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CASE STUDY: UGANDA

Uganda: Impact of the Rome Statute and the International Criminal Court

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Executive Summary

The situation in Uganda presented a challenging first case for the International Criminal Court (ICC). The origins of the conflict between the Lord's Resistance Army (LRA) and the government are complex, and many people in the north resent the government for failing to protect them from the LRA. Local actors pursued several initiatives, including traditional justice and amnesty, to bring the conflict to an end. Arrest warrants that the ICC issued in October 2005 against LRA senior leaders, including its leader, Joseph Kony, gave rise to fears that a negotiated solution to the 20-year old conflict would no longer be possible.

The Juba agreement concluded in June 2007 proposed national trials in combination with other mechanisms, including traditional justice, a commission for truth-seeking, and reparations for victims. The judiciary established a War Crimes Division of the High Court of Uganda in July 2008, and Parliament passed an International Criminal Court Act in 2010. These steps forward were seemingly motivated by Uganda's hosting of the ICC Review Conference, as well as the desire to possibly challenge the admissibility of the case against LRA leaders in the future.

While these steps contribute to establishing a permanent capacity to try international crimes in Uganda, other transitional justice options such as truth-seeking and reparations are increasingly being neglected, despite the expressed desires of affected populations for these forms of justice.

Introduction

Uganda's most recent two decades of conflict began as a rebellion of the Ugandan People's Democratic Army (UPDA), a group of army officers who fled from Kampala when President Yoweri Museveni, leader of the National Resistance Army/Movement (NRA/M), took power in 1986 after a five-year guerilla war. The rebellion gradually transformed into a highly structured rebel group with cult-like qualities, which called itself the Lord's Resistance Army (LRA), headed by Joseph Kony.[1] Ethnic divisions and political and economic marginalization, some of which began in colonial times, mark Uganda's complex and violent history.[2]

The LRA garnered little public support for its cause. It increasingly turned against the civilian populations of northern Uganda, many of whom belonged to the Acholi tribe. With financial and military support from the Sudanese government in Khartoum and using South Sudan to launch its operations, the LRA proved difficult to defeat. It waged a brutal campaign mostly targeting civilians accused of collaborating with the Ugandan government. LRA crimes have been widely documented and range from murders, abductions, forced marriage, and horrific mutilations including amputating limbs or cutting off ears, noses,

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About the Authors

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or lips. These atrocities of the LRA were deliberate attempts to instill terror, to violate local values and power structures, and to swell rebel ranks.

The effects of the conflict were catastrophic.[3] It is estimated that up to 75,000 people were abducted during the 20-year conflict. Most of the victims were youth and children.[4] About 1.8 million people in the north became internally displaced persons (IDPs) and lived in dreadful conditions in camps; in 2005, the World Health Organization estimated an excess mortality rate of 1,000 a month in those camps. The IDP population basically depended on humanitarian organizations such as the World Food Program (WFP) for survival, with insufficient support from the local or central government.

The dire nature of the humanitarian catastrophe had two immediate consequences. It lent great urgency to resolving the conflict, so people could return to their homesteads and villages to resume normal lives, which in due course would allow the social fabric to mend. In the north it gave rise to significant resentment against the government that was seen to be failing both in resolving the conflict and in protecting civilians. Many of the measures the government took, such as the strict curfews, prevented people from pursuing their livelihoods. Additionally these actions were perceived as degrading, and to some extent vengeful and punitive against the Acholi who had long been at the epicenter of the conflict. The relationship between the Uganda People's Defense Forces (UPDF) and people in the camps was strained by the army's failure to protect the population from the LRA and its own abusive or undisciplined behavior toward local communities.

The government's response to the violence was often contradictory. Throughout most of the conflict, the government promoted a combination of a military solution and peace talks as a way to end the LRA conflict. President Museveni favored a military solution combined with amnesty as an incentive to surrender. The Ugandan government also sporadically pursued negotiations mainly under the auspices of Betty Bigombe, an Acholi and government minister who—at great personal risk—made serious attempts to meet with the LRA first in 1994 and later in December 2004. While her attempts were widely admired, by late 2005 it was clear that her efforts were destined for failure.

Views on how the conflict should have been resolved differed drastically between northern Uganda, where the conflict was playing out, and the rest of the country, which was generally prospering.[5] In the north, religious and traditional leaders increasingly came together to try to find peaceful local solutions to the conflict, involving dialogue and a focus on reintegrating former LRA combatants.[6] One of their efforts was the comprehensive Amnesty Act, passed in 2000. The amnesty continues to enjoy a level of support among affected populations as it supports reintegration of formerly abducted people.[7] 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."

These factors and the historical north-south divide in Uganda are important in understanding key components of the dynamics around justice issues and the impact of the ICC in northern Uganda. In December 2003, the Ugandan government referred the situation in the north to the ICC because it could not arrest the LRA, which was operating mostly from bases in South Sudan. The ICC Prosecutor first commented on the situation in Uganda after the massacre of February 21, 2004, in the Barlonyo IDP camp in Lira and formally announced the opening of an ICC investigation that July. In October 2005, arrest warrants were issued for five senior LRA leaders, including Kony and Vincent Otti, the second in command. Only three of the leaders survive today.

Complementarity

The discussions on complementarity in Uganda first surfaced during "agenda item three" of the Juba Peace talks, held from August 2006 to November 2008.[8] The issue came to the fore because the LRA demanded the withdrawal of the arrest warrants. While the ICC Prosecutor made clear that he could not withdraw the arrest warrants, parties to the negotiations began to discuss putting in place a national procedure to deal with the LRA. This would allow Uganda to potentially challenge the admissibility of the ICC case against LRA leaders in the future, thereby seeking to exert control over the fate of the LRA. The parties at Juba took the view that national criminal proceedings, rather than any alternatives such as traditional justice, were most likely to meet the complementarity threshold.

The Agreement on Accountability and Reconciliation, signed by the government and the LRA on June 29, 2007, states, "Formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict. Provided that, state actors shall be subjected to existing criminal justice processes and not to special justice processes under this Agreement." The annexure specifies "a War Crimes Division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict." The decision to pursue a national solution allowed the talks to proceed beyond the very delicate questions on accountability, to other agenda items. The agreement also foresaw a range of other transitional justice measures, including traditional justice, truth-seeking, reparations, and special measures for women and children.

However, the final peace agreement that was to bring into force all prior agreements was not signed during the last opportunity to do so, in late November 2008. This has created a complex legal situation. Although the LRA signed several agreements, it is clear that it does not intend to live up to its obligations. The government for its part has pledged implementation of the various agreements signed at Juba.

In July 2008, the Ugandan government established a War Crimes Division (WCD) of the High Court of Uganda by administrative decree.[9] It is not clear how this development is compatible with the continued application of the Amnesty Act. For instance, lower-level LRA commanders apprehended during "Operation Lightning-Thunder" in the Democratic Republic of Congo (DRC), such as Col. Thomas Kwoyelo, have not been given amnesty but have been charged in a local court.

The recent debate in Uganda has centered on technical aspects of the law and is dominated by actors who were previously not involved in the Juba negotiations. Lawyers and technical experts have come to play an important role, while the politicians and community-level leaders are increasingly absent. Also, during the Juba talks the presumption was that a small number of people would be tried in connection to the LRA conflict, mainly those who had the highest levels of responsibility. Since then however, this has become considerably less clear. Finally, it is not clear whether the WCD can try state actors: the Juba agreement implied that it could not, but no such prohibition is included in the International Criminal Court Act.

Four Ugandan judges have already been appointed to the division, and several of them have international experience. The total number of judges sitting at any time will be five. The suggestion has been made to put additional international judges on the bench, preferably from other African countries that adhere to common law. This could further bolster the court's perceived independence.[10]

On March 10, 2010, Parliament passed the International Criminal Court Act, but it was still not public at the time of writing.[11] It forms a redraft of the previous International

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Criminal Court Bill of 2006.[12] Initially the ICC Bill of 2006 was revised by the Justice, Law, and Order Sector in 2009 into an International Crimes Bill that gave the WCD jurisdiction over genocide, crimes against humanity, and war crimes, as well as underlying offenses specified under Ugandan law.[13] However, the Legal and Parliamentary Affairs Committee reverted largely to the language of the ICC Bill of 2006, apparently without the provisions governing the division. The current Act gives the High Court jurisdiction over Rome Statute crimes.[14] By relying on ICC definitions to incorporate the crimes, Uganda is following the same practice as the implementing legislation in other countries such as the United Kingdom, South Africa, and Germany.[15] The motivation for passing the bill seems to have been largely driven by the desire to host the ICC Review Conference scheduled to be held in Kampala from May 31 to June 11, 2010.

A crucial part of Uganda's attempt to put in place domestic measures now is to prepare itself to challenge complementarity. Although the arrest warrants remain in place, Uganda could conceivably challenge the admissibility of the case against the three surviving LRA leaders under Article 19 of the Rome Statute. While currently the question is theoretical, it has sparked intense interest in and outside of Uganda on what the standards are for complementarity. This emphasis has had some distorting effect on the debate, in which questions regarding the WCD's relation to Ugandan law or the broader context have sometimes received insufficient attention.

Some human rights organizations argue that the Ugandan legal system lacks capacity and impartiality and that it should not try the LRA. But as stated by a group of experts on complementarity, "The standard for showing inability should be a stringent one, as the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards."[16] But in order to succeed in a complementarity challenge, Uganda would first need to open an investigation into those cases in which it wants to challenge admissibility. In the absence of national proceedings, a case is admissible under the current jurisprudence of the ICC.[17] Uganda would also need to argue that the grounds on which it first made the referral no longer apply; when the government initially made the referral, it argued that it was unable to arrest LRA members because they were outside its territory. Finally, Uganda would need to ensure that it does not appear "unwilling," for instance by allowing for alternative sentences that are seen as disproportionately low. It would also need to demonstrate independence and impartiality in the trials.

In any case, these legal questions remain premature. On March 10, 2009, the Pre-Trial Chamber held: "Pending the adoption of all relevant texts and the implementation of all practical steps, the scenario against which the admissibility of the Case has to be determined remains therefore the same as at the time of the issuance of the Warrants, that is one of total inaction on the part of the relevant national authorities; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage."[18] The Appeals Chamber upheld the decision on September 16, 2009.[19] An actual challenge to the admissibility of the case remains theoretical for some time to come.

Peace and Justice

In late 2005, in a pre-cursor to the negotiation that was to follow, the LRA moved its base to Garamba National Park in DRC, pursuant to the signing of the Comprehensive Peace Agreement (CPA) between northern and southern Sudan. In early 2006, the first overtures to open dialogue were made, and Riek Machar, vice president of South Sudan, offered to mediate. On August 26, 2006, the LRA and the Ugandan government signed the first Cessation of Hostilities (CoH) Agreement.[20]

The negotiations that followed lasted two and a half years and were fraught with setbacks. The CoH was continuously breached, and the LRA did not honor deadlines to assemble and disarm. Due to the ICC arrest warrants, senior LRA leaders feared arrest and did not come to Juba to negotiate in person. Instead, they were represented by a delegation composed of exiled Acholi in the diaspora who often had their own political agenda.[21] Probably the most serious setback to the negotiations was the LRA's execution of Otti, Kony's second in command, in October. 2007. Otti was seen as a proponent of the peace process, while many doubted Kony's dedication to it.

The LRA repeatedly demanded that the ICC arrest warrants be dropped as part of the negotiation, but there was no legal avenue for this. The government instead promised that it would approach the Court or the Security Council if and when the LRA signed the final agreement. The government and the LRA signed the Agreement on Accountability and Reconciliation on June 29, 2007. After additional consultations were completed, an annexure to the agreement was drafted and signed in February 2008. A final peace agreement, due to be concluded in late November 2008, was not signed because Kony did not show up at the final signing ceremony.

In a curious way the Juba process was simultaneously a failure and a success. The renewed fighting with the LRA during Operation Lightning Thunder in December 2008 and the atrocities committed since have eliminated the possibility of continued negotiations in Uganda and have made a final settlement with the LRA seem more elusive than ever.[22] At the same time, relative peace has returned to northern Uganda and IDPs are returning on a widespread basis. The gains derived from this peaceful period are deemed to be permanent, and a return to conflict in northern Uganda is becoming more difficult to imagine. Also, as discussed above, the Juba negotiation provided a road map for transitional justice that is still being followed.

Debate will continue in years to come as to whether or not the arrest warrants were the most significant factor in the breakdown of the Juba peace process. It is very difficult to pinpoint a single cause since multiple factors, including the execution of Otti, led to this outcome. Similarly, debate continues on whether the arrest warrants served to bring the LRA to the negotiating table. The LRA certainly sought to use the talks to eliminate the ICC arrest warrants. But a variety of factors contributed to the group's participation in the talks, and it is not possible to point to the ICC arrest warrants as the single, or even the main, factor. What is much clearer is that the ICC arrest warrants had a significant impact on the contents of the negotiation and on the accountability and reconciliation agreement in particular, as discussed above.

Impact of the ICC on Victims and Affected Communities

The Ugandan transitional justice debate has gone through highs and lows in terms of involving those who have been most affected by the conflict. For instance, much has been written about the early opposition to the ICC intervention in Uganda.[23] Generally, early opposition among traditional and religious leaders and civil society stemmed from three sources. First, many in the north feared the ICC's involvement would make a peace deal with the LRA impossible. Though they had originally supported the ICC intervention, they changed their minds upon learning that the Court could not conduct its own arrests. Second, some considered the ICC itself as lacking local legitimacy. People in the north had not heard of the Court when the Ugandan government signed the Rome Statute. There was a sense that the Western-style justice the ICC sought to impose should not trump local mechanisms.

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Finally, many believed that the ICC intervention was not impartial. The Prosecutor's announcement of Uganda's referral in December 2003 was made at a joint press conference with President Museveni, creating a perception that the Court was siding with the government—a perception that has proved difficult to undo. Those who doubted the Court's impartiality pointed to the fact that the ICC had not opened an investigation of the UPDF, nor had it pursued the crime of forced displacement. Some have argued that conditions in the camps were killing far more people than the LRA. Others said that since the Court did not have the ability to enforce its own arrest warrants, relying on the government's cooperation means that the ICC cannot be impartial. These were views that were held early on in the process and may have changed over time.[24]

However, due to the general interest in Uganda, opinions of the affected population on transitional justice were studied more extensively in northern Uganda than in many other parts of the world.[25] A lot of surveys were initiated because of the interest the ICC's intervention in Uganda garnered. Research shows that the views of affected populations were far from uniform. For instance, ICTJ and the Human Rights Center at the University of California, Berkeley, conducted a survey called "Forgotten Voices" in 2005, some time before the Juba talks began. This survey was repeated in 2007 in a report entitled "When the War Ends" at the height of the peace process.[26] Both of these were large-scale, representative surveys of the affected population, and about 2,500 people responded to each one.

When surveyed in 2005, a majority of respondents (66 percent) said they favored "hard options" in dealing with LRA leaders, including trials, punishment, or imprisonment. Only 22 percent preferred "soft options" such as forgiveness, reconciliation, and reintegration. This was seen to affirm the ICC intervention. In 2007, this statistic had reversed, with a majority of 54 percent preferring soft options and just 41 percent preferring the hard ones. Of respondents, 29 percent said that the ICC was the mechanism most suited to deal with the LRA, whereas 28 percent said the Ugandan national courts.[27] This may indicate that while people want both peace and justice, during the height of Juba they were more willing to compromise on forms of justice.

The surveys also showed that most victims support comprehensive approaches to justice that also involve measures for victims, such as reparations or truth-seeking. The work of the ICC Trust Fund is also important to this end. It is not clear what rights have been accorded to victims in the International Criminal Court Act.

Conclusion

The Ugandan experience demonstrates that an ICC intervention need not prevent the peaceful settlement of conflict. Instead, the international pressure resulting from the arrest warrants was carefully utilized at Juba in order to negotiate a solution that would seek to achieve a comprehensive approach to justice at the national level. While Uganda continues to face challenges, the fact that it is developing a national capacity to try war crimes in the future is welcome. Solutions to impunity must be found at the national level; if credible, these solutions can be seen as closer to victims and have more potential to transform society.

The ICC's involvement has concentrated Uganda's domestic debate on criminal justice. The upcoming Review Conference in Kampala has meant that the country has accelerated the implementation of criminal justice over other forms. Neither the ICC nor the WCD can provide a complete solution to justice in northern Uganda. The people of this region have said repeatedly that they desire a comprehensive approach to justice, which incorporates victim-centered measures such as truth-seeking, reparations, and cultural approaches rooted in traditional justice. Also, future negotiations may still be necessary in the future, but the way forward in this respect is not easy to discern.

Endnotes

1. The group's name is thought to be a parody on the National Resistance Army/Movement. Doom, Ruddy, and Koen Vlassenroot, "Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda," *African Affairs 98*, 1999, 22.

2. Lomo, Zachary, and Lucy Hovil, Behind the Violence: Causes, Consequences, and the Search for Solutions to the War in Northern Uganda, Refugee Law Project, February 2004.

3. Jan Egeland (Security Council Meeting Record S/PV.5331 from Dec. 19, 2005).

4. See Pham, Phuong, Patrick Vinck, and Eric Stover, Abducted: The Lord's Resistance Army and Forced Conscription in Northern Uganda, Berkeley-Tulane Initiative on Vulnerable Populations, June 2007.

5. The dividing line is often said to run neatly along the Nile.

6. Afako, Barney, Reconciliation and Justice: Mato Oput and the Amnesty Act, Conciliation Resources 2002.

7. "Forgotten Voices, A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda." ICTJ and the Human Rights Center at University of California, Berkeley, July 2005; Coming Home: Understanding why Commanders of the Lord's Resistance Army Choose to Return to a Civilian Life, Conciliation Resources and QPSW, May 2006. Uganda had several amnesties before the one that passed in 2000, including the Amnesty Statute of 1987 that excluded genocide, murder, kidnapping, and rape.

8. The peace talks included five agenda items. Separate agreements were signed on each item. These were all supposed to come into force with the signing of the final peace agreement.

9. Annexure, section 7.

10. Section 20 (1) of the draft of the International Crimes Bill said: "The War Crimes Division shall consist of five judges, to be appointed by the President on the advice of the Judicial Service Commission in accordance with Ugandan law." The War Crimes Division may also engage international advisors, according to section 20 (3).

11. The bill was still not publicized on May 5, 2010.

12. The version stalled because some considered it incompatible with Uganda's Constitution that grants heads of state immunity. That was seen as an obstacle to implementing the ICC Statute because it denies such immunity in Article 27. It is unclear how this issue was resolved in the current act.

13. International Crimes Bill, section 18*bis*.

14. Report of the Committee on Legal and Parliamentary Affairs on the International Criminal Court Bill 2006.

15. Terracino, Julio Bacio, "National Implementation of ICC Crimes: Impact on National Jurisdiction and the ICC," JICJ 5 (2007), 423-4.

16. Group of experts, ICC Office of the Prosecutor, The Principle of Complementarity in Practice, 2003.

17. Furthermore, a Pre-Trial Chamber of the ICC stated in the Lubanga case, "National proceedings must encompass both *the person and the conduct* which is the subject of the case before the Court" (emphasis added). *Prosecutor vs. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision of Pre-Trial Chamber I on the Prosecutor's Application for a Warrant of Arrest, Article 58, Feb. 10, 2006, para. 31.

18. *Prosecutor vs. Kony et al*, Pre-Trial Chamber Decision on the Admissibility of the Case under Article 19 (1) of the Statute (ICC-02/04-01/05-377).

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The Review Conference of the Rome Statute provides a unique opportunity to evaluate the progress of the International Criminal Court and the challenges that it faces. ICTJ brings a wealth of expertise in situation countries to the discussions of complementarity, peace and justice, and the impact of the ICC on the status of victims. ICTJ has developed a briefing paper series for the conference available at **www.ictj.org.**

Acknowledgement

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19. Appeals Chamber, Judgment on the appeal of the Defense against the "Decision on the Admissibility of the Case under Article 19 (1) of the Statute" of March 10, 2009, Sept. 16, 2009.

20. For an extensive analysis on the Juba peace talks, see International Crisis Group's "Peace in Northern Uganda," Africa Briefing No. 41, Sept. 13, 2006.

21. Ibid.

22. "It is estimated that a thousand civilians were killed by the LRA in the aftermath of Operation Lightning Thunder, hundreds were abducted and around 200,000 displaced." Atkinson, Ron, From Uganda to the Congo and Beyond: Pursuing the Lord's Resistance Army, International Peace Institute, 2009, 14-15. The figures the ICC gives are higher with 1,250 killings, 2,000 abductions, and 300,000 displacements in DRC alone, and 80,000 displaced and 250 killed in the Central African Republic. See Office of the Prosecutor, Weekly Briefing, Issue 26, Feb. 26-March 1, 2010.

23. For two opposing views on this, see Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed, 2006), and "Peace First, Justice Later," Refugee Law Project Working Paper 17, July 2005.

24. Knowledge about the ICC increased considerably over the years. In 2005, only 27 percent of respondents had heard of the ICC, whereas in 2007 this number had increased to 60 percent. Among those who knew about the ICC, many expressed support, thereby challenging to some extent the notion that the north was universally opposed to it. But some of the support seemed based on misperceptions: for instance, in 2007 55 percent of respondents who had heard about the ICC (32 percent of the total) still thought that the Court had the power to make arrests.

25. Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda, UN Office of the High Commissioner for Human Rights, August 2007; and The Cooling of Hearts: Community Truth-Telling in Acholiland, Gulu District NGO Forum and Liu Institute's Justice and Reconciliation Project, July 2007. Other examples include "The Building Blocks of Sustainable Peace: The Views of Internally Displaced People in Northern Uganda." Oxfam Briefing Paper, September 2007, and Fostering the Transition in Acholiland: From War to Peace, from Camps to Home, Hurifo, September 2007.

26. Pham, P., P. Vinck, E. Stover, A. Moss, M. Wierda, and R. Bailey, *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, and ICTJ, December 2007.

27. Pham, P., P. Vinck, M. Wierda, E. Stover, and A. di Giovanni, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda*, ICTJ and the Human Rights Center, University of California, Berkeley, July 2005. The surveys also showed that knowledge about the ICC increased considerably over the years. In 2005, only 27 percent of respondents had heard of the ICC, whereas in 2007 this number had increased to 60 percent. Among those who knew about the ICC, many expressed support, thereby challenging to some extent the notion that the north was universally opposed to it. But some of the support seemed based on misperceptions: for instance, in 2007 55 percent of respondents who had heard about the ICC (32 percent of the total) still thought that the Court had the power to make arrests.

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