



# UGANDA: INTERACTION BETWEEN INTERNATIONAL AND NATIONAL RESPONSES TO THE MASS ATROCITIES

BY SIGALL HOROVITZ

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## ABOUT DOMAC

**THE DOMAC PROJECT** focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, inter alia, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

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## EXECUTIVE SUMMARY

Scores of civilians, including women and children, were killed, abducted, forced to fight, tortured, and sexually abused during the armed conflict between the Ugandan military and the rebel group Lord's Resistance Army (LRA). The conflict has recently reached its 25<sup>th</sup> year, but none of the perpetrators have faced justice. In 2005, International Criminal Court (ICC) in The Hague charged five senior LRA leaders with atrocities committed in northern Uganda, but has so far been unable to apprehend and try them. A sixth LRA commander is detained in Uganda for conflict-related crimes. He was brought to trial before the International Crimes Division (ICD) of the High Court of Uganda, but the proceedings are currently on hold while the Ugandan Supreme Court decides whether the accused may benefit from a national amnesty law. Thus, neither international nor national trials addressing LRA atrocities have commenced so far.

This report posits that, given the limited capacity of international courts in terms of the number of perpetrators they can prosecute, an effective fight against impunity requires that the international community adopt a comprehensive approach which promotes the utilization of international and national accountability processes in parallel. Calibrating international and national trials would also ensure that legal norms developed by international courts are applied in national trials. In the case of Uganda, it is particularly important that international trials are complemented by (fair and genuine) national proceedings, given that atrocities are still being committed on a daily basis by LRA members.

While the international community has not attempted to calibrate international and national trials in Uganda, the ICC has still had some impact on Ugandan courts. Elements of this impact are identified and assessed in this report, which also offers ways to maximize any positive impact identified. To identify ICC impact on Uganda, the author analyzed various documents and conducted in-depth interviews with about 20 core professionals affiliated with the ICC or the Ugandan justice system.

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# LIST OF ABBREVIATIONS

LRA	Lord's Resistance Army
ICC	International Criminal Court
ICD	International Crimes Division of the High Court of Uganda
UNLA	Uganda National Liberation Army
NRA	National Resistance Army
NRM	National Resistance Movement
UPDF	Ugandan People's Defence Force
ICJ	International Court of Justice
ICTJ	International Center for Transitional Justice
IDP	Internally displaced person
DPP	Director of Public Prosecutions
OTP	The Office of the Prosecutor of the ICC
JLOS	Justice, Law and Order Sector
PILPG	Public International Law and Policy Group
IICI	Institute of International Criminal Investigations
JRR	Justice Rapid Response
UCICC	Ugandan Coalition for the ICC

## 1. INTRODUCTION

Scores of civilians, including women and children, were killed, abducted, forced to fight, tortured, and sexually abused during the armed conflict in northern Uganda, fought between the Ugandan military and the rebel group Lord's Resistance Army (LRA). Spanning for over twenty years, the armed conflict in northern Uganda has been considered one of the longest-running conflicts in sub-Saharan Africa.<sup>1</sup> In addition to the above atrocities, homes and schools were destroyed during the conflict, and almost two million civilians were forcefully displaced into camps with appalling conditions.

In June 2006, the Ugandan government and the LRA started peace talks in the South Sudanese city of Juba. After some progress was made, including the signing of a cessation of hostilities and four other interim agreements, the peace process eventually collapsed and armed hostilities between the parties resumed in December 2008. However, the LRA had relocated by then to the Democratic Republic of the Congo (DRC) thereby allowing a relative calm to return to northern Uganda.<sup>2</sup> At the time of writing, the population of northern Uganda is beginning to recover from decades of conflict.<sup>3</sup>

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<sup>1</sup> Civil Society Organisations for Peace in Northern Uganda, 'Counting the Cost Twenty years of War in Northern Uganda' (30 March 2006), p. 7 <<http://www.oxfam.org/sites/www.oxfam.org/files/uganda.pdf>> accessed on 10 November 2010.

<sup>2</sup> It is noted, however, that the LRA continues to commit atrocities in the Democratic Republic of the Congo (DRC), the Central African Republic (CAR) and South Sudan. See HRW, 'DR Congo: Strengthen Civilian Protection Before Elections' (9 June 2011) <<http://www.hrw.org/en/news/2011/06/09/dr-congo-strengthen-civilian-protection-elections>> accessed on 15 June 2011 ("Since September 2008, the LRA has killed nearly 2,400 civilians and abducted about 3,400 others, many of them children. The LRA operates in the Central African Republic and Southern Sudan, as well as in northern Congo, where at least 107 new attacks have occurred since the beginning of the year. More than 400,000 people have been displaced due to the LRA across this remote central African region, with limited or no access to humanitarian assistance."); ICC OTP Weekly Briefing of 23-29 November 2010 (Issue #65) <<http://www.icc-cpi.int/NR/rdonlyres/7105B39A-2F30-43FF-9222-D7349BF15502/282732/OTPWBENG.pdf>> accessed on 9 December 2010 ("Since early 2008, the LRA is reported to have killed more than 1,500, abducted more than 2,250 and displaced well over 300,000 in DRC alone. In addition, over the same period, more than 120,000 people have been displaced, and more than 250 people killed by the LRA in Southern Sudan and the Central African Republic (CAR)"); UK Home Office, Border Agency, 'Operational Guidance Note Uganda' (March 2009) <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/ugandaogn/?view=Binary>> accessed 6 November 2010 (hereinafter: "UK Home Office Guidance on Uganda"), para. 2.8 ("suspected LRA rebels began attacking villages across hundreds of kilometres in an area stretching from the Central African Republic (CAR) through Sudan and into DRC. It was reported on 28 January [2009] that more than 900 people had been killed and over 130,000 had fled from their homes to escape the attacks.")

<sup>3</sup> Pham PN and Vinck P, 'Transitioning to Peace: A Population-Based Survey on Attitudes about Social Reconstruction and Justice in Northern Uganda', Human Rights Center, University of California, Berkeley School of Law (2010) <[http://hrc.berkeley.edu/pdfs/HRC\\_Uga2010final\\_web.pdf](http://hrc.berkeley.edu/pdfs/HRC_Uga2010final_web.pdf)> accessed on 9 December 2010 (hereinafter: "Berkeley 2010 Survey"); Michael Otim and Marieke Wierda, 'Uganda: Impact of the Rome Statute and the International Criminal Court', ICTJ Briefing Paper (May 2010) <[http://www.ictj.org/static/Publications/ICTJ\\_UG\\_RSRC-ImpactofICC\\_bp2010.pdf](http://www.ictj.org/static/Publications/ICTJ_UG_RSRC-ImpactofICC_bp2010.pdf)> accessed on 24 October 2010 (hereinafter: "ICTJ Briefing Paper").



In 2003, three years before the Juba peace talks commenced, the Ugandan President Museveni had requested the International Criminal Court (ICC) in The Hague to intervene and prosecute the LRA leadership. In 2005, the ICC charged five senior LRA leaders with atrocities committed in northern Uganda, but has so far been unable to apprehend and try them. A sixth LRA commander is detained in Uganda for conflict-related crimes. He was brought to trial before the International Crimes Division (ICD) of the High Court of Uganda, but the proceedings are currently on hold while the Ugandan Supreme Court decides whether the accused may benefit from a national amnesty law. Thus, neither international nor national trials addressing LRA atrocities have commenced so far.

## 1.1 OBJECT OF REPORT

International courts are created to establish accountability in the aftermath of mass atrocities, through fair trials.<sup>4</sup> But they can only prosecute a handful of perpetrators, which in cases of mass atrocities usually represents a small fraction of the criminals. Therefore, international courts, even if they try the highest level perpetrators, have a greater chance to establish accountability in the countries they address if their process is complemented by national justice processes in those countries.<sup>5</sup> Otherwise, an “accountability gap” would remain which could prevent the eradication of impunity.<sup>6</sup>

In the case of Uganda, the ICC has charged five LRA leaders with war crimes and crimes against humanity committed in northern Uganda between 2002 and 2004. Two of the suspects have since died, and the remaining three are still at large. A sixth LRA leader was arrested by the Ugandan authorities and brought to trial before the ICD for atrocities committed in northern Uganda from 1992. However, the trial has been halted following a ruling by the Ugandan Constitutional Court that the criminal proceedings deny

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<sup>4</sup> International courts have other goals as well, but this report focuses on their goal of establishing accountability through fair trials.

<sup>5</sup> See, e.g., William W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’, 49 Harv. Int’l L.J. 53 (2008); Brian Concannon, Jr., ‘Beyond Complementarity: The International Criminal Court and National Prosecutions, a View From Haiti’, 32 Colum. Human Rights L. Rev. (2000) 201. It is noted that in order to promote accountability, national trials must not amount to “sham” trials or “victor’s justice”, but should rather meet minimum fairness and due process standards. National trials can and do also take place in third states, for example under the principle of universal jurisdiction. However, it is unlikely that many such prosecutions would take place in the absence of the suspects and evidence in such third states. Even when suspects are present in third states, investigations and prosecutions in these states often face legal, financial, practical and political hurdles. Furthermore, fair prosecutions before the domestic courts of the state of the crimes could also enhance the legitimacy of the post-conflict government and judiciary, and be more sensitive to local nuances than prosecutions by third states.

<sup>6</sup> The phenomenon described by the phrase “accountability gap” is sometimes described as an “impunity gap”.

the suspect equal protection under the Amnesty law. The case is currently under appeal. While the suspect is still detained, it is unclear at this stage whether he, or any others, would ever be prosecuted in Uganda for the wartime atrocities. Given the number and gravity of the atrocities committed in northern Uganda by both state and non state actors, the prospect of no or very few perpetrators being brought to justice may significantly undermine the ICC's message of accountability.<sup>7</sup>

The ICC was established through the Rome Statute, a multilateral treaty which reiterates the obligation of states to investigate and prosecute atrocities. While lacking "strong" enforcement powers to ensure that states fulfill this obligation, the Rome Statute encourages states to investigate and prosecute atrocities by threatening that otherwise the ICC will do so in their stead (at least in relation to the gravest crimes).<sup>8</sup> But even when the ICC becomes involved, due to its limited resources, it can only prosecute a few perpetrators in each case.<sup>9</sup> Thus, national justice processes will still be necessary to bridge the accountability gap. But given that what triggered the ICC's involvement in the first place was the lack of national proceedings, it cannot be assumed that the relevant state would start providing justice after the ICC becomes involved.

The position of this report is that, in the wake of atrocities, the international community should strive to adopt a comprehensive approach which actively promotes the parallel utilization of the ICC and national accountability processes. Until then, full accountability may not be achieved even when the ICC intervenes. While such a comprehensive approach can (and should) be implemented through a variety of means, one way to encourage national accountability processes is to ensure that the ICC has positive impacts on domestic procedures.<sup>10</sup> The principle of complementarity, according to which the jurisdiction of the ICC is residual to that of states, could provide a

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<sup>7</sup> It is noted that accountability may still be achieved if alternative or traditional justice mechanisms are implemented in an effective manner in Uganda.

<sup>8</sup> The Statute clarifies that states have the primary jurisdiction to prosecute atrocities and the jurisdiction of the ICC is residual, or complementary, in this respect.

<sup>9</sup> The principle of "focused investigations and prosecutions" is at the core of the Prosecutorial Strategy of the ICC Prosecutor. See ICC OTP Prosecutorial Strategy (2009-2012) <<http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>> accessed 20 December 2010 (hereinafter: "ICC Prosecutorial Strategy 2009-2012"), paras. 3, 15, 18-21.

<sup>10</sup> It is noted that not all the potential domestic impacts of international courts are desirable. For example, the holding of trials by an international court may provide an excuse for national courts (or other accountability mechanisms) to remain inactive or to hold politically-motivated trials against political opponents labeled as war criminals. These are negative impacts. A positive impact would be the encouragement by an international court of national justice procedures which are fair, and address perpetrators that are not handled by the international court.

convenient framework for ensuring and maximizing positive domestic ICC impacts.<sup>11</sup> As this report will show, the ICC has already had some effects on atrocity-related judicial procedures in Uganda, but whether these effects can be qualified as “positive impacts” will ultimately depend on the quality and outcomes of the relevant national procedures.

The object of this report is to identify the impacts that the ICC had on domestic atrocity-related judicial proceedings in Uganda in terms of the (1) rates and trends of such proceedings; (2) applicable domestic norms; (3) relevant sentencing practices; and (4) national capacity to handle such proceedings. These four areas of focus were chosen for their relevance to an analysis of whether the ICC has encouraged domestic accountability processes in Uganda. The report will focus on the ICC’s impacts on formal criminal justice processes in Uganda, rather than traditional or alternative procedures.

## 1.2 STRUCTURE AND METHODOLOGY

The present report amounts to a case-study which provides a broad preliminary assessment (rather than an exhaustive in-depth analysis) of the ICC’s impacts in Uganda in each of the four above-listed areas of focus. Before providing such an assessment, parts 2 to 7 of the report examine contextual matters which are important for a proper understanding of the ICC’s impacts in Uganda. In particular, parts 2 and 3 of the report present a general background on Uganda and its conflict and atrocities. In part 4, the report outlines the political and legal conditions in Uganda, in an attempt to identify the willingness and ability of the local authorities to prosecute atrocities. Parts 5 and 6 describe the national and international judicial responses to the atrocities, namely, Uganda’s approach to atrocity-related accountability and the ICC’s involvement in Uganda. In part 7, the relationship between Uganda and the ICC is discussed. Part 8 is the core of this report – it identifies the ICC’s impacts on Uganda’s judicial response to the atrocities, in the four areas listed in section 1.1 above. Part 9 concludes the report and provides some recommendations.

The report largely relies on data obtained through interviews with about 20 core professionals affiliated with the ICC or the Ugandan justice system.<sup>12</sup> Since most interviewees did not want the information they provided to be attributed directly to them,

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<sup>11</sup> Indeed, the OTP adopted an official policy of “positive complementarity” that aims to promote national proceedings. See ICC Prosecutorial Strategy 2009-2012 (n 9), paras. 3, 15-17.

<sup>12</sup> The interviews were conducted by the author in The Hague and Uganda in 2008 and 2010.

they are cited throughout this report with generic references, such as “a senior Ugandan judicial official” or “an ICC official”. The interviewees were selected based on their knowledge of and active role within the Ugandan justice system or the ICC. In addition to describing relevant domestic developments in Uganda, the interviewees also shed light on the relationship between these developments and the ICC. The impact assessments made in this report are based on the interviews, as well as information from UN and NGO reports, international and national legal instruments, academic literature, news articles and other publically available documents.

Adopting a methodology partly based on interviews was necessary in light of the lack of sufficient literature which can explain the relationship between the relevant international and national judicial processes.<sup>13</sup> While this methodological approach is limited in that observations are based on *perceptions* of interviewees, the report avoids misinforming the reader by relying also on credible documents, and by explicitly noting when certain observations are based on interviews. In addition, a draft of this report was reviewed by three international law experts familiar with both the ICC and Ugandan atrocity-related judicial proceedings, and their comments were taken into account.

## 2. COUNTRY BACKGROUND

### 2.1 GENERAL<sup>14</sup>

The Republic of Uganda (Uganda) is a landlocked country in Eastern Africa, covering an area of 241,038 sq km, with Kampala as its capital city. It borders South Sudan to its north, Rwanda and Tanzania to its south, Kenya to its east, and the DRC to its west. Uganda’s population of about 32.4 million includes members of over 20 ethnic groups.<sup>15</sup> The largest ethnic group, the Baganda, constitutes 16.9 percent of the population. Smaller ethnic groups include the Banyakole, Basoga, Bakiga, Iteso, Langi, Acholi, Bagisu, Lugbara and Bunyoro.<sup>16</sup> Over 80 percent of Uganda’s population is Christian

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<sup>13</sup> A forthcoming book which may fill this gap by providing primary research into the impact of the ICC in Uganda is Sarah M.H. Nouwen, ‘Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan’ (Cambridge University Press, forthcoming 2012).

<sup>14</sup> The information in this section (including in the footnotes) is based on the CIA Factbook <<https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html>> accessed on 24 October 2010 (hereinafter: “CIA Factbook on Uganda”).

<sup>15</sup> In addition, Uganda hosts over 200,000 refugees from Sudan, over 27,000 Congolese refugees and over 19,000 Rwandan refugees.

<sup>16</sup> Each of these groups represents fewer than 10 percent of the population. There are a number of even smaller ethnic groups which, combined, amount to 29.6 percent of the population.

(about half Roman Catholics and half Protestants) and around 12 percent is Muslim.<sup>17</sup> The most widely spoken languages in Uganda are English (official), Luganda and Swahili. Uganda's natural resources include fertile soil, regular rainfall, small deposits of copper, gold and other minerals, as well as recently discovered oil. Over 80 percent of the work force engages in agriculture. The average life expectancy at birth is 52.72 years.

Uganda, a former British Protectorate, gained independence on 9 October 1962. Within its borders, which were artificially created by the British, many ethnic groups with different political systems and cultures were grouped together. This planted seeds for political instability that rocked the country from independence to date. Uganda's first Prime Minister after independence was Milton Obote. He was ousted in 1971 in a military coup led by Idi Amin, the dictator considered responsible for the deaths of hundreds of thousands of people. In 1979, Amin was overthrown by a coalition of political groups under the Uganda National Liberation Front supported by Tanzania.

Elections in 1980 brought back to power Milton Obote, whose second government was marred by political instability and intolerance which claimed many lives. In 1985, Obote was overthrown by General Tito Okello and his Uganda National Liberation Army (UNLA). Okello ruled the country for less than a year until, following the failure of the Nairobi Peace Agreement, he was ousted by then rebel leader Lieutenant General Yoweri Kaguta Museveni and his National Resistance Army (NRA). The NRA was the military wing of the National Resistance Movement (NRM).

Since 26 January 1986 and until today, Museveni has been ruling Uganda as its President, maintaining power through a combination of one party system, piecemeal democratic concessions, outright military victories, rigged elections, constitutional amendments and repression of political opponents. His political party retained the name NRM, but the military component changed its name from NRA to the Ugandan People's Defence Force (UPDF). Despite the prevalence of corruption in his government, Museveni is considered to have brought economic growth and relative stability to

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<sup>17</sup> The breakdown of the ethnic groups in Uganda is as follows: Baganda 16.9%, Banyakole 9.5%, Basoga 8.4%, Bakiga 6.9%, Iteso 6.4%, Langi 6.1%, Acholi 4.7%, Bagisu 4.6%, Lugbara 4.2%, Bunyoro 2.7%, other groups 29.6%. In terms of religious affiliation, Roman Catholic 41.9%, Protestants 42% (Anglican 35.9%, Pentecostal 4.6%, Seventh Day Adventist 1.5%), Muslim 12.1%, other religions 3.1%, no religion 0.9%.

Uganda. However, over 28 different insurgents groups have fought Museveni in different parts of the country since he rose to power.<sup>18</sup>

## 2.2 POLITICAL AND LEGAL SYSTEMS<sup>19</sup>

Uganda is a republic with a multiparty political system. Its constitution was adopted on 8 October 1995, and has since been amended several times. A constitutional amendment adopted in 2005 removed the previously set presidential term limits.<sup>20</sup> Uganda's executive branch includes the President, who is the head of both the state and the government, and the Prime Minister who assists the president in supervising the cabinet. The cabinet is appointed by the president from among the elected legislators. The president is elected by popular vote for a five-year term, which, according to the constitutional amendment of 2005, can be extended for an unlimited number of times. On 23 February 2006, in Uganda's first multi-party elections in almost 26 years, Museveni received 59.3% of the vote (his main opponent, Kizza Besigye, received 37.4%).<sup>21</sup> The most recent elections were held on 18 February 2011, with Museveni receiving 68% of the vote (Kizza Besigye received 26%).<sup>22</sup> These results mean that Museveni may serve as president for 30 years or more.<sup>23</sup> The next elections are planned for 2016.<sup>24</sup>

The legislative branch in Uganda consists of a unicameral National Assembly consisting of 375 members who serve five-year terms. Of these, 350 members are

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<sup>18</sup> As explained in section 3.1 below, the armed conflict in northern Uganda spiraled out of the local revolts against Museveni which started immediately after his rise to power in 1986.

<sup>19</sup> Unless stated otherwise, the information in this section is based on CIA Factbook on Uganda (n 14).

<sup>20</sup> Constitutional Amendment Act of 2005 [Uganda], Art. 28 <[http://www.ugandaonlinelawlibrary.com/files/constitution/Constitutional\\_Amendment\\_Act\\_2005.pdf](http://www.ugandaonlinelawlibrary.com/files/constitution/Constitutional_Amendment_Act_2005.pdf)> accessed on 25 December 2010. Compare to Article 105 of the Constitution of the Republic of Uganda of 1995 <[http://www.ugandaembassy.com/Constitution\\_of\\_Uganda.pdf](http://www.ugandaembassy.com/Constitution_of_Uganda.pdf)> accessed on 25 December 2010. For the updated version of the constitution see the Constitution of the Republic of Uganda (as at 15<sup>th</sup> February 2006) <[http://www.wipo.int/clea/docs\\_new/pdf/en/ug/ug002en.pdf](http://www.wipo.int/clea/docs_new/pdf/en/ug/ug002en.pdf)> accessed on 12 June 2011 (hereinafter: "Ugandan Constitution"). For an abridged and simplified version of the Ugandan Constitution which incorporates the Constitutional Amendment Act of 2005, see 'The Abridged and Simplified Version of the Constitution of the Republic of Uganda' <[http://www.parliament.go.ug/images/abridged\\_constitution\\_2006.pdf](http://www.parliament.go.ug/images/abridged_constitution_2006.pdf)> accessed on 25 December 2010.

<sup>21</sup> Elections irregularities were reported. See, e.g., UK Home Office Guidance on Uganda (note 2), para. 3.7.3

<sup>22</sup> Guardian.co.uk, 'Ugandan leader wins presidential election rejected as fraudulent by opposition' (20 February 2011) <<http://www.guardian.co.uk/world/2011/feb/20/ugandan-leader-wins-presidential-election>> accessed on 15 June 2011.

<sup>23</sup> Irregularities were reported in connection with these elections as well. See, e.g., US Department of State, Congressional Research Service, 'Uganda: Current Conditions and the Crisis in North Uganda' (by Ted Dagne, 29 April 2011) <<http://fpc.state.gov/documents/organization/162753.pdf>> accessed on 15 June 2011, p.1 ("The Obama Administration stated that "the elections and campaign period were generally peaceful, but we note with concern the diversion of government resources for partisan campaigning and the heavy deployment of security forces on election day." The Commonwealth Observer Group expressed similar concerns. The African Union stated that the elections were peaceful and transparent, but called for a Review of the Electoral Law. Opposition groups declared the elections to be fraudulent and rigged").

<sup>24</sup> CIA Factbook on Uganda (n 14).

directly elected (238 constituency seats and 112 district women representatives), 15 members representing special interest groups are indirectly elected (5 youth representatives, 5 representatives of persons with disabilities, and 5 worker's representatives), and 10 members represent the Ugandan army. The President may appoint additional ex-officio members. The last legislative elections were held on 18 February 2011 (the NRM received 263 seats and the remaining seats were divided among over 6 other parties). The next legislative elections are planned for February 2016.<sup>25</sup>

According to the Constitution, Uganda's judiciary comprises a Supreme Court, a Court of Appeal, a High Court and "such lower courts as Parliament may by law establish".<sup>26</sup> Judges are recommended by the Judicial Service Commission, appointed by the president and approved by the legislature. The legal system in Uganda is based on the British common law system and accordingly adopts a dualistic approach to international law whereby international law provisions apply only when implemented through domestic legislation. As in other common law jurisdictions, also in Uganda the role of victims in criminal proceedings is limited to that of witnesses. Traditional customary law often applies in Uganda in parallel to the formal legal system. Uganda is a member of the ICC and accepts the jurisdiction of the International Court of Justice (ICJ), albeit with reservations.

### 3. CONFLICT BACKGROUND

#### 3.1 THE CONFLICT

Following the brutal dictatorships of Idi Amin and Milton Obote, General Tito Okello briefly ruled the country in the mid 1980s (see section 2.1 above). Okello belonged to the Acholi ethnic group and his military force, the UNLA, consisted of many Acholi. The UNLA forces had fought Museveni and his NRM/NRA forces in Luwero. Thus, when Okello was ousted by Museveni in 1986, UNLA officers accusing Museveni of breaching the Nairobi Peace Agreement and fearing revenge revolted against Museveni and his

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<sup>25</sup> The information in this paragraph is based on the African Election Database <<http://africanelections.tripod.com/ug.html> - 2011 Parliamentary Election> accessed on 24 December 2011.

<sup>26</sup> Ugandan Constitution (n 20), Art. 129. The Constitution does not explicitly provide for Military courts. Rather, in Article 210 is mandates the Parliament to "make laws regulating the Uganda Peoples' Defence Forces, in particular, providing for— (a) the organs and structures of the Uganda Peoples' Defence Forces; (b) recruitment, appointment, promotion, discipline and removal of the members of the army; ...". See Ugandan Constitution (n 20), Art. 120.

newly established NRM regime. The UNLA remnants regrouped and formed the Uganda Peoples Democratic Army and launched a rebellion. Other rebel groups, including the LRA, would later join this rebellion.<sup>27</sup>

The LRA was founded in 1987 by Joseph Kony, a self proclaimed spiritual “medium” aspiring to rule Uganda according to the Biblical Ten Commandments.<sup>28</sup> The rebel group received support from the Acholi population, who had suffered from what they perceived as NRM atrocities in earlier insurgencies and feared marginalization by the Museveni government.<sup>29</sup> By mid-1988, most of the rebel groups had stopped fighting the government, as a result of either military defeat or political solutions.<sup>30</sup> But the LRA continued its insurgency which eventually spiraled into the violent conflict in northern Uganda that is yet to be resolved.<sup>31</sup>

Initially the LRA only targeted government troops, but with a decrease in popular support and an increase in government retaliations, the rebels started abducting many Acholi civilians, including young children, as a way to recruit troops. In addition, the LRA attacked Acholi civilians who they suspected were collaborating with the government. Thus, the LRA turned against the Acholi civilian population – the very people on whose behalf it claimed to fight. In 1993 a peace process was led by the then Minister for Pacification for northern Uganda, Betty Bigombe, but it collapsed shortly after an agreement was reached. The government of Sudan, in retaliation for Museveni’s support of the Sudan’s People Liberation Army, began supporting Kony and his men financially and militarily, allowing the LRA to launch operations from South Sudan and making it difficult for the Ugandan government troops to defeat the rebels.<sup>32</sup>

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<sup>27</sup> Besides the LRA, other rebels groups which revolted against Museveni included the Uganda People’s Democratic Army (UPDA) and the Holy Spirit Movement (HSM) of Alice Auma “Lakwena”. See Lomo, Zachary, and Lucy Hovil, Behind the Violence: Causes, Consequences, and the Search for Solutions to the War in Northern Uganda, Refugee Law Project, Working Paper No. 11 (February 2004), p. 4 <[http://www.refugeelawproject.org/working\\_papers/RLP.WP11.pdf](http://www.refugeelawproject.org/working_papers/RLP.WP11.pdf)> accessed on 24 October 2010 (hereinafter: “RLP Paper on the War in Northern Uganda”).

<sup>28</sup> Alexander K.A. Greenawalt, ‘Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court’, 50 Virginia J of Intl L 108 (2009) (hereinafter: “Greenawalt, Complementarity in Crisis”), p. 11

<sup>29</sup> RLP Paper on the War in Northern Uganda (n 27).

<sup>30</sup> *Ibid* (explaining that the HSM was defeated by the NRA in November 1987, and the UPDA signed with the NRA the Gulu Peace Accord of June 1988. The peace agreement was brokered by Museveni’s brother Salim Saleh; it provided amnesty to the fighters, and about 2,000 of them subsequently joined the NRA.)

<sup>31</sup> *Ibid* (explaining that Kony was a former UPDA commander who had unsuccessfully tried to take over the HSM and eventually created the LRA. He absorbed into his group former UPDA fighters who refused to give up arms following the Gulu Peace Accord of June 1988).

<sup>32</sup> *Ibid*.



In 2003, the Ugandan President requested the ICC to intervene and prosecute the LRA leadership. In 2005, following an investigation and a determination that the crimes are sufficiently grave to trigger its jurisdiction, the ICC issued arrest warrants against five LRA leaders, including Joseph Kony. It charged them with crimes against humanity and war crimes committed in northern Uganda between 2002 and 2004 (see section 6.2 below). By early 2006, Sudan decreased its support for the LRA and the rebel group moved its base to northeast DRC. At the time of writing, the LRA continues to commit atrocities in the DRC, the CAR and South Sudan.<sup>33</sup>

### 3.2 THE JUBA PEACE PROCESS

In July 2006, peace talks between the Ugandan government and representatives of the LRA were brokered by the vice-president of South Sudan, Riek Machar, in the South Sudanese city of Juba.<sup>34</sup> On 26 August 2006, a cessation of hostilities agreement was signed by the parties and, by late February 2008, they concluded four additional agreements including a permanent ceasefire and an agreement on accountability.<sup>35</sup> It was politically possible to reach the agreement on accountability because of the risk that the ICC would prosecute the atrocities if Uganda failed to do so (see section 4.1 below). A date in April 2008 was set for the signing of the final peace agreement but LRA leader Joseph Kony refused to come out of his hiding place in order to sign it. The ceremony was rescheduled to November 2008, but Kony again failed to appear, marking the collapse of the Juba peace process.<sup>36</sup>

In December 2008, the Ugandan military renewed its fight against the LRA by attacking its bases in the DRC during “Operation Lightning Thunder”.<sup>37</sup> While the

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<sup>33</sup> ICTJ Briefing Paper (n 3).

<sup>34</sup> Earlier attempts to encourage peace negotiations between the government and the LRA were made by Acholi government minister Betty Bigombe. But these efforts did not result in serious peace talks. See ICTJ Briefing Paper (n 3).

<sup>35</sup> One of the agreements set the aim of finding comprehensive solutions, another addressed accountability and reconciliation, another was about disarmament, demobilization and reintegration of LRA forces, and the fifth was a permanent cease-fire agreement. The Cessation of Hostilities Agreement (also known as Agenda Item No. 1) was signed on 26 August 2006. The Comprehensive Solutions Agreement (also known as Agenda Item No. 2) was signed on 2 May 2007. The Accountability and Reconciliation Agreement (also known as Agenda Item No. 3) was signed on 29 June 2007. The Permanent Ceasefire Agreement (also known as Agenda Item No. 4) was signed on 23 February 2008. The Agreement on Disarmament, Demobilisation and Reintegration of the LRA Forces (also known as Agenda Item No. 5) was signed on 29 February 2008. See, e.g., UK Home Office Guidance on Uganda (note 2), para. 2.6.

<sup>36</sup> Lecture by Sylvana Arbia organized by the Grotius Centre for International Legal Studies (13 May 2009) <<http://www.grotiuscentre.org/cms/ace/files/SCL%20Series%20Sylvana%20Arbia%20Uganda%20Situation.pdf>> accessed on 27 September 2010 (hereinafter: “Sylvana Arbia 2009 Lecture at Grotius Centre”), p. 8.

<sup>37</sup> ReliefWeb, ‘After Operation Lightning Thunder: Protecting Communities and Building Peace’ (28 Apr 2009) <<http://www2.reliefweb.int/rw/rwb.nsf/db900sid/ASHU-7RJ32N?OpenDocument>> accessed on 1 November 2010 (explaining that Operation Lightning Thunder was a joint military operation of the armed forces of Uganda, DRC, and

operation did not destroy the LRA, nor lead to Kony's arrest, it is considered to have weakened the LRA.<sup>38</sup> Relative peace has since returned to northern Uganda for the first time in over 20 years.<sup>39</sup> Despite the lack of a final peace agreement, the Ugandan government has started implementing the interim agreements concluded at Juba.<sup>40</sup>

### 3.3 THE MASS ATROCITIES

The atrocities committed by the LRA during the conflict include killing, abducting, mutilating, raping, sexually enslaving and torturing civilians, forcing children to fight, and burning and looting civilian property.<sup>41</sup> In particular, LRA forces reportedly killed over 65,000 civilians and abducted about 75,000 civilians, mostly children and youth.<sup>42</sup> The abductees, about a quarter of them women, were sexually enslaved and tortured by the LRA.<sup>43</sup> According to a recent report by the NGO International Center for Transitional Justice (ICTJ), the LRA committed "horrific mutilations including amputating limbs or cutting off ears, noses, or lips" with the deliberate intent "to instill terror, to violate local values and power structures, and to swell rebel ranks".<sup>44</sup>

To prevent the LRA from receiving support, and ostensibly to protect civilians, the government moved most of the population of northern Uganda into camps. But it did not

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Southern Sudan, which received support from the United States. It involved aerial and ground attacks against the main LRA camp in Garamba Park in the DRC).

<sup>38</sup> Sylvana Arbia 2009 Lecture at Grotius Centre (n 36), p. 9 ("Operation Lightning Thunder ... did weaken the LRA significantly, but it did not destroy it...").

<sup>39</sup> However, as noted above, the LRA continues to commit atrocities in the DRC, the CAR and Southern Sudan (see note 2 above).

<sup>40</sup> ICTJ Briefing Paper (n 3).

<sup>41</sup> See, e.g., ICC Case Information Sheet for Case no. ICC-02/04-01/05 (updated 16 June 2010) <<http://www.icc-cpi.int/NR/rdonlyres/E7F674DF-C2D8-4A86-98C1-4C9621050D4B/282225/KonyEtAlIENG.pdf>> accessed 31 October 2010 ("the LRA has established a pattern of 'brutalization of civilians' by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements ... abducted civilians, including children, are said to have been forcibly 'recruited' as fighters, porters and sex slaves to serve the LRA and to contribute to attacks against the Ugandan army and civilian communities").

<sup>42</sup> ICTJ Briefing Paper (n 3), p. 2 ("It is estimated that up to 75,000 people were abducted during the 20-year conflict. Most of the victims were youth and children"); Stephen Oola, 'The Coalition for Reconciliation in Uganda: Important Lessons for Proactive Civil Society Engagement in Catalysing Transitional Justice Discourse', a paper presented at the African Transitional Justice Research Network Workshop, 30–31 August 2010 <[http://www.transitionaljustice.org.za/docs/2010workshop/4\\_Oola.pdf](http://www.transitionaljustice.org.za/docs/2010workshop/4_Oola.pdf)> accessed on 12 November 2010 (hereinafter: "Oola, Important Lessons"), p. 1 ("The LRA has caused the deaths of over 65,000 people in northern Uganda").

<sup>43</sup> In June 2007, the University of California at Berkeley and Tulane University published a report about the LRA's practices of forced conscription. The report is based on extensive empirical research. It reveals that: (1) As many as 38,000 children and 37,000 adults have been abducted by the Lord's Resistance Army since 1986; (2) Nearly one in four of the abductees is female and, on average, women remain enslaved by the LRA three and a half years longer than men; (3) Young women are often used by LRA commanders as "wives," and up to 10 percent become pregnant while in captivity, contributing to the length of their stay; (4) In some LRA-occupied regions, as many as 10 percent of the inhabitants were abducted. While some eventually returned to their communities, others died in captivity. See UC Berkeley News Press Release, 'Damning report on Uganda war crimes', by Yasmin Anwar (15 June 2007) <[http://berkeley.edu/news/media/releases/2007/06/15\\_LRA.shtml](http://berkeley.edu/news/media/releases/2007/06/15_LRA.shtml)> accessed on 28 October 2010.

<sup>44</sup> ICTJ Briefing Paper (n 3).

provide the population in the camps with sufficient food, healthcare or security. Thus, about 1.8 million people became internally displaced persons (IDPs), living in camps under appalling conditions and depending on humanitarian aid to survive. The lack of protection in the camps allowed further human rights abuses to take place. In 2005, the World Health Organization has estimated the excess mortality rate in the camps at about 1,000 persons a month.<sup>45</sup> Some reports claimed that up to 90 percent of the northern Ugandan population resided in camps at one stage.<sup>46</sup> However, by late 2009, according to Amnesty International, about 80% of the IDPs were able to leave the camps, although “[o]ver 400,000 displaced people remained in camps and in dire need of humanitarian assistance.”<sup>47</sup> At the time of writing, more IDPs were able to return to their villages and almost all camps have closed down.<sup>48</sup>

Some reports claim that the forced displacement of civilians into IDP camps, and the failure to provide them with food, healthcare and security, amount to serious crimes against civilians committed by the government and the UPDF. Reports by Human Rights Watch allege that UPDF troops committed additional crimes against civilians, including murder, torture, rape, destruction of property, and recruitment of children under 15.<sup>49</sup>

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<sup>45</sup> ICTJ Briefing Paper (n 3).

<sup>46</sup> Berkeley 2010 Survey (n 3).

<sup>47</sup> Amnesty International Report 2010, Chapter on Uganda <[http://thereport.amnesty.org/sites/default/files/AIR2010\\_AZ\\_EN.pdf#page=280](http://thereport.amnesty.org/sites/default/files/AIR2010_AZ_EN.pdf#page=280)> accessed on 25 December 2010 (“The majority of internally displaced people in the conflict-affected northern region left the camps and returned to their homes. It was estimated that up to 65 per cent of the original displaced population returned to their villages of origin and 15 per cent went to transit sites outside camps. Most of those who returned to their villages faced lack of access to clean water, health care, schools and other essential public services. Over 400,000 displaced people remained in camps and in dire need of humanitarian assistance”) (hereinafter: “AI 2010 Report on Uganda”).

<sup>48</sup> Berkeley 2010 Survey (n 3).

<sup>49</sup> Human Rights Watch, ‘ICC: Investigate All Sides in Uganda’ (4 February 2004) <<http://www.hrw.org/en/news/2004/02/04/icc-investigate-all-sides-uganda>> accessed 13 November 2010 (reporting that the UPDF has committed “extrajudicial killings, rape and sexual assault, forcible displacement of over one million civilians, and the recruitment of children under the age of 15 into government militias”); Human Rights Watch, ‘Abducted and Abused: Renewed Conflict in Northern Uganda’ (14 July 2003) <<http://www.hrw.org/en/reports/2003/07/14/abducted-and-abused-0>> accessed on 13 November 2010, at pages 41-68 (reporting that atrocities committed by UPDF troops from 2002 and 2003 included “summary execution, torture, rape, child recruitment, and inhuman conditions of detention in unauthorized detention locations”); Human Rights Watch, *The Scars of Death: Children Abducted by the Lord’s Resistance Army in Uganda*, September 1997, <<http://www.hrw.org/en/reports/1997/09/18/scars-death>> at footnote 79 and text attached (reporting that during a military operation in 1991, in addition to forcing the population into camps without food and healthcare, government troops buried civilians alive, shot civilians, destroyed their fields, and sexually tortured men and women. HRW relied on a document by the Acholi Parliamentary Group, “Submission to the Parliamentary Committee on Defense and Internal Affairs Investigating the Northern Rebellion with a View to Bringing it to a Speedy End,” date uncertain, but probably December 1996 or January 1997, pp. 5-6).

## 4. CONDITIONS FOR PROSECUTIONS IN UGANDA

This part discusses the current political and legal conditions in Uganda, in an attempt to identify the willingness and ability of national authorities to prosecute the atrocities committed in northern Uganda.

### 4.1 POLITICAL WILL TO PROSECUTE ATROCITIES

In recent years, Uganda has demonstrated increasing willingness to prosecute LRA atrocities. This is somewhat unexpected given the Ugandan government's long tradition of responding to rebel-led mass atrocities through military means or by granting amnesties in return for peace.<sup>50</sup> Information available at the time of writing suggests that Uganda has seldom prosecuted atrocity crimes, whether as international or domestic crimes (although some rebels may have been tried for crimes against the state such as treason).<sup>51</sup> The conflict with the LRA in northern Uganda is no exception: In 2000, the Museveni government adopted an Amnesty Act exempting from prosecution all rebels who lay down their weapons and renounce the war (Amnesty Act).<sup>52</sup>

However, during the Juba peace process, one of the interim agreements signed by the parties introduced a framework of accountability for LRA atrocities. Despite the

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<sup>50</sup> Both the Idi Amin and Museveni governments have traditionally offered amnesties to rebels in return for laying down their weapons. For example, in 1987, Museveni adopted a law granting amnesty to rebels who laid down their weapons (hereinafter: "Amnesty Law of 1987"). However, certain serious crimes such as genocide, murder, kidnapping and rape were not covered by the Amnesty Law of 1987. After 1987, additional amnesties were granted by Museveni as a matter of policy on an ad hoc basis. If the rebels refused to lay down their arms, military means were imposed. See ICTJ Briefing Paper (n 3). That Uganda has historically preferred to respond to atrocities by amnesties, *de jure* or *de facto*, and military means rather than through formal prosecutions was also confirmed in an interview with Cambridge researcher Dr. Sarah Nouwen who has done extensive research in this area in Uganda. Interview notes with author. One interviewee, a senior Ugandan official, recalled that there was one attempt to address atrocities judicially, that was when Idi Amin set up a truth commission in 1974 to investigate disappearances between 25 Jan 1971 and 1974 (called 'Commission of Inquiry into the Disappearances of People in Uganda since 25 January 1971'). However, the commission's report was never published and its recommendations were not implemented. See Center for the Study of Violence and Reconciliation, 'Justice in Perspective - Truth and Justice Commission, Africa - Uganda' <[http://www.justiceinperspective.org.za/index.php?option=com\\_content&task=view&id=37&Itemid=76](http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=37&Itemid=76)> accessed on 15 June 2011.

<sup>51</sup> This is based on information provided by Cambridge researcher Dr. Sarah Nouwen who has done extensive research in this area in Uganda. Interestingly, when she searched through the archives of the Ugandan courts, Dr. Nouwen found two charge sheets against Joseph Kony from 1999, one on the count of murder and the other on the count of terrorism. Another interviewee, a senior Ugandan official, confirmed that Kony was indeed indicted a while ago by national authorities, but no judicial proceedings commenced as he was never apprehended. Interview notes with author. Regarding the lack of international crimes prosecutions in Uganda see Sylvana Arbia 2009 Lecture at Grotius Centre (n 36), p. 6 ("According to academic literature, there have been no recorded prosecutions of international crimes per se in Uganda's legal history"). Section 5.1 below discusses the first LRA atrocity-related criminal proceedings in Uganda.

<sup>52</sup> Amnesty Act, 2000 (Ch 294) [Uganda] <[www.beyondjuba.org/policy\\_documents/Amnesty\\_ACT\\_Chapter\\_294.pdf](http://www.beyondjuba.org/policy_documents/Amnesty_ACT_Chapter_294.pdf)> accessed on 30 October 2010 (hereinafter: "Amnesty Act of 2000"). The conditions of surrendering weapons and renouncing the war are listed in Article 3, para. 1. According to Article 3, paras. 2 to 4, rebels who are in custody or have already been charged with war-related crimes are still eligible for an amnesty, but subject to a special approval from the DPP (although the scope of the DPP's discretion in this regard is unclear).

failure of the peace talks, the government has been adopting measures to apply this framework in practice. This has culminated in the indictment and trial of former LRA commander Thomas Kwoyelo (see section 5.1 below). While his trial was halted following a Constitutional Court order, the failure to release him suggests that the Ugandan government is determined to prosecute LRA atrocities at all cost. But to pave the way for such accountability processes, Uganda must find a way to restrict the amnesty granted by the Amnesty Act of 2000, which protects rebels from prosecution for rebellion crimes and “any other crime in the furtherance of the war or armed rebellion”.<sup>53</sup> The Amnesty Act was meant to remain in force for only six months but was periodically extended and remains in force at the time of writing.<sup>54</sup> Nonetheless, in 2006, a provision was added to the Amnesty Act authorizing the Ugandan Minister of Internal Affairs to submit for the parliament’s approval a list of names to be excluded from the national amnesty regime (see discussion under the title “Amnesty Regime” in section 8.1 below).

To understand Uganda’s shift from a policy of automatic blanket amnesty to accountability, it should be mentioned that while thousands of rebels disarmed and received amnesty from 2000, the top LRA leaders did not surrender and continued to commit atrocities from their base in South Sudan.<sup>55</sup> In December 2003, unable to access the LRA in South Sudan, the Ugandan government requested the ICC Prosecutor to initiate proceedings against LRA leaders.<sup>56</sup> Thus, almost four years after adopting the Amnesty Act, Uganda referred the situation in its north to the ICC, an international court which is not bound by the national amnesty regime.<sup>57</sup> In 2005, the ICC charged the top

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<sup>53</sup> By not excluding any crimes from its ambit, the Amnesty Act of 2000 differs from the Amnesty Law of 1987 (n 50) which excluded certain serious crimes.

<sup>54</sup> Amnesty Act of 2000, Article 16 (“This Act will remain in force for a period not exceeding six months and on expiry, the Minister may by statutory instrument extend that period.”). The Amnesty Act has periodically been extended and was valid at the time the research for this report was concluded. However, subsequently, on 25 May 2012, the Amnesty Act was partially abrogated by a law which essentially abolished the blanket amnesty regime (see note 157 below).

<sup>55</sup> By 2008, an estimated 23,000 rebels received amnesty and were demobilized, including high and low ranking fighters. It is noted that rebel groups were active in other areas of Uganda. Of the 23,000 rebels that received amnesty, about half were affiliated with the LRA, but none of them were high ranking troops. See Greenawalt, *Complementarity in Crisis* (n 28), p. 133.

<sup>56</sup> ICC Press Release no. ICC-20040129-44, ‘President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’ (29.01.2004) <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/>> accessed on 30 October 2010.

<sup>57</sup> The ICC Pre-Trial Chamber summarized the explanation provided by the Solicitor General of Uganda as follows: “whilst the national judicial system of Uganda was ‘widely recognised for its fairness, impartiality, and effectiveness’, it was the Government’s view that the Court was ‘the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility for the crimes within the referred situation’. This view was based on several considerations, including (i) the scale and gravity of the relevant crimes; (ii) the fact that the exercise of jurisdiction by the Court would be of immense benefit for the victims of these crimes and contribute favourably to national reconciliation and social rehabilitation; (iii) Uganda’s inability to arrest the persons who might bear the greatest

five LRA leaders, including Joseph Kony, but has been unable so far to arrest them (the ICC case is addressed in section 6.2 below).

Against this background, peace talks between the government and the LRA commenced in Juba in 2006 (see section 3.2 above). The LRA delegation to the talks demanded that the ICC drop the case against its leaders as a condition for peace.<sup>58</sup> The Ugandan government was willing to consider this demand favorably,<sup>59</sup> but needed the ICC to agree to discontinue the case since the latter cannot simply stop its proceedings at the behest of a state (even if that state referred the case to the ICC in the first place).<sup>60</sup> However, a state can challenge the admissibility of a case before the ICC under Article 19 of the Rome Statute, on the basis that the case is being handled on the national level.<sup>61</sup> In this context, the parties at Juba concluded an agreement establishing a framework for prosecuting LRA atrocities (see section 8.1 below). It is recalled that conflict-related crimes were also committed by UPDF troops (see section 3.3. above). Uganda's approach to these crimes is addressed in section 5.2 below.

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responsibility for the relevant crimes.” See ICC Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, Pre-Trial Chamber II, 10 Mar. 2009, at para. 37.

<sup>58</sup> Interestingly, the ICC's involvement was cited as one of the reasons the LRA agreed to participate in peace negotiations: they had hoped that a peace deal will give them immunity from prosecution. See, e.g., International Crisis Group, Africa Report No. 124, 'Northern Uganda: Seizing the Opportunity for Peace' (2007), <<http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/uganda/Northern%20Uganda%20Seizing%20the%20Opportunity%20for%20Peace.ashx>> accessed on 3 November 2010, at pp. 1-2 (“ These [ICC warrants] rattled the affected commanders, giving them an incentive to start talking about a peace agreement that might bring immunity from prosecution, and put pressure on the Sudanese government to cut support for the rebels”).

<sup>59</sup> See, e.g., Greenawalt, *Complementarity in Crisis* (n 28), p. 177 (“The Ugandan authorities publicly pledged that they would go to the ICC to seek withdrawal of charges, but only after the LRA leaders surrendered and underwent the mato oput ceremony. The LRA, by contrast, repeatedly demanded the withdrawal of the charges as a pre-condition to a final agreement. Of course, such a withdrawal was not something the Ugandan government could accomplish without the cooperation of the ICC”).

<sup>60</sup> This is different in cases where the ICC has not yet identified suspects: Pursuant to Article 18 of the Rome Statute, once the ICC Prosecutor decides to start an investigation he must notify the state(s) concerned. If the relevant state opens an investigation into the matter within a month after receiving such notification, the ICC Prosecutor must defer the case to the state. If the state wants the ICC to discontinue a case after this one-month period has elapsed, it must challenge its admissibility under Article 19 of the Rome Statute. The ICC may also defer a case “in the interest of justice” under Article 53 of the Rome Statute, or suspend a case (for a renewable period of 12 months) following a request by the UN Security Council made under Chapter VII of the UN Charter and Article 16 of the Rome Statute.

<sup>61</sup> According to the ICC's jurisprudence, and consistent with the principle of complementarity, for such a challenge to succeed after the ICC has identified a suspect, the ICC must be satisfied that the relevant state has taken concrete steps to determine whether the same individual is responsible for substantially the same conduct as alleged in the case before the ICC. This is sometimes referred to as the “same person/same conduct” test. See, e.g., *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011 (Pre-Trial Chamber II). It is noted that the ICC case-law to date does not require that the national proceedings involve the same legal characterization of the charges or the same penalty structure as applicable in the ICC proceedings (although the ICC is likely to consider whether the punishment reflects the gravity of the crimes to confirm that the proceedings are genuine).

## 4.2 LEGAL CAPACITY TO PROSECUTE ATROCITIES

In contrast to the situation in other conflict-torn states, Uganda's legal institutions, at least on the national level, were not destroyed as a result of the conflict. This is probably because the violence was geographically removed from the capital. In interviews held in 2008, several Ugandan legal professionals explained that their national justice system, despite lacking experience in prosecuting atrocities, was perfectly capable to handle complex criminal proceedings even against high-profile offenders like Joseph Kony.<sup>62</sup> In the words of a senior Ugandan judicial official: "there [was] a first experience even for the international tribunals, they didn't start with experts".<sup>63</sup> The official stressed that the case law of the international tribunals could be used in Ugandan proceedings. He added that some of the core professionals involved in those tribunals are Ugandans who can be called back home and engaged as experts.<sup>64</sup>

However, other interviewees considered that, in 2008, Uganda lacked legal norms and institutions that were sufficiently specialized to handle complex atrocity-related investigations and prosecutions.<sup>65</sup> For example, as of 2008, Ugandan law did not criminalize all types of war crimes as well as international crimes such as genocide and crimes against humanity. The only domestic law covering international crimes was the Geneva Conventions Act of 1964 (GC Act), which only criminalized war crimes amounting to 'grave breaches' of the Geneva Conventions.<sup>66</sup> Further, it was unclear whether the GC Act could apply to atrocities committed during the northern Ugandan conflict because of its exclusive reference to 'grave breaches' which are associated with crimes committed during international conflicts,<sup>67</sup> and the view that the northern Ugandan conflict is non-international in nature (although this characterization is open to some

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<sup>62</sup> Interview notes with author.

<sup>63</sup> Interview notes with author.

<sup>64</sup> Interview notes with author.

<sup>65</sup> Interview notes with author. It is recalled that under Uganda's legal system, there is no possibility of direct application of international law (see section 2.2 above).

<sup>66</sup> The Geneva Conventions Act, Act 31, 1964 [Uganda] <[http://www.adh-geneva.ch/RULAC/national\\_legislation.php?id\\_state=163](http://www.adh-geneva.ch/RULAC/national_legislation.php?id_state=163)> accessed on 31 December 2010 (hereinafter: "GC Act").

<sup>67</sup> That the GC Act (n 66) criminalizes only acts committed during an international armed conflict is based on the fact that it refers to 'grave breaches' while not referring to violations of common Article 3 of the Geneva Conventions. However, this interpretation is open to some debate, explained a legal professional working in Ugandan on transitional justice issues (written comments with author). The 'grave breaches' of the Geneva Conventions of 1949, which are criminalized in Uganda under the GC Act (n 66), include "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

debate).<sup>68</sup> However, one interviewee suggested that atrocities can be prosecuted as domestic offenses, and specialized institutions are not absolutely necessary for atrocity-related proceedings if the ordinary criminal justice mechanisms can handle them. Nonetheless, it was still felt that Uganda's lack of experience in adjudicating atrocities called for some legal capacity development in this area.<sup>69</sup> Accordingly, since 2008, Uganda has been developing specialized legal norms and institutions intended for the prosecution of atrocities (see part 8 below for a discussion of these developments).

Another legal impediment to atrocity-related prosecution in Uganda is the Amnesty Act of 2000, which is discussed in section 4.1 above in connection with an analysis of Uganda's political will to prosecute atrocities. Although amnesty laws are often an expression of a government's limited political will to prosecute crimes, they still amount to legal impediments to prosecutions.

## 5. NATIONAL JUDICIAL RESPONSE TO ATROCITIES

This part briefly describes Uganda's first ever criminal proceedings addressing LRA atrocities (section 5.1), and the treatment of UPDF violations by the Ugandan military justice system (section 5.2). It also includes a brief description of traditional and alternative justice measures which may be used in Uganda, some of which are already used at the community level but may soon be used nationally (section 5.3).

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<sup>68</sup> Numerous scholars consider that an armed conflict between a state and a non-state actor, even if it crosses international borders, should be considered a non-international armed conflict. See, e.g., Marko Milanovic, "Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case", 89 *Int'l Rev. Red Cross* (2007), 384 ("the single defining characteristic of international armed conflicts has not been their cross-border, but their interstate, nature"). Further, the ICC regards the Uganda-LRA conflict as non-international in nature (and accordingly charged the LRA leaders with war crimes under Rome Statute Articles 8(2)(c) and 8(2)(e)). However, it could be argued that the conflict had an international nature so long as the government of Sudan provided support to the LRA (a period extending over a substantial amount of years). According to the jurisprudence of the ICTY, when one government has "overall control" over a non-state armed group fighting against another government, the conflict becomes international in nature since the non-state armed group is considered an agent of the controlling government. See *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-A, Appeals Chamber Judgment (15 July 1999), at para. 131. It is noted that the ICTY's "overall control" test is more relaxed than the "effective control" test, established by the ICJ in the *Nicaragua* case, which requires a government to have more than overall control over a non-state armed group for the latter to be considered an agent of the former. See *Military and Paramilitary Activities (Nicaragua v. US)* [1986] ICJ Rep 14, at 62–65, 110–116. Some commentators accept the ICTY's "overall control" test as a norm of customary international law. See, e.g., Roozbeh (Rudy) B. Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates', 173 *Eur J Int Law* 21 (2010), pp. 187-188 and references in footnote 90 therein. If this is the case, then Uganda must find that Sudan's support to the LRA satisfies the ICTY's "overall control" test for it to consider the conflict international.

<sup>69</sup> Interview notes with author. It noted in this context that Uganda never applied the above-mentioned GC Act (n 66) and thereby missed an opportunity to develop normative and institutional capacities to handle atrocity-relating proceedings. Relevant norms which could have been developed include procedural norms but also substantive norms such as those defining the crimes and their elements (e.g. the *mens rea* requirements of war crimes).



## 5.1 NATIONAL (CIVILIAN) TRIALS

As noted in section 4.1 above, rebel-led atrocities were seldom prosecuted by Ugandan national courts. A policy of responding judicially to LRA atrocities was first considered by Uganda only subsequently – and probably consequently – to the ICC’s opening of an investigation in Uganda. In 2009, Uganda initiated for the first time atrocity-related criminal proceedings against an LRA member. The accused was former LRA commander Thomas Kwoyelo, whose trial before the ICD was recently halted by the Constitutional Court.

Kwoyelo was captured in March 2009 in eastern DRC and transferred to Gulu, in northern Uganda, where he was detained pursuant to domestic criminal charges.<sup>70</sup> In September 2010, he was charged with war crimes under the GC Act and his case was transferred to the ICD in Kampala.<sup>71</sup> Kwoyelo is considered the LRA’s fourth in command and one of the higher-ranking LRA commander to be apprehended thus far.<sup>72</sup> According to a senior Ugandan official, Kwoyelo allegedly committed crimes together with Vincent Otti, the LRA’s second in command against whom the ICC issued an arrest warrant in 2005 (he has died since then).<sup>73</sup> Two senior LRA commanders who were apprehended before Kwoyelo (Keneth Banya and Sam Kolo) were both granted amnesty.<sup>74</sup>

It is recalled that under Uganda’s Amnesty Act of 2000, rebels can receive an amnesty simply by surrendering their weapons to the authorities and renouncing the war.<sup>75</sup> The law clarifies that even rebels who are in custody or have been charged with war-related crimes are eligible for an amnesty, subject to the approval of Uganda’s Director of Public Prosecutions (DPP).<sup>76</sup> However, the scope of the DPP’s discretion in

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<sup>70</sup> The media reported that he was charged with 12 counts of kidnapping with intent to murder. See Institute for War & Peace Reporting, ‘Reporting Linked to Progress in LRA Suspect Case’, by Bill Oketch (6 October 2010) <<http://iwpr.net/report-news/reporting-linked-progress-lra-suspect-case>> accessed on 10 December 2010; Institute for War & Peace Reporting, ‘Uganda Set for First War Crimes Trial’, by Bill Oketch (14 July 2010) <<http://iwpr.net/report-news/uganda-set-first-war-crimes-trial>> accessed on 28 October 2010.

<sup>71</sup> Institute for War & Peace Reporting, ‘Reporting Linked to Progress in LRA Suspect Case’, by Bill Oketch (6 October 2010) <<http://iwpr.net/report-news/reporting-linked-progress-lra-suspect-case>> accessed on 10 December 2010 (hereinafter: “IWPR Report on LRA Case”). All charges in the indictment are based on events from 1992-1993 (I thank Adv. Stephen Oola for drawing my attention to this point). It is recalled that the GC Act (n 66) criminalizes war crimes committed in the course of an *international* armed conflict (see section 4.2 above).

<sup>72</sup> See IWPR Report on LRA Case (n 71).

<sup>73</sup> Interview notes with author.

<sup>74</sup> A Ugandan official indicated that the two LRA leaders were apprehended by the Ugandan military, before requesting and receiving amnesty in December 2008. Interview notes with author. I thank Adv. Stephen Oola for clarifying their names.

<sup>75</sup> Amnesty Act of 2000, Article 3, paragraph 1.

<sup>76</sup> Amnesty Act of 2000, Articles 3, paragraphs 2 to 4. Indeed, as noted above, two LRA leaders who were apprehended by the Ugandan military requested and received amnesty in December 2008.

this regard is unclear. While senior Ugandan officials suggested that Kwoyelo had not applied for an amnesty, this was contested by other sources.<sup>77</sup> The Constitutional Court has since found that Kwoyelo had legally applied for amnesty in May 2010, fulfilled its requirements under the Act, and was thus entitled to an amnesty certificate and to be released. The court also ruled that the amnesty act was legal and constitutional.<sup>78</sup> However, as of the time of writing, the decision of the Constitutional Court is under appeal before the Ugandan Supreme Court and Kwoyelo is still detained.<sup>79</sup>

## 5.2 MILITARY TRIALS

Crimes against civilians committed by government troops during the conflict in northern Uganda are described in section 3.3 above. In 2003, Human Rights Watch reported that “[UPDF troops] are rarely prosecuted for crimes committed against civilians. Even when UPDF abuses have been investigated, the investigations have sometimes been kept internal and therefore have created an appearance of impunity...”.<sup>80</sup> In 2008, Amnesty International reported that “[t]here was general impunity for soldiers who committed human rights violations against civilians”.<sup>81</sup> More recent news reports indicate that northern Ugandans would like to see the ICC investigate UPDF crimes.<sup>82</sup> This has also

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<sup>77</sup> Cambridge researcher Dr. Sarah Nouwen recalled seeing Kwoyelo’s amnesty application. Another interviewee, a legal professional working in Ugandan on transitional justice issues, saw media reports and blogs suggest that Kwoyelo has applied for amnesty but was not given reasons for not (yet) receiving it. Written comments by both interviewees are with author. However, in July 2010, Ms. Rachel Odoi-Musoke of Uganda’s Justice Law and Order Sector asserted that Kwoyelo had not requested amnesty. She made this statement at a conference held at Witwatersrand University in Johannesburg in July 2010, where the author was present. That Kwoyelo had not requested amnesty was also claimed in an interview with a senior Ugandan official. Interview notes with author.

<sup>78</sup> *Thomas Kwoyelo alias Latoni v Uganda* (Const. Pet.No. 036 Of 2011(reference)) [2011] UGCC 10 (22 September 2011) <<http://www.ulii.org/ug/judgment/2011/10>> accessed on 20 November 2012.

<sup>79</sup> After the research for this report was concluded, Kwoyelo applied to the African Court on Human and Peoples’ Rights to complain about his continued detention. See Acholi Times, ‘Col Kwoyelo Asks African Court To Intervene In His Case Over Illegal Detention’, 22 October 2012 <<http://www.acholitimes.com/index.php/land-issues/8-acholi-news/947-col-kwoyelo-asks-african-court-to-intervene-in-his-case-over-illegal-detention>> accessed on 20 November 2012.

<sup>80</sup> Human Rights Watch, ‘Abducted and Abused: Renewed Conflict in Northern Uganda’ (14 July 2003) <<http://www.hrw.org/en/reports/2003/07/14/abducted-and-abused-0>> accessed on 13 November 2010, at p. 41.

<sup>81</sup> Amnesty International, ‘Ugandan government must establish reparations programme for war victims’ (17 November 2008) <<http://www.amnesty.org/en/news-and-updates/report/ugandan-government-must-establish-reparations-programme-war-victims-20081117>> accessed on 20 December 2010. Also see ‘Uganda army guilty of crimes against humanity - AI, UHRC reports’ (17 November 2008) <<http://www.afriquejet.com/news/africa-news/uganda-army-guilty-of-crimes-against-humanity---ai,-uhrc-reports-2008111716187.html>> accessed on 20 December 2010 (reporting the Ugandan response to Amnesty International’s above report: “As usual, Army and Ministry of Defence Spokesman, Major Paddy Ankuda, poured scorn on the reports, saying AI cannot be taken seriously because people who should have given the side of the UPDF account were available but were never contacted. ‘If there is any incriminating evidence that our soldier kills anyone, there is no shortcut; they face the law’, Ankuda said on telephone Monday afternoon”).

<sup>82</sup> See, e.g., Institute for War & Peace Reporting, ‘Uganda Victims Question ICC’s Balance - Victims of Uganda’s civil war have criticised international justice for being too one-sided’, by Florence Ogola (14 June 2010) <<http://iwpr.net/report-news/uganda-victims-question-iccs-balance>> accessed on 20 December 2010; UGNET, ‘Acholi

been confirmed in interviews with Ugandan lawyers and human rights activists.<sup>83</sup> It is noted in this context that the Amnesty Act of 2000 does not apply to government soldiers, as it grants an amnesty only to a person who has “engaged in or is engaging in war or armed rebellion against the government”.<sup>84</sup>

However, in interviews with the author, senior Ugandan officials insisted that, throughout the conflict in northern Uganda, government soldiers have been prosecuted by Ugandan military courts for criminal acts committed during the conflict (even if not defined as international crimes).<sup>85</sup> One Ugandan official confirmed that at least 20 soldiers were executed following death penalties imposed by Ugandan court-martials for conflict-related crimes. He called the military justice system “rigorous”.<sup>86</sup> Another Ugandan official noted that while the records of these military trials are currently confidential, the Ugandan government intends to publish them in the future.<sup>87</sup> According to a 2010 news article about UPDF atrocities, “the Army spokesman ... insists there were only isolated cases of military abuses and the perpetrators have since been punished.”<sup>88</sup> A Cambridge researcher clarified that while Uganda held many military trials covering war-related crimes, it seldom prosecuted high ranking officers.<sup>89</sup>

An interesting observation to make in this context relates to the ICJ case of *DRC vs. Uganda*.<sup>90</sup> In its judgment of December 2005, the ICJ found that Ugandan troops committed “massive human rights violations and grave breaches of international humanitarian law ... on the territory of the DRC”.<sup>91</sup> Even if the ICJ refrained from explicitly ordering Uganda to prosecute these crimes, Uganda is obligated under the Geneva Conventions of 1949 to search for and either prosecute or extradite perpetrators of grave

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leaders build 'war crimes' case against UPDF' (23 Nov 2008) <<http://www.mail-archive.com/ugandanet@kym.net/msg26336.html>> accessed on 20 December 2010.

<sup>83</sup> Interview notes with author.

<sup>84</sup> Amnesty Act of 2000, Art. X.

<sup>85</sup> Interview notes with author.

<sup>86</sup> Interview notes with author.

<sup>87</sup> Interview notes with author.

<sup>88</sup> Institute for War & Peace Reporting, 'Uganda Victims Question ICC's Balance - Victims of Uganda's civil war have criticised international justice for being too one-sided', by Florence Ogola (14 June 2010) <<http://iwpr.net/report-news/uganda-victims-question-iccs-balance>> accessed on 20 December 2010.

<sup>89</sup> Information provided by Dr. Sarah Nouwen of Cambridge University. Written comments with author.

<sup>90</sup> Case concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), 19 December 2005, I.C.J. Reports 168.

<sup>91</sup> *Ibid*, para. 207. For a discussion about this case and its findings in relation to Uganda see Thordis Ingadottir, 'The ICJ Armed Activity Case – Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions', 78 (4) *Nordic J. Int'l L.* 581 (2009) <<http://www.domac.is/reports/>> accessed 31 December 2010.

breaches of international humanitarian law.<sup>92</sup> Despite the availability of the GC Act, which implements the Geneva Conventions domestically, Ugandan officials admitted that Uganda has not prosecuted any of its soldiers following the above ICJ ruling, as it never accepted the finding that its troops committed war crimes in the DRC.<sup>93</sup> Consistently, Uganda rejected a recent UN report implicating the UPDF in war crimes committed during the 1997-2003 war in the DRC.<sup>94</sup>

### 5.3 TRADITIONAL AND ALTERNATIVE JUSTICE

As explained in further detail in section 8.1 below, the accountability framework negotiated at Juba encourages the use of traditional justice measures (with necessary modifications) in addressing LRA crimes, and calls for alternative justice means such as a truth commission and a reparation program. While such alternative justice processes on the national level are currently limited, traditional reconciliation ceremonies take place on the local level in various communities in Uganda. These traditional mechanisms, ranging from simple cleansing ceremonies to more elaborate “Mato Oput” ceremonies, embraces complex accountability measures including truth seeking, acknowledgment, compensation, and reconciliation rituals aimed at healing broken relationships and reintegrating former rebels into their communities.<sup>95</sup> They thus provide some degree of justice and accountability in the aftermath of atrocities, complementing the national amnesty regime. Subjecting perpetrators to traditional reconciliation rituals can also help restore the social cohesion within communities which include victims and their family members. This section will not elaborate further on these traditional processes, as it seeks only to draw attention to their use by various communities in Uganda and their

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<sup>92</sup> See, e.g., Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), 75 U.N.T.S. 287, Article 146 (“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ‘prima facie’ case”).

<sup>93</sup> Interview notes with author. One of these Ugandan officials added that these crimes may have been perpetrated by Rwandan troops, as opposed to Uganda troops, but the ICJ was prevented from examining the acts of Rwandan troops as Rwanda did not accept its jurisdiction (the DRC also complained against Rwanda before the ICJ). Dr. Sarah Nouwen of Cambridge University, who also examined this issue, argued that Uganda’s referral of the situation concerning the LRA made the ICC dependant on the UPDF for its investigations and security in Uganda, providing a disincentive to investigating simultaneously the UPDF for its crimes committed in DRC. Interview notes with author.

<sup>94</sup> See Official Letter from the Republic of Uganda to UNHCHR regarding the Report of the “DRC Mapping Exercise” (30 September 2010) <[http://www.ohchr.org/Documents/Countries/ZR/DRC\\_Report\\_Comments\\_Uganda.pdf](http://www.ohchr.org/Documents/Countries/ZR/DRC_Report_Comments_Uganda.pdf)> accessed 10 December 2010.

<sup>95</sup> Tradition in Transition: Drawing on The Old to Develop a New Jurisprudence for Dealing with Uganda’s Legacy of Violence, Refugee Law Project, Beyond Juba Working Paper No. 1 (July 2009) <[http://www.refugeelawproject.org/working\\_papers/BJP.WP1.pdf](http://www.refugeelawproject.org/working_papers/BJP.WP1.pdf)> accessed on 24 December 2011; ICTJ Briefing Paper (n 3), P. 2

possible future use by the Ugandan national authorities in connection with the Juba accountability framework.<sup>96</sup>

## 6. INTERNATIONAL JUDICIAL RESPONSE TO ATROCITIES: THE ICC

This part provides a brief overview of the ICC (section 6.1) and examines the ICC's proceedings in relation to Uganda (section 6.2). It also includes a brief discussion about Ugandan local perception of the ICC (section 6.3).

### 6.1 ICC BACKGROUND<sup>97</sup>

#### *Establishment*

The ICC, based in The Hague, is the first permanent international criminal court mandated to help end impunity for the most serious crimes of concern to the international community. The ICC was established by the Rome Statute, a multilateral treaty which was adopted by 120 states on 17 July 1998, and which entered into force on 1 July 2002 after ratification by 60 states. Thus the ICC is a treaty-based international organization which is independent from (although cooperative with) the UN. As of April 2012, as many as 121 states are party to the Rome Statute (including Uganda).

The Rome Statute grants the ICC jurisdiction over genocide, crimes against humanity and war crimes committed on or after 1 July 2002 (the date in which the Statute entered into force) on the territory of (or by nationals of) a State Party or a state which has accepted the ICC's ad hoc jurisdiction.<sup>98</sup> However, when a case has been referred to the ICC by the UN Security Council, it can concern the territory or nationals of any UN Member State. In addition, the ICC is mandated to address only the gravest crimes. The ICC is a court of last resort and is complementary (or residual) to the jurisdiction of national courts. It will not act if the case concerned is investigated or

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<sup>96</sup> For an examination of traditional justice and reconciliation systems in Uganda see Ugandan Coalition for the ICC, 'Approaching National Reconciliation in Uganda: Perspectives on Applicable Justice Systems' (August 2007) <[http://www.iccnw.org/documents/ApproachingNationalReconciliationInUganda\\_07aug13.pdf](http://www.iccnw.org/documents/ApproachingNationalReconciliationInUganda_07aug13.pdf)> accessed on 9 December 2010. Also see ICTJ Briefing Paper (n 3), P. 2 ("A second approach promoted at the local level was the use of traditional ceremonies to reintegrate former LRA soldiers into their communities. These are part of Acholi traditions and encompass a wide array of events, ranging from the simple cleansing rituals to the more elaborate ceremony of Mato Oput, an extensive reconciliation ceremony between clans that culminates in drinking the 'bitter root'").

<sup>97</sup> Unless stated otherwise, the information in this section is based on information available at the official website of the ICC <[www.icc-cpi.int](http://www.icc-cpi.int)> accessed on 10 December 2010.

<sup>98</sup> The Rome Statute has recently been amended to cover the crime of aggression, but the amendment will only enter into force when several conditions are met and not before several years from now.

prosecuted at the domestic level, unless the national proceedings are not genuine (for example if they are intended to shield a person from prosecution by the ICC). This is referred to as the “principle of complementarity”.<sup>99</sup> Pursuant to the Rome Statute, the Office of the Prosecutor of the ICC (OTP) can initiate an investigation *proprio motu* (on his own initiative),<sup>100</sup> or on the basis of a referral from the UN Security Council or from a State Party to the Rome Statute.<sup>101</sup>

## 6.2 ICC CASE CONCERNING UGANDA<sup>102</sup>

### General

Uganda signed the Rome Statute on 17 March 1999, ratified it on 14 June 2002, and referred the situation in its north to the ICC in December 2003.<sup>103</sup> The ICC Prosecutor decided to initiate an investigation into the situation in northern Uganda in July 2004.<sup>104</sup> About a year later, the ICC issued arrest warrants against five LRA leaders charging them with war crimes and crimes against humanity.<sup>105</sup> In particular, arrest warrants were issued by the ICC against the LRA’s top leader, Joseph Kony, his second in command, Vincent Otti, and three other high ranking LRA commanders (Okot Odhiambo, Raska Lukwiya and Dominic Ongwen).<sup>106</sup> Two of the suspects have died since the warrants

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<sup>99</sup> Article 17 of the Rome Statute enshrines the principle of complementarity by providing that a case is inadmissible before the ICC when it is being investigated or prosecuted by a state which has jurisdiction over the case and which is willing and able to genuinely carry out the proceedings, or when the case has been investigated by such a state but a decision was made not to prosecute the suspects (and such decision did not result “from the unwillingness or inability of the State genuinely to prosecute”). Article 17 provides two additional grounds of inadmissibility: (i) when the case is insufficiently grave to be addressed by the ICC, (ii) when the suspect has already been tried for the alleged crimes.

<sup>100</sup> Initiation by the OTP of a *proprio motu* investigation is subject to the authorization of the ICC Pre-Trial Chamber.

<sup>101</sup> A *proprio motu* investigation or a State Party referral must be in relation to ICC-crimes committed on the territory or by the national of a State Party. These restrictions do not apply where the UNSC refers to the ICC a situation, which may concern any UN Member State.

<sup>102</sup> Unless stated otherwise, the information in this section is based on information available at the official website of the ICC <[www.icc-cpi.int](http://www.icc-cpi.int)> accessed on 10 December 2010.

<sup>103</sup> ICC Press Release no. ICC-20040129-44, ‘President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’ (29.01.2004) <<http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20s%20resistance%20army%20%20ira%20to%20the%20icc?lan=en-GB>> accessed on 10 November 2010.

<sup>104</sup> ICC Press Release no. ICC-OTP-20040729-65, ‘Prosecutor of the International Criminal Court opens an investigation into Northern Uganda’ (29.07.2004) <<http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda?lan=en-GB>> accessed on 10 November 2010.

<sup>105</sup> Arrest warrants against all five were issued by the ICC under seal on 8 July 2005, and unsealed on 13 October 2005. It is noted that the 2000 Amnesty Act cannot apply in an international court, not only because it is a domestic legislation but also because international law does not recognize the applicability of blanket amnesties in cases of international crimes.

<sup>106</sup> ICC Situation in Uganda, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Case no. ICC-02/04-01/05. The arrest warrant against Kony charges him of 33 crimes against humanity and war

were issued (Otti and Lukwiya). The other three are still at large at the time of writing. Accordingly, their trials before the ICC have not yet commenced (trials *in absentia* are prohibited under the Rome Statute). However, preliminary proceedings have taken place concerning the admissibility of the case and the participation of victims in the proceedings. The admissibility-related proceedings are addressed in the following paragraphs.

### *Admissibility Proceedings*

ICC Pre-Trial Chamber II, on its own initiative, deliberated on the admissibility of the LRA case. It decided, on 10 March 2009, that the case was admissible as there were no domestic proceedings against the suspects.<sup>107</sup> This was consistent with Uganda's own position at the time.<sup>108</sup> The Pre-Trial Chamber's decision was upheld on appeal, with the Appeals Chamber clarifying that "the Pre-Trial Chamber's decision to hold admissibility proceedings at the time that it did, did not ... impair the right of the ... suspects to challenge subsequently the admissibility of the case".<sup>109</sup> Thus, in principle, Kony and the other LRA suspects may still challenge the admissibility of their case before the ICC. The success of such a challenge will ultimately depend on whether Uganda is able and willing genuinely to investigate and or prosecute them.

It is recalled that the LRA demanded at Juba that the ICC drop the case against its leaders and Uganda was willing to consider this demand (see section 4.1 above). According to a senior Ugandan official, who was involved in the Juba talks, the ICD was set up to try the LRA leaders so that none of them would have to be tried by the ICC.<sup>110</sup> In March 2010, Museveni was quoted saying that the LRA leaders sought by the ICC will eventually be tried in Uganda because the ICC "will put them in a hotel" instead of

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crimes committed in northern Ugandan between 1 July 2002 and the end of 2004 (the ICC lacks jurisdiction over crimes pre-dating 1 July 2002). The other suspects are charged with between 7 and 32 counts.

<sup>107</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/04-01/05-379, "Decision on the admissibility of the case under article 19 (1) of the Statute", dated 10 March 2009 (Pre-Trial Chamber II) (hereinafter: "PTC Decision of 10 March 2009"). This decision was confirmed on appeal. See *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC-02/04-01/05-408, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", dated 16 September 2009 (Appeals Chamber) (hereinafter: "AC Decision of 16 September 2009").

<sup>108</sup> The ICC judges requested Uganda, the ICC Prosecutor, the Defence and the victims to submit observations during the admissibility proceedings. Uganda, the Prosecutor, and the Office for Public Counsel for Victims submitted that the case was still admissible. Counsel for the Defence did not make any submissions on the substantive issue of the admissibility of the case. See PTC Decision of 10 March 2009 (n 107).

<sup>109</sup> AC Decision of 16 September 2009 (n 107), para 85. Interestingly, Judge Daniel David Ntanda Nsereko, a Ugandan national, was one of judges who delivered this decision.

<sup>110</sup> Interview notes with author. The interviewee added that the ICC will continue looking for Kony and his men until they are apprehended. But once they are caught, they will be tried before the ICD.

hanging them.<sup>111</sup> But Uganda's interactions with the ICC, explained an ICC official, suggest that it has no intention of making an admissibility challenge, and that the ICD was set up to prosecute suspects which are not sought by the ICC.<sup>112</sup>

### 6.3 UGANDAN PERCEPTIONS OF THE ICC

Ugandan and ICC officials acknowledge that the local population in northern Uganda was at one stage antagonistic toward the ICC, but this is changing as the population increasingly accepts the ICC and the need for accountability.<sup>113</sup> Many people currently support a possible role of the ICC in the conflict in northern Uganda, although some sectors are either ignorant of its work or oppose it based on perceived biases of the ICC towards governmental actors and failure to arrest its indictees who instead continue to commit more atrocities.<sup>114</sup> A Ugandan lawyer and human rights activist added that negative perceptions of the ICC are sometimes based on misinformation spread by local leaders (e.g. that the ICC was imposed on Uganda). The activist lawyer gained knowledge about these matters through his personal involvement with NGOs that operated in northern Uganda. He added that Ugandans from other areas generally have a positive perception about the ICC.<sup>115</sup>

The view of a senior ICC official was that local perceptions of the ICC in northern Ugandan were positive when the ICC first became involved in Uganda. However, when the locals realized that the ICC could not arrest the suspects, they became disappointed and eventually concerned that the arrest warrants would prevent disarmament and peace.<sup>116</sup> Other ICC officials suggested that local antagonism toward the ICC in northern Uganda stemmed from a number of possible causes, such as misinformation spread about the ICC, a tradition of resolving conflict through amnesty and negotiations rather

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<sup>111</sup> AllAfrica.com, 'Uganda: ICC Bill – Why Did MPs Trap Museveni and Save Kony?' (by Isaac Mufumba, 31 March 2010) <<http://allafrica.com/stories/201003310540.html>> accessed on 5 June 2011 ("Two days after the Bill was passed, Museveni, while speaking at Kamwokya during the opening of the NRM Communication Bureau, said that the indicted LRA leaders will be tried locally because the Hague "will put them in a hotel" instead of hanging them") (hereinafter: "AllAfrica.com, Uganda: ICC Bill").

<sup>112</sup> Interview notes with author.

<sup>113</sup> Interview notes with author.

<sup>114</sup> I thank Adv. Stephen Oola for raising these points.

<sup>115</sup> Interview notes with author.

<sup>116</sup> Interview notes with author. This has also been confirmed by publically available materials. See, e.g. Oola, Important Lessons (n 42). In addition, the population-based survey conducted in 2010 by Berkeley University, comparing its own findings with the findings of similar studies conducted in 2005 and 2007, reports that: "In all three surveys, we asked whether accountability was important. The affirmative responses varied from 77 percent in 2005, to 67 percent in 2007, and 84 percent in 2010. The lower percentage in 2007 may be explained by the fact that the peace process was ongoing at that time, and respondents may have feared that demands for accountability would put it in jeopardy". See Berkeley 2010 Survey (n 3), at p. 39.



than accountability, and the population's prioritization of immediate needs such as security and bearable living conditions over justice.<sup>117</sup>

In any event, explained a senior Ugandan official in an interview from late 2010, the local population is becoming increasingly interested in pursuing justice and accountability in light of the recent improvement in the security situation in northern Uganda.<sup>118</sup> A Ugandan judge opined that the ICC's involvement in Uganda has raised the national and local awareness to the need for accountability.<sup>119</sup> ICC officials considered that thanks to the ICC's outreach initiatives, the population in northern Uganda has become better informed about the ICC and the concept of accountability, and has come to accept the ICC.<sup>120</sup> However, some sectors remain suspicious of the ICC and consider it biased in light of its failure to address UPDF crimes (see section 5.2 above).

## 7. ICC - UGANDA COOPERATION

According to Ugandan and ICC officials, Uganda has been fully cooperative with the ICC in providing it with information, access to witnesses and crime scenes, and assistance in setting up and running its field office and witness protection systems in Uganda.<sup>121</sup>

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<sup>117</sup> Interview notes with author. In relation to the third argument, it is noted that a population-based survey conducted in 2010 by Berkeley University found that even in 2010 justice was not prioritized over other needs such as food, land related issues, education and health. See Berkeley 2010 Survey (n 3), at p. 19.

<sup>118</sup> Interview notes with author.

<sup>119</sup> Interview notes with author. He added that this new awareness, in turn, enabled the creation of the ICD and the new national emphasis on traditional justice in Uganda.

<sup>120</sup> Interview notes with author. It is noted that while this section relies mostly on information revealed in interviews with senior ICC and Ugandan officials and core legal professionals, several population-based surveys on local perceptions in northern Uganda about transitional justice and the ICC are publicly available. Three such population-based surveys were conducted by Berkeley University (with various partners) in 2005, 2007, and 2010. Similar questions were asked of the many interviewees to enable a comparison between the results of the three surveys. See Berkeley 2010 Survey (n 3); Pham PN, Vinck P, Stover E, Moss A, Wierda M, 'When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda', Human Rights Center, University of California, Berkeley; Payson Center for International Development, Tulane University; International Center for Transitional Justice, New York (2007) <<http://hrc.berkeley.edu/pdfs/When-the-War-Ends.pdf>> accessed on 9 December 2010; Pham PN, Vinck P, Wierda M, Stover E, di Giovanni A, 'Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda', International Center for Transitional Justice and the Human Rights Center, University of California, Berkeley (2005) <[http://hrc.berkeley.edu/pdfs/Forgotten\\_Voices\\_Report.pdf](http://hrc.berkeley.edu/pdfs/Forgotten_Voices_Report.pdf)> accessed on 9 December 2010. Additional studies about local-perceptions in northern Uganda towards transitional justice processes include: Office of the UN High Commissioner for Human Rights, 'Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda' (August 2007) <<http://www.unhcr.org/refworld/docid/46cc4a690.html>> accessed on 9 December 2010; Ugandan Coalition for the ICC, 'Approaching National Reconciliation in Uganda: Perspectives on Applicable Justice Systems' (August 2007) <[http://www.iccnw.org/documents/ApproachingNationalReconciliationInUganda\\_07aug13.pdf](http://www.iccnw.org/documents/ApproachingNationalReconciliationInUganda_07aug13.pdf)> accessed on 9 December 2010.

<sup>121</sup> Interview notes with author. It is noted that cooperation between the ICC and State Parties to the Rome Statute is governed by Part 9 of the Rome Statute, which consists of Articles 86-102. Article 86 states the general rule that

Cooperation in the other direction may also take place soon:<sup>122</sup> The Ugandan DPP has informed the ICC Prosecutor that Uganda will request the ICC's assistance in conducting national atrocity-related proceedings.<sup>123</sup> In response, the ICC Prosecutor assured him that the OTP is "committed to supporting the Ugandan national authorities in their efforts to reduce the impunity gap and will continue its dialogue with the Director of Public Prosecutions in that regard".<sup>124</sup> The OTP publicly identified specific exhibits which it may disclose to the Ugandan DPP, including maps, graphs, logbooks and transcripts of radio intercepts.<sup>125</sup>

An OTP official noted that Uganda, in addition to requesting information from the ICC, also intends to ask for technical assistance. While the OTP will consider offering such assistance, it cannot pervasively engage in capacity building since it must keep a certain distance from national justice systems (see section 8.4 below).<sup>126</sup> According to a senior Ugandan official, Uganda's request for assistance will also include the issue of access to ICC witnesses. The official explained that ICC witnesses in Uganda refuse to cooperate with national authorities on the basis that they promised the ICC not to discuss their evidence with third parties. This problem has surfaced in the Kwoyelo case, in which the Ugandan authorities are investigating some of the same events investigated by the ICC. Thus Uganda intends to ask the ICC to allow its witnesses in Uganda to cooperate with state authorities.<sup>127</sup> A senior OTP official indicated that the ICC will consider such a request.<sup>128</sup>

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"States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".

<sup>122</sup> While most of the articles in Part 9 of the Rome Statute address the obligations of states to cooperate with the ICC, Article 93 provides for cooperation in the opposite direction: It allows the ICC to assist a state in conducting national trials or investigations, upon the request of that state and subject to the fulfilment of certain requirements such as witness protection guarantees and third party consent when relevant.

<sup>123</sup> OTP Weekly Briefing of 23-29 November 2010 (Issue #65) <<http://www.icc-cpi.int/NR/rdonlyres/7105B39A-2F30-43FF-9222-D7349BF15502/282732/OTPWBENG.pdf>> accessed on 9 December 2010.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.* An OTP official added that this could include information which the ICC originally got from Uganda but perhaps Uganda did not keep copies of. Interview notes with author.

<sup>126</sup> Interview notes with author.

<sup>127</sup> Interview notes with author.

<sup>128</sup> Interview notes with author.

## 8. ICC'S IMPACT ON UGANDAN JUDICIAL RESPONSE TO ATROCITIES

This part of the report addresses the impact of the ICC on domestic atrocity-related judicial proceedings in Uganda in terms of (1) the rates and trends of such domestic proceedings; (2) the applicable domestic norms; (3) relevant sentencing practices; and (4) national capacity to handle such proceedings. As explained above, the report addressed these four areas because they are relevant to an analysis of whether the ICC has encouraged domestic accountability processes in Uganda, and it focuses on the ICC's impacts on domestic *criminal* judicial proceedings rather than traditional or alternative ones (see section 1.1 above). It is further recalled that this report is a case-study which provides a broad preliminary analysis of the above areas rather than an in-depth thematic analysis (see section 1.2 above).

### 8.1 ICC'S IMPACT ON NATIONAL PROSECUTION RATES AND TRENDS

During the Juba peace talks, the ICC's involvement in Uganda became perceived domestically as an obstacle to peace.<sup>129</sup> Consequently, to deflect the ICC, the Ugandan government adopted domestic accountability approaches (see section 4.1 above). Thus the ICC's involvement in Uganda may have ultimately encouraged the government to change its attitude toward conflict-related atrocities, from a primarily military response to a judicial one. This paradigmatic shift in Ugandan policy can therefore be regarded as a possible impact of the ICC on prosecution trends in Uganda.

The proposition that Uganda adopted an accountability policy *because* of the ICC can be challenged on the basis that Uganda referred the situation to the ICC in the first place, demonstrating that it opted for accountability *before* the ICC became involved.<sup>130</sup> However, a recent empirical study suggests that Uganda referred the case to the ICC “as part of a military strategy and international reputation campaign, rather than out of a

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<sup>129</sup> Greenawalt, *Complementarity in Crisis* (n 28), p. 144 (“While I am hesitant to reduce the negotiating difficulties [at Juba] to a single factor, news reports have consistently portrayed the ICC's involvement as a major stumbling block”). Also see Oola, *Important Lessons* (n 42).

<sup>130</sup> Since Uganda referred the situation to the ICC, in a way it was Uganda's own choice to involve the ICC in the first place. However, since Uganda is a State Party to the Rome Statute, the ICC Prosecutor could have decided on his own initiative to open an investigation, and there were some suggestions that northern Uganda would be a good case for the ICC even before the Rome Statute entered into force. In addition, suggestion have been made that the ICC Prosecutor “invited” Uganda to refer the situation. See Sarah M. H. Nouwen and Wouter G. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’, *EJIL* (2010), Vol. 21 No. 4, 941–965, at footnotes 32 and 33 (text and references therein).

conviction about law and justice”.<sup>131</sup> Another argument challenging the above proposition (that Uganda adopted an accountability policy because of the ICC) is that pressure by Ugandan civil-society groups would have led the government to adopt an accountability approach at Juba even without the ICC’s involvement.<sup>132</sup> While it is almost impossible to prove this hypothesis, it is noted that a Ugandan judge attributed his country’s grass-root awareness to the need for accountability to the ICC’s involvement.<sup>133</sup> If this is true, it means that some of the “bottom-up” pressure to establish accountability in Uganda may have itself been a result of the ICC’s involvement, lending further support to the above proposition. In any event, it is doubtful whether civil society pressure alone, without the threat of ICC trials, would have caused such a shift in government policy.

Thus it seems safe to conclude that Uganda’s political choice to judicially address LRA atrocities was an impact of the ICC’s involvement in Uganda (even if other variables contributed to this outcome such as an active civil society). This paradigm shift in Uganda’s policies toward LRA crimes is probably the most significant impact of the ICC in Uganda (regardless of whether it was motivated by pragmatic or normative considerations), and an impact which yielded all the other impacts discussed below. To understand this important impact of the ICC, the present section will open with a brief discussion of the accountability framework adopted in Juba. It will subsequently address one of the main challenges to implementing this framework – the national amnesty regime. The section will then describe the steps taken so far by Uganda to implement the accountability framework, namely, establishing the ICD and preparing for its first trial. It will conclude by considering some future possible impacts of the ICC on prosecution trends in Uganda.

### *Juba Accountability Framework*

In June 2007, having realized that conducting domestic proceedings may be the only way to avoid LRA trials in The Hague, the government and LRA representative at Juba

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<sup>131</sup> Sarah M. H. Nouwen and Wouter G. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’, EJIL (2010), Vol. 21 No. 4, 941–965, p. 949 (“... the Ugandan government decided to refer the LRA to the ICC as part of a military strategy and international reputation campaign, rather than out of a conviction about law and justice. Initiated in the Ministry of Defence – not Justice – the referral was aimed ‘to intimidate these thugs [the LRA], to show that they were sought by many more’...”).

<sup>132</sup> This argument was made in an interview with a legal professional working in Ugandan on transitional justice issues (written comments with author). On the role of Ugandan civil society in encouraging accountability in Uganda see Oola, Important Lessons (n 42).

<sup>133</sup> Interview notes with author.

concluded an Agreement on Accountability and Reconciliation (Agreement).<sup>134</sup> The Agreement encourages the use of traditional justice mechanisms, with necessary modifications, “as a central part of the framework for accountability and reconciliation”.<sup>135</sup> However, it insists that persons accused of committing “serious crimes or human rights violations in the course of the conflict” will be handled by formal justice mechanisms (criminal or civil).<sup>136</sup> Among this last group of persons, those accused of “the most serious crimes, especially crimes amounting to international crimes” will not be handled by just any formal justice mechanisms, but will be prosecuted by “formal courts provided for under the Constitution”.<sup>137</sup> The Agreement adds that “the nature and gravity of the offending conduct and the role of the alleged perpetrator in that conduct” will help determine the adjudication forum.<sup>138</sup>

Interestingly, the Agreement calls for “alternative” penalties to be imposed by the formal justice system.<sup>139</sup> The Agreement does not provide examples of such alternative penalties, but requires them to reflect, on the one hand, the gravity of the crimes and, on the other hand, the perpetrator’s cooperation with the proceedings. It also stipulates that the alternative penalties should have a reparations component, promote individual and community reconciliation, and rehabilitate the perpetrators.<sup>140</sup>

In the Agreement, the government commits to amend the Amnesty Act in light of the proposed accountability framework.<sup>141</sup> A senior Ugandan judicial official explained that, following the conclusion of the Agreement, a committee was set up by Uganda’s Justice, Law and Order Sector (JLOS) to examine the compatibility of the Amnesty Act

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<sup>134</sup> Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement in Juba, Sudan, signed in Juba, Sudan, on 29 June 2007 <[http://www.beyondjuba.org/peace\\_agreements/Agreement\\_on\\_Accountability\\_And\\_Reconciliation.pdf](http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf)> accessed on 11 December 2010 (hereinafter: “Agreement”). The Agreement is also known as “Agenda Item No. 3” of the Juba peace talks.

<sup>135</sup> Agreement, Art. 3.1.

<sup>136</sup> Agreement, Art. 4.1.

<sup>137</sup> Agreement, Art. 6.1. It is recalled that the Ugandan Constitution explicitly establishes the Ugandan Supreme Court, Court of Appeal and the High Court, while authorizing the Parliament to create lower courts by law (see section 2.2 above).

<sup>138</sup> Agreement, Art. 4.3.

<sup>139</sup> Agreement, Art. 6.3 (“Legislation shall introduce a regime of alternative penalties and sanctions which shall apply, and replace existing penalties, with respect to serious crimes and human rights violations committed by non-state actors in the course of the conflict”).

<sup>140</sup> Agreement, Art. 6.4 (“Alternative penalties and sanctions shall, as relevant: reflect the gravity of the crimes or violations; promote reconciliation between individuals and within communities; promote the rehabilitation of offenders; take into account an individual’s admissions or other cooperation with proceedings; and, require perpetrators to make reparations to victims”).

<sup>141</sup> Agreement, Art. 14.4 (“Obligations and Undertakings of the Parties: ... The Government: ... Introduce any amendments to the Amnesty Act or the Uganda Human Rights Act in order to bring it into conformity with the principles of this Agreement”).

(and other national legislations) with the aim of establishing the accountability of Kony and other suspects and propose necessary reforms.<sup>142</sup>

In February 2008, the parties at Juba appended an annex to the Agreement which calls for relevant institutions for the implementation of the Agreement (Annex).<sup>143</sup> In particular, the Annex calls for the establishment of a special division within the High Court of Uganda to prosecute “individuals alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions” during the conflict.<sup>144</sup> It also calls for the creation of a national unit of prosecutors and investigators specializing in serious crimes,<sup>145</sup> a truth commission,<sup>146</sup> and a reparation program.<sup>147</sup> The Annex reaffirms the central role of traditional justice in Uganda.<sup>148</sup>

Thus the Agreement and Annex create an accountability framework under which traditional justice mechanisms handle non-serious crimes whereas the formal justice system addresses “serious crimes” (while applying “alternative” penalties). Under this accountability framework, the “most serious” of the “serious crimes” are to be prosecuted by a special division within the High Court (later named the ICD).<sup>149</sup> The gravity of the crime and the role of the perpetrator help determine which cases go to the ICD.<sup>150</sup>

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<sup>142</sup> Interview notes with author.

<sup>143</sup> Annexure to the ‘Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement on 29th June 2007’, signed in Juba, Sudan, on 19 February 2008 <[http://www.iccnw.org/documents/Annexure\\_to\\_agreement\\_on\\_Accountability\\_signed\\_today.pdf](http://www.iccnw.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf)> accessed on 11 December 2010 (hereinafter: “Annex”). The Annex was concluded after each party held national consultations with different sectors of its constituencies.

<sup>144</sup> Annex, Articles 7 and 14. Article 7 provides that: “A special division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict”. Article 14 provides that the “[p]rosecutions shall focus on individuals alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions.”

<sup>145</sup> Annex, Art. 10.

<sup>146</sup> Annex, Art. 4-6.

<sup>147</sup> Annex, Art. 16.

<sup>148</sup> Annex, para. 19.

<sup>149</sup> The Agreement (in Art. 6.1) provides that the “most serious” crimes will be prosecuted by a constitutional court, which the Annex (in Art. 7) identifies as a “special division of the High Court” (later named ICD). The Annex (in Art. 14) clarifies that the “[p]rosecutions shall focus on individuals alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions.” Further details on the ICD are provided in section 8.4 below.

<sup>150</sup> The Agreement, in Art. 6.1, provides that “individuals who are alleged to bear particular responsibility for the most serious crimes” (emphasis added) will be sent to the constitutional court (later designated as the High Court’s ICD). It is recalled that the Ugandan Constitution explicitly establishes the Ugandan Supreme Court, Court of Appeal and the High Court, while authorizing the Parliament to create lower courts by law (see section 2.2 above). Indeed Art. 4.3 of the Agreement clarifies that “[t]he choice of forum for the adjudication of any particular case shall depend, amongst other considerations, on the nature and gravity of the offending conduct and the role of the alleged perpetrator in that conduct”.

It is noted that the new accountability framework explicitly excludes state actors from its special justice processes,<sup>151</sup> and alternative penalty regime.<sup>152</sup> On the other hand, state actors have never enjoyed the amnesty regime, as the Amnesty Act of 2000 is inapplicable to them.<sup>153</sup> Accordingly, the Agreement signed at Juba explicitly provides that state actors will continue to be subject to “existing criminal justice processes”.<sup>154</sup> This suggests that state actors will be subject to pre-Juba accountability procedures such as military trials in the case of soldiers. As discussed above, certain human rights NGOs assert that Ugandan soldiers enjoy impunity, although this has been rejected by Ugandan officials (see section 5.2 above). In any event, the NGOs did not suggest that military accountability procedures did not exist, but rather, that they were not applied in practice and thus soldiers enjoyed *de facto* impunity. If this is true and this trends continues, then the implementation of the Juba accountability framework will essentially mean that only LRA fighters will be held to account, including for the most minor violations (even if by traditional or alternative justice means), while government troops will enjoy impunity.<sup>155</sup>

On 10 March 2009, in its decision on the admissibility of the LRA case, ICC Pre-Trial Chamber II assessed the state of implementation of the Juba accountability framework, and concluded that it is “in the initial stages” and “a lot is yet to be done”.<sup>156</sup> As of the time of writing, Uganda has not established a truth commission or a reparation program, and has not yet begun to apply nationally any traditional justice measures. In addition, as the following paragraph explains, Uganda has not yet amended the Amnesty Act, or restricted its amnesty regime by any other means. However, as also explained below, the ICD was created in 2008 and its first trial has recently commenced.

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<sup>151</sup> Agreement, para. 4.1.

<sup>152</sup> See, Agreement, para. 6.3: “Legislation shall introduce a regime of alternative penalties and sanctions which shall apply, and replace existing penalties, with respect to serious crimes and human rights violations committed by non-state actors in the course of the conflict”.

<sup>153</sup> Refer to relevant provision.

<sup>154</sup> Agreement, para. 4.1.

<sup>155</sup> However, if LRA accountability is established exclusively for the “most serious crimes”, then one may justify “one-sided” justice by arguing that only LRA crimes reached this threshold and not UPDF violations (this is the view of the ICC which has so far only charged LRA leaders, on the basis of the gravity principle which it is required to apply). But since the accountability framework adopted in Juba also calls for accountability for non-serious crimes (even if through traditional or alternative justice means), Uganda should ensure that state actors are also held accountable for low-gravity crimes.

<sup>156</sup> PTC Decision of 10 March 2009 (n 107), para. 12.

### *Amnesty Regime*

The Amnesty Act of 2000 was originally intended to remain in force for six months, but has been periodically extended and is still applicable at the time of writing (see section 4.1 above).<sup>157</sup> When President Museveni referred the situation to the ICC, he noted that the national amnesty would be restricted to “ensur[e] that those bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda are brought to justice”.<sup>158</sup> Indeed, the Amnesty Act was amended in 2006 to provide that “a person shall not be eligible for grant of amnesty if he or she is declared not eligible by the Minister by statutory instrument made with the approval of Parliament.”<sup>159</sup> This provision, explained a Ugandan official, mandates the Minister of Internal Affairs to submit for the parliament’s approval a list of names to be excluded from the national amnesty regime. The Uganda official added that the minister has not yet provided such a list.<sup>160</sup> However, another source explained that such a list was submitted to parliament but was rejected.<sup>161</sup>

Thus, a blanket amnesty is available in principle to LRA leaders at the time of writing. The Amnesty Act even grants amnesties to rebels in custody, and even if it subjects such amnesties to the DPP’s approval, it does not indicate whether the DPP may refuse an amnesty on any substantive grounds (see section 5.1 above). While subjecting the amnesty to the DPP’s approval could in theory help deny amnesties to atrocity perpetrators, it seems that the above-mentioned list of names (to be suggested by the interior minister and approved by parliament) may provide a more useful mechanisms to deny amnesties from atrocity perpetrators. It is also recalled that the government undertook in the Agreement to amend the Amnesty Act.

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<sup>157</sup> For last extension see The Amnesty Act (Extension of Expiry Period) Statutory Instruments Supplement 2010 No. 21 (21 May 2010) [Uganda] <[http://www.beyondjuba.org/policy\\_documents/Amnesty\\_Act\\_Instrument.pdf](http://www.beyondjuba.org/policy_documents/Amnesty_Act_Instrument.pdf)> accessed on 9 December 2010 (extending the applicability of the Amnesty Act until 25 May 2012). However, after the research for this report was concluded, on 25 May 2012, the Amnesty Act was partially abrogated by a law which essentially abolished the blanket amnesty regime. See The Amnesty Act (Declaration Of Lapse of Part II) Statutory Instruments Supplement 2012 No. 34 [Uganda] <[http://www.ucicc.org/attachments/article/21/The%20Amnesty%20Act%20\(Declaration%20Of%20Lapse%20of%20Part%20II\)%20Instrument.%202012.pdf](http://www.ucicc.org/attachments/article/21/The%20Amnesty%20Act%20(Declaration%20Of%20Lapse%20of%20Part%20II)%20Instrument.%202012.pdf)> accessed on 20 November 2012.

<sup>158</sup> ICC Press Release no. ICC-20040129-44, ‘President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’ (29.01.2004) <<http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/>> accessed on 30 October 2010 (“President Museveni has indicated to the Prosecutor his intention to amend this amnesty so as to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda are brought to justice”).

<sup>159</sup> The Amnesty (Amendment) Act, 2006 (An Act to amend the Amnesty Act, Cap 294) [Uganda] <[http://www.beyondjuba.org/policy\\_documents/Amnesty\\_\(Amendment\)\\_Act\\_2006.pdf](http://www.beyondjuba.org/policy_documents/Amnesty_(Amendment)_Act_2006.pdf)> accessed on 9 December 2010, Art. 2. This law extended the applicability of the Amnesty Act of 2000 until 19 July 2008.

<sup>160</sup> Interview notes with author. Also the ICC Registrar, in a public address given in 2009, stated that such list was not submitted to the Ugandan parliament. See Sylvana Arbia 2009 Lecture at Grotius Centre (n 36).

<sup>161</sup> This information was provided by Cambridge University researcher Dr. Sarah Nouwen, who researched the impact of the ICC in Uganda. Written comments with author.



### *The Creation of a War Crimes Court in Uganda*

In 2008, in order to implement the Juba accountability framework, Uganda reorganized its High Court to include the ICD.<sup>162</sup> It shortly afterward appointed a registrar and judges to sit on its bench. Since the ICD was created as a result of the Juba accountability framework, it can be regarded as an impact of the ICC's involvement in Uganda. This proposition was confirmed by a Ugandan lawyer and human rights activist.<sup>163</sup> Also a Ugandan official affiliated with the ICD agreed that by charging Kony and his men, the ICC encouraged the establishment of the ICD.<sup>164</sup>

Some interviewees, including a Ugandan minister, considered that Kony should be tried by the ICD.<sup>165</sup> But according to a senior ICC official, Uganda's interactions with the ICC do not suggest that it intends to challenge the admissibility of the LRA case before the ICC (see related discussion in section 6.2 above).<sup>166</sup> In addition, a news report from June 2010 indicates that the ICD will "try alleged war criminals that the ICC is unlikely to deal with".<sup>167</sup> The report adds the following:

"Justice Akiki Kiiza, who presides over the division, says that war crimes trials held in the country will function in a similar fashion to those in The Hague, with three judges officiating each case. The court currently has four judges capable of overseeing war crimes trials, and is searching for a fifth, which Kiiza hopes could come from the international community, in order to bring some outside expertise. Kiiza says that the court is ready to try war crimes suspects as soon as the department of the public prosecutor refers a case to them."<sup>168</sup>

By December 2010, a legal professional working on transitional justice issues in Uganda indicated that the ICD already had 5 judges. These did not include an international judge, and it was still unclear at that stage whether the ICD would be able to include an

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<sup>162</sup> The ICD has jurisdiction to try any offence relating to genocide, crimes against humanity, war crimes and transboundary international terrorism, human trafficking, piracy and any other crimes under international law as may be provided under the Penal Code Act of Uganda, the Geneva Conventions Act of 1964, and the International Criminal Court Act of 2010, as well as international customary law. See High Court (International Crimes Division) Order, 2011, referred to in "The Role of Specialized Courts in Prosecuting International Crimes and Transitional Justice in Uganda: Participation of the Honorable Minister of State and Deputy Attorney General at the UNDP Policy Dialogue on 'Complementarity' and Transitional Justice", New York, October 12-13, 2011 <[www.jilos.go.ug/uploads/The%20Role%20of%20Specialised%20Courts%20in%20Prosecuting%20International%20Crimes.pdf](http://www.jilos.go.ug/uploads/The%20Role%20of%20Specialised%20Courts%20in%20Prosecuting%20International%20Crimes.pdf)> accessed on 24 December 2011 (hereinafter: "The Role of Specialized Courts").

<sup>163</sup> Interview notes with author.

<sup>164</sup> Interview notes with author.

<sup>165</sup> Interview notes with author.

<sup>166</sup> Interview notes with author.

<sup>167</sup> Institute for War & Peace Reporting, 'Uganda Victims Question ICC's Balance - Victims of Uganda's civil war have criticised international justice for being too one-sided', by Florence Ogola (14 June 2010) <<http://iwpr.net/report-news/uganda-victims-question-iccs-balance>> accessed on 20 December 2010.

<sup>168</sup> *Ibid.*

international judge.<sup>169</sup> Ugandan officials indicated that, in early 2008, investigators and prosecutors were appointed by the Ugandan police and DPP, respectively, to handle atrocity-related proceedings.<sup>170</sup> Since then, defense attorneys were also identified to handle atrocity cases.<sup>171</sup>

A Ugandan official explained that the ICD was created through an administrative act, as a legislative act was not necessary to create a division within an existing court. Its rules of procedure and evidence, added the official, will be adopted by the judiciary's "Rules Committee" which is headed by the Ugandan Chief Justice.<sup>172</sup> The ICD was established with the intention to address crimes that were committed before its creation. The presiding judge of the ICD has been quoted explaining that "[u]nlike the ICC, we can try all war crimes cases, and not just those that happened after 2002 ... We are simply a division of the High Court".<sup>173</sup> However, the exact jurisdiction of the ICD will depend on the legislation governing its powers, which is yet to be adopted.

#### *First Criminal Proceedings*

At the time of writing, only one individual has been charged in Uganda for LRA atrocities: Thomas Kwoyelo. Believed to be the LRA's fourth-in-command, Kwoyelo was charged with war crimes under the GC Act for his activities in northern Uganda. As noted in section 5.1 above, his trial has commenced before the ICD but was halted following a Constitutional Court order (although he is still in custody). It may be farfetched to argue on the basis of one national trial (which was halted shortly after it started) that the ICC had an impact on prosecution trends in Uganda. Moreover, this trial could be motivated by reasons other than Uganda's new interest in establishing accountability for LRA crimes. Nonetheless, the proceedings against Kwoyelo were enabled largely because of Uganda's recent paradigm shift from amnesty to accountability, which can be regarded as an impact of the ICC on prosecution trends in Uganda (see discussion above).

#### *Possible Future Impacts on Prosecution Rates and Trends*

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<sup>169</sup> Written comments with author.

<sup>170</sup> Interview notes with author..

<sup>171</sup> A Uganda official affiliated with the ICD indicated that already in 2008, defense lawyers were appointed to represent clients before the ICD. However, according to a legal professional working in Ugandan on transitional justice issues, the identification of defense counsel who may work on such cases started only after mid-2010, and the only one who is involved in the proceedings, as of the time of writing, is counsel for Thomas Kwoyelo (the accused in first war-crimes case which is expected to commence soon). Interview notes with author.

<sup>172</sup> Interview notes with author.

<sup>173</sup> *Ibid.*

The ICC's impact on prosecution rates and trends in Uganda may still increase in the future, especially if the ICC decides to assist Ugandan proceedings by sharing evidence or directing its witnesses to cooperate with Ugandan authorities (see part 7 above). Such assistance may encourage atrocity-related proceedings in Uganda. Further, the mere existence of the ICC may encourage the government to prosecute crimes which are not addressed by the ICC. However, if the ICC's involvement in Uganda will eventually encourage a one-sided accountability paradigm of "victors' justice", this may be a less-than-optimal legacy.

## 8.2 NORMATIVE IMPACTS

On 10 March 2010, the Ugandan Parliament adopted the International Criminal Court Act (ICC Act), which implements domestically the main provisions of the Rome Statute.<sup>174</sup> The ICC Act regulates the collaboration between the Ugandan authorities and the ICC, with the view of facilitating proceedings before the ICC, but the law also aims "to enable Ugandan courts to try, convict and sentence persons who have committed crimes referred to in the [ICC] Statute".<sup>175</sup> The ICC Act incorporates the Rome Statute's definitions of genocide, crimes against humanity and war crimes, criminalizing these international crimes under Ugandan law.<sup>176</sup> In addition, the ICC Act implements domestically many of the Rome Statute's general principles (which apply in relation to international crimes), including command responsibility, non-applicability of a statute of limitation, and the exclusion of jurisdiction over persons under 18.<sup>177</sup> As noted in section 2.2 above, Uganda has a dualist approach to international law and therefore its courts could not implement directly provisions of the Rome Statute without an enabling legislation, even after Uganda has ratified the Statute.

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<sup>174</sup> The International Criminal Court Act 2010, the Uganda Gazette No 39 Volume CIII dated 25<sup>th</sup> June 2010, assented on 25<sup>th</sup> May 2010 <[http://www.ucicc.org/index.php?option=com\\_joomdoc&task=doc\\_details&gid=10&Itemid=67](http://www.ucicc.org/index.php?option=com_joomdoc&task=doc_details&gid=10&Itemid=67)> accessed on 5 June 2011.

<sup>175</sup> ICC Act, Art. 2 para. (g).

<sup>176</sup> It is recalled that certain war crimes committed during an *international* conflict were already covered by Ugandan law (in particular the GC Act (n 66)), but the ICC Act criminalizes international crimes regardless of whether they were committed in an international or a non-international conflict. At least the ICC has characterized the conflict in Northern Uganda as non-international in nature. The approach of the ICC has been that the conflict was non-international, which is why the ICC indictments charge Kony and the other LRA leaders with crimes under Article 8(2)(c) and Article 8(2)(e) (these provisions criminalize acts committed in the course of a non-international armed conflict).

<sup>177</sup> The provisions in the following Rome Statute articles are incorporated in Article 19 of the Ugandan ICC Act: Rome Statute Articles 20 (double jeopardy), 22(2) (principles of interpretation), 24(2) (effect of changes in the law), 25 (the principle of individual criminal responsibility), 26 (exclusion of jurisdiction over persons under 18), 28 (command/superior responsibility), 29 (exclusion of statute of limitation), 30 (mental element of crimes), 31 (grounds for excluding criminal responsibility), 32 (mistakes of fact or law) and 33 (superior orders and prescription of law).

It is also recalled that the role of victims in criminal proceedings in Uganda is limited to that of witnesses (see section 2.2 above). By contrast, the Rome Statute includes provisions granting victims the rights to reparations and participation in proceedings. These provisions of the Rome Statute were not included in the ICC Act of 2010,<sup>178</sup> and their absence has attracted criticism from Ugandan victims' organizations.<sup>179</sup> However, a senior Ugandan official explained that the Rome Statute provisions regarding victim participation and reparation derive from civil law approaches that are foreign to Uganda's common law system. Incorporating such foreign concepts into Ugandan law would have diverted resources from more urgent capacities which Uganda needs to develop in order to investigate and prosecute international crimes.<sup>180</sup> It is noted that the ICC Act obligates national authorities to cooperate with the ICC, including by enforcing ICC orders concerning victim reparation.

The ICC Act cannot apply retrospectively. Therefore, the atrocities committed in northern Uganda before 2010 would have to be prosecuted as domestic offenses under the Ugandan Penal Code Act of 1950 or as "grave breaches" under the GC Act of 1964.<sup>181</sup> But atrocities committed after 25 June 2010 (the date the ICC Act entered into force) can now be prosecuted in Uganda as international crimes under the ICC Act. However, the ICC Act refrains from limiting the Amnesty Act of 2000.

Uganda ratified the Rome Statute in 2002 but took eight years to implement it domestically through the ICC Act.<sup>182</sup> A draft of this implementing legislation, called the ICC Bill, was first presented to the Ugandan Parliament in 2004 and again in 2006.<sup>183</sup> A

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<sup>178</sup> Still, the ICC Act accords victims the right to protection when they appear as a witness (as it accords to any witness even if he or she is not a victim), a right also guaranteed under the Rome Statute.

<sup>179</sup> See, e.g., Uganda Victims Foundation's Statement on the International Crimes Bill of 2009, 4<sup>th</sup> November 2009 <<http://www.vrwg.org/downloads/publications/02/UVF%20Position%20Paper%20International%20Crimes%20Bill%20of%202009.pdf>> accessed on 12 December 2010 ("Whilst it is recognised that the Ugandan legal system does not normally provide for victims to participate in criminal proceedings (other than as witnesses) or to be legally represented, the UVF is of the firm belief that the special nature of the crimes coming before the [ICD] merits significantly greater involvement of victims in the process. In particular, victims should be able to address the [ICD] on issues that concern them and there should be provision for legal representation of the victims in the [ICD]. Representation and free legal aid should be given to the victims").

<sup>180</sup> Interview notes with author.

<sup>181</sup> Indeed, Uganda recently charged an LRA leader for "grave breaches" under the GC Act (n 66) and domestic crimes (see section 5.1 above).

<sup>182</sup> While the Rome Statute does not obligate States Parties to implement domestically all its provisions, Part 9 of the Statute does require them to "ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part." See Rome Statute, Article 88. (It is noted that the Amnesty Act of 2000 was adopted one year after Uganda signed the Rome Statute).

<sup>183</sup> AllAfrica.com, Uganda: ICC Bill (n 111) ("The [Ugandan ICC] Bill was first tabled in December 2004 but was never debated by the 7th parliament. It was once again tabled on 5th December 2006, making it the first Bill to have taken such a long time to be passed"). Also see <[http://www.beyondjuba.org/policy\\_documents/ICC\\_BILL\\_No.18.pdf](http://www.beyondjuba.org/policy_documents/ICC_BILL_No.18.pdf)> accessed on 12 December 2010.

senior Ugandan official explained that the ICC Bill was not considered for a number of years out of an attempt not to disturb the Juba peace talks.<sup>184</sup> It is noted that the ICC Act was approved in the eve of the high-profile ICC review conference, which was to be hosted by Uganda in May-June 2010. Thus, some sources indicated that Uganda enacted the ICC Act to show the world, at the conference, that it is committed to the Rome Statute.<sup>185</sup> Yet others have argued that the ICC Act was adopted because of the involvement of the ICC in Uganda.<sup>186</sup> This last argument suggests that the ICC Act is not only an impact of Uganda's ratification of the Rome Statute but also a result of the ICC's actual involvement in Uganda.

The normative impact of the ICC on Uganda may still increase in the future, for example, if procedural rules influenced by ICC norms are adopted to facilitate proceedings before the ICD. Two legal experts affiliated with the ICD had different views on whether such procedural rules will be adopted. While one of them considered that they are needed, the other suggested that trials before the ICD could be conducted on the basis of Uganda's existing rules of criminal procedure and evidence.<sup>187</sup> In any case, a recent administrative order provides that "the ICD will adopt rules of procedure and evidence applicable to criminal trials in Uganda as well as international practices and rules, including those applied by the ICC or other international criminal tribunal".<sup>188</sup>

### 8.3 IMPACT ON SENTENCING PRACTICES

In the absence of domestic atrocity-related convictions in Uganda, it is difficult to determine whether the ICC and its normative framework have had an impact on sentencing practices in Uganda. However, one noticeable impact of the ICC on sentencing norms in Uganda relates to the applicability of the death penalty to international crimes. The present section will begin by focusing on this area.

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<sup>184</sup> Interview notes with author.

<sup>185</sup> AllAfrica.com, Uganda: ICC Bill (n 111) ("Sources within the corridors of parliament say that the Bill was pushed through as part of Kampala's preparations to host the first review conference..."). This was also confirmed by Cambridge University researcher Dr. Sarah Nouwen. Written comments with author.

<sup>186</sup> See, e.g., Oola, Important Lessons (n 42), at p. 3 ("the ICC intervention ... catalysed the creation of [the ICD] in the High Court of Uganda and the recent domestication of the Rome Statute.").

<sup>187</sup> Interview notes with author.

<sup>188</sup> High Court (International Crimes Division) Order, 2011, referred to in "The Role of Specialized Courts" (n 173).

### *Exclusion of the Death Penalty from ICC Act*

The death penalty applies to 15 different crimes under Uganda law, including murder, rape, defilement, aggravated robbery, aggravated kidnapping and nine types of treason-related offenses.<sup>189</sup> The punishment is mandatory by law with respect to six of the treason-related offenses, and discretionary in relation to the other capital offenses.<sup>190</sup> In 2009, the Ugandan Supreme Court held that the mandatory application of the death penalty is unconstitutional, but its discretionary application is a lawful “deterrent”.<sup>191</sup> However, death sentences meted out by Ugandan (civilian) courts have not been executed in practice since 1999.<sup>192</sup>

Against this background, it is interesting that the death penalty is inapplicable to international crimes covered by Ugandan law. Both the GC Act of 1964 and the ICC Act of 2010 provide for a maximum penalty of life imprisonment for war crimes, genocide and crimes against humanity.<sup>193</sup> This is consistent with the Rome Statute’s sentencing norms, which exclude the death penalty. However, in the original draft of Uganda’s ICC Act, the death penalty was applicable to international crimes.<sup>194</sup> The following concern was expressed during the parliamentary debate on the adoption of the ICC Act:

“The Bill provides for a death penalty for crimes such as genocide and crimes against humanity ... yet the Rome Statute ... does not provide for this kind of

<sup>189</sup> See, e.g., Penal Code Act sections 25, 83, 118, 123, 272, 235 and 273. Additional death penalty provisions are included in Uganda’s military law called the Uganda People’s Defence Forces Act (formerly called the National Resistance Army Statute), and Uganda’s Anti-Terrorism Act of 2002

<sup>190</sup> Report by anti death penalty NGO Hands off Cain titled ‘Uganda’s penal code provides for 15 capital offences’ (1 January 2009) <<http://english.nessunotocchicaino.it/news/index.php?iddocumento=12001524>> accessed on 6 December 2010.

<sup>191</sup> BBC News Article, ‘Uganda court keeps death penalty’ (21 January 2009) <<http://news.bbc.co.uk/2/hi/7841749.stm>> accessed on 6 December 2010. Also see AI 2010 Report on Uganda (n 47).

<sup>192</sup> Amnesty International, ‘Uganda: Amnesty International calls on the Ugandan government to abolish the death penalty’, Amnesty International Public Statement, AI Index: AFR 59/001/2009 (22 January 2009) <<http://www.amnesty.org/en/library/asset/AFR59/001/2009/en/44962ecb-e93e-11dd-8224-a709898295f2/af590012009eng.pdf>> accessed on 25 December 2010; Amnesty International Report 2008, Chapter on Uganda <<http://www.amnesty.org/en/region/uganda/report-2008>> accessed on 25 December 2010 (noting that “[c]ivilian courts [in Uganda] continued to impose the death penalty for capital offences. No executions following convictions by a civilian court have been carried out since 1999. In September the Prisons Services reported that at least 520 inmates were on death row in Uganda. Military courts continued to hand down death sentences and order executions of soldiers in the Uganda Peoples’ Defence Forces (UPDF). The exact number of soldiers put to death under military law remained unclear”) (hereinafter: “AI 2008 Report on Uganda”). Senior Ugandan officials also confirmed that death sentences imposed by military courts are still being executed. Interview notes with author.

<sup>193</sup> GC Act (n 66), Article 1 (1); ICC Act, Articles 7-9.

<sup>194</sup> The Eighth Parliament of Uganda, Parliamentary Debates (Hansard), Official Report Fourth Sessions – Third Meeting (10 March 2010), at p. 10933, <[http://www.beyondjuba.org/policy\\_documents/Hansard\\_ICC\\_Bill\\_Act.pdf](http://www.beyondjuba.org/policy_documents/Hansard_ICC_Bill_Act.pdf)> accessed on 25 December 2010 (noting that the ICC Bill refers to the Penal Code for sentencing purposes, so that if the underlying offense of a crime against humanity was murder, the death penalty may be imposed).

penalty. Persons prosecuted in Uganda under this law will get a harsher punishment than those who will be tried under the Rome Statute.”<sup>195</sup>

This anomaly may have been the reason for excluding the death sentence from the ICC Act of 2010. Another possible reason for its exclusion, speculated a senior ICC official, was Uganda’s desire to attract international support for the implementation of its new accountability framework.<sup>196</sup> But there may be other reasons, as the following paragraphs suggest.

According to Amnesty International, already in October 2007 the Ugandan Minister of Internal Affairs “ruled out the imposition of the death penalty for LRA leaders if they were tried in Ugandan courts for crimes committed during the conflict in northern Uganda.”<sup>197</sup> This statement, which was made during the Juba peace talks, was probably intended to motivate the LRA to sign a final peace agreement. The reference in the Juba accountability framework to an “alternative” penalty regime for LRA crimes (see section 8.1 above) may have also had the same purpose. Since the Juba peace talks were abandoned in 2008, motivating the LRA to sign a final peace agreement no longer seems a plausible reason for excluding the death penalty from the ICC Act which was adopted in 2010. But still, promising rebels that they will not receive the death penalty can motivate them to stop fighting, especially if the amnesty regime will be qualified. Moreover, since life sentence is the maximum punishment for war crimes under Uganda’s GC Act of 1964, the death penalty may have been excluded from the ICC Act out of considerations of normative consistency with the only other domestic legislation dealing with international crimes.

To conclude, it is difficult to be certain that the death penalty’s exclusion from the ICC Act was an impact of the ICC or Rome Statute, as it could be explained by the government’s desire to reconcile the LRA and the trend set in the GC Act of 1964. Nonetheless, the concern raised by Ugandan parliamentarians that defendants prosecuted in Uganda under the ICC Act will be punished more severely than those tried by the ICC, suggests that the Rome Statute penalty regime had some influence on the eventual exclusion of the death penalty from the Ugandan ICC Act.

#### *Possible Future Impact: Abolition of the Death Penalty*

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<sup>195</sup> *Ibid.*

<sup>196</sup> Interview notes with author.

<sup>197</sup> AI 2008 Report on Uganda (n 192).

While the maximum penalty in Uganda for international crimes such as genocide is life sentence, Ugandan law continues to allow the imposition of the death penalty in case of ordinary crimes such as murder. A senior Ugandan official recalled that in the period leading to the adoption of the ICC Act there were parliamentary discussions in Uganda about abolishing the death penalty altogether. Parliamentary debates about abolishing the death penalty also took place before the ICC existed, and were merely revisited in light of the deliberations on the ICC Act.<sup>198</sup> Perhaps when this issue is raised again before the Ugandan parliament, the new anomaly, where the death penalty applies to ordinary murder but not to genocide, may encourage the legislator to abolish the death penalty altogether.

*Possible Future Impact: Avoiding Token Penalties*

It is recalled that the Juba accountability framework calls for “alternative” rather than “conventional” penalties in cases of LRA convictions (see section 8.1 above). But it provides no examples of such alternative penalties. If these penalties only include “token” punishments, accountability may not be achieved. But since the Juba accountability framework requires the penalties to reflect the gravity of the crimes committed, and in view of the need to provide significant sentences in order to satisfy the principle of complementarity, it is likely that token penalties will not be imposed on perpetrators of serious crimes. In fact, it is possible that the ICD will refer to the Rome Statute for guidance in determining which “alternative” (in the sense of non-capital) penalties to impose on atrocity perpetrators (even if they were convicted for domestic crimes).<sup>199</sup>

## 8.4 CAPACITY BUILDING IMPACTS

As noted above, various professionals including judges and prosecutors were appointed to handle atrocity-related proceedings before the ICD (see section 8.1 above). A Ugandan official affiliated with the ICD expressed disappointment that the ICC was not assisting Uganda in building the capacity of the ICD.<sup>200</sup> Another Ugandan official

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<sup>198</sup> Interview notes with author.

<sup>199</sup> This would especially be the case if Uganda decides to challenge the admissibility of the LRA case before the ICC, as it would have to satisfy the ICC that its intention to prosecute the same case domestically is genuine (and the severity of the sentence could serve as an indication that the domestic charges in the national proceedings reflect the gravity of crimes alleged by ICC).

<sup>200</sup> Interview notes with author. Although the interviewee noted that Uganda intends to ask the ICC for information as well as assistance in strengthening its national capacity to handle atrocity cases. He also added that the ICD judges



suggested that while the ICC may not be mandated or in possession of sufficient resources to engage in local capacity building, its staff members could still provide legal advice to Ugandans involved in prosecuting atrocities on the national level.<sup>201</sup> A third Ugandan official commented that the experience and knowledge of the ICC are useful for the Ugandan judiciary.<sup>202</sup>

But ICC officials maintain that strengthening the capacity of national justice systems is not within the ICC's mandate; this is rather the job of other international organizations, donor states, UN agencies, peacekeeping missions, etc.<sup>203</sup> OTP officials, in particular, consider that they must keep a certain distance from the justice systems of the states they address, in case they will have to make submissions to the ICC about the feasibility and genuine nature of national proceedings. They furthermore do not wish to dictate for local authorities the manner in which they should achieve justice (which the OTP may inadvertently be doing if it engaged pervasively in national capacity building).<sup>204</sup> An ICC Registry official explained that while the ICC is not mandated to strengthen national capacities, it forms part of an international criminal law enforcement system which can function properly only if national jurisdiction are able to prosecute atrocities. Thus the ICC has a stake in national capacity strengthening and will do its best, within its mandate, to contribute to this aim.<sup>205</sup> The following paragraphs describe some of ways in which the ICC contributes to national judicial capacity building.

### *Witness Protection Issues*

Even if the ICC does not proactively engage in capacity building, it helps develop local knowledge by collaborating with national authorities. For example, noted an OTP official, the ICC has transferred relevant expertise to local authorities who have cooperated with

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and lawyers intend to visit The Hague to strengthen their capacity by observing ICC proceedings, and are also scheduled to receive training from IICI.

<sup>201</sup> Interview notes with author.

<sup>202</sup> Interview notes with author.

<sup>203</sup> Interview notes with author. This position was also publically expressed by the ICC President, when he was asked, during his visit to Kinshasa last year, to provide Congolese judges with training in The Hague and exposure to the work of the ICC. A Congolese judge explained to the ICC President that this would improve the capacity of the local judges to handle atrocity related trials and to manage the participation of victims and witnesses in these trials. The ICC President responded that the Court does not offer such trainings and referred the Congolese judge to other institutions which give the appropriate training. See Radio Netherlands Worldwide, 'DRC judges request training in The Hague' (21 December 2009, by H. Michaud) <<http://www.rnw.nl/international-justice/article/drc-judges-request-training-hague>> accessed 6 May 2010.

<sup>204</sup> Interview notes with author.

<sup>205</sup> Interview notes with author.

it in setting up and running its witness protection program in Uganda.<sup>206</sup> Another OTP official explained that the ICC's standard practice is to rely on the collaboration of local police officers (whom it trains for this purpose) in running its "initial response system" (putting the witness in a safe house) and the "secondary response system" (relocation of the witness). The systems serve the ICC's own purposes, but since they are run by the ICC in conjunction with national authorities, the nationals acquire certain skills in the process.<sup>207</sup> A senior Ugandan official confirmed that Uganda has been cooperative with the ICC in the area of witness protection. The Ugandan official added that while the ICC does not directly employ locals to run its witness protection system, it relies on the Ugandan authorities in cases of actual danger to specific witnesses.<sup>208</sup>

While this type of collaboration may not guarantee Uganda a well-functioning national witness protection program, it could provide a foundation for the creation of such a national program. Indeed, stressed a senior Ugandan official, Uganda has started creating a national witness protection system to support national atrocity-related prosecution.<sup>209</sup> Uganda has indicated that its forthcoming request for assistance from the ICC will include witness related matters.<sup>210</sup> The OTP generally indicated that it would respond favorably to Uganda's request, if certain conditions are met (see part 7 above). Thus, future collaboration between the ICC and Uganda may further strengthen Uganda's national capacity in witness related areas, including their protection.

### *Outreach*

The ICC has a field office in northern Uganda, from where it administers local outreach activities. It is recalled that the ICC Registry runs an outreach program (see section 6.1 above). The program is largely facilitated through field officers who carry out outreach activities in the countries addressed by the ICC. In particular, these field officers inform local communities, authorities and civil society organizations about the ICC's goals, mandate, activities, norms and procedures. These outreach initiatives are meant to

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<sup>206</sup> Interview notes with author. Also see Sylvana Arbia 2009 Lecture at Grotius Centre (n 36), p. 5 ("the Victims and Witnesses Unit has worked closely with the Ugandan authorities to set up a Rapid Response Mechanism to protect vulnerable witnesses, as well as working on international relocations, as a last resort and where the threat cannot be met by local measures").

<sup>207</sup> Interview notes with author.

<sup>208</sup> Interview notes with author.

<sup>209</sup> Interview notes with author.

<sup>210</sup> OTP Weekly Briefing of 23-29 November 2010 (Issue #65) <<http://www.icc-cpi.int/NR/rdonlyres/7105B39A-2F30-43FF-9222-D7349BF15502/282732/OTPWBENG.pdf>> accessed on 9 December 2010.

generate understanding and acceptance of the ICC and not for capacity building purposes.<sup>211</sup> Nonetheless, explained a senior ICC official, the outreach activities increase local capacity to address atrocities by sensitizing local authorities and lawyers to international norms.<sup>212</sup>

However, a Ugandan lawyer and human rights activist complained, in an interview held in 2008, that not enough outreach was done by the ICC in Uganda and many Ugandans are still unaware of the ICC's work. He added that the location of the ICC field office in the north is unknown to many, and while security reasons may justify not disclosing its location, the public is denied access to information about the ICC. The Ugandan lawyer also considered that the ICC should have outreach activities in other areas of Uganda, and not just in the north, as people from all over the country were victims of LRA attacks when they traveled to the north. But he admitted that the ICC may face the greatest resistance in the north.<sup>213</sup> Nonetheless, it is recalled that ICC officials, some of whom were interviewed in late 2010, considered the ICC's outreach program in northern Ugandan to be effective both in informing the population about its work and in encouraging local acceptance of the ICC (see section 6.3 above). The different views of the Ugandan lawyer and ICC officials could be explained by the ICC's increased outreach activities after 2008, due to policy or practical considerations (such as the improved security situation in northern Uganda).

### *Training*

The ICC Registry, in addition to managing the outreach program, also runs annual seminars for potential defense counsel and victims representatives before the ICC. The seminars include information about the ICC as well as legal training. The OTP also provides training to national police officers and investigators in order to educate them about ICC norms. These trainings do not teach local professionals how to actually investigate or prosecute atrocities. But still, by teaching them about ICC norms, these initiatives can contribute to national capacity. An OTP official noted that in addition to outreach activities and trainings, the ICC officials help build national capacity by

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<sup>211</sup> Based on interviews with ICC officials. Interview notes with author.

<sup>212</sup> Interview notes with author. This has been done recently in Kenya, where three ICC lawyers gave lectures about ICC norms and procedures to local lawyers. See Capital News, 'Kenyan lawyers to get tips from ICC experts' (19 October 2010) <<http://www.capitalfm.co.ke/news/Kenyanews/Kenyan-lawyers-to-get-tips-from-ICC-experts-10217.html>> accessed on 4 November 2010.

<sup>213</sup> Interview notes with author.

interacting with Ugandan judges and prosecutors and informally updating them about ICC norms and standards (as opposed to specifically advising them on how to handle certain cases).<sup>214</sup>

An ICC judge, while maintaining that capacity building is not the job of the ICC, noted however that groups of national judges, including from Uganda, visit the ICC and attend lectures by ICC officials. In addition, ICC members are sometimes invited by national institutions and NGOs to give lectures in their countries, including in Uganda.<sup>215</sup> An ICC official added that the OTP consults with external experts from the relevant countries, in an ad hoc manner, during the analysis stage of a situation. But this is done to build the capacity of the ICC not of the national experts.<sup>216</sup>

### *ICC Engages Nationals*

An ICC official noted that the ICC employs Ugandan nationals in its headquarters in The Hague (as investigators, translators and interpreters) as well as in its field office in Uganda. These employees will return to their national justice systems equipped with valuable knowledge they have acquired at the ICC.<sup>217</sup> Another ICC official mentioned that the ICC periodically hosts visiting professionals and interns from various regions, including Uganda. He referred to the ICC's visiting professionals program as a capacity building tool, which strengthens national capacities while providing the ICC with a chance to learn from visiting professionals. The official added that the ICC also has an internship program, enabling students and young professionals to learn about the operation of the ICC. The participation of nationals from developing countries in both the visiting professionals and internship programs is sponsored by the ICC, out of a fund especially created by means of a generous contribution of the EU and other donor countries.<sup>218</sup>

According to an ICC judge, the ICC is not meant to address conditions in just one country and thus does not make an effort to employ nationals of a certain country in order to strengthen that country's national capacity. But the fact that there is a Ugandan

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<sup>214</sup> Interview notes with author.

<sup>215</sup> Interview notes with author.

<sup>216</sup> Interview notes with author.

<sup>217</sup> It is noted, however, that a Ugandan lawyer and human rights activist complained that the locals employed in the ICC field office in Uganda are general rather than professional staff. Interview notes with author.

<sup>218</sup> Interview notes with author.

judge at the ICC certainly helped build awareness to the ICC in Uganda. Still, the Ugandan judge must make an extra effort to remain detached from the national judiciary in Uganda as the ICC must be (and seem to be) objective and independent.<sup>219</sup>

### *Information Management and Evidence Sharing*

The ICC also has an impact on information management capacities within national justice systems. This is because its formal requests for cooperation from the national prosecution require the latter to be organized, have archives, library systems, references, databases, etc. However, an OTP official noted that this impact is very minor.<sup>220</sup> If the ICC accepts Uganda's request for cooperation (see part 7 above), and shares evidence with Uganda, this may encourage a further "upgrading" of information management systems in Uganda. In addition, by sharing evidence with Uganda, the ICC may have a significant positive impact on the ability of national authorities to carry out investigations and prosecutions related to the LRA atrocities in northern Uganda.

### *Capacity Building Initiatives by Other Actors*

Since 2008, Uganda has been developing its judicial capacity in an attempt to implement its new accountability policy. NGOs and third states, mainly through their development agencies, have been assisting Uganda in this endeavor. Since Uganda's need for capacity development stems from its new accountability policy, which is an impact of the ICC, the capacity building activities of various actors in Uganda can be regarded an indirect impact of the ICC.<sup>221</sup> A brief overview of these activities follows.

One organization which plays an important role in strengthening Uganda's domestic capacity to prosecute atrocities is the US-based global pro bono law firm, the Public International Law and Policy Group (PILPG). In 2008, PILPG set up an office in Uganda, and has since then been advising and assisting the Ugandan government and the JLOS on the domestication of the Rome Statute, the establishment of the ICD, the pending war crimes trial and other transitional justice issues.<sup>222</sup> Recently, PILPG helped facilitate a needs-assessment mission of foreign experts to Uganda, with the aim of

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<sup>219</sup> Interview notes with author.

<sup>220</sup> Interview notes with author.

<sup>221</sup> It is also noted that, according to ICC officials, the Court encourages States Parties to the Rome Statute to strengthen the judicial capacity of other states which are subject to ICC proceedings. Interview notes with author.

<sup>222</sup> Website of PILPG <<http://www.publicinternationallaw.org/areas/peacebuilding/negotiations/index.html>> accessed on 28 October 2010.

advising the national justice sector on its readiness to start war-crimes trials and on outreach issues. In 2010, PILPG also facilitated workshops for war crimes prosecutors and investigators and potential war crimes defense counsel on Uganda-relevant international criminal law and practice and on outreach issues, among other capacity-enhancement and assistance activities.<sup>223</sup>

In 2009, a Ugandan judicial delegation visited the international and hybrid courts in Sierra Leone, Bosnia and The Hague and learned about their work, in a study tour organized by the Danish International Development Agency and the NGO ICTJ.<sup>224</sup> According to a senior Ugandan official, the tour lasted two weeks, was attended by 18 Ugandan judicial professional, and was funded by the EU.<sup>225</sup>

In 2010, the Netherlands-based Institute of International Criminal Investigations (IICI) has trained Ugandan justice sector officials on investigating and prosecuting atrocities. The recipients of the training were mainly officials and civil-society representatives working on war crimes and transitional justice issues, including judges of the ICD, war crimes prosecutors and investigators, defense lawyers, other JLOS officials, and civil society actors. The program was funded by the Austrian Development Agency with the backing of Uganda's JLOS.<sup>226</sup> The Netherlands-based NGO International Criminal Law Services partnered with IICI in carrying out parts of its training program in Uganda.<sup>227</sup> Also in 2010, Uganda sent national investigators to receive training and certification from Justice Rapid Response (JRR), an organization which provides on-demand investigators to governments who wish to investigate atrocities soon after they were committed on their territories.<sup>228</sup> JRR trained them in areas related to the conduct of investigations into mass crimes. The Ugandan investigators certified by JRR continue to be based in Uganda and are deployed elsewhere by JRR only when they are needed for a specific temporary assignment. Thus, JRR enhances their capacity

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<sup>223</sup> Information provided to the author (through email) by Mr. Gabriel Oosthuizen, Chief of Party of PILPG Uganda Project. Email record with author.

<sup>224</sup> BIRN, 'BiH Hosts Delegation from Uganda' (14 September 2009) <<http://birn.eu.com/en/1/240/25608/>> accessed on 28 October 2010.

<sup>225</sup> Interview notes with author.

<sup>226</sup> Website of IICI <<http://www.iici.info/pages/events-past.php>> accessed on 28 October 2010.

<sup>227</sup> Website of ICLS <<http://www.iclsfoundation.org/projects>> accessed on 28 October 2010. ICLS also held a media workshop in Uganda, in 2009, with funding from the German foreign affairs ministry, in order to raise the awareness of radio journalists to international criminal justice issues and encourage them to broadcast radio programs addressing these issues.

<sup>228</sup> See, e.g., website of the NGO No Peace Without Justice <<http://www.npwj.org/ICC/Hague-Justice-Rapid-Response-Certification-Workshop.html>> accessed on 28 October 2010.

through special trainings, while at the same time the investigators enhance the capacity of JRR missions around the world.<sup>229</sup>

It is noted that also local NGOs are involved in strengthening national judicial capacity. For example, in 2008, the Ugandan Coalition for the ICC (UCICC) organized a two day symposium for the Ugandan judiciary, including the judges and registrar of the ICD, to inform them about international criminal law.<sup>230</sup>

## 9. CONCLUSION AND RECOMMENDATIONS

Discussions in Uganda about accountability for the war's atrocities began when the ICC initiated its proceedings concerning Uganda. These discussions were not common in Uganda beforehand, neither within the government nor at the grass-root level. This new "accountability discourse" in Uganda has been attributed by most interviewees (including ICC employees, Ugandan officials, and civil society members) to the ICC's active engagement in Uganda.<sup>231</sup> The new accountability approach in Uganda led to the development of new legal norms as well as institutional and human capacities.

Thus the creation in 2008 of the ICD, which recently started its first case, is an impact of the ICC in Uganda. The ICC Act of 2010, with its exclusion of the death penalty and adherence to other international human rights standards, is another significant impact of the ICC in Uganda (and even though the law has not yet been applied in practice, its adoption reflects an important legal development). The ICC Act and the ICD may be used to prosecute suspects who were not charged by the ICC, suggesting that the ICC's involvement in a state can eventually lead local courts to prosecute atrocities and perpetrators not directly addressed by the ICC.

However, in order to prosecute atrocities in a manner which sends a strong message of accountability, Uganda will have to overcome legal and political obstacles such as the national amnesty regime. Furthermore, not only the quantity but also the quality of the trials will matter. Otherwise, the impacts that the ICC so far had in Uganda

<sup>229</sup> This information is based on interviews with a Ugandan official and a JRR employee. Interview notes with author.

<sup>230</sup> The symposium was facilitated by UCICC staff, the ICC field office staff and Swedish international law consultant Mr. Pal Wrangé. It was supported by the Human Rights Network Uganda (HURINET), and funded by the Mac Arthur Foundation. See Report on 'The UCICC Symposium for Judicial Officers on the Relevance of International Criminal Law in Africa, held on August 28th-29th 2008 At Imperial Resort Beach Hotel in Entebbe' <[http://www.iccnw.org/documents/UCICC\\_WORKSHOP\\_for\\_Judicial\\_Officers.pdf](http://www.iccnw.org/documents/UCICC_WORKSHOP_for_Judicial_Officers.pdf)> accessed on 28 October 2010.

<sup>231</sup> Interview notes with author. Also see, e.g., Oola, Important Lessons (n 42).

may remain limited. The OTP, by sharing information with Uganda following the latter's request for assistance, could significantly strengthen national capacities in Ugandan and encourage domestic proceedings. Also any assistance the ICC will provide Uganda regarding witness related issues can strengthen Uganda's capacity to protect witnesses and thereby improve its atrocity-related proceedings. If the ICC cannot directly engage in capacity building activities, it could at least assist or advise existing capacity building programs operating in Uganda. Hopefully, this will be the direction in the coming years.<sup>232</sup> Finally, the ICC can encourage national judicial proceedings by increasing its presence on the ground and communicating more with the local population.

The OTP, believing in the importance of national proceedings, adopted a policy of "positive complementarity" aimed at "encourage[ing] genuine national proceedings where possible, including in situation countries".<sup>233</sup> ICC officials explained that while the ICC cannot directly participate in domestic investigations or prosecutions, it can encourage other actors, such as the EU or development agencies, to promote domestic proceedings.<sup>234</sup> The ICC can also encourage national prosecutions by making statements and undertaking diplomatic efforts aimed at encouraging states to initiate proceedings.<sup>235</sup> The positive complementarity approach is consistent with the view expressed by States Parties to the Rome Statute at the 2010 ICC Review Conference that the principle of complementarity requires them "to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards".<sup>236</sup>

International courts can only prosecute a handful of perpetrators. Therefore, even where international trials take place, to effectively fight impunity and promote the rule of law, they must be complemented by genuine and fair national prosecutions (or other

<sup>232</sup> A number of ICC officials expressed the view that the ICC, in principle, should cooperate with existing judicial capacity building programs in the countries it addressed. Interview notes with author.

<sup>233</sup> ICC Prosecutorial Strategy 2009-2012 (n 9), para. 17. Also see *ibid* paras. 15-16; OTP Paper on Some Policy Issues (n 6), p. 2 ("To the extent possible the Prosecutor will encourage States to initiate their own proceedings"); ICC OTP Report on Prosecutorial Strategy (n 13) ("The principle of 'positive complementarity' is one of the fundamental principles '[a]t the core of the Prosecutorial Strategy' of the ICC Prosecutor"); ICC Press Release ICC-CPI-20100603-PR537 (3 June 2010), 'Review Conference: ICC President and Prosecutor participate in panels on complementarity and co-operation' <[http://www.icc-cpi.int/Menus/ASP/ReviewConference/PressReleaseRC/Review+Conference+ICC+President+and+Prosecutor+participate+in+panels+on+complementarity+and+co\\_oper.htm](http://www.icc-cpi.int/Menus/ASP/ReviewConference/PressReleaseRC/Review+Conference+ICC+President+and+Prosecutor+participate+in+panels+on+complementarity+and+co_oper.htm)> accessed on 5 March 2011 ("ICC Prosecutor Luis Moreno-Ocampo highlighted that 'Positive complementarity is about States assisting one another, receiving additional support from the international Criminal Court itself as well as from civil society to meet Rome Statute obligations'").

<sup>234</sup> Interview notes with author.

<sup>235</sup> Interview notes with author.

<sup>236</sup> International Criminal Court, Assembly of States Parties, Kampala Declaration, Declaration RC/Decl.1 (1 June 2010), para. 5 <[www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Decl.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.1-ENG.pdf)> accessed 31 December 2010.



robust accountability measures). It is also important that the international and national judicial responses to the atrocities are harmonized. If the two parallel processes compete over resources or apply different norms and standards, they may undermine each other, eventually undermining their (supposed) mutual goal of establishing accountability through fair trials. In the case of Uganda, the international and national judicial responses to the atrocities are developing separately, with a blanket amnesty applicable on the national level. This creates a risk that the combined impact of the national and international trials will be sub-optimal. While international actors outside the ICC (e.g. UN, EU, states) should help strengthen the judicial capacity of post-conflict states, for example through Rule of Law programs, they should also provide incentives to increase the political will of states to prosecute, for example by tying loans to the holding of trials or the incorporation of international criminal law norms into domestic law.<sup>237</sup>

This report has shown that Uganda's adoption of an accountability policy toward LRA atrocities was encouraged by the ICC's initiation of proceedings against the LRA leadership, suggesting that national proceedings can be a result of international proceedings. Policy makers can learn from the experiences of the ICC and other international courts about modalities of collaboration between international and national justice systems which they can introduce when they set up future international courts, or when the next ICC intervention takes place, in order to maximize the potential of international courts to have an encouraging effect on national courts. They can thus encourage national courts to effectively prosecute atrocities in parallel to international courts. Policy makers can even specifically mandate international courts to actively promote parallel national trials, while equipping them with the necessary resources to execute such a mandate.

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<sup>237</sup> This paragraph is inspired by views expressed by a senior ICC official. Interview notes with author.