

BEYOND COMPLEMENTARITY:  
THE INTERNATIONAL CRIMINAL COURT  
AND NATIONAL PROSECUTIONS,  
A VIEW FROM HAITI

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INTRODUCTION

The Rome Statute of the International Criminal Court (ICC Statute or Statute)<sup>1</sup> is an important victory against impunity for the large-scale human rights violations that occur all too frequently. Yet international prosecutions are only one tool in the struggle for ac-

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1. *Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, U.N. Doc. A/Conf.183/9 (1998) [hereinafter ICC Statute or Statute].

countability and should be used as a backup to national prosecutions. National prosecutions should remain the primary option, wherever feasible, because they can handle many more cases and are usually preferable from the perspectives of victims and local justice systems. The ICC Statute recognizes the primacy of national courts, since one of its guiding principles is that the International Criminal Court (ICC or Court) shall be complementary to national criminal jurisdictions.

However, complementarity and the Statute's provisions for assistance to local judiciaries are not enough. If the ICC is to have a noticeable impact on the majority of human rights cases, if prosecution of those responsible for large scale human rights abuses is to be the rule rather than the exception,<sup>2</sup> and if this century is not to repeat last century's "millions of . . . victims of unimaginable atrocities,"<sup>3</sup> the ICC will have to do more. It will need to go beyond complementarity and systematically integrate assistance to local judiciaries into its work.

This Article will use Haiti's experience in coming to terms with the human rights violations of its 1991–94 dictatorship as a point of departure for discussing why the Court should support local prosecutions and how it could do so. Haiti provides a good example because although justice for the dictatorship's victims is both a popular and a governmental priority and the government has implemented a host of initiatives to achieve it, the results thus far have been disappointing. Many of the difficulties encountered are the result of trying to achieve justice during a democratic transition. Other problems stem from the government's lack of resources. The ICC is particularly well placed to help countries whose will for justice is frustrated by poverty and the challenges of a democratic transition.

Part I of this Article will discuss Haiti's efforts to provide justice for the coup victims and analyze the obstacles encountered along the way. Part II will focus on the ICC Statute and on ways the Court could maximize its assistance to countries like Haiti. These would in-

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2. See generally M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 14 *Nouvelles Études Pénales* 45 (1998); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale L.J.* 2537 (1991).

3. ICC Statute, *supra* note 1, preamble. See Jennifer Balint, *An Empirical Study of Conflict, Conflict Victimization, and Legal Redress*, 14 *Nouvelles Études Pénales* 101, 107 (1998).

clude: 1) helping to train prosecutors and judges from countries that need it the most; 2) helping to obtain evidence; 3) helping with arrests; and 4) effectively using the threat of ICC jurisdiction to encourage national trials.

## I. CRIME AND PUNISHMENT: HAITI'S EXPERIENCE

### A. Crimes Against Humanity in Haiti, 1991–1994

The coup d'état of September 30, 1991 ended Haiti's first experiment with a freely elected government. With the support of the country's economic elite, a military junta<sup>4</sup> overthrew and exiled President Jean-Bertrand Aristide, the landslide winner of Haiti's first democratic elections nine months earlier. Hundreds of thousands of pro-democracy protesters took to the streets throughout the country, wielding signs and photographs, clanging pots and pans. Soldiers shot into the crowds, killing hundreds of people in the first days of the coup. The Haitian people continued their nonviolent resistance for three years, and the coup participants continued to repress them. Between 4,000 and 7,000 people were murdered, over 60,000 forced to the high seas as "boat people," 300,000 internally displaced, and countless more were victims of illegal arrests and torture, including beatings and rapes, as well as theft and destruction of property.<sup>5</sup>

The crimes perpetrated against the Haitian population were committed by both regular troops and paramilitary terrorist organizations, often working in concert.<sup>6</sup> Although some terror was random, much was systematic, coordinated at the national level, and precisely

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4. See Notification of Blocked Individuals of Haiti, 58 Fed. Reg. 58480 (Nov. 1, 1993) (listing people determined by the United States Government to have participated in or supported the coup).

5. See generally Si M Pa Rele, Rapport de la Commission Nationale de Verité et de Justice (1997) [hereinafter Truth Commission Report], <http://www.haiti.org/truth/table.htm>. See also Irwin Stotzky, *Silencing the Guns in Haiti* (1997); Commission Justice et Paix du Diocèse des Gonaives, *La Répression au Quotidien en Haiti 1991–1994* (Gilles Danroc & Daniel Roussièrè eds., 1995); Human Rights Watch/Americas, *Terror Prevails in Haiti: Human Rights Violations and Failed Diplomacy*, at 5–7 (1994).

6. Truth Commission Report, *supra* note 5, <http://www.haiti.org/truth/chapit7.htm#Top>.

targeted at leaders and participants in Haiti's vigorous grassroots groups and pro-democracy movement. Several prominent Aristide supporters were assassinated, notably businessman Antoine Izmary, Minister of Justice Guy Malary, and Father Jean-Marie Vincent.<sup>7</sup> These crimes would have fallen squarely within the ICC's mandate as crimes against humanity, as they were widespread and systematic, pursuant to a state policy, and knowingly directed against a civilian population. The Court cannot, however, prosecute crimes that occurred before its entry into force.<sup>8</sup>

Much of the repression occurred while the world was watching and recording. Reporters, photographers, and television crews regularly patrolled Haiti's streets for atrocities, and had little difficulty finding them. The Mission Civile Internationale en Haïti (MICIVIH), a human rights observer mission created jointly by the United Nations and the Organization of American States, spent most of the coup years in Haiti or across the border in the Dominican Republic. Human rights and solidarity groups regularly visited Haiti and reported on the repression,<sup>9</sup> and members of Haitian human rights organizations risked their lives to issue regular reports.<sup>10</sup> In fact, the murder of Antoine Izmary took place outside a crowded, public, church service, in full view of MICIVIH observers, members of the diplomatic corps, and the foreign press. Given the high degree of visibility of the acts of violence, there should have been an abundance of evidence available for later prosecutions.

In September 1994, a multinational force with a UN Security Council mandate and led by the United States entered Haiti and forced the coup leaders to relinquish power. In the following months, most of the high military and paramilitary leaders left the country

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7. *Id.*, <http://www.haiti.org/truth/chapit4.htm#Top>.

8. ICC Statute, *supra* note 1, art. 7.

9. Groups that reported on human rights violations in Haiti under the *de facto* regime included the Inter-American Commission on Human Rights, Human Rights Watch, Amnesty International, National Coalition for Haitian Refugees, Lawyers Committee for Human Rights, the New England Observers' Delegation, the Quixote Center, and Peace Brigades International/Cry for Peace.

10. Notably, the Plateforme des Organisations Haïtiennes des Droits de L'Homme and the Catholic Church's Commission Justice et Paix issued reports.

for Central America<sup>11</sup> or the United States,<sup>12</sup> and the president disbanded the army.

## B. Prosecuting Human Rights Violations

Systematic trial of those responsible for large-scale violations of human rights has never been easy at a time of transition,<sup>13</sup> and Haiti is no exception. The coup victims have incessantly demanded justice, and the government has made repeated, if not always successful, efforts to provide it.<sup>14</sup> Initiatives to advance prosecutions include a national project to collect victim testimonies<sup>15</sup> and a national

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11. Generals Raoul Cédras, the head of the army, and Philippe Biamby, his second-in-command, flew in planes supplied by the United States to Panama. The U.S. rented three of Cédras' houses for Embassy personnel at \$15,000 per month. Lt. Col. Michel François, considered by many the muscle behind the coup, went to the Dominican Republic and subsequently to Honduras, where he survived extradition demands from the U.S. (for cocaine trafficking) and Haiti (for murder). Catherine Orenstein, *Haitian Putschist Hits Florida Jackpot*, NACLA Report on the Americas, Sept.–Oct. 1997, at 1.

12. See Steve Fainaru, *U.S. Is a Haven for Suspected War Criminals*, Boston Globe, May 2, 1999, at A1 (Col. Carl Dorélien, the head of personnel for the army under the coup, reports that 15 high ranking former military personnel, including the entire high command except for Cédras and Biamby, emigrated to the United States); Catherine Orenstein, *supra* note 11, at 1 (Dorelien won \$3.2 million in the July 1997 Florida state lottery). Emmanuel Constant, the acknowledged head of FRAPH, the most prominent paramilitary organization, lives in New York despite a 1995 deportation order from an immigration judge. *In re Emmanuel Constant*, No. A 74 002 009 (Immigration Ct. 1995). Catherine Orenstein, *Haitian Refugee*, The Village Voice, Aug. 12, 1997, at 49 (describing a secret deal between Constant and the U.S. Department of Justice, where Constant refrains from speaking to the press in return for the suspension of his deportation, and the New York City Council calling for his deportation). See also Catherine Orenstein, *The Death Squad Kid*, In These Times, Nov. 29, 1998, at 9; Ron Howell, *Haunted by Haiti Violence*, N.Y. Newsday, Aug. 21, 2000, at A4.

13. See Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past*, 20 Law & Soc. Inquiry 7, 20 (1995) (“There has probably been no historical instance where anything remotely like a full policy of criminal accountability has been implemented.”).

14. See generally Mission Civile Internationale en Haïti, OEA/ONU, *Haiti: La Lutte Contre l'Impunité et pour la Réparation en Haïti* (1999).

15. The most prominent of these was the “Bureau des Doléances,” a Presidential initiative of offices in the regional departments with staff to record victim testimony. Each Bureau was to pass its information on to the local prosecutor for use in preparing complaints. Although the Bureau did gather substantial amounts of testimony in some areas, local prosecutors rarely made use of the information. See *id.* at 5–6.

program of legal assistance to victims.<sup>16</sup> The government has established special teams of prosecutors and judges,<sup>17</sup> a Special Investigative Unit of the national police dedicated to human rights cases, and the Bureau des Avocats Internationaux (BAI), a group of lawyers from Haiti and abroad assisting the judiciary with the prosecutions.<sup>18</sup> Related initiatives include programs to “find the truth” about the repression,<sup>19</sup> as well as programs for victim reparation,<sup>20</sup> law reform,<sup>21</sup>

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16. In 1995 and 1996 the government attempted to set up a national network of lawyers to help victims with their cases. This effort failed because it proved difficult to find lawyers who would aggressively pursue the cases. The intransigence of the local judiciaries was also a factor.

17. The first such team, UPENA (“Unité Pénale Nationale”) was composed of selected judges and prosecutors and received specialized training at the Judicial Academy. It never started to actually work on cases, and is now defunct. See Rodolfo Mattarollo, *The Transition to Democracy and Institution Building: The Case of Haiti*, 14 *Nouvelles Études Pénales* 483, 495 (1998). The Ministry of Justice set up less formal but eventually more effective teams for other cases.

18. The BAI has existed since 1995 and targets notorious human rights violations. BAI lawyers work with the victims to prepare complaints and coordinate with prosecutors, judges, police, and national officials to advance the prosecutions.

19. The Commission Nationale de Verité et de Justice (Truth Commission or CNVJ) started work in April, 1995, and presented its report, *Si M Pa Rele* (If I Don’t Cry Out), to the government in February, 1996. See Truth Commission Report, *supra* note 5. Although the report’s information is useful for prosecutors in that it helps locate witnesses and confirm their stories and provides background information for specific cases, the CNVJ’s mandate was expressly not a judicial one. *Id.* The Truth Commission report does play a role in the broader debates about justice, as its recommendations for prosecutions still carry much weight.

20. Soon after its reestablishment, the democratic government provided medical and housing assistance and jobs to human rights victims in a non-systematic way. In 1997, the Ministry of Justice attempted to systematize this work through an office called *Le Bureau Poursuites et Suivi*. See *Le Bureau Poursuites et Suivi & Les Victimes du Coup d’État de 1991–94*, Ministère de la Justice et de la Sécurité Publique, Haiti, *Bilan et Perspectives* (1999). That program proved controversial, and was terminated in April 1999. The Ministry of Justice has met with human rights and victim’s groups in order to plan a replacement, but there is no program yet in place. The government has provided assistance to victims of specific events, especially those of the December 1993 FRAPH arson in Cite Soleil, who received either a new house or compensation in August 1999, and those of the April 1994 Raboteau massacre, who have received some monetary compensation and training.

21. See Commission Préparatoire à la Réforme du Droit et de la Justice du Ministère de la Justice et de la Sécurité Publique, Document de Politique Générale (2ème ver., 1998) [hereinafter Report of the Commission for Law Reform].

and commemoration.<sup>22</sup> Haitian non-governmental organizations (NGOs) and foreign organizations have also sponsored initiatives to provide medical treatment for victims,<sup>23</sup> to encourage their psychological rehabilitation,<sup>24</sup> and to advocate for a systematic policy of victim compensation.<sup>25</sup>

Despite the government's efforts, these initiatives have not come close to satisfying the popular thirst for justice. There have been no systematic prosecutions,<sup>26</sup> few major trials, and even fewer long-term jail sentences.<sup>27</sup> Fortunately, however, neither the gov-

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22. Although no substitute for prosecutions, the Haitian government has made a significant effort to publicly acknowledge the sacrifices of the coup victims. The anniversaries of the coup d'état itself, as well as prominent events such as the Raboteau massacre, major assassinations, and the return to democracy, are publicly commemorated. There is a large statue and park near the National Palace for victims, which has become a focal point for victim organizing. There are also statues for female victims and for Antoine and George Izmerly, Guy Malary, Father Jean-Marie Vincent, and the victims of Raboteau.

23. Médecins du Monde, a French NGO, MICIVIH, and Human Rights Fund, a U.S. Agency for International Development (USAID) sponsored project, have all provided medical treatment for victims.

24. MAP VIV (Mouvement d'Appui aux Victimes de Violence), FAVILEK (Famn Viktim Leve Kanpe), SOFA (Solidarite Famn Ayisyen), and many other Haitian groups, as well as Human Rights Fund, Médecins du Monde, and MICIVIH have all had programs in this area. *See generally* Cécile Marotte & Hervé Rakoto Razafimbahiny, *Mémoire Oubliée* (1997).

25. *See, e.g.*, MAP VIV, *Jalons pour une Politique de Réparation* (1998) (copy on file with author); Mission Civile Internationale en Haïti, OEA/ONU, *Haïti: Droits de l'Homme et Réhabilitation des Victimes* (1997).

26. *See* Mission Civile Internationale en Haïti, *supra* note 14, at 18.

27. In 1995, there were two major trials for the murderers of Aristide supporter Antoine Izmerly and pro-democracy activist Jean-Claude Museau. The Izmerly jury found fourteen defendants guilty, including some high level military and paramilitary operatives. However, all but one, a low level paramilitary, were tried in absentia. (The unreported trial court decision is on file with the author.) The Museau court found only one defendant guilty, and he had fled a few weeks before trial. The author followed the Museau case as human rights observer for MICIVIH in 1995. All information regarding the case comes from a review of the case file and conversations with justice officials working on the case. The year 1996 saw the trial for the assassination of Justice Minister Guy Malary in October 1993. The two defendants were acquitted by the jury. *See infra* note 144 and accompanying text. In 1999, former Sergeant Jean-Fritzel Jean-Baptiste was tried, convicted, and sentenced to five years in prison for torture, attempted murder, and kidnapping. Adama Dieng, Independent Expert of the United Nations Commission on Human Rights, *Introductory Remarks on the Human*

ernment nor the victims show any signs of giving up. The victims continue to organize<sup>28</sup> and to expand their capacity to pressure the government. Fondation 30 Septembre, a victims' group, has held a demonstration near the National Palace every Wednesday since its founding in 1997, modeled after the Mothers of the Plaza de Mayo in Argentina. Human rights groups continue to issue reports decrying the lack of progress on cases, and less structured groups communicate their concern in less structured ways, such as through graffiti<sup>29</sup> and denunciations appearing in the press.

The government continues to try new things, to support initiatives that have proven successful, and to push the system to perform better. As a result, there are more promising cases in the pipeline, most notably the Raboteau Massacre<sup>30</sup> and the Cité Soleil arson cases. In the Raboteau case, five years of work by the special police investigative team, local and national judicial officials, the victims,

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Rights Situation in Haiti, Before the United Nations Commission on Human Rights, 56th Session (Apr. 19, 2000).

28. In addition to existing human rights groups and Fondation 30 Septembre, there has been a significant rise in local victims' organizations and women's groups. The grassroots groups are starting to form federations of groups, based on geography (e.g., the Central Plateau) or issues (e.g., female victims of political violence).

29. Popular inscriptions include, usually in Creole, "No reconciliation without justice," "The Criminals must be judged," and "No Democracy Without Justice."

30. The Raboteau Massacre was a military/paramilitary operation in Raboteau, Gonaives in April 1994. The raid took place in the context of a nationwide clamp-down on pro-democracy activities. Gonaives, and particularly Raboteau, has always prided itself on being a center of resistance to tyranny. During the coup, Raboteau lived up to its reputation as its residents continued to organize demonstrations, hide fugitives, and distribute pro-Aristide literature despite frequent retaliation. On April 22, the de facto authorities decided they had had enough, and in a dawn raid soldiers and paramilitaries went from house to house, beating, looting, and sacking. Those who did not flee were often arrested, beaten, or dunked in the area's open sewers. Those who fled were hunted down, and either arrested and tortured or shot. The attackers even commandeered fishing boats to shoot people who fled into the harbor, their traditional refuge.

The Raboteau trial has become the most prominent human rights trial in Haiti and is receiving special government attention. The *Juge d'Instruction* and prosecutors in the case have been given enhanced logistical support, including a special secure office. Two BAI lawyers, including the author, have worked on the case for five years. There are programs to educate victims and witnesses about the legal process and to provide them medical, psychological, and economic assistance. A team from the police's special investigative unit works on the case full-time and a special office coordinates these initiatives.



and the BAI have led to twenty-two suspects in custody and strong evidence of culpability, including corroborated testimony from a large number of victims and witnesses. The prosecution has obtained reports from experts in forensic anthropology, genetics,<sup>31</sup> and military organization,<sup>32</sup> all of whom are expected to testify at the trial. The investigating magistrate issued formal charges in September 1999, which were upheld by the Appeals Court and by the *Cour de Cassation* (Supreme Court) in May 2000.<sup>33</sup> The trial, which began in September 2000, was still underway at this writing.

### C. Obstacles to Results

The uneven success of Haiti's efforts reflects neither a state policy of impunity nor a lack of popular interest, but rather the difficulty of a poor country providing justice in a democratic transition. The obstacles to justice can be grouped into six main categories: 1) the structure and historical role of the justice system; 2) the need to balance competing governmental priorities; 3) resistance to prosecution within the society; 4) difficulties in gathering and preserving evidence; 5) difficulties in arresting suspects; and 6) general feelings of insecurity. Each category includes barriers that are deeply rooted and systemic, as well as those that can be addressed more easily. However, they all coexist and mutually reinforce one another to frustrate even the strongest of commitments to justice.

#### 1. The Justice System

The largest single obstacle to prosecutions in Haiti is the legal system itself. It functions poorly in general, and worse with respect to human rights cases. A long history of undemocratic govern-

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31. A team of forensic anthropologists, invited by the CNVJ and under the auspices of the Argentine Forensic Anthropology Team and the Human Rights Program of the American Association for the Advancement of Science, conducted research on the Raboteau massacre in 1995. More research, including DNA identification, was sponsored by MICIVIH in 1997 and 1998. See An Inter-American Team of Forensic Anthropology Consultants, *Forensic Anthropology Investigation: A Report for the Haitian Commission on Truth and Justice* (1995).

32. Two experts from the Centro de Militares para la Democracia Argentina, under the auspices of MICIVIH, investigated and wrote a report on the responsibility of the military hierarchy in the massacre.

33. Unpublished decisions on file with the author. See also David Stoelting, *Enforcement of International Criminal Law*, 34 Int'l Law. 671 (2000).

ment, capped by the thirty-year dictatorship of Francois and Jean-Claude Duvalier (1957–1986) and followed by eight years of turmoil and repression, have left a system unaccustomed to applying the rule of law and unprepared to manage its caseload efficiently. In addition, neither the private bar nor the judiciary is equipped or inclined to help human rights victims seek justice.<sup>34</sup>

The judiciary has suffered from chronic under-investment. Until 1995, there had been no significant investment in infrastructure for years.<sup>35</sup> Judges received salaries that required them to work second jobs or to sell justice to get by.<sup>36</sup> There had been no formal judicial training, no continuing education, and very little evaluation or supervision of judicial officials.<sup>37</sup>

The laws themselves are largely unchanged since the early 19th century,<sup>38</sup> leaving a procedure ill-adapted to an early 21st century caseload.<sup>39</sup> Haiti has not ratified most of the international con-

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34. See Lawyers Committee for Human Rights, Paper Laws, Steel Bayonets: Breakdown of the Rule of Law in Haiti 1 (1990) (The report, written before the 1991 coup d'état, opens with "[t]here is no system of justice in Haiti. Even to speak of a 'Haitian Justice System' dignifies the brutal use of force by officers and soldiers, the chaos of Haitian courtrooms and prisons, and the corruption of judges and prosecutors"); National Coalition of Haitian Refugees, No Greater Priority: Judicial Reform in Haiti (1995); Report of the Commission for Law Reform, *supra* note 21; Stotzky, *supra* note 5, at 81 (Haiti's judicial structure is "less developed than that of virtually any nation that has attempted" a democratic transition).

35. For example, the trial court in Gonaives, Haiti's third largest city, was crammed into the second floor of a ramshackle building with no telephone, electricity, or bathrooms. Missing floorboards afforded a view of the court of appeals hearings on the first floor. This situation has improved since 1995, since the Canadian government built courthouses for each of Haiti's trial courts, and now, thanks to national and international investment, most trial courts have minimally adequate facilities.

There has been a similar improvement in supplies. In 1995, many courthouses had no texts, paper, or pens other than what the judges were willing to supply themselves, which was sometimes nothing. Again, due to both national and international investment, notably by USAID, most courthouses have basic legal texts and office supplies.

36. Even after the raises, trial judges interviewed by the author reported that their salaries are \$600–\$700 per month and that most still teach school.

37. This has improved since 1995 as well. Through national and international efforts, an *Ecole de la Magistrature* [Judicial Academy] has been set up, which provides continuing education to judicial officials and a year-long program for new officials.

38. See Report of the Commission for Law Reform, *supra* note 21, at 2.

39. See *id.* at 18 ("La lenteur de la justice haïtienne est proverbiale.").

ventions that could help with the prosecution of human rights cases.<sup>40</sup> The judiciary has little experience with human rights trials or complex cases, and thus little jurisprudence.

More important than physical, financial, and jurisprudential difficulties, Haiti's legal culture and traditions maintain a system that is slow, formalistic, and geared to serve the interests of economic, military, and political powers.<sup>41</sup> For judges, the incentives to sell justice have always been strong, and the possibilities of achieving real justice slight.<sup>42</sup> The political upheavals of the last ten years have exacerbated this trend by culling out anyone likely to take a principled stand in any direction.<sup>43</sup>

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40. International instruments to which Haiti is a party are integrated into domestic law. Haiti Const. art. 276-2. However, Haiti has not acceded to many important human rights instruments, including: 1) Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 2) Convention on the Punishment and Suppression of the Crime of Apartheid, 3) Convention on the Inapplicability of Statute of Limitations to War Crimes and Crimes Against Humanity, 4) Protocol I to the Geneva Conventions of 1949 Relative to the Protection of Victims of International Armed Conflict, 5) Protocol II to the Geneva Conventions of 1949 Relative to the Protection of Victims of Internal Armed Conflict, 6) Additional Protocol to the American Convention on Human Rights Relative to Economic, Cultural, and Social rights, and 7) Inter-American Convention for the Prevention of Torture. These treaties could help with extradition and transfer of information from other countries. Haiti's adoption of these treaties would also incorporate useful international standards into Haitian law, such as the doctrines of command responsibility, statutes of limitation, and the duty to refuse an illegal order. In Rwanda, for example, the ratification of international instruments has proven to be an important and practical advantage in the prosecutions of human rights violators. Daniel de Beer, Commentary: The Organic Law of 30 August 1996 on the Organization of the Prosecution of Offences Constituting the Crime of Genocide or Crimes Against Humanity 14–15 (1997).

41. See Report of the Commission for Law Reform, *supra* note 21, at 2. See also National Coalition for Haitian Refugees, *supra* note 34, at 1–7.

42. In an interview with the author, one Justice of the Peace, who preferred to remain anonymous, reported that he wanted to follow the letter of the law, but with little police protection and not enough money to rent a secure house, he felt too vulnerable to oppose the powerful. He subsequently traded his robes in Haiti for a house painter's brush in Miami.

43. For instance, a judge with ten years experience at the time current President Préval took office in 1996 would have been appointed under the dictatorship of Jean Claude Duvalier, served two years under the dictatorship of Gen. Henri Namphy, five months under a token democracy, another three months of Namphy, eighteen months under Gen. Prosper Avril, eleven months under an interim president appointed from the Supreme Court, nine months under the elected Aristide administration, three years under a dictatorship, and another fourteen months under Aristide. Surviving

The bar has traditionally collaborated closely with the judiciary in serving the interests of the elite. From training and by disposition, very few lawyers are willing and competent to take cases of human rights victims. Even if lawyers are interested in taking these cases, they rarely have the victims' confidence.<sup>44</sup> High barriers to entry allow the bar to replicate itself and maintain this system despite the arrival of democracy.<sup>45</sup>

Despite the historical trends and current obstacles, there are judges, prosecutors, and lawyers in Haiti who would like to be involved in providing justice for the victims of human rights violations. Their efforts are usually frustrated by an intransigent judicial system, a lack of resources, training, and experience, and a paucity of role models.<sup>46</sup>

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such a diversity of masters requires a much different set of skills than does conducting human rights trials.

44. For example, in 1996 the BAI attempted to recruit lawyers in the city of Gonaïves to help in the case of the 1994 Raboteau massacre. At that time, two years after the return of democracy, no lawyers or organizations had offered legal services to the massacre victims, even though one legal assistance organization with foreign funding supposedly targeted the Raboteau area. Although some local lawyers said they would be willing to work on cases if paid, the victims did not trust any of them, so an out-of-town lawyer was hired.

45. After finishing law school, graduates must present a *mémoire*, or thesis. Technical support, access to materials, and advice for this process are not integrated into the curriculum, so students must find a lawyer willing to help them with their proposed topic, for a price. After successfully defending their *mémoire*, candidates must complete a two-year *stage* or internship. Although some internships may be done in the public sector (in a courthouse, for example), the vast majority of candidates must find a senior lawyer in private practice who is willing to supervise them. As a result, although many students are enrolled in Haiti's six law schools, some motivated by the possibility of using the law for social change, fewer than twenty lawyers per year are admitted to practice, most of whom are motivated primarily by money and power. This estimate is based on the author's discussion with lawyers and law students.

Haiti's legal education system is changing, but haltingly. Citizens Network, a Belgian NGO, installed a pilot legal assistance program in 1996 to help law school graduates with their *mémoire* and *stage* in return for lightly paid legal assistance for the poor. According to personnel at the Citizen's Network, although successful and popular, that program was terminated for lack of funding. A new progressive law school in the town of Jérémie graduated its first class in July 1999. The BAI recently started a program to create a core group of progressive, well-trained lawyers to work on human rights cases as lawyers, prosecutors, and judges.

46. Author's conversations with judges, prosecutors and lawyers, 1995–2000.

Victims are alienated from the judicial system, as its structure is designed to exclude them.<sup>47</sup> Most victims cannot pay the high court costs and lawyers' fees.<sup>48</sup> Most are excluded linguistically, as court proceedings are usually in French, while most victims speak only Haitian Creole.<sup>49</sup> Jury pools are also highly exclusive. Although 60–85% of the population cannot read or write,<sup>50</sup> literacy is a prerequisite for jurors in accordance with the Code d'Instruction Criminelle.<sup>51</sup> In practice, the court officials who create the jury list include from the literate fringe only those traditionally deemed qualified by status: law students or graduates, large landowners, wealthy businessmen, and prominent teachers.<sup>52</sup>

Significantly, unlike many nations in similar circumstances, Haiti is spared two common obstacles: an amnesty law and a statute of limitations that would prohibit prosecutions. Although there was substantial pressure by the United States and the United Nations for a broad amnesty upon the restoration of democracy,<sup>53</sup> the actual amnesty decree is narrow, covering only the coup d'état of September 1991 itself. It does not cover consequent murders, acts of torture, and other crimes.<sup>54</sup> In one of the few legislative accomplishments since

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47. See Report of the Commission for Law Reform, *supra* note 21, at 7–11.

48. *Id.* at 16.

49. *Id.* at 17.

50. Alix Cantave, Haitian Studies Association Report, Political and Economic Reconstruction of Haiti, 1926, *available at* <http://www.cas.umb.edu/hsarpt.html> (last visited Dec. 7, 2000) (quoting World Health Organization statistics on illiteracy of 63% for men, 68% for women and noting that the commonly quoted figure is 85% percent overall).

51. Code d'Instruction Criminelle art. 216 (Haiti).

52. The author has been working on jury selection issues for the BAI since 1996. This work includes advising local and national officials and interviewing victims, potential jurors, and local officials.

53. See Michael Scharf, *Swapping Amnesty for Peace: Was There a Duty To Prosecute International Crimes in Haiti?*, 31 *Tex. Int'l L.J.* 1, 8 (1996). See also Naomi Roht-Arriaza, *Conclusion: Combating Impunity*, in *Impunity and Human Rights in International Law and Practice* 300 (Naomi Roht-Arriaza ed., 1995).

54. “Sont amnistiés . . . les auteurs et complices du Coup d'état du 30 Septembre, 1991 qui a entraîné le départ forcé pour l'exil du Président de la République . . .” [“Are hereby amnestied . . . the authors and accomplices of the Coup d'état of September 30, 1991, which led to the forced departure for exile of the President of the Republic . . .” (author's translation)]. See *Le Moniteur* (Official Government Newsletter, Port-au-Prince, Haiti), Dec. 1, 1994, at 55. Some have argued that this could be broadly interpreted to include other crimes committed from 1991–94 in support of the coup re-

the return of democracy, in 1998 Parliament removed the statute of limitations for crimes committed during the coup years.<sup>55</sup>

## 2. Prioritization of Justice

The second category of obstacles in Haiti is political, and includes the question of where the fight against impunity fits among the government's legitimate, often urgent priorities. Haiti is the poorest country in the hemisphere, and among the world's poorest.<sup>56</sup> The education system, after years of upheaval and neglect, is one of the world's worst,<sup>57</sup> and health care is inaccessible to most of the population.<sup>58</sup> Law enforcement had been the bailiwick of the army, which was abolished in 1995, and a new police force had to be built from scratch, with few experienced officers.<sup>59</sup> As usually happens when a democratic regime replaces a repressive one, common crime has increased.<sup>60</sup> With the exception of the 1990, 1995, and 2000 elections, the majority of the population has never effectively participated in electing representatives. Those likely to be elected have lit-

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gime's consolidation. *See, e.g.*, Scharf, *supra* note 53, at 17. This interpretation is inconsistent with President Aristide's actual practice of pursuing cases against the coup criminals, as well as with the language of the decree itself. Furthermore, Aristide showed that he could make a broader decree when he did so under pressure in 1993. That decree was subsequently revoked. The amnesty law has never been successfully invoked in trials for coup era human rights violations. The defense lawyers in the Raboteau case, some of the most experienced in the country, did not even raise the issue of amnesty in their appeals of the charges. The BAI represented the victims on appeal. The author reviewed all submissions in the case and observed the hearings.

55. La Loi sur la Réforme Judiciaire du 8 Mai, 1998 art. 7 (published in *Le Morniteur* (Official Government Newsletter, Port-au-Prince, Haiti), Aug. 17, 1998).

56. Haiti's annual per capita Gross Domestic Product (GDP) is usually calculated at below U.S. \$300. Kevin Watkins, Oxfam International, *Education Now: Break the Cycle of Poverty* 116 (1999), available at <http://www.oxfam.org.au/oxfam/advocacy/education/report/index.html>.

57. According to Oxfam, only Bhutan, Niger, and Ethiopia have worse educational performance. *Id.*

58. Health care for the poor has improved dramatically in the last year, with the arrival of 800 health professionals from Cuba, who offer low cost care in underserved areas. Chris Chapman, *Cuba to Send More Doctors to Haiti Under Aid Pact*, Reuters Newswire, Jan. 19, 2000.

59. *See* Amnesty International, *Haiti: Still Crying Out for Justice* (1998).

60. *See* Wallace Scott, *You Must Go Home Again*, *Harper's Mag.*, Aug. 2000, at 47, 48 (reporting that crime increased in El Salvador following transition); *Fear Felt in Haiti Ahead of Vote*, Associated Press, May 5, 2000.

tle experience governing, because officials who served under the various dictatorships are unlikely to be elected. Since politics has historically been based on acquiring power through means other than pleasing the majority of citizens, there is little tradition of political parties with coherent policy positions.<sup>61</sup>

Although the Haitian government has made justice for coup victims a priority, the need to balance other competing priorities manifests itself in: a) a shortage of resources for justice efforts in general,<sup>62</sup> and for human rights cases in particular; b) the uneven success of programs for human rights prosecutions;<sup>63</sup> c) the slow pace of judicial reform; d) the inability to recruit adequate judges and prosecutors; and e) the inability to get the judiciary to effectively process even simple human rights cases.

The privileging of other important priorities at the expense of human rights trials is frustrating from the perspective of those primarily concerned with justice for the coup victims. However, it does not necessarily indicate a lack of will of the government to prosecute those responsible. An analysis of the impunity problem that ignores the complexity of a poor country's needs and simply classifies the government as one not interested in justice is unlikely to yield results. A more fruitful approach would include concrete strategies to raise justice in the pecking order, through well targeted national and international pressure, and assistance aimed at helping the state overcome some of its real difficulties, both within and without the justice system.

Certain priorities, such as economic and infrastructure development, compete with justice by requiring scarce resources and the energy and time of government officials. Others conflict or are perceived to conflict more directly. Human rights trials, especially in the

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61. This situation has been improving. For the 2000 legislative elections, one party, Fanmi Lavalas, issued a 182-page program document. See Jean-Bertrand Aristide, *Investir dans l'Humain: Livre Blanc de Fanmi Lavalas* (1999).

62. For example, a rookie police officer earns about as much as a chief prosecutor or trial court judge and much more than a Justice of the Peace. Author's conversations with police officers, prosecutors, and judges, 1996–2000.

63. Several initiatives have fallen short because of lack of funding, and many judges and prosecutors claim that they would do more if they were better equipped and protected. In some cases, like the Raboteau and Jean Dominique case, however, the government has provided generous assistance to judges and prosecutors, including a special workroom, transportation, and security.

short term, can put stress on the overall security situation. These trials are sometimes seen as endangering efforts to consolidate democracy, create a stable climate for investment, and develop a police force.<sup>64</sup> Even within the justice system itself, there are tensions between making systemic changes and handling a few potentially incendiary cases, and dealing with current crime or dealing with past crimes. Further tension exists between the need for judges, prosecutors, and police who are not performing well to spend time in training rather than working on the impunity cases.

It is often said that a transitional state's best chance of coming to terms with its past is during the "honeymoon" of the first year of democracy. During the period, before the opposition becomes organized, and while the new government's support is at its highest, the state can devote itself to justice before it loses some of its support, and more importantly, becomes bogged down with other priorities.<sup>65</sup> Haiti, however, enjoyed no such luxury. Within the first fourteen months of restored democracy, the country ran four separate national elections for almost every elective office including President, dismantled the army, and recruited, trained, and installed new forces of police and prison guards.<sup>66</sup>

### 3. Resistance to Prosecution Within Society

In countries transitioning from dictatorship to democracy, the amount of power retained by the former oppressors or their political and financial allies varies. In Rwanda, for example, the transition was so abrupt that there is little vestige of the former rulers. In Chile, on the other hand, the power structures remained largely intact after the arrival of formal democracy. To the extent that the old guard retains power, the transitional government is forced to compromise with it, and to expend energy overcoming internal resistance to any reform, including justice for human rights victims.

Haiti faces less resistance to prosecutions than many other transitional societies because it abolished the army, and, at least

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64. In the long term, however, these political and economic goals cannot be achieved without progress in the judicial arena.

65. Roht-Arriaza, *supra* note 53, at 282.

66. The author observed the four elections as part of the Organization of American States' electoral mission. He worked with the new prison guards and police with MICIVIH in 1995 and 1996 and with the BAI from 1996–2000.



numerically, the coup supporters were very small while the coup victims were very large. Yet in the transition to democracy, the financial elite who backed the coup retained their old power. The military and paramilitary groups are at least perceived to have some capability,<sup>67</sup> and the civil service is still full of those hired under one dictatorship or another. In Haiti's tightly knit society, most people, even most victims, have some relationship with someone accused of human rights violations. Therefore, although there is no public resistance or opposition to the prosecution of human rights cases, the prosecutions must overcome significant resistance within Haitian society.

Some of this covert resistance comes from former army members. The army, although disbanded, has not disappeared. Former members continue to organize politically,<sup>68</sup> and most of the former high command still meet in Florida, where they live in exile.<sup>69</sup> Despite requests from the Haitian government, the multinational force never attempted systematic disarmament of military or paramilitary personnel.<sup>70</sup> It is widely believed that former soldiers and paramilitaries still possess their guns.<sup>71</sup> In addition, former members of the military recycled into the new civilian police force make up about a third of the force, and almost all of its leadership, especially the police *commissaires*.<sup>72</sup> The military in Haiti generated substantial insti-

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67. 18 Haiti Progress 31 (2000) (repeating Haitian National Television report that former members of the military now in the police force were preparing prominent assassinations and a coup d'état).

68. For example, former soldiers periodically demonstrate in Port-au-Prince over their pension funds. Also, several right-wing candidates for Haiti's 2000 legislative elections have advocated a revival of the army.

69. Fainaru, *supra* note 12.

70. See Stotzky, *supra* note 5, at 160, 172–73 (reporting that some Special Forces units actually helped the army and paramilitary groups hide weapons). See also Amnesty International, *supra* note 59. In 1995, United States Special Forces members in Haiti told the author that they knew where the guns were hidden and who had them, but were under orders to not conduct disarmament operations. See *id.* (quoting reports that the disarmament of Haiti has not been successful).

71. Stotzky, *supra* note 5, at 44.

72. At least six former military members of the police have been arrested for human rights violations committed during the coup. Three former soldiers in the police, including a *commissaire*, were convicted for their participation in the May 1999 Carrefour Feuille police massacre. The author observed the Carrefour Feuille trial in August 2000. Three more soldiers have been arrested and charged in the Raboteau trial.

tutional loyalty, so even former soldiers who were appalled by the carnage of the coup are still reluctant or afraid to help the prosecutions of their former colleagues. None of the former soldiers now serving in the police force (which is under the Ministry of Justice) have provided information to help the prosecutions.

The economic elite that financed and supported the coup are still in business, many of them enriched from importing products through the embargo.<sup>73</sup> They employ many people, have significant influence on the government, and retain groups of armed men, mostly former soldiers, as security guards. Although it would be hard to spot the hand of the elite in any particular case, there is at least a general assumption among those working for human rights prosecutions that these elite have been using their influence against the prosecutions.

Prosecutions must also combat the unorganized, but still formidable, resistance based on family or friendship ties that can trump political convictions or professional responsibilities. Although the organizers of the repression were not in contact with the victims, those who executed the policy were recruited from the same poor neighborhoods. Therefore, it is inevitable that many of the victims and attackers had relationships and communications with each other, and often the ones responsible for carrying out the repression would try to spare their friends or relatives. Sometimes even the most malicious person was willing to save potential victims from harm by an advance warning or a word to his accomplices. Many accounts of coup atrocities also mention a soldier or paramilitary saving potential victims from his own collaborators.<sup>74</sup> This assistance goes both ways, as now every accused has some relation with the victims, or if not, with a judge, a police officer, or a court worker.

The resistance to prosecutions within Haitian society is buttressed by the equivocal attitude of the international community to-

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73. Catherine Orenstein, *Second Hand Democracy*, 13 Tikkun 44, 45 (1998). The current head of the Chamber of Commerce is widely accused of having organized the massacre of peasants occupying land he claimed as his own in the village of Piatre. When a team of judges began investigating the case, the chamber head left the country. The BAI has worked with the Piatre victims.

74. In the Raboteau case, for example, the activists for whom the military claimed to be looking had left town the night before, tipped off by one of the massacre's most zealous participants. Also in the Raboteau case, victims have asked the judge to release a defendant arrested on the complaint of other victims.

ward prosecuting human rights cases. Although most foreign governments are on the record as favoring justice for Haiti's victims, their actions are often to the contrary. The U.S., for example, despite spending tens of millions of dollars on justice and law enforcement support since the return of democracy, has hindered the prosecutions in many ways, including pressuring the Haitian government to give amnesty to the coup criminals,<sup>75</sup> flying the top leaders out of Haiti,<sup>76</sup> letting many others stay in the United States,<sup>77</sup> and refusing to hand over evidence of atrocities that belongs to Haiti.<sup>78</sup> Among the myriad foreign assistance programs in justice and law enforcement, not one provides legal representation to coup victims. MICIVIH alone specifically supported the prosecution of human rights cases.<sup>79</sup>

#### 4. Collection, Preservation, and Analysis of Evidence

Another obstacle to prosecuting human rights cases in Haiti is finding evidence. Human rights cases are often difficult to prove, and this is especially true with Haiti's cases. The prosecutions depend heavily on victim testimony because the dictatorship prevented the collection and preservation of other evidence. Although finding victims is easy, they are often unable to identify their attackers<sup>80</sup> or

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75. Scharf, *supra* note 53, at 8.

76. Orenstein, *supra* note 11, at 1.

77. Fainaru, *supra* note 12, at A1.

78. *Id.* After hearing a news report about the United States declining to execute the deportation order of paramilitary chief Emmanuel Constant, one of the most persistent victims approached the author, visibly deflated and said that "they" (the victims) just could not do it: they were used to fighting the army, the paramilitaries and the judicial system, and could persevere there, but they could not beat the United States.

79. MICIVIH provided training for UPENA, an initiative to create a team of judges and prosecutors to work on human rights cases; provided informal assistance to judges and prosecutors actually working on cases; and sponsored experts in forensic anthropology and military organization in the Raboteau case. Until its departure in March 2000, the mission was unequivocal on the need to prosecute the coup criminals and the need for the international community to increase its contribution to this effort. Many victims, however, criticized the mission for not being more directly involved in the cases, and for not providing all of its documentation to the prosecution. In addition, MICIVIH did not collect its information during the dictatorship in a form that would be useful for prosecutions. The United Nations Development Program (UNDP) helped with the Raboteau trial by financing the international experts who will testify.

80. In general, repression in Port-au-Prince was anonymous. Victims can say little more about their attackers than what they were wearing. Outside of the capital,

are reluctant to testify. When the accused can be identified, corroborating the victim's testimony is often difficult because the attack took place in a military installation or during the panic of a large-scale operation. Potential corroborating witnesses are often not found because they were internally displaced or otherwise transient, and have since migrated or returned to their homes. Although scores of journalists and human rights workers interviewed victims during the coup, they did not take the testimony in a form useful for prosecutions. Often the interviews do not adequately identify the informant, or do not have sufficient details.<sup>81</sup> As most victims are poor and illiterate and come from an oral and informal culture, their stories do not always fit neatly into the logical boxes a prosecutor would like to see in court. These problems of eyewitness testimony become magnified in Haiti, as elsewhere, as time passes, memory fades, and witnesses move or die.

Physical evidence to corroborate the eyewitness reports is rare. Contemporary crime scene and ballistics investigation did not take place because the ones charged with investigating were themselves the perpetrators.<sup>82</sup> Few people had cameras to document deaths, injuries, and property damage. Retaining photographs and other evidence, such as a bloody shirt or broken furniture, was not done because doing so would invite further attacks.

Medical evidence, often the best corroborative evidence available, is severely limited. Under the dictatorship, as now, most Haitians could not afford the formal health care system and either went without treatment or consulted traditional healers who do not keep records. Even those victims who could access the health care system often refused to do so out of fear of further injury.<sup>83</sup> When victims went back to the hospital, the medical records were often destroyed.<sup>84</sup>

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however, it was more personalized, with some soldiers desiring that the victims specifically fear them. As a result, it is most difficult to build cases in the worst atrocities, the mass shootings in urban areas.

81. The author prepared several human rights cases for trial from 1996–2000.

82. The most notorious unit of the Haitian military was the police department's investigative unit, called "Anti-Gang."

83. For example, one of the victims of the Raboteau massacre left the hospital in Gonaives after soldiers came in looking for her and was forced to do the same a week later in the capital.

84. The state hospital in Gonaives, which is the only hospital in the area, has no record of admissions for the victims of the Raboteau massacre.

Despite the limitations, however, there is some medical evidence. Some victims have scars or continuing medical problems that can help substantiate their claims. Others were treated by doctors, often financed by foreign organizations, who kept records.<sup>85</sup>

Prosecutors have had particular difficulty in demonstrating evidence of command responsibility. As a result, most of the arrestees so far have been those who were on the scene executing the orders, rather than those who gave them. Moreover, no former soldiers have been willing to testify about the command structure, either out of solidarity with their former colleagues or a fear of reprisals.<sup>86</sup>

The best evidence that could implicate the high command and the paramilitary leadership, as was shown by the Nuremberg trials, is its own documents. Although the Haitian military did not match the Nazis in record keeping, it did keep routine records of intelligence reports, correspondence, troop movements and operations, and financial transactions.<sup>87</sup>

The military and paramilitary organizations also kept more sadistic documentation, including video and audio cassettes, and “trophy photos” of torture sessions, which reportedly include the torturers posing with their victims. This information would greatly facilitate prosecutions, but approximately 160,000 pages of the best documentation were taken from military and paramilitary facilities by U.S. troops.<sup>88</sup> These materials have not been returned despite re-

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85. Medecines du Monde treated victims during the coup. USAID, through its Human Rights Fund, paid local doctors to treat victims.

86. In the Raboteau case, however, prosecutors have been able to establish a strong command responsibility case. The High Command issued a press notice a few days after the massacre, acknowledging that it was an army operation, but contending that the action was a reprisal against terrorists. Several witnesses have testified that the massacre was planned in advance and involved transfers of troops from other districts. There is also much circumstantial evidence, especially the timing of the attack relative to other regional, national, and international events. Finally, a team of military experts from the Centro de Militares para la Democracia in Argentina conducted documentary research and interviews in Haiti, and provided a report detailing the responsibility of the military commanders. Spanish and French versions of the report on file with author.

87. The army’s record keeping is analyzed in the report of the Argentine military experts for the Raboteau case, on file with the author.

88. David Gonzalez, *So That Tyrants Won’t Rest, Haitians Keep a Vigil*, N.Y. Times, Aug. 2, 2000, at A4; Howell, *supra* note 12 (explaining that “[t]he desire to root

quests from the Haitian government,<sup>89</sup> sixty-nine members of the U.S. House of Representatives,<sup>90</sup> and a host of individuals and organizations from the United States and abroad.<sup>91</sup> The inability of Haitian prosecutors to access this evidence is a serious impediment to their work, and is one that the ICC could help remove.<sup>92</sup>

## 5. Arrests

Arrests in Haiti are rendered difficult by the ability of suspects to take refuge both within and outside the country. This difficulty is compounded by other obstacles such as inadequate resources, the limited experience of the police, resistance to arrests by former military members, and the poor organization of the Haitian bureaucracy.

Many of the accused have fled Haiti, across the border to the Dominican Republic or to the United States.<sup>93</sup> For those without the means to leave the country, there are ample hiding places in rural areas within Haiti, as there is little police presence outside of towns. Although police units are trying to track down suspects, they are inexperienced and inadequately equipped.<sup>94</sup> They do not receive adequate assistance from other units because of poor communication and organization. Furthermore, there is a lack of cooperation from local

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out the crimes of the coup has . . . propelled a campaign for the United States to return documents it seized from the paramilitary group and the Haitian military”).

89. Dieng, *supra* note 27.

90. Letters from members of the U.S. House of Representatives, to President William Clinton (Dec. 1, 1995 & Jan. 30, 1996).

91. Dieng, *supra* note 27.

92. A group of Haitian grassroots organizations has mounted an international campaign to demand their return. For more information, e-mail avokahaiti@aol.com.

93. See Fainaru, *supra* note 12 (describing how suspected war criminals from Haiti, among other countries, have settled in the United States).

94. In one 1997 arrest, a member of the police team on the Raboteau case burst into the BAI office, asking for the office's car keys, explaining that a suspect was nearby on Avenue John Brown. The suspect suffered more than most from the Port-au-Prince traffic as the police caught up with him in their borrowed car. He was a former soldier and believed to be armed and dangerous, so the team toted a shotgun along with their service revolvers. He did not resist, which was fortunate since there was no ammunition in the shotgun. That arrest marked number twenty-one, which was at the time one more than the total incarcerated for the Yugoslav War Crimes Tribunal.

commanders, many of whom are themselves former members of the military.<sup>95</sup>

Techniques for locating people that work in more developed countries have borne little fruit in Haiti. Databases such as automobile and tax records are not easy to access because of poor organization and actual resistance by staff. Moreover, even once accessed, documents are not reliable, as aliases are easily and frequently used.<sup>96</sup> Many suspects can be identified only by their nicknames, which are even more easily changed. As a result, although victims can often name their attackers, the police do not often succeed in locating and arresting them.

## 6. General Insecurity

Countries making the transition from authoritarianism to democracy often experience a rise in common crime along with the decrease in political repression.<sup>97</sup> With an inexperienced police force, inefficient and corrupt judiciary, guns in the hands of unemployed former military or paramilitary, and a drug trade well established by the coup regime, Haiti is no exception.<sup>98</sup> Arrest rates for serious crimes are low, and quick releases for the most violent arrestees are high.<sup>99</sup> Although criminals often escape or are liberated illegally, coup-era human rights cases are the exception. In all of the BAI's cases, for example, there has been only one escape and no liberations

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95. See Mission Civile Internationale en Haïti, *supra* note 14, at 32–34.

96. Using a false name was common practice in the army during the dictatorship. Truth Commission Report, *supra* note 5, at <http://www.haiti.org/truth/chapit7.htm#Top>.

97. For example, Russia, El Salvador, and South Africa experienced increased crime levels. See Scott, *supra* note 60.

98. Michel François, one of the coup leaders, was indicted by a Florida grand jury for drug smuggling, but Honduras refused the extradition request. See *Honduran Judge Refuses to Extradite Haitian Ex-Official to U.S.*, N.Y. Times Apr. 17, 1997, at A4. Lt. Marc Valmé, a François associate, was sentenced to life imprisonment in the same case. Patricia Zengerle, *Haiti-U.S. Drug Trio Sentenced to Life*, Reuters (Miami), Feb. 12, 1999; Tim Weiner, *CIA Formed Haitian Unit Later Tied to Narcotics Trade*, N.Y. Times, Nov. 14, 1993, at A1; Stotzky, *supra* note 5 at 175–76.

99. Amnesty International, *Haiti un Travail Inachevé* 11 (2000).

of arrestees against whom the evidence was strong.<sup>100</sup> In the case of the one escapee, prison authorities fired responsible guards and the departmental prison coordinator, and reinforced the prison structure. The uncertainty caused by the increase of crime and the perception that the state cannot do anything about it makes everyone less willing to participate in the criminal justice system. This is especially true in human rights cases, as it is generally feared that the former military and paramilitary ardently embraced organized crime after the restoration of democracy.<sup>101</sup> In the Raboteau case, for example, several defendants who are at large are reported to be gang members.<sup>102</sup> Others have been “caught” for the purposes of the case when they were discovered already incarcerated for other recent crimes.

To date, there have been no confirmed reports of attacks against witnesses or officials for participating in a human rights case, but the fear of such attacks is widespread and has a large impact on the prosecutions. Victims and witnesses fear retaliation, judges and prosecutors claim that they cannot advance the cases without more protection, and police complain that their arrestees are soon back on the streets, with a grudge.<sup>103</sup> This insecurity has also been cited as a factor in low turnout for jury duty, as has been reported to the author by several judicial officials, especially regarding prospective women jurors.

Haiti’s efforts to provide justice to its human rights victims certainly illustrates the difficulties of such an endeavor. But they also show that the difficulties are not insurmountable, and that a poor country, even without much outside help, can make progress if it keeps trying. Both these successes and failures provide a good background for examining why the ICC should help countries like Haiti, and analyzing how it could do so.

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100. This is mostly because of the high profile of the cases, the fear of victim reaction to an improper release, and close coordination among police, judicial, and penal authorities.

101. See Amnesty International, *supra* note 59, at 3.

102. Author’s interviews with police investigators, lawyers on the case, and victims.

103. The fear of release has had one salutary effect on the police working on BAI cases: they now look more closely at the evidence before making an arrest, and often coordinate with the judge issuing the warrant to confirm that the case is strong.



## II. THE IMPACT OF THE ICC ON NATIONAL PROSECUTIONS

No matter how well the ICC performs its tasks, national prosecutions will always be essential to the fight against impunity. The ICC Statute's complementarity provisions recognize the importance of national trials, in both its complementarity rule and its provisions allowing the court to help local judiciaries.<sup>104</sup> Yet because of its unique international profile and mandate, the Court can and should go farther. It should actively assist local judiciaries trying to prosecute human rights cases, and this assistance should be systematic and central to the Court's work. This section will discuss why national prosecutions are essential, and analyze ways the ICC can maximize its support for these efforts.

### A. The Importance of National Prosecutions

National prosecutions are important to international prosecutions because international courts can only prosecute a small fraction of the large-scale human rights violations that occur. They are also important from the perspective of the prosecuting country because victims generally prefer a good local prosecution to a good international one.<sup>105</sup> National prosecutions are a valuable opportunity both to force the local justice system to perform better and to build public confidence in that system.

The ICC's ability to take cases is limited by its own mandate, by the limits of its resources, and by political constraints on its jurisdiction. As a result, the Court will likely take only the most serious cases with significant symbolic value and those that generate sufficient political consensus. The Court's mandate limits it to "the most serious crimes of concern to the international community as a whole."<sup>106</sup> This means that, quantitatively<sup>107</sup> and qualitatively, the

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104. "[E]ffective prosecution [of serious crimes] must be ensured by taking measures at the national level..." and the ICC "shall be complementary to national criminal jurisdictions." See ICC Statute, *supra* note 1, preamble.

105. See *infra* note 114 and accompanying text.

106. ICC Statute, *supra* note 1, art. 1.

107. For example, the International Criminal Tribunal for Rwanda (ICTR) reached its sixth conviction in December, 1999, Press Release, ICTR, ICTR/INF09-2-216en-Arusha (Dec. 6, 1999), while the Rwandan courts had tried over 1,400 by then. De Beer, *supra* note 40, at 7. See also Stoetling, *supra* note 33, at 671 (stating that

ICC will be reserved for high-level leaders or notorious episodes.<sup>108</sup> Most violations will not justify engaging the ICC process, and even where the ICC conducts an investigation into an episode, it will be unable to pursue most of the potential defendants. The ICC will be useful in prominent cases because it will have a high political profile, large logistical capability, well-paid international staff, and the capacity for complex litigation. These factors also make it too cumbersome and expensive for the ICC to pursue minor incidents or low-level soldiers or paramilitaries.<sup>109</sup>

The ICC will not be able to reach some cases for political reasons, because of the possibility of a negotiated settlement,<sup>110</sup> or because either the host state or an influential state party opposes it.<sup>111</sup> The ICC Statute allows for delays in or removal of jurisdiction where the territorial state is prosecuting or has prosecuted,<sup>112</sup> or at the behest of the Security Council.<sup>113</sup> Although the jurisdictional limits can be used positively to encourage national prosecutions or resolve an ongoing conflict, both types of limits can also be abused to frustrate

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Rwandan courts have handled a far greater number of prosecutions than the better known international criminal tribunal).

108. See generally M. Cherif Bassiouni, *Policy Perspectives Favoring the Establishment of the International Criminal Court*, 52 J. Int'l Aff. 795 (1999).

109. Michael P. Scharf, *Balkan Justice* 224 (1997) (the trial of Dusko Tadic by the International Criminal Tribunal for the Former Yugoslavia (ICTY) cost the Tribunal some twenty million dollars).

110. *Id.* at 44 (opposition by British negotiator Lord Owen to pursuing Serb leaders during negotiations); Christopher Black & Edward S. Herman, *An Unindicted War Criminal*, *Z Mag.*, Feb. 2000, at 25–26 (indictment of Slobodan Milosevic did not come until after negotiations had fallen apart and NATO started bombing).

111. See *infra* notes 150–61 and accompanying text. In the ICTY context, several countries, notably Russia, oppose the trial of high level Serb leaders. Augusto Pinochet would have presented an intriguing challenge to ICC jurisdiction, given the differences, even among NATO countries, about the wisdom of trying him outside of Chile. Although in many cases the political opposition to ICC jurisdiction would also preclude national jurisdiction, in some cases the host country is attempting to prosecute, against the resistance of other states. See Press Release, Human Rights Watch, *More 'Pinochet Style' Prosecutions Urged* (Mar. 3, 2000) (citing mass murderers currently being sheltered in third countries, including Ethiopia's Mengistu Haile Mariam in Zimbabwe and South Africa, Uganda's Idi Amin and Milton Obote in Saudi Arabia and Zambia, respectively, and Paraguay's Alfredo Stroessner in Brazil). See also *supra* note 11 and accompanying text.

112. ICC Statute, *supra* note 1, art. 15.

113. *Id.* art. 16.

an important ICC prosecution. The Court is likely to refrain from acting in many cases because of the difficulties in making arrests or building adequate cases.

If local conditions permit a high-quality prosecution, national prosecutions are preferable from the standpoint of victims and local justice systems.<sup>114</sup> A good local prosecution would have most of the advantages of a good ICC trial while at the same time generating national support for the justice system. It would also encourage the local judiciary to raise its standards of performance and be more responsive to the concerns of those traditionally excluded from the system. These benefits will not only advance the ICC's objectives with respect to major human rights violations, they will also directly advance the related causes of human rights, administration of justice, and democracy reinforcement.

Furthermore, victims generally prefer a local prosecution to an international one.<sup>115</sup> Although victims in Haiti are understandably skeptical about whether their system can provide an acceptable trial, they are also wary of a trial held outside the country, where the rules may be different. In a local trial, the victims would better understand the proceedings, and could exercise some leverage over the government and the judiciary. They could hear the verdict with their own ears, and be more certain that those convicted were incarcerated.<sup>116</sup>

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114. However, with respect to victim reparation, a process in the ICC could be preferable to the domestic forum. For example, article 75 of the ICC Statute permits the Court to enter a judgement against an individual defendant, which then is enforceable in the jurisdiction of any state party. Furthermore, the Court can provide an award from a trust fund for the victim in certain cases. This is an advantage in a state where there are few resources for compensating victims, or where a victim would have difficulty enforcing a local judgement against a defendant residing abroad. This procedure is not automatic upon the request of a victim; it requires a prosecutor or judge to initiate it. It could also never reach the majority of victims of a series of large scale human rights violations.

115. If asked simply whether they would prefer a national prosecution to an international one, some victims say they prefer the international because they assume it would be better quality and that the international tribunal would be able to adjudicate all of the accused and obtain all of the evidence. When it is explained that international tribunals often experience some of the same problems as local courts, all victims I spoke with said they would prefer a local trial, if the quality were comparable to the international one.

116. Thérèse, a resident of Cité Soleil, is a victim of several Haitian dictatorships as well as an ardent pro-democracy activist. She reported that she believes in Jesus

Victims are also wary of an international tribunal applying different rules.<sup>117</sup> For example, in Haiti there is an automatic jury for the most serious felonies, including murder, which ensures that the fact finders represent the victims to some extent, and understand the context of the crimes. Victims would not like to turn this job over to less accountable foreign judges. Victims are also concerned about the punishment given in an international trial. They fear that incarceration in the industrialized world may be better than freedom in their neighborhoods.<sup>118</sup> Although it is not so with Haiti (which has abolished the death penalty), some victims criticize the International Tribunal's inability to impose execution.<sup>119</sup>

Psychological benefits to the victims would be greater with a successful national trial. Victims of massive human rights violations are usually the least powerful in their own countries, and their countries are themselves often among the least powerful globally. Their victimization is only part of a larger context of disempowerment. As a result, any remedy to the victim's problems must, as much as possible, empower them by involving them in all aspects. This includes decisions such as choosing whom to arrest and prosecute, what information to use, and trial strategy. Involving the victims would be much easier to do with a national prosecution: more victims could testify and therefore have the opportunity to tell their stories in public. More people could see the trial, either in person or on live televi-

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without seeing, *see* John 20:29, but would not do the same for the ICC, or any other work of man. The distrust of prosecutions outside the country would be stronger among people with historical reasons to distrust foreign involvement in their affairs.

117. *See* Stefaan Vandeginste, *The International Criminal Tribunal for Rwanda: Justice and Reconciliation*, 11 Relief & Rehabilitation Network Newsletter 4, 5 (1998) (the modern "vengeful" justice represented by the ICTR contrasts with the traditional role of justice in Rwanda, reestablishing social order and repairing interpersonal relations), available at <http://www.odihpn.org.uk/newslet/acrobat/n11e.pdf>.

118. ICC sentences are served in a state designated by the Court, from a list of volunteers. ICC Statute, *supra* note 1, art. 103(1)(a). As there is no provision for ICC subsidy of the incarceration, volunteers are most likely to be wealthy countries. Prison conditions for ICC prisoners are to conform to international treaty standards and to be the same as for other prisoners convicted of similar crimes in the enforcing state. *Id.* art. 106.

The author has had conversations with several of the victim plaintiffs in the Raboteau and Cite Soleil cases (1999) who have expressed disappointment that the defendants would be incarcerated in foreign countries.

119. Le Génocide et les Massacres au Rwanda en 1994, La Justice en Question (report on file with the author).

sion, and it would be in a more familiar format. Most importantly, a successful national trial would be evidence of a structural change in the society, usually the type of change that the repression was implemented to stop in the first place. In many countries the formerly oppressed would be punishing their former oppressors for the first time, through the medium of a justice system that was traditionally itself an instrument of oppression.

National prosecutions also afford the local judiciary opportunities to improve its performance and, if it is successful, to build public confidence in the system. The Raboteau case in Haiti, for example, acts as both a carrot and a stick: the case's notoriety allows the judiciary to obtain resources and assistance that it cannot attract to other cases, and the spotlight forces those involved to perform at a much higher level. The resulting product of the system has, so far, been superior to that from cases in the past,<sup>120</sup> and will set a higher standard for performance. The progress to date has increased faith in the justice system in those close to the case, especially the victims. If the trial is ultimately successful, confidence will rise nationwide, as will expectations for the judiciary to build on its success.

The ICC has enormous potential to help these essential national prosecutions. As discussed below, the Statute allows the Court to help in many ways, but does not require it to do so. Absent a conscious effort to integrate assistance to local judiciaries into the ICC's programs, this potential could be lost in the day-to-day press of work on high profile cases. The fact that assistance to national prosecutions has not played a large role in the debates surrounding the Court thus far implies that such assistance is not a high priority. Accordingly, the Court should, in its planning and operational stages, systematically institutionalize assistance to local judiciaries into its programs. By going beyond passive complementarity, the Court could leverage its efforts, thereby multiplying its own effect on providing justice for the victims of human rights violations.

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120. The complaints, pleadings and other documents filed by the victims' lawyers are well above the norm and have been copied by lawyers in other cases. The *Ordonnance de Renvoi*, which details the accusations against each, is probably the highest quality document ever produced by the Haitian judiciary.

B. Helping National Judiciaries Overcome Obstacles to Prosecution

1. Supporting Better National Justice Systems

The ICC could most effectively aid national judiciaries with human rights cases by hiring and training staff from countries that need the most help, and by providing jurisprudence. In both cases, however, the potential advantages also carry the potential risk that international prosecutions will be privileged at the expense of national prosecutions, and that the gap between the two will widen. The Court should take measures to mitigate this possible harm.

The ICC should, as part of its recruitment, target lawyers and judges from countries likely to have trials for crimes within the ICC mandate. The technical training and exposure to higher standards would make Court alumni able to assist with human rights trials in their native countries when the opportunity arose. The philosophical connection with an international network (with the possibility of future work abroad if the political situation required) would make the alumni more willing to take an active role in trials in their native countries. The ICC could foster this through a program of hiring investigators, prosecutors, and other staff from countries that are either already experiencing large scale violations of human rights or are likely to do so because of ethnic conflicts, a history of authoritarian rule, or other factors. For example, the Rwanda tribunal could have recruited Haitian lawyers or could now be recruiting lawyers from Sierra Leone, Congo, or other states likely to need the services of jurists trained in human rights trials. These lawyers could work on ICC cases and, when appropriate, return to their home countries to prosecute national cases. In the short term, the training would strengthen the national judiciary's ability to prosecute (by providing trained, experienced personnel), and increase public confidence in national cases prepared by alumni who would carry the prestige of the ICC. In the long term, lawyers cycling out of the ICC could form a beachhead in the fight to make their respective national judiciaries more responsive to victims and more respectful of the law.

Recruiting lawyers from countries like Haiti would benefit the ICC directly, as well as promote its general goals. An individual from a country with a similar history, legal tradition, or infrastructure as the target country would have perspectives and abilities lacking in investigators with less shared experience. He or she would

have an immediate advantage in surmounting cultural barriers, which would lead to better collection of information, and more accurate evaluation of testimony and other evidence. An interviewer with a shared culture would make victims feel more comfortable, and usually more free with their information.<sup>121</sup>

The ICC Statute permits the recruitment of lawyers likely to carry out national prosecutions down the road, but does not require or otherwise encourage a systematic program.<sup>122</sup> Article 44 of the ICC Statute allows the Court to recruit investigators and other staff,<sup>123</sup> and Article 36 encourages an equitable geographic representation in hiring.<sup>124</sup> Yet a general recruitment, even enhanced by geographic equity, would not alone ensure that these positions go to the states that most need trained human rights lawyers. The most needy states are the least likely to have lawyers of “the highest standards of efficiency [and] competency” come to the attention of the prosecutor or registrar.<sup>125</sup> To have a noticeable impact on the weakest national judiciaries, and to ensure a mix of perspectives beyond geographic, such as economic and cultural, the ICC must put in place a systematic plan for recruiting and hiring with a view to reinforcing the most needy national judiciaries.

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121. The author’s experience in Haiti provides countless examples of Haitian or African colleagues understanding a situation, or establishing a relationship with a witness much better or faster than a colleague from an industrialized nation (including the author himself). If there is a shortage of qualified candidates, an investment by the Court in raising smart, motivated candidates up to the appropriate level would be rewarded by performance both with the Court and back in the home country.

122. See Working Group of the A.B.A. Sec. of Int’l L. & Prac., Draft Rules of Procedure and Evidence for the International Criminal Court R. 28 (1999) [hereinafter ICC Draft Rules].

123. ICC Statute, *supra* note 1, art. 44.

124. *Id.* art. 36. This rule would allow the ICC to hire staff with training in trauma and gender for the Victims Unit. The same logic that applies to hiring developing world lawyers and investigators applies to this unit. Hiring developing world staff would both provide valuable experience to these individuals and aid the ICC in that many victims may feel more comfortable dealing with a person from a similar background.

125. ICC Statute, *supra* note 1, art. 44(2). Without a structure in place, the tendency will be to hire from countries that need the least help, those with the strongest talent pool. This will be exacerbated if the ICC makes frequent use of gratis personnel of state parties under Article 44(4), who will come disproportionately from wealthy countries. However, Article 44(4) does limit this use to “exceptional circumstances,” which should be respected.

The benefits of ICC recruitment in countries needing its help could be offset by “brain drain,” or the perception that there are two justices, with the international kind better financed, more prestigious and more effective. Therefore, ICC policies should be designed as much as possible to narrow the gap between the two “systems of justice.” Staff should be encouraged to return to their home countries and apply the lessons learned at the Court.<sup>126</sup> The Court could make special leave provisions for work on selected national prosecutions, and even subsidize its staff members who return to work in national judiciaries.

The ICC will probably have little positive impact on local infrastructures or judicial salaries, since building courthouses, providing file cabinets, and paying salaries is well outside its mandate. Of course, to the extent that the ICC assists the national judiciary by sharing information on its investigations or prosecutions, it would relieve financial pressure in a particular case.<sup>127</sup> Conversely, the ICC may have a negative impact on salaries and infrastructure. It may reduce foreign assistance to the national judiciary, either because donors feel that the ICC has fulfilled the need for justice, or simply because scarce resources diverted to the ICC cannot go elsewhere.<sup>128</sup> By its mere existence, the ICC will have some positive impact on judicial training, as its decisions can serve as models for formal or informal judicial training.<sup>129</sup>

The ICC will likely have little direct effect on law reform or procedural reform, as these issues are beyond its mandate. To the extent it moves toward guaranteeing “lasting respect for the enforcement of international justice,”<sup>130</sup> it might encourage countries to rat-

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126. Policies that will encourage staff to return to their home countries include applying maximum terms for certain categories of staff, liberal leave policies, and seniority credit for work done with national prosecutions.

127. See ICC Statute, *supra* note 1, art. 53; ICC Draft Rules, *supra* note 122, R. 36–38. The prosecutor could invoke her power to investigate and assist in preparing the case for trial and then ultimately defer to the national prosecution.

128. Donor countries frustrated with the lack of progress in national judiciaries often look for ways to divert judicial assistance and other funds away from the national government. See *generally* Request for Proposals for Its Administration of Justice Program in Haiti, USAID, Doc. 521-99-007, Sec. C (on file with author).

129. The value of training may be mitigated if the local judges, seeing that the models of justice require a logistical capability beyond that available, use that as an excuse for resignation.

130. ICC Statute, *supra* note 1, preamble.



ify useful international instruments. Its mandate would not allow it to directly attack the problem of resistance within the society to the prosecutions. However, it may do so indirectly, by the threat of an international prosecution.<sup>131</sup>

The ICC's jurisprudence will likely help the national prosecutions in two ways: by providing precedents to national courts and by providing forms or templates to prosecutors. The ICC will likely settle many questions of law that it has in common with national courts. Although such resolutions would not be binding, they would be a useful guide. The law the Court applies, after its own Statute and rules, comes from both treaties and principles of international law, and general principles of law derived from national legal systems.<sup>132</sup> The Court's analyses pursuant to these authorities would be especially useful in countries without significant jurisprudence relevant to human rights cases.

In Haiti, for example, the judiciary has little experience with human rights cases or complex litigation. Consequently, the judiciary has little precedent on issues likely to arise in human rights cases, such as the legal responsibilities of subordinates and superior officers, accomplice or accessory liability, and definitions of terms like war crimes and crimes against humanity. ICC decisions would suggest a way to analyze these issues and a potential substantive result. In a similar manner, ICC decisions and pleadings submitted by parties would be useful as templates or references for prosecutors<sup>133</sup> and lawyers in drafting complaints, or briefing important issues of law. As both jurisprudence and forms, the ICC pleadings and decisions would set a high standard for quality, which would encourage national actors to improve the quality of their work.

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131. Among the accomplishments of the effort to try Augusto Pinochet in Spain was its effect on the national discourse on impunity in Chile. As the Chilean government pursued Pinochet's release, it was forced to answer critics by saying that the national judiciary was up to the task of prosecuting the former dictator. It appears that this process will lead to Pinochet's trial in Chile. Clifford Klaus, *Pinochet Reportedly Stripped of Immunity in Secret Court Vote*, N.Y. Times, Aug 2, 2000, at A4.

132. ICC Statute, *supra* note 1, art. 21.

133. In the civil law system, they would be useful to the *juge d'instruction*, an office which combines prosecutorial and judicial functions during the pre-trial phase. In Haiti, materials from both Rwanda and Yugoslavia have been used in pre-trial preparation.

The limit to the usefulness of ICC materials will be the extent to which they are easily available in the non-industrialized countries. The Court's judgments and "other decisions resolving fundamental issues" are to be published in Arabic, Chinese, English, French, Russian, and Spanish, the Court's official languages.<sup>134</sup> Although most judges and prosecutors speak one of these languages, it might be difficult for them to access the decisions. While a website could reach much of the world, the areas where it does not reach might be where the material would be the most useful. Accordingly, the ICC should have a program to systematically make available its decisions in developing countries via an appropriate technology.

ICC jurisprudence could also have a negative effect on national prosecutions by creating two standards of justice, one international and the other national. This could lead to a perception by national judiciaries or donor countries that national judiciaries simply cannot provide adequate justice. With Rwanda, for example, the International Tribunal receives frequent, usually positive attention in the international press, while the local prosecutions receive mostly negative attention, such as when they execute someone. Local authorities have often complained that the International Tribunal does not share its information with them, does not profit sufficiently from local expertise and information,<sup>135</sup> or trumps local authority on extradition.<sup>136</sup>

The perception of a large gap between national and international tribunals could discourage local authorities from even trying to initiate human rights cases and donor countries from helping them try. The ICC would help close this gap any time it helps a local judiciary increase its capability. This could also ensure that cooperation goes both ways; besides providing help, it could make sure that the Court receives any help that local authorities can provide. Finally, the ICC should coordinate as much as possible with local authorities, keeping them fully informed about the Court's activities and jurisprudence.

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134. ICC Statute, *supra* note 1, art. 50.

135. See Vandeginste, *supra* note 117, at 5 (describing gulf between ICTR and local population, and the problems caused by it).

136. See de Beer, *supra* note 40, at 30.

## 2. Prioritization of Justice

Prioritization of justice among competing claims on a government is a political issue. The ICC's likely impact on the question is complex and will differ with varying situations. The problem is especially complicated for outside actors trying to influence the priorities without understanding the broader context. Although it might be easy to say that Serbia or Myanmar should spend less on weapons and more on justice, it is not as simple to ask Haiti to pay teachers less so that judges can make more. In transitional countries it is often not just a matter of allocating money, but of allocating the time and energy of the limited group with the management capacity and power to implement the initiative.

The way in which the ICC could most help a national government move justice up on the list of priorities is by providing technical assistance to make the prosecutions as easy as possible. One reason that justice for human rights violators may be pushed down the list is the fear of failure. For a transitional government trying to consolidate democracy, especially one having mixed success, prominent human rights trials pose significant political, social, and security risks. If the trial is not successful, the government loses credibility and confidence in the justice system is further eroded, thus creating another flash point for criticism.<sup>137</sup> Even if it is successful, it may require the diversion of too many resources from elsewhere.

To the extent that human rights prosecutions can be made less expensive and more achievable, they will be raised higher on the list of government priorities. By training national lawyers and officials, providing exemplary jurisprudence, and assisting the domestic effort with the collection, analysis, and preservation of evidence, the ICC would make national prosecutions more attractive to national decision makers, increasing the chances of having resources allocated in that direction.

The ICC's most immediate political impact, of which it is both a cause and an effect, would be that justice for human rights violations is taken more seriously worldwide.<sup>138</sup> This trend will give inspi-

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137. The Haitian judiciary continues to be criticized for the handling of the Maly case four years later, and fear of a repetition engenders caution among judicial officials, according to discussions by the author with Ministry of Justice and other judicial officials from 1994 to the present.

138. *Accord Bassiouni*, *supra* note 108.

ration to advocates for prosecution and ammunition in the internal skirmishes over political priorities. It may also help make promotion of trials a foreign policy goal of donor nations.

### 3. Resistance to Prosecutions Within Society

The ICC would be effective in pushing reluctant states to prosecute, especially where there is a threat of the Court taking jurisdiction. The possibility of an ICC trial would encourage national prosecution, either out of pride, the fear of appearing unable or unwilling to enforce the law, nationalism, or a desire to keep one's nationals from international jurisdiction.<sup>139</sup> Looming ICC jurisdiction could push reluctant governments to prosecute, as well as provide support for governments sympathetic to prosecution against their internal opposition.

The ICC's utility as a stick to encourage national prosecutions is limited, however, by the territorial state's ability to keep the Court at bay. The easiest way to do this is through Article 17 of the Statute, which makes a case inadmissible if a state is investigating or prosecuting it, has decided not to prosecute, or has already prosecuted.<sup>140</sup> Under Article 18, a state can defer an ICC investigation on the grounds that it is conducting its own investigation.<sup>141</sup>

The ICC Statute does allow for a case to be declared admissible if the territorial state is not willing or able to prosecute, but in practice this language will be very difficult to apply. To determine "unwillingness," the Court must consider: a) whether the state was acting to shield the accused from responsibility, b) whether there has been a delay "inconsistent with an intent to bring the person concerned to justice," and c) whether the state proceedings were independent and impartial.<sup>142</sup> To determine "inability," the Court must look for a "total or substantial collapse or unavailability" of the national system.<sup>143</sup>

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139. This leverage comes in the form of the ICC's ability to assert jurisdiction over a situation without the consent of the state party either by referral from the Security Council or on the prosecutor's own motion. *See* ICC Statute, *supra* note 1, arts. 13, 15.

140. *Id.* art. 17(1)(a)–(c).

141. The Pre-Trial Chamber can override the state's request or stop the deferral, but that too can be appealed. *Id.* art. 18.

142. *Id.* art. 17(2).

143. *Id.* art. 17(3).

These standards are sufficiently vague to allow a country acting in bad faith to go through the motions of a prosecution and either postpone it indefinitely or arrange an acquittal. The prosecution of the 1993 assassination of Haitian Minister of Justice Guy Malary provides an example of how a weak prosecutor could defeat the goals of the ICC. In the Malary case, the government actually tried to obtain a conviction, but blundered along the way. Although some individual actions appeared inconsistent with a desire or ability to prosecute, and the trial as a whole was a fiasco, finding either unwillingness or inability would have been very difficult under the Statute's standards. A country acting in bad faith could engineer an outcome like the one in the Malary case quite easily.

From Malary's assassination under the dictatorship until the restoration of democracy a year later, the "unwillingness genuinely to prosecute" was beyond question. In 1995, however, arrests were made in the case, and in 1996 two suspects were tried.<sup>144</sup> The trial itself was a comprehensive exposition of the legal system's shortcomings, as it was poorly investigated, prepared, and presented.<sup>145</sup> Even the selection of the jury, which acquitted the defendants, was procedurally and substantively flawed.<sup>146</sup>

Despite these problems, there was clearly not an "unwillingness to prosecute" in the traditional sense—the government brought the case to trial and presented the inculpatory evidence that was at hand to a jury. There was no desire to protect the accused—in fact, despite an acquittal, both suspects spent three years in prison before being released for lack of evidence of any other crimes. There was not a "collapse or unavailability of the judicial system" in the classic sense, in that the government was able to arrest two prominent sus-

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144. The author observed the trial.

145. See Petitioner's Memorandum of Supplemental Information at 3, Lawyers Comm. for Human Rights v. Republic of Haiti, Case No. 11,335, Inter-Am. C.H.R. (filed Feb. 19, 1999) (arguing that the investigation and trial were so "riddled with abnormalities and errors" that the Haitian government failed to meet its international obligation to provide judicial protection) (on file with author). See also Amnesty International, Haiti: A Question of Justice 16 (1996) (noting "serious deficiencies" in the trial); Human Rights Watch, Haiti: A Thirst for Justice, a Decade of Impunity 23 (1996) (describing lack of preparation by the prosecution and the prosecution's weak presentation of the case).

146. See *supra* note 144. See also Human Rights Watch, *supra* note 145, at 23 (noting failure of prosecution to object to seating of a jury openly hostile to the prosecution).

pects and bring them to a public trial where the jury was able to make an unpopular decision to acquit. The mere passage of time, over seven years, could not make the case admissible under the ICC rules, since only a delay “which in the circumstances is inconsistent with an intent” to prosecute allows a finding of unwillingness.<sup>147</sup>

It would seem difficult under these circumstances for the ICC to make a finding of unwillingness and even more difficult to expose the acquitted defendants to double jeopardy by declaring the trial an intentional shield and inconsistent with an intent to prosecute.<sup>148</sup> Yet the fact remains that seven years after the political assassination of the Minister of Justice, there has been no conviction and no preparation for a subsequent trial. This ambiguous situation was created by a government making some, if not its best, effort to investigate and prosecute a hard case.<sup>149</sup> In any legal system, the potential for delays is large regardless of the prosecutor’s good faith. In developing or transitional states, justice and other governmental systems break down and tasks fall through the cracks between different actors. It is, in many cases, impossible to draw the line between legitimate difficulties and a lack of will, or attribute poor individual performances to the whole system.

A government wanting neither a legitimate national trial nor ICC jurisdiction could intentionally create the same ambiguity. It could send investigators out and have them return without sufficient evidence because witnesses are hard to find or afraid. Procedural irregularities could be planted and defendants could be freed on technicalities. Witnesses could recant.<sup>150</sup> A good faith prosecutor could be overmatched at trial. Selection of the jury pool, and of the jury itself, could be easily manipulated. If done well, such a strategy would make it impossible for the Court to declare the state unwilling or unable to prosecute.<sup>151</sup>

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147. ICC Statute, *supra* note 1, art. 17(2)(b).

148. *Id.* art. 20(3).

149. *Cf.* Lawyers Committee for Human Rights, *supra* note 145, at 13 (arguing that “the trial exemplified how the Government of Haiti failed to discharge its minimum responsibility for the diligent prosecution of human rights offenses”).

150. Again, this can happen with international tribunals. In the ICTY Tadic trial, a major prosecution witness conceded after his testimony that he had lied, tainting the whole case. Scharf, *supra* note 109, at 199.

151. Another issue would be the ICC’s interest in taking a case that was a difficult one to prove and its ability to do a better job than the territorial state, especially if

If a sham investigation or prosecution does not deter the ICC prosecutor, a territorial state could try to convince the ICC that the case is not of sufficient gravity,<sup>152</sup> challenge a prosecutor's refusal to defer to the investigation,<sup>153</sup> and appeal the Pre-trial Chamber's rejection of this challenge.<sup>154</sup> It could also convince the prosecutor that "an investigation would not serve the interests of justice" because of the age or infirmity of the accused, among other things.<sup>155</sup>

A prosecution could also be delayed or prevented by pressure from either the target state or one of its allies. A state could apply financial pressure by declining to pay its assessed contributions to the ICC. It could reward or punish specific prosecutors or prosecutions by withholding or making voluntary contributions.<sup>156</sup> States could use their cooperation, provision of expertise, evidence, or materials as leverage on specific cases or with the Court as a whole. Judges are nominated by states and elected by the States Parties,<sup>157</sup> as is the Prosecutor,<sup>158</sup> and many may look forward to future employment with their national governments.<sup>159</sup> Prosecutors can be removed by a simple majority vote of the States Parties.<sup>160</sup> States can apply pressure through the Security Council to defer the investigation for a twelve month renewable period.<sup>161</sup> If none of these strategies worked, a target state could subsequently make it very difficult for the prosecutor to conduct an investigation on its soil and encourage allied nations to do the same. Thus, a reluctant state party could delay a pro-

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the cooperation of local officials was in doubt. Furthermore, if the territorial state did not want one of its citizens to be put into the ICC's hands, his non-arrest could be easily arranged.

152. See ICC Statute, *supra* note 1, art. 17(1)(d).

153. *Id.* art. 19.

154. *Id.* art. 18(4).

155. *Id.* arts. 53(1)(c), 53(2)(c).

156. *Id.* art. 116. Article 116 allows assistance from governments, organizations, individuals, and corporations, but does not restrict the contribution to the Court's general funds.

157. *Id.* art. 36.

158. *Id.* art. 42.

159. Both former chief prosecutors of the ICTY left for their national supreme courts. Black & Herman, *supra* note 110, at 25 (former Chief Prosecutor Louise Arbour named to Canada's highest court).

160. ICC Statute, *supra* note 1, art. 46(b).

161. *Id.* art. 16.

ceeding while the support for it erodes, or even prevent a proceeding altogether.

There is also the risk that a potential ICC proceeding could serve to discourage national prosecutions by decreasing the pressure on the state to prosecute. This would happen where there is public pressure for justice that the state, despite its efforts, has difficulty satisfying. The prospect of an ICC prosecution could relieve national and international pressure on the government by redirecting attention to the Court. If the ICC prosecutes, the conviction of prominent defendants might decrease the pressure on the local judiciary to pursue the remaining defendants. The state may then be tempted to say that "justice has been done."<sup>162</sup> An acquittal by the ICC, given the image and capabilities of the Tribunal, would likely discourage future national efforts.<sup>163</sup>

#### 4. Collection, Analysis, and Preservation of Evidence

The ICC could complement a national judiciary by assisting with the collection, analysis, and preservation of evidence. For example, the ICC could pass information gathered through its prosecution of the most prominent defendants on to the national judiciary for the trials of subordinates. In addition, the prosecutor could, after an investigation, decide that the national judiciary would be the better forum for prosecution, transfer the file, and defer to the local court. Where there are common issues of fact, the ICC could also share information about a prosecution involving one country with a second country.<sup>164</sup> To maximize the potential of this assistance, the ICC should institutionalize a systematic program for sharing evidence with national courts.

The assistance that the ICC provides in practice, however, will ultimately depend on both the amount of evidence the ICC is

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162. An analogy can be made to the prosecution of the Raboteau case in Haiti. Although it is the trial of one specific event, which was far from the worst episode of the dictatorship, it is often called "the trial of the coup d'état." This has led some to express fears that once the "trial of the coup d'état" is over, there will be no need to try the hundreds of other potential accused on behalf of the hundreds of thousands of victims.

163. The ICC Statute prohibits national court trials for the same crimes of a person acquitted by the ICC. ICC Statute, *supra* note 1, art. 20.

164. An example of an applicable case would be Operation Condor, where several South American dictators cooperated in exterminating pro-democracy activists.



able to accumulate and its willingness to share. The ICC would be most effective in providing scientific and technical assistance, collecting information from third parties, and obtaining information from victims, witnesses, and defendants outside of the national court's jurisdiction. The Statute allows the Court to provide information to a state that is investigating a crime in the ICC's jurisdiction or other serious crime (for example, crimes committed before the ICC came into being, or crimes where there was no nexus with an ICC member). The assistance can include providing evidence from the Court's investigation or trial and allowing the questioning of detainees.<sup>165</sup>

Although the ICC Statute does not expressly provide for it, the Court will have access to a high level of scientific and technical expertise.<sup>166</sup> The ICC could lend this technical assistance to corroborate eyewitness testimony, including forensic anthropology evidence,<sup>167</sup> medical examinations of victims, statistical analysis,<sup>168</sup> and ballistics evidence where still available. Where the ICC is investigating ongoing violations, especially with refugees, it could arrange for almost contemporaneous medical examinations of victims. The ICC could also develop a program of collecting and preserving evidence in ongoing situations, including victim and witness testimony, photographs, and clothing.

Much of this type of information would be collected outside the prosecuting state's borders.<sup>169</sup> The national judiciary may not have the same access to such information if, for example, the transitional government was not effectively in power at the time. Indeed, this was the case with the constitutional government of Haiti during the dictatorship. The transitional state may also have good relations

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165. ICC Statute, *supra* note 1, art. 93(10).

166. *Id.* art. 54 (a prosecutor shall "extend the investigation to cover all facts and evidence relevant to whether there is criminal responsibility"). *See also* ICC Draft Rules, *supra* note 122, R. 91; M. Cherif Bassiouni, *Commission of Experts Established Pursuant to Security Council Resolution 780*, 5 *Crim. L.F.* 279 (1994).

167. *See* An Inter-American Team of Forensic Anthropology Consultants, *supra* note 31, at Introduction, D1 (noting that forensic anthropologists provided important assistance to the Haitian Truth Commission and Raboteau case).

168. *See id.* (stating that the anthropology consultants performed a statistical analysis of hospital records and truth commission information).

169. For example, interviews of refugees, scientific or medical examinations of refugees, physical evidence in their possession, statistical analyses, and many other types of evidence would not necessarily be collected within the prosecuting state's borders.

with the country of refuge, or the prosecutors may not have the resources for international travel. Although the ICC's disclosure of such information may be limited by witness confidentiality concerns or tactical decisions to keep the information secret as long as possible, in the case where the territorial state is conducting prosecutions, those concerns are slight.<sup>170</sup>

In many cases, the amount of useful information that the Court could collect on its own is dwarfed by the information available from third party states. Haiti is a good example of this: the repression took place before journalists, foreign governments, and international human rights missions—just about everyone but the constitutional government. Information could be collected in such a case from witness interviews, intelligence reports, intercepted communications, and satellite and other photographs. Information produced by others but seized by the third party state could also be collected by the Court. Obtaining this information would depend largely on the amount of political leverage the ICC possesses and is willing to exercise. The ICC Statute allows the Court to request documents and other cooperation for mutual legal assistance from state parties or intergovernmental organizations.<sup>171</sup> The ICC, however, has no way of enforcing this order against an uncooperative state.<sup>172</sup> Even if it possesses evidence provided by a state, it cannot turn it over to a national prosecution without the source state's consent.<sup>173</sup>

History shows that third state cooperation cannot be assumed. The commission of experts for Yugoslavia received substantial cooperation from some quarters, but disappointingly little in others.<sup>174</sup> Information furnished to the International Criminal Tribunal

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170. The Haitian Truth Commission investigators asked all of their witnesses whether they wanted their testimony kept secret. Although the military and paramilitary groups posed a significant threat at the time, almost no witnesses outside of Port-au-Prince asked for confidentiality, and less than one third in the capital requested confidentiality. (In the course of his work investigating and prosecuting human rights cases, the author has reviewed hundreds of interview forms prepared by CNVJ investigators.) See generally Truth Commission Report, *supra* note 5.

171. ICC Statute, *supra* note 1, arts. 86, 87.

172. *Id.* art. 87. All the Court can do, with respect to non-cooperation by either a state party or non-party, is to communicate the non-cooperation to the Assembly of Parties or, where applicable, the Security Council.

173. *Id.* art. 93(10)(b)(ii)(1).

174. See Bassiouni, *supra* note 166; Scharf, *supra* note 109, at 46.

for the Former Yugoslavia (ICTY) has varied widely according to the donor states' political objectives.<sup>175</sup> Although the United States sent 20,000 troops to stop human rights violations in Haiti,<sup>176</sup> and is spending millions on Haiti's justice system, it has been much less generous in providing information important to the human rights trials.<sup>177</sup> Experience in analogous situations shows that political pressure can sometimes bear fruit.<sup>178</sup> The ICC should use its unique visibility and moral clout to obtain as much information as possible from reluctant states.

Several factors mitigate the ICC's ability to obtain cooperation. The first is that, especially in its formative years, the ICC may be unwilling to risk alienating potential or actual states parties to the treaty or it may be wary of scaring off prospective parties. Second, a requested state may invoke a national security exception to disclosure.<sup>179</sup> The ICC Statute does force the state to justify the invocation of this exception and allows the ICC to make an independent judgment as to the exception's applicability.<sup>180</sup> In the end, however, the enforcement of this judgment on a reluctant state is a political

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175. See Black & Herman, *supra* note 110, at 25–28 (NATO members provided ample documentation of Serb responsibility for war crimes during NATO's bombing of Serbia in April and May 1999, but refused to supply requested materials regarding similar Croat atrocities).

176. The legal justification for the invasion was based on the doctrine of humanitarian intervention resulting from the widespread human rights violations. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 1, U.N. Doc. S/RES/940 (1994).

177. The FRAPH/FADH documents, which belong to Haiti, are the most obvious example, but the United States has also been reluctant to turn over its own documents. See *supra* note 78 and accompanying text. One exception is provided by a Freedom of Information Act request, through which the State Department provided documents for the Raboteau case. These documents discredit the military's humanitarian intervention pretext for the operation. See S.C. Res. 940, *supra* note 176, at note 150.

178. The campaign for information about Nazi assets held by Swiss banks is an example of a strategy combining legal and political pressure. More recently, international campaigns have successfully induced the United States to release documents involving human rights violations in Chile. See Press Release, Human Rights Watch, CIA, State, NSC Documents Declassified on Chile (June 30, 1999); *Argentines Exhort Albright on Files*, Associated Press Newswire, Aug. 16, 2000; Equipo Nizcor, Honduras le Pide a los Estados Unidos la Desclasificación Completa de los Documentos Sobre la Base El Asuacate (2000) (internet announcement citing Associated Press reports, on file with the author).

179. See ICC Statute, *supra* note 1, arts. 72, 93(4).

180. *Id.* arts. 72(5), 87(7).

matter for either the Security Council or the Assembly of States Parties.<sup>181</sup> Even if a state did provide information to the ICC, a confidentiality restriction may prevent it from being passed on to the national prosecution.<sup>182</sup>

A national investigation could also help the ICC, as the strengths and weaknesses of the two would be complementary.<sup>183</sup> Although the ICC will likely have relatively strong scientific, technical, and administrative expertise, it will almost certainly be short on local knowledge, including informer networks and cultural information important to evaluate both witness credibility and defendant responses to interrogation. Collaboration with the local investigation will therefore be mutually beneficial.

The ICC Statute allows broad sharing of evidence between the Court and national judiciaries.<sup>184</sup> What it does not do is institutionalize programs that ensure that such assistance will be an integral part of the Court's work. Without such programs, it is possible that assistance to the states that need it the most, the poorer or more fragile countries, will be overlooked in the day-to-day pressure of the ICC's caseload. A request for information delivered by a wealthy state with frequent contact with the Court, influence over its finances, and access to the international media would receive prompt attention under the Statute. Absent a systemic program for processing the requests, an inquiry from a prosecutor mailed from a small, poor country far from the Hague might end up permanently at the bottom of someone's to-do box.

## 5. Arrests

The ICC could best help national prosecutions with arrests by providing information to justify warrants, and information that would help to identify and locate suspects. Although under certain provisions a person arrested pursuant to a Court warrant could be transferred for a national prosecution, these provisions are extremely limited.<sup>185</sup> As with evidentiary assistance, the ICC's help in appre-

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181. *Id.* art. 87(7).

182. *Id.* art. 55.

183. This is assuming that the national system was inclined towards prosecutions in the first place.

184. *See supra* text accompanying note 164.

185. ICC Statute, *supra* note 1, art. 90.

hending individuals is technically possible, but ultimately will depend on the political will of other states to help it and its own willingness to share the information.

The ICC has broad powers to issue arrest warrants on the application of the prosecutor to the pre-trial chamber.<sup>186</sup> A warrant may be issued for any of several reasons, including the existence of reasonable grounds to believe the person has committed a crime within the ICC's mandate, or in order to ensure the person's appearance at trial, prevent the obstruction of the investigation or court proceedings, or prevent the continuing commission of crimes under investigation by the prosecutor.<sup>187</sup> The ICC's ability to have these warrants executed is of great benefit to a national prosecution, even if the arrestees are not subsequently handed over to the national effort. Initially, if arrestees are obstructing the ICC prosecution, it is likely that they are also wielding influence over the domestic effort. If they are instrumental for the ICC prosecution, they are likely to have valuable information that the local prosecutors could access via interrogations.

The ICC will be able to arrest some categories of offenders beyond the reach of national judiciaries, such as those protected by official immunity or a statute of limitations in the national court. Under the Statute, a defendant's official capacity does not exempt him from criminal responsibility,<sup>188</sup> and no statute of limitations applies.<sup>189</sup>

The ICC, however, has no police force, and its ability to execute warrants is circumscribed by its reliance on domestic authorities for enforcement.<sup>190</sup> Its ability to issue warrants and obtain arrests is only as effective as the state that is executing the warrant wants it to be. This limitation is amply illustrated by the ICTY, whose 1996 warrants against Radovan Karadzic and Ratko Mladic remain un-

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186. *Id.* art. 58.

187. *Id.* art. 58(1).

188. *Id.* art. 27.

189. *Id.* art. 29.

190. *Id.* art. 59. It is not entirely clear from the text of the ICC Statute if there would be the possibility of a direct enforcement mechanism via some form of United Nations peace keeping force that could potentially execute warrants. *But see* F.M. Lorenz, *Combating Impunity: The Practical Limits on Military Force*, 14 *Nouvelles Études Pénales* 465 (1998).

executed, despite their public appearances in a country occupied by NATO peacekeepers.<sup>191</sup> Defendants could easily evade arrests in countries that have a weak or corrupt police force or are not parties to the ICC Statute. Furthermore, arrestees are brought before a national tribunal before their surrender to the ICC, which provides another opportunity for influence to be exerted to prevent transfer to the Court.<sup>192</sup>

The ICC could probably convince states to apprehend and deliver defendants to it that a national judiciary could not.<sup>193</sup> This ability stems in part from the perception that an international tribunal would be more respectful of a defendant's rights, but also to a large extent from the tribunal's high media profile and ability to exert political pressure. This confidence in the Court over national judiciaries is reflected by the priority given to the Court where a state party arrests an accused who is also the subject of a national extradition request.<sup>194</sup> However, this power is likely to be severely limited in situations where the defendant is found in a state unwilling to cooperate because of a political or strategic affinity with the accused, or where the defendant has been given *de facto* asylum after a political compromise.

People arrested pursuant to an ICC warrant can, in some cases, be transferred to a national court. A person convicted by the Court can be extradited from the host state to another state for trial,<sup>195</sup> with Court approval,<sup>196</sup> after he has served his sentence. The person could not, however, be tried again for crimes for which he has been acquitted or convicted by the Court.<sup>197</sup> A person arrested pursuant to an ICC mandate could also be extradited from the arresting

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191. Scharf, *supra* note 109, at 150–54, 224–25.

192. See ICC Statute, *supra* note 1, art. 59.

193. See *Le Genocide et les Massacres au Rwanda en 1994, la Justice en Question* (report on file with the author). In some cases, countries turned defendants over to the Rwanda tribunal who had been arrested pursuant to a Rwandan extradition request. However, the ability of the ICC to obtain arrests from third countries might be decreased with the possibility that the defendants could be turned over to a state prosecution.

194. See ICC Statute, *supra* note 1, art. 90.

195. *Id.* art. 107.

196. *Id.* art. 108.

197. *Id.* art. 20.

state to a third state, although the Court's request would usually have priority.<sup>198</sup>

The Statute does not provide for transfer of prisoners directly from the ICC to a requesting state, which prevents the ICC from contributing to the national effort in three ways. The first is in a situation where the prosecutor determines that there is evidence of criminal behavior, but not enough proof of a crime under the ICC's jurisdiction. For example, there could be ample evidence that the person was involved in murder, but not that it was part of an attack that was sufficiently widespread or systematic to justify a crimes against humanity conviction.<sup>199</sup> A second way is when the prosecutor determines that a national prosecution would be preferable because the victims prefer it, because the national prosecution would help develop the national judiciary, or because the national courts could do a better job.<sup>200</sup> The third would be if the person were acquitted despite evidence of criminality, because there was an absence of one of the elements of war crimes, crimes against humanity, genocide, or aggression.

## 6. General Insecurity

Although the ICC will have little impact on the overall security situation of a country attempting to prosecute human rights violations, it could mitigate the effect of insecurity on national prosecutions by protecting key witnesses and sharing the witnesses, or their information, with the national prosecution.

The ICC could not protect most of the witnesses likely to be used in a national case, but it could integrate the most important ones into its prosecution and protection programs. A few witnesses beyond the reach of defendant intimidation would not only ensure some testimony, but would also relieve pressure on those remaining in the country. The ICC Statute does not define the parameters of witness protection, but has general provisions for witness protection and the creation of a Victims and Witnesses Unit.<sup>201</sup> Presumably, the

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198. *Id.* art. 90.

199. *See id.* art. 7.

200. *See supra* notes 115–20 and accompanying text.

201. “The court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” ICC Statute, *supra* note 1, art. 68(1). *See id.* art. 43(6) (creating a Victims and Witnesses Unit).

program will eventually include all necessary pre-trial security, and where necessary, post-trial relocation.

If the ICC does have a program of comprehensive protection for key witnesses, it could gear the program to help national prosecutions by consulting with national authorities, if appropriate, on the selection of witnesses to be protected. A witness' potential assistance to national prosecutions should be a factor in determining whether to offer protection. The actual protection afforded should include protection for the witness to testify at a national trial and appropriate protection after that if appearance at the national trial increases the person's risk.

### CONCLUSION

The ICC presents a historic opportunity for the international community to take a stand against large scale violations of human rights. However, the Court offers only a limited forum for the international community to take a stand; many of the cases concerning large-scale violations of human rights are prosecuted by national judiciaries. The national courts can try many more cases than the ICC ever could, in a setting that is generally better for the victims and for developing national systems.

The ICC's ability to help national prosecutions, as with its own ability to prosecute, depends largely on states, and how much those states are willing to let it or help it perform those functions. But the ICC Statute specifically authorizes many ways of providing assistance, and there are many other ways that fit within the existing framework. To maximize these opportunities, the Court should integrate assistance to national prosecutions into the core of its work, especially hiring, investigation, witness protection, and arrest activities. Such assistance will help the ICC to be more responsive to the conditions of its target countries, and it will support the judiciaries in a difficult process of transition while they come to terms with the past. Most important, providing assistance to national judiciaries is the only way that the world will have accountability for the majority of crimes under the ICC's mandate.

### EPILOGUE

After this Article's submission, the Raboteau Massacre trial reached its conclusion. The jury convicted sixteen of the twenty-two



defendants in custody, most of whom received life sentences. The judge convicted all thirty-seven *in absentia* defendants, including the leaders of the dictatorship, all members of the military high command, and leaders of FRAPH, the main paramilitary organization. The court awarded \$150 million in compensatory damages.

National and international observers agreed that the trial was well-prepared and fundamentally fair to defendants and victims alike. The United Nations Independent Expert on Haiti, Adama Dieng, called the trial “a landmark in the fight against impunity” and “a huge step forward” for the Haitian justice system.<sup>202</sup> The United Nations Support Mission to Haiti (MICAHA) added that the Raboteau Massacre case, along with another trial held in August, “prove that the Haitian justice system is capable of effectively prosecuting” human rights cases, “while respecting the guarantees of the 1987 Constitution and International Treaties to which Haiti is a party.”<sup>203</sup>

The Raboteau trial’s success was especially gratifying because it was the result of several initiatives coming together and performing well. Two of the prosecutors and the presiding judge were recent graduates of the Judicial Academy. Two others had recently been promoted to their positions. The victims and witnesses were highly credible and consistent, in large part due to the work of the BAI. The police and prison officials performed their tasks with professionalism. A special office coordinated the extensive logistics flawlessly, and international expert testimony sealed the case against the defendants.<sup>204</sup>

The trial’s principal lesson to the international community is that a poor country with an underdeveloped judiciary making a difficult democratic transition can still provide high-quality justice for its victims. Justice for Raboteau required persistence by the victims and officials, time, and some help from outside. Much of this help—the BAI’s technical and material assistance; the international expertise in forensic anthropology, genetics, and military organization; and training of judges and prosecutors—could effectively be provided by

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202. Press Release, United Nations Independent Expert on Haiti, Raboteau Verdict in Haiti “A Landmark in Fight Against Impunity,” but Case Not Yet Finished, Says UN Independent Expert (Nov. 20, 2000), available at <http://www.unog.ch/news2/documents/newsen/hr00090e.html>.

203. Press Release, United Nations Support Mission to Haiti (MICAHA) (Nov. 20, 2000) (author’s translation) (on file with author).

204. See Brian Concannon, *Justice in Haiti: The Raboteau Trial*, Human Rights Tribune, Dec. 2000, at 11.

250            *COLUMBIA HUMAN RIGHTS LAW REVIEW*            [32:201

the ICC to countries like Haiti through a program integrated into the Court's core activities.