflict also puts women at risk for trafficking and at greater risk for having to engage in “survival” sex or sexual bartering, through which many women are becoming infected with HIV.

Although there has been increasing international attention to sexual violence in armed conflict, two essential features have persisted. First, it is routinely used on a large scale in most wars against women (though
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much less frequently, men and boys too are sometimes targeted for sexual attack). Second, perpetrators of sexual violence continue to enjoy near complete impunity. Over the past decade, the number of successful prosecutions has been paltry compared to the scale of the crimes.

At the start of the 21st century, with some of the most horrific known examples of sexual violence during armed conflict taking place before our very eyes, we have to ask why wartime rape recurs with such alarming predictability. Why are women so consistently targeted for this specific type of assault? Ultimately, can wartime sexual violence be prevented?

Several critical factors make sexual violence in conflict resistant to eradication. First, women’s subordinate and unequal status in peacetime renders them predictably at risk for sexual violence in times of war. Second, increasing international exposure and public outrage about rape in conflict have failed to translate into vigorous investigation and prosecution of perpetrators, a necessary element in any serious effort to deter such violence. Finally, inadequate services for survivors of wartime sexual assault reflects official disregard for the harm women and girls suffer in the course of conflict and suggests a lack of commitment to facilitating rape survivors’ reintegration into society.

Treatment of Women in Times of “Peace”

Sexual violence has continued to be systematic and unrelenting in part because of state failure to take seriously, prevent, and prosecute routine
and widespread discrimination and violence against women during times of “peace.”

Women throughout the world face systemic attacks on their human rights and chronic, routinized and legal discrimination and violence, much of it justified through cultural and religious arguments. Even where discrimination is prohibited, it often persists in practice. By any reasonable measure, state failure to uphold women’s rights as full and equal citizens sends an unmistakably clear message to the broader community that women’s lives matter less, and that violence and discrimination against them is acceptable.

The discrimination and violence women endure is targeted at them in part or in whole because of their sex. In both law and practice, women are subordinate and unequal to men. Women are frequently denied their right to equality before the law; their right to substantive equality; their rights to freedom of movement, association, and expression; and equal access to education, work, and healthcare.

The state often plays a crucial and complicit role in permitting discrimination and violence targeting women and girls. For example, governments have abysmal records of prosecuting domestic and sexual violence against women. Since government statistics are so poor, it is debatable which of the two is less vigorously prosecuted.
Although most states fail to protect women as equal citizens on myriad fronts, state failure is particularly noteworthy with regard to the prevention and prosecution of sexual assault. In most countries, rape goes largely unreported. When it is reported, prosecutions are rarely successful and are sometimes determined by whether the victim was a virgin. Biased judicial officials disregard the testimony of women with sexual experience outside of marriage. Evidentiary standards disadvantage women. Moreover, in some countries, a victim’s failure to convince the state that she has a credible claim of rape can be converted into an admission of out-of-wedlock sex, and the state can prosecute her for adultery.

Many states fail to uphold women’s right to sexual autonomy and bodily integrity in peacetime. Many women are legally unable to protect themselves from unwanted sex. States have enacted marital exemption clauses to rape. Some states still allow a rapist to marry the rape victim in order to escape punishment. Some states obstruct women’s access to divorce. States permit customary and other practices—such as widow “cleansing,” forced marriage, and wife inheritance—to flourish, even though they are predicated on the rape of women.

In far too many countries, the honor of a community or family is still closely tied to control of the sexual activity of women and girls. Male family members often put a premium on female virginity, “purity,” or sexual inexperience. Consequently, combatants the world over know that targeting women and girls both inflicts grave harm on individuals and symbolically assaults the larger community (or ethnic group or
nationality) to which the female victims belong. Until this fundamental fact changes, women and girls will always be at risk.

A principal impetus to sexual violence (whether in peace or wartime) is sexual subordination and deriving sexual gratification from sexually harming another. Such subordination is both an important motivation for the attack and an obstacle to subsequent prosecution—in part because women are still greatly stigmatized for the violence that is inflicted on them. Sexual violence is the only crime for which the community’s reaction is often to stigmatize the victim rather than prosecute the perpetrator.

Many men are accustomed to enforcing gender norms and stereotypes through physical violence. They interact in violent ways (actual and threatened) with women without sanction, and sometimes with community and government support. Such violence is often culturally, sometimes legally, sanctioned.

This is the backdrop against which rape and other forms of gender-based violence in armed conflict must be understood. It is a continuation—and a significant worsening—of the various discriminatory and violent ways that women are treated in times of peace.
The following cases from armed conflicts in the DRC and Sierra Leone illuminate the link between wartime sexual violence and other forms of gender-based violence and women’s subordinate status in peacetime.

Sexual violence against women has been a pervasive and alarming feature of armed conflict in eastern DRC. Tens of thousands of women and girls have been assaulted. Most of the forces involved in the conflict—combatants of the Rassemblement congolais pour la démocratique (RCD), Rwandan soldiers, the Mai-Mai, armed groups of Rwandan Hutu, and Burundian rebels of the Forces for the Defense of Democracy (Forces pour la défense de la démocratique, FDD) and Front for National Liberation (Front pour la libération nationale, FNL)—frequently and sometimes systematically rape women and girls. All parties to the conflict have been implicated. There is no sign of abatement. In early November 2003, the United Nations reported that in new fighting in eastern DRC thousands of women and girls had been tortured and raped.

Well before conflict broke out in the DRC, women and girls were second-class citizens. The law and social norms defined the role of women and girls as subordinate to men. The Congolese Family Code expressly subordinates women in the family by requiring them to obey their husbands, who are recognized as the head of the household. Reflecting the community’s sense that educating boys is more important than educating girls, a higher percentage of boys attend school than girls. Some male household heads “resolve” rape cases involving their daughters or sisters by accepting money payment from the perpetrator or his family, or by arranging to have the perpetrator marry the victim,
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thus underscoring the notion that rape was a crime against the perceived “owner” of the victim.

In Sierra Leone’s armed conflict, sexual violence was committed on a much larger scale than the highly visible amputations for which Sierra Leone became notorious. Thousands of women and girls of all ages, ethnic groups, and socioeconomic classes were subjected to widespread and systematic sexual violence, including individual and gang rape. Rapes were perpetrated by both sides, but mostly by the rebel forces of the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the West Side Boys, a splinter group of the AFRC.

Like women in the DRC, Sierra Leonean women faced widespread discrimination in practice, law, and custom before armed conflict erupted—each compounding and reinforcing the other, to women’s enormous disadvantage. Although the constitution formally contains a guarantee of sex equality, provisions permitting discrimination in adoption, marriage, divorce, and inheritance, among other areas, nullify this guarantee. The constitution thus legitimizes and codifies women’s subordinate and second-class status. In addition, under customary and Islamic law, the two systems under which most women are married, women have distinctly subordinate status. Notably, a married woman is often considered a minor and as such can be represented by her husband, who has the right to prosecute and defend actions on her behalf.
Further, married women in Sierra Leone had lost significant control over their sexual autonomy well before the war began. Under customary law, a wife can only refuse to have sexual intercourse with her husband if she is physically ill, menstruating, or breast-feeding. She can also refuse intercourse during the day, in the bush, or during Ramadan. Physical violence against women is widespread in Sierra Leone, and under customary law, a husband has the right to “reasonably chastise his wife by physical force.” Men who were accustomed to exercise control over women’s bodies in times of peace continued to do so with extreme brutality during the civil war.

In Sierra Leone, a complicated constellation of rape laws in the statutory system ensures minimal prosecution of rape. In some communities, the only type of rape that is treated as a serious crime is that of a virgin. Even in such cases, the punishment for rape in local courts often involves fines or “virgin money,” payable to the victim’s family. The emphasis continues to be on the injury to family honor and, to the extent the injury to the girl is considered, the emphasis is on her status as a virgin.

During armed conflict, combatants routinely abduct women—for long and short periods of time—and force them to become “wives,” essentially obliging women to cook, clean, wash clothes, and have sex (and often as a consequence to bear children), all of which are stereotyped, gender-specific forms of labor. Such relationships, of course, mimic relationships during peacetime, especially peacetime situations in which forced marriage and expectations of free female labor are common practice. This stereotyped perception of women
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persists in wartime and puts them at great risk for abduction and violence.

For example, in Sierra Leone, the RUF and other rebel units regularly abducted women and girls, occasionally for combat, but most often for forced sex and slave labor. In eastern DRC, combatants abducted women and girls and held them for periods up to a year and a half, forcing them during that time to provide both sexual service and undertake gender-specific work. Women and girls were obliged to carry out domestic labor, such as finding and transporting firewood, cooking, and doing laundry for the men who held them captive and sexually assaulted them. During Rwanda’s genocide, militia members held some women in forced “marriages.” These women not only were raped, but militia members held them and forced them to do household work, including cooking and cleaning. In Algeria’s civil war, armed Islamist groups abducted women and girls from local villages, often times raped them, killed most, and held others in captivity to do cooking and other household work. Colombia’s guerrilla and paramilitary forces recruit female child combatants, some of whom are pressured to have sexual relations with commanding officers and forced to use contraception. In northern Uganda, teenage girls are forced into sexual slavery as “wives” of Lord’s Resistance Army commanders, who subject them to rape and other sexual violence, unwanted pregnancies, and the risk of sexually transmitted diseases, including HIV/AIDS.

The male demand for female labor to perform female household chores persists during armed conflict. These patterns of social dominance and deeply engrained gender-specific roles get violently expressed in wartime
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and too often lead to women’s abduction and enslavement during armed conflict.

This level of social conditioning and gender stereotyping can be addressed through education and through measures to ensure equality and respect for women’s human rights. Such behavior must be punished through international—and one day local—prosecution.

**Prevention**

Many wars are foretold in some way. Rarely does a war erupt overnight. If wars can be anticipated, so can the fact that women will be victims of sexual violence during the fighting. National governments, the U.N., civil society, and regional actors must do more during peacetime, in periods when hostilities are mounting, and during the early stages of armed conflict to prevent sexual violence. Better training of combatants is a necessary first step.

Such training should include better and more regular instruction of combatants not only on protections generally due to civilians under international humanitarian law (IHL), but also the specific prohibitions against sexual violence.

Improved and more rigorous training and education on IHL will unlikely reach many of the less organized rebel groups increasingly participating in wartime rape, but it will reach more organized rebel
groups and will affect a core group of uniformed soldiers and officers under state authority. Soldiers in the field should receive timely, clear, consistent, and regular training and reinforcement on the illegality and unacceptability of sexual violence in conflict, and should act as examples to other, nonregularized combatants.

Although it is doubtful that many of those who commit sexual assault in conflict and use it to their strategic ends are unaware of its illegality, governments are not relieved of their responsibility to continue to attempt to prevent sexual violence. Governments should disseminate information on its prohibition and signal a serious commitment to investigate and punish all humanitarian law violations, including sexual violence.

As civilians are likely to take up arms and participate in combat when the rule of law collapses or in times of civil war, better and broader education of civil society on IHL will also decrease the use of rape in conflict. Governments should engage in broad, grass-roots dissemination and education campaigns (radio, television, print media, internet) with as many components of civil society as possible to educate them about prohibitions under IHL, particularly the prohibitions against the use of sexual violence.

Training and deploying civil society monitors in times of war is potentially a significant deterrent and can aid post-conflict accountability efforts. Civil society monitors at all levels of society should be trained in the basics of international human rights and humanitarian law. As
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monitors, they can act as witnesses to violations and document them for future trials and other accountability mechanisms. Nongovernmental organizations (NGOs) with interest and relevant experience would be good candidates for this. This training should also benefit women by reinforcing what should always be the case—that sexual violence is a crime that should be prevented and punished even during peacetime.

**International Investigation and Prosecution as Deterrence**

To date, sexual violence in armed conflict has been prosecuted primarily at the international level—through ad hoc courts created by the U.N. Security Council (the International Criminal Tribunal for the former Yugoslavia, ICTY, and the International Criminal Tribunal for Rwanda, ICTR) and mixed or hybrid courts (such as the Sierra Leone Special Court). Prosecution of sexual violence is an important indication of commitment to improved accountability for gender-specific crimes in conflict. It is also an important expression of commitment to deterring future crimes of this nature.

Although both the ICTY, established in 1993, and the ICTR, established in 1994, began strongly, their commitment seems to have waned after a number of important initial convictions. The present record is disappointing, given the high hopes that women’s rights activists, female survivors of sexual violence, and others had held for the tribunals.
Both tribunals contributed groundbreaking international jurisprudence on sexual violence and gender-based crimes in armed conflict. However, both have been plagued by weak investigations and neither has had an effective long-term prosecution strategy that acknowledges the degree of wartime sexual violence suffered by women. Barring dramatic advances before the expiration of their respective mandates in 2010, in terms of sexual violence prosecutions each criminal tribunal risks being remembered for what it missed doing, rather than for what it achieved.

The ICTY was established to prosecute persons for serious violations of international humanitarian law, including grave breaches of the Geneva Conventions, war crimes, and crimes against humanity committed in the territory of the former Yugoslavia since 1991. Rape of women by combatants as a strategy of war featured prominently in the wars in the former Yugoslavia, up to and including the 1998-99 Kosovo conflict.

The women’s human rights community the world over applauded the creation of the ICTY. They believed that the exercise of the ICTY’s mandate and the public revelation and subsequent documentation of the widespread use of rape in wars in the former Yugoslavia would significantly erode the historic impunity afforded sexual violence in armed conflict. Activists hoped that the ICTY would pursue cases of sexual violence in conflicts in the former Yugoslavia as vigorously as, and on equal terms with, other crimes committed during the wars.
Yet, the ICTY—like its sister institution, the ICTR—has failed to meet expectations for establishing accountability for sexual violence in the former Yugoslavia. To its credit, it has indicted at least 27 individuals for crimes that involved either rape or sexual assault. (In perhaps its most famous recent case, the ICTY is trying former Serbian President Slobodan Milosevic for command responsibility for war crimes, including acts of sexual violence, in Kosovo.)

Though the ICTY’s record on prosecution is underwhelming, several of its cases have nevertheless broken new ground in jurisprudence on sexual violence under international law. In one landmark case, in February 2001, the ICTY convicted Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic for rape, torture, and enslavement. The three received sentences of twenty-eight, twenty, and twelve years, respectively. These cases marked the first time in history that an international tribunal had indicted individuals solely for crimes of sexual violence against women. The ICTY ruled that rape and enslavement were crimes against humanity, another international precedent. The tribunal found that the defendants had enslaved six of the women. Most important, although two of the women were sold as chattel by Radomir Kovac, the ICTY found that enslavement of the women did not necessarily require the buying or selling of a human being. Such jurisprudence is the exception, not the rule.

Like the ICTY, the ICTR has failed to give priority to sexual violence cases after its initial landmark decisions involving rape. Although NGOs and U.N. agencies report that tens of thousands of women were sexually assaulted during the Rwandan genocide, the ICTR to date has
handed down only one conviction involving sexual assault that has survived appeal.

Established to prosecute persons responsible for genocide and other serious violations of IHL, the ICTR issued a verdict in September 1998 that convicted former mayor Jean-Paul Akayesu for individual criminal and command responsibility on nine counts of genocide, crimes against humanity, and war crimes. The verdict was the first handed down by the Rwanda Tribunal; the first conviction for genocide by an international court; the first time an international court had punished sexual violence in a civil war; and the first time that rape was found to be an act of genocide when it was committed with the intent to destroy a particular group targeted as such.

Despite its promising start, the ICTR has been a weak vehicle for providing redress for sexual violence crimes committed against women during the 1994 genocide. Although at this writing there were more than a dozen cases pending that include charges of sexual violence, there had been only two convictions—that of Jean-Paul Akayesu and a later conviction of Alfred Musema, which was subsequently overturned on appeal in November 2001.

Even the Akayesu decision did not come without a fight. The ICTR initially was reluctant to indict Akayesu for rape. When Akayesu was first charged in 1996, the twelve counts in his indictment did not include sexual violence—despite the fact that Human Rights Watch and other rights groups had documented widespread rape during the genocide,
particularly in areas under his control. A lack of political will among some high-ranking tribunal officials, as well as faulty investigative methodology by some investigative and prosecutorial staff, in part explains this initial omission. It was only after local and international women’s rights activists protested the absence of rape charges against Akayesu, including by submitting an amicus curiae brief to the ICTR urging it to bring charges of rape and other crimes of sexual violence against Akayesu, did the tribunal amend the indictment.

More generally, the ICTR’s effectiveness in investigating and prosecuting sexual violence has been hampered by a number of factors, including lack of financial resources, poor staff training, lack of political will, poor witness protection, weak investigations, and a general perception by investigators that rape cases are too hard to prove in court.

In 2001, in response to complaints by local and international NGOs about a lack of political will to prosecute sexual violence, the ICTR amended many of its indictments to include sexual violence charges. In meetings and letters, NGOs have expressed concerns that indictments have been hastily amended to include gender-based violence charges without substantial evidentiary support, and that this strategy will undermine the tribunal’s long-term effectiveness regarding the prosecution of sexual assault.

Whether cases of sexual violence are prosecuted at the local or international levels, programs to protect victims and witnesses at all
stages are critical. Sexual violence prosecutions by the ICTY and the ICTR have been hampered or abandoned because female witnesses have felt that their testimony would put them at risk. In particular, they fear that their identities would be revealed and that their families would suffer retaliation and stigma.

Effective witness and victim protection programs are a cornerstone to successful prosecution. Women victims of sexual violence in the former Yugoslavia have refused to testify for fear that their identity would become known and they and their families would face reprisals. Female rape victims who have testified before the ICTR in Arusha have reported returning home to Rwanda to find that their testimony, including details of their rapes, are known by people in their home areas. Other rape survivors who have testified before the ICTR returned home to face anonymous threats and other harassment as a result of their testimonies on rape. After such incidents, some Rwandan NGOs threatened to boycott the ICTR and discourage women from testifying if the ICTR did not improve its mechanisms for protecting their identity and safety.

It remains to be seen how effectively other international or mixed courts will investigate and prosecute sexual violence. However, the Special Court for Sierra Leone appears to be taking its mandate on sexual violence seriously. The court, which will try a limited number of perpetrators from all warring groups who bear the greatest responsibility for serious violations of IHL committed from November 1996 onward, has a mandate for three years. Investigating and prosecuting crimes of sexual violence have been an integral part of the investigative and
prosecutorial strategy from the beginning of court operations in July 2002. As such, crimes of sexual violence—including rape, sexual enslavement, abduction or forced labor—form part of ten out of the total of thirteen indictments issued to date. The court has on staff two full-time gender crimes investigators and has conducted gender sensitivity training for all members of the investigations team.

The establishment of the International Criminal Court (ICC) in July 2001 (whose treaty came into force on July 1, 2002) holds the promise of establishing meaningful accountability for gender-based crimes against women in armed conflict. Women’s rights activists in many countries hailed the creation of the Court, particularly those who have worked tirelessly for years to ensure that the ICC would be an effective and strong vehicle for accountability for wartime violence against women. Its statute criminalizes sexual and gender violence as war crimes and crimes against humanity. Accordingly, the definitions of war crimes and crimes against humanity include rape, sexual slavery (including trafficking of women), enforced prostitution, forced pregnancy, enforced sterilization, other forms of grave sexual violence, and persecution on account of gender.

In addition to this critical area of codification, the ICC’s statute includes measures to facilitate better investigation of gender-based crimes and better care of female witnesses. It provides procedural protections for witnesses and victims, has rules of evidence to protect victims of sexual violence, requires the appointment of advisers with legal expertise on sexual and gender violence, and facilitates victims’ direct participation in the court’s proceedings.
In July 2003, the ICC prosecutor announced that he was following developments in the Ituri province in eastern DRC very closely. As noted above, the conflict there has included widespread and systematic rape, as well as other forms of sexual violence against women and girls.

**Post-conflict Social Reintegration**

How governments treat survivors of sexual violence in the aftermath of conflict is a critical measure of their seriousness in addressing the crime and of their commitment to preventing future abuses.

Justice and accountability for female victims of sexual violence in armed conflict is not merely a matter of international or local prosecution but should include a focus on programs and services to address the psychological and physical injuries to victims and to assist their reintegration into the broader community. Too often in post-conflict settings female survivors of sexual assault are left with little community support, insufficient economic means to sustain themselves (and often children who are the product of rape), and profound physical and psychological trauma.

Communities often blame women and girls abducted by members of warring factions for what happened to them. When conflict ends, the women and girls often do not return home for fear of being rejected by their families and typically find little support and certainly no specially designed programs to address their needs. As such, many are left with
no other option but to remain with the very rebel or militia “husband” who abducted and most often raped them.

Because of the persistent stigma attached to sexual violence victims in most of the world, many women are discouraged from ever coming forward to seek help. Women victims of rape often face ostracism by their families, intimate partners, and communities (in the worst cases they become victims of “honor crimes”); if they are married, they risk being divorced or otherwise abandoned by their husbands; and if they are not married, they risk never becoming so (and therefore living as outcasts from their communities). Those infected by HIV can expect even more discrimination and stigma from their families and communities. Many survivors of sexual violence will unnecessarily suffer and die in silence, absent well-designed programs and community efforts to urge them to come forward for assistance.

It would be a gross injustice if women survived sexual violence in armed conflict only to have to endure similar abuses in peacetime. Governments committed to the recovery of sexual violence survivors must undertake efforts to improve women’s human rights in all aspects of their lives and eradicate discrimination against them. To this end, governments need to focus specific efforts on protecting women’s sexual autonomy, in part by reviewing laws and customary practices to eliminate all impediments to women’s equal and autonomous sexual decision-making. This means, in part, ending forced marriage; eradicating discriminatory nationality laws; decriminalizing adult consensual sex; ending wife inheritance; ending widow “cleansing”; criminalizing spousal rape; ending inheritance and property rights
discrimination against women; reviewing personal status laws and customs and guaranteeing women equal rights in the family; ending all harmful customary practices that subordinate women sexually; and vigorously condemning, investigating, and prosecuting all forms of violence against women, in particular sexual violence.

Post-conflict recovery for sexual violence survivors also requires the establishment of educational and work programs to enable them to become economically self-sufficient. Access to economic opportunities is critical because, first, women survivors of sexual violence are very likely to be the primary caretakers of their own children and other relatives; and second, many women may be in desperate need of medical attention for treatment of HIV-related and other illnesses, and to stave off full-blown AIDS. Women must be given the means to provide for themselves and their dependents and thus to avoid the need to exchange sex for basic goods, services, or shelter. Economic autonomy better positions women to refuse unwanted sex and reclaim their bodily integrity.

Sexual violence victims need services to address the extensive physical and psychological consequences of sexual assault. They frequently suffer long-term physical and emotional scarring. Many survivors of sexual violence confront unwanted pregnancies, debilitating gynecological problems, and untreated sexually transmitted diseases, including HIV. Post-traumatic stress syndrome and other lasting psychological consequences of assault plague women survivors and can obstruct their full and productive reintegration into civil society. In a post-conflict setting, it is critical that individual governments and the
international community work quickly to reconstitute healthcare services and establish mechanisms to improve rape survivors’ access to these services. This accessible care should include counseling, information, and treatment for a range of STDs, including HIV.

In this context, making post-exposure HIV prophylaxis (PEP) easily available to female survivors of sexual violence could save many lives. PEP, a standard policy for rape and sexual assault survivors in many countries, is an affordable four-week treatment with antiretroviral drugs that can prevent HIV disease in persons raped by an HIV-positive perpetrator. Where it already exists as a service in peacetime, it should be possible to preserve in wartime. Where it does not exist already, it should be a priority for donors concerned about the impact of sexual violence in war.

Doctors Without Borders (Médecins Sans Frontières), the humanitarian medical aid agency, has been providing PEP as part of its package of care for sexual violence survivors in emergency settings, including in DRC and Congo-Brazzaville, demonstrating that this is a feasible intervention in conflict settings. U.N. agencies are also currently reviewing the inclusion of PEP in reproductive health kits provided in emergency settings.

National governments should work with NGOs and other actors in civil society to help sexual violence survivors re-integrate into society and, if they wish, seek redress. For example, in DRC, local human rights and women’s NGOs have joined forces and started to document abuses
against women and girls more systematically. The Coalition against Sexual Violence in South Kivu was formed in December 2002 as an advocacy platform. Local churches are involved in providing spaces for rape survivors to discuss their trauma, as part of the recuperation process.

Women should be active participants in the rebuilding of civil society—and not just in traditionally “female” spheres, such as those involving children, health, or welfare. U.N. Security Council Resolution 1325 on Women, Peace, and Security, adopted in October 2000, recognizes the important role women can and should be playing in pre and post-conflict societies, as a means to prevent conflict in the first place and as a means to achieve sustainable peace once conflict has ended and ensure women’s greater participation in government. Governments should look to this resolution for guidance, and should actively undertake efforts to have women participate fully in the planning and implementation of the reconstruction of civil society, as full and equal partners at all levels of decision-making.

Focusing post-conflict efforts on promoting civil, political, economic, cultural, and social rights for all women will invariably improve the prospects of many survivors of sexual violence. The same efforts will improve women’s status more generally and render them less at risk for violence in times of war.
The End of Sexual Violence Against Women in Armed Conflict

One of the greatest challenges is to prevent sexual violence against women in the first instance. This can be achieved by making concerted efforts in at least three arenas. First, there must be heightened respect for women’s human rights in all aspects of their lives. Failure to address sex discrimination as a significant underlying cause of sexual violence will ensure that present and future generations of women continue to be at risk for sexual violence. Second, there must be significantly improved compliance with the provisions of IHL during armed conflicts. Key methods include regular training and education of soldiers and other combatants regarding international legal protections for civilians, specifically prohibitions against rape and other forms of gender-based violence. Finally, there must be vigorous condemnation, investigation, and prosecution of gender-specific crimes against women in times of peace as well as war.
Serb returnees to Croatia, Smiljana and Pavao Cakic, in front of their occupied house, Popovic brdo, April 2003. © 2003 Davar Kovacevic
Legacy of War: Minority Returns in the Balkans
By Bogdan Ivanisevic

In the territories that comprise the former Yugoslavia—notably Croatia, Bosnia and Herzegovina (hereafter Bosnia), and Kosovo—the failure of international and domestic efforts to promote the return of refugees and displaced persons has left substantially in place the wartime displacement of ethnic minorities. The Balkan experience offers an important lesson for other post-conflict situations: unless displacement and “ethnic cleansing” are to be accepted as a permanent and acceptable outcome of war, comprehensive and multi-faceted return strategies—with firm implementation and enforcement mechanisms—must be an early priority for peace-building efforts. Post-war efforts in the former Yugoslavia make clear that when these elements are present, minority return progresses; when they are absent, return stalls.

In all parts of the former Yugoslavia affected by ethnic wars during the 1990s, persons displaced by war from areas in which they now comprise an ethnic majority were able to return to their homes fairly soon after the end of hostilities. The true measure of effectiveness of the return policies pursued by national authorities and the international community, however, is the extent to which minorities have been able to return. By that measure return has been far less successful. Most minority members are still displaced, and it is increasingly evident that, even if the conditions for return improve in the future, most will not return to their homes.
In most areas of return, nationalistic politicians remained in power during the crucial immediate post-war period and either used that power to hinder the return of minorities, or did precious little to facilitate it. There was no physical security for prospective returnees, and they were unable to repossess their occupied homes or to have destroyed homes reconstructed. Rather than enhance prospects for reconciliation and return by bringing to justice war crimes perpetrators irrespective of their ethnicity, authorities directed their prosecutorial zeal against minorities, including returnees. The international community proved unable or unwilling to counteract this obstructionism.

By the time the authorities, under pressure from the international community or with its direct involvement, finally began to improve the security and housing situation for returnees, the willingness to return had faltered. Having spent months and years living elsewhere, the refugees and displaced persons had already become acclimated to their new environment. At the same time, return to the place of pre-war residence promised discrimination in employment, education, and law enforcement. Given a choice between local integration and return under such conditions, many opted for the former.

Only a resolute response from the international community could have opened a way for successful minority returns. For the most part such resoluteness has been missing. The international community has been too tolerant of the excuses made by governments in the region to justify their failure to return properties to pre-war occupants. International peacekeepers in Bosnia and Kosovo too often showed themselves
unwilling to confront the extremists responsible for ethnically motivated violence against minorities or to arrest high-ranking war crimes suspects.

Although inadequate policies made many refugees and displaced persons lose interest in returning to their homes, the international community and national authorities should do their utmost to assist those who do want to return or they run the risk of providing succor to those who believe that the forcible expulsion of a population is a legitimate objective of war. The following analysis sets out the obstacles to minority returns in the former Yugoslavia, current initiatives to facilitate return, and recommendations on the way forward.

**How Many are Still Displaced**

Between 300,000 and 350,000 Croatian Serbs left their homes during the 1991-95 war in Croatia, mostly for Serbia and Montenegro and Bosnia. The majority remain refugees. The total number of returns registered by the Croatian government as of July 2003 was 102,504. The actual number of returnees is significantly lower because, after a short stay in Croatia, many depart again for Serbia and Montenegro or Bosnia.

In the period 1995-99, the nationalistic Croatian Democratic Union of the late president Franjo Tudjman enacted laws and carried out policies with the clear intention of preventing the return of Serb refugees. In January and February 2000, parties and candidates with a professed commitment to democracy and human rights defeated the nationalists in parliamentary and presidential elections, and it appeared that the conditions for return would improve significantly. In reality the new
authorities have been slow to amend the returns policy, and the overall conditions for return have barely improved.

By the end of the 1992-95 war in Bosnia, 1.2 million people had found refuge abroad and more than a million others were internally displaced. The Dayton-Paris Peace Agreement, which ended the war, guaranteed the return of all refugees and internally displaced persons. Between 1996 and July 2003, the United Nations High Commissioner for Human Rights registered 965,000 returns of refugees and displaced persons to their pre-war homes, while more than a million remain displaced. Of those who have returned, some 420,000 returned to the areas in which their ethnic group—Bosniac (Bosnian Muslim), Serb, or Croat—is a minority.

The large-scale return of refugee and displaced Bosnian minorities began only in 2000, after the Office of the High Representative (OHR) in Bosnia (created under the Dayton-Paris Peace Agreement in December 1995 to oversee implementation of the civilian aspects of the agreement) introduced well-devised property legislation and international agencies took a more robust approach toward local officials who had obstructed returns. The breakthrough also resulted from a series of arrests between 1998 and 2000 of persons indicted for war crimes by the International Criminal Tribunal for the former Yugoslavia (ICTY). While the number of minority returns was 41,000 both in 1998 and 1999, in 2000 the number rose to 67,500, in 2001 to 92,000, and in 2002 reached a peak with 102,000 returns. In the first eight months in 2003, some 34,100 minorities returned. In comparison to the same period in the previous year, the figure represents a 50 percent drop. Rather than suggesting a
dramatic aggravation of the conditions for return, however, the decrease reflects the narrowing of the pool of persons willing to return, eight or more years after they had fled their homes.

In Kosovo, approximately 230,000 Serbs, Roma, and others not of Albanian ethnicity have fled since the end of the 1999 NATO war and the pullout of Serbian police and Yugoslav soldiers from the province. Only about 9,000 minority members have returned since 1999, about half of them Serbs and half Roma. Precarious security conditions remain the chief obstacle to return. The situation is similar in Serb-controlled northern Kosovo, only with reversed roles, with ethnic Albanians unable to return.

**Obstacles to Return**

Obstacles to the return of minorities have been similar in most parts of the former Yugoslavia. It has taken years for the security situation to become conducive to minority return. Some areas of return, notably Kosovo, remain unsafe. Those who do wish to return frequently find that their homes are occupied, yet administrative bodies and courts have often failed to evict temporary occupants, or proceeded slowly in doing so. The limited government funds available for reconstruction of damaged and destroyed properties have mainly benefited members of the majority ethnic group. By the time other obstacles for minority return in the former Yugoslavia began to soften, international donors had shifted their focus elsewhere. Discrimination has also played a role in discouraging return. Judiciaries have been eager to prosecute minorities on war-crime charges and reluctant to bring to justice
suspects from the majority. Local public enterprises have failed to employ returning minorities.

It is clear that political will on the part of local authorities can have a significant impact on minority return. Experience shows that when leaders engage in efforts to facilitate return, the situation on the ground improves. For example, the largest number of returns to mixed communities in Kosovo has been in the Gnjilane municipality, where ethnic Albanian officials have distinguished themselves by unequivocally condemning anti-Serb violence and encouraging dialogue between local Albanians and the prospective Serb returnees.

Security Impediments

Violence, harassment, and threats, coupled with police failure to arrest perpetrators, have frustrated the efforts of refugee and displaced minorities in the former Yugoslavia to return to their homes. The problem is particularly stark today in Kosovo, where Serbs and Roma are the primary targets. The vast majority of post-war ethnically motivated murders and other serious crimes in the province remain unpunished. By failing to deter organized violence from the very beginning, the international military and civilian missions in Kosovo have contributed to its proliferation, and set off a spiral of impunity that continues to feed extremism on both sides of the ethnic divide. In comparison to the period 1999-2001, the number of life-threatening attacks against minority communities declined in 2002-03, but this was at least in part due to reluctance of fearful Serbs to venture out of their
enclaves into majority Albanian areas—hardly a sign of improved ethnic relations.

In Bosnia, security concerns remained a major impediment to return years after the conclusion of hostilities. A 1999 survey co-sponsored by the United Nations High Commissioner for Refugees (UNHCR) found that 58 percent of displaced persons and refugees who indicated a preference to sell, exchange, or lease their properties in Bosnia said that they would return to their former homes if the local authorities guaranteed their safety or if their pre-war neighbors returned. In recent years, however, security conditions have significantly improved. The breakthrough resulted in large part from the NATO-led Stabilization Force (SFOR) arrests of a dozen ICTY indictees in the critical areas of Prijedor (western parts of Republika Srpska) and Foca (eastern part of Republika Srpska) between 1998 and 2000. Despite an improved situation overall, however, incidents directed against minorities still occur. In 2002 and 2003 the incidents included use of arms and explosive devices, as well as attacks on religious shrines and cemeteries.

By 2003, physical attacks against returnees in Croatia, already rare in comparison to Kosovo and Bosnia, had all but disappeared. However, in certain areas, including Benkovac, Zadar, Gospic, and Petrinja, Serbs continue to be concerned about their safety, due to general hostility from local populations or authorities.
Impunity for War Crimes and Discriminatory Prosecutions

It is clear that the failure to bring to justice war crime suspects, including those indicted by the ICTY, has weakened minorities’ resolve to return and live as neighbors with their wartime foes. Where prosecutions have been carried out, authorities have taken a selective approach, prosecuting minorities in far greater numbers than members of the majority and sending a message to minorities that they are not equal citizens in the country of return. Rather than promoting reconciliation, ethnic bias in war crimes prosecutions has perpetuated the ethnic divide and deterred return.

While Croatia’s cooperation with the ICTY with respect to provision of documents has earned it a passing grade from the international community, the government has nonetheless failed to hand over Ante Gotovina, a Croatian Army general indicted for crimes against Croatian Serbs between July and November 1995. The government claims that, since July 2001, when the ICTY prosecutor issued the indictment against Gotovina, the police have been unable to track him down. ICTY prosecutor Carla del Ponte and the Croatian press, however, have persuasively argued that Gotovina is at liberty in Croatia.

Croatia has demonstrated far more enthusiasm for the domestic prosecution of Croatian Serbs for war crimes. More than 1,500 have been indicted, often on ill-founded charges. The arrest of returning Serb refugees on war crimes charges has been particularly problematic. Although most arrests of Serb returnees ended in dropped charges or acquittals, the threat of arrest and prolonged detention has deterred the return of other refugees. At the same time, Croatian courts have dealt
with only a handful of war crimes against ethnic Serbs, usually resulting in acquittals and absurdly low sentences. The Lora trial from 2002, and trial for crimes in Paulin Dvor, ongoing at this writing, dramatically exposed the absence of adequate witness protection measures in Croatia, as frightened key witnesses declined to offer relevant testimony or even show up in court.

The authorities in Bosnia’s Republika Srpska have yet to arrest a single individual indicted by the ICTY or to try any Bosnian Serb on war crimes charges. A dozen war crimes trials are ongoing in Bosnia’s other entity, the Federation of Bosnia and Herzegovina, where Bosniacs (Bosnian Muslims) and Bosnian Croats are in the majority. Trials have often been marred by the reluctance of witnesses to testify, the absence of effective witness protection mechanisms, poor case preparation, and weak cooperation with other judiciaries in the region.

The justice system established by the international community in Kosovo has done little to hold individual perpetrators accountable and break entrenched perceptions of collective guilt. Kosovo’s judiciary has been unable to bring to justice those responsible for anti-Albanian crimes, and this failure alienated and radicalized many Kosovo Albanians. At the same time, Kosovo Albanian prosecutors and judges manifested an ethnic bias at the expense of local Serbs, thus alienating the Serb minority.

In the four years since the end of the war, only four people have been found guilty of war crimes against Kosovo Albanians by a final
judgment delivered by the Kosovo courts, three of them Kosovo Serbs and the other an ethnic Albanian. A dozen other Serbs have been prosecuted on war crimes charges in cases with Albanian prosecutors and investigating judges, and tried by trial panels consisting of Albanian judges alone—or sometimes with an international judge in the minority. Monitors from the Organization for Cooperation and Security in Europe (OSCE) and human rights organizations reported serious due process violations, as well as apparent or actual bias on the part of Kosovo Albanian judges and prosecutors. Most of these trials resulted in guilty verdicts, but the Kosovo Supreme Court, with an international-majority panel eventually quashed the verdicts. By June 2003 Kosovo courts had still not brought a single indictment for war crimes committed against ethnic Serbs.

The unwillingness of Serbian authorities to bring to justice those responsible for war crimes committed in 1998 and 1999 in Kosovo also has impeded the return of Kosovo Serbs. Since 2000, Serbian courts have tried only four Kosovo-related war crimes cases, only one of which dealt with mass killings of Kosovo Albanians. There has been no investigation into the killings in Gornje Obrinje, Racak, Suva Reka, Mala Krusa, Cuska, Dubrava prison, Izbica, Slatina, Meja, Vucitrn, and Bela Crkva, each involving dozens of victims. In the eyes of Kosovo Albanians, the failure to prosecute betrays a continuing disrespect for Albanian victims and Serbs’ refusal to confront the past. As a result prospects for reconciliation remain dim and the return of minority Serbs to Kosovo has been indirectly hampered.
Occupied Homes

Most minority refugees and displaced persons have not been able to repossess their occupied homes, nor have they received alternative housing or monetary compensation. Repossession concerns both privately owned houses and so-called socially owned apartments. The latter are apartments previously owned by the state or state enterprises, in which hundreds of thousands of families lived in pre-conflict Yugoslavia. The right to use a socially owned apartment—frequently referred to as the right of tenancy—was a real property right, and had many of the attributes of ownership, though holders of tenancy rights could not sell the right and the state could terminate their rights in certain narrow circumstances. During the war and immediately afterward, authorities in Croatia and in Bosnia terminated the tenancy rights of tens of thousands of displaced minorities. In Kosovo, former tenancy rights holders are in a better position because they had been allowed to purchase their apartments and many had become full owners before the 1999 war.

Since the end of the war, Croatia has prevented virtually all Croatian Serbs who lost tenancy rights from reoccupying their apartments or receiving substitute housing. Successive Croatian governments have refused to recognize lost tenancy rights as an issue requiring resolution. Serb homeowners have fared better, repossessing 14,430 out of 19,270 homes abandoned during the war. More than 5,000 homes, however, remain occupied by Croats. Government efforts to return these homes to their owners have been limited to providing alternative accommodation for Croat temporary occupants, either by constructing new homes or purchasing homes from Serbs who do not wish to return.
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However, these methods require substantial state funding, and the government's ability to provide it has been limited, leading to substantial delays. In the meantime, many Serbs have grown disillusioned and decided to sell their houses.

In Bosnia, the principal role of the internationally appointed High Representative in the repossession process resulted in much higher repossession rates. As of August 2003, the rate for privately owned properties and socially owned apartments had been around 88 percent. Unlike Croatia, former tenancy rights holders in Bosnia have been able to repossess their pre-war apartments. This difference well illustrates the importance of political will. In Croatia, authorities have favored the Croat majority and left tens of thousands Serb families dispossessed. In Bosnia, an ethnically neutral international administration devised legislation and set in motion practices that helped tenancy rights holders repossess their homes. Nonetheless most of those who repossess their pre-war homes in Bosnia then sell, exchange, or rent the property, rather than moving back in, preferring to remain in their new area rather than return to their former homes. This is particularly true in cities.

Associations of displaced Serbs from Kosovo claim that up to two-thirds of Serb properties in Kosovo are occupied. Funding for agencies responsible for property repossession continued to be insufficient long after the 1999 war. As a result, housing authorities as of early 2003 had issued decisions on only 1,856 claims for repossession of properties, some 8 percent of the total claims registered at that time.
Access to Reconstruction Assistance

Slow and often discriminatory reconstruction of damaged and destroyed homes and properties is another huge obstacle to return. While the government in Croatia has done impressive work in reconstructing the damaged or destroyed houses of ethnic Croats, reconstruction assistance to returning Serbs began only at the end of 2002, seven years after the end of the war.

Unequal aid allocation also impacts reconstruction in Kosovo, where Albanians have had better access to funding. For example, in the municipality of Klina, more than half of the Albanian houses had been reconstructed as of the end of 2002, contrasted with only 6-7 percent of Serb-owned houses. In Bosnia, funding constraints rather than discrimination have proved the main impediment to reconstruction assistance. UNHCR and OHR estimate that, at the beginning of 2002, reconstruction funding was available for 20 percent of 66,500 devastated properties whose owners had expressed an interest in returning.

Discrimination in the Enjoyment of Social and Economic Rights

Discrimination against minorities in Croatia, Bosnia, and Kosovo persists in various forms. In most areas of return, virtually no minority returnees are employed in public services and institutions, such as health centers, schools, child-care centers, post offices, courts, police, power-supply companies, customs services, or the local administration. Limited opportunities for employment are often aggravated by
education policies have also hindered return in Bosnia and in Kosovo, with access to schooling for returnee children often limited to schools with ethnically or linguistically biased curricula and textbooks. Few parents have been willing to send their children to such schools. To avoid them, parents have often kept children in the displacement community, housing the children with relatives or with one parent who remained behind for the purpose; other families have opted not to return at all. In some parts of the former Yugoslavia, discrimination against returnees also affects their enjoyment of social services, pension rights, and health care.

**Shared Responsibility of Local and International Actors**

The multitude of actors involved in returns-related activities often makes it difficult to identify those responsible for impeding minority returns. Local authorities in the areas of return are often even more nationalistic than the central government, and central governments are only too willing to point to local opposition as the explanation for ill-functioning returns policies. The substantial international presence in Bosnia and Kosovo, both military and civilian, can also serve as pretext for local actors to leave hard decisions and hazardous actions—including war crimes arrests and the prevention of inter-ethnic violence—to foreigners. Nonetheless, it is safe to conclude that all actors—international and domestic—bear some of the responsibility for the limited success of minority return in the region.

In Croatia, rates of ethnic Serb return since the end of the war have depended primarily on policies of the national government. While the
pre-2000 government blocked return, the government constituted after the 2000 elections has tolerated it within certain limits, defined by the government’s fear of alienating broad sectors of the nationalistic electorate. The role of the international community in promoting the return of refugees has taken the form of political conditionality linked first to Croatia’s membership in the Council of Europe, and more recently to its desire to join the European Union and to the ongoing presence of an OSCE monitoring mission in Croatia. The limited involvement of the international community and its unwillingness fully to exercise what leverage it did possess has enabled successive Croatian governments to discriminate against Serbs and impede returns.

In Bosnia, return-related responsibilities have been shared by international agencies on the ground and the local authorities. The Office of the High Representative has had a key role in return activities. The High Representative imposed relevant legislation and removed from their posts numerous Bosnian officials who obstructed its implementation—but such robust practices began only three years after the war, by which time many among the displaced had already lost faith in returning. The contribution of domestic actors in Bosnia has consisted mainly in implementation of housing legislation by municipal housing commissions. Nonetheless, the key for continued return of minorities is in the hands of the Bosnian politicians. The willingness of displaced Bosnians to return depends largely on how they anticipate and experience reception in the areas of return. The role of Bosnian politicians in fostering a climate and policies conducive to return cannot be substituted by any outside actor.
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In Kosovo, responsibility for return of minorities is shared by a number of actors. The Special Representative of the United Nations Secretary-General (SRSG) who heads the United Nations Interim Administration in Kosovo (UNMIK), has the main executive authority, legislative power in certain areas, as well as veto power over legislative acts of the Kosovo Assembly. UNMIK includes an international police force. The NATO-led Kosovo Force (KFOR) conducts peacekeeping activities. Provisional institutions of self-government include the Assembly and ten ministries. In addition to elected municipal assemblies and administrations, since October 2000 UNMIK local community officers have operated to enhance the security of minorities and to assist them in access to public services. The unwillingness of UNMIK and KFOR to confront local actors involved in forcing out minorities created a climate of impunity in Kosovo which has been difficult to overcome, notwithstanding subsequent international efforts to facilitate return.

In Kosovo, the government of Serbia and Montenegro has maintained parallel judicial, administrative, health, and educational institutions in Serb municipalities in the north and in enclaves in the center and the south. Such an approach has thwarted integration of Kosovo Serbs into economic and social life in the province, a necessary condition for sustainable return.
Recent Initiatives to Improve Minority Return

Addressing Insecurity

In Kosovo insecurity remains the key obstacle to return, and persists to some extent in Bosnia. In Croatia, security for returnees is no longer a significant obstacle. There are some recent signs that UNMIK is taking a tougher stance on crimes against minorities in Kosovo. In uncharacteristic moves in October and November 2003, UNMIK arrested six Albanian suspects for the murder of four Serbs earlier in the year. It remains to be seen whether these arrests mark a definitive departure from what had been UNMIK’s passive approach to crimes against non-Albanians.

In Bosnia and in Kosovo, the international community has relied on creating a multi-ethnic structure for the municipal police as a means for improving both the perception and the reality of security for minorities. The results have been modest at best. Despite commitment by international agencies and Bosnian officials in both the Federation and Republika Srpska that local police forces should reflect the pre-war ethnic balance, the numbers of minority officers remain small. The most recent U.N. report stated that by May 2002 only 16 percent of the targeted 28 percent in the Federation were minorities, while only 5 percent of the force in Republika Srpska were minorities compared to a 20 percent target. In Kosovo, minorities comprised 16 percent of the Kosovo Police Service in October 2003. However, minority police are barely present in the areas with an Albanian majority, and it is precisely in those areas where obstacles to return are greatest.
Accountability for War Crimes

The Chief State Prosecutor in Croatia formally instructed local prosecutors in June 2002 to review pending war crimes cases and drop charges where evidence against the suspects was insufficient. Possibly as the result of the state-wide review, the number of arrests of Serbs fell from 59 in 2001 to 28 in 2002. In addition, half of the arrested Serbs were provisionally released during pre-trial proceedings. In 2002 and 2003 the authorities also began prosecuting ethnic Croats for war crimes against Serbs. Still, the number of arrested, tried, and convicted Serbs remains far higher than that of ethnic Croats.

The past year saw modest signs of improvement in Bosnia in the process of establishing accountability for war crimes. An all-Bosnian State Court came into existence in January 2003. Some of the deficiencies present in earlier war crimes prosecutions before local courts are expected to be remedied when the court’s humanitarian law chamber becomes operative in 2004. At this writing, Republika Srpska was also expected to begin its first war crimes trial against Serb indictees by the end of 2003, in a case of the abduction and disappearance of Roman Catholic priest Father Tomislav Matanovic in September 1995.

The most controversial development in Kosovo during 2003 was the July 16 conviction of former Kosovo Liberation Army commander Rustem Mustafa and three collaborators for illegally detaining and torturing eleven ethnic Albanians and one Serb, and executing six Albanians suspected of collaborating with the Serb regime, during the 1998-99 conflict. The men received sentences ranging from five to seventeen years. The convictions caused deep resentment among
Kosovo Albanians and triggered a wave of violent attacks against UNMIK. In June, the departing UNMIK chief Michael Steiner promulgated a new criminal code for Kosovo, giving more powers to international prosecutors to investigate atrocities and other serious crimes, and providing for more effective witness protection.

**Property Repossession and Reconstruction**

Repossession of property remains a major impediment to return in Croatia and Kosovo, while insufficient reconstruction assistance hinders returns in Croatia and Bosnia. The Croatian cabinet recently adopted laws and decrees purportedly aimed at providing housing for dispossessed tenancy rights holders. Legislation adopted in July 2002 stipulates that the government will provide alternative accommodation in “areas of special state concern” (areas controlled by Serb rebels during the 1991-95 war) to Croatian citizens without apartments or houses in Croatia or other parts of the former Yugoslavia. However, in its first year of implementation, not a single Serb former tenancy right holder is known to have obtained housing by virtue of the law. In June 2003, the cabinet adopted a decree enabling individuals returning to places outside areas of the special state concern to rent or purchase government-built apartments at below-market rates. Even the purchase rates stipulated by the June 2003 decree, however, will be beyond the financial means of most prospective returnees, and other forms of reparation or compensation for past dispossession remain unavailable to them.
Resolution of property claims finally made limited progress in Kosovo in 2003. As of September 2003, housing authorities had issued decisions on 31 percent of claims for restoration and confirmation of residential property rights (in contrast to only 8 percent at the start of the year). However, temporary occupants were slow to vacate the properties, and effective enforcement mechanisms were lacking. As of September, the number of actual repossessions still barely exceeded 2 percent of all claims.

After having reconstructed more than 100,000 Croat houses in the second half of 2002, the Croatian government has started to reconstruct Serbs homes with state funds. Then-Deputy Prime Minister Goran Granic stated in mid-June 2003 that 75 percent of the houses to be reconstructed during 2003 are Serb-owned. All reconstruction is scheduled to be completed by 2006.

In Bosnia, foreign funding for reconstruction continues to diminish, a trend which began in late 1990s. In Kosovo, the funding available for reconstruction of Serb homes has been sufficient, possibly because of the low number of those who are seriously considering return in light of safety concerns.

**Tackling Discrimination**

The efforts of the High Representative and other international agencies in Bosnia are shifting from property repossession toward combating discrimination and further integrating Bosnian political and social
structures. The policies are intended to stimulate return of those whose ethnicity has made them feel like second-class citizens. In 2003, the most significant effort toward ending discrimination was directed at ending segregation in public education. Minority children have been able to share school buildings with majority children since 2000, but classes, curricula, and teaching staff, and even shifts in some cases, remained separate. On August 8, 2003, the educational authorities of Republika Srpska, Federation BH, ten Federation cantons, and the independent district of Breko, signed an agreement on Common Core Curriculum, which incorporates the curricula of all entities and cantons. Pursuant to the agreement, schools which until recently functioned as “two schools under one roof” are to register as single legal bodies with one school director and one school board. The agreement, if implemented, should give a decisive blow to segregation in Bosnian schools, while leaving room for separate studying of the so-called “national subjects” that reflect the cultural distinctiveness of each constituent people.

In December 2002 the Croatian parliament enacted the Constitutional Law on the Rights of National Minorities. Under the law, the state has to ensure proportional representation of minorities in the administration and the judiciary at state, county, and municipal levels. However, the obligation to ensure proportional representation does not extend to public institutions, such as schools, universities, and hospitals, or to the police. Given the history of persistent discrimination against Serbs in post-war Croatia, the lack of legal obligation to pursue adequate minority representation in public institutions and enterprises does not augur well for a marked increase in the employment of Serb returnees.
In Kosovo, UNMIK has enacted regulations on the minimum employment of minorities in central institutions and public enterprises, but the 10 percent figure achieved by October 2003 remains far below the targeted 18 percent. In contrast to Croatia and Bosnia, however, the low level of minority participation in Kosovo is more often caused by the unsafe environment and limited freedom of movement for potential employees than by employment discrimination as such.

**Recommendations**

In territories of the former Yugoslavia, insecurity, limited tenancy rights, failures of justice, and discrimination are the central barriers to return of refugees and displaced people. While some of the basic preconditions for return in Bosnia—including physical safety and the ability to repossess pre-war homes—have been satisfied, there is still wide room for improvement in the reconstruction of houses. The continued failure to arrest ICTY indictees and to pursue domestic prosecutions of war crime suspects have also created a climate less than hospitable to return. Croatia has yet to start resolving the tenancy rights issue or to bring Croat war criminals to justice, and its long-term commitment to the reconstruction of Serb homes is an open question. In Kosovo, improved security is a precondition for addressing all return-related problems. In all parts of the former Yugoslavia, effective measures to combat employment discrimination have to be devised and implemented. Only when all these changes are in place will minority refugees and displaced persons have a fair chance to opt between return and a permanent integration in their current place of residence. For the changes to materialize, both domestic actors and the international community will have to redouble their efforts to facilitate minority return.
To adequately address security problems in Kosovo, the international community must maintain pressure on local political leaders to promote ethnic tolerance. KFOR and UNMIK must themselves marshal the political will necessary to pursue full accountability for ethnic violence and create measures to effectively coordinate criminal investigations. Local police should strengthen patrols in areas in which returnees report security problems or an increased sense of insecurity. UNMIK should speed up the recruitment of minority police officers in ethnically mixed areas, and all Kosovo Police Service members who show ethnic bias in the conduct of their activities should be disciplined or dismissed. In Bosnia, the European Union Policing Mission (EUPM) should robustly discipline and dismiss local police officers who obstruct efforts to resolve inter-ethnic violence and discrimination against ethnic minorities.

In all parts of the former Yugoslavia, cooperation with the ICTY and domestic war crimes prosecutions should be significantly improved. Croatia should arrest indicted Ante Gotovina and surrender him to the custody of the ICTY, and Serbia and Republika Srpska authorities should do the same with respect to the two dozen Serb indictees who live in those areas. Most importantly, authorities should show a greater commitment to bringing to justice and fairly trying war crimes suspects irrespective of their ethnic origin. Cooperation between states in war crimes prosecutions should include providing requested documents and allowing access to all witnesses sought by the court. Governments in the territory of the former Yugoslavia should facilitate testimony of witnesses from other jurisdictions, including by videoconference. The legislation providing for witness protection measures in Croatia, Bosnia,
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and Kosovo should be vigorously implemented, and Serbia should enact a detailed witness protection law. Legislation criminalizing intimidation of or threats to witnesses and other participants in the proceedings should be adequately enforced.

There is a pressing need for enhanced international support for accountability efforts in the former Yugoslavia. International donors should assist domestic judiciaries with technical and financial support for effective war crimes prosecution; allocate sufficient funds for effective implementation of witness and victim protection measures; and assist in out-of-region relocations of those in need of protection. NATO-led SFOR remains the only credible force in Bosnia able to arrest the wartime leader of Bosnian Serbs, Radovan Karadzic, and should do so. The international community should also put pressure on the authorities in Serbia and Montenegro to cooperate with war crime investigations in Kosovo, in particular by handing over suspects to UNMIK.

Croatia should vigorously implement the July 2002 legislative changes addressing property repossession, and introduce and implement rules that would remove the many remaining obstacles to effective repossession. In particular, Croatia should reconsider its existing policies on cancelled tenancy rights. It should give original tenancy rights holders an opportunity to repossess apartments which have not been privatized by subsequent occupants, and, where the apartments have already been sold, it should help them to obtain property of equivalent value or financial compensation. In Kosovo, the housing authorities should substantially speed up repossession procedures.
In all parts of the former Yugoslavia, evictions of temporary occupants often have been accompanied by the looting and destruction of the property by the outgoing occupants. Governments should enact legislation making such targeted looting and destruction a separate criminal offense and prosecute those responsible. Housing authorities should include a notice or warning to temporary occupants about the criminal sanctions for looting or destruction of property.

Finally, authorities in all parts of the former Yugoslavia should closely monitor employment practices in state institutions and enterprises. Pertinent ministries should intervene in cases in which discrimination on ethnic grounds is apparent and develop a proactive strategy for recruitment and hiring of qualified minority candidates. Discriminatory practices for minority returnees in government positions and state-owned enterprises should end, and authorities should ensure fair employment opportunities.
The human rights movement has come a long way since Human Rights Watch was founded twenty-five years ago. In almost every nook and cranny of the globe, activists raise the banner of human rights to support their demands for respect and dignity. Thanks to this movement, by the end of the last century human rights had become one of the world's dominant ideologies, tirelessly proclaimed by governments. Although the movement was unable to stop genocide in Iraq, Rwanda, and Yugoslavia, and massive killings elsewhere, it was beginning to impose a moral element in international relations with a force unprecedented in modern history. The movement was a factor in democratic transformations in Eastern Europe, Latin America, and parts of Africa and Asia.

Yet the human rights movement now faces serious challenges. In particular, the horrific attacks of September 11, 2001, aimed at the heart of American power, have unleashed a reaction that threatens to wipe away many gains under the cover of an endless “war on terror.” As this campaign unfolds, protagonist governments again relegate human rights to second-class status, just as they did before and during the Cold War, while others opportunistically invoke the war on terror to justify internal repression. In the face of these challenges, the movement must demonstrate that the promotion of fundamental rights is essential to security and an indispensable tool in the fight against terrorism.
“Human rights activists, after years of being ignored or disdained as cranks, are riding a wave of popularity because of President Carter’s focus on the rights issue. They say the experience is at once exhilarating and unsettling. ‘Human rights is suddenly chic,’ says Roberta Cohen, executive director of the International League for Human Rights. ‘For years we were preachers, cockeyed idealists or busybodies and now we are respectable.’”

So began a 1977 New York Times article on the human rights movement. Later that year, Amnesty International would win the Nobel Peace Prize in acknowledgement of its already considerable achievements. The following year, Human Rights Watch would be founded. Today, human rights, and the human rights movement, are a fundamental part of the international political landscape.

In the past twenty-five years, a vast new array of groups—national and international—have breathed life into the Universal Declaration of Human Rights and other norms adopted after World War II. The banner of human rights is raised throughout the world—by Tibetan monks and Ecuadorian plantation workers, by African women’s groups and gay and lesbian activists in the United States. A United Nations high commissioner for human rights is the official champion of the Universal Declaration. The United States and the European Union, among others, have by legislation made respect for human rights a factor in bilateral relationships. Most countries have domestic human rights commissions.
or human rights ombudsmen. Human rights education is part of the curriculum in more than sixty countries. Most countries have ratified most of the major human rights treaties. An International Criminal Court is gearing up to investigate some of the worst atrocities, while the movement has already ensnared such emblems of brutality as Augusto Pinochet and Slobodan Milosevic.

The human rights movement itself has become more inclusive, a substantial mosaic that includes large professional INGOs (international nongovernmental organizations) as well as thousands of regional, national, and local organizations working on issues ranging from self-determination to the rights of children, and from access to HIV medicines to the right to water.

As the movement expands, previously neglected issues, particularly those dealing with economic and social rights, have moved into the mainstream. Indeed, there has been a growing convergence in the work of groups dedicated to promoting economic and social development on the one hand, and those protecting human rights on the other. Many development organizations are shifting from needs-based, welfare oriented and humanitarian approaches to rights-based approaches to development. Human rights groups once focused largely on civil and political issues such as political imprisonment and torture. But increasingly we are addressing the underlying social and economic causes of these violations or championing economic and social rights issues, such as education, health, and housing.
Women’s rights, once kept at the margins, has become a driving force in the human rights movement since women’s groups took the 1993 United Nations World Conference on Human Rights in Vienna by storm and won full recognition that “women’s rights are human rights.” Among other things, the focus on women’s rights has helped broaden the core human rights concepts of “violation” and “violator,” directing the movement away from an exclusive focus on state actions to examine the culpability of state inaction in the face of known abuses by private actors.

The different layers of the movement complement each other. There are what we might call primary organizations or movements of people struggling to claim rights for their own members, such as some civil rights groups in the United States, many women’s organizations, the Landless Workers Movement in Brazil, and the like. There are groups seeking to promote rights by creating the building blocks of a rights-respecting society—a free press, an independent judiciary, education in human rights and tolerance, and civilian control of the military. And there are national and international groups, from groups such as the Colombian Commission of Jurists to Human Rights Watch, which monitor respect for human rights norms and mobilize pressure to prevent or end abuse.

The movement has also become considerably more sophisticated in its advocacy. From the early letter-writing campaigns invented by Amnesty International, the movement has evolved to include campaigners, organizers, lobbyists, and media experts. The leading INGOs now have researchers on the ground connected by e-mail with advocacy offices at
the United Nations and in major capitals, putting us in a strong position to affect international decisions as they are being made. Some monitoring groups, such as Human Rights Watch, target advocacy at powerful governments—such as the United States and the European Union—treating them sometimes as partners in pressing for change, sometimes as surrogates for their abusive allies who are more impervious to democratic criticism, (and, of course, sometimes as perpetrators of abuses themselves). We are of course mindful of Ian Martin’s salient warning that “the human rights movement cannot be happy in working through the existing power relationships in an unequal world, nor can it even be neutral in its attitude to them.” Yet applying the methodology of “naming and shaming” not only to abusive governments but also to their international allies, when it is done with the support of our own partners in the affected country, has made the movement a much more powerful force with which to reckon.

After the Cold War

For years after Human Rights Watch’s founding, the Cold War provided both an incentive for governments to use human rights as a weapon and an obstacle to those seeking principled international cooperation to advance human rights. The United States was eager to raise the banner of human rights in its ideological war with the Soviet Union and its allies, even as it covered up abuses (when it did not directly sponsor them) in authoritarian regimes that it aided, ostensibly as bulwarks against communism. The eastern bloc, for its part, rejected criticism of its rights record as impermissible “interference in the internal affairs” of sovereign countries and paralyzed the United Nations human rights machinery.
Even during the Cold War, however, human rights mobilization helped lead to many important accomplishments, playing no small role in the end of *apartheid* in South Africa and the move towards democratic governance in much of Latin America. The Helsinki process—which triggered the creation of Helsinki Watch, the forerunner of Human Rights Watch—created the framework for individuals both within and outside of the Soviet bloc to challenge repressive governments, ultimately leading to the collapse of a Soviet system that in practice denied fundamental human rights.

The end of the Cold War seemed to bring a new consensus around the human rights ideal. The dissidents of the Soviet bloc who had created the human rights movement there, and for whom the international movement had campaigned, were not only free but in some cases were swept into power. A movement towards multi-party democracy took hold in Africa. Latin America completed its transformation from the era of U.S.-backed military dictatorships. In some Asian countries such as the Philippines and South Korea, human rights movements also helped usher in democratic change. A new democratic majority—now including many countries of Eastern Europe and Latin America—unlocked the potential of the United Nations Commission on Human Rights, which in the early 1990s finally unlocked the potential of the United Nations to take human rights seriously and, in some cases, even adopt something close to the activist role that Eleanor Roosevelt might have envisioned.

Most importantly, the principle of state sovereignty steadily yielded in the face of human rights pressure. In 1993, the United Nations World Conference on Human Rights in Vienna decisively put the sovereignty
defense to rest by proclaiming that the “promotion and protection of all human rights is a legitimate concern of the international community.” The way a state treated its people was indeed everyone’s business. In the face of challenges from supporters of cultural relativism and “Asian values,” the Vienna conference also emphatically declared that the “universal nature of these rights and freedoms is beyond question.”

Human rights became, in the words of Michael Ignatieff, the “dominant moral vocabulary in foreign affairs,” even if, in practice, they were often trumped by inconsistent economic and security goals. With the rhetoric of human rights ascendant, and television and the internet carrying instantaneous reports of abuse, the free hand of governments to act in the perceived interests of ruling elites was, perhaps more than any other time in recent history, constrained by an informed and active civil society. Richard Falk rightly recognized that “during the decade of the 1990s, the movement towards an international human rights consensus was initiating a normative revolution in international relations that was beginning to supersede realist calculations of power and status in the political imagination of observers and policymakers.”

Yet even in this supposed golden decade of the 1990s, the human rights movement could not stop genocides in the former Yugoslavia and Rwanda, crimes against humanity in East Timor and Chechnya, or the killing of millions of civilians in armed conflict in central Africa. (Indeed, as we were meeting in Vienna to celebrate the triumph of human rights, the slaughter in Bosnia continued unabated only a few hundred miles away). Half of our planet’s six billion people still live in poverty, 24 percent in “absolute poverty.” Two billion of the human rights
movement’s clients do not have access to health care; one-and-a-half billion have no access to drinking water.

In a world in which intolerance and extremism are on the rise, in which millions die in armed conflict, in which poverty and misery are rampant, some are tempted to ask, as David Rieff has, whether improved norms have accomplished anything “for people in need of justice, or aid, or mercy, or bread?” Have they “actually kept a single jackboot out of a single human face?”

One should not confuse gloom about the current course of human events with scepticism about the value of the human rights endeavour or the accomplishments of the movement, however. It is certainly true that norms alone will not stop a tyrant or an extremist faction bent on genocide, and that is where the human rights movement, like many others, must confront the difficult question of military intervention to stop atrocity. (I think that most of my colleagues would agree that recourse to force is not only legitimate but also morally imperative in the face of genocide or equivalent atrocity. However there remains deep disagreement on how that force is to be authorized or employed). But while dictators may not be constrained by norms, open democracies are, as long as they are supported by an engaged civil society. Between the relatively surgical nature of the bombing of Iraq and Serbia and the carpet-bombing of Laos and Cambodia, not to mention the destruction of Hiroshima or Dresden, there is more than an evolution in the kindness of generals. Similarly, it is more difficult to imprison a Nelson Mandela for twenty-five years or a Chia Thye Poh from Singapore for
twenty-three years. What was common practice fifty or twenty-five years ago is simply not acceptable today.

Norms empower activists and victims, by creating benchmarks, by legitimising their demands, by establishing, in the words of the Universal Declaration of Human Rights, “a common standard of achievement for all peoples and all nations.” In a host of areas, ranging from the rights of women to the trend away from the death penalty, the process of developing norms and then mobilizing for their enforcement has indeed achieved concrete results.

Participating in the Pinochet case in the British House of Lords in 1998, I was struck at how the human rights movement had come of age. Not only were lofty proclamations like the United Nations Convention against Torture finally being applied in a concrete case, they were being applied in the case of the man whose sneering face behind the dark sunglasses had come to symbolized ruthless dictatorship, and whose repressive tactics twenty-five years earlier had unleashed the very forces—human rights activism and international conventions—which would lead to his arrest and to those hearings. Pinochet sent hundreds of thousands of articulate Chileans into exile. They, together with an outraged world opinion, swelled the ranks of groups like Amnesty International, which in turn pressed for the adoption of the Convention against Torture that would allow for the arrest of the ex-dictator.
September 11

At the height of its strength, however, the human rights movement was confronted with a new challenge that threatened, and still threatens, to undo much of what it had achieved. Looking out from our office conference room on the morning of September 11, 2001, Human Rights Watch staff watched as two hijacked airplanes destroyed the World Trade Center. These crimes against humanity, aimed at the heart of American power, have unleashed a reaction that threatens to wipe away many gains under the cover of an endless “global war on terror.” The campaign against terrorism has seen the erosion of the rule of law rather than its enforcement. Human rights have been undermined at the very time they most need to be upheld.

Around the world, many countries cynically attempted to take advantage of the war on terror to intensify their own crackdowns on political opponents, separatists, and religious groups, or to suggest they should be immune from criticism of their human rights practices. Many states have responded to the indiscriminate violence of terrorism with new laws and measures that themselves fail to discriminate between the guilty and the innocent. Numerous countries have passed repressive anti-terrorism laws that expand governmental powers of detention and surveillance in ways that threaten basic rights. There has been a continuing spate of arbitrary arrests and detentions of suspects without due process. In some places, those branded as terrorists have faced assassination and extra-judicial execution.

One of the most worrying developments has been the renewed debate over the legitimacy of torture. Even if torture had continued to be
widespread around the world, until recently it had become almost axiomatic that no country admits to condoning torture. Torture is the ultimate degradation, the unspeakable medieval act that we had banished from acceptable practice. Torture was one of Amnesty International’s first battles and thanks to the movement, torture has been considered the emblematic barbarity that was no longer permissible under any circumstances. It is the torturer who, a U.S. court noted in the Filártiga case, had supplanted the pirate of yore as “an enemy of all mankind.” It was for torture, not mass killings, that Pinochet was stripped of his immunity. Yet now we see, particularly in the United States, important voices suggesting that torture can be a proper tool in the fight against terrorism. Indeed, there have been serious charges that detainees captured in Afghanistan have been beaten and subject to what are known as “stress and duress” techniques by U.S. officials or handed over to third countries where they are likely to be tortured, charges which the Bush administration has failed squarely to address.

At the inter-governmental level, concern for human rights has taken a back seat to lining up allies in the terror war, effectively giving free passes to newfound as well as more established strategic allies. This year at the Commission on Human Rights in Geneva, no government was willing to table a resolution critical of China, while Russia easily beat back a resolution on Chechnya despite its on-going atrocities there.

These developments led Michael Ignatieff to ask, after September 11, “whether the era of human rights has come and gone.”
There is no doubt that the human rights movement faces a new challenge. The gloves have come off. We should not cling to the illusion that without the support of an organized citizenry the United States (or any other powerful country) will make human rights the “soul of [its] foreign policy,” to use President Jimmy Carter’s words.

In this new era, the movement must demonstrate that the promotion of human rights internationally is not just an ethical value but is also an essential tool in the fight against terrorism. Kofi Annan pointed the way in his September 2003 address to the General Assembly: “We now see, with chilling clarity, that a world where many millions of people endure brutal oppression and extreme misery will never be fully secure, even for its most privileged inhabitants.” While terrorists themselves are not likely to be mollified by policy changes, we must act on the evidence that support for terrorism feeds off repression, injustice, inequality and lack of opportunity. As Richard Falk has said, “The message of extremism is not nearly as likely to resonate as broadly and nearly as menacingly if its animating grievances are not widely shared in the broader affected community.” Where there is democracy and equality, where there is hope, where there are peaceful possibilities for change, terrorism is far less likely to gain popular support. Global security is thus enhanced by the success of open societies that foster respect for the rule of law, promote tolerance, and guarantee people’s rights of free expression and peaceful dissent.

In the United States, where the shock waves of September 11 are most naturally felt, the resulting fears have been exploited by the Bush administration to press a radical roll-back of constitutional rights. The
human rights movement is striving to persuade Americans that, while the government has to be empowered to take those measures which are reasonable and necessary to reduce the very real threat of terrorism, the requirements of security can and must be reconciled with the blessings of liberty. In one of the most chilling warnings by a sworn defender of the constitution, U.S. Attorney General John Ashcroft told Congress that "to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national security and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends." Though it is an uphill battle, the movement is responding with the words of Benjamin Franklin, one of the U.S.'s founding fathers, that “they who would give up an essential liberty for temporary security, deserve neither liberty nor security.”

These difficult times demand that the human rights movement reach its full potential to mobilize individuals and groups. This means completing the unfinished task of integrating all its parts, of developing mutually beneficial relations between international and national human rights groups. We have come a long way since a Central American activist complained to me that the movement followed the “maquila” model in which northern groups exploited the south’s “raw material” of abuses and then pressed for rich governments to condition aid to poor countries. But we are still struggling to find ways in which national and local front-line groups can overcome their difficulties in access to funding, international media, and expertise in order to better participate in defining the international rights agenda. This is not just politically correct rhetoric. As Bahey El Din Hassan, Director of the Cairo Institute for Human Rights Studies, has pointed out, for example, only
by empowering Arab partners to help define the agenda can international NGOs help them counter the perception that human rights are a western imposition. The movement must come to grips with the fact it is weakest precisely where support for terrorism is greatest, in the Middle East and west Asia.

In order to reach our full strength, we must create a synergy between the human rights movement and those campaigning for social and economic justice. Even if our agendas are not always a perfect fit, we need to join our voices around the key issues that unite us. Many of our signal successes as a movement, such as the creation of an International Criminal Court and the anti-apartheid struggle, came about when we joined forces with wider constituencies. The International Campaign to Ban Landmines, for instance, of which Human Rights Watch was a founder, unites a massive coalition of 1,300 human rights, humanitarian, children, peace, disability, veterans, medical, humanitarian mine action, development, arms control, religious, environmental, and women's groups in over 90 countries. In awarding the Nobel Peace Prize to the Campaign and its lead coordinator, Jody Williams, the Nobel Committee cited the uniqueness of an effort that made it "possible to express and mediate a broad wave of popular commitment in an unprecedented way."

I have no doubt that an overwhelming majority of people in our world support the human rights ideal. Our unfinished task is to mobilize that majority into a force too powerful to be resisted.
Appendix: 2003 Human Rights Watch Publications

Reports by Country

Afghanistan:
“Killing You is a Very Easy Thing for Us:” Human Rights Abuses in Southeast Afghanistan, 07/03, 101pp.

Algeria:
Time For Reckoning: Enforced Disappearances and Abductions, 02/03, 84pp.

Angola:
Struggling Through Peace: Return and Resettlement, 08/03, 29pp.
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Azerbaijan:

Bangladesh:
Ravaging the Vulnerable: Abuses Against Persons at High Risk of HIV Infection, 08/03, 51pp.

Bhutan:
“We Don’t Want to Be Refugees Again:” A Briefing Paper for the Fourteenth Ministerial Joint Committee of Bhutan and Nepal, 05/03, 22pp.

Brazil:
Cruel Confinement: Abuses Against Detained Children in Northern Brazil, 04/03, 51pp.

Burundi:
Everyday Victims: Civilians in the Burundian War, 12/03, 64pp.
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Cambodia:
Don’t Bite the Hand that Feeds You: Coercion, Threats, and Vote-Buying in Cambodia's National Elections, 07/03, 22pp.
World Report 2004

The Run-Up to Cambodia’s 2003 National Assembly Election: Political Expression and Freedom of Assembly Under Assault, 06/03, 15pp.


Canada:


Chile:

Discreet Path to Justice?: Chile, Thirty Years After the Military Coup, 09/03, 16pp.

China:

Locked Doors: The Human Rights of People Living with HIV/AIDS in China, 09/03, 95pp.

Colombia:

“You'll Learn Not to Cry:” Child Combatants in Colombia, 09/03, 168pp.

Colombia’s Checkbook Impunity, 09/03, 13pp.
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Côte D'Ivoire:
Trapped Between Two Wars: Violence Against Civilians in Western Côte D'Ivoire, 08/03, 55pp.

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Democratic Republic of Congo:

Egypt:
Charged With Being Children: Egyptian Police Abuse of Children in Need of Protection, 02/03, 79pp.

El Salvador:
Deliberate Indifference: El Salvador’s Failure to Protect Worker’s Rights, 12/03, 98pp.

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World Report 2004

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Flight From Iraq: Attacks on Refugees and Other Foreigners and their Treatment in Jordan, 05/03, 22pp.
Forcible Expulsion of Ethnic Minorities, 03/03, 34pp.
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International Humanitarian Law Issues in a Potential War in Iraq, 02/03, 14pp.

Israel/Occupied Territories:
Briefing to the 59th Session of the UN Commission on Human Rights on the Human Rights Situation in Israel and the Occupied Territories, 02/03, 4pp.

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**Kenya:**
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