



International Refugee
Rights Initiative

A poisoned chalice?

Local civil society and
the International Criminal
Court's engagement
in Uganda

Discussion Paper 1
October 2011

*Just Justice? Civil Society, International Justice
and the Search for Accountability in Africa*

A discussion paper series on international justice in Africa

Background to the Paper

The paper was drafted by Lucy Hovil, Senior Researcher at the International Refugee Rights Initiative. The paper draws extensively on her experience as the head of research at the Refugee Law Project of Makerere University, a local civil society organisation in Uganda at the time when the International Criminal Court (ICC) was beginning its engagement there. An abbreviated form of this paper was presented by the author at the panel discussion, “NGOs and the International Criminal Court: the State of the Union?” held at the Review Conference of the International Criminal Court, Kampala, 4 June 2010, organised by the International Refugee Rights Initiative and the Open Society Justice Initiative. Deirdre Clancy and Olivia Bueno of IRRI reviewed and edited the material and provided additional drafting. Eric Stover and Godfrey Musila kindly commented on an earlier draft.

Just Justice? Civil Society, International Justice and the Search for Accountability in Africa

This paper is the first of a series of papers developed by the International Refugee Rights Initiative in collaboration with local partners in Africa reflecting local perspectives on experiences with international justice. The series is designed to more fully explore perceptions of international justice and the social, political and legal impact of its mechanisms at the local level. It is aimed at opening up a dialogue about the successes and failures of the international justice experiment in Africa and the development of recommendations for a more productive and effective engagement going forward.

The International Refugee Rights Initiative would like to thank the MacArthur Foundation for its generous support of this paper series

Introduction

When the International Criminal Court (ICC) announced in February 2004 that its first investigation would be alleged war crimes committed by commanders of the Lord's Resistance Army (LRA), a rebel group operating in northern Uganda, the stakes were high.¹ The Court was a new institution with the somewhat formidable mandate of ending impunity for the worst crimes throughout the world, and northern Uganda was its first situation. International human rights NGOs had spent years advocating for the Court and were now desperate for it to succeed: the LRA seemed a perfect target. Its notorious leader, Joseph Kony, abducted and abused children, carried out atrocities of the most appalling nature, and had a cultish aura that seemed to negate any rational political agenda. In addition, the Court was responding to a request from the government of Uganda to investigate the LRA, which presented it with the opportunity to test out its mandate in the relatively uncontroversial waters of a state referral.

The events that followed took everyone by surprise. Despite no prior warning of the announcement – which, significantly, was made jointly by the ICC Prosecutor, Luis Moreno-Ocampo and President Museveni at a press conference – the ICC's involvement in northern Uganda was met with immediate and widespread condemnation by Ugandan civil society. As Branch said, “[f]or perhaps the first time in the history of international law ... those opposing the enforcement of humanitarian and human rights law were not self-interested government officials or rebel leaders. Instead, the protests came from the Ugandan human rights community itself, from activists, lawyers, and civil-society organisations working for peace in the North.”²

Civil society had had little prior interest in or knowledge of the court, and certainly no axe to grind against it. Unlike other situations where

civil society had been calling upon international tribunals to intervene, civil society in Uganda had not been campaigning for the ICC's involvement. Partly this was due to the fact that the Court was new and relatively unknown, but mainly it was because the ICC's involvement at that point did not appear to make sense to many of those working or living in the midst of the conflict.³

Despite no prior warning of the announcement... the ICC's involvement in northern Uganda was met with immediate and widespread condemnation by Ugandan civil society

An increasingly heated debate between national and international NGOs developed over the course of the following months, and seven years later many of the issues that lie at the heart of it remain unresolved. This debate highlighted the polarisation that was emerging between international understandings of the appropriateness of different forms of justice (as represented by the ICC and a number of international human rights organisations speaking out in support of the Court's actions) and local understandings (as represented by the majority of local human rights and civil society organisations, and community leaders in the north).

The vigorous exchange that followed significantly undermined the areas of mutual understanding and common ground that could have led to a healthy discussion on ending the war and creating an environment of sustainable peace – and the role of pursuing accountability for international crimes. Instead, it set up a false distinction between the demands of justice and the demands of peace;⁴ it raised questions regarding the basis for the relationship between local and international organisations,⁵ and it led to concerns about who has the right to represent the views of victims, the intended beneficiaries of justice. This polarisation only increased with the issuing

of arrest warrants in 2005, which further entrenched positions.

Subsequent efforts have been made to bridge some of these divides. And, as the main focus of LRA activity has moved out of Uganda and the prospect of resumption of negotiations or prosecution has diminished, the intensity of the debate has waned. However, serious rifts remain, much damage has been done, and there continues to be inadequate space for debate: even at the Rome Statute Review Conference held in Kampala in June 2010, these issues remained largely implicit rather than explicit, suggesting the extent to which room for debate and discussion remains highly restricted.

This paper, therefore, seeks to begin a dialogue that can build on an honest appraisal of the ICC's Uganda engagement and the implications of the acrimonious encounter between the Court and its international justice constituency, and local civil society. It focuses on the initial months and years of the ICC's activities, recognising that a deeper exploration of the dynamics that created division and tension is necessary for the success of future international justice interventions. Therefore this paper begins to explore a number of questions. Has the Court drawn appropriate lessons from the experience? What lessons have been learned by civil society organisations – both local and international? What more needs to be done to ensure less divisive engagements in the future?

The ICC engagement viewed within a transitional justice framework

So why did the process become so divisive and, more importantly, what were the implications of these fissures in civil society for promoting

justice in the north specifically and Uganda more generally? In order to begin to explore this question, this paper examines local civil society's response to the ICC's involvement in Uganda. The starting point for analysis is the author's own experience of working with local civil society in Uganda during the initial months and years of the ICC's intervention, which is discussed and rooted within the wider discourse of transitional justice. Discussions that are typically viewed within a transitional justice framework provide language that can help to untangle some of the complex issues and dynamics that were being discussed – sometimes articulately but sometimes clumsily – at the time. Drawing on principles inherent within the transitional justice debate, this paper questions the extent to which the actions and approach of the Court in the initial phase of the referral enhanced or compromised the promotion of “the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”⁶

The four goals of transitional justice outlined by de Greiff provide a helpful point of departure. He talks of “two mediate goals (providing recognition to victims and fostering civic trust) and two final goals (contributing to reconciliation and to democratisation.)”⁷

Building on this approach – and giving substance to it – the paper emphasises the extent to which citizenship (as both a legal construct ensuring the “right to have rights”⁸ and as a form of belonging at an empirical level) and its erosion or promotion are key to understanding both the goals and impact of any transitional justice process. The importance of the bond of citizenship provides something of a framework for understanding the consequences of injustice and the restoration of justice, and civil society has a crucial role to play in promoting the latter.

This approach is not intended to suggest either that the ICC's intervention – as one of a number of potential tools of transitional justice – was somehow explicitly *trying* to meet all (or any?) of these goals, nor that the transitional justice discourse itself has the monopoly on understanding the means of recovery in the aftermath of conflict. It is also acknowledged that this framework is one of many that exist within this fast growing field. However, it is argued that these mediate and long-term goals provide a useful framework for measuring the impact of an intervention intended to bring about justice and sustainable peace in the aftermath of violence in a context in which much of the Ugandan population (particularly in the north, but by no means exclusively so) felt excluded from broader political processes.

But it is also important to recognise that transitional justice is not just about goals – goals that are too often unrealistic and likely to disappoint. Accordingly, McAdams conceptualises transitional justice primarily as a *process*, “in which the outcome is uncertain but the undertaking is valued in itself.”⁹ The unfolding of the process itself, therefore, is profoundly important. In particular, it is argued that attention to the interaction between the pursuit of justice and the broader political context in which it is operating is vital to ensuring a meaningful outcome. In responding to the ICC intervention, Ugandan civil society was trying to raise questions around the wider impact of the ICC, not in the technical language that the Court and international human rights activists might be comfortable with, but in a way that questioned whether or not the Court was playing a useful role in addressing *overall conflict dynamics* and, in turn, contributing to the wider demands of state-building and the realisation of rights more generally in the country. The Court's role as a tool of international justice in the global “fight against impunity” was somehow seen to be elevating itself above, or outside of, politics. This separation of international legal justice from the pursuit of national political accountability

did not make sense to many on the ground and jeopardised the credibility of the Court. As Nouwen and Werner argue, “Defining away the ICC's political dimensions eventually undermines the Court by making it look either hypocritical or utopian.”¹⁰

Furthermore, the paper considers the extent to which the dispute that arose meant that issues of local autonomy were set in opposition to a restrictive expression of the idea of complementarity (as fluidly embedded in the Rome Statute) rather than as mutually compatible or infusing ideas.¹¹ Binaries therefore developed where they did not need to exist, between local and international NGOs, between the ICC and local civil society, and between the government and local civil society, particularly as local voices felt that they had lost the autonomy to shape the debate that was going forward.

The following reflection on the immediate aftermath of the ICC's intervention in Uganda and the consequent issuing of arrest warrants uses these frameworks to better understand the issues and questions that were raised by civil society. It considers them from the perspective of two fundamental fields of concern that emerged: the *process* that took place and the *substance* of the ICC's engagement. Set against a brief overview of events in the early stages of the ICC intervention, these two interrelated factors are discussed in turn.

An overview of events

The International Criminal Court's involvement in Uganda began in July of 2003, when the ICC Prosecutor identified Uganda as a situation of concern. In December 2003, President Museveni formally referred the situation in Uganda concerning the LRA to the ICC. At that point, the Office of the Prosecutor (OTP) began examining the situation in Uganda with greater

scrutiny, and on 29 July 2004, the OTP decided that there was a “reasonable basis to open an investigation.”¹²

Meanwhile in November 2003, Betty Bigombe, the former Minister of State for the Pacification of the North, had begun to meet with top LRA members in an attempt to reach a peaceful settlement to the conflict in northern Uganda. These talks resulted in a geographically bounded seven-day ceasefire between the LRA and the UPDF on 14 November 2004, which was then renewed continuously in anticipation of a general ceasefire agreement that would be reached by year’s end. However, no agreement was reached and the new year began with renewed hostilities. Betty Bigombe continued her attempts to bring the warring parties to the table, and her efforts bore some fruit including the declaration by President Museveni of an eighteen-day ceasefire on 4 February 2005. However, LRA attacks continued. Weeks later, the defection to the Ugandan government of the LRA’s principal negotiator, Sam Kolo, dealt another serious setback to the peace process. The situation was further complicated when, on 8 July 2005, the ICC issued under seal warrants to arrest five senior members of the LRA, including Kony, which were unsealed on 13 October 2005. It is this period of the conflict and the conflict negotiations, from 2003 – 2005, that is the focus of the following reflection.

The process

When the Prosecutor announced that he would begin an investigation, Ugandan civil society was not only puzzled but angry at this unsolicited international involvement. The ICC was seen to have played directly into the hands of President Museveni and to have further compounded the injustices at the root of the conflict. The process of engagement with civil society that unfolded reinforced these perceptions. It indicated that the ICC was either unaware of these dynamics, or was not taking them into consideration. The ideas that local

civil society actors had, and their decades of involvement in a war that had affected many of them personally, seemed to be effectively ignored. There was minimal consultation about accountability and justice options before the ICC made its announcement; no prior warning about the announcement; and no mechanism provided for voicing dissent in the immediate aftermath.¹³

Of course, from a procedural perspective the channels of victim participation or *amicus curiae* submission were open to communities and civil society once the investigation commenced. But in reality, these formal mechanisms were little known at the time, were untested and technically complex and, even if engaged, would only have permitted a narrow window of dialogue. Despite the length of the investigation and the huge publicity generated by the debate on the impact of the ICC on the peace process, victim participation in the cases has been slow, and remarkably low in the context of the large number of victims who potentially have the right to apply. Similarly civil society has been slow to get engaged as intermediaries or as promoters of the victim representation process, reflecting the complexity of views on the ground about the ICC and related security and protection concerns.¹⁴ Although some NGOs have been able to work with the ICC’s Victims Trust Fund, this has been much less contentious as it has involved bringing direct benefits to victim communities.¹⁵

By the time the ICC did try and mount something of a public relations campaign, enormous damage had already been done: the absence of prior and meaningful engagement had left local organisations feeling thoroughly trampled upon. The ICC, with support from its international justice constituency, appeared to be acting no differently to any other international actor with money, power and resources who comes in from outside and forces its agenda onto local communities and organisations regardless of its efficacy. It was

undermining the autonomy of local people who had a strong desire to shape the justice that might finally begin to clear up the mess of the past decades.

Instead, concerns voiced by civil society about the potential impact of the ICC's approach were condemned both by ICC staff members and officials of the Court and by a number of international human rights groups: because the ICC's actions were being done in the name of promoting justice (the proverbial "fight against impunity"), by implication anyone who spoke out against the Court was labelled anti-justice. For instance, in 2006 the author was asked to remove any negative references to the ICC from a report for an international body, because it was "against the interests of justice."¹⁶ In effect, the ICC's involvement and the discourse that surrounded it monopolised the discussion on justice in northern Uganda – and, by extension, in Uganda (and, indeed, more widely within the region) – and limited the debate on the potential appropriateness of other forms of justice. There seemed to be a lack of acknowledgement that justice can be sought, promoted and articulated in different configurations.

There was a strong recognition of the huge deficit in justice which, after all, lay at the root of so many of Uganda's conflicts... Ultimately, people wanted a process, not a one-off event ... that they feared would derail that process.

Instead of allowing for healthy interaction and debate between the Court and its supporters on the one hand, and the dissenting voices of Ugandan civil society on the other, positions immediately became polarised. Furthermore, the extent to which local civil society was not being heard felt all the more unjust in a context in which the war in the north had gone largely

unnoticed by the international community for almost two decades.

Specifically, the language of the Court and those promoting its actions – with a strong emphasis on international law and a specific way in which crimes, and their relative levels of seriousness, were defined – was unfamiliar to many people: there was a realisation on the ground that the engagement of the Court with local communities was not a relationship of equals. On the ground, this environment translated into heavy-handed pressure on local civil society organisations to stop speaking out against the ICC's actions. For instance, two of Uganda's leading human rights lawyers were invited to visit the Hague for a week in order to meet with people from the Court along with members of high profile international human rights groups. Despite considerable pressure to change their stance, they refused to do so – their position on the ICC's involvement was based on a prior in-depth knowledge of the Rome Statute and a clear understanding of the implications of this particular approach to pursuing justice within the context of ongoing conflict in northern Uganda. Their problem was not a lack of understanding. At another point, a senior Court official suggest that a Ugandan critic of the intervention could take up a position at the institution, an offer perceived to be an attempt to silence voices of dissent.

Furthermore, while a number of field officers of international organisations who were based in Uganda at the time originally voiced their concerns about the ICC's actions, they were also soon silenced by head offices that took an official stance of support for the ICC, once again stifling debate.¹⁷ In addition, research on understandings of conflict and justice carried out by local groups that had previously been accepted was challenged by international human rights groups and members of the Court. For instance, in the context of questioning the accuracy of research carried out by one local organisation, a staff member from the Court went as far as to request to see raw data

collected – a request that was refused.¹⁸ National voices that had previously been supported by international organisations were now being questioned by those same organisations because they were not showing unequivocal support for the Court’s actions, and instead of healthy discussion, a major dispute developed leaving everyone feeling bruised.

At the heart of this disagreement were two competing ideas of justice. To the people of northern Uganda, justice looked like the opportunity to go home in safety and, from that basis, to then pursue appropriate forms of justice that could promote political accountability and foster the growth of new forms of trust between citizen, community and state that would allow for sustainable peace. From the perspective of the ICC, however, the primary image of justice was of Kony standing in the dock. The former emphasised the need to address structural injustice, while the latter placed an emphasis on individualised criminal justice. People in the north were crying out for justice – but they desperately needed peace first, as a component of the kind of just resolution to the conflict that was ultimately envisaged. There was a strong recognition of the huge deficit in justice which, after all, lay at the root of so many of Uganda’s conflicts. So yes, the prosecution of Kony might be a critical component of that process, but not at the expense of the wider pursuit of justice which, inevitably, incorporates peace.

Ultimately, people wanted a process, not a one-off event (symbolised by the dramatic issuing of an arrest warrant) that they feared would derail that process. These two pictures of justice are certainly not mutually exclusive. They do not deny that the ICC wanted to see people return to their homes or that those in the north did not want to see Kony held accountable for his actions. They illustrate, however, the extent to which tackling the atrocious fall-out from the war was being driven by conflicting conceptions of priorities.

Furthermore, the absolutist nature of international law and the justice it purports to generate were seen as ignoring or even negating the value of local understandings of justice. Local mechanisms of justice were demoted and written off as not meeting the demands of justice (as defined in international law via the interpretation of concepts such as complementarity and admissibility). Those who were promoting these local understandings – including religious and cultural leaders in the north – suddenly had their integrity and motivation questioned when the ICC arrived on the scene. As these leaders spoke about alternative forums for pursuing accountability, controversy was created about the extent to which they could legitimately speak on behalf of the communities they purported to represent.¹⁹ For sure, any leader whether cultural, religious or political is never going to be fully representative: what was clear, however, was that such leaders were desperate for the war to end and for people to once again live in their homes in peace.²⁰ As Afako has described, “when Ugandans referred approvingly to, for example, *mato oput*, this was often shorthand for saying, ‘Please leave us alone and let us address these problems ourselves.’”²¹ Ultimately, Ugandan civil society actors recognised the need for any mechanisms of justice to promote a proper, functioning democracy that would ensure that such a conflict could never be repeated.

Why the need for the ICC?

There was also a more fundamental question which, although rarely posed directly, highlights the root of many of the concerns. Was the ICC really needed in Uganda, and why was it there? Where was the gap that the ICC needed to fill in the armoury of tools that were available to pursue accountability and end the war? It seemed clear to those on the ground that the issue was not whether Kony and his senior commanders could be *tried*; it was whether they could be *caught*. Indeed, as the text of the

referral from the government of Uganda to the ICC itself acknowledges, “[t]he Ugandan judicial system is widely recognised as one of the most independent, impartial and competent on the African continent... There is no doubt that Ugandan courts have the capacity to give captured LRA leaders a fair and impartial trial.”²² Yet the government had failed to apprehend Kony and for that reason they were unable to try him. As the referral goes on to say, “Uganda has referred this situation primarily, because without international cooperation and assistance, it cannot succeed in arresting those members of the LRA leadership and others most responsible for the above mentioned crimes.” Thus the government was in substance asking the ICC to help them apprehend an alleged war criminal – assistance with a trial appeared to only secondary to requirement.²³

It seemed clear to those on the ground that the issue was not whether or not Kony and his senior commanders could be tried; it was whether they could be caught.

In order to get around the fact that the ICC is not supposed to act in situations where national courts have the capability and capacity to hold fair trials, the referral letter then says, “...any case arising from LRA crimes would be manifestly admissible under Article 17 of the ICC Statute because of the ‘inability’ of the Ugandan judicial system to prosecute the crimes within the meaning of Article 17, paragraph 3. Inability in this instance does not in any way imply the total or substantial collapse of the national judicial system within the purview of Article 17(3), but merely the ‘unavailability’ of the system, because *Uganda is unable to obtain the accused* since those most responsible are either sheltered in the Sudan, or in remote regions of Uganda for limited time periods, making arrest and prosecution difficult without international assistance.”²⁴

In this context, surely the logical step for Museveni would have been to seek international cross border assistance under existing bi-lateral or multi-lateral accords to arrest Kony, rather than recruit an international court – with no powers of arrest or enforcement – with which to threaten him?²⁵ Could it be that the decision to refer the case was done in order to shift international attention onto a group of “lunatics” committing heinous crimes across the north and away from growing criticism of the regime’s hold on power – and international armed forays – which were coming under increasing scrutiny? Despite the fact that Museveni had arguably had ample opportunity to end the war on several occasions²⁶ – not least with increased surveillance and tracking of the LRA’s whereabouts – this poisoned chalice, handed to the ICC, was accepted at face value. The political meaning of the referral in terms of maintaining the locus of state power and the implications for the entrenchment of citizen exclusion appeared to have been little interrogated. Added to the fact there had been such limited interaction with local civil society by the international justice constituency before the ICC proceeded, it ensured that the battle lines were drawn in the wrong place right from the beginning. Local ownership of the ICC process was almost zero, despite the fact that justice was being pursued in their name. As Branch says, “[i]f local injustice is the price to be paid for the kind of international justice that results from ICC prosecution, then we must abandon the Court and imagine new modes of building a truly global rule of law.”

The substance of the ICC’s involvement

A number of substantive issues relating to the context in which the investigation was announced and subsequently unfolded meant that the ICC’s involvement at that point in the

conflict was not viewed favourably by the majority of those who had been living and working in the midst of the conflict for decades. These issues coalesced around two main factors: (1) the one-sidedness of the ICC investigation, which was neither adequately cognisant of the views and desires of victims, nor allowed for an honest appraisal of the conflict that might lead eventually to reconciliation and healthier democratic realities; and (2) the way in which this particular approach to the pursuit of justice was seen to further jeopardise, rather than restore the bond between citizens and the state in the war-affected areas.

A one-sided investigation

The ICC's involvement in Uganda came about as a result of a state referral by the government of Uganda. Right from the beginning, from the perspective of local actors this factor alone was enough to discredit its involvement: by accepting an invitation by President Museveni to open the investigation – by implication targeting only the actions of the LRA – the ICC was seen as a tool of the government. This perception then appeared to be confirmed when arrest warrants were made against LRA rebels, with no further indication that the government was being investigated. The fact that the investigation unfolded with visible cooperation from state assets, including accompaniment of ICC officials by Ugandan security forces and the maintenance of considerable secrecy about the whereabouts of the ICC office in Uganda, added to the questions raised. Concerns about the close relationship between the ICC and the government of Uganda were more recently reinforced by the fact that the government of Uganda hosted the first ICC Review Conference held in Kampala in June 2010.

Yet to those caught up in the midst of the war, the government was perceived to be as much a source of instability and human rights abuses as

the LRA. It had not only failed to protect its citizens from the LRA but had compounded their misery by forcing much of the rural population of the north into so-called “protected villages” as part of its counter-insurgency campaign, preventing them from accessing their land: those found outside of the allocated perimeters of the camps or towns were assumed to be rebel collaborators and were frequently executed. Human Rights Watch, for instance, has documented a range of crimes allegedly committed by government of Uganda forces against the civilian population, including “extrajudicial executions, rape, torture and cruel, inhuman and degrading treatment, arbitrary detention, and forced displacement.”²⁷

Not surprisingly, the government has strongly denied that displacement came about primarily as a result of its military strategy, and it certainly has not been held accountable for its actions. Indeed, in its referral to the ICC, the government lays full blame on the LRA for forcing people to “seek protection” in IDP camps.²⁸ Whatever its primary or secondary impetus, this forced displacement was a massive violation of the human rights of the population across the north: it left hundreds of thousands of Ugandans living in the most appalling conditions – not only unprotected by a government that had promised protection, but suffering ongoing abuse at the hands of some of its soldiers. As Dolan puts it, what has passed for “protection” in northern Uganda has in fact been a cover for violation and mass humiliation.²⁹

The ICC, therefore, had appeared to sidestep the one area of chronic injustice (the actions of the government and its armed forces) that was least likely to be reached by the domestic courts, which were subject to state control. The official ICC position was that the UPDF's actions, where potentially criminal, did not reach the Statute's gravity threshold in the period of time over which the Court had jurisdiction,³⁰ (and indeed, in assessing gravity it should be acknowledged that the temporal restriction was

an issue, particularly with regards to alleged crimes relating to forced displacement, most of which took place before 2002.) However, the Court's criteria for defining gravity differed from that of the war-affected population: in asserting that actions associated with government forces did not reach the gravity threshold, the Court was seemingly ignoring the fact that the local population saw the government as a key perpetrator.³¹ While arguably the LRA might have committed crimes of greater magnitude and in greater number, it was recognised that the levels of responsibility were fundamentally different. As a result, local interpretation of the situation viewed the rationale for the "gravity" assessment as a somewhat convenient excuse: it was assumed that the government of Uganda's co-operation was contingent on the ICC *not* investigating it, and therefore it appeared that the ICC had made this decision for political reasons rather than on the basis of any proper analysis of the crimes committed.³² Consequently the court's neutrality was seen by local observers to be compromised from the start. Justice was being promoted by those held partially responsible for *injustice* in the north.

By not holding the government accountable, the ICC was also failing to address wider grievances that lay at the root of the conflict and to acknowledge the massive break-down in trust as a result not only of the government's total inability to protect its civilians, but its complicity in their suffering. Although there was minimal support for Kony's actions in the north, the root causes of the war and its consequences reflected profound frustration with a government that had continually marginalised the north of the country and silenced opposition.

It was also symptomatic of wider discontent throughout the country, which has seen the rise of 22 rebel groups since President Museveni came to power.³³ The LRA insurgency, while geographically confined to the north, was understood to reflect a deep-rooted dissatisfaction with governmental abuses of

power and the chronic marginalisation of large swathes of the country – issues that urgently needed to be brought to light and addressed. Uganda had experienced more than enough victors' justice in its violent history, and the negative consequences of failing to tackle root causes were being predicted.

Within this context, the Court, with support from a powerful and articulate international justice community, appeared to be pushing an agenda that seemed to misread or indeed ignore local understandings of the conflict and the seriousness of the different crimes committed – and, therefore, of the right response to that conflict. Instead, it reinforced an image of the war that had been carefully portrayed to the outside world by President Museveni: the LRA was the violator of human rights and a terrorist organisation, while the government of Uganda was doing everything in its power to protect its citizens from a group of bandits or criminals with no political agenda. In this interpretation of events an arrest warrant against Kony and his key leaders made good sense.

But while there was a certain amount of truth in this, it only presented one side of the picture: it ignored root causes of the conflict; it overlooked the vicious counter-insurgency campaign conducted by the UPDF,³⁴ and, most importantly, it did little to incorporate the views and wishes of those caught up in the midst of the war. As a result, the ICC was perceived to have become complicit in the political manoeuvring that has enabled President Museveni to maintain power for 24 years, and had jeopardised the Court's own neutral stance as a result. It had effectively legitimised the government's military campaign in the north (and subsequently its forays into eastern Democratic Republic of Congo (DRC), Sudan and, later, Central African Republic (CAR)) and reinforced its justification for continuing that campaign.³⁵ The Court's actions were seen to show a disregard for the need to address the local context that had been characterised by a

major break down in civic trust between the government and its people.

Prioritising protection – “more justice rather than less justice”

A second key concern was the huge chasm between justice in theory and the realisation of justice in practice that seemed to infuse the very process of discussing the referral and unfolding investigation. Specifically, the issue of arrest warrants against five senior LRA commanders, the essence of the ICC’s involvement, was seen not only as unrealistic in its ability to deliver justice, but dangerous in its potential fall-out. Given that the government of Uganda had been unsuccessfully trying to arrest Kony for two decades – and indeed had used this as the basis for justifying the Court’s involvement – issuing an arrest warrant with no ability to enforce it appeared irresponsible and only reinforcing of the status quo.³⁶

Of course, the Court is operating within constraints that are widely acknowledged, including the fact that it does not have its own forces to carry out arrests, and is dependent on governments to do so.³⁷ And certainly, its actions had served to put attention on the devastating war in the north and, to an extent, had put increased pressure on the government to protect its people. However, while no-one questioned whether or not Kony had committed serious crimes and deserved to be brought to justice in some form, the question was how it could and should take place, when it should happen, and who should lead the process. In theory, many of those on the ground could – and wanted to – support the ICC’s effort as part of the solution to the war.

In practice, however, there was a strong realisation that the pursuit of ICC justice, which was dependent on successfully arresting Kony and the other subjects of the arrest warrants, was unlikely to happen in the circumstances.

Indeed, it is interesting to note that support for the ICC’s intervention in the north was considerably stronger amongst those who mistakenly believed that the ICC had a force that would arrest Kony than among those who realised that the implementation of the warrants relied on the same army that had failed to arrest him for decades.³⁸ As the ICC Prosecutor said in 2006, “We believe the best way to stop the conflict and restore security to the region is to arrest the top leaders. The LRA is an involuntary army and the majority of the fighters are formerly abducted children. Arresting the top leaders is the best way to ensure that these crimes are stopped and not exported to other countries.”³⁹ While this is hard to dispute, the reality remains that the LRA leadership has *not* been arrested and its violence has been exported to at least three countries.

Therefore the *idea* of justice, however excellent in theory, is not the same as the realisation of that justice. And the gap between the ideals of justice and the realisation of rights is nowhere felt more keenly than by those who have

Arrest warrants that promised so much but were inevitably fated to deliver so little, were seen as yet another unrealistic ideal

experienced the brunt of conflict. Conflict inevitably breaks down the basis for civic trust as those who suffer its consequences are, by definition, unprotected by those responsible for their protection. Thus, in a context in which international human rights ideals had failed to protect civilians pummelled for decades by an appalling and preventable conflict, people wanted mechanisms of justice that would genuinely deliver. By questioning the ICC’s involvement at that point in the conflict, therefore, those who criticised the ICC’s involvement were not turning their backs on the promotion of justice: they were demanding

more justice – justice that was robust and that genuinely engaged with the context; justice that would contribute to – or at least complement – the promotion of fair and equal governance; justice that would deliver.

As a result, arrest warrants that promised so much but were inevitably fated to deliver so little, were seen as yet another unrealistic ideal – and a dangerous one at that, given the critical gap between the ICC’s ability to talk about justice and realise it. As Dolan says, “the argument has been made that the problem with the ICC in Uganda... is neither a bogged down public relations campaign nor the need for ‘more sensitisation’ on its role and mandate; the problem with the ICC is its over-exposure in the light of its limited problem-solving capacity.”⁴⁰

Furthermore, by stipulating that the government of Uganda and other states in the region were obliged to conduct arrests, the issue of the warrants implicitly legitimised and privileged a military resolution to the war. Not only have military engagements continued to fail up to today, but a military resolution to the war went against a long-standing campaign within northern Uganda specifically, and amongst civil society in Uganda more generally, for a negotiated settlement to the conflict. A successful peace process was seen to offer the possibility for root causes to be addressed, which would foster civic trust and ultimately lead to more accountable forms of democracy. The government’s relentless pursuit of a military victory over Kony, or even, some would argue, the deliberate prolongation of the war, was not only seen as futile – and in some respects self serving – but had left the unprotected civilian population ruthlessly targeted in the fall-out. Kony’s military strategy of using abducted children as the foot soldiers in his war ensured that military confrontations primarily targeted the children of those living in the north. Previous peace talks had been tried with minimal commitment from both the LRA and the government and had failed. Yet at this

time there was increased optimism that both sides in the conflict might be willing to negotiate.⁴¹ Most of all, there was a widely held belief that negotiations would allow for the most sustainable outcome for those living in the north, not least as it presented the opportunity to address root causes of the conflict.

The ICC’s announcement in 2004 came at the height of the war when the situation was particularly raw. The fall-out from Operation Iron Fist – the government’s military drive against the LRA that began in 2002 and incorporated operations in south Sudan following the thawing of relations between the governments of Sudan and Uganda – had only served to exacerbate the conflict, which had subsequently spread further east and led to the displacement numbers escalating and reaching approximately 1.8 million people. Most international NGOs remained trapped in town centres unable to reach those in the camps who were living in increasingly dire situations.⁴²

With the stark realities of the failure of the military initiative, the momentum for peace talks had been growing. The international community was finally listening to civil society and putting increased pressure on Museveni to act accordingly. In November 2004, Betty Bigombe, a former MP from the north acting in her personal capacity as a peacemaker, began discussions with senior LRA commanders and brokered a pledge by the UN to provide food for the LRA during a potential negotiations process. This took place alongside increasing speculation around the possible announcement of arrest warrants, which were finally unsealed on 13 October 2005 for Kony and four of his senior commanders. In the thick of the conflict, with a mounting death toll, the lack of synergy between these two processes – on the one hand arrest warrants which, in their requirement for enforcement, implicitly pushed for a military solution to the war and, on the other, growing momentum for peace talks – created considerable concern.

To a certain extent these fears were allayed once the Juba peace process did get off the ground in South Sudan in 2006, which many interpreted as the most promising development towards ending the war in 20 years. Indeed, the extent to which the ICC assisted in promoting negotiations is a subject of much debate: the ICC and its supporters argue that the pressure put on the LRA by the arrest warrants, as well as the international attention they attracted, were critical in getting the LRA to the negotiating table. Others would argue that the negotiations got off the ground *despite* the ICC's involvement. Or as Grono argues, the ICC's involvement has been both a spur to the negotiations process and an obstacle.⁴³ Whatever the impetus for the commencement of the negotiations process ultimately it did not succeed in reaching its goal of ending the LRA insurgency. In fact, although the LRA is no longer waging open war in Uganda, its operations have now spread elsewhere and communities in South Sudan, CAR and DRC are feeling the full weight of its depravations.⁴⁴ Whether the blame for this outcome can lie partly with the ICC or not is impossible to say. Certainly Kony has used the arrest warrants as an excuse not to sign the final agreement, but whether that is simply a smokescreen is likewise impossible to determine.

What is clear is that the contradiction inherent in the existence of arrest warrants sanctioned by the government on the one hand, and a peace process that depended on building trust between the LRA and the government for its success on the other, continued to be a somewhat predictable sticking point. It was precisely this inconsistency within the process that was foreseen and feared by many local civil society actors who placed the LRA conflict within the broader context of national discontent and injustice, as outlined above, and were concerned about the impact of isolated one-off international interventions. While the negotiations process was seen as an opportunity to address wider root causes and grievances surrounding the war, including the

legacy of political violence, the contradiction between negotiations and an ongoing military campaign put the process in jeopardy. Indeed, one of the root causes of conflict within the country is precisely the kind of inconsistency that this represented, namely a lack of government accountability and ability to deliver on its promises. Civil society simply wanted these complexities to be recognised and for the Court and its supporters to show far greater awareness of the broader implications of the Court's involvement.

The warrants also appeared to contradict, at a legal level, a national amnesty law that had come into force through widespread consultation across the country after almost two decades of the government failing to end the LRA conflict by military means, and was therefore widely viewed as the best hope for ending the conflict. There are few people in the world, let alone in northern Uganda, who would support amnesty for a man such as Kony – unless, that is, they thought it the only way to not only end the ongoing fighting, but to create a context in which to address the war and its related economic, political and social grievances. With nearly two million people in the north desperate to return to their homes without the constant fear of gruesome attack, granting Kony amnesty was seen by many as painfully sub-optimal, but a price worth paying for peace. It was also seen as a ticket that would allow their abducted children to leave the LRA without facing arrest. Yet it was a process that relied on trust between those wanting to hand themselves in, and the government body responsible for awarding amnesty. People feared that if this trust was broken the entire process could be derailed. The inherent legal contradiction between the amnesty law and the ICC arrest warrants, therefore, created both confusion and concern and weakened the credibility of both – as further evidenced by Museveni's offer of

amnesty to Kony during the negotiations process.⁴⁵

More recently, Uganda's Constitutional Court was called upon to explore these tensions. In September 2011, the Constitutional Court ordered the trial of Thomas Kwoyelo (a former LRA commander) before the new International Crimes Division of the Ugandan High Court, to cease. The Court found that, by refusing to issue a certificate of amnesty to Kwoyelo and proceeding against him in the criminal courts, the DPP and the Amnesty Commission had violated the equal treatment provisions of the Constitution.⁴⁶ Somewhat predictably, Amnesty International called the judgement an instance of "pervasive impunity for serious crimes and human rights violations."⁴⁷

War and justice in context

Ultimately, these two substantive concerns – which, when presented by local groups were interpreted as somehow undermining the fight against impunity – reflected the desire to push for more rather than less justice, something that appeared to be fundamentally misunderstood. Also misunderstood was the fact that criticism for the way in which the ICC's intervention had taken place did not necessarily translate into criticism for the *idea* of the Rome Statute more broadly and the many facets of justice contained within it. Local activists' desire for the wider context to be better understood did not lead to support for the LRA, but led to an understanding that resolution of the conflict and the demands of justice needed to be about far more than issuing arrest warrants against Kony and his top commanders. Of course, the Court would not dispute this and, indeed, the polarisation of positions obscured other critical components to the Rome Statute such as the emphasis on victim participation and reparations – only theoretically conceived at that time – which focuses on the needs of victims and their communities rather than the

crimes of a few. An emphasis on reparations, for example, in discussions with local communities might have provided a much more mutually comfortable approach to beginning a discussion on justice in this context.⁴⁸

Insufficient recognition was given to the fact that the Court's involvement had actually fundamentally re-aligned the scales: the intervention of the ICC and the emphasis on a few criminal prosecutions of a few senior LRA figures had dominated the discussion such that other forms and targets of justice were made to look inferior. In particular, the emphasis on *legal* justice was obscuring the broader demands for political justice. Of course, whether or not Kony has ever had a political agenda has been much debated,⁴⁹ but what is not debatable is the fact that the context in which the war in the north was taking place was politically loaded, and therefore needed to be resolved at that level. The deficit in civic trust and the lack of proper democratic processes desperately needed to be acknowledged and addressed. But the actions of the court appeared to ignore the wider political context and appeared self-serving as a result, pursuing the fight against impunity regardless of the cost.

Therefore, while the ICC has never claimed to be anything more than part of the solution to the war in the north, in practice its involvement fundamentally altered the parameters for promoting both peace and justice. There was a strong desire for the ICC and those pushing for its involvement to recognise the complex factors that related to the wider political context and to proceed in a manner that did not derail an intricate and fragile process that was already underway – a process that recognised the desperate need to restore the relationship between a discredited government and the people it is supposed to represent.

Conclusion

So what can be learnt? As stated above, the ICC cannot be expected to be anything more than part of the solution, a mechanism that operates within the broader dynamics of international relations and realpolitik. No individual transitional justice measure, on its own, can achieve the kinds of outcomes that are only generated by a range of measures in parallel. For instance reparations for those who lost so much during the war, truth telling processes and judicial reform all need to be incorporated into a wider process of transition.

However, in order to be effective, these mechanisms need to complement each other and be cognisant of the wider context in which they are operating. When measured against the broader goals of transitional justice, therefore, the substance and process of the ICC's intervention fell chronically short. While the scale of the war was unprecedented and far surpassed levels of atrocity that traditional mechanisms of justice had previously dealt with, five arrest warrants not only failed to fill the justice deficit in the north but were seen as negatively impacting both the chance for peace and for justice. In other words, what was presented – and acknowledged to be – the partial realisation of justice was, in fact, interpreted as a travesty of justice: “some justice’ may not be justice at all.”⁵⁰

First, victims’ voices were not incorporated into the original decision to investigate and the reconciliatory potential of the court’s intervention was jeopardised as a result. Second, the way in which the court only focused on one side of the conflict negated the potential for its actions to help repair the relationship between a population that had lost all faith in its government and a government that had not only failed to protect a significant portion of its population but had been seen to have been part of the problem. Third, root causes were ignored and sidelined as a result of the ICC’s intervention, as the arrest warrants effectively promoted the government’s military approach to ending the war and, arguably, put

at risk a peace process. As a result, the opportunity to genuinely engage with Uganda’s political deficiencies was compromised. And it was the lack of acknowledgement of these factors and dynamics that led to such a strongly negative response from civil society in the initial days of the ICC’s involvement.

Of course, seven years later a considerable amount of water has flowed under the bridge and the jury is still out on the overall impact of the ICC’s intervention. Hundreds of thousands of IDPs have returned to their homes and there is no longer open conflict in northern Uganda. The Juba Peace Process, which began in July 2006, has taken enormous strides forward, and local initiatives including the Beyond Juba Initiative have gone a long way in filling some of the gaps in addressing the national dynamics of the conflict and promoting local voices. The signing of a Cessation of Hostilities, a Comprehensive Solutions to the Conflict, and an Agreement on Accountability and Reconciliation, all give cause for cautious optimism. In particular the third agreement, Agenda Item No. 3 on Accountability and Reconciliation, shows a clear awareness of the need to address wider root causes of conflict in Uganda and place the northern war within a national context.⁵¹ The creation of a division of the Ugandan High Court to hear war crimes and related cases was an important aspect of building capacity to start this project, although its first steps have been tremulous. Meanwhile the ICC has invested heavily in outreach activities in northern Uganda – and throughout Uganda – and in community support projects through the Victims Trust Fund, which has certainly had some impact on the perception of the Court: some have been won over while others have not.

However, the LRA remains at large and continues to cause carnage in CAR, eastern DRC and South Sudan.⁵² It is also allegedly threatening to return to Uganda and is securing strategic territory accordingly.⁵³ As we go to press, President Obama has just announced

that the United States of America is sending 100 troops to help and advise governments across Central Africa in apprehending the LRA (although what this will actually achieve remains to be seen).⁵⁴ And the recovery process in the north is being hampered by the fact that there has been no final resolution or closure to the war: Kony and his supporters are still out there and the threat of renewed attacks remains. For many, therefore, the war is not over. Furthermore, to date the UPDF have not been held accountable for their actions in the north: the forced displacement of almost two million people in northern Uganda and the broader injustice it represents will likely haunt the country long after Kony has died, whether in the bush or in captivity. Civic trust remains appallingly low, victims have yet to see the delivery of justice from government in terms of reparations or public acknowledgement of the role it played in the conflict, and the longer-term goals of reconciliation and democratisation are chronically lacking. These deficiencies are neither the sole fault nor the responsibility of the ICC. Yet they show that it is critical that any mechanisms of justice implemented either within a context of ongoing conflict or in its aftermath are mindful of the wider impact and implications of their actions.

¹ ICC press release, "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC", 29 January 2004. As stated in the press release: "President Museveni met with the Prosecutor in London to establish the basis for future co-operation between Uganda and the International Criminal Court. A key issue will be locating and arresting the LRA leadership. This will require the active co-operation of states and international institutions in supporting the efforts of the Ugandan authorities." (available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20lra_%20to%20the%20icc?lan=en-GB).

² Adam Branch, "International Justice, Local Injustice: The International Criminal Court in Northern Uganda," *Dissent* (Summer 2004) (available at <http://www.dissentmagazine.org/menutest/articles/su04/branch.htm>).

³ Of course, not everyone had the same opinion. Many did express their support for the ICC's intervention. However, many of those who expressed initial support believed that

the Court had the authority and capacity to arrest members of the LRA. See International Centre for Transitional Justice and Human Rights Center, Berkeley, University of California, 2005, "Forgotten Voices: A Population-based Survey on Attitudes about Peace and Justice in Northern Uganda". It states that of those interviewed, 83 percent believed that the Court had the authority and capacity to arrest members of the LRA.

⁴ Moses Chrispus Okello emphasises the extent to which peace and justice are inseparable, and that sequencing should not be confused with prioritisation. ("The False Polarisation of Peace and Justice in Uganda". Presentation to the discussion, "Building a Future on Peace and Justice." 25 - 27 June 2007, Nuremberg, Germany.)

⁵ It goes without saying that the very concept of either local or international civil society is highly suspect, not least as neither is in any way homogenous. However, while acknowledging a somewhat crude application of categories, for the purpose of this paper the key distinctive is between local and international organisations.

⁶ UN Security Council Secretary General's report on "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", 3 August 2004. While there is no single definition of transitional justice, this statement both defines the scope of transitional justice and puts it within the broader context in which the idea of transitional justice itself is recognised.

⁷ Pablo de Greiff, "Theorizing Transitional Justice" In Melissa Williams, Rosemary Nagy, Jon Elster, eds., *Transitional Justice. Nomos vol. L.* (New York University Press, 29 January 2004).

⁸ Hannah Arendt, 1986, *The Origins of Totalitarianism*. Andre Deutsch, pp. 295-296.

⁹ A. James McAdams, "Transitional Justice: The Issue that Won't Go Away." *International Journal of Transitional Justice*, 5 (2), 2011, 304 – 312.

¹⁰ Sarah Nouwen and Wouter Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan." *European Journal of International Law*, Vol. 21, No. 4, 2011.

¹¹ The question of *Whose Justice?* and the issues raised by such a question formed the focus of a Special Issue of the *International Journal for Transitional Justice*, vol. 3, issue 3, November 2009, which highlights many of the tensions in this regard. See, for example, Godfrey M. Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions."

¹² ICC Press Release: Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda, July 29, 2004, available at <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>.

¹³ That is not to suggest a lack of awareness of the inherent restrictions in what the Court and the OTP could have done. Although activities on the ground by the

organs of the Court are restricted by their mandate and function and the nature of the phase of the investigation, a degree of discretion did exist for the Court and its international justice constituency to have had greater formal and informal engagement, such as, for example, around the Prosecutor's article 15 interests of justice assessment.

¹⁴ See notes of confidential dialogue with ICC intermediaries in situation countries, on file with the International Refugee Rights Initiative.

¹⁵ For more information on the work of the ICC's Victims Trust Fund in Uganda and their NGO partners see <http://www.trustfundforvictims.org/projects>.

¹⁶ Email correspondence on file with the author.

¹⁷ Personal communication with INGO staff members.

¹⁸ Email correspondence on file with the author.

¹⁹ See, for example, Tim Allen, "War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention," February 2005.

²⁰ See Erin Baines, "The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda", *International Journal of Transitional Justice*, 1 (1), 2007, pp. 91 – 114.

²¹ Barney Afako, as referred to by Waddell and Clark, March 2007.

²² Referral of the Situation Concerning the Lord's Resistance Army, Submitted by the Republic of Uganda, 16 December 2003. Found on <http://www-rohan.sdsu.edu/~abranh/Current%20Projects/Uganda%20ICC%20Referral%202003.pdf> (accessed 23 March 2010) Section 25

²³ Ibid. The referral letter also notes that, "Furthermore, Uganda is of the view that the scale and gravity of LRA crimes are such that they are a matter of concern to the international community as a whole. It is thus befitting both from a practical and moral viewpoint to entrust the investigation and prosecution of these crimes to the Prosecutor of the ICC."

²⁴ Ibid. Emphasis added.

²⁵ It is interesting to note that later in the evolution of the situation before the Court, the judges did just that. See 21 December 2008 decision which requested the Government of the DRC to explain the steps it was taking to arrest the subjects of arrests warrants in the Uganda situation.

²⁶ See, for example, Lucy Hovil and Moses Chrispus Okello, "Only Peace Can Restore the Confidence of the Displaced": Update on the implementation of the recommendations made by the UN Secretary General's Representative on Internally Displaced Persons following his visit to Uganda", Internal Displacement Monitoring Centre/Norwegian Refugee Council, Geneva, March 2006.

²⁷ Human Rights Watch "UN: Council should help end fresh abuses by Uganda's LRA." Letter to the Security Council, 19 June 2008 (available at <http://www.hrw.org/en/news/2008/06/18/un-council-should-help-end-fresh-abuses-uganda-s-lra>).

²⁸ *Referral of the Situation Concerning the Lord's Resistance Army*, Submitted by the Republic of Uganda, 16 December 2003. Found on <http://www-rohan.sdsu.edu/~abranh/Current%20Projects/Uganda%20ICC%20Referral%202003.pdf> (accessed 23 March 2010)

²⁹ C. G. Dolan, "Understanding War and Its Continuation: The Case of Northern Uganda, 1986-2004", *DESTIN*. London: London School of Economics and Political Science, 2005.

³⁰ Nicholas Waddell and Phil Clark, March 2007, in their report on the meeting, "Peace, Justice and the ICC in Africa" held by the Royal African Society et al at the London School of Economics, says that in his presentation, the Prosecutor talked of how "the killings committed by the LRA far outnumbered killings committed by the UPDF. He explained that, when deciding which cases to pursue, the documents and reports assessed by the Office of the Prosecutor indicated that the crimes committed by the LRA were the worst crimes. More recent evidence, he said, had confirmed this. The Prosecutor indicated his openness to reviewing any evidence of crimes committed by the UPDF. He pointed out that, by prosecuting the LRA, the ICC was not acquitting others but simply concentrating on the worst crimes as the first priority." (available at <http://www.crisisstates.com/download/others/Peace.%20Justice%20and%20the%20ICC%20-%20series%20report.pdf>).

See also IRRI, "In the Interests of Justice? Prospects and Challenges for International Justice in Africa." November 2008, p. 29.

³¹ Zachary Lomo 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, 2004.

³² Although the government of Uganda was also being increasingly questioned over its international involvement in eastern DRC, the Prosecutor when he made his first application for the issue of an arrest warrant in the DRC qualified that conflict as "non-international". Interestingly the judges themselves refused to accept this characterisation of the conflict and insisted that the framework for the international crimes analysis should be that of an international conflict. See Katy Glassborow, "ICC Deems Congo Conflict 'International'", *Institute for War and Peace Reporting*, 8 February 2007.

³³ Lomo and Hovil, 2004.

³⁴ Human Rights Watch, 2008.

³⁵ See Ledio Cakaj, "'This is our land now': Lord's Resistance Army attacks in Bas Uele, northeastern Congo." Enough Field Report, August 2010. The report documents recent attacks carried out by the LRA, particularly in Bas Uele region of Congo. It highlights the impact of the government of Uganda's failed attempt to capture the LRA through Operation Lightning Thunder, which has led to revenge attacks on the civilian population.

³⁶ At the time of the warrants, Kony was moving between northern Uganda and southern Sudan. Although hopes for arresting him in Sudan had improved with the thawing of

relations between the governments of Uganda and Sudan, Operation Iron Fist in 2002 had failed to lead to Kony's arrest. Although the decision of the Court added a new onus on state parties to arrest and render the LRA suspect if they were found on their territory, the question of how this would be done and the nature of the political will which existed to do so still remained.

³⁷ Indeed, in recognition of the limitations on the Court in executing arrest warrants (only five out of 16 suspects against whom arrest warrants have been issued are currently in the custody of the Court), the ICC prosecutor called for the US military to help enforce ICC arrest warrants. See Samar Al-Bulushi and Adam Branch, "AFRICOM and the ICC: Enforcing international justice in Africa?" Pambazuka News, 27 May 2010, available at <http://www.pambazuka.org/en/category/features/64752>.)

³⁸ Interviews carried out in northern Uganda by the Refugee Law Project at this time strongly pointed to this being the case. (On file with the author.)

³⁹ ICC Statement by Prosecutor Luis Moreno-Ocampo, 6 July 2006, available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/statement%20by%20prosecutor%20luis%20moreno_ocampo.)

⁴⁰ Chris Dolan, "Understanding War and Its Continuation: The Case of Northern Uganda", London: Development Studies Institute, London School of Economics and Political Science, 2005. Cited in International Refugee Rights Initiative, "In the Interests of Justice? Prospects and Challenges for International Justice in Africa." November 2008.

⁴¹ This was argued by the Refugee Law Project in a paper published the day before the ICC's announcement. See Zachary Lomo and Lucy Hovil, "Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda," RLP Working paper no. 11, February 2004.

⁴² Only those organisations – specifically World Food Programme and Norwegian Refugee Council – that were allowed to use an armed escort to move were able to reach the camps.

⁴³ As referred to in Waddell and Clark, March 2007.

⁴⁴ Ironically, the situation of the LRA, having moved from its Ugandan locus and gathered strength, is finally now the focus of a major military AU regional cooperation initiative. In a recent statement the African Union expressed its "deep concern at the continuing criminal activities of the LRA and its devastating effects on local populations in the Democratic Republic of Congo (DRC), the Republic of South Sudan and Central African Republic, as well as on regional security and stability." Council resolution quoted in PANAPRESS, AU Concerned over LRA activities, 27 September 2011, at <http://www.panapress.com/AU-concerned-over-LRA-activities--3-796970-0-lang2-index.html>.

⁴⁵ Museveni made the offer on 4 July 2006, conditional on the negotiations being successful. His offer was considered

by many in the international community as a breach of his commitment to the ICC. See, for example, Institute for War and Peace Reporting, "Uganda: Amnesty Offer Blow for Rebel Chief Arrest Plans", 6 July 2006. (available at <http://iwpr.net/report-news/uganda-amnesty-offer-blow-rebel-chief-arrest-plans>).

⁴⁶ See, inter alia, the website of the Refugee Law Project which monitored the Kwoyelo trial at www.refugeelawproject.org/kwoyelo_trial.php.

⁴⁷ Amnesty International, "Uganda's amnesty for LRA commander a 'setback' for justice," 23 September 2011.

⁴⁸ For an excellent analysis of the Rome Statute's repatriations regime, see Conor McCarthy, "Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory." *The International Journal of Transitional Justice*, Vol. 3, 2009, 250 – 271. The subsequent development of a Victim's Trust Fund in Uganda has been a positive development since – although, of course, the challenge remains in how it can be satisfactorily administered. Furthermore, it is important to note that one form of reparation, namely a formal apology from the government of Uganda for its actions, even if being pursued would go beyond the jurisdiction of the Rome Statute (McCarthy, p. 270).

⁴⁹ Lomo and Hovil, 2004.

⁵⁰ Adam Branch, "What the ICC Review Conference Can't Fix." Oxford Transitional Justice Research Working Paper Series, 15 March 2010 (available at http://www.csls.ox.ac.uk/documents/AdamBranchICC_Final.pdf).

⁵¹ The Agreement on Accountability and Reconciliation was signed on 29 June 2007, and an annex to that agreement was signed in February 2008. It provides, among other things, that a special division of the High Court of Uganda will try individuals alleged to have committed serious crimes during the conflict, while lesser crimes will be dealt with using traditional forms of justice. International Refugee Rights Initiative, "In the Interests of Justice? Prospects and Challenges for International Justice in Africa", November 2008, p. 81.

⁵² See Ledio Cakaj, 2010. "“This is our land now”: Lord's Resistance Army attacks in Bas Uele, northeastern Congo." Enough Field Report, August 2010. The report documents the horrific scale and nature of recent attacks carried out by the LRA, particularly in the Bas Uele region of Congo and highlights the impact of the Government of Uganda's failed attempt to capture the LRA through Operation Lightning Thunder, which has led to the LRA carrying out revenge attacks on the civilian population.

⁵³ Ibid.

⁵⁴ See, for example, Justin Dralaze, "Ugandans welcome U.S. troop plan to fight rebels", Reuters, Oct 15 2011, <http://af.reuters.com/article/sudanNews/idAFL5E7LFOI920111015?sp=true>.