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MAKING JUSTICE COUNT

Lessons from the ICC's Work in Côte d'Ivoire



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Making Justice Count

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Summary

In October 2011, judges of the International Criminal Court (ICC) authorized the court’s prosecutor to open an investigation into crimes committed during Côte d’Ivoire’s 2010–2011 post-election crisis. The crisis began after former President Laurent Gbagbo, having been defeated at the polls, refused to cede power to current President Alassane Ouattara. In the five months of violence that followed the disputed election, at least 3,000 civilians were killed in attacks perpetrated along political, and, at times, ethnic and religious lines by forces affiliated with both Gbagbo and Ouattara.

To date, the ICC Office of the Prosecutor (OTP) has brought cases against three individuals arising out of its investigations in Côte d’Ivoire, including Laurent Gbagbo, for crimes allegedly committed by forces affiliated with Gbagbo. The OTP is continuing its investigations into the country’s post-election violence.

At the core of the ICC’s mandate is the delivery of justice through fair, criminal proceedings. Justice can have immeasurable benefits to ensuring that victims obtain redress and to helping increase respect for the rule of law, especially in war-torn societies.

But fair proceedings alone are insufficient. The benefits of justice are difficult to realize unless efforts to hold perpetrators to account are also responsive to the concerns of affected communities and clearly understood by those communities. As a result, ICC officials need to carry out their mandates in a manner designed to ensure that the ICC’s delivery of justice will be accessible, meaningful, and perceived as legitimate—that is, that it can have impact—in countries where it conducts investigations.

This report examines the court’s engagement in Côte d’Ivoire, and, to a far lesser extent, in Mali, where the OTP opened investigations in 2013. Based on interviews with Ivorian and Malian civil society representatives and journalists, and with court officials, as well as review of relevant court decisions and policy documents, our research finds that the court has yet to make the most of opportunities to increase the impact of its proceedings in Côte d’Ivoire.

A. The Importance of Impact

By the end of 2015, the ICC, the world’s only permanent international criminal court, will move into its purpose-built headquarters in The Hague, the Netherlands. The ICC began its work in 2003, but has since used temporary facilities in a suburb of The Hague. With impressive new headquarters nearing completion, it may be tempting to think of the ICC as an exclusively Hague-based court. The courtrooms and the vast majority of its staff are based there. And although its legal framework allows the ICC to hold hearings in other locations, it is likely that most trials will take place in The Hague.

However, the court is working day-to-day in the countries where it has opened investigations. It is in these countries where the crimes to be tried before the court have been committed, and, therefore, where, for the most part, investigations will need to take place. It is also where individuals and the communities affected by the commission of crimes within the court’s jurisdiction reside, coping with ongoing conflict or the aftermath of massive human rights violations.

These affected communities lie at the heart of the court’s work. Although the ICC has many constituents—ranging from the governments that make up its 123 states parties, to intergovernmental organizations providing support to the ICC, to international civil society which campaigned for the court’s creation—chief among these stakeholders are the victims and communities which have been directly affected by atrocity crimes. In situations under investigation by the ICC concerning conflicts on a national scale, or where those accused of crimes are national figures—as is often the case—the entire population within a given country is likely to be concerned by cases before the court.

When it comes to the ICC’s impact in affected communities, the delivery of justice matters, but so does the quality of that justice and ensuring that justice is also seen to be done. For example, trials of leaders or former leaders can send a signal that no one is above the law, providing a powerful affirmation of the rule of law—yet only where that message is heard and understood by those victimized by criminality.

Efforts by ICC officials to ensure the court’s work has impact—that is, that its work is accessible, meaningful, and perceived as legitimate—within affected communities therefore are an essential component of the court’s mandate.

B. Influencing Impact

The court’s organs have a number of mandates or responsibilities relevant to engaging affected communities and maximizing the ICC’s impact. Many of these are supported by the presence of ICC staff, on either a temporary or permanent basis, in countries where the ICC is conducting investigations.

Of central importance to the delivery of justice and to impact is the selection of cases by the Office of the Prosecutor. The ICC is not expected to try all cases of serious crimes arising out of a given situation, and the OTP has a wide margin of discretion in deciding on the basis of its investigations which specific cases to pursue.

When it comes to increasing impact, however, the OTP’s selection and prioritization of cases should reflect underlying patterns of serious crimes—what crimes, committed where, and by which groups—following impartial and independent investigations of allegations against all parties. The prosecution should aim to bring charges against those most responsible and representative of the gravest crimes.

Additional criteria are appropriate to guide the selection and a certain prioritization of cases, and we are not advancing a comprehensive theory here in that regard. But our observation of the ICC’s experience across its situation countries suggests that where cases do not meet at least the above criteria, the court’s legitimacy can be undermined in the eyes of affected communities, lessening its impact.

The court’s responsibilities relevant to impact extend beyond those assigned to the OTP. These include the Registry’s outreach programs to make court proceedings accessible to affected communities. It also includes its efforts to facilitate rights guaranteed under the Rome Statute, the ICC’s founding treaty, for victims to participate in court proceedings and to seek reparations. Assistance projects carried out by the Rome Statute’s Trust Fund for Victims to provide physical and psychological rehabilitation, as well as material support, can have an important and immediate effect on the lives of some victims.

And, although it has received too little attention to date, the ICC’s role, shared by all organs, in engaging national judicial authorities and professionals with regard to domestic

trials of ICC crimes (a part of what is known as “positive complementarity”) is key to its long-term impact and legacy in situation countries.

Although the OTP is independent of other court organs, the OTP’s selection of cases in a given country situation creates the framework in which these other actors must implement their own responsibilities. This plays out in myriad ways. Perception issues created by the OTP’s selection of cases will affect the neutral delivery of information through the court’s outreach programs. Meanwhile, the prosecution’s investigations and choice of cases set in motion the judicial proceedings that will follow before the court; the pace of the prosecution’s investigations and, more generally, the unpredictable nature of judicial developments flowing from these investigations, affect the timeframes in which other actors can implement their own activities. Under the court’s case law, the scope of the prosecution’s charges will determine which victims are eligible to participate in proceedings and even to apply for reparations.

The court’s impact—that is, its relevance, accessibility, and legitimacy in affected communities—is likely to be a function, on the one hand, of the cases selected by the prosecutor (and ultimately whether they are fairly tried), and, on the other hand, of how other ICC actors navigate the OTP’s decisions about case selection in delivering on their own responsibilities.

For all court actors, maximizing the court’s impact is no easy task. This is so, particularly given the court’s broad mandate, which means working in several, unique country situations simultaneously, with limited resources.

The ICC’s experience to date, as well as that of its predecessor tribunals, also requires a certain realism about what impact the ICC can achieve. Impact is not solely the product of factors within the control of court officials. Relatives of victims may be more concerned about bringing direct perpetrators than commanders to justice, for example, while the court must focus, for the most part, on those most responsible for grave abuses. The ICC often works in highly politicized contexts—where support for justice and the ICC’s role, even among victims, cannot be assumed.

But maximizing the court’s impact through engagement with affected communities should remain a strategic goal for court officials, requiring their continuous attention and efforts to improve progress toward this end.

C. Effect of the Prosecution’s Decisions on Impact in Côte d’Ivoire

To date, on the back of its investigations in Côte d’Ivoire, the OTP has brought cases against three individuals: Laurent Gbagbo, his wife Simone Gbagbo, and Charles Blé Goudé, Gbagbo’s former youth minister and close ally, and the longtime leader of a violent, pro-Gbagbo militia group. Trial of Gbagbo and Blé Goudé is scheduled to begin before the ICC in November 2015, while Simone Gbagbo remains in Côte d’Ivoire after authorities refused to surrender her to the court. The OTP has indicated that its investigations in Côte d’Ivoire will continue on an impartial basis, but four years after first seeking permission to open investigations, the prosecution has yet to lay charges before the court for crimes committed by those allied with Ouattara.

The absence of cases to date for crimes committed by pro-Ouattara forces means that so far the OTP has missed the mark in selecting cases in a manner likely to maximize impact in the country. But this and other decisions by the OTP have also created a number of challenges for other court actors.

First, the OTP moved swiftly in its initial investigations; within two months of opening investigations, the ICC had issued an arrest warrant for Gbagbo and he was transferred to The Hague. The pace of the office’s initial investigations is not itself at issue here. But it meant that other court actors, and in particular, the court’s Outreach Unit, faced significant information needs on the ground within a very short period of time.

Second, although crimes were committed by pro-Gbagbo forces in Abidjan and in the interior, particularly the west, the Gbagbos and Blé Goudé are only charged in connection with four or five incidents, all of which took place within Abidjan. As a result, to date, the ICC’s cases do not adequately reflect the scope of the post-election violence.

Third, and perhaps most significantly, although the prosecution maintained it would investigate crimes committed by all sides, it sequenced its investigations, examining first crimes committed by forces allied to Gbagbo. The one-sided focus of the ICC’s

cases to date has helped to polarize opinion about the court and undermined perceptions of its legitimacy.

This quick start, the limited incidents in the court’s cases, and the one-sided nature of the prosecution’s approach raised significant obstacles for the Registry in carrying out its mandate to engage affected communities in order to provide objective information about proceedings and to facilitate the engagement of a broader set of victims in proceedings before the court. And yet, strategies employed by these other court actors have also missed opportunities that might have mitigated these challenges and yielded greater impact on the ground.

D. Outreach

In order to ensure that justice is not only done, but seen to be done—particularly within communities affected by the crimes to be tried—the ICC needs to communicate clearly about its mandate, court proceedings, and other relevant developments. At the ICC, “outreach” refers to a dynamic, two-way dialogue between the court and affected communities within ICC situations to provide this information. Outreach may include “direct” outreach, directly communicating with communities through, for example, town-hall meetings, community radio call-in programs, or theatrical productions, or it may include outreach through use of mass media.

Limited resources precluded the ICC’s Registry from deploying an outreach officer in Abidjan until October 2014, three years after investigations were opened. Activities to provide information about the court and its proceedings were overseen by a Hague-based outreach officer and through regular missions to Côte d’Ivoire.

With these limited resources, in its community outreach program, the Registry’s Outreach Unit prioritized working together with its Victims Participation and Reparations Section (VPRS) and a network of non-governmental organizations to provide information to those victims who could potentially participate in court proceedings. This was necessary to ensure these victims could access their Rome Statute-protected right of participation.

Under the court’s case law, however, only those victims who have suffered harm as a result of the incidents reflected in the charges in a specific case are eligible to

participate in that case (known as “case victims”). Given that the cases against the Gbagbos and Blé Goudé concern only four or five incidents, all taking place within Abidjan, this meant that community outreach efforts were focused on a very select segment of the Ivorian population.

While Human Rights Watch’s research indicates that these case victims have had access to significant levels of information—an important achievement, facilitated by a VPRS field-based staff member—the Outreach Unit’s prioritization of potential case victims has meant that the court has not been in a position through its community outreach program to engage more broadly with the Ivorian population.

When it comes to victims of abuses committed by pro-Ouattara forces, this may have reinforced, rather than mitigated, the perception problems occasioned by the prosecution’s one-sided approach.

The Outreach Unit’s efforts were not limited to community outreach, however. In spite of the absence of an Abidjan-based outreach officer, the Outreach Unit engaged closely with Ivorian journalists. But politicization of the print media within Côte d’Ivoire, mirroring the underlying divisions within the country, and, more generally, a distrust of mass media by the population, has meant that it is unlikely to be an effective tool for outreach.

Civil society organizations have stepped into the breach to carry out more wide-ranging outreach programs. But resource constraints, as well as important limits in the role non-court actors should be expected to play in delivering information about ICC proceedings, have meant that their efforts do not diminish the need for the court’s own outreach activities.

There appears to be clear recognition of these gaps among court staff. A field outreach officer has now been deployed to Abidjan and the court looks set to expand its activities.

E. Engaging Victims

One of the Rome Statute’s most significant innovations is the right of victims to present their “views and concerns” or, as it is termed before the ICC, to participate in proceedings. The ICC was the first of the international criminal tribunals to recognize this

right, but has struggled to ensure victim participation is meaningful, both to individuals and to court proceedings.

As indicated above, under the court's case law, judges have distinguished between victims with standing in specific cases and victims with standing in proceedings in the broader situation giving rise to those cases. Opportunities for participation have been more robust for victims with standing in specific cases, and limits in the formal standing of other victims before the court cases have created a catch-22. One the one hand, victims have few formal opportunities to provide their views on the framing of charges. But, on the other hand, given that the court's case law requires victims to demonstrate a link to the charges in order to participate in a specific case, the framing of these charges may extinguish any formal rights they have to participation.

This makes all the more important implementation in practice of the OTP's existing policy commitments to consult with victims across all phases of its work to ensure its selection and prioritization of cases is responsive to the experience of victims, a key factor in ensuring impact. Human Rights Watch recommends the OTP put in place a specific strategy to consult victims on its case selection decisions.

Some opportunities to engage a broader set of victims in court proceedings do remain prior to the opening of cases. In Côte d'Ivoire, however, the judges and the Registry have not made the most of these potential opportunities.

First, pursuant to Rome Statute article 15(3), victims in Côte d'Ivoire had the opportunity to make representations to the court's judges with regard to the OTP's application to open investigations in the country. The OTP needed to seek the judges' authorization to investigate because although the Ivorian government had made declarations accepting the court's jurisdiction, it was not yet an ICC state party and could not refer the situation to the ICC prosecutor. In the absence of a state referral or a UN Security Council referral, the OTP needed to seek the judges' permission under Rome Statute article 15 to open what are known as "proprio motu" investigations.

The OTP undertook missions to Côte d'Ivoire and publicized its request to open investigations, as well as the right of victims to make written submissions to the court. Judges relied on representations received from victims in their decision authorizing the

OTP's investigations. Indeed, the OTP should consider whether as part of its standing commitment to consult with victims it should seek to replicate aspects of this article 15 process even in investigations opened pursuant to state of UN Security Council referrals.

But the judges did not order the court's Outreach Unit or VPRS to undertake any special activities within the country regarding the process for submitting representations, missing opportunities to lay important groundwork for early outreach and engagement with affected communities in Côte d'Ivoire.

Second, resource constraints have meant that VPRS has not been able to sustain activities directed beyond potential case victims and toward the broader population of victims on a continuous basis. This is an understandable prioritization, and it is no easy task to communicate effectively with other victims about what are in all likelihood very limited opportunities for standing. There is a real risk of raising expectations that cannot be met, and experience from some of the earliest ICC situation countries, including Uganda and DRC, bears this out.

The discrepancy between expectation and reality of victim participation prior to the opening of specific cases has led one expert to conclude that while victims should maintain some basic rights before the ICC to challenge the prosecution's selection of charges, it is preferable to shift attention towards increasing the recognition of those rights in national accountability mechanisms.

An ICC approach that during significant periods of time is too narrowly targeted and driven by the prosecution's identification of cases, however, may be short-sighted. A pro-active information strategy with all victims is vital to minimizing the risk of alienating these individuals from the court.

F. Reforms Hold Promise for Impact-sensitive Approaches

As to both outreach efforts and those activities aimed at facilitating victim participation, the ICC Registry appears to have closely tracked the choices made by the OTP or requirements set down by the judges. That is, to a significant degree, outreach and victim participation-related initiatives have prioritized providing information to those victims who could potentially participate in the cases brought by the OTP.

Given the limits in the OTP’s cases—which to date relate to incidents only within Abidjan and which do not yet concern crimes committed by all sides to the violence—these decisions by the Registry may have doubled-down on the OTP’s selective approach, rather than making the most of opportunities to engage with Ivorians more broadly.

Human Rights Watch recommends the Registry take steps to increase its attention to impact. Specifically, the Registry should consider adopting organ-wide, country-specific strategies for impact in each ICC situation. These Registry-wide strategies should seek to define, from the earliest onset of Registry activities, how the Registry’s mandates can together contribute to impact. The Registry’s strategies will need to be closely tied to the OTP’s choices and judicial proceedings, like the opening of cases or the start of trial proceedings, more generally. But they should equip the Registry to respond to demands and make the most of opportunities for impact in situation countries, which will often arise independently of those proceedings.

Recent reforms to the Registry and to the court’s field presence should position Registry officials and staff to make the most of this recommendation. The court’s presence overall in its situation countries has been slow to develop. Perhaps due to the lack of approval by states parties for resources to fund high-level heads of field offices in situation countries, we believe its approach has become overly tied to judicial developments.

Under a new Registry structure, such heads of office, termed “chiefs of field offices” will now be put in place in a number of field offices, with oversight for multidisciplinary teams of outreach and victim participation specialists. These chiefs of field offices should be in a position both to help formulate more strategic approaches, tailored to each country situation, and to oversee their implementation on the ground. At the same time, it will be important to guard against the risk that combining different outreach and victim participation mandates into a single multidisciplinary team results in the diminution of either mandate.

Recommendations

To the Office of the Prosecutor

- Increase consultation with affected communities with a view toward better informing decisions regarding case selection and prioritization in light of the experiences of victims; and
- Include performance indicators relevant to strengthening consultations within affected communities in the court-wide set of performance indicators under development.

To the Registry

- Adopt Registry-wide, country-specific strategies for impact, bringing together the Registry’s diverse mandates with a view toward broadening the ICC’s engagement in ICC situation countries; these strategies will need to be tied to judicial developments, but should also recognize that opportunities for impact, as well as information needs within affected communities, will not always be tied to these developments;
- Make the most of envisioned reforms, including the establishment of senior-level “chiefs of field offices,” in ICC field offices, to develop country-specific strategies for impact, to ensure a coordinated approach across the Registry in the implementation of these strategies, and to engage with national authorities and international partners in ICC situation countries regarding capacity building programs in the national justice sector, the latter relevant to the ICC’s long-term impact; and
- Include performance indicators relevant to increasing the ICC’s impact through the Registry’s mandates in the court-wide set of performance indicators under development.

To ICC States Parties

- Provide additional resources, if needed, in the ICC’s budget to support the court’s implementation of more robust strategies for impact.

Methodology

This report is based on field research in Abidjan and Bamako, and in-person or telephone interviews and email correspondence with individuals in Abidjan, Belfast, Berkeley, Brussels, Geneva, Kampala, London, The Hague, and Washington, DC between August 2014 and July 2015.

Human Rights Watch chose these locations given the International Criminal Court's (ICC) headquarters in The Hague and the selection of Côte d'Ivoire and Mali as the two cases intended studies for this report.

Human Rights Watch conducted telephone and in-person interviews with no fewer than 75 individuals, including 16 ICC staff members, representatives of at least 16 civil society organizations, United Nations officials, members of the diplomatic community in the two countries, journalists, and three international or transitional justice experts.

Interviews with ICC staff members were conducted in a mix of individual and group settings. Interviews generally lasted about one hour. We also received a consolidated, emailed response from the ICC Registry to a questionnaire regarding victim participation.

Many of the interviews with civil society organizations took place in the presence of more than one representative of the same civil society organization.

We also conducted interviews with nine journalists in Abidjan and Bamako. In November 2014, telephone interviews were conducted with an additional three Abidjan-based journalists from Brussels.

Côte d'Ivoire and Mali were selected as two intended case studies for this report given contrasts in the state of ICC investigations there. In Côte d'Ivoire, investigations by the ICC's Office of the Prosecutor (OTP) resulted in the issuance of an arrest warrant and the transfer of a suspect to The Hague within two months. In Mali, investigations by the OTP were opened in 2013, but have not yet resulted in public arrest warrants.

Given the more limited state of the ICC's investigations in Mali, we have chosen to incorporate our research on Mali into this report's general discussion of the court's field presence, rather than a more detailed, stand-alone analysis of the situation (see Part II below).

Registry staff at the ICC assisted in the identification of some of those we interviewed. Human Rights Watch also reviewed ICC decisions and policy statements, as well as some relevant reports on the ICC by other civil society organizations. In addition, the report draws heavily on past research conducted for our July 2008 report *Courting History: The Landmark International Criminal Court's First Years* and the organization's ongoing monitoring of the ICC, including in the ICC's six other situation countries.

A majority of interviews conducted during research in Côte d'Ivoire and Mali, particularly with representatives of civil society organizations and journalists, were conducted with the assistance of French-English interpreters. In-person and telephone interviews conducted outside Côte d'Ivoire and Mali were conducted in English, with the exception of the telephone interviews conducted with three Abidjan-based journalists. The latter were conducted in French with the assistance of an interpreter.

I. Influencing Impact

At the core of the International Criminal Court’s (ICC) mandate is the delivery of justice through fair, criminal proceedings. But fair proceedings alone are insufficient to ensure that the ICC’s delivery of justice will be accessible, meaningful, and perceived as legitimate—that is, that it can have impact—in countries where it conducts investigations.¹ When it comes to impact, the delivery of justice matters, but so does the quality of that justice and ensuring that justice is also seen to be done.

This immediate understanding of impact is likely to be a necessary pre-requisite for the court’s proceedings to achieve broader goals, including catalyzing additional national prosecutions to bring full accountability and addressing root causes of criminality in order to deter future crimes. For example, trials of leaders or former leaders can send a signal that no one is above the law, providing a powerful affirmation of the rule of law, but only where that message is heard and understood by those victimized by criminality.

The court’s “impact” can refer to both of these dimensions: in the first instance, the court’s relevance, meaning, and legitimacy within affected communities, and, in the second instance, the effect the ICC could have more broadly on accountability and deterrence. Our emphasis in this report, however, is primarily on the former dimension of impact.

The ICC’s experience to date, as well as that of its predecessor tribunals, requires a certain realism about what impact the ICC can achieve.² Impact is not solely the product of factors

¹ In this report, Human Rights Watch argues for prioritizing impact, including legitimacy, within local communities, both in the prosecutor’s case selection decisions and in the implementation of other aspects of the court’s mandate. We have incorporated “perceived as legitimate” into this definition of what it means for the International Criminal Court (ICC) to have impact in affected communities following the helpful comments made by Professor Margaret M. deGuzman in response to a presentation of a preliminary version of this report at the April 2015 annual meeting of the American Society of International Law. This emphasis on legitimacy is consistent with Human Rights Watch’s past observations on the OTP’s case selection decisions. See Part I.A below. In the context of situation and case selection decisions, Professor deGuzman has argued that the ICC’s legitimacy depends on decisions that are consistent with the “goals and priorities” reflective of “the values of the ICC’s constitutive communities.” These goals and priorities are not clearly defined, however, and may differ between local and global communities. To make the most of its limited resources, she argues that the ICC express global norms through its selection decisions. Local communities, state actors, non-governmental organizations, and the international community could provide feedback and refine the ICC’s choices over time. See Margaret M. deGuzman, “Choosing to Prosecute: Expressive Selection at the International Criminal Court,” *Michigan Journal of International Law*, vol. 33 (2012), pp. 265-319.

² See Njonjo Mue, “Policy Brief: Enhancing the Societal Impact of International Criminal Tribunals,” Impunity Watch, February 2015, http://www.impunitywatch.org/docs/Policy_Brief_-Enhancing_the_Societal_Impact_of_International_Criminal_Tribunals.pdf (accessed July 8, 2015), pp. 2-4 (noting as limitations of international justice when it comes to impact a lack of clarity as to goals, narrow prosecutorial strategies, and

within the control of court officials. Relatives may be more concerned about bringing direct perpetrators rather than commanders to justice, for example, while the court, for the most part, must focus on those most responsible for grave abuses. The ICC will often work in highly politicized contexts where support for justice and the ICC's role, even among victims, cannot be assumed. And achieving impact in ICC countries becomes increasingly challenging as cases before the court have multiplied and its resources have failed to keep pace.

But achieving impact should remain a central, strategic goal for court officials. Indeed, given that the ICC is likely to only try a handful of cases in each country, court officials need to pay attention to maximizing the effect of these proceedings in order to increase the court's overall impact. Officials have a number of different responsibilities in this regard, explored below.

A. Prosecution's Selection of Cases

The ICC is not expected to try all crimes or all perpetrators, and, therefore, there will be limits to the number of cases brought by the Office of the Prosecutor (OTP) in each situation, as well as to the scope of those cases. Particularly because of these limits, the OTP's selection and prioritization of cases is central to the court's impact. For victims, the prosecutor's selection strategy provides the earliest and most visible measure of how the court will address the suffering that they have endured. The prosecutor's selection of alleged perpetrators and charges also has practical implications for victims: it determines which victims will be eligible to have their voices heard as participants in proceedings (see Part VI below).

When it comes to impact, the OTP's cases should reflect underlying patterns of ICC crimes—that is, what crimes, committed where, and by which groups—following independent and impartial investigations of allegations against all parties. Put into practice, this means that the ICC will try those most responsible for the most serious crimes on charges representative of those underlying patterns of ICC crimes.

This will usually mean investigation and trial of several cases in a given situation. Identification of these cases should emerge from investigations grounded in a deep

the difficult of shifting perceptions where there is a gap between narratives established by international tribunals and those held by affected communities).

appreciation of the context in which the ICC operates, with a focus on perpetrators and incidents that match up with underlying crime patterns, and with particular attention given to those cases—whether because they are the most complex or because they target high-level defendants—least likely to be effectively pursued by national authorities.³

Additional criteria are appropriate to guide the selection and prioritization of cases, and we are not advancing a comprehensive theory here in that regard. But where the OTP’s cases do not meet at least these criteria, our observation across the ICC’s situation countries suggests that the court’s legitimacy can be undermined in the eyes of affected communities, lessening its impact.

Although the above approach is largely consistent with the OTP’s policy commitments to date, a particular problem in the ICC’s selection and prioritization of cases in practice has been the failure in some situations to bring cases where more than one party to a conflict has committed serious crimes (as in Libya and in the Kivus investigation in Democratic Republic of Congo), or to minimize the time lag between cases brought against different parties to the conflict (as in the Ituri investigation in Democratic Republic of Congo and in Côte d’Ivoire, the latter discussed in detail below) or to provide adequate explanations as to why those cases are not being pursued (as in Uganda).⁴

B. Outreach

The court’s outreach activities, carried out by its Registry—a neutral ICC organ responsible for non-judicial aspects of the court’s administration—aim at establishing a two-way dialogue with communities affected by the crimes tried before the ICC in order to make its judicial proceedings accessible to those communities. Indeed, in order to ensure that justice is not only done, but seen to be done in affected communities, the ICC needs to communicate clearly about its mandate, court proceedings, and other relevant developments. This was a

³ A focus on “those most responsible” will usually mean charging those individuals bearing the greatest responsibility for crimes. This standard, however, should be applied flexibly at times, where, for example, pursuing lower ranking officials could deter other similarly situated officials from committing ICC crimes, with an immediate impact for victims on the ground. For further discussion see Human Rights Watch, *Selection of Situations and Cases for Trial before the International Criminal Court: A Human Rights Watch Policy Paper*, no. 1, October 2006, <http://www.hrw.org/en/news/2006/10/26/selection-situations-and-cases-trial-international-criminal-court>, pp. 7-15.

⁴ See Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 2011, <http://www.hrw.org/sites/default/files/reports/icc0911webcover.pdf>; see also Letter from Human Rights Watch to the ICC Prosecutor Regarding Accountability for Serious Crimes in Libya, November 11, 2014, <http://www.hrw.org/news/2014/11/11/letter-icc-prosecutor-regarding-accountability-serious-crimes-libya>.

key lesson learned from the ad hoc international criminal tribunals in the former Yugoslavia and Rwanda, as well as from the Special Court for Sierra Leone.

Outreach may include “direct” outreach, that is, means of directly communicating with communities, such as town-hall meetings, community radio call-in programs, and theatrical productions, or it may include outreach through use of mass media.

To support these responsibilities, the Registry has established an Outreach Unit within the Press Information and Outreach Section (previously, the Public Information and Documentation Section, PIDS). The Outreach Unit has a small staff based in The Hague and in ICC field offices. The Registry’s communications activities should be carried out on a neutral basis, but can be done in close coordination with other court actors, for example, to disseminate responses to questions posed to the OTP.

The OTP has a Public Information Unit, and OTP officials and staff members carry out their own public information activities, including in situations under investigation, but do not engage in “outreach,” as that term is used by the ICC.

C. Victim Participation and Reparations

The Rome Statute provides for “victim participation” in court proceedings, that is, it provides victims with certain rights to present their views and concerns to the court. Victims can thus appear before the court—although usually through a legal representative appointed to act on behalf of a group of victims, rather than personally—in their own right, and not just as a witness called by one of the parties. Although the system of victim participation before the ICC derives from the “civil party” system in civil law jurisdictions, victims at the ICC are participants, rather than full parties, like the prosecution and the defense. The implementation of victim participation—including procedures for victims to apply or be registered to participate—is subject to determination by the judges, and has varied with the phase of proceedings and across the court’s cases.

The Rome Statute also provides for other, specific opportunities for victims to make their views known to the court. Under Rome Statute article 15(3), for example, victims are able to make written “representations” to the judges in the context of proceedings to determine whether to authorize “proprio motu” investigations by the OTP. “Proprio motu”

investigations are those opened on the prosecution’s “own motion” rather than pursuant to a state or Security Council referral.

The Rome Statute also provides for court-ordered reparations to victims in the event of a conviction.

The Registry’s Victim Participation and Reparations Section (VPRS) is responsible for facilitating the applications of victims for participation and reparations, providing notice of decisions affecting the interests of victims, and assisting victims and the court in the selection and appointment of counsel.

D. In Situ Proceedings

Although the ICC’s seat is in The Hague, it can hold court proceedings in other locations, known as “in situ” proceedings. To date, in situ proceedings have been limited to a visit of the ICC’s judges to the Democratic Republic of Congo; the judges inspected the crime scene underlying the charges in the prosecutor’s case against Germain Katanga and Mathieu Ngudjolo Chui.

E. Trust Fund for Victims

The Trust Fund for Victims (TFV) was established by the Assembly with two mandates. First, it can implement court-ordered reparations in the event of a conviction. Second, it can also provide interim assistance—known as its “assistance mandate”—to victims in ICC situation countries, in parallel to court proceedings. These assistance projects provide victims with physical or psychological rehabilitation, or material support. The TFV currently has assistance projects in two of eight ICC situation countries (Uganda and Democratic Republic of Congo).

The Trust Fund for Victims has not yet had any presence in Côte d’Ivoire. The Trust Fund’s director explained that until recently, a lack of voluntary donations had prevented its expansion beyond the two ICC situation countries where it is currently active, Uganda and Democratic Republic of Congo.⁵ Although staff members of the Trust Fund’s secretariat are

⁵ Human Rights Watch interview with Pieter de Baan, executive director, ICC Trust Fund for Victims (TFV), The Hague, September 15, 2014. Planning for assistance projects supporting victims of sexual and gender-based violence in the Central African Republic was considerably advanced, but the projects were suspended in March 2013 following renewed conflict in

funded from the court's assessed budget, it relies on voluntary donations to fund its assistance mandate.⁶

The Trust Fund's financial position is improving, however, and its resources (covering both assistance projects and a reserve set aside to fund court-ordered reparations) have grown from €4 million in 2009 to just over €10 million as of July 2014.⁷ On this basis, the TFV should be in a position to move forward with assistance projects in additional ICC situation countries. Accordingly, the Trust Fund expects to deploy two staff members to the Abidjan office at the earliest in 2016.⁸

F. Positive Complementarity

Under what is known as the principle of complementarity, the ICC is a court of last resort, stepping in only where national authorities are unable or unwilling to try cases domestically. But even where the ICC has launched its own investigations, its officials and staff members can play a role in engaging with national authorities to build capacity and political will to support additional prosecutions and investigations. Indeed, given that the ICC is likely to bring only a limited number of cases to trial in each situation country, its efforts to help spur national prosecutions could be an essential element of increasing the effect of the court and its long-term legacy. The court is not a development agency, but there are a number of ways in which court staff can contribute to capacity building efforts, including by sharing expertise on international criminal law, investigations, and witness protection with national professionals.

G. Field Offices

To facilitate its work, the ICC needs to have a presence in (or near) situation countries. To date, the court's presence has ranged from missions for staff otherwise based at the court's headquarters in The Hague, to temporary or informal presences, to the opening of

the country. See TFV, "TFV Strategic Plan 2014-2017," http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFV_Strategic_Plan_2014_2017_approved.pdf (accessed June 5, 2015), p 6.

⁶ See Assembly of States Parties (ASP), "Proposed Programme Budget for 2015 of the International Criminal Court," ICC-ASP/13/10, September 18, 2004, http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-10-ENG.pdf (accessed June 29, 2015), part II.F ("Major Programme VI: Secretariat of the Trust Fund for Victims").

⁷ TFV, "TFV Strategic Plan 2014-2017," p. 9.

⁸ Human Rights Watch interview with Pieter de Baan, executive director, TFV, September 15, 2014, and email correspondence, May 13, 2015.

formal field offices managed by the court’s Registry with ICC staff members permanently based in the field.

Setting up a formal field office managed by the court’s Registry can pose a number of legal, logistical, and security concerns—and requires the cooperation of national authorities, a key ingredient. But when it comes to engaging affected communities and maximizing the court’s impact, including its long-term legacy, the ICC’s field offices should serve as a central element.⁹

Staff members based in the field are likely to have a more nuanced understanding of the environment in each country, helping the court to tailor its activities and contributing this perspective to broader ICC policy debates. They can also conduct activities on a far more consistent and regular schedule than if Hague-based staff are solely responsible for the work. Where security conditions permit, ICC field offices with a public profile can also serve as a much needed “face of the ICC,” a place where affected communities, the media, national authorities, and the international community can look to for basic information about the ICC. In short, they can make the court less abstract.¹⁰

In Côte d’Ivoire, the court opened a formal field office in Abidjan in September 2013. Court officials recognized the need to move quickly to establish the field office given, as discussed in Part III, the opening of the first ICC case in late November 2011. A memorandum of understanding with the Ivorian government was completed in February 2012. But the court encountered a number of delays in opening the Abidjan office. These included the time to locate the right office building, to bring it up to security standards, and to bring over certain court assets, including 28 tons of equipment, from the ICC’s closed-down offices in Chad, rather than purchasing new equipment.¹¹

⁹ The activities of the ICC in the field extend to many areas beyond those subsequently addressed in this report, including investigations, logistical support to court activities, security for court staff and counsel, victim and witness protection and support, and facilitating the court’s external relations with national authorities, international partners, and the diplomatic corps in situation countries, on which the court often relies for assistance. Field presence is also essential to support these activities, many of which require developing and sustaining close relationships with a range of partners on the ground.

¹⁰ See Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years*, July 2008, <http://www.hrw.org/sites/default/files/reports/1icco7o8webwcover.pdf>, pp. 100-101.

¹¹ Human Rights Watch telephone conversations with ICC staff, The Hague, August 8, 2014, and June 5, 2015, and email correspondence, June 8-9, 2015.

Notwithstanding these delays, the Abidjan field office has the potential to contribute to the impact of the ICC's work in Côte d'Ivoire. The Registry's Victims Participation and Reparations Section has had a field-based staff member in Abidjan since early 2012, even before the opening of the field office. As discussed below, as of October 2014, the Outreach Unit now has a field-based officer in Abidjan, increasing prospects for a broader approach in engaging affected communities.

* * *

Although the OTP is independent of other court organs, the OTP's selection of cases in a given country situation creates the framework in which these other actors must implement their own responsibilities. This plays out in myriad ways. Perception issues created by the OTP's selection of cases will affect the neutral delivery of information through the court's outreach programs. Meanwhile, the prosecution's investigations and choice of cases set in motion the judicial proceedings that will follow before the court. The pace of the prosecution's investigations and, more generally, the unpredictable nature of judicial developments flowing from these investigations, affect the timeframes in which other actors can implement their own activities. And under the court's case law, the scope of the prosecution's charges will determine which victims are eligible to participate in proceedings and even to apply for reparations.

The court's impact—that is, its accessibility, meaning, and perceived legitimacy in affected communities—is likely to be a function, on the one hand, of the cases selected by the prosecutor (and ultimately whether they are fairly tried), and, on the other hand, how other ICC actors navigate the OTP's decisions about case selection in delivering on their own responsibilities.

II. ICC Registry's Evolving Approach to Field Presence

The International Criminal Court's presence through formal field offices in its situation countries has been slow to develop.¹²

Field offices were not proposed in any of the court's initial budgets. This was chiefly because at the time the Office of the Prosecutor considered that investigation activities, which would be short in duration, could be conducted effectively with trips from The Hague. The OTP was also concerned that an ongoing field presence could compromise confidential and sensitive investigative and witness protection work by making the court too visible.

The necessity of field offices became clear, however, as the OTP grappled with the difficulty of conducting operations without an ongoing presence in situation countries. The court's first field offices were established in 2005.

Although offices were initially conceived as a way to support investigations and witness protection, growing acceptance of the importance of outreach and the facilitation of victim participation gradually saw the expansion of field offices to include staff associated with these functions, as well as, in some countries, staff of the Trust Fund for Victims.

Even with this expansion, however, field offices continued to be seen primarily as logistical hubs for the court, rolled out according to a generic blueprint. This "generic model" permitted a quick scale-up of the court's field presence—the field office in Bangui opened in 2007, five months after investigations formally began in the Central African Republic—but one which lacked the capacity to tailor that presence to each particular situation country.

This began to shift in 2009, as the Registry formulated policy guidance that anticipated scaling up or down its field engagement, including decisions about opening formal field offices, according to a number of strategic and operational factors.¹³

¹² See extended discussion, summarized here, in Human Rights Watch, *Courting History*, p. 101-105.

¹³ ASP, "Report on the review of field operations," ICC-ASP/9/12, July 30, 2010, <http://www.icc-cpi.int/NR/rdonlyres/3358BCD6-6DC3-42D6-91F8-ABC5FFED3CA6/0/ICCASP912ENG.pdf> (accessed June 4, 2015); ASP,

One of the factors identified by the Registry as underlying this new strategy was ensuring that field operations were “judicially driven”:

Bearing in mind the Court’s judicial mandate, field operations strategy is constructed on the principle that field operations are, at all times, closely linked to, and driven by, the judicial developments and the different judicial phases in each situation.¹⁴

Related to this, the Registry emphasized the importance of field operations being “scalable, time-bound, and tailored,” that is, “[f]ield operations are adapted to the specific context, taking into account the judicial phases of the situation before the Court....”¹⁵

Although this may change in light of Registry reforms, discussed below, decisions about whether, when, and what kind of Registry field presence to open have been coordinated through the Registry’s Field Operations Section. The section brings together Registry sections with field-based operations, as well as the Registry’s staff responsible for external relations and cooperation. These sections identify their operational needs in-country, including the deployment of any field-based staff. Consultations are also undertaken with the OTP and the Trust Fund for Victims about Registry-provided services they may need in-country. These operational needs are then considered in light of other factors, including feasibility and resources, in order to reach a decision about opening a field office or other field presence.¹⁶

This approach appears to define operational needs, again, with close reference to the given judicial phase of a situation. Registry staff contacted for this report confirmed that developments related to judicial proceedings are a key factor in determinations about the deployment of staff to situation countries.¹⁷

¹⁴ Report of the Court on the Field Operations Strategy,” ICC-ASP/10/26, November 17, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-26-ENG.pdf (accessed June 4, 2015).

¹⁵ ASP, “Report of the Court on the Field Operations Strategy,” para. 6.

¹⁶ Ibid. Other principles articulated in the “Report of the Court on the Field Operations Strategy” include: maximizing efforts and resources, maximizing cooperation, effective support for judicial cooperation, service-oriented operations, exit strategy (that is, “develop[ing] and implement[ing] [a field operations strategy] with a view to contributing to a lasting legacy in situation countries within existing resources”), and a staff-friendly environment.

¹⁷ Ibid., paras. 7-8.

¹⁷ Human Rights Watch telephone conversation with ICC staff, The Hague, August 8, 2014; email correspondence with ICC Registry, The Hague, November 11, 2014.

The question of the extent to which the court should link establishing its field presence to judicial developments is demonstrated most acutely by those ICC situations in which there are long periods of judicial inactivity. Indeed, the Committee on Budget and Finance, an expert committee of the ICC's Assembly of States Parties responsible for the annual review of the court's proposed budget, in a drive to find cost savings, appeared to push the court further in the direction of tying field presence to judicial developments, when it called for a review of staffing and potential downsizing of the Kampala field office. The Committee cited the absence of judicial developments in the northern Uganda situation given the failure to execute arrest warrants for the leaders of the Lord's Resistance Army.¹⁸ And where the court has yet to establish a field office or to conduct sustained, public activities in-country, the question arises as to when the ICC should seek to increase its visibility, even in the absence of judicial developments.

Given their central importance to engagement with affected communities, Human Rights Watch has advocated for the early establishment of field offices in the ICC's situation countries. We recognize, however, that establishing field offices and carrying out outreach and victim participation activities carries a number of logistical and security challenges, as well as resource implications. As a result, the court faces difficult decisions about whether and how to open these offices.

In Mali, for example, OTP investigations were opened in January 2013, but have not yet

¹⁸ ASP, "Report of the Committee on Budget and Finance on the work of its thirteenth session," ICC-ASP/8/15, November 16, 2009, http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-15-ENG.pdf (accessed June 4, 2015), paras. 78, 83-85. Based on limited ICC judicial activity in the Uganda and Darfur situations—where proceedings have been stalled by a lack of arrest and, in one case which has advanced to trial, the death of one suspect, lengthy delays due to the translation of evidence, and the need to replace a voluntary summons to appear with an arrest warrant for the remaining defendant—the Registry redeployed staff from the Kampala office to other situations, leaving behind only the resources necessary to support the Office of the Prosecutor (OTP) and the Trust Fund for Victims, as well as "a very limited number of Registry residual activities," and shut down its offices in N'Djamena and Abeche, Chad. By the end of 2014, the Registry had decided to scale back all court outreach activities in Uganda, a decision which was criticized by local groups as "risk[ing] sending a message that the Court has now given up." African Youth Initiative Network, "Position Paper from ICC's Intermediaries and Local Partners Concerning the Cessation of Regular Activities of the Outreach Section of the ICC Field Office in Kampala," November 30, 2014, http://www.iccnow.org/documents/Position_Paper_from_Intermediaries_and_Local_Partner_of_the_ICC___UGANDA___AYINET.pdf (accessed June 4, 2015). One of two surviving accused—Dominic Ongwen—was transferred to The Hague in January 2015 after he was received into the custody of United States military advisers working with the African Union (AU) Regional Task Force in the Central African Republic earlier that month. See "ICC: LRA Transfer Advances Chance for Justice," Human Rights Watch news release, January 20, 2015, <http://www.hrw.org/news/2015/01/20/icc-lra-transfer-advances-chance-justice>. The Outreach Unit is now scaling back up its presence in Uganda. Human Rights Watch telephone conversation with ICC staff, Kampala, June 3, 2015.

yielded specific cases opened before the ICC.¹⁹ The court does not presently have a field office in Mali, although it has requested the resources to open an office in 2015.²⁰

The absence of a field office has not meant, however, the absence of outreach and victim participation activities relevant to the Mali situation.

The Outreach Unit brought 30 representatives of Malian civil society organizations and 20 members of the Malian media out of the country to Côte d'Ivoire for a three-day seminar in December 2013. The session with civil society organizations was conducted jointly with VPRS, to provide information about victim participation.

In addition, in December 2014, the Outreach Unit brought a group of five journalists and five civil society representatives to The Hague for a three-day training, enabling the journalists to have the opportunity to report directly from the court's media center. Going forward, the Outreach Unit plans to conduct two similar missions per year, bringing together civil society and the media in locations outside of Mali.²¹

Although court staff interviewed for this report generally favored beginning robust outreach efforts as soon as possible after the start of an investigation, legitimate concerns about insecurity in the country appear to be a primary limitation. In addition to insecurity in the north of Mali, the OTP's investigations could include investigation of armed groups

¹⁹ The situation was referred to the OTP by the government of Mali. See Letter from Malick Coulibaly, then-Minister of Justice, Republic of Mali, to the ICC Prosecutor, "Renvoi de la situation au Mali," July 13, 2012, <http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf> (accessed June 4, 2015). Progress in investigations has been impacted by a number of factors. First, given pressing investigative needs in other cases where there are pending judicial deadlines to be met, the OTP has not been able to keep the Mali team staffed to the level it desired. Second, a more basic limitation has been that it has taken time to facilitate certain investigative steps, for example, to ensure appropriate protective measures are in place before interviewing potential witnesses. The absence of such arrangements has obliged the office to take measures regarding selection of witnesses and arrangements for meetings. While a permanent presence of investigators on the ground has been considered, it has not been necessary or feasible until recently due to these restrictions. Third, the ongoing presence of armed groups in the north, the general climate of insecurity and lawlessness, and growing number of attacks including on UN peacekeepers, have limited investigative opportunities in the north of the country. Human Rights Watch email correspondence with ICC staff, The Hague, May 11-15, 2015.

²⁰ The court's proposed program budget for 2015 requested resources to open a field office in Bamako. ASP, "Proposed Programme Budget for 2015 of the International Criminal Court," ICC-ASP/13/10, para. 413. The TFV does not have any activities in Mali. Subject to the security situation, the TFV is considering whether its anticipated presence in Côte d'Ivoire could provide support to any activities in Mali as well. Human Rights Watch interview with Pieter de Baan, executive director, TFV, The Hague, September 15, 2014, and email correspondence, May 13, 2015.

²¹ Human Rights Watch telephone conversation with ICC staff, The Hague, September 4, 2014, and email correspondence, May 18-21, 2015.

some of which are linked to Al-Qaeda in the Islamic Maghreb. These groups continue to operate in the north, but, as evidenced by a March 2015 bombing in Bamako and the emergence in early 2015 of a new Islamist armed group in Mopti and Segou regions, their reach has extended into new areas of operation.²² This insecurity creates risks both for court staff and for those with whom they would be interacting in Mali.²³

At time of writing, the court's security section, which makes determinations as to whether court staff may undertake missions to situation countries, has not approved in-country outreach activities. The current approach therefore aims at remotely providing some basic information to actors, including the media, inside the country, while building networks of partners for when the court is able to increase its visibility.²⁴

Malian journalists interviewed for this report indicated a high degree of public interest in the ICC, and an eagerness for follow-up from the court to support expanding their reporting around the court.²⁵ Representatives of civil society organizations we interviewed, on the other hand, noted the importance of providing information about the ICC to the general population, but given security concerns and a desire for further progress in investigations before the court increases its visibility, they expressed support for the court's low-profile approach.²⁶ In other ICC situations, however, it has been precisely this vacuum of information at the earliest phases of the court's operations that has bred misconceptions and misperceptions.²⁷

The court's field presence will always need to be closely tied to judicial proceedings. As explained in the court's field operations strategy documents, each judicial phase carries

²² "Mali bar attack kills five in Bamako," *BBC News Online*, March 7, 2015, <http://www.bbc.com/news/world-africa-31775679> (accessed June 4, 2015); "Mali: Lawlessness, Abuses Imperil Population," Human Rights Watch news release, April 14, 2015, <http://www.hrw.org/news/2015/04/14/mali-lawlessness-abuses-imperil-population>.

²³ For issues related to security of witnesses, court staff, and all others who may be put at risk by their link with court's activities, security assessments are continually carried out and updated, and protective measures (including immediate response mechanisms) are put in place and tested with partners such as the Malian government and the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). Security challenges are likely to evolve based on different stages of the investigation and proceedings. Hence, protective measures are intended to be adapted based on changes on the ground and the trend of the investigation. Human Rights Watch email correspondence with ICC staff, The Hague, May 11-15, 2015.

²⁴ Human Rights Watch email correspondence with ICC staff, The Hague, May 18-21, 2015.

²⁵ Human Rights Watch individual and group interviews with four Malian journalists, Bamako, September 29, 2014.

²⁶ Human Rights Watch individual and group interviews with representatives of four Malian civil society organizations, Bamako, September 29-30, 2014.

²⁷ Human Rights Watch, *Courting History*, pp. 126, 127-130.

with it a different set of court activities, requiring different levels of operational support.²⁸ But an approach that places too much emphasis in decisions about scaling and staffing field presences on a link to concrete, courtroom developments risks the court missing out on opportunities to deepen engagement and inform perceptions and expectations. These opportunities are not exclusively driven by court developments, but can also arise from developments in situation countries themselves. These include, for example, opportunities for the court to coordinate activities with national mechanisms also addressing the situation of victims in the country.

In addition, developments on the ground can create information needs or other demands to which the court should respond in order to situate its mandate within these developments and to inform expectations about that mandate. These developments may be wholly independent of the court's own proceedings and may include developments in parallel, national judicial proceedings, elections contested by ICC accused, political statements about the court by national or regional authorities, and even renewed violence.

In March 2013, for example, Uhuru Kenyatta and William Ruto, two ICC accused at the time, contested and won Kenya's presidential and vice-presidential elections on a joint ticket. Trials of Kenyatta and Ruto had yet to start at the ICC, but politicization of the court's proceedings by the defendants and their supporters increased during their election campaign and after they took office. The government's repeated political attacks against the ICC and efforts before the African Union and UN Security Council to halt the cases posed steep challenges for perceptions of the court within Kenya.

An apparent trend toward tying the court's field presence to judicial developments may stem from its inability to fully implement the strategic approach it charted in 2009-2010. States parties, on the advice of the Assembly's Committee on Budget and Finance, approved resources for 2010 for the creation of a new Strategic Coordination and Planning Unit within the Registry.²⁹ This unit has provided a certain amount of direction to the court's field operations, including an annual review to identify whether field operations need to be scaled up or scaled down in order to ensure the "most cost-

²⁸ ASP, "Report of the Court on the Field Operations Strategy," para. 6.

²⁹ ASP, "Report of the Committee on Budget and Finance on the work of its thirteenth session," paras. 80-82.

efficient, effective structure.” As part of this review, resources can be moved between situation countries.³⁰

But states parties, again on the advice of the Committee on Budget and Finance, did not approve a corresponding investment in the field to put in place “heads of registry” (as they were initially termed in the 2010 budget request) or “registry field coordinators” (as put forward in the 2011 budget request), and the court did not push for these positions in subsequent budget requests.³¹ A “head of registry” or “registry field coordinator” would have improved coordination at field-level, and Human Rights Watch had publicly called on states parties to support the creation of these posts.³² But the position would also have provided a source of strategic guidance when it comes to decisions about what kind of field presence, and with what levels of staffing, the court requires in a given situation.

In the absence of senior-level input from its field offices, the court appears to have struggled to implement a fully strategic approach to its field presence. As a result, in our view, the Registry may be overemphasizing judicial developments in its decisions about scaling up or down that presence.

An extensive restructuring of the court’s Registry, known as the *ReVision* and carried out between January 2014 and June 2015, looks set to create conditions that could help remedy this problem.

Following the *ReVision*, the Registry has established a new Division for External Relations, bringing together the external-facing aspects of its mandate. The Division for External Relations director—reporting directly to the registrar and sitting on the newly formed

³⁰ ASP, “Report of the Court on the Field Operations Strategy,” para. 8.

³¹ See ASP, “Report of the Committee on Budget and Finance on the work of its thirteenth session,” paras. 80-82; ASP, “Report of the Committee on Budget and Finance on the work of its fourteenth session,” ICC-ASP/9/5, December 6-10, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-5-ENG.pdf (accessed June 4, 2015), paras. 67-74; ASP, “Proposed Programme Budget for 2012 of the International Criminal Court,” ICC-ASP/10/10, July 21, 2011, http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf (accessed June 4, 2015), paras. 226-227. Such a position would have filled a critical gap. Although the court’s main field offices have a field office manager, this is a mid-level post, focused on logistical and operational support. He or she does not have authority over staff from other Registry units based in the office. As a result, channels of communication for field-based staff have been “vertical,” that is, staff members in the field communicate almost exclusively with their department colleagues and supervisors in The Hague, even where it concerns coordination within the same field office. See Human Rights Watch, *Courting History*, pp. 109-112.

³² See, for example, Letter from Human Rights Watch to Committee on Budget and Finance, ASP, April 15, 2010 (on file with Human Rights Watch). The ICC’s Nairobi-based tasked force, located with the UN Office at Nairobi has had a P-4 Registry field coordinator since 2011.

Registry Management Team—will have oversight of the Press Information and Outreach Section, the Victims and Witnesses Section (formerly the Victims and Witnesses Unit, which runs the court’s witness and victim protection and support programs), and the court’s field offices. The director will also oversee a Cooperation and External Relations Section, with separate units dedicated to external relations and state cooperation, country-level analysis of security, media, political conditions, and direct intelligence, and support to field offices and missions.

Significant changes are also planned for the field offices. A new position, chief of field office, will be established for some field offices. The chief of field office, to be recruited at a P-5 level, will supervise all staff based in a given field office, and is similar to the position the creation of which Human Rights Watch supported in the past, as noted above.³³ In addition to an administrative and operations officer and a field security officer, field offices will have “staff working in a multidisciplinary team focusing on outreach and victim issues.” Unlike the outreach and VPRS staff currently based in field offices, staff of this multidisciplinary team will no longer report directly to the Outreach Unit or VPRS in The Hague, but rather to the chief of field office, creating positive opportunities for increased coordination between the Registry’s mandates.³⁴ As explained below, see Part VII.B, attention will need to be paid to ensure that bringing functions together into one team does not undercut the Registry’s delivery on its outreach and victim participation mandates.

These reforms appear to be part of a positive, broader revitalization of the court’s field presence. The Registry’s Victims and Witnesses Section has indicated that it intends to have a greater number of staff in the field than in The Hague.³⁵ And the OTP has

³³ An exception to this will be made for Victims and Witnesses Section staff, who will continue to report to the head of that section in The Hague.

³⁴ See ASP, “Report on the review of the organizational structure of the Registry: Outcomes of Phase 4 of the *ReVision* Project - Decisions on the structure of the Registry,” ICC-ASP/14/18, May 4, 2015, http://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-18-ENG.pdf (accessed June 4, 2015), paras. 26-31. A separate element of the *ReVision* process may see the abolition of the Victims Participation and Reparations Section (VPRS), joining it together with the Office of Public Counsel for Victims (OPCV) into a single Victims’ Office. See ICC Registry, “Proposal of the Registrar on the Principles Guiding the Establishment of a Victims Office and a Defence Office” (on file with Human Rights Watch). Consideration of this proposal is beyond the scope of this report, but it has attracted considerable attention and debate. See, for example, Coalition for the ICC (CICC) Legal Representation Team, “Comments and Recommendations on the Proposed Victims Office in the context of the Registry ReVision,” April 3, 2015 (on file with Human Rights Watch). Human Rights Watch joined this CICC position paper.

³⁵ ASP, “Report on the review of the organizational structure of the Registry,” para. 28.

emphasized in its current strategic plan the importance of increasing the field presence and country knowledge of its investigators.³⁶ It has now deployed, on a full-time basis, an investigator in Côte d'Ivoire with a semi-public profile,³⁷ a shift from past practice of relying only on rotating missions of investigators from The Hague.

Our recommendations for maximizing the Registry's contributions to impact (see Part VII.B) seek to make the most of these shifts in approach.

³⁶ OTP, "Strategic plan, June 2012-2015," October 11, 2013, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf (accessed June 4, 2015), paras. 27, 47-48.

³⁷ Human Rights Watch group interview with ICC staff, The Hague, August 13, 2014.

III. ICC Prosecution's Cases in Côte d'Ivoire

In October 2011, International Criminal Court judges authorized the court's prosecutor to open an investigation into crimes committed during the country's 2010-2011 post-election crisis. The crisis began after former President Laurent Gbagbo, having been defeated at the polls, refused to cede power to current President Alassane Ouattara.³⁸ In the five months of violence that followed the disputed election, at least 3,000 civilians were killed in attacks perpetrated along political, and, at times, ethnic and religious lines by forces affiliated with both Gbagbo and Ouattara.³⁹

Three weeks after opening investigations, on October 25, 2011, the ICC prosecutor filed a confidential application for an ICC warrant of arrest against former President Gbagbo.⁴⁰ The warrant was subsequently issued under seal on November 23, 2011, but the fact of

³⁸ The investigation was initially authorized for crimes committed after November 28, 2010. *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire," October 3, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1240553.pdf> (accessed June 4, 2015), para. 212. But Côte d'Ivoire had been a situation under preliminary examination by the OTP long before the 2010-2011 electoral crisis. In 2003, the then-government of Laurent Gbagbo submitted an article 12(3) declaration accepting the court's jurisdiction for crimes committed since September 19, 2002, the coup attempt that marked the beginning of a rebellion against Gbagbo's rule. In their June 2011 request to open an investigation, however, the OTP only requested authorization to investigate crimes committed after November 28, 2010, reasoning that the more recent 2010-2011 post-election violence had reached "unprecedented levels" and that it had more information available to meet the "reasonable basis" evidentiary threshold required for authorization of an investigation. Nonetheless, the OTP indicated that it was open to the pre-trial chamber determining that the broader timeframe—that is, dating back to September 19, 2002—merited investigation. *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, "Request for authorisation of an investigation pursuant to article 15," June 23, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1097345.pdf> (accessed June 4, 2015), paras. 41-42. The pre-trial chamber, by a majority, considered that the OTP had not provided information regarding specific incidents occurring within the earlier time period and, rather than authorize a broader timeframe outright, requested the OTP to provide additional information. *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire," paras. 175-185. On the basis of that additional information, the pre-trial chamber expanded the permissible scope of the investigation to include crimes committed from September 19, 2002. *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, "Decision on the Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010," February 22, 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1341467.pdf> (accessed June 4, 2015), para. 37. To date, however, the prosecution has focused investigations on the 2010-2011 post-election crisis.

³⁹ For further background on abuses committed during the 2010-2011 post-election crisis, see Human Rights Watch, "*They Killed Them Like It Was Nothing": The Need for Justice for Côte d'Ivoire's Post-Election Crimes*, October 2011, http://www.hrw.org/sites/default/files/reports/cdi1011webwcover_o.pdf. See also Appendix.

⁴⁰ The prosecution's arrest warrant is referred to in the pre-trial chamber decision issuing the warrant. See *Prosecutor v. Laurent Gbagbo*, ICC, Case No. ICC-02/11-01/11, "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo," November 30, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1291604.pdf> (accessed June 4, 2015), para. 4.

its existence was made public when President Ouattara’s government—which had arrested Gbagbo in April 2011—surrendered Gbagbo to the ICC on November 30, 2011.⁴¹

After a lengthy pre-trial process—which, at the ICC, includes a proceeding held by the judges to decide whether to send a case to trial, known as a “confirmation of charges hearing”—Gbagbo now faces trial on four charges of committing the crimes against humanity of murder, rape, other inhumane acts, and persecution in relation to four sets of incidents.⁴² They are:

- Attacks related to pro-Ouattara demonstrations at the headquarters of Radiodiffusion Television Ivoirienne (RTI), the national broadcaster, and in the aftermath between December 16-19, 2010;
- The attack on a women’s demonstration in Abobo on March 3, 2011;
- The shelling of Abobo market and the surrounding area on March 17, 2011; and
- An attack on Yopougon commune on or around April 12, 2011.⁴³

The ICC also issued arrest warrants against two other persons—Gbagbo’s wife Simone and Charles Blé Goudé, Gbagbo’s former youth minister and close ally and the longtime leader of

⁴¹ “New suspect in the ICC’s custody: Laurent Gbagbo arrived at the detention centre,” ICC press release, ICC-CPI-2011130-PR747, November 30, 2011, [http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2011\)/Pages/pr747.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2011)/Pages/pr747.aspx) (accessed June 4, 2015); see also *Prosecutor v. Laurent Gbagbo*, ICC, Case No. ICC-02/11-01/11, “Warrant of arrest for Laurent Koudou Gbagbo,” November 23, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1276751.pdf> (accessed June 4, 2015).

⁴² The confirmation of charges hearing for Gbagbo began in February 2013, and, under the ICC’s regulations, a written decision was expected within 60 days of the hearing’s end. Regulations of the Court, ICC, ICC-BD/01-03-11, as amended on November 2, 2011, <http://www.icc-cpi.int/NR/rdonlyres/50A6CD53-3E8A-4034-B5A9-8903CD9CDC79/0/RegulationsOfTheCourtEng.pdf> (accessed June 4, 2015), reg. 53. In June 2013, however, a majority of the judges sitting on the case found that the prosecution had failed to put forward enough evidence to send the charges to trial at that point. But, finding that the case was not “so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges,” the majority deferred a final decision, invited the prosecution to provide additional evidence in support of its charges, and adjourned the hearing for several months. *Prosecutor v. Laurent Gbagbo*, ICC, Case No. ICC-02/11-01/11, “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute,” June 3, 2013, <http://www.icc-cpi.int/iccdocs/doc/doc1599831.pdf> (accessed June 4, 2015), paras. 44-47. The prosecution did so, and, in June 2014, the judges—this time by a different majority—sent the case to trial. *Prosecutor v. Laurent Gbagbo*, ICC, Case No. ICC-02/11-01/11, “Decision on the confirmation of charges against Laurent Gbagbo,” June 12, 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1783399.pdf> (accessed June 4, 2015). Additional delays to the start of the confirmation of charges hearing in 2013 included a postponement to permit the Gbagbo defense team additional time to prepare and a defense motion challenging Gbagbo’s fitness to stand trial. See “Q&A: Laurent Gbagbo and the International Criminal Court,” Human Rights Watch, February 12, 2013, <http://www.hrw.org/news/2013/02/12/qa-laurent-gbagbo-and-international-criminal-court>.

⁴³ *Prosecutor v. Laurent Gbagbo*, ICC, Case No. ICC-02/11-01/11, “Decision on the confirmation of charges against Laurent Gbagbo,” paras. 266-278.

a violent, pro-Gbagbo militia group.⁴⁴ Simone Gbagbo and Blé Goudé face the same charges as Laurent Gbagbo, but Blé Goudé also faces trial in connection with a fifth incident:

- An attack on Yopougon commune between February 25-28, 2011.⁴⁵

Blé Goudé was surrendered to The Hague in March 2014, following his extradition from Ghana to Côte d'Ivoire in January 2013.⁴⁶ Pre-trial proceedings in the case, namely the confirmation of charges hearing, were completed by the end of 2014. Judges have joined Blé Goudé's case with that of Laurent Gbagbo, and set November 10, 2015 as the start of the trial.⁴⁷

Simone Gbagbo remains in detention in Côte d'Ivoire. The ICC is a court of last resort, and does not have jurisdiction over cases being tried before national courts, provided investigations or prosecutions are conducted genuinely.⁴⁸ Ivorian authorities challenged

⁴⁴ *Prosecutor v. Charles Blé Goudé*, ICC, Case No. ICC-02/11-02/11, “Warrant of Arrest for Charles Blé Goudé,” December 21, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1292069.pdf> (accessed June 4, 2015); *Prosecutor v. Simone Gbagbo*, ICC, Case No. ICC-02/11-01/12, “Warrant of Arrest for Simone Gbagbo,” February 29, 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1344439.pdf> (accessed June 4, 2015).

⁴⁵ *Prosecutor v. Charles Blé Goudé*, ICC, Case No. ICC-02/11-02/11, “Decision on the confirmation of charges against Charles Blé Goudé,” December 11, 2014, <http://www.icc-cpi.int/iccdocs/doc/doc1879935.pdf> (accessed June 4, 2015). In establishing the contextual element of an “attack” in the Blé Goudé confirmation of charges hearing, the OTP again relied exclusively on incidents taking place within Abidjan.

⁴⁶ “Charles Blé Goudé transferred to the ICC,” ICC, press release, ICC-CPI-20140322-PR988, March 22, 2014, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr988.aspx (accessed June 4, 2015); “Charles Blé Goudé: Ghana extradites Ivory Coast Gbagbo ally,” *BBC News Online*, January 18, 2013, <http://www.bbc.com/news/world-africa-21075583> (accessed June 4, 2015).

⁴⁷ *Prosecutor v. Laurent Gbagbo*, ICC, Case No. ICC-02/11-01/11, and *Prosecutor v. Charles Blé Goudé*, ICC, Case No. ICC-02/11-02/11, “Decision on Prosecution requests to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters,” March 11, 2015, <http://www.icc-cpi.int/iccdocs/doc/doc1939574.pdf> (accessed June 4, 2015); “Laurent Gbagbo and Charles Blé Goudé case: Trial to open on 10 November 2015,” ICC press release, ICC-CPI-20150507-PR1106, May 7, 2015, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1106.aspx (accessed June 4, 2015).

⁴⁸ Article 17(1)(a)-(b) provide that a case is inadmissible before the ICC where “[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution,” or where an investigation has taken place, but “the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.” ICC chambers have interpreted this provision as requiring a two-step test, first, whether there is or has been an investigation or prosecution encompassing the same person and same conduct as the case pending before the ICC, and, second, if there are or have been proceedings, whether those proceedings have not been genuine, with reference to unwillingness or inability. See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC, Case No. ICC-01/04-01/07, “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case,” September 25, 2009, <http://www.icc-cpi.int/iccdocs/doc/doc746819.pdf> (accessed June 30, 2015). Article 17(2) and (3) detail indicia of unwillingness and inability, respectively. The concepts of “unwillingness” and “inability,” however, have only been interpreted by judges on a handful of occasions. Most admissibility challenges have been rejected by the court’s judges at the first step, that is, they have been rejected due to an absence of relevant national proceedings. See Carsten Stahn, “Admissibility Challenges before the ICC From Quasi-Primacy to Qualified Deference?” in Carsten Stahn, ed., *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), pp. 231-239.

the ICC's jurisdiction over the Simone Gbagbo case, contending that they had the intention and the capability to try her in Côte d'Ivoire for the crimes in question.⁴⁹

An ICC pre-trial chamber in November 2014 found that although there were potentially cases against Simone Gbagbo pending in national courts that could cut off the ICC's jurisdiction (namely, charges of so-called "blood crimes, rather than the "offenses against the state" charges in relation to which Gbagbo was convicted in Côte d'Ivoire in March 2015⁵⁰), the Ivorian authorities had not shown enough concrete, tangible evidence that these investigations were making sufficient progress to render the case against Simone Gbagbo inadmissible before the ICC. The decision was confirmed by the ICC's appeal chamber in May 2015.⁵¹

Côte d'Ivoire remains obligated to surrender Simone Gbagbo to the ICC. At time of writing, however, there is no indication that the government will hand her over to The Hague.

⁴⁹ See *Prosecutor v. Simone Gbagbo*, ICC, Case No. ICC-02/11-01/12, "Requête de la République de Côte d'Ivoire sur la recevabilité de l'affaire le procureur c. Simone Gbagbo, et demande de sursis à exécution en vertu des articles 17, 19 et 95 du Statut de Rome," September 30, 2013, <http://www.icc-cpi.int/iccdocs/doc/doc1653132.pdf> (accessed June 4, 2015).

⁵⁰ While Gbagbo was convicted in an Abidjan court in March 2015 of "offenses against the state"—charges which related to her role in 2010-2011 post-election crisis—and sentenced to 20 years' imprisonment, those charges did not include the killings and rape that constitute the basis of the crimes against humanity charges she faces at the ICC. See Jim Wormington (Human Rights Watch), "After Simone Gbagbo's Trial, What Next for Justice in Côte d'Ivoire?" commentary, *Jeune Afrique*, April 8, 2015, <http://www.hrw.org/news/2015/04/08/after-simone-gbagbo-s-trial-what-next-justice-cote-d-ivoire>.

⁵¹ See *Prosecutor v. Simone Gbagbo*, ICC, Case No. ICC-02/11-01/12, "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo,'" May 27, 2015, <http://www.icc-cpi.int/iccdocs/doc/doc1976613.pdf> (accessed June 4, 2015).

IV. Effect of the ICC Prosecutor's Decisions on Impact

A. A Quick Start

In Côte d'Ivoire, International Criminal Court actors beyond the Office of the Prosecutor were confronted by an exceptionally fast timeline at the outset. While the pace of those investigations is not at issue in this report, it meant, in practice, that it was difficult for the court's Outreach Unit to communicate effectively about the court's developments in advance of Gbagbo's surrender to The Hague.

The ICC's engagement in Côte d'Ivoire did not begin with the 2010 election crisis. Following the then-government of Laurent Gbagbo's article 12(3) declaration in 2003,⁵² the prosecution had put the situation in the country under what is known as "preliminary examination," in order to assess whether a full, formal investigation was warranted.

By the time of the 2010-2011 electoral crisis, the OTP had yet to reach a decision regarding opening that investigation. Before the 2010 crisis, civil society organizations in the country promoted the ICC and called for investigations. But the court's Registry was unable to carry out any outreach activities during that period.⁵³ This is because, at the ICC, public information activities in situations under preliminary examination are the responsibility of the OTP, while the Outreach Unit's mandate kicks in once situations are under formal investigation.⁵⁴ In the case of Côte d'Ivoire—which was not yet an ICC state party—the authorities, in spite of having sought the court's jurisdiction and having agreed in principle to allow the OTP to visit the country, failed to facilitate the visit. The OTP did make a single mission prior to the 2010-2011 post-election violence, only after securing an invitation via the Coalition ivoirienne pour la Cour pénale internationale (CI-CPI) (Ivorian Coalition for the ICC), a civil society organization.⁵⁵

⁵² See note 38.

⁵³ Human Rights Watch interview with ICC staff, The Hague, April 21, 2015.

⁵⁴ See ASP, "Court's Revised strategy in relation to victims," ICC-ASP/11/38, November 5, 2012, http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf (accessed June 4, 2015), fn. 15. While not addressed in this report, this distinction—particularly given the OTP's limited communications capacity—can undermine efforts to ensure early outreach in countries, both in order to inform expectations around the preliminary examination and to raise awareness and understanding of the court's mandate prior to the opening of any investigation.

⁵⁵ Human Rights Watch group interview with ICC staff, The Hague, June 10, 2015; and email correspondence with representative of an Ivorian civil society organization, Abidjan, May 18-20, 2015.

The OTP issued a statement during the post-election crisis in an effort to deter abuses,⁵⁶ and undertook two missions to the country shortly after announcing it was seeking authorization to investigate, including to inform victims of the opportunity to make representations to the chambers regarding that request (see Part VI.A below).⁵⁷ The OTP has continued to maintain its own public information activities, including holding press conferences or media briefings during OTP missions to the country, and making staff available at all times to respond to press inquiries. Indeed, given the absence of a field-based outreach officer from the Registry for three years after the opening of investigations, as discussed below, the OTP increased its efforts to proactively spur coverage in the Ivoirian and international media regarding ICC-related developments.⁵⁸

But it was only with the launch of investigations in October 2011, that the Registry’s Outreach Unit could begin its work in country. Within three weeks, however, the prosecution had already filed for an arrest warrant and, a month later, Laurent Gbagbo was transferred to The Hague, see above. The opening of investigations, the issuance of arrest warrants, and the surrender of a former head of state are hugely significant developments, requiring intense communication efforts by the court with affected communities. The limited time between the opening of investigations and Gbagbo’s surrender to The Hague made it difficult for the court’s Registry to get its outreach programs up and running, and puts a renewed focus on the importance of considering opportunities for early outreach even prior to the opening of investigations (see Part VI.A below).

B. Limited Scope of Current Cases

At the time investigations were opened in Côte d’Ivoire, the OTP had in place a policy of conducting “focused” investigations.⁵⁹ The Office has since adopted a substantially different approach to investigations, shifting away from focused to more open-ended investigations.⁶⁰ This approach should strengthen not only the quality of evidence

⁵⁶ “Statement by ICC Prosecutor Luis Moreno-Ocampo on the situation in Côte d’Ivoire,” OTP press release, December 21, 2010, [http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%2oreleases/press%2oreleases%20\(2010\)/Pages/pr617.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%2oreleases/press%2oreleases%20(2010)/Pages/pr617.aspx) (accessed June 17, 2015).

⁵⁷ Human Rights Watch group interview with ICC staff, The Hague, June 10, 2015.

⁵⁸ Ibid.

⁵⁹ OTP, “Prosecutorial Strategy 2009-2012,” February 1, 2010, <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (accessed June 4, 2015), pp. 5-6.

⁶⁰ See OTP, “Strategic plan, June 2012-2015,” pp. 6, 13-14, 20-22.

available to the court, but also provide the office with a greater range of options when it comes to selecting incidents for trial.

When it comes to formulating specific charges, however, it is still likely that the prosecution will take a focused approach, concentrating charges in a given case on a select number of incidents.⁶¹

Indeed, as a single institution working across multiple countries simultaneously and with limited resources, the ICC is not expected to prosecute every incident in which international crimes within situation countries have been committed. A certain focus in the selection of incidents may be necessary to ensure efficient trials. Our research into “lessons learned” from the Milosevic case at the International Criminal Tribunal for the former Yugoslavia highlighted the importance of pursuing such an approach to ensure that trials are both meaningful and manageable.⁶² The prosecution also needs to be guided by the available evidence, including measures required to limit the exposure of witnesses to risk, and, to some extent, the feasibility of prosecuting particular cases.

Still an important balance needs to be struck in the framing of charges in a particular case in order to ensure that the ICC’s cases remain responsive to the experiences of victims.⁶³ This means that the formulation of charges should include incidents representative of the gravest crimes and reflecting the underlying patterns of crimes committed in the situation, that is, what crimes, committed where, and by which groups.

Such an approach is consistent with the prosecution’s policy statements to date, which indicate that in selecting incidents for trial, the OTP’s stated goal is “to provide a sample

⁶¹ See OTP, “Strategic plan, June 2012-2015,” p. 25 (“The OTP will continue to conduct focused prosecutions in which we present the relevant evidence in a clear and efficient way”). The OTP’s policy document on victim participation indicates that a focused selection of incidents aims at “allow[ing] the Office to carry out short investigations; to limit the number of persons put at risk by reason of their interaction with the Office; and to propose expeditious trials while aiming to represent the entire range of victimization.” See also OTP, “Policy Paper on Victims’ Participation,” April 2010, <http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/281751/PolicyPaperonVictimsParticipationApril2010.pdf> (accessed June 4, 2015), p.8.

⁶² Human Rights Watch, *Weighing the Evidence: Lessons from the Slobodan Milosevic Trial*, vol. 18, no 10(D), December 2006, <http://www.hrw.org/reports/2006/milosevic1206/milosevic1206webcover.pdf>, pp. 52-57.

⁶³ See Jeffrey Locke, “Indictments,” in Luc Reydams, Jan Wouters, and Cedric Ryngaert, *International Prosecutors* (Oxford: Oxford University Press, 2012), pp. 614-619 (noting the trend in streamlining indictments for trial management purposes, while also cautioning against a minimalist approach that fails to bring charges representative of the worst crimes allegedly committed by a perpetrator); see also Luke Moffett, *Justice for Victims Before the International Criminal Court* (New York: Routledge, 2014), pp. 69-71.

that reflects the gravest main types of victimization.”⁶⁴ The OTP’s policy statements also include a number of commitments to dialogue and consultation with victims regarding the OTP’s decisions.⁶⁵ Human Rights Watch continues to advocate for sufficient resources within the court’s budget, including to permit the OTP to meet this goal.⁶⁶

When it comes to the cases against Laurent Gbagbo and Charles Blé Goudé, the cases reflect incidents within Abidjan. During the confirmation of charges hearing for Gbagbo, the OTP indicated it had “selected four incidents that are representative of the crimes committed by the pro-Gbagbo forces in a sustained series of attacks put into motion by Mr. Gbagbo during the post-election violence.”⁶⁷ The prosecution also cited a total of 32 other incidents in Abidjan in the Gbagbo and Blé Goudé cases, which it put forward to substantiate the contextual element of an “attack,” required under Rome Statute article 7 for a crime against humanity.

But this focus on Abidjan is in contrast to the prosecution’s application to investigate, the pre-trial chamber’s authorization of the investigation, and the prosecution’s application for an arrest warrant against Gbagbo, all of which relied on allegations of crimes against humanity and war crimes committed by Gbagbo-allied forces in a number of locations in

⁶⁴ OTP, “Prosecutorial Strategy 2009-2012,” paras. 20. At time of writing, the OTP is drafting a new policy document guiding its selection and prioritization of cases.

⁶⁵ See, for example, OTP, “Policy Paper on the Interests of Justice,” September 2007, <http://icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> (accessed June 5, 2015), p. 6 (OTP will conduct dialogue with victims and community representatives to ascertain “interests of victims” as required under Rome Statute article 53, governing the initiation of investigations); OTP, “Policy Paper on Victims’ Participation,” pp. 3-5, 8-9, 13-15 (noting that a core principle of the 2009-2012 prosecutorial strategy was to “systematically address the interests of victims,” by “seeking their views at an early stage, before an investigation is launched, and continuing to assess their interests on an on-going basis”); Regulations of the OTP, ICC-BD/05-01-09, April 23, 2009, <http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBDo50109ENG.pdf> (accessed June 5, 2015), reg. 16 (“The Office shall, in coordination with the Victims Participation and Reparations Section of the Registry, as appropriate, seek and receive the views of the victims at all stages of its work in order to be mindful of and to take into account their interests”); OTP, “Policy Paper on Sexual and Gender-Based Crimes,” June 2014, <http://icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf> (accessed June 5, 2015), para. 22 (“The Office will increasingly seek opportunities for effective and appropriate engagement and consultation with victim groups and representatives in order to take into account the interests of victims at various stages of its work.”). The OTP also participated in the formulation of a court-wide strategy in relation to victims, which recognizes the central importance of victims and their interests to court proceedings and of communication with victims. Under this strategy, the OTP has particular responsibilities for communication with victims during preliminary examinations. See note 54.

⁶⁶ Elizabeth Evenson and Jonathan O’Donohue (Human Rights Watch and Amnesty International), “The International Criminal Court at risk,” commentary, *Open Democracy*, May 6, 2015, <https://www.hrw.org/news/2015/05/06/international-criminal-court-risk>.

⁶⁷ *Prosecutor v. Laurent Gbagbo*, ICC, Case No. ICC-02/11-01/11, Transcript, Confirmation of Charges Hearing, February 19, 2013, <http://icc-cpi.int/iccdocs/doc/doc1555481.pdf> (accessed June 5, 2015), p. 45, lines 10-12.

the west of the country.⁶⁸ (Pro-Ouattara forces are also alleged to have committed brutal abuses in the west.⁶⁹)

In its application for an arrest warrant against Gbagbo, for example, the prosecution referred to an attack perpetrated by forces loyal to Gbagbo against the civilian population in Abidjan neighborhoods “but also in other cities and villages of the country, especially in the western part of Côte d’Ivoire, including Irobo, Grand Lahou, Fresco, and the Sassandra region, as well as Duékoué and Kouibly.”⁷⁰ When presenting its amended charges for confirmation, however, the OTP only referred in passing to events taking place outside Abidjan.

According to Human Rights Watch research—also cited by the OTP and the pre-trial chamber—as Republican Forces loyal to Ouattara made military gains in the far west of the country, retreating militia and mercenary groups loyal to Gbagbo perpetrated massacres and widespread killings as they inflicted a final wave of violence against northern Ivorians and West African immigrants.⁷¹

The office, according to court staff, had taken broad steps to prepare for investigations while its article 15 authorization request was pending before the judges, but a focus on incidents in Abidjan in its arrest warrant applications was the result of a desire to move swiftly. As also discussed below, with Gbagbo already in detention, and fearing his possible release, the OTP chose to move forward with the case it had at the time built on ready access to evidence within Abidjan. In addition, according to court staff, investigating additional incidents would have increased logistical, security, and protection challenges.⁷² To a certain degree, this reflects the operational and resource realities faced by the OTP. As

⁶⁸ See, for example, *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire,” paras. 41, 132.

⁶⁹ See, for example, Human Rights Watch, “They Killed Them Like It Was Nothing,” pp. 6, 75-90 (“As the Republican Forces began their offensive in early March, they likewise engaged in collective punishment of real and perceived Gbagbo supporters. In the far west, the Republican Forces executed at point-blank range elderly Guéré villagers who were unable to flee. One woman said she watched her father, husband, and son all killed in front of her. The Republican Forces held women and raped them in towns where military bases were located. They burned entire villages to the ground.”).

⁷⁰ *Prosecutor v. Laurent Gbagbo*, ICC, Case No. ICC-02/11-01/11, “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo,” paras. 30-36.

⁷¹ Human Rights Watch, “They Killed Them Like It Was Nothing,” pp. 59-64; see *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire,” paras. 40, 65, 132, 182, and “Request for authorisation of an investigation pursuant to article 15,” paras. 88, 133, 151.

⁷² Human Rights Watch group interview with ICC staff, The Hague, June 10, 2015, and email correspondence, June 17-24, 2015.

a consequence, however, the OTP cases in Côte d'Ivoire do not adequately represent the scope of crimes committed by Gbagbo-allied forces.

Our research did not set out to measure what effect this limitation in the scope of cases standing on its own may have on the court's impact in Côte d'Ivoire. But, as also discussed below, under the court's case law, only victims with a link to the specific incidents identified in the charges will have standing in the subsequent proceedings following the opening of a specific case before the ICC. Given the ICC Registry's decisions that, in view of resource constraints, it would tie the scope of outreach, and, to a lesser extent, activities aimed at informing victims of their rights, to the scope of the OTP's cases, the narrow focus on Abidjan has been a factor in limiting the court's footprint in Côte d'Ivoire.

We make no argument here as to whether the OTP should select incidents explicitly in order to give a broader range of victims the potential for formal standing in case proceedings. The OTP should, however, ensure its framing of the charges is responsive and representative of victims' experiences across a conflict, which would also make it easier for the Registry to prioritize its outreach appropriately. We make recommendations in Part VI.A regarding strengthening the OTP's consultations with victims.

C. Perceptions of Bias

The OTP's decision to move forward quickly with a case centered in Abidjan against Gbagbo-allied forces went hand-in-hand with its decision not to proceed simultaneously with investigations against pro-Ouattara forces. This has had a profoundly damaging effect on perceptions of the ICC within Côte d'Ivoire.

A decision to move forward only against Gbagbo-allied forces was consistent with a policy of "sequencing" investigations followed by the OTP in its earliest years. Under this policy, groups were selected for investigation on the basis of the gravity of the crimes alleged as well as the potential preventative impact of investigation. After completion of investigations of a particular group, chosen with reference to these criteria, the office then examined whether other groups warranted investigation.⁷³ The OTP later distanced itself from a strict policy of sequencing; in 2010, for example, prior to opening investigations in

⁷³ OTP, "Report on Prosecutorial Strategy," September 14, 2006, http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (accessed June 5, 2015), pp. 5-6.

Côte d'Ivoire, it conducted simultaneous investigations of groups associated with post-election violence in Kenya. “Sequencing,” however, was the approach adopted in practice in the Côte d'Ivoire situation.⁷⁴

The OTP’s decision to move forward in a “sequenced” manner with cases first against Gbagbo-allied forces resulted from its ability to ready that case quickly, given the availability of key evidence and insider witnesses. In the face of uncertainty as to whether the opportunity for Gbagbo’s surrender to the court would last, and based on the information available to it at the time, the OTP considered it was better to go forward to secure the case it had.⁷⁵

The OTP’s decision in this regard can be questioned. Removing Gbagbo from the Ivorian political scene was something the Ivorian government wanted desperately. Yet rather than pursue cases against both sides simultaneously and use Gbagbo’s surrender to The Hague as a way to ensure cooperation on cases against pro-Ouattara forces as well, the OTP’s sequenced approach and quick surrender of Gbagbo—depriving the OTP of a point of key leverage with the government—instead created space for the government to drag its feet in cooperating with the ICC. The now explicit non-cooperation in the surrender of Gbagbo’s wife, Simone, is one example.

Whether justified with regard to the information available to the OTP at the time of its decision to sequence investigations, that initial decision has persisted; more than three years after Gbagbo’s surrender to The Hague, the OTP has yet to open cases before the court for crimes committed during the post-election crisis by forces loyal to President Ouattara.

The Office of the Prosecutor has continuously maintained that its investigations will be continued on an impartial basis in Côte d'Ivoire, but court staff explain that a focus on

⁷⁴ Human Rights Watch group interview with ICC staff, The Hague, August 13, 2014; group interview with ICC staff, The Hague, June 10, 2015 and email correspondence June 17-24, 2015. In its application to the pre-trial chamber for authorization to open investigations in Côte d'Ivoire, the OTP indicated that it did not yet have a “reasonable basis to believe”—the evidentiary threshold required to open investigations—that pro-Ouattara forces had committed crimes against humanity, as opposed to war crimes. It indicated that its investigations would seek to determine whether such crimes had been committed. Relying on materials submitted by the OTP as well as victim representations (see Part VI.A below), the pre-trial chamber disagreed, finding there was already sufficient evidence to support a “reasonable basis to believe” pro-Ouattara forces had committed crimes against humanity. See *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire,” paras. 26, 92-116.

⁷⁵ Human Rights Watch group interview with ICC staff, The Hague, June 10, 2015, and email correspondence, June 17-24, 2015.

finalizing the cases against Gbagbo and Blé Goudé, as well as resource constraints given the surrender of suspects in other cases pending before the court, have affected its ability to “roll-out” the second case, which has been underway in parallel.⁷⁶ Bensouda indicated in an April 2015 media interview that she hoped over the course of the year to step up the pace of investigations against crimes committed by forces affiliated with Ouattara.⁷⁷ As it stands, however, it seems possible that the trial of Gbagbo and Blé Goudé will begin before any charges are laid before the court into pro-Ouattara forces.

In the meantime, the OTP’s cost-benefit analysis resulting in a sequenced approach polarized opinion about the court.

According to a 2014 survey of 1,000 Abidjan residents, of the 94 percent of respondents who had heard of the ICC, 47 percent had positive impressions of the court, while 46 percent had negative impressions. Those surveyed with negative impressions of the ICC most frequently cited perceptions of bias as the reason for their opinion.⁷⁸

Perceptions of bias in the ICC’s work in Côte d’Ivoire were frequently mentioned during our research for this report:

There is a silent section of society. They are on the pro-Gbagbo side. They feel victimized because only their people are being sought.... The main perception is that the ICC is only working with people in power.... It is looked at as a means of eliminating [political] opponents.⁷⁹

All the victims are not satisfied by the ICC. The ICC is not working to take into account all the victims.... Victims that belong to the other side [i.e.,

⁷⁶ Ibid.; see also, OTP, “Strategic Plan, June 2012-2015,” p. 14.

⁷⁷ Marc Perelman, “The Interview,” *France24*, March 31, 2015, <http://www.france24.com/en/20150331-interview-fatou-bensouda-icc-chief-prosecutor-investigations> (accessed June 5, 2015).

⁷⁸ Specifically, “respondents most frequently cited the perception that the Court (1) is pursuing only one group (24%) or (2) being biased toward the government (9%), the military (1%) or unspecified biases (6%).” See Phuong N. Pham and Patrick Vinck, Harvard Humanitarian Initiative, Harvard School of Public Health, Brigham and Women’s Hospital, “Fragile Peace, Elusive Justice: Population-Based Survey on Perceptions and Attitudes about Security and Justice in Abidjan,” July 2014, http://www.peacebuildingdata.org/sites/m/pdf/Abidjan_2014_Fragile_Peace_Elusive_Justice.pdf (accessed June 5, 2015), pp. 45-47.

⁷⁹ Human Rights Watch group interview with representatives of an international civil society organization, Abidjan, September 23, 2014.

victims of abuses by pro-Ouattara forces] do not believe in the ICC. It is painful to say this because normally a victim does not have a side.⁸⁰

By contrast, Human Rights Watch's interviews with victims and civil society organizations just before the court opened investigations indicated a high-degree of optimism about the ICC. Many people affiliated with Gbagbo were hopeful that the ICC would proceed impartially; while these individuals had no faith in the domestic judicial processes, they thought proceedings before the ICC would be different.⁸¹

The risk that a one-sided strategy would instead polarize opinion about the court and undermine perceptions of its legitimacy was entirely predictable, given deep politico-ethnic divisions within the country which had persisted following the 2002-2003 armed conflict and its aftermath, and which had been a key factor in the 2010-2011 post-election crisis.⁸² Although the OTP has indicated that it intends to remedy the absence of cases against pro-Ouattara forces in the coming period, this polarized opinion continues to pose a significant challenge to increasing the court's impact in Côte d'Ivoire.

* * *

Taken together, the limited incidents in the court's cases, the one-sided nature of the prosecution's approach to date, and the prosecution's quick start raised significant challenges for the Registry in carrying out its mandate to engage affected communities in order to provide objective information about proceedings and to facilitate victim participation before the court. As discussed in the following part, however, the Registry has missed opportunities to deploy strategies that might have mitigated these challenges.

⁸⁰ Human Rights Watch interview with representative of an Ivorian civil society organization, Abidjan, September 25, 2014.

⁸¹ The prosecution's one-sided approach has also limited the ICC's contribution to catalyzing national prosecutions, in that it reduced their leverage to pressure the Ivoirian authorities to pursue an even-handed approach. Had the OTP pursued investigations against pro-Ouattara perpetrators, the Ivorian government, if it did not wish to handover the individuals in question while also respecting its obligations under the Rome Statute, would have had to demonstrate that it is prosecuting pro-Ouattara perpetrators in national courts. As one representative of international civil society put it: "[The ICC's role in complementarity is] to be an albatross around the government's neck. ... But the ICC cannot play this role because they have only indicted one side." Human Rights Watch interview with representative of an international civil society organization, Abidjan, September 23, 2014; see also Human Rights Watch, *Turning Rhetoric into Reality: Accountability for Serious Crimes in Côte d'Ivoire*, April 2013, https://www.hrw.org/sites/default/files/reports/CDI0413_ForUpload.pdf, pp. 37-38.

⁸² The 2002-2003 armed conflict began with a coup attempt largely motivated by the marginalization of northerners by the then-Gbagbo government. After the end of the conflict, the country remained divided between the then-Gbagbo government controlled south, and the rebel-controlled north. Many of the rebel fighters in the north went on to fight for Ouattara after Gbagbo refused to step down in 2010. See Human Rights Watch, "They Killed Them Like it Was Nothing," pp. 19-21, 23-25.

V. Outreach

The court's outreach activities aim to establish a two-way dialogue with communities affected by the crimes tried before the International Criminal Court in order to make its judicial proceedings accessible to those communities.⁸³ On the one hand, the publicity of proceedings is an essential component of ensuring fair trial, while, on the other hand, the right of victims to have information about proceedings is an element of guaranteeing access to justice, particularly where serious crimes have been committed.⁸⁴

The “Court’s Revised strategy in relation to victims,” recognizes as one of its strategic objectives:

[e]nsuring that victims of situations under preliminary examination or victims of a situation or case under investigation, trial, appeal or for which reparations are being adjudicated receive clear communications about the ICC, its mandate and activities as well as their right as victims in relation to the elements of the ICC system and at all steps of the judicial process.⁸⁵

⁸³ See Regulations of the Registry, <http://www.icc-cpi.int/iccdocs/registry/Regulations-of-the-Registry-Eng.pdf> (accessed June 5, 2015), reg. 5 *bis* (3); ASP, “Strategic Plan for Outreach of the International Criminal Court,” ICC-ASP/5/12, September 29, 2006, http://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCASP512_English1.pdf (accessed June 5, 2015), para. 3.

⁸⁴ ASP, “Strategic Plan for Outreach of the International Criminal Court,” paras. 1-3; ICC Registry, “Behind the Scenes: The Registry of the International Criminal Court,” 2010, <http://www.icc-cpi.int/iccdocs/PIDS/docs/behindTheSce.pdf> (accessed July 10, 2015), p. 36; UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, November 29, 1985, <http://www.un.org/documents/ga/res/40/a40r034.htm> (accessed June 5, 2015), art. 6(a). The central importance of outreach has also been recognized by the ASP. See, for example, ASP, “Strengthening the International Criminal Court and the Assembly of States Parties,” ICC-ASP/13/Res.5, December 17, 2014, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP13/ICC-ASP-13-Res5-ENG.pdf (accessed June 5, 2015), preambular para. 20, para. 63; see generally CICC Communications Team, “Comments and Recommendations to the Tenth Session of the Assembly of States Parties,” December 1, 2011, http://iccforum.com/media/background/outreach/2011-12-01_CICC_Communications_Team_Comments_and_Recommendations_to_the_Tenth_Session_of_the_ASP.pdf (accessed June 5, 2015), annexes I-III (compiling references to the importance of outreach in ASP resolutions and the statements of states parties at ASP sessions and the ICC’s 2010 review conference).

⁸⁵ ASP, “Court’s Revised strategy in relation to victims,” ICC-ASP/11/38, paras. 15, 18. The court has defined “victim” for the purposes of its strategy as “a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court, or in certain circumstances an organization or institution that has sustained certain harm to its property, as defined in Rule 85 of the Rules of Procedure and Evidence.” As the strategy goes on to note, and as discussed below, the term “victim,” and the specific rights which attach to that term under the Rome Statute, vary with the phase of proceeding or type of court or Trust Fund for Victims’ activity. See ASP, “Report of the Court on the strategy in relation to victims,” ICC-ASP/8/45, November 10, 2009, http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf (accessed June 5, 2015), para. 7.

The Rome Statute, its Rules of Procedure, and regulations of the court and Registry provide certain sets of victims with more specific rights of notification at various stages of the proceedings.⁸⁶

In addition to meeting the court's obligations to make proceedings public and to provide information about proceedings to victims, broadly defined, outreach can have a number of other knock-on effects, all relevant to increasing the court's impact. For example, outreach can create a sense of awareness and interest in the legal process and, by raising awareness about crimes in the ICC's jurisdiction, can increase respect for the rule of law and human rights in the country in question. Conveying information about ICC trials could positively influence the national will to try similar crimes and implement fair trial standards in the process. Further, creating a climate of understanding and knowledge of the court's work can also have the practical benefit of making people more willing to cooperate and assist the ICC in conducting its work on the ground. A higher level of knowledge about the court can also make affected communities more effective interlocutors for court officials, shaping their own policy decisions to make the ICC more responsive, in turn, to the concerns of individuals and communities.

But there are, of course, limits to what outreach can achieve. An effective outreach strategy will not necessarily lead to universal support for the court's work in affected communities. The ICC's work is ripe for political manipulation by those with an interest in seeing it fail. Nor can outreach, on its own, cure flaws in prosecutorial strategy or defects in judicial rulings, or decisions that people may simply disagree with.⁸⁷ Even under challenging circumstances, however, the court needs to persist in seeking to conduct effective outreach in order to meet its mandates to ensure the publicity of proceedings and information about those proceedings to victims.⁸⁸

Outreach activities in Côte d'Ivoire have faced an uphill struggle from the outset. The prosecution's sequencing of its investigations made it challenging for the court's outreach staff to deliver neutral, objective information about proceedings viewed as inherently

⁸⁶ See ASP, "Court's Revised strategy in relation to victims," annex ("Rights and Prerogatives of Victims in Proceedings before the ICC").

⁸⁷ See Njonjo Mue, "Policy Brief," Impunity Watch, pp. 5-6.

⁸⁸ For an extended analysis of the court's first years of outreach practice, see Human Rights Watch, *Courting History*, pp. 116-148. On the value and limits of outreach, see also Njonjo Mue, "Policy Brief," Impunity Watch, pp. 4-6.

political. But, at least until the recent arrival of a field-based outreach officer, the court’s outreach strategies have been insufficient to overcome this challenge. Forced by a lack of resources to prioritize in its community outreach programs the limited set of victims directly concerned by the prosecution’s cases, and hampered by politicization within mass media in reaching a broader population, the court’s outreach strategies have been ill-equipped to engage polarized opinion about the court in Côte d’Ivoire.

A. Tying Community Outreach to the Prosecution’s Cases

A field-based outreach officer was only deployed to Abidjan in October 2014, three years after the opening of investigations. Court staff cited resource constraints—stemming from state party pressure on the court to hold down its overall budget—in explaining the very late deployment of this outreach officer. Specifically, these resource constraints prevented requesting a new position, and, as a result, a position had to be redeployed from the Central African Republic. Redeploying and recruiting this position took a year.⁸⁹

As a result, until recently, outreach activities in Côte d’Ivoire have been conducted from The Hague and through missions to the country from Hague-based staff. Even in The Hague, however, there are no dedicated staff members for the Côte d’Ivoire situation. The sole, Hague-based outreach officer, under the supervision of the director of the Outreach Unit, covers all eight of the ICC’s country situations. (In situations without field-based outreach officers, she is the primary person responsible for overseeing outreach, while in those situation countries with field-based outreach officers, she coordinates the work of those teams.⁹⁰) This only underscores the limited resources available to support outreach.

Prior to the October 2014 deployment of a field-based outreach officer, there had been seven outreach missions to Côte d’Ivoire, each lasting between one to two weeks, over the course of the preceding three years. Through these missions, the court conducted 22 sessions, with 500 participants, divided between three programs targeting, respectively, the community, the media, and the legal community. The court also organized training in The Hague for a select group of Ivorian journalists.⁹¹

⁸⁹ Human Rights Watch telephone conversation with ICC staff, The Hague, September 4, 2014.

⁹⁰ Human Rights Watch interview with ICC staff, The Hague, April 21, 2015, and email correspondence, May 18-21, 2015.

⁹¹ Human Rights Watch telephone conversation and email correspondence with ICC staff, The Hague, September 4, 2014. Sessions held in Abidjan included training civil society organizations, including those already engaged in providing outreach about the ICC, as well as those which might assist in reaching groups of victims; training of journalists on the ICC and providing updates about

With its limited resources, when it comes to community outreach, the Outreach Unit prioritized reaching individuals directly affected by the incidents listed in the charges brought by the prosecution, working with the Victims Participation and Reparations Section and through a network of 30-35 non-governmental organizations.⁹²

Given the court's case law on victim participation, this is an understandable prioritization. In order to be recognized as a "case victim" (as compared to a "situation victim," discussed below), and to enjoy rights associated with that status during pre-trial and trial proceedings, individuals need to demonstrate they have suffered harm arising out of the specific crimes charged in the case.⁹³ Outreach efforts to individuals who are potential case victims are important to facilitate the access of those individuals to their rights before the court.

Indeed, our research suggests that as a result of the combined efforts of the Outreach Unit, VPRS, the common legal representative of victims, civil society, and other intermediaries serving as a bridge between the court and affected communities, potential case victims have received a significant amount of information about the court (see "Case Victims in Côte d'Ivoire").⁹⁴

court developments; three sessions with women lawyers (through the Association des femmes juristes de Côte d'Ivoire, an Ivorian civil society organization) and one session with the Ivorian bar association; one session, held jointly with the OTP, for the prosecutors and judges of the Supreme Court; and one session, again held jointly with the OTP, for the Special Investigative Cell (*Cellule spéciale d'enquête*). Human Rights Watch email correspondence with ICC staff, The Hague, May 18-21, 2015.

⁹² Human Rights Watch telephone conversation with ICC staff, The Hague, September 4, 2014.

⁹³ Specifically, through applications for participation—or the registration process, as used in the trial phase of the Kenya situation—“(1) the identity [of the victim] appears duly established; (2) the events described in the application for participation constitute the crime(s) within the jurisdiction of the Court with which the suspects are charged; and (3) whether the applicant has suffered harm that appears to have arisen “as a result” of the crime(s) charged.” *Prosecutor v. Francis Kimeyia Muthaura et al.*, ICC, Case No. ICC-01/09-02/11, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings,” August 26, 2011, <http://icc-cpi.int/iccdocs/doc/doc1211737.pdf> (accessed June 5, 2015), para. 40; see also REDRESS, “The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future,” October 2012, http://www.redress.org/downloads/publications/121030participation_report.pdf (accessed June 5, 2015), pp. 11-16. The procedures for applying to participate as a victim of the case, as well as for the specific modalities of that participation in pre-trial, trial, and appeal proceedings are determined on a case-by-case basis by the court’s chambers. Chambers have taken divergent approaches with regard to the application process, but have generally agreed on the modalities for participation. These modalities have included permitting victims, through their counsel, to make open and closing statements and written submissions, attend hearings, and question witnesses. In exceptional cases, a highly limited number of victim participants have been permitted to appear directly before the court to provide their views and concerns. See *ibid.*, pp. 41-59 (modalities of participation); Susana SaCouto and Katherine Cleary Thompson, “Obtaining Victim Status for Purposes of Participating in Proceedings at the International Criminal Court,” December 2013, <https://www.wcl.american.edu/warcrimes/icc/documents/Report18final.pdf> (accessed June 5, 2015) (application process).

⁹⁴ According to a forthcoming study of victims participating in ICC cases in four countries, case victims in Côte d'Ivoire have had better access to information than in other ICC countries also included in the study. The lead researcher noted, however, that a factor may be that victims with standing in the ICC's current cases in Côte d'Ivoire live within Abidjan, which may facilitate their access to information and to counsel, court staff, or intermediaries (and vice versa). Human Rights Watch

But the prosecution’s current cases in Côte d’Ivoire, as discussed above, are limited to four or five incidents, all within Abidjan, and occurring on a handful of different days. Many serious abuses committed during the post-election violence, as with other crimes committed in the country since September 2002—all technically within the scope of the ICC’s investigations—occurred outside Abidjan, particularly in the west. Tying outreach to the incidents prosecuted before the ICC may have been necessary because of limited resources, but it leaves many affected communities beyond the Outreach Unit’s remit:

The Registry did not do the sensitizing program very well. Many victims did not have a chance.... The Registry focused its activities on charges in the case. We think they want to do more, told us to wait. We are hoping for this.⁹⁵

In addition, because the cases brought by the prosecution to date focus on alleged perpetrators on only one side of the conflict, linking community outreach to the prosecution’s cases may have worsened perceptions of bias in the court’s work.

For example, the court has not attempted to contact Ivorian refugee communities outside the country. These communities are perceived as allied with former President Gbagbo. During the election crisis, many of them were likely victims or witnesses of crimes carried out by pro-Ouattara forces and militias. Some members of these communities, who are aware of the ICC through the international media and the diaspora, perceived the absence of cases against anyone associated with Ouattara during the war as a bias of the court.⁹⁶

B. Limits in the Use of Mass Media for Outreach

Community outreach has not been the sole outreach program run by the ICC, which has sought to make effective use of mass media to reach broader audiences. Even without a field-based outreach officer, the court’s close engagement with a network of journalists was possible. Through the media outreach program, the court had been in touch with

telephone conversation with Stephen Smith Cody, director, Atrocity Response Program, Human Rights Center, University of California Berkeley School of Law, June 17, 2015.

⁹⁵ Human Rights Watch group interview with representatives of an Ivorian civil society organization, Abidjan, September 24, 2014.

⁹⁶ Human Rights Watch telephone conversation with representative of an international civil society organization, Geneva, August 12, 2014.

about 30 journalists on a weekly basis. Representatives of community radio stations were also included in outreach activities.⁹⁷

Human Rights Watch interviewed eight Ivorian journalists. Many were strongly appreciative of the quality of information available from the court to inform their reporting, citing in particular the court's public affairs listserv, which the ICC uses to distribute press releases and other updates, across all of its country situations. Four journalists indicated their reporting also relies on quick responses by the court's spokesperson or its Hague-based outreach officer to their individual emails or telephone calls.⁹⁸

At least five journalists we interviewed had participated in training provided by the ICC, in both Abidjan and The Hague. One reported that journalists who had attended the training now assist others in their reporting by explaining terms or correcting errors.⁹⁹

This emphasis on close engagement with media in Côte d'Ivoire appears to reflect some lessons learned from court's earliest experience with outreach, where the importance of using mass media was sometimes overlooked. For example, in northern Uganda, apart from efforts around the issuance of the arrest warrants against members of the Lord's Resistance Army leadership in 2005, the ICC did not have an active presence on the radio. Although this changed beginning in 2008, the vacuum left by the ICC's radio silence was deftly filled by those with different and often contrary agendas.¹⁰⁰

⁹⁷ Human Rights Watch telephone conversation with ICC staff, The Hague, September 4, 2014, and email correspondence, May 18-21, 2015.

⁹⁸ Human Rights Watch interviews with Ivorian journalists, Abidjan, October 1, 3-4, 2014, and telephone conversations, November 26, 2014.

⁹⁹ Human Rights Watch interview with Ivorian journalist, Abidjan, October 1, 2014. The ICC's Public Information and Documentation Section—recently renamed the Press Information and Outreach Section, of which the Outreach Unit is a part—also produces a number of different audio-visual programs, summarizing court proceedings or answering frequently asked questions, including "Demandez à la Cour," "Dans la salle d'audience," and "La CPI en un clin d'oeil." Links to these programs are distributed via their public affairs listserv, but our interviews with journalists and civil society organizations did not indicate widespread awareness of their existence or use. In addition, hearings are streamed live or with a short, 30-minute delay from the court's website, but two journalists interviewed by Human Rights Watch indicated that there were often problems accessing the feed. This posed a real challenge to their reporting given that, apart from the Gbagbo confirmation of charges hearing, proceedings are not broadcast live on Ivorian television. Other challenges cited by one journalist were delays in publishing decisions online and a lack of materials available in French. Human Rights Watch interview with Ivorian journalists, Abidjan, October 1, 2014, and telephone conversations, November 26, 2014.

¹⁰⁰ See Human Rights Watch, *Courting History*, pp. 144-147.

It is unlikely, however, that mass media will ever be a fully effective means for disseminating neutral and objective information about the ICC's proceedings in Côte d'Ivoire. Like the political landscape on which it operates, the print media, in particular, is deeply politicized. With the exception of a small group of relatively independent outlets, Ivorian newspapers are often affiliated with or even owned by political figures.¹⁰¹ This political affiliation directly influences reporting, including on the ICC: "The media is polarized.... Our paper supports and backs up the ICC. All the papers in favor of the opposition [meaning, those who support Gbagbo] think the ICC is evil."¹⁰²

Journalists explained that newspapers affiliated with the government and the opposition provide competing spins on court developments. One cited the following example:

When the ICC adjourned the confirmation of charges hearing against Gbagbo due to insufficient evidence, *La Patriote*, a paper close the government, reported that the judges just decided to postpone because they wanted to avoid another crisis. But the paper close to Gbagbo, *Notre Voie*, regarding the same decision, reported that the dissenting judge wanted the ICC to release Gbagbo straight away. In fact, the dissenting judge wanted to confirm the charges against Gbagbo.¹⁰³

Given this, it is perhaps unsurprising that according to the survey cited above, newspapers are little read, and little trusted, within Abidjan (although these findings should be seen in the context of the survey's findings of overall high levels of distrust, including distrust of state institutions and within the population).¹⁰⁴ And according to a researcher examining the experience of victims participating in the ICC's proceedings, these individuals "look at the press but don't really believe it."¹⁰⁵

The same survey reveals a higher level of consumption of television, but nearly 40% of those surveyed also distrust television.¹⁰⁶ International channels, like France24 and

¹⁰¹ See Zio Moussa, "The Media and the Political Crisis in Côte d'Ivoire," Media Foundation for West Africa, 2002, http://www.mfwa.org/media/documents/document1408033022_0.pdf (accessed July 1, 2015), pp. 51-57.

¹⁰² Human Rights Watch interview with Ivorian journalist, Abidjan, October 3, 2014.

¹⁰³ Human Rights Watch interview with Ivorian journalist, Abidjan, October 1, 2014.

¹⁰⁴ Pham and Vinck, "Fragile Peace, Elusive Justice," pp. i-iii, 24-25.

¹⁰⁵ Human Rights Watch telephone conversation with transitional justice expert, Washington, DC, September 16, 2014.

¹⁰⁶ Pham and Vinck, "Fragile Peace, Elusive Justice," pp. 24-25.

Canal/TV5, along with Radio France Internationale have significant audiences and may provide important opportunities for providing information about court proceedings.¹⁰⁷ But there will be limits to the time devoted to Côte d'Ivoire, let alone to the ICC proceedings about Côte d'Ivoire, in these outlets.

Court staff were aware from the outset of the politicized nature of the country's print media, as well as the limited trust placed in the country's newspapers, but stressed the need to engage with media all the same in order to avoid even more distortion in reporting on the ICC. Court staff have seen some benefits of this engagement: "Newspaper headlines remain polarized, but the facts of stories have improved in their accuracy."¹⁰⁸

With a field outreach officer in place, who can meet more frequently with editors and journalists and can conduct at least limited media monitoring, there may be additional opportunities to yet further deepen engagement with the media.¹⁰⁹ Where court staff directly participate in radio shows or give telephone interviews, they have seen more neutral approaches within the media.¹¹⁰

But given the heavily polarized attitudes within Ivorian media towards the ICC, some of those interviewed for this report viewed with skepticism the question of whether increased engagement is likely to substantially reshape the reporting landscape:

What can the ICC do? They came here. They organized training. They paid for training and accommodation to take us to The Hague. But as soon as we got back to our country it is the same way of processing information. Maybe it is only a change in politics that will make a difference.¹¹¹

This makes a renewed focus with a field outreach officer now in place on other outreach tools all the more important. The court's plans to directly engage affected

¹⁰⁷ In the Phan and Vinck survey, France24 had a 24 percent audience share, Canal+, a 30 percent share, and Radio France Internationale, a 32 percent share. *Ibid.*, p. 24.

¹⁰⁸ Human Rights Watch interview with ICC staff, The Hague, April 21, 2015.

¹⁰⁹ Human Rights Watch interview with ICC staff, The Hague April 21, 2015; telephone conversation with ICC staff, Abidjan, May 7, 2015.

¹¹⁰ Human Rights Watch email correspondence with ICC staff, Abidjan, May 26-29, 2015.

¹¹¹ Human Rights Watch interview with Ivorian journalist, Abidjan, October 1, 2014.

communities in outreach activities and new partnerships with community radio are discussed below.¹¹²

C. The Role of Civil Society

Without capacity to do direct outreach on a broad scale and a media landscape that makes it a less-than-effective tool to reach the general population, the court’s outreach efforts have resulted in deep, but narrow engagement in Côte d’Ivoire, according to those we interviewed for this report.¹¹³

Efforts by national and international civil society organizations in the country have, however, helped to mitigate this problem, sometimes in partnership with the ICC.

The network of non-governmental organizations (NGOs) working with the court in the community outreach program is not exclusively concerned with victims of the specific incidents identified in the prosecution’s cases. Some of these NGOs work nationally—they have offices in the country’s interior—and some are part of national civil society networks and coalitions. One international civil society organization has made a conscious effort to include a diverse set of national civil society organizations in at least some of its trainings in Côte d’Ivoire on victims’ rights before the ICC.¹¹⁴

More generally, the court’s activities have been supported extensively by the CI-CPI. Indeed, long before the arrival of ICC staff in country, CI-CPI had been carrying out awareness raising

¹¹² Representatives of two civil society organizations we interviewed highlighted the potential importance of community radio for outreach. Human Rights Watch individual and group interviews with representatives of two Ivorian civil society organizations, Abidjan, September 24, 2014. The Phan and Vinck study does not contain data distinguishing between trust in community radio as opposed to national or commercial broadcasters. The court may also want to consider expanding its presence on social media. According to the Phan and Vinck study, at least 45 percent of respondents accessed the internet occasionally including 19 percent who accessed it daily. See Phan and Vinck, “Fragile Peace, Elusive Justice,” pp. 23-25. One journalist we interviewed spoke to the increasing importance of social media in Côte d’Ivoire: “We need to recognize that social networks are getting more and more important. When I posted an article about [the Blé Goudé confirmation of charges hearing], several websites wrote about this, just based on my post. Social networks are now really important for many papers and websites.” Human Rights Watch interview with Ivorian journalist, Abidjan, October 4, 2014. At the same time, however, the court should be aware that social media in Côte d’Ivoire is also highly politicized and subject to manipulation.

¹¹³ Our methodology for this report, which did not extend to population surveys, does not allow us to make any firm conclusions regarding the overall level of knowledge about the ICC within Côte d’Ivoire. As indicated above, the Phan and Vinck study indicated that 94 percent of the population within Abidjan had heard of the ICC, but that only five percent indicated that their knowledge of the ICC was good or very good. Phan and Vinck, “Fragile Peace, Elusive Justice,” p. iii. The study did not cover respondents residing outside of Abidjan. Individuals interviewed for this report expressed a range of views about the level of knowledge generally within Côte d’Ivoire about the ICC.

¹¹⁴ Human Rights Watch interview with Gaelle Carayon, ICC legal officer, REDRESS, London, August 14, 2014.

campaigns on the court since 2005.¹¹⁵ Three journalists we interviewed indicated a heavy reliance on the CI-CPI as a source of information about court proceedings.¹¹⁶

In addition to Abidjan, where it organizes a public conference every three to four months, the CI-CPI and its member organizations have carried out programs in the country's interior, including in the west, sometimes spending several days in a location. The CI-CPI also developed a drama, "Lady ICC," which was performed in several locations and subsequently filmed for distribution on a DVD. The coalition also publishes a magazine, "La Haye" (The Hague), available online. They have carried out trainings for a wide range of actors, including parliamentarians, journalists, lawyers, victims, defense forces, traditional chiefs, religious leaders, youth and women's associations, and secondary schools. Some CI-CPI members have also conducted their own outreach activities, particularly through a partnership between the International Federation for Human Rights (FIDH), the Ivorian Movement for Human Rights (MIDH), and the Ivorian League for Human Rights (LIDHO).¹¹⁷

The CI-CPI believes it can have an impact on perceptions of the court through this direct engagement:

We were in some small towns in the West. All those areas are in favor of Gbagbo. They did not want to listen. But when we took time to explain to people, some of them understood and they listened.¹¹⁸

It was very difficult for people to understand in the beginning [who was eligible to participate in proceedings before the court]. It took time to make them understand. But now they do. Yes, people still support the ICC [even if they are not eligible to participate as victims]. People really do understand the work of the ICC because we carried out a large campaign with CI-CPI.¹¹⁹

¹¹⁵ Human Rights Watch group interviews with representatives of two Ivorian civil society organizations, Abidjan, September 24, 2014.

¹¹⁶ Human Rights Watch interviews with Ivorian journalists, Abidjan, October 1, 3, 2014, and telephone conversations, November 26, 2014.

¹¹⁷ Human Rights Watch individual and group interviews with representatives of three Ivorian civil society organizations, Abidjan, September 24, 2014.

¹¹⁸ Individual comment made during Human Rights Watch group interview with representatives of an Ivorian civil society organization, Abidjan, September 24, 2014.

¹¹⁹ Individual comment made during Human Rights Watch group interview with representatives of an Ivorian civil society organization, Abidjan, October 1, 2014.

There is clearly an important relationship between the ICC and civil society organizations when it comes to outreach. Ivorian civil society organizations can help the ICC to understand information needs on the ground, for example, and can then play a role in reaching audiences that are inaccessible to the court. Indeed, these kinds of relationships have been an important element of the court’s outreach programs across its country situations, although support and financial assistance to these partners has sometimes lagged behind the large expectations placed on their shoulders.¹²⁰

But past experience in other ICC situation countries demonstrates that civil society-conducted activities cannot stand in for direct engagement between court staff and affected communities. In fact, the absence of direct outreach by court staff in Côte d’Ivoire reflects something of a reversal in court practice in other countries.

In the earliest years of the court’s practice—up until 2007—outreach consisted primarily of conducting seminars or workshops targeting discrete groups such as local NGOs, journalists, members of parliament, and the judiciary. While it was hoped that the information provided to these actors would be further disseminated, that did not always occur. It became clear that direct contact between ICC staff and affected communities was needed. With the availability of more resources in the court’s budget, the creation of the Outreach Unit, and increased staff in The Hague and in the field, among other factors, the court’s outreach programs began to expand into direct engagement with affected communities. This included, for example, public screenings of court proceedings in the Democratic Republic of Congo and town halls in Congolese villages, internally displaced persons camps in northern Uganda, and refugee camps in eastern Chad.¹²¹

Indeed, there are a number of sound reasons for realistic expectations of civil society’s role in court outreach.

First, in the highly politicized contexts in which the ICC often operates, as in Côte d’Ivoire, there are certain messages that are better conveyed by court actors. These include, for example, providing detailed explanations of decisions or court processes, including the prosecution’s choice of cases. In particular, where civil society organizations are

¹²⁰ See Human Rights Watch, *Courting History*, pp. 139-142.

¹²¹ See Ibid., pp. 124-125.

supporting victim participants in ICC proceedings, they need to pay strict attention to preserving the neutrality of that assistance—neutrality from other court actors, including the prosecution. Another approach could undermine the trust victims place in these organizations to ensure that their rights and interests, rather than those of other parties, are upheld. Being seen to carry messages for the prosecution or the defense as part of conducting outreach activities could compromise that neutrality, and could also create confusion on the part of victim participants about their own role in proceedings.¹²²

Second, there are also limits to the risks civil society representatives should be asked to bear on behalf of the court. With the court nearly always operating in politically charged environments or ongoing conflict, civil society representatives perceived to be working on behalf of the court or conflated with court staff can find themselves facing physical risk. Risks for civil society organizations in Côte d'Ivoire working on ICC-related matters do not appear to have been a significant factor, but neither have they been non-existent.¹²³ The situation could worsen as the OTP moves forward with investigations against Ouattara-allied forces.

Third, civil society also does not and, for confidentiality reasons as well as the ability of staff of the court to coordinate across organs and units, cannot have access to the same level of information about the court and its proceedings as court staff. In Côte d'Ivoire, for example, while civil society organizations working closely with case victims were satisfied by information provided about the court and its proceedings, some other civil society representatives expressed certain ambivalence about whether they had sufficient information:

We get more information from the [global] Coalition for the ICC than we do from the ICC. We don't get any more than what the public gets, it is just the public information from the Registry, nothing more. OPCV and VPRS are taking care of victims. But day-to-day there is a need for more information and more updates. Information must be done permanently; that is what is missing.¹²⁴

Based on Human Rights Watch's monitoring of ICC-related developments in Côte d'Ivoire, past gaps in information have occurred when addressing rumors regarding Laurent

¹²² Human Rights Watch group interview with representatives of an international civil society organization, Brussels, August 20, 2014.

¹²³ Human Rights Watch group interview with representatives of an Ivorian civil society organization, Abidjan, September 24, 2014.

¹²⁴ Ibid.

Gbagbo's health, the procedure for joining his case to that of Charles Blé Goudé, the complicated litigation regarding the admissibility challenge in the Simone Gbagbo case, the lengthy delays in starting the trial, and explaining why the OTP sequenced investigations. Issues, particularly regarding the OTP's perceived one-sided approach, are likely to persist even after they have been addressed in media comments given by court officials; this underscores the importance of ongoing, sustained engagement with affected communities.

Ivorian civil society representatives will continue to play a central role in raising awareness about the ICC, but they too cited the importance of the court carrying out its own direct outreach:

The ICC needs a specific program to inform people on how they work. The ICC needs to let people know that they are a justice court and not just there to imprison African leaders.... The ICC office in Abidjan could take some action to organize public meetings, to explain directly to people. The [ICC] office here does organize some meetings but it is not done regularly. We are civil society and we organize a conference every three months on a specific topic. If we can do this, we think the ICC is able to do more.¹²⁵

We are expecting much more from [the ICC]. They have much more than us. When they come here, they are here for one week. Then they are away for three to four months.¹²⁶

Resource constraints for civil society organizations are also real and seem to be increasing.

¹²⁷ The ICC does not pay organizations to conduct outreach activities or provide funding to support the administration of outreach projects; it can subsidize certain costs, including the rental of facilities, catering, and, in some instances, transportation and communication costs.¹²⁸ A follow-up project to "Lady ICC" had been put on hold due to a lack of funding, although the Outreach Unit is considering whether it may be able to

¹²⁵ Human Rights Watch group interview with representatives of an Ivorian civil society organization, Abidjan, September 24, 2014.

¹²⁶ Human Rights Watch group interview with representatives of an Ivorian civil society organization, Abidjan, September 24, 2014.

¹²⁷ Ibid.

¹²⁸ Human Rights Watch telephone conversation with ICC staff, Abidjan, May 7, 2015, and email correspondence, July 1-2, 2015. In Côte d'Ivoire, the field-based outreach officer is also assisting civil society organizations to submit proposals to donors to secure funding for outreach activities.

provide some funding to relaunch the project, at least on a limited basis, in 2016.¹²⁹ Given its own resource constraints, however, the Outreach Unit is not in a position to support all possible projects.¹³⁰ While civil society has thus played an important role, its actions alone cannot overcome the absence of more robust court efforts on the ground.

* * *

Taken together, the court’s outreach strategies to date, narrowly focused on case victims and media outreach, have risked reinforcing the limited approach taken by the prosecution. With these strategies it is unlikely the court’s outreach program has achieved the stated goal of a two-way dialogue with a broader set of affected communities. The near-absence of this dialogue, particularly with communities politically aligned with Laurent Gbagbo, will do little to engage, let alone shift polarized opinion about the court arising out of the OTP’s sequenced approach. This may limit understanding of the court’s proceedings, and therefore the perceived and actual effect within Côte d’Ivoire of these proceedings, both in terms of providing victims with meaningful redress and longer-term contributions to consolidating the rule of law.

The deployment of an outreach officer in Abidjan in October 2014 who can dedicate himself fully to outreach activities there, appears to be an effort by the Registry to change course in Côte d’Ivoire. The Outreach Unit has taken steps to widen and deepen relationships with civil society organizations, including conducting a series of trainings and workshops. Representatives of some organizations attend sessions to inform themselves about the court, while other organizations will go on to partner with the ICC in one of two ways. They will either organize outreach activities for their members of the general population at which the court’s Outreach Unit is invited to present on the court, while others, using training provided by the court, will conduct their own outreach activities with affected communities. As an example, the outreach officer is developing outreach programs in cooperation with the Association of Female Jurists, which has legal clinics across the country. Activities will begin in Abidjan, but could expand to other parts of the country.

¹²⁹ Human Rights Watch email correspondence with representative of an Ivorian civil society organization, Abidjan, May 21, 2015; email correspondence with ICC staff, Abidjan, July 1-2, 2015.

¹³⁰ Human Rights Watch email correspondence with ICC staff, Abidjan, July 1-2, 2015.

Outreach plans for 2015 also include expanding efforts within Abidjan, for example, partnering with a network of youth organizations to organize activities aimed at young people, including a trivia contest about the ICC. Teams will be drawn from each of Abidjan’s 13 communes, and the contest will be broadcast via radio, reaching a broader audience. Close collaboration with VPRS remains a priority, but outreach activities like these are aimed at the general population, which may, of course, include potential case victims.

In addition, the field outreach officer has also undertaken two missions outside of Abidjan, including to the hometowns of Gbagbo and Blé Goudé, to begin to build networks of local NGOs to keep them informed about the ICC, and is exploring partnerships with community radios within Abidjan to carry call-in programs on the ICC.¹³¹

CASE VICTIMS IN CÔTE D’IVOIRE

In total, four hundred seventy victims participated in pre-trial proceedings against Laurent Gbagbo and Charles Blé Goudé and have now been accepted as victims in the joint trial of the two defendants.¹³² Victims also participated in the admissibility challenge to the Simone Gbagbo case.

These victims have all been represented in either pre-trial proceedings or the admissibility challenge by a court-appointed common legal representative, Paolina Massidda, who is also the International Criminal Court’s principal counsel for victims. Until January 2015, Massidda was assisted by an Ivorian lawyer, based in Abidjan; following the resignation of the lawyer, Massidda has proposed recruiting a new lawyer, also to be based in Abidjan.¹³³

The trial chamber has put in place a framework for accepting further applications for victim participation and, at time of writing, is reviewing whether to maintain Massidda as the legal representative at trial.¹³⁴

Our research indicates that case victims in Côte d’Ivoire have had significant access to information about court proceedings.

¹³¹ Human Rights Watch telephone conversation with ICC staff, Abidjan, May 7, 2015, and email correspondence, May 26-29, 2015.

¹³² *Prosecutor v. Laurent Gbagbo*, ICC, Case No. ICC-02/11-01/11, “Decision on Victim Participation,” March 6, 2015, <http://www.icc-cpi.int/iccdocs/doc/doc1934587.pdf> (accessed on June 8, 2015), paras. 41-42.

¹³³ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC, Case No. ICC-02/11-01/15, “Information on Common Legal Representation of Victims in the proceedings,” May 15, 2015, <http://www.icc-cpi.int/iccdocs/doc/doc1976215.pdf> (accessed June 8, 2015), paras. 11-17.

¹³⁴ *Prosecutor v. Laurent Gbagbo*, ICC, Case No. ICC-02/11-01/11, “Decision on Victim Participation,” paras. 10, 42, 49.

As is the case in other ICC situation countries, the Victims Participation and Reparations Section has used a small network of “intermediaries”—sometimes individuals and sometimes representatives of civil society organizations—to get in touch with potential victims. These intermediaries, who work confidentially, with training provided by VPRS, and are generally persons already known and trusted by victims and are an essential bridge between the court and affected communities.

VPRS provides its intermediaries with a weekly update of court proceedings, which can then be shared directly with victims.¹³⁵ VPRS has had a field-based staff member in Abidjan since early 2012,¹³⁶ eighteen months before the court’s field office opened in September 2013. The VPRS field-based staff member was previously a member of Ivorian civil society. One civil society representative reported even more frequent contact with VPRS.¹³⁷

Information provided by VPRS is also complemented by information from civil society. One civil society representative described the system in this way:

The ICC here is very close to the victims. At each step of the procedure, we bring information to the victims, information we receive through the CI-CPI and the ICC. As soon as I have information I pass it on.... As we have the Registry here [in Abidjan] any time there is new information, he organizes a meeting with intermediaries. It is not every day that [the VPRS field-based staff member] is available, however, so intermediaries also contact us, [a civil society organization].¹³⁸

VPRS also held private group meetings in areas within the scope of the charges—namely Abobo and Yopougon—to inform individuals of their right to apply to participate before the court.¹³⁹

In addition, when the victim’s counsel Paolina Massidda is in the country, Massidda uses a network of focal points—who may or may not be the same as the intermediaries used by VPRS—to arrange for direct meetings with her clients, that is, victims accepted as participants in the case. Between June 2012 and March 2015, she had visited Abidjan 20 times. Victim participants are also given the local telephone number for the legal assistant, in the event they want to contact someone in-country.¹⁴⁰

¹³⁵ Human Rights Watch interview with representative of an Ivorian civil society organization, Abidjan, September 24, 2014.

¹³⁶ Human Rights Watch email correspondence with ICC Registry, The Hague, November 11, 2014.

¹³⁷ Human Rights Watch interview with representative of an Ivorian civil society organization, Abidjan, September 24, 2014.

¹³⁸ Human Rights Watch group interview with representatives of an Ivorian civil society organization, Abidjan, October 1, 2014.

¹³⁹ Human Rights Watch interview with representative of an Ivorian civil society organization, Abidjan, September 25, 2014.

¹⁴⁰ Human Rights Watch interview with Paolina Massidda, Principal Counsel for Victims, Office of the Public Counsel for Victims, ICC, The Hague, August 21, 2014; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC, Case No. ICC-02/11-01/15, “Information on Common Legal Representation of Victims in the proceedings,” May 15, 2015, para. 18.

VI. Engaging Victims

One of the most significant innovations in the Rome Statute is the right of victims to participate in certain court proceedings.¹⁴¹ This right does not exist before the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, which preceded the International Criminal Court's creation. Although the court continues to struggle to realize a robust system of victim participation, participation should play a central role in increasing the court's impact by bringing victims directly into contact with court proceedings and by ensuring those proceedings are informed by the experience of victims.

It has been up to the court's judges to determine how victim participation is to be implemented in practice, including to ensure it is not inconsistent with the rights of the defense and to define, where relevant, the application process for victims wishing to participate in proceedings, the legal representation of victims recognized as participants, and what specific modalities victim participation will take in the proceedings.

Rome Statute article 68(3) affords victims a general right of participation in proceedings. Under the court's case law, however, the opportunities for victim participation under this general right vary with the phase of court proceedings.

As discussed above, once a specific case has been opened—an arrest warrant or summons has been issued for a specific defendant on specific charges—the court's case law permits only the participation in that case of victims who can demonstrate a connection between their harm suffered and those charges. As a result, the prosecution's choice of charges—potentially later modified by the court's judges in confirming the case that will ultimately be sent to trial—sets to a large degree the framework for victim participation in the case.¹⁴²

Nonetheless, the judges have interpreted article 68(3) as affording a broader set of victims a narrow right of participation in other specific judicial proceedings that may arise during investigations. And the Rome Statute and the court's Rules of Procedure and Evidence also provide other specific opportunities for the participation of a broader set of victims prior to

¹⁴¹ Rome Statute of the International Criminal Court, A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 68(3) ("Rome Statute").

¹⁴² Article 19(3) also provides for victim participation in challenges to the admissibility or jurisdiction of a specific case.

the opening of cases or, in limited circumstances, even investigations. These include written representations regarding the authorization of proprio motu investigations (article 15(3)), discussed below, the review of the prosecutor's decision not to proceed with investigation or prosecution (article 53(3), Rule 92(2), and Rule 107(5)),¹⁴³ and where a chamber seeks the views of victims on any issue (Rule 93).¹⁴⁴

As with outreach, it is important to be realistic about what victim participation in the proceedings can achieve when it comes to bridging the gap between affected communities and the ICC at the pre-investigative or investigative (situation) phase. This is particularly true given real limits in the rights accorded to victims during these phases, as discussed below. With regard to all phases of proceedings before the ICC, the court's jurisprudence has been criticized by victims' rights advocates as failing to sufficiently take into account representations made by victims or their counsel or to seek the views of victims on key issues.¹⁴⁵ Even where they do benefit from victims' views and concerns, the judges and the Office of the Prosecutor will need to take independent decisions.

As the same time, however, victim representations or participation in these early, pre-case phases has the potential, at the very least, to provide a source of engagement between the court and affected communities.

¹⁴³ Victims have applied to participate in a petition by the government of Comoros seeking review of the OTP's decision under article 53 not to investigate an attack on a flotilla of ships, including one registered to Comoros, which had been the subject of a state referral to the OTP by Comoros. *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC, Case No. ICC-01/13, "Decision on the Victims' Participation," April 24, 2015, <http://www.icc-cpi.int/iccdocs/doc/doc1966279.pdf> (accessed July 1, 2015).

¹⁴⁴ See generally Carsten Stahn, Hector Olasolo, and Kate Gibson, "Participation of Victims in Pre-Trial Proceedings of the ICC," *Journal of International Criminal Justice* 4 (2006), 224-237.

¹⁴⁵ See Mariana Pena and Gaelle Carayon, "Is the ICC Making the Most of Victim Participation?" *International Journal of Transitional Justice*, 2013, <http://ijtj.oxfordjournals.org/content/early/2013/09/28/ijtj.ijtj021.full.pdf+html> (accessed June 8, 2015), pp. 10-18. A full review of the court's victim participation system is beyond the scope of this report, but the system has met with considerable criticism from a variety of perspectives, including those who would advocate for more robust approaches and those who are skeptical about the value of victim participation. Sarah Kendall and Sarah Nouwen, for example, argue that at the ICC, there is an increasing gap between the reality of victim participation—in which few victims are directly represented in legal proceedings—and claims made about the ICC's work on behalf of victims. This leads to an unhelpful abstraction of victims. See Sarah Kendall and Sarah Nouwen, "Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimization," *Law and Contemporary Problems*, vol. 76 (2014), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4376&context=lcp> (accessed June 8, 2015), pp. 235-262; see also Chris Tenove, "Victim Participation at the ICC – What's the Deal?" *Justice in Conflict* (blog), November 22, 2013, <http://tenove.com/2013/11/27/victim-participation-at-the-icc-asp2013/> (accessed June 8, 2015) (providing a helpful compilation of recent articles on victim participation before the ICC).

This engagement should not be underestimated; a trio of researchers deeply engaged on victim participation issues at the ICC recently highlighted the importance of an “ongoing dialogue” between the ICC and victims. They quoted one victim as reporting, “The most important thing is that we want somebody from the Court to come here so we can interact with them.”¹⁴⁶

Viewed more expansively, engaging a broad set of victims in the pre-investigation and investigation phases could also influence the prosecutor’s choices and make those choices more responsive to underlying patterns of criminality and victims’ experiences, a key aspect of the court’s ultimate impact in a given country.

* * *

In the Côte d’Ivoire situation, where, unlike in the Outreach Unit, the Victims Participation and Reparations Section has had a field-based staff member in Abidjan since the beginning of 2012, there have been robust efforts to facilitate the participation of victims in the cases against Laurent and Simone Gbagbo, and Charles Blé Goudé. These victims have had access to a significant level of information about proceedings (see “Case Victims in Côte d’Ivoire”).

When it comes to engaging a broader set of victims, the prosecution’s one-sided and narrowly focused cases have again represented real challenges in light of the court’s case law reserving the most expansive rights of participation for case victims. But the judges and the Registry, however, have failed to make the most of the potential opportunities that do exist to engage a broader set of victims.

A. Missed Opportunities for Early Outreach and Engagement with Victims

Although Ivorian governments made article 12(3) declarations accepting the ICC’s jurisdiction in 2003 and again in 2010, Côte d’Ivoire did not become an ICC member country until 2013. This meant that investigations in Côte d’Ivoire were opened under article 15, the provision of the ICC treaty permitting the prosecutor to go forward *proprio*

¹⁴⁶ Stephen Smith Cody, Susana SaCouto, and Chris Tenove, “Victims at the ICC: What is the Way Forward?” *Justice in Conflict* (blog), December 10, 2014, <http://justiceinconflict.org/2014/12/10/victims-at-the-icc-what-is-the-way-forward> (accessed June 8, 2015).

motu—on her own motion—provided that authorization is granted by a pre-trial chamber of the court. As part of the article 15 process, victims of violations covered by the Rome Statute are permitted to make representations in writing to the judges.¹⁴⁷

This can be a critical moment for engaging victims in the judicial process and for informing the direction of any authorized investigation, as a 2011 Registry submission to the judges on Côte d'Ivoire makes clear:

The Registry notes that the process established by article 15(3) provides the only mechanism for enabling victims' voices to be heard by the public and the Court as a whole on a subject which is likely to be of great importance to them, namely whether they are supportive or opposed to an investigation. Because of the limited nature of other forms of victim participation outside the context of a given case, the article 15 process represents the only opportunity for victims to voice their opinions concerning not only whether an investigation should occur, but also how the Prosecutor might prioritize his investigations. Without binding the Prosecutor, such views may be of use to him and to the Chamber. The opportunity to present such views also provides victims with a sense of their connection to the Court and involvement in its work. The inclusion of victims' voices in a public Registry report (as opposed to a mere compilation of numbers) presents one avenue through which their statements can be made known and given due recognition.¹⁴⁸

To facilitate these representations, the OTP has certain limited obligations to inform victims with whom it is in contact of its intent to seek authorization to investigate. It can do so by way of a general notice, for example, publishing an advertisement in a newspaper or broadcasting this information in the media.¹⁴⁹

¹⁴⁷ Rome Statute Article 15(3) provides: "If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence."

¹⁴⁸ *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, "Report on Victims' Representations," August 29, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1223025.pdf> (accessed June 8, 2015), para. 92; see also REDRESS, "The Participation of Victims in International Criminal Court Proceedings," pp. 41-43.

¹⁴⁹ ICC Rules of Procedure and Evidence, ICC-ASP/1/3, http://www.icc-cpi.int/en_menus/icc/legal%2otexts%2oand%2otools/official%2ojournal/Documents/RulesProcedureEvidenceEng.pdf (accessed June 8, 2015), rule 50.

With regard to Côte d'Ivoire, the pre-trial chamber assigned to the situation considered that the prosecution had taken sufficient steps to give victims notice of its application for authorization to investigate, including publication of the notice to Ivorian newspapers, and distribution of the notice to the main national TV and radio stations, the UN peacekeeping mission's radio station (UNOCI FM), and to civil society representatives.¹⁵⁰

The OTP opposed any activities by the Registry in Côte d'Ivoire having direct contact with victims prior to the authorization of the investigation, citing concerns about delays in the proceedings, such as those experienced during the equivalent article 15 process undertaken with regard to authorizing investigations in Kenya. This included delay that would be necessary to ensure such activities did not put victims or intermediaries at risk.¹⁵¹

In the interest of efficiency, the pre-trial chamber did not order the Outreach Unit or VPRS to undertake any activities in Côte d'Ivoire to inform victims regarding the opportunity to make representations.¹⁵²

This was in contrast to the approach taken in the Kenya situation—the only other ICC investigation opened pursuant to the prosecutor's article 15 proprio motu powers. The pre-trial chamber there ordered VPRS to seek out voluntary, collective representations from community leaders.¹⁵³ VPRS and Outreach Unit first conducted a mission to Kenya to determine how best to implement the court's order. During the mission, court staff had the opportunity to provide information about the ICC, the article 15 process, and the role of victims to a select group of organizations and individuals. They were also able to gauge

¹⁵⁰ The OTP publicized a notice “by posting it on the ICC website, and sending it to a) its media contact database of 3,500 entries worldwide, b) 15 newspapers in Côte d'Ivoire which all published or referred to it in their 17 or 18 June edition, c) the main national TV and radio stations as well as ONUCI FM radio which also disseminated the information subsequently d) and about one hundred individual recipients (Ivorian civil society actors, NGO representatives and senders of art. 15 communications).” The OTP conducted two missions to Côte d'Ivoire while the authorization request was pending, during which it publicized the possibility for victims to make representations, reiterated the applicable deadlines, and conveyed to the Ivorian authorities the importance of not blocking any efforts by victims to submit representations. See *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, “Request for authorisation of an investigation pursuant to article 15,” para. 176; Human Rights Watch group interview with ICC staff, The Hague, June 10, 2015.

¹⁵¹ See *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, “Request for authorisation of an investigation pursuant to article 15,” paras. 177-179.

¹⁵² *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, “Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute,” July 6, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1106693.pdf> (accessed June 8, 2015), para. 8.

¹⁵³ *Situation in the Republic of Kenya*, ICC, Case No. ICC-01/09, “Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute,” December 10, 2009, <http://www.icc-cpi.int/iccdocs/doc/doc791568.pdf> (accessed June 8, 2015), para. 9.

existing understanding and perceptions of the ICC, to map, on a preliminarily basis, victim populations and the civil society organizations assisting them, and to get a handle on security conditions and how victims would be likely to access information about the court. Based on this mission, the Registry concluded that it should immediately begin outreach activities in Kenya.¹⁵⁴

As indicated above, the OTP carried out two missions to Côte d'Ivoire while the authorization request was pending, further publicizing the possibility of victim representations. But in the absence of a similar directive from the pre-trial chamber, VPRS and the Outreach Unit conducted their first mission to Côte d'Ivoire in November 2011, only after the investigation was authorized.¹⁵⁵ Without overstating the impact earlier outreach might have had in Côte d'Ivoire—given the polarizing nature of the ICC's initial arrest warrant—lessons learned from other ICC situations suggest that the provision of neutral information about the ICC as soon as possible can help to prevent damaging rumors and misinformation. These can be very difficult for the court to subsequently challenge.

Indeed, in Kenya, activities undertaken during the pre-authorization phase as part of the article 15(3) process were critical to laying the ground for outreach activities in Kenya once the investigation was authorized, according to a court staff member. As a result of missions undertaken during the pre-authorization phase, “[outreach in Kenya] was really able to start from the beginning of the situation ... [without the pre-authorization activities] a lot of time and opportunities might have been lost. Instead we were able to work in real time, providing information in-step with the prosecution’s activities.”¹⁵⁶

Early outreach is not a panacea. The terrain for the court in Kenya became progressively more challenging, particularly during and after the March 2013 elections in which two then-defendants before the ICC, Uhuru Kenyatta and William Ruto, were elected Kenya’s president and deputy president. Frustration with the court also grew given delays in the proceedings, persistent questions regarding the strength of the Office of the Prosecutor’s investigations, and, ultimately, the OTP’s withdrawal of the charges against Kenyatta in December 2014, citing government obstruction and witness interference. But early

¹⁵⁴ *Situation in the Republic of Kenya*, ICC, Case No. ICC-01/09, “Report Concerning Victims’ Representations,” March 29, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc853213.pdf> (accessed June 8, 2015).

¹⁵⁵ Human Rights Watch email correspondence with ICC Registry, November 11, 2014.

¹⁵⁶ Human Rights Watch telephone conversation with ICC staff, Kampala, June 3, 2015.

outreach might have been particularly helpful in the Côte d'Ivoire situation, where, as previously discussed, the Registry was faced with extraordinarily quick investigations, leaving it on the back foot in terms of getting outreach programs up and running.

Although the Registry noted that specific programs undertaken on the ground, if ordered by the chamber, might have helped improve the quality of representations,¹⁵⁷ the pre-trial chamber did rely on victim representations in its assessment of the prosecutor's application. In fact, it was on the basis of these representations, along with open-source information, that the pre-trial chamber requested the prosecution to provide additional information so that the chamber could consider whether the temporal scope of the situation should be enlarged to include crimes committed prior to the election crisis in November 2010.¹⁵⁸ Representations by 72 victims referred to crimes committed prior to the beginning of the post-election crisis in November 2010, primarily in the central part of the country, with the vast majority of representations citing pro-Ouattara fighters as alleged perpetrators.¹⁵⁹ In addition, the pre-trial chamber relied, in part, on victim representations in concluding that there was a reasonable basis to believe pro-Ouattara forces had committed crimes against humanity during the post-election violence (in contrast to the prosecution's position) and in identifying additional crimes—in particular, pillage, cruel treatment, and torture—not presented by the OTP.¹⁶⁰

This reliance—even with the limitations imposed by the court's approach to the article 15(3) process—indicates the importance these article 15 representations could have to ensure the court's proceedings are responsive to victim concerns from the outset, in addition to providing an opportunity for early outreach and engagement. In Côte d'Ivoire, in our view, the judges tended to minimize the importance of this early outreach and engagement by not putting in place sufficient efforts to encourage the most effective possible submissions.

¹⁵⁷ *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, “Report Concerning Victims’ Representations” (public redacted version), August 29, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1223025.pdf> (accessed June 8, 2015), paras. 73-90.

¹⁵⁸ See above note 38.

¹⁵⁹ *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/11, “Report Concerning Victims’ Representations,” para. 52.

¹⁶⁰ *Situation in the Republic of Côte d'Ivoire*, ICC, Case No. ICC-02/011, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire,” paras. 104-116, 164, 168, 182; see also REDRESS, “The Participation of Victims in International Criminal Court Proceedings,” pp. 42-43.

B. Obstacles to Potential Participation by a Broader Set of Victims

Limited Formal Rights for Situation Victims

After investigations are opened at the ICC, victims can have standing under article 68(3) to participate in proceedings outside of those connected to specific cases, known as “participation in the situation.”

Similar to the benefits identified above for robust approaches to victim representations under article 15(3), participation of victims in proceedings as investigations are underway could provide a critical opportunity, on the one hand, to engage victims in proceedings from an early point, and, on the other hand, for the OTP’s selection of cases to be fully informed by the experience of victims, including their identification of underlying patterns of crimes and representative incidents. In addition, as noted by one author, human rights jurisprudence suggests the participation of victims in investigations can safeguard the transparency and scrutiny of judicial proceedings.¹⁶¹

Initially, in decisions in the Uganda, Democratic Republic of Congo, and Darfur situations, ICC judges afforded victims standing in the situation, as a general matter.¹⁶² In doing so, the judges recognized that the OTP’s investigations could implicate the personal interests of any individual suffering harm as the result of a crime falling within the court’s jurisdiction, and therefore gave the victim a right to present views and concerns to the court. This led to the recognition of some individuals as “situation victims” or “victims of the situation.”

The OTP and the Office of Public Counsel for the Defense challenged this recognition of a general right of participation. The OTP cited as a concern what it considered to be the risk of improper interference in its investigations.¹⁶³

¹⁶¹ See Luke Moffett, “Realising Justice for Victims before the International Criminal Court,” International Crimes Database Brief 6, September 2014, <http://www.internationalcrimesdatabase.org/upload/documents/20140916T170017-ICD%20Brief%20-%20Moffett.pdf> (accessed June 8, 2015), p. 7.

¹⁶² See *Situation in the Democratic Republic of Congo*, ICC, Case No. ICC-01/04, “Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6,” January 17, 2006, <http://www.icc-cpi.int/iccdocs/doc/doc183441.PDF> (accessed June 8, 2015).

¹⁶³ See summary of OTP’s position in *Situation in the Democratic Republic of Congo*, ICC, Case No. ICC-01/04, “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007,” December 19, 2008, <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf> (accessed June 8, 2015),

In December 2008, the appeals chamber reversed course in a decision relating to the Democratic Republic of Congo.¹⁶⁴ The appeals chamber decided that a victim only has standing at the ICC where there are specific judicial proceedings, and where those proceedings relate to the individual's personal interests.¹⁶⁵ Although there may be "specific judicial proceedings" prior to the opening of specific cases, these will be rare. As a result, pre-trial chambers generally do not now review victim applications for participation in the situation unless and until there such "specific judicial proceedings," such as the review of a decision not to proceed with an investigation or prosecution under Rome Statute article 53.¹⁶⁶ Applications may be processed by VPRS but are held to the side until there are specific judicial proceedings requiring the chamber to assess victim applications for participation.¹⁶⁷

para. 22. The role of chambers in supervising the prosecutor's investigations—a byproduct of the ICC's nature as a hybrid institution blending elements of common and civil law systems—was also a contested issue at the time of this litigation, with the prosecution maintaining the full independence of those investigations. See Human Rights Watch, *Courting History*, pp. 21-26. This debate continues in a slightly different form today in litigation over the extent to which the Rome Statute requires the OTP to complete its investigations at the time the confirmation of charges hearing takes place. See War Crimes Research Office, American University Washington College of Law, "Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor," October 2012, <https://www.wcl.american.edu/warcrimes/icc/documents/ICCReport16.pdf> (accessed June 8, 2015), pp. 61-67; see also Elizabeth Evenson (Human Rights Watch), "Kenyatta decision turns spotlight on ICC investigation," ACCESS (Victims' Rights Working Group Bulletin), issue 22, Spring 2013, <http://www.redress.org/downloads/reports/130617EnglishVersionFinal.pdf> (accessed June 8, 2015), p. 2. Although the OTP maintains that it is not required to do so as a matter of law, its current strategic plan commits it to being trial ready prior to seeking applications for arrest warrants or voluntary summonses. OTP, "Strategic plan, June 2012-2015," para. 4(a).

¹⁶⁴ *Situation in the Democratic Republic of Congo*, ICC, Case No. ICC-01/04, "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007," December 19, 2008. The appeals chamber delivered the same decision in an appeal arising out of the Darfur situation in February 2009. *Situation in Darfur*, ICC, Case No. ICC-02/05, "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of the Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of the Pre-Trial Chamber I of 6 December 2007," February 2, 2009, <http://icc-cpi.int/iccdocs/doc/doc625413.pdf> (accessed June 8, 2015).

¹⁶⁵ *Situation in the Democratic Republic of Congo*, ICC, Case No. ICC-01/04, "Judgment on Victim Participation in the Investigation Stage," paras. 39-59. The change in the court's case law is discussed in detail in REDRESS, "The Participation of Victims in International Criminal Court Proceedings," pp. 43-46.

¹⁶⁶ According to one pre-trial chamber, other possible judicial proceedings in the situation include preservation of evidence in the context of a unique investigative opportunity (article 56(3)), issues concerning victims' protection and privacy or the preservation of evidence (article 57(3)(c)), and where, under Rule of Procedure and Evidence 93, the chamber seeks the views of victims or their legal representatives on any issue. See *Situation in the Republic of Kenya*, ICC, Case No. ICC-01/10, "Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya," November 3, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc962483.pdf> (accessed June 8, 2015), para. 12.

¹⁶⁷ See, for example, *Situation in Uganda*, ICC, Case No. ICC-02-04, "Decision on Victim's Participation in Proceedings Related to the Situation in Uganda," March 9, 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1368784.pdf> (accessed June 8, 2015).

There have been no “judicial proceedings,” or proceedings not related to the specific cases opened against the Gbagbos and Blé Goudé, in the Côte d’Ivoire situation generally, and, as a result, there are no recognized “situation victims.”¹⁶⁸

The OTP has recognized that the court’s case law, coupled with a focused prosecutions approach, discussed above, means that there will be many victims unable to participate in the cases it brings before the court once it has done so. It has indicated that it seeks to broaden the effect of its cases and reflect the wider experience of victims by receiving and encouraging input from victims during preliminary examinations and investigations, by including information about the scope and impact of crimes in its submissions to the court’s judges on the gravity of crimes, and by advocating a wider approach to the eligibility of victims for court-ordered reparations.¹⁶⁹

Nonetheless the court’s case law limiting participation in the investigative phase, coupled with case law confining participation in the case to those victims linked to the charges, creates a catch-22 when it comes to the formal rights of victims before the ICC. Victims are limited in their opportunity to influence the framing of the charges, but the framing of those charges may extinguish any rights they have to participation:

[T]he Prosecutor’s decisions on charging in all circumstances have a direct impact on victims, as only victims of the crimes charged will be able to continue participating in the proceedings and a link to the charges may be required for the purpose of obtaining reparation. As such ... the charging stage may be considered by some victims as the most fundamental stage, as it defines which crimes or incidents—including what might be hidden crimes such as sexual violence—will ultimately form part of the case, and, thus, part of the historical record for that situation.¹⁷⁰

¹⁶⁸ Human Rights Watch email correspondence with ICC Registry, November 11, 2014.

¹⁶⁹ OTP, “Policy Paper on Victims’ Participation,” pp. 8-9.

¹⁷⁰ Inger Agger, Sylvestre Bisimwa, Terith Chy, Katherine Gallagher, Marjorie Jobson, Sapna Malik, Carlos Martín Beristain, Richard Stein, and Norbert Wöhler, “Independent Panel of experts report on victim participation at the International Criminal Court,” REDRESS and Amnesty International, AI index: IOR 53/001/2013, July 2013, http://www.iccnow.org/documents/Independent_Panel_of_Experts_Report_on_Victim_Participation_at_the_ICC.pdf (accessed June 8, 2015), para. 49. While not directly relevant to the rights of situation victims, it is important to note that efforts by victims to influence the framing of charges have persisted beyond the opening of specific cases, for example, in the Lubanga case, where the OTP was heavily criticized for only bringing charges related to the use of child soldiers, rather

The sole appeals court decision on reparations, to date, also links eligibility for reparations with the charges on which a conviction is based.¹⁷¹

As discussed below, these limited formal rights raise real questions as to how the court can responsibly engage broadly with victims, without raising expectations about their potential standing in court proceedings that it may not be able to meet. We argue, nonetheless, that there are sound reasons for the Registry to broaden the reach of its activities around victim participation beyond those individuals who may be eligible for standing in a specific case.

The limited formal rights to standing during investigations also amplify the importance of implementing in practice the OTP's commitment, referenced above, to receiving input from victims during preliminary examinations and investigations. Indeed, in limiting the standing of victims at the situation phase, the appeals chamber noted that nothing precluded victims from providing information to the OTP during investigations, even without formal recognition before the court.

The OTP should consider two steps to this end.

First, the OTP should increase its consultation with affected communities with a view to better informing its decisions regarding case selection and prioritization. A commitment to this consultation should continue to be reflected in the OTP's policy papers, including its forthcoming policy on the selection and prioritization of cases.

To bring together its various commitments to consultation and to implement that commitment in a fully effective manner—while addressing how these consultations can be conducted in a way that minimizes risks to victims, recognizing the very real limits on the ICC's capacity to provide protection should risks arise—it may be helpful for the OTP to develop and implement a strategy specifically guiding its consultations with victims and their representatives regarding case selection.

than charges more fully representative of those allegedly committed by Lubanga's forces. See discussion of this and other examples in Mariana Pena and Gaelle Carayon, "Is the ICC Making the Most of Victim Participation?" pp. 12-14.

¹⁷¹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-1/04-01/06, "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012," March 3, 2015, <http://www.icc-cpi.int/iccdocs/doc/doc1919024.pdf> (accessed on June 8, 2015), paras. 211-214, 222.

In addition, it may be important for the office to ensure that its investigations benefit in full from the analysis carried out during the preliminary examination process. The OTP collects information with regard to the “interests of victims” as part of the preliminary examination, the process to determine whether or not to open a formal investigation. This is because under Rome Statute article 53(1)(c), the Office of the Prosecutor is required to consider whether “taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”¹⁷²

During preliminary examinations, the OTP does not have full investigative powers and is limited to open source materials, as well as information provided under article 15 from any source, including victims (known as “article 15 communications”). To ascertain the “interests of victims,” it relies on these communications and open source materials, including any publicly available surveys of the perceptions of victims on justice. But, in each situation under analysis, it also carries out a mapping of victims and victims groups and their representatives, including, for example, community or religious leaders. As needed, it can seek the views of victims through these representatives, and, where security considerations permit, it has held town halls or other meetings to hear directly from victims.¹⁷³

The OTP’s identification of potential cases, and the interests of victims regarding the situation, as part of the preliminary examination does not bind its subsequent investigations. Nor does it eliminate the need for ongoing consultation with victims as the OTP conducts its investigations and prosecutions. But its efforts to identify the “interests of victims” during preliminary examinations for the purpose of finding a reasonable basis to proceed with an investigation should mean that the OTP has a considerable amount of potentially relevant information available to it from the outset that could help guide its case selection and prioritization decisions in a manner responsive to victims.

Once investigations are opened, a further means of implementing this commitment to consultation could be to formally solicit victims’ representations.

¹⁷² Article 53 governs the OTP’s decisions regardless of whether it is considering a proprio motu investigation or an investigation pursuant to a state or Security Council referral.

¹⁷³ Human Rights Watch telephone conversation with ICC staff, The Hague, July 3, 2015.

The Rome Statute only provides for a formalized process of written victim representations submitted to the court's judges in context of article 15 proceedings to authorize proprio motu investigations, as in Côte d'Ivoire. There is no apparent policy rationale to distinguish between the value such representations can have in guiding the choice to investigate proprio motu, as opposed to pursuant to state or Security Council referrals, apart from adding an extra check on the prosecution's decision making. When it comes to guiding the framing of a situation and directing the OTP toward patterns of the gravest crimes that will best respond to the experiences of victims, however, these victims' representations are relevant to all potential investigations.

Implementing this process outside of that envisioned within article 15 may be challenging. Under article 15, these representations are solicited after a formal notice is made by the prosecution of its intent to open investigations, but prior to the authorization and opening of investigations. It may cause confusion were the OTP to launch a formal process of soliciting victim representations before it has publicly announced a decision to investigate.

For that reason, the OTP should consider soliciting these written representations only after publicly announcing the opening of a situation. While this means that these representations will serve a slightly different function—informing already opened investigations, rather than contributing to decision-making to open investigations—it does not diminish their value. And, given the current understanding at the court limiting the Registry's mandate in countries prior to the opening of investigations, implementing this process only once investigations are open will also increase the feasibility of close coordination between the OTP and outreach and victim specialists in the Registry. That coordination will be necessary to design and implement the most effective approach to solicit representations, to clarify with victims the limited purpose of these submissions, and to distinguish them from the office's investigative activities, as well as applications to participate in proceedings, and to provide opportunities for early outreach of a more generalized nature. It will also be important to clarify the different roles played by the OTP and other court actors in order to limit confusion about these mandates on the part of affected communities. Ideally, as has been the practice under article 15(3), these written submissions should be anonymized and compiled into a report, which can form part of the public record of the situation.

Second, the OTP should suggest including in the court-wide performance indicators currently under development indicators relevant to ensuring its selection of cases responds to underlying patterns of crimes identified on the basis of independent and impartial investigations of allegations against all parties. It should also include performance indicators regarding its commitment to conducting consultations within affected communities.¹⁷⁴

Limits in the Registry's Engagement of Situation Victims in Côte d'Ivoire

In all the court's country situations, the ICC's legal regime distinguishing between victims of the situation and victims of the case presents the Victims Participation and Reparations Section with the very difficult challenge of explaining to individual victims what rights they may have, how and under what circumstances they are to be exercised, and managing their expectations regarding participation in proceedings.

The limited scope of the prosecution's cases in Côte d'Ivoire has handed VPRS a particularly difficult challenge. This is true both for those victims who might have suffered harm at the hands of pro-Gbagbo supporters, but are outside of the specific charges in the current cases, as well, of course, for all victims of pro-Ouattara abuses.

Civil society representatives working with victims in Côte d'Ivoire spoke to this:

When we talk with victims, many people see themselves in different incidents to the charges against Gbagbo. They say they are part of the charges but they are not.¹⁷⁵

Victims are not really aware of their rights because of the complexity. When we take the case of Mr. Gbagbo, charges are on the basis of 4 incidents. Some of the victims are not part of those four incidents.... At the national

¹⁷⁴ The OTP, along with the Registry and the court's chambers, are currently developing sets of "quantitative and qualitative indicators" to be used in evaluating the court's performance, pursuant to a request made by states parties at the thirteenth Assembly of States Parties session in December 2014. See ASP, "Strengthening the International Criminal Court and the Assembly of States Parties," ICC-ASP/13/Res.5, annex I, para 7(b) ("requests the Court to intensify its efforts to develop qualitative and quantitative indicators that would allow the Court to demonstrate better its achievements and needs, as well as allowing States Parties to assess the Court's performance in a more strategic manner").

¹⁷⁵ Human Rights Watch group interview with representatives of an Ivorian civil society organization, Abidjan, September 24, 2014.

level, we are trying to assist all the rest of the victims not taken into account by the ICC.¹⁷⁶

At a training session [organized by an international civil society organization], we realized there were many representatives of victims who did not even know that Paolina [Massidda] was appointed to take care of only selected victims. They thought she was appointed for all victims.... Then they realized that the communications system isn't working very well.¹⁷⁷

Selection of victims depends on the selection of cases. The selection of victims depends on a selection of incidents. There have been lots of victims in Côte d'Ivoire. Officially, there are some 3000 victims.... When civil society goes to talk to victims, other victims are asking, but what about us?¹⁷⁸

VPRS has not confined its activities to events only aimed at reaching potential case victims. Its field-based staff person, along with staff on missions from The Hague, conducted approximately 275 sessions between 2013-2015 with civil society actors, including victims groups, to discuss a variety of topics including the role of the ICC, victims' rights, and participation before the court. Indeed, in the absence of an outreach officer in Abidjan, VPRS's staff person in the field served as a general point of contact for civil society organizations with diverse constituencies. Security considerations, however, initially limited its activities to Abidjan.¹⁷⁹

But its ability to sustain these broader activities has been curtailed during certain points in the proceedings, namely, where decisions of the judges set in motion proceedings to solicit and adjudicate applications for the participation of victims in the cases. During

¹⁷⁶ Human Rights Watch group interview with representatives of an Ivorian civil society organization, Abidjan, September 24, 2014.

¹⁷⁷ Human Rights Watch interview with representative of an Ivorian civil society organization, Abidjan, September 24, 2014.

¹⁷⁸ Human Rights Watch interview with representative of an Ivorian civil society organization, Abidjan, September 25, 2014.

¹⁷⁹ Human Rights Watch email correspondence with ICC Registry, June 1-9, 2015. Indeed, prior to the issuance of the OTP's Document Containing the Charges (DCC), VPRS does not have sufficient information about the charges, and therefore must direct its activities more broadly. In the Gbagbo case, an amended DCC was issued on January 7, 2013, more than a year after Gbagbo's surrender to The Hague. Given the OTP's sequenced approach to investigations, it was, however, clear from the outset that the OTP's investigations would not extend to crimes committed by pro-Ouattara forces, and that, therefore, victims of those crimes would not be eligible to participate formally in the cases. Ibid.

these periods, given resource constraints, VPRS prioritizes its efforts on those individuals potentially linked to the existing cases.¹⁸⁰

VPRS's prioritization during these periods of potential case victims is understandable in order to meet chamber-ordered deadlines and ensure the rights of victims entitled to participate in case proceedings. Even with additional resources, providing accurate information to potential situation victims without raising unhelpful expectations is no easy task, given the real limits in what they can expect from the court, should they fall outside the scope of any eventual charges aid by the prosecution.

In other ICC situations, including Uganda and the Democratic Republic of Congo, victims who submitted applications to participate in court proceedings, but who have not had the opportunity to exercise any rights before the court—given a lack or near lack of judicial proceedings in which they may have had standing—have been highly frustrated. This may have been mitigated by more continuous contact between the court and these applicants. Ultimately, however, it may have been the result of a discrepancy between expectations about what applications would bring in terms of engagement in proceedings and the reality of that engagement.¹⁸¹ The court's judges have not been receptive to challenges by victims—whether at the investigation phase or after a case has already been open—to the prosecution's framing of the charges.¹⁸²

The discrepancy between expectation and reality—driven by the case law, but also by the court's limited resources, which mean a significant proportion of victims will always fall

¹⁸⁰ Human Rights Watch email correspondence with ICC Registry, November 11, 2014, and June 1-9, 2015.

¹⁸¹ Human Rights Watch telephone conversation with Stephen Smith Cody, director, Atrocity Response Program, Human Rights Center, University of California Berkeley School of Law, June 17, 2015. Based on analysis of what were the limited opportunities for victims in northern Uganda to have standing before the court, Luke Moffett concludes “it is questionable whether victim applications to the ICC are worthwhile, when victims and intermediaries are taking the time and effort to fill in forms, reliving the trauma, and expecting some sort of response from the ICC when in the end the Court is not making the effort to reciprocate by deciding on their applications and taking their views into account.” Luke Moffett, *Justice for Victims Before the International Criminal Court*, pp. 210-211. Frustration in Uganda and DRC may also stem from an even more fundamental discrepancy between victims' motivations in completing application forms, namely a desire for individual material reparation, and what the court is likely to offer. Human Rights Watch telephone conversation with Stephen Smith Cody, director, Atrocity Response Program, Human Rights Center, University of California Berkeley School of Law, June 17, 2015.

¹⁸² See discussion of attempts by victims or rights advocates to challenge the prosecution's framing of the charges in REDRESS, “The Participation of Victims in International Criminal Court Proceedings,” pp. 43-46; Mariana Pena, “Ugandan Victims Raise Concerns in Relation to the Ongwen Case,” *International Justice Monitor*, February 5, 2015, <http://www.ijmonitor.org/2015/02/ugandan-victims-raise-concerns-in-relation-to-the-ongwen-case/> (accessed June 24, 2015); Luke Moffett, *Justice for Victims Before the International Criminal Court*, pp. 115-120.

outside the scope of the charges brought in ICC cases—has led the author of an in-depth study of victim participation and the experience of victims in northern Uganda to conclude that while victims should maintain some basic rights to challenge the prosecution’s selection of charges, it is preferable to shift attention away from what the ICC can offer by way of formal rights to victims. Instead the focus should be on increasing the recognition of those rights in national accountability mechanisms, including through capacity building assistance to national jurisdictions.¹⁸³

An approach that during significant periods of time is so narrowly targeted and driven by the prosecution’s identification of cases, however, may be short-sighted. There is a basic need for the court’s Registry to explain to victims the system of victim participation before the ICC. Because the system distinguishes between victims in ways that may be hard for victims to make sense of, a proactive information strategy with victims is vital to minimize the risk of alienation from the court.

In situations where investigations are ongoing, as in Côte d’Ivoire, there may eventually be proceedings in which additional victims are eligible to participate. If these victims are not included in the court’s programs regarding victim participation from the outset, it may be difficult for the court to subsequently bridge this lack of engagement.

Given the court’s complex case law on victim participation, and high expectations and misperceptions about the ICC within affected communities, it is hard to overstate the importance of getting it right when it comes to engaging victims. The organs of the court should explore avenues available to increase opportunities to benefit from the experiences of victims early on in investigations, thus increasing engagement with those victims and the court’s potential impact.

¹⁸³ Luke Moffett, “Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague,” *Journal of International Criminal Justice*, vol. 13 (2015), pp. 281-311.

VII. Increasing Impact through Registry Strategies

The Registry has a diverse set of mandates relevant to increasing the effect and impact of the court’s interventions in its situation countries. As set out above, these include implementing outreach programs, and facilitating the participation of victims in proceedings before the International Criminal Court, as well as establishing and operating field offices to support these and other court activities. Rather than viewing these mandates independently, the Registry should adopt Registry-wide, country-specific strategies for ensuring impact.

This approach should move the Registry away from its current practices, which, in our assessment, have risked over-prioritization of judicial developments.

As illustrated by this report, in outreach efforts and those activities aimed at facilitating victim participation in Côte d’Ivoire, the ICC’s Registry appears to have closely tracked the choices made by the Office of the Prosecutor or requirements set down by the judges. To a significant degree, outreach and victim participation-related initiatives have prioritized providing information to those victims who could potentially participate in the cases brought by the OTP.

Given the limits in the OTP’s cases—which relate to incidents only within Abidjan and which do not yet concern crimes committed by all sides to the violence—this may have doubled-down on the OTP’s selective approach, rather than making the most of opportunities to engage with Ivorians more broadly.

Instead, Registry-wide strategies should seek to define, from the earliest onset of Registry activities in a particular country, how the Registry’s mandates can contribute to impact and, on the basis of these strategies, appropriate action plans should be developed.

Registry-wide strategies for impact should allow deeper engagement with questions not yet adequately addressed in the Registry’s strategic planning, including when to increase the court’s visibility within affected communities and how to engage with national authorities through positive complementarity, to increase the court’s long-term impact, or legacy. In addition, by bringing the Registry’s mandates together into a single strategy this should promote coordination between its sections and units.

Although our research for this report was limited to Côte d'Ivoire and Mali, it is also based on our observation of the court's work across its eight situation countries. The court's practice in these two countries raises questions that are likely to be relevant in other ICC situation countries, and, therefore, we recommend the adoption of Registry-wide strategies for each ICC country.

These strategies should be country-specific and rooted in a deep appreciation of the context in which Registry mandates will be carried out. In addition to an assessment of the court's logistical, security, and resource requirements, this should include a political analysis of the situation; an evaluation of national capacity to support investigation and prosecution of international crimes (both in order to benefit the court's own activities as well as its positive complementarity initiatives); and mapping of victim communities and sources of information available within these communities, as well as their baseline perceptions (and those of the general public) of the ICC.

Indeed, the Victims Participation and Reparations Section and the Outreach Unit already have established practices of mapping victim communities and the media. The Outreach Unit has also benefited from population-based surveys on perceptions of the ICC and justice carried out by external actors, as with the study in Côte d'Ivoire cited above. These analyses should be brought together to benefit a more comprehensive approach across the Registry.

While each strategy will need to be tailored to the specifics of a given situation country, it may be possible for the Registry to develop a template for impact, which can then provide a head start on situation-specific planning. A similar approach has been used by the Registry in the planning of field operations, as well as outreach programming. The Registry should consider developing indicators relevant to the implementation of these strategies, and, in turn, deepening impact, as part of current efforts to put in place court-wide performance indicators, as previously discussed.

These strategies will need to be dynamic and flexible, and should be updated as needed according to developments, including those driven by the court and those on the ground. In addition, these strategies will need to be developed in light of information available to the Registry about the OTP's anticipated activities, including the scope and pace of investigations, and updated as the OTP moves forward in its work. To this end, close

coordination and information sharing with the OTP is necessary, while respecting the independence and confidentiality of the OTP’s activities.

It is likely that such an approach by the Registry will also benefit the court’s judges in their decisions regarding victim participation and holding in situ proceedings. In the past, the Registry has been tasked by ICC chambers to develop feasibility studies for holding in situ proceedings. A central mandate of VPRS has been to advise chambers of systems of victim participation, as well as the appointment of common legal representatives. Improved strategic planning by the Registry can improve the advice offered to judges in both regards.

A. Making the Most of Recent Reforms

Recent changes to the Registry’s structure through its *ReVision* process put Registry officials and staff in a good position to make the most of this recommendation.

As discussed in Part II, field offices will now be headed up by a new, senior-level position, the “chief of field office.” The presence of a high-level Registry staff member on the ground could itself be a driver for more impact-sensitive approaches; it should strengthen the voice of field-based staff in court policy debates, a critical gap in the past.¹⁸⁴

These chiefs of field offices could play at least three important roles when it comes to Registry-wide strategies for impact.

First, they should be able to provide high-level strategic advice, based on deep knowledge of the country situation, and should therefore play a leading role in developing these strategies. This could be done in close coordination with those sections based in The Hague with long-experience in the field, including VPRS and the Outreach Unit. Where the ICC does not yet have a field office, the capacity to develop these strategies will need to be located elsewhere within the DER.

Second, given their oversight of other Registry staff in the field, they should be able to bring about the coordination between Registry mandates to implement a comprehensive strategy.

¹⁸⁴ See Human Rights Watch, *Courting History*, pp. 108-109.

Third, the chiefs of field offices, given their seniority, may be in position to engage authorities and international partners in ICC situation countries regarding capacity building programs within the national justice sector. While the ICC is not a development agency, there are a number of ways in which court staff can contribute to capacity building efforts, including by sharing expertise on international criminal law, investigations, and witness protection with national professionals. Given that the ICC is likely to bring only a limited number of cases to trial in each situation country, its efforts in this regard to help spur national prosecutions could be an essential element of increasing the effect of the court and its long-term legacy. Through engaging with national authorities and the donor community in a situation country, chiefs of field offices may be well-positioned to identify opportunities for court staff to contribute to existing capacity building efforts and to provide guidance to other actors as to important gaps in existing programming.

B. Specific Recommendations for Registry-wide Impact Strategies

Our research for this report suggests that in developing strategies for impact, the Registry may want to keep the following considerations in mind.

First, as indicated above, the Registry's strategies will need to be developed through close coordination with the OTP and guided by judicial developments. But they should aim at carrying out mandates in a manner that deepens engagement, recognizing that opportunities for impact, as well as information needs within affected communities will not always be tied to judicial developments. Opportunities for impact may sometimes exist independently of specific judicial developments.

Second, outreach, and the recruitment of outreach specialists to join the chief of field office as soon as possible, should be prioritized. Although the ICC has long recognized the importance of early outreach, this was not matched by practice with regard to Côte d'Ivoire. The Registry's decisions have been constrained by available resources, but going forward, the Registry should prioritize planning for sufficient outreach specialists—usually more than one staff member—from the outset of court activities. Although the chief of field office may be able to shoulder some responsibilities for public information, outreach specialists will be needed to develop and implement broad strategies for reaching affected communities.

Third, there should be a realistic assessment of the degree to which the court can depend on civil society organizations when it comes to outreach. These are, in the first instance, court responsibilities, mandated through the Rome Statute, court regulations, court policy documents, and Assembly of State Parties resolutions.¹⁸⁵ But, in addition, as set out above, there are real limits to what civil society can do on behalf of the court. While the ICC should engage civil society as part of its outreach and victim participation strategies, and some civil society organizations or representatives may be in a position to assist in the delivery of outreach programming, the ICC should not depend on these partnerships to the exclusion of the court's own activities. The Registry should ensure that its budget requests contain correspondingly adequate resources for outreach.

Fourth, multidisciplinary teams hold out the promise for increased coordination between the Registry's mandates, particularly when it comes to impact. But it is important to guard against the risk that they could result in the conflation and ultimately the diminution of the court's outreach and victim participation activities.

It may be tempting to consider the outer limit of outreach to be informing potential victims of their rights to participate in cases. But, as discussed above, the court's case law defines as potential victims of the case only those victims concerned by specific charges. This will always be a narrow subset of victims, and, depending on the prosecutor's charges, may exclude significant communities of victims. Robust outreach strategies are needed to ensure the ICC's broad engagement within situation countries.

Indeed, if accepted as participants in cases, these victims also have access to their legal representatives, who, along with their field-based teams, can play an essential role in providing information to their clients. This may limit the need for court staff to duplicate information to these specific individuals.

Similarly, sufficient resources need to be allocated to providing information about the victim participation system in order for the court to both ensure potential case victims are informed of their rights, as well as to engage victims on a more sustained basis in the pre-investigative and investigative phases of situations. Engaging victims is unlikely to be possible solely through broad outreach activities, given the risks that may be associated

¹⁸⁵ See Part V above.

with individuals identifying themselves as victims and seeking information about their potential standing before the court.

C. Ensuring Adequate Resources to Support Impact

As noted throughout this report, limits in the court’s available resources have forced trade-offs that may have undermined the court’s impact, at least in Côte d’Ivoire. These include delays in starting investigations against pro-Ouattara forces, the slow deployment of a field based officer to support outreach, and a need to prioritize efforts directed at potential case victims, as opposed to sustaining broader efforts to engage potential situation victims, during certain periods of proceedings.

ICC states parties, which fund the court’s budget, have provided increases to the OTP over the past two years, but its resources still fall short of what is needed to support case selection strategies that reflect the experiences of affected communities, given that such strategies are likely to require bringing at least some additional cases.

Meanwhile, resources available to the court’s Outreach Unit have flatlined.

In 2010, the approved annual budget for the Public Information and Documentation Section (including the Outreach Unit) was €3,279,100. At the time, the ICC had five open situations under investigation. For 2015, with four additional situations under investigation, including a new investigation in the Central African Republic, the court requested an annual budget for the Public Information and Documentation Section of €3,482,700, amounting to an increase (in non-real terms) of €203,600 or just over six percent as compared to the 2010 approved annual budget.

As noted above, the Trust Fund for Victims has been unable to expand its assistance mandate, primarily because of its limited resources. The absence of the Trust Fund from more ICC situation countries represents a missed opportunity for the Rome Statute system to have an immediate impact in the lives of at least some victims.

The Registry has indicated that it can implement its *ReVision* reforms within its current budget (a total of €65.02 million) and its current staffing levels (496 established posts, along with 65.4 posts full-time equivalent posts funded through general temporary

assistance).¹⁸⁶ This includes the high-level chiefs of field offices, described above, in at least some field offices and a commitment to bolster the now-renamed Press Information and Outreach Section to improve outreach strategies.¹⁸⁷

Nonetheless, it may be the case that implementing more robust strategies for impact, whether to conduct additional investigations or to scale up outreach, victim participation, and/or other field-based activities, will require additional resources. ICC states parties should be willing to consider and support these resources on the basis of clearly articulated strategies by court officials. The court should have the resources it needs to carry out its mandate in a way that seeks to maximize impact. Any other approach risks squandering the investment ICC states parties have already made.

¹⁸⁶ See ASP, “Report on the review of the organizational structure of the Registry,” paras. 32-24.

¹⁸⁷ Ibid., para. 29.

Appendix: The ICC in Côte d'Ivoire

September 19, 2002: Northern rebel group, Patriotic Movement of Côte d'Ivoire (Mouvement Patriotique de Côte d'Ivoire, MPCI), launches attacks on Abidjan, as well as northern towns of Bouaké and Korhogo, seeking to depose the then-government of Laurent Gbagbo.

October-December 2002: MPCI consolidates control of the northern half of Côte d'Ivoire and forms alliance with two further rebel groups from the west to create a political-military structure called “Forces Nouvelles”. Clashes between government forces and Forces Nouvelles continue in the center and, particularly, the west of the country.

April 18, 2003: Gbagbo government makes an article 12(3) declaration, accepting the jurisdiction of the International Criminal Court (ICC) for events since September 19, 2002. Conflict between Forces Nouvelles and government forces was marked by grave crimes committed by all sides, particularly in Abidjan and the west.

May 2003: A ceasefire agreement is signed formally ending active armed conflict although occasional breaches continue through 2005. The country is now split in two—as it would remain through 2010—with the Forces Nouvelles controlling the north and the government the south. Severe human rights violations against civilian populations continue in both parts of the country.

February 27, 2004: UN Security Council establishes peacekeeping mission in Côte d'Ivoire (UN Operations in Côte d'Ivoire, UNOCI), which monitors a buffer zone from the east to west of the country that separates the opposing forces.

March 4, 2007: President Gbagbo and Forces Nouvelles-head Guillaume Soro sign the Ouagadougou Political Agreement, which resulted in Soro’s appointment as prime minister and provides for presidential elections, eventually held in 2010.

July 2009: ICC Office of the Prosecutor mission to Côte d'Ivoire to participate in civil society event.

November 28, 2010: Alassane Ouattara, a former prime minister, announced the winner in a second round of presidential elections, a result certified by UNOCI and endorsed by the wider international community. Incumbent president, Laurent Gbagbo, rejects the election result.

December 2010-April 2011: Gbagbo's refusal to step down leads to five months of violence, in which Ouattara's newly-created Republican forces—comprised primarily of former Forces Nouvelles—oppose Gbagbo security forces and militia groups. At least 3,000 civilians killed in attacks perpetrated along political, and, at times, ethnic, and religious lines by forces affiliated with both sides of the conflict.

December 14, 2010: Ouattara confirms the validity of the earlier article 12(3) declaration and asks the ICC to examine all crimes committed since March 2004.

April 11, 2011: Republican Forces arrest Laurent Gbagbo and his wife, Simone.

May 3, 2011: Ouattara reaffirms his December 2010 declaration to the ICC, this time asking the court to examine crimes committed after the November 28, 2010, election.

May 19, 2011: The ICC prosecution notifies the court's presidency of its intent to seek authorization to open an investigation in Côte d'Ivoire.

June 17, 2011: The ICC prosecution notifies victims and their legal representatives of its intention to request authorization to open an investigation into the situation of Côte d'Ivoire and informs victims under Rules of Procedure and Evidence 50 they have 30 days to make their representations to the pre-trial chamber pursuant to article 15(3) of the Rome Statute.

June 23, 2011: The ICC prosecution files its formal application before the court's pre-trial chamber seeking authorization to open an investigation.

October 3, 2011: ICC judges authorize its prosecutor to open an investigation, initially for crimes committed after November 28, 2010. ICC investigators arrive in Côte d'Ivoire to start investigations.

October 25, 2011: The prosecutor files an application for a warrant of arrest against former President Gbagbo.

November 2011: The ICC Registry's Outreach Unit and Victims Participation and Reparations Section arrive for a first joint mission in-country.

November 23, 2011: ICC arrest warrant issued under seal for Laurent Gbagbo.

November 30, 2011: The ICC arrest warrant for Laurent Gbagbo is unsealed and the government of Côte d'Ivoire surrenders Gbagbo to the ICC. His wife is placed under house arrest.

December 21, 2011: ICC issues arrest warrant under seal for Charles Blé Goudé, Gbagbo's former youth minister, close ally, and the longtime leader of a violent pro-Gbagbo militia group.

February 2012: Memorandum of understanding is signed between the ICC and the Ivorian government, paving the way for the ICC to open a field office in Abidjan.

February 29, 2012: The ICC issues arrest warrant under seal for Simone Gbagbo.

November 22, 2012: The arrest warrant against Simone Gbagbo is unsealed. She remains in Côte d'Ivoire, as the government challenges the admissibility of her case before the ICC.

February 19-28, 2013: Confirmation of charges hearing in Laurent Gbagbo case.

February 15, 2013: Côte d'Ivoire ratifies the Rome Statute.

June 3, 2013: An ICC pre-trial chamber finds that the ICC prosecution failed to put forward enough evidence to send the case against Laurent Gbagbo to trial. Rather than dismiss the case, however, they give the prosecution more time to bring additional evidence.

January 18, 2013: Blé Goudé is extradited from Ghana to Côte d'Ivoire.

September 2013: The ICC field office opens in Côte d'Ivoire.

September 30, 2013: The arrest warrant against Blé Goudé is unsealed.

March 22, 2014: Blé Goudé is surrendered to The Hague by Côte d'Ivoire.

June 12, 2014: ICC judges confirm charges against Laurent Gbagbo.

September 29-October 2, 2014: ICC confirmation of charges hearing for Blé Goudé.

October 2014: ICC field outreach officer deployed to Côte d'Ivoire.

December 11, 2014: An ICC pre-trial chamber confirms the charges against Blé Goudé.

March 11, 2015: An ICC trial chamber decides to join the cases of Gbagbo and Blé Goudé.

November 10, 2015: A joint trial of Gbagbo and Blé Goudé before the ICC scheduled to start.

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MAKING JUSTICE COUNT

Lessons from the ICC's Work in Côte d'Ivoire

The International Criminal Court (ICC), a court of last resort, has an essential role to play in delivering justice for mass atrocity. The ICC faces significant challenges, however, in ensuring that its proceedings not only deliver justice but also have impact—that is, that they are meaningful, accessible, and perceived as legitimate—in communities affected by the crimes to be tried before the court. Ensuring such impact requires a focus by court officials.

This report, *Making Justice Count: Lessons from the ICC's Work in Côte d'Ivoire*, examines the ICC's engagement in Côte d'Ivoire and assesses whether court actors have taken the steps necessary to ensure that the court achieves maximum impact.

In October 2011, the ICC prosecutor opened investigations into abuses committed during the country's 2010-2011 post-election violence. Investigations are ongoing, but, to date, only cases for crimes allegedly committed by one side to the violence have been opened before the ICC. This has polarized opinion about the ICC, limited redress for some victims, and created steep challenges for other ICC actors in delivering neutral information about the court and engaging victims.

The report also finds that these other court actors within the ICC registry tied their own strategies closely to the decisions made by the prosecution in framing its existing cases, missing opportunities to broaden the court's engagement. Resource constraints have been an important factor, the report finds.

Making Justice Count recommends that the ICC prosecutor strengthen consultations with victims to ensure cases are responsive to their experiences. It recommends that the ICC Registry make the most of envisioned reforms, including a bolstered presence in countries, to implement strategies designed to increase the court's impact on the ground.



A newsstand in Abidjan displays the day's papers on October 1, 2014, including headline coverage of a pre-trial hearing then underway in a case before the International Criminal Court stemming from Côte d'Ivoire's 2010-2011 post-election violence.

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