

**ACCOUNTABILITY FOR MASS ATROCITIES
THE LRA CONFLICT IN UGANDA**

By

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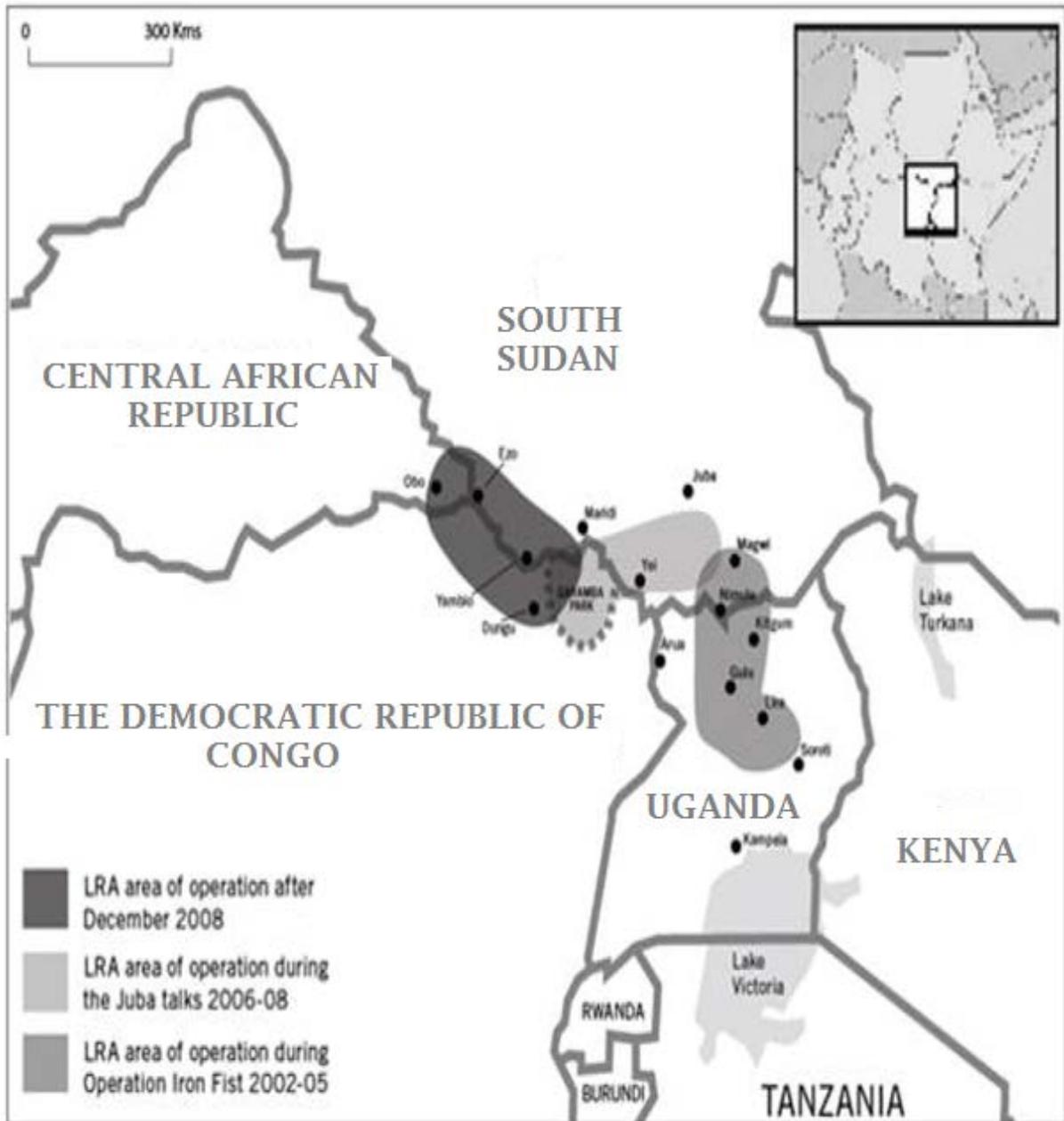
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Map showing LRA areas of activity. Source: Accord Conciliation Resources

ABSTRACT

This thesis addresses accountability for mass atrocities. It presents a case study of Uganda that has undergone a two-decade conflict between the Lord's Resistance Army (LRA) insurgent group and the national army, the Uganda People's Defence Armed Forces (UPDF). The government of Uganda has initiated various accountability measures that include international and domestic prosecutions, truth telling, reparations and traditional justice to address international crimes and other human rights violations committed during the conflict. The thesis in particular investigates how all these mechanisms could be used in a way that ensures that Uganda fulfils its international obligations and that the different measures complement each other.

The thesis traces the background to the conflict that began in 1986 and explores the consequences of the conflict on the civilian population in Uganda. It alludes to its spread from Uganda to South Sudan and since 2008, to the Democratic Republic of Congo (DRC) and Central African Republic. It argues that the significant and continuous involvement of the government of Sudan from 1994 to 2005 internationalised the LRA conflict. It further finds that both the LRA and the UPDF perpetrated war crimes and crimes against humanity during the conflict.

The thesis further discusses the international obligation of Uganda to prosecute, punish and extradite persons responsible for the commission of international crimes and to ensure remedies to victims of such crimes and other human rights violations. It finds that the lapse of Part II of the Amnesty Act that allowed for a 'blanket amnesty' leaves room for Uganda to fulfil its international obligations. The thesis further investigates the Agreement on Accountability and Reconciliation and its Annexure reached between the government of Uganda and the LRA in Juba that ushers in the various accountability pursuits in Uganda. It argues that the implementation and successes of the Agreement depends on the consultations, legislations, policies and the establishment and workings of the institutions envisaged that could lead to justice, truth and reparations in Uganda.

The thesis finds that the different accountability measures that Uganda is pursuing correspond to the political, social and historical conditions in Uganda, in particular, decades of armed conflict and human rights violations with impunity of perpetrators. It concludes that the success of the accountability undertakings will largely depend on the high calibre of officials and staff of the different institutions and their ability to deal wisely with challenges that will inevitably arise. It further finds that a political will and commitment is essential to ensure adequate investment in technical, material and financial resources and that non-interference of the government in the work of the institutions will ensure success. It concludes that such a political will and commitment, a robust consultation with stakeholders including victim groups and the creation of alliances locally, nationally, regionally and internationally, Uganda's accountability pursuits will lead to the desired justice, truth and reparations.

Acronym	
ACHPR	African Charter on Human and Peoples' Rights
ADF	Allied Democratic Forces
ANISOM	African Union Mission in Somalia
ARLPI	Acholi Religious Leaders Peace Initiative
CAR	Central African Republic
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDF	Civil Defence Forces (Sierra Leone)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CIVHR	Commission of Inquiry into Violations of Human Rights
CMI	Chieftaincy of Military Intelligence (Uganda)
CRC	Convention on the Rights of the Child
CSOPNU	Civil Society Organisations for Peace in Northern Uganda
DDR	Disarmament, Demobilisation and Reintegration
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
DRT	Demobilisation and Resettlement Team (Uganda)
FARDC	Forces Armées de la République Démocratique du Congo (The Armed Forces of the Democratic Republic of Congo)
FDC	Forum for Democratic Change
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICD	International Crimes Division (of the High Court of Uganda)
ICERD	International Convention on Elimination of all Forms of Racial Discrimination
ICESCR	International Convention on Social, Economic and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDEA	International Institute for Democracy and Electoral Assistance
IDP	Internally Displaced Persons
IHT	Iraqi High Tribunal
JLOS	Judicial and Law Order Sector (Uganda)
LRA	Lord's Resistance Army
MONUSCO	United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo
NGO	Non-governmental organisation
NIF	National Islamic Front (Sudan)
NRA/M	National Resistance Army/Movement (Uganda)
OCHA	Office of Coordination of Humanitarian Affairs
RRC	Reparations and Rehabilitation Committee (South Africa)
RUF	Revolutionary United Front (Sierra Leone)
SCSL	Special Court for Sierra Leone
SPLA	Sudan People's Liberation Army



Acronym	
TJWG	Transitional Justice Working Group (Uganda)
TRC	Truth and Reconciliation Commission
UNICEF	United Nations Children's Fund
UPA	Uganda People's Army
UPC	Uganda's People's Congress
UPC	Union of Patriotic Congolese
UPDA/M	Uganda People's Democratic Army/Movement
UPDF	Uganda's Peoples' Defence Forces
UPF	Uganda People's Front
URF	United Resistance Front (Sudan)

THE PREFACE

I spent much of my early life in Lacor, a suburb near a Catholic mission in Gulu, Northern Uganda. My family frequently visited relatives in Laliya, Kati-Kati, Pageya and Bobi, the more distant villages in Gulu district. The harvesting seasons, in July and in December, coincided with school holidays. That was my favourite time of the year. Each year, my family went off to the villages to help our relatives with the harvesting, the biggest family gatherings ever. It was hard day's work under the scorching sun, harvesting the crops, drying and storing them in granaries. Everybody did a share of the work, even children as young as five years, who carried the lighter load and served cold water to the older people working. The sunset was the most rewarding time for the hard day's work. Everybody sat around a big campfire lit in the middle of the compound (*wang oo*) and told stories, jokes, riddles, while roasting and feasting on maize, cassava, potatoes, groundnuts or whatever harvest we got from the field that day. Those are the most memorable days of my childhood.

In 1989 as the conflict in Northern Uganda intensified, my family moved to Kampala and those nights in Gulu became a distant dream. The only news ever received from Gulu was about abductions, killings and torture of relatives, schoolmates, neighbours and friends. It was hard to reconcile the news with the place of my childhood. Around 1994, we heard that people no longer slept in their houses but in bushes in surrounding areas. The bushes were safer - potential attack from snakes and other creatures of the bushes notwithstanding. The lucky ones took refuge in hospitals, schools or mission compounds as the Lord's Resistance Army (LRA) the insurgent group operating in the area had intensified abductions and taken to burning down the grass-thatched houses where the majority of the population live. The LRA razed entire homesteads to the ground. It was also around that time that the government started forcing people to move to protected villages that later came to be known as Internally Displaced Persons (IDP) camps. Children stopped going to school due to fear of abductions, many of which occurred in schools or on the way to school. It was not safe to go to school anymore.

I returned to Gulu for the first time in July 1997 after I finished my Advanced level (A' level) examinations and the year I joined the Faculty of Law at Makerere University. My visit was

grounded in Gulu town. Villages like Pageya, Bobi and Laliya were now war zones and relatives had either moved out of Gulu and were living in the IDP camps or had been abducted or killed. I went to Gulu every year after that and from 1998 joined those who dared to hope for peace in the Peace Walk organised by the Acholi Religious Leaders Peace Initiative (ARLPI) and later several other NGOs in Gulu every year. It was a walk of hope, as peace remained a distant dream.

The 'night commuter' phenomena where scores of children left their homes every night to sleep in bus parks, shop verandas or schools in the town centre¹ reached its peak around 2003 after the failed 'Operation Iron Fist' that escalated violence in Northern Uganda and spread LRA activities to the eastern region of the country. This incidence, highlighted by the ARLPI, attracted international media coverage but the situation on ground did not change much. In 2004, as I prepared to go to University of Pretoria to undertake an LLM in Human Rights and Democratisation in Africa, I saw the need to research and understand why there had been no international military intervention in the conflict. In my understanding, the conflict clearly constituted a threat to international peace and security.² My research found that the international community considered the LRA conflict a national problem within the control of the government of Uganda and saw no need to intervene.³

Although, there was not much international intervention in the conflict, in December 2003, the government of Uganda referred the situation of the LRA to the International Criminal Court (ICC).⁴ The ICC Prosecutor found that there was sufficient basis to begin its first investigations and on 8 July 2005, unsealed arrest warrants for five LRA suspects on charges of war crimes and crimes against humanity.⁵ Though the ICC had issued arrest warrants for LRA suspects, the Amnesty Act of Uganda, passed in 2000 as a conflict resolution measure

¹ Further discussion on the 'night commuter' phenomena is contained in chapter one.

² United Nations Charter chapter VII; art 39 in particular, mandates the United Nations to intervene in situations that are a threat to peace to maintain or restore international peace and security.

³ Indeed every couple of months, senior army officials and politicians in the government indicated that the LRA were 'ragtag army fleeing in disarray' and would be defeated in a matter of time; Unpublished: P Acirokop 'Pitied and then Ignored: International Response to the Plight of Children in Northern Uganda' unpublished LLM thesis, University of Pretoria, 2005.

⁴ 'President of Uganda refers situation of the Lord's Resistance Army to the ICC' ICC Press Release 23 Feb 2004 ICC-CPI-20040129-43.

⁵ ICC Press Release, 'Warrants of Arrest unsealed Against 5 LRA Commanders', ICC-CPI-20051014-110.

granted a ‘blanket amnesty’ to all who renounced rebellion against the government of Uganda.⁶

When I returned to Uganda in 2006 after the LLM, I started work as a child and human rights advisor with Save the Children in Uganda – later that year, I was appointed the Chairperson of Civil Society Organisations for Peace in Northern Uganda (CSOPNU).⁷ By the time, I took up the position as chair of CSOPNU, the Juba Peace Talks was well underway, and all stakeholders, including CSOPNU were giving full support to the talks. Although all stakeholders considered the talks, the best chance for negotiated peace, there was a lingering doubt on the actual agenda of the parties.

There was indication that the LRA leadership saw the talks as a chance to neutralise the threats of prosecutions and to secure jobs for its members.⁸ While the government of Uganda saw this as an opportunity to work out technicalities to end the insurgency that had become both a political liability and an embarrassment. Nonetheless, on 29 June 2007, the negotiating parties in Juba signed the Agreement on Accountability and Reconciliation paving way for domestic prosecutions, use of traditional justice, truth-telling process, reparations, and other national legal arrangements as accountability and reconciliation measures with respect to the conflict. The parties later adopted an Annexure to elaborate principles and mechanisms of implementing the main Agreement.⁹

Most intriguing and the subject of this thesis is whether these measures of accountability meet Uganda’s international obligation in respect of the atrocities perpetrated in the conflict. The thesis also investigates how well these mechanisms can complement each other to ensure that Northern Uganda returns to the nostalgic place of my childhood. A

⁶ Amnesty (Amendment) Act 2000, art 2.

⁷ CSOPNU is a coalition of at least 64 NGOs both national and international that advocated for the peaceful resolution of the LRA conflict and protection of victims of the conflict.

⁸ This was quite clear from the demands of the LRA/M for the ICC arrest warrants to be dropped before it signed a comprehensive peace agreement.

⁹ Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement, signed in Juba, South Sudan on the 29th June 2007 (Agreement on Accountability and Reconciliation) and the Annexure to the Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement on 19th Feb 2008.

place where people live without fear of violent death or torture; where children are not afraid to go to school; where people can begin to regain livelihoods and most importantly, a place where people can meaningfully take part in civic and democratic activities without fear of recurrence of conflict.

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Contents

CHAPTER ONE	1
INTRODUCTION	1
1.1 Background	1
1.2 Consequences of the LRA conflict.....	4
1.2.1 Operation North (1991)	7
1.2.2 Operation Iron Fist (2002)	9
1.2.3 Operation Lightning Thunder and ‘exportation’ of the LRA conflict	13
1.3 Statement of the problem	19
1.4 Research questions	22
1.5 Definition of terms.....	23
1.6 Objective	24
1.7 Methodology.....	25
1.8 Literature review.....	26
1.9 Overview of chapters	49
CHAPTER TWO	51
INTERNATIONAL NORMATIVE STANDARDS REVELANT TO THE LRA ATORICITY IN UGANDA.....	51
2.1 Introduction	51
2.2 War crimes	54
2.2.1 ‘Internationalised’ conflict?	55
2.2.2 Threshold for application.....	59
2.2.3 Acts punishable as war crimes.....	61
2.3 Crimes against humanity	71
2.3.1 Threshold of crime	71
2.3.2 Acts punishable as crimes against humanity.....	73
2.4 Conclusion.....	78
CHAPTER THREE	79
INTERNATIONAL OBLIGATION OF STATES TO ADDRESS CERTAIN CRIMES	79
3.1 Introduction	79
3.2 Duty to investigate, prosecute or extradite.....	80
3.2.1 Geneva Conventions and Protocol I	80
3.2.2 Rome Statute	81
3.2.3 Protocols to the Great Lakes Pact.....	82
3.2.4 CAT	83
3.2.5 UN resolutions and ‘soft laws’	83

3.3	Obligation to enact penal sanction	83
3.4	Obligation to respect, ensure rights and provide remedies	84
3.5	Legality of amnesties in international law	87
3.6	Accountability mechanisms	91
3.6.1	Prosecutorial options	92
3.6.2	Non-prosecutorial options	96
3.7	Intervention by human rights bodies	100
3.8	Conclusion	103
CHAPTER FOUR		104
SHORT OF INTERNATIONAL OBLIGATIONS? UGANDA’S AMNESTY ACT AND THE AGREEMENT ON ACCOUNTABILITY AND RECONCILIATION		104
4.1	Introduction	104
4.2	How the Amnesty Act was applied	109
4.2.1	Government’s attitude towards amnesty	114
4.2.2	Resource and time-bound limitation	119
4.2.3	Crimes committed in other states and universal jurisdiction.....	119
4.3	The Agreement on Accountability and Reconciliation and its Annexure	121
4.3.1	Formal prosecutions	122
4.3.2	Investigations	123
4.3.3	Historical clarification and truth telling	124
4.3.4	Reparations	125
4.3.5	Traditional justice	126
4.3.6	Relationship with the Amnesty Act	127
4.4	Conclusion	128
CHAPTER FIVE		130
THE ICC’S INTERVENTION IN THE LRA SITUATION		130
5.1	Introduction.....	130
5.2	Independence of the ICC Prosecutor	134
5.3	Victim or perpetrator	137
5.4	Arrest of LRA suspects	141
5.5	Withdrawal of ‘self-referral’ and complementarity	148
5.6	Reparations	157
5.7	Conclusion.....	163
CHAPTER SIX.....		165
INTERNATIONAL CRIMES DIVISION OF THE HIGH COURT OF UGANDA: CHALLENGES AND OPPORTUNITIES		165

6.1	Introduction.....	165
6.2	Applicable laws at the ICD	169
6.3	Retroactive application of legislation	171
6.4	Rules of procedure and evidence	177
6.5	Persons to be tried by the ICD	178
6.6	Prosecution as ordinary crimes in domestic courts.....	182
6.7	Territorial jurisdiction of the ICD	184
6.8	Penalties to be imposed by the ICD.....	185
6.9	Age of liability	188
6.10	Protection and participation of victims and witnesses	189
6.11	Reparations.....	193
6.12	Role of outreach.....	194
6.13	Conclusion.....	196
	CHAPTER SEVEN.....	198
	CONDONING IMPUNITY? TRADITIONAL JUSTICE AS AN ACCOUNTABILITY MEASURE FOR INTERNATIONAL CRIMES	198
7.1	Introduction.....	198
7.2	Acholi traditional justice	201
7.3	Traditional justice and the LRA conflict	206
7.4	Modification of traditional justice	207
7.5	Nature and magnitude of crimes.....	209
7.6	Legitimacy of the process and traditional institutions	211
7.7	Conclusion.....	217
	CHAPTER EIGHT.....	219
	A TRUTH COMMISSION FOR UGANDA?.....	219
8.1	Introduction	219
8.2	Past Investigative commissions in Uganda	222
	8.2.1 The 1974 Commission.....	222
	8.2.2 The 1986 Commission.....	224
8.3	Features of a new truth commission	226
	8.3.1 Form, structure and composition	226
	8.3.2 Powers and functions	228
	8.3.3 Temporal and material jurisdiction	232
8.4	Relationship with the Amnesty Act	236
8.5	Relationship with formal prosecutions.....	237
8.6	Reparations	242

8.7 Reintegration and reconciliation	249
8.8 Conclusion	256
CHAPTER NINE	258
CONCLUSION AND RECOMMENDATIONS	258
9.1 Conclusion	258
9.2 Recommendations	267
9.2.1 Amendment and adoption of certain laws and policies in Uganda	267
9.2.2 Political will and commitment	269
9.2.3 Conduct of outreach	270
9.2.4 Regional collaboration	270
BIBLIOGRAPHY	272
ANNEXURE A	306
AGREEMENT ON ACCOUNTABILITY AND RECONCILIATION & ANNEXURE.....	306
ANNEXURE B	322
THE NATIONAL RECONCILIATION BILL, 2009	322

CHAPTER ONE

INTRODUCTION

1.1 Background

Uganda's history since independence in 1962 has been dominated by a series of military coups and brutal regimes that were responsible for grave and systematic human rights violations. The first post-colonial president of Uganda was the Kabaka of Buganda, Sir Edward Muteesa II. Milton Obote, from Northern Uganda and long-time opponent of autonomy for kingdoms in Southern Uganda, including the kingdom of Buganda, was prime minister. On 24 May 1966, Obote ousted Muteesa and assumed his offices of president and commander in chief. Obote further suspended the 1962 constitution, abolished kingdoms and consolidated his control over the military by eliminating several rivals.¹

The first regime of Milton Obote ended in 1971, when his army commander, Gen Idi Amin Dada took over power in a coup. Amin lasted for eight years and after his fall in 1979, Prof Yusuf Lule and Godfrey Lukongwa Binaisa had short tenures.² Uganda held elections in 1980, although disputed; the election ushered in the second rule of Milton Obote. In July 1985, Obote's army general, Tito Okello Lutwa, overthrew and assumed his position in government.³ Lutwa's rule ended in January 1986, when Yoweri Kaguta Museveni, the incumbent, took over power in a coup.⁴ During these various regimes, rule of law was suspended and a series of crimes were committed against civilians by both state and non-state actors. The crimes usually depended on ethnic or regional background, religion and/or societal status of the victim. The various governments subjected Ugandans to systematic

¹ PM Mutibwa *Uganda since Independence: A Story of Unfulfilled Hopes* (1992) 42 – 64.

² Mutibwa (n 1 above) 78 – 96.

³ Obote, Amin and Lutwa were all from Northern Uganda and their governments and military largely consisted of people from Northern Uganda.

⁴ T Allen & K Vlassenroot 'Introduction' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 7.

violations of human rights including arbitrary arrest and detention, extrajudicial killings and torture since independence.⁵

Yoweri Kaguta Museveni (a Munyankole from western Uganda) and his National Resistance Army (NRA) seized control of the government in 1986 after nearly five years of bush warfare, from General Tito Okello Lutwa (an Acholi from Northern Uganda).⁶ Museveni's army consisted of mostly Banyankole senior and Baganda junior officers, commanding mostly Baganda veterans and people from western Uganda recruited in the last months of the war. In other words, Museveni's power base was a largely southern army replacing the northern political and military rule known since independence.⁷

In the first decade of his rule, many considered President Museveni successful, as he seemed to follow a more inclusive democratic path by supporting a new political formula to restore civilian control, rule of law and economic growth. His government created a non-partisan 'democratic' system that many enthusiastically embraced. His army was more disciplined and responsive to civilian control than its predecessors and he restored kingdoms that Obote had had been abolished in 1967.⁸ An elaborate consultative process led to the 1995 constitution that entrenched rule of law and human rights in its provisions.⁹

President Museveni's government further showed considerable dedication to liberalising the economy and disciplining expenditures. The economy grew steadily, becoming more diversified and with a lower percentage of poverty.¹⁰ However, the success of the first decade of Museveni's rule was marred in the second decade and many felt he was repeating disruptive patterns of past presidents. Like them, he has failed to overcome the ethnic,

⁵ PG Okoth 'The Military in Transition to Democracy in Uganda' in P Langseth et al., (eds) (2nd ed) *Uganda: Landmarks in Rebuilding a Nation* (1997) 258–265.

⁶ Allen & Vlassenroot (n 4 above) 6.

⁷ International Crisis Group 'Uganda: No Resolution to Growing Tension' Africa Report No 187 (5 April 2012) 6; referring to N Kasfir "'Movement" Democracy, Legitimacy and Power in Uganda' in J Mugaju & J Oloka-Onyango (eds) *No Party Democracy in Uganda: Myths and Realities* (2000) 281.

⁸ The kingdoms were however, recognised as cultural and not political bodies.

⁹ BJ Odoki *The Report of the Uganda Constitutional Commission: Analysis and Recommendations* (1993); in this publication Odoki argues that the Constitution of Uganda must be seen as a 'human rights charter' since human rights serves as the basis for all its provisions.

¹⁰ International Crisis Group (n 7 above) 6; newly discovered extensive oil reserves will generate additional revenue that could stimulate additional development if used properly although to-date Uganda relies heavily on donor funds.

regional and religious divisions that marred Uganda's politics since independence and he has increasingly relied on centralisation, patronage and coercion to maintain control. In addition, the President Museveni's government has confronted more rebellions in many regions of the country than his predecessors have, the longest running being the LRA conflict.¹¹

After the coup by Museveni in 1986, Lutwa's ousted army and the many civilian supporters grouped and formed the Uganda People's Democratic Army (UPDA) that led a popular revolt from Northern Uganda. The UPDA was defeated in 1987 and some of the fighters received amnesty in accordance with the Amnesty Statute of 1987 that provided for general and specific pardons to groups that were engaged in rebellion.¹² However, remnants and other dissidents came together to form the Holy Spirit Movement (HSM), led by Alice Auma 'Lakwena.'¹³ For almost a year, Lakwena maintained the HSM insurgency, coming within 80 kilometres of Kampala, the capital of Uganda, before being defeated and fleeing into exile.¹⁴

¹¹ International Crisis Group (n 7 above) 6; other rebel groups that cropped up to oppose Museveni's rule include the Uganda Peoples' Army (UPA) composed of the Iteso and closely allied to the Langi; the West Nile Bank Front (WNBFF) formed by Juma Oris in 1998 and defeated by the NRA with the assistance of the Sudanese People's Liberation Army (SPLA) in 1998; some remnants thereafter formed the Uganda National Rescue Front II which operated with Sudanese support in Aringa county in Arua district until it signed a cease fire with the government in 2002; the Allied Democratic Forces (ADF) formed in 1996 by puritanical Muslim Ugandans of the Tablighi Jamaat Sect after a merger with the remnants of the rebel National Army for the Liberation of Uganda. The ADF rebel group was based in the Rwenzori mountains range along Uganda's western border with the DRC and by 1998 had carried out several attacks on civilians leading to large displacement. The group was defeated in December 2005 with assistance from the Congolese government and the UN Peacekeeping mission in Congo.

¹² The National Resistance Council passed this Statute in 1987; under this Statute, four offences; genocide, murder, kidnapping and rape were considered to be heinous to be included within the ambit of the amnesty. The Amnesty Statute professed to encourage various fighting groups and sponsors of insurgency to cease their activities; it in particular targeted Ugandans in exile, many of whom were afraid to return home due to fear of prosecution. Several people were detained but none was prosecuted for crimes excluded from the ambit of the Amnesty Statute.

¹³ Allen & Vlassenroot (n 4 above) 8; see also 'Northern Uganda Chronology' Conciliation Resources <http://www.c-r.org/our-work/accord/northern-uganda/chronology.php> (accessed 14 Nov 2011). 'Lakwena' is an Acholi word meaning prophet and Alice Auma Lakwena claimed to be a prophetess sent by God, possessed by a spirit that was guiding her for the good of the Acholi people. She claimed that she named her political grouping the HSM because whatever action the group undertook was under the guidance of the Holy Spirit. For further reading see, R Schlenker *Witchcraft and the Legitimation of the State in Uganda* MA Dissertation, School of Oriental and African Studies, University of London (1999) 15-16; H Behrend 'Alice Lakwena and the Holy Spirit' (1999) *Ohio University Press* 43; R Gersony *The Anguish of Northern Uganda: Results of a Field Based Assessment of the Civil Conflict in Northern Uganda* (1997) 24 – 25; R Doom & K Vlassenroot 'Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda' (1999) 98 (390) *African Affairs* 27.

¹⁴ 'Alice Lakwena, 51, Dies in Kenyan Refugee Camp' *Daily Nation* 19 January 2007; for a long time, there were talks and negotiations with the government to resettle Alice Lakwena in Uganda but this never happened and died in Dadaad, a refugee camp in Kenya.

In 1988, Joseph Kony, a young relative of Lakwena claimed that the Holy Spirit had anointed him to continue and complete the work that Lakwena had started.¹⁵ In 1994, Kony's small group of rebels came to call itself the Lord's Resistance Army (LRA).¹⁶ Like Lakwena, Kony promised to overthrow President Museveni's government and to purify the Acholi people from within. He also claimed that the Holy Spirit had revealed that both goals would be accomplished through violence.¹⁷ Kony's early campaign was not a particularly significant affair, although with a small mobile group he maintained a degree of insecurity in Acholiland.¹⁸ This changed in 1994 when the National Islamic Front (NIF), the military junta ruling the Sudan, began supporting the LRA in retaliation for the alleged support that President Museveni's government was giving to the Sudan People's Liberation Army (SPLA).¹⁹ The LRA from then on got a sound base in South Sudan where they received training and weaponry, stepping up operations in Northern Uganda – mainly attacks against the civilian population.²⁰

1.2 Consequences of the LRA conflict

The LRA's central strategy is the abduction of civilians, mostly children. The abducted are used to carry items looted from raided villages; most are taken to the LRA bases to be trained as combatants and deployed in the frontline while some others, especially the girls

¹⁵ 'Profile: Joseph Kony' BBC News, 7 Oct 2005 <http://news.bbc.co.uk/2/hi/africa/4320858.stm> (accessed 15 Jan 2009); Allen & Vlassenroot (n 4 above) 9; Gersony (n 13 above) 26; Kony claimed that he inherited the spiritual power from Lakwena and that he was anointed by God to continue with the work she had started. For a long time, little was known about him. He used spiritualism and biblical revelations to maintain support and terrorize his forces that are mainly abducted children. While it is clear the LRA is antigovernment, the group never articulated a coherent political agenda until 2006 Juba peace negotiations when it claimed to be representative of the people in Northern Uganda that it constantly terrorizes.

¹⁶ 'Northern Uganda: The Forgotten War' Catholic Relief Service 2004 <http://icar.gmu.edu/ICC/NorthernUganda.pdf> (accessed 15 June 2009).

¹⁷ Amnesty International 'Breaking God's Commandments: The Destruction of Childhood by the Lord's Resistance Army' AFR 59/001/1997 (1997) 4.

¹⁸ Gersony (n 13 above) 6; Acholiland is the area comprised of the original districts of Gulu, Pader and Kitgum; occupied by the ethnic Acholi; these districts have in recent years been subdivided to include new districts such as Amuru and Nwoya.

¹⁹ Allen & Vlassenroot (n 4 above) 9 – 10; Gersony (n 13 above) 35; Z Lomo & L Hovil 'Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda' (2004) 11 *Refugee Law Project Working Paper* 5; SPLA was the southern Sudan rebel movement (now in government of the newly created state of South Sudan) that was fighting for the independence of South Sudan from the Islamic dominated government in Khartoum.

²⁰ As above; see also CR Soto *Tall Grass: Stories of Suffering and Peace in Northern Uganda* (2009) 31 – 35.

become sexual slaves and/or domestic workers. The abductees are tortured or killed if they attempt to escape.²¹ The World Development Report of 2007 estimates that 66,000 children have been abducted by the LRA since the conflict began in 1986.²² In 2003 because of the increasing number of abductions, tens of thousands of children in Northern Uganda commonly referred to as 'night commuters', travelled miles on foot to towns and city centres to sleep in bus stations, churches, storefronts and on the street. By 2005, at least 50,000 children made this nightly sojourn.²³ Parents who were afraid that the LRA would attack or abduct their children if they stayed in the villages or IDP camps overnight sent them to the towns.²⁴ The children, particularly girls, risked sexual violence and other forms of abuse; they were attacked on the way to or at their night time sleeping places, as there was no protection offered during the journey and no supervision in the night.²⁵

In April 1989, the government ordered the people out of their homes into 'protected villages' or Internal Displaced Persons (IDP) Camps that worsened the crisis.²⁶ The government forced nearly two million people from their homes to IDP camps, entire villages and gardens were razed to the ground to cut off means of subsistence and ensure that

²¹ P Pham et al., *Abducted: the Lord's Resistance Army and Forced Conscriptation in Northern Uganda* (2007) 18; C Dolan 'Which Children Count? The Politics of Children's Rights in Northern Uganda' in O Lucima (ed) *Protracted Conflict, Elusive Peace Initiatives to end the Violence in Northern Uganda* (2002) 68; Human Rights Watch *Abducted and Abused: Renewed Conflict in Northern Uganda* (2003) 15(12A) 16 – 28; RE Anderson et al., 'Pawns of Politics: Children, Conflict and Peace in Northern Uganda' (2004) *World Vision Report* 17 – 18.

²² See also Pham et al., (n 21 above) 20; estimate the number of abducted children between 1986 to 2006 at 24,000 to 38,000 children, and suggests that for every three children in the official reception count, ten youth were actually abducted, suggesting a figure of at least 66,000 abductions in total; see also c Blattman & J Annan 'On the Nature and Causes of LRA Abduction: What the Abductees Say' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 134 – 135.

²³ Irin 'Uganda: When the Sun Sets, We Begin to Worry' IRIN in-depth - Life in Northern Uganda 5 January 2004 1.

²⁴ As above; Soto (n 20 above) 162 – 186 gives a detailed account of the night commuter phenomena; Anderson et al., (n 21 above) 19.

²⁵ Soto (n 20 above) 171 – 176; from 22 to 25 June 2003, Acholi religious leaders, most notable, Bishop Odama, Bishop Nelson Onono-Onweng, Bishop Baker Ochola, and Sheik Musa Khalil of the Acholi Muslim Community, Fr. Carlos Rodríguez and Fr. Julius Orach spent the nights in the streets with the children trying to highlight their suffering to the government and the international community. This to some extent highlighted the plight of the children to the international community but drew a critical response from the government of Uganda that wanted the international community to believe that the situation was firmly under its control and did not warrant international scrutiny.

²⁶ O Otunnu 'Causes and Consequences of War in Acholiland' in O Lucima (ed) *Protracted Conflict, Elusive Peace initiatives to end the Violence in Northern Uganda* (2002) 13; 'Uganda Chronology' Conciliation Resources <http://www.c-r.org/our-work/accord/northern-uganda/chronology.php> (accessed 21 Jan 2009); there were at least 59 IDP camps created in the Acholi sub region as of 2006.

civilians leave.²⁷ The IDP camps were overcrowded, and they lacked basic social services like, education, health, water, and sanitation. Surveys and reports estimated that about 1,000 civilians died per week in the camps from malnutrition, poor sanitation, and fires that often ravaged the camps. In addition, the confinement of people in the camps without adequate protection made it easier for the LRA to carry out raids and massacres.²⁸

One of the most notorious massacres perpetrated by the LRA was carried out at Patongo, Pader district in November 2002, where the LRA murdered 20 people and the commander of the group ordered that 2 bodies be dismembered and boiled in a pot in the presence of survivors.²⁹ The first massacre perpetrated by the LRA took place in April 1995 in Atyak, when a team of LRA rebels commanded by Vincent Otti, who was born in Atyak, lined up more than 200 people on the bank of a river and shot them in cold blood.³⁰ In July 1996, the LRA killed at least 150 Sudanese refugees in a succession of attacks in Acholi camp, a Sudanese Refugee camp in Northern Uganda. In January 1997, the LRA clubbed or hacked to death at least 400 civilians in villages in Lamwo County. In July 2002, the LRA killed 90 civilians, most of them children in Pajong village, Mucwini, Kitgum district. In October 2002, the LRA killed at least 120 civilians in Amel village. In February 2004, the LRA killed at least 300 civilians, most burnt to death in Barlonyo IDP camp in Lira district among many other massacres. A central feature in all these massacres is that the Ugandan army that in 1995 had been re-designated as the Uganda Peoples' Defence Forces (UPDF) arrived long after the LRA had gone.³¹

²⁷ Soto (n 20 above) 121.

²⁸ Human Rights Watch *The Scars of Death: Children Abducted by the Lord's Resistance Army* (1997) 29 – 30; A Mwenda 'Uganda's Politics of Foreign Aid and Violent Conflict: the Political uses of the LRA Rebellion in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 55; indicates for instance that in a camp of 15,000 people, only 14 soldiers were deployed to protect the people and these soldiers were mainly drawn from the local militia group rather than the mainstream army. Often, the soldiers lived inside the camps, where the civilian population provided them as a human shield against rebel attacks. The government put the people in camps and abandoned them.

²⁹ Soto (n 20 above) 20.

³⁰ Gersony (n 13 above) 38; Soto (n 20 above) 33; Vincent Otti was the LRA second in command and one of the ICC indictees. There is an indication that he was executed on Kony's orders in 2006 but his death is yet to be independently verified, more discussion on Vincent Otti and the charges against him is contained in chapter two and five of this thesis.

³¹ Soto (n 20 above) 33; Gersony (n 13 above) 39.

All these killings resulted in thousands of children being orphaned and heading households, with only a few able to attend school or find sufficient means for support and protection; girls were forced into early marriages and prostitution.³² There was little or no access to health care, hospitals and health centres were displaced or closed, and those that existed did not have personnel to operate them. Education was disrupted; schools were closed or displaced, leaving two generations of citizens in Northern Uganda without basic education.³³

Not only the LRA committed atrocities against civilians; Uganda security agents also reportedly committed multiple violations of human rights in Northern Uganda, including summary execution, torture, rape, recruitment of children in armed conflict, and inhuman conditions of detention in unauthorised detention locations.³⁴ In response to the LRA conflict, the UPDF carried out three major operations, Operation North, Operation Iron Fist and Operation Lightening Thunder as discussed below.

1.2.1 Operation North (1991)

The government of Uganda first launched an operation code named 'Operation North' in March 1991. In preparation for the offensive and counterinsurgency the entire Northern Uganda was locked down, all humanitarian organisations were forced to leave and a media blackout was imposed. The government allegedly committed serious human rights violations against civilians during this period, including torture of about three dozen prisoners in an underground pit in Gulu, extra-judicial killings and detention of 18 prominent politicians and local leaders among hundreds of other people from Acholi.³⁵

As part of the operation, the then Minister for the North, Betty Bigombe, created the Arrow Boys, composed of locally recruited young men mostly armed with bows and arrows as a form of local defence.³⁶ The creation of this group led Kony to believe that he had lost the

³² Human Rights Watch (n 28 above) 35.

³³ Human Rights Watch (n 28 above) 35 – 36; Otunnu (n 26 above) 13; Dolan (n 21 above) 71.

³⁴ Gersony (n 13 above) 45 – 47; Human Rights Watch (n 28 above) 41 – 47.

³⁵ Allen & Vlassenroot (n 4 above) 11; Human Rights Watch (n 28 above) 41 – 47; Gersony (n 13 above) 31- 32; Amnesty International 'Human Rights Violations by the National Resistance Army' (1991) *Amnesty International AFR59/20/91* 10 - 15.

³⁶ Gersony (n 13 above) 31.

population support and he blamed civilians for the cooperation with and perceived support of the government. He therefore escalated the reprisals and intensified killings.³⁷ The LRA started mutilating civilians; cutting off hands, noses and ears; padlocking mouths shut through holes cut in lips, or simply hacking civilians to death with machetes.³⁸

‘Operation North’ did not succeed in destroying the insurgency, so Betty Bigombe, leading a delegation of elders and religious leaders from Acholiland initiated the first face-to-face meeting with representatives of the LRA.³⁹ The LRA asked for general amnesty for its combatants and stated that they would not surrender but were willing to return ‘home’. There were several meetings and protracted negotiations but the parties failed to reach an agreement.⁴⁰

The LRA broke off negotiations on 2 February 1994 and President Museveni in turn gave a seven-day deadline for the LRA to surrender.⁴¹ These events ended the peace initiative and led to the retreat of the LRA into South Sudan and the continued attacks against civilians in Northern Uganda.⁴² There were several other attempts at peace talks after this, mainly spearheaded by the Acholi Religious Leaders Peace Initiative (ARLPI) that managed to keep open a window of communication with the LRA. There was mention of peace negotiations but neither the LRA nor the government of Uganda committed to it.⁴³

³⁷ Accord ‘Uganda: Northern Uganda Chronology’ <http://www.c-r.org/our-work/accord/northern-uganda/chronology.php> (accessed 15 April 2011).

³⁸ C Dolan ‘What do you Remember? A Rough Guide to the War in Northern Uganda’ (1986 – 2000) (2000) 33 *COPE Working Paper* 15.

³⁹ Gersony (n 13 above) 32; states that observers who resided in Gulu at the time indicate that the operation had a significant impact on the LRA; its military strength significantly reduced and its movement was greatly curtailed, therefore question why the UDF did not take that opportunity to destroy the movement.

⁴⁰ Accord ‘Uganda: Northern Uganda Chronology’ available at <http://www.c-r.org/our-work/accord/Northern Uganda/chronology.php> (accessed 15 April 2011).

⁴¹ RR Atkinson ‘The Realists in Juba? An Analysis of the Juba Talks’ in T Allen & K Vlassenroot (eds) *The Lord’s Resistance Army: Myth and Reality* (2010) 205; states that the explanation that the government gave for this abrupt announcement was that the military intelligence of the LRA had contacted the Sudanese government that had agreed to give the LRA arms and other support.

⁴² As above; see also CCM Lamwaka ‘Civil War and the Peace Process in Uganda 1986 – 1997’ (1998) 4(2) *East African Journal of Peace and Human Rights* 155.

⁴³ T Allen *Trial Justice: The International Criminal Court and the Lord’s Resistance Army* (2006) 78; the ARLPI and other groups kept pushing for peace talks and in May 2004 Betty Bigombe travelled to Sudan to make contact with the LRA leader, but failed in the endeavour.

1.2.2 Operation Iron Fist (2002)

In March 2002, the UPDF launched a massive military offensive code-named 'Operation Iron Fist' against the LRA bases in South Sudan.⁴⁴ The government in Khartoum allowed the UPDF over its borders to hunt down the LRA. The US state department had named the LRA a 'terrorist group'. This agreement was therefore part of the Khartoum government's efforts to broadcast its new status as an engaged member of the international community by distancing itself from the LRA. The agreement, coupled with the return of the UPDF that had been deployed in the Democratic Republic of Congo (DRC), created what the Ugandan government felt was an ideal situation in which to end a conflict that had become an embarrassment and a political liability.⁴⁵

The purported aim of the offensive was to eradicate the LRA insurgency; instead, the LRA moved bases from South Sudan into Uganda and the conflict in Uganda intensified. The LRA escalated attacks, abductions, killings, burning, looting and ambushes on vehicles.⁴⁶ The LRA also began to move into areas outside Acholiland, in apparent search for support. However, when the local populace resisted, they extended the attacks to Northeast and Eastern Uganda resulting into widespread displacement and suffering in those regions.⁴⁷

Following the devastation caused by the 'Iron Fist' operation, the LRA conflict gained unprecedented international scrutiny and involvement. In November 2003, the then United Nations Undersecretary General for Humanitarian Affairs and Emergency Relief Coordinator, Jan Egeland undertook a field visit to Uganda, bringing attention to the conflict.⁴⁸ Total humanitarian funding increased from 19.5 million US dollars to 56 million US dollars in 2007.

⁴⁴ 'Uganda-Sudan: No Rapid Solution in anti-LRA Campaign' Irin Plus News 27 May 2002 <http://www.irinnews.org/Report.aspx?ReportID=32074> (accessed 30 May 2011).

⁴⁵ S Perrot 'Northern Uganda: A "Forgotten Conflict" Again? Impact of the Internationalisation of the Resolution Process' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 190.

⁴⁶ Human Rights Watch (n 25 above) 3;

⁴⁷ Lomo & Hovil (n 19 above) 34 – 35; 'Uganda: Feature – Hope for Peace in North and End to Suffering' Irin News 12 March 2003 <http://www.irinnews.org/report.aspx?reportid=42034> (accessed 14 Feb 2008).

⁴⁸ Perrot (n 45 above) 187; see also 'Uganda Conflict Worse than Iraq' BBC News 10 November 2003 <http://news.bbc.co.uk/2/hi/africa/3256929.stm> (accessed 16 January 2009).

In addition, total official development assistance and aid increased from 817 million US dollars in 2000 to 1.2 billion US dollars in 2005.⁴⁹

In December 2003, President Museveni referred the LRA situation to the International Criminal Court (ICC) that promptly started investigations.⁵⁰ On 14 April 2004, for the first time, the United Nations Security Council publicly condemned the atrocities committed by the LRA and expressed concern for the plight of the displaced people.⁵¹ In 2005, the ICC unsealed warrant of arrest against five LRA commanders; Joseph Kony, the LRA leader; Vincent Otti, the LRA second in command; Okoth Odhiambo; Dominique Ongwen and Raska Lukwiya who all held senior posts of equal ranks forming the 'Control Altar' that represents the core LRA leadership responsible for devising and implementing LRA strategy.⁵² The warrant of arrest contained general allegations that the LRA were responsible for mass atrocities against civilians in Uganda.⁵³

Previous attempts to bring international attention to the conflict had been thwarted by the government of Uganda that repeatedly indicated that the conflict was internal and firmly within its control. The government claimed that a military victory against the LRA was imminent and would be achieved in a matter of weeks.⁵⁴ It became clearer with passing

⁴⁹ Perrot (n 45 above) 189; referring to World Bank *World Development Indicators Database: Uganda Data Profile* (2007); UNOCHA Financial Track Service: Uganda (2000), (2002) & (2007).

⁵⁰ 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC' ICC Press Release ICC-20040129-44.

⁵¹ 'Press Statement on Northern Uganda by Security Council President' UN Security Council Press Release (SC/8057) AFR/900 14 April 2004 <http://www.un.org/News/Press/docs/2004/sc8057.doc.htm> (accessed 10 March 2009); the Security Council has since then monitored the situation of the LRA conflict, for instance in 2006, Security Council Resolution 1653 (Jan 2006) condemned the LRA alongside other rebel forces operating in the Great Lakes region and called upon the government to renew its commitment to end the conflict and respond to the humanitarian situation; Security Council Resolution 1663 (March 2006) called upon the Secretary General to continuously appraise himself of and make recommendations to the Council about the situation; in May 2007, the Security Council reported that the LRA had not released any children, women or non-combatants from its ranks and voiced deep concern over the issue. The Security Council report also stated that government security forces continue to occupy schools in abandoned communities.

⁵² ICC Pre-Trial Chamber II Situation in Uganda 'Public Redacted Version: Warrant of Arrest, Joseph Kony, Vincent Otti, Okot Odhiambo, Dominique Ongwen and Raska Lukwiya' ICC- 02/04 (8 July 2005) paras 7, 8 & 9.

⁵³ As above para 5.

⁵⁴ Perrot (n 45 above) 196; the position of the government was supported by its close allies, the US and the UK in the Security Council and also by Russia and China that have consistently advocated for non interference in national sovereignty. Therefore, attempts to place the situation on the Security Council agenda or to mandate a UN military intervention failed. Uganda continued to convince the UN that a military victory in the LRA conflict was imminent. Uganda further committed to giving regular updates on the situation in Northern

years that the government did not have the ability, or at least the willingness to handle the humanitarian crisis and to end the conflict. In 2005, the UN Secretary General in a report on the protection of civilians in armed conflict compared Uganda to Eastern DRC and Darfur and alluded to the Ugandan lack of adequate and sustained effort to handle the humanitarian crisis and security for the affected population. The report also pointed out the forcible displacement of civilians into poorly protected camps without adequate basic social services that worsened the humanitarian situation. Reports like this, the increased international focus on the LRA conflict and the humanitarian situation in Northern Uganda was especially embarrassing for the government of Uganda as exactions and business of the UPDF and other security organs were closely scrutinised.⁵⁵ This grudgingly led to a renewed interest in peace negotiations with the LRA.

On 28 June 2006 in an interview aired on BBC, Kony denied committing atrocities and appeared to call for an end to hostilities;⁵⁶ this was in response to an announcement by President Museveni that he would guarantee the safety of Kony if peace were agreed to by July 2006. President Museveni pledged to grant Kony total amnesty and call off ICC investigations if he gave up 'terrorism' by that date.⁵⁷ In June 2006, the government of South Sudan formally invited Uganda to attend peace talks in Juba - South Sudan.⁵⁸ Uganda accepted the invitation to the Juba talks mediated by Riek Machar, the Vice President of South Sudan. The talks began on 14 July 2006. The then, Internal Affairs Minister, Dr. Ruhakana Rugunda, leader of the government delegation, stated that his main priority was

Uganda and initiated the Joint Monitoring Committee (JMC) that gave regular updates to the development partners and lessened the pressure to put the situation in Northern Uganda on the Security Council agenda.

⁵⁵ Perrot (n 45 above) 195; this report came out almost at the same time with the ICJ ruling in December 2005 of the UPDF violations in the territories of DRC.

⁵⁶ This interview was conducted by Sam Farmer of Times (London) and was broadcast live on BBC News Tonight on 28 June 2006 at 2130BST/2230GMT; during the interview, Kony denied committing atrocities. Although atrocities committed by the LRA against civilians in Uganda, South Sudan and DRC are well documented and thousands of civilians, including children who returned over the years from LRA captivity have given accounts the atrocities committed against them and others while with the LRA. It is interesting to contrast this BBC story with accounts by Mareike Schomerus who was also present during the interview; M Schomerus 'Chasing the Kony Story' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 93 - 112.

⁵⁷ 'Museveni Pledges to Grant Kony Amnesty' Uganda Radio Networks 4 July 2006 <http://ugandaradionetwork.com/a/story.php?s=6351> (accessed 15 Feb 2009).

⁵⁸ 'Uganda: Government to send Team to Sudan over Proposed LRA Talks' IRIN News 28 June 2006.

to obtain a quick ceasefire.⁵⁹ The LRA delegation, led by Martin Ojul, stated that the LRA did not accept peace talks because they could no longer fight but suggested that the LRA deemed negotiations as the best way to end the conflict.⁶⁰

The Juba talks then commenced with an agreed five point agenda including cessation of hostilities; comprehensive solutions to the problems of Northern Uganda; accountability and reconciliation; official end of war; and disarmament, demobilisation and reintegration (DDR) of LRA combatants.⁶¹ On 26 August 2006, the government and LRA representatives signed a Cessation of Hostilities Agreement. Under the agreement, the LRA forces were to leave Uganda and gather in two assembly areas protected by the government of South Sudan on the understanding that the UPDF would not attack those areas. By mid September 2006, the LRA had begun gathering in the assembly areas.⁶² On 29 June 2007, the two sides agreed on the principles of how questions of accountability and reconciliation would be handled. The parties agreed that both formal domestic criminal justice procedures and traditional justice would play a role.⁶³ Following this, the government of Uganda through a Legal Notice created a new Division of the High Court – the International Crimes Division (ICD) to adjudicate international crimes.⁶⁴

The parties signed an accord on Disarmament, Demobilisation and Reintegration on 29 February 2008, leaving the signing of a comprehensive peace agreement itself as the last missing action. The mediator planned several ceremonies for the signing, but Kony repeatedly failed to appear to sign the deal.⁶⁵ Kony demanded that the ICC first drops its warrant of arrest for the LRA to accept signing of a comprehensive peace deal. He also

⁵⁹ Dr. Ruhakana Rugunda later became Ugandan representative in the Security Council, following the selection of Uganda as a non-permanent member. The author conducted an informal discussion with him on his role in the peace talks on 14 April 2009 in New York where he was based. After 2011 elections, he was appointed as Minister in the new cabinet.

⁶⁰ 'Ceasefire First on Kony's Agenda' Daily Monitor 15 July 2006 1.

⁶¹ Atkinson (n 41 above) 214 - 217.

⁶² 'Uganda: Most Rebels have left Northern Uganda for South Sudan – army' IRIN News 26 September 2006.

⁶³ Agreement on Accountability and Reconciliation clause 3.1.

⁶⁴ Agreement on Accountability and Reconciliation clause 2.1; stipulates that national legal arrangement composed of both formal and non formal measures to ensure justice and reconciliation should be created; the International Crimes Division was thus created through a Legal Notice in 2008 as the War Crimes Division of the High Court of Uganda and in 2011 re-designated, the International Crimes Division; Legal Notice No. 10 of 2011, The High Court (International Crimes Division) Practice Directions 2011 clause 3.

⁶⁵ 'Uganda Rebels Delay Signing Peace Deal' Reuters 11 April 2008 <http://www.france24.com/en> (accessed 20 Jan 2009).

stated that he was seeking clarifications on the operation of the traditional justice mechanism and the kind of punishments domestic prosecutions would levy. Kony thereafter claimed that his negotiating team had misled him on the true nature of the agreement and suspended them.⁶⁶

On 11 April 2008, Kony declared in a communiqué that all the signed agreements were invalid, except the Cessation of Hostilities, which he agreed to extend for five days. This marked the end to the peace talks. Since the failure of the talks, the LRA carried out several attacks in South Sudan and the DRC from its new base in Garamba National Park.⁶⁷ In one reported attack in 2008, the LRA killed at least 400 people in a number of villages in the DRC on and after Christmas day.⁶⁸

1.2.3 Operation Lightning Thunder and ‘exportation’ of the LRA conflict

On 14 December 2008, the armed forces of Uganda (UPDF), the DRC *Forces Armées de la République Démocratique du Congo* (FARDC) and South Sudan (SPLA) with military and logistical support from the United Nations peacekeeping mission in Congo (MONUSCO) and the US Africa Command (AFRICOM) launched a joint military offensive on the LRA. The aim of the offensive was to root out the rebel group that had become a regional problem.⁶⁹ The military offensive, code named ‘Operation Lightning Thunder’⁷⁰ failed in its stated aim of rooting out the LRA conflict, instead the LRA rebels scattered across the region, conducting ruthless reprisal attacks against civilians in South Sudan, DRC and Central African Republic.⁷¹

⁶⁶ ‘Uganda Rebels Suspend Talks, Appoint New Team’ the Sudan Tribune 10 April 2008 <http://www.sudantribune.com/Ugandan-rebels-suspend-peace-talks,26715> (accessed 20 Feb 2011).

⁶⁷ ‘Congo Terror after LRA Raids’ BBC News 23 Oct 2008 <http://news.bbc.co.uk/2/hi/africa/7685235.stm> (accessed 14 November 2009).

⁶⁸ ‘LRA Rebels Commit New Atrocities’ BBC News 16 Jan 2009 <http://news.bbc.co.uk/2/hi/africa/7834242.stm> (accessed 12 Dec 2009).

⁶⁹ ‘UN unanimously backs offensive against Lord’s Resistance Army’ Reuters 22 Dec 2008 <http://www.france24.com/en> (accessed 20 Jan 2009); this military offensive was unanimously backed by the United Nations Security Council that released a statement commending the states in the region for their increased cooperation and the joint effort made to address the security threat posed by the LRA.

⁷⁰ Allen & Vlassenroot (n 4 above) 19; this operation was based on a security agreement between Uganda, Southern Sudan and the DRC that had been negotiated back in June 2008. At the end of August 2008, an agreement had also been concluded between the members of the Tripartite-plus-One Mechanism (including DRC, Rwanda, Uganda and Burundi) to neutralise the LRA.

⁷¹ Perrot (n 45 above) 209; ‘Living in Fear after LRA atrocities’ BBC News 28 Jan 2009 <http://news.bbc.co.uk/2/hi/7852086.stm> (accessed 20 Dec 2009).

Most LRA fighters shifted to the remote Garamba National Park establishing a secure base from which they now raid the region.⁷²

The LRA conflict is one of Africa's longest conflicts and it steadily intensified, spreading from Acholiland to Eastern and West Nile regions of Uganda to the tri-border area of DRC, South Sudan and Central African Republic.⁷³ The spread of the conflict is a clear manifestation of how an internal conflict can easily be 'exported' to have repercussions on neighbouring countries. Indeed, Africa Great Lakes Region has experienced recurrent and devastating armed conflicts as well as humanitarian crises that sometime spill across borders. In various parts of the region, the legacy of colonialism, ethnic conflict, weak state structures, and the illegal exploitation of natural resources have given rise to a vicious cycle of violence, displacement, and institutional collapse.⁷⁴

In addition, countries in the region have actively extended military, logistic, economic and financial support to irregular forces operating in the neighbouring territories, which has led to suspicion and mistrust among the regional governments. For instance, immediately after the ICC unsealed the LRA warrant of arrest, the government of Uganda announced its

⁷² Human Rights Watch 'CAR/DR Congo: LRA Conducts Massive Abduction Campaign, New Regional Strategy Needed to Protect Civilians and Rescue Children' (11 August 2010) <http://www.hrw.org/en/news/2010/08/11/cardr-congo-lra-conducts-massive-abduction-campaign> (accessed 09 Dec 2010); to date, the LRA continue to conduct highly coordinated and ruthless attacks against civilians; a website administered by the Invisible Children and Resolve 'The LRA Crisis Tracker' provides regular updates on LRA activities in the region, available at <http://www.lracrisistracker.com/#updates> (accessed 16 July 2012).

⁷³ J Spiegel & J Prendergast 'A New Peace Strategy for Northern Uganda and the LRA (Strategy Paper)' *Enough Project* 18 May 2008 <http://www.enoughproject.org/publications/new-peace-strategy-northern-uganda-and-lra> (accessed 17 Jan 2012).

⁷⁴ M Mamdani *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (2011) 36; indicating that the genocide in Rwanda finds roots in the invasion of Rwanda by the Rwanda Patriotic Front (RPF) (composed of refugees and sons of refugees who fled Rwanda due to ethnic purges by the Hutu dominated government) from Uganda with support of the NRM government in Uganda. By providing this support, Uganda exported its first political crisis since coming into power in 1986 to Rwanda; see also 'Congo Civil War' Global Security <http://www.globalsecurity.org/military/world/war/congo.htm> (accessed 22 Nov 2011); 'Congo War Driven Crisis Kills 45,000 a month: Study' Reuters 22 Jan 2008 <http://www.reuters.com/article/2008/01/22/uscongo-democraticdeathidUSL22280201220080122> (accessed 22 Nov 2011); 'Evaluating Peace and Security in the DRC and US Policy in the Great Lakes Region' Africa Faith and Justice Network <http://afjn.org/focus-campaigns/promote-peace-d-r-congo/30-commentary/788evaluating-peace-and-stability-in-the-rdc-and-us-policy-in-the-great-lakes-region.html> (accessed 22 Nov 2011); indicating that from 1996, Rwanda, Uganda and Angola supported the rebel group, Alliance of Democratic Forces for the Liberation of Congo until the overthrow of the then President, Mubutu Sese Seko. In addition the Congo War (1998 to 2003) drew in eight African Nations including Rwanda, Uganda, Sudan and twenty five armed groups becoming the deadliest conflict since World War II killing an estimated 3.8 million people; millions displaced and millions sought refuge in neighbouring countries such as Uganda, Tanzania, Rwanda and Burundi.

intention to re-enter South Sudan to ‘hunt down’ the indicted LRA leaders and hand them over to the ICC.⁷⁵ Previous incursion of Uganda into South Sudan intensified the conflict in Uganda and spread it to the eastern part of the country. It also led to unprecedented number of abductions in the country giving birth to the ‘night commuter’ phenomena. Uganda also used the execution of arrest warrants as reason to re-enter the DRC, a move that the Congolese government resisted.⁷⁶ The UPDF had prior to this, invaded the DRC with a stated mission of protecting its borders from the militias in the country but, the Congolese government later accused them of aggression, massive looting, and atrocities against Congolese civilians.⁷⁷

Nonetheless, the concerned governments put their mistrust and suspicion aside and together deployed troops to fight the LRA and protect civilians in the affected areas, but these are too few and ill equipped to provide adequate protection. MONUSCO has also deployed about 1,000 peacekeepers in the LRA affected areas in north North-Eastern DRC, a number, which, according to Human Rights Watch, are too few considering the scale and geographical breadth of the problem, so civilians remain vulnerable to LRA attacks.⁷⁸

⁷⁵ ‘US Lawyer to Probe Kony’ the Daily Monitor 5 Feb 2004.

⁷⁶ ‘Museveni Wants to Hunt LRA in Congo’ the New Vision 19 June 2006.

⁷⁷ Case Concerning Armed Activities on the Territory of Congo (*Democratic Republic of Congo v Uganda*) ICJ (19 Dec 2005) ICJ Reports (2005) 168; the facts in this case were allegations by the DRC that Uganda violated article 2(4) of the UN Charter and committed acts of aggression against it. In the application, the DRC argued that such armed aggression had involved among others a violation of its sovereignty and territorial integrity; violations of international humanitarian law and massive violations of human rights. Uganda disputed the claim and counter claimed that the DRC had committed acts of aggression towards it, when it attacked its diplomatic premises and personnel in Kinshasa as well as other Ugandan nationals. In the judgment on merits, the ICJ recognised the complex and tragic situation which had long prevailed in the Great Lakes region and the suffering by the local populations. The ICJ observed that instability in the DRC had had negative security implications for Uganda and some other neighbouring states and that by actively extending military, logistic, economic and financial support to irregular forces operating in the territory of DRC, Uganda had violated the principle of non-use of force in international relations and the principle of non-intervention. The ICJ also decided that there was credible and persuasive evidence to conclude that officers and soldiers of the UPDF were involved in the looting, plundering and exploitation of Congo’s natural resources and that the military authorities did not take any measures to put an end to these acts. To further demonstrate the complex situation in the Africa Great Lakes, in less than 2 months after issuing this decision, on 3 Feb 2006, the ICJ rendered its decision on the preliminary objections to jurisdiction and admissibility raised by Rwanda in the case concerning Armed Activities on the Territory of the DRC (New Application: 2002) *The Democratic Republic of Congo v Rwanda*).

⁷⁸ ‘CAR/DR Congo: LRA Conducts Massive Abduction Campaign, New Regional Strategy Needed to Protect Civilians and Rescue Children’ Human Rights Watch 11 August 2010 <http://www.hrw.org/en/news/2010/08/11/cardr-congo-lra-conducts-massive-abduction-campaign> (accessed 9 Dec 2010).

The LRA maintains its brutal practice that includes; massacres, mutilations, abduction of civilians, mainly children to serve as soldiers and sex slaves, looting and pillage directed at civilian populations. These atrocities have led to massive displacement and humanitarian crisis in a region already devastated by numerous conflicts.⁷⁹ Since 2009 the LRA have killed more than 2000 people, abducted more than 2,500 and displaced over 380,000 in the tri-border area of South Sudan, DRC and Central African Republic though no atrocities have been perpetrated by the LRA in Uganda since 2006.⁸⁰ A worrying development is that the LRA tucked away in the tri-border of the DRC, South Sudan and Central African Republic is slipping down the priority list for Uganda. The government redeployed at least two UPDF battalions from Central African Republic to the volatile Karamoja region of Uganda in July 2010.⁸¹ Other competing priorities include Uganda's engagement with the African Union Mission in Somalia (ANISOM) where Uganda currently has 4,600 troops and as of April 2011 planned to send 4000 more.⁸²

A ray of hope to end the LRA conflict and capture its leaders is the initiative by the African Union (AU) that has set up a regional mechanism aimed at implementing a comprehensive strategy to address the problems posed by the LRA in the region.⁸³ Since its launch, the AU initiative has generated high expectations and hopes in the affected countries and attracted interest from a number of international partners, including the European Union, the US and the United Nations.⁸⁴ In particular, the US President, Barack Obama in May 2009 signed the LRA Disarmament and Northern Uganda Recovery Act. This law promises to renew

⁷⁹ S Paterno 'The Uganda LRA Allowed to Plunder' the Sudan Tribune 12 Feb 2009 <http://www.sudantribune.com/spip.php?article30154> (accessed 23 Nov 2010).

⁸⁰ Resolve 'From Promise to Peace: A Blueprint for President Obama's LRA Strategy' (September 2010); the report and statistics are available on the Resolve website www.theresolve.org/the-crisis (accessed 14 March 2011).

⁸¹ L Cakaj, 'Field Dispatch: Disturbing Developments in the Hunt for Kony' *Enough Project* (29 June 2010).

⁸² 'Uganda to Increase its Troops in Somalia' Hiraan 25 April 2011 http://www.jiraan.com/news2/2011/apr/uganda_to_increase_it_s_troops_in_somalia.aspx (accessed 17 April 2011).

⁸³ 'The African Union Regional Cooperation Initiative against the Lord's Resistance Army' was adopted by Peace and Security Council of the African Union in its 321st Meeting held on 22 May 2012 in Addis Ababa; see <http://www.peaceau.org/fr/article/321st-meeting-of-the-peace-and-security-council-on-the-au-led-regional-cooperation-initiative-against-the-lord-s-resistance-army-rci-lra?culture=en&changelocale=0&> (accessed 09 July 2012).

⁸⁴ 'Report of the Chairperson of the Commission on the Operationalisation of the AU led Cooperation Initiative Against the Lord's Resistance Army' *African Union, Peace and Security Council* 299th meeting in Addis Ababa Ethiopia (22 Nov 2011) PSC/PR/(CCXCVIX) para 16 & 23; the AU plans to open an office in the region to keep a close eye on the situation.

commitments to assist civilians susceptible to LRA attacks and bring the LRA leadership to justice by devising an interagency strategy to prevent LRA violence by apprehending LRA leaders; encouraging defections of mid field commanders; demobilising child soldiers; and investing in sustainable peace.⁸⁵ In addition, in October 2011, the US sent one hundred ‘combat equipped’ troops to Uganda to help and advice forces battling the LRA.⁸⁶

Religious and traditional leaders in Uganda have also continued a coordinated effort to promote dialogue and ensure a peaceful outcome of the conflict. They are acting in collaboration with religious, traditional and civic leaders in the countries affected by the conflict. A number of these leaders from the affected countries pooled resources across borders and in March 2009 formed the Regional Civil Society Task Force. This taskforce is building on the long experience of Northern Ugandan civil society in dealing with the LRA to develop a collective peace building capacity. Through shared analysis and experiences, the Task Force advocates regional solution to the conflict and face-to-face talks with the LRA.⁸⁷

The two conflict resolution methods that have been prominent from the start of the conflict - military solution or a negotiated settlement – are still being pursued. Both mechanisms will require a sustained commitment and new diplomatic, financial and material resources from the governments and partners at the regional and international level to coordinate a successful regional effort to end the LRA conflict. The success of this endeavour will open up space to address accountability for atrocities perpetrated in the conflict comprehensively. The first step in ensuring accountability would be to arrest the LRA leadership; prevent the LRA from continuing to commit atrocities against civilians in the region and end the LRA insurgency. As a minimum, there is a need to mitigate the effects of the conflict by enhancing protection of civilians, demobilising and reintegrating members of the LRA forces and providing increased humanitarian assistance to communities affected by the conflict.

⁸⁵ Resolve (n 80 above).

⁸⁶ ‘Obama Sends 100 US troops to Uganda to Fight LRA’ New Vision 14 October 2011 1.

⁸⁷ E Drew ‘Regional Community Peace Building and the LRA Conflict, A Conversation with John Baptist Odama, Archbishop of Gulu, Uganda’ Conciliation Resources Services <http://www.c-r.org/our-work/accord/cross-border-project/regional-community-peacebuilding.php> (accessed 10 Feb 2011); the Task Force faces huge challenges that include developing relationships across great distances with limited resources, little infrastructure and multiple language barriers.

Nonetheless, the Juba talks ensured calm and stability in the affected areas in Uganda and the Agreement on Accountability and Reconciliation signed in 2007 has set the pace for accountability pursuits in Uganda.⁸⁸ The Agreement provides for formal criminal and civil undertaking, use of traditional justice, truth telling and other national measures of reparations for victims.⁸⁹ Accordingly, in 2008, the government of Uganda through the Justice Law and Order Sector (JLOS) established a high level Transitional Justice Working Group (TJWG) to give effect to the provisions of the Agreement. The TJWG is comprised of five thematic sub-committees including; international crimes prosecutions; truth and reconciliation; traditional justice; sustainable funding; and integrated systems.

In line with the Agreement on Accountability and Reconciliation that calls for wide consultations with all stakeholders,⁹⁰ JLOS started a process of countrywide consultations to get views on appropriate accountability and reconciliation forums.⁹¹ In addition, in 2008, the government of Uganda through a Legal Notice created the ICD to adjudicate international crimes and the division is operational.⁹² Its first trial began in 2011 against Thomas Kwoyelo, a former LRA commander captured in the DRC in 2008.⁹³ The Prosecutor arraigned Kwoyelo in September 2010 and his trial at the ICD commenced on 11 July 2011 after several delays. In a November 2011 constitutional petition, Kwoyelo challenged his prosecution as amounting to unequal treatment before the law (Amnesty Act); the Constitutional Court declared the Amnesty Act constitutional, that Kwoyelo's prosecution amounted to unfair treatment and accordingly ordered the ICD to cease his trial.⁹⁴ The state is set to appeal this decision.⁹⁵

⁸⁸ Accountability pursuits were launched by the Justice Law and Order Sector in its Third National Forum held between 30 July and 1 August 2008 in Entebbe, Uganda, for more see www.jlos.go.ug/ (accessed 09 July 2012).

⁸⁹ Agreement on Accountability and Reconciliation clause 3.1.

⁹⁰ Agreement clause 2.4.

⁹¹ JLOS Report *Transitional Justice in Northern, Eastern Uganda and some parts of West Nile Region* (March 2008); JLOS in addition carried out consultations in eight sub-regions including Buganda, Teso, Bugisu, Bugwere, Busoga, Karamoja, Acholi, Ankole, Toro, Bunyoro, Lango and West Nile of Uganda.

⁹² Legal Notice No. 10 of 2011, The High Court (International Crimes Division) Practice Directions 2011 clause 3.

⁹³ Thomas Kwoyelo was detained in the maximum prison of Uganda at Luzira and was in detention for at least two years before his trial commenced.

⁹⁴ *Thomas Kwoyelo Alias Latoni v Uganda* Constitutional Petition No.036/11(Reference) [Arising Out of HCT-00-ICD-Case No. 2/10] Ruling of the Court at para 625.

⁹⁵ Further discussion of this case is contained in chapter four of this thesis.

Since 2009, the TJWJ has been undertaking a consultative process aimed at a policy on the operation of traditional justice, truth telling, reparations and reconciliation measures. The TJWG is also in the process of developing a comprehensive National Policy on Transitional Justice.⁹⁶ The process that began in 2009 has taken a very slow pace. To date there is yet to be a concerted effort on the part of the government to document, investigate, and provide victims with access to relevant information concerning the violations they and others in the region suffered due to the conflict. The government is yet to make progress in the pursuit of justice regarding the mass atrocities perpetrated in LRA conflict and there has hardly been any systematic information, outreach or consultation with victims on any development or planning for reparations mechanisms.⁹⁷

1.3 Statement of the problem

Tens of thousands of people were killed, tortured, or maimed during of the LRA conflict. Millions were (or are still) displaced, confined to areas with little or no basic social services, many lost property and means of livelihood. The LRA abducted thousands of civilians, especially children, to serve as soldiers, sex slaves and or domestic workers. Many more are at risk of abduction and a significant number remain in the LRA ranks. The LRA conflict with the attendant atrocities, spread from Uganda to South Sudan, DRC and Central African Republic and at the time of writing, still rages on. The ability of the LRA to cause such destruction to human life and property for such a long period of time, covering vast territories, indicates a failure by Uganda and the other regional governments to adequately protect and fulfil their obligations towards civilians in conflict situations as provided for in both humanitarian and human rights law regimes.

The Agreement on Accountability and Reconciliation reached in Juba proposes both judicial and non-judicial measures for accountability for crimes committed in the conflict. The

⁹⁶ Interview with Ismene Zarifis Transitional Justice Advisor of JLOS conducted on 24 Feb 2012. The main complaint by civil society groups is that their involvement in the process is very limited and so is the consultation with the local population. This was further discussed during a meeting to ensure more civil society involvement in the process organised by the African Institute for Strategic Research, Governance and Development hosting representatives from 27 different organisations took place in Kampala on 26 Aug 2011.

⁹⁷ Uganda Human Rights Commission & United Nations High Commissioner of Human Rights *"The Dust has not yet Settled"*, *Victims View on a Right to Remedy and Reparations: A Report from the Greater North of Uganda* (2011) 61. This is the biggest concern of civil society groups in Uganda today.

government has made some progress on the creation of the some structures and some policies and legislations are in place. However, progress on the ground is slow as the ICC struggles to secure arrest of the ICC indictees. Uganda referred the LRA situation to the ICC not because it was ‘unwilling’ or ‘unable’ to prosecute LRA perpetrators but because it had failed to capture its leadership and because it needed to gain advantage in a conflict that had become a political liability and embarrassment. However, today, Uganda is still where it was in 2003 before it made the referral to the ICC, since the underlying question of arrest of suspects remain outstanding.

The ICD created in 2008 began its first prosecution in 2010 but this came to a standstill due to the operation of the Amnesty Act.⁹⁸ The Amnesty Act, passed in 2000, ensured the pardon of at least 13,000 LRA fighters, including several commanders responsible for international crimes committed in the conflict.⁹⁹ Part II of the Amnesty Act that granted a ‘blanket amnesty’ to all engaged in armed rebellion against the government of Uganda lapsed in May 2012 but critical issues remain. For instance, there is still a great concern that not all persons responsible for international crimes in the LRA conflict will face trial.

The DPP indicates that, he will prosecute just about ten LRA commanders in the ICD.¹⁰⁰ Furthermore, it is unclear whether the DPP will prosecute culpable LRA commanders granted amnesty in the event that the Supreme Court overturns the 2011 Constitutional Court ruling. It is not clear if all LRA members granted amnesty would be subject to other non-Prosecutory accountability measures envisaged under the Agreement on Accountability

⁹⁸ Since its creation in 2008, the ICD started hearing in the case against Thomas Kwoyelo, a former commander with the LRA for war crimes and domestic crimes committed in Uganda during the conflict. In 2011, Kwoyelo petitioned the Constitutional Court of Uganda asking it to declare his prosecution unconstitutional arguing that he is entitled to amnesty under the Amnesty Act. The Constitutional Court agreed and ordered the ICD to cease Kwoyelo’s trial. The Attorney General has put a notice of appeal to the Supreme Court that may overturn the decision of the Constitutional Court but for now, prosecution of international crimes by the ICD has come to a standstill. Further discussion on this case is contained in chapter four and six of this thesis.

⁹⁹ Some of the high-ranking LRA commanders granted amnesty includes; Brigadier Banyana, Onekomon, Sam Kolo among others. According to Joan Kagezi, the senior principal State Attorney in charge of international crimes prosecutions, the DPP will not prosecute these individuals despite the overwhelming evidence that they are responsible for some of the international crimes perpetrated in the LRA conflict. Further discussion on this is contained in chapter four.

¹⁰⁰ For instance, since the capture and detention of Gen Caesar Acellam, one of the LRA five top commanders in May 2012 by the UPDF, there has been no clarity as to whether he will be prosecuted or not though he did not apply for amnesty before the lapse of Part II of the Act. According to Joan Kagezi, the senior principal State Attorney in charge of international crimes prosecutions, the DPP has prepared an indictment for Gen Acellam but it is not clear if the UPDF will release him to the custody of the ICD. Interview conducted on 6 July 2012.

and Reconciliation. There is no clear legal framework on accountability for international crimes in the LRA conflict that increases the risk that the application of justice will be selective and biased on the political interests of the government of Uganda. This limits the ability of Uganda to comply with the principle of complementarity under the Rome Statute and the effectiveness of the proposed accountability measures to ensure that all perpetrators of international crimes in the LRA conflict account and that, the victims receive remedies for harms suffered.

Furthermore, the newly passed International Criminal Court Act of 2010 that domesticates the Rome Statute and is the most comprehensive national legislation dealing with international crimes in Uganda will not be used as a basis for prosecution for crimes committed in the LRA conflict before 2010. In addition, the Agreement on Accountability and Reconciliation shields state actors, including military personnel that perpetrated international crimes during the conflict, from measures envisaged under it.¹⁰¹ The ICC and the ICD have further not opened any investigations into actions of state actors. Although the ICC has stated that it will investigate both sides to the conflict, it has not issued warrant of arrest for state actors, despite the well-documented atrocities perpetrated by the UPDF during the LRA conflict. The ICD is yet to show inclination to investigate action of state actors during the conflict.¹⁰²

Planning mechanisms, policies and legislations for truth telling, reparations and traditional justice are lagging behind and the affected population have very little understanding of the processes or the government's commitment to the undertakings. In addition, Uganda is conducting accountability pursuits in isolation, yet other regional states have been (and are

¹⁰¹ Agreement on Accountability and Reconciliation clause 4.1; provides that state actors will not be subject to accountability measures envisaged under the agreement. See also S Ntale 'ICC to Investigate Ugandan Army' CNN 3 June 2010 <http://edition.cnn.com/2010/WORLD/africa/06/03/uganda.army.icc> (accessed 15 Nov 2011). The ICC Prosecutor, Luis Moreno-Ocampo made this announcement while in Uganda for the ICC Review Conference citing complaints from several of the affected people and human rights activists alleging that the Uganda army had committed atrocities during the LRA conflict.

¹⁰² Joan Kagezi, the senior principal State Attorney for international crimes prosecution in office of the Director of Public Prosecutions (DPP), stated that the DPP has no evidence that state actors were involved in the commission of international crimes, therefore no reason to investigate. Interview conducted in Kampala on 20 Jan 2011. Although atrocities perpetrated by the UPDF in Northern Uganda are well documented, the DPP claims not to have knowledge of them. Further discussion on the nature of atrocities committed by both the LRA and the UPDF is contained in chapter two of this thesis.

still being) affected by the LRA conflict and the attendant atrocities. Victim groups in DRC, Central African Republic and South Sudan have not been consulted on appropriate accountability measures; crimes perpetrated against them have not been investigated and they will not benefit from reparations programs that may be developed. The government of Uganda must tackle all these issues if it is to achieve the aims of accountability for atrocities perpetrated in the LRA conflict.

1.4 Research questions

How can the multiple accountability measures adopted and proposed to address international crimes committed in the LRA conflict in Uganda be best used to promote justice, truth and reparations?

Sub-questions:

1. What is the normative framework applicable to the LRA conflict?
2. What is Uganda's international obligation in regard to atrocities committed in the LRA Conflict?
3. What is the role of the Amnesty Act and the Agreement on Accountability and Reconciliation in ensuring accountability for international crimes committed in the LRA conflict?
4. What is the role of the International Criminal Court in ensuring accountability for international crimes committed in the LRA conflict?
5. What is the role of the International Crimes Division of the High Court of Uganda in ensuring accountability for international crimes committed in the LRA conflict?
6. What is the role for traditional justice in ensuring accountability for international crimes committed in the LRA conflict?
7. What role can a Truth Commission play in ensuring accountability for international crimes committed in the LRA conflict?

1.5 Definition of terms

Accountability: in law is synonymous to the terms ‘responsibility’ and ‘liability’ and describes the condition of being actually or potentially subject to a legal obligation or the legal obligation to answer for an act done, and to repair any injury it may have caused.¹⁰³

There is however, no common definition of the term ‘accountability’ in the context of conflict, mass atrocities and the aftermath. Several terms are used to explain it and it is often synonymous to the term ‘transitional justice’ that encompasses mechanisms that can effect justice, offer reparations to victims, establish a culture of respect of human rights as well as contribute to reconciliation of societies recovering from conflict.¹⁰⁴

In this thesis, the term ‘accountability’ is used to include mechanisms undertaken both at the national or international level to ensure justice, truth and reparations in aftermath of mass atrocities. These specifically include measures that assign individual criminal responsibility for violations and abuse; impose legitimate consequences for perpetrators including payment of compensation and public acknowledgment of guilt; truth telling to generate official historical records; and measures for victim reparations. The focus of this thesis is on measures proposed in the Agreement on Accountability and Reconciliation and its Annexure or ongoing in Uganda that includes domestic and international prosecutions, use of traditional justice, truth telling and reparations processes.

International crimes/mass atrocities: are the crimes of serious concern to the international community as a whole. It includes; the crime of genocide, crimes against humanity, war crimes and crime of aggression as defined in the Rome Statute of the International Criminal Court,¹⁰⁵ Geneva Conventions of 12 August 1949, the Additional Protocols of 1977 and violations of human rights treaties that obligates states to investigate, prosecute, punish or

¹⁰³ American Heritage Dictionary of the English Language (4th ed) Houghton Mifflin Company (2000) <http://legal-dictionary.thefreedictionary.com/accountability> (accessed 13 Feb 2009).

¹⁰⁴ Report of the Secretary General *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies* UN Security Council S/2004/616 (24 August 2004) para 8.

¹⁰⁵ Rome Statute arts 5, 6, 7, 8 and 8 *bis*.

extradite offenders such as the Convention against Torture.¹⁰⁶ In this thesis, ‘international crimes’ is used interchangeably with the term ‘mass atrocities’ that characterises such crimes.¹⁰⁷

Justice: as used in this thesis means, ‘regard for the rights of the accused; for the interests of victims and for the well-being of society at large.’¹⁰⁸ This implies the duty of the state to investigate violations, to prosecute perpetrators and punish them if guilt is established and rights of victims to receive fair and effective remedies through courts or other administrative bodies.¹⁰⁹

Truth: as used in this thesis encompass facts on the history, patterns and manifestations of a conflict including details of violations, abuse of human rights and humanitarian law and in the event of death and disappearance, information on the whereabouts and circumstances of death of victims.¹¹⁰

Reparations: as used in this thesis encompasses a range of measures such as rehabilitation, restitution, compensation, guarantees of non-recurrence and other symbolic measures such as apologies, memorials and commemorations that may be collective or individual.¹¹¹

1.6 Objective

The objective of this thesis is to examine the, who, what, when, where, why and how of the accountability measures proposed for the LRA conflict. The thesis examines how the multiple accountability measures, both judicial and non-judicial, could be effectively used to promote justice, truth and reparations. Chapter two examines the applicable international norms to the conflict while chapter three examines the international legal obligation of

¹⁰⁶ Updated Set of Principles for the Protection and promotion of Human Rights through Action to Combat Impunity’ (Diane Orentlicher) Economic and Social Council E/CN.4/2005/102/Add.1 (8 Feb 2005) B.

¹⁰⁷ Chapter two of the thesis further elaborates these terms.

¹⁰⁸ Report of the Secretary General (n 80 above) para 7.

¹⁰⁹ Updated Set of Principles for the Protection and promotion of Human Rights through Action to Combat Impunity’ (n 105 above) principle 19.

¹¹⁰ This definition is derived from a reading of clauses 2.2 and 2.3 of the Principle Agreement on Accountability and Reconciliation and clause 4 of the Annexure.

¹¹¹ This definition is derived from clause 9 of the Agreement on Accountability and Reconciliation.

Uganda. These two chapters, together with the introductory remarks in chapter one, create a framework for analysis in the chapters that follow. Each proceeding chapter examines a different accountability measure; its strengths and weaknesses and the challenges and opportunities that they present. The analysis is the basis for conclusion and recommendations in the last chapter.

Using lessons learned from other conflict or post conflict states, the analysis of accountability for international crimes committed in the LRA conflict could inspire short-term reforms on the functions and roles that the different mechanisms to remain effective. In the long run, this could serve as lessons learned for other states in the aftermath of mass atrocities. The target audience is key personnel in the different institutions, policy makers working on policy and legislation for accountability measures for international crimes in Uganda, the political leadership in Uganda and other governments in the Great Lakes region, the LRA and all persons concerned or/and interested in matters of accountability for mass atrocities.

1.7 Methodology

The author seeks to accomplish these objectives by undertaking an in-depth desk review of the available literature including a review of primary sources like legal texts and government periodicals. The thesis also relies on reports undertaken in the last two decades that are a result of extensive field research relating to accountability mechanisms and impact of the LRA conflict on civilian population generally. This provides reference material and helps the study to make a comparison between laws, policies and their effects on ground to make suggestions for reform.

The thesis further analyses and highlights lessons learnt from accountability processes in countries such as Sierra Leone, South Africa, Rwanda, Peru, Liberia and Columbia for comparison of the models to the ones being pursued in Uganda. The lessons learnt in the situations highlighted also inform the discussion on the LRA conflict and help to generate analysis, recommendations, and conclusions. This required an extensive review of varied sources of information ranging from newspapers, to treatises, judgments, periodical

literature, commentaries, and other publications relating to accountability for mass atrocities. Government sources, such as statistics, official statements, or interventions before the press, are also used. Other reports, statements, and official documents from international organisations and governments regarding accountability are analysed and factored in accordingly.

The author also held informal discussions and interviews with victims/survivors of atrocities in Northern Uganda, politicians, judicial officials, prosecutors, scholars and policy makers to get a practical insight on accountability processes in Uganda.

1.8 Literature review

As a result of the mounting concern about the LRA conflict and the attendant mass atrocities, there has been wide international and national media coverage of the conflict as well as films and documentaries. The most prominent among these are 'Uganda Rising'¹¹²; 'Rebels without a Cause/Journey into Sunset'¹¹³ and Invisible Children's 'Rough Cut'.¹¹⁴ There is also a growing scholarship as well as advocacy giving various accounts of the conflict; its history; features; how and why the atrocities occurred and possible resolution measures.¹¹⁵ Several studies have assessed events in Northern Uganda, before and after independence in search of the root cause of the conflict that is said to be rooted in the history of ethnic politics in Uganda dating back to the colonial era.¹¹⁶

¹¹² This documentary focuses on the plight of civilians in Northern Uganda and it won seven awards in Canada, France, the USA and Norway <http://www.ugandarising.com/home.html>.

¹¹³ Former special advisor to the president at the International Crisis Group, John Prendergast who now co-chairs the Washington based project – ENOUGH produced this documentary.

¹¹⁴ This documentary was dedicated to the 'night commuters' in Uganda http://www.invisiblechildren.com/media/assests/file/online_media_kit.pdf (accessed 15 July 2011); another video by Invisible Children 'Kony2012' aimed at generating international commitment to capture the LRA leader Joseph Kony, is the most viewed video in 2012. The video has become a media sensation and attracted a lot of criticisms from Uganda and abroad for poor portrayal of the conflict.

¹¹⁵ T Allen *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2006); T Allen 'War and Justice in Northern Uganda: An Assessment of the International Criminal Court Intervention' (2005) *Crisis Research Centre* 1 - 100; Citizens for Global Solutions 'In Unchartered Waters: Seeking Justice Before the Atrocities Have Stopped' (2004) http://gobalsolutions.org/files/general/unchartered_waters.pdf among others.

¹¹⁶ A Branch 'Exploring the Roots of LRA Violence: Political Crisis and Ethnic Politics in Acholiland' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010); C Dolan *Social Torture: the Case of Northern Uganda* (2009); S Finnström *Living with Bad Surrounding: War, History and Everyday Moments in Northern Uganda* (2008); A Branch 'Neither Peace nor Justice: Political Violence and the Peasantry in Northern

The spiritual dimension to the LRA conflict has been a popular focus of the media and has been subject to academic scholarship that also analysed the political agenda of the LRA and its military strategies.¹¹⁷ Some authors have gone as far as seeking the LRA leader's comments on these issues.¹¹⁸ For instance, Green describes his journey up and down the Nile in the quest to locate and interview Joseph Kony. He provides, a thoughtful and even-handed exploration of a conflict that has been sensationalised, misunderstood, or ignored and expounds on why President Museveni might not have wanted to end the war, how Sudan is involved and how difficult it is to piece everything together.¹¹⁹ In an anthropological research, Finnström acknowledges and expounds on the difficulty of researching during war. He argues that war violates cosmologies as well as people and opines that, an intercultural understanding of the conflict at issue and of its local implications provides a framework for dealing with the uncertainties of research in war.¹²⁰

Several reports reviewed the humanitarian and security situation of IDPs and concluded that the government of Uganda and the international community did not do enough to protect the civilians in IDP camps.¹²¹ Some reports even suggested the dismantling of IDP camps,

Uganda 1986 – 1998' (2005) 8(2)*African Studies Quarterly* 1 – 31; C Mbazira, 'Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda' in C Murungu & J Biegon (eds) *Prosecuting International Crimes in Africa* (2011).

¹¹⁷ K Titeca 'The Spiritual Order of the LRA' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010); S Finnström *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda* (2003); H Behrend 'War in Northern Uganda: The Holy Spirit Movement of Alice Lakwena, Severino Lukoya and Joseph Kony (1987 – 1997)' in C. Clapham (ed) *African Guerrillas* (1998); H Behrend *Alice Lakwena and the Holy Spirit: War in Northern Uganda 1986 – 97* (1999); H Behrend 'Power to Heal, Power to Kill: Spirit Possession and War in Northern Uganda (1986 – 1994)' in H. Behrend et al. (eds) *Spirit, Possession Modernity and Power in Africa* (1999).

¹¹⁸ M Schomerus 'A Terrorist is not a Person like me: An Interview with Joseph Kony' in T Allen and K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010).

¹¹⁹ M Green *The Wizard of the Nile: The Hunt for Africa's Most Wanted* (2008).

¹²⁰ S Finnström 'In and Out of Culture: Fieldwork in War-torn Uganda (2001) 21 *Critique of Anthropology* 247 – 258.

¹²¹ P Diane 'Fulfilling the Forgotten Promise: The Protection of Civilians in Northern Uganda' (Jan 2006) Inter-Action's Protection Working Group; W Weeks *Pushing the Envelope: Moving Beyond 'Protected Villages' in Northern Uganda* United Nations Office for Coordination of Humanitarian Affairs (March 2002); Foundation for Human Rights Initiative *Northern Uganda: Peace at Last? July – Dec 2006* (2006); C Dolan 'Views on the Northern Uganda Conflict from Inside the War Zone' (2000) *COPE Fieldwork Findings*; IRIN *In-depth: Life in Northern Uganda: When the Sunsets, we Start to Worry...* Humanitarian News and Analysis (Jan 2004); Amnesty International 'Uganda: Summary of Human Rights Concerns' (2003); GL Bramucci 'Waiting Games: Growing Up with War in Northern Uganda' (2003) *Associazione Volontari Per il Servizio Internazionale (AVSI)*; Conciliation Resources 'Northern Uganda: One Step Forward, Two Steps Back' (2003) *Kacoke Madit and Reconciliation Project*; D Westbrook 'The Torment of Northern Uganda: A Legacy of Missed Opportunities

return of the population to their original homes and a search for alternative solutions to the issue of security of civilians.¹²² While other reports give detailed accounts of the most notorious LRA attacks on villages and IDP camps in Uganda.¹²³ Other commentators analysed the scale, incidences of abduction, the impact of this, and the conflict on the populations in Northern Uganda.¹²⁴ An increasing amount of literature has also considered the return and resettlement experiences of children forcefully abducted by the LRA.¹²⁵ Some specifically focus on the situation and the abuse of females during the war.¹²⁶ Annan

(2000) *Online Journal of Peace and Conflict Resolution*; Refugee Law Project & Internal Displacement Monitoring Centre (2 ed) *Only Peace can Restore Confidence of the Displaced: Update on the Implementation of the Recommendation made by the UN Secretary General Representative on IDP's Following his visit to Uganda* (Oct 2006); this report investigates progress made in the protection and security of IDPs in Uganda. The report uses benchmarks set by the UN Secretary General Representative on IDP's; see also FM Deng 'The International Protection of the Internally Displaced' (1995) *International Journal of Refugee Law Special Issue* 76; that argues that the problems of internal displacement can only be solved by addressing the root causes, often embedded in civil wars. The author further argues that only peace can restore the confidence of the displaced and encourage them to return to their homes and resume normal life and that as long a conflict prevails, not only will deprivation persist, but respect for human rights and fundamental freedoms will remain elusive.

¹²² Acholi Religious Leaders' Peace Initiative *Let my People go! The Forgotten Plight of the People in Displaced Camps in Acholi* (July 2001).

¹²³ See for instance; Justice and Reconciliation Project 'Remembering the Atyak Massacres: April 20th 1995' (April 2007) 4 *Justice and Reconciliation Project Field Notes*; this report recounts the struggles faced by civilians in Atyak in Northern Uganda where in one massacre in 1995, the LRA under the command of Vincent Otti killed over 300 civilians. The report advances recommendations to meet the victims needs of justice; G Opobo et al., 'Kill Every Living thing: Barlonyo Massacres' (28 Feb 2009) *Justice and Reconciliation Project Field Notes*; documents the massacre of over 300 civilians in Barlonyo IDP camp in February 2004 by the LRA Okot Odhiambo indicted by the ICC. The report calls for the prosecution of the responsible LRA leaders and accountability of the government of Uganda for failing to protect the civilians; Justice and Reconciliation Project 'The Mukura Massacres of 1989' (March 2011) *Justice and Reconciliation Project Field Note XII*; Justice and Reconciliation Project 'As Long as you live, you will Survive: The Omot Massacre'(Feb 2010) *Justice and Reconciliation Project Field Note XI*; Justice and Reconciliation Project 'The Lukodi Massacre 19th May 2004' (April 2011) *Justice and Reconciliation Project Field Note XIII*.

¹²⁴ P Pham et al *Abducted: The Lord's Resistance Army and Forced Conscriptioin in Northern Uganda* (2007); Amnesty International 'Breaking God's Commandments: The Destruction of Childhood by the Lord's Resistance Army' (1997) *Amnesty International AFR 59/01/97*; World Vision *Pawns of Politics: children, conflict and peace in Northern Uganda* (2004); Human Rights Watch *The scars of death: Children abducted by the Lord's Resistance Army in Uganda* (1997); Human Rights Watch *Abducted and abused: Renewed Conflict in Northern Uganda* (2003); CR Soto *Tall Grass: Stories of Suffering and Peace in Northern Uganda* (2009); Human Rights and Peace Centre & Liu Institute for Global Issues *The Hidden War: The Forgotten People, War in Acholi and its Ramifications for Peace and Security in Uganda* (2003) 22.

¹²⁵ JN Corbin 'Returning Home: Resettlement of Formerly Abducted Children in Northern Uganda' (2008) 32(2) *Disasters* 316 – 335; T Allen & M Schomerus *A Hard Homecoming: Lessons Learned from the Reception Centre Process in Northern Uganda* (2006); J Annan et al., *The State of Youth and Youth Protection in Northern Uganda: Findings from the Survey of War Affected Youth* (2006); P Phuong et al., *Abducted: The Lord's Resistance Army and Forced Conscriptioin in Northern Uganda* (2007).

¹²⁶ J Annan et al., *The State of Female Youth in Northern Uganda: Findings from the Survey of War Affected Youth (SWAY)* (2008); K Carlson K & D Mazurana *Forced Marriage within the Lord's Resistance Army, Uganda* (2008); S McKay 'Girls as "Weapons of Terror" In Northern Uganda and Sierra Leonean Rebel Fighting Forces' (2005) 28(5) *Studies in Conflict & Terrorism* 385 – 397; S McKay 'Reconstructing Fragile Lives: Girls Social Reintegration in Northern Uganda and Sierra Leone' (2004) 12(3) *Gender and Development* 19 – 30; S McKay &

et al., for instance challenge the conventional notions that women recruited by the LRA are passive victims, documenting that females play an active role within LRA structures.¹²⁷ All the available literature on the LRA conflict agrees to the deploring humanitarian situation and failure of the government to protect civilians in Northern Uganda and call for resolution of the conflict.¹²⁸

There were several on an off attempts at peace negotiations between the government of Uganda and the LRA, and none of these attempts led to a resolution.¹²⁹ Some academic literature investigated the reasons behind the protracted conflict and possible solutions. For instance Branch argues that the debates regarding a solution to LRA conflict has failed to take into account the political agency of the Acholi peasantry and their relationship with the government on the one hand and the LRA on the other. He argues that both the LRA and the government failed to realise an effective popular mobilisation among the Acholi and concludes that the solution to end the conflict and violence lies in putting the Acholi peasantry at the centre of conflict resolution.¹³⁰

Van-Acker on the other hand argues that the robustness of the LRA conflict indicates that the forces working against peace outstrip those working for it.¹³¹ While Vinci argues that Kony and the LRA just prefer to continue to survive as an autonomous entity that is why peace offers have been not been accepted.¹³² Vinci further investigates the LRA's use of mutilation, abduction, surprise, and unpredictable attacks and concludes that the LRA is

DE Mazurana *Where are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War* (2004); S McKay et al., *Girls Formerly Associated with Fighting Forces and their Children: Returned and Neglected* (2006); G Onyango et al., *Girl Mothers of Northern Uganda Conference on Girl Child Mothers in Fighting Forces and their Post – War Reintegration in Southern and Western Africa: Bellagio Italy* (2005).

¹²⁷ J Annan et al., *Women and Girls at War: “Wives”, Mothers and Fighters in the Lord’s Resistance Army* (2009).

¹²⁸ Civil Society Organisation for Peace in Northern Uganda *Nowhere to Hide: Humanitarian Protection Threats in Northern Uganda* (2004); C Hema ‘Uganda: A Nation in Crisis’ (2007) 37(2) *California Western International Law Journal* 277 – 298; Human Rights and Peace Centre and Liu Institute for Global Issues *The Hidden War: The Forgotten People, War in Acholi and its Ramifications for Peace and Security in Uganda* (2003).

¹²⁹ CCH Lamwaka ‘Civil War and the Peace Process in Uganda 1986 – 1997’ (1998) 4 *East African Journal of Peace and Human Rights* 139.

¹³⁰ A Branch ‘Neither Peace nor Justice: Political Violence and Peasantry in Northern Uganda 1986 – 1998’ (2005) 8 *African Studies Quarterly* 1 – 31.

¹³¹ F Van-Acker ‘Uganda and the LRA: The New Order no one Ordered’ (2004) 103(412) *African Affairs* 335 – 357.

¹³² A Vinci *Armed Groups and the Balance of Power* (2009) 99.

strategically using these methods to create fear, which acts as a force multiplier to further its organisational survival and accounts for the protracted conflict.¹³³

Vinci further argues that although the LRA may have begun its war for instrumental goals, such creating political change, it replaced these goals with existential motivations. In the sense that the LRA rebel group fights in order to continue providing security and a vocation to its members, and that this would be lost by a return to wider society. The author posits that the factor allowing for this turn from instrumental to existential motivation is that the LRA has effectively separated itself from wider society and created an autonomous political community. This in essence implies that LRA members must first reintegrate in the greater Acholi and Ugandan community before a political settlement can be achieved.¹³⁴

Finnström addresses the peculiar concern that the LRA rebels had the Acholi elders' ceremonial 'warfare blessing' that has been interpreted as having turned into a curse on Acholiland. He interprets the possible 'warfare blessing' as a critical event regardless of whether it exists or not. He argues that the 'warfare blessing' can be regarded as the mere utterance of words or a blessing performed within the framework of the local moral world. He concludes that as much as the issue of the 'warfare blessing' is a lived consequence of the conflict, it cannot be used as an explanatory model for the cause and protracted nature of the conflict.¹³⁵

Several commentators have expounded on the generous assistance given to the LRA by the government of Sudan that they argue helped to sustain the conflict. Some have argue that the LRA was a *defacto* militia through which Sudan waged war against Uganda in retaliation to Uganda's government support of the SPLA.¹³⁶ Prunier suggests that there is an

¹³³ A Vinci 'The Strategic use of Fear by the Lord's Resistance Army' (2005) 16 *Small Wars and Insurgencies* 360 – 381.

¹³⁴ A Vinci 'Existential Motivations in the Lord's Resistance Army's Continuing Conflict' (2007) 20(4) *Studies in Conflict and Terrorism* 337 – 352.

¹³⁵ S Finnström 'Wars of the Past and War in the Present: The Lord's Resistance Army/Movement in Uganda' (2006) 76 *African* 200 – 220.

¹³⁶ M Schomerus 'The Lord's Resistance Army in Sudan: A History and Overview' (2007) *Geneva Graduate Institute of International Studies, Small Arms Survey (Sudan Human Security Baseline Assessment Project; Amnesty International 'Breaking God's Commandments: The Destruction of Childhood by the Lord's Resistance Army' (1997) Amnesty International AFR 59/01/97; Human Rights and Peace Centre The Hidden War: The Forgotten People, War in Acholiland and its Ramification for Peace and Security in Uganda (2003).*

undeclared war between Sudan and Uganda with DRC used as an external battlefield. He argues that in the DRC, from the fall of President Mobutu until 2002, proxy guerrilla organisations either fought each other or fought the armies of their sponsor's enemy in a proxy war that morphed into the bigger 'Congolese' conflict.¹³⁷ As illustrated in chapter two of this thesis, the sustained and continuous assistance given by the government of Sudan to the LRA between 1994 and 2005, rendered the LRA conflict an internationalised conflict operating alongside an internal conflict.

Schomerus investigates the military history of the LRA in Sudan and prospects for ending the conflict¹³⁸ and other studies analyse how the armed conflict by the LRA affected civilians in South Sudan, DRC and Central African Republic while providing an insight on cross-border relations.¹³⁹ Some authors argue that it was never the interest of the government of Uganda to resolve the conflict through negotiations,¹⁴⁰ advancing the additional argument that the conflict is beneficial to the government, as it has kept the army occupied and benefitted senior army officers economically.¹⁴¹

As a possible conflict resolution measure, the government of Uganda passed the Amnesty Act in 2002, granting a blanket amnesty to all who gave up rebellion against it.¹⁴² Critics of national amnesties argue that honouring amnesties promotes a culture of impunity.¹⁴³ Yet,

¹³⁷ G Prunier 'Rebel Movements and Proxy Warfare: Uganda, Sudan and the Democratic the Congo (1986 – 1999)' (2004) 103 *African Affairs* 359 – 383; G Prunier *World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (2009).

¹³⁸ M Schomerus 'The Lord's Resistance Army in Sudan: A History and Overview' (2007) 8 *The Small Arms Survey: HSBC Working Paper*.

¹³⁹ S Gordon et al., 'Reluctant Hosts: The Impact of the Lord's Resistance Army on Communities in Western Equatorial State, Southern Sudan' (2007) *World Vision*; M Schomerus 'Perilous Border: Sudanese Communities Affected by Conflict on Sudan-Uganda Border' (Nov 2008) *Conciliation Resources*; Invisible Children and Resolve 'LRA Crisis Tracker: Annual Security Brief' (2011) LRACrisisTracker.com.

¹⁴⁰ A Branch 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 12 (2) *Ethics and International Affairs* 179 – 198; C Dolan *Social Torture: The Case of Northern Uganda* (2009); S Finnström *Living with Bad Surrounding: War, History and Everyday Moments in Northern Uganda* (2008).

¹⁴¹ A Mwenda 'Uganda's Politics of Foreign Aid and Violent Conflict: the Political uses of the LRA' in T Allen and K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010); A Branch 'Exploring the roots of LRA violence and ethnic politics in Acholiland' (2010); S Finnström 'An African Hell of Colonial Imagination? The Lord's Resistance Army in Uganda, Another Story' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010).

¹⁴² Amnesty Act (2002) sec 2.

¹⁴³ K Roth 'It's Worth Bringing Tyrants to Justice' International Herald Tribune 10 Aug 2005; argues that it is possible to reach a peace agreement without amnesty provisions citing the case of the former Yugoslavian President Slobodan Milosevic who agreed to end the Bosnian conflict and accept the Dayton Peace Accord

several studies explored the role of amnesty in the wider transitional justice processes in Uganda and cited the need for it.¹⁴⁴ Feldman, however, questioned whether the government should forego justice in order to prevent bloodshed in Northern Uganda.¹⁴⁵ While Souaré assesses the justifications for grant of amnesty and conclude that, any peace agreement should include an amnesty provision. Souaré further argues that the amnesty provision should include the stipulation that any violation of the peace agreement would mean the nullification of amnesty guarantees.¹⁴⁶ Chapter three of this thesis investigates the place of amnesty in international law and finds that unless it contradicts an international treaty, it is not necessary unlawful. Chapter four specifically investigates how Uganda applied the amnesty law and finds that its operation of a 'blanket amnesty' thwarted Uganda's international obligations under treaties that Uganda ratified and domesticated that require prosecution of international crimes committed in Uganda.¹⁴⁷ The chapter concludes that the lapse of Part II of the Amnesty Act opens doors to the government to fulfil its international obligations of investigating, prosecuting and punishing offenders where guilt is established and ensuring that victims receive the right to an effective remedy.

without obtaining an amnesty, soon after international calls for prosecution; he also argues that the threats of ICC prosecution forced oppressive leaders in Sudan and the DRC to reform brutal practices in order to avoid the Prosecutor's attention; MP Scarf & PR Williams 'The Functions of Justice and Anti-Justice in the Peace-Building Process' (2003) 35 *Case Western Reserve Journal of International Law* 161 – 175; argue that amnesties do not fulfil the cathartic process of retribution and accountability, but instead leads to acts of revenge. The authors further argue that the stigmatising effect of unhindered criminal prosecutions works to isolate and weaken political legitimacy of disruptive actors in the international community.

¹⁴⁴ L Mallinder 'Uganda at a Crossroads: Narrowing the Amnesty?' (2009) *Working Paper: Beyond Legalism: Amnesties, Transition and Conflict Transformation Project*; R Murphy 'Establishing a Precedent in Uganda: The Legitimacy of National Amnesties under the International Criminal Court (2006) 3(1) *Eyes on the ICC*; B Afako 'Promoting Reconciliation: A Brief Overview of the Amnesty Process in Uganda' (Nov 2002) *Civil Society Organisations for Peace in Northern Uganda*; Acholi Religious Leaders' Peace Initiative *Seventy times Seven: The Implementation and Impact of the Amnesty in Acholi* (2004).

¹⁴⁵ RM Feldman 'A Deal with the Devil: Issues in Offering Joseph Kony Amnesty to Resolve the Conflict in Uganda' (2007) 18 *Small Wars and Insurgencies* 134 – 143.

¹⁴⁶ IK Souaré 'Moving the Ugandan Peace Process from the Dichotomy of Criminal Trials vs Amnesty' (2008) 17(2) *African Security Review* 106 – 112; See also the interesting debate advanced by Pensky in M Pensky 'Amnesty on Trial: Impunity, Accountability and the Norms of International Law' (2008) 1(1-2) *Ethics & Global Politics* 1 – 40; arguing that the norm against amnesty is based on a narrowly retributive concept of criminal justice, yet, a broader norm for democratic accountability would continue to prefer prosecutions over amnesties in international law but less for the opportunity for deserved retribution but more for the public enactment of the deliberative procedures associated with the rule of law.

¹⁴⁷ For instance, the Geneva Conventions of 1949 that were domesticated as the Geneva Conventions Act of 1969 of Uganda and it demands the investigation, prosecution, punishment or extradition of persons responsible for grave breaches.

In 2003, the government of Uganda referred the LRA situation to the ICC. The ICC promptly took up investigations and in 2004 issued warrants of arrest for the top five LRA leaders. This ushered in a debate in which some quarters argued for the need for amnesty to end the conflict and others for justice through prosecutions to end impunity.¹⁴⁸ Several scholars argued for the value of amnesty as a peace-building tool, stating that the unrelenting insistence on criminal prosecutions where there is an amnesty in place prolongs a conflict and exacerbates the suffering of civilians. Newman for instance argues that a restrictive rule on amnesties would have significant distributive effects in the ongoing project of international criminal justice.¹⁴⁹

Ssenyonjo on the other hand considers the question of whether a ‘total amnesty’ to individuals indicted by the ICC is binding on the ICC and found that it does not.¹⁵⁰ Moy argues that the lack of clarity on the question of amnesty in international law leaves some room for amnesty programs like the one in Uganda to prevail over ICC jurisdiction, particularly because the charges against the LRA strictly involve war crimes and crimes against humanity.¹⁵¹ Ssenyonjo further investigates whether amnesty is counterproductive to the work of the ICC and concludes that those who bear the greatest responsibility for the crimes committed in the conflict must face prosecutions. On the other hand, he opines that since 80% of LRA force either are children or abducted, they deserve amnesty. The difficulty he posits is how to categorise those members that deserve amnesty.¹⁵² Apuuli further

¹⁴⁸ P Pham et al., *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* (2005); B Afako ‘Reconciliation and Justice: Mato Oput and the Amnesty Act’ in O Lucima (ed) *Protracted Conflict Elusive Peace: Initiatives to end the Violence in Northern Uganda* (2002) 64 – 67; L Hovil and Z Lomo ‘Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation’ (2005) 15 *Refugee Law Project Working Paper*; E Baines et al., *War Affected Children and Youth in Northern Uganda: Towards a Brighter Future* (2006).

¹⁴⁹ DG Newman ‘The Rome Statute, Some Reservations Concerning Amnesties and a Distributive Problem’ (2005) 20(2) *American University International Law Review* 293 – 357.

¹⁵⁰ M Ssenyonjo ‘The ICC and the Lord’s Resistance Army Leaders: Prosecution or Amnesty?’ (2007) 54 *Netherlands International Law Review* 51 – 80; M Ssenyonjo ‘The ICC and the Lord’s Resistance Army Leaders: Prosecution or Amnesty?’ (2007) 7(2-3) *International Criminal Law Review* 363 – 710.

¹⁵¹ A Moy ‘The International Criminal Courts Arrest Warrants and Uganda’s Lord’s Resistance Army: Renewing the Debate over Amnesty and Complementarity’ (2006) 19 *Harvard Human Rights Journal* 267 – 273.

¹⁵² M Ssenyonjo ‘Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the ICC’ (2005) 10 *Journal of Conflict and Security Law* 405 – 434.

suggests that the top leaders of the LRA must account for the crimes committed in the conflict, while the abducted and conscripted foot soldiers should be amnestied.¹⁵³

In furtherance of this debate, MacMillan argues that amnesty and justice are not mutually exclusive. She argues that in Uganda, because of the risks of prolonged conflict, decades of authoritarian dictatorship and oppression, increased conflict related deaths and public opinion in favour of amnesty; amnesty will serve the interests of justice better than prosecution. She asserts that amnesty and negotiations might be just as effective as prosecutions in reinforcing to the Ugandan people that their government is finally open to non-military solutions, responsive to public opinion and accountable for its failures.¹⁵⁴

Rose and Ssekandi looked not only at the Amnesty Act but also examined whether traditional mechanisms aimed at aiding the process of reintegration and reconciliation in Northern Uganda are consistent with the goals pursued by the international community when instituting the ICC of attaining justice and deterring impunity. The authors argue that justice and reconciliation in Northern Uganda would require more than amnesty and the use of traditional mechanisms, which respectively work more towards ending the conflict and fostering reintegration of former combatants than towards justice.¹⁵⁵

Several other authors seized on the potential of Acholi traditional justice and healing ceremonies as possible accountability and reconciliation measures.¹⁵⁶ Pain, for instance argues that the way forward to achieve justice and reconciliation in Northern Uganda is to

¹⁵³ KP Apuuli 'Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda (2005) 5 *African Journal of Conflict Resolution* 33 – 61.

¹⁵⁴ KE MacMillan 'The Practicability of Amnesty as a Non-Prosecutory Alternative in Post Conflict Uganda' (2007) *Policy and Ethics Journal*.

¹⁵⁵ C Rose & FM Ssekandi 'The Pursuit of Transitional Justice and African Traditional Values: A Clash of Civilisations, the Case of Uganda (2007) 1 *African Prospects* 116 – 136.

¹⁵⁶ Refugee Law Project 'Position Paper on the ICC' 28 July 2004 <http://www.refugeelawproject.org/resources/papers/archive/2004/RLP.ICC.investigations.pdf>; L Hovil and JR Quinn 'Peace First, Justice Later: Traditional Justice in Northern Uganda' (2005) 17 *Refugee Law Project Working Paper*; L Hovil and Z Lomo 'Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation' (2005) 15 *Refugee Law Project Working Paper*; JB Odama 'Reconciliation Process (Mato Oput) among the Acholi Tribe of Northern Uganda' Commemorative address made during the ceremony for 21st Niwano Peace Prize Award Japan http://www.npf.or.jp/peace_prize_f/21/speech_e.pdf (accessed 8 July 2010); P Bako 'Does Traditional Conflict Resolution lead to Justice? The Mato Oput in Northern Uganda' (2009) 3 *Pretoria Student Review* 103; Mato Oput Project 'Community Perspectives on the Mato Oput Process: A research Study by the Mato Oput Project' (October 2009) 10.

combine formal amnesty and the performance of the Acholi traditional justice mechanisms of *mato oput* (drinking bitter root) and *gomo tong* (bending spears).¹⁵⁷ Further research on this matter broadened the range of Acholi rituals that could be used as conflict resolution measures including *lwako ping wang* (washing away the tears); *mayo kum* (cleansing the body); and *tumu kir* (cleansing abominable acts) among others.¹⁵⁸ Harlacher et al., for instance, give an in depth exploration of the different traditional justice and healing ceremonies in Acholi when and how they were performed in the past and the role the ceremonies are playing in the LRA conflict today. They conclude that symbolic acts of reconciliation and peace building rooted deep in the past can still have relevance in the present, even if weapons of war have changed.¹⁵⁹

Several other studies were highly critical of the use of Acholi traditional justice and healing ceremonies as an accountability measure for crimes committed in the LRA conflict. Some studies concluded that few people in the affected areas considered the traditional structures a key priority.¹⁶⁰ Bradbury, for example, noted that the tensions between traditional leaders over the possible financial benefits and that external support of traditional practices would be another way to bring the region under the government's control without contributing to improved education and economic development.¹⁶¹ Some studies pointed out that traditional structure in Northern Uganda is weak and fragmented

¹⁵⁷ D Pain 'The Bending of Spears: Producing Consensus for Peace and Development in Northern Uganda' (1997) *International Alert and Kacoke Madit*; this report was commissioned by International Alert following the 1997 big meeting (Kacoke Madit) of the Acholi in London. This meeting was a gathering of over three hundred Acholi from Uganda and the Diaspora, including government ministers, church leaders and LRA representatives. This meeting was aimed at raising international awareness of the situation in Northern Uganda and also to generate consensus for peace and reconciliation among the Acholi.

¹⁵⁸ E Baines *Roco Wat I Acholi: Restoring Relationships in Acholiland: Traditional Approaches to Justice and Reintegration* (2005); T Harlacher et al., *Traditional Ways of Copying in Acholi: Cultural Provisions for Reconciliation and Healing from War* (2006).

¹⁵⁹ T Harlacher et al., *Traditional Ways of Copying in Acholi: Cultural Provisions for Reconciliation and Healing from War* (2006).

¹⁶⁰ C Dolan 'Inventing Traditional Leadership? A Critical Assessment of Dennis Pain's The Bending of the Spears' (2000) 13 *COPE working Paper*; Accord 'Background papers presented to the conference on peace research and the reconciliation agenda September 1999' (1999) 32 *COPE working paper*.

¹⁶¹ M Bradbury *An Overview of Initiatives for Peace in Acholi, Northern Uganda* (1999); EK Baines 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) *International Journal for Transitional Justice*; JO Latigo 'Northern Uganda: Traditional Based Practices in Acholi Region' in L Huyse & M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2008); P Acirokop 'The Potentials and Limits of *Mato Oput* as a Tool for Reconciliation and Justice' in S Pamar et al., (eds) *Children and Transitional Justice: Truth Telling, Accountability and Reconciliation* (2010).

and that many of the traditional leaders were not sure of how to carry out traditional justice rituals, the studies also question the heritage of some of the traditional leaders.¹⁶²

As illustrated in chapter seven of this thesis, the author agrees with the above observations including the efficacy and challenges to the use of traditional justice. The chapter argues that traditional justice can only play a positive role in Uganda's pursuit of accountability if it is not fashioned as a national tool for accountability. That is if the use of traditional justice is limited to the community level and it is not treated as an alternative to other forms of accountability but rather as a complementary mechanism available to all who desire it.

Nonetheless, in search of a credible national alternative to the ICC investigations, the tendency to promote the use of traditional justice in Northern Uganda remained unabated. Quinn for instance explored the use of traditional justice instead of trials and truth commissions, to bring about societal acknowledgement of what has happened, and offered ideas as to how these traditional practices might augment the rebuilding process in Uganda.¹⁶³ Quinn further argues that traditional justice mechanisms were not only used historically, but continue to be used in contemporary society and are therefore relevant as an accountability measure for Uganda.¹⁶⁴ Murithi also argues that local approaches to peace building and reconciliation contain valuable lessons for international peacemakers with respect to rebuilding social trust and restoring communal existence.¹⁶⁵

Letha opined that local contexts must begin to inform western-based approaches to transitional justice; arguing that without them, external interventions often fail to resonate with the values, norms and beliefs of victims.¹⁶⁶ Other authors have argued that the tension between 'traditional' and 'western' forms of justice in Uganda arises from the varied

¹⁶² T Allen *War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention* (2005); T Allen 'The International Criminal Court and the Invention of Traditional Justice in Northern Uganda' (2007) *Politique Africaine* 147 – 165.

¹⁶³ JR Quinn 'Social Reconstruction in Uganda: The Role of Informal Mechanisms in Transitional Justice' (2006) 8(4) *Human Rights Review* 389 – 407.

¹⁶⁴ JR Quinn 'Beyond Truth Commissions: Indigenous Reconciliation in Uganda' (2006) 4(1) *The Review of Faith and International Affairs* 31 – 37.

¹⁶⁵ T Murithi 'Rebuilding Social Trust in Northern Uganda' (2002) 14 *Peace Review* 291 – 295.

¹⁶⁶ V Letha 'Abomination: Local Belief System and International Justice' (Sept 2007) 5 *Justice and Reconciliation Project Field Notes*; the author illustrates this point by focusing on the Acholi concept of *Kiir* - abomination.

objectives of the two, premised on the paradigm of retributive justice *vis-a-vis* the paradigm of restorative justice. While the former is primarily concerned with accountability and ensuring that perpetrators do not go unpunished, the latter is concerned with ensuring restorative justice involving active participation of the victim, the perpetrator and the community in a process that aims at the restoration of a harmonious relationship between victim and perpetrator.¹⁶⁷ While some quarters supported a resort to traditional justice because the majority of the LRA rebels were forcefully recruited, some as children, and forced to commit crimes against people.¹⁶⁸

Allen, after an in depth field research, discusses the ICC intervention in the ongoing LRA conflict, the local political circumstances in which it has opted to operate and the attendant controversy it has caused, with impressive detail. He agrees with most commentators on Northern Uganda that rituals of healing are common in Acholi but claims that there is no widespread enthusiasm for *mato oput* or other ceremonies performed as accountability mechanism for crimes committed during the war. He dismisses the role of Acholi traditional justice generally and *mato oput* in particular as hardly a unique system of Acholi justice stating that no such a thing exists. He puts forward a fervent argument for the role of the ICC in the conflict, arguing that the people in Northern Uganda require the same kind of conventional legal mechanism as everyone else living in modern states.¹⁶⁹

Allen further argues that aid agencies funded the establishment of ‘traditional’ leaders, including newly created paramount chiefs for the Acholi, Madi, Iteso and Langi peoples, with a stake in promoting the use of local rituals in addressing violent crimes. He argues that the merits of reifying local rituals in a form of semi-official ‘traditional justice’ have been

¹⁶⁷ M Maloney & B Harvey ‘Breaking Eggs/Re-building Societies: Traditional Justice as a Tool for Transitional Justice in Northern Uganda’ (2006) 372 *Public Policy and Dispute Resolution* 4.

¹⁶⁸ L Hovil & JR Quinn ‘Peace First, Justice Later: Traditional Justice in Northern Uganda’ (2005) 17 *Refugee Law Project Working Paper*; JB Odama ‘Reconciliation Process (Mato Oput) among the Acholi Tribe of Northern Uganda’ Commemorative address made during the ceremony for 21st Niwano Peace Prize Award Japan, available at www.npf.or.jp/peace_prize_f/21/speech_e.pdf (accessed 8 July 2010); P Bako ‘Does Traditional Conflict Resolution lead to Justice? The Mato Oput in Northern Uganda’ (2009) 3 *Pretoria Student Review* 103; Mato Oput Project ‘Community Perspectives on the Mato Oput Process: A research Study by the Mato Oput Project’ (October 2009).

¹⁶⁹ T Allen ‘Trial Justice: The International Criminal Court and the Lord’s Resistance Army’ (2006).

oversold and the dangers under-appreciated.¹⁷⁰ While Quinn considers the role and influence of Uganda's religious leaders on the use of traditional practices from the stand point of the six major faith groups and their consideration of the use of neo-traditional practice.¹⁷¹ Quinn further acknowledges that there are power dynamics at play behind and within traditional practices of acknowledgement in the wider transitional justice framework in Uganda. She concludes that sometimes, traditional practices are carried out by individuals who, at first glance appear to be the justifiable wielders of power, may in fact, be abusing this power.¹⁷²

The role of the ICC in the LRA conflict has without doubt been shrouded with legal, political and practical complexities and subject to numerous debates. Some authors investigate the circumstances of referral by President Museveni and question if the Uganda case was legally admissible by the ICC. Some commentators state that the ICC was drawn into the Ugandan situation by an error of judgment.¹⁷³ Arsanjani and Reisman for instance argue that the ICC should never have found the referral by Uganda to satisfy the threshold for admissibility set out in Article 17 of the Rome Statute.¹⁷⁴ Happold considers the various policy and legal issues involved in the ICC referral and the consequent investigations. After examining the legality of Uganda's 'self-referral' and propriety of the ICC Prosecutor's criteria for case selection, he questions the credibility of the ICC and its effectiveness.¹⁷⁵

Clark argues that the ICC opened investigations in Uganda on an unusual ground that appears to contradict its prosecutorial policies; which is the 'inability of the government forces to capture and arrest the LRA leadership'. He argues that in pursuing its first cases in the DRC and Uganda, the ICC is still struggling to define its identity and purpose and

¹⁷⁰ T Allen 'Ritual Ab(use)? Problems with Traditional Justice in Northern Uganda' in N Waddell & P Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (2008).

¹⁷¹ JR Quinn 'The Thing behind the Thing: The Role and Influence of Religious Leaders on the use of Traditional Practices of Acknowledgment in Uganda' (2010) 8(1) *Review of Faith and International Affairs* 3 – 12.

¹⁷² JR Quinn 'Power to the People? Abuses of Power in Traditional Practices of Acknowledgment in Uganda' *Penal-Disputing Ideas in Transitional Justice* Canadian Political Science Association; Montreal QB 1 June 2010.

¹⁷³ A Branch 'International Justice, Local Injustice' (2004) 51(3) *Dissent Magazine*; A Branch 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21(2) *Ethics and International Affairs* 179 – 198.

¹⁷⁴ MH Arsanjani & WM Reisman 'The Law in Action of the International Criminal Court' (2005) *American Journal of International Law*.

¹⁷⁵ M Happold 'The International Criminal Court and the Lord's Resistance Army' (2007) 8(1) *Melbourne Journal of International Law* 159 – 184.

endeavouring to secure the recognition and confidence of the states that back it. This he argues has led to a situation where the Court sometimes makes inconsistent decisions that undermine its legitimacy. He concludes that the ICC needs a more systematic process of case selection, and a clearer view of how to balance contending legal and political concerns, including the difficult task of addressing government atrocities, if it is to fulfil its mandate and the hopes of its supporters and populations affected by violence.¹⁷⁶

Schabas while investigating the ICC's first cases argues that from the beginning of its work, the ICC has taken initiatives aimed at attracting cases for prosecution rather than insisting that states fulfil their obligation to prosecute as required by the complementarity principle that is central to the Rome Statute. He further argues that the ICC has been unthreatening to the states concerned because it has targeted rebel groups rather than pro-government militias and others associated with the regimes concerned.¹⁷⁷

As illustrated in chapter five of this thesis, the author agrees with the observations of most of the commentators on the legal, political and practical complexities around the referral to the ICC and the investigations on only one party to the conflict. The author, however, notes that the government of Uganda has shown no interest in taking over prosecutions of the LRA leaders indicted by the ICC and the ICC has shown no inclination to hand over the prosecutions of these leaders to Uganda. The chapter therefore concludes that the ICC remains an important accountability forum for atrocities committed in the LRA conflict and that the ICC must ensure that meaningful processes of national prosecutions, truth telling, and reparations accompany all its activities, adhering to the notion of complementarity that is central to the Rome Statute.

¹⁷⁶ P Clark 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda' in N Waddell & P Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (2008).

¹⁷⁷ WA Schabas 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) 19 *Criminal Law Forum* 5 – 33; this changed in the Darfur and Kenya situations where the target of the ICC is mainly government officials though these were not 'self-referral' like the first cases of the ICC but referral by the Security Council and instigated by the ICC Prosecutor himself respectively. Perhaps in the cases of self-referral, the ICC will refrain from investigating state actors to encourage more referrals.

Some quarters however, view the ICC as imposing justice in what is comparable to imposed aid with all its negativities.¹⁷⁸ Some commentators went as far as arguing that the ICC process is a neo-liberal imposition of western values of justice in an African context.¹⁷⁹ Nouwen and Werner in addition question the representation of the ICC by its advocates as a legal bastion immune from politics arguing that the ICC is inherently political by making a distinction between ‘friends’ and ‘enemies’ of the international community, which it purports to represent. Using original empirical data, the authors demonstrates how in both Uganda and Sudan warring parties have used the ICC's intervention to brand opponents as enemies of humanity, and to present themselves as friends of the ICC, and thus friends of the international community. The authors observe that the ICC Prosecutor has at times encouraged this friend - enemy dichotomy. They conclude that their observations do not result in a denunciation of the ICC as a ‘political institution’ but underline that a sound normative evaluation of the ICC's activities can be made only when its political dimensions are acknowledged and understood.¹⁸⁰

The ICC was sore a point during the Juba negotiations mediated by Riek Machar, the SPLA commander and now vice President of South Sudan.¹⁸¹ The Juba talks were perhaps the best chance for a negotiated settlement but stalled several times due to the looming threat of ICC warrants of arrest. This sparked the peace versus justice debate among scholars and commentators.¹⁸² A Refugee Law Project report defined ‘peace’ as the absence of war and

¹⁷⁸ C Dolan, ‘Imposed Justice and the need for Sustainable Peace in Uganda’ presentation to Beyond Juba Project/AMANI Project, Transitional Justice Training Programme for Parliamentarians (2008) http://www.beyondjuba.org/Conference_presentations/Imposed_Justice_and%20the_need_for_Sustainable_Peace_in_Uganda.pdf (accessed 12 June 2010).

¹⁷⁹ A Perkins ‘Justice for War Criminals – or Peace for Northern Uganda?’ <http://www.guardian.co.uk/society/katineblog/2008/mar/20/justiceforwarcriminalsorp> (accessed 15 June 2010).

¹⁸⁰ SMH Nouwen & WG Werner ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ (2010) 21 (4) *European Journal of International Law* 941 – 965.

¹⁸¹ S Perrot ‘Northern Uganda: a “forgotten conflict”, again? The Impact of the International Resolution Process’ in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010); R Atkinson ‘The Realist’ in Juba? An Analysis of the Juba Peace Talks’ in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010); S Simonse et al., ‘NGO Involvement in the Juba Peace Talks: The Role and Dilemmas of IKV Pax Christi’ in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010); R Iya ‘Encountering Kony: A Madi Perspective’ T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010).

¹⁸² T Allen *War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention* (2005); T Allen ‘The International Criminal Court and the Invention of Traditional Justice in Northern Uganda’ (2007) *Politique Africaine* 147 – 165; A Branch *The Political Dilemma of Global Injustices:*

‘justice’ as dealing with the past abuses, argues that there is a clear order in which the two should happen, that is; peace needs to be secured before justice can be decided upon and carried out.¹⁸³ While other scholars argue that peace and justice are inextricably linked and can be pursued together.¹⁸⁴ Yet, several others disagreed, arguing that although peace and justice are complementary in that justice can deter abuses and can help make peace sustainable by addressing grievances non-violently; the reality of peacemaking sometime requires a deal with perpetrators that is unavoidable and necessary to prevent further conflict and suffering.¹⁸⁵

Several scholars investigated the extent to which criminal justice should be compromised for the sake of peace.¹⁸⁶ Hoening argues that from a victim’s perspective, ‘peace without justice’ may make decidedly more sense than ‘justice without peace’ would. In addition, he pointed out weaknesses with retributive justice in the context of the ICC, which included its limited scope and reach - it focuses only on a small number of perpetrators of international crimes. He argued that justice of this nature will only ‘scratch the surface of the suffering heaped upon the local population in a war that has lasted two decades’.¹⁸⁷

Southwick suggests that to help maximise the prospects of peace in Uganda, the ICC should limit its role, applying pressure in a way that reinforces the exit options of amnesty for top

Anti-civilian Violence and the Violence of Humanitarianism, the Case of Northern Uganda (2007); A Branch ‘Uganda’s Civil War and the Politics of ICC Intervention’ (2007) 21(2) *Ethics and International Affairs* 179 – 198.

¹⁸³ L Hovil & JR Quinn ‘Peace First, Justice Later: Traditional Justice in Northern Uganda’ (2005) 17 *Refugee Law Project Working Paper*.

¹⁸⁴ E Baines ‘Accountability, Reconciliation and the Juba Peace Talks: Beyond the Impasse (2006) *Justice and Reconciliation Project*.

¹⁸⁵ K Hanlon ‘Peace or Justice? Now that the Peace is being Negotiated in Uganda, will the ICC still Pursue Justice?’ (2007) 14 *Tulsa Journal of Comparative and International Law* 295; N Grono & A O’Brien ‘Justice in Conflict? The International Criminal Court and Peace Process in Northern Uganda’ in N Waddell & P Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (2008); M Glasius ‘What is Global Justice and Who Decides?: Civil Society and Victim Responses to the International Criminal Court’s First Investigations’ (2009) 31(2) *Human Rights Quarterly* 496 – 520; this report discusses the salient sources of debate and controversy including the perceived selectivity or bias of the ICC, whether the ICC investigations are detrimental to peace-building efforts, the detachment of the ICC from the lived reality of local populations and victims and compensation to victims.

¹⁸⁶ A Greenawalt ‘Complementarity in Crisis: Uganda, Alternative Justice and the International Criminal Court’ (2009) 50 *Virginia Journal of International Law* 108.

¹⁸⁷ P Hoening ‘The Dilemma of Peace and Justice in Northern Uganda’ (2008) *East African Journal of Peace and Human Rights* 338 – 343; B Chinedu, ‘Implementing the International Criminal Court Treaty in Africa: The Role of Non-Governmental Organisations and Government Agencies in Constitutional Reform’ in KM Clark (ed) *Mirrors of Justice: Law and Power in the Post Cold War Era* (2010) 114.

LRA leaders to ensure a negotiated settlement. She further argues that in an ongoing conflict, even after a state's invitation to commence investigations; the ICC must independently analyse what effect its action may have on reducing atrocities and enhancing the prospects for peace.¹⁸⁸ Southwick further argues that to break the deadlock in the justice versus peace debate, all parties should carefully consider practical approaches to provisions of the Rome Statute that would enable suspension of the ICC indictments.¹⁸⁹ While Apuuli observes that although the ICC investigations resulted into the issuance of indictments, the indicted leaders up till now have not been apprehended, yet the warrants of arrest ended all hopes of a negotiated settlement.¹⁹⁰

Other authors disagree on the impact of the ICC investigations on the Juba negotiations. For instance, Gardner argues that if applied carefully and with the full use of its provisions for victims and witnesses protection, the ICC could play a positive role in furthering the resolution of LRA conflict while laying the groundwork for long-term reconciliation and stability in the country.¹⁹¹ Pescheke too challenges the view that ICC investigations onto ongoing conflicts will create an obstacle to peace. She argues that that the impact of the ICC investigations depends on the dynamics of a particular conflict and is likely to have both negative and positive effects on a peace process. She concludes that in the Ugandan case, the impact of the ICC on the peace prospects in reality might be quite limited and contends further that undue emphasis on the ICC should be avoided otherwise the ICC may unfairly be made a scapegoat should peace efforts fail.¹⁹²

A Human Rights Watch report furthers this argument and demonstrates that a decision to ignore atrocities reinforces a culture of impunity that may carry a high price. The paper argues that remaining firm on the importance of justice or at least leaving the possibility of justice open does not necessarily impede negotiations but can yield short and long-term

¹⁸⁸ K Southwick 'Investigating War in Northern Uganda: Dilemmas for the International Criminal Court' (2005) *Yale Journal of International Law* 105 – 119.

¹⁸⁹ K Southwick 'Uganda: Challenges of Peace and Justice' *Refugee International Bulletin* 19 Feb 2008.

¹⁹⁰ KP Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda' (2006) 4(1) *Journal of International Criminal Justice* 179 – 187.

¹⁹¹ M Gardner 'In Unchartered Waters: Seeking Justice before the Atrocities Have Stopped: The International Criminal Court in Uganda and the Democratic Republic of Congo' (June 2004) *Citizens for Global Solutions*.

¹⁹² K Peschke 'The ICC Investigations into the Conflict in Northern Uganda: Beyond the Dichotomy of Peace versus Justice' in BS Brown (ed) *Research Handbook on International Criminal Law* (2011).

benefits.¹⁹³ Indeed, as illustrated earlier in this chapter, the threat of ICC prosecutions is one of the reasons why the LRA called for negotiations in the first place and during the negotiation period from 2006 to 2008, atrocities dramatically reduced and the LRA have not perpetrated any atrocities in Northern Uganda since. However, civilians in the DRC, South Sudan and Central African Republic now endure the most of LRA brutality despite the pursuit of justice by the ICC.

Other works have looked at the experiences of the ICC in Northern Uganda. Some scholars focus on how the office of the Prosecutor attempted to develop a comprehensive approach in pursuit of his mandate. Brubacher for instance contributes an insider view of the ICC on the peace versus justice debate and the involvement of international criminal tribunals within ongoing conflicts. He elucidates on how the ICC Prosecutor attempted to develop a comprehensive approach in order to pursue his mandate. He concludes that international criminal courts can contribute to efforts to achieve sustainable peace that includes the re-establishment of legal order and the rule of law.¹⁹⁴

A movement urging the government of Uganda to seek an end to ICC investigations in the 'interests of justice' as provided for in the Rome Statute ensued.¹⁹⁵ In its policy paper, the office of the ICC Prosecutor indicated that it would be misleading to equate the 'interests of justice' to the 'interests of peace' arguing that the Ugandan debate is about 'interests of peace.'¹⁹⁶ The paper states that for cases where a situation should arise whereby ICC involvement directly threatened peace and stability, the right article to deal with this would be article 16, which obliges the court to defer an investigation or prosecution for one year on request of the Security Council by chapter seven resolution.¹⁹⁷

¹⁹³ Human Rights Watch 'Selling Justice Short: Why Accountability Matters for Peace' (July 2009) <http://www.hrw.org/node/84264> (accessed 15 July 2011).

¹⁹⁴ M Brubacher 'The ICC Investigations of the Lord's Resistance Army: An Insider View in 'The Lord's Resistance Army' in T Allen and K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010).

¹⁹⁵ Interests of Justice are provided for under article 53 of the Rome Statute.

¹⁹⁶ Policy Paper on the Interests of Justice (September 2007) Office of the Prosecutor, International Criminal Court <http://www.icc.cpi.int/NR/rdonlyers/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICC0TPInterestsOfJustice.pdf>.

¹⁹⁷ UN Security Council Chapter VII Resolutions are those that deal with situations that threatens international peace and security.

While Marong argues that to insist on justice at the ICC irrespective of how that might impact on the efforts to find durable peace in Uganda, risks defeating the goals of both peace and justice. The author moves the discussion from the justice versus peace debates instead arguing on the best forum for prosecutions for crimes committed in the LRA conflict. She argues, that the appropriate forum must not only be informed by the legal and moral imperatives of the LRA leadership but must also how it might affect accountability goals such as peace, victim participation, deterrence and legitimacy of the trial. She concludes that in theory, domestic trials offer the best prospect of attaining both peace and justice.¹⁹⁸

Beyond the debate on amnesty and the use of traditional justice as an alternative to the ICC, several other commentators agree on the need for domestic prosecution. Human Rights Watch in a memorandum enumerates why credible prosecutions of those responsible for international crimes in accordance to international standards are so important in Uganda. The memorandum gives detailed benchmarks that would need to be satisfied before any national alternative to trial by the ICC of the indicted LRA leaders would be adequate or for any other trial for international crimes committed in the LRA conflict.¹⁹⁹

Other authors argue that trials are far more effective if they are organised in the country where the crimes occurred with more involvement from local individuals and organisations.²⁰⁰ To cement this argument, Harris opines that the ICC should add a transfer mechanism to shift cases back to the courts of national jurisdiction modelled on a similar rule to that of the International Criminal Tribunal for Rwanda.²⁰¹ While other quarters questioned the competence and credibility of Ugandan courts to deal with crimes on the scale committed in the LRA conflict.²⁰² As illustrated in chapter six of this thesis, Ugandan

¹⁹⁸ A Marong 'Making Complementarity Work: The Case for Uganda-Based Trials of the Lord's Resistance Army and Lessons from the Rwanda Tribunal' (2010) *African legal Aid Quarterly* 39 – 46.

¹⁹⁹ Human Rights Watch 'Benchmarks for Assessing Possible National Alternatives to ICC Cases Against the LRA' (May 2007) *Human Rights Watch Memorandum*; the benchmarks are said to include credible, independent and impartial investigations and prosecution; rigorous implementation of internationally recognised standards of fair trial; and penalties on conviction that are appropriate and reflect the gravity of the crime.

²⁰⁰ JM Kamatali 'From the ICTR to ICC: Learning from the ICTR Experiences in Bringing Justice to Rwandans' (2005) 12 *New England Journal of International & Comparative Law* 89.

²⁰¹ GH Harris 'Closer to Justice: Transferring Cases from the International Criminal Court' (2010) 19(1) *Minnesota Journal of International Law* 201 – 239.

²⁰² Amnesty International 'Uganda: Agreement and Annex on Accountability and Reconciliation falls Short of a Comprehensive Plan to end Impunity (March 2008) *Amnesty International* AFR 59/001/2008; 'Report on the

courts and the ICD in particular has the competence to deal with prosecutions of international crimes perpetrated in the LRA conflict and all issues of concern can be ironed out by amendments of certain laws, selection of staff with requisite credentials and a robust outreach. The chapter however, questions whether the executive will allow the ICD to operate without interference in its activities. The chapter further questions whether the ICD will investigate crimes committed by state actors as individuals in government have shown every indication that they do not take lightly any accusation of wrong doing on their part. In addition, the Agreement on Accountability and Reconciliation, specifically shields state actors from prosecutions in the forum envisaged.²⁰³

Other mechanisms proposed in the Agreement on Accountability and Reconciliation are truth telling and reparations processes. Rose argues that truth telling and reparations processes could play a critical role in Northern Uganda's transition from conflict to peace.²⁰⁴ Previously, a Refugee Law Project Report analysed the process as provided for in the Amnesty Act from the perspective of those who have undergone the process, those who had received, or were expected to receive ex-combatants in their communities. The report concluded that, despite a number of challenges in its implementation, amnesty is perceived as a vital tool for conflict resolution and for longer-term reconciliation and peace within the specific context in which it is operating as it resonates with specific cultural understanding of justice. The report however, recommended truth telling or admittance of guilt on the part of former combatants as a measure to ensure reconciliation with the community.²⁰⁵ Matua too argues that reform in Uganda requires the full democratisation of the political society that can be constructed through a truth telling process to overhaul the state.²⁰⁶

As illustrated in chapter eight of this thesis, the author agrees with these observations and argue that truth telling process will give Uganda an opportunity to confront it's past, official

Work of the Office of the High Commissioner for Human Rights in Uganda' (12 February 2007) UN Doc A/HRC/4/49/Add2 para 31.

²⁰³ Agreement on Accountability and Reconciliation clause 4.1.

²⁰⁴ C Rose 'Looking Beyond and Traditional Justice and Reconciliation Mechanism in Uganda: A Proposal for Truth Telling and Reparations' (2008) 28 *Boston College, Third World Law Journal*.

²⁰⁵ L Hovil and Z Lomo 'Whose Justice? Perceptions of Uganda's Amnesty Act 2002: The Potential for Conflict Resolution and Long Term Reconciliation' (2005) 15 *Refugee Law Project Working Paper*.

²⁰⁶ M Matua 'Beyond Juba: Does Uganda Need a National Truth and Reconciliation Process?' (2007) 13 *Buffalo Human Rights Law Review* 401 – 413.

denials and imposed silences, and also will provide victims with public validation of their suffering and that this will make the state's obligation to provide integral reparations unquestionable. The chapter however, questions the extent to which individuals with state authority and the state institutions will give room to a truth telling process to exercise its powers and publicly question their conduct with a looming threat of prosecutions. The author further questions whether the NRM government will accept that its rule has been tarnished by decades of conflict and that state institutions are in need of reform or if it will, like it has done in the past, set sight to justifying policies, hiding complicity and rejecting blame.

The Agreement on Accountability and Reconciliation and its Annexure recognised the need for multiple mechanisms to bring about accountability and reconciliation, in which traditional justice, reparations and truth telling processes were agreed to as parallel and complementary to formal justice systems. Consultations on the different processes are underway, while domestic prosecutions through the newly created ICD have begun. However, challenges to the operation of the ICD are evident. For example, its first trial against Thomas Kwoyelo, the LRA commander captured in Garamba National Park in 2008 was brought to a standstill due to the operation of the Amnesty Act. In addition, Kwoyelo was not been charged with crimes against humanity that was perpetrated in the conflict due to lack of a domestic legislation criminalising such acts prior to March 2010. Human Rights Watch in a briefing paper therefore questions whether the Amnesty Act will ultimately bar cases against LRA members. The briefing paper also questions whether the International Criminal Court Act that implements the Rome Statute in Uganda can be used to prosecute crimes from the conflict as the law only commences in March 2010. The briefing paper further stresses the importance of the ICD in pursuing cases involving crimes committed by both the LRA and the state security organs.²⁰⁷

Human Rights Watch further expounds on the existing inadequacies in the Ugandan justice system and the questionable commitment shown by both the LRA and the government of

²⁰⁷ Human Rights Watch 'Justice for Serious Crimes before National Courts: Uganda's International Crimes Division' (Jan 2012) *Human Rights Watch Briefing Paper*; this briefing paper also explores the impact of structural inadequacies within the ICD, such as frequent rotation of staff on and off the Division and the lack of a witness and victim protection and support scheme.

Uganda to serious accountability efforts arguing that the true test ultimately lies not in the language of the text, but in the rigors of implementation of the Agreement on Accountability and Reconciliation.²⁰⁸ Worden further observes that planning mechanisms for accountability and reconciliation are lagging far behind fast moving events on the ground. He suggests that the government and civil society must move now from ideas to action if they are to be prepared to deliver a form of accountability that is acceptable to victims of the conflict and that can form the foundation for a lasting peace in Uganda.²⁰⁹ In the same tone, Mbazira posits that the Ugandan experience illustrates how perpetrators of international crimes can elude both international and domestic judicial processes; pointing out that despite ICC arrest warrants, the international community has failed to affect the arrest of suspects and that the ICD is idle due to the absence of accused persons.²¹⁰

Otim and Wierda on the other hand opine that the early treatment of accountability and reconciliation dilemmas at Juba set new standards in terms of efforts to meld local demands and international legal obligations and in terms of the process of soliciting the views of affected populations. In these respects, they argue that much can be learnt from experiences in Uganda, regardless of whether the peace process itself succeeds or fails.²¹¹ While Hopwood correctly points out that with or without a concluded peace agreement in Juba, further violence and unrest may continue in the region if longstanding grievances are not addressed. He further states that hidden arms caches, unexploded ordinances, and landmines scattered throughout the region, present a largely unmitigated security threat.²¹²

The parties did not sign a comprehensive peace agreement after the Juba talks. Some commentators have called for additional negotiations with a new format. Some have urged the UN Security Council and the African Union (AU) Peace and Security Council mandate a

²⁰⁸ Human Rights Watch *Uganda: The June 29 Agreement on Accountability and Reconciliation and the Need for Adequate Penalties for the Most Serious Crimes* (Jan 2008); Human Rights Watch 'Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation' (Feb 2008) 4 *Memorandum on Justice Issues and the Juba Talk*.

²⁰⁹ S Worden 'The Justice Dilemma in Uganda' (Feb 2008) *United States Institute of Peace Briefing Paper*.

²¹⁰ C Mbazira 'Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda' in C Murungu & J Biegon (eds) *Prosecuting International Crimes in Africa* (2011).

²¹¹ M Otim & M Wierda 'Justice at Juba: International Obligations and Local Demands in Northern Uganda' in N Waddell & P Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (2008).

²¹² J Hopwood 'With or Without Peace: Disarmament, Demobilisation and Reintegration in Northern Uganda' (Feb 2008) 6 *Justice and Reconciliation Project Field Notes*.

special envoy for LRA-affected areas assisted by the government of South Sudan to negotiate peace directly with Kony and his commanders.²¹³ Other reports have called for a better-coordinated military pursuit with assistance of the international community to bolster the fight against the LRA to ensure the apprehension or elimination of its leadership.²¹⁴ Other reports in addition call for a new strategy that prioritises civilian protection; unity of effort among military and civilian actors within and across national boundaries; and national ownership to bring the LRA conflict to an end.²¹⁵

Nonetheless, LRA conflict rages on and the rebels including culpable LRA leaders have been returning for years to their communities in Uganda and have taken advantage of the amnesty offered by the government. Accountability, nonetheless, remains a prominent legal issue with an ever-increasing literature on the subject and this thesis contributes to that. Most of the available scholarly work focuses on the tension caused by the ICC investigations on the amnesty process and the peace talks. Other literature concentrates on whether or not traditional justice processes are appropriate accountability measures; and what the appropriate forum would be; domestic or international courts. In addition, whether traditional justice or truth telling and reparations process are what is needed and what should come first, peace or justice. In this thesis, the author agrees with Quinn who suggests that in examining the case of Uganda where a myriad of mechanisms have been applied as transitional measures since Independence, what is required is complementarity not sequencing as the different measures can work to reinforce each other.²¹⁶ In addition, the author takes the view that there is no 'one size fits all' when it comes to accountability for mass atrocities. The thesis therefore gives an in depth consideration to the unique situation of the LRA conflict and analyses the four different accountability measures underway or proposed to deal with crimes committed in the conflict; investigating where and how they can effectively complement each other to promote justice, truth and reparations in Uganda.

²¹³ International Crisis Group 'The Road to Peace, with or without Kony' (10 Dec 2008) 146 *Africa Report*.

²¹⁴ J Prendergast 'Let's make a Deal: Leverage Needed in Northern Uganda Peace Talks' (Aug 2007) 6 *ENOUGH Strategy Paper*; A Benner & J Prendergast 'Ending the Lord's Resistance Army' (Oct 2011) *ENOUGH Project; Resolve From Promise to Peace: A Blueprint for President Obama's LRA Strategy* (6 Oct 2010).

²¹⁵ International Crisis Group 'LRA: A Regional Strategy beyond Killing Kony' (28 April 2010) 157 *Africa Report*.

²¹⁶ JR Quinn 'Chicken and Eggs? Sequencing in Transitional Justice: The Case of Uganda' (2008) *International Law Journal of Peace Studies* 35 – 53.

1.9 Overview of chapters

Chapter one gives a brief background to the conflict and provides a review of literature that forms the basis for analysis in the chapters that follows.

Chapter two discusses the international normative standards applicable to the conflict. The chapter concludes that war crimes and crimes against humanity were committed in the LRA conflict and discusses the specific elements of the crimes committed.

Chapter three gives a description of Uganda's international obligation in regard to international crimes. This chapter also examines the place of amnesties in international law and gives an overview of the different accountability measures, national and international, judicial and non-judicial.

Chapter four discusses the Uganda Amnesty Act and the Agreement on Accountability and Reconciliation reached in Juba. This chapter specifically analyses if these two instruments complies with Uganda's international obligations.

Chapter five analyses the ICC intervention in the LRA conflict. It critically analyses the hard questions asked in relation to ICC warrants of arrest, investigations, and response of victim groups in Uganda. It also looks at the ICC reparations regime and discusses its benefits for victims of the LRA conflict.

Chapter six focuses on the International Crimes Division of the High Court of Uganda. It discusses the laws applicable in the division, questions of jurisdiction, and other interlocutory matters likely to come before court.

Chapter seven discusses the challenges to application of traditional justice to the crimes committed in the LRA conflict and gives an overview of the different healing rituals and traditional justice mechanisms practised among the Acholi of Uganda.

Chapter eight analyses the features of a truth commission for Uganda. It gives an overview of the past two investigative commissions in Uganda and uses that and case studies from other transitional states to highlight potential challenges for a new truth telling and reconciliation process in Uganda.

Chapter nine considers all the analysis in the preceding chapters to provide conclusions and recommendations for the thesis.

CHAPTER TWO

INTERNATIONAL NORMATIVE STANDARDS REVELANT TO THE LRA ATORICITY IN UGANDA

2.1 Introduction

The introductory remarks in chapter one clearly established that the LRA conflict has had serious consequences for the civilian populations in Uganda and beyond, including killings, mutilations, sexual violence, displacements, pillage and abductions. The conflict also created a series of serious humanitarian crisis in the region. This brings us to the question of normative standards relative to the situation. An appraisal of the normative standards, inevitably involves a review of four bodies of law; international human rights law (IHRL);¹ international humanitarian law (IHL)²; international criminal law (ICL);³ and domestic law of states⁴. These together set the standard for governments, non-state actors and their agents during conflict situations and prescribe consequences for both the state and the individual for failure to meet those standards.⁵

These four bodies of law are interrelated and sometimes overlap in as far as they address accountability of the individual (whether state or non-state actor) for violations of norms that they contain. For instance, human rights treaties such as the Convention against Torture (CAT)⁶ and humanitarian law treaties such as the Geneva Conventions of 1949 and

¹ SR Ratner et al., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd ed) (2009) 10; defines IHRL as the body of international law aimed at protecting the human dignity by guaranteeing the rights of persons against their governments and to a limited degree, protects the rights of individuals against other actors such as guerrilla groups, terrorists or corporate entities. This body of law mainly developed after the Second World War.

² Ratner et al., (n 1 above)10; defines IHL as the body of law that governs the conduct of armed conflict and addresses limits on methods of war (mainly codified in the Hague Convention) and protection of individuals not engaged in hostilities during armed conflicts or occupation (mainly codified in the Geneva Conventions). IHL therefore offers protection to individuals against all powers engaged in conflict.

³ Ratner et al., (n 1 above) 10; defines ICL as the body of law assigning criminal responsibility for serious violations of international law including violations of human rights and humanitarian law.

⁴ In this case, the applicable domestic laws will be the laws of Uganda; detailed discussion is contained in chapter six of this thesis.

⁵ Ratner et al., (n 1 above) 4.

⁶ CAT art 4.

the Additional Protocols of 1977⁷ contain penal provisions creating individual criminal responsibility.⁸ In addition, domestic law of states criminalise many IHL and IHRL violations as ordinary crimes in a particular country.⁹ States also sometimes apply international treaties under broad jurisdictional bases, enabling them to prosecute international crimes in domestic courts or domesticate international treaties that become part of national laws.¹⁰ Therefore, as much as ICL and domestic penal laws contain their own normative standards, they also provide another alternative to enforce IHL and IHRL standards.¹¹

The ICL standard relevant to the atrocities committed in Uganda is mainly the Rome Statute that Uganda is a state party to.¹² The relevant IHL standard is mainly the Geneva Conventions¹³ and their Additional Protocols.¹⁴ The major IHRL treaties relevant to the conflict includes; the International Covenant on Civil and Political Rights (ICCPR);¹⁵ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹⁶ and the Convention on the Rights of the Child (CRC) and its Optional

⁷ First Geneva Convention art 50; Second Geneva Convention art 51; Third Geneva Convention art 130; Fourth Geneva Conventions art 147; Additional Protocol I to the Geneva Conventions arts 11 and 85.

⁸ Ratner et al., (n 1 above) 12 – 13, referring to ICTY Trial Chamber decision in *Prosecutor v Blagojevic and Jokic* Trial Judgment IT-02-60-T (17 January 2005) 834; the ICTY trial chamber equated ‘genocide and crimes against humanity with serious violations of international humanitarian law.’

⁹ Some of the crimes under domestic law would include acts such as murder, rape, assault, pillage, among others.

¹⁰ Ratner et al., (n 1 above) 15; in Uganda for instance, the Geneva Conventions were domesticated as the Geneva Convention’s Act of 1969 and the Rome Statute was domesticated as the International Criminal Court Act 2010; these two acts of Parliament , give Ugandan Courts jurisdiction to prosecute the grave breaches as contained in the Geneva Conventions and international crimes as contained in the Rome Statute.

¹¹ WM Reisman ‘Institutions and Practices for Restoring and Maintaining Public Order’ (1995) 6 *Dule Journal of Comparative and International Law* 175.

¹² Uganda ratified the Rome Statute on 14 June 2002 and domesticated in March 2010 as the International Criminal Court Act 2010 (ICC Act).

¹³ The First Convention (Convention I) is for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field; the Second Convention (Convention II) is for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the Third Convention (Convention III) is Relative to the Treatment of Prisoners of War; and the Fourth Convention (Convention IV) is Relative to the Protection of Civilian Persons in the Time of War; all the four Geneva Conventions came into force on 12 August 1949. Uganda ratified the Geneva Conventions on 18 May 1964 and domesticated in 1969 as the Geneva Conventions Act.

¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) 8 June 1977 and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Internal Armed Conflict (Protocol II) 8 June 1977 both ratified by Uganda on 13 March 1991. Uganda has not yet domesticated the Additional Protocols.

¹⁵ Uganda ratified the ICCPR on 21 June 1995 and the treaty domesticated it in chapter four of the Ugandan Constitution of 1995, as the bill of rights. .

¹⁶ Uganda assented to CAT on 3 November 1986.

Protocol on the Involvement of Children in Armed Conflict.¹⁷ The relevant African regional human rights treaties include the African Charter on Human and People's Rights (ACHPR)¹⁸ and the African Charter on the Rights and Welfare of the Child (African Children's Charter).¹⁹

Also of relevance to this discussion is the key legislation of the International Conference on Peace, Security, Democracy and Development on the Great Lakes Region. In particular the Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all Forms of Discrimination (Protocol on Genocide) and the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children (Protocol on Sexual Violence).²⁰ The states in the Great Lakes Region recognised that political instability and conflicts in the respective countries have a considerable regional dimension and thus require a concerted regional effort in order to promote sustainable peace and development. They therefore came up with the International Conference on the Great Lakes Region (ICGLR) that is an inter-governmental organization composed of countries in the region.²¹ The Protocols therefore form part of the applicable norms to the LRA conflict.

This chapter mainly gives a description of the normative standards contained in the different treaties and it premises the discussion on the fact that the atrocities committed in the LRA conflict amount to war crimes and crimes against humanity.²² To this end, the chapter sets out the crimes as described in the Rome Statute,²³ making analogies with the relevant IHL and IHRL treaties as appropriate. The discussion starts with war crimes and

¹⁷ Uganda ratified the CRC on 17 August 1999 and domesticated it as the Children Act of 1997; and accessed the Optional Protocol on the Involvement of Children in armed conflict on 6 May 2002.

¹⁸ Uganda ratified the ACHPR on 27 May 1986.

¹⁹ Uganda ratified the African Children's Charter on 21 October 1994.

²⁰ These two Protocols are part of the Pact on Security, Stability and Development in the Great Lakes Region agreed to between 14 and 16 December 2006 by the eleven member states. The Pact came into force on June 2008.

²¹ The eleven member states are Angola, Burundi, Central African Republic, Republic of Congo, Kenya, Democratic Republic of Congo, Uganda, Rwanda, Sudan, Tanzania and Zambia; the ICGLR was founded in 2000 when the UN Security Council in Resolutions 1291 and 1304 called for an International Conference on peace, security, democracy and development in the Great Lakes region.

²² ICC Pre-Trial Chamber II 'Public Redacted Version: Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005' (27 September 2005) ICC-02/04-01/05 para 42; ICC Trial Chamber II was satisfied that there are reasonable grounds to believe that Joseph Kony, together with other persons ordered or induced the commission of war crimes and crimes against humanity.

²³ Rome Statute arts 5, 7 & 8 sets out the elements and threshold for war crimes and crimes against humanity.

classifies the LRA conflict as ‘internationalised’ to determine the applicable section of the Rome Statute. The chapter then states the threshold for the crime and the different elements of the crime, referring to the atrocities perpetrated in the LRA conflict. The second part of the chapter discusses crimes against humanity, the threshold for commission of the crime; the different elements of the crimes referring to the atrocities perpetrated in the LRA conflict.

2.2 War crimes

War crimes are serious violations of customary or treaty rules belonging to the corpus of IHL. Traditionally war crimes were regarded as violations of rules relating to international armed conflict though it is now widely accepted that serious infringement of IHL in non-international armed conflicts also amounts to war crimes.²⁴ The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) explained the rationale behind this new trend in *Tadic case*.²⁵ The Appeals Chamber stated that since non-international armed conflicts have become more and more protracted and cruel, it follows that the distinction as international or non-international should lose value as far as human beings are concerned and added that since similar and equally brutal crimes are committed in either situation; the dichotomy should lose weight.²⁶

In support of this decision, the drafters of the Rome Statute codified war crimes committed in non-international armed conflicts in article 8 (2)(c)-(f). Unfortunately, this codification upholds the distinction in the regulation of international armed conflict on the one hand, and non-international conflicts on the other, thereby separating the laws applicable to the two situations. This retrogrades from the above decision, which was a move towards the

²⁴ A Cassese *International Criminal Law* (2nd ed) (2008) 81; this view originated from the *Tadic Appeal Decision* (ICTY) 1995, when the Appeals Chamber decided that war crimes must consist of a serious infringement of an international rule, in other words, must constitute a breach of a rule protecting important values involving grave consequences for the victim; that the rule violated must either belong to the corpus of customary law or be part of an applicable treaty and that the violations must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

²⁵ *Prosecutor v Tadic* Case No. IT-94-1-AR72 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Judgment of 2 October 1995) ICTY Appeal Chamber para 94.

²⁶ As above para 128-137.

abolition of the distinction to one corpus of law applicable to all conflicts.²⁷ Nonetheless, as far as war crimes are concerned, this distinction has been maintained both in ICL and IHL, therefore classification of the LRA conflict to determine applicable norms remains essential to establish applicable norms.

2.2.1 'Internationalised' conflict?

The LRA conflict is *prima facie* a non-international covered under common article 3 of the Geneva Conventions and Additional Protocol II. This is because the conflict is between a state party and a rebel group under responsible command that has carried out sustained and concerted military operations for a number of years,²⁸ with the necessary intensity required by Additional Protocol II.²⁹ In addition, the LRA conflict *prima facie*, is not an international conflict, as it does not meet the definition set forth in common article 2 of the Geneva Conventions, as it is not a conflict between states. Protocol I extends the definition of international armed conflict to include conflicts in which peoples are fighting against colonial dominance and alien occupation and against racist regimes in the exercise of the right to self-determination.³⁰ Article 4 of Protocol I further provides that entities other than states can become parties; in particular, national liberation movements, which claim to be fighting conflicts which fall under the definition provided in, article 1(4). The LRA rebel group does not fall under any of these characterisation but the factual circumstances of the conflict renders it internationalised.

The term 'internationalised' armed conflict describes non-international conflicts that are rendered an international conflict, although the factual circumstances that can achieve that internationalisation are complex and not yet well defined.³¹ The *Tadic Appeal Judgement* stipulated that a non-international armed conflict breaking out on a territory of a state might become international depending on the circumstances. It may become an

²⁷ WA Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010) 96.

²⁸ Geneva Conventions art 3 & Protocol II art 1(1).

²⁹ Protocol II, art 1(2); limits its application to exclude situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence.

³⁰ Protocol I art 1(4).

³¹ D Schindler 'International Humanitarian Law and Internationalised Armed Conflicts' (1982) 230 *International Review of the Red Cross* 255.

international conflict alongside a non-international conflict if another state intervenes in that conflict through its troops or if some of the participants acts on behalf of another state.³²

As noted in the background notes in chapter one, from 1994 to 2005, the government of the Sudan provided support to the LRA that helped to sustain the conflict. The International Court of Justice (ICJ) in the *Nicaragua* case³³ decided that a high degree of control is necessary for a non-international conflict to be internationalised. The issue brought before the ICJ was whether the US because of its financing, organising, training, equipping and planning of the operations of organised military and paramilitary groups of rebels (*contras*) in Nicaragua, was responsible for violations of IHL law committed by those rebels. The ICJ held that a high degree of control was necessary for this to be the case. It required that first, a party not only be in effective control of a military or paramilitary group, but that the party exercises control with respect to the specific operation in the course of which breaches may have been committed.³⁴ The Court further suggested that in order to establish that the US was responsible for 'acts contrary to human rights and humanitarian law' allegedly perpetrated by the Nicaraguan *contras*, it was necessary to prove that the US had specifically 'directed or enforced' the perpetration of those acts.³⁵

The *Tadic Appeal Judgment* found the 'control test' in the *Nicaragua Case* not persuasive. The Court held that in order to attribute the acts of a military or paramilitary group to a state, it must be proved that the state wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activities. In such a case, a can be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the state

³² *Tadic v Prosecutor* Case No IT-94-I-A (Judgment of 15 July 1999) ICTY Appeal Chamber (*Tadic Appeal Judgment*) para 84.

³³ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*) (Judgment) 27 June 1986 Reports of Judgments, Advisory Opinions and Orders International Court of Justice (*Nicaragua v United States of America*); see reference in *Tadic Appeal Judgment* para 100.

³⁴ *Nicaragua v United States of America* para 115.

³⁵ *Nicaragua v United States of America* para 115

should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.³⁶

The author is however, persuaded by the observation of Judge Shahabuddeen. Judge Shahabuddeen opined that the degree of control required to make a non-international armed conflict an international armed conflict is simply that which 'is effective in any set of circumstances to enable the impugned state to use force against the other state through the intermediary of the foreign military entity concerned.'³⁷ In addition, a Trial Chamber of the ICTY in a review of an indictment in *Rajic case*³⁸ found that a non-international conflict could be rendered an international conflict if foreign troops intervene 'significantly' and 'continuously'.³⁹

Following the above judicial reasoning, the author submits that the LRA conflict from 1994 to 2005 was internationalised because of the 'significant' and 'continuous' involvement and support that the Sudanese government rendered to the LRA. Amnesty International puts forward a very compelling argument:

Sudan government support for the LRA has been a critical factor in the movement's operation since 1994. Without Sudanese support, the LRA would not have had many of the weapons used to commit human rights abuses or the relatively secure rear bases to which abducted children are taken for training, often sited close to Sudan army units. The Sudan army uses the LRA as a militia to fight the SPLA (and to destabilize Uganda in response to the Uganda government's alleged support for the SPLA)....⁴⁰

³⁶ *Tadic Appeal Judgment*, para 124; see also paras 115 – 145 for detailed reasoning of the Appeal Chamber.

³⁷ *Tadic Appeal Judgment* 'Separate Opinion of Judge Shahabuddeen' para 20.

³⁸ *Prosecutor v Rajic* IT-95-12-R61, Review of the Indictment Pursuant to Rule 61 (13 September 1996) ICTY Trial Chamber (*Rajic Review*).

³⁹ *Rajic Review* para 12.

⁴⁰ Amnesty International 'Uganda: 'Breaking God's Commandments': The Destruction of Childhood by the Lord's Resistance Army' (1997) *AFR 59/001/1997* 8; additional literature elucidating to the support that the LRA received from Sudan includes; T Allen & K Vlassenroot 'Introduction' in T Allen and K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Realty* (2010) 12; T Allen 'Trial Justice: The International Criminal Court and the Lord's Resistance Army' (2006) 49; CR Soto 'Tall Grass: Stories of Suffering and Peace in Northern Uganda' (2009) 45.

Further, information from the formerly abducted and other returned LRA rebels indicate that the LRA bases in South Sudan were close to those of the Sudanese national army that supplied the LRA with arms, uniforms and training.⁴¹ In addition, the LRA engaged in battles against the SPLA and against the UPDF and in return, the government of Sudan gave it support and enabled the LRA to become what some analysts have described as a 'well equipped fighting force'.⁴² The government of Uganda and that of Sudan acknowledged the support each extended to rebel groups in South Sudan during the Nairobi negotiations aimed at restoring democratic relations between the two states. These negotiations led to the signing of the Nairobi Agreement on 8 December 1999 between Uganda and Sudan.⁴³ Indeed, this Agreement led to the return of LRA abductees facilitated by the government of Sudan,⁴⁴ clearly alluding to the degree of control that the government of Sudan had over the LRA. In addition, investigations by the Office of the Directorate of Public Prosecutions points to support that the government of Sudan rendered to the LRA that was crucial to the continued survival of the LRA therefore 'significant' and 'continuous' to render the conflict internationalised between 1994 and 2005.⁴⁵

Article 4(1) of the Fourth Geneva Convention, defines 'protected persons', victims of grave breaches – as:

⁴¹ Interview with Achiro Alice conducted on 15 May 2012 in Gulu. Achiro Alice was abducted by the LRA in 1990 and escaped from LRA captivity in 2002 during the Iron Fist Operation. She and other interviewees including Anena Lily Grace and Ajok Florence indicate that life in the LRA bases in South Sudan was completely normal; the Sudan government gave the LRA land on which the LRA built homesteads, farmed food crops and reared domestic animals. In case of serious illness, the rebels were air lighted with support of the Sudan government to Khartoum for treatment.

⁴² RR Atkinson 'The Realist in Juba? An Analysis of the Juba Peace Talks' in T Allen and K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 206; S Finnström *Living with bad Surroundings: War, History and everyday Moments in Northern Uganda* (2008) 84 – 91; G Punier 'Rebel Movements and Proxy Warfare: Uganda, Sudan and the Congo (1986 -1999)' (2004) 109(412) *African Affairs* 359 – 383.

⁴³ The Agreement was aimed at restoring diplomatic relations between Uganda and Sudan with the aim of restoring peace in the region. It was mediated by the former US President, Jimmy Carter and witnessed by the former Kenyan President, Daniel Arap Moi in Nairobi. Among other things, the parties pledged to cease support of rebel groups. For further details on the background and implementation of the Agreement see <http://www.cartercenter.org/news/documents/doc989.html> (accessed 08 July 2012).

⁴⁴ J Neu 'Sudanese and Uganda Delegations Agree on Steps to Implement the Nairobi Agreement' <http://www.cartercenter.org/news/documents/doc989.html> (accessed 08 July 2012).

⁴⁵ Interview with Joan Kagezi, the senior principal State Attorney in charge of international crime prosecution in the office of the Director of Public Prosecutions in Uganda conducted on 6 July 2012. Recent reports indicate that the government of Sudan is backing the LRA that are heading to the Darfur region of Sudan from Central African Republic to support the pro Sudan government militias in the area. See for instance Sudan Tribune 'Sudan is Backing Joseph Kony' 30 April 2012 and BBC News 'Ugandan Army says Sudan is Backing Joseph Kony's LRA' 30 April 2012.

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals...⁴⁶

The Convention intends to protect civilians in enemy territory, occupied territory, or combat zone who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In this case, the government of Sudan, through the LRA, exercised control over civilians in parts of Uganda and South Sudan. These civilians should be considered as protected persons, and they should benefit from the grave breaches provision. The author therefore contends that the LRA conflict between 1994 and 2005 was an internationalised armed conflict, operating a long side and non-international armed conflict. Therefore, the entire article 8 of the Rome Statute is applicable to the situation.⁴⁷

2.2.2 Threshold for application

From the reading of article 8(2) of the Rome Statute, war crimes only occur in situations of armed conflict and are committed against persons not taking part or no longer taking part in armed hostilities.⁴⁸ Therefore, armed conflict that meets the threshold of definitions set out in IHL is a precondition for the application of this article.⁴⁹ The first threshold for application is the existence of an armed conflict⁵⁰ and the second threshold is that the crimes

⁴⁶ Fourth Geneva Convention art 4.

⁴⁷ The indictment of the LRA indictees by the ICC only charges them for war crimes committed in a non-international armed conflict while the International Crimes Division of Uganda, set out clearly in its first indictment that the LRA conflict is internationalised and therefore charged the indictee with grave breaches as domesticated in the Geneva Conventions Act and alternative crimes were charged under the Penal Code Act of Uganda. The classification of the conflict as internationalised is important for the Geneva Convention Act that only criminalises 'grave breaches' committed in the context of international armed conflict as war crimes in Uganda. Further discussion on this is contained in chapter five and six of this thesis.

⁴⁸ Cassese (n 24 above) 89.

⁴⁹ Rome Statute art 8(2)(a) criminalises the grave breaches of the Geneva Conventions; art 8(2)(b) criminalises other serious violations of the laws and customs applicable to international armed conflict; art 8(2)(c) applies to violations of common article 3 of the Geneva Conventions; art 8(2)(e) criminalises other serious violations of the laws and customs applicable to internal conflicts.

⁵⁰ Rome Statute art 8(2)(d) and (f) excludes situations of internal disturbances and tension from the ambit of internal conflicts.

perpetrated in the conflict are committed as part of a plan or policy or as part of a large-scale commission of crimes.⁵¹

The existence of armed conflict: according to the Appeals Chamber of the ICTY, an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state. The Appeals Chamber further opined that an armed conflict exists from the initiation of violence and extends beyond the cessation of hostilities until a general conclusion peace is reached in cases of international armed conflict. In cases of non-international armed conflict, until a peaceful settlement is achieved. Until then, IHL continues to apply, whether or not actual combat takes place in the whole territory of the warring states or, in the case of non-international armed conflicts, in the territory under the control of a party to the conflict.⁵²

As previously, set out in this chapter and in chapter one, fighting between the LRA and the Ugandan army began in 1986 and persists to this day. As much as there has been several temporary ceasefire and numerous attempts at peaceful negotiations, a peace settlement to the conflict is yet to be achieved.⁵³ The hostilities in the region exceed the intensity requirements applicable to both international and non-international armed conflict. In addition, there has been protracted, large-scale violence between the LRA, the UPDF and armed forces of other states in the region. The LRA insurgency is therefore an armed conflict in the region.

Large-scale commission or commission as part of policy: according to the Appeals Chamber of the ICC, the requirement of large-scale commission under the Rome Statute is alternative to the requirement of a commission as part of a policy. The Appeals Chamber observed that ‘the statutory requirement of either large scale commission or part of a policy is not an absolute but qualified by expression ‘in particular’ that serves as a practical guideline to the

⁵¹ Rome Statute art 8(1).

⁵² *Prosecutor v Tadic* Case No. IT-94-1-A ‘Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction’ (Decision of 2 October 1995) ICTY Appeal Chamber para 70.

⁵³ Geneva Conventions I, art 5 & 75; Geneva Conventions II, art 5 & 75 and Geneva Convention IV, art 6 & 75 all contain provisions intimating that their application may extend beyond cessation of fighting.

court.⁵⁴ As set out in the introductory remarks in chapter one, the LRA have since 1986 been carrying out an armed conflict against the government of Uganda and the UPDF and have since directed several massive attacks not only against the UPDF but civilian populations in Uganda, South Sudan, DRC and Central African Republic.

The acts of the LRA created a cycle of violence and established a pattern of ‘brutalisation of civilians’ by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements. Abducted civilians, including children, are forcibly ‘recruited’ as fighters, porters and sex slaves to serve the LRA and to contribute to attacks against the Ugandan army and civilian communities.⁵⁵ In addition, there is evidence to suggest that the large-scale commission of crimes against civilians was part of the LRA policy that was devised and implemented by members of ‘Control Altar’ a section representing the core LRA leadership responsible for devising and implementing LRA strategy that includes standing orders to attack and brutalise civilian.⁵⁶ This meets the threshold of large-scale commission and commission as part of a policy.

2.2.3 Acts punishable as war crimes

Attacks against civilian population and civilian objects: the prohibition of attacks on civilian population and objects is a basic and vital principle in the conduct of hostilities. It is laid out in article 48 of Protocol I that provides that parties to a conflict must distinguish between the civilian population and combatants and between civilian and military objects. In addition, in non-international armed conflicts, article 13(2) of Protocol II, prohibits parties from making the civilian population the object of attack. The act is criminalised in article 85(3) of Protocol I. The article recognises such an act as a grave breach, when committed wilfully, causing death or serious injury to body or health. Also criminalised are

⁵⁴ *Prosecutor v Germaine Katanga and Mathieu Ngudjolo Chui* (situation in Democratic Republic of Congo: ICC-01/04-01/07) Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, article 58’ (13 July 2006) ICC Appeals Chamber para 70; Schabas (n 27 above) 200.

⁵⁵ Arrest Warrant for Joseph Kony (n 22 above) para 5.

⁵⁶ Arrest Warrant for Joseph Kony (n 22 above) para 9.

indiscriminate attacks against civilian objects, wilfully launched in the knowledge that the consequences will be excessive.⁵⁷

The LRA from the beginning of the conflict to date have directed attacks against the civilian population, launched with the intention to cause excessive consequences such as death or serious injury. The LRA launched its first attack against civilians in April 1995 in Atiak County in Amuru district.⁵⁸ Other attacks launched by the LRA on civilian population and objects include attack on Patongo camp in Pader district in November 2002. Attack on Acholi camp, in July 1996; attack in Lamwo county in Kitgum district in July 1997; attack in Pajong county in Kitgum district in July 2002;⁵⁹ attack in Barlonyo camp in Lira district in February 2004;⁶⁰ among several other attacks directed at the civilian population. The LRA also carried out several attacks against schools, hospitals and other civilian objects.⁶¹ According to the office of the Prosecutor of the ICC, between July 2002 and June 2004 alone, the LRA was responsible for over 850 attacks on the civilian population.⁶²

Wilful killing and murder: IHL prohibits the killing of civilians or persons not actively engaged in conflict if intentional or not justified by military necessity as a grave breach under the Geneva Convention and Protocol I⁶³ or as murder under common article 3.

⁵⁷ Rome Statute arts 8(2)(b)(i) & 8(2)(e)(i).

⁵⁸ Generally see, Justice and Reconciliation Project 'Remembering the Atiak Massacre April 20th 1995' (2007) 4 *JPR Field Notes*.

⁵⁹ R Gersony 'The Anguish of Northern Uganda: Results of a Field-Based Assessment of the Civil Conflicts in Northern Uganda' (1997) 38 – 43; Soto (n 40 above) 20 & 33; Arrest Warrant for Joseph Kony (n 22 above) counts 4, 8, 18, 25 & 32; Joseph Kony is charged on 6 counts of attack against civilian population; all the other LRA indictees have been charged with attack on civilian population; Okot Odhiambo on 2 counts and Dominic Ongwen on 1 count; ICC Pre-Trial Chamber II 'Public Redacted Version: Warrant of Arrest for Vincent Otti' (8 July 2005) ICC-02/04; ICC Pre-Trial Chamber II 'Public Redacted Version: Warrant of Arrest for Okot Odhiambo' (8 July 2005) ICC-02/04; ICC Pre-Trial Chamber II 'Public Redacted Version: Warrant of Arrest for Dominic Ongwen' (8 July 2005) ICC-02/04.

⁶⁰ Justice and Reconciliation Project 'Kill Every Living Thing: The Barlonyo Massacre' (2009) IX JRP Field Note; this report generally documents LRA attack against residents of Barlonyo camp, where the LRA commander, Okot Odhiambo ordered his soldiers to 'kill every living thing'. The report notes that the victims of the attack beg for justice against not only the LRA who committed the atrocities but also the government that failed to protect or acknowledge what happened there.

⁶¹ Generally see introductory remarks in chapter one; Human Rights Watch *Abducted and Abused: Renewed Conflict in Northern Uganda* (2003) 17 – 26; Soto (n 39 above) 33; Gersony (n 56 above) 41.

⁶² M Brubacher 'The ICC Investigations of the Lord's Resistance Army: an Insider View in T Allen and K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 269.

⁶³ First Convention art 50; Second Convention art 51; Third Convention art 130; Fourth Convention art 147 & Protocol I art 85(3)(b).

Several IHRL instruments prohibit arbitrary deprivation of life⁶⁴ and the Rome Statute criminalises it.⁶⁵ Murder or wilful killing of civilians is a central feature of the LRA conflict and every attack on the civilian population led to scores of death; a goal not justified by military necessity. Some of the most notorious massacres perpetrated by the LRA including the Patongo massacre in Pader district in November 2002, led to the wilful killing or murder of at least 20 people.⁶⁶ In the attack on Atiak County in April 1995, the LRA lined up more than 200 people on the bank of a river and shot them in cold blood. In July 1996, the LRA killed at least 150 Sudanese refugees in a succession of attacks in Acholi camp. In January 1997, the LRA clubbed or hacked to death at least 400 civilians in villages in Lamwo County. In July 2002, the LRA killed 90 civilians, most of them children in Pajong village, Mucwini in Kitgum district. In October 2002, the LRA killed at least 120 civilians in Amel village. In February 2004, the LRA killed at least 300 civilians, most burnt to death in their huts in Barlonyo IDP camp in Lira district.⁶⁷

In addition to killing civilians during attacks, the LRA killed civilians in captivity. The LRA routinely executed abducted civilians were whenever their services was not needed; when they attempted to escape or disobeyed orders; or as retaliation for a failed mission or attack. The LRA further allegedly used abductees as human shield during encounters with the UPDF. Young abducted children forced to carry loot were executed if they became tired, walked too slowly, asked to rest, or appeared to be longing for their homes and families; other abductees were forced to carry out such killings.⁶⁸ At times, young children captured were killed and their mothers given to LRA commanders or fighters as 'wives'. The LRA killed the children to ensure that their mothers only had children conceived by LRA members.⁶⁹ Girls and women who refused to engage sexually with the LRA commanders or fighters were ruthlessly beaten, then put into pits in swamps and buried alive. Whenever the LRA captured suspected UPDF or militia members or informants, they would tie them to trees

⁶⁴ UDHR art 2; ICCPR art 6; ACHPR art 4.

⁶⁵ Rome Statute art 8(2)(b)(vi) provides for wilful killings & art 8(2)(c)(i) provides for murder.

⁶⁶ Soto (n 40 above) 20; in this particular case, the commander of the group ordered that 2 of the bodies be dismembered and boiled in a pot in the presence of survivors.

⁶⁷ Soto (n 40 above) 33.

⁶⁸ Uganda Human Rights Commission (UHRC) & United Nations High Commissioner of Human Rights (UNOHCHR) *"The Dust has not yet Settled", Victims View on a Right to Remedy and Reparations: A Report from the Greater North of Uganda* (2011) 29 – 30.

⁶⁹ K Carlson & D Mazurana *Forced Marriage within the Lord's Resistance Army* (2008) 15.

deep in the bush and let them die.⁷⁰ Methods, by which the LRA allegedly killed people, include; dismemberment, having body parts cut, burning, or hacking, beating or crushing people to death.⁷¹ According to the office of the Prosecutor of the ICC, between July 2002 and June 2004, the LRA were responsible for at least 2,200 killings and all the indictees face charges of wilful killing and murder.⁷²

The UPDF are also said to have routinely executed, raped and stabbed or shot to death LRA captives, who were often abductees or suspected rebel collaborators.⁷³ In addition, the UPDF shot scores of civilians to death when they were unable to produce identification documents during the 1991 Operation North.⁷⁴ On 16 August 1996, the UPDF turned over some suspected LRA collaborators to the mob in Gulu town. The mob beat the suspects to death in the presence of UPDF personnel. In addition, on 31 August 1995 a UPDF helicopter gunship opened fire against an LRA column killing a number of civilians among other incidences.⁷⁵

Enlisting children in armed conflict: IHL and IHRL prohibit the use of children in armed conflict. This rule was first laid out in article 77 of Protocol I that provides that parties to a conflict shall take all feasible measures to ensure that children who have not attained the age of fifteen years do not take a direct part in hostilities. The article in particular directs parties to refrain from recruiting children in their armed forces. Paragraph 2 of the article further provides that when recruiting children who have attained the age of fifteen but are not yet eighteen years, the parties should endeavour to give priority to the older children. In addition, Protocol II dealing with non-international armed conflict lays down the same rule prohibiting parties from recruiting or allowing children who have not attained the age of fifteen to take part in hostilities.⁷⁶

⁷⁰ UHCR & UNOHCHR (n 65 above) 39.

⁷¹ Human Rights Watch (n 58 above) 21 – 26; Human Rights Watch *Stolen Children: Renewed Conflict in Northern Uganda* (2003) 15(7A) 8 - 13.

⁷² Brubacher (n 59 above) 269; Arrest Warrant Joseph Kony (n 22 above) counts 30, 27, 23, 20, 17, 12 & 10; Kony is charged by the ICC on seven counts of murder; Arrest Warrant for Okot Odhiambo (n 55 above) count 17; Odhiambo is charged on one count of murder; Arrest Warrant of Ongwen (n 56 above) count 30; Ongwen is charged on one count of murder.

⁷³ UHCR & UNOHCHR (n 65 above) 40; Human Rights Watch (n 58 above) 41.

⁷⁴ Soto (n 40 above) 29.

⁷⁵ Gersony (n 56 above) 45.

⁷⁶ Protocol II art 4(3)(c).

This rule is also laid down in the CRC that provides fifteen years as the minimum age for recruitment or participation in armed conflict.⁷⁷ The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict increases the standard set by the previous instruments providing eighteen as the minimum age for direct participation in hostilities, for recruitment into armed groups and for compulsory recruitment by governments.⁷⁸ The International Labour Organisation (ILO) Convention 182⁷⁹ requires parties to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.⁸⁰ The Convention defines a child as any person under the age of eighteen years⁸¹ and defines the compulsory recruitment of children for use in armed conflict as one of the worst forms of child labour.⁸² The African Children's Charter further directs parties to take all necessary measures to ensure that no child takes part in armed conflict and that no child is recruited.⁸³ The Rome Statute further criminalises the use of children who are fifteen years and below in both in international and non-international armed conflicts.⁸⁴

A central strategy of the LRA is the abduction of children from IDP camps, villages, schools or the roadside. The LRA used the abducted children as sex slaves, porters and as soldiers.⁸⁵ The primary target for LRA abduction and forced recruitment are boys and girls between 10 to 18 years of age.⁸⁶ The World Development Report of 2007 estimates that the LRA has abducted 66,000 children since the conflict began in 1986.⁸⁷ According to the ICC investigations, between July 2002 and June 2004, the LRA were responsible for at least

⁷⁷ CRC art 38; the provision is drawn from provisions of the two Protocols to the Geneva Conventions.

⁷⁸ States may accept volunteers from the age of 16 years but must deposit a binding declaration at the time of ratification or accession, setting out their minimum voluntary recruitment age and outlining certain safeguards for such recruitment. Uganda declared 18 years as its minimum age for voluntary recruitment.

⁷⁹ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour (ILO Convention 182); Uganda ratified this Convention on 21 June 2001.

⁸⁰ ILO Convention 182 art 1.

⁸¹ ILO Convention 182 art 2.

⁸² ILO Convention 182 art 3(a).

⁸³ African Children's Charter art 22(2); art 2 defines a child as anyone under the age of 18 years, and no exceptional age is provided for use of children in armed conflict.

⁸⁴ Rome Statute art 8(2)(e)(vii) & 8 (2)(b)(xxvi).

⁸⁵ Generally see discussion in chapter one; see also Anderson et al., 'Pawns of Politics: Children, Conflict and Peace in Northern Uganda' (2004) *World Vision Report* 17 – 25.

⁸⁶ UHCR & UNOHCHR (n 65 above) 43.

⁸⁷ The International Bank for Reconstruction and Development/World Bank World Development Report 2007, *Development and the Next Generation* (2006).

3,200 cases of abduction of children forced to serve as combatants. The ICC has charged all the indictees with several counts of enlisting children in armed conflict.⁸⁸

The UPDF also recruited children and used them in armed conflict. The UPDF reportedly pressured and forcibly recruited children into their forces, including forcing them to join the 105 Battalion mainly composed of former officers from several rebel groups in Uganda including the LRA.⁸⁹ The UPDF also forced newly captured or escaped abductees from the LRA to lead them to LRA bases or areas of LRA activity.⁹⁰ In addition, after the 1994 surge in LRA attacks, the government called on the communities to raise militia forces, which it put under the command of the UPDF.⁹¹ Several children joined the militia forces and received military training and weapons. The UPDF deployed the children as far as South Sudan to fight the LRA.⁹²

In February 2005, the BBC reported that at least 800 former LRA child fighters had joined the Ugandan army.⁹³ The Child Soldiers Global report of 2008 further indicates that scores of children served as soldiers in the UPDF until 2008.⁹⁴ With international condemnation on the use of child soldiers, including the United Nations Security Council Resolution 1612 (2005) that established a monitoring and reporting mechanism on the use of child soldiers, the UPDF and the government are said to have halted the recruitment of children and took steps to demobilise the children serving in the UPDF and militia forces.⁹⁵ Therefore, both parties to the conflict have committed the crime of using children in hostilities.

⁸⁸ Brubacher (n 59 above) 269; Arrest Warrant for Joseph Kony (n 22 above) counts 5 & 13; Kony is charged on two counts of enlisting children in armed conflict; Arrest Warrant for Okot Odhiambo (n 56 above) count 13; Odhiambo is charged on one count of enlisting children in armed conflict.

⁸⁹ UHCR & UNOHCHR (n 65 above) 43.

⁹⁰ D Mazuran & S McKay *Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Policy and Programme Recommendations* (June 2003) 6; states that former abductees indicated that there was always pressure from the UPDF for them to join; S McKay & D Mazuran *Where are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War* (2004) 81; states that many former child abductees were recruited by the UPDF and forced to join the Local Defence Units (LDU).

⁹¹ See background notes in chapter one of this thesis.

⁹² UHCR & UNOHCHR (n 65 above) 45.

⁹³ 'Ugandan Army Recruiting Children' BBC News 15 February 2005; the BBC reported that the army spokesman justified the recruitment stating that the young people needed jobs hence the recruitment.

⁹⁴ Coalition to stop the Use of Child Soldiers *Uganda: Child Soldiers Global Report 2008* (2008) 2 – 3.

⁹⁵ UHCR & UNOHCHR (n 65 above) 45.

Torture, inhuman treatment, and outrages upon personal dignity: IHL prohibits of torture, cruel treatment, and outrages upon personal dignity in particular, humiliating and degrading treatment of civilians and persons not in active combat. The Geneva Conventions and Protocol I prohibit it in regard to international armed conflicts⁹⁶ while, common article 3 and Protocol II in cases of non-international conflicts.⁹⁷ The prohibition is also a fundamental guarantee in all major human rights instruments.⁹⁸ CAT specifically seeks to prevent and punish the prohibitions described as absolute, non-derogable and no exceptional circumstances whatsoever may be evoked to justify them.⁹⁹

The Rome Statute defines ‘torture’ as ‘the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.’¹⁰⁰ CAT on the other hand defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. For purposes such as obtaining from him or third person information, for a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating, or coercing him or a third person, or for any reason based on discrimination of any kind. A public official or other person acting in an official capacity must instigate or consent to the infliction of such pain, or suffering. Torture therefore does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁰¹ Therefore, IHL does not require such pain or suffering to be inflicted by or at the instigation of or with the consent of a public official or other person acting in an official capacity, which is a requirement of IHRL.¹⁰²

⁹⁶ First Geneva Convention art 12(2); Second Geneva Convention art 12(2); Third Geneva Convention art 17(4), 87 & 89; Fourth Geneva Conventions art 32 & Protocol I art 75(2).

⁹⁷ Geneva Conventions common art 3; Protocol II art 4(2).

⁹⁸ ICCPR art 7; ACHPR art 5; CRC art 37(a).

⁹⁹ CAT art 2.

¹⁰⁰ Rome Statute art 7(2)(e).

¹⁰¹ CAT art 1.

¹⁰² *Prosecutor v Kunarac et al.* Case No. IT-96-23/1-A (Judgment of 12 June 2002) ICTY Appeals Chamber para 145 & 148; the Appeal Chambers held that the definition of torture under IHL does not comprise the same elements as the definition of torture applied generally in IHRL, in particular, the presence of a state official or of any other person in authority in the torture process is not necessary for the offence to be regarded as torture under IHL. The Trial Chamber defined torture as the intentional infliction, by act or omission, or severe pain or suffering, whether physical or mental, in order to obtain information or a confession, or to punish,

The Rome Statute defines inhuman treatment/acts as the intentional infliction of severe physical or mental pain or suffering.¹⁰³ The distinguishing element of this crime with torture is that less severity of pain or suffering is required and there is no requirement that the treatment be inflicted for a specific purpose for it to be deemed an inhuman act.¹⁰⁴ While outrages upon personal dignity includes acts, which humiliate, degrade or otherwise violate the dignity of a person.¹⁰⁵ The Rome Statute defines all these acts as war crimes. Torture and inhumane acts are also punishable as crimes against humanity.¹⁰⁶ The ICTY and ICTR have included rape within the scope of the crime of torture. The ICTY trial chamber, for example, held that acts such as rape and sexual violence gives rise to severe pain or suffering whether physical or mental as required by the definition of the crime of torture thus when rape is proved, the crime of torture has also been established.¹⁰⁷

Most of the atrocities committed by the LRA including sexual slavery, abduction, mutilations, and beatings would amount to torture, inhuman or degrading treatment. For instance, abducted children were tied up with ropes as they were led to the LRA bases in South Sudan; those who could not keep up were killed, beaten, maimed and others forced to witness or take part in the beatings or killings. The LRA forced civilians to become combatants and forced girls to become sexual slaves of the LRA commanders and fighters.¹⁰⁸ The LRA used torture or cruel, inhuman or degrading treatment of adults and children in public during attacks and within the confines of the LRA bases as a means to terrorise the population and to break their will to resist their demands. In addition, the LRA used this crime to punish communities for allegedly informing the UPDF of their presence; giving sanctuary to those that escaped capture; resisting or refusing demands; or for

intimidate or coerce the victim or a third person or to discriminate on any ground, against the victim or a third persons.

¹⁰³ Rome Statute art 7(1)(k).

¹⁰⁴ 'What is the definition of torture and ill treatment' ICRC <http://www.icrc.org/eng/resources/documents/misc/69mjxc.htm> (accessed 16 Nov 2011).

¹⁰⁵ Rome Statute art 8(2)(c)(ii).

¹⁰⁶ Rome Statute art 7(1)(f), 7(2)(e) & 7(1)(k).

¹⁰⁷ *Prosecutor v Kunurac et al.*, Case No. IT-96-23/1-A (Judgment of 16 November 1998) ICTY Trial Chamber para 494.

¹⁰⁸ Soto (n 40 above) 32; Human Rights Watch (n 56 above) 17 – 26.

receiving support from the government and the international community for instance by going to the IDP camps.¹⁰⁹

Cases of torture by the LRA includes acts such as rape of women and girls, the cutting and burning of women and girls' genitals and breasts, and the castration of males. There are reports of the LRA carving and smashing people's faces and bodies. It is also reported that the LRA tied victims to trees so that they were unable to escape as acts of torture, cruel, inhuman or degrading treatment were carried out. The LRA reportedly forced civilians to drink and eat substances such as petrol, human blood and/or human flesh that are harmful or considered a taboo. The LRA forced abducted children to commit several of these crimes as a form of punishment, intimidation and indoctrination.¹¹⁰ The ICC charged all the LRA indictees on several counts of cruel treatment, amounting to war crimes.¹¹¹

It is also important to note that the UPDF also committed acts of torture, cruel, degrading and inhuman treatment of alleged captured LRA fighters, abductees, suspected collaborators and other civilians. Methods of torture by the UPDF is said to include; tying hands and arms behind backs so tightly it caused permanent nerve damage, hanging people from the ceiling, beating people with sticks and metal pipes, rubbing hot oil and peppers into wounds, cutting and electrocuting people, cutting genitals, breaking bones and smashing teeth.¹¹² In addition, the UPDF committed acts of sexual violence against both males and females in Northern Uganda. The UPDF carried out these acts publicly, to punish, intimidate and/or humiliate civilians.¹¹³

¹⁰⁹ Human Rights Watch (n 58 above) 21 – 31.

¹¹⁰ UHCR & UNOHCHR (n above 65 above) 41.

¹¹¹ Generally see introductory remarks in chapter one; see also Arrest Warrant of Joseph Kony (n 22 above) counts 7, 24 & 31; the ICC charged Kony on three counts of cruel treatment amounting to war crimes; Arrest Warrant for Dominic Ongwen (n 56 above) count 31; the ICC charged Ongwen on one count of cruel treatment.

¹¹² Human Rights Watch *State of Pain: Torture in Uganda* (2004) 16(4A) 19; Human Rights Watch *Concerns Regarding Torture and other Cruel, Inhuman or Degrading Treatment in Uganda* (2005) 9.

¹¹³ C Dolan *Social Torture: The Case of Northern Uganda, 1986 – 2006* (2009); the author argues that the entire situation in Northern Uganda should be considered primarily as one of social torture, rather than war; Finnström (n 42 above) 233 – 234; gives several accounts of acts of torture by the UPDF; 'Gender Against Men' (2008) A Documentary by the Refugee Law Project; this documentary exposes sexual violence against men in the context of the conflict in Africa's Great Lakes Region and alludes to violence against men carried out before their families by UPDF soldiers in Northern Uganda; Christine Akumu Okot, the Gender Officer with the local government in Gulu further stated that the majority of sexual violence against men by the UPDF took place in

Pillage: or the act of looting property or plundering in war is a long-standing rule of customary international law first codified in the Hague Regulations.¹¹⁴ The Geneva Conventions¹¹⁵ and Protocol II prohibit pillage.¹¹⁶ IHR instruments such as the Universal Declaration of Human Rights (UDHR) prohibit the arbitrary deprivation of property¹¹⁷ and the ACHPR guarantees the right to property.¹¹⁸ In the decades of the conflict, the LRA survived or supplemented their resources by pillaging property belonging to civilians from IDP camps and villages.¹¹⁹ The civilian population lost property including personal effects and key commercial assets such as livestock. The LRA and UPDF both looted properties in the absence of civilians who fled due to insecurity or forcefully took the property from them.¹²⁰ In addition, both the LRA and the UPDF destroyed property belonging to civilians including burning homes, granaries and cutting down fruit and nut trees to destroy livelihoods. In addition, many civilians lost property due to UPDF aerial bombardments.¹²¹

The LRA conflict further led to widespread destruction of critical social infrastructure that includes hospitals, clinics, schools and roads by both the LRA and the UPDF. The increased insecurity and the direct targeting of schools by the LRA resulted in many children dropping out of school and missing years of education. The LRA destroyed property to punish and terrorise populations and the UPDF allegedly vandalised public property such as schools, health clinics and businesses, in part to enrich themselves, and in part to gather necessary supplies to support their forces.¹²² The ICC charged all LRA indictees on counts of pillage that was committed on a large scale during the conflict.¹²³

Lamogi and Alero areas in Nwoya district in Northern Uganda; Interview conducted on 27 March 2011 in Gulu. See further discussion under sexual violence.

¹¹⁴ Hague Regulations reg 47.

¹¹⁵ Fourth Geneva Convention art 33(2).

¹¹⁶ Protocol II art 4(2)(g); prohibits the pillage of property of persons whose liberty is curtailed.

¹¹⁷ UDHR art 17(2).

¹¹⁸ ACHPR art 14.

¹¹⁹ Generally see the discussion contained in chapter one.

¹²⁰ UHCR & UNHCHR (n 65 above) 52; there is a further indication to Karamojong cattle rustlers took advantage of the conflict to raid cattle in the region though other reports indicate that the UPDF and the government worked in collaboration with the Karamojong raiders to steal livestock between 1987 and 1988 that was then sold to the benefit of both parties.

¹²¹ UHCR & UNHCHR (n 65 above) 52.

¹²² UHCR & UNHCHR (n 65 above) 53.

¹²³ Arrest Warrants for Joseph Kony (n 22 above) counts 9, 15, 19, 26 & 33; the ICC charged Kony on five counts of pillaging; Arrest Warrant for Okot Odhiambo (n 56 above) counts 15 & 19; the ICC charged Odhiambo on

2.3 Crimes against humanity

Crimes against humanity as codified in ICL are human rights atrocities committed by individuals against other individuals just as IHRL addresses atrocities perpetrated by the state against its own population.¹²⁴ Crimes against humanity are generally recognised as very grave crimes that shock the collective conscience of humankind as they strike what is most essential to human beings; life, liberty, physical and mental welfare, health and or dignity.¹²⁵ Largely many concepts underlying this category of crimes derive from, or overlap with, those of IHRL for instance the right to life, freedom from torture, liberty among others as laid out in all human rights instruments. Therefore, while war crimes are closely linked with IHL, crimes against humanity are largely predicated upon IHRL.¹²⁶

2.3.1 Threshold of crime

The Rome Statute provides that for an offence to be amount to a crime against humanity, it must be committed as part of widespread or systematic attack against any civilian population with knowledge of the attack.¹²⁷

Widespread and systematic attack: the Rome Statute requires that an attack must be ‘widespread and systematic’ for an offence to amount to a crime against humanity though it does not specifically define these words. Pre-Chamber I of the ICC dealing with the situation in Congo stated that the two conditions are disjunctive, in that if a chamber is satisfied that the ‘attack’ is ‘widespread’ it need not also consider whether it is ‘systematic.’¹²⁸ The Pre-Trial Chamber held that ‘widespread’ refers to the ‘the large scale nature of the attack, as

two counts of pillage; Arrest Warrant for Dominic Ongwen (n 56 above) count 33; the ICC charged Ongwen on one count of pillage.

¹²⁴ Schabas (n 27 above) 139.

¹²⁵ FZ Ntoubandi *Amnesty for Crimes Against Humanity under International Law* (2007) 54.

¹²⁶ Cassese (n 24 above) 99.

¹²⁷ Rome Statute art 7(1).

¹²⁸ *Prosecutor v Jean-Pierre Bemba Gombo* (situation in Central African Republic: ICC-01/05-01/08) Decision Pursuant to Article 7(1)(a) and (b) of the Rome Statute’ (15 June 2009) ICC Trial Chamber (*Bemba Case*) para 82.

well as to the number of victims.¹²⁹ The attack could be carried out over a large geographical area or it could be an attack on a small geographical area directed at a large number of civilians.¹³⁰

Pre-Trial Chamber I decided that ‘systematic’ pertains to ‘organised nature of the acts of violence and to the improbability of their random occurrence.’¹³¹ The Trial Chamber further added that the specific act charged against an individual defendant need not be widespread or systematic; even a single act of murder by a perpetrator may constitute a crime against humanity as long as the legal requirements with regard to the contextual element of the crimes, including the nexus element, are met. In other words, the single act must be situated within a widespread or systematic attack, in which others participate.¹³²

Attack directed against any civilian population: article 7(1) of the Rome Statute also requires that the ‘attack must be committed against any civilian population.’ ‘Attack against civilian population’ is defined as ‘a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population pursuant to or in furtherance of a state or organisational policy to commit such attack.’¹³³ The civilian population must be the ‘primary object of the attack’ and not just incidental victims.¹³⁴ In addition, the potential civilian victims under attack may belong to any civilian population, regardless of the nationality, ethnicity, or other distinguishing features.¹³⁵ There is further no need to show that the entire population of a geographical entity was targeted in the attack, as long as it is not directed against a limited and randomly selected number of individuals.¹³⁶

¹²⁹ *Prosecutor v Omar Hassan Ahmad Bashir* (Situation in Darfur, Sudan: ICC-02/05-01/09) ‘Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’ (4 March 2009) ICC Trial Chamber (Arrest Warrant for Bashir) para 81; *Prosecutor v Katanga et al.*, (situation in the Democratic Republic of Congo: ICC-01/04-01/07) ‘Decision on the Confirmation of the Charges’ (30 September 2008) ICC Trial Chamber (*Katanga et al.*, case) para 394 -397.

¹³⁰ *Bemba case* (n 125 above) para 83.

¹³¹ Arrest Warrant for Bashir (n 126 above) para. 81.

¹³² Schabas (n 27 above) 149.

¹³³ Rome Statute art 7(2)(a); see also *Prosecutor v Naletilic et al.*, Case No. IT-98-34-T (Judgment of 31 March 2003) ICTY Trial Chamber para 233; *Prosecutor v Limaj* Case No. IT-03-66-T (Judgment of 30 November 2005) ICTY Trial Chamber (*Limaj Case*) para 182

¹³⁴ *Bemba case* (n 125 above) para 75.

¹³⁵ *Bemba Case* (n 125 above) para 76.

¹³⁶ *Bemba case* (n 125 above) para 77.

With knowledge of the attack: means that the perpetrator must know that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.¹³⁷ The atrocities committed by the LRA in the conflict meet the threshold set out in article 7(1) of the Rome Statute as there is evidence to show that the crimes were committed as part of the LRA organisation policy and that they were systematic in nature and directed against civilian populations, with knowledge of the attack.¹³⁸ The five warrants of arrest issued by Pre-Trial Chamber II of ICC against the LRA indictees confirm this.

2.3.2 Acts punishable as crimes against humanity

Murder and extermination: the crime of murder¹³⁹ and extermination¹⁴⁰ involve the deliberate taking of a person's life, where the person is not actively involved in combatant and represents a core crime against humanity.¹⁴¹ For the crime of murder to exist, the perpetrator must kill one or more persons. The mental element of murder is that the conduct is intended to bring about the death of such a person; intentional killing may or may not be premeditated.¹⁴² For murder to amount to a crime against humanity a lesser mental element is required than in ordinary cases of murder; it is sufficient for the perpetrator 'to cause the victim serious injury with reckless disregard for human life.'¹⁴³ On the other hand, for extermination to exist, the perpetrator must conduct mass killing of a civilian population¹⁴⁴ as well as, 'the intentional infliction of conditions of life, inter alia the deprivation of access of food and medicine, calculated to bring about the destruction of part

¹³⁷ Schabas (n 27 above) 155; *Prosecutor v Kunarac et al.*, Case No. IT-96-23/1-A (Judgment of 12 June 2002) ICTY para 102 & 140; *Tadic Appeal Judgment* para 271; *Prosecutor v Kordic et al.*, Case No. IT-95-14/2-A (Judgment of 17 December 2004) ICTY Trial Chamber para 99 – 100; *Limaj Case* (n 130 above) para 190.

¹³⁸ Brubacher (n 59 above) 269.

¹³⁹ Rome Statute art 7(1)(a); murder is also punishable as a war crime by the Rome Statute, art 8(2)(c).

¹⁴⁰ Rome Statute art 7 (1)(b).

¹⁴¹ Ntoubandi (n 122 above) 72 making reference to the Report of the International Law Commission, Finalised Draft Text on the Elements of Crime, Doc. PCNICC/2000/1/Add.2 of 2 November 2000.

¹⁴² Cassese (n 24 above) 109 -110; indicating that, the act of killing must be planned and willed in advance, with the mental status persisting over the time between the first moment when the intention took shape and the later physical act of killing.

¹⁴³ *Prosecutor v Akayesu* ICTR-96-4-T (Judgment of 2 Oct 1998) ICTR Trial Chamber (*Akayesu judgment*) para 589 – 590.

¹⁴⁴ Ntoubandi (n 122 above) 72.

of a population.’¹⁴⁵ The crimes of murder and extermination are directly related to the right to life codified in several human rights instruments,¹⁴⁶ these crimes were perpetrated in a large scale in the LRA conflict.¹⁴⁷

Sexual crimes: the offences generalised as sexual crimes includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and sexual violence.¹⁴⁸ The ICTR in the *Akayesu* case defined ‘rape’ as physical invasion of a sexual nature, committed on a person under circumstances that are coercive.¹⁴⁹ All sexual crimes are committed in circumstances that are coercive. These constitutes of ‘threats, intimidations, extortion and other forms of duress which prey on fear or desperation of victims.’ Coercion may also be inherent in certain circumstances, such as armed conflict or military presence.’¹⁵⁰ Sexual violence also includes gender-based violence that is directed against a woman because she is a woman or that affects women disproportionately including acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.¹⁵¹

There are special rules of evidence set out in the Rules of Procedure and Evidence of the ICC that apply to all sexual crimes. For instance, the legal requirement of corroboration may not be imposed for, ‘in particular crimes of sexual violence.’¹⁵² In addition, evidence of prior sexual conduct is inadmissible.¹⁵³ Sexual crimes committed in the LRA conflict, disproportionately affected girls and women. Research reveals that in Northern Uganda, one

¹⁴⁵ Rome Statute art 7(2)(b); these acts are also punishable as war crimes in the Rome Statute, art 8(2)(b)(xxii) & 8(2)(e)(vi); *Prosecutor v Kritic* Case No. IT-98-33 (Judgment of 2 Aug 2001) ICTY Trial Chamber para 503; the Trial Chamber of the ICTY stated that for the crime of extermination to be established, there must also be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.

¹⁴⁶ UDHR art 2; ICCPR art 6; ACHPR art 4.

¹⁴⁷ The examples of the crimes of murder and extermination perpetrated in the LRA conflict refer to discussion under murder and wilful killing as war crimes. In addition, the LRA indictees are all facing charges for murder; Arrest Warrant for Joseph Kony (n 22 above) counts 10, 16 & 27.

¹⁴⁸ Rome Statute art 7(1)(g).

¹⁴⁹ *Akayesu* Judgment (n 140 above) para 598.

¹⁵⁰ *Bemba case* (n 125 above) para 162.

¹⁵¹ Protocol on Sexual Violence art 5; this definition is derived from General Comment 19 of the Committee on the Elimination of all forms of Discrimination against Women (CEDAW).

¹⁵² Rules of Procedure and Evidence of the Rome Statute rule 63(4).

¹⁵³ Rules of Procedure and Evidence of the Rome Statute rule 71.

in six female adolescents has been abducted by the LRA¹⁵⁴ and that female abductees are not only forced to serve as soldiers and to perform domestic labour but are used as sex slaves and forced into marriages with the rebels. Many of the victims have given birth to children fathered by their captors. Evidence collected from the former captives reveal that sexual violence is part of a systematic practice perpetrated by the LRA on orders of its leadership.¹⁵⁵

Acts of sexual violence by the LRA includes; rape, forced marriage, forced pregnancy, forced child bearing, sexual mutilation and male castration among others. Most of the sexual crimes by the LRA are carried out within the confines of 'forced marriage', which is orchestrated and managed by top LRA leadership. Reports indicate that the LRA leadership prohibited rape of civilians outside the confines of 'forced marriage'. However, at times LRA fighters would rape civilian girls and women if they believe that they would not be caught or punished by their commanders.¹⁵⁶

There are reported cases of the UPDF raping and sexually abusing women and girls they 'rescued' from the LRA, particularly within the more remote locations of UPDF operation. This includes cases of mass rape of captured females from the LRA, who after, on orders of UPDF commanders are stabbed or shot to death.¹⁵⁷ The UPDF, in addition, reportedly raped women and girls when they accompanied them to collect food, firewood and poles for building outside the IDP camps. The UDPF have also raped men and gang-raped women as a form of punishment against particular communities.¹⁵⁸ Victims also reported rape of women by UPDF fighters to terrorise populations who refused to leave their villages and go

¹⁵⁴ J Annan et al., *The State of Female Youth in Northern Uganda: Findings from the Survey of War Affected Youth (SWAY)* (2008) 25.

¹⁵⁵ K Carlson & D Mazurana 'Accountability for Sexual and Gender-Based Crimes by the Lord's Resistance Army' in S Pamar et al., *Children and Transitional Justice: Truth Telling, Accountability and Reconciliation* (2010) 237.

¹⁵⁶ UHCR & UNOHCHR (n 65 above) 49.

¹⁵⁷ Human Rights Watch *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda* (2005) 17(12A) 32.

¹⁵⁸ 'Gender Against Men' A production of the Refugee Law Project (2008).

into the IDP camps.¹⁵⁹ The ICC indicted LRA leaders, all face charges of rape and sexual slavery.¹⁶⁰

Enslavement and forcible transfer of populations: enslavement¹⁶¹ means ‘the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.’¹⁶² ‘Forcible transfer of population’¹⁶³ means ‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.’¹⁶⁴ These offences curtail the freedom from slavery, liberty of movement and security of persons guaranteed in several human rights instruments.¹⁶⁵

Enslavement and forcible transfer of the population is a central feature of the LRA conflict. The LRA abducted majority of its members and forcibly transferred from their usual residence to LRA bases usually in South Sudan or the DRC. The LRA forced the abductees into marriages, forced to serve as domestic labourers, sexual slaves and as combatants. The LRA leadership, enforced rules dictating impersonal conduct through physical violence such as beatings, mutilations, killings, usually enforced through other abductees. The LRA captors made the abductees dependant on them, for all basic provisions and singled out those who resisted for punishment and sometimes death.¹⁶⁶ While forced out of their usual residence, the LRA enslaved the abductees while in custody of the LRA. The ICC has charged Joseph Kony, with the crime of enslavement.¹⁶⁷

¹⁵⁹ UHCR & UNOHCHR (n 65 above) 48.

¹⁶⁰ Arrest Warrant Joseph Kony (n 22 above) count 1, 6, 3, 2; the ICC has charged Kony on two counts of enslavement, one count of rape as a crime against humanity and one count of rape as a crime against humanity.

¹⁶¹ Rome Statute art 7(1)(c).

¹⁶² Rome Statute art 7 (2)(c) sets out the definition of enslavement.

¹⁶³ Rome Statute art 7(1)(d).

¹⁶⁴ Rome Statute art 7(2)(d) sets out the definition of forced displacement.

¹⁶⁵ ICCPR arts 8(1), (2) & (3); provides for freedom from slavery, servitude and forced labour; art 9 provides for liberty and security & art 12 provides for liberty of movement.

¹⁶⁶ Annan et al., (n 151 above) 24 & 60 - 65.

¹⁶⁷ Arrest Warrant for Joseph Kony (n 22 above) counts, 11, 21 & 28.

One major crime allegedly committed by the UDF is the forcible transfer of civilians in Northern Uganda into IDP camps; without any basic social services and without adequate protection from LRA attacks.¹⁶⁸ By the height of displacement in 2005, there were 240 IDP camps in northern, eastern and West Nile regions of Uganda and nearly 2 million people, that is approximately 90 to 95% of the population of Acholiland, 33% of the population of Lango, 200,000 people in Teso and 41,000 in West Nile had become internally displaced due to the conflict. The UDF subjected civilians to violence, impoverishment and humiliation due to the manner in which they enforced the displacement policy. In implementing the policy, the UDF reportedly gave people a few days or in some cases only 24 hours to leave their homes and make necessary preparations to leave their homes and did not allow the civilians to return for property left behind. The UDF, LRA and other civilians then looted the property.¹⁶⁹ The UDF further used violence including, rape, force, threats and destruction of property to compel civilians to leave their homes and move into IDP camps.¹⁷⁰

The forced displacement meant that the primarily agro-pastoral, subsistence agriculture population, was cut off from agricultural lands and traditional homesteads. This had a devastating economic, livelihood, social and cultural effect on people who could not produce enough food for subsistence, leading to negative consequences on the health and well-being of the population. The IDP camps where the government, forced people to move to were poorly protected and had inadequate facilities resulting into the death of thousands of people due to disease and violence. A mortality study conducted by World Health Organisation and Uganda Ministry of Health in 2005 show that from January to July 2005, there was a recorded 1,000 death a week in Acholiland, well above emergency levels. The study further found a total excess mortality of 25,694 persons, of which 10,054 were children under five and estimated that at least 3,971 people violently killed in this period in that Acholiland.¹⁷¹

¹⁶⁸ Dolan (n 110 above) 107 – 110; Finnström (n 42 above) 197.

¹⁶⁹ UHCR & UNOHCHR (n 65 above) 50 – 51.

¹⁷⁰ C Okello & L Hovil 'Confronting the Reality of Gender-based Violence in Northern Uganda' (2007) 1(3) *International Journal of Transitional Justice* 433 – 443.

¹⁷¹ Ministry of Health (Republic of Uganda) & World health Organisation (WHO) *Health and Mortality Survey among Internally Displaced Persons in Gulu, Kitgum and Pader Districts, Northern Uganda* (July 2005) 6, 7, 29 - 32.

2.4 Conclusion

All in all, the LRA have committed international crimes such as rape, sexual slavery, mutilations, killings, forced labour, abductions, use of children in combat, pillage, forcible transfer of populations and enslavement among others that are protected by IHL and IHRL. In addition, these crimes meet the threshold of war crimes and crimes against humanity as provided for under the Rome Statute. As evidence of this, the LRA leadership indicted by the ICC all face several counts of war crimes and crimes against humanity. As discussed in this chapter, several acts committed by the UPDF amount to war crimes and crimes against humanity, though no the ICC or ICD has not charged any UPDF official with crimes related to the LRA conflict. The commission of crimes that meet the threshold of war crimes and crimes against humanity confer international responsibility on states to investigate, prosecute or extradite the offenders and to provide remedies for victims of the crime. The next chapter discusses whether this is an absolute legal requirement without exception.

CHAPTER THREE

INTERNATIONAL OBLIGATION OF STATES TO ADDRESS CERTAIN CRIMES

3.1 Introduction

As discussed in the previous chapter, the parties to the LRA conflict perpetrated gross violations of human rights and humanitarian law, and the violations meet the threshold for war crimes and crimes against humanity as defined in ICL. The scale and impact of the crimes committed inevitably brings us to the question of solutions that provide a meaningful measure of accountability to ensure justice, truth and reparations to victims of the crimes. Questions on accountability are very sensitive and often politically contested and there appears to be no consensus on what the obligations of states are in these situations. The legal requirement to address certain international crimes is clearly set out in IHL, IHRL and ICL and under international customary law. In addition, several UN ‘soft law’ instruments set guidelines for nations on questions of accountability for mass atrocities.

The UN ‘soft law’ instruments referred to includes’ the Basic Principles and Guidelines on the right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Van Boven Principles).¹ The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity first produced in 1997 and updated in 2005 (Principles to Combat Impunity);² and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Joinet Principles).³ These ‘soft laws’ do not purport to constitute legal standards and are offered as guidelines to demonstrate the existing state obligation to protect and remedy violations and abuse. In addition, UN Security Council resolutions, UN

¹ Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Resolution 60/147, UN GAOR, 60th Session, 64th Plenary meeting, UN Doc A/Res/60/147 (16 Dec 2005) (by Theo Van Boven commonly known as Van Boven Principles).

² Protection and Promotion of Human Rights through Action to Combat Impunity, Commission of Human Rights, 61st session, Item 17 of the Provisional Agenda, E/CN.4/2005/02/Add.1 (8 Feb 2008) (Report of the Independent Expert to update the Set of Principles, Diane Orentlicher)

³ Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nation, General Assembly, A/RES/40/34, 96 Plenary Meeting, (29 Nov 1985).

General Assembly resolutions, other reports, declarations and recommendations of various international bodies, international and national court decisions as well as writings of scholars also provide reliable sources that suggest the existence of particular obligations on states.⁴

Putting into consideration all the above instruments, the first part of this chapter discusses the obligation of states to investigate, prosecute or extradite and to ensure, protect and provide remedies for violations and abuses. It also investigates the legality of amnesties in international law. The second part gives an overview of the mechanisms through which states and the international community meet these obligations. The focus in this chapter is the specific mechanisms proposed for Uganda such as prosecutions both in domestic courts and in an international tribunal; non-judicial options such as truth telling, reparations and traditional justice and possible intervention by human rights bodies is discussed.

3.2 Duty to investigate, prosecute or extradite

Several international law instruments require states to investigate, prosecute or extradite offenders for crimes that they prohibit. These treaties specifically deal with international crimes such as war crimes, crimes against humanity, torture, genocide, slavery, sexual and gender based violence among others that by their extent and gravity go beyond the limits tolerable to the international community. As a result, international law demands punishment.⁵ For the purpose of this thesis, the discussion is limited to treaties and other international law instruments prohibiting international crimes perpetrated in the LRA conflict; that is, war crimes; crimes against humanity; torture and sexual violence.

3.2.1 Geneva Conventions and Protocol I

The Geneva Conventions and Protocol I make it mandatory for states to search for perpetrators of grave breaches regardless of their nationality and the territory where the

⁴ SR Ratner et al., *Accountability for Human Rights Atrocity in International Law: Beyond the Nuremberg Legacy* (3rd ed) (2009) 114.

⁵ FZ Ntoubandi *Amnesty for Crimes against Humanity under International Law* (2007) 54.

crimes were committed and to either prosecute and punish or extradite them to another state party for prosecution.⁶ Article 146 of Geneva Convention IV for instance states that:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

This obligation to investigate, prosecute or extradite offenders provided for in the Convention is mandatory and not subject to any form of limitation. Protocol I further expanded this obligation⁷ with the view to improve its effectiveness.⁸ The Commentary of the Geneva Conventions provides that, the universality of jurisdiction for grave breaches is basis that they will be punished and that the obligation to extradite ensures the universality of punishment.⁹

3.2.2 Rome Statute

The Rome Statute entrusts states with the primary responsibility to prosecute offenders of international crimes, surrender them to the ICC, or extradite them to a state that has jurisdiction.¹⁰ It is however not clear whether this duty under the Rome Statute is mandatory for as much as the preamble to the Statute recalls that it is the duty of every

⁶ First Geneva Convention art 49; Second Geneva Convention art 50; Third Geneva Convention art 129; Fourth Geneva Convention art 146.

⁷ Protocol I art 85; this article deals with the repressions of breaches of the Convention and the Protocol and expands the scope of grave breaches; art 86 further extends liability for grave breaches to superiors for acts of their subordinates if they knew or had information that the subordinate was to commit a breach and did not take feasible measures to prevent or repress it. See also arts 87 to 91.

⁸ Ntoubandi (n 5 above) 116; MP Scharf 'The Letter of the Law: The Scope of International Legal Obligation to Prosecute Human Rights Crimes' (1996) *59 Law and Contemporary Problems* 43.

⁹ JS Pictet (ed) 'Commentary: The Geneva Conventions of 12 August 1949' (1958) 4 *International Committee of the Red Cross* (1958) 587; WN Ferdinandusse *Direct Application of International Criminal Law in National Courts* (2006) 91 – 99; notes that the Geneva Conventions and Protocol I have not lived up to their promise of ending impunity and ensuring universality of punishment as prosecutions for grave breaches is rare and impunity for the grave breaches reigns on.

¹⁰ Rome Statute art 1, establishes the jurisdiction of the court; art 5 provides for the crimes within the jurisdiction of the Court; art 89 provides for surrender of persons to the court; art 90 provides for competing requests and extradition of persons who may have committed crimes within the jurisdiction of the ICC.

state to exercise criminal jurisdiction over those responsible for international crimes; the operative part of the Statute lacks any affirmative obligation on the part of the state.¹¹ For instance, the Rome Statute does not specifically exclude issues that bar prosecutions such as amnesties and pardons. In addition, the Prosecutor has the obligation to decline to pursue a case where it would not be in the 'interest of justice' and the Security Council has powers to defer investigations or prosecutions.¹² All these factors play a central role in the Rome Statute and represent a grave challenge for its effectiveness to address impunity for international crimes.¹³

3.2.3 Protocols to the Great Lakes Pact

The Protocol on Genocide and Protocol on Sexual Violence require member states to undertake to prevent and to punish perpetrators of crimes provided therein.¹⁴ The Objective of the Protocol on sexual violence is to provide protection for women and children against the impunity for sexual violence in the specific context of the Great Lakes Region. The Protocol further establishes a legal framework under which states undertake to prosecute and punish the perpetrators of crimes of sexual violence. It also provides a legal basis for the surrender of persons and fugitives charged with committing offences of sexual violence, without prejudice to the Protocol on Judicial Cooperation. The Protocol further makes provision for the establishment of a regional mechanism to provide legal, medical, material and social assistance, including counselling and compensation, to women and children who are victims and survivors of sexual violence in the Region.¹⁵ In addition, member states to the Protocol on Genocide make an undertaking to prevent and punish the crimes listed in its provisions.¹⁶

¹¹ Ratner et al., (n 4 above) 169.

¹² Rome Statute art 53(1)(c) & art 16 respectively.

¹³ Ratner et al., (n 4 above) 242 – 243; making reference to S R Ratner 'New Democracies, Old Atrocities: An Inquiry in International Law' (1999) 87 *Georgetown Law Journal* 720 – 731.

¹⁴ Protocol on Sexual Violence, art 2 & 3; and para 5 to the preamble recognises the prevalence of sexual violence in the region; Protocol on Genocide para 5 of the preamble; affirms the obligation of states to exercise criminal jurisdiction over perpetrators.

¹⁵ Protocol on Sexual Violence art 2.

¹⁶ Protocol on Genocide art 8(1); art 13 further requires member states to assist each other in the prosecution of such offences; art 14 requires states to make provisions for extradition of persons responsible for such crimes.

3.2.4 CAT

CAT also imposes a legal obligation on states to put in place measures to prevent the commission, to prosecute, punish or extradite perpetrators including public officials for the crime of torture.¹⁷ The Convention in particular provides that ‘a state party under whose jurisdiction a person alleged to have committed torture is found, shall either extradite or submit the case to its competent authorities for the purpose of prosecution’,¹⁸ thereby affirming the duty to investigate, prosecute or extradite torture offenders.

3.2.5 UN resolutions and ‘soft laws’

United Nations political bodies have also endorsed the duty to investigate, prosecute or extradite. For instance, the Final Declaration of the 1993 World Conference on Human Rights as well as Resolution of the Security Council, General Assembly and the Human Rights Commission has called on states to prosecute human rights abuses.¹⁹ Various UN ‘soft laws’ affirm this obligation as well.²⁰

3.3 Obligation to enact penal sanction

The instruments discussed above further obligate states to enact penal sanctions to ensure the punishment of war crimes, crimes against humanity, sexual violence and torture in domestic courts.²¹ For instance, the preamble to the Rome Statute emphasises that the punishment of international crimes must be effectively ensured by legislative and

¹⁷ CAT art 2; obligates states to take effective legislative, administrative and judicial measures to prevent acts of torture in any circumstances; art 5 obligates states to establish jurisdiction over the crime of torture; art 7 & 8 obligates states to prosecute or extradite perpetrators of torture.

¹⁸ CAT art 7(1).

¹⁹ World Conference on Human Rights: The Vienna Declaration and Programme of Action (25 June 1993) para 60 & 61; UN Security Council Resolution 1265 ‘Protection of Civilians in Armed Conflict’ Security Council (17 September 1999) para 6; UN General Assembly Resolution 54/179 ‘Situation of Human Rights in the Democratic Republic of Congo’ (24 February 2000) para 4(e); calls upon the DRC to fulfil its obligations and ensure that those responsible for human rights atrocities are brought to justice; Van Boven Principles, para 4 provides for the duty to prosecute and punish human rights violators.

²⁰ Promotion and Protection of Human Rights through Action to Combat Impunity, principle 19; Van Boven Principles, principle III(4).

²¹ First Geneva Convention art 49; Second Geneva Convention art 50; Third Geneva Convention art 129; Fourth Geneva Convention art 146; see CAT art 7; Protocol on Sexual Violence art 3(4); Protocol on Genocide art 9(1).

constitutional measures at the national level.²² The Protocol on Genocide requires states to undertake necessary measures to ensure that the provisions of the Protocol are not only domesticated but also enforced through national action.²³

These laws do not explicitly require such prosecutions to reflect the international nature of the crimes; states can prosecute those crimes based on ordinary criminal law.²⁴ The ICTY has further found that war crimes do not have to be prosecuted based on humanitarian law alone but can also be prosecuted as ordinary crimes within domestic jurisdictions.²⁵ The complementarity regime of the Rome Statute that appears to regard prosecutions of international crimes based on ordinary criminal law, as a sufficient response, that would preclude the ICC from exercising jurisdiction, confirms this.²⁶

3.4 Obligation to respect, ensure rights and provide remedies

IHRL does not expressly require states to punish violations of the rights they protect²⁷ but requires states to respect and to ensure the rights enumerated and to provide remedies when the rights are violated. This right encompasses individual right to; have serious violations effectively investigated; provide equal and effective access to justice; and to provide effective remedies, including reparations.²⁸ Several IHRL instruments such as the UDHR, ICCPR, CAT, CRC, and ACHPR affirm the obligation of states to address the rights of victims.

UDHR for instance clearly provides that everyone is entitled to the rights and freedoms set forth in the Declaration,²⁹ while the ICCPR contains a less precise provision obligating states to 'undertake to respect and to ensure rights to all individuals within its territory and subject

²² Rome Statute preamble para 4.

²³ Protocol on Genocide art 9.

²⁴ *Ferdinandusse* (n 9 above) 18 – 21; further discussion on prosecution as ordinary offences in domestic courts is contained in chapter six of the thesis.

²⁵ *Hadzihasanovic case* ICTY IT-01-47-T 'Judgment' (15 March 2006) 260.

²⁶ JK Kleffner *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008) 119 – 123; further discussion on the principle complementarity of the ICC is done in chapter five of the thesis.

²⁷ With the exception of CAT that expressly provides for the duty to prosecute, punish or extradite in art 2.

²⁸ Van Boven Principles, principle II(3).

²⁹ Universal Declaration of Human Rights art 2.

to its jurisdiction.³⁰ The ACHPR obligates states to ‘recognise rights, duties and freedoms contained in the charter and to adopt measures to give them effect.’³¹ In addition, human rights instruments generally require states to remedy human rights violations.

A ‘remedy’ pertains to the means by which a right is enforced or the prevention, redress, or compensation for a violation of a right. Remedies vary from the right to lodge a complaint to a criminal court to monetary compensation.³² UDHR, in article 8, provides that everyone has a right to an effective remedy by a competent tribunal. This provision implies that the remedy must be individualised and adjudicatory. The ICCPR in defining the right to a remedy specifies that the right shall extend to violations committed by government officials.³³ For example in the case of Eduardo Bleier, the Human Rights Committee found that the state has a duty to investigate and if necessary prosecute, as well as pay compensation to victims of human rights violations.³⁴

In the same vein, the Inter-American Court of Human Rights in *Velasquez Rodriguez case* found an obligation of states to investigate and prosecute human rights violators by combining the general ‘ensure and respect’ language of article 1(1) of the American Convention with the substantive prohibitions on torture and arbitrary killing.³⁵ The African Commission has also noted that the violation of any ACHPR provisions is a violation of article 1 of the Charter that requires parties to recognise rights, duties and freedoms enshrined in the Charter and provide remedies for their violations.³⁶ In general, the remedies are required to be available, effective and sufficient.³⁷

³⁰ ICCPR art 2(1).

³¹ ACHPR art 1.

³² Ntoubandi (n 5 above) 131; European Convention on Human Rights art 13; Protocol to the African Charter on the Establishment of the African Court on Human and Peoples’ Rights art 26(1); ICCPR art 2(3); American Convention on Human Rights art 26; see also N Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’ (1990) 78(2) *California Law Review* 474.

³³ ICCPR art 2(3).

³⁴ Communication R 7/30 *Eduardo Bleier v Uruguay* UNHR Committee Doc 40 (A/37/40) (1982) para 19.

³⁵ *Velasquez Rodriguez v Honduras*, Judgment of 29 July 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988)

³⁶ *Sir Dawda K Jawara v The Gambia* communications 147/95 & 149/96 (Decision of 11 May 2000) ACHPR (*Jawara Communication*) para 46; *Lawyers for Human Rights v Swaziland* communication 251/2002 (Decision of 11 May 2005) ACHPR para 50 & 51.

³⁷ *Jawara Communication* (n 36 above) para 32; the African Commission stated that a remedy is available if the petitioner can pursue them without impediment; effective, if it offers prospects of success; and sufficient, if it is capable of redressing the complaint.

Further, the Inter-American Court of Human Rights has found that the promulgation and application of two amnesty laws in Peru violated the American Convention. The Court observed that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible. This is because; such provisions prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance. The Court further observed that such provisions are prohibited because they violate non-derogable rights recognised by international human rights law.³⁸

In addition, the African Commission on Human and Peoples' Rights has found that the Clemency Order adopted in Zimbabwe violated the African Charter. The Clemency Order in question granted pardon to every person liable to criminal prosecution for any politically motivated crime committed between January and July 2000, a period of violence surrounding the February 2000 constitutional referendum and June 2000 parliamentary elections in Zimbabwe. The Order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period. It exempted, however, crimes of murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty.³⁹

The Human Rights Committee has further stated that the right to an effective remedy preclude the granting of blanket amnesties for violations of IHL and IHRL.⁴⁰ The ICJ and the ICTY decided that it is impossible to invoke an immunity created by national law before an international tribunal.⁴¹ In 2004, the Special Court for Sierra Leone (SCSL) found that it was not bound to respect the amnesty provisions agreed to by the government of Sierra Leone

³⁸ *Chumbipuma Aguirre et al., v Peru* (Decision of 14 March 2001) Inter-American Commission of Human Rights para 41.

³⁹ *Zimbabwe Human Rights NGO Forum v Zimbabwe* communication 245/02 (Decision of 15 May 2006) ACHPR paras 191, 193, 194, 204, 211, 212 & 215.

⁴⁰ Ratner et al., (n 4 above) 169 making reference to Human Rights Committee Comments on Nigeria, UN Doc A/51/40 (1996) 1 (40) *Report of the Human Rights Committee para 284*; Human Rights Committee comments on Argentina, UN Doc. A/50/40 (1995) *Report of the Human Rights Committee para 153 & 158*.

⁴¹ *Case Concerning the Arrest Warrant (Congo v Belgium)* (Decision of 11 April 2002) ICJ and *Prosecutor v Furundzija* Case No. IT-95-17/1- T (Judgment of 10 Dec 1998) ICTY Trial Chamber para 155.

and the warring rebel groups contained in the 1999 Lomé Agreement. Although the holding stemmed from a clear provision of the Court's Statute denying effect to amnesty, the Court added that in cases of universal jurisdiction, an amnesty granted by one state could not deprive another state of jurisdiction in cases dealing with international crimes.⁴² In the report on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, the UN Secretary General recommended that UN mediators refuse to endorse amnesties within peace accords that include mass atrocities.⁴³ Whether amnesties and pardons are indeed incompatible with state obligations under international law warrants further discussion.

3.5 Legality of amnesties in international law

'Amnesty' is a sovereign act of oblivion for past acts, granted by a government to persons who are guilty of a crime and often condition upon their return to obedience and duty within a prescribed time.⁴⁴ Though clearly an exercise of sovereign power, critics of amnesties routinely condemn them as a violation of the duty to prosecute under international law, particularly when offered to high-level perpetrators of international crimes.⁴⁵ Yet amnesties are the most consistently used alternative to domestic or international criminal prosecutions; in fact, the number of amnesties granted far exceed prosecutions of the international crimes indicating that state practice clearly show that no *jus cogens* (customary international obligation without the possibility to opt out) exists on the matter.⁴⁶

As much as the several treaties discussed above call for investigation and prosecution of international crimes, some treaties for example Protocol II encourages grant of amnesty, without specifying to which crimes it should not apply at the end of non-international

⁴² *Prosecutor v Morris Kallon (SCSL-2004-15-AR72 (E), Brima Bazzy Kamara (SCL-2004-16-AR72(E))* 'Decision on Challenge to Jurisdiction: Lomé Accord Amnesty' (13 March 2004) SCSL para. 67.

⁴³ UN Secretary General 'Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies' UN Doc S/2004/616 (23 August 2004) para 64(c).

⁴⁴ Black's Law Dictionary (5th ed) (1983) 76.

⁴⁵ RC Slye 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* 191 – 197.

⁴⁶ J Alvarez 'Alternatives to International Criminal Justice' in A Cassese et al., (eds) *International Criminal Justice* (2009) 34.

conflict.⁴⁷ While the Rome Statute provides for criminal prosecution of international crimes, it does not explicitly reject amnesties for the same crimes. In addition, key human rights instruments, such as the ICCPR, do not spell out clear obligations for states to prosecute and punish all human rights violators or abusers.⁴⁸

State practices on amnesties also differ greatly; for instance while some amnesties exclude international crimes from their scope, others are ambiguous in this respect but have not prevented the prosecution of international crimes. Yet, others have extended their scope to include all crimes regardless of their gravity or definition clearly ignoring the international obligation to investigate and prosecute international crimes.⁴⁹ The practice of granting amnesties could be treated as breach of the duty to prosecute but the fact remains that amnesties have been deployed by virtually every society, and will continue to play an important role as a conflict resolution measure.⁵⁰

In the last 30 years, amnesties have been instrumental in halting human rights abuses and restoring peace in countries like Angola, Argentina, Brazil, Cambodia, Chile, El Salvador, Guatemala, Haiti, Honduras, Ivory Coast, Nicaragua, Peru, Sierra Leone, South Africa, Togo, and Uruguay.⁵¹ These countries have granted amnesty to members of the former regime or insurgencies that committed international crimes within their respective borders, as part of a peace arrangement. Sometimes, the UN itself pushed for or endorsed the grant of amnesty as a means to restore peace and democratic governments.⁵² Although the UN does not encourage or condone amnesties regarding international crimes or gross violations of human rights, foster amnesties that violate treaty obligations of the parties, or that impair victims' right to a remedy, or victims' or societies' right to the truth.⁵³

⁴⁷ Protocol II 6(5).

⁴⁸ Ratner et al., (n 4 above) 169.

⁴⁹ Ferdinandusse (n 9 above) 200 -201.

⁵⁰ Slye (n 45 above) 173 – 247.

⁵¹ Roht-Arriaza (n 32 above) 483.

⁵² MP Scharf 'Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 (504) *Cornell International Law Journal* 41; noting the involvement of the UN in the amnesty negotiations in countries such as Cambodia, El Salvador, Haiti, Sierra Leone and South Africa. Note that the UN does not condone amnesty for persons responsible for international crimes as clearly indication in the Report of the Secretary General (n 41 above).

⁵³ Office of the United Nations High Commissioner for Human Rights (UNOHCHR) *Rule-of-Law Tools for Post-Conflict States: Amnesties* HR/PUB/09/1 (2009) 44.

Amnesties do not always endorse a culture of impunity; they usually vary along many dimensions depending on a particular conflict and sometimes are essential to meet practical demands of humanity like ending an armed conflict and atrocities. Amnesties are classified as ‘blanket’ where they offer immunity to all perpetrators no matter the crimes committed. ‘Partial’ where they exclude international crimes from their ambit; and ‘conditional’ where the grant is contingent on the perpetrator fulfilling some conditions for instance telling the truth, offering an apology and/or compensating victims for the crimes committed,⁵⁴ which are compatible with some notions of accountability.⁵⁵

While there is no clear agreement among commentators on when amnesties are illegal, many have agreed that blanket amnesties issued for a group with no regard to crimes committed, producing little or no information of abuse and violations are illegal.⁵⁶ While conditional amnesties granted upon acknowledgment of guilt like was the case with the South Africa has drawn the least criticism. This is because the acknowledgment of guilt was accompanied by the particularised consideration of individual cases that constituted a form of accountability and enabled preservation of collective memory. In addition, the process was not ‘imposed from the above’ but adopted democratically from within and was responsive to unique leadership and the historical and cultural circumstances in South Africa.⁵⁷ In addition, at the time, South Africa had not ratified relevant treaties such as CAT and crimes alleged to have been committed were crimes against humanity not grave breaches (war crimes committed in an international armed conflict) that require prosecution.⁵⁸

⁵⁴ W Burke-White ‘Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation’ (2001) 42 *Harvard International Law Journal* 482; classifies amnesties into 4 categories from the least to the most legitimate.

⁵⁵ Alvarez (n 46 above) 34.

⁵⁶ B Chigara *Amnesty in International Law: The Legality under International Law of National Amnesty Laws* (2002); the author argues that amnesties are inconsistent with the notion of justice as fairness.

⁵⁷ Slye (n 45 above) 245 – 247.

⁵⁸ *The Azanian Peoples’ Organisation (AZAPO) & others v President of South Africa & others* (Constitutional Court of South Africa) (Judgment of 25 July 1996) (*AZAPO Case*) paras 26 30, 32; for the obligation of the Geneva Conventions and Protocol I to apply, grave breaches must have been committed, which was not the case in South Africa.

The grant of amnesty therefore, except in treaties requiring prosecution, are not, necessarily inconsistent with international law. Amnesties are therefore a possible exception to the duty to prosecute, rather than a denial of that duty if the circumstances require such a step and if the conditions of the amnesty reflect a proper balance between the different interests involved.⁵⁹ International law is not opposed to amnesties but seeks to limit their permissible scope. Amnesties can play a valuable role in ending armed conflicts, reconciling divided communities and restoring human rights – if they do not grant immunity to individuals responsible for international crimes and other gross violations of human rights. Gross violations of human rights are widely recognised to include extrajudicial, summary or arbitrary executions; torture, cruel, inhuman or degrading treatment; slavery; and enforced disappearance, including gender-specific instances of these offences.⁶⁰

In addition, the Rome Statute allows prosecutorial discretion in the ‘interest of justice’ and is silent on the legality of amnesties.⁶¹ The 2004 Report of the Truth and Reconciliation Commission of Sierra Leone further supports this assertion:

The Commission is unable to condemn the resort to amnesty by those who negotiated the Lomé Peace Agreement [which provides amnesty to persons who committed crimes against humanity in Sierra Leone]. The explanations given by the government negotiators, including in their testimonies before the Truth and Reconciliation Commission, are compelling in this respect. In all good faith, they believed that the RUF [insurgents] would not agree to end hostilities if the Agreement were not accompanied by a form of pardon or amnesty... The Commission is unable to declare that it considers amnesty too high a price to pay for the delivery of peace to Sierra Leone, under the circumstances that prevailed in July 1999. It is true that the Lomé Agreement did not immediately return the country to peacetime. Yet it provided the framework for a process that pacified the combatants and, five years later, has

⁵⁹ *AZAPO Case* (n 58 above) paras 25, 30 & 32; MP Scharf & P Dowd ‘No Way Out? Questions of Unilateral withdrawal of Referrals to the ICC and Other Human Rights Courts’ (2008) 8(21) *Case Legal Studies Research paper* 21.

⁶⁰ UNOHCHR (n 53 above) 44.

⁶¹ Rome Statute preamble para 6 & art 53 (1)(c) providing for interests of justice. Further discussion on ‘interests of justice’ is contained in chapter five of this thesis. For further reading, see MC Bassiouni ‘The Need for International Accountability’ in MC Bassiouni (ed) *International Criminal Law* (3rd edition III) (2008) 20 - 21.

returned Sierra Leoneans to a context in which they need not fear daily violence and atrocity.⁶²

In the final analysis, although arguments based on legal duties in treaties should and do influence decision makers, they hardly determine the policies of states and international organisations about accountability, criminal or otherwise. Ultimately, the responses of states to various atrocities will rely principally on moral, social, and political considerations.⁶³ In addition, grant of amnesty does not necessarily mean the absence of accountability, if amnesty is tied to accountability measures such as truth and reparations, documentation of abuses (and identification of perpetrators by name), and employment bans and purges (referred to as ‘lustration’) that keep such perpetrators from positions of public trust.⁶⁴

3.6 Accountability mechanisms

As discussed above, states are obligated to ensure accountability for certain criminal acts, this in practical sense requires the creation and engagement of specific mechanisms, either judicial or non-judicial, designed for this purpose. Domestic institutions, including courts, investigative commissions, reparations bodies and traditional justice practices are the primary mechanisms to ensure accountability for crimes.⁶⁵ International tribunals that are either, ad hoc, hybrid or permanent are additional measures used to ensure that international crimes are punished. These mechanisms can be used as alternatives or several can be used simultaneously.⁶⁶

⁶² Sierra Leone Truth and Reconciliation Commission ‘Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission’ (2004) 365; quoted in WA Schabas ‘Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’ (2004) 11 *UC Davis Journal of International Law and Policy* 163 – 164.

⁶³ Ratner et al., (n 4 above) 172; further discussion on amnesties focusing on Uganda is contained in chapter four.

⁶⁴ Roht-Arriaza (n 32 above) 482 – 491.

⁶⁵ These are the mechanisms proposed as accountability measures for crimes in the LRA conflict; the chapters that follow discuss each of the mechanisms.

⁶⁶ Uganda will use/is using these mechanisms simultaneously as set out in chapter one and four of this thesis.

3.6.1 Prosecutorial options

National courts⁶⁷

National courts are the main fora for ensuring the investigation, prosecution and punishment of offenders for international crimes. The legal basis for prosecution could be international treaties that have become part of the domestic laws of a state⁶⁸ or states may also utilise their existing criminal law to ensure prosecution, as prosecution does not entail the reliance on international law.⁶⁹ National courts are best suited to undertake this role since they are closer to the scene of the crime, therefore have greater access to evidence, witnesses, victims and perpetrators. National courts will however only yield benefits if the judicial system in question is impartial and effective. The impartiality and effectiveness of a judicial system depends on well defined criminal laws, evidence and procedural rules; well trained judges, law enforcement and legal officers; adequate infrastructures such as court rooms, investigative offices, record keeping facilities, detention and prison facilities. Where all or some of these conditions are absent, as is usually the case in states in the aftermath of atrocities, a government must make a concerted effort and investment to ensure that it meets these conditions.⁷⁰

In cases where national courts are ineffective, partial or where a national government is unwilling to prosecute certain offenders of international crimes; third countries could request for the extradition of offenders and conduct trials based on universal jurisdiction.⁷¹ Since the Nuremberg trials, there have been a surge in the use of national courts for the prosecution of international crimes and most charges are based on domestic rather than

⁶⁷ A detailed discussion on the role of national courts with specific reference to Uganda is contained in chapter six of this thesis.

⁶⁸ While such treaties, once ratified, are part and parcel of domestic law in monist states; they have to be domesticated by an act of Parliament to become domestic law in dualist states, so states sometime adopt the provisions as they appear in the international treaty, sometimes adopt certain aspects of the treaty and sometimes go beyond the required obligation and include other crimes within the scope of the law in domestic law.

⁶⁹ Ratner et al., (n 4 above) 177 and 185; a detailed discussion of this in relation to Uganda is contained in chapter six of this thesis.

⁷⁰ Ratner et al., (n 4 above) 203 – 204; further discussion on the specific issues is contained in chapter five and six of the thesis.

⁷¹ Ratner et al., (n 4 above) 198; in such cases, the country in question must have criminal codes permitting prosecutions for extraterritorial acts, or allow prosecution directly under international law.

international law.⁷² Most recently, the DRC gave its military courts jurisdiction over cases involving international crimes and the courts have carried out several prosecutions.⁷³

International criminal tribunals

Ad hoc international tribunals: the unwillingness and sometimes inability of governments to prosecute international crimes through national courts led to the creation of international criminal tribunals that could directly prosecute individuals for international crimes. Initially, international criminal tribunals were created on *ad hoc* basis in response to atrocities committed in particular conflicts; the Nuremberg⁷⁴ and Tokyo trials⁷⁵ are the first tribunals of this nature created to try international crimes committed in the World War II.⁷⁶ Fifty years down the road, the UN Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁷⁷ and the International Criminal Tribunal for

⁷² For example countries such as Ethiopia, Latvia, Guatemala, Iraq, Peru have conducted domestic trials for offenders of international law; see reports such as Human Rights Watch 'World Report' (2008) 210 – 211; Amnesty International 'Guatemala Disappearance Trial begins' Press Release 18 March 2008; 'Ex President Stands Trial in Edgy Peru' New York Times 10 December 2007.

⁷³ Avocates Sans Frontières (AFS) 'Case Study: Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo' <http://www.asf.be> (accessed 10 Sept 2011); discussion on domestic trials by Uganda is contained in chapter six of this thesis.

⁷⁴ The Nuremberg Trials were a series of military tribunals, held by the main victorious allied forces of the Second World War, most notable for the prosecution of prominent members of the political, military and economic leadership of the defeated Nazi Germany. The trials were held in Nuremberg in Germany from 1945 to 1946. The best-known and first trials were the trials of the Major War Criminals before the International Military Tribunal (IMT), which tried 24 of the most important captured leaders of Nazi Germany. The second set of trials of lesser war criminals was conducted under Control Council Law, No. 10 at the US Nuremberg Military Tribunals. These trials were conducted according to the London Charter of the International Military Tribunal (Nuremberg Charter) which was the decree issued on 8 August 1945, that set down laws and procedures by which the Nuremberg trials were to be conducted.

⁷⁵ This was the International Military Tribunal for the Far East that was convened on 29 April 1946 to try leaders of the Empire of Japan for three types of crimes; 'Class A' crimes were reserved for those who participated in a joint conspiracy to start and wage war, therefore those in the highest decision making bodies; 'Class B' crimes were reserved for those who committed 'conventional' atrocities or crimes against humanity; 'Class C' crimes were reserved for those who participated in the planning, ordering, authorisation or failure to prevent such transgressions at higher levels in the command structure. Twenty eight Japanese military and political leaders were charged with Class A crimes and more than five thousand and seven hundred Japanese nationals were charged with Class B and C crimes. The Charter of the International Tribunal for the Far East prescribed the formation of the tribunal, the crimes the tribunal would consider and how it would function on the model set by the Nuremberg Charter.

⁷⁶ For more on these tribunals, see GJ Bass *Stay the Hand of Vengeance: The Politics of War Crimes Trials* (2000); Y Totani *The Tokyo War Crimes Trials: The Pursuit of Justice in the Wake of World War II* (2009).

⁷⁷ M Martínez *National Sovereignty and International Organisations* (1996) 279; the ICTY was created by the United Nations Security Council Resolution 827 that was adopted unanimously on 25 May 1993, after reaffirming Resolution 713 (1991) and all subsequent resolutions on the topic of the former Yugoslavia. This

Rwanda (ICTR).⁷⁸ Both these tribunals have been viewed and criticised as a substitute for the international failure to stop the war or situations in those territories.⁷⁹

Hybrid or internationalised tribunals: due to the expense associated with the *ad hoc* tribunals; inaccessibility, due to remoteness of location⁸⁰; ineffectiveness in influencing accountability goals such as deterrence and reconciliation and because the tribunals did little or nothing to ensure national capacity building; the international community in the later years opted for hybrid tribunals.⁸¹ These tribunals have been created in countries such as East Timor, Sierra Leone, Cambodia, Kosovo, Bosnia, Serbia, Iraq and Lebanon.⁸² These hybrid tribunals share key attributes; for instance, they were all established to prosecute persons most responsible for international crimes in the territory concerned. They all have their seat in the location where atrocities were committed;⁸³ all have mixed benches of international and local judges, prosecutors, defence counsel and support personnel; and all have jurisdiction over international crimes though have additional jurisdiction over certain specified domestic crimes.⁸⁴

resolution also approved the report of the UN Secretary General [Report s/25704] and annexed the Statute establishing the ICTY.

⁷⁸ C Heyns *Human Rights Law in Africa* (1999) 8; the ICTR was created by the United Nations Security Council Resolution 955, adopted on 8 November 1994. The Resolution recalled all resolutions on Rwanda and noted that serious violations of IHL had taken place in the country, therefore acted under Chapter VII of the UN Charter.

⁷⁹ Ratner et al., (n 4 above) 212; also states that many states view these tribunals as extraordinary and sometimes threatening judicial enforcement mechanisms as they usurp powers of domestic courts; also note that the jurisdiction of both the ICTY and ICTR superseded jurisdictions of national courts.

⁸⁰ The ICTY is based in the Hague, the Netherlands though atrocities were committed in the former Yugoslavia and the ICTR is based in Arusha, Tanzania, though the atrocities were committed in Rwanda.

⁸¹ JK Kleffner & A Nollkaemper 'The Relationship between Internationalised Courts and National Courts' in CPR Romano et al., (eds) *Internationalised Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (2004) 359; A Cassese, 'The Role of Internationalised Courts and Tribunals in the Fight Against International Criminality' in CPR Romano et al., (eds) *Internationalised Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (2004) 3 – 6.

⁸² As above.

⁸³ Except the Lebanon Tribunal with its seat in the Hague, the Netherlands.

⁸⁴ Ratner et al., (n 4 above) 247; notes some fundamental differences between the tribunals for instance entities such as the Iraqi High Tribunal and the Serbian War Crimes Chamber are more of domestic courts assisted by international advisors; *Prosecutor v Charles Ghankay Taylor* SCSL-2003-01-1 Appeals Chamber 'Decision on Immunity from Jurisdiction' (31 May 2004) para 38, 42 & 53); notes that SCSL is completely independent of the Sierra Leonean domestic legal system and conceives itself very much as an international institution with attributes similar to the ICTY and ICTR; LA Dickenson 'The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo' (2003) 37 *New England Law Review* 1060; R Cryer et al., *An Introduction to International Criminal Law and Procedure* (2007) 159 – 160; noting that, while the Extraordinary Chambers of Cambodia and the SCSL were set up under an agreement between the UN and the post conflict governments of Cambodia and Sierra Leone, the Courts of East Timor, Kosovo and Bosnia were established by international administrators exercising governmental control over the areas; MA Newton 'Legal

The International Criminal Court:⁸⁵ the initiative to create the ICC started in the 1990s and on 17 July 1998, the UN Diplomatic conference adopted the Rome Statute that brought the ICC into existence with effective jurisdiction from 1 July 2002.⁸⁶ The ICC has jurisdiction over international crimes in cases where national courts are either unable or unwilling to prosecute.⁸⁷ The Rome Statute represents a highly significant development for criminal accountability in terms enforcement of ICL and the codification and progressive element of the substantive law.⁸⁸ Unlike the international predecessors, the Rome Statute gives attention to crucial issues such as gender by adding gender based crimes and crimes of sexual violence to the list of crimes under the ICC jurisdiction.⁸⁹

The Rome Statute also ensures that the prosecutor appoints advisers with legal expertise on specific issues including sexual and gender based violence.⁹⁰ The Statute further ensures that the Victims and Witness unit⁹¹ include staff with expertise in trauma related to crimes of sexual violence; and specifies the need for a fair representation of female and male judges as well as the need to include judges with legal expertise on violence against women.⁹² Further, the Statute accords extensive protection to victims and witnesses.⁹³ The present situations being investigated or prosecuted by the ICC includes; DRC, Central African

Authority for the Creation of the Iraqi High Tribunal' in MP Scharf & GS McNeal (eds) *Saddam on Trial: Understanding and Debating the Iraqi Tribunal* (2006) 15 -23; notes that the Iraqi High Tribunal and Serbian Courts were established directly by the countries concerned with some assistance from international advisors.

⁸⁵ A detailed discussion of the ICC in relation to the LRA conflict in Uganda is contained in chapter five of this thesis.

⁸⁶ RSK Lee *International Criminal Court: The Marking of the Rome Statute, Issues, Negotiations and Results* (1999) provides an in-depth discussion on the creation of the ICC.

⁸⁷ Rome Statute preamble & arts 1, 5, 11(1) and 126 (1) for jurisdiction generally of the ICC.

⁸⁸ MS Ellis 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building' (2002) 15 *Florida Journal of International Law* 215.

⁸⁹ Rome Statute arts 7 & 8; elements of war crimes and crimes against humanity, include sexual and gender based crimes such as rape, sexual slavery, forced pregnancy among others.

⁹⁰ Rome Statute art 42.

⁹¹ This unit is established by art 43(6) of the Rome Statute.

⁹² Rome Statute art 36(8).

⁹³ Rome Statute art 15(3); provides for closed sessions; art 68(2) provides for extension of protection of victims and witnesses and their participation in the proceedings; art 43(6) provides for the establishment of a victim and witness unit within the Registry; art 75; provides for reparations for victims. Ratner et al., (n 4 above) 241; further discusses other important innovations of the Rome Statute that includes the continuation of trials even where the accused pleads guilty

Republic, Darfur (Sudan), Uganda, Kenya, Libya and Ivory Coast.⁹⁴ A more detailed discussion on the ICC and its investigations in Uganda is contained in chapter five of this thesis.

3.6.2 Non-prosecutorial options

Despite the appeal of criminal prosecutions as the most direct way of pursuing accountability for mass atrocities, political and practical challenges to employing prosecutorial mechanisms have led to the dramatic development over the last 25 years of alternative non-judicial processes. These processes may not provide rigorous investigations, determinations and punishment of offenders of international law but sometimes, they represent the best or the only alternative to criminal prosecutions. The mechanisms also act as valuable precursors or complement criminal prosecutions and may be the optimal form of accountability in certain situations.⁹⁵ The discussion of these accountability measures will be limited to investigative commissions, reparations and traditional justice measures that are relevant to the Ugandan situation.

Investigative commissions: these are relatively young, although increasingly common form of accountability. They usually focus on investigating events of the past, sometimes concentrating on specific atrocities or pattern of abuses over time. These commissions are often temporary entities that are required to conclude investigations and produce report of findings with recommendations within a specified time. Investigative commissions are created by executive or legislative action though sometimes ushered in as a result of an agreement between warring parties.⁹⁶ These bodies are often established as truth telling or fact-finding institutions and are victim centred in their approach. They can be established internationally, regionally or nationally and the features vary widely depending on historical, political, legal and security context in which they operate.⁹⁷ The scope of activities of these

⁹⁴ For further details on the situations see <http://www.icc-cpi.int/Menus/ICC/Situations+and+cases/> (accessed 21 January 2012).

⁹⁵ Ratner et al., (n 4 above) 259.

⁹⁶ PB Hayner *Unspeakable Truths: Confronting State Terror and Atrocity* (2001) 14.

⁹⁷ PB Hayner 'Fifteen Truth Commissions 1974 to 1994: A Comparative Study' (1994) 16 *Human Rights Quarterly* 597 & 607; M Freeman *Truth Commissions and Procedural Fairness* (2006) 12 – 22.

institutions very much depends on its mandate, financial resources, time constraints, political conditions and the scale of abuses it examines.⁹⁸

Numerous investigative bodies have been created worldwide though not all have performed their mandate to conclusion.⁹⁹ These bodies may serve as substitutes for, operate alongside, or be a precursor to international or national forms of criminal accountability. Amnesties have also been accepted or given as part of the mandate of the bodies. For instance, one of the best known commissions, the South African Truth and Reconciliation Commission (South Africa TRC) required truth in exchange for amnesty; while in Chile, an amnesty existed prior to the Commission's report; in Argentina grants of amnesty followed the commission's effort; yet in Sierra Leone, both criminal prosecutions, amnesty and commission's proceedings operated simultaneously.¹⁰⁰ Further discussion on truth commissions with specific reference to Uganda is contained in chapter eight.

Measures of reparations: several human rights instruments affirm the right of victims to various forms of reparations, including official acknowledgments, commemorative monuments and compensation. An ever-increasing concern for the rights of victims is also evident in the inclusion of victims' remedies and a trust fund for compensation in the ICC¹⁰¹ as well as in a number of UN 'soft law' instruments.¹⁰² Therefore, victims have, in theory, a right to reparations for among other things, physical or mental harm, emotional distress, lost education or other opportunities, loss of earnings, harm or reputation and dignity and costs for assistance. States must therefore provide a forum through which victims can

⁹⁸ A more detailed discussion on truth commissions is contained in chapter eight.

⁹⁹ Hayner (n 97 above) 260 - 261; these include; Uganda 1974 and 1986; Bolivia 1982; Argentina 1983; Uruguay 1985 and 2000; Zimbabwe 1985; Nepal 1990; Chile 1990; African National Congress 1992 and 1993; Germany 1992; El Salvador 1992; Sri Lanka 1994; Haiti 1994; Burundi 1995; South Africa 1995; Ecuador 1996; Guatemala 1997; Nigeria 1999; Republic of Korea 2000; Sierra Leone 2000; Panama 2001; Grenada 2001; Peru 2001; East Timor 2002; Ghana 2002; Morocco 2004; Paraguay 2004; DRC 2004; Liberia 2005; and a Joint Penal for Indonesia and East Timor 2005.

¹⁰⁰ EM Evenson 'Truth and Justice in Sierra Leone: Coordination between the Commission and the Court' (2004) 104 *Columbia Law Review* 730 – 767; W Schabas 'Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 *Journal of International Criminal Law* 1082 – 1099.

¹⁰¹ Rome Statute art 75 & 79.

¹⁰² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Joint Principles and Van Boven Principles.

satisfy their rights to restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁰³

Reparations are embodiment of a society's recognition, remorse and atonement for harms inflicted¹⁰⁴ and are meant to wipe out all the consequences of the criminal act and establish a situation, which would probably have existed, had the crime not been committed.¹⁰⁵ The Van Boven Principles give a detailed definition of each element of reparations. For instance, restitution includes as appropriate elements of restoration of liberty, enjoyment of human rights, identity, family life and citizenship among others that whenever possible restore the victim to the original situation before a violation of IHRL and IHL.¹⁰⁶ Compensation provides economically assessable damages that must be proportional to the gravity of the violation of IHL and IHRL.¹⁰⁷

Rehabilitation includes medical and psychological care as well as legal and social services.¹⁰⁸ Satisfaction measures aimed at the cessation of continuing violations, verification of facts and public disclosure of truth, search for the whereabouts of the disappeared, establish identities of children abducted and bodies for those killed, official declaration of a judicial body, public apology, commemorations and inclusion of an accurate account of the violations in educational materials.¹⁰⁹ Guarantees of non-repetition include ensuring effective civilian control of military and security forces, ensuring that proceedings abide by international standards of due process, strengthen the independence of the judiciary, provide human rights education and review and reform laws that allow human rights violations among others.¹¹⁰

Application of reparations regime is still unfolding and generates complex challenges. In aftermath of mass atrocities, states have usually designed reparations programmes that

¹⁰³ Joinet Principles principles 8 – 10; Alvarez (n 44 above) 34.

¹⁰⁴ J Torpey 'Making Whole what has been smashed: Reflections on Reparations' (2001) 73 *Journal of Modern History* 349.

¹⁰⁵ Case concerning Factory at Chorzow (1928) A 17 ICJ Series 47.

¹⁰⁶ Van Boven Principles principle 19.

¹⁰⁷ Van Boven Principles principle 20.

¹⁰⁸ Van Boven Principles principle 21.

¹⁰⁹ Van Boven Principles principle 22.

¹¹⁰ Van Boven Principles principle 23.

stem from recommendations of truth and other investigative commissions. Although states have, the option of not giving commissions created this responsibility, as was the case in Argentina and El Salvador.¹¹¹ In addition, some truth or investigative commissions that did receive this mandate, formulated recommendations that went unheeded or that have been implemented only partially for example South Africa, Guatemala, Haiti and Peru.¹¹²

Other states have implemented reparations initiatives that did not stem directly from truth commission recommendations for example Argentina and Germany. Some other states have established self-standing reparations commissions or procedures for example Brazil, Malawi, Morocco, and Guatemala. Other states have established reparations efforts out of ordinary legislative initiatives with no particular institution being in charge of their overarching supervision for example Argentina. States can therefore decide the way to go about designing reparations measures that best suits their different contexts.¹¹³ The most essential thing is for reparations programmes to establish a link between the benefits they distribute and other accountability measures such as justice and truth to distinguish them from purely financial compensation.¹¹⁴

Traditional justice and healing measures: these are yet another venue of accountability for mass atrocities and lesser offences committed during armed conflicts. Traditional healing ceremonies are designed to give therapy, remove stigma attached to victims and to reconcile them with perpetrators and society.¹¹⁵ In addition, these measures offer an accountability platform by allowing perpetrators to account for their crimes, show remorse, apologise and compensate victims.¹¹⁶ These mechanisms are very important in the aftermath of mass atrocities provided that procedural guarantees accorded by IHRL for accused persons is respected and that all victims, including women and children are

¹¹¹ See further and detailed discussion in chapter eight of this thesis.

¹¹² Detailed discussion is contained in chapter eight of this thesis.

¹¹³ Office of the High Commissioner for Human Rights (UNOHCHR) 'Rule-of-Law for Post-Conflict States: Reparations Programme' HR/PUB/08/1 (2008) 11.

¹¹⁴ As above, 12; further and detailed discussion is contained in chapter eight of this thesis.

¹¹⁵ For an overview of traditional healing ceremonies among the Acholi of Uganda, see chapter seven of this thesis.

¹¹⁶ Further and detailed discussion is contained in chapter seven of this thesis.

accorded the right to participate fully in the processes.¹¹⁷ However, traditional justice and healing practises though practised by several communities emerging from conflict, have only recently gained international recognition and have not yet been subject to much scholarly elaboration. Their value as an accountability measure for mass atrocities remains is still being investigated. Further discussion on the value of Acholi traditional justice in relation to the LRA conflict in Uganda is contained in chapter seven of the thesis.

Other accountability measures that are also important in the aftermath of mass atrocities but not considered in this thesis include immigration measures, civil suits and lustration measures.¹¹⁸ The accountability measures are used in isolation or two or more could be used simultaneously depending on the circumstances of a given situation or conflict and the anticipated outcomes.

3.7 Intervention by human rights bodies

Regional human rights courts such as the Inter-American Court of Human Rights, the European Court of Human Rights, the African Court on Human and Peoples' Rights may adjudicate cases dealing with mass atrocities.¹¹⁹ In addition, quasi-judicial bodies such as the Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD), the Committee against Torture (CAT) and the Committee on the Elimination of Discrimination against Women (CEDAW) at the UN level.¹²⁰ The African Commission on Human and People's Rights, the African Committee of Experts on the Rights and Welfare of the Child and the inter-American Human Rights Commission at the regional level may also examine individual complaints of human rights violations.

These courts and quasi-judicial bodies do not have jurisdiction over individuals, neither do they have criminal or penal jurisdiction but they possess jurisdiction over states and

¹¹⁷ Chapter seven of this thesis gives further analysis of the compatibility of Acholi traditional justice system with human rights law.

¹¹⁸ Ratner et al., (n 4 above) provides further and detailed discussion of these measures.

¹¹⁹ International law bodies such as the International Court of Justice at the UN level, and other regional courts, such as the East African Community Court, that regulate relations between states are additional bodies that can intervene to prevent or adjudicate cases involving the commission of international crimes.

¹²⁰ Optional Protocol to the ICCPR; CERD art 14; CAT art 22.

adjudicate state responsibility for violations of IHRL.¹²¹ These bodies have varying powers of enforcement over the state. For instance, the European, inter-American and African Human Rights Courts issue legally binding orders while the HRC gives ‘views’ on situations. The treaty bodies are also empowered to make ‘general comments’ which are authoritative interpretations of the articles of the human rights treaties and adopt conclusions and recommendations after examining specific country reports.

Though primarily created to deal with human rights issues, some of these bodies have applied IHL in an attempt to give effective remedies to litigants in armed conflict situations. An example that clearly stands out is the decision of the Inter-American Commission on Human Rights in the *Tablada* case,¹²² where the complainants alleged violations by state agents not only of the American Convention on Human Rights but rules of IHL.¹²³ In its decision, the Commission made a detailed examination as to whether it was competent to apply IHL directly and decided that it was competent to do so,¹²⁴ reasoning that to apply IHL directly enhanced its ability to respond to situations of armed conflict.¹²⁵

The European Human Rights Court on the other hand has done exactly what the American Commission avoided - applying IHRL to situations of armed conflict directly rather than applying IHL.¹²⁶ This application remains controversial because of the inherent differences between the two bodies of law. IHL applies to all parties to a conflict (government and

¹²¹ These bodies emphasise domestic enforcement therefore require exhaustion of domestic remedies before referral of a matter to such a body. The requirement of exhaustion of local remedies has been elaborated by the different treaty bodies and has clearly attained the status of customary law. In addition, in 1991, the UN organised an international workshop on national human rights institutions in Paris and came up with Principles Relating to the Status of National Human Rights Institution (Paris Principles). The Paris Principles recommended a set of guidelines for the functioning of domestic human rights institutions that would receive complaints, undertake independent fact finding, offer conciliation services and appropriate remedies such as compensation – in this vain, the 1995 Constitution of the Republic of Uganda created the Uganda Human Rights Commission to offer such services and plays an important role in human rights monitoring and redress in Uganda

¹²² *Juan Carlos Abella v Argentina* (Judgment of 13 April 1998) Inter-American Commission of Human Rights (*La Tablada* case).

¹²³ *La Tablada* case (n 122 above) para 16.

¹²⁴ *La Tablada* case (n 122 above) para 327 & 328; though the Commission found that Argentina had not violated the applicable provisions of international humanitarian law, it found that it had competence to directly apply international humanitarian.

¹²⁵ *La Tablada* case (n 122 above) para 161.

¹²⁶ Most notably see decisions of the European Court of Human Rights in relation to the second conflict in Chechnya delivered by the Court between February 2005 and July 2008. The Court published 37 judgments against Russia due to the events in Chechnya in this period.

dissident armed groups alike) while, IHRL rules essentially bind only states, and has little relevance in regulating the behaviour of non-state armed groups.¹²⁷ In addition, IHRL does not contain rules that moderate conduct of hostilities therefore leaves a challenge on how to apply the broad principles to the conduct of hostilities in a manner that is persuasive and realistic.¹²⁸

This may be the case but the judgments of these bodies can put pressure on governments to comply with international obligations including duties to prosecute offenders and remedy violations. In addition, the decision of these bodies also serve the cause of developing IHRL and IHL by interpreting unsettled legal issues; cases before the bodies can be initiated relatively quickly and inexpensively and adjudication does not require attendance of offenders.¹²⁹ A case originating from the failure to ensure the rights of children during the LRA conflict is pending decision before the African Committee of Experts on the Rights and Welfare of the Child. The complainants in this case allege that Uganda failed to ensure children's rights to mandatory social services such as education, health, water and sanitation and that the state used and failed to ensure that others do not use children in armed hostilities violating articles 22(2), 22(3) and 29(a) of the African Children's Charter. Other violations alleged in this case include torture of children, sexual violence against them, and failure to ensure their rights to survival and development.¹³⁰ A decision in this case will create a precedent and provide reference for the accountability pursuits in Uganda today. Human rights bodies therefore remain an important avenue in governing mass atrocities that evolve in situations of armed conflicts and even those that do not reach the threshold of armed conflicts, applying the same rules to all situations.¹³¹

¹²⁷ W Abresch 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 4 *Centre for Human Rights and Global Working Paper* 2-3.

¹²⁸ Abresch (n 127 above) 4 & 13; notes that IHRL must be realistic in the sense of not categorically forbidding killing in the context of armed conflict or otherwise making compliance with the law and victory in battle impossible to achieve. These realistic rules must be persuasively derived from legal standards of humanitarian law.

¹²⁹ Ratner et al., (n 4 above) 257.

¹³⁰ *Children affected by the LRA conflict in Uganda v Republic of Uganda* 'Complainants Submission on Merits' African Committee of Experts on the Rights and Welfare of the Child 001/2005 para 8.

¹³¹ Abresch (n 127 above) 17-18. A case pending decision before the African Committee of Experts on the Rights and

3.8 Conclusion

In the final analysis, there is no single model for addressing international crimes. Although, the experiences of other nations may offer some lessons for nations recovering from or in conflict situations, the political, social and historical conditions in a country will govern the weights of the competing considerations and thus the means of approaching accountability.¹³² States therefore have to make the ultimate moral, political and legal decision on which measure or combination of which will achieve the expected outcomes of accountability undertaking. This leaves room for states to come up with novel ways of tackling the question of accountability for the good of a country.

The chapters that follow provide an analysis of the accountability processes that Uganda has committed to undertake to address mass atrocities in the LRA conflict. This commitment was made when the government referred the LRA situation to the ICC and in Juba when it negotiated and signed the Agreement on Accountability and Reconciliation. Before the ICC referral and the agreement in Juba, the government had created a law that granted amnesty to anybody who gave up armed rebellion against it as a conflict resolution measure.¹³³ The next chapter analyses this law and the Agreement on Accountability and Reconciliation for consistency with Uganda's international obligation before discussion of specific accountability measures in the latter chapters.

¹³² Ratner et al., (n 4 above) 175.

¹³³ Codified as the Amnesty Act 2000, Laws of Uganda.

CHAPTER FOUR

SHORT OF INTERNATIONAL OBLIGATIONS? UGANDA'S AMNESTY ACT AND THE AGREEMENT ON ACCOUNTABILITY AND RECONCILIATION

4.1 Introduction

The previous chapter established the international obligations of states in respect to international crimes. As established in chapter two, the parties to the LRA conflict perpetrated war crimes and crimes against humanity and the need for accountability in line with international obligations is not lost on them. On 29 June 2007, as part of the peace pact negotiated in Juba, the LRA and the government of Uganda signed the Agreement on Accountability and Reconciliation and on 19 February 2008 appended the Annexure to the Agreement.¹ The Agreement and the Annexure sets out the framework for implementing accountability for the crimes perpetrated in the LRA conflict and are aimed at addressing 'serious crimes, human rights violations and adverse socio-economic and political impacts' of the protracted conflict.² The parties reached the Agreement in recognition of the need to prevent impunity and ensure reparations for victims of the LRA conflict in line with the Constitution of Uganda, international legal obligations of Uganda and requirements of the Rome Statute in particular the principle of complementarity.³ Whether the Agreement sets the right framework to meet this goal is discussed later in the chapter.

Prior to the signing of the Agreement, in the late 1990's the protracted conflict, with its attendant human and material cost, generated a remarkable movement among the victim community in Northern Uganda to lobby for amnesty as a conflict resolution measure. Acholi cultural leaders under the institution *Ker Kwaro Acholi* and religious leaders under the umbrella interdenominational organisation, the Acholi Religious Leaders' Peace Initiative (ARLPI) led this lobby. These groups represented the communities in Northern

¹ The Agreement on Accountability and Reconciliation and its Annexure is annexed to this thesis as Annexure A.

² Agreement on Accountability and Reconciliation preamble paras 2, 3, 4 & 5.

³ Agreement on Accountability and Reconciliation preamble para 3.

Uganda and argued that dialogue with the rebels was possible and a more worthy solution to the conflict than military pursuits that had caused suffering for more than a decade.⁴

An amnesty bill (1999) modelled on the Amnesty Statute of 1987 was crafted. The 1987 Statute formed part of the peace deal with the UPDF and sought to encourage the various fighting groups and their sponsors to end their activities. This statute excluded crimes such as genocide, murder, kidnapping and rape from its ambit.⁵ Likewise, the 1999 amnesty bill sought to exclude those crimes. The ARLPI however, rejected this limitation and strongly advocated for the adoption of a blanket amnesty without any limitations. These leaders stated that a blanket amnesty would be in line with the aspirations of the people of Acholi at home and in the Diaspora. They justified this assertion stating that most combatants in the LRA, involved in the commission of mass atrocities were forcibly abducted and victimised, therefore deserved amnesty. That and also the profound war weariness, suffering and the diminished trust in a military solution created an environment where amnesty and peace talks were perceived as a more worthy conflict resolution measure. The victim community believed that any threat of prosecution, even of a minority of combatants, would pose an obstacle to peaceful resolution of the conflict.⁶

The supporters of the Amnesty Act adopted in 2000⁷ viewed it as a significant step towards ending the conflict in Northern Uganda and working towards a process of national reconciliation. As the preamble to the Act emphasized, the Act is the expressed desire of the people of Uganda to end armed hostilities, reconcile with those who have caused suffering and rebuild their communities.⁸ Its provisions granting a blanket amnesty represented a radical response to the conflict that sought to balance the immediate needs of peace and

⁴ CR Soto 'Tall Grass: Stories of Suffering and Peace in Northern Uganda' (2009) 39.

⁵ B Afako 'Reconciliation and Justice: 'Mato Oput' and the Amnesty Act' in O Lucima (ed) *Protracted Conflict, Elusive Peace: Initiatives to End the Violence in Northern Uganda* (2002) 66; further discussion on the statute is contained in chapter one of this thesis.

⁶ As above.

⁷ Amnesty Act, 2000; The Amnesty (Amendment) Act, 2002; The Amnesty (Amendment Act) Act, 2006' (September 2006) Cap 294 Laws of Uganda; members of insurgent groups that have applied and received amnesty includes; Action to Restore Peace; Allied Democratic Forces; Force Obote Back Again; National Union for the Liberation of Uganda; Uganda National Freedom Movement; Uganda National Rescue Front; Uganda People's Army and the West Nile Bank Front.

⁸ Amnesty Act preamble para 2.

end of hostilities to ensure reconciliation and the desire to restore and rebuild communities devastated by conflict.⁹

It is hardly surprising that serious concerns have been raised on the concept of a ‘blanket amnesty’, offering amnesty to those who have committed or may have committed international crimes. The Amnesty Act raised serious and complex questions about the concept of accountability in conflict and post-conflict situations. Part II of the Act that granted blanket immunity to all persons engaged in armed rebellion in Uganda, had long been overtaken by the Agreement on Accountability and Reconciliation and its Annexure that recognised the need for accountability for the crimes committed during the conflict. In addition, the International Crimes Division of the High Court of Uganda was specifically created in 2008 to prosecute those responsible for international crimes committed in the LRA conflict. Nonetheless, in 2010, the government renewed the Act for a further two-year period, contradicting these commitments.¹⁰

In February 2012, the Justice Law and Order Sector (JLOS) Transitional Justice Working Group (TJWG) met in Kampala to address key issues regarding the Amnesty Act, in anticipation of the lapse of the Act in May 2012. The meeting concluded that a review of the Amnesty Act was necessary in order to address the inconsistencies between the Act and Uganda’s international obligation and also other laws in Uganda for instance the International Criminal Court Act (ICC Act) and the Geneva Conventions Act. A review of the Amnesty Act was also considered necessary in light of the development of transitional justice mechanisms envisioned in the National Transitional Justice Policy that the TJWG is developing.¹¹ Several review meetings took place thereafter and on 24 May 2012, the Chair

⁹ Amnesty Commission *An Act of Forgiveness: A guide to the Amnesty Act, 2000; The Amnesty (Amendment) Act, 2002; The Amnesty (Amendment Act) Act, 2006* (September 2006) 3.

¹⁰ The renewal of the Act in 2010 was no doubt was part of the NRM preparation for the 2011 national elections, an attempt to appease the people in Northern Uganda who overwhelmingly supported amnesty. Indeed, for the first time the NRM predominantly won elections in northern and eastern Uganda, regions that traditionally voted for the opposition.

¹¹ The Formal Criminal Jurisdiction Sub-Committee of the TJWG has since the meeting in Feb 2010 been undertaking a review of the Amnesty Act and will consider key legal and policy options for the way forward on Amnesty in light of Uganda’s international obligations, national laws and the National Transitional Justice Policy objectives that the group is developing. In anticipation of the review, the Refugee Law Project and UNOHCHR, in collaboration with UN Women held a one day conference in Nov 2011 entitled ‘Dialogue: The Crossroads of Amnesty and Justice’ to discuss the continued role of the Amnesty Act in creating an

of the TJWG presented the findings of the amnesty review process. TJWG together with the Attorney General reached the consensus that Part II of the law should lapse by May 2012, in accordance to section 16 of the Amnesty (Amendment) Act of 2006. That the Amnesty Commission should maintain its activities in the area of reintegration and support to reporters for an additional 12 months, that JLOS should expedite the adoption of the national transitional justice policy for Uganda, within 12 months, and that the government should adopt a new law to take forward a truth-seeking process that complements traditional justice practices. TJWG further recommended that the truth telling body could incorporate a conditional amnesty for lesser offenses in exchange for the truth and establish a victim assistance program, especially for victims suffering from serious physical and mental injuries and illnesses.¹²

Accordingly, on 23 May 2012, the Minister of Internal Affairs, Hillary Onkuma declared the lapse of operation of Part II of the Amnesty Act.¹³ Part II of the Amnesty Act regulated the provisions of the law relating to the grant of amnesty as well as the procedures for the grant of Amnesty in accordance with section 2 of the Amnesty Act. The declaration of a lapse therefore means that amnesty has ceased in Uganda and from 25 May 2012 when the lapse took effect, any person engaged in war or armed rebellion against the government of Uganda shall be investigated, prosecuted and punished for any crime committed in the course of the war if found guilty. On the other hand, persons already issued amnesty certificates when the law operated shall not be subject to prosecution or any form of punishment for conduct during the war.¹⁴

environment for reconciliation, accountability and sustained reintegration and peace in Uganda. The conference had a particular focus on the impact of the Amnesty Act on accountability for international crimes. This conference sparked off nationwide discussion on the Amnesty Act and its relationship to other accountability measures. For more information see <http://jlos.go.ug/uploads/Website%20article%20ANETY-KITGUM.pdf> (accessed 14 April 2012).

¹² Joint Leadership and Steering Committee 'Presentation by Hon Justice Gidudu, Chair Transitional Working Group' (18 May 2012) available at www.jlos.go.ug/page.php? (accessed 10 July 2012).

¹³ Effected under Statutory Instrument No. 34 of 2012, that was signed and gazetted on 1 June 2012. This was by virtue of section 16(3) of the Amnesty Amendment Act of 2006 that provides that the Minister may by statutory instrument; declare the lapse of the operation of Part II of the Act.

¹⁴ Such persons are protected under the Constitution of Uganda that in art 28(5)(f) provides that no person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.

The Minister also extended the expiry period of Part I, III, and IV of the Amnesty Act for a period of 12 months.¹⁵ Part III of the Act, establishes the Amnesty commission, a demobilisation and resettlement team, and elaborates its functions among other provisions. The extension of this Part means that the Amnesty Commission shall continue with its duties of demobilisation, reintegration, resettlement of reporters, and sensitisation of the public on the Amnesty Law and promote appropriate reconciliation mechanisms to affected communities. The Amnesty Commission and the demobilisation and resettlement must complete these activities within the one year of the extension period.¹⁶ It is however, not clear whether the further recommendations of the TJWG and Attorney General will be incorporated in the accountability process within the specified time.

The 'blanket amnesty' was in operation for eleven years prior to the lapse and without any guidelines on how it would operate alongside other measures of accountability, created a lot of confusion and dissatisfaction among various groups both nationally and internationally. The first part of this chapter therefore, discusses how the Amnesty Act was applied, the challenges to application and its shortcomings in relation to the Constitution of Uganda and Uganda's international obligations. This part concludes that the lapse of Part II of the Amnesty Act paves way for accountability for crimes committed by the LRA during the conflict and allows Uganda to meet its international obligations. The chapter further suggests that even those who benefitted from amnesty should take part in quasi-judicial accountability mechanisms such as a truth telling process and traditional justice. The second part of the chapter analyses the Agreement on Accountability and Reconciliation and its Annexure. This Part highlights the main provisions of the Agreement that relates to accountability measures and discusses how they would operate. The chapter also tests whether these provisions are in line with the Constitution of Uganda and Uganda's international obligations. This part concludes that the provisions of the Agreement on Accountability and Reconciliation and its Annexure establishes a general national framework for further and specific discussion on accountability for mass atrocities perpetrated in the LRA conflict and are in line with Uganda's accountability obligations.

¹⁵ Effected under Statutory Instrument No. 35 of 2012, that was signed and gazetted on 1 June 2012. This was done by virtue of section 16(2) of the Amnesty Amendment Act of 2006.

¹⁶ Interview with Judge Onega chair of the Amnesty Commission conducted on 11 July 2012 in Kampala.

4.2 How the Amnesty Act was applied

The Amnesty Act defined ‘amnesty’ as ‘pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the state’, and conferred upon beneficiaries of the amnesty an irrevocable legal immunity from prosecution.¹⁷ The Act extended amnesty to all those engaged in acts of rebellion against the government of Uganda, ‘through actually participating in combat; collaborating with insurgents; committing other crimes to support insurgency; or in any other way assisting others involved in insurgency at any time since 26 January 1986.’¹⁸ Although the law appeared to be directed at political offences, in particular, engaging in acts of rebellion, it refrained from expressly requiring that the offence be of a political nature. It therefore left no room for excluding international crimes from its scope, as it said nothing of the lawfulness of the conduct of hostilities in terms of IHL before the grant of amnesty.¹⁹

The UN Secretary General in his report on transitional justice affirmed that if carefully crafted, amnesties can help in the return and reintegration of displaced persons and former fighters in the aftermath of armed conflict and that they should be encouraged but that amnesties should not be permitted to pardon international crimes.²⁰ As established in the previous chapter, amnesties and similar measures that pardon perpetrators of international crimes and other gross human rights violations are incompatible with the duty of states to prosecute, impose appropriate punishment on those found guilty, and provide an adequate and effective remedy to victims whose rights have been violated. This is clearly provided for by specific IHL and IHRL instruments such as the Geneva Conventions, Additional Protocol I and CAT.

¹⁷ Amnesty Commission (n 9 above) 5; Constitution of Uganda art 28(10); provides that no person shall be tried for any criminal offence if the person shows that he or she has been pardoned in respect of the act or offence. The pardon granted under the Amnesty Act, therefore confers an irrevocable immunity from prosecution that continues to be effective long after the Amnesty Act has expired. It is important to note that, the definition of amnesty in the Amnesty Act does not appear to bar civil action against perpetrators of crimes.

¹⁸ Amnesty Act sec 3(1); no offences are excluded from the scope of the amnesty and all forms of insurgency activities are covered under this section.

¹⁹ A O’shea *Amnesty for Crimes in International Law and Practice* (2002) 39.

²⁰ Report of the UN Secretary General S/2004/616 para 32.

In the domestic arena, the ‘blanket amnesty’ shrank the states’ human rights obligations under the Constitution of Uganda that provides that rights and freedoms in the Constitution shall be respected, upheld and promoted and that individuals have the right to apply to a competent court for redress in case of violations of those rights.²¹ Further, the provisions of the Amnesty Act contravened the independence and autonomy of the DPP to institute criminal proceedings against any person or authority in any court with competent jurisdiction in Uganda.²² The provisions of the Act were further in collision with Uganda’s laws such as the Geneva Conventions Act that required the state to investigate and prosecute war crimes.²³ Yet, the Constitutional Court of Uganda on 22 September 2011 declared the Amnesty Act, constitutional.²⁴ The Court justified its findings citing Uganda’s history that has been characterised by political and constitutional instability and stated that the aim of the Act to end an armed rebellion, was in line with national objectives and state policy; and that made the Act constitutional.²⁵ The Court however, failed to consider the relevance of the Amnesty Act, in particular the provisions granting a blanket amnesty that had been in operation for eleven years, while the LRA conflict rages on despite its promise of total amnesty and the aim of the Act to end the rebellion.²⁶ The state is set to appeal this decision to the Supreme Court.²⁷

Experiences of states in the aftermath of mass atrocities has shown that amnesties that foreclose prosecution for international crimes are unlikely to be sustainable, even when

²¹ Constitution of Uganda art 20(2) provides that rights and freedoms enshrined in the Constitution shall be respected, upheld and promoted and art 50 provides for the rights of persons to apply to a competent court for redress in case of violations of their rights

²² Constitution of Uganda art 120(3)(b).

²³ Geneva Conventions Act 1964 cap 363 Laws of Uganda domesticates the Geneva Conventions; art 2 provides for the punishment of persons who commit graves of the Convention.

²⁴ *Thomas Kwoyelo alias Latoni v Republic of Uganda* (Constitutional Court of Uganda) ‘Ruling of the Court’ Constitutional Petition No 36/11 (Reference) Arising out of HC-00-ICD Case 02/10 (22 Sept 2011) 19 – 20.

²⁵ As above.

²⁶ According to Judge Onega, the chairman of the Amnesty Commission, several LRA commanders including Gen Caesar Acellam (captured in May 2012) and Okoth Odhiambo (one of the ICC indictees) have called the Commission inquiring about the amnesty showing that the leaders were interested in ending the rebellion but prevented from doing so by the top commander, Joseph Kony. The Chairman opined that the lapse of Part II of the Amnesty Act closes the only window of opportunity that the LRA conflict will be resolved peacefully. Interview conducted on 11 July 2012.

²⁷ The state has filed a notice of appeal but the case will not be heard until quorum that requires the appointment of another Supreme Court judge is established. In Jan 2012, the Judicial Service Commission had a meeting and several candidates have been nominated. Telephone interview with Joan Kagezi, Principal State Attorney in charge of international crimes prosecution conducted on 22 Feb 2012.

adopted in the hope of advancing national reconciliation rather than with the cynical aim of shielding perpetrators from accountability. For instance in Argentina, when the government adopted amnesty laws in the 1980s, it defended its actions on the ground that there was a compelling need for national reconciliation and consolidation of the democratic system.²⁸ In 2003, Argentina's Congress annulled the laws with retroactive effect; two years later, its Supreme Court upheld the Congress's actions. Argentina has since had more transitional human rights trials than any other country in the world and has enjoyed the longest uninterrupted period of democratic rule in its history.²⁹ In other states, courts have progressively cut back on the scope of amnesties that violate their human rights obligations. For instance, in Chile, the courts have interpreted a Pinochet era amnesty narrowly, allowing cases to go forward on legal theories that defy the amnesty's attempt to block all prosecutions.³⁰ The Supreme Court of Uganda will have to look critically at these cases before reaching a decision on amnesty.

In Uganda, a grant of amnesty was contingent upon the offenders reporting to a recognised official, renouncing or abandoning involvement in war or rebellion and surrendering any weapons in possession.³¹ The 'reporter'³² was then issued a certificate of Amnesty.³³ The reporter was required to complete a survey form detailing basic bio data, basic health information, the rebel group one served with, role in the group, why he/she joined the group and a declaration that he/she renounced rebellion. Where a reporter was under lawful detention in relation to an offence related to an armed conflict, he/she was deemed to be granted amnesty if he/she declared to a lawful officer that he/she had renounced rebellion and declared his/her intention to apply for amnesty.³⁴ Such a person was not released from custody until the DPP certified that the person was retained because of

²⁸ *Alicia Consuelo Herrera et al., v Argentina*, Inter-American Commission on Human Rights (Decision of 2 October 1992) para 25.

²⁹ K Sikkink & CB Walling 'The Impact of Human Rights Trials in Latin America' (2007) 44(4) *Journal of Peace Research* 427.

³⁰ Office of the United Nations High Commissioner of Human Rights (OHCHR) *Rule-of-Law Tools for Post-Conflict States: Amnesties* HR/PUB/09/1 (2009) 1.

³¹ Amnesty Act sec 4(1)(a),(b) &(c).

³² Amnesty Act part 1(2) defines a 'reporter' as someone seeking a grant of amnesty under the Act.

³³ Amnesty Act sec 4(1)(d).

³⁴ Amnesty Act sec 4(2)(a) & (b).

his/her involvement in armed rebellion and that he/she was not detained to be prosecuted for any other offence.³⁵

The DPP was charged to investigate all cases of persons in custody who had been charged with criminal offences and to take steps to ensure the release of all those who qualified for a grant of amnesty under the act, if such persons renounced activities in which they had been involved.³⁶ This in effect meant that those who did not ‘renounce’ rebellion were not entitled to a grant of amnesty and in strict sense excluded those who were captured in battle, but did not surrender. In practice though, persons captured in battle received amnesty. This serious loophole left the process susceptible to abuse as it became impossible for the DPP to determine when a perpetrator had not ‘renounced’ rebellion or when the renouncement was not genuine.³⁷

The Amnesty Act establishes an Amnesty Commission, which oversaw the amnesty process and is the lead agency in the implementation of the Act.³⁸ The functions of the Commission include monitoring the demobilisation, reintegration and resettlement of reporters; coordination of a programme of sensitisation of the public on the law; promotion of appropriate reconciliation mechanisms in the affected areas; and promotion of dialogue and reconciliation.³⁹ The Act also established a Demobilisation and Resettlement Team (DRT) whose functions are to decommission arms, demobilise, resettle and reintegrate reporters.⁴⁰ The DRT functions at a regional level, and is responsible for the implementation of the Amnesty Act, under direct supervision of the Amnesty Commission.⁴¹

³⁵ Amnesty Act sec 4(3).

³⁶ Amnesty Act sec 4(4); the grant of amnesty is extended to persons living outside Uganda if they renounce rebellion and report to any Ugandan diplomatic mission or some other organisation authorised to receive such persons by sec 4(5) of the Act.

³⁷ This is clearly illustrated in the case of *Thomas Kwoyelo* (n 18 above); who was captured in battle in 2008, detained for two years, charged with war crimes in 2010 and after his trial was due to commence, made an application for amnesty claiming that he has renounced rebellion, yet there is every indication that legal fees for his defence is obtained from the LRA or LRA supporters in South Sudan. Kwoyelo rejected the lawyers offered to him on state brief and instead choose instruct counsel privately. Discussion with Joan Kagezi on 26 March 2011.

³⁸ Amnesty Act sec 7, 8 & 9.

³⁹ Amnesty Act sec 9.

⁴⁰ Amnesty Act sec 12.

⁴¹ Amnesty Act sec 13; currently, there are 6 DRT offices around the country located in Gulu, Kitgum, Arua, Kasese, Mbale and Kampala, all of which rely heavily on other government agencies, civil society organisations,

On receiving an amnesty certificate, a reporter was entitled to a standard amnesty package which consisted of 263,000 Uganda shillings (about 100 USD) as an allowance and 20,000 Uganda shillings (about 8 USD) as transport money to his/her home of origin. The reporters were also entitled to a home kit, which included a mattress, saucepans, blankets, plates, cups, maize flour and seeds.⁴² Even with the lapse of Part II of the Amnesty Act, there is justification for this allowance and kit, as reporters need assistance to rebuild their lives outside the 'bush'. The Act, however, paid no particular attention to the different categories of returnees and their needs. It for instance, failed to cater for abducted women and children who were forcibly recruited into the LRA, some of whom played the supportive rather combat role in the conflict. There was a further complaint that the government gave preferential treatment to demobilised senior commanders in contrast to the lower ranking commanders and foot soldiers largely composed of formerly abducted persons. The government gave the senior former commanders accommodation, yet the lower ranking commanders and foot soldiers were not entitled to accommodation. That caused resentment and bitterness among the ex-rebels and is an impediment to reconciliation.⁴³

In addition, the amnesty process focused solely on reporters and did not address the material needs of victims in any way.⁴⁴ The amnesty package therefore created resentment among the victimised communities who state that while they continue to suffer and have to rebuild their lives, without assistance from the government, the perpetrators are

the community and donors for successful implementation. The lapse of Part II of the Amnesty Act does not affect these functions.

⁴² Interview with Justice Onega, chair of the Amnesty Commission, conducted on 14 Jan 2011.

⁴³ J Hopwood 'With or Without Peace: Disarmament, Demobilisation and Reintegration in Northern Uganda' (Feb 2008) 6 *Justice and Reconciliation Project Field Notes* 6; in Feb 2008, while in Gulu, I spoke to a group of four formerly abducted children in Gulu town. A 16-year-old boy, who stayed at the World Vision reception centre on return, insisted that he had forgiven his captors and was not ready to talk about anything other than forgiveness. That was until another boy pointed out that their former commander was residing in Acholi Inn, one of the most affluent hotels in Gulu town courtesy of the government. The 16 year old boy then agreed with his friends that given the opportunity, they would kill the commander in question because he made them suffer a lot in the 'bush' and now he is enjoying life, among the elites, well they continue to suffer.

⁴⁴ According to Justice Onega, the Amnesty Commission has seen the need for and applied for funds for packages targeting victims but this has not been forthcoming from either donors or the government. However, the problems the 'amnesty package' has created has been recognised by the government and donors and the most recent re-integration project of the Commission 'Uganda Emergency Demobilisation' that offers skills training to reporters is also being extended to victim communities.

rewarded.⁴⁵ A Refugee Law Project research found that there is too much focus on the ‘amnesty package’, that it distorted the amnesty process, and that the real purpose - peace and sustainable reconciliation was lost.⁴⁶

By June 2010, at least 12,861 LRA members had applied for and received amnesty.⁴⁷ According to the UN Mission in the DRC (MONUC), since 2011, the estimated number of core numbers of the LRA has bounced between 250 and 150 soldiers.⁴⁸ The weaknesses inherent in its provisions and other factors limited the application of the Amnesty Act and created a challenge to its implementation. These challenges affect the entire accountability processes in Uganda as discussed below.

4.2.1 Government’s attitude towards amnesty

Since its inception, the government’s attitude towards amnesty has been controversial and seen as a tactical device to gain an upper hand in the conflict rather than based on a genuine desire to end the conflict through peaceful means and to ensure reconciliation. This sentiment is due to the UPDF’s continuous determination to pursue a military solution to the conflict. For instance the government’s controversial military strategy that began in March 2002 - Operation Iron Fist, shortly after passing of the Act, fully contradicted the aims of the amnesty law. In addition, after the US included the LRA on its State Department’s list of terrorist organisations post 11 September 2001 attacks,⁴⁹ the government of Uganda

⁴⁵ P Acirokop ‘The Potential and Limits of Mato Oput as a Tool for Reconciliation and Justice’ in S Parma et al. (eds) *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (2010) 271; stating that return process is complicated by stigma, persons who return from the ‘bush’ are usually referred to as murderers or rebels and the children have been nicknamed *duk paco* (return home). The children say they find this phrase offensive as people lace it with sarcasm and bitterness angry that they suffered due to the war and now perpetrators are being rewarded. This nickname is derived from a radio programme started by the Amnesty Commission called *duk paco* that seeks to encourage the rebels to return home. Among the items provided as amnesty package are school bags for children with *duk paco* printed on.

⁴⁶ L Hovil & Z Lomo ‘Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: Potential for Conflict Resolution and Long-Term Reconciliation’ (2005) 15 *Refugee Law Project* 26.

⁴⁷ Interview with Judge Onega, chairman of the Amnesty Commission, conducted on 14 Jan 2011; while a few LRA members have been denied amnesty as discussed later in this chapter.

⁴⁸ ‘Questions over the progress of the LRA’ IRIN 24 Feb 2012, available at <http://www.unhcr.org/refworld/docid/4f4cd6cb2.html> accessed 16 March 2012); reports further indicate that the LRA have broken up into very small groups and Kony himself moves with about five to ten soldiers in a vast area sparsely populated that makes finding them very difficult.

⁴⁹ The September 11th attacks were a series of four coordinated suicide attacks by al-Qaeda on the US on September 11 2001. These attacks are commonly referred to as September 11, September 11th or 9/11. The US

adopted the Anti-terrorism Act No 14 of 2002 that lists the LRA in the second schedule as a terrorist organisation; outlaws membership in such organisations; and any contact with the organisations attracts punishment.

In addition, although the government repeatedly stated its intention to negotiate peace with the LRA, those who attempted to have dialogue and breach the communication gap with the rebels in line with the Amnesty Act; (most notably religious and cultural leaders) were accused of being rebel collaborators or sympathisers and at times threatened. For example, the UPDF instructed Father Carlos Rodriguez, a member of the ARLPI to leave Northern Uganda forthwith because of his attempts to reach the rebels and negotiate the release of abducted persons, especially schoolchildren. The army spokesperson, Major Shaban Bantariza advised that he should be deported for his own safety.⁵⁰ In addition, the government has viewed with hostility the fact that LRA leaders sometimes phone religious leaders who are peace activists.⁵¹

At the same time, three years after the enactment of the Amnesty Act, the government referred the situation of the LRA to the ICC that started investigations. Further, in 2008, the government created the ICD with the immediate aim of prosecuting top LRA perpetrators for crimes committed in the conflict in line with the Agreement on Accountability and Reconciliation yet renewed the blanket amnesty in 2010.⁵² This caused considerable confusion due to the obvious contradiction between investigations and prosecutions and the blanket amnesty provided for under the Amnesty Act. The government continuously renewed the Amnesty Act despite ongoing investigations by both the ICC and the ICD, until May 2012.⁵³

responded to the attacks by launching the War on Terror, invading Afghanistan to dispose the Taliban that provided a safe haven for al-Qaeda and by enacting the USA Patriot Act.

⁵⁰ 'Ugandan army Spokesman Major Shaban Bantariza says the Priest Should be Deported' Voice of America February 2004 <http://www.voanews.com/english/archive/2004-02/a-2004-02-12-45-Ugandan.cfm> (accessed 15 Aug 2009).

⁵¹ T Allen *Trial Justice: the International Criminal Court and the Lord's Resistance Army* (2006) 34.

⁵² Annexure to the Agreement on Accountability and Reconciliation clause 23.

⁵³ Amnesty (Amendment) Act 2006 sec 16 provides that the Amnesty Act shall remain in force for a period of two years that may be extended. The Act is due for extension in May 2012.

Perhaps most critical is that despite the eligibility of some people to receive amnesty, the law enforcement and security agencies denied this right to some individuals with no credible explanation. A case in point is that of Thomas Kwoyelo, the first person indicted by the ICD. Two years after his capture and detention, Kwoyelo renounced rebellion before a prison warden and completed the Amnesty Declaration Form.⁵⁴ The Amnesty Commission deemed him to qualify for amnesty in accordance to Section 3 of the Amnesty Act and asked for certification by the DPP in accordance to section 4(4) of the Act but received no response.⁵⁵

Kwoyelo challenged his prosecution by the ICD before the Constitutional Court that found no credible and convincing explanation why others, in similar situations, benefitted from amnesty and Kwoyelo did not and ordered the ICD to cease his trial.⁵⁶ The ICD has since ceased the trial but Kwoyelo.⁵⁷ The State applied to the Constitutional Court for a stay of execution pending an appeal to the Supreme Court. The Constitutional Court denied the stay.⁵⁸ The DPP refused to order the release of Kwoyelo despite an order of mandamus by the High Court to compel the DPP and the Chairman Amnesty Commission to issue him an amnesty certificate and have him released with the immediate effect.⁵⁹ On 30 March 2012,

⁵⁴ *Thomas Kwoyelo Alias Latoni v Uganda* (Constitutional Court of Uganda) 'Affidavit by Thomas Kwoyelo in Support of the Petition Constitutional Reference 036/11 para 17.

⁵⁵ *Thomas Kwoyelo Alias Latoni v Uganda* (n 18 above) para 18 & 19; during discussions with Judge Onega on 19 Jan 2011 in Kampala, the judge stated that if Kwoyelo or any other rebel approaches his office, he will grant them amnesty in accordance with the Act no matter the interest of the DPP in prosecuting the person in question for crimes committing during the conflict.

⁵⁶ *Thomas Kwoyelo Case* (n 18 above) para 620; the state has filed a notice of appeal but the appeal cannot be heard until an additional judge is appointed to the Supreme Court that presently lacks quorum.

⁵⁷ *Uganda v Kwoyelo Thomas alias Latoni* (International Crimes Division of the High Court of Uganda) HCT-00-ICD-CASE NO. 0002 of 2010 (11 Nov 2011); the ICD made an order to cease the trial of Kwoyelo forthwith and ordered the DPP and the Chairman Amnesty to comply with the provisions of the Amnesty Act.

⁵⁸ *Uganda v Kwoyelo Thomas alias Latoni* (Constitutional Court of Uganda) Constitutional Application No. 50/11 (Arising out of Constitutional Reference No 36/11) (10 Nov 2011) 2; the Court found that the State had not made a case to warrant the grant of stay of execution and dismissed the application. The Court promised to furnish the reasoning behind the ruling at a later date.

⁵⁹ *Kwoyelo Thomas alias Latoni v Attorney General* (High Court of Uganda, Civil Division) HCT-00-CV-MC-0162-2011 (25 Jan 2012) 19 & 20; the Court ordered the Chairman Amnesty Commission and the DPP to grant a certificate of Amnesty to Kwoyelo immediately and release him; see also 'DPP Rejects Kwoyelo's Amnesty' the New Vision 5 Feb 2012; the DPP maintained that Kwoyelo is charged with grave breaches of the Geneva Convention therefore not eligible to receive amnesty; telephone interview with Joan Kagezi senior principal State Attorney in charge of international crime trials. It appears that the fear that the DPP and his team are not willing to express is that Kwoyelo is a flight risk. With the connections he has with the LRA or its supporters in Sudan (from where the fees for his defence allegedly remitted) he potentially has people to give him sanctuary out of Uganda. That means that in the event that the Supreme Court overturns the ruling of the Constitutional

the Supreme Court issued an interim order staying execution of any consequential orders arising from the Constitutional Reference, pending hearing and determination of the main application for stay of execution.⁶⁰ On 5 April 2012, the High Court issued an order staying the execution of the order of mandamus granted by the Court pending the state's intended appeal against the order.⁶¹

The seemingly haphazard way in which the government applied the Amnesty Act is further illustrated by the case of Okello Solomon Patrick alias Okello Mission who joined the LRA during the Juba talks in 2006. He is known to have played a key role in explaining to Kony technical issues raised during the peace talks. The UPDF captured Okello Mission in March 2010 in South Sudan; he claimed that he had gone there to renew peace talks on behalf of Kony. He has been detained with no charge since in the Chieftaincy of Military Intelligence (CMI) safe house in Kawempe, a Kampala suburb. Despite the provisions of the Amnesty Act, the Ugandan authorities said that they would charge for with treason, but have not yet done so.⁶²

To date, the government has not given any explanation as to why it granted amnesty to some people yet denied others, like Kwoyelo. Even with the lapse of Part II of the Act, it is not clear which offenders the government intend to prosecute before the ICD. For instance, Gen Caesar Acellam, who was captured on 13 May 2012, did not apply for amnesty before the lapse of Part II of the Act but it is not yet clear if the UPDF will release him to the custody of the ICD for trial. The DPP has already prepared an indictment for him and hope to start trial soon.⁶³ Since the capture of Gen Acellam, the UPDF has printed and distributed defection fliers with his photograph throughout the LRA affected regions in South Sudan, DRC and Central African Republic. The fliers advises the LRA fighters to put down arms and

Court, it will be hard or impossible to secure his arrest. In addition, if granted, the amnesty would not be reversible.

⁶⁰ *Attorney General v Thomas Kwoyelo alias Latoni* (Supreme Court of Uganda at Kampala) Constitutional Application No. 01 of 2012 (Arising from Constitutional Reference No. 36 of 2011) (30 March 2012).

⁶¹ *Attorney General v Thomas Kwoyelo alias Latoni* (High Court of Uganda at Kampala) Miscellaneous Application No. 179 of 2012 (Arising out of Miscellaneous Cause No. 162 of 2011) (5 April 2012).

⁶² L Cakaj, (September 2011) 'Too Far from Home: Demobilising the Lord's Resistance Army' Enough Project (September 2011) <http://www.enoughproject.org> (accessed 15 April 2011).

⁶³ Interview with Joan Kagezi the senior principal State Attorney in charge of international crimes prosecution, conducted on 6 July 2012.

stop fighting with a promise that they would not be harmed, indicating that Acellam has not been harmed by the UPDF.⁶⁴ In addition, the US is working with UN missions and military forces in the region to expand communications, including through distributing leaflets and radio broadcasts urging LRA fighters to defect, surrender peacefully and return home.⁶⁵ These leaflets and broadcasts say nothing of the lapse of Part II of the Amnesty Act and the fact that the ICD operations continue and that it prepares to prosecute commanders like Thomas Kwoyelo. The LRA commanders must be fully aware of the contradictions that they communicate to the fighters.⁶⁶

Further, the government of Uganda has used amnesty as a political gimmick to dissuade political dissent aimed at it. For example, the police arrested Kiiza Besigye, leader of the Forum for Democratic Change (FDC) the main opposition party in Uganda on 14 November 2005 on charges of treason. Besigye claims that his co-accused were subjected to torture to confess to belonging to a rebel group, the Peoples' Redemption Army (PRA) that he claims was conjured up by the government and does not exist.⁶⁷ The accused persons in the treason trial were forced to apply for amnesty to avoid prosecution.⁶⁸ This weakens the assumption of fairness and affects the legitimacy of the Amnesty Commission and law enforcement institutions. This, together with the lapse of the Part II of the Amnesty Act jeopardises the potential of ending Uganda's cycles of violence and the potential for reconciliation.⁶⁹

⁶⁴ See <http://www.lracrisistracker.com/> for more details on the defection fliers.

⁶⁵ 'Statement by Ambassador Jeffrey DeLaurentis, U.S. Alternate Permanent Representative to the United Nations for Special Political Affairs, At a Security Council Briefing on UNOCA/LRA' (29 June 2012) available at <http://usun.state.gov/briefing/statements/194265.htm> (accessed 12 July 2012).

⁶⁶ Cakaj (n 53 above).

⁶⁷ The existence of this rebel group is disputed; the government has asserted its existence for several years although it has occasionally called the group 'dormant'. The government alleges that the rebel group is based in Eastern DRC and has links to Rwanda. The government further alleges that, renegade Ugandan army officers including the FDC President, Kizza Besigye, founded the group. The FDC and Rwandan President dispute the existence of such a group. In 2004, the government estimated that PRA consisted of 2000 rebels that were ready to attack Uganda. As a result, in Dec 2004, Uganda deployed troops along the border, later making way into the DRC where the UPDF were accused of looting and other atrocities against civilians in the DRC. See 'Uganda Deploys troops along on Congo Border' People's Daily online 2 Dec 2004; for more on the resulting ICJ case against Uganda, see chapter one of this thesis.

⁶⁸ 'Nine more PRA Suspects Freed Friday' the Daily Monitor 16 Feb 2007 1.

⁶⁹ Hovil & Lomo (n 39 above) 19 -20.

4.2.2 Resource and time-bound limitation

The Uganda Amnesty Commission is underfunded and resource issues have severely constrained its effectiveness. For instance, many reporters have not received a resettlement package. In addition, the Commission has not been able to implement reintegration and resettlement programs due to lack of resources.⁷⁰ This remains a critical issue as the Commission must continue with its duties including the demobilisation, reintegration, and resettlement of reporters. In addition, since the lapse of Part II of the Amnesty Act, the Commission has not received funds to sensitise the public on this and to perform its other roles. The government must therefore better fund the Commission and the DRT to enable them perform this broad and more relevant function of reintegrating reporters and encouraging reconciliation within the limited time.⁷¹

4.2.3 Crimes committed in other states and universal jurisdiction

Although the DPP's office has clearly stated that it does not intend to indict persons who benefitted from the amnesty process because the Constitution of Uganda protects them,⁷² offences committed by the LRA involve not only Uganda territories but also South Sudan, the DRC and Central African Republic. The other states have a right to assert jurisdiction over persons granted amnesty in Uganda. If this happens, Uganda will be obliged to extradite such persons to face trial in the requesting state.⁷³ In addition, the crimes perpetrated in the conflict in Northern Uganda are matters covered by universal jurisdiction,

⁷⁰ Interview with Justice Onega conducted on 14 Jan 2011 in Kampala.

⁷¹ C Rose 'Looking beyond Amnesty and Traditional Justice and Reconciliation Mechanism in Northern Uganda: A Proposal for Truth Telling and Reparations' (2008) 28(2) *Boston College Third World Law Journal* 358; Citizens for Global Solutions 'In Unchartered Waters: Seeking Justice before the Atrocities have Stopped' (2004) 23 *Citizens for Global Solutions* 26.

⁷² Interview with Joan Kagezi, senior principal State Attorney in charge of war crimes prosecutions conducted on 6 July 2012 in Kampala.

⁷³ Geneva Conventions I art 49(2) that requires a state according to its own legislation to extradite offenders of the grave breaches to a requesting state that makes a *prima facie* case. The Extradition Act of Uganda cap 117 of 1964 contains the law relating to the extradition of persons accused or convicted of crimes committed in other jurisdiction, sec 23 only excludes the extradition of persons charged with political crimes.

so any other interested state may request Uganda to surrender persons granted amnesty for purposes of prosecution.⁷⁴

A nationally granted amnesty does not preclude a foreign state from proceeding with prosecutions. In the *Pinochet case*,⁷⁵ involving the request from Spain for the extradition of the former Chilean head of state from the UK, counsel for Pinochet never pleaded for the recognition of the Chilean amnesty to bar the extradition of Pinochet. The English criminal law and the law of extradition appear to contain no principle that could be relied upon to support such an argument. Therefore, although a state may choose to grant amnesty to perpetrators of international crimes, this does not bar other interested states from prosecuting such individuals.⁷⁶

The application of the Amnesty Act had several loopholes and fell short of any accountability goal. It has prevented the prosecution of individuals who may be criminally responsible for international crimes, interfered with the victims' and society's right to know the truth about violations of IHL and IHRL and foreclosed the victims' rights to reparations that would include compensation from perpetrators.⁷⁷ The lapse of Part II of the Act however, opens doors for investigations into the activities of the LRA and possible prosecution of those responsible for international crimes committed during the conflict. Although the Constitution protects those who already received amnesty against criminal prosecution, there is nothing in the law that bars victims from seeking compensation from them through civil suits. In addition, persons granted amnesty should be encouraged to take part in other non-judicial or quasi-judicial processes like a truth telling and traditional justice processes.

⁷⁴ O'shea (n 13 above) 265; also see detailed discussion on international obligations in chapter three of this thesis.

⁷⁵ *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Pinochet Ugarte* (No. 3) [2003] 1 AC 147; J Zalaguet 'Balancing Ethical Imperatives and Political Constraints: The Dilemmas of Democracies Confronting Past Human Rights Violations' (1992) *Hasting Law Journal* 312.

⁷⁶ M Freeman *Necessary Evils: Amnesties and the Search for Justice* (2009) 315.

⁷⁷ As indicated previously, there is nothing in the Amnesty Act that bars victims from pursuing civil cases against perpetrators before the courts in Uganda though the majority of the victims are not aware of this and do not have the money to do so.

Today, the TJWG is developing a National Transitional Justice Policy.⁷⁸ The referral of the Ugandan case to the ICC sparked off the development of the National Transitional Justice Policy and accountability for crimes committed in LRA conflict. The Juba negotiations presented an opportunity to discuss Uganda's international accountability obligations. Whether the resultant Agreement on Accountability and Reconciliation and its Annexure addressed the issue is discussed next.

4.3 The Agreement on Accountability and Reconciliation and its Annexure

The Agreement on Accountability and Reconciliation and its Annexure represents the compromise reached between the LRA and the government of Uganda in Juba. The government agreed to the negotiation in an attempt to end the drawn out conflict that had become a political embarrassment. While the LRA agreed to the negotiations with the desire to remove the threats of prosecution by the ICC.⁷⁹ This was clear from the demand of the LRA for a withdrawal of the warrants of arrest issued by the ICC and the response of the government of Uganda that it would meet the demand if a comprehensive peace agreement were reached. The intention of the parties to bypass the ICC proved legally impossible without genuinely addressing the question of accountability for crimes committed in the conflict at the domestic level.⁸⁰ The Agreement on Accountability and Reconciliation and its Annexure therefore set out the framework through which the government would deal with questions of accountability; the measures proposed and the inherent weaknesses are discussed below.

⁷⁸ The Formal Criminal Jurisdiction Sub-Committee of the TJWG has since the meeting in Feb 2010 been undertaking a review of the Amnesty Act and will consider key legal and policy options for the way forward on Amnesty in light of Uganda's international obligations, national laws and the National Transitional Justice Policy objectives that the group is developing. In anticipation of the review, the Refugee Law Project and UNOHCHR, in collaboration with UN Women held a one day conference in Nov 2011 entitled 'Dialogue: The Crossroads of Amnesty and Justice' to discuss the continued role of the Amnesty Act in creating an environment for reconciliation, accountability and sustained reintegration and peace in Uganda. The conference had a particular focus on the impact of the Amnesty Act on accountability for international crimes. This conference sparked off nationwide discussion on the Amnesty Act and its relationship to other accountability measures. For more information see <http://jlos.go.ug/uploads/Website%20article%20ANETY-KITGUM.pdf> (accessed 14 April 2012).

⁷⁹ Another factor that may have been critical for the request for a peace negotiations by the LRA is the signing of a Comprehensive Peace Agreement between the Khartoum government and the leadership in South Sudan that required the withdrawal of the Sudanese Armed Forces from South Sudan, cutting the LRA supply lines and the safe haven they had in South Sudan.

⁸⁰ Wierda & Otim (n 73 above) 22.

4.3.1 Formal prosecutions⁸¹

The Agreement and its Annexure proposes measures of justice,⁸² including both criminal and civil justice measures to be applied to any individual who is alleged to have committed serious crimes or human rights violations.⁸³ The choice of forum is to be informed by the nature and gravity of the conduct and the role of the alleged perpetrator in that conduct.⁸⁴ Formal courts provided for under the Constitution are exercise jurisdiction for serious crimes that includes those amounting to international crimes during the conflict.⁸⁵ During the negotiations, the parties discussed the need for a specific institution to carry out criminal prosecutions for international crimes and the Annexure proposed a Special Division of the High Court to handle crimes of this nature.⁸⁶ The government through a Legal Notice created the ICD, to prosecute individuals alleged to 'have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions.'⁸⁷ A proviso in the Agreement excludes state actors from the jurisdiction of the envisaged division.⁸⁸ However, this proviso was not formalised in the Legal Notice creating the ICD whose jurisdiction is not limited to any particular individuals or category of individuals.⁸⁹

⁸¹ Further and detailed discussion on formal prosecutions in Uganda is contained in chapter six of this thesis.

⁸² Agreement on Accountability and Reconciliation preamble para 4 & 5; clause 2.1.

⁸³ Agreement on Accountability and Reconciliation clause 4.1.

⁸⁴ Agreement on Accountability and Reconciliation clause 4.3.

⁸⁵ Agreement on Accountability and Reconciliation clause 6.1.

⁸⁶ Agreement on Accountability and Reconciliation part 5 and Annexure clauses 7, 8 & 9; the negotiators also recognised the limitation of Uganda's laws to adequately address the crimes perpetrated in the LRA conflict and the need to domesticate the Rome Statute was discussed and agreed to, though this discussion is not reflected in any of the provisions of the Agreement and the Annexure. The domestication of the Rome Statute in 2010 was partly as a result of the negotiations in Juba in addition to other factors that played a role; see chapter six for further discussion.

⁸⁷ Agreement on Accountability and Reconciliation clause 4 & Annexure clause 14.

⁸⁸ Agreement on Accountability and Reconciliation clause 4.1; there appears to be no justifiable reason why different processes should apply to different offenders for crimes perpetrated in the same conflict; this appears to be an attempt to shield state actors from prosecutions; indeed, no criminal proceedings have been instituted (at least publically) against state actors for crimes committed in the LRA conflict.

⁸⁹ The High Court (International Crimes Division) Practice Directions, Legal Notice 10 of 2011, Legal Notice Supplements, Uganda Gazette 38 (CIV) 31 May 2011 para 6.

The provision, envisaging domestic trials of international crimes were specifically included to satisfy the ICC complementarity regime.⁹⁰ They were intended to put a halt to the ICC investigations thereby satisfy the LRA demand that ICC arrest warrants be dropped before the signing of a comprehensive peace agreement.⁹¹ The parties included a provision emphasising that Uganda has institutions, customs and laws that are capable of addressing the crimes committed during the conflict,⁹² but failed to assert primacy over international crimes or to establish modalities on how the justice processes in Uganda would collaborate and work alongside the ICC. The International Criminal Court Act 11 of 2010 that domesticates the Rome Statute provides for modalities of cooperation and partly rectifies this oversight. There is however, a further need for a transfer mechanism at the ICC to transfer cases to Ugandan courts at a time when Uganda will be willing to assert jurisdiction over offenders at the ICC.⁹³

4.3.2 Investigations

The Agreement further provides for an investigative unit with a multi-disciplinary character controlled by the DPP that will identify individuals alleged to have planned or carried out international crimes.⁹⁴ According to Barney Afako, the Legal Advisor to the Mediator, the DPP will investigate and prosecute every crime based upon systematic, neutral and independent process of investigation.⁹⁵ The Annexure requires the government to establish a unit that will carry out investigations and provides for its processes, composition and protection guidelines for special groups like children and women.⁹⁶ Barney Afako provided further assurances that the investigations shall be independent, impartial and not

⁹⁰ Agreement on Accountability and Reconciliation preamble para 3.

⁹¹ Wierda & Otim (n 71 above) 21; see also background notes in chapter one of the thesis.

⁹² Agreement on Accountability and Reconciliation clause 5.1.

⁹³ GH Harris 'Closer to Justice: Transferring Cases from the International Criminal Court' (2010) 19(1) *Minnesota Journal of International Law* 212; JM Kamatali 'From the ICTR to the ICC: Learning from ICTR Experience on Bringing Justice to Rwandans (2005) 12 *New England Journal of International and Comparative Law* 90; both authors advocate for the ICC to adopt a transfer mechanism modelled on a similar rule adopted by the ICTR to transfer cases to national jurisdiction to ensure more involvement by local communities.

⁹⁴ Annexure clauses 10, 11, 12 & 13.

⁹⁵ B Afako, 'A Detailed Description of Various Accountability Institutions' (May 2008) *Final Report on the Workshop on Accountability and Reconciliation: Juba Peace Talks* 18.

⁹⁶ Annexure clause 10 & 13.

influenced by any work, not even the investigations by the ICC.⁹⁷ It is unclear if operation of this investigative unit will include investigations into acts of state actors who are shielded from the accountability measures envisaged under the Agreement and Annexure.⁹⁸

4.3.3 Historical clarification and truth telling⁹⁹

The Agreement provides for an inquiry into past violations,¹⁰⁰ and requires the government by law to establish a body to be conferred with all necessary powers and immunities to consider and analyse any relevant matters including the history and manifestations of the conflict. To inquire into human rights violations giving particular attention to experiences of women and children; to hold hearings; to make provisions for witness protection; to promote truth telling; encourage preservation of memory; gather information on disappearance; make recommendations on a regime of reparations; make recommendations to ensure non reoccurrence; and to publish its findings and any other relevant function.¹⁰¹

The body is to be composed of persons of high moral character, integrity, and necessary expertise, reflecting a gender balance and national character.¹⁰² The government is further required to make detailed guidelines on how this body will work and relate to formal prosecutions.¹⁰³ The Agreement and Annexure however fail to establish how this body will relate to formal prosecutions and other measures. It is however, clear from the reading of the provisions that LRA personnel most responsible for international crimes will be

⁹⁷ Afako (n 95 above) 18.

⁹⁸ Joan Kagezi, the Senior Principle State Attorney in charge of international crimes in an interview conducted on 14 June 2011 in Kampala stated that the DPP and investigators have not looked into crimes allegedly committed by state actors but the DPP's office encourages anybody with information to report to them. This clearly is sidestepping the issue, as crimes allegedly committed by the UPDF are clearly documented and readily available to anybody interested in investigating alleged acts. For crimes perpetrated by the UPDF in the LRA conflict, see chapter two of this thesis.

⁹⁹ Further and detailed discussion on a national process of truth telling is contained in chapter eight of this thesis.

¹⁰⁰ Agreement on Accountability and Reconciliation clause 2.2 & 2.3.

¹⁰¹ Annexure clause 4.

¹⁰² Annexure clause 6.

¹⁰³ Annexure clause 5.

prosecuted. A policy document or legislation establishing a truth telling institution should therefore clarify the relation the truth telling institution will have with the ICC and ICD.¹⁰⁴

4.3.4 Reparations¹⁰⁵

The Agreement requires that victims must receive reparations both on a collective and individual basis. The reparations will include a range of measures such as rehabilitation, restitution, compensation, guarantees of non-reoccurrence and other symbolic measures such as apologies, memorials and commemorations.¹⁰⁶ The Agreement provides that the government should pay out compensation out of resources it has identified for that purpose. The government also committed to review its financial and institutional requirements and procedures for reparations to ensure that it adopts the most effective mechanism.¹⁰⁷

In addition, perpetrators appearing before the accountability institutions envisaged are required to pay compensation to victims as part of penalties and sanctions in the proceedings.¹⁰⁸ It is not clear if LRA perpetrators who will appear before these institutions will have money or property to pay compensation to victims.¹⁰⁹ Yet, the Agreement shields state actors who may be better able to pay from accountability procedures envisaged by the Agreement.¹¹⁰ A reparations scheme created must therefore ensure that all victims of the LRA conflict receive some form of reparations to cure this defect.

¹⁰⁴ Further discussion on this is contained in chapter eight of this thesis.

¹⁰⁵ Further discussion on reparations is done in chapter five, six, seven and eight of this thesis.

¹⁰⁶ Agreement on Accountability and Reconciliation clause 9.

¹⁰⁷ Annexure clause 16, 17 & 18.

¹⁰⁸ Agreement on Accountability and Reconciliation clause 6.4 & 9. 2.

¹⁰⁹ OL Ogora 'Acholi Traditional Justice' (May 2008) *Final Report on the Workshop on Accountability and Reconciliation: Juba Peace Talks* 13; in relation to traditional justice process, proposes that compensation should be symbolic and in cases where the perpetrator does not have money or property to satisfy compensation ordered, alternatives penalties like community service should be ordered. The presenter further indicated that Ker Kwaro Acholi has a set of written rules which sets the amount of symbolic compensation depending on the circumstances surrounding a crime that could work as a guide for elders performing Acholi traditional justice rituals.

¹¹⁰ Agreement on Accountability and Reconciliation clause 4.1 & Annexure clause 23; the Constitution of Uganda art 126(2)(c) empowers courts to order adequate compensation to victims of crimes; therefore if responsible state actors are prosecuted in ordinary courts in Uganda, they may be ordered to pay compensation to victims.

4.3.5 Traditional justice¹¹¹

The Agreement promotes the use of traditional justice, in particular mechanisms such as *mato oput*; *culo kwor*; *kayo cuk*; *ailuc* and *tonu ci koka* as practised in the communities affected by the conflict with necessary modification.¹¹² It is however not clear how the processes will deal with inter-ethnic crimes; the actual capacity of traditional structures to take on such massive and transformed duties; and the feasibility of relying on voluntary confessions to propel the process into motion.¹¹³ While the Agreement makes no clarification of this and the modification envisaged, and does not compel persons to undergo traditional justice process,¹¹⁴ it nonetheless provides that the mechanisms shall form a central part of the alternative justice and reconciliation framework.¹¹⁵

It is unclear, for instance, whether the intention is for traditional justice to replace criminal proceedings in some cases and in what circumstances it will be applied. The Agreement generally provides that serious crimes that include international crimes should be addressed through formal prosecutions, traditional justice and any other alternative justice mechanism established.¹¹⁶ This will pose a serious problem in decision of which perpetrator appears before what accountability measure and the reasons why, since these measures do not have the same standards and rigors of prosecution and the punishment levied greatly differs.¹¹⁷ Traditional justice should therefore just complement criminal proceedings in cases of less serious crimes and not be an alternative to it.¹¹⁸

¹¹¹ Further and detailed discussion is done in chapter seven.

¹¹² Agreement on Accountability and Reconciliation clause 3.1.

¹¹³ A more detailed discussion on the role of traditional justice for crimes perpetrated in the LRA conflict is contained in chapter seven.

¹¹⁴ A more detailed discussion on the role of traditional justice for crimes perpetrated in the LRA conflict is contained in chapter seven.

¹¹⁵ Annexure clause 19.

¹¹⁶ Annexure clause 23; this provision is subject to clause 4.1 of the Agreement on Accountability and Reconciliation that provides for formal criminal and civil justice measures and excludes state actors from accountability under the measures envisaged.

¹¹⁷ For instance while persons found guilty in a criminal prosecution are liable to imprisonment and sometimes required to compensate victims; the only punishment envisaged by traditional justice is compensation of the victim and his/her family.

¹¹⁸ Further discussion on this is contained in chapter seven of the thesis.

The Agreement and Annexure also require the government in consultation with relevant stakeholders to examine traditional justice practices in the affected areas paying attention to the role and impact of the processes on women and children.¹¹⁹ This in essence should require an examination of the human rights standards established by IHRL to ensure that the measures adopt the same standards. The government must also ensure that sanctions levied reflect the gravity of the crimes committed and circumstances surrounding the commission to satisfy the requirement of effective remedies provided for in IHRL.¹²⁰

4.3.6 Relationship with the Amnesty Act

Finally, while providing for judicial and non-judicial accountability measures to deal with serious crimes committed during the conflict, the Agreement and its Annexure did not outlaw amnesty for any crime committed during the LRA conflict, neither did it provide modalities on how amnesty would operate alongside the other accountability measures. For instance, the Agreement does not state whether the investigative body to be established¹²¹ would include the power to recommend or award amnesties for crimes committed. Furthermore, the Agreement and Annexure undermined their own commitment to accountability by exempting all persons, including culpable LRA commanders already granted amnesty from any accountability process envisaged.¹²²

Understandably, for continuity and commitment to its policies and laws, the government could not unilaterally revoke amnesty it had already granted. This could have easily derailed the negotiations and the LRA and the victim community at large would have lost faith in the government. It would however have been in good faith for the negotiators to spell out that, even those already pardoned should undergo the other non-prosecutorial options without fear of incriminating themselves to ensure that victims get to know the truth and receive

¹¹⁹ Annexure clause 21.

¹²⁰ Ogora (n 109 above) 13.

¹²¹ Annexure clause 4 & 6.

¹²² Agreement on Accountability and Reconciliation clause 3.10; provides that where a person has already been subjected to proceedings or exempted from liability for any crime or civil acts or omissions, or has been subjected to accountability or reconciliation proceedings for any conduct in the course of the conflict, that person shall not be subjected to any other proceedings with respect to that conduct.

reparations. However, a legislation or policy to implement the Agreement and Annexure, can deal with this.

The Agreement is explicit in its requirement for gender considerations in the accountability undertakings. For instance, it provides that the national bodies created must strive to prevent and eliminate gender inequalities that arise during the processes.¹²³ It further provides that special provisions should be made for women, children and victims of sexual violations and crimes,¹²⁴ that the body should recognise their needs and that it should adopt gender-sensitive approaches; and to ensure their experiences, views and concerns are recognised and taken into account. The parties also committed themselves to protect the dignity, privacy and security of women and girls, and encourage and facilitate the participation of women and girls in the processes for implementing the Agreement.¹²⁵

4.4 Conclusion

Part II of the Amnesty Act lapsed on 25 May 2012, but there is a further need for a provision in the National Transitional Justice Policy requiring those granted amnesty to undergo non-prosecutorial options in the accountability mechanisms. This will ensure justice, truth, and reparations for the victims of the LRA conflict. In addition, the Agreement and Annexure should be approached as a foundation for further and specific discussion on accountability. They set the space for 'formal criminal and civil justice measures to be applied to any individual who is alleged to have committed serious crimes, including international crimes and other human rights violations in the course of the conflict, either through special measures or through ordinary courts in Uganda. The Agreement and Annexure also specifies that an 'alternative regime of penalties' will be introduced, and that these shall take into account the gravity of the crimes but also the need for reconciliation, thereby incorporating the demands for justice, truth and reparations.

¹²³ Agreement on Accountability and Reconciliation clause 10.

¹²⁴ Agreement on Accountability and Reconciliation clause 3.4.

¹²⁵ Agreement on Accountability and Reconciliation clause 11.

The lapse of Part II of the Amnesty Act and the Agreement and Annexure therefore are in line with Uganda's international obligations though the implementation depends on the consultations, legislations, policies and the establishment and workings of the institutions envisaged that should clarify some of the outstanding issues. The JLOS TJWJ consultative process aimed at a comprehensive National Policy on Transitional Justice that started in 2009 has taken a very slow pace and the recommendation that the policy should be in place within a year, must be adhered to.¹²⁶ In addition, there has been no concerted effort on the part of the government to document, investigate, and provide victims with access to relevant information concerning the violations they and others in the region suffered due to the conflict. The government is yet to make progress in the pursuit of fair and impartial justice regarding the mass atrocities perpetrated in LRA conflict and there is hardly been any systematic information, outreach or consultation with victims on any development or planning for reparations mechanisms.¹²⁷

The chapters that follow discuss measures provided for in the Agreement on Accountability and Reconciliation specifically the ICD, traditional justice and truth telling process. The next chapter will analyse the intervention of the ICC that set into motion accountability pursuits in Uganda.

¹²⁶ Interview with Ismene Zarifis, Transitional Justice Advisor with JLOS, conducted on 24 Feb 2012. The main complaint by civil society groups is that their involvement in the process is very limited and so is the consultation with the local population, a meeting to ensure more civil society involvement in the process organised by the African Institute for Strategic Research, Governance and Development hosting representatives from 27 different organisations took place in Kampala on 26 Aug 2011

¹²⁷ Uganda Human Rights Commission & United Nations High Commissioner of Human Rights *"The Dust has not yet Settled"*, *Victims View on a Right to Remedy and Reparations: A Report from the Greater North of Uganda* (2011) 61. This is the biggest concern of civil society groups in Uganda today.

CHAPTER FIVE

THE ICC'S INTERVENTION IN THE LRA SITUATION

5.1 Introduction

In December 2003, President Yoweri Museveni of Uganda referred the situation concerning the LRA to the ICC.¹ The ICC Prosecutor determined that there was sufficient basis for investigations and, in July 2004, commenced investigations.² Warrants of arrest were issued under seal by Pre-Trial Chamber II on 8 July 2005 and unsealed on 13 October 2005.³ The Trial Chamber also issued a request for the arrest and surrender of five LRA suspects named in the warrants. These warrants were the first the ICC issued since the Rome Statute came into force in July 2002.⁴

The ICC Prosecutor charged Joseph Kony, the LRA leader on 33 counts, comprising 12 counts of crimes against humanity and 21 counts of war crimes.⁵ Vincent Otii charged on 32 counts, comprising 11 counts of crimes against humanity and 21 counts of war crimes.⁶ Okot Odhiambo charged on 10 counts, comprising 2 counts of crimes against humanity and 8

¹ 'President of Uganda refers situation of the Lord's Resistance Army to the ICC', ICC-CPI-20040129-43; the Rome Statute provides 3 ways in which the court may exercise its jurisdiction in respect to crimes of war crimes, crimes against humanity, genocide and crimes of aggression (these are provided for in article 5 of the Statute with particulars provided in articles 6, 7, and 8 (crimes of aggression is yet to be defined). 1) The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court and if she/he concludes that there is a reasonable basis to proceed with an investigation, she/he is required to submit to the Pre-Trial Chamber a request for authorisation of an investigation (this is provided for in article 15 of the Statute, this referral mechanism and has been invoked by the ICC in the situation in Kenya and Libya). 2) The Security Council acting under Chapter VII of the Charter of the United Nations can make a referral to the Prosecutor if one or more of the crimes under the Statute appears to have been committed in any state (this is provided for in article 13 of the ICC Statute and the situation with the Darfur referral). 3) Finally a state party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation (this is provided for in article 14 of the ICC Statute and was the case of the Ugandan, Central African Republic and the Democratic Republic of Congo (DRC) referrals.)

² 'Prosecutor of the International Criminal Court Opens Investigations into Northern Uganda', ICC-CPI-20040729-65.

³ 'Warrants of Arrest unsealed Against 5 LRA Commanders', ICC-CPI-20051014-110.

⁴ As above.

⁵ ICC Pre-Trial Chamber II 'Public Redacted Version: Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005' (27 September 2005) ICC-02/04-01/05 para 5, 34 and 42.

⁶ ICC Pre-Trial Chamber II 'Public Redacted Version: Warrant of Arrest for Vincent Otti' (8 July 2005) ICC-02/04 para 5, 34 & 42; Otti is said to have been executed by Joseph Kony the LRA leader; 'Kony Confirms Otti's Death' New Vision 23 January 2008; the death of Otti has not been independently verified so the ICC still considers him a fugitive and proceedings against him are ongoing.

counts of war crimes.⁷ Dominic Ongwen is charged on 7 counts, comprising 3 counts of crimes against humanity and 4 counts of war crimes.⁸ Raska Lukwiya is charged on 4 counts, comprising of 1 count of crimes against humanity and 3 counts of war crimes.⁹ All the indictments refer to the general allegations that the LRA engaged in a cycle of violence and established a pattern of brutalisation of civilians by acts including murder, abductions, and sexual enslavement among others, all crimes falling within articles 5, 7 and 8 of the Rome Statute. The indictment alleges that the crimes took place after 1 July 2002 within the context of the situation in Uganda.¹⁰ All the indictees were charged on the basis of individual criminal responsibility as members of the 'Control Altar' that represents the core leadership of the LRA responsible for devising and implementing LRA strategy including 'standing orders to attack and brutalise civilian populations'.¹¹

Issuing the warrants was a welcome move for most of the international community. Kofi Annan, the then Secretary General of the UN stated that the warrants would send a powerful signal around the world that those responsible for international crimes would be held accountable for their actions. The European Union High Representative for Common, Foreign and Security Policy, Javier Solana stated that the move would put an end to impunity.¹² Human Rights groups like The International Centre for Transitional Justice (ICTJ) stated that the indictment constituted a crucial part of the solution to the conflict in Northern Uganda.¹³ Amnesty International and Human Rights Watch applauded the ICC for taking steps against the gross human rights violations in the conflict but also brought

⁷ ICC Pre-Trial Chamber II 'Public Redacted Version: Warrant of Arrest for Okot Odhiambo' (8 July 2005) ICC-02/04 para 5, 24 & 32.

⁸ ICC Pre-Trial Chamber II 'Public Redacted Version: Warrant of Arrest for Dominic Ongwen' (8 July 2005) ICC-02/04 para 5, 22 and 30.

⁹ ICC Pre-Trial Chamber II 'Public Redacted Version: Warrant of Arrest for Raska Lukwiya' (8 July 2005) ICC-02/04 para 5, 22 & 30; note that the ICC reached a decision to terminate proceedings against Raska Lukwiya following the confirmation of his death during battle with the UPDF, Pre-Trial Chamber II (11 July 2007) 'Public: Decision to Terminate Proceedings Against Raska Lukwiya' ICC-02/04-01/05.

¹⁰ Arrest Warrant for Joseph Kony (n 5 above) para 34; Arrest Warrant for Vincent Otti (n 6 above) para 34; Arrest Warrant for Okot Odhiambo (n 7 above) para 24 and Arrest Warrant for Dominic Ongwen (n 8 above) para 22.

¹¹ Arrest Warrant for Joseph Kony (n 5 above) para 8 & 9; Arrest Warrant for Vincent Otti (n 6 above) para 8 & 9; Arrest Warrant for Okot Odhiambo (n 7 above) para 8 & 9; Arrest Warrant for Dominic Ongwen (n 8 above) para 8 & 9.

¹² IrinNews.org 'Uganda: Indictment of LRA leaders draws widespread praise,' 17 Oct 2005 (accessed 3 August 2009).

¹³ 'Ugandan Rebel Leaders Indicted' ICTJ 7 Oct 2005, available at <http://www.ictj.org/en/news/press/release/254.html> (accessed 3 Sept 2009).

attention to the alleged atrocities committed by the UPDF that they argued warranted investigations by the ICC.¹⁴

The ICC intervention however, drew many criticisms in Uganda and contrary to the expectations of many, the biggest critics were victims of LRA atrocities and groups advocating on their behalf.¹⁵ Religious leaders, in particular, the Catholic Archbishop, John Baptist Odama, who heads the ARLPI, complained that the involvement of the ICC would put an end to efforts to ensure a peaceful negotiation of the conflict. Betty Bigombe, who at the time was the Minister for the North, backed by the United States, Britain, the Netherlands, Norway and the Catholic Church had renewed peace talks with vigour using amnesty as a negotiating tool.¹⁶ When the ICC released its warrants, Bigombe complained that the ICC had rushed too much as the ceasefire agreement she was close to brokering had been thwarted at the last minute.¹⁷ Judge Peter Onega, the chair of the Amnesty Commission complained that the ICC's warrants frustrated his work by scaring away rebels who were otherwise contemplating defection.¹⁸

The consistent complaint of the ICC critics in Uganda was that the timing of the warrants was not right and that the ICC intervention would exacerbate the violence.¹⁹ The immediate

¹⁴ Human Rights Watch 'ICC Takes Decisive Step for Justice in Uganda', 14 Oct 2005 <http://hrw.org/english/docs/2005/10/14/uganda11880.htm> (accessed 15 July 2009); and Amnesty International, 'Uganda: First ever Warrants by the International Criminal Court – a first step towards addressing Impunity', Media Briefing 14 October 2005.

¹⁵ W Pelsler, 'Will ICC Prosecutions Threaten Ugandan Peace Process?' ACR, Issue 46 (28 Nov 2005); T Allen, 'Trial Justice: The International Criminal Court and the Lord's Resistance Army' (2006) 83 – 88.

¹⁶ J Lobe, 'Historic ICC Arrest Warrants Evoke Praise, Concern' Inter-Press Service (14 October 2005) <http://www.ipsnews.net/print.asp?idnews=30640> (accessed 10 April 2009).

¹⁷ As above.

¹⁸ 'ICC Indictments to Affect Northern Peace Efforts, Says Mediator' IRIN News (10 October 2005) http://www.irinnews.org/report.asp?ReportID=49453&SelectRegion=East_Africa&SelectCountry=UGANDA (accessed 12 June 2005); Uganda: ICC Jeopardising Local Peace Efforts – Northern leaders' IRIN News (25 March 2005) <http://www.irinnews.org/report.asp/ReportID=46323> (accessed 12 February 2009); many feared that the ICC warrants would undermine the efforts to achieve peace in progress at that time and that the intervention would ruin the amnesty process which has been in place since 2000 and has been successful in luring a large number of LRA combatants out of fighting. The hope of among many in Northern Uganda was that the peace process and amnesty would in the long term lead to a wider process of peace and reconciliation in Uganda.

¹⁹ Allen (n 15 above) 96 – 127; M Schomerus & K Tumutegyezie 'After Operation Lightning Thunder: Protecting Communities and Building Peace' Conciliation Resources (April 2009) <http://www.reliefweb.int/rw/> (accessed 14 July 2010); these arguments no doubt find merit in the later development in the conflict when the governments of Uganda, DRC and Southern Sudan launched a joint military offensive to wipe out the LRA and apprehend the indicted leaders that worsened the security situation on the DRC/Sudan border, increased

concern of the critics was that the LRA would retaliate against the civilian population and carry out massive attacks, as known.²⁰ Indeed, a week after the ICC announced that it would open investigations in Uganda; the LRA attacked an IDP camp at Abia in Lira district, killing 50 civilians.²¹ Some commentators have further suggested that by inviting the ICC to look into the situation, the government of Uganda was looking for justification for a concerted military response and wanted to secure international support. They argued that since the ICC has no means of enforcing its warrants other than through the cooperation of states, the UPDF would get a free hand to pursue its military objectives in the pretext of executing the warrants.²²

The inability of the ICC to effect arrest caused a lot of scepticism among the population in Northern Uganda who questioned the difference a written document ordering the arrest of LRA commanders would make when military pursuit by the UPDF had failed for two decades.²³ Local civil society groups as well as international NGOs such as Amnesty International and Human Rights Watch questioned why the government had limited the terms of the referral to crimes committed by the LRA²⁴ when it is clear that the UPDF had also been responsible for crimes committed in the conflict.²⁵ The ICC Prosecutor maintained

LRA activities were reported including attacks and abductions, tens of thousands of Sudanese and Congolese were displaced and the humanitarian situation in the area worsened.

¹⁹ For more information on this see Refugee Law Project 'ICC Statement' 23 July 2004.

²⁰ CR Soto *Tall Grass: Stories of Suffering and Peace in Northern Uganda* (2009) 207, 216 & 224 that documents that just like the victim communities in Northern Uganda feared, on 1 Feb 2004, the LRA attacked Abiye IDP Camp killing 44 people and wounding more than 70 creating a massive displacement of at least 300,000 people in Lira town; later that year, the LRA massacred more than 300 civilians in Barlonyo IDP camp, a few kilometres north of Lira town; this massacre happened in broad daylight and several of the victims were burned to death in their grass thatched houses; on 23 May 2005, the LRA killed at least 29 people in Pagak, this attack is said to be led by Vincent Otti, one of the indictees of the ICC; on 24 May 2005, the LRA killed at least 43 people in Lukode among others attacks and killings.

²¹ P Clark 'Law, Politic and Pragmatism: The ICC and Case Selection in Uganda and in the Democratic Republic of Congo' in N Waddell & P Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (2008) 42.

²² A Branch, 'Uganda's Civil War and Politics of ICC Intervention' (2007) 21 (2) *Ethics and International Affairs* 185.

²³ Soto (n 20 above) 220; some of the questions that puzzled the victim communities was how the UPDF would arrest Kony and his top commanders who were in Sudan most of the time; the author states that he talked to Luis Ocampo the ICC Prosecutor in 2004 and presented him the views of the victims in Northern Uganda and the Prosecutor stated that Sudan was willing to cooperate to ensure the arrest of Kony and the other LRA top commanders.

²⁴ The title of the referral by President Museveni to the ICC is, 'Referral of the Situation of the Lord's Resistance Army in Northern Uganda.'

²⁵ Branch (n 22 above) 184; 'ICC Assigns Cases on DRC, Northern Uganda to Pre-Trial Chambers' UN News Service (7 July 2004) <http://www.un.org/apps/news/story.asp?ID-11272> (accessed 13 May 2011).

that he operates with a threshold of gravity of crimes, based on which, he gave priority to crimes committed by the LRA.²⁶

The involvement of the ICC in the LRA situation nonetheless, played a role in ushering the parties to the negotiating table and the resultant Juba negotiations that accounts for the degree of stability and security in Northern Uganda since 2006.²⁷ As expounded above, the ICC intervention in the LRA situation was received with mixed feelings and some hostility; fundamental issues including how the ICC intervention could end to the conflict and ensure justice, truth and reparations for victims have been raised and the debate rages on. This chapter will analyse prominent issues linked to this issue. That includes; the independence of the ICC prosecutor; withdrawal of self-referral and the related principle of complementarity; arrest of suspects; and the victim reparation scheme under the Rome Statute. This chapter will further investigate the appropriateness of the ICC as an accountability forum for war crimes and crimes against humanity perpetrated in the LRA conflict.

5.2 Independence of the ICC Prosecutor

When the Ugandan government referred the LRA situation to the ICC, it cited only crimes allegedly committed by the LRA. In addition, the ICC Prosecutor made the announcement of the referral together with President Museveni in a joint press briefing in London in January 2004.²⁸ Following that, the Defence Minister of Uganda - Amama Mbabazi, his lawyers together with senior officials of the Jurisdiction, Complementarity and Cooperation Division of the ICC, including the Prosecutor himself, were seen posing in a picture on a boat in the

²⁶ M Glasius, 'What is Global Justice and Who is it For? The ICC's First Five Years' (22 July 2008) http://www.opendemocracy.net/article/globalisation/international_justice/the-iccs-first-five-years (accessed 18 Dec 2010).

²⁷ T Allen et al., 'Postscript: A Kind of Peace and an Exported War' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 287; it is most likely that what has kept the LRA from returning to Uganda since 2006 is the distance of Uganda from their current base in the DRC and Central African Republic; activities of the UPDF, their supporters and other state armies in the area of LRA operation and at the estimated force of 150 – 200 rebels, the LRA may be too few to make such a move. It is very doubtful that the standing ICC warrants is what has kept the rebel group away since the effect of the warrants is not limited to the territories of Uganda.

²⁸ 'President of Uganda refers situation concerning Lord's Resistance Army LRA to the ICC' ICC-20040129-44 <http://www.icc-cpi.int/> (accessed 10 July 2010); Allen (n 15 above) 82.

Dutch canals.²⁹ Further, while explaining the ICC involvement in the LRA conflict to Parliament, the Minister of Defence stated that the ICC had sufficient basis to proceed with formal investigations that will lead to international prosecutions of LRA leaders. The Minister stated that the number of people that the ICC would handle would not exceed five,³⁰ 'revealing the government's confidence in its having a firm grip on the ICC proceedings.'³¹ Indeed, the Ugandan owned newspaper, the New Vision, has carried headlines announcing that the ICC had 'cleared' the UPDF of wrongdoings in Northern Uganda.³²

Following initial investigations, the ICC issued arrest warrants for only five top LRA commanders. This action, from the onset, created an impression of bias; many in Uganda were sceptical about the independence, and partiality of the Prosecutor. The general thought was that the ICC Prosecutor was working with President Museveni and his government and not for the victims of crimes committed in the conflict.³³ It is documented that the government of Uganda and the UPDF committed serious crimes in Northern Uganda during the LRA conflict; most notable is the forceful displacement of civilians into IDP camps without basic social services and inadequate protection from LRA attacks.³⁴ Other serious crimes attributed to the UPDF include extrajudicial executions; torture; rape and other sexual abuse; prolonged detention of alleged rebel collaborators including children held without charge or bail; and recruitment of children, including former LRA child soldiers into the UPDF.³⁵ In addition, the government for a long time did not provide

²⁹ SMH Nouwen & WG Werner 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 24 (2) *European Journal of International Law* 953.

³⁰ 'Statement Defence Minister Mbabazi' (29 July 2004) Hansard http://www.Parliament.go.ug/index.php?option=com_wrapper&Itemid=33 (accessed 12 October 2011).

³¹ Nouwen & Werner (n 29 above) 950.

³² 'ICC Clears UPDF in the North' Saturday Vision 30 August 2008 1.

³³ M Schomerus 'A Terrorist is not a Person like me': An Interview with Joseph Kony' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 118 – 120; while no one other than the LRA leadership itself disputes that the LRA are responsible for appalling acts; many, including the author take the view that to focus on them alone is to ignore the fight against impunity, which is the mandate of the ICC; alleged offences committed by the UPDF have been public knowledge for a long time, and some even predate the LRA conflict, therefore, any accountability measure must deal with these atrocities as well.

³⁴ T Allen & K Vlassenroot, 'Introduction' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 14 – 15; A Mwenda 'Uganda's Politics of Foreign aid and Violent Conflict: the Political uses of the LRA Rebellion in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 55.

³⁵ Human Rights Watch *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda* (2005) 17 (12A) 24 – 35; S Perrot 'Northern Uganda: a 'forgotten conflict', again? The Impact of the Internalisation of the Resolution Process' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth*

security to aid workers who attempted to provide food and basic social services to the affected population, which further aggravated the plight of the displaced civilians.³⁶

The ICC Prosecutor has defended his decision in only indicting LRA leaders, stating that he based his selection on the gravity of crimes and that the crimes committed by the LRA were numerous and of a higher gravity than crimes attributed to the UPDF.³⁷ In a statement, the Prosecutor indicated that between July 2002 and June 2004, the LRA had been responsible for at least 2,200 killings and 3,200 abductions in over 850 attacks, as well as a high number of sexual crimes, including rape and sexual enslavement.³⁸ Irrespective of numerical differences in crimes committed, there is sufficient basis to argue that a 'state's involvement in the commission of crimes against civilians is an independent and sufficient indication of gravity, because of the high risk of impunity for such crimes.'³⁹

In June 2010, Olara Otunnu, a prominent politician in Uganda⁴⁰ in a meeting, asked the ICC Prosecutor to investigate President Museveni and the UPDF, who, he claimed were partly responsible for crimes committed in the LRA conflict, upon which the Prosecutor reportedly told Otunnu to produce concrete evidence and not engage in a 'political debate'. In a press conference, the Prosecutor insisted that his office found the LRA most responsible for international crimes but promised to assess the information provided by Otunnu, provided the crimes were committed after July 2002.⁴¹ The ICC Prosecutor in the later years

and Reality (2010) 195; M Brubacher 'The ICC Investigations of the Lord's Resistance Army: an Insider View' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 269; Soto (n 20 above) 192; Branch (n 22 above) 181.

³⁶ See further details in chapter two.

³⁷ 'UN Criminal Court to Target Uganda Rebels, DR Congo Militia' (8 February 2005) <http://www.monuc.org/news.aspx?newsID> (accessed 10 Jan 2010) referring to statement of ICC Prosecutor on the Ugandan Arrest Warrants also note that the ICC Public Relations Advisor, Christian Palme, is said to have reaffirmed this argument, stating that the LRA crimes are far more serious than the crimes of the UPDF; see art 17(1)(d) of the Rome Statute that provides that the crimes must be of 'sufficient gravity' to justify action by the ICC; Brubacher (n 35 above) 269.

³⁸ Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties' 28 November to 3 December 2005) the Hague (2 December 2005) *ICC-02/04-01/05-67 2*; see also Brubacher (n 35 above) 269.

³⁹ Nouwen & Werner (n 29 above) 951 referring to W Schabas 'Prosecutorial Discretion v. Judicial Activism at the International Criminal court' (2008) 6 *Journal of International Criminal Justice* 748.

⁴⁰ Olara Otunnu is a prominent politician in Uganda; he heads the Uganda Peoples' Congress (UPC) one of the most prominent political parties in Uganda. He was formerly a UN Diplomat and the UN Special Representative for Children in Armed Conflict.

⁴¹ C Musoke & W Opulot 'ICC Prosecutor Rejects Otunnu's War Case' the New Vision 3 June 2010 2.

mentioned that the ICC may yet investigate UPDF crimes, but it appears highly unlikely that the ICC will prosecute UPDF suspects, given its reliance on the government for its continued presence in Uganda and the good relationship it has with key Ugandan officials.⁴²

Uganda government and military officials, on their part have made it clear that they will not be subject to the ICC's jurisdiction; the Minister of Defence is reported to have stated categorically that the UPDF is not guilty of crimes, and that it will not be investigated or prosecuted by the ICC.⁴³ This is a clear indication that Uganda referred the situation to the ICC just to gain advantage in the conflict and its cooperation throughout the entire process is not guaranteed, especially, if the ICC turns its investigations towards its military and other officials. The ICC may be well aware of this and the decision to investigate only crimes attributed to the LRA is to secure Uganda's cooperation throughout the process. In essence, the ICC seems to be willing to put its institutional interest of carrying out an effective prosecution ahead of careful consideration of questions of justice and reparations for victims and the affected community and its mandate of ending impunity.⁴⁴ It is pertinent that the ICC makes its impartiality evident in practice and that it clearly establishes its independence from the Ugandan government in more than just rhetoric. The court's investigations of the situation in Uganda must be part of a comprehensive plan to end impunity, regardless of which side committed the crime.⁴⁵

5.3 Victim or perpetrator

When investigating perpetrators of crimes committed in the LRA conflict, it appears that the ICC prosecutor did not take heed of the collective victimisation of children by the LRA. The LRA is largely comprised of children or adults abducted as children and forcibly trained to become soldiers. The LRA force these children to commit crimes, many of them designed to

⁴² Clark (n 21 above) 43; Clark's interviews with government officials further reveals that the ICC Prosecutor approached President Museveni in 2003 and persuaded him to refer the Uganda situation to the ICC; the referral therefore suited both parties, providing the ICC with its first case and Uganda government another advantage over the LRA.

⁴³ Branch (n 22 above) 185 – 186.

⁴⁴ Nouwen & Werner (n 29 above) 953.

⁴⁵ Branch (n 22 above) 189.

alienate them from their communities.⁴⁶ Although article 26 of the Rome Statute explicitly states that the ICC will not have jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the crime,⁴⁷ it does not preclude prosecution of someone who had already attained the age of 18 at the time the alleged crime was committed. In 2004, Tim Allen predicted that the ICC would likely want to avoid controversy over this issue by not indicting anybody abducted as a child.⁴⁸ However, the ICC issued an arrest warrant for Dominic Ongwen⁴⁹ who was abducted by the LRA when he was about 10 years old while on his way to school.⁵⁰

The LRA trained Ongwen as a soldier to fight against the UPDF and, like all other LRA child abductees, were in a situation where either you kill or you are killed. Ongwen became so efficient at imitating his superiors that he was eventually 'promoted' to the 'Control Altar' thus, he became part of the core LRA leadership responsible for devising and implementing LRA strategy.⁵¹ As previously elucidated, Ongwen represents many other individuals in this category. Most of the frontline perpetrators and commanders in the LRA conflict are children, or abducted as children. The LRA forced these children to kill torture or maim friends, neighbours and relatives as part of indoctrination to the LRA and to make escape a non-option. For those who stay long with the LRA, this becomes a way of life as they grow into adulthood.⁵²

⁴⁶ This has been extensively documented, see for instance; Human Rights Watch 'Stolen Children: Abduction and Recruitment in Northern Uganda' <http://hrw.org/reports/2003/uganda0303> (accessed 14 February 2009); Human Rights Watch *Abducted and Abused: Renewed Conflict in Northern Uganda* (2003) 15 (12A)14 – 28.

⁴⁷ This is a clear move from the Statute of the Special Court of Sierra Leone that empowered the Court to take proceedings against persons of 15 years and above, a sore point for child protection agencies around the world.

⁴⁸ Allen (n 15 above) 93.

⁴⁹ Arrest Warrant for Dominic Ongwen (n 8 above).

⁵⁰ 'Uganda Picking up the Pieces' IRIN News (7 October 2007) <http://www.irinnews.org/Report.aspx?ReportId=74572> (accessed 12 January 2010).

⁵¹ Arrest Warrant for Dominic Ongwen (n 8 above) para 8, 9 & 10 explains his leadership role; S Bradshaw 'Justice Dilemma Haunts Uganda' BBC News <http://news.bbc.co.uk/2/hi/africa/7603939.stm> also available on the webpage is a video on Dominique Ongwen titled – 'Life on the Edge: The Dilemma of the White Ant' (accessed 08 Jan 2011).

⁵² Human Rights Watch (n 35 above) 22; Anderson et al., 'Pawns of Politics: Children, Conflict and Peace in Northern Uganda' (2004) *World Vision Report* 17 & 18.

The charge against Ongwen is for war crimes and crimes against humanity including enslavement, inhumane acts, cruel treatment and attack against civilian populations.⁵³ As such, Ongwen is the first known person to be charged in an international criminal tribunal with the same crimes of which he is also victim.⁵⁴ Ongwen's case raises complicated justice questions on how individual criminal responsibility could be addressed in the context of collective victimisation and how justice and reparations can be achieved for Ongwen and for the victims of the crimes he committed. One defence available to Ongwen is that he was under duress or threat of death when he committed the crimes for which he is charged.⁵⁵ However, such a defence does not provide any answers to his complex status as victim or perpetrator; neither does it ensure accountability for the crimes he committed.⁵⁶

Ongwen may not be the same as other children - abducted and forced to kill against their will, who remained in the LRA for a shorter period of time - or young adults abducted as children, who remained with the LRA but gained no rank or standing within the rebel group. Nonetheless, his role in 'Control Altar' of the LRA does not diminish the fact he was once a child, unprotected, abducted, indoctrinated and forced to commit heinous acts, he is therefore no less a victim than the other young adults and children. Research shows that a child's moral development is stunted in settings of collective victimisation.⁵⁷ Armed groups purposively select children because they are 'amenable to indoctrination, more loyal, and less questioning of commands that present moral difficulties.'⁵⁸ In such an environment, the

⁵³ Arrest Warrant for Ongwen (n 8 above) counts 28, 29, 31 and 32.

⁵⁴ Justice and Reconciliation Project 'Complicating Victims and Perpetrators in Uganda: On Dominique Ongwen' (July 2008) 7 *JPR Field Notes* 1; the note among others examines the experiences of abducted children in the war in Northern Uganda and provides evidence that Ongwen grew up in one of the most brutal environment known to humanity with little room for moral development that would enable him to later take decisions independent of the LRA.

⁵⁵ Rome Statute art 31(c) & (d), that provides that anyone under duress or threat of death in commission of an international crime is exempt from prosecution.

⁵⁶ E Bouris *Complex Political Victims* (2007) 20; in this book, Bouris finds weighty problems with the dichotomous conception of actors in a conflict that tend to reproduce simplistic categories of 'victims' and 'perpetrators' as if both were discreet and homogenous groups. She argues that political victims are victims who also participate or engage in acts and discourses that victimise others, even themselves; she further argues that victims, much like the conflicts themselves are complex and rather than use this complexity as a way to dismiss victims or call for limits in the response from the international community, she advocates for greater and more effective responses to conflict. Bouris' concern is that failure to recognise and address complex political victims in justice pursuits after conflict creates new space in which mass victimisation can take place.

⁵⁷ A Honwana *Child Soldiers in Africa* (2007) 53.

⁵⁸ Honwana (n 57 above) 33.

children have little power to act counter to orders given to them and it is easy to mould them into effective and dispensable soldiers.⁵⁹

According to a rebel leader in the DRC, children make good fighters because they are young and want to show off. That they think it is all a game, so they are fearless. Realistically, this does not change when one turns 18 years and is still living within the same brutal setting, under control and command of the same mentors. The psychosocial concern intrinsic to a child's development in such a situation is impaired and the child is not in a position to make a successful transition to adulthood.⁶⁰

To be clear, the aim of this discourse is not to exonerate Ongwen of allegations against him, but to highlight his status, mindful of the many other young adults who may be in similar situations. The author has argued elsewhere that children and persons in the same category as Ongwen can and should benefit from a process that ensures accountability for ones action; respects procedural guarantees appropriate in the administration of juvenile justice; and reflects the desirability of promoting the capacity of an individual to assume constructive role in society.⁶¹ What is questioned is whether the ICC is the right forum to execute this and whether a person with a complex status like Ongwen is rightly dubbed 'most responsible for international crimes' as his arrest warrant suggests.

There are many more like Ongwen. Young boys and girls who grew up in the LRA and assumed command positions, perpetuating the same crimes of which they are victims. Some have since returned, others are still in the 'bush,' some are dead but their status needs to be recognised and taken into consideration in accountability pursuits. They should not be excluded from the accountability processes but should be taken through appropriate measures that puts their status as children or adults, abducted as children into

⁵⁹ Honwana (n 57 above) 28.

⁶⁰ JPR Field Note (n 54 above) 15.

⁶¹ P Acirokop, 'Potentials and Limits of Mato Oput as a Tool for Reconciliation and Justice', in Parmar et al (eds) *Children and Transitional Justice: Truth Telling, Accountability and Reconciliation* (2010) 268.

consideration and aims to rehabilitate and reintegrate them into society.⁶² Like all the other LRA indictees, Ongwen remains at large.

5.4 Arrest of LRA suspects

Unsealed in July 2005, the LRA warrants of arrest remain outstanding to date and the LRA fighters continue to roam villages and forests in the tri-border areas of Sudan, DRC and Central African Republic, perpetrating crimes for which the ICC seeks them.⁶³ The decision of Uganda to refer the situation to the ICC was admittedly based on the inability of the Ugandan authorities to capture and arrest the LRA commanders.⁶⁴ The ICC Prosecutor has justified this decision stating that the case was admitted on the grounds that the Ugandan government is unable to prosecute the LRA because the LRA were in Sudan and thus difficult to capture.⁶⁵ Yet the ICC itself is not equipped to deal with arrests. As discussed earlier in this chapter, one reason for the scepticism of the ICC involvement in the LRA conflict from the victim standpoint is that the ICC does not have its own military or police to implement the warrants of arrest issued.

The ICC does not have an enforcement institution to effect arrests; Ugandan institutions on which the ICC is relying have to date failed to arrest the top LRA commanders. The regional governments; South Sudan, DRC and Central African Republic, on which the ICC could count

⁶² For further reading see N Boothby & J Crawford, 'Mozambique Child Soldier Life Outcome Study: Lessons Learned in Rehabilitation and Reintegration Efforts' (2006) 1 (1) *Global Public Health*; the authors studied the life of former child soldiers in Mozambique from 1988 - 2004 right from a rehabilitation centre in Maputo and long after their reintegration in their communities. The research found that despite being labeled 'lost generation' and 'future barbarians' by journalists, the majority in the group became productive, capable and caring adults because of rehabilitation, recovery and reintegration efforts given to them while a few continued with their violent ways or were so disordered that they were unable to take hold of their lives.

⁶³ Reports indicate that the LRA are moving between South Sudan and the DRC where they are committing atrocities including abductions, killing and terrorizing civilians; see for instance 'Deadly LRA attacks prompt Exodus in North Eastern DRC' IRIN News 30 Dec 2008 <http://www.irinnews.org> (accessed 14 April 2009) reporting the killing of 189 civilians in several attacks blamed on the LRA; See also, 'LRA attacks in the DRC displace 1200' Reuters Alert Net – Global 10 Aug 2009.

⁶⁴ See for instance submissions by the Solicitor General of Uganda to Pre-Trial Chamber II of the ICC in *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen* (situation in Uganda: No. ICC-02/04-01/05) Public Document and Decision on Admissibility of the Case under Article 19(1) of the Statute, Pre Trial Chamber II (10 March 2009) ICC Trial Chamber para 37.

⁶⁵ LM Ocampo 'Remarks at the 27th Meeting of the Committee of Legal Advisors on Public International Law' (18 March 2004) *Strasbourg, Germany* 13; see also LM Ocampo 'The International Criminal Court: Hopes and Fears' (2 March 2005) *Coca-Cola World Fund at Yale Lecture*.

on to secure arrests, are all embroiled in internal conflict and/or other complex affairs⁶⁶ therefore may have little time, interest or strength to engage in the ICC pursuits against the LRA.⁶⁷ The ICC presence in the region no doubt serves as a source of pressure on governments to cooperate with apprehending suspects but it is important not to overestimate the ICC's capacity to influence these governments. It is clear that the ICC opened a case in Northern Uganda on grounds for which it is not adequately equipped to respond.⁶⁸

The ICC has not only issued warrants of arrest for LRA commanders but also in regard to the situation in DRC, Central African Republic, Libya, Ivory Coast and Darfur - Sudan and some suspects have been apprehended. In 2006, the ICC issued a warrant of arrest for Thomas Lubanga Dyilo, ex-commander of the defunct Union of Patriotic Congolese (UPC) militia group that operated mainly in Ituri province in North-Eastern DRC. Lubanga was arrested, tried and on 14 March 2012, was convicted on charges of using child soldiers.⁶⁹ In May 2008, the ICC issued a sealed warrant of arrest Jean Pierre Bemba Gombo, for the situation in the Central African Republic and he is undergoing trial.⁷⁰ Also appearing before the ICC is Bahr Idriss Abu Garda who was the chair and general coordinator of military operations of

⁶⁶ For instance at the time the SPLA was in the process of negotiating a comprehensive peace agreement with the government in Khartoum, which was signed in January 2005, and then there were further negotiations on the referendum on the cessation of South Sudan from the rest of the country which was only recently concluded; Central African Republic and the DRC are both embroiled in armed conflict and have referred the situation in their respective territories to the ICC, which may be of greater concern to them than arrest of the LRA suspects.

⁶⁷ That said however, as discussed in the background notes in the thesis, the regional governments in 2009 jointly pursued the LRA that has become a common problem in the Garamba forests in the DRC, several LRA leaders were captured but the joint forces failed to capture those wanted by the ICC and failed to put an end to the LRA massacres.

⁶⁸ Clark (n 21 above) 43.

⁶⁹ The ICC Pre-Trial Chamber I issued a sealed warrant of arrest for Mr. Lubanga on 10 February 2006; the trial chamber found that there was reasonable ground to believe that he had committed international crimes consisting of conscripting and enlisting children of less than 15 years and using them to participate actively in hostilities and requested his arrests and transfer to the court; Lubanga was transferred to the ICC on 17 March 2006 and his trial began on 26 January 2009; he was convicted on 14 March 2012; other DRC Indictées include Bosco Ntaganda (at large) and Germaine Katanga & Mathieu Ngudjolo Chui, both are in custody of the Court and their trial commenced on 24 November 2009; see <http://www.icc-cpi.int/Menu/ICC/situations+and+cases>, also see Trial Watch <http://www.trial-ch.org> (accessed 15 Feb 2009).

⁷⁰ Bemba was arrested in Belgium and he is facing trial at the ICC for his role as commander of the Congolese Liberation Movement (MLC) militia outfit, also outsourced to fight in the neighbouring Central African Republic.

the United Resistance Front (URF) rebel group in Darfur.⁷¹ Suspects still at large include Ahmed Haroun, the Sudanese state minister for humanitarian affairs, and Janjaweed militia commander, Ali Mohamed Ali Abdel-Rahman whose warrants were issued in May 2007.⁷² The ICC has also issued a warrant of arrest for President Omar Al Bashir of Sudan, for war crimes and crimes against humanity allegedly committed in Darfur; the ICC is yet to secure his arrest.⁷³

As much as there are differences between the cases being investigated by the ICC, the difficulty of apprehending suspects is a common problem. The arrest and surrender of suspects is a major concern in the international criminal justice regime that must rely on the assistance of states and other entities from the apprehension of suspects, investigations, to securing attendance of witnesses and enforcement of decisions.⁷⁴ Unlike the *ad hoc* tribunals like the ICTY and ICTR, the situation of the ICC is more precarious, as it is not empowered with the authority under Chapter VII of the UN Charter unless the UN Security Council refers the case to it.⁷⁵ This inability to apprehend suspects does not only undermine the credibility of a justice system, but also frustrates the prosecution of cases denying the possibility of justice and reparations to victims of abuse and violations.⁷⁶

The international law principle of '*pacta sunt servanda*'⁷⁷ obligates states to cooperate with the ICC in carrying out its duties and article 86 of the Rome Statute makes it mandatory for state parties to cooperate fully with the ICC including the surrender of suspects within

⁷¹ Abu Garda faces charges of war crimes (3 counts); he voluntarily appeared before ICC Trial Chamber on 18 May 2008 and is not in custody; the other three Sudanese indictees remain at large <http://www.icc-cpi.int/Menus/ICC/situations+and+cases> (accessed 14 Oct 2011).

⁷² Both accused are still at large; see <http://www.icc-cpi.int/Menus/ICC/situations+and+cases> (accessed 14 Oct 2011).

⁷³ President Bashir was indicted on five counts of crimes against humanity and two counts of war crimes allegedly committed in Darfur; the arrest warrant for Bashir has caused a lot of controversy in many quarters, for this and more on ICC warrants of arrest see <http://www.icc-cpi.int/Menus/ICC/situations+and+cases> (accessed 14 Oct 2011).

⁷⁴ SD Roper & LA Barria, 'State Cooperation and the International Criminal Court Bargaining Influence in the Arrest and Surrender of Suspects' (2008) 21 *Leiden Journal of International Law* 457; referring to JK Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects', (2002) 27 *Yale Journal of International Law* 111 and 119.

⁷⁵ Suffice to say, as the Sudan case demonstrates, even Chapter VII authority requires the goodwill and cooperation of the state under investigation and other states that may be of help.

⁷⁶ Roper & Barria (n 74 above) 458.

⁷⁷ This is derived from the provisions of article 26 of the Vienna Convention on the Law of Treaties and it means, 'every treaty in force is binding upon parties to it and must be performed by them in good faith'.

their territories. Article 87(6) of the Statute permits the Court to request cooperation from state parties and to seek assistance from non-state parties and intergovernmental organisations. The experiences of ad hoc tribunals shows that lack of state cooperation greatly undermines the effectiveness of courts but this, thus far, has not been a stumbling block for the ICC in the LRA situation. The problem is the apparent inability of the government of Uganda and other regional governments and law enforcement apparatus to capture the LRA suspects.⁷⁸

Attempting to arrest suspects has meant more military pursuits, further brutalisation and displacement of civilians in the region that has for a long time been devastated by armed conflict. The regional governments and other institutions are working together to ensure the arrest of the LRA and other suspects in the region, but there is a need to ensure adequate protection of civilians at risk. The Operation Lightning Thunder was an attempt that went wrong, as it resulted in a lot of civilian deaths; thousands injured, and some 100,000 displaced.⁷⁹ In 2011, the US sent 100 troops to help Uganda fight the LRA and the African Union brigade has a force of 5,000 troops from the Central African Countries to hunt down the LRA.⁸⁰ These provide hope that the LRA suspects will be captured.⁸¹

Daunting as the challenge of capturing LRA suspects may be, the ICC may face a bigger challenge in regard to the LRA conflict, if it indeed decides to investigate the government of Uganda and the UPDF and issue arrest warrants for its officials. The government has on several occasions threatened to withdraw the referral. This threat can be interpreted to imply that the government will cease cooperating if its own military and other officials become subject of ICC scrutiny, and it will no doubt resist arrest. Governments have the

⁷⁸ The difficulty in apprehending the LRA suspects is compounded by the fact that the LRA is mobile in Sudan, DRC and Central African Republic and although all the countries with the exception of Sudan are parties to the Rome Statute, the number of places that the LRA have access to has greatly increased their chance to evade the authorities.

⁷⁹ International Crisis Group analysis, 'African Peace-building Agenda: Elements of a New Strategy to Disarm the LRA' 6 November 2009.

⁸⁰ 'Joseph Kony: African Union Brigade to Hunt Down LRA Leaders' the Guardian 24 March 2012.

⁸¹ In addition the African Union, Peace and Security Council has created a mechanism to ensure regional cooperation and a comprehensive strategy to address the LRA problem, see African Union Peace and Security Council 'Report of the Chairperson of the Commission on the Operationalisation of the AU Led Cooperation Initiative against the Lord's Resistance Army' (22 Nov 2011) 229th Meeting Addis Ababa Ethiopia, PSC/PR/(CCXCVIX) para 16.

power and ability to prevent free movements of investigators, including access to the public information if they desire, and may well fail to guarantee security for victims and witnesses appearing before the ICC.⁸²

Furthermore, the Rome Statute allows a state party to deny assistance to the ICC Prosecutor in the form of evidence or document production by claiming that doing so might threaten its 'national security.'⁸³ This unlike the ICTY and ICTR Statutes, which gave states similar protections but allows the Trial Chamber to make the final determination. The Rome Statute, ultimately leaves that final determination in the hands of the state under investigation.⁸⁴ This gives plenty of room for a state to interfere with ICC investigations. The *Jean-Bosco Barayagwiza* case in the ICTR is an example of how a state can interfere with the work of an International Criminal Tribunal.⁸⁵

In that case, the ICTR dismissed genocide charges against Barayagwiza because of violations of the pre-trial rights of the accused.⁸⁶ This displeased the government of Rwanda that decided to suspend cooperation with the ICTR. Specifically, Rwanda stopped the ICTR investigations by denying the Prosecutor a visa to enter Rwanda and refused to grant exit visas for witnesses to travel to Tanzania where the court is located. Rwanda's actions would have derailed the entire ICTR trials, and therefore its legitimacy.⁸⁷ This compelled the Appeals Chamber to reconsider the case and reverse its ruling based on 'new facts' brought forth by the Prosecutor which made their initial decision to dismiss the case due to violations of Barayagwiza's procedural rights a 'disproportionate' remedy.⁸⁸ Rwanda's

⁸² For more and in reference to the situation in Sudan, see NJ Udombana, 'Pay Back Time in Sudan? Darfur in the International Criminal Court', (2005) 13 *Tulsa Journal of Comparative and International Law*.

⁸³ See article 72 ICC Statute (protection of national security information).

⁸⁴ Rome Statute art 93(4).

⁸⁵ *Prosecutor v Jean Bosco Barayagwiza* Case No. ICTR-97-19-AR72 (Decision of 2 Nov 1999) ICTR Trial Chamber (*Barayagwiza* Case).

⁸⁶ *Barayagwiza* Case para 72 & 106 – 111.

⁸⁷ E Goujin, 'Rwanda Suspends Cooperation with Genocide Court over Release' Agency France Press 6 Nov 1999.

⁸⁸ *Prosecutor v Jean-Bosco Barayagwiza* Case No. ICTR-97-19 Prosecutor's Request for Review or Reconsideration (Decision of 31 March 2000) ICTY Appeal Chambers.

threat not to cooperate with the tribunal if it did not prosecute Barayagwiza for the crime of genocide was a decisive reality for the continued existence of the ICTR.⁸⁹

The Sudan case further illustrates the difficulty of apprehending suspects without state or international cooperation. This case has proved especially embarrassing for the ICC. For instance, the African Union in a meeting resolved not to cooperate with the ICC over the arrest of President Bashir, a big blow to the ICC whose cases and suspects so far are exclusively African.⁹⁰ President Bashir continues to make international trips, even to ICC member states. For instance, in August 2010, President Bashir joined other African leaders in Nairobi at a ceremony marking the signing of a new Kenyan Constitution. The ICC reached a decision to inform the Assembly of State Parties and the Security Council of this pending visit for them to take any action deemed appropriate.⁹¹ President Bashir made the visit and both the Assembly of State Parties and the Security Council took no action. The Kenyan Foreign Minister, Moses Wetangula reportedly told the Daily Nation Newspaper that President Bashir visited Kenya in response to the government's invitations to all neighbours to attend a historic moment in Kenya, and as a state guest, would not be arrested. The minister further stated that harming or embarrassing guests is not 'African'.⁹²

⁸⁹ WA Schabas 'Barayagwiza v Prosecutor (Decision, and Decision (Prosecutor's Request for Review or Reconsideration) Case No. ICTR-97-19-AR72' (2000) 94(3) *the American Journal of International Law* 563.

⁹⁰ 'African Union in Rift with Court,' BBC News/Africa 3 July 2009; in a statement, the AU pointed out that its request to the ICC to defer the Bashir indictment had been ignored and went on to emphasize that the AU member states shall not cooperate with the ICC in matters relating to the arrest and surrender of the Sudanese President. See also African Union, Assembly 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal Doc. Assembly/AU/13(XIII)' (3 July 2009) Assembly/AU/Dec.245 (XIII) Rev. 1 para 10; African Union, Assembly, 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court Doc. Assembly/AU/10(XV)' (27 July 2010) Assembly/AU/Dec.296(XV) paras 5-6; African Union, Assembly, 'Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII)' (30-31 January 2011) Assembly/AU/Dec.334(XVI) para 5; African Union, Assembly, 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court - Doc. EX.CL/670(XIX)' (30 June - 1 July 2011) Assembly/AU/Dec.366(XVII) para 5.

⁹¹ *Prosecutor v Omar Hassan Ahmad Al Bashir* (situation in Darfur, Sudan: ICC-02/05-01/09) Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al Bashir's Presence in the Territory of the Republic of Kenya (Decision of 27 Aug 2010) ICC Trial Chamber.

⁹² 'Sudan President Al-Bashir Defies the ICC Arrest Warrant, Visits Kenya' Daily Nation 28 August 2010 4.

In addition, in July 2010, President Bashir travelled to Chad, a state party to the Rome Statute.⁹³ In October 2011, President Bashir travelled to Malawi, a state party to the Rome Statute to attend a summit of the Common Market for Eastern and Southern Africa (COMESA) in Lilongwe. The Registrar of the ICC sent a note to the Malawian embassy in Brussels, reminding it of the legal obligation to cooperate in the arrest and surrender of Bashir in the event that he entered Malawian territory. Malawi refused to comply with the request and the trial chamber found it in violation of its legal obligation under article 87(7) of the Rome Statute.⁹⁴ In July 2009, the government of Uganda also invited President Bashir for the Smart Partnership Conference that was held in Kampala but the President did not attend in person.⁹⁵ These international invitations and travels show the difficulty in apprehending suspects without cooperation of states. First, only state parties have legal obligation to comply with the Court's order and even where it fails to comply, the Court is limited to making a finding of noncompliance and reporting it to the Assembly of States or to the Security Council if the case originated as a Security Council referral. It is unclear whether the Assembly of States can take any action beyond making the finding of noncompliance.⁹⁶

In addition, defiance of state parties like Kenya and Uganda makes one question the extent of cooperation these states will give to the ICC in their own investigation, whenever they feel that international prosecutions is not a politically viable option or thwarts the state's other interests. That said however, in the Kenyan case before the ICC, both the suspects and

⁹³ *Prosecutor v Omar Hassan Ahmad Al Bashir* (situation in Darfur, Sudan: ICC-02/05-01/09) Decision Pursuant to article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Decision of 13 Dec 2011) ICC Trial Chamber para 3 – 7.

⁹⁴ *Prosecutor v Omar Hassan Ahmad Al Bashir* (situation in Darfur, Sudan: ICC-02/05-01/09) Decision Pursuant to article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Decision of 12 Dec 2011) ICC Trial Chamber para 47.

⁹⁵ 'Museveni Invites Bashir to Uganda despite ICC Charge' Daily Monitor 7 July 2009 1; President Bashir was advised against attending the conference in Uganda and he did not attend despite assurances from Ugandan leaders guaranteeing his safety. This invitation is a clear indication that Uganda thwarts the authority of the ICC by taking sides with the African Union to challenge the arrest warrant of President Bashir, the first head of state to be indicted.

⁹⁶ A Wartanian, 'The ICC Prosecutor's Battlefield: Combating Atrocities while Fighting for States' Cooperation: Lessons from the UN Tribunals applied to the Case of Uganda' (2005) 36(4) *Georgetown Journal of International Law* 1293.

the government have pledged cooperation with the Court.⁹⁷ Although the government and the National Assembly of Kenya both attempted to stop the ICC process by appealing to both the United Nations Security Council and the Court itself regarding the admissibility of the case.⁹⁸ The African Union also endorsed the position of Kenya in seeking to delay or postpone the ICC proceedings.⁹⁹ On 23 January 2012, Pre-Trial Chamber II confirmed the charges against Kenyatta, Muthaura, Ruto and Sang and declined to confirm the charges against Ali and Kosgey.¹⁰⁰

As the LRA situation stands today, there is no state standing in the way of the ICC to secure arrest of the suspects, the regional governments concerned have indicated that they would oblige to the ICC and hand over LRA suspects, but have thus far failed to apprehend them. This demonstrates that securing state cooperation though very crucial in apprehending suspects, is not enough in an ongoing conflict.¹⁰¹ The fears of victim groups in Uganda that lobbied for a withdrawal of the LRA warrants of arrest warrants is confirmed every day, with the continued violence and humanitarian crisis in the region.

5.5 Withdrawal of 'self-referral' and complementarity

In November 2004, President Museveni, for the first time, announced that he would seek to withdraw the referral to the ICC and find other ways to deal with the LRA.¹⁰² One reason for this announcement could have been indications by the ICC prosecutor that he may launch investigations into actions of the UPDF. Another reason is that President Museveni may have wanted to use the ICC as a political ploy to gain the upper hand in negotiations with the LRA. The announcement came when prospects for peace were looking hopeful and

⁹⁷ 'Statement by the Prosecutor of the International Criminal Court on the Kenya Ruling' ICC Press and Media 24 Jan 2012.

⁹⁸ 'Kenya Petitions UN organ to Delay Trial' Daily Nation 02 Oct 2011.

⁹⁹ 'Africa Union Backs Kenya Call to Delay ICC case' BBC News 2 Jan 2011.

¹⁰⁰ *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (situation in Kenya: ICC-01/09-01/11) Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute' (Decision of 23 Jan 2012) ICC Trial Chamber para 138.

¹⁰¹ Wartanian (n 93 above) 1310.

¹⁰² Amnesty International 'Uganda: Government cannot prevent International Criminal Court from Investigating Crimes' Press Release 16 Nov 2004 1; this, even though the ICC has clearly indicated that it does not consider itself bound by the Amnesty Act, president Museveni offered the rebels full amnesty if they renounced rebellion.

found lots of support in Northern Uganda among the local leadership and victim groups.¹⁰³ However, the announcement drew a lot criticism from human rights groups such as Amnesty International that argued that a withdrawal would incur a loss of credibility to the Court, and represent a defeat of its mandate to end impunity.¹⁰⁴

Theoretically, as the drafters of the Rome Statute expected, a state referring a situation would have little or no desire to withdraw it. In other words, any situation grave enough to warrant a referral, would unlikely dissipate enough to cause the referring state to change its mind.¹⁰⁵ The Rome Statute therefore does not expressly provide for such withdrawals in its articles. The drafters of the statute evidently did not consider practical situations, like pressure on states to resolve conflict through negotiations, and that some disputes may not be susceptible to military solutions.¹⁰⁶ It is clear now with the proliferation of self-referrals and the example set by Uganda that the issue of withdrawal of self-referrals is unavoidable and must be tackled.¹⁰⁷

The Rome Statute refers to ‘withdrawals’ in some of its articles, though it does not directly deal with the question of withdrawal of a self-referral. For example, article 127 deals exclusively with withdrawal from the Rome Statute as a whole. As much as the article allows the state to withdraw from the statute, the state is not discharged from obligations arising from the treaty, including cooperation with the court in connection with criminal investigations and proceedings in relation to which the state had a duty to cooperate, and commenced prior to the date on which the withdrawal became effective.¹⁰⁸ A withdrawal from the Rome Statute therefore does not prejudice in any way the continued consideration

¹⁰³ WW Burke-White & S Kaplan ‘Shaping the Contours of Domestic Justice: The ICC and Admissibility Challenge in the Uganda Situation’ in C Stahn & G Sluiter (eds) *The Emerging Practice of the International Criminal Court* (2009) 83; HA Moy ‘The International Criminal Court’s Arrest Warrants and Uganda’s Lord’s Resistance Army: Renewing the Debate Over Amnesty and Complementarity’ (2006) 19 *Harvard Human Rights Journal* 273.

¹⁰⁴ Amnesty International (n 99 above) 1.

¹⁰⁵ P Kirsch & D Robinson ‘Referral by State Parties’ in A Cassese et al., (eds) *The Rome Statute of the International Criminal Court: A commentary* (2004) 619, 624-625.

¹⁰⁶ MH Arsanjani & WM Reisman ‘The Law in Action of the International Criminal Court (2005) 99(2) *American Journal of International Law* 395, 397; it is likely that some states that made self-referrals may later agree as part of the negotiating process with their adversaries to withdraw referrals from the ICC.

¹⁰⁷ Arsanjani & Reisman (n 103 above) 397.

¹⁰⁸ Rome Statute art 127(2); Parliamentarians in Kenya using this article, tabled a motion seeking to withdraw from the Rome Statute after six individuals were named by the ICC Prosecutor as bearing the greatest responsibility 2007-2008 election violence in the country, the cabinet however, did not support this move; for more, ‘Parliament Move on ICC Draws Criticism’ *Daily Nation* 23 Dec 2010.

of any matter, which was already before the Court before the withdrawal, became effective.¹⁰⁹ The article in essence affirms the sovereign right of the state to withdraw from a treaty, yet binds it to its existing obligations under the treaty.¹¹⁰ Therefore, if Uganda chooses to withdraw from the Rome Statute as a whole, the Prosecutor would continue with investigations and eventual prosecution of cases arising out of the LRA situation and the government of Uganda would still be obligated to cooperate with the Court.¹¹¹

Article 121 addresses the issue of withdrawal from the treaty ‘with immediate effect’ as a legitimate response by a state party to an amendment of the Rome Statute.¹¹² This article also conditions the withdrawal on compliance with article 127(2). The article therefore affirms a state’s sovereign right not to be bound to new treaty obligation, unless it so desires, while holding the state accountable to those obligations already in place. At the time the announcement of possible withdrawal was made, Uganda could not have made use of this article, as it had no effect. Nevertheless, making use of this article would not discharge Uganda from its existing obligations under the Rome statute. Article 61 further establishes the prosecutorial power to withdraw charges in certain circumstances but it does not relate to power of withdrawal by a state party.

Nonetheless, the Rome Statute provides some leeway out of a referral by way of deferral or termination of investigations once a referral has been made. For instance, the UN Security Council in a resolution adopted under Chapter VII of the UN Charter¹¹³ has powers to request the Court to defer or suspend an investigation.¹¹⁴ This implies that the matter must

¹⁰⁹ Rome Statute art 127(2).

¹¹⁰ This is an indication that the Rome Statute does not permit the withdrawal of a specific referral.

¹¹¹ Uganda has not considered this option and there are no indications that the state may wish to withdraw from the ICC at present.

¹¹² Rome Statute art 121.

¹¹³ Security Council Chapter VII resolutions are actions with respect to threats to peace, breaches of peace and acts of aggression.

¹¹⁴ Rome Statute art 16 provides that, ‘no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Security Council under the same conditions; some commentators urged the government of Uganda to take this option at the time when a comprehensive peace agreement with the LRA seemed likely. This is the diplomatic process that the government in Kenya tried to undertake in regard to investigations in its territory; in a letter to the ICC President; Kenya’s Permanent Representative to the United Nations indicated that Kenya would seek a 12 month reprieve from the Security Council in accordance with article 16 of the Rome Statute to help facilitate the implementation of Kenya’s new Constitution, the transformation of governance structures

be placed on the agenda of the Security Council to be determined. Some activists urged the government of Uganda to make use of this option at the time when a comprehensive peace agreement with the LRA was likely but Uganda did not make such request.¹¹⁵

In addition, under article 53 the Prosecutor may reconsider the decision to investigate or prosecute a case where he or she determines that a crime within the jurisdiction of the court has not been committed.¹¹⁶ The Court may also determine a case inadmissible under article 17 where a state is willing or able to prosecute.¹¹⁷ This article is based on the recognition that states have the primary obligation under the Rome Statute to investigate and prosecute international crimes and the practical reality that the ICC, as a single institution with limited resources, will never be able to investigate and prosecute more than a small number of such crimes. The Chief Prosecutor of the ICC has stated that the absence of trials before the ICC, because of the regular functioning of national institutions, would be a major success in terms of ending impunity.¹¹⁸

In addition, where he finds that an investigation would not serve the 'interest of justice', taking into account the gravity of the offence and the interest of victims,¹¹⁹ the Prosecutor would have to present a case to Pre-Trial Chamber that on finding merit in the matter would drop the case. Several commentators argued that this provision could apply in the Uganda case, considering the security risk to the victim populations and the possibility of peaceful negotiations.¹²⁰ In Uganda, the warrants of arrest issued by the ICC were seen as a stumbling block to a peaceful resolution of the conflict, several commentators therefore

as well as the judicial and police systems, while helping to avert potential chaos in Kenya; this letter was printed in the Saturday Nation 12 March 2011 9.

¹¹⁵ As discussed earlier in this chapter, the African Union supported the calls for the Security Council to defer investigations into the situation in both Kenya and Darfur.

¹¹⁶ Rome Statute art 53(a).

¹¹⁷ Rome Statute art 53(b).

¹¹⁸ KJ Heller 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 *Criminal Law Forum* 1.

¹¹⁹ Rome Statute art 53(c).

¹²⁰ MR Brubacher 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 (71) *Journal of International Criminal Justice* 82; A Cassese et al., 'Round Table: Prospects for the Functioning of the International Criminal Court' in M Politi & G Nesi (eds) *The Rome Statute of International Criminal Court: A Challenge to Impunity* (2001) 300.

urged the Prosecutor to use his discretion under article 53(1)(c) of the Rome Statute to drop the case.¹²¹

In a public address, the Prosecutor indicated that he would not heed to calls to use his discretionary powers under article 53 to adjust to the situation on ground, as they are inconsistent with the Rome Statute and undermined the law.¹²² The Prosecutor viewed the ‘interest’ in Uganda as interests to resolve the LRA conflict peacefully but not as interests of justice.¹²³ The Prosecutor however stated that ‘interest of victims’, an element of ‘interests of justice’ means that his office must take into consideration the victims’ personal security as well as the obligation of the court to protect victims and witnesses in accordance to articles 68(1) and 54(1)(b) of the Rome Statute.¹²⁴

To ensure the protection of victims and witnesses, the Prosecutor requested the trial chamber to issue the LRA arrest warrants under seal to allow time for his office and the Victims and Witnesses Unit under Registry to ensure protection for all witnesses.¹²⁵ In addition, there has been an indication that owing to security concerns for victims, the Prosecutor intended to wait until such a time that the LRA capacity to inflict violence was low compared to the ability of the government of Uganda to provide security to victims.¹²⁶ Such a time evidently did not present itself as the LRA arrest warrants were unsealed in October 2005 while the LRA still had the ability to and continued to commit atrocities against civilians.

From the foregoing, it appears that a ‘self-referring’ state has no power to deny jurisdiction to the ICC, unilaterally. The ICC operates on a system of complementarity as it is intended to complement and not to usurp national jurisdictions. The preamble to the ICC statute is

¹²¹ Burke-White & Kaplan (n 100 above) 83; Moy (n 96 above) 272.

¹²² Burke-White & Kaplan (n 100 above) 82 – 83 referring to LM Ocampo ‘Address Building a Future on Peace and Justice (25 June 2007).

¹²³ Office of the Prosecutor of the International Criminal Court ‘Policy Paper on the Interests of Justice (September 2006) <http://www.icc-cpi.int/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf> (accessed 7 January 2011).

¹²⁴ As above.

¹²⁵ *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen* (Situation in Uganda: ICC-02/04-01/05) ‘Decision on the Prosecutor’s Application for Unsealing of the Arrest Warrants (Decision of 13 Oct 2005) ICC Trial Chamber.

¹²⁶ Brubacher (n 35 above) 274.

explicit in its announcement that the ICC ‘shall be complementary to national criminal jurisdictions’ and primacy is accorded to national legal systems.¹²⁷ Complementarity is reinstated in article 1 and details are provided for in articles 17 to 20 of the Rome Statute. The underlying concept of ‘complementarity’ is that national systems remain responsible and accountable for investigating, prosecuting crimes committed under their jurisdiction and that states are to maintain and enforce adherence to international standards.¹²⁸

The Rome Statute provides that ‘effective prosecution of international crimes must be ensured by taking measures at the national level and by enhancing international cooperation.’¹²⁹ Indeed the ICC Prosecutor indicated that his first task is to make best efforts to help national jurisdictions fulfil their mission.¹³⁰ The only basis on which the ICC could take on the Uganda case is if the national authorities were ‘unwilling’ or ‘unable’ to carry out genuine investigations and/or prosecutions.¹³¹ By making the referral, Uganda portrayed a clear willingness to prosecute although the operation of the Amnesty Act that granted a blanket amnesty contradicted this portrayal and presented a challenge to Uganda’s ability to comply with the principle of complementarity. The lapse of the amnesty in May 2012, however, paves way for Uganda to fulfil the obligation to prosecute.¹³² That said, however, the basis of the ICC admitting the Ugandan case was its inability to prosecute.

The criteria to determine ‘inability’ includes total or substantial collapse of national judicial systems; the inability to arrest the accused or to procure the necessary evidence and testimony; or inability to carry out proceedings.¹³³ The Ugandan judiciary is said to be one of the most proficient and robust in Africa. It is able to prosecute international crimes such as those involving the LRA.¹³⁴ Indeed, President Museveni is said to have stated that if cases

¹²⁷ Rome Statute preamble paras 4, 6 and 10.

¹²⁸ Burke-White & Kaplan (n 96 above) 84; W Burke-White ‘Proactive Complementarity: the International Criminal Court and National Courts in the Rome Statute’ (2008) 49 *Harvard Human Rights Law Journal* 53.

¹²⁹ Rome Statute preamble para 6.

¹³⁰ Burke-White & Kaplan (n 100 above) 84 referring to LM Ocampo, ‘Statement to the Assembly of State Parties of the Rome Statute of the International Criminal Court (22 April 2003).

¹³¹ Rome Statute art 17(1)(a).

¹³² Further discussion on this is contained in chapter four and six of this thesis.

¹³³ Rome Statute art 17(3).

¹³⁴ Clark (n 21 above) 48; the operation of the Amnesty Act that the government of Uganda has continuously renewed makes one question the willingness of the government of Uganda to try LRA suspects. Although the

involving the UPDF or other government officials are brought to attention, the Ugandan judiciary would try them; a clear indication that the judiciary is functional.¹³⁵ The ‘inability’ question on which the ICC found the Uganda referral admissible had nothing to do with the collapse or unavailability of the Ugandan judicial system but rather the limited capability of the UPDF to capture the LRA leaders because the LRA has access to several countries in the region.¹³⁶

The additional criteria for ‘inability’ in article 17(3) used by the ICC in determining admissibility of a given case is that the state is unable to secure the accused or to obtain the necessary evidence or testimony and must relate to the partial or total collapse of the states’ judicial system.¹³⁷ The inability of the government’s security agents to capture the LRA leadership however, has nothing to do with any problems of Uganda’s judicial system.¹³⁸ The ICC, by admitting the case, has taken over judicial responsibilities that Uganda could and should have fulfilled, but wished to hand over, out of political interest.¹³⁹ The case was referred and admitted because Uganda was unable to achieve physical jurisdiction over suspects who are mobile in South Sudan, DRC and Central African Republic.¹⁴⁰ The question therefore is, if the indictees are captured or otherwise return to Uganda to face criminal prosecutions, would the ICC then deem the case inadmissible?

This is an unlikely scenario. Uganda, despite political statements indicating its intentions to withdraw the referral from the ICC and preparations for domestic prosecutions and other non-judicial accountability measures, has not brought a motion challenging the admissibility of the case before the ICC. The ICC Prosecutor has also made little effort to explain how the admission of the Ugandan case complies with the doctrine of complementarity. Pre-Trial

government initiated proceedings against Kwoyelo a LRA suspect in the ICD; this has been brought to a halt due to operations of the Amnesty Act. Further discussion on this case is contained in chapter four and six of this thesis.

¹³⁵ K Southwick ‘Investigating War in Northern Uganda: Dilemmas for the International Criminal Court’ (2005) *Yale Journal of International Law* 108.

¹³⁶ As above.

¹³⁷ JT Holmes ‘The Principle of Complementarity’ in RS Lee (ed) *International Criminal Court: The Making of the Rome Statute* (1999) 41, 49.

¹³⁸ Arsanjani & Reisman (n 103 above) 395.

¹³⁹ As above.

¹⁴⁰ Burke-White & Kaplan (n 100 above) 84 referring to LM Ocampo, ‘Statement to the Assembly of State Parties of the Rome Statute of the International Criminal Court (22 April 2003).

Chamber II on 21 October 2008 initiated admissibility proceedings under article 19(1) to review whether Uganda was still ‘unable’ and ‘unwilling’ to prosecute the crimes committed in the conflict. This was due to the proposal to establish a Special Division of the High Court of Uganda (designated the International Crimes Division in 2011) to prosecute persons responsible for international crimes in the LRA conflict. Pre-Trial Chamber II invited the Prosecutor and Uganda among others to submit their observations by 10 November 2008.¹⁴¹

The Prosecutor in his submission highlighted that he had constantly monitored the situation in Uganda and had not identified any national proceedings related to the case to evoke complementarity; he therefore argued that the case is admissible.¹⁴² Uganda observed that the framework and processes envisaged in the Agreement on Accountability and Reconciliation and its Annexure reached between the state and the LRA for the accountability of persons who committed crimes within the jurisdiction of the ICC had not been agreed upon in the anticipation of a comprehensive peace agreement, which was not executed. Uganda therefore submitted that the Agreement and Annexure had no legal force and that the case was still admissible before the ICC.¹⁴³

Uganda further submitted that efforts were being made to make provisions of the Agreement on Accountability and Reconciliation and its Annexure operational; in particular by means of establishing a Special Division within the High Court of Uganda to try international crimes. The Solicitor General, representing the state submitted that such efforts relied on the premise that, other than those already indicted by the ICC, there were other individuals in the LRA ranks who may have to account for various crimes committed in the course of the conflict.¹⁴⁴ This submission resonates with the ICC Prosecutor’s vision of

¹⁴¹ *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen* (Situation in Uganda: ICC-02/04-01/05) Decision on Admissibility of the Case under Article 19(1) of the Statute (Decision of 10 March 2009) ICC Pre-Trial Chamber (*Prosecutor v Joseph Kony et al.*).

¹⁴² *Prosecutor v Joseph Kony et al.*, (n 140 above) para 5

¹⁴³ *Prosecutor v Joseph Kony et al.*, (n 140 above) para 8.

¹⁴⁴ *Prosecutor v Joseph Kony et al.*, (n 140 above) para 12; this despite the fact that the ICC criminal jurisdiction is limited to crimes committed after July 2002, meaning that all the crimes perpetrated by the indicted LRA commanders before this date will not be prosecuted by the ICC that has been granted sole jurisdiction over the individuals.

division of labour between national jurisdictions and the office of the Prosecutor.¹⁴⁵ The Pre-Trial Chamber reached the decision that the Ugandan situation was admissible and the Chamber emphasised that it was for the court and not Uganda to make determinations on admissibility.¹⁴⁶

Submissions such as those by the Solicitor General of Uganda are contrary to rhetoric of the President and other politicians in Uganda. If Uganda is ‘willing’ and ‘able’ to indict other individuals for war crimes and crimes against humanity, it defeats reason that Uganda is ‘unwilling’ or ‘unable’ to try those already indicted by the ICC. Such submissions work against the principle of complementarity. Arsanjani and Reisman have submitted that in the Ugandan case, the ICC took an innovative allowance of voluntary referral. They argue that this allowance, may take the ICC into areas where the drafters of the Rome Statute had not wished to tread. The authors conclude that in strict legal terms, a voluntary referral such as the one by Uganda fails to satisfy the threshold for admissibility set out in article 17 of the Statute.¹⁴⁷

It is however, clear that the admissibility of cases in circumstances of self-referrals has implications for the operation of the Court far beyond Uganda as cases both the Central African Republic and the DRC situations also came to the ICC through self-referrals and there is a possibility that the ICC may receive more of such referrals in future. When a case has been self-referred, the Prosecutor and the Pre-Trial Chamber have to evaluate admissibility pursuant to article 17 prior to the opening of an investigation or the issuance of arrest warrants.¹⁴⁸ Even after the initiation of an investigation, the Rome Statute further requires the Prosecutor to engage in a continuing evaluation of national judicial efforts and to inform the Pre-Trial Chamber if there are no grounds for prosecution because genuine national proceeding has made the case inadmissible.¹⁴⁹ In addition, where the Prosecutor seeks to proceed with an investigation initiated under his *proprio motu* powers, the Pre-Trial Chamber must approve his decision and consider admissibility criteria in deciding whether

¹⁴⁵ Office of the Prosecutor of the International Criminal Court ‘Paper on some Policy Issues before the Office of the Prosecutor (2003) part II(I.I)5.

¹⁴⁶ *Prosecutor v Joseph Kony et al.*, (n 140 above) para 51.

¹⁴⁷ Arsanjani & Reisman (n 103 above) 395 – 396.

¹⁴⁸ Rome Statute art 53(1)(b).

¹⁴⁹ Rome Statute art 53(2).

to authorise the investigation.¹⁵⁰ The Rome Statute further requires that states that would normally exercise jurisdiction in such cases be notified of the impending investigations.¹⁵¹ Such states are given one month within which to inform the Court that they are investigating or have investigated the situation and may request that the Prosecutor defer investigation.¹⁵² The Pre-Trial Chamber is mandated to allow such a deferral based on national prosecutorial efforts¹⁵³ or the Pre-Trial Chamber could render the situation inadmissible if it does not meet the requirements set out in article 17 of the Statute.¹⁵⁴

Further, article 19 of the Rome Statute allows a challenge to the admissibility of a case by an accused or by a state with jurisdiction on the ground that the case is being investigated, prosecuted or that the case has been investigated or prosecuted.¹⁵⁵ This challenge can only take place once and must come prior to or at the commencement of trial.¹⁵⁶ After a trial has commenced, the state or the accused must seek leave of the Court for any subsequent challenge to be brought, any such challenge after the commencement of trial must be based on a double jeopardy claim as provided for in article 17(1)(c) of the Rome Statute.¹⁵⁷

5.6 Reparations

The possibility of arrest and prosecutions, in turn, raises the possibility of reparations for victims of crimes committed in the LRA conflict. One of the great innovations of the Rome Statute and its Rules of Procedure and Evidence is the series of rights granted to victims. The preamble to the Rome Statute cautions parties to be 'mindful that during the century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.'¹⁵⁸ Article 75 of the Statute provides that the ICC

¹⁵⁰ Rome Statute art 15.

¹⁵¹ Rome Statute art 18(1).

¹⁵² Rome Statute art 18(2).

¹⁵³ Rome Statute art 18(2).

¹⁵⁴ Rome Statute art 19(1).

¹⁵⁵ Rome Statute art 19(2)(a) & (b).

¹⁵⁶ Rome Statute art 19(4).

¹⁵⁷ Rome Statute art 19(4).

¹⁵⁸ Rome Statute preamble para 1; promoters of victims' rights argue that the right to reparations is an essential part of the inalienable right to effective remedy; see also the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law (Van Boven Principles), adopted on 16 December 2005 by the United Nations General Assembly.

can establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.¹⁵⁹ Reparations generally encompass ‘any economically assessable damage resulting from violations of human rights and humanitarian law.’¹⁶⁰ The Court is further empowered to determine the extent of ‘any damage, loss and injury to, or in respect of, victims’ either upon request or, in exceptional circumstances, on its own motion. Reparations order can either be made against a convicted person or, where appropriate, through the Trust Fund for Victims.¹⁶¹

A Victims and Witnesses Unit is established under the Court's Registry.¹⁶² This Unit has started a process of outreach and consultations with victims in Uganda, as part of its mandate to foster victim protection and participation in Court proceedings. It has also developed forms to be used to help assess victim’s reparations claims.¹⁶³ At least 18 victim assistance projects that incorporate gender specific interventions have been approved for Uganda.¹⁶⁴ Questions on who actually qualifies as a ‘victim’ and the scope of reparations are left open in article 75 and are largely dealt with by the Rules of Procedure and Evidence of the ICC. Rule 85 for instance defines ‘victims’ as any natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.¹⁶⁵ The rule further defines victims, to include organisations or institutions that have sustained direct harm or harm to property, which is dedicated to religion, education, art, science or

¹⁵⁹ Rome Statute art 75(1).

¹⁶⁰ Basic Principles and Guidelines on the Right to Effective Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Van Boven Principles) principle 13.

¹⁶¹ Rome Statute art 75(2); the ICC cannot make reparation orders against state on the view that it is geared towards finding individual responsibility for crimes and should only have a correlative power to order reparations against individuals; during the drafting of the Statute, there was great concern from some delegations that the ICC’s reparations powers could create state responsibility and lose support of certain states, therefore reparation responsibility on states was abandoned. The ICC can however enlist the assistance of states through a request for cooperation under article 93 & 109 to identify, trace and freeze proceeds of crimes for forfeiture through orders; see Rome Statute arts 75(3) & (4).

¹⁶² For more information see <http://www.icc-cpi.int/victimissues.html>.

¹⁶³ See http://www.vrwg.org/download/publications/05/FormReparations1_en.pdf (accessed 9 January 2011).

¹⁶⁴ 34 projects have been approved in all, 16 of them for the DRC. The projects target 380,000 direct and indirect beneficiaries. The projects include the provision of psychological support, physical rehabilitation and material assistance for ex-child soldiers, mutilated victims, and victimized villages among other groups <http://www.trustfundforvictims.org/projects> (accessed 09 January 2012).

¹⁶⁵ Rules of Procedure and Evidence of the ICC, rule 85(a).

charitable purposes and to historic monuments, hospitals and other places and objects of humanitarian purposes.¹⁶⁶

Rule 97, which governs the assessment of reparations, gives the Court the option to make individual awards or, where appropriate, awards on a collective basis.¹⁶⁷ Rule 97(2) further gives the Court a wide range of options to assess injury and loss and to determine the ‘various options concerning the appropriate types and modalities of reparations.’¹⁶⁸ The Court, accordingly, could validly make an order directed at a whole group of victims or a community or both.

Rule 94 stipulates that, to apply for reparations under article 75, victims are required to file a written application with the Court's Registry containing specific information and evidence¹⁶⁹ while, Rule 97 gives the Court the option of making awards on a collective basis. This might enable the Court to make general awards thus obviating the need for each victim to approach the Court with an application for reparations. In addition, article 75(1) of the Rome Statute grants the Court the mandate to award reparations ‘on its own motion in

¹⁶⁶ Rule of Procedure and Evidence of the ICC, rule 85(b); see also C Jorda & J de Hemptinne, ‘The Status and Role of Victim’ in A Cassese et al, (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 268; this means that there has to be some link between victims and crimes committed under the Statute, however, how close the link between the harm and the commission of the crimes has to be in order for a victims to be eligible for reparations is not immediately clear. This issue caused controversy during the drafting of Rule 85. The vast majority of delegations supported in principle a broad definition of victim based on the Victims Declaration, which extends the link between harm and victim to include family members of the victims. The broader definition has been used in various reparations programs, such as Peru and South Africa. On the other hand, some delegates feared that an overly broad definition would impose logistical constraints on the ICC and overwhelm it with very large number of victims who might thereby be expected to participate fully in the Court’s proceedings and request reparations. The debate over how broadly to define victim in the Rules was ultimately left unresolved. As such, the current wording of Rule 85 was intended as a guide for the Court, which will clarify how broadly to define victim at a future date, when applying the Statute and Rules to the facts of cases.

¹⁶⁷ Rule 97(1); emphasis is put on the fact that reparations should normally be on an individualised basis unless the Court considers it appropriate to make the award on a collective basis or both.

¹⁶⁸ According to this sub-rule, victims or their legal representatives, convicted person or Court on its own motion can appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate type and modalities of reparations. The Court is empowered to invite all relevant and interested parties to make observations on report of the experts.

¹⁶⁹ According to rule 94; evidence includes address of the claimant, description of harm, location and date of incident, description of property etc.

exceptional circumstances.¹⁷⁰ In Uganda, several persons have made applications for reparations to the ICC.¹⁷¹

This status accorded to victims has been hailed as ‘a significant step forward in the recognition of the rights of victims in international criminal proceedings.’¹⁷² In particular, it is said to represent a shift in international criminal law, from purely retributive to a more restorative focus, which is ‘more meaningful and fair’ to victims.¹⁷³ A close examination of the Ugandan case however exposes a number of limitations to the ICC reparations scheme. The conflict in Northern Uganda dates back to 1986 yet the ICC’s jurisdiction for both prosecutions and reparations is limited to crimes committed after July 2002. This means that many victims of LRA atrocities stand to be excluded from the reparations scheme. In addition, the indictments against the three LRA leaders alive only cover a limited number of victims and instances of abuse, in a limited number of undisclosed locations.¹⁷⁴ It is therefore very likely that many victims will be excluded from the ICC reparations scheme for having suffered a crime committed at a location not included in the indictment or simply at a time not included in the indictment.

Even more daunting is that, not all crimes committed in the LRA conflict, even after 2002 can be attributed to the LRA alone. There are two parties to the conflict and crimes such as systematic and widespread rape, torture, and destruction of villages, displacement, and use of child soldiers could be attributed to both the LRA and the UPDF. A case against the LRA alone will not capture all victims of the international crimes in the conflict. In addition, a great number of victims suffered solely due to government actions, mismanagement or

¹⁷⁰ Jorda & de Hemptinne (n 154 above) 269; delegates supported this wording in the text on the argument that ‘peasant communities in remote parts of the world were unlikely to be able to mount any coherent claim for reparations in an international tribunal, especially if there was evidence of State complicity in the crimes.

¹⁷¹ Interview with Maria Kamara, ICC Outreach Officer based in Kampala conducted on 24 January 2011; Kamara also indicated that the fact that reparations are directly linked to arrest and prosecutions of suspects is a source of frustrations for victims who have made desperate calls that suspects must be arrested.

¹⁷² SA Fernandez de Gurmendi, ‘Victims and Witnesses’ in R Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedures and Evidence* (2001) 427 cites the power as an historic and significant step forward; P Lewis & H Friman, ‘Reparations to Victims’ in R Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedures and Evidence* (2001) 474 cites it as an ‘advancement of Victims Rights.’

¹⁷³ C Muttukumar, ‘Reparations to Victims,’ in R Lee (ed) *The International Criminal Court, the Making of the Rome Statute: Issues, Negotiations, Results* (1999) 262; I Bottigliero *Redress for Victims of Crimes Under International Law* (2004) 214 cites it as a more meaningful and fair step.

¹⁷⁴ For LRA indictments and update on the case see <http://www2.icc-pi.int/Menus/ICC/Situations+and+Cases/Cases>.

malfeasance. For instance, many people lost their homes and livelihoods because of UPDF's destruction of villages and agricultural fields and many suffered from gross mal-nutrition and illness in IDP camps as a direct result of government's forceful displacement. Such victims potentially fall outside ICC's reparations scheme unless all parties to the conflict are investigated and prosecuted.¹⁷⁵

Even where the ICC has the power to award reparations, there are doubts that the Court could secure the funds needed to fulfil those awards, leaving otherwise rightful claimants without a remedy. Unlike human rights tribunals, the ICC does not have the power to order a state to pay reparations. The Court can only make reparations orders, or fines and forfeiture orders, against individuals facing trial before it. However, trying to secure funds from individuals poses a number of challenges. First, individual perpetrators often do not have funds, because either they are themselves indigent, or their money has been sheltered in foreign accounts.¹⁷⁶ The LRA have managed to sustain an expensive war for decades but it is not clear whether they have funds or assets acquired stashed somewhere.¹⁷⁷

As an alternative to making orders against perpetrators, the ICC can rely on the Trust Fund for Victims, which is funded by sources beyond those recovered from perpetrators. The Trust Fund is empowered to collect voluntary contributions from states, non-state organisations and private individuals. The Trust Fund already faces significant challenges in building up a sufficient pool of resources to satisfy future reparations awards. One should bear in mind that, at present, the Court is officially investigating situations in Uganda, the Democratic Republic of Congo, and the Central African Republic, the situation in Darfur and Kenya, Ivory Coast and Libya as the most recent addition. These situations involve hundreds of thousands if not millions of victims, which would suggest that the Trust Fund might face

¹⁷⁵ A Di Giovanni 'The Prospects of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?' (2005 – 2006) 2 *Journal of International Law and International Resolutions* 25.

¹⁷⁶ Jorda & de Hemptinne (n 154 above) 1415; citing the ICTY and ICTR which often had to defray the costs of alleged perpetrator's defence, in addition, all accused appearing before the SCSL were found indignant including Charles Taylor, a former head of state.

¹⁷⁷ The general assumption that has been made by investigators and Prosecutors working in the International Crimes Division of Uganda is that the LRA leadership does not/will not has funds to pay compensation to victims of crimes that they committed. This sentiment however, changed when Thomas Kwoyelo, the first indictee of the War Crimes Division of the High Court of Uganda, privately instructed counsel, rejecting the lawyer that was appointed on state brief to represent him. Interview with Joan Kagezi, the Senior Principal State Attorney in charge of war crimes trials in Uganda conducted on 18 Jan 2011.

an insurmountable task in trying to raise enough funds to provide reparations across the ICC's various cases.¹⁷⁸

A major problem the ICC will face is managing expectations of victims. It is not clear whether the ICC will grant reparations if a case does not go to trial, yet the ICC Registrar is obliged to publicise the reparations proceedings 'as widely as possible and by all possible means.'¹⁷⁹ By giving wide publicity to the proceedings and consulting victims to assess their reparations claims and handing out standard forms, the ICC risks sending the message to the victims that they will indeed receive reparations, in some form or the other, for wrongs committed against them. These expectations are easily created than dispelled. With respect to Uganda, research reveals that the population, where it is aware of the ICC, already holds high expectations of what the Court can accomplish in terms of reparations.¹⁸⁰

The Rome Statute no doubt creates high expectations that the ICC with its limited mandate and funds may not be able to fulfil. The ICC therefore, needs to be mindful of the challenges it will face in exercising its reparations powers in order to meet its goal of being more responsive to victims and to deliver justice in a restorative manner. It is therefore pertinent that the ICC weighs its decision on reparations with or without trials carefully and that it does not act alone. The ICC must link its efforts to local mechanisms of accountability like a truth commission to be truly responsive to accountability goals such as truth and reparations. If it fails in this respect, the Court risks jeopardising not only the work of its own mandate and the specific goals of reparations, but also efforts to achieve lasting peace, justice and reparations for victims of the LRA conflict.¹⁸¹

¹⁷⁸ Total resources available to the Trust Fund now are Euro 3, 050,000, (as of 2008) the figure is available at: <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Victims?Trust+Fund+for+Victims/Current+Projects> (accessed 10 July 2010).

¹⁷⁹ Rules of Procedure and Evidence of the International Criminal Court rule 96.

¹⁸⁰ P. Pham et al., *When the War Ends: A population Based-Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda* (2007) 34; the ICC outreach section In Uganda is working to manage expectations by clearly indicating to victims that they will only receive reparations if the LRA situation goes on trial and that filling the Reparations forms does not mean automatic grant of reparations – interview with Maria Kamara conducted on 24 Jan 2011 in Kampala.

¹⁸¹ Di Giovanni (n 175 above) 30.

5.7 Conclusion

In the final analysis, the victim population in northern Uganda viewed the ICC's intervention with mixed feelings, and it does not get any easier with the passing years as LRA indictees remain at large and continue perpetrating crimes for which the ICC seeks them. The LRA conflict reaches back to 1986; the ICC's temporal jurisdiction makes the court a highly inappropriate accountability measure as there are equally serious crimes committed in Uganda before 2002 and a great number of people victimised before that date. In addition, the Prosecutor has conducted investigations on only one party to the conflict, the LRA; yet the UPDF equally perpetrated international crimes leading to questions on his partiality in the situation. It is further evident that in carrying out investigations, the Prosecutor did not pay heed to the collective victimisation of children who were turned perpetrators during the conflict.

Nonetheless, the ICC remains an important accountability forum for international crimes committed in the LRA conflict. Therefore, as it sets out to prosecute and provide reparations, it should be attuned to the above shortcomings and ensure that all its activities are accompanied by meaningful processes of national prosecutions, truth telling and truth and reparations, adhering to the notion of complementarity that is central in its Statute. To borrow the words of the former UN Secretary General, the ICC approach must be 'comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms,' as its role is to help build domestic justice capacities not to substitute national structures.¹⁸² The ICC must ensure that the regional governments put more effort to secure the arrest of the suspects to ensure justice, truth and reparations for the victims of crimes committed. In addition, the involvement of the ICC in Uganda draws emphasis to the fact that the LRA conflict has a regional dimension. It therefore, requires a comprehensive solution and maximum regional cooperation, not only to apprehend suspects but also to prosecute international crimes committed in whichever territory and to provide reparations for all victims of crimes in any of the territories that the LRA have access

¹⁸² United Nations Security Council *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies: Report of the Secretary General* (23 Aug 2004) UN Doc S/2004/616 23 summary para 2.

to be true to its mandate of ending impunity and achieving lasting peace in the world. The next chapter discusses national accountability measures for crimes committed in the LRA conflict, starting with the domestic prosecutions for international crimes.

CHAPTER SIX

INTERNATIONAL CRIMES DIVISION OF THE HIGH COURT OF UGANDA: CHALLENGES AND OPPORTUNITIES

6.1 Introduction

Domestic investigations and prosecutions, where they are properly undertaken, are said to be the most effective process in ensuring accountability for international crimes. This is because states usually have the best access to evidence and witnesses and have their own enforcement mechanisms.¹ Domestic prosecutions are also said to foster a greater sense of local ownership, which may in turn enhance local impact of trials and any potential deterrent effect. This best explains why under the ICC complementarity regime, domestic jurisdiction retain the primary responsibility to prosecute cases if they are ‘able’ and ‘willing’ to carry out investigations and prosecutions.² To satisfy the ICC complementarity regime and to fulfil government’s commitment under the Agreement on Accountability and Reconciliation, the government of Uganda through a Legal Notice created a new Division of the High Court – the ICD to adjudicate international crimes.³

The creation of the ICD was in accordance to the Constitution of Uganda⁴ that provides that courts of judicature consisting of the Supreme Court, Court of Appeal, High Court and subordinate courts shall exercise judicial powers in Uganda as Parliament may establish by law.⁵ The High Court of Uganda has original and unlimited jurisdiction in all matters and the law may confer on it, appellate and other jurisdiction,⁶ thus, a division to specifically handle

¹ Office of the Prosecutor ‘Paper on some Policy Issues before the Office of the Prosecutor’ *ICC-OTP 2003* part 1 para 4 http://amicc.org/docs/OcampoPolicyPaper9_03.pdf (accessed 9 January 2012).

² Rome Statute preamble paras 4, 6 & 10; these paragraphs confirm the absolute necessity to prosecute persons for international crimes, emphasizes the duty of states to exercise its criminal jurisdiction in such cases and puts emphasis on the fact that the ICC shall be complementary to national criminal jurisdiction.

³ Agreement on Accountability and Reconciliation clause 2.1; stipulates that national legal arrangement composed of both formal and non formal measures to ensure justice and reconciliation should be created; the International Crimes Division was thus created through a Legal Notice in 2008 and in 2011 re-designated, the International Crimes Division; Legal Notice No. 10 of 2011, The High Court (International Crimes Division) Practice Directions 2011 clause 3.

⁴ The Republic of Uganda: Constitution of the Republic of Uganda (1995) Amended by the Constitution (Amendment) Act, Act 11/2005 and the Constitution (Amendment) (No. 2) Act, 21/2005.

⁵ Constitution of Uganda art 129(1).

⁶ Constitution of Uganda art 139.

international crimes could only be legally established as part of the High Court.⁷ Three judges selected based on their standing and experiences have been appointed to the ICD.⁸

The ICD will consist of five Judges sitting in panels of three; the judges are appointed by the President, with the approval of Parliament, on the advice of the Judicial Service Commission as provided for in article 142 of the Constitution of Uganda. The Registrar is also appointed by the President on advice of the judicial service commission⁹ and is responsible for non-judicial aspects of administration such as legal aid, court management, procurement and personnel among others.¹⁰ The Prosecutory function is handled by the office of the DPP that has appointed at least five State Attorneys to work at the ICD, these attorneys, are also assigned other ordinary criminal cases, depending on need. The Criminal Investigations Division (CID) of the Uganda Police Force conducts investigations. Several senior police officers around the country with the CID act as focal points for the ICD.¹¹ In line with the Constitution, defendants before the ICD may instruct counsel privately or in cases where the defendant is indigent, counsel may be appointed on 'state brief' to give free legal services.¹²

The ICD is fully constituted and operational. The first trial for war crimes and other violations of Uganda's penal laws is against Thomas Kwoyelo, a former LRA commander captured in the DRC in 2008.¹³ Kwoyelo's was arraigned in Court in September 2010 and trial

⁷ The government needed to set up the Division before the ICC Review Meeting that took place in Kampala in July 2010 to show to the international community that it is committed to the fight against impunity. According to Joan Kagezi, the Senior Principal State Attorney in the office of the Director of Public Prosecutions (DPP) in charge of war crimes prosecutions, the other Divisions of the High Court such as the Anti-corruption and Commercial Divisions created in 1999 proved effective and there is expectation and enthusiasm in the judicial sector in Uganda that this will be the case with the ICD. The ICD will also deal with the crime of terrorism, several suspects of the July 2010 bombing in Kampala are already in custody pending trial; Interview with Joan Kagezi conducted on 18 Jan 2011.

⁸ The appointed judges include Justice Dan Akiki-Kizza, who heads the division, has vast experience as a Judge in Uganda, and served in the anti corruption Commission of Sierra Leone. He is deputised by Justice Elizabeth Ibanda Nahamya, who served in various capacities at the ICTR and SCSL; and Justice Owiny Dollo, who is from Northern Uganda and is trained in international law.

⁹ Constitution of Uganda art 145.

¹⁰ The Registrar is appointed to serve in any Division of the High Court, so from time to time changed. General functions of the Registrar is provided for in the Judicature Act, Cap 13 1996 sec 41 & 43 and the Trial on Indictment Act cap 23 1971 sec 3, 27(2), 58(2) & 60.

¹¹ Interview with Joan Kagezi conducted on 18 Jan 2011.

¹² Constitution of Uganda art 28(3)(e).

¹³ Thomas Kwoyelo was detained in the maximum prison of Uganda at Luzira and was in detention for at least two years before his trial commenced.

commenced on 11 July 2011 after several delays.¹⁴ In a November 2011 Constitutional Petition, Kwoyelo challenged his prosecution as amounting to unequal treatment before the law (Amnesty Act); the Constitutional Court declared the Amnesty Act constitutional, that Kwoyelo had been treated unfairly under it and ordered the ICD to cease his trial.¹⁵

In contrast to Uganda, in the DRC, the military courts have been granted exclusive jurisdiction over international crimes, even where the suspects are civilians. Several individuals have been indicted and a few, for instance, Songo Mboyo successfully prosecuted on charges of mass rape and sexual violence as war crimes.¹⁶ Several legal practitioners in Uganda questioned the necessity of a new division exclusively dealing with international crimes, which they view as a waste of resources. They in particular question the need for judges specifically handling international crimes that could be catered for by ordinary courts and the court martial, as there is already a shortage of judges in the country. This has created a tremendous backlog that is choking up the judiciary. These concerns were raised in a meeting between judges and legal practitioners in Kampala facilitated by the Uganda Law Society on 2 February 2011.

Judge Elizabeth Nahamya, one of the judges appointed to the ICD, justified the necessity of the ICD citing the complex nature of trials for international crimes and a need for a complementary mechanism to facilitate ICC prosecutions.¹⁷ There is a definite need for this division and a problem the author foresees, is appeal in both interlocutory and substantive matters before the ICD that must go through Appeal and Supreme Courts that have to handle civil, criminal and election appeals as well as constitutional petitions. No additional

¹⁴ According to Joan Kagezi, investigations took place in 2008 and the investigators have not been in touch with the witnesses since. At the time of the initial investigations, the witnesses were in IDP camps but they have now returned to their villages, therefore DPP needs time to trace the witnesses, identify those in need of protection and prepare them for trial.

¹⁵ *Thomas Kwoyelo Alias Latoni v Uganda* (Constitutional Court of Uganda) Constitutional Petition No.036/11(Reference) [Arising Out of HCT-00-ICD-Case No. 2/10] Ruling of the Court of 22 Sept 2011) at para 625 ordering the ICD to cease trial of Kwoyelo; further discussion of this case is contained in chapter four of this thesis.

¹⁶ C Aptel 'Justice Systems and the Impact on the Rome Statute' a discussion in session 7 of the *Consultative Conference on International Criminal Justice System: Transitional Justice and Domestic Justice System* (9 – 11 2009) held at the UN headquarters.

¹⁷ The judge also clarified that all the judges assigned to the Division are high court judges, therefore assigned ordinary cases, including cases outside Kampala to ensure reduction in backlog. This will remain the case until such a time that the ICD may be overwhelmed with trials of international crimes. This discussion took place in Kampala in a periodic meeting organised by the Uganda Law Society in Kampala.

judges have been appointed to the courts that have repeatedly adjourned cases due to lack of quorum.¹⁸

It is important to point out that as much as many sections of the Ugandan society, especially victim groups expressed reservations about the ICC prosecutions, there seems to be more enthusiasm towards domestic prosecutions for international crimes perpetrated in the LRA conflict. This could be because the ICD was created because of an agreement between the government of Uganda and the LRA, therefore, no apparent contention or because at the time it was created, Northern Uganda had been relatively calm for at least two years. In addition, the LRA tucked away in the tri-border area of Central African Republic, the DRC and South Sudan and not an immediate threat, makes prosecutions a much more appealing option now than at the time that the ICC took up investigations.¹⁹

This chapter examines pertinent issues that affect the work of the ICD, in particular the applicable laws, which leads to the discussion on retroactive application of legislation specifically looking at the International Criminal Court Act 11 of 2010 that will not apply to international offences committed prior to March 2010. The chapter then discusses the Rules of Procedure and Evidence to be applied by the ICD placing emphasis on rules relating to sexual crimes that was rampant during the conflict. The next section discusses persons to be prosecuted by the ICD. Although the ICD jurisdiction makes no restrictions, no investigations have been launched in the actions of the UPDF during the conflict. There appears to be a preference of subjecting state actors for crimes committed during the conflict to other

¹⁸ Constitution of Uganda arts 137 & 140 spells out the role of Court of Appeal and Supreme Court of Uganda ; Judge Nahamya who I interviewed on 23 Feb 2011, agrees that the appellate courts may be overwhelmed considering the volume of appeals that may be lodged when the ICD commences trials. On average, an appeal takes 3 years before the Court of Appeal and even more before the Supreme Court. Though the Attorney General has put in a notice of appeal of the Constitutional Court amnesty decision, this will not be heard until a new judge is appointed to the Supreme Court that as of March 2012, lacks quorum. Interlocutory applications take an average of 3 months, or less depending on the urgency of the matter. Previously interlocutory applications automatically stayed proceedings in the High Court but to ensure expediency, this rule has been changed and stay is granted on a case-by-case basis. A further problem is the overcrowding in prisons, which are holding twice the number of persons, originally intended; these could have a negative impact negatively prosecutions of international crimes but can easily be sorted out by more recruitments and the government can give priority and acquire more facilities for the purpose of trials. For more details see, Government of Uganda *National Planning Authority: National Development Plan 2010* (2010) 292 – 296.

¹⁹ Discussion with the ICC Outreach Officer, Maria Kamara conducted on 15 May 2011 in Kampala; local government officers in Gulu and Pader districts also expressed this view in October 2011 during a field visit I undertook in Northern Uganda.

domestic courts, this leads to a discussion on prosecutions of international crimes as ordinary crimes in ordinary courts in Uganda. The chapter then discusses the territorial jurisdiction of the ICD, penalties to be imposed and age of liability before turning to practical issues such as protection and participation of victims and witnesses, reparations and conduct of outreach, which are especially important in the work of the ICD.

6.2 Applicable laws at the ICD

The crimes and law within the jurisdiction of the Division include:

... Any offences relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime as may be provided for under the Penal Code Act, Cap 120, the Geneva Conventions Act, Cap 363, and the International Criminal Court Act II of 2010 or under any other penal enactment.²⁰

The DPP initially charged Thomas Kwoyelo²¹ with kidnapping under the Penal Code Act and remanded him in Gulu prison. Later, the DPP ordered his transfer to Luzira maximum prison in Kampala and the charges amended to war crimes in accordance to the Geneva Conventions Act Cap 363, laws of Uganda. The DPP further amended his indictment in 2011 to include 12 counts and 53 charges for offences he allegedly committed between 1996 and 2008 in the context of an international armed conflict in Uganda in accordance to the Geneva Conventions Act with alternative charges under the Penal Code of Uganda.²² The

²⁰ Legal Notice 10 of 2011 clause 6; this provision does not prejudice article 139 of the Constitution that provides that the High Court has unlimited and original jurisdiction in all matters. The jurisdiction of the ICD is much broader than what the government had negotiated for in Juba. The Agreement on Accountability and Reconciliation envisaged a special mechanism to prosecute crimes committed only by the LRA in the course of the conflict.

²¹ Kwoyelo was allegedly the focal point of the LRA in Uganda who gave the green light to the LRA on where, who and when to attack and constantly moved around the LRA operation areas including Northern Uganda, Eastern DRC and South Sudan. According to Joan Kagezi, several other culpable people including Major Makasi were captured in Garamba forests but most of them received an amnesty certificate, therefore, the DPP will not initiate proceedings against them. Other than Kwoyelo, the DPP's office is carrying out investigations and other five suspects have been identified.

²² *Prosecutor v Thomas Kwoyelo alias Latoni* (International Crimes Division of the High Court of Uganda) HCT-00-ICD-Case No. 02/10 'Final Amended Indictment' para 1 spells out that the LRA conflict is an international armed conflict as the rebels acted with support of or under the control of the government of Sudan. The particular charges against Kwoyelo are for Grave breaches of the Geneva Conventions and Geneva Conventions Act with alternative crimes under the Penal Code Act of Uganda. The crimes he is charged with on several counts include wilful killing, destruction of property, causing serious injury to body, inhumane

indictment alleges that Kwoyelo is a senior commander with the LRA who ordered the perpetration of several attacks; or that the LRA carried out attacks with Kwoyelo's knowledge or authority in Kilak County in Amuru district between 1987 and 2005.²³ The Senior Principal State Attorney in charge of war crime trials is confident that the DPP has overwhelming evidence to show that the conflict was internationalised and that the evidence the ICC has shared with them, shows the same. Chapter two of this thesis discusses the nature of the LRA conflict and concludes that between 1994 and 2005, it was an internationalised conflict, alongside an internal conflict.²⁴ It remains to be seen whether Courts in Uganda will reach the same conclusion when the issue is subject to judicial reasoning.²⁵

Other countries in the region also have legislations in place to prosecute international crimes, for instance, the DRC ratified the Rome Statute in March 2002 and as a monist state, the Statute has been applicable since ratification.²⁶ In November 2002, the DRC further adopted military and criminal procedure codes that gave it power to prosecute war crimes, crimes against humanity, and genocide. It then started prosecutions in military courts on that basis in 2006. The military courts began applying the Rome Statute directly though civilian courts have refrained from applying it.²⁷ To ensure prosecution of international crimes through civilian courts, the DRC created a draft implementing legislation on the Rome Statute in 2008 that amends the criminal code by adding international crimes as defined in the Rome Statute. The bill will also amend the criminal procedure code and will shift jurisdiction for international crimes from the military to the civilian justice system and give it the same post July 2002 temporal jurisdiction as the ICC.²⁸

treatment, extensive destruction of property, taking of hostages; with the alternative crimes of murder, attempted murder, kidnap with the intent to murder, destruction of property and robbery with aggravations under the Penal Code Act.

²³ *Prosecutor v Thomas Kwoyelo* 'Final Amended Indictment' para 2.

²⁴ See discussion on the nature of the LRA conflict in chapter two.

²⁵ Also undergoing trial at the ICC are several suspects of the July 2010 twin bomb blasts in Kampala that was carried out by the Somalia based Al-Shabab group. At least 86 people died in that attack.

²⁶ Constitution of the Democratic Republic of Congo (2006) arts 153 & 215; civilian and military courts are given powers to directly apply ratified treaties as long as they are consistent with law and custom of the DRC.

²⁷ *Avocats sans Frontières (ASF) 'Case Study: The Application of the Rome Statute of the International Criminal Courts by the Courts of the Democratic Republic of Congo'* (March 2009) 9 – 20 http://www.asf.be/publication/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf (accessed 10 Jan 2012).

²⁸ Open Society Foundation *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda and Kenya* (2011) 21.

In Kenya, International Crimes Act domesticated the Rome Statute. Parliament approved the bill on 12 December 2008 and the Act took effect on 1 January 2009.²⁹ The Act gives the High Court jurisdiction over international crimes and incorporates definitions of international crimes as provided for in the Rome Statute.³⁰ Although, the High Court has jurisdiction over international crimes, a Special Tribunal for Kenya was proposed as an alternative for prosecution of alleged crimes against humanity during the post election violence in 2007 to 2008 in Kenya.³¹ It is unclear whether the International Crimes Act will be applied retroactively to cover the period of post election violence³² or if a new legislation will be drafted to specifically apply to crimes committed in the post election violence by the proposed Special Tribunal of Kenya.

In Uganda, the ICC Act commenced in March 2010, and no other domestic legislation criminalises crimes against humanity therefore, the DPP will not prosecute those committed in the LRA conflict prior to the passing of the Act. This, although it is evident to the DPP and the public that crimes against humanity were committed in the LRA conflict. There were therefore many calls in Uganda for this Act to apply retroactively.

6.3 Retroactive application of legislation

As previously mentioned, the government of Uganda created the ICD as a complementarity mechanism as envisaged by the Rome Statute. Its operations were therefore hindered in wait for the passing of the ICC Act. This Act gives basis for the prosecution of the crimes of genocide, war crimes and crimes against humanity by Ugandan Courts and establishes procedures to facilitate cooperation with the ICC. The cabinet first tabled the bill ushering in this Act in Parliament in December 2004 but the parliamentarians did not debate the bill

²⁹ International Crimes Act of Kenya sec 1.

³⁰ International Crimes Act of Kenya secs 8 & 9 – 17.

³¹ Commission of Inquiry into the Post-Election Violence, 'Final Report' (16 Oct 2008) 472 – 475 http://www.reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf (accessed 10 January 2012).

³² Open Society Foundation (n 28 above) 85.

due to apparent lack of interest and knowledge in the ICC.³³ The Bill was re-tabled in December 2006 but again put aside to give chance to the peace negotiations in Juba.³⁴ It was finally passed in March 2010 and no doubt pushed through as part of Uganda's bid to host the first Review Conference of the ICC that took place in Kampala in June 2010.³⁵

All stakeholders had hoped that the ICC Act would be passed retroactively to apply to crimes committed in LRA conflict and beyond the temporal jurisdiction of the ICC of July 2002. Contrary to the general expectations and recommendations of the Formal Criminal Jurisdiction sub-committee³⁶ of JLOS TJWG,³⁷ the law commenced on 10 March 2010, the day the Parliament passed it. In the consultations carried out by JLOS in July and August 2009, the civil society reached a general agreement that the temporal jurisdiction of the ICC Act should predate the effective jurisdiction of the ICC, which is limited to crimes committed

³³ Interview with Rachel Odoi-Musoke conducted on 12 March 2011 in Kampala; understandably, in 2004 when the ICC had commenced investigations in Uganda, there was a general lack of knowledge and interest in the ICC and its work. Parliamentarians also viewed the ICC as an institution that contradicts the aims of the Amnesty Act and would stand in the way of a peaceful negotiation of the conflict in Northern Uganda, therefore, they were not ready to discuss a bill to domesticate a law they barely understood and viewed with hostility.

³⁴ At this time, there was still general hostility towards the ICC that was viewed a 'spoiler' of the peace talks. Joseph Kony had made it clear that the LRA would not reach a peace deal with the government unless the ICC withdraws the arrest warrants against him and some of his commanders. At the time, it was not clear what the intention of the executives was and to give it chance to follow protocol to seek withdrawal of the arrest warrants, the Bill was once again put aside.

³⁵ All persons interviewed between July 2010 and March 2011 including judges and registrar at the ICD; representatives of the DPP and officials at the Law Reform Commission indicated that the government needed to pass the Bill before the Review Conference to show its commitment to prosecutions of international crimes to the international community. Interestingly, the Bill was passed hardly one month after some youth with links to opposition parties in Uganda in an unprecedented move petitioned the ICC seeking an indictment of the President Museveni, the Chief of Defence Forces - General Aronda Nyakairima and the Inspector General of Police - Major General Kale Kayihura over the death of at least 30 people during the September 2009 riots that rocked parts of Kampala after the visit of the Kabaka of Buganda - Ronald Mwendu Mutebi to Kayunga was blocked by the police and the military on the apparent orders of the President; see 'Uganda: ICC Bill - Why Did MPs Trap Museveni and Save Kony?' All African.com (10 March 2010) <http://allafrica.com/stories/201003310540.html> (accessed 23 Oct 2010).

³⁶ The overall goal of this sub-committee is to propose an effective legal and institutional framework to combat impunity for international crimes. The sub-committee is required to review existing laws in so far as they relate to the formal criminal justice sphere; review the Uganda International Criminal Court Act of 2010; conduct field work in other post conflict areas; conduct regional consultations and consensus building workshops. The proposals of the sub-committee are intended to address interaction between the ICC and Uganda as well as to suggest procedural and substantive rules governing the creation of the ICD.

³⁷ The government created JLOS TJWG as a commitment to the Juba Peace Talks and the Agreement on Justice and Accountability. The group is tasked to come up with policy and legislative proposals for the implementation of the Agreement on Accountability and Reconciliation and its Annexure. The working Group includes representatives of the sector Institutions including, the Ministry of Justice and Constitutional Affairs, the Judiciary, the Uganda Law Reform Commission, Uganda Police Force, the directorate of Public Prosecutions, Judicial Services Commission, Ministry of internal Affairs, the Uganda Law Society, the Uganda Human Rights Commission and the Amnesty Commission.

after 1 July 2002. There were further suggestions that the jurisdiction of the Act should go as far back as 1962, to ensure that all international crimes perpetrated in Uganda since independence are accounted for.³⁸ Other proposals included, 1995, the date the Constitution of Uganda was promulgated and the year Uganda ratified and domesticated the ICCPR. Another proposal was 1986, to take into consideration atrocities committed from the start of the conflict in Northern Uganda. Others included, 1980, to cover crimes committed in the Luwero Triangle conflict that ushered President Museveni and the NRM into power; and 1971 was a further suggestion to take into consideration the crimes committed during the reign of Idi Amin Dada.³⁹

TJWG noted all these suggestions but conscious of evidentiary complications and limitations that arise from the investigations of crimes that occurred several years before, recommended 1995 as a commencement date.⁴⁰ Unfortunately, Parliament ignored the strong will of Ugandans to fight impunity; in fact, the issue of commencement date that was prominent in civil society discussion did not feature at all as a contentious issue in the parliamentary debate on the ICC bill.⁴¹ Perhaps, the members of Parliament were conscious of Uganda's legality principle as provided for in the Constitution:

No person shall be charged with or convicted of a criminal offence, which is founded on an act, or omission that did not at the time it took place constitute a criminal offence... No penalty shall be imposed for a criminal offence that is severer in degree or description than

³⁸ Uganda's post colonial history has been very turbulent, marked by coups and insurgencies where gross human rights violations and abuse have been committed with impunity; for instance perpetrators of crimes in Obote I, II, and Amin's despotic regime were never prosecuted, even crimes, most notable the rampant use of child soldiers perpetrated during the 1980 to 1986 insurgency and eventual coup by President Museveni's NRA guerrilla's fighters have been overlooked but Ugandans have not forgotten and still want perpetrators of those crimes prosecuted. For more see introductory remarks in chapter one of the thesis; see also T Allen 'War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention' (2005) *Crisis States Research Centre* 7 – 9.

³⁹ Interview with Rachel Odoi-Musoke, conducted on 12 March 2011 in Kampala.

⁴⁰ As above.

⁴¹ Generally see Government of Uganda, Parliamentary Debates (Hansard) Official Report, 4th Session, 3rd Meeting, Wednesday 10 March, 2010; other states have passed laws retrospectively for instance the United Kingdom, passed the Pakistan Act of 1990 and sec 2(3) and deemed it to have come in force on 1st October 1989, nine months before it was enacted. The War Crimes Act of 1991 of the United Kingdom gives British Courts jurisdiction over war crimes committed in World War II. Even the United States Constitution that clearly prohibits the passing of retrospective laws in article 9 and 10 deemed constitutional the passing of the Adam Walsh Child Protection and Safety Act of 2006 that imposes a new registration requirement on sex offenders and applies retrospectively.

the maximum penalty that could have been imposed for that offence at the time when it was committed.⁴²

UDHR, the ICCPR, and the ACHPR all contain similar provisions, which are rightly described as a universal legal principle aimed at protecting individuals from arbitrary abuse of justice through retroactive legislation. Though the ICCPR contains a clear proviso that:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission, which at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.⁴³

In this particular case, the author contends that the acts in question at the time they were committed were criminal according to the general principles of law recognised by the community of nations, so no injustice would have occurred, had the ICC Act been passed retroactively. In fact, international norms require that all international crimes perpetrated in Uganda, whenever and by whoever committed, be prosecuted. It is the author's view that the effective prosecution of those responsible for international crimes in Uganda is much more important than upholding principles on non-retroactivity, if the aims of accountability are to be achieved.

The Court of Justice of the Economic Community of Western African States (ECOWAS court) reached a judgment on a similar issue dealing with Hissène Habré who allegedly committed crimes against humanity, war crimes, and torture, after seizing power in Chad in 1982 and imposing himself as President. In July 2006, the African Union mandated Senegal to ensure that Hissène Habré is prosecuted on behalf of Africa, by a competent Senegalese court and to ensure that he is guaranteed a fair trial.⁴⁴ In 2008, Senegal amended constitutional provisions and penal laws providing its courts with jurisdiction to prosecute any individual for international crimes. In October 2008, Habré filed a case before the ECOWAS court

⁴² Constitution of Uganda arts 28(7) & (8); this provision is derived from the Universal Declaration on Human Rights which in article 11(2) provides that no person shall be prosecuted for an offence which did not exist at the time of the offence nor a heavier penalty be imposed.

⁴³ ICCPR art 15(2).

⁴⁴ African Union Conference, 7th Session, Decision on the Hissène Habré Case and the African Union S 5 (ii), Doc. Assembly/AU/3 (VII) (2006).

asking for protection from prosecution based on retroactive legislation and basing his argument on article 15 of the ICCPR. In its judgment of 18 November 2010, the Court partly upheld Habré's claim ruling that a trial in a Senegalese court under the existing national framework would violate the prohibition of retroactive legislation. The Court however, also held that Senegal could prosecute Habré but strictly within the scope of an *ad hoc* special tribunal of an international character since the laws of nations recognised the alleged crimes as international crimes.⁴⁵

Perhaps even more importantly, without a pre-existing legislation to punish crimes against humanity⁴⁶ most if not all offences described as such, are provided for in Uganda's penal laws. The ICC Act incorporates the specification of the crime in article 7 of the Rome Statute, which means:

(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in Paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

Indeed, most, if not all crimes described as crimes against humanity are crimes under the Penal Code Act of Uganda. Rape for instance is provided for in sections 123 and 124 of the Penal Code Act. Abduction, indecent assault, defilement, detention with sexual intent are

⁴⁵ *Hissène Habré v Senegal* Decision No. ECW/CCJ/JUD/06/10 (Decision of 18 November 2010) Court of Justice of the Economic Union of West African States Unofficial translation of the French original available at <http://www.hrw.org/en/habre-case> (accessed 13 Sept 2011)

⁴⁶ War crimes are codified in the Geneva Conventions Act, Cap 636 Laws of Uganda of 1964 (Geneva Conventions Act).

provided for under Penal Code Act.⁴⁷ Chapter XVIII and XX provides for the crime of murder and related offences (murder and manslaughter) and offences connected with murder and suicide, respectively. Chapter XXIV provides for the crime of enslavement including kidnapping, abduction, wrongful confinement and slavery as offences against Liberty. The only difference with Uganda's penal provisions is that, there is no requirement that the offences are committed as part of widespread or systematic attack directed against any civilian population with knowledge of the attack as provided for in the Rome Statute and the ICC Act.

Can a reasonable person then argue that he/she was not put on notice that the acts perpetrated in the LRA conflict were crimes in Uganda? Can one argue that the acts committed did not constitute criminal offences in Uganda? The author sees no basis for such arguments. The widespread and systematic nature of the crimes perpetrated against civilians in the LRA conflict must be acknowledged, recognised and prosecuted as such. On the other hand, the fact that they were widespread, systematic and directed against a civilian population should not be the basis for failure to prosecute. The Constitution of Uganda, provides that substantive justice shall be administered without undue regard to technicalities – to fail to prosecute in this instant case amounts to giving regard to technicalities.⁴⁸ The offenders knew or at least ought to have known that their acts and/or omissions were not only morally objectionable but also criminal. Prosecution therefore, does not occasion an injustice but failure to prosecute, surely does.⁴⁹

The DPP must therefore charge indictees before the ICD with crimes under the Penal Code Act and lead evidence during trial to show that the crimes were widespread and/or systematic and that they were directed against a civilian population with knowledge of the attack. The evidence led must correspond to the gravity of the crime to meet the threshold

⁴⁷ Penal Code Act secs 126, 128, 129 134 respectively.

⁴⁸ Constitution of Uganda art 126(2)(e).

⁴⁹ *Attorney General of Israel v Adolf Eichmann* Case No.336/61, District Court of Jerusalem; the Court found that no injustice was worked in prosecuting Eichmann, although there was no pre-existing legislation criminalising the acts, Eichmann was aware that the acts committed were morally and legally objectionable, therefore, there was no violation of the retroactive application of law principle.

laid down by the ICC Act. These relevant circumstances adduced in evidence during the trial will add to aggravating factors to ensure effective penal sanctions at sentencing.⁵⁰

6.4 Rules of procedure and evidence

The ICD will apply rules of procedure and evidence applicable to criminal trials in Uganda and may from time to time adopt practice directions for better management, orderly and timely disposal of cases.⁵¹ Article 28 of the Constitution sets out fair trial guarantees of the accused, these are generally respected in criminal proceedings and meet international standards. It will, however, be necessary for certain rules of evidence to be modified to meet the circumstances of violation; that is, an armed conflict. For instance, the rule requiring medical corroboration to prove physical force in cases of sexual violence, in particular rape should be revised. In addition, prior conduct of the victim as a defence should be done away with, as this will create a burden on victims who may already be traumatised and do not want to relive such experiences. In addition, such requirements are not practical in situations of armed conflict.

The ruling of both the ICTY and ICTR will be instructive for the ICD when prosecuting cases of sexual violence. For instance in *Prosecutor v Akayesu*,⁵² the ICTR broadly defined rape as physical invasion of sexual nature committed on a person under circumstances that were coercive, the ICTR further noted that the coercive nature need not be evidenced by show of physical force but may be inherent in certain circumstances such as armed conflict.⁵³ In addition, the ICC employs special rules set out in its Rules of Procedure and Evidence that apply to all sexual crimes. For instance, the legal requirement of corroboration is not mandatory for, 'in particular crimes of sexual violence.'⁵⁴ In addition, evidence of prior sexual conduct is inadmissible⁵⁵ and coercion (to show lack of consent) may be inherent in

⁵⁰ In an informal discussion held with Joan Kagezi the senior principal State Attorney in charge of international crimes prosecution on 6 July 2012, the author advanced this suggestion. Ms. Kagezi indicated that there is nothing that legally precludes the DPP from doing this and that it will be considered for further indictments and during trial.

⁵¹ Legal Notice 10 of 2011 clause 8; the applicable rules will therefore will include the Magistrate Court Act; Trials on Indictment Act Cap 23; and the Evidence Act.

⁵² *Prosecutor v Akayezu* Case No. ICTR 69-4-T (Judgement of 2 Sept 1998) ICTR Trial Chamber (*Akayesu case*).

⁵³ *Akayesu case* para 688.

⁵⁴ Rules of Procedure and Evidence of the International Criminal Court rule 63(4).

⁵⁵ Rules of Procedure and Evidence of the International Criminal court rule 71.

certain circumstances, such as armed conflict or military presence.⁵⁶ Special rules of this nature will be necessary for prosecution of offences of sexual violence at the ICD.

6.5 Persons to be tried by the ICD

The ICC Act is explicit in respect to its personal jurisdiction. Courts in Uganda can exercise jurisdiction over, a person who is a citizen or permanent resident of Uganda; a person who is employed by the Uganda government in a civilian or military capacity; a person who has committed the offence against a citizen or permanent resident of Uganda; and a person who after the commission of the offence is present in Uganda.⁵⁷ The DPP however, has no intention to assert jurisdiction over persons already indicted by the ICC and is ready to work with the ICC to ensure that those most responsible for crimes in the LRA conflict are prosecuted.⁵⁸ For the crimes perpetrated in the LRA conflict, the ICD will limit its jurisdiction to those who played leadership role within the LRA structures minus those indicted by the ICC.⁵⁹ Other lower ranking perpetrators will potentially appear before other accountability mechanisms like a Truth and Reconciliation Commission when/if created and traditional justice structures.⁶⁰

The problem however, is that amnesty was not only granted to lower ranking LRA perpetrators but high ranking and culpable members as well.⁶¹ The DPP has indicated that a grant of amnesty is not a bar to prosecutions of international crimes committed by Ugandans and/or in Uganda.⁶² If this were the case, it does not make sense that the DPP has not investigated or proffered charges against culpable high-ranking LRA commanders such

⁵⁶ *Prosecutor v Jean-Pierre Bemba Gombo* (situation in Central African Republic: ICC-01/05-01/08) Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009) ICC Pre-Trial Chamber (*Bemba Case*) para 162.

⁵⁷ ICC Act art 18.

⁵⁸ Interview with Joan Kagezi conducted on 18 January 2011 in Kampala.

⁵⁹ Interview with Joan Kagezi conducted on 18 January 2011 in Kampala; see also Agreement on Accountability and Reconciliation clause 4.1 excluding state actors from accountability measures envisaged under the Agreement.

⁶⁰ Agreement on Accountability and Reconciliation clause 6.1.

⁶¹ Some of the high-ranking LRA commanders granted amnesty includes; Brigadier Banyana, Sam Kolo, Onekomon and Matsanga-Nyekorach who acted as the LRA representative in the later stage of the Juba talks.

⁶² Interview with Joan Kagezi conducted on 18 January 2011 in Kampala; the ICD ceased the trial of Kwoyelo but the DPP refused to release him from prison, insisting that the crimes for which, Kwoyelo is charged cannot be subject to amnesty. See further discussion in chapter four of this thesis.

as Brigadier Banya, Sam Kolo and Onekomon Kikoko among others, implicated in many atrocities committed in the LRA conflict. In addition, recent beneficiaries of amnesty include Major Makasi and Charles Arop. Charles Arop was the LRA Director of Operations; he surrendered to Ugandan troops in November 2009 and received amnesty in the same period.⁶³ In addition, David Matsanga Nyekorach, the LRA spokesperson and leader of the LRA peace delegation who is accused of frustrating the peace talks, also received amnesty.⁶⁴

Perhaps this is an attempt to avoid tension between the DPP's office and the Amnesty Commission, since these persons have already received amnesty certificates.⁶⁵ Should culpable individuals therefore escape prosecution so that accountability and reconciliation institutions are not at loggerhead? Perhaps this was a necessity to stay in line with the letter and spirit of the Amnesty Act, but what is more puzzling is that although Kwoyelo is not the only culpable LRA commander captured and in Uganda, he is the only one against whom charges have been proffered. One cannot help but question the reasons behind such differential treatment by the concerned institutions.⁶⁶

On 22 September 2011, the Constitutional Court declared Kwoyelo's trial unequal treatment before the Amnesty Act. The Court further declared the Amnesty Act, constitutional and ordered the ICD to cease trial of Kwoyelo.⁶⁷ The Court justified its findings citing Uganda's history that has been characterised by political and constitutional instability and stated that the aim of the Act to end an armed rebellion, was in line with national objectives and state

⁶³ Human Rights Watch *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division* (Jan 2012) 14; Arop is accused of leading the 'Christmas massacres,' part of a series of attacks in 2008 and 2009 resulting in the deaths of at least 620 civilians and the abductions of more than 160 children in the DRC.

⁶⁴ S Oola, 'Uganda: Mutsanga should not have been Given Amnesty' AllAfrica.com 10 June 2010 <http://allafrica.com/stories/201006110203.html> (accessed 22 Oct 2010).

⁶⁵ The DPP has made it clear that his office will not pursue rebel commanders already granted amnesty.

⁶⁶ Major Makasi is one such other commander, captured in Garamba, together with Kwoyelo but granted amnesty by the Amnesty Commission.

⁶⁷ *Prosecutor v Thomas Kwoyelo* (n 15 above) para 620; the state has indicated intentions of appealing this decision and applied to the High Court to stay of execution of the Constitutional Court order but this application was denied by Justice Zehurikirize. On 25 Jan 2012, the Justice made an order of mandamus to the Chairman of the Amnesty Commission and the DPP to grant Kwoyelo an amnesty certificate and release him immediately. This order was appealed by the attorney General and on 5 April 2012, the High Court reached a decision staying the execution of the order of mandamus granted by the Court pending the determination of the intended appeal by the applicant before the Supreme Court. See *Attorney General v Thomas Kwoyelo alias Latoni* (High Court of Uganda at Kampala) Miscellaneous Application No. 179 of 2012 (Arising from Miscellaneous Cause No. 162 of 2011) Order of 5 April 2012.

policy; and that made the Act constitutional.⁶⁸ Although the court stated that in determining the constitutionality of legislation, ‘its purpose and effect must be put into consideration as both purpose and effect are relevant to determine the constitutionality or unconstitutionality of that legislation’; it failed to do so in its ruling. The Court should have considered whether the inclusion of international crimes within the ambit of amnesty contravenes Uganda’s domestic and international obligations that require Uganda to investigate, prosecute and where it establishes guilt, punish perpetrators of international crimes and accord appropriate remedies to victims.

The state is set to appeal this decision and there is hope that the Supreme Court that made an interim order staying execution of any consequential orders seeking to enforce the judgement in the Constitutional Reference pending hearing and determination of the main application for stay of execution will overturn the ruling of the Constitutional Court.⁶⁹ In the event that the Supreme Court rules that the Amnesty Act, as it was then was unconstitutional, will the DPP then proceed against LRA leaders culpable of International Crimes? The DPP has ruled out the possibility of that happening, stating that his office will not prosecute those who hold amnesty certificates.⁷⁰ It is not clear yet when the Supreme Court that does not constitute a bench will hear the appeal. New judges are yet to be appointed to the Court.⁷¹

In addition, the Constitution of Uganda protects the President from prosecutions. Article 98(4) provides that while holding office, the President shall not be liable to proceedings in any court. Article 98(5) adds that, civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office. It further provides that any period of limitation in respect of any such proceedings shall not be taken to run during the

⁶⁸ *Prosecutor v Thomas Kwoyelo* (n 15 above) 19 - 20.

⁶⁹ *Attorney General v Kwoyelo alias Latoni* (Supreme Court of Uganda at Kampala) Constitutional Application No. 01 of 2012 (Arising from Constitutional Reference No. 36 of 2011) order of the Court 30 March 2012.

⁷⁰ Interview with Joan Kagezi the Senior Principal State Attorney in charge of international crimes prosecution.

⁷¹ Most of the judges of the Supreme Court have reached the retirement age but the state has been slow in the appointment of new judges. Since March 2012, the Judicial Service Commission has nominated several individuals for appointment to the Supreme Court.

period while that person was president. The Rome Statute however, does not recognise such immunity and in Article 27(1) clearly states that:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Article 27(2) of the Rome Statute further provides that Immunities or special procedural rules, which may attach to the official capacity of a person, whether under national or international law, shall not bar the ICC from exercising its jurisdiction over such a person. Section 25 of the ICC Act provides that any immunity or special procedure rule attaching to the official capacity of any person shall not be a bar to a request by the ICC for surrender or other assistance.⁷² A recent constitutional petition⁷³ challenged this section, arguing that it is inconsistent with articles 98(4) and (5) and 128 of the Uganda Constitution that protects the President and other state officials from proceedings in courts.⁷⁴ The Court is yet to make pronouncement on that provision but it is likely that the constitutional provisions protecting the president will be upheld, as the Constitution is the supreme law in Uganda.⁷⁵

In addition, although the Agreement on Accountability and Reconciliation sought to exclude state actors from the jurisdiction of the envisaged special division,⁷⁶ the Legal Notice creating the ICD does not limit the jurisdiction of the ICD to particular individuals or categories of individuals.⁷⁷ The practice, however, seems to be that for crimes perpetrated

⁷² See also Nuremberg Charter art 7; reaffirmed in principle 221 of the Nuremberg Principles, Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, GA Resolution 95(1) UN GAOR, 1st Session, Point 2 at 1144, UN Doc A/236 (1946). This rule has been affirmed in art 7(2) ICTY Statute art 6(2) of the ICTR Statute and art 6(2) of the Statute of the Special Court for Sierra Leone.

⁷³ *Jowad Kezaala v Attorney General of Uganda* (Constitutional Court of Uganda) Constitutional Petition 24 (2010).

⁷⁴ Uganda Constitution art 98(4) provides that while holding office, the President shall not be subjected to proceedings in any court and article 128(4) protects persons exercising judicial powers from liability from any action or suit subject to the exercise of judicial powers.

⁷⁵ Although there is nothing that bars the ICC from proceeding against state officials in Uganda, there seems a general reluctance on the part of the Prosecutor to do so as illustrated in chapter six of this thesis.

⁷⁶ Agreement on Accountability and Reconciliation clause 4.1.

⁷⁷ Legal Notice No 10 para 6.

in the LRA conflict, state actors will be subject to the military or other ordinary courts in Uganda.⁷⁸ The State Attorney in charge of international crimes prosecution stated that the DPP does not have any leads to evidence of international crimes committed by state actors in the LRA conflict but that if any lead is brought to attention of the DPP, it will be followed. The State Attorney further indicated that in a March 2012 consultation meeting she undertook in Nwoya district, the local population gave a clear lead on crime of rape against both males and females perpetrated by members of the UPDF Fourth Battalion against civilians. She indicated that the DPP is following that lead and if it finds sufficient evidence to support this allegation, the DPP will charge the responsible officers.⁷⁹ Justice James Ogoola, the former Principal Judge of Uganda has further stated that, state actors will be held accountable through prosecutions in the ordinary courts in Uganda and for soldiers, through the court martial.⁸⁰

6.6 Prosecution as ordinary crimes in domestic courts

As discussed in chapter three of this thesis, international law, including the Geneva Conventions considers the prosecution of international crimes as ordinary offences in domestic courts as fulfilling the obligation to investigate, prosecute and punish.⁸¹ In addition, the complementarity regime of the Rome Statute appears to regard prosecutions of international crimes based on domestic criminal law sufficient response to preclude

⁷⁸ For instance in its reply to the case concerning War Affected Children in Northern Uganda before the African Committee of Experts on the Rights and Welfare of the Child; the government stated that the commander who was in charge of Barlonyo camp that was attacked by the LRA in 2004 was prosecuted in a court martial. The government further indicated that the court martial severely punished the commander for the negligence of his troops (see detailed discussion of the attack in chapter two). The government however, does not provide any details of the crimes, procedure and the punishment levied and if this is true, it is one isolated incidence, there is no information on other UPDF commanders being punished for negligence for the numerous attacks on IDP camps by the LRA (see detailed discussion in chapter two) or charged on individual criminal responsibility for crimes perpetrated during the conflict (a detailed discussion on international crimes perpetrated by the UPDF is contained in chapter two).

⁷⁹ Interview with Joan Kagezi conducted on 06 July 2012 in Kampala. Although the ICD is meant to take over all prosecutions of international crimes, there is reluctance on part of state actors for their actions to be subject to this court; therefore, prosecution as ordinary crimes will have to be pursued if state actors are to be held accountable for their action.

⁸⁰ J Ogoola 'Presentation on the Special Division of the High Court' *Final Report on the Workshop on Accountability and Reconciliation: Juba Peace Talks* (6 – 7 May 2008) Kampala.

⁸¹ Generally see the discussion on the 'obligation to investigate, prosecute and punish' in chapter three of this thesis.

action by the ICC.⁸² As previously elucidated in this chapter, several acts constituting international crimes, such as murder, rape and pillage are criminalised as ordinary offences in Uganda's penal regime. Therefore, Uganda has the option to prosecute crimes perpetrated in the LRA conflict based on its domestic penal laws in ordinary courts.

For the prosecution to be meaningful, however, the charges must correspond to the gravity of the crime and must entail 'effective penal sanctions' to meet the threshold laid down by the Geneva Conventions Act and the ICC Act.⁸³ The High Court of Uganda can carry out the prosecutions and for cases involving the military, the Court Martial can carry out prosecutions.⁸⁴ Court martial proceedings and prosecutions as ordinary crimes in domestic courts will not require time and resources to prove the nexus between the crime and the armed conflict in cases of war crimes or the classification of the conflict. As long as such prosecutions reflect the gravity of the crimes committed and encourages the participation of witnesses and victims, they will yield accountability for international crimes perpetrated in the LRA conflict.

Several states have prosecuted international crimes as ordinary crimes. For instance, the US, Lieutenant Calley was convicted by the general court martial for three counts of murder and assault with intent to commit murder in violation of article 118 and 134 of the Uniform Code of Military Justice of the US for his involvement in a massacre in the Vietnam War. The government could have charged him with grave breaches of the Geneva Conventions.⁸⁵ German courts have also charged several defendants from the former Yugoslavia with not

⁸² Rome Statute art 1.

⁸³ See art 49 of Geneva Convention I; art 50 of the Geneva Convention II; art 129 of Geneva Conventions III and art 146 of Geneva Convention IV.

⁸⁴ According to Joan Kagezi, the senior principal State Attorney in charge of international crime prosecution, several UPDF officials have been prosecuted by the High Court on charges of capital offences like murder and rape and that several others have been prosecuted by the court martial and given harsh sentences including death. Interview conducted on 6 July 2012 in Kampala.

⁸⁵ See *US v Calley*, 46 C.M.R. (1973) 1131, 1138. There have been several other court martial proceedings of members of the US Armed Forces for what amounted to grave breaches committed during military operations in Panama, Somalia and Iraq; W Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7(4) *Journal of International Criminal Justice* 723 – 741 at 730 making reference to Statement of J H McNeil before the committee on the judiciary of the US House of Representatives 12 June 1996; SD Murphy, 'Contemporary Practice of the United States relating to International Law' (2004) 98 *American Journal of International Law* 595.

only international crimes but also ordinary crimes such as murder.⁸⁶ However, although prosecution as ordinary crimes in domestic courts remain an option in Uganda, there has been little or no effort to investigate actions of state actors in the conflict.⁸⁷ On a positive note however, the lapse of Part II of the Amnesty Act in May 2012 means that there is no legal barrier to the prosecution of LRA commanders responsible for international crimes.

6.7 Territorial jurisdiction of the ICD

Jurisdiction of Ugandan courts is limited to crimes committed only or partly within Ugandan territories under the Penal Code Act,⁸⁸ although the Geneva Conventions Act broadly extends jurisdiction of courts in Uganda to offences committed outside Ugandan territories. Ugandan courts have powers to indict, try and punish such a person for that offence in any place in Uganda 'as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment of that person, be deemed to have been committed in that place.'⁸⁹

As previously discussed in this thesis, the LRA have committed international crimes, not only in Uganda but also in the DRC, Central African Republic and South Sudan. The mentioned countries have not brought charges against any LRA personnel and there is no indication that they will do so. In addition, the ICC has not charged the LRA indictees with crimes committed in any other territory, except Uganda.⁹⁰ Ugandan courts therefore must assert

⁸⁶ Ferdinandusse (n 79 above) 731.

⁸⁷ According to the DPP, several UPDF officials responsible for crimes such as rape, murder and pillage have over the years been successfully prosecuted by the High Court sitting in Gulu. The office also indicated that the court martial has also prosecuted several UPDF officials for serious crimes such as murder and indiscriminate attacks against civilians in the conflict affected areas. Interview with Joan Kagezi, the senior principal State Attorney in charge of international crimes prosecutions conducted on 6 July 2012 in Kampala.

⁸⁸ Penal Code Act sec 4(1); the exception to the territorial rule regards the offence of treason as provided in sections 23, 24, 25, 27 and 28 of the Penal Code Act, if committed by a Ugandan or a person ordinarily resident in Uganda outside Ugandan territory. That said, however, sect 3(b) of the Penal Code (saving some laws) provides that nothing in the Code shall affect the liability of any person to be tried or punished for an offence under the provisions of any law in force in Uganda relating to the jurisdiction of Uganda Courts in respect of acts done beyond the ordinary jurisdiction of such courts; ICC Act sec 7 to 9; extends jurisdiction to Ugandan Courts to try persons for international crimes committed outside the territory of Uganda, Joan Kagezi therefore indicated that the DPP will only bring charges against persons for international crimes committed outside the territory of Uganda from March 2010 under the ICC Act.

⁸⁹ Geneva Conventions Act sec 2(2).

⁹⁰ Although nothing in the Rome Statute appears to bar the ICC Prosecutor from amending charges against the indictees to include crimes perpetrated in the other territories in the region.

universal jurisdiction and comprehensively deal with all the crimes committed in the conflict, in whichever territory.⁹¹ Several states have prosecuted and convicted or at least sought to prosecute persons for crimes committed abroad, by non-nationals on the principle of universal jurisdiction; examples that Ugandan Courts could follow.⁹²

The DPP however, limited charges against Kwoyelo to acts he allegedly committed within Ugandan territories. In essence, for purposes of trial of offences in the LRA conflict, the DPP intends to prosecute only Ugandans or persons ordinarily resident in Uganda for offences committed within the territory of Uganda or partly committed within the territory of Uganda. The DPP has however indicated that for offences committed after the commencement of the ICC Act (March 2010), his office will try persons for offences committed outside Ugandan territories as provided for in the Act.⁹³

6.8 Penalties to be imposed by the ICD

The death penalty is the maximum sentence under Uganda's penal laws and the Supreme Court confirmed this, in 2009.⁹⁴ In that case, the Attorney General appealed against the 2005 Constitutional Court ruling that declared mandatory death sentence and delay on the death row for more than 3 years unconstitutional. The petitioners in a cross appeal challenged the constitutional court's decision that retained the death penalty to be applied

⁹¹ This is one way that ICC prosecutions can complement domestic prosecutions as the ICC has jurisdiction to try perpetrators for international crimes committed outside Ugandan borders.

⁹² For example in *Aguilar Diaz et al. v Pinochet*, Belgium sought the extradition of General Pinochet from the United Kingdom to answer charges of crimes against humanity committed in Chile against Chilean nationals; *in Javor et al. v X*, the French sought the prosecution of the defendant for genocide and crimes against humanity committed in a Serbian detention camp in the former Yugoslavia; In Switzerland, a Rwandan citizen, Niyonteze was charged with genocide and crimes against humanity committed in Rwanda in 1994, he was sentenced to life imprisonment on 11 charges of genocide among others; A Serbian, N. Djajic, was convicted for aiding and abetting war crimes by a German Court and another Serbian, D Kuslic was convicted for Genocide and murder in German. Several Germans were tried in England for war crimes under the 1991 War Crimes Act of England among several others.

⁹³ With the exception to the Geneva Conventions Act and the ICC Act, Ugandan Penal laws do not extend jurisdiction of Ugandan Courts to crimes committed by Ugandans abroad except for offences related to treason. Sec 4(2) of the Penal Code Act extends jurisdiction to offences under sections 23, 24, 25, 27 and 28 committed outside Uganda - treason and other offences. Understandably, the DPP's aim is to secure convictions and with as little fuss as possible and would want to avoid unnecessary interlocutory applications like challenges to jurisdiction. Interview with Joan Kagezi conducted on 18 January 2011. Note that the ICC also limited indictments of the LRA leaders to crimes allegedly committed within the territories of Uganda.

⁹⁴ *Susan Kigula and 416 other v Attorney General* (Supreme Court of Uganda) Constitutional Appeal before the Supreme Court of Uganda, No 3 of 2006 (21 January 2009).

on a case by case basis and hanging as an appropriate and constitutional mode of carrying out executions.⁹⁵ The Supreme Court upheld the decision of the Constitutional Court declaring mandatory death penalty unconstitutional but retaining the death penalty to be applied on a case-by-case basis.⁹⁶

Though the maximum penalty in the Rome Statute is life imprisonment,⁹⁷ article 80 gives leeway to a national jurisdiction to have a sentencing regime of its own. Despite this leeway, the Parliament of Uganda decided to follow the shifting international trend and removed the clause authorising the death penalty, replacing it with life imprisonment as the maximum sentence in the ICC Act.⁹⁸ The maximum sentence under the Geneva Conventions Act is life imprisonment for a grave breach involving wilful killing.⁹⁹ The 2010 Constitutional petition¹⁰⁰ challenged this provisions; arguing that sections 7(3), 8(3), 9(3), 15 and 16 of the ICC Act are discriminatory and unconstitutional for prescribing penalties that are less than those for the same crime punishable under sections 188 and 189 of the Penal Code Act.¹⁰¹ The petitioner argued that these provisions are inconsistent with article 21(1), (2) and (3) of the Constitution.¹⁰²

In effect, the argument is that while a person charged with murder under the Penal Code Act faces the possibility of death, a person charged with murder or wilful killing under the ICC Act may only be imprisoned for life, which is discriminatory, therefore unconstitutional.¹⁰³ It is unfortunate that Uganda retains the death penalty for ordinary offences in her statute books but for extraordinary offences like war crimes, genocide and crimes against humanity - the death penalty is done away with. It is most likely that Uganda made this shift conscious of the fact that the international donor community, including the UN and European governments are unlikely to support proceedings that may culminate in

⁹⁵ The petitioners were 417 Individuals on the death row, including 2 women.

⁹⁶ *Susan Kigula and 416 others* (n 88 above).

⁹⁷ Rome Statute art 77.

⁹⁸ ICC Act secs 7(3), 8(3) & 9(3).

⁹⁹ Geneva Conventions Act art 2.

¹⁰⁰ *Jowad Kezaala v Attorney General* (n 68 above).

¹⁰¹ These sections define death as maximum penalty.

¹⁰² This article provides for equality and freedom from discrimination.

¹⁰³ C Mbazira 'Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda' in C Murungu & Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 218.

the passing of a death sentence. For instance, after the Iraqi High Tribunal (IHT) included the death penalty in its sentencing regime, the UN declared that it could not sponsor or actively participate in a trial that could hand down such punishment.¹⁰⁴

In addition, countries that have abolished the death penalty may not extradite to a country, which retains the death penalty.¹⁰⁵ In the case of Rwanda, the ICTR dismissed the request to have remaining genocide suspects transferred to Rwanda for trial until the judiciary was reformed, fair trial rights guaranteed, prison conditions improved and the death penalty in particular abolished.¹⁰⁶ Thereafter, despite a referendum, where the public overwhelmingly voted for the retention of the death penalty, in 2007, Rwanda lawmakers voted to scrap the death penalty to encourage the transfer of genocide suspects to face trial at home.¹⁰⁷

Rwanda got a lot of international approval since this move¹⁰⁸ and swiftly signalled that it would actively seek the extradition of suspects known to be hiding out abroad and evading justice. The Justice Minister reportedly stated that Rwanda had signed several extradition agreements with many countries in Africa, Europe and in North America and was hopeful that the countries would cooperate in transferring genocide suspects to Rwanda.¹⁰⁹

¹⁰⁴ V Blum, 'Crafting Justice in Iraq' *International Centre for Transitional Justice* (22 December 2003) <http://www.ictj.org/en/news/coverage/articles/391.html> (accessed 23 Oct 2010).

¹⁰⁵ *Roger Judge v Canada* Communication No. 829/1998 U.N.Doc CCPR/C/78/D/829/1998 (2003) (Decision of 8 Aug 2003) Human Rights Committee para 10.6; in this case, the Human Rights Committee decided that by extraditing the applicant to a country that applies the death penalty (US in this case) Canada had violated the right to life of the applicant.

¹⁰⁶ A Twahirwa, 'Death Penalty Rwanda: Abolition Spurs Quest for Justice', Inter Press Service Agency, (7 Aug 2007) <http://ipsnews.net/africa/nota.asp?idnews=38821> (accessed 15 Feb 2011); K Musoke, allAfrica.com, 'Rwanda: Kagame Wants Genocide Trials Moved to Kigali' All Africa.com (25 June 2009); Reporting that Rwanda made this application under 11 *bis* of the ICTR statute.

¹⁰⁷ O quist-Arcton, 'Rwanda Lawmakers Vote to Scrap Death Penalty' NPR 9 June 2007 <http://www.npr.org/templates/story/story.php?storyid=10910112> (accessed 21 Oct 2010).

¹⁰⁸ A Twahirwa 'Death Penalty Rwanda: Abolition Spurs Quest for Justice' Inter Press Service Agency 7 August 2007 <http://ipsnews.net/africa/nota.asp?idnews=38821> (accessed 15 Feb 2011); reports that the President of Interpol, Jackie Selebi indicated that with the abolition, Interpol would cooperate in tracking down genocide suspects during the 19th African Regional Conference in Tanzania in July 2007; the United Nations High Commissioner for Human Rights, Louise Arbour, issued a tribute for Rwanda's decision to abolish the death penalty stating that the thirst for justice remained unquenched but with the ban on the death penalty, Rwanda had taken the necessary step to ensure respect for life, at the same time making progress to bring to justice to those responsible for the heinous crime of genocide.

¹⁰⁹ As above; see also H Holland 'Kagame Says Rwanda Should Host Genocide Trials' Reuters 24 June 2009 <http://af.reuters.com/article/topNews/idAFJOE55N0KT20090624> (accessed 15 Feb 2011); K Musoke 'Rwanda: Kagame Wants Genocide Trials Moved to Kigali' Reuters 25 June 2009.

Perhaps Uganda is conscience of such limitations.¹¹⁰ The death penalty is still available for crimes committed under the Penal Code Act that can be relied on by the ICD but the Senior Principal State Attorney in charge of international crime prosecutions indicated that the DPP's office would not request the ICD to issue the death penalty to be in line with international practice.¹¹¹ It is imperative now that Uganda amends its penal laws to remove the death penalty and have a uniform sentencing regime in its jurisdiction.

6.9 Age of liability

Section 19(1)(a)(v) of the ICC Act, excludes jurisdiction of the ICD over persons under 18 years of age at the time, the alleged offence was committed.¹¹² Yet, other laws in Uganda authorise the prosecution of children of 12 years and above.¹¹³ The practice in Uganda has been that children get mitigated sentences for the same crime committed by adults. In the *Jowad Kezaala constitutional petition*, the petitioner challenges this provision arguing that it is inconsistent with articles 2 and 34(6) of the Constitution of Uganda that recognises criminal responsibility of children.¹¹⁴ The Senior Principal State Attorney in charge at the ICD indicated that the DPP would not charge persons who were under the age of 18 at the time of commission of crimes.¹¹⁵ The State Attorney further stated that no individual abducted as a child would be indicted for international crimes.¹¹⁶

¹¹⁰ I Mufumba, 'Uganda: ICC Bill- Why Did MPs Trap Museveni and Save Kony?' All Africa.com (10 March 2010) <http://allafrica.com/stories/2010003310540.html> (accessed 23 Oct 2010); reports that President Museveni was at odds with the removal of the death sentence, a reason advanced for the delay in signing of the ICC Act.

¹¹¹ Joan Kagezi, interview conducted on 18 January 2011 in Kampala.

¹¹² This is done by incorporating article 26 of the Rome Statute.

¹¹³ The Children Act Cap 59 laws of Uganda, sec 88 provides that all persons of 12 years and above are criminally liable.

¹¹⁴ Constitution of Uganda art 2 provides that the Constitution is the supreme law and art 34(6) provides that children shall be kept separately from adult offenders.

¹¹⁵ Interview conducted on 18 Jan 2011 in Kampala.

¹¹⁶ In an affidavit to support his constitutional petition, Kwoyelo evoked his status as a formerly abducted child claiming that he was abducted by the LRA when he was 13 years old on his way to school; 'Affidavit in Support of the Constitutional Petition' *Uganda v Thomas Kwoyelo* Constitutional Reference No 36 of 2011 paras 3, 4 & 5; the state refrained from responding to this assertion though Joan Kagezi had indicated to me during an interview conducted on 18 January 2011 in Kampala that there is evidence to suggest that Kwoyelo was an adult by the time he joined the LRA and that he was not abducted; in effect, indicating that one's status as a 'formerly abducted child' will be an important determining factor in determining persons to be prosecuted by the ICD for crimes allegedly committed in the LRA conflict. The Constitutional Court however, did not deal with this issue.

This could be because the DPP is conscious of the rampant abduction of children that sustained the LRA conflict. On the other hand, the DPP may simply be avoiding the outcry that the ICC received on the indictment of Dominic Ongwen and may simply want to avoid side discussions that will complicate cases and may lead to acquittals. Like discussed in the previous chapter, children and persons abducted as children should benefit from accountability processes that ensures accountability for ones action; respects procedural guarantees appropriate in the administration of juvenile justice; and reflects the desirability of promoting the capacity of the individual to assume constructive role in society. The author maintains that the ICD like the ICC is not the right forum for this.

6.10 Protection and participation of victims and witnesses

Victim and witness participation is a necessity for fair and successful prosecutions, yet very often, in the aftermath or in situations of mass atrocities, such individuals do not want to participate in accountability processes out of fear, real or imagined. Providing protection to witnesses and victims is therefore important for law enforcement as well as a fundamental legal obligation, which poses a significant challenge in countries emerging from conflict where impunity of perpetrators has not been effectively confronted.¹¹⁷ The LRA conflict created a large number of victims, both direct and indirect, in Uganda and beyond. These victims will be required to testify in court about their experiences and experiences of others around them. This exposes them to risks, that may be aggravated considering that the ICD's location in Uganda where perpetrators and their supporters may have access to; have influence and resources; human and material, to intimidate and in the worst case scenario, further harm the victims. The question of protective measures cannot therefore, be overlooked by the ICD as it conducts investigations and trials.

The DPP and investigators recognise and appreciate the risks potential witnesses may face. At the start of investigations, the DPP did not take witness protection with utmost seriousness. Apparently, witnesses approached, did not express any fears and investigators

¹¹⁷ International Network to Promote the Rule of Law (INPROL) 'Witness Protection in Countries Emerging from Conflict' (5 Dec 2007) INPROL Consolidated Response (07-008) <http://www.inprol.org/files/CR07008.pdf> (accessed 29 June 2010).

saw no need to put any protective measures in place. When Kwoyelo, the first person indicted for war crimes by the ICD privately instructed defence counsel, the police, realised that although the LRA have not been active in Uganda since 2006, they may well still have resources and influence not only in Uganda but also in the region.¹¹⁸ This was the wakeup call for the DPP and his team of investigators that are now keen on possible risks that witnesses and victims may face. JLOS and its international partners carried out a risk assessment and have in place a Witness Protection bill.¹¹⁹ In addition, JLOS is pursuing a risk assessment for ICD witnesses to evaluate concrete risks and recommend those best placed to administer witness protection and the necessary training required.¹²⁰

The timing of these efforts raises concern given that at least 60 witnesses are already selected to testify on behalf of the prosecution in the Kwoyelo case, should it proceed to trial.¹²¹ Field reports indicate that these witnesses had since December 2011 not received any updates from the DPP and investigators on the constitutional ruling that ordered the cessation of Kwoyelo's trial case. Several witnesses reportedly stated that the ICD officials had promised that Kwoyelo would be imprisoned for life and that he would not return to the community.¹²² The State Attorney in charge of international crimes prosecution stated that the DPP's office has not made contact or discussed the constitutional case with the witnesses because the matter is still pending appeal and it would be premature to tell the witnesses that Kwoyelo will be returning to the community.¹²³

¹¹⁸ The privately instructed lawyers are Caleb Alaka & Francis Onyango who are said to receive payment for their involvement in the case from Sudan. The state offered Kwoyelo a lawyer on state brief as required by law for persons facing capital offences but Kwoyelo made no indication that he was interested in the addition. Interview with Joan Kagezi conducted on 18 January 2011 in Kampala. In an informal discussion with Francis Onyango, one of Kwoyelo's defence attorneys conducted on 20 April 2011, Onyango confirmed that their pay did not come from the state but did not indicate from who and where the payment was received.

¹¹⁹ At the end of 2011, the Law Reform Commission planned to start consultation on the bill but this has not yet commenced. Interview with Ismene Zarifis, transitional justice advisor of JLOS conducted on 17 Feb 2012 in Kampala.

¹²⁰ Interview with Ismene Zarifis conducted on 17 Feb 2012 in Kampala.

¹²¹ There is every possibility of Kwoyelo's case proceeding to trial as there is likelihood to the Supreme Court will overturn the Constitutional Court ruling that failed to investigate the purpose and relevance of the Amnesty Act, give a critical appreciation of Uganda's international obligations and the rights of victims under domestic laws of Uganda. Further discussion is contained in chapter four of this thesis.

¹²² Justice and Reconciliation Project 'Moving Forward: Kwoyelo and the Quest for Justice: A Rapid Situational Analysis and Opinions on the Way Forward' (15 Nov 2011) 2.

¹²³ Telephone discussion with Joan Kagezi conducted on 12 Feb 2012. Although the High Court denied a stay of execution pending appeal, the DPP has refused to release Kwoyelo from prison and there is no likely that he will return to his village until the Supreme Court disposes off the matter. Further discussion is contained in chapter four.

While the DPP and investigators continue with investigations of both the LRA and UPDF perpetrators, they must carefully consider the level of risk that each potential witness faces before, during and after trial to manage risks, effectively. Factors that should be taken into account will include the relationship between the witness and alleged perpetrator. Also the status of the alleged perpetrator; nature of the alleged crime; the nature of the threat; importance of the testimony to be given by the witness; the psychological state of the witness; and the period of time in which the witness is likely to be at risk.¹²⁴ Measures adopted could include protecting the identity of witnesses and other confidentiality guarantees. The ICTY, ICTR, the SCSL and the ICC all have at their disposal a number of confidentiality measures ranging from expunging names and identifying information from Court records; testimony under a pseudonym; electronic facial distortion, voice distortion and closed session from which the ICD could borrow.¹²⁵

In addition, victims of sexual violence are usually shy to take part in court processes due to trauma, stigma and blame that society usually attaches to the victims of such crimes. The ICD needs to pay particular attention to the lessons learned from the experiences *ad hoc* criminal tribunals such as the ICTY and ICTR that have documented the long lasting consequences on women who suffer sexual assault. Women who testify in the tribunals have received special psychological counselling and special protection that includes testifying from remote locations, where they are reluctant to face their tormentors in court. The Tribunals have also made special protective measures available to children and other vulnerable groups of victims and witnesses.¹²⁶

The protection accorded to victims and witnesses will largely determine their participation in the court processes but will only ensure the participation of victims and witnesses who are before the ICD. The Court should however, enable all victims to participate in its

¹²⁴ INPROL (n 111 above).

¹²⁵ Justice Nahamya indicated that, nothing that will bar the ICD from making appropriate rulings on protective measures, when it commences trials. Interview conducted on 11 March 2011 in Kampala.

¹²⁶ United Nations Department of Peacekeeping Operations *Review of the Sexual Violence Elements In the Judgment of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in Light of the Security Council Resolution 1820* (2009).

processes as provided in clause 8 of the Agreement on Accountability and Reconciliation, in the following terms:

The government of Uganda shall promote the effective and meaningful participation of victims in accountability proceedings...Victims shall be informed of the processes and any decision affecting their interests....In the implementation of accountability and reconciliation mechanisms, the dignity, privacy and security of victims shall be respected and protected.¹²⁷

In addition, article 68 of the Rome Statute provides for the participation of victims where their personal interests are affected and permits the presentation of their views and concerns in Court:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.¹²⁸

This provision however, is not incorporated in the ICC Act, so the victims do not have access to the ICD, as they would, the ICC. The ICD should therefore, give opportunity to victims and witnesses to participate in its proceedings through outreach and consultations. In addition, the seat of the Court will also determine how many victims can participate in Court proceedings. According to a number of ICD officials interviewed, there has been constant request from victim groups that trials to be held somewhere in Northern Uganda, in close proximity to the communities most affected by the conflict. The Registrar of the ICD has

¹²⁷ Agreement on Accountability and Reconciliation clause 8.

¹²⁸ Rome Statute art 68(3).

considered this request but funds are not yet available to make such a move.¹²⁹ The Court however, held its first hearing on the Kwoyelo's case on 12 July 2011 in Gulu.¹³⁰

6.11 Reparations

A further measure to ensure effective remedies to victims is the provision of compensation for the crimes suffered. The Agreement on Accountability and Reconciliation stipulates that alternative penalties shall require perpetrators to make compensation to victims.¹³¹ In addition, the Rome Statute, in article 75, makes detailed provisions for reparations and article 79 provides for reparations through the Trust Fund for Victims.¹³² However, the only provision related to reparations in the ICC Act is in clause 64 that is restricted to implementation of reparation awards made by the ICC under article 75 of the Rome Statute.

The Constitution of Uganda gives authority to Courts to order adequate compensation to victims¹³³ but this is limited to compensation by an accused.¹³⁴ It is necessary for Uganda to design a policy on reparations within her accountability processes to ensure a range of measures such as rehabilitation, restitution, compensation, guarantees of non-reoccurrence and other symbolic measures such as apologies, memorials and commemorations for victims of crimes in the LRA conflict. This would serve to restore victim's confidence in the state and to uphold Uganda's legal and moral obligations under the Rome Statute and the Agreement on Accountability and Reconciliation.¹³⁵

¹²⁹ Moving trials to Gulu for instance would mean, funds to hire a Courthouse, to upgrade prison facilities, pay per diem to Judges, prosecutors and all other staff of the ICD, funds that the ICD does not have at present. Interview with Alex Ajiji, Registrar of the ICD, conducted on 26 Jan 2011.

¹³⁰ M Kersten 'Uganda's Controversial First War Crimes Trial: Thomas Kwoyelo' Justice in Conflict 7 July 2011 <http://justiceinconflict.org/2011/07/12/ugandas-controversial-first-war-crimes-trial-thomas-kwoyelo/> (accessed 11 January 2012).

¹³¹ Agreement on Accountability and Reconciliation clause 9(1).

¹³² Rome Statute arts 75 and 79.

¹³³ Constitution of Uganda art 26(2)(b).

¹³⁴ Constitution of Uganda art 26(2)(b); art 53(2) further empowers the Uganda Human Rights Commission to order compensation and other legal remedy where an infringement of human rights or freedoms is established; and sec 126 of the Trial on Indictment Act, Cap 23 empowers the High Court to order compensation against a convict.

¹³⁵ According to ICD officials interviewed, though the Court will not award reparations (except for compensation ordered on a case-by-case basis against accused persons), the need for reparations is noted and this will be handled through truth and reconciliation commission that will be created. Interviews with Justice Nahamya, Joan Kagezi and Alex Ajiji of the ICD. Further and detailed discussion on reparations is contained in chapter eight of this thesis.

6.12 Role of outreach

The immediate challenge of the ICD will be to overcome the distrust among Ugandans of law enforcement, judicial and other state institutions that are riddled with corruption, nepotism, and favouritism.¹³⁶ If the ICD is to be successful, the public must feel that it has ownership of the process and is actively engaged in the outcome of all its justice initiatives. To have this credibility, the ICD will need the support of all Ugandans, civil society groups, traditional, religious and community leaders as well as the different political parties as early as possible in its operations. Only this kind of support will make the ICD processes meaningful in a concrete way. This support can only be achieved through a robust outreach programme.¹³⁷

In its outreach activities, it is necessary that the ICD reach the most vulnerable groups of population, particularly children and women, through information that is specifically targeted to consider their needs.¹³⁸ That said, the outreach should not only focus on victims' rights and needs, but also on fair trial rights of the accused so that the trials are understood to be fair and balanced, thus facilitating the acceptance of the eventual outcome of the proceedings.¹³⁹ There will also be a need to manage the expectations of victims as unrealistic expectations, when not met, could negatively affect the victims' perception of the ICD and the judicial processes in the country generally.

¹³⁶ Unpublished: MT Kirya 'The Independence and Accountability of the Judiciary in Uganda: Opportunities and Challenges' (2010) 10; the law enforcement institutions and the judiciary in Uganda are ranked among the most corrupt institutions in the country.

¹³⁷ Public International Law and Public Group (PILPG) & Vanderbilt University Law School International Legal Studies Program *Outreach Strategy for War Crimes Division of the High Court of Uganda* (2010) 19.

¹³⁸ In survey that the author undertook in Gulu town on 10 Sept 2011, the author found that all the formerly abducted children in GUSCO reception centre had not heard of the ICD; the children stated that they heard rumours that some people will be prosecuted in Uganda but were unaware that the Division had been set up and were unsure as to whether the division would target them as perpetrators of crimes in the Northern Uganda conflict; group discussion with a group of 22 children in GUSCO reception centre.

¹³⁹ For instance the JRP situational analysis (n 116 above) reports that witnesses indicated that they were promised that Kwoyelo would be imprisoned for ever; it is therefore clear that fair trial rights of the accused including the possibility of acquittal were not discussed with the witnesses who agreed to testify on the grounds that the accused will be imprisoned forever.

The ICD does not underestimate the need for an outreach programme to make the ICD better known, understood and accessible to the affected populations. The judges, prosecutors, registrar and investigators have carried out at least two consultation meetings with the affected population in Uganda since 2009.¹⁴⁰ The consultative meetings that have so far been done were carried out without representatives from the defence, which creates a misconception that the entire division, with the exception of defence, work as one, compromising fair trial rights of the accused persons and confidentiality guarantees of victims and witnesses. It is however, commendable that these meetings actually took place though there remains a big need for a more robust, responsive, consistent and sensitive outreach programme before, during and after trials of the ICD.

Closely related to the above, all main officials initially appointed to work with the ICD; the Judges, Prosecutor, Investigator and Registrar hailed from Western or other parts of Uganda, excluding the north and east that were most affected by the conflict, creating an impression of bias among the affected communities.¹⁴¹ The complaints of the affected populations were noted and Justice Owiny Dollo who is from Northern Uganda was appointed to the ICD. A number of staff working at the ICD also hail from Northern, Eastern and West Nile regions of Uganda that were most affected by the conflict.¹⁴² It is commendable that Ugandan leadership acknowledges the deep-rooted ethnic tensions that count for the many armed conflicts Uganda has witnessed. The appointment of public officials therefore should reflect ways to counter such divisions and disparities. Outreach remains the most powerful tool to educate the public and thereby remove the misunderstandings, ignorance and hostility that remain among the victim community and the entire population of Uganda towards the ICD and its officials.

¹⁴⁰ Interviews with Justice Nahamya; Registrar Alex Ajiji; Rachel Odoi-Musoke of JLOS; and Joan Kagezi of the DPP's office conducted between January and April 2011 in Kampala. These consultative meetings were done in 2009 and there is plan to have one more activity before the start of proceedings.

¹⁴¹ Most of the people that the author had discussions with in Gulu and Kampala who were aware of the ICD and its processes, expressed reservation about the appointees of the ICD and insisted that competent people from Northern and Eastern Uganda exist and should be considered for appointment if the Division is to have credibility.

¹⁴² Interview with Alex Ajiji, Registrar of the ICD conducted on 26 Jan 2011 in Kampala.

6.13 Conclusion

The ICD is a manifestation of Uganda's judicial attempt to move towards accountability after decades of armed struggle and mass atrocities. This move will ensure justice for victims of mass atrocities by punishing perpetrators and requiring them to compensate victims. In addition, through eye witness accounts, production of documents, videos and other evidences that may create an authoritative version of the truth, the process will narrate a story that later becomes history,¹⁴³ accomplishing the accountability goals of justice and to some extent, truth and reparations. Undertaking domestic prosecutions is a challenge that requires ample technical, material and financial investments. Uganda will also require a lot of support from the international community to achieve this goal. It is particularly critical to ensure and assure the independence of ICD, like every judicial organ, domestic or international, both in the manner of appointment of the judges and key officers and non-interference of the executive. As the most crucial appointments have already been made, it is, retrospectively, hoped that all the judges and other staff so far appointed are individuals of high moral character, impartiality, and integrity, possessing experience in criminal and international law, especially international humanitarian and human rights law, to effectively accomplish this work. The credibility of the ICD and all its processes depends on such assurances, and the ICD should not become an organ for political witch-hunt. The Public must see it as a bastion against impunity, which does not favour anybody despite political or social standing.¹⁴⁴ The executive should not interfere with the powers of the ICD and the other courts in the prosecution of international crimes committed in Uganda.¹⁴⁵

¹⁴³ MA Drumbl *Atrocity, Punishment and International Law* (2007) 175.

¹⁴⁴ During the parliamentary debate on the ICC Bill (2006), a member of Parliament, Elyas Lugwago is said to have expressed fear that the Bill will be used by government to intimidate people from the opposition see, All Africa.com, 10 March 2010 Isaac Mufumba, 'Uganda: ICC Bill- Why Did MPs Trap Museveni and Save Kony?' available at <http://allafrica.com/stories/2010003310540.html> (accessed 23 Oct 2010).

¹⁴⁵ A possible challenge the ICD will face is assaults on its independence by the executive as has been the case against the High Court in the past. Most notable example is the 2004 assault of legal practitioners in the High Court premises by government security operatives and the re-arrest of treason suspects that had been granted bail by the Court. The suspects were arraigned before the court martial in complete defiance to the High Court ruling. For more see J Oloka-Onyango 'Judicial Power and Constitutionalism in Africa: A Historical Perspective' in M Mamdani & J Oloka-Onyango (eds) *Uganda: Studies in Living Conditions, Popular Movements and Constitutionalism* (1994) 470

In addition, there is a need to amend the constitutional provision on immunity of head of state to ensure scrutiny and censure of all Ugandans without any privilege of leadership. The Amnesty Act has interfered with the operations of the ICD and the fight against impunity. There is likelihood that the Supreme Court will overturn the Constitutional Court ruling on amnesty. However, as much as the Supreme Court may overturn this ruling, it is unlikely that the DPP will proceed against LRA culpable leaders who may have committed international crimes and already been granted amnesty.¹⁴⁶

It is further important that Uganda amend her penal laws and allow for a uniform sentencing regime, for international and ordinary crimes that will require a repeal of the death penalty from Uganda's penal laws. It is also crucial that the DPP evokes the principle of universal jurisdiction for international crimes to comprehensively investigate and prosecute all crimes committed in the LRA conflict if the aims of accountability are to be realised. To achieve all these, it is crucially important that Uganda provide sufficient and adequate budgetary allowance for the ICD in order to accomplish its work. The ICD will have critical undertakings, such as witness and victim protection, provision of legal services for accused persons, maintenance of regular staff and a robust outreach programme, involve considerable financial investment and will require financial commitment from the government.¹⁴⁷ The ICD is not the only means towards achieving accountability and reconciliation in Uganda; it must not be seen to contradict other accountability mechanisms created to ensure a viable post conflict society. Other proposed mechanisms such as traditional justice and a truth telling process will fundamentally complement the work of the ICD and the ICC. These mechanisms are discussed in the chapters that follow.

¹⁴⁶ According to the Joan Kagezi, the DPP has no intention to proceed against persons already granted amnesty (see further discussion in chapter four).

¹⁴⁷ National Planning Authority *National Development Plan of Uganda* (2010) 295 indicates that the judiciary over the years has faced many logistical related problems and continues to be understaffed which is one of the biggest constraints in the judicial sector. The sector is clogged with backlog in cases as a result, with a case disposal rate at 41 per cent.

CHAPTER SEVEN

CONDONING IMPUNITY? TRADITIONAL JUSTICE AS AN ACCOUNTABILITY MEASURE FOR INTERNATIONAL CRIMES

7.1 Introduction

The intervention of the ICC in the LRA conflict and the shortcomings it presented, particularly its inability to secure arrests and to end the conflict, led to a keen interest nationally and internationally in domestic solutions including the use of traditional justice as an accountability measure to satisfy the ICC complementarity regime. Victim groups under the leadership of the ARLPI and *Ker Kwaro Acholi* (council of traditional Leaders in Acholi) advocated for the use of *mato oput* (drinking bitterroot), an Acholi traditional justice mechanism, to address atrocities committed in the LRA conflict. These leaders sold *mato oput* as a measure that would ensure accountability for crimes perpetrated during the conflict and would not jeopardise the peace process, as the ICC was bound to.¹

Donors, NGOs, development agencies and the government of Uganda, eagerly took up traditional justice, as a possible accountability measure² but focus remained only on *mato oput*.³ This however, did not dissuade the ICC from continuing with its investigations, even though in 2005, following a visit of some members of the ARLPI to the Hague, the Chief Prosecutor stated that he was mindful of traditional justice and reconciliation processes in Uganda.⁴ Traditional justice then took the centre stage in negotiating accountability and

¹ L Hovil & JR Quinn 'Peace First, Justice Later: Traditional Justice in Northern Uganda (July 2005) 17 Refugee Law Working Paper 4, 18 – 19; this report suggests that Ugandans can deal with questions of accountability and reconciliation locally and that the ICC process ignores local processes; see also T Allen 'Bitter Roots: the invention of Acholi Traditional Justice' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 242.

² T Allen *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2006) 132 – 138; Allen (n 1 above) 242.

³ This unfortunately reinforced the sentiment that the LRA conflict is an Acholi conflict requiring an Acholi solution, which is not the case as other ethnic groups in Uganda and a number of others in South Sudan, the DRC and Central African Republic were equally victimised by the LRA and although the LRA leadership remains predominately Acholi, it is composed of persons from several ethnic groups in Uganda, DRC, South Sudan and Central African Republic.

⁴ 'Joint Statement by ICC Chief Prosecutor and the Visiting Delegation of Acholi Leaders from Northern Uganda' ICC Press Release 18 March 2005 http://www.icc-cpi.int/pressrelease_details&id=96.html (accessed 15 Oct 2010).

reconciliation measures in Juba where it was recognised that the Acholi are not the only ethnic group affected by the conflict. Several other ethnic groups with different cultural and traditional processes are equally affected. Therefore, traditional justice processes as applied by the different ethnic groups were considered. The Juba negotiators therefore reached a principle that:

Traditional justice mechanisms, such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka* and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications as a central part of the framework for accountability and reconciliation.⁵

This is indicative of the strong desire of groups in Uganda to ensure that traditional justice plays a key role in the post conflict search for justice, truth and reparations. A great number of studies have been undertaken on the use of traditional justice and it has become central to the numerous debates and discussion on accountability and reconciliation for crimes perpetrated in Northern Uganda.⁶ Unfortunately, most of the studies and debates have focused on the *mato oput* mechanism, and not much focus has gone to the other traditional justice mechanisms practiced in Acholi or by neighbouring ethnic groups that have also been greatly affected by the conflict.⁷

The different ethnic groupings in Uganda have varied traditional justice practices as recognised by the Agreement on Accountability and Reconciliation. These practices have common fundamental features that include, cleansing, truth telling, punishment or atonement through the requirement of compensation, forgiveness, and reconciliation.⁸ In addition, the traditional justice practices are based on key principles that include;

⁵ Agreement on Accountability and Reconciliation clause 3. 1.

⁶ See literature review contained in chapter one of this thesis.

⁷ Unfortunately, my focus in this thesis will be only on *mato oput* with mention of the other Acholi justice and healing mechanisms but I recognise that these mechanisms will not work to the satisfaction of all ethnic groups affected by the LRA conflict. The Judiciary Law and Oder Sector (JLOS) and the Uganda Law Reform Commission have been instructed to carry out field research on the use of other traditional justice measures in Uganda but at the time of writing, had not embarked on this endeavour. The UNICEF branch office in addition commissioned a research on the different traditional justice measures in Uganda in 2009 but at the time of writing, the final report was not available to the public. Interview with Jeroline Akubo, a senior official at the Uganda Law Reform Commission, conducted on 18 March 2011.

⁸ L Komakech & A Sheff 'Tradition in Transition: Drawing on the Old to Build New Jurisprudence for Dealing with Uganda's Legacy of Violence' (July 2009) 1 *Beyond Juba Project* 16.

voluntariness, trust, truth telling, compensation, and restoration of broken relationships.⁹ There is evidence that traditional practices enjoy significant local support and correspond to accountability requirements that include truth, justice and reparations.¹⁰ However, it remains unclear to what extent these practices could address the systematic and widespread abuses perpetrated in the LRA conflict and whether the practices meet or can be modified to meet Uganda's international obligations including procedural guarantees for the accused and the right of participation for all, including women and children.

Nonetheless, the Agreement on Accountability and Reconciliation requires the government to ensure that 'serious crimes' committed during the conflict are addressed through the traditional justice structures among other national arrangements including prosecutions.¹¹ The Agreement further provides that the legislation establishing the Special Division to try international crimes may provide for the recognition of traditional justice processes in its proceedings.¹² These provisions are open to interpretation and no doubt need further elaboration, particularly with respect to the relationship between traditional justice and criminal prosecutions. As a result, the government of Uganda assigned JLOS to carry out consultations on the use of traditional justice in Uganda. JLOS in turn is undertaking a countrywide study on the use of traditional justice measures aimed at examining the practicalities, applicability and admissibility of these measures as a tool to promote accountability and reconciliation in Uganda.¹³

Despite the numerous studies and debates, there remains a general lack of understanding and appreciation of the concept and practice of these rituals. Many people, even ardent traditional justice supporters are unable to differentiate healing rituals from justice measures. There is a further lack of understanding on when/how these rituals can be

⁹ OL Ogora 'Acholi Traditional Justice' presentation at a Workshop on Accountability and Reconciliation in Uganda: Juba Peace Talks (6 – 7 May 2008) *Final Workshop Report* para 4.1.

¹⁰ Between February and July 2008 and in September to October 2010, I conducted a number of interview with the local population in Northern Uganda, though there were a few reservations on how to effectively apply traditional justice, there seems to be much enthusiasm for it.

¹¹ Annexure clause 23.

¹² Annexure clause 9(e).

¹³ JLOS consultations has started a process of consultation in the different regions of Uganda but a report is not yet available to the public. Interview with Rachel Odoi-Musoke conducted on 18 March 2011 in Kampala. In addition, the Refugee Law Project, 'Beyond Juba' is undertaking further consultations and research to complement the efforts of JLOS; see Komakech & Sheff (n 8 above) 9.

undertaken and when/how, they can lead to accountability and foster reconciliation.¹⁴ For purposes of clarity, this chapter provides a brief description of some of the Acholi rituals, when/how, they are performed and what they are expected to achieve. It is important to point out from the onset that the discussion in this chapter is only based on Acholi justice mechanisms although the Acholi are not the only ethnic group affected by the LRA conflict, this is due to lack of literature on the other available mechanism and limitation on time and resources for research.

The chapter also investigates the application of *mato oput* to the crimes committed in the LRA conflict examining specific challenges. The challenges examined include modification of traditional justice and what it entails, nature and magnitude of offences, legitimacy of the processes and traditional institutions. The chapter concludes that traditional justice should play a role in accountability process for the LRA conflict for both LRA and UPDF perpetrators but should be applied as a complementarity process not an alternative to formal prosecutions and a truth telling process.

7.2 Acholi traditional justice

The Acholi, like many other ethnic groupings in Uganda and Africa at large, greatly rely on traditional ways to resolve disputes between and among people to uphold social harmony. During the conflict, despite the attendant displacement, diminished status of cultural leaders, and poverty that greatly curtailed the practice of cultural rituals, many people continued to rely on them. Healing rituals and justice ceremonies were performed as relatives returned from the ‘bush’ with some beneficial results.¹⁵ These rituals are grounded on a spiritual belief of ancestors and involvement of the dead in the living world. *Cen* or bad spirits that is central to this belief is expected to haunt the living, causing sufferings and destruction including, death, disease and famine on clans and family members, unless

¹⁴ During informal discussions I had in July 2009 with some staff of the Law Reform Commission, many could not distinguish healing rituals from justice mechanism and every traditional ritual taking place in Acholiland is referred to as *mato oput*. This misunderstanding goes way back and in 2004, where nearly ceremony taking place in Acholi was generically referred to as *mato oput*; T Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War* (2006) 100.

¹⁵ P Acirokop ‘The Potential and Limits of Mato Oput as a Tool for Reconciliation and Justice’ in S Parmar, et al., (eds) *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (2010) 276 – 277.

appeased.¹⁶ Therefore, for these rituals to be effective, the perpetrators, the victims and their families must believe in the concept of *cen* and the social consequences attached to it or at least have the desire to reconcile with family, clan and the community at large.

Nyono tonggweno is one of the most basic traditional rituals performed in Acholi. It literally means, stepping on an egg. It is a welcome ceremony and used to welcome family members who have been away for a long period. There is a perceived need to receive such a person home in order to reconcile any problems or feeling of alienation that may have resulted from their extended absence and to ensure that the person feels like a full member of the family again. It is a sign of commitment on both the 'returnee' and the family to live together in harmony.¹⁷

The ritual involves stepping on an egg (*tonggweno*) placed on a slippery branch (*pobo* - a common plant in Acholi) and a stick with a fork (*layebi*), traditionally used to open granaries. The egg symbolises purity and stepping on it suggests a restoration of innocence. The *pobo*, being slippery and soapy is said to cleanse the returnee from any external influences he or she might have encountered while away. The *layebi* is a symbol of welcoming a person back into the home, where the family will once again share food and drinks.

This ceremony was traditionally carried out at the entrance of a homestead or of a clan settlement but since 2003, the paramount chief; *Rwot* Achana initiated communal stepping on the egg ceremony for large numbers of returnees living in the IDP camps.¹⁸ This ceremony has been most utilised in recent times since the items required (an egg, *pobo* and *Layebi*) are cheap or easily available and the ritual process is brief. The ceremony however, is basic and is not expected to cleanse *cen* that one may have met during the journey effectively. This would require a more elaborate ceremony.¹⁹

¹⁶ This sentiment was also echoed by numerous elders in Gulu and Amuru that I interviewed in between Feb and April 2008 including *Rwot* Otinga Atuka Otto Yayi of Lamogi; Opoka Vanango of Paicho; Mzee Banya of Lacor and Ladit Omong of Obiya among others; see also E Baines et al., *The Cooling of Hearts: Community Truth-telling in Acholi-land* (July 2007) 7.

¹⁷ E Baines *Roco Wat I Acoli/Restoring Relationships in Acholiland: Approaches to Justice and Reintegration* (2005) 26.

¹⁸ Baines (n 17 above) 27.

¹⁹ Interview with *Rwot* Otinga Atuka Otto Yayi of Lamogi conducted in Lacor IDP camp on 12 February 2008.

Lwoko pig wang is a ritual performed when a person thought dead returns to the family alive. *Lwoko pig wang* literally refers to washing away tears that a family shed in mourning. Symbolically, it is to wash away the thought of death, which may manifest in a bad omen or attract *cen* to the family after the return. This is because, the Acholi, believe that when you mourn the living, the dead may assert their rights over him/her and call him/her to join their world.²⁰ This ritual is very popular in the current conflict setting when a formerly abducted person, thought dead and was mourned, returns to the family.²¹

Moyo Kom literally translates into cleansing the body. This ritual involves a combination of the two ceremonies of *nyono tonggweno* and *lwoko pig wang*.²² The ritual is performed to denote cleansing the body from negative influence of *cen* to prevent misfortune and ill health.²³ The ceremony begins with elders invoking the ancestors to come to their aid, after which, a goat is slaughtered and cut open. The urine of the goat is removed and placed on the chest of the person to be cleansed, while elders make pleas to the ancestors to give blessings to the person. The Acholi elders interviewed all emphasised that this is a very important ritual for 'returnees' and that they should all be cleansed in the ritual to rid them of bad omen that they may have contracted while in the 'bush'.²⁴

Tumu kir is a sacrifice to appease (*tumu*) the ancestors for an abomination (*kir*) that has been committed. Behaviours that constitute *kir* across clans in Acholi are those that might kindle or accompany already existing conflicts usually committed in anger and/or hatred to the displeasure of the ancestors.²⁵ In order to avoid misfortune, such as diseases, famine, or accidents that may strike the offender and the entire clan, a sacrifice (usually a goat) is offered to appease the ancestors for the abomination and to ask for future protection.²⁶

²⁰ Baines (n 17 above) 28.

²¹ Interview with Rwot Otinga Atuka Otto Yayi of Lamogi, conducted on 12 February 2008 in Lacor IDP Camp.

²² Harlacher et al., (n 14 above) 71.

²³ Interview with Rwot Otinga Atuka Otto Yayi of Lamogi conducted in Lacor IDP camp on 12 Feb 2008.

²⁴ The elders interviewed include Rwot Otinga Atuka Otto Yayi of Lamogi; Rwot Apige of Paicho, Ladit Oweka Layii of Lacor IDP camp; and Mzee Obama Adam of Lacor.

²⁵ Interview with Mzee Obama Adam of Lacor conducted on 13 Feb 2008 in Lacor, Amuru district.

²⁶ Interview with Mzee Obama Adam of Lacor conducted on 13 Feb 2008 in Lacor, Amuru district; see also Harlacher et al., (n 14 above) 75.

Kwero merok is a cleansing ceremony for warriors returning from war and is one of the most elaborate rituals in Acholi culture. It lasts three days if a person who killed during war is male and four days if female.²⁷ Traditionally, this ceremony was not performed for someone who kills members of his or her family or clan but currently, it is being performed on returnees who have done so and suffer from extreme psychological distress.²⁸ As described by Rwot Apige of Paicho, when a warrior kills an enemy in war, he is considered impure and is required to go through an elaborate ritual with the purpose of cleansing him from the *cen* of the slain enemy. Inclusive in the ritual is the cleansing of the ancestral shrine (*abila*)²⁹ done to secure the assistance and guidance of the ancestors who together with clan members and elders support the warrior during the ceremony.

Kwero merok has been performed on returnees with beneficial results on both the individuals and the community.³⁰ In the context of the LRA conflict, returnees are expected to tell their families what happened in the 'bush', especially killings they may have committed. Family members report the matter to elders and based on the information obtained, the elders may decide if *kwero merok* is the appropriate ritual to be performed. The aim of these rituals is to heal persons who may have committed an abomination or contracted/come into contact with bad spirits by appeasing the spirits and or ancestors.³¹ *Kwero merok* continues to be performed in Acholiland in varying degrees. As much as some rituals like *kwero merok* involve a degree of truth telling, this truth is only disclosed to family members and elders and not necessarily the entire community or the victim's family.³² They therefore, do not necessarily involve accountability. *Mato oput* and *gomo tong* discussed below are the rituals used for this purpose.

²⁷ This is a gendered distinction in Acholi but its origins remain unclear. The most the author got from elders and other persons interviewed is that, the ancestors decided it that way.

²⁸ Harlacher et al., (n 14 above) 100.

²⁹ Traditionally, every homestead had a shrine for the ancestors but because of displacement, people usually make temporary shrines for the purpose of the ceremony; interview with Mzee Obama Adam conducted on 13 Feb 2008 in Lacor, Amuru district.

³⁰ Harlacher et al., (n 14 above) 100. The authors indicate that they observed and documented *kwero merok* rituals over a period and that it showed high positive effects in reducing psychological distress and fostering social reintegration.

³¹ Interview with Rwot Apige of Paicho conducted on 12 February 2008 in Paicho, Amuru district.

³² Harlacher et al., (n 14 above) 102.

Mato oput literally means, 'drinking *oput*'. *Opud* is a tree common in Acholi. Its bitter root is ground and used to prepare a drink that is shared at the peak of the ceremony. *Mato oput* aims at re-establishing relationship that break down between two clans as a response to a killing, deliberate or accidental.³³ Traditionally, the ritual was not applied to killings that happened in a war but rather those occurring between clans that had friendly relationships with each other. The process only starts when a perpetrator comes forward and confesses to a killing(s) to his/her family. The family may reach a decision to inform the elders who then initiate meetings with the offended clan. The actual ritual takes place at the end of a long process of confession, mediation and payment of compensation (*culo kwor*) to reconcile the clans.³⁴

Common characteristics of the ceremony include the slaughter of two sheep. The sheep are cut in half and exchanged by the parties. Members of the clans then drink the prepared drink of *opud* to wash away bitterness. The willingness of the offender's clan (not the offender as a single person) to assume responsibility for the act committed, as well as readiness and ability to pay compensation are necessary precursors for a successful process leading to the ceremony. Until the ceremony is concluded, *cen* would be expected to haunt the killer and his/her entire clan, a strong motivation to successful conclusion of the ceremony.³⁵ In the past, a young girl from the offender's clan would be given as compensation for deliberately committed murder as a form of compensation; this has been replaced by a system where cattle or money may be used as forms of compensation. *Mato oput* involves confession, show of remorse, forgiveness, and compensation that leads to reconciliation and healing after a killing. This ritual has an important component to fostering justice, truth and compensation in Acholiland.³⁶

³³ Harlacher et al., (n 14 above) 78.

³⁴ According to the elders interviewed *mato oput* is not a one day affair, it involves a long process of negotiations and mediation, even up to 5 years until both clans agree to a compensation and are ready to forgive and reconcile, this fact seems to be ignored by advocates for *mato oput*, and there seems to be this general feeling that *mato oput* is just about the ritual and payment of compensation, so finalised as soon as it begins.

³⁵ Acirokop (n 15 above) 277.

³⁶ Several people interviewed in February 2008 in Pabbo, Lacor and Acholi bur(Pader district) IDP camps in Northern Uganda felt that *mato oput*, would ensure justice in Northern Uganda. Several returnees felt that a ceremony like *mato oput* if performed would ensure that they gain acceptance back to the community. See also D Pain, *The Bending of Spears: Producing Consensus for Peace and Development in Northern Uganda* (1997) 58; where the author argues that the ritual is important in for fostering justice and peace in Acholiland.

Gomo tong - translated as bending spears was performed as a symbolic ceremony to mark the end of a war or a bloody conflict between different Acholi clans, chiefdoms, or neighbouring ethnic groups. The ritual is a vow between clans or ethnic groups engaged in a violent conflict to end hostilities. At times, it is done in conjunction with *mato oput*. Elders from conflicting clans get together to discuss the source of conflict, develop prevention strategies and warn people to discontinue fighting. At the end of discussions, the mediator bends a spear. In the act of bending the spear, the elders evoke the ancestors and promise that the killings would stop. The act of bending the spear is very significant and if, without due cause, conflict starts again; it is believed that the tip of the spear would turn against the aggressor.³⁷

7.3 Traditional justice and the LRA conflict

Recent studies agree on the general strengths of traditional justice mechanism that includes; accessibility both in terms of proximity and language of operation; the processes are said to be speedy unlike their formal counterpart; highly participatory; and cheaper to administer.³⁸ There have also been strong suggestions that these systems are more appropriate to African communities where people live in close-knit groups and must continue to rely on social and economic cooperation with their neighbours.³⁹ Further, the UN has recognised the importance of traditional justice. In 2004, Kofi Annan, the then UN Secretary General, stated that due regard must be given to informal traditions for administration of justice or settlement of disputes, to help them to continue with their often vital role and to do so in conformity with both international standards and local tradition.⁴⁰

Several researchers have attended and documented ceremonies of *mato oput* being performed in Northern Uganda, see for instance S Finnström *Living with Bad Surrounding: War and Existential Uncertainty in Acholiland, Northern Uganda* (2003) chap 3; T Allen (n 2 above) 165.

³⁷ Baines (n 17 above) 30; this ritual was last performed in 1984 between the Acholi and Madi neighbours to address and stop the cycle of violence resulting after the fall of Idi Amin Dada in 1979 between the 2 groups.

³⁸ See for instance L Huyse & M Salter 'Introduction' in L Huyse & M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2007) 5.

³⁹ As above.

⁴⁰ Report of the Secretary General *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies* (3 Aug 2004) S/2004/616 12.

Research has found that Acholi traditional practices appear to meet both the procedural and the accountability standards, such as those of the Rome Statute and the ICCPR, for instance, the presumption of innocence; no compulsion to confess guilt; trial in the presence of the accused and the desirability for promoting rehabilitation, among others. The research concluded that Acholi traditional system combines elements of both retributive and restorative justice therefore appropriate as an accountability measure for crimes committed in the LRA conflict.⁴¹ Likewise, the author has argued elsewhere that *mato oput* as practised largely meets international standards for a non-judicial intervention in juvenile justice such as informed consent and assistance for children; protection from discrimination; best interest of the child and participation of children in the processes.⁴²

Mato oput has a core principle of truth telling, show of remorse, atonement through the payment of compensation, forgiveness and healing that are necessary ingredients for reconciliation and accountability. The process also ceases to be about an individual victim or perpetrator but involves the entire community. This is in consonant with Desmond Tutu's view that African justice aims at the healing of breaches, the redressing of imbalances, the restoration of broken relationships seeking to rehabilitate both the victim and the perpetrator.⁴³ This is not to suggest that there are no challenges to the use of traditional justice generally and *mato oput* in particular as an accountability measure for crimes committed in the LRA conflict. The challenge is in fact enormous and already highlighted by many studies in the case of the LRA conflict. Drawing lessons from other states in the aftermath of mass atrocities, the following are some of the main challenges to the use of traditional justice.

7.4 Modification of traditional justice

The Agreement on Accountability and Reconciliation provides for the promotion of traditional justice, with necessary modifications as a central part of the framework for

⁴¹ EK Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 *International Journal for Transitional Justice* 102.

⁴² Acirokop (n 15 above) 281 - 288.

⁴³ D Tutu *No Future without Forgiveness* (1991) 51.

accountability and reconciliation in Northern Uganda.⁴⁴ It is not clear what modifications are envisaged but this could well mean that the government intends to take control and inject a degree of formality in the process to work alongside the ICD. The most ambitious project of this nature has been the Rwandan *Gacaca*.

After the government of Rwanda failed to make substantial progress in clearing genocide cases still awaiting trial, it turned to community justice system to deal with persons who allegedly committed genocide. The government of Rwanda, on 26 January 2002, passed an Organic Law, creating *Gacaca* jurisdictions to deal with middle-ranging genocide crimes, which occurred between October 1990 and December 1994.⁴⁵ *Gacaca*, the Kinyarwanda word for justice on the grass used to be presided over by the *inyangamugayo*, meaning respected community members and its role traditionally was to resolve community disputes over land, marriage, inheritance, livestock, property damage and other minor offences. The procedure was completely informal, voluntary, and highly participatory and involved the entire community in resolving the dispute and achieving a settlement to the satisfaction of all.⁴⁶

Gacaca as practiced today is very different from the traditional counterpart; it presides over genocide cases; the government appoints persons presiding; it has been formalised and completely legalistic; attendance is compulsory and in recent years has been under state coercion.⁴⁷ According to some commentators, the formalisation had a positive impact on the acceptance of the *Gacaca* and its legitimacy, internationally, nationally and locally.⁴⁸ Others also state that the formalisation of the *Gacaca* enabled it to be an accountable, formal and an alternative to local prosecutions that ensured accountability and helped to reduce the culture of impunity in Rwanda.⁴⁹ Yet others say that the *Gacaca* is viewed by the

⁴⁴ Agreement on Accountability and Reconciliation clause 3.1.

⁴⁵ R Vogler *A World View of Criminal Justice* (2005) 259.

⁴⁶ Vogler (n 45 above) 260.

⁴⁷ Vogler (n 45 above) 260; S Vandeginste *Justice, Reconciliation and Reparations after Genocide and Crimes against Humanity: The Proposed Establishment of Popular Gacaca Tribunals in Rwanda* (1999) 26; A Megwalu & N Loizides *Dilemmas of Justice and Reconciliation: Rwandans and the Gacaca Courts* (2010) 4.

⁴⁸ T Lambert 'Legitimising Traditional Justice Mechanisms in the Transition from Conflict: A Comparison between Rwanda and Uganda' (2010) *University of Calgary: ECPR Graduate Conference 2*.

⁴⁹ S Wolters 'The Gacaca Process: Eradicating the Culture of Impunity in Rwanda? (August 2005) *Institute for Security Studies: situation Report* <http://www.issafrika.org/AF/current/2005/050805rwanda.pdf> (accessed 10 July 2009).

people of Rwanda as a state imposed mechanism designed to expand the state's reach into local communities and that the system has lost credibility, has created divisions and suspicion among people, undermining its reconciliation value.⁵⁰

It must therefore be recognised that the formalisation of traditional justice institutions legally does not guarantee their legitimate operation and that the state taking control of traditional institutions could have a negative impact. Lars Waldorf provides several examples of states attempting to take control of traditional processes and failing in the process.⁵¹ For example in India, the state tried to replace traditional *panchayats* - village or caste councils with *nyaya panchayats* - people's courts with the justifiable aim of expanding access to justice for the poor, promoting speedy conciliation and extending central control. The new institutions tried to blend formal and the informal systems, but they became unpopular and only survived for 10 years.⁵² State control of traditional processes potentially compromises its positive attributes; therefore, its credibility as the process is no longer voluntary and ceases to rely on social sanctions and popular participation. The government of Uganda therefore needs to refrain from 'modifying' or formalising traditional processes as this may lead to these negative repercussions.

7.5 Nature and magnitude of crimes

Traditional justice mechanisms practised by most communities in Northern Uganda were conceptualised to deal with only a few cases of homicide that happened on a small scale. Understandably, the means and methods of warfare at the time were such that there was

⁵⁰ Vogler (n 45 above) 260; B Ingelaere 'Does Truth Pass Across the Fire Without Burning? Locating the Circuit in Rwanda Gacaca Courts' (2009) 47 *The Journal of Modern African Studies* 507-528; the author who after twenty months of field work in Rwandan villages found that the Gacaca as practiced ran contrary to the core values of the customary institution and established societal practices. The author concludes that the Gacaca practice in Rwanda serves the interest of power holders (national and local) and not the interest of truth telling and justice.

⁵¹ L Waldorf 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' (2006) 79 (1) *Temple Law Review* 35.

⁵² Waldorf (n 51 above) making reference to SL Whitson 'Neither Fish, Nor Flesh, Nor Good Red Herring, Lok Adalats: An Experiment in Informal Dispute Resolution in India', (1992) 15 *Hasting International & Comparative Law Review* 342.

no great destruction to property and life.⁵³ In the same vein, *mato oput* was never conceptualised as a process to address systematic cases of murder, rape, kidnappings, mutilation, pillage, destruction of property among others as the crimes committed by the LRA and UPDF in the conflict and it will be a great challenge for the mechanism to serve that purpose.⁵⁴ ‘There are so many deaths that cannot be accounted for, so many children and relatives missing, so much property destroyed, looted, burned and it is almost impossible to pinpoint the exact perpetrator.’⁵⁵ Unlike in formal prosecutions of international crimes, where persons could be prosecuted on command or superior responsibility⁵⁶ for failure to prevent or punish, in the *mato oput* process, the exact perpetrator must account for the crimes.

Also central to *mato oput* process is that the perpetrator must be able to identify the victim to be able to initiate the process of reconciling with the victim and/or his/her family and clan. The UPDF has fought the LRA in several places in Uganda, South Sudan, Central African Republic and the DRC and committed crimes in several of those places. This leaves a huge and undefined pool of victims. It will therefore be difficult for even the most remorseful perpetrator to identify every victim and his or her families to initiate the process of *mato oput*.

In addition, elders are moved to begin the process of *mato oput* only when a confession has been made. Without a confession, the mechanism is of no use. Sometimes families may implore a suspected perpetrator who shows signs of being possessed by *cen*⁵⁷ to confess but the final decision to commence the process lie with that person.⁵⁸ This is related to the practice in central Mozambique where *magamba* spirits are believed to possess the living causing misfortune to the individual until they are allowed to air out their grievances (truth)

⁵³ RA Gabriel & KS Metz ‘A short History of War: Evolution of Warfare and Weapons, Strategic Studies Institute U.S Army War College’ <http://www.au.af.mil/au/awc/awcgate/gabrmetz/gabr0001.htm> (accessed 15 Jan 2010).

⁵⁴ Acirokop (n 15 above) 289.

⁵⁵ Interview with Ochora Walter, Resident District Commander of Gulu conducted on 10 Feb 2008 in Gulu.

⁵⁶ Rome Statute art 28.

⁵⁷ This includes nightmares, hallucinations, diseases and other general misfortune.

⁵⁸ Interview with Ochora Walter conducted on 10 Feb 2008; interview with Rwot Otinga Otto Yayi of Lamogi conducted 12 Feb 2008 in Lacor IDP camp; Rwot Otinga especially emphasised the voluntary nature of *mato oput* process and insisted that the ceremony is not useful if one is forced to it.

and are appeased by the perpetrator, for the victim to find rest. The person must be willing to visit the elders and ask for assistance and members of the person's family must be willing to take part in the ritual for it to proceed, without which, the ritual does not proceed.⁵⁹ Likewise, *mato oput* cannot proceed without a confession. There is no indication that LRA and UPDF perpetrators will make the necessary confession for the process of *mato oput* to commence.

In addition, the Acholi cosmology does not define some of the most rampant crimes perpetrated in the LRA conflict, like use of child soldiers, sexual slavery and abductions, so the justice system does not have the competence to deal with them.⁶⁰ There is always a danger in radically changing a system to cope with something that it has not done before within a short period time as the case of Rwanda *Gacaca*. The government of Rwanda modified the *Gacaca* to address cases of genocide but the persons dispensing justice are lay people, who did not get much training before they were required to deal with international crimes, not familiar to them.⁶¹ The now formalised process under which the *Gacaca* operates does not respect procedural guarantees that are accorded in criminal justice systems to the detriment of the accused persons. The accused persons hardly have a right to defend themselves, they do not have a right to counsel, and evidence brought against them are not always substantiated, yet the mechanism is empowered to impose prison sentences, even up to life sentences.⁶²

7.6 Legitimacy of the process and traditional institutions

Traditional processes in Acholi are presided over by council of elders and/or *Rwodi* (chiefs) and/or clan leaders. The legitimacy of these leaders has been greatly harmed due to the

⁵⁹ V Igreja & B Dias-Lambranca, 'Restorative Justice and the Roles of Magamba Spirits in Post Civil War Gorongosa, Central Mozambique' in L Huysse & M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2009) 70; the authors further use 2 case studies to elaborate on the rituals, one case did not proceed because a member of the family, who is Christian was unwilling to appear before the elders to enable them perform the ritual.

⁶⁰ Interview with Rwot Otinga Otto Yayi of Lamogi conducted 12 Feb 2008 in Lacor IDP camp.

⁶¹ M Goldstein-Bolocan 'Rwandan Gacaca: An Experiment in Transitional Justice' (2005) *Journal of Dispute Resolution* 376 – 377; WA Schabas 'Genocide, Trials and Gacaca Courts' (2005) 3 *Journal of International Criminal Justice* 891.

⁶² Ingelaere (n 50 above) 38 – 39.

conflict. Many of the elders, like the rest of the population, live in extreme poverty. Some have even turned to alcohol and have lost respect among the people.⁶³ In Acholi, there is the general fear that these leaders will not be able to lead an independent and neutral justice process and that the process they undertake will be riddled with corruption.⁶⁴ This fear may be genuine and with donor and NGO involvement, the elders now see getting involved in accountability processes as a way of making money.⁶⁵

In addition, the crowning of some of the traditional leaders has also been contested; this affects the legitimacy of the institution. For instance, *Rwot Achana* was crowned the paramount or overall chief in Acholi, a position that did not exist in the past. This has created some tension and resentment among the different clans.⁶⁶ In addition, the appointment of traditional chiefs are now said to be based on political connections rather than heritage or community recognition, as was the case in the past.⁶⁷ There is a general fear that such persons do not have the cultural understanding and knowledge and cannot perform the role of dispensing traditional justice.⁶⁸ This no doubt will affect the legitimacy and popularity of the traditional process as is the case in Rwanda.

In Rwanda, the *inyangamugayo*, in the true sense of the word – respected community leaders, have been replaced by political appointees, creating legitimacy issues. On the other hand, in Burundi, the selection criteria used for the *bashingantahe* - traditional councillors, if maintained, will be the main strength of the process. Members of the community identify and select the *bashingantahe*. The criteria used for selection are personal qualities that

⁶³ Acirokop (n 15 above) 291; M Bradbury *An Overview of Initiatives for Peace in Acholi, Northern Uganda* (1999) 17 – 20; Allen (n 1 above) 247 - 248

⁶⁴ Interview with a group of 8 youths in Gulu town conducted on 11 Aug 2010.

⁶⁵ It is essential to emphasise that traditionally, elders who undertook this role were not remunerated, in fact, in the election of leaders by the community, material wealth was a consideration, so that such persons have no need to try and make money from such processes – payment was the respect and the task accorded to them by the community. This with the current degree of poverty in Northern Uganda will be difficult to achieve, the traditional leaders expect payment just to give information even for purposes of scholarly research; this is because, most NGOs and aid workers carrying out research in the region, pay some compensation for time and information. See also C Dolan 'Inventing Traditional Leadership? A Critical Assessment of Dennis Pain's *The Bending of the Spears*' (2000) 31 *COPE working paper*; Accord 'Background Papers Presented to the Conference on Peace Research and Reconciliation Agenda, Gulu Northern Uganda' (1999) 32 *COPE Working Paper*.

⁶⁶ As above.

⁶⁷ As above.

⁶⁸ Allen (n 2 above) 149.

include, experience, wisdom, love for truth and a highly developed sense of justice among others. The selected candidates go through an initiation process and take an oath of loyalty.⁶⁹ Adhering to such selection procedure is what gives traditional justice processes credibility and legitimacy. The politicisation of the traditional leadership considerably reduces the potential of these institutions, since their success rests on the credibility of its leadership.⁷⁰ The political independence of traditional leaders gives them enhanced credibility in playing their role. The government of Uganda will therefore have to refrain from politicising traditional institutions and allow the community their traditional role to make such decisions to avoid inefficiency and corruption that will make the mechanism unpopular.

In addition, traditional justice as applied in Uganda and elsewhere in Africa is usually a cultural specific mechanism for different ethnic groups. It is therefore impractical for people who do not belong to a certain ethnic group or do not subscribe to a certain culture to respond to it positively.⁷¹ For instance, *mato oput* as applied by the Acholi could not be practically used as an accountability and reconciliation measure for crimes committed by members of the LRA who are Acholi against the Langi or Iteso neighbours. It cannot be used as an accountability mechanism for crimes committed by a Muyankole UPDF official against an Acholi, or a Langi LRA member against an Iteso victim and so on. In addition, crimes connected to the LRA conflict have also been perpetrated in the DRC, South Sudan and Central African Republic – these crimes need to be accounted for and traditional justice is not the appropriate mechanism for this undertaking.⁷²

As discussed, the thesis maintains that it is impractical to formalise traditional processes to create a uniform mechanism to be applied across the board. The Uganda situation is unlike the case of Rwanda *Gacaca* and Burundi *Ubushingantahe*, where the entire nation adheres to the same tradition. In addition, the tradition has received a degree of codification, and

⁶⁹ AN Kaburahe 'The Institution of Bashingantahe in Burundi' in L Huyse and M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2007) 154 – 155.

⁷⁰ As above.

⁷¹ JO Latigo 'Northern Uganda: Traditional Based Practices in Acholi Region' in L Huyse and M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2007) 113.

⁷² Allen (n 1 above) 249; indicating that his non Acholi informants were outright dismissive of reliance of *mato oput*.

one mechanism adopted can be applied to the entire nation removing complexities involved in having multiple traditional systems dealing with the same groups of perpetrators who may have committed similar crimes.⁷³ Varying traditional practices may have to be applied in Uganda and the neighbouring countries to satisfy all victims of the conflict and bring about meaningful reconciliation.

Payment of compensation by the perpetrator's family and/or clan and procuring items like goats, sheep or cows is central to the success of most traditional justice processes. This will no doubt create immense financial constraints on the poverty-stricken communities that have relied or are relying on aid for survival for more than two decades. There have been suggestions that the government and donors should support such processes by providing items needed and putting aside funds for compensation to benefit persons who have undergone traditional justice processes.⁷⁴

Payment of compensation by government and/or donors of behalf of perpetrators that undergo the process will inevitably cast doubt on the legitimacy of processes. This might lead to resentment as the issue with the amnesty package as shown, with victims feeling that perpetrators are being rewarded.⁷⁵ Struggling to provide items needed for the ceremony and payment of compensation is seen as a sign of atonement and the punishment for the wrongdoing.⁷⁶ Traditional leaders should therefore be encouraged to engage community members to come up with novel ways of payment of compensation and atoning for crimes that does not require immediate exchange of money or property. One of these ways could be requiring the perpetrator (and his/her clan) to farm or herd animals for the offended clan for a certain number of years.⁷⁷

⁷³ Allen (n 1 above) 255.

⁷⁴ Baines (n 41 above) 124.

⁷⁵ Refer to the discussion in part one of chapter four of this thesis.

⁷⁶ Informal discussion with Christine Akumu Okot and Mwa Chris, officers of local government of Gulu and Pader respectively conducted on 10 Aug 2011 in Gulu town.

⁷⁷ This is not to suggest that the government should not create a reparations scheme to benefit victims of the conflict in Northern Uganda, such a scheme is absolutely necessary but property or monies from this scheme should not be availed to LRA or other individual perpetrators and this may encourage corruption and create resentment and misunderstanding among the victim population.

Also very important is that with the advent of the ICD, the ICC and a possible Truth Commission, space must be created for the use of traditional justice.⁷⁸ The Agreement on Accountability and Reconciliation provides for traditional justice as an alternative to prosecutions and the principle of double jeopardy potentially applies to bar criminal prosecutions of those who have undergone it.⁷⁹ Traditional justice measures lack the rigors of prosecution. They, therefore, should not be an alternative to prosecution of international crimes. Traditional justice should be a complementary mechanism, dealing with less serious crimes and available to all who desire it, including those who may undergo prosecutions and those who have received amnesty. In addition, use of traditional justice processes should be limited to the community level and not used as a national tool for accountability.

This is not to suggest that the author is opposed to the use of traditional justice as an accountability measure, quite the contrary, traditional justice and other rituals are very essential in post conflict societies. Indeed, they have been used throughout Africa to serve important elements of accountability during and after conflict.⁸⁰ Some examples include Angola, where the traditional ceremony of *conselho* based on the general encouragement given to people to abandon the thoughts and memories of war and losses was used as a healing process. In addition, in both Angola and Mozambique, cleansing rituals attended by the family and entire communities were carried out when welcoming ex-combatant child soldiers back into the community.⁸¹ In Mozambique, despite government's policy of 'forgive and forget', survivors living in the former epicentres of the civil war in Gorongosa, inspired by their own cultural wisdom, developed their own socio-cultural mechanisms to create healing and attain justice and reconciliation in the aftermath of the civil war.⁸² In Sierra Leone, healing ceremonies aimed to 'cool the hearts' of former child combatants and

⁷⁸ Agreement on Accountability and Reconciliation clause 3.10 provides that where a person has been subjected to an accountability or reconciliation mechanism in respect for any conduct during the conflict, that person shall not be subject to any other proceedings that in affect means that when one goes through *mato oput* or any other traditional justice measure, he/she will not be subject to any other measure.

⁷⁹ Agreement on Accountability and Reconciliation clause 3.1 & Annexure clause 19.

⁸⁰ JR Quinn 'What of Reconciliation? Traditional Mechanism of Acknowledgment in Uganda' in JR Quinn (ed) *Reconciliation(s)* (2008) 397 – 398; gives various accounts on the use of traditional justice in Africa.

⁸¹ Quinn (n 80 above) referring to A Honwana 'Children of War: Understanding War and War Cleansing in Mozambique and Angola' in S Chesterman (ed) *Civilians in War* (2001) 1137 – 1140.

⁸² Igreja & Dias-Lambranca (n 59 above) 66 – 67.

encourage their reintegration in the community has been used.⁸³ Traditional justice has also served a critical accountability role in Rwanda and Burundi.

This clearly shows the important role that traditional justice plays in healing and reconciliation after conflict. In Northern Uganda, traditional rituals and justice ceremonies were performed way before the government and the international community took up the issue, even in the midst of the conflict. The rituals continue to be practiced today and will be practised at an even larger scale when circumstances permit, with or without the involvement of government and/or donors. Indeed, traditional justice should not be overlooked and there is a need to explore the potential of the system as practised by the different communities in the LRA affected areas, further, to enhance access to justice, truth and reparations.⁸⁴

The author however, argues that traditional justice is more likely to play a positive role if its application is at the individual and community level and if its participation is voluntary and complementary to other accountability mechanisms. This inevitably requires an investment by the government to take initiatives to enhance the capacity of traditional leaders but also preserve the autonomy of and non-political character of the traditional institution.⁸⁵ The government will need to accord respect to these leaders and give them space to exercise visible influence within the communities,⁸⁶ but to make traditional justice an alternative mechanism is tantamount to condoning impunity for the grave crimes perpetrated in the LRA conflict.

⁸³ Quinn (n 80 above) referring to R Shaw 'Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone' (2005) 130 *United States Institute of Peace, Special Report* 9.

⁸⁴ Annexure to the Agreement on Accountability and Reconciliation clause 20 calls on the government and other stakeholders to examine these practices to explore the appropriate role of the mechanisms.

⁸⁵ The non-political nature and autonomy of traditional leaders and institutions is provided for in art 246 of the Constitution of Uganda.

⁸⁶ Authority of traditional has for long been challenged by the creation of local councillors who have taken on roles such as mediation, arbitration and conciliation, roles that were in the past undertaken by traditional leaders, this has greatly reduced the influence of traditional leadership.

7.7 Conclusion

The level of support that traditional justice has received shows the recognition of the complexities of the conflict by the affected population in the country. There is deep-rooted knowledge that embracing formal justice means a continuation of a military pursuit, therefore more atrocities on civilians.⁸⁷ The most popular saying among locals in Northern Uganda is that, ‘today I live in my own home, I farm my own field, and so I am in support of anything that retains this status quo.’ This is an indication that even today, the people are aware that the peace that prevails is fragile, the LRA are still a threat, contrary to government suggestions. Therefore, traditional justice remains a popular accountability venue that is most likely to maintain the status quo.

Traditional justice and healing ceremonies therefore have a significant role to play in Uganda’s accountability pursuits. The processes offer an accountability platform by allowing perpetrators to account for their crimes, show remorse, apologise and compensate victims, encompassing the goals of justice, truth and reparations. In addition, the processes provide a broad platform for victims and it delivers the greatest impact to local communities that must continue to live together. However, the numerous weaknesses of mechanisms such as cultural specificity and its inability to respond to the gravity and scale of crimes perpetrated, makes it an inappropriate tool, especially so, if it is used as an alternative mechanism to prosecutions. The use of traditional justice therefore should be complementary and voluntary and it should remain at the community level.

The Agreement on Accountability and Reconciliation acknowledge the need for dialogue to promote justice, truth, reparations for victims and to ensure reconciliation. This is also the expressed desire of the affected communities in Uganda.⁸⁸ Suffice to say that traditional justice will not adequately play this role; neither will formal prosecutions adequately accomplish this. Instituting a truth commission would therefore be in keeping with the

⁸⁷ This was clearly demonstrated when the LRA refused to sign a peace deal in 2008 insisting that the ICC first drops its arrest warrants and Joseph Kony’s assertion that he had been misled on the true nature of the agreement on accountability and reconciliation that the LRA and government’s peace teams reached.

⁸⁸ This was the finding of JLOS during the consultations conducted in eight sub-regions including Buganda, Teso, Bugisu, Bugwere, Busoga, Karamajo, Kapchorwa, Acholi, Ankole, Toro, Bunyoro, Lango and West Nile of Uganda. Interview with Rachel Odoi-Musoke conducted on 18 March 2011 in Kampala.

language of the Agreement on Accountability and Reconciliation and the desire of the people of Uganda. This is discussed in the next chapter.

CHAPTER EIGHT

A TRUTH COMMISSION FOR UGANDA?

8.1 Introduction

The Agreement on Accountability and Reconciliation recognises that a comprehensive, independent and impartial analysis of the history and manifestations of the conflict, especially the human rights violations and crimes committed in its course is an essential ingredient for attaining reconciliation at all levels.¹ In this vein, the Agreement enjoins the parties to promote national legal arrangements to ensure justice and reconciliation in respect of the conflict.² Although a Truth Commission is not specifically mentioned, a survey carried out by the JLOS in 2008, found that overwhelmingly, Ugandans desire truth telling, reconciliation and reparations as part of a comprehensive solution to the conflict.³

The United Nations Principles to Combat Impunity (Joinet Principles)⁴ provide that everyone have the inalienable right to know the truth about the circumstances and reasons that led to massive or systematic violations. It further provides that the full and effective exercise of this right, exploring the broader context of the conflict, provide a vital safeguard against the reoccurrence of violations.⁵ Principle 5 further enjoins the state to take appropriate action including the creation of truth commissions or other commissions of inquiry to establish facts surrounding those violations so that the truth is ascertained and strategies for addressing the root causes are addressed. This right is elaborated as:

¹ Agreement on Accountability and Reconciliation clause 2.3.

² Agreement on Accountability and Reconciliation clauses 5.1 & 5.2.

³ JLOS *Transitional Justice in Northern Eastern Uganda & Some Parts of West Nile Region* (2009) 22 – 26 & 30.

⁴ The set of Principles for Protection and Promotion of Human Rights Intended to Strengthen Action to Combat impunity UN Sub-Commission for Prevention of Discrimination and Protection of Minorities, 48th Sess., Annex II, Agenda Item 10 at 12, U.N Doc. E/CN.4/Sub.2/1996/18. 29 June 1996.

⁵ Joinet Principles principle 2; truth is relative and it is not clear whether it comes out of the different accountability processes, including a truth commission but what is essential is that a truth telling process could help in creating 'official history' that would have been generated through a comprehensive process that involves mass participation of all sectors of society.

The right to know is not simply the right of any individual victim or closely related persons to know what happened - a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from reoccurring in the future. Its corollary is a “duty to remember” which the state must assume in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people’s national heritage and as such must be preserved.⁶

Truth commissions give a country the opportunity to confront it’s past, official denials and imposed silences, and provides victims with public validation of their suffering. It also makes the state’s obligation to provide integral reparations increasingly unquestionable.⁷ Usually, victims are central in the work of truth commissions, and a lot of emphasis is put on their voices giving those who have been excluded, persecuted or/and stigmatised an opportunity to participate in public life and to have their suffering acknowledged.⁸ Equally important, attention is paid to the institutions and sectors of society that formed the structure of power for the regimes where gross human rights violations and abuses were perpetrated to clearly identify why, how, what and where reforms are needed.⁹

A truth commission may well bridge the accountability gap that will be left by the other accountability measures in Uganda.¹⁰ There are many features of the LRA conflict that would not be accomplished through the amnesty process, traditional justice or formal prosecutions. For instance an investigation into the various strategies and rationales that the government has followed in handling the LRA conflict that led to one of the world’s worst humanitarian crisis; an investigation into how and why both the LRA and UPDF

⁶ Revised Final Report on Question of Impunity of Perpetrators of Human Rights Violations, Prepared by Mr. Joinet pursuant to sub-commission Decision 1996/119, United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1997/20/Rev.1, October 2, 1997, part A(17).

⁷ S Cohen *States of Denial: Knowing about Atrocities and Suffering* (2001) 255 - 266.

⁸ P Smith, ‘Memory without History: Who Owns Guatemala’s past?’ (2001) 24(2) *Washington Quarterly* 59 – 61 & 64.

⁹ Smith (n 8 above) 64.

¹⁰ The previous chapters, particularly chapter five and six established that prosecutions alone will not accomplish all aspects of accountability and will not be instrumental in ensuring truth and reparations in Uganda. Chapter four established that the Amnesty Act, granting a blanket amnesty, designed to put an end to hostilities has failed to bring out the truth and has become a divisive rather than a uniting factor for the rebels returning from the ‘bush’ and the affected communities. Chapter seven further concluded that traditional justice is best suited for use at the community level and it alone will not bring about meaningful accountability in Uganda.

involved children in the hostilities and atrocities committed by and against them during the conflict; an investigation into the different military offensive undertaken by the UPDF against the LRA and why they failed; an investigation into the various attempts at peace talks and the factors that led to their failure; and an investigation into abductions, disappearance, detention, torture, murder and other offences committed both by the LRA and the UPDF.¹¹ These investigations transcend individual perpetrators and put emphasis on the role of government institutions and voices of victims. In addition, the process will make recommendations aimed at addressing the root causes and outcomes of the conflict, thereby countering inequality in society and also identifying perpetrators and naming them individually. This will allow victims to pursue compensation against those identified through civil suits and will shame and bar such individuals from the position of public trust, thereby promoting justice. In addition, a truth commission would be best placed to recommend reparations for victims of the atrocities and legislative and institutional reform to ensure reconciliation and to prevent reoccurrence of violations.¹²

The Agreement on Accountability and Reconciliation provides for the widest possible consultations in order to receive views and concerns of all stakeholders¹³ and to ensure the widest national ownership of all accountability and reconciliation processes.¹⁴ In this vein, in 2008, JLOS started a process of nationwide consultations that is ongoing at the time of writing.¹⁵ Civil society groups have also come up with a proposed National Reconciliation Bill of 2009 (working bill), which is still in a draft form and has not submitted for consideration by Parliament.¹⁶ The drafters of the working bill have the option to submit the bill as a

¹¹ C Rose, 'Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth Telling and Reparations', (2008) 28(2) *Third Worlds Law Journal* 371.

¹² The ICD will not award reparations to victims of atrocities and the ICC reparations regime will only come into play if indictees are arrested and tried. Further, only a limited number of victims stand to benefit from the process. In addition, the ICD and ICC for the moment are concentrating on crimes committed by the LRA only, so victims of crimes committed by the UPDF may not receive reparations – a truth and reconciliation commission could deal with these limitations.

¹³ The stakeholders are highlighted to include state institutions, civil society, community leaders, traditional and religious leaders, academia and victims.

¹⁴ Agreement on Accountability and Reconciliation clause 2.4.

¹⁵ Interview with Rachel Odoi – Musoke, Senior Advisor with JLOS, conducted in Kampala on 12 Jan 2011.

¹⁶ The Department of Peace and Conflict Studies, Makerere University together with the Refugee Law Project and other stakeholders prepared the proposed bill, it is still very much a working document and has not been finalised. Consultations with the civil society in Uganda is still ongoing and the drafters are trying to get as much civil society input as possible – telephone discussion with Lyandro Komakech, a researcher at the

private members bill, but have decided that it will have more weight if it is presented as a government bill. They are therefore lobbying cabinet, relevant ministries and judiciary to endorse the bill and present it to Parliament for debate.¹⁷ This chapter recognises that the context in which each commission works is unique and so are political, social and legal factors that drive a particular conflict; demanding a tailored legislation that greatly accounts for its success. The chapter therefore, refers to the working bill, the only comprehensive working document in relation to a truth-telling process in Uganda.

If created, this will not be the first commission aimed at investigating human rights violations in Uganda. Uganda was the first African country to establish human rights investigative commission, though the work of the past commissions made little or no impact, and have virtually been forgotten. This chapter therefore gives an overview of the past two commissions mandated to investigate human rights violations in Uganda, which greatly informs the rest of the discussion on the appropriate legislation for the new commission. The chapter then discusses the appropriate form, structure and composition; powers and functions; jurisdiction; relationship with amnesty and formal prosecutions; provisions on reparations, reintegration and reconciliation, while paying close attention to the political, social and legal realities in Uganda and lessons learned from other states.

8.2 Past Investigative commissions in Uganda

8.2.1 The 1974 Commission

The first commission established in Uganda was the Commission of Inquiry into the Disappearance of People of Uganda, established in 1974 by President Idi Amin Dada. This was in response to pressure to investigate disappearances affected by Ugandan military

Refugee Law Project on 3 November 2010. Provisions of the working bill is cited and annexed to this thesis with permission of Refugee Law Project. The version of the working bill referred to in this thesis is annexed and marked Annexure B.

¹⁷ The February 2011 elections interfered and delayed this process that is back on track now; interview with Chris Dolan, Director of the Refugee Law Project conducted in Kampala on 18 Feb 2011. This process is working parallel to the nationwide consultations that JLOS is undertaking and it's very likely that JLOS will have a separate document at the end of consultations depending on their findings in the field (which may not differ much from the working bill). If this happens, then it is unlikely that Cabinet will endorse a private bill if another, drafted by a government institution is in place. Interview with Rachel Odoi-Musoke conducted on 12 January 2011 in Kampala.

since Amin came into power in January 1971.¹⁸ A Presidential Decree established the Commission. It had the mandate to inquire into and establish the identity of persons who are alleged missing; to establish whether such persons are dead or alive; for people who fled Uganda, why they left; for the dead, the circumstances surrounding their death; those responsible for the disappearance or death and what should be done to them. It was further mandated to make recommendations on what should be done for the families of those missing or dead and what government should do to put an end to such disappearances.¹⁹

The Commission had a mandate to take evidence in person or by a written memorandum, in public or private from any member of the public but with a number of limitations on its powers. The limitations included the requirement that no investigations would be carried out on matters that may affect the security of the state.²⁰ The commission was composed of a Pakistani Judge as chair, two Ugandan police superintendents and a Ugandan army officer.²¹ The Commission had the mandate to operate from 1 July 1974 and to hand in a report to the President by 30 September 1974.²²

In fulfilment of its mandate, the Commission generally conducted public hearings; it heard 545 witnesses and documented 308 cases of disappearances. The Commission concluded that the Public Security Unit and the National Investigation Bureau bore the main responsibility for the disappearances. The report also indicated that army officers, military police and members of intelligence service were involved in many cases of disappearances. It recommended that the reform of the police and intelligence services and human rights trainings for government officials, among others.²³ The Commission's report was however, never made public and its recommendations never adopted by the government. Later the

¹⁸ Commission of Inquiry into Disappearance of People in Uganda since 25 January 1971, Legal Notice 2 of 1974 Cap 56 Laws of Uganda (Legal Notice 2, 1974); posted by USIP Library, available at Truth Commissions Digital Collection, Truth Commission in Uganda <http://www.usip.org/publicatios/truth-commission-uganda-74> (accessed 02 November 2010) annexed as Annexure C.

¹⁹ Legal Notice 2, 1974 part II.

²⁰ Legal Notice 2, 1974 part III.

²¹ Legal Notice 2, 1974 part I.

²² Legal Notice 2, 1974 part I.

²³ PB Hayner 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study' (1994) 16(4) *Human Rights Quarterly* 612; Hayner makes reference to Richard Carver statement that the commission was successful in view of the practical difficulties it faced and highly unfavourable political climate under which it operated. See R Carver 'Called to Account: How African Government's Investigate Human Rights Violations (1990) 89 *African Affairs* 399.

four commissioners were targeted by the state because of their work and this inquiry did nothing to stop the brutality and human rights violations that characterised Idi Amin's eight-year rule in Uganda.²⁴

The 1974 Commission has been discredited and its entire operations viewed as a waste of time. Yet, some commentators have argued that the Commission played an important role in establishing historical records, and have pointed out that during its operations, the number of disappearances decreased, at least in the short term.²⁵ Nonetheless, the Commission's work failed to deter future violations as it was clearly set up without a political will or a commitment to reforms. The 1974 Commission is discounted in history and no reference was made to it in setting up Uganda's second commission of inquiry in 1986, twelve years later.²⁶

8.2.2 The 1986 Commission

In 1986, President Museveni seized control of the government after nearly six years of guerrilla warfare. As the basic tenets of his philosophy to rebuild the nation, the President outlined a ten-point programme in which he emphasised democracy, security, national unity, independence, restoration and rehabilitation of social services, end to corruption and misuse of power, solutions for displaced people, pan-African cooperation and pursuing a mixed economy.²⁷ In pursuit of these goals, President Museveni established, among other institutions, a commission of inquiry, to address human rights violations that had been perpetrated by the past regimes - the Commission of Inquiry into Violations of Human Rights (1986 Commission).²⁸ The 1986 Commission was received with enthusiasm and in the early days perceived as a tool to usher in a new era of respect of human rights in Uganda.²⁹

²⁴ Hayner (n 23 above) 612; in particular, the Pakistani judge lost his job with the government; one of the Ugandan commissioners was framed with murder and sentenced to death and another fled Uganda to avoid arrest.

²⁵ Carver (n 23 above) 400.

²⁶ Hayner (n 23 above) 613.

²⁷ YK. Museveni, 'Sowing the Mustard Seed: The Struggle for Freedom and Democracy in Uganda' (1997) 217.

²⁸ 'Legal Notice Creating the Commission of Inquiry into violations of Human Rights, Commission of Inquiry Act, Legal Notice No 5 (May 16 1986) Cap 56 laws of Uganda (Legal Notice 5, 1986); copy annexed as Annexure D.

²⁹ Hayner (n 23 above) 612; referring to Amnesty International Report 'Uganda: Human Rights Watch, 1986 – 1989' 1; indicating that the government immediately moved to ratify international human rights instruments

The Commission had a broad mandate that included inquiry into all aspects of all human rights violations, breaches in the rule of law, and excessive abuse of power committed in Uganda by the previous governments. The Commission had a further mandate to look into possible ways of preventing recurrence of such violations, powers to hear direct evidence, subpoena witnesses and request for documents from official sources. Temporal jurisdiction was from 9 October 1962, when Uganda attained its independence to 26 January 1986 when President Museveni took power in a coup.³⁰ The Commission comprised of six members, male and was chaired by the then Uganda Chief Justice - Arthur Oder.³¹

The Commission conducted public hearings, live television and radio broadcasts, generating popular support³² but after several years of operation, with no end in sight, the public interest in its work waned.³³ The Final Report of the Commission came out in 1994, but the report was not widely distributed. The commissioners also remained silent about their work, which remains virtually unknown.³⁴ In its final report, the 1986 Commission reportedly made precise proposals for change. These include, suggestions to repeal laws that allowed for detention without trial; human rights education in schools and training programs for the army and security forces; constitutional guarantees and fulfilment of international treaty obligations; prosecution of those found in violation of human rights; and the need for reform in military and security sectors. The government has implemented very few of the recommendations.³⁵

Some of the challenges of the 1986 Commission included its very broad and vague mandate as it was burdened with the task of sifting through and collecting testimony of nearly 25

and to introduce domestic safeguards against human rights violations indicating that it is standards by which it wished to be judged by the community of nations. See also JR Quinn 'Dealing with a Legacy of Mass Atrocity: Truth Commissions in Uganda and Chile' (2001) 23(4) *Netherlands Quarterly of Human Rights* 391.

³⁰ Legal Notice 5 1986, para 3.

³¹ JR Quinn 'Constraints: The Un-Doing of the Ugandan Truth Commission' (2004) 26(2) *Human Rights Quarterly* 409; after several years of operation, a female commissioner was appointed to the Commission.

³² Rose (n 11 above) 363.

³³ Though the Legal Notice instructed the Commission to perform its work in a speedy manner and present a report in the shortest time possible, no cut off date within which to complete work and present a report was indicated.

³⁴ JR Quinn, 'The Politics of Acknowledgement: An Analysis of Uganda's Truth Commission' (2003) 19 *York Centre for International and Security Studies* 20; Quinn (n 31 above) 407.

³⁵ Quinn (n 34 above) 9; Quinn (31 above) 412.

years of abuses under different regimes with different perpetrators and victims.³⁶ The Commission also faced major financial constraints, with work coming to a standstill every couple of months, regional trips cancelled repeatedly due to lack of funds and after years of operation, the public interest in its work faded.³⁷ The 1986 Commission has been discredited as a tool used by President Museveni's government to discredit previous regime and legitimise his rule.³⁸

The past two commissions in Uganda were developed out of very different political realities, focused on different but overlapping periods, and both were largely unsuccessful in their endeavours.³⁹ The failures thereof highlight the potential challenges that a new truth commission for Uganda may face. This, together with the prevailing political and social conditions is taken into consideration in the discussion that follows. The discussion also benefits from the numerous truth commission experiences in countries such as South Africa, Sierra Leone, East Timor, Peru and Liberia to draw potentially useful lessons.

8.3 Features of a new truth commission

8.3.1 Form, structure and composition

The working bill provides that the new truth commission should be composed of different forums to operate on a national and regional level with support from existing institutions including the Human Rights Commission, local government and traditional justice institutions.⁴⁰ The forum is to be composed of thirteen members, all Ugandans,⁴¹ with no

³⁶ Quinn (n 34 above) 5.

³⁷ Hayner (n 23 above) 618; the Commission had a financial downturn in 1987, the Ford Foundation and other International donors made contribution but the financial crisis followed the commission throughout its work.

³⁸ According to Frank Onapito Ekomoliot, the former Presidential Press Secretary and a prominent journalist in Uganda, interviewed on 14 January 2011 in Kampala; at the time, there was a need for President Museveni to change his image from a rag tag bush fighter to a political leader and the 1986 Commission was a strategy to gain credibility and legitimise his rule.

³⁹ As previously discussed, the 1974 Commission failed due to lack of a political will and commitment to reform; the 1986 Commission failed due to its broad mandate that proved difficult to manage and lack of political commitment to make funds available to the commission in a timely manner.

⁴⁰ Working bill part II(B).

⁴¹ An earlier draft of the bill provided for a mixed national and international composition but this provision was amended in this later draft because members of the public favoured a purely national composition. Guatemala and Sierra Leone both had mixed tribunals, which have been attributed to their success. Advantages put forward for mixed commissions include the fact that foreign members usually have experience from other

less than seven women. A member is to be appointed from the existing Amnesty Commission and another from the Human Rights Commission and others from the academia, civil society and the four regions of Uganda.⁴²

Selection criteria used for selecting members determines the quality, credibility and success of any accountability measure and is very important for a truth commission. The working bill gives this role to a five member 'selection committee', two of whom shall be women, with the composition that reflects a regional balance and comprises of highly qualified persons of integrity drawn from the academia, civil society, faith based institutions and cultural institutions among others. The members of the Selection Committee are to be appointed by Parliament.⁴³

Forum candidates are to be nominated by the public⁴⁴ and members selected by the Selection Committee and approved by Parliament.⁴⁵ Criteria for selection are; high moral character, proven integrity, and persons trusted to remain impartial to functions of a truth commission.⁴⁶ The process provided for in the working bill if followed, will ensure local ownership, credibility and legitimacy of the members of the forum, which is desirable for the success of the process. The drafters of the working bill are evidently conscious of Uganda's history – regional and gender marginalisation and therefore see the need for regional and gender balance to give credibility to the forum.

countries that the commission can draw from and helps enrich the process and that where the credibility of nationals is questioned, the presence of foreign members can to some extent give the public confidence in the process. There is however, nothing to suggest that the purely national composition of the 1986 Commission contributed to its failure. In addition, Prof Henrietta Mensa-Bonsu, a former commissioner in Ghana and Liberia suggests that if persons with the requisite credentials exist in Uganda appointing nationals with the support of internationals at the technical level, may be the best way to go, the most important thing is the desire of Ugandans (Interview conducted via email on 28 March 2011). See also Judge Thomas Buergenthal, Lecture given on 17 October 2006 at Western Reserve University School of Law, 'Truth Commissions: Between Impunity and Prosecution' *Transcript of the Frederick K. Cox International Law Centre, Lecture in Global Legal Reform*.

⁴² Working bill part IV(B).

⁴³ Working bill part IV(A)(1).

⁴⁴ The working bill does not clarify how the public nomination shall be done, this needs to be clearly spelled out to ensure that persons nominated meet the necessary criteria and are representative of the people.

⁴⁵ Working bill part IV(B).

⁴⁶ Working bill part IV(C).

The working bill seeks to establish committees as part of the forum; committees proposed include an ‘amnesty committee’ comprising of five members chaired by a member of the forum; the other four members need not be members, and are appointed by a chairperson on consultations with other members of the forum.⁴⁷ This committee shall have the power to receive amnesty application and shall grant or deny amnesty.⁴⁸ The working bill also seeks to create an ‘investigation committee’ composed of three members appointed by the chairperson with approval of other members of the forum. This committee too, is to be chaired by a member of the forum and the other two members need not be members but must have specialised knowledge in investigating complex societal and criminal conflicts.⁴⁹ This structure, though modelled on the South African truth commission differs in that these ‘committees’ do not constitute the forum and general investigations into human rights violations, reparations and rehabilitation are carried out as the main forum activities.

8.3.2 Powers and functions

The working bill seeks to empower the truth commission with powers to hold hearings; take statements; summon witnesses; conduct searches and seize relevant documents; issue warrants; preserve documents; determine eligibility and grant or deny amnesty; conduct investigations including exhumations and forensic examinations; identify perpetrators and issue a final report and recommendations.⁵⁰ This list is inclusive and not exhaustive and gives the truth commission all powers reasonable and necessary to carry out its mandate but that, as the history of truth commissions in Uganda has shown, must be backed up by political will to make the necessary resources available and to give room within which a commission can exercise the powers.

The question therefore is how likely will individuals with state authority and security institutions give room to a new truth commission to exercise its powers and publicly question their conduct, with a looming threat of prosecutions? Uganda clearly departs from

⁴⁷ Working bill part IV(H).

⁴⁸ Working bill part IV(H)(3).

⁴⁹ Working bill part IV(I).

⁵⁰ Working bill part II(C)(1).

‘transitional justice’ paradigm, as there is no regime change, certainly not in the traditional sense. The NRM government has been in power for the last twenty-five years and in February 2011 won elections for another five-year term as Uganda prepares to undertake accountability measures with its apparent blessings and goodwill. Will these blessings, goodwill and cooperation be guaranteed to allow a commission to honestly deal with past abuses and violations to allow reform and accountability? Will the NRM government accept that its rule has been tarnished by decades of conflict and that state and security institutions are in need of reform? On the other hand, will the government set its sight to justifying policies, hiding complicity and rejecting blame?

A new truth commission in Uganda will have to work against these odds. Cooperation of the state and a political will is crucial to avoid the repeat of the 1974 and 1986 commissions’ experience that did not yield much benefit. For instance, after the 1974 inquiry, the Amin’s government became more repressive than ever.⁵¹ In addition, during the 1986 commission’s inquiry, files, audio and video recordings disappeared. Though some commissioners reportedly suggested that the disappearance of evidence was merely due to sloppy archival and storage techniques, others have speculated that commissioners and other people who worked with the Commission had purposely destroyed evidence that would implicate them or their friends and family in heinous crimes. This indicates that perhaps the NRM government is unable and/or unwilling to tolerate attempts to delve into the issues of the past.⁵²

The working bill proposes a three months preparation period upon establishment within which to facilitate activities necessary for the commencement of core activities of the forum.⁵³ These activities include determining operation guidelines and procedures, recruitment and training of staff; designing a witness protection mechanism; designing work schedules, work plans and code of conduct;⁵⁴ not forgetting designing a robust outreach programme that will be necessary to ensure local ownership and participation. The author is

⁵¹ Hayner (n 23 above) 612.

⁵² Quinn (n 31 above) 413; the Commission was further not allowed to look into human rights abuses perpetrated by the NRA before it took over power in 1986; yet reports indicated that the rebel group committed a lot of atrocities against civilian in Luwero Triangle.

⁵³ Working bill part II(D).

⁵⁴ Working bill part II(D).

of the view that considering the length of the period the truth commission is to investigate; the level of atrocities; the state of the roads, media and other infrastructure that it will rely on for its activities - three months is such a short time for members come up with credible, comprehensive, integrated and visible programmes and procedures. Sufficient preparation time should therefore be accorded to a truth commission in the founding legislation.

Of particular concern is design of a witness protection programme that the working bill leaves to members of the commission. This will be a very delicate undertaking, which will require a lot of technical expertise, funds, research and attention to detail. It is necessary to draw attention to the fact that the LRA conflict has not yet ended and the LRA very much remains a threat to the people who are conscious of this fact.⁵⁵ The LRA to exert terrible atrocities on people whom they believe have 'sold them out.' This fear of revenge is one reason that provoked outcry from the victim populations when the ICC first started investigations.⁵⁶ It will naturally follow that many people may be afraid to give statements to a truth telling institution unless guaranteed adequate protection.

In addition, the populace may be concerned about giving testimony implicating security institutions, including the army and other government officials who may have state backing, means and the ability to intimidate or harm them. Intimidation is a method that has widely been employed by the government of Uganda and security personnel to disquiet opposition.⁵⁷ Top military personnel, and sometimes politicians in President Museveni's government, have given every indication that they do not take kindly to accusation of wrongdoing by security forces or politicians right from the time when the ICC started its

⁵⁵ However, there has been no hostility in Uganda since 2006 after the commencement of the Juba peace process although the LRA remain active, perpetrating atrocities in Sudan, the DRC and Central African Republic and still very much a threat to the populace in Uganda. Phase out of IDP camps in Northern Uganda has been a very slow process as the populace are not sure if this is really the end of hostilities and are well aware that the LRA remain a force to be reckoned with.

⁵⁶ Informal discussion with a group of eight youth in Gulu town on 10 Aug 2010.

⁵⁷ For example in 2004, when the high court granted bail to Kizza Besigye, the main opposition leader and other nine suspects facing terrorism and treason charges; security forces besieged the court, re-arrested and new proceedings were instituted in a court martial in complete disregard of the court's ruling. More recently, several opposition leaders were tortured and arrested by police officer as they conducted a peaceful protest, 'walk to work protest' to highlight the escalating standard of living in Uganda – generally see headlines in the New Vision and Daily Monitor Newspapers between 8 to 30 April 2011.

investigations in Uganda.⁵⁸ As a result, representatives of a truth telling institution will have to come up with sound measures to protect those willing to talk and encourage those reluctant to do so.

An important protection measure will be confidentiality guarantees including clandestine meetings with witnesses that could be arranged outside the institution premises; concealing to the public the identity of the person giving testimony through private hearings; and the use of pseudonym and deletion of identifying information from public records. Specialists may periodically have to check offices for hidden microphones, as was the case in El Salvador.⁵⁹ It is also important that independent legal service be provided for individuals with concerns on confidentiality before they give testimony to the truth commission.⁶⁰ The Commission should also ensure that it reaches agreements with other governments to resettle some witnesses in extreme cases where the life of such a witness and/or their family members may be at risk. This will especially be applicable if such a witness is also required to give evidence in judicial processes.

The working bill, in addition, proposes that commencing with the preparation period, the commission shall have five years within which to receive matters and will conclude all pending matters within six months of the end of the five-year filing period. The commission shall have a further one year beyond the end of the filing period to write and publicise its reports to Ugandans.⁶¹ Provisions are made for the extension of the truth commission's mandate for additional three months at a time by resolution of Parliament.⁶² This time limitation is sufficient and may well contribute to the success of the institution. The appointed members should however remain conscious of the history of the 1986 Commission; it was hoped that the work of the Commission would be completed within a

⁵⁸ 'UPDF Spokesman: Ignore Human Rights Watch Report on UPDF' Uganda Genocide 30 July 2008; the UPDF spokesman was referring to a report that Human Rights Watch documented on atrocities allegedly committed by the UPDF <http://ugandagenocide.info/?p=163> (accessed on 18 Nov 2010); Human Rights Watch Report, 'ICC: Investigate Both Sides in Uganda', (4 Feb 2004) <http://www.hrw.org/en/news/2004/02/04/icc-investigate-all-sides-uganda> (accessed 18 Nov 2010).

⁵⁹ Judge Thomas Buergenthal (n 41 above).

⁶⁰ This role can be played by existing legal aid providers in Uganda for example the Legal Aid Clinic of the Law Development Centre, the Uganda Legal Aid Clinic and the Norwegian Refugee Council Legal Assistance Programme.

⁶¹ Working bill part II(D).

⁶² Working bill part II(E).

period of three years, although this was not clearly spelled out in the founding legislation. However, the Commission only tabled its final report eight years after it began operations. By this time some of the evidence which had existed either disappeared or was damaged; some of those who might have testified as either victims or perpetrators either died or moved to other countries; many of the events were lost to the ravages of time and memory⁶³ and most importantly, public interest in its work had waned.⁶⁴ A new truth commission should not be caught up in this trap.

8.3.3 Temporal and material jurisdiction

The working bill proposes that the temporal Jurisdiction of a new truth commission be 9 October 1962 when Uganda attained independence to the date of assent of the new legislation.⁶⁵ This raises a few issues of practical concern - for instance, how the commission will be able to finish its work in a timely manner if it has to sift through evidence of almost 50 years. As discussed previously, one major reason for the failure of the 1986 Commission was the attempt to unveil 25 years of atrocities, under different regimes, with different groups of perpetrators and victims. In addition, what 'truth' can a new truth commission reasonably uncover that the 1986 Commission failed to unearth in the eight years of its existence?⁶⁶ There is also the worry that digging up the past through such a comprehensive process would only serve to inflame the situation by rehashing old quarrels and reopening wounds.⁶⁷ Many people have the desire to move on and not to be dragged to the past repeatedly, especially so, that nothing much came out of the 1986 Commission process.⁶⁸

⁶³ Quinn (n 34 above) 22.

⁶⁴ Quinn (31 above) 409.

⁶⁵ Working bill part III(A).

⁶⁶ Quinn (n 34 above) 20 – 21; stating that during the operation of the CIVHR, thousands of people filled questionnaires with regard to their recollection of events that had occurred in the past and many of which were then investigated in the field. At least 608 witnesses appeared before the CIVHR and that the CIVHR travelled to virtually every region of the country holding hearings and collecting testimonies. These testimonies are bound into 18 enormous volumes that are available at the Uganda Human Rights Commission's offices. The final report is 720 pages and contains testimony, analysis and recommendations, along with a list of names of those subjected to torture and abuse. What is the chance that these people will want to go through such a comprehensive process again? Although nothing much came out the inquiry, at least the information collected is still available for reference for a new commission.

⁶⁷ Interview with Frank Onapito Ekomoliot conducted on 14 January 2011 in Kampala; this sentiment has been echoed by a number of Ugandans who do not clearly understand the difference a new truth commission will make in regard to 'truth' of what happened in the past – some have even suggested that going far back may

Valid as these questions may be, there are still people in Uganda who feel that their rights were violated in the period after independence and there may be fresh evidence or information on violations that occurred in the period probed by the 1986 commission. These people may have the desire to be heard and may feel more confident to talk now, than they did back then; doors should not be shut on them or any other new evidence that may be available. In addition, there remains a need to comprehensively question and understand the root cause of conflicts in Uganda since independence for the Ugandan society to begin to form relationships, participate in social and civic structures of society to defeat the deep rooted division that have paralysed the nation since independence.⁶⁹ To achieve this, an investigation into events, even prior to independence⁷⁰ is inevitable. Very important is also that the new truth commission does not get caught up in debates of the past but spend sufficient time investigating the events that caused great suffering in the recent history of Uganda.

To this end, the author suggests the establishment of another committee, ‘a historical clarification and analysis committee’ with the sole responsibility of creating an independent and objective historical record. This committee would examine the underlying causes, nature, extent and manifestations of all conflicts in Uganda since independence; and the nature, causes extend and manifestations of the north-south divide in the country with the aim of generating an ‘official history’ that includes abuses and violations perpetrated and recommending reforms in state institutions.⁷¹ Evidence collected by the 1986 Commission would be an important point of reference to this committee that would also review recommendations of the 1986 Commission, adopt or modify them as necessary.

derail the matter at hand – the abuses and violations perpetrated in the LRA conflicts with wounds still visible and suffering ongoing.

⁶⁸ Quinn (31 above) 412.

⁶⁹ Quinn (n 34 above) 22.

⁷⁰ The necessity of an historical analysis is recognised in clause 3.2 of the Agreement on Accountability and Reconciliation.

⁷¹ Agreement on Accountability and Reconciliation clause 3.2 recognises the need for historical analysis and clarification; Uganda’s history since independence has been largely dominated by coups and other insurgencies all characterised by gross human rights violations and abuse, the LRA conflict is the longest running one. Several other insurgencies cropped up since 1986 when President Museveni took over power and according to him, in the 2011 presidential campaigns, the NRM quelled 32 insurgencies, many of which, Ugandans do not seem to know about.

The working bill, broadly defines the subject matter jurisdiction as:

Considering and analysing any matter relevant to violent conflicts and to widespread or systematic violations or abuses of human rights including their history, facilitating and directing, and/or initiating enquiries into manifestation of conflicts including human rights violations and abuses, documenting such violations and abuses, determining motives and patterns, gathering and receiving evidence of violations and abuses, determining who can file complaints restoring the human dignity of victims by giving them the opportunity to tell their stories and the acknowledgment by perpetrators, adopting its own rules and procedures, designing witness protection mechanism, coordinating its activities with the Amnesty commission and the Human Rights Commission, referring cases to traditional cultural institutions, referring cases to alternative justice and reconciliation mechanism, preparing reports, creating an independent and objective historical record, making recommendations on the appropriate mechanisms of reconciliation, reintegration, reparations and rehabilitation measures to victims, initiating legal, institutional and other reforms and designing and conducting symbolic reconciliation activities.⁷²

The working bill, in the same part, spells out the manner in which a new commission may carry out its functions.⁷³ The scope, size, subject matter and operations in the working bill are largely undetermined. Pertinent issues like witness protection programmes and relationship with existing commissions, is left for members to determine. As so often happens in the establishment of truth commissions, this sweeping mandate may prove difficult to manage⁷⁴ and therefore needs revision.

In addition, the mandate of a new truth commission should clearly spell out gender and child rights issues. Experiences of children and women must be examined in detail and enough attention given to their participation and protection. The LRA conflict involved a large scale use of children as soldiers; in addition, the other atrocities committed like abductions, sexual violence, massive population displacement, disruption of education and health services, affected mostly children and men and women were affected differently. A

⁷² Working bill part III.

⁷³ Working bill part III.

⁷⁴ Quinn (n 34 above) 7 referring to C Tomuschatt, 'Clarification Commission in Guatemala', (2000) 23(2) *Human Rights Quarterly* 239 – 240

truth commission must therefore give a great focus to the experiences of women and children and impacts of the multiple levels of violations against them both as direct and indirect victims of the conflict.

The only reference in the working bill to women and children is that ‘particular attention to the experiences of women and children and other vulnerable groups should be made.’⁷⁵ The founding legislation could go further than that in clarity. For example, the Liberian Truth and Reconciliation Act,⁷⁶ goes furthest to set the stage for a concerted effort both to focus on the impacts of the conflict on children and women and to them in its activities.⁷⁷ In its mandate, the Act provides for specific mechanism and procedures to address the experiences of women, children and other vulnerable groups. It urges the commissioners to pay particular attention to gender based violations and issues of child soldiers.⁷⁸

The Liberian Act further provides that the truth commission should take into account the security and other interests of women, children and other vulnerable groups and design a witness protection measure on a case-by-case basis as well include special programs for the group.⁷⁹ The Act further mandated the commission to employ specialists in children and women’s rights and to ensure that special measures are employed that will enable them provide testimony, while at the same time protecting their safety and not endangering or delaying their social reintegration or psychological recovery.⁸⁰

The clear articulation of children and women’s important role in the mandate, operation and outcomes of the truth commission and the call for policies, procedures and operational concerns to secure their safe involvement in its work were significant achievements of the Liberian truth commission. These provisions raised new challenges and responsibilities requiring human and financial resources, as well as a sustained commitment by the

⁷⁵ Working bill part III(B)(1)(a).

⁷⁶ An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia, Enacted by the National Transitional Legislative Assembly on 12 May 2005.

⁷⁷ Liberia TRC Act art IV(4); art VI(24); and art VII(26) (n) and (o).

⁷⁸ Liberia TRC Act art IV(4)(e).

⁷⁹ Liberia TRC Act art IV(26)(n).

⁸⁰ Liberia TRC Act art IV(26)(o).

Commission to consider the safety and participation children and women,⁸¹ the usually forgotten victims of human rights violations and abuses in accountability processes.

At the broader level, a truth telling process should bear in mind that victims of the LRA conflict have not been given a central position in all the other measures in operation that puts more emphasis on perpetrators and their needs.⁸² The founding legislation must therefore ensure that it creates an institution that will be open and responsive to the needs of victims and recognise the value of their experience and truly restore their dignity as humans and promote their role in nation building. To be able to do this, the institution must ensure that it reaches all victims in the furthest corner of the country and abroad. It must therefore establish its presence across the country ensuring that regional teams have adequate logistical support including transport and communication facilities that is critical to their work.⁸³

8.4 Relationship with the Amnesty Act

The working bill seeks to create an Amnesty Committee with powers to consider applications for the grant of amnesty.⁸⁴ Like the South African TRC, the Amnesty committee, is empowered to grant amnesty in respect of those acts, omissions or offences for which the applicant has made full disclosure.⁸⁵ It is further provided that the Amnesty Committee shall have no jurisdiction to admit for hearing and grant of amnesty to persons who may have committed crimes that falls within the jurisdiction of the ICD until such a time, as the DPP

⁸¹ T Sowa 'Children and the Liberian Truth and Reconciliation Commission' in S Pamar et al., (eds) *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (2010) 198.

⁸² For example the Amnesty Act and Commission put more emphasis on the needs of perpetrators as discussed in the previous chapter and in formal prosecutors as discussed in chapter 3 and 4, the most likely role victims will have is that of witnesses and they will not have a platform to narrate their experiences and have them acknowledged.

⁸³ Hayner (n 23 above) 600; states that many truth commissions are limited by mandate, political constraints, restricted access to information or by lack of resources including logistical, human and financial challenges that are the determining factors to the work of truth commission; Quinn (n 31 above) 414; further states that the 1986 commission faced chronic shortages in transportation to and from hearings outside Kampala, and also in stationary that sometimes the Commissioners were forced to ask those who had come to give testimony to provide their own paper and pen in order for the testimony to be recorded.

⁸⁴ Working bill part IV(H) & part V(B).

⁸⁵ Working bill part V(B)(b).

shall advise that it shall not prosecute such a person.⁸⁶ This step ensures accountability of those who will receive amnesty. For the sake of continuity and to show commitment to its policies and laws, the founding legislation should not unilaterally revoke amnesty already granted, as this could lead to loss of faith in the government by the general public and doubts on the seriousness of accountability pursuits, that it is undertaking.⁸⁷ However, the legislation must spell out that even those already granted amnesty must cooperate and give testimony to a truth commission without fear of implicating themselves, as criminal proceedings will not be instituted against them.⁸⁸

8.5 Relationship with formal prosecutions

Unlike most transitional states that opt for either prosecutions or truth telling processes, Uganda is considering prosecutions and truth telling processes as complementary accountability measures. The work of a truth commission will no doubt overlap with that of the ICD and the ICC as they have similar objectives such as ensuring accountability and preventing reoccurrence though the means used to achieve this end may differ. The co-existence in Sierra Leone of the Truth and Reconciliation Commission (TRC) and Special Court for Sierra Leone (SCSL) is especially instructive for Uganda. The use of these two options in Sierra Leone represents a unique and unprecedented experiment and most importantly demonstrates some of the tensions that the different measures are likely to face as well as the feasibility of their coexistence.⁸⁹

The SCSL had the mandate to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.⁹⁰ While the TRC had the mandate to look into human rights violations from, 23 March 1991 when the conflict in Sierra Leone

⁸⁶ Working bill part V(A)(1).

⁸⁷ See further discussion in chapter four and six of the thesis.

⁸⁸ This was the case in Sierra Leone, where the TRC took testimonies from several perpetrators granted amnesty under the Lomé Accord.

⁸⁹ WA Schabas, 'Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience' (2004) 98 *American Society of International Law* 198.

⁹⁰ Statute of the Special Court for Sierra Leone art 1(1).

began to the signing of the Lomé Peace Agreement on 7 July 1999.⁹¹ The two Institutions never came to a formal agreement on how they would cooperate; they instead exercised respectful relations with each other.⁹²

According to William Schabas, one of the commissioners for the TRC in Sierra Leone, concerns about overlapping mandates and jurisdictions did not actually play out in any significant way as the day-to-day work of the TRC and the Court shared little common ground. He adds that the two institutions demonstrated that they could work side by side without conflict or tension.⁹³ Schabas also argues that although many Sierra Leoneans did not appreciate the distinction between the TRC and SCSL, what was significant is that the people understood that the institutions were working towards accountability for the atrocities suffered during the war. He suggests that the failure of the people to grasp the distinctions between the two institutions did not represent a significant problem.⁹⁴

This could have been because while the SCSL Prosecutor began to issue indictments in March 2003, actual trials only began in June 2004 at which point, the TRC's work was nearly complete.⁹⁵ This certainly will not be the case in Uganda, as the ICC has already issued five indictments; the ICD has begun its first trial, while a truth telling process is still an idea.⁹⁶ It is therefore very important that these institutions during their operations ensure that Ugandans understand and that there is no confusion about the different roles and functions. The institutions should also ensure that Ugandans clearly understand the purpose of investigations, hearings and statement taking by the different mechanisms and consequences as relates to each institution.

Another area of concern will be information sharing between the different Institutions that potentially will deter perpetrators and witnesses from sharing information with a truth

⁹¹ Truth and Reconciliation Act of Sierra Leone art 2.

⁹² WA Schabas, 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', in WA Schabas & S Darcy (eds) *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truths* (2004) 191.

⁹³ WA Schabas 'The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone (2003) 25(4) *Human Rights Quarterly* 1035.

⁹⁴ As above.

⁹⁵ Schabas (n 92 above) 190.

⁹⁶ The Constitutional Court of Uganda ordered the ICD to cease the first trial of its first case and the ICC indictees are at large.

commission out of fear that the ICD or the ICC will use such information against them or others. The working bill provides that:

The Forum shall have the discretion to grant use immunity from prosecution so that testimony given before any forum or statements given to a forum investigator cannot be used against that witness in a subsequent criminal proceeding as evidence. Provided that use immunity shall not prevent the Office of the Prosecutor using such statements to develop leads or for background purposes in developing criminal cases or establish the crime base in cases of war crimes and crimes against humanity.⁹⁷

This provision may discourage potential witnesses from giving testimony to a commission due to fear of incriminating themselves or simply fear of being required to give evidence in Court. In Sierra Leone, the TRC publicly stated that it would not share confidential information with the SCSL and the SCSL Prosecutor on his part stated that the Court would not use evidence presented by the TRC.⁹⁸ There are disagreements among commentators on the impact of this. While William Schabas argues that the willingness of perpetrators to participate in truth telling processes has little to do with threat of criminal prosecutions or the promise of amnesty,⁹⁹ Tim Kelsall argues that the presence and work of the SCSL was a factor deterring witnesses from giving testimony before the TRC.¹⁰⁰ Schabas argument can find support in the fact that while only a small number of perpetrators testified before the TRC, other truth commissions that functioned with no threat of prosecution were no more successful in persuading perpetrators to testify.¹⁰¹

Prosecutions and truth telling processes in Uganda will nonetheless have to operate side by side. A truth commission should not withhold important information critical to the prosecutions in the performance of its functions but it should make use of its discretion not to divulge information that could for instance, could be obtained by a court from another source. The current international court practice of ordering disclosure from states can

⁹⁷ Working bill part V(D)(8).

⁹⁸ A Tejan-Cole, 'The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission' (2002) 5 *Yearbook of International Humanitarian Law* 326.

⁹⁹ Schabas (n 92 above) 192.

¹⁰⁰ T Kelsall, 'Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone', (2005) 27 *Human Rights Quarterly* 361, 381.

¹⁰¹ Schabas (n 89 above) 167.

provide guidance on information sharing, where it must be shown that the information is relevant and necessary to the fair determination of a case and that the request for information be specific so as not to be unduly onerous on a state¹⁰² or a truth commission, in this case.

Closely related to the above, it is necessary that members of a truth commission and staff be granted immunity from testifying in proceedings before the ICD or the ICC during and after the completion of their work, so that witnesses who give confidential information have the assurance that their confidentiality will be respected. The working bill makes a provision that:

Every representative and every staff member of the Forums shall keep in strict confidence any information, which comes to his or her knowledge by virtue of their office or association with the forums, and shall take an oath or affirmation of that duty.¹⁰³ The Forum shall not release or communicate any of the information it acquires during the course of its existence to any individual or institution except as is necessary to carry out its mandate.¹⁰⁴

These provisions are very important and allow the TRC and formal prosecutions to function autonomously without being drastically affected by each other's operations.

Another related issue is whether persons being prosecuted can give testimony to a truth commission. The working bill does not restrict members from taking testimony from anybody¹⁰⁵ and that should extend to persons indicted both nationally and internationally to give the TRC room to fulfil its mandate of creating an impartial historical record,¹⁰⁶ which will require testimony from not only from victims and witnesses but also perpetrators. In Sierra Leone, several detainees of the SCSL, including Sam Hinga Norman of the Civil Defence Forces (CDF), Augustine Gbao, and Issa Sesay of the Revolutionary United Front (RUF) approached the TRC about giving public testimony. This request provoked the only

¹⁰² M Wierda et al; 'Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone' (2002) *The International Centre for Transitional Justice* 3; Rules of Procedure and Evidence of the International Criminal Court for the former Yugoslavia, rule 54 bis.

¹⁰³ Working bill part V (D)(7)(a).

¹⁰⁴ Working bill part V(D)(7)(b).

¹⁰⁵ Working bill part III(A)(1) extends the jurisdiction of the truth process to all nationals and all atrocities committed within the geographical limits of Uganda.

¹⁰⁶ Wierda et al., (n 102 above) 3 - 4.

public tension between the institutions. While the TRC intended to receive testimony from the detainees, the SCSL Prosecutor opposed public testimony. The matter was brought for determination before a Trial Chamber of the SCSL by detainee Sam Hinga Norman and the TRC.

Judge Bankole Thompson, in his decision, refused the request to conduct a public hearing of the detainee in the interest of justice and to retain the integrity of proceedings before the SCSL. The Judge was careful to point out that the TRC Act allowed the TRC to receive testimony from victims, witnesses; perpetrators and that none of the categories properly defined an accused.¹⁰⁷ This point should be carefully considered in a founding legislation of a truth commission in Uganda to avoid such collision. On appeal, Justice Robertson reached a common ground, allowing the accused to give private rather than public testimony to the TRC;¹⁰⁸ the accused then, refused to cooperate with the TRC after having been deprived of a public platform.¹⁰⁹

As demonstrated above, a TRC and formal prosecutions can co-exist in Uganda, as was the case in Sierra Leone. All potential issues of conflict and perception can be sorted out by careful drafting of founding legislation. In addition, during operations, regular meetings between liaison staff of the different institutions should be encouraged to ensure smooth interactions of the institutions.¹¹⁰ A robust outreach programme categorically stating the different functions and roles of the processes, purpose of evidence collected and a clear spell of confidentiality guarantees will iron out negative perceptions. In addition, the mechanisms would benefit a great deal from collaborating in outreach efforts to provide opportunity to explain their distinct and autonomous nature, while at the same time avoiding contradictions and rivalry and enhancing confidence in all processes. The success of

¹⁰⁷ *Prosecutor v Sam Hinga Norman* Case No. SCSL.2003.08.PT, Decision on Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Sam Hinga Norman JP (29 October 2003) SCSL Trial Chamber para 3.

¹⁰⁸ *Prosecutor v Sam Hinga Norman*, Case No. SCSL.2003.08.PT Decision on Appeal Chamber by the Truth and Reconciliation Commission (TRC) of Sierra Leone and Sam Hinga Norman JP Against the Decision of his Lordship, Mr. Bankole Thompson Delivered on 30 October 2003 to Deny the TRC's Request to Hold a Public Hearing with Sam Hinga Norman JP (28 November 2003) SCSL Appeal Chamber para 47.

¹⁰⁹ Schabas (n 92 above) 48.

¹¹⁰ Wierda et al., (n 102 above) 19.

the institutions above all will depend on the high calibre of officials and staff and their ability to deal wisely with challenges that will inevitably arise.¹¹¹

8.6 Reparations

The working bill defines reparations as any remedy or any form of compensation, symbolic or ex-gratis payment, restitution, rehabilitation or recognition, reconciliation, satisfaction or guarantee of non-repetition made in respect to victims¹¹² in effect encompassing the definition as enumerated in the Van Boven Principles. The government has made some timid effort towards compensation, specifically through the Acholi War Debt Claimants Association, a victim lobby group advocating for comprehensive compensation for the loss of human life, livestock and other property destroyed during the war, created in 2005. This body and the government reached an out of court settlement, where the government agreed to pay 38 trillion shillings for property lost during the war due to government action. So far, the government has only 2.1 billion.¹¹³ There is a further and huge need for a coherent reparations plan for the millions of victims of the LRA conflict that could be implemented through a truth commission.¹¹⁴

The working bill in part II(C)(1) enumerates the functions of the truth commission, which includes making recommendations for reparations. The truth commission is tasked with making recommendations to the government and other actors with regard to the most appropriate modalities for implementing a regime of reparations and rehabilitation. These must take into account the needs of victims and perpetrators for psychosocial or other rehabilitative services.¹¹⁵ Victims groups have identified categories of serious violations that they believe should trigger the right to reparations. These includes; killing, torture or cruel, inhuman or degrading treatment, abduction, slavery, forced marriage, forced recruitment, mutilation, sexual violence, serious psychological harm and forced displacement. Pillage,

¹¹¹ As above.

¹¹² Working bill part I(B)(18).

¹¹³ See http://savenorthernuganda.org/about_us.html (assessed 1 March 2012); several victims are dissatisfied with this compensation that has been limited to cattle lost during the war. The victims state that while they lost hundreds of herds, they have been compensated for the loss of one or two cattle now.

¹¹⁴ Government Compensation to Acholi War Claimants not Enough' the Daily Monitor 23 Nov 2011.

¹¹⁵ Working bill part III (B)(13).

looting and destruction of property were also indiscriminate and committed by both the UPDF and the LRA without any due regard to IHL and IHRL.¹¹⁶ Most central in this is the loss of land that the government seized to create military facilities and IDP camps, for which, the people have not received compensation.¹¹⁷ In addition, politicians and other persons connected to the government are said to have taken by force land belonging to the local populace without any compensation.¹¹⁸

The working bill however, does not clearly state the government's responsibility in terms of funds for reparations; other sources for funds or guidelines on how to go about securing funds for reparations.¹¹⁹ It is left for a truth commission to make recommendations on the appropriate measures.¹²⁰ The mandate to make recommendations on reparations is best carried out by a truth commission, given that in the course of its work, a truth commission can define and compile information about victims. This is a very important step in the design and implementation of reparations programmes otherwise; such vital information may be missing. For example, in Colombia, discussions about reparations took place without much information about the number of victims, their socio-economic profile or even their location.¹²¹ Colombia's plan relied on judicial determinations for individual, collective, or symbolic reparations, in accordance to the law.¹²² In other words, the burden of seeking reparations was on the victims who had to present claims before courts and could only receive reparations after establishing responsibility for and circumstances surrounding the

¹¹⁶ Uganda Human Rights Commission (UHRC) & United Nations Office of the High Commissioner of Human Rights (UNOHCHR) *"The Dust has not yet Settled" Victims View on a Right to Remedy and Reparations: A Report from the Greater North of Uganda* (2011) XII; for further details on international crimes perpetrated in the LRA conflict, see discussion in chapter two.

¹¹⁷ UHCR & UNOHCHR (n 116 above) XVI; in addition details that Karamojong cattle raiders are said to have taken advantage of the situation including the lack of protection afforded by the government to kill, rape and loot properties of people in the war affected region.

¹¹⁸ Discussions with several people resident in Northern Uganda.

¹¹⁹ As much as I opined in the previous chapter that the government must not get involved in providing compensation for cases handled through traditional justice processes as it may tarnish the credibility of the process; the government must be the central contributor for compensation and other reparation award recommended by the truth commission.

¹²⁰ The Commission is expected to make recommendations on appropriate reparations programme that will be implemented at the end of its mandate, perhaps by another institution.

¹²¹ Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Rule-of-Law Tools for Post-Conflict States: Reparations Programmes' (2008) 11.

¹²² L J Laplante & K Theidon, 'Transitional Justice in Times of Conflict: Colombia's Ley de Justicia Y Paz' (2007) *University of Michigan Law School* 95; referring to art 8 of Justice and Peace Law of Columbia, 975 of 22 July 2005.

human rights abuse, a great weakness in the Columbia law. In contrast, by the time South Africa TRC published its report, including its recommendations on reparations, it had collected a large amount of information about the potential beneficiaries.¹²³

The working bill further, intends the membership in a truth commission to include civil society representatives and since JLOS is undertaking a nationwide consultative processes leading to policy, legislation and design of the institution. It follows that the truth commission may enjoy a very high degree of moral capital, and this might have a positive impact on how its recommendations generally and particularly on reparations are perceived and implemented. Nevertheless, truth commissions, even those with high moral capital, are not necessarily strong political players over time. The temporary nature of the institution means that, unless specific provisions are made in advance, there may be little or no follow-up on their recommendations, including those on reparations.¹²⁴

In addition, recommendations of truth commissions are not usually binding on states; therefore, governments may ignore them, and even where they were binding, implementation is not guaranteed. For example, as much as El Salvador's Truth Commission did not propose a reparations plan as such, it did make a few concrete recommendations, including dedicating 1% of foreign assistance to reparations, which the government ignored. Guatemala's Commission for Historical Clarification made ambitious recommendations for reparations which were also ignored by the government.¹²⁵ Moreover, some governments only partially implemented recommendations on reparations by truth commissions, for example in South Africa, a committee focused on reparations and rehabilitation featured the importance of reparations as an integral part of South Africa's reconciliation and transition project.¹²⁶ The Reparations and Rehabilitation Committee (RRC), was tasked to identify victims; seek victim's input regarding the type of reparations to be adopted; and to design and recommend reparations program to the government, to be implemented via

¹²³ OHCHR (n 121 above) 11.

¹²⁴ OHCHR (n 121 above) 11.

¹²⁵ OHCHR (n 121 above) 12.

¹²⁶ CJ Colvin 'Overview of the Reparations Programme in South Africa', in P de Grieff (ed), *A Handbook on Reparations* (2006) 176.

legislation.¹²⁷ Although it was noted that reconciliation was not possible without reparations, the RRC was not as visible like the amnesty and reconciliation committees and it did not have an independent budget except for a small amount used for emergencies like medical attention for those who testified at the TRC's hearings.¹²⁸

In the performance of its role, the RRC was criticised for not being adequately inclusive and participatory.¹²⁹ For instance, truth telling and reparations were linked and that meant that only those who were able or prepared to approach the TRC to give testimony benefited from financial compensation. Many people were unaware of the implications of not approaching the TRC in relation to receipt of compensation, poor people in rural areas who lacked information and education on these issues were particularly affected. It is very likely that many female victims of sexual violence were unable to approach the TRC because of stigma, fear, unwillingness to re-live tragedies and a range of related reasons.¹³⁰

In addition, the Promotion of National Unity and Reconciliation Act, which authorised the South African TRC, included no requirements for reparations from perpetrators or beneficiaries of apartheid. The Act did not call for reparations directly from perpetrators to victims even though under the traditional system, *ubuntu*, an African philosophy of humanity, one who violates community law is required to pay a debt - *ulihlawule*. The Act thus broke this link between the violation and the obligation.¹³¹ In addition, whilst the range of reparations proposed by the RRC was comprehensive, financial compensation was conservative.¹³² The TRC recommendations exist in varying degrees of implementation. Community reparations, for example, have not been fully developed by the government

¹²⁷ This was unlike the Amnesty Committee that also had the enforcement power, a weakness in the South African TRC Act.

¹²⁸ Colvin (n 126 above) 176.

¹²⁹ University of Witwatersrand, 'Traces of Truth: The South African TRC' http://truth.wvl.wits.ac.za/cat_descr.php?cat=4 (accessed 15 Nov 2010).

¹³⁰ B Goldblatt, 'Gender and Reparations in South Africa' *International Centre for Transitional Justice and International Development Research Centre* <http://www.ictj.org/static/Africa/SAfrica/SouthAfricaExecsSum.pdf> (accessed 15 Nov 2010).

¹³¹ LS Graybill *Truth and Reconciliation in South Africa: Miracle or Model?* (2002) 6 – 8.

¹³² MR Amstutz *The Healing of Nations: The Promise and Limits of Political Forgiveness* (2005) 196 -197; the RRC principle recommendation was that the government should grant all victims monetary reparations and recommended equal financial compensation to all qualified victims regardless of need or level of suffering of 20,000 USD over next six years. In April 2003, the government promised instead to pay 3,900 USD to each of the victim's families. Considering that this amount was intended to serve not just as compensation but also contribute to a better quality of life for survivors, it is a very conservative sum, which is yet to be paid.

because it insists that victims should avail themselves with the existing government services. This has left victims feeling that they were poorly treated.¹³³

In Peru, the *Comisión de la Verdad y Reconciliación* (CVR) proposed detailed reparations measures for different types of abuses, including the restitution of rights for political detainees and economic benefits for the disabled, families of those who disappeared, and victims of rape. The President took the necessary step and asked for forgiveness in the name of the state, from all victims, but rejected calls for individual compensation citing Peru's scarce resources. It is therefore not surprising that the victims found the truth telling process and apology insincere.¹³⁴

These experiences show that reparations are often perceived to be a luxury that only affluent states can afford but governments need to appreciate that reparations are a necessity, a matter of legal obligation, and therefore a priority.¹³⁵ The key issue is not the financial capacity of the state but rather the strength of political alliances that support reparations. Where political alliances supporting reparations are weak or non-existent, financing for such programs will also be weak or non-existent.¹³⁶ How governments develop, speak about and deliver reparations programs generate a context that must be consistent with the overall aims of the reparations. That is, the recognition of the harm suffered and recognition of the humanity of the person(s), individually or collectively affected; building civic trust among citizens and between citizens and the institutions of the state; and promoting social solidarity.¹³⁷ One must also bear in mind that, because of their past mistreatment, victims are already sensitive to the rhetoric of governments and politicians and feel excluded from society and the state.¹³⁸ The government of Uganda must therefore endeavour to make reparations a reality for the victims.

¹³³ Goldblatt (n 130 above).

¹³⁴ The International Centre for Transitional Justice (ICTJ) & the International Development Research Centre (IDRC) 'Repairing the Past: Reparations and Transitions to Democracy, Perspectives from Policy, Practice and Academia' *Symposium Summary (Ottawa Canada)* 11 – 12 March 2004 http://www.ier.ma/IMG/pdf/REPARATIONSsymposium_report_.pdf (accessed 15 Nov 2010).

¹³⁵ ICTJ & IDRC (n 134 above).

¹³⁶ ICTJ & IDRC (n 134 above).

¹³⁷ N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004) *Hastings International and Comparative Law Review* 212.

¹³⁸ ICTJ & IDRC (n 134 above).

In addition, governments should resist the temptation to substitute normal development measures for reparations as the link between benefits and abuses is weakened and reparations are undermined. Development is an important factor in establishing sustainable economies, but it is an entitlement of every citizen not because they are victims. Hence, it is imperative that reparations programs preserve the integrity of the link between violations and obligations.¹³⁹ Reparations should provide direct remedy to the victims of atrocities that signify public acknowledgement that a state or perpetrator committed violations or abuse and/ or a state's failure to prevent violations and harms and its responsibility to redress these serious violations. However, development efforts should underpin key reparations efforts to help bolster and strengthen reparations. For example, governments could construct roads to enable access to and from more remote and isolated communities that bore the brunt of violence, as was the case in Guatemala. In addition, staffing and rebuilding of schools and health centres in conflict affected areas could be prioritised by national development initiatives as was the case in Peru and the international community could assist in building the capacity of the state to manage and undertake reparations programme as the attempts in Nepal.¹⁴⁰

The founding legislation must clearly define the duties of the state to make reparations and spell out clearly, that victims can seek compensation from the perpetrators.¹⁴¹ The legislation should further include a clause requiring reparations to be financed through the state budget, a model used in Argentina, Brazil, and Chile, which has been more effective in procuring the necessary financial resources for reparations.¹⁴² The budget line for reparations should be permanently established to respond to reparations needs that may

¹³⁹ ICTJ & IDRC (n 134 above) stating that in Peru, President Toledo proposed a Peace and Development Plan worth 820 million USD to support reconstruction in the areas most affected by the conflict. This fund isn't specifically linked to the actual abuse suffered therefore its reparatory effect may be extremely limited. The paper further argues that if community reparations and development are simply interchanged, then the program risks losing its individual component, thereby decreasing its ability to recognise individual harm and suffering.

¹⁴⁰ UHCR & UNOHCHR (n 116 above) 19 – 20; see further discussion on government's development effort below.

¹⁴¹ Joint Principles principle 31.

¹⁴² I Cano & PS Ferreira 'The Reparations in Brazil' in P de Greiff (ed) *A Handbook on Reparations* (2006) 102; E Lira 'The Reparations Policy for Human Rights Violations in Chile' in P de Greiff (ed) *A Handbook on Reparations* (2006) 55; MJ Guembe 'Economic Reparations for Grave Human Rights Violations: The Argentinean Experience' in P de Greiff (ed) *A Handbook on Reparations* (2006) 21.

arise in future. The founding legislation should further require the government to raise additional and separate funds from external donors, well-wishers and other development partners to support its efforts. Any such support from externals should be treated as a separate fund and not replace government's contribution. The fund should be channelled through the national body responsible for implementing reparations.¹⁴³

In addition, provisions on reparations should be informed and sensitive on gender needs to facilitate the effective and meaningful participation of females. Females are more disadvantaged within societies before, during and after war and for socioeconomic, physical and psychological reasons, they experience violations and outcomes differently.¹⁴⁴ The effects and outcomes of particular violations, affects them adversely and differently from males and some forms of violence specifically targets them.¹⁴⁵ Therefore, a reparations programme should consider this and address the disproportionate effects of the crimes and violations on women and girls, their families and their communities.¹⁴⁶

The Nairobi Declaration that comprehensively provides for a gender-just understanding of the right to a remedy and reparations should be used as the guiding document on any reparations policy in Uganda. In addition, due to stigma, victims of sexual crimes, both males and females are usually reluctant to come forward to claim reparations. The founding legislation should therefore include measures to enable them to come forward even after a formal prescribed period has expired.¹⁴⁷ In addition, trained specialists should be made

¹⁴³ Uganda Victims' Foundation C/o Africa Youth Initiative Network 'Statement on the Need for Reparations and Guiding Principles for Victims of Crimes Perpetrated in Uganda' (6 May 2011) 5.

¹⁴⁴ R Rubio-Marín 'Introduction: A Gender and Reparations Taxonomy in R Rubio-Marín (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (2009) 2- 3.

¹⁴⁵ Several international instruments recognise and reflect in their provisions how violence and other abuses affect girls and women adversely and differently from males for instance the CRC and the two optional protocol on The Involvement of Children in Armed Conflict and the Sale of Children, child Prostitution and Child Pornography; The Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children that Uganda is a party to. In addition, several policy outcomes of intergovernmental processes have reached consensus on this issue, for instance, the Beijing Platform for Action (1995); the Outcome of the Twenty-Third Session of the General Assembly (2000); The International Conference on Population and Development (1994); the World Summit for Children (1990); the Millennium Declaration (2000) that led to the Millennium Development Goals (2005); as well as the various Security Council Resolutions such as Resolution 1325 on Women Peace and Security; Resolutions 1261, 1314, 1379, 1539 and 1612 on Children and Armed Conflict.

¹⁴⁶ Nairobi Declaration on Women's and Girls' Right to Remedy and Reparations 22 May 2007 (Nairobi Declaration) preamble.

¹⁴⁷ Nairobi Declaration clause 3(g).

available to victims of sexual violence to help with administrative procedures necessary to obtain reparations.¹⁴⁸

Related to the above is the need to, review, reform and educate the public on laws that are gender biased. For instance, customary laws as regards property ownership and inheritance that the vast majority of the population relies on are imbued with gender inequalities. These customary laws discriminate against females and they are used to deny them vital resources like land.¹⁴⁹ In addition, laws defining and establishing parameters of sexual violence as well as the onerous evidentiary burden such as those requiring eye witness corroboration, medical examination and police reports in cases of sexual violence must be reformed.¹⁵⁰ Such reforms shall allow a gender sensitive reparations programme.

Most importantly, the reparations programme should provide an indication to victims and others that the government takes human rights violations and abuses seriously and that the government is determined to contribute to the quality of life of victims. To the extent that reparations programme may become part of a political agenda that enjoys broad and deep support, they might even have a positive impact not just on social trust between citizens and the institutions of the state, but also among citizens.¹⁵¹ If integrated and implemented within a comprehensive accountability process, reparations might provide beneficiaries with a reason to think that the institutions of the state take their well-being seriously, that they are trustworthy, this in turn will create an environment conducive for reintegration and reconciliation.

8.7 Reintegration and reconciliation

As the title of the proposed bill suggests, one of the result of the truth commission is to ensure reconciliation in Uganda.¹⁵² Broadly speaking, the mandate of the forum is to

¹⁴⁸ UHCR & UNOHCHR (n 116 above) 28.

¹⁴⁹ D Mulumba 'Property Rights and Marginalised Groups in Uganda' a paper presented at the national Consultation Conference: Legal Empowerment of the Power (Nov 2006) 14.

¹⁵⁰ UHCR & UNOHCHR (n 116 above) 24.

¹⁵¹ OHCHR (n 121 above) 30- 31.

¹⁵² The proposed bill is titled 'The National Reconciliation Bill 2009'.

promote national peace, unity and reconciliation.¹⁵³ The working bill comprehensively provides for the promotion of reconciliation. Some of way includes, facilitating and initiating or coordinating enquiries into the history of conflicts;¹⁵⁴ determining the nature, causes and manifestations including violations and abuses of human rights.¹⁵⁵ Identifying those responsible¹⁵⁶ and conducting investigations and holding hearings.¹⁵⁷ Restoring the dignity of victims by giving them the opportunity to provide an account of violations or abuses suffered.¹⁵⁸ Promoting truth telling in communities¹⁵⁹ and seeking assistance from traditional, cultural, religious leaders, foreign governments, individuals and organisations among others to facilitate sessions and resolve local conflicts.¹⁶⁰ Promoting and encouraging preservation of memory and producing a comprehensive final report¹⁶¹ and making recommendations on the appropriate modalities for reparations and rehabilitation.¹⁶² Designing reconciliation initiatives and conducting symbolic reconciliation activities in collaboration with relevant institutions throughout the nation and encouraging or facilitating inter-communal reconciliation initiatives.¹⁶³

Challenges to reintegration as communities in Northern Uganda move back to the homes of origin are already immense. In 2008, the government issued Camp Phase-Out Guidelines, which included plans for the gradual demolition of abandoned huts as IDPs moved to decongestion camps. The camp phase-out focused exclusively on return without other options for those who were forced to or those who choose to stay in the camps. Majority of those forced to stay are the most vulnerable groups including orphaned children who do not know their original homes, children heading households and could not build huts in their original homes and the elderly.¹⁶⁴ In 2009, the government phased out camps; basic services

¹⁵³ Working bill part III(B).

¹⁵⁴ Working bill part III(B)(1).

¹⁵⁵ Working bill part III(B)(2).

¹⁵⁶ Working bill part III(B)(3).

¹⁵⁷ Working bill part III(B)(4).

¹⁵⁸ Working bill part III(B)(5).

¹⁵⁹ Working bill part III(B)(6).

¹⁶⁰ Working bill part III(B)(7) &(8).

¹⁶¹ Working bill part III(B)(10), (11) & (12).

¹⁶² Working bill part III(B)(13).

¹⁶³ Working bill part III(B)(14).

¹⁶⁴ According to the Durable Solutions Officer of NRC; NRC and other NGOs stepped in to construct houses for some of the vulnerable children who knew their original homes but those who do not have land were left out of this program.

were discontinued and that ensured de facto return. Those who could not leave were left to negotiate a way forward with landowners, with no involvement of government.¹⁶⁵

According to aid workers and local government officials, the majority of the population in Northern Uganda have returned to their original homestead while others have settled in originally unoccupied land¹⁶⁶ but there are still many scattered groups of vulnerable people, especially children and the old in the camps and live at the mercy of the landowners. Yet, many youth find the transition from life in the camps to life in villages challenging as the majority lack any agricultural skills, which are the main way of life in the villages. This has led to the increase in the number of street children in the larger towns and an increase in the number of robberies, alcohol and drug abuse in the region, a severe impediment to reintegration.¹⁶⁷

As a measure to ensure return and reintegration after decades of displacement and insecurity, the government and its development partners developed the Peace Recovery and Development Plan (PRDP) and Northern Uganda Social Action Fund (NUSAF) as part of the framework for rebuilding the affected areas, ensure reintegration of the displaced, former abductees, and returned rebels. The first phase of the PRDP was completed but the government extended the implementation to cover 40 districts instead of the original 14 districts affected by the conflict. This was done without any increase in funding and significantly reduced the intended impact of the PRDP in the affected districts.¹⁶⁸ In addition, the PRDP and NUSAF and other programmes of the developmental partners have emphasised construction of schools and health centres without the necessary equipment and personnel to keep them running. As a result, a number of newly built schools and health

¹⁶⁵ Interview with NRC and UNHCR officials that specifically handled camp management in Northern Uganda.

¹⁶⁶ Land has become a major source of conflict in Northern Uganda; several people have lost claims to clan land that has been taken by the more powerful families and the government, its officials including officials with security organs are cited as the major land grabbers in the region.

¹⁶⁷ Interview with local government officials and staff of civil society organisations including Save the Children in Uganda, the Norwegian Refugee Council and CARITAS conducted in Gulu between 19 to 25 October 2011.

¹⁶⁸ Interview with officials working with the Norwegian Refugee Council; Save the Children in Uganda and local government officials in Gulu district.

centres lie dormant. This creates a further negative impact on the rebuilding and reintegration process.¹⁶⁹

Several children lost parents during the conflict and have assumed the adult role of heading households and caring for younger siblings – often the children drop out of school to undertake this role. Traditionally, the extended family would step in to take care of such children but due to poverty, families are no longer willing or able to do so, yet, some children lost the extended family in the conflict. There is hardly any data on the number of child headed households in Northern Uganda but according to local government officials, they could be in thousands.¹⁷⁰ These children face a number of difficulties often in securing physical safety, shelter, food, health and education for themselves and their siblings.¹⁷¹

Although several of government officials and aid workers interviewed state that stigma has reduced, the formerly abducted and returned rebels say they are subject to stigma and ridicule and several are alienated from family. Families of victims expose many formerly abducted children to potential dangers such as revenge and stigma that keeps them away from school and the villages of their birth; instead, they seek life on the street.¹⁷² A great number of street children in Gulu are formerly abducted children. According to an official with the World Vision, ‘several of the children are traumatised and have behavioural problems including habitual recourse to violence which they use as a survival strategy. This makes it difficult for them to reintegrate into normal life.’¹⁷³ As evidence of this ‘at least 70% of juvenile offenders in Gulu prison are formerly abducted children facing charges of rape, defilement, assault, theft and different degrees of robberies.’¹⁷⁴

Formerly abducted girls face a more precarious situation; many were subjected to forced marriages and have had children as a result. These girls or women and their children usually

¹⁶⁹ This information was consistent among all interviewees, but, there seems to be no data to show the school and health centre buildings not active.

¹⁷⁰ Discussion with the Probation and Welfare Officer in Pader district conducted on 22 Oct 2011.

¹⁷¹ John Bosco Oryema, a 15-year-old boy living in the former camp in Acholi Bur with his 4 siblings, gave this information.

¹⁷² A great number of street children in Gulu are former abductees and they cite stigma, ridicule and alienation from families as reason why they left their villages.

¹⁷³ Interview with an official at the World Vision Reception Centre in Gulu conducted on 21 Oct 2011; the officer added that there are no reported cases of former abductees or rebels that have been killed.

¹⁷⁴ Information from the Probation and Social Welfare Officer in Gulu district.

have nowhere to go, going back to their families is not always an acceptable option since, according to the patrilineal societies in Northern Uganda; children belong to their fathers. The culturally appropriate place for female returnees with children is to resettle in communities of the father of their children but several of these men are still active with the LRA. The women may be unaware of the villages and where they know, the women may not be recognised as 'wives' or/and their children recognised as belonging to the family and clan. There is a general reluctance to accept children born in the 'bush' or due to war time rape into lineages, especially so, as it will give these children claims over clan lands.¹⁷⁵ In addition, gendered hierarchies have been flaunted and those who can have demanded and continue to demand various kinds of recompense. Ownership of property, especially land will be bitterly contested and will divide families as already evidenced; a large number of children and young adults born in the 'bush' or out of war time rape have not be accepted into clan lineages.¹⁷⁶

At the national level, there is also a need to overcome ethnic, religious and regional divisions and tension dating back to the colonial era and has been cited as a major cause of for the LRA conflict.¹⁷⁷ At the start of his rule, President Museveni and the NRM embarked on an ambitious program of popular inclusion that aspired to transcend all divisions and promised fundamental change in the politics of the country.¹⁷⁸ Like his predecessors, he has so far failed at the process of national integration and there are now serious doubts about the ability or desire of the NRM government to resolve longstanding antagonisms and divisions.¹⁷⁹

The once promising democratic transition has weakened and power has become increasingly centralised and concentrated in the President's hands. Power plays by President Museveni have included the removal of constitutionally mandated term limits to allow him

¹⁷⁵ T Allen *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2006) 171.

¹⁷⁶ Allen (n 176 above) 171 – 172.

¹⁷⁷ See further discussion contained in the introductory remarks in chapter one.

¹⁷⁸ International Crisis Group 'Uganda: No Resolution to Growing Tension' Africa Report No 187 (5 April 2012) 7; referring to YK Museveni 'Ours is a Fundamental Change' in YK Museveni (ed) *What is Africa's Problem? Speeches and Writings on Africa* (1992) 21; YK Museveni (1985) *Selected Articles on the Uganda Resistance War* 46; the initiatives the government introduced to solve the longstanding divisions and broaden NRM support included the national 'no party' structure, broad based government and a process to adopt a constitution through extensive popular consultations.

¹⁷⁹ International Crisis Group (n 178 above) 8 -9.

unlimited term in office and the arrest of political opponents prior to elections and increasing harassment and intimidation of political opponents. State policies have created a more personal, patronage based, executive centred, and military reliant regime. Many of the state policies enrich the President's inner circle, intensifying resentment.¹⁸⁰ Popular protests are on the rise every day, for instance the 'walk to work' protest that started after the re-election of the President in 2011, ostensibly over the rising cost of living but clearly directed at Museveni's rule, continue in Kampala and other urban centres despite a violent crackdown. These frequent demonstrations and violent crackdowns by the government indicate that many sectors of the society are deeply dissatisfied and the government's methods of resolving the dispute are far from satisfactory.¹⁸¹

Further, Uganda confirmed significant oil reserves, predominantly located in the Lake Albert region in the border with the DRC (estimated at 2.5 billion barrels) for commercial extraction in 2006, that many fear is a curse rather than a blessing as it may become an additional source of division.¹⁸² If extracted, these resources would put Uganda among the top 50 world oil producers, which could be quite a boom for Uganda doubling or tripling its current export earning but it is also likely to exacerbate social and political tension. The oil may ensure President Museveni's control by enabling him to consolidate his system of patronage and will increase corruption. If President Museveni gains access to substantial oil revenue, the combination of considerable oil funds and strong presidential powers could increase the ability of his government to remain in power indefinitely.¹⁸³

Indeed, President Museveni is reported to have categorically stated that, he discovered the oil and that it is his duty to ensure that it benefits all before he leaves power. This is a ploy to secure a life presidency that can only be sustained through an expensive patron-client system, and the construction of a state security machinery to intimidate and harass those

¹⁸⁰ International Crisis Group (n 178 above) 1.

¹⁸¹ International Crisis Group (n 178 above) 1.

¹⁸² The fears that abundant natural resources are a curse are unscientifically drawn from Nigeria, Sierra Leone, the DRC and Sudan among others that have all experienced at one time or another different levels of armed conflicts due to poor institutional and governance quality that allows national elites to become corrupt and give maximum advantage to foreign mining companies to reap huge profits.

¹⁸³ J Kathman & M Shannon 'Oil Extraction and Potential for Domestic Instability in Uganda' (2011) 12(3) *African Studies Quarterly* 27.

who dare to oppose or question government dealings.¹⁸⁴ This inevitably will involve an increase in corrupt behaviour and a reduction in government transparency in oil and tax revenue management that can only be accomplished through an increasing autocratic relationship with the public and political opponents. This unfortunately is a reality that Uganda will face as already witnessed through the October 2011 parliamentary revolt over the lack of transparency in oil contracts and alleged resulting large payment in bribes to government ministers.¹⁸⁵

In addition, the Lake Albert region is an ecologically sensitive area with an enormous amount of biodiversity, if not properly managed; oil extraction could lead to environmental degradation that could lead to local strife.¹⁸⁶ Further, there are indications that social unrest could be on the rise in the region. As news of the oil deposits has spread, large numbers of people from outside the region have begun to move into areas that they expect to be rich in oil with the goal of obtaining oil rents from the government. This had generated animosities among the Banyoro people who are the longstanding inhabitants of the region on the Ugandan side of Lake Albert. In addition, given that the oil reserves were discovered under what is largely Bunyoro land, the Bunyoro kingdom has called for a greater share of oil revenues as compensation for hosting the oil extraction infrastructure. Yet, such an agreement is likely to exacerbate the existing ethnic and regional conflict and produce further unrest due to migration to the oil rich region.¹⁸⁷

The foregoing clearly shows that it is dangerous to assume that reintegration and reconciliation will be an easy process in Uganda. On the contrary, it will be a long, painful and difficult process and violent incidences can be anticipated. The success of the process

¹⁸⁴ W Okumu 'Uganda May Face an Oil Curse' Africa Files 1 June 2010.

¹⁸⁵ See for instance; 'Top Ministers took Bribes from Tullow Oil – Parliament Told' the Independent 11 Oct 2011; 'Oil Bubble Burst' the Monitor 11 Oct 2011; 'MPs Demand Halt in Government Oil Deals Citing Bribery' the Monitor 11 Oct 2011; Kutesa and Onok Willing to Step Aside, Mbabazi Stays Put' the Monitor 12 Oct 2011; 'Here is What is at Stake with Uganda's Oil' the Monitor 12 Oct 2011; 'Accused Ministers Deny Corruption' the Monitor 12 Oct 2011; 'MPs Order Ministers to Resign over Alleged Oil Bribes' 12 Oct 2011; 'MPs Collect Signatures to Censure Ministers Named in Saga' the New Vision 12 Oct 2011; 'Oil Saga – Museveni Speaks Out' the New Vision 12 Oct 2011.

¹⁸⁶ Kathman & Shannon (n 183 above) 24.

¹⁸⁷ Kathman & Shannon (n 183 above) 29 – 30; in addition, the Lake Albert region is a politically sensitive area that lies between Uganda and the DRC that have had a violent history and border disputes. In addition, the region has also been vulnerable to rebel activities for instance the ADF in the 1990s and the LRA after the failure of the Operation Iron Fist in 2002. For more, see introductory remarks in chapter one

will largely depend on a political will and readiness to overcome social, political, ethnic and regional divisions. Nonetheless, the recognition that grave wrongs have been committed in the past, that people have been severely victimised and that individuals, groups and institutions have been identified as perpetrators underlines a new moral regime and gives victims confidence required for their re-entry into civic processes of negotiation.

In addition, truth telling, acknowledgment and coming to terms with the past are necessary for societal recovery, reintegration and provide the best ground for reconciliation. It is however, unwise to assume that these will automatically lead to reconciliation. The lesson from South Africa is very instructive for Uganda in this regard. One major critique of the South African TRC was though the South African were far from satisfied, the TRC lectured that South Africans had forgiven perpetrators and were reconciled.¹⁸⁸ Reconciliation is not an event but a process and the work of the TRC is just the beginning of such a process that may take several years to come.

8.8 Conclusion

A truth telling process that ensures equality and non-discrimination in investigation and reparations processes; that puts in place support structures to assist and protect the safety of victims and witnesses and ensures their participation in all related processes;¹⁸⁹ presents Uganda with a great opportunity. An opportunity to know the truth about the many armed conflicts that Uganda has suffered; an opportunity to amend wrongs through reparations and prosecutions and an opportunity to clear the path for institutional reform to ensure non-reoccurrence of conflicts and mass atrocities. This process must allow a victim and civil society lead and participation in policy and legislation design and in the implementation, monitoring and evaluation of the processes. In addition, there must be a political will to

¹⁸⁸ See for instance Nahla Valji, 'Race and Reconciliation in a Post-TRC South Africa' A paper presented at a conference entitled, *Ten Years of Democracy in Southern Africa* (May 2004) Organised by the Southern African Research Centre and Queens University.

¹⁸⁹ This should include the development of flexible reparation processes to enable the most vulnerable victims, such as survivors of sexual violence and children born out of war time rape to have access to reparations. This will include the availability of trained female investigators and health workers; flexible evidentiary standards that ensures that victims are not stigmatised and endangered further and urgent interim reparation measures such as medical, psycho-social support and education opportunities for victims.

ensure sincere participation of government and security institutions as well as politicians and other officials individually and collectively in the process.

It is also important to note early in the process that Ugandans are weary of empty political promises, therefore this time the government must ensure that promises are turned into deeds to give citizens confidence in the state. Also important is that although guns have been silent for a while, the peace in Northern Uganda is illusory and could be shattered any moment, thus creating a sensitive environment that may be hostile to a truth telling process. Therefore, victims and witnesses have to be given adequate protection so that their involvement and participation in the truth process does not endanger them any further. The truth telling institution should also remember that seeking truth for atrocities committed over a period of two decades would not be easy as those who may have committed grave crimes attempt to hide their complicity and physical truth may be eroded or destroyed, requiring sustained technical support and oversight from international partners in the investigation and reparations processes.

A political will and commitment, sustained funding from government and additional technical and financial support from development partners, together with more robust local consultations, will ensure local ownership, credibility and legitimacy of a truth commission. If members selected have the desired integrity, experience and selection ensures regional and gender balance, the working bill with amendments as recommended in this chapter will go a long way in ensuring the desired goal of truth, justice and reparations paving way to institutional reform and reconciliation in Uganda.

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

9.1 Conclusion

The LRA conflict and the attendant atrocities rages on in the tri-border area of Sudan, DRC and Central African Republic and continues to contribute to the vicious cycle of violence, and displacement in Africa Great Lakes Region. The duration and spread of the conflict is a clear manifestation of how an internal conflict can easily be ‘exported’ to have repercussions on neighbouring territories. Ethnic division, weak state structures, and the illegal exploitation of natural resources ensure that states in the region actively extend military, logistic, economic and financial support to irregular forces operating in the neighbouring territories. This has led to suspicion and mistrust among the regional governments including the governments of Uganda, DRC, South Sudan and the Sudan. It is such mistrust that led to the continuous and significant support that the government of Sudan gave the LRA from 1994 to 2005 that rendered the conflict internationalised.¹ However, since 2009, the regional governments started paying attention to the common problem caused by the LRA in the region and are working together to ensure the capture of the LRA leaders, to bring the conflict to an end and to protect civilians affected by the conflict.²

The fighting groups, however, continue to pay little or no heed to rules of international humanitarian and human rights law. The groups continue to perpetrate atrocities against civilians. Some of the atrocities include, attacks against the civilian population; torture or inhuman, cruel or degrading treatment; wilful killing or murder; pillage; use of child soldiers; and sexual violence among others all amounting to war crimes and crimes against humanity.³ This is despite the ICC investigations and ongoing prosecutions of international crimes in the region⁴ and the accountability undertakings underway in Uganda. The

¹ See detailed discussion in chapter two of this thesis.

² Detailed discussion is contained in chapter one of this thesis.

³ Detailed discussion is contained in chapter two of this thesis.

⁴ Countries under ICC investigations in the region are Uganda, DRC, Sudan, Central African Republic and Kenya. Note that, in the Ugandan situation, the ICC indictees have only been charged with offences allegedly

continuity of mass atrocities, despite criminal investigations and other accountability pursuits in the region clearly shows that unless the LRA top commanders are apprehended, or surrender, the mass atrocities will continue for decades to come. The two conflict resolution methods that have been prominent from the start of the conflict, military solution and/or a negotiated settlement are still being pursued. Both mechanisms require sustained commitment and new diplomatic, financial and material resources from the regional governments and their international partners to coordinate a successful regional effort to end the LRA conflict.⁵ The success of such endeavours will ensure an end to the conflict, and will create an environment in which the government can comprehensively address questions of accountability to promote justice, truth and reparations.

Nonetheless, the referral of the Ugandan situation to the ICC and resultant warrants of arrest to some extent undermined the authority of the LRA leaders and constrained their operation, including the withdrawal of support by the government of Sudan; part of the reason why the LRA called for peace talks in 2006 that accounts for the stability in Northern Uganda since 2006.⁶ There is every indication that the local population in Northern Uganda gain more and more confidence each passing year that the conflict has finally come to an end.⁷ However, the fact that LRA leadership have not been captured, coupled with LRA atrocities in neighbouring countries that is aired on local radios everyday makes the population cautious and fearful of a possible LRA return in Northern Uganda. Several people still maintain two homes, one in the parishes and other areas closer to towns and another in

committed within the territory of Uganda although there is ample evidence to suggest that the LRA have perpetrated similar offences in South Sudan, DRC and Central African Republic.

⁵ Presently, there is an AU led initiative to tackle the LRA problem in the region. The AU initiative is in collaboration with international organisations such as; the UN, EU, World Bank and International Conference on the Great Lakes Region (ICGLR). Also in support of this initiative is the US government that has provided military support to the UPDF. In this initiative could lead to the capture of LRA suspects and other culpable LRA leaders to undergo accountability.

⁶ Other reasons advanced for the cessation of support by the Sudan government is the signing of the Comprehensive Peace Agreement between the SPLA and the government in Khartoum in January 2005 that ended the north and south civil war and therefore the direct military contribution that the LRA had made to the military in South Sudan. Further discussion on this issue is contained in chapter one of this thesis.

⁷ Unlike during the 2008 field trip where several villages were still abandoned and a lot of land remained uncultivated, in the October 2011 field I carried in Gulu, Pader, Amuru and Nwoya districts, the country side was bustling with activities, a lot of homes were undergoing construction or had been constructed and evidence of cultivation in most places along the way.

the villages in the homes of origin, where they carry out farming in case of any eventualities.⁸

The ICC warrants of arrest are no doubt a great concern of the LRA leadership and part of the reason why they called for talks in 2006. Ironically, they were also a major stumbling block to securing a comprehensive peace agreement that was not reached.⁹ The ICC involvement in the LRA situation is imbued with legal and political complexities but the ICC remains an important accountability forum in Uganda as the government has shown a clear unwillingness to investigate and prosecute LRA leaders indicted by the ICC.¹⁰ In addition, the ICC involvement acted as a constant reminder to the negotiating parties in Juba that questions of accountability must be fully addressed at the domestic level. It also brought to the forefront, the government's international obligations to investigate violations, prosecute and punish offenders if found guilty and to ensure rights of victims to reparations and truth.¹¹

The resulting Agreement on Accountability and Reconciliation and its Annexure set in motion a comprehensive accountability strategy that incorporates various accountability measures including domestic prosecutions, historical clarification and truth telling, use of traditional justice and reparation measures.¹² The Agreement however, did not clarify the relationship of the measures envisaged with the ICC but it is clear now that the ICC investigations will complement the national undertakings. ICC activities will therefore be complementary and must be accompanied by national processes, especially so, that its temporal jurisdiction of July 2002 limits it from comprehensively addressing questions of accountability including justice and reparations for all victims of the LRA conflict that began

⁸ In Feb 2012, some people in Lalogi sub-county in Amuru district claimed to have cited some strange people in the area, leading to widespread fear that the LRA had returned to Northern Uganda. This rumour was however, not confirmed but an indication of the fear that people still live with.

⁹ RR Atkinson 'The Realists in Juba? An Analysis of the Juba Peace Talks' in T Allen & K Vlassenroot (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 211 – 212.

¹⁰ Detailed discussion is contained in chapter five of this thesis.

¹¹ Accountability and Reconciliation was the third agenda item during the Juba talks. See also chapter three of this thesis for a detailed discussion on international obligations for international crimes.

¹² Agreement on Accountability and Reconciliation clause 2. Although these domestic measures were reached with the intention that the processes would replace the ICC investigations, the government refused to start any processes to stall or stop ICC investigations until a comprehensive peace agreement was reached and the LRA refused to sign a comprehensive peace agreement until ICC investigations were called off.

in 1986. In addition, the ICC will only prosecute only a limited number of people and it has targeted only non-state actors for crimes committed only in Uganda.¹³ This may be due to policy and practical limitations of the Court, but puts emphasis on the fact that the ICC can only complement national processes that must comprehensively deal with questions of accountability to ensure justice, truth and reparations.

In the domestic arena, the government of Uganda through the Justice Law and Order Sector (JLOS) established a high level Transitional Justice Working Group (TJWG) to give effect to the provisions of the Agreement on Accountability and Reconciliation and its Annexure in 2008. The five thematic sub-committees of the TJWG that includes: international crimes prosecutions; truth and reconciliation; traditional justice; sustainable funding; and integrated systems has since held a number of high profile meeting and started a process of a country wide consultations to get views on appropriate accountability and reconciliation forums.¹⁴ The TJWG has since 2009 began to put in place mechanisms to carry out consultations with Ugandans including victims of crimes committed in the conflict to get their views on truth telling, reparations and traditional justice mechanisms. With the views collected, the TJWG has also embarked on the task of developing a national transitional justice policy that seeks to be holistic and victim centred and provides a framework on accountability and reconciliation, in line with the Agreement on Accountability and Reconciliation.¹⁵

In July 2008, the government established the International Crimes Division (ICD)¹⁶ of the High Court of Uganda to try individuals alleged to have committed international crimes during the conflict. The ICD has the mandate to try international crimes defined in Uganda's Penal Code Act, the 1964 Geneva Conventions Act, the 2010 International Criminal Court Act, or any other criminal law in Uganda. The ICD operates alongside Uganda's Amnesty Act

¹³ Further and detailed discussion on this is contained in chapter five of this thesis.

¹⁴ JLOS Report *Transitional Justice in Northern, Eastern Uganda and some parts of West Nile Region* (March 2008); JLOS in addition carried out consultations in eight sub-regions including Buganda, Teso, Bugisu, Bugwere, Busoga, Karamoja, Acholi, Ankole, Toro, Bunyoro, Lango and West Nile of Uganda.

¹⁵ Keynote address by the Chair of JLOS TJWG during a conference hosted by Uganda Human Rights Commission in collaboration with the UN Office of the High Commissioner for Human Rights and UN Women in Kampala entitled: *Thematic Conference on the Right to Remedy and Reparations of the Conflict in Northern Uganda* (13 – 14 Feb 2012).

¹⁶ Previously, designated the War Crimes Division of the High Court of Uganda.

2000, which was introduced in the midst of the conflict with the intent of ending hostilities and bringing the warring parties to the negotiating table. The Act granted a 'blanket' amnesty to all engaged in rebellion against the government of Uganda, if they renounced rebellion. In 2006, the Act was amended, requiring the Minister and Parliament to declare certain persons ineligible for the grant of amnesty. The Minister did not make any such declaration.¹⁷ On 25 May 2012, the minister allowed Part II of the Amnesty Act to lapse, this paves for accountability pursuits in Uganda.¹⁸

The blanket grant of amnesty that operated for eleven years in Uganda has however, presented a challenge to the mandate of the ICD to hear cases against those alleged to have committed international crimes in the course of the conflict. For instance, activities of the ICD stalled in November 2011 when the Constitutional Court ordered it to cease the trial of Thomas Kwoyelo. The Court reached this decision in light of the Amnesty Act that entitled Kwoyelo like all other perpetrators engaged in armed rebellion against the government of Uganda to a grant of amnesty without an investigation into the lawfulness of their conduct.¹⁹ The lapse of Part II of the Act ensures that the DPP can now continue with investigations and issue more indictments without any concern over contradictions in the laws.

Uganda has taken a pragmatic approach to accountability, ushering in several accountability measures including domestic prosecutions, truth telling and traditional justice processes. The approach, does not presume any one-measure best suited. This is consonant with the view of the UN Secretary General who has persuasively argued that in the aftermath of mass atrocities, accountability strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth seeking, institutional reform, dismissals or an appropriately conceived combination thereof.²⁰ Indeed, the accountability measures underway in Uganda correspond to the political, social and historical conditions in the country; in particular, decades of armed conflict, numerous coups and rebellion with

¹⁷ Further and detailed discussion is contained in chapter four of this thesis.

¹⁸ Further and detailed discussion is contained in chapter four of this thesis.

¹⁹ Detailed discussion is contained in chapter four and six of this thesis.

²⁰ United Nations *Report of the Secretary General: Rule of Law and Transitional Justice in Post Conflict Societies* S/2004/616 (23 Aug 2004).

impunity of perpetrators that for decades denied victims the right to justice, truth and reparations.

A combination of these measures can be effectively used and they can complement each other. Formalising of the amnesty process within a truth telling mechanism to require truth and in some cases compensation to victims even from those already granted amnesty will ensure accountability of all for the mass atrocities committed in the LRA conflict.²¹ Formal prosecutions in response to international crimes committed in the LRA conflict will ensure justice for the victims of crimes committed. In addition, formal prosecutions can ensure that truth and history is recovered. This can be achieved through eyewitness accounts, production of documents, videos and other evidences that may create an authoritative version of the truth and thereby narrate a story that later becomes history.²² In addition, the ICC has a mandate to ensure reparations and domestic courts in Uganda have the mandate to order offenders to compensate victims, which to an extent meets the reparations goal of accountability.²³

To achieve these aims, the ICD and other domestic courts in Uganda must ensure scrutiny and censure of anyone who may have perpetrated international crimes and other human rights abuses in the LRA conflict. Investigations and prosecutions must be carried out without any privilege of leadership to complement the ICC undertakings, effectively. The ICD must also evoke the principle of universal jurisdiction to comprehensively investigate and prosecute all international crimes committed in the LRA conflict in whichever territory, at whatever time and by whichever perpetrator for the aims of accountability to be realised.²⁴ However, there is a further need to categorise offenders in the conflict, children and persons abducted as children, should be taken through accountability processes that puts their status as children or adults abducted as children into consideration. They should be taken through a process that respects procedural guarantees appropriate in the administration of juvenile justice and reflects the desirability of promoting the capacity of

²¹ Further discussion is contained in chapter eight of this thesis.

²² MA Drumbl *Atrocity, Punishment and International Law* (2007) 175; see also discussion in chapter six of this thesis.

²³ Constitution of Uganda art 126, 28 & 50; Trial on Indictment Act of Uganda art 110. Detailed discussion is contained in chapter six of this thesis.

²⁴ Detailed discussion on this issue is contained in chapter six of this thesis.

an individual to assume constructive role in society. A truth telling process is best placed to take such a role.²⁵

Traditional justice processes that will play a central role in the accountability pursuits in Uganda will complement formal prosecutions. Traditional justice practices are based on key principles that include; voluntariness, trust, truth telling, compensation, and restoration of broken relationships. They will offer an accountability platform by allowing perpetrators to account for their crimes, show remorse, apologise and compensate victims, encompassing the goals of justice, truth and reparations. Traditional justice enjoys significant local, national and international support but it is clear that the process cannot be effectively used as accountability measure to deal with international crimes committed in the conflict. This is because, the multi-ethnic groupings in Uganda means that different ethnic groups adhere to different cultures and practices therefore the system cannot be made uniform to apply across board. In addition, traditional justice system rely on social sanction and is grounded on a spiritual belief of the involvement of the dead in the living world from which it derives its legitimacy; formalisation of such a process to create a uniform mechanism to be applied nationally will lead to a loss of legitimacy and credibility of the process.²⁶

Also critical is that, traditional structures in Uganda lack the capacity to take on such a massive role and transformed duty of addressing systematic and widespread crimes committed in the LRA conflict and it will not be feasible to rely on voluntary confession to propel the process in motion. Traditional justice and healing ceremonies can only complement the accountability processes for mass atrocities if its use is limited to the individual and community level. The process must also be voluntary and available to all who desire it and must complement and not be an alternative to other accountability measures. In other words, participation in traditional justice processes must be limited to those who desire it, be limited to the community, clan or family level and should not bar the prosecution of an individual or bar his or her participation in truth telling and other reparations mechanism.²⁷

²⁵ See further discussion in chapter five and six of this thesis.

²⁶ See further elaboration in chapter seven of this thesis.

²⁷ This argument is further elaborated in chapter seven of this thesis.

A truth telling and reparations processes presents Uganda with a great opportunity to recognise the wrongs committed in the LRA conflict, to recognise that civilians were severely victimised and that the state is ready to amend the wrongs through investigations, identification and punishment of individual perpetrators and provisions of reparations. In addition, the process creates an opportunity to ensure the scrutiny and censure of state institutions and government policies and legislations to usher in legislative and institutional reforms in Uganda, which in turn will lead to the reconciliation of the different sectors of the Ugandan society.²⁸ In addition, a truth telling process will give a wider platform for victims, witnesses and perpetrators to recount their stories and generate history.

Overall, prosecution and punishment of offenders together with a truth telling process that makes recommendations aimed at addressing the root causes and outcomes of the conflict will not only counter inequalities in society but also punish perpetrators, identify them and also name them individually. These processes will allow victims to pursue compensation against those identified through civil suits and will shame and bar such individuals from the positions of public trust, thereby promoting justice. While the use of traditional justice and healing ceremonies may well facilitate justice through local ownership (if there is minimal interference of the state in the processes), encourage local participation and payment of compensation to victims. Traditional justice and healing ceremonies will also provide a broad platform for victims and will deliver a great impact to local communities that must continue to live together. In addition reparations, implemented in close association or as part of all other accountability initiatives will work best, as it will be seen as part of a comprehensive accountability policy rather than an isolated effort. Participation of the various stakeholders including victims in the design of the policy will ensure maximum impact on the victims that it is essentially meant to serve.²⁹

The main conclusion in this thesis is that with careful treading, political will, technical, financial and material investment by the government of Uganda and its development

²⁸ Detailed discussion on this issue is contained in chapter eight of this thesis.

²⁹ Office of the United Nations High Commissioner for Human Rights *Rule-of-Law Tools for Post-conflict States: Reparations Programmes* HR/PUB/08/1 (2008) 12.

partners, this blend of accountability measures can effectively complement each other to ensure justice, truth and reparations in Uganda. It is therefore incumbent on the state, in consultation with the local populations to remain true to this comprehensive plan not only to prosecute all persons responsible for international crimes but to also ensure that all accountability measures, including the non-judicial measures meet international standards that includes; fair and impartial proceedings; guarantee of fair trial; equal access to effective remedies to victims; and access to relevant information on the available mechanisms.

However questioned is the political will and commitment to ensure adequate funding and investment in the process as well as the sincere participation of government and security institutions and politicians, individually and collectively in the process to achieve the desired justice, truth and reparations.³⁰ The legislative and administrative processes to propel the various mechanisms into motion, in particular, truth telling and reparations processes are taking a very slow pace. This has created anxiety among victim and civil society groups in Uganda about the commitment of the government to the accountability processes. In addition, there is yet to be a concerted effort on the part of the government to document, investigate, and provide victims with access to relevant information concerning the violations that they and others in the region suffered due to the two decade conflict. Further, there has hardly been any systematic information, outreach or consultations with victims on the development or planning of the accountability processes.³¹

It is the expressed desire of the victimised communities that they are involved in the formulation of the mandates and design of the different accountability mechanisms as they are best place to provide the indispensable assistance to reach out to marginalised, hard-to-reach communities and victims. It is further such involvement that will make these mechanisms truly victim oriented in their scope and operation. This will show the victims

³⁰ Detailed discussion is contained in chapter eight of this thesis.

³¹ Interview with Ismene Zarifis Transitional Justice Advisor with JLOS, conducted on 24 Feb 2012. The main complaint by civil society groups is that their involvement in the process is very limited and so is the consultation with the local population, a meeting to ensure more civil society involvement in the process organised by the African Institute for Strategic Research, Governance and Development hosting representatives from 27 different organisations took place in Kampala on 26 Aug 2011.

that the government is responsive to public opinion and accountable for its failures.³² In his report on transitional justice, the UN Secretary General points out that the most successful transitional justice experiences owe a large part of their success to the quantity and the quality of public and victim consultation carried out,³³ a remainder to decision makers and technocrats working on accountability processes in Uganda.

There are further, serious doubts about the government's ability or willingness to resolve long standing divisions in Uganda that is the root cause of the LRA conflict or to ensure accountability for mass atrocities committed in Uganda. The re-election of a broadly based NRM government in 2011, access to material resources, tactical skill, ability to deflect international criticism and President Museveni's ambition to control Uganda's transition as an oil exporter suggest that he will try to continue to consolidate and direct Uganda's future, no matter the consequences on the country and the impact on accountability.³⁴ It is worrisome, that Uganda's accountability undertakings depends on how the attendant policies will affect the NRM government rather than whether it resolves long standing national problems including impunity for international crimes and other gross human rights violations. Unless this changes, impunity will reign and so will violent conflicts in Uganda.³⁵

Critical challenges that require immediate attention to ensure accountability for mass atrocities in the LRA conflict remain. The thesis therefore makes a number of recommendations as below.

9.2 Recommendations

9.2.1 Amendment and adoption of certain laws and policies in Uganda

Lapse of Part II of the Amnesty Act that allowed for a blanket grant of amnesty in Uganda took effect on 25 May 2012. This opens doors to the investigation, prosecution and

³² Uganda Human Rights Commission & United Nations High Commissioner for Human Rights *"The Dust has not yet Settled"*, *Victims View on a Right to Remedy and Reparations: A Report from the Greater North of Uganda* (2011) XIX.

³³ United Nations (n 19 above) para 16.

³⁴ International Crisis Group 'Uganda: No Resolution to Growing Tension' Africa Report No 187 (5 April 2012)1.

³⁵ As above.

punishment of those found guilty of international crimes committed in the LRA conflict. However, the government of Uganda must now expedite the adoption of the national transitional justice policy for Uganda, within 12 months as recommended by JLOS after the amnesty review process.³⁶ In addition, the government should adopt a new law to take forward a truth telling process that complements traditional justice practices. The truth telling body should incorporate a conditional amnesty for lesser offenses in exchange for the truth, apology and in some instances compensation before a grant of amnesty. Amnesty should further only be granted in cases where the DPP indicates that he does not intend to bring criminal charges against a person. To show commitment to its policies and laws, the government should not unilaterally revoke amnesty already granted, as this could lead to loss of faith by the public in the government and doubts on the seriousness of accountability pursuits in Uganda.³⁷ There is however, a need for a new policy on a truth commission and traditional justice to spell out that, even those granted amnesty should undergo those non-prosecutorial measures without fear that criminal proceeding will be instituted against them. This will ensure accountability of those who already received amnesty and will ensure that victims of the crimes they committed receive justice, truth and reparations.

In addition, the government must immediately enact a policy that ensures victim assistance, to deal with urgent cases, for instance, for victims suffering from serious physical and mental injuries and illnesses. The government and the various stakeholders must make known to the victim community that the grant of amnesty does not bar civil liability, therefore victims can proceed against such perpetrator in courts, administrative or quasi-judicial bodies in Uganda to receive compensation.³⁸ It is also important to point out that amnesty granted in Uganda does not bar prosecutions by other interested states, where international crimes may have been committed; therefore, the government should reach agreements with the other states who wish to investigate and prosecute culpable LRA perpetrators who may have received amnesty in Uganda to allow them to do so.

³⁶ Joint Leadership and Steering Committee 'Presentation by Hon Justice Gidudu, Chair Transitional Working Group' (18 May 2012) available at www.jlos.go.ug/page.php? (accessed 10 July 2012).

³⁷ Also note that 'pardon' is a constitutionally protected right in Uganda; Constitution of Uganda art 28(10).

³⁸ This will be in line with art 50 of the Constitution of Uganda.

In addition, Uganda must repeal the constitutional provisions on immunity of head of state to ensure scrutiny and censure of all Ugandans for their role in the LRA conflict. Uganda must further amend its penal laws providing a uniform sentencing regime, so that international crimes do not attract lesser sentences than ordinary crimes in the penal code. This in effect will require the removal of the death penalty from Uganda's penal legislation.

9.2.2 Political will and commitment

Accounting for crimes committed in the LRA conflict will require political will and the commitment of the government of Uganda at every level. The government must ensure adequate financial, technical and material investment in all accountability undertaking including investigations, trials, legal aid, witness protection, outreach, and reparations among other undertakings. The government should seek additional funding from the international community where the state budget falls short. The international community should also make an undertaking to provide oversight, technical expertise and other support the accountability process in Uganda. In addition, a founding legislation of a TRC should include a clause requiring reparations to be financed through the state budget, to ensure effectiveness in procuring the necessary financial resources for this undertaking.

The government of Uganda should allow the accountability mechanisms to honestly deal with crimes and violations to allow reform and accountability. That will include giving its full cooperation and room to the mechanisms to investigate state officials and institutions and to prosecute state officials who may have committed international crimes during the conflict. The government must also give the accountability mechanisms full powers to conduct searches, seize relevant documents, issue warrants, conduct investigations and require attendance of witnesses in complete independence and a guarantee of non-interference from the executive for a successful outcome of the accountability processes. This independence from the executive must not only be in writing but must be observed in practice.

9.2.3 Conduct of outreach

It is clear that the most successful processes owe a large part of their success to the quantity and the quality of public and victim consultation carried out.³⁹ Despite the failure to reach a comprehensive peace agreement in Juba, the talks sparked off a process of soliciting views of the affected population and consultation with all other stakeholders. This should continue but with even more rigor than currently, right from the present preparation phase, during and also after the accountability processes end to ensure that national needs and aspirations are met.

In addition, the staff of the different accountability mechanisms must carry out robust outreach programmes clarifying the functions and roles of the different processes; purpose of each mechanism; linkages among the processes; protection mechanisms; and confidentiality guarantees for each mechanism to all sections of the Ugandan society and beyond. This will ensure effective participation of all, especially, the most affected and most vulnerable groups such as children, women, the illiterate and the very poor sections of the society. In addition, the different mechanisms should collaborate with each other in the outreach efforts. Joint publicity campaigns to explain the distinct and autonomous nature of the different institutions, while at the same time avoiding contradictions and rivalry thereby enhancing confidence in all the processes.

9.2.4 Regional collaboration

The LRA conflict was exported from Uganda to other regional states; therefore, accountability undertaking must have a regional dimension to it. The governments of Uganda, South Sudan, Sudan, DRC and Central African Republic, together with international partners must work together not only to ensure the end to the conflict but to also ensure that all international crimes committed in the LRA conflict are effectively prosecuted. This in effect will require that the governments evoke the principle of universal jurisdiction to

³⁹ United Nations (n 18 above) para 16.

ensure that international crimes committed by whomever, whenever and in whichever territory is effectively prosecuted in any one of the affected states to fight impunity as provided for in the Protocol on Sexual Violence and the Protocol on Genocide.

The regional governments must also go beyond criminal accountability and make an effort to ensure truth and reparations, not only among the citizens of the different states that may have been harmed by the conflict but also the regional governments. This will remove mistrust that may have developed due to the support that may have been extended to irregular armed forces fighting a government in the region and other atrocities committed by national armies including the illegal exploitation of natural resources in different territories. The conference on the Great Lakes Region provides a platform for this and there is an additional need for a regional truth and reconciliation commission with the mandate to consider matters relevant to the LRA conflict and the other conflicts in the region. This truth commission would ensure that the governments in the region acknowledge the support (material, financial or moral) that has been extended to non-state actors. It would further determine motive, pattern and the systematic violations and abuse of human rights and rules of humanitarian law; restore the dignity of victims by giving them the opportunity to tell their stories and acknowledgment by perpetrators and make recommendations on the appropriate mechanisms for reconciliation, reintegration, rehabilitation and reparations for victims (including states) in the region.

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Alex Ajiji, Registrar of the ICD (interviewed on 26 Jan 2011 in Kampala)

Christine Akumu Okot and Mwa Chris officers of local government of Gulu and Pader districts (Interviews conducted on 10 August 2010 and 22 Oct 2011 in Gulu)

Frank Onapito Ekomoliot, former Presidential Press Secretary (interviewed on 4 Jan 2011 in Kampala)

Ismene Zarifis, Transitional Justice Advisor, JLOS Uganda (Interviewed 12 Feb 2012)

Jeroline Akubo, senior legal with the Uganda Law Reform Commission (conducted on 15 Feb 2011 and 22 Feb 2012 in Kampala)

Joan Kagezi, Senior Principal State Attorney in charge of war crime prosecutions (Interviewed on 18 Jan 2011; 13 Feb 2011 and 22 March 2011 in Kampala)

Justice Elizabeth Nahamya, Judge of the ICD (interviewed on 26 Jan 2011, 24 Feb 2012 in Kampala)

Justice Onega, chairman of the Amnesty Commission (interviewed on 14 Jan 2011 and 10 June 2010 in Kampala)

Ladit Omong of Obiya (interviewed 15 Feb 2008 in Gulu)

Ladit Opoka Vanango of Paicho (interviewed 12 Feb 2008 in Amuru)

Ladit Oweka Layii of Lacor IDP camp (interviewed 20 Feb 2008 in Gulu)

Maria Kamara, ICC Outreach Officer based in Kampala (interviewed on 24 Jan 2011, 25 June 2010 in Kampala)

Mzee Obama Adam of Lacor (interview conducted on 13 Feb 2008 in Gulu)

Ochora Walter, Resident District Commander of Gulu, (Interview conducted in Gulu on 10 February 2008)

Rachel Odoi – Musoke, Senior Principal Advisor with JLOS (Interviewed on 18 Jan 2011, 20 Nov 2010 and 3 March 2011 in Kampala)

Rwot Apige of Paicho (interviewed 12 Feb 2008 in Amuru)

Rwot Otinga Otto Yayi of Lamogi (interviewed on 12 February 2008 in Lacor IDP camp)

Ten former child soldiers (ages between 15 and 21) living in GUSCO reception centre (Focus group discussion on 18 February 2008 in Gulu)

Twelve returnees (ages 14 to 23) (in a focus group discussion in Pabbo IDP camp on 21 February 2008 in Amuru)

ANNEXURE A

AGREEMENT ON ACCOUNTABILITY AND RECONCILIATION & ANNEXURE



AGREEMENT ON ACCOUNTABILITY AND RECONCILIATION

BETWEEN THE GOVERNMENT OF THE REPUBLIC OF UGANDA AND THE LORD'S RESISTANCE ARMY/MOVEMENT JUBA, SUDAN

This Agreement, between the Government of Uganda (The Government) and the Lord's Resistance Army/Movement (LRA/M) (herein referred to as the Parties), witnesseth that:

PREAMBLE

WHEREAS THE PARTIES:

HAVING BEEN engaged in protracted negotiations in Juba, Southern Sudan, in order to find just, peaceful and lasting solutions to the long-running conflict, and to promote reconciliation and restore harmony and tranquillity within the affected communities and in Uganda generally;

CONSCIOUS of the immense, pain, suffering, injury and adverse socio-economic and political impacts of the conflict, and of the serious crimes, human rights violations; and recognising the need to honour the victims by promoting lasting peace with justice;

COMMITTED to preventing impunity and promoting redress in accordance with the Constitution and international obligations and recalling, in this connection, the requirements of the Rome Statute of the International Criminal Court (ICC) and in particular the principle of complementarity;

DRIVEN by the need for adopting appropriate justice mechanisms, including customary processes of accountability, that would resolve the conflict while promoting reconciliation and convinced that this Agreement is a sound basis for achieving that purpose;

GUIDED BY the Objective Principle of the Constitution, which directs that there shall be established and nurtured institutions and procedures for the resolution of conflicts fairly and peacefully; and further recalling the Constitutional duty on the courts of Uganda to promote reconciliation between contesting parties;

NOW THEREFORE THE PARTIES AGREE as follows:

1. DEFINITIONS

Unless the context suggests otherwise, the following words and phrases shall have the meaning assigned thereto:

“Ailuc” refers to the traditional rituals performed by the Madi to reconcile parties formerly in conflict, after full accountability.

“Alternative justice mechanisms” refers to justice mechanisms not currently administered in the formal courts established under the Constitution.

“the conflict” means the Northern and North-eastern Uganda conflict, and includes the impacts of that conflict in the neighbouring countries.

“Constitution” means the Constitution of the Republic of Uganda.

“Culo Kwor” refers to the compensation to atone for homicide as practiced in Acholi and Lango cultures, and any other forms of reparation for any other purposes, after full accountability.

“Gender” refers to the two sexes, men and women, within the context of society.

“Government” means the Republic of Government of Uganda.

“Kayo Cuk” refers to the traditional accountability and reconciliation processes practiced by the Langi communities after full accountability and reconciliation has been attained between parties formerly in conflict, after full accountability.

“Mato Oput” refers to the traditional ritual performed by the Acholi after full accountability and reconciliation has been attained between parties formerly in conflict, after full accountability.

“Reconciliation” refers to the process of restoring broken relationships and re-establishing harmony.

“**Tonu ci Koka**” refers to the traditional rituals performed by the Madi to reconcile parties formerly in conflict, after full accountability;

“**Victims**” means persons who have individually or collectively suffered harm as a consequence of crimes and human rights violations committed during the conflict.

2. COMMITMENT TO ACCOUNTABILITY AND RECONCILIATION

- 2.1. The Parties shall promote national legal arrangements, consisting of formal and non formal institutions and measures for ensuring justice and reconciliation with respect to the conflict.
- 2.2. The accountability processes stipulated in this Agreement shall relate to the period of the conflict. However, this clause shall not prevent the consideration and analysis of any relevant matter before this period, or the promotion of reconciliation with respect to events that occurred before this period.
- 2.3. The Parties believe that a comprehensive, independent and impartial analysis of the history and manifestations of the conflict, especially the human rights violations and crimes committed during the course of the conflict, is an essential ingredient for attaining reconciliation at all levels.
- 2.4. The Parties agree that at all stages of the development and implementation of the principles and mechanisms of this Agreement, the widest possible consultations shall be promoted and undertaken in order to receive the views and concerns of all stakeholders, and to ensure the widest national ownership of the accountability and reconciliation processes. Consultations shall extend to state institutions, civil society, academia, community leaders, traditional and religious leaders, and victims.
- 2.5. The Parties undertake to honour and respect, at all times, all the terms of this Agreement which shall be implemented in the utmost good faith and shall adopt effective measures for monitoring and verifying the obligations assumed by the Parties under this Agreement.

3. PRINCIPLES OF GENERAL APPLICATION

- 3.1. Traditional justice mechanisms, such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka* and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation.

Conduct of Proceedings

- 3.2. The Parties recognise that any meaningful accountability proceedings should, in the context of recovery from the conflict, promote reconciliation and encourage individuals to take personal responsibility for their conduct.
- 3.3. With respect to any proceedings under this Agreement, the right of the individual to a fair hearing and due process, as guaranteed by the Constitution, shall at all times be protected. In particular, in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.
- 3.4. In the conduct of accountability and reconciliation processes, measures shall be taken to ensure the safety and privacy of witnesses. Witnesses shall be protected from intimidation or persecution on account of their testimony. Child witnesses and victims of sexual crimes shall be given particular protection during proceedings.

Cooperation within proceedings

- 3.5. The Parties shall promote procedures and approaches to enable individuals to cooperate with formal criminal or civil investigations processes and proceedings. Cooperation may include the making of confessions, disclosures and provision of information on relevant matters. The application of any cooperation procedures shall not prejudice the rights of cooperating individuals.
- 3.6. Provisions may be made for the recognition of confessions or other forms of cooperation to be recognised for purposes of sentencing or sanctions.

Legal representation

- 3.7. Any person appearing before a formal proceeding shall be entitled to appear in person or to be represented at that person's expense by a lawyer of his or her choice. Victims participating in proceedings shall be entitled to be legally represented.
- 3.8. Provision shall be made for individuals facing serious criminal charges or allegations of serious human rights violations and for victims participating in such proceedings, who cannot afford representation, to be afforded legal representation at the expense of the State.

Finality and effect of proceedings

- 3.9. In order to achieve finality of legal processes, accountability and reconciliation procedures shall address the full extent of the offending conduct attributed to an individual. Legislation may stipulate the time within which accountability and reconciliation mechanisms should be undertaken.

- 3.10. Where a person has already been subjected to proceedings or exempted from liability for any crime or civil acts or omissions, or has been subjected to accountability or reconciliation proceedings for any conduct in the course of the conflict, that person shall not be subjected to any other proceedings with respect to that conduct.

4. ACCOUNTABILITY

- 4.1. 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.
- 4.2. Prosecutions and other formal accountability proceedings shall be based upon systematic, independent and impartial investigations.
- 4.3. The choice of forum for the adjudication of any particular case shall depend, amongst other considerations, on the nature and gravity of the offending conduct and the role of the alleged perpetrator in that conduct.
- 4.4. For purposes of this Agreement, accountability mechanisms shall be implemented through the adapted legal framework in Uganda.

5. LEGAL AND INSTITUTIONAL FRAMEWORK

- 5.1. The Parties affirm that Uganda has institutions and mechanisms, customs and usages as provided for and recognised under national laws, capable of addressing the crimes and human rights violations committed during the conflict. The Parties also recognise that modifications may be required within the national legal system to ensure a more effective and integrated justice and accountability response.
- 5.2. The Parties therefore acknowledge the need for an overarching justice framework that will provide for the exercise of formal criminal jurisdiction, and for the adoption and recognition of complementary alternative justice mechanisms.
- 5.3. Alternative justice mechanisms shall promote reconciliation and shall include traditional justice processes, alternative sentences, reparations, and any other formal institutions or mechanisms.
- 5.4. Insofar as practicable, accountability and reconciliation processes shall be promoted through existing national institutions and mechanisms, with necessary

modifications. The Parties shall consult on the need to introduce any additional institutions or mechanisms for the implementation of this Agreement.

- 5.5. The Parties consider that the Uganda Human Rights Commission and the Uganda Amnesty Commission are capable of implementing relevant aspects of this Agreement.

Legislative and policy changes

- 5.6. The Government will introduce any necessary legislation, policies and procedures to establish the framework for addressing accountability and reconciliation and shall introduce amendments to any existing law in order to promote the principles in this Agreement.

6. FORMAL JUSTICE PROCESSES

- 6.1. Formal courts provided for under the Constitution shall exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes, during the course of the conflict.
- 6.2. Formal courts and tribunals established by law shall adjudicate allegations of gross human rights violations arising from the conflict.

Sentences and Sanctions

- 6.3. Legislation shall introduce a regime of alternative penalties and sanctions which shall apply, and replace existing penalties, with respect to serious crimes and human rights violations committed by non-state actors in the course of the conflict.
- 6.4. Alternative penalties and sanctions shall, as relevant: reflect the gravity of the crimes or violations; promote reconciliation between individuals and within communities; promote the rehabilitation of offenders; take into account an individual's admissions or other cooperation with proceedings; and, require perpetrators to make reparations to victims.

7. RECONCILIATION

- 7.1. The Parties shall promote appropriate reconciliation mechanisms to address issues arising from within or outside Uganda with respect to the conflict.
- 7.2. The Parties shall promote collective as well as individual acts and processes of reconciliation shall be promoted at all levels.

7.3. Truth-seeking and truth-telling processes and mechanisms shall be promoted.

8. VICTIMS

- 8.1. The Parties agree that it is essential to acknowledge and address the suffering of victims, paying attention to the most vulnerable groups, and to promote and facilitate their right to contribute to society.
- 8.2. The Government shall promote the effective and meaningful participation of victims in accountability and reconciliation proceedings, consistently with the rights of the other parties in the proceedings. Victims shall be informed of the processes and any decisions affecting their interests.
- 8.3. Victims have the right of access to relevant information about their experiences and to remember and commemorate past events affecting them.
- 8.4. In the implementation of accountability and reconciliation mechanisms, the dignity, privacy and security of victims shall be respected and protected.

9. REPARATIONS

- 9.1. Reparations may include a range of measures such as: rehabilitation; restitution; compensation; guarantees of non-recurrence and other symbolic measures such as apologies, memorials and commemorations. Priority shall be given to members of vulnerable groups.
- 9.2. The Parties agree that collective as well as individual reparations should be made to victims through mechanisms to be adopted by the Parties upon further consultation.
- 9.3. Reparations may be ordered to be made by perpetrators as part of penalties and sanctions in accountability proceedings.

10. GENDER

In the implementation of this Agreement, a gender-sensitive approach shall be promoted and in particular, implementers of this Agreement shall strive to prevent and eliminate any gender inequalities that may arise.

11. WOMEN AND GIRLS

In the implementation of this Agreement it is agreed to:

- (i) Recognise and address the special needs of women and girls.
- (ii) Ensure that the experiences, views and concerns of women and girls are recognised and taken into account.
- (iii) Protect the dignity, privacy and security of women and girls.
- (iv) Encourage and facilitate the participation of women and girls in the processes for implementing this agreement.

12. CHILDREN

In the implementation of this Agreement it is agreed to:

- (i) Recognise and address the special needs of children and adopt child-sensitive approaches.
- (ii) Recognise and consider the experiences, views and concerns of children.
- (iii) Protect the dignity, privacy and security of children in any accountability and reconciliation proceedings.
- (iv) Ensure that children are not subjected to criminal justice proceedings, but may participate, as appropriate, in reconciliation processes.
- (v) Promote appropriate reparations for children.
- (vi) Encourage and facilitate the participation of children in the processes for implementing this Agreement.

13. RESOURCES

The Government will avail and solicit resources for the effective implementation of this Agreement.

14. OBLIGATIONS AND UNDERTAKINGS OF THE PARTIES

The Parties:

- 14.1. Expeditiously consult upon and develop proposals for mechanisms for implementing these principles.

- 14.2. Ensure that any accountability and reconciliation issues arising in any other agreement between themselves are consistent and integrated with the provisions of this Agreement.

The Government:

- 14.3. Adopt an appropriate policy framework for implementing the terms of this Agreement.
- 14.4. Introduce any amendments to the Amnesty Act or the Uganda Human Rights Act in order to bring it into conformity with the principles of this Agreement.
- 14.5. Undertake any necessary representations or legal proceedings nationally or internationally, to implement the principles of this Agreement.
- 14.6. Address conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA/M.
- 14.7. Remove the LRA/M from the list of Terrorist Organisations under the Anti-Terrorism Act of Uganda upon the LRA/M abandoning rebellion, ceasing fire, and submitting its members to the process of Disarmament, Demobilisation, and Reintegration.
- 14.8. Make representations to any state or institution which has proscribed the LRA/M to take steps to remove the LRA/M or its members from such list.

The LRA/M:

- 14.9. The LRA/M shall assume obligations and enjoy rights pursuant to this Agreement.
- 14.10. The LRA/M shall actively promote the principles of this Agreement.

15. ADOPTION OF MECHANISMS FOR IMPLEMENTING THIS AGREEMENT

- 15.1. The Parties shall negotiate and adopt an annexure to this Agreement which shall set out elaborated principles and mechanisms for the implementation of this Agreement. The annexure shall form a part of this Agreement.
- 15.2. The Parties may agree and the Mediator will provide additional guidance on the matters for the Parties to consider and consult upon in the interim period, in developing proposals for mechanisms for implementing this Agreement.

16. COMMENCEMENT

This Agreement shall take effect upon signature.

IN WITNESS WHEREOF the duly authorized representatives of the parties have hereunto appended their respective signatures at Juba, South Sudan, this 29th day of June 2007.

Dr S Kagoda
Permanent Secretary
Ministry of Internal Affairs
Acting Head of the Government
of Uganda Delegation

Mr. Martin Ojul
Leader of the LRA/M Delegation

WITNESSED BY:

H.E Lt. Gen. Riek Machar Teny-Dhurgon (PhD)
Vice President, Government of Southern Sudan and
Mediator of the Government of Uganda - Lord's Resistance Army/Movement Peace
Talks

H.E Japheth R Getugi
For the Government of the Republic of Kenya

H.E Ali I Siwa
For the Government of the United Republic of Tanzania

ANNEXURE TO THE AGREEMENT ON ACCOUNTABILITY AND RECONCILIATION

This Annexure to the Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda (the Government) and the Lord's Resistance Army/Movement (LRA/M) (the Parties) on 29th June 2007 (the Principal Agreement) provides as follows:

THE PARTIES:

HAVING SIGNED the Principal Agreement by which the parties committed themselves to implementing accountability and reconciliation with respect to the conflict;

PURSUANT TO the terms of the Principal Agreement calling for the adoption of mechanisms for implementing accountability and reconciliation;

HAVING CARRIED OUT broad consultations within and outside Uganda, and in particular, with communities that have suffered most as a result of the conflict;

HAVING ESTABLISHED through consultations under Clause 2.4 of the Principal Agreement, that there is national consensus in Uganda that adequate mechanisms exist or can be expeditiously established to try the offences committed during the conflict;

RECALLING their commitment to preventing impunity and promoting redress in accordance with the Constitution and international obligations, and recalling, in this connection, the requirements of the Rome Statute of the International Criminal Court (ICC) and in particular the principle of complementarity;

CONFIDENT that the Principal Agreement embodies the necessary principles by which the conflict can be resolved with justice and reconciliation and consistent with national and international aspirations and standards;

NOW THEREFORE AGREE as follows:

Primacy of the Principal Agreement

1. This Annexure sets out a framework by which accountability and reconciliation are to be implemented pursuant to the Principal Agreement, provided that this Annexure shall not in any way limit the application of that Agreement, whose provisions are to be implemented in full.

2. The Government shall expeditiously prepare and develop the necessary legislation and modalities for implementing the Principal Agreement and this Annexure ('the Agreement').

3. The Government, under clause 2 above, shall take into account any representations from the parties on findings arising from the consultations undertaken by the Parties and any input by the public during the legislative process.

Inquiry into the Past and related matters (*Principal Agreement: clauses 2.2 & 2.3*)

4. The Government shall by law establish a body to be conferred with all the necessary powers and immunities, whose functions shall include:

- (a) to consider and analyse any relevant matters including the history of the conflict;
- (b) to inquire into the manifestations of the conflict;
- (c) to inquire into human rights violations committed during the conflict, giving particular attention to the experiences of women and children;
- (d) to hold hearings and sessions in public and private;
- (e) to make provision for witness protection, especially for children and women;
- (f) to make special provision for cases involving gender based violence;
- (g) to promote truth-telling in communities and in this respect to liaise with any traditional or other community reconciliation interlocutors;
- (h) to promote and encourage the preservation of the memory of the events and victims of the conflict through memorials, archives, commemorations and other forms of preservation;
- (i) to gather and analyse information on those who have disappeared during the conflict;
- (j) to make recommendations for the most appropriate modalities for implementing a regime of reparations, taking into account the principles set out in the Principal Agreement;
- (k) to make recommendations for preventing any future outbreak of conflict;
- (l) to publish its findings as a public document;
- (m) to undertake any other functions relevant to the principles set out in this Agreement.

5. In the fulfilment of its functions, the body shall give precedence to any investigations or formal proceedings instituted pursuant to the terms of this Agreement. Detailed guidelines and working practices shall be established to regulate the relationship between the body and any other adjudicatory body seized of a case relating to this Agreement.

6. The body shall be made up of individuals of high moral character and proven integrity and the necessary expertise for carrying out its functions. In particular, its composition shall reflect a gender balance and the national character.

Legal and Institutional Framework (*Principal Agreement: Part 5*)

7. A special division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict.

8. The special division of the High Court shall have a registry dedicated to the work of the division and in particular, shall make arrangements to facilitate the protection and participation of witnesses, victims, women and children.

9. For the proper functioning of the special division of the court in accordance with the agreed principles of accountability and reconciliation, legislation may provide for:

- (a) The constitution of the court;
- (b) The substantive law to be applied;
- (c) Appeals against the decisions of the court;
- (d) Rules of procedure;
- (e) The recognition of traditional and community justice processes in proceedings.

Investigations and Prosecutions (*Principal Agreement: Part 4*)

10. The Government shall establish a unit for carrying out investigations and prosecutions in support of trials and other formal proceedings as envisaged by the Principal Agreement.

11. The unit shall have a multi-disciplinary character.

12. The Director of Public Prosecutions shall have overall control of the criminal investigations of the unit and of the prosecutions before the special division.

13. Investigations shall:

- (a) Seek to identify individuals who are alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians;
- (b) Reflect the broad pattern of serious crimes and violations committed during the conflict;
- (c) Give particular attention to crimes and violations against women and children committed during the conflict.

14. Prosecutions shall focus on individuals alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions.

Cooperation with Investigations and Proceedings (*Principal Agreement: clauses 3.5 & 3.6*)

15. Rules and procedures shall regulate the manner in which an individual may cooperate with any investigations and proceedings arising from this Agreement, by disclosure of all relevant information relating to:

- (a) His or her own conduct during the conflict;
- (b) Details which may assist in establishing the fate of persons missing during the conflict;
- (c) The location of land mines or unexploded ordnances or other munitions; and,
- (d) any other relevant information. Provided that a person shall not be compelled to disclose any matter which might incriminate him or her.

Reparations (*Principal Agreement: clauses 6.4 & 9*)

16. The Government shall establish the necessary arrangements for making reparations to victims of the conflict in accordance with the terms of the Principal Agreement.

17. Prior to establishing arrangements for reparations, the Government shall review the financial and institutional requirements for reparations, in order to ensure the adoption of the most effective mechanisms for reparations.

18. In reviewing the question of reparations, consideration shall be given to clarifying and determining the procedures for reparations.

Traditional Justice (*Principal Agreement: clause 3.1*)

19. Traditional justice shall form a central part of the alternative justice and reconciliation framework identified in the Principal Agreement.

20. The Government shall, in consultation with relevant interlocutors, examine the practices of traditional justice mechanisms in affected areas, with a view to identifying the most appropriate roles for such mechanisms. In particular, it shall consider the role and impact of the processes on women and children.

21. The Traditional Justice Mechanisms referred to include:

- i. Mato Oput in Acholi, Kayo Cuk in Lango, Ailuc in Teso, Tonu ci Koka in Madi and Okukaraba in Ankole; and
- ii. Communal dispute settlement institutions such as family and clan courts.

22. A person shall not be compelled to undergo any traditional ritual.

Provisions of General Application

23. Subject to clause 4.1 of the Principal Agreement, the Government shall ensure that serious crimes committed during the conflict are addressed by the special Division of the High Court; traditional justice mechanisms; and any other alternative justice mechanism established under the Principal Agreement, but not the military courts.

24. All bodies implementing the Agreement shall establish internal procedures and arrangements for protecting and ensuring the participation of victims, traumatised individuals, women, children, persons with disabilities and victims of sexual violence in proceedings.

25. In the appointment of members and staff of institutions envisaged by the Agreement, overriding consideration shall be given to the competences and skills required for the office, and gender balance shall be ensured.

26. The Mediator shall from time to time receive or make requests for reports on the progress of the implementation of the Agreement.

IN WITNESS WHEREOF the duly authorized representatives of the Parties have signed this Annexure in Juba on the 19th day of February 2008

.....
Hon. Ruhakana Rugunda (Dr) Dr David Nyekorach Matsanga
Minister of Internal Affairs and Leader of the LRA/M Delegation
Head of GoU Delegation

WITNESSED BY:

.....
H.E. Lt. General Riek Machar Teny-Dhurgon (PhD)
Vice President, Government of Southern Sudan
And Chief Mediator of the Peace Talks

.....
H.E. André M Kapanga (PhD)
For the Government of the Democratic Republic of Congo

.....
H.E. Japheth R. Getugi
For the Government of the Republic of Kenya

.....
H.E. Nsavike G. Ndatta
For the Government of the United Republic of Tanzania

.....
H.E. Francisco Caetano Madeira
For the Government of the Republic of Mozambique

.....
Lt. Gen. (Rtd.) Gilbert Lebeko Ramano
For the Government of the Republic of South Africa

.....
H.E. Jan Ledang
For the Government of Norway

.....
Ms Anna Sundström
Political Advisor to the EU Special Representative for the Great Lakes Region,
For the European Union

.....
Mr Timothy R. Shortley
Senior Advisor to the Assistant Secretary of State for African Affairs,

For the Government of the United States of America

ANNEXURE B

THE NATIONAL RECONCILIATION BILL, 2009

MEMORANDUM

The purpose of this Bill is to enact a law to provide a framework for a national reconciliation process in Uganda and address the historical causes underlying violent conflicts and widespread or systematic violations or abuses of human rights. These aims shall be accomplished by examining the legacies of past violations and abuses of human rights which were committed in Uganda from independence in 1962 to the date of assent, including all their relevant antecedents and circumstances. This law shall be known as the “National Reconciliation Act,” and shall mandate the creation of a National Reconciliation Forum with the authority to recommend reparations for victims of human rights violations, hold perpetrators accountable, recommend measures to prevent the future violation of human rights, design and conduct symbolic nation-wide reconciliation activities, and provide for other related matters.

THE NATIONAL RECONCILIATION BILL, 2009

ARRANGEMENT OF CLAUSES

THE NATIONAL RECONCILIATION BILL, 2009

PREAMBLE

Whereas the nation is inspired by Objective III of our National Objectives and Directive Principles of State Policy in the 1995 Constitution that: *“every effort shall be made to integrate all peoples of Uganda while at the same time recognizing the existence of their ethnic, religious, ideological, political and cultural diversity,”* and that: *“there shall be established and nurtured institutions and procedures for the resolution of conflicts fairly and peacefully”*;

AND

Mindful that the nation, since its independence and up to the present day, has been confronted with violent conflicts and widespread and systematic violations or abuses of human rights as well as socio-economic losses;

AND

Considering that the civil conflicts were generally characterized by gross violations and abuses of human rights and the widespread commission of war crimes and crimes against humanity in further violation of international humanitarian law and standards;

AND

Convinced that national peace, security, unity and reconciliation are indispensable to the attainment of national development goals and objectives and to ensuring growth, prosperity and regional integration;

AND

Considering also that Uganda has, in the past, taken measures to address such violations by establishing policies for the purpose of achieving closure with regards to past oppression, while simultaneously working toward national security, unity, peace and reconciliation;

AND

Aware that the 1995 Constitution of the Republic of Uganda mandates building a better future through the establishment of a socioeconomic and political order based on the principles of trust and respect for the human rights of all the peoples of Uganda irrespective of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability;

AND

Recognising that national healing and reconciliation will be greatly enhanced by a process that seeks to establish the truth through public dialogue regarding the nature, causes, and consequences of violent conflict and the impact these continue to have on the Ugandan nation;

AND

Recalling that in the course of the Juba peace talks the government of Uganda recognized the need for an overarching national justice and reconciliation framework, including alternative justice mechanisms such as traditional reconciliation and truth telling processes, alternative sentencing, reparations and any other formal institutions or mechanisms;

AND

Recalling that the government of Uganda also recognized that a comprehensive, independent and impartial analysis of the history and manifestations of the conflict,

including the human rights violations, abuses and crimes committed during its course, is an essential ingredient for attaining reconciliation at all levels;

AND

Reaffirming the commitment of the Ugandan people to peace, justice, unity, national healing and reconciliation and the general principles of human and peoples' rights as enshrined in Chapter IV of the Constitution of the Republic of Uganda, the African Charter on Human and Peoples Rights, the Rome Statute establishing the International Criminal Court the Charter of the United Nations and the Universal Declaration of Human Rights, and other international conventions and protocols relating to the rights and protections of women, children and minorities, to which Uganda is a party.

NOW THEREFORE, Parliament hereby enacts this law to provide a framework for achieving national reconciliation and to address the historical causes underlying violent conflicts and widespread and systematic violations or abuses of human rights.

BILL NO... 2009
The National Reconciliation Bill 2009

A Bill for an Act

ENTITLED

THE NATIONAL RECONCILIATION ACT, 2009

An Act to:

Provide for the establishment of a National Reconciliation Forum ("Forum") with a mandate to direct an independent national reconciliation process in Uganda by examining the causes, nature and extent of violent conflicts and widespread and systematic violations or abuses of human rights from independence in 1962 to the date of assent including all its relevant antecedents and circumstances, and taking into account the perspectives of the victims and the motives and perspectives of the persons and institutions responsible for creating and perpetuating this legacy; and provide for other related matters.

BE IT ENACTED BY Parliament of the Republic of Uganda as follows:

PART I – PRELIMINARY

A. Title and Commencement

1. This Act may be cited as the "National Reconciliation Act, 2009".

2. This Act shall come into force on the date of assent.

B. Interpretation

In this Act, unless the context otherwise requires –

“Act” means the National Reconciliation Act.

“Amnesty” means forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State for acts or omissions for which amnesty is available under this Act.

“Amnesty Committee” refers to the committee of the Forum responsible for determining if an individual is entitled to amnesty under this Act.

“Appropriate justice mechanisms” refer to formal justice mechanisms, traditional justice, religious arbitration and other alternative justice mechanisms deemed appropriate by the Forum.

“Armed forces and groups” refers to any full or part-time members or agents of the state and its respective auxiliaries, or any armed groups not under the control of the state.

“Chairperson” means the Chairperson of the National Reconciliation Forum, Amnesty Committee, or Investigation Committee as the case may be established under this Act.

“Conflict” refers to the acts, omissions or offences the Forum is authorized to investigate under this Act.

“Constitution” means the Constitution of the Republic of Uganda, 1995.

“Date of assent” means the date this Act shall come into force.

“Human rights abuses” refers to violations of human rights perpetrated by non-state actors.

“Human rights violations” refers to violations of human rights perpetrated by state actors, including groups or individuals not officially affiliated with the state but under its de facto control.

“Investigation Committee” refers to the committee of the Forum responsible for conducting investigations under this Act.

“Joint Committee” refers to a committee of Parliament of the Republic of Uganda established for the purposes of fulfilling the objectives of this Act.

“Minister” means the Minister responsible for Justice.

“Selection Committee” means the committee selected to nominate members of the Forum.

“Perpetrators” refer to persons or institutions directly and indirectly implicated in the organisation, financing, directing, or execution of crimes, in the course of the conflict.

“President” means the President of the Republic of Uganda.

“Regions” refer to the four regions of Uganda: northern, eastern, western and central.

“Reparations” refer to any remedy or any form of compensation, symbolic or ex-gratis payment, restitution, rehabilitation or recognition, reconciliation, satisfaction or guarantee of non-repetition made in respect to victims.

“Victims” refer to persons, groups or institutions affected directly or indirectly as a result of human rights violation, abuses, or damage in the course of the conflicts resulting in physical harm, mental injury, emotional affliction, or economic losses.

PART II – THE FORUM

A. National Reconciliation Forum

There shall be established a National Reconciliation Forum with such mandate and powers as provided for under this Act.

B. Structure of the Forum

The Forum shall:

1. Operate on both a national and regional level; and
2. Subject to its mandate and for the purpose of carrying out its functions, have powers to operate throughout the country with support from existing institutions including the Amnesty Commission, the Human Rights Commission, local government, traditional justice institutions, and faith-based institutions.

C. Powers of the Forum

1. The Forum shall have all powers reasonable and necessary to carry out its mandate, including but not limited to, the power to hold hearings, take statements, summon witnesses, conduct searches and seize relevant documents, issue warrants, preserve documents, determine eligibility and grant or deny amnesty, conduct investigations including exhumations and forensic examinations, identify perpetrators, and issue a final report and recommendations

2. The regional offices shall be considered organs of the Forum and shall have such authority as delegated to them by the Forum.

D. Time Frame for the Forum

The Forum shall be established within three months from the date of assent. After all members of the Forum have been selected, the Forum shall be given three months preparatory period within which to facilitate activities necessary for the commencement of its core functions. Commencing with the end of the preparatory period, anyone having standing to present a matter to the Forum shall have five years in which to do so beyond that date. The Forum shall conclude its consideration of any pending matters within six months of the end of the five-year filing period. The Forum shall have one year beyond the end of the filing period to write and publicize its report to the citizens of Uganda.

E. Extension of Tenure

Parliament may by resolution and on request from the Forum, extend the Forum's tenure for an additional period of three months at a time only, for good cause(s) shown. In no case shall such a request for extension be given for more than two times.

F. Immunity of Members and Staff of Forum

A member of the Forum or any employee or other person performing any authorized function of the Forum shall not be personally liable to any civil proceedings for any act done in good faith in the performance of those functions.

G. Seal of the Forum

The Forum shall have a common seal the use of which shall be authenticated by signature of the Chairperson or other authorised member of the Forum.

H. Traditional, Cultural and Religious Institutions

The Forum shall co-ordinate with appropriate justice and reconciliation institutions within different communities to promote community truth-telling and reconciliation at the grassroots and community levels and makes recommendations establishing the terms of reconciliation within the regions and across borders where appropriate.

PART III – MANDATE AND FUNCTIONS OF THE FORUM

Considering and analysing any matter relevant to violent conflicts and to widespread or systematic violations or abuses of human rights including their history, facilitating and directing, and/or initiating enquiries into manifestations of conflicts including human rights violations and abuses, documenting such violations and abuses, determining motives and pattern, gathering and receiving evidence of violations and abuses, determining who can file complaints, restoring the human dignity of victims by giving them the opportunity to tell their stories and the acknowledgement by perpetrators, adopting its own rules and procedures, designing witness protection mechanisms, coordinating its activities with the Amnesty Commission and the Human Rights Commission, referring cases to traditional cultural institutions, referring cases to alternative justice and reconciliation mechanisms, preparing reports, creating an independent and objective historical record, making recommendations on the appropriate mechanisms for reconciliation, reintegration, reparations and rehabilitation measures to victims, initiating legal, institutional and other reforms, and designing and conducting symbolic reconciliation activities.

A. Jurisdiction

The Forum shall have jurisdiction over all matters within its mandate that occurred from 9 October 1962 to the date of assent, provided that:

1. The matters in question occurred within the geographical limits of the Republic of Uganda without regard to the nationality of the participants; or
2. Either the victims or perpetrators were citizens of the Republic of Uganda without regard to where in the world the acts in question occurred.
3. Notwithstanding the above, the Forum shall have power to admit for hearing and documentation purposes, any relevant incidents, violations or abuses that took place before 9 October 1962 and remain unaddressed.

B. Promotion of National Peace, Unity and Reconciliation

The Forum shall exercise such functions as are relevant for the realisation of its mandate, including but not limited to:

1. Facilitating and, where necessary, initiating or coordinating enquiries into the history of conflicts and documentation of:
 - a) Violations and abuses of human rights, violation of land rights and destruction of land and other economic crimes, privileges, powers and authority in Uganda permitting systematic patterns of violation, giving particular attention to the experiences of women, children and vulnerable groups, especially as pertains to gender-based violations.
 - b) The fate of individuals who have disappeared during conflicts.

2. The nature, causes, extent, and the manifestations of conflicts including violations and abuses of human rights, including massacres, gender-based violence, murder, extra-judicial killings, disappearances, economic crimes, factors leading to the perpetuation of these conflicts and any other form of crime perpetrated in the cause of violent conflicts during the specified period, and the root causes, circumstances, factors, context, motives and perspectives which led to such violations or abuses.
3. Identifying those responsible and determine whether the violations or abuses within the Forum's mandate were the result of deliberate planning by those responsible.
4. Conducting investigations, including exhumations, forensic examinations, and holding hearings.
5. Helping restore the human dignity of victims and promoting reconciliation by providing an opportunity for victims, perpetrators and other witnesses, to give an account of the violations and abuses suffered.
6. Promoting reconciliation and reintegration through truth telling in communities through cooperation with any traditional or other community reconciliation interlocutors.
7. Seeking assistance from traditional, cultural, religious and other leaders to facilitate the public sessions and resolve local conflicts.
8. Soliciting the assistance of foreign governments and individuals, organisations, governmental departments or non-resident Ugandans; obtaining records, documents or any other information from any sources including government authorities; and compelling the production of such information where necessary.
9. Establishing procedures and arrangements for ensuring the participation of victims, and designing witness protection mechanisms on a case-by-case basis.
10. Referring specific or general matters to traditional cultural institutions or other alternative justice mechanisms, where appropriate.
11. Promoting and encouraging the preservation of the memory of the events and victims of the conflict through memorials, archives, commemorations and other forms of preservation.
12. Publishing a comprehensive and public final report setting out the Forum's activities and findings including recommendations with regard to preventing future conflicts.
13. Making recommendations to the Government of Uganda and other actors with regard to the most appropriate modalities for implementing a regime of reparations and rehabilitations, taking into account the needs of victims and perpetrators for psycho-social or other rehabilitative services.

14. Designing reconciliation initiatives and conducting symbolic reconciliation activities in collaboration with relevant institutions throughout the nation and encouraging or facilitating inter-communal reconciliations initiatives.

PART IV – COMPOSITION OF THE FORUMS AND COMMITTEES

A. Selection Committee

1. There shall be a five member Selection Committee responsible for selecting members of the Forum. At least two members shall be women. The composition of this committee shall reflect a regional balance and comprise highly qualified persons of integrity drawn from academia, civil society organizations, faith based institutions, cultural institutions and other professions. This committee shall be appointed by the Parliament of the Republic of Uganda using the following criteria:

- a) citizens of diverse professional backgrounds;
- b) proven integrity and credibility;
- c) non-partisan;

2. No serving elected official, employee of a local or the central government, a member of the armed forces, or a person previously convicted of a felony shall be appointed to the Selection Committee.

3. The Selection Committee shall be constituted within thirty (30) days from the date of assent and shall serve for such period necessary to select members of the Forum. It shall be paid such remuneration and allowances determined by the appointing authority as reasonably necessary for them to perform their duties.

4. Information concerning the selection of the Selection Committee and members of the Forum shall be widely publicized in the national press and other media to inform the public of its critical role in the national reconciliation process.

B. Membership of the Forum

The Forum shall comprise thirteen (13) members, with not less than seven (7) women. One shall be from the Amnesty Commission, one from the Human Rights Commission, three from academia and civil society and two from each of the four regions. These members shall be selected by the Selection Committee in the following manner.

1. The Amnesty Commission and the Human Rights Commission shall each nominate two candidates within sixty (60) days of the date of assent. Within thirty (30) days

thereafter, the public shall contribute its views concerning the nominees to the Selection Committee. Within fifteen (15) days thereafter, the Selection Committee shall select one person from each Commission to serve as members.

2. Three members of the Forum shall be representatives of academia and civil society. Members of academia and civil society shall nominate candidates within thirty (30) days of the date of assent. Within thirty (30) days thereafter, the public shall contribute its views concerning the nominees to the Selection Committee. The Selection Committee shall make its selection within fifteen (15) days thereafter.

3. Each region shall have two members, at least one of who shall be a woman. Those members shall be persons from that region. The Selection Committee shall within eighty (80) days of the date of assent conduct a nationwide sensitization and selection process across all regions to inform the public about the Forum and inviting nominations. The public shall nominate candidates within ninety (90) of the date of assent. The Selection Committee shall make its selection within fifteen (15) days thereafter.

4. Within thirty (30) days of the selection of the Forum, the Parliament of the Republic of Uganda sitting in a special session or otherwise, shall approve those selected to serve as members of the Forum; provided, however, that Parliament shall reject any member who does not meet the criteria set forth in Part IV(C) In that event, the Selection Committee shall choose another member pursuant to Part IV(F).

C. Criteria

The members of the Forum shall be persons of high moral character, proven integrity, and good educational background. They shall be persons who can be trusted to remain impartial in the performance of their functions, and who will enjoy the confidence of the people of Uganda. Upon appointment, members shall renounce their membership in political parties. No serving elected official, employee of a local or the central government, a member of the armed forces, or a person previously convicted of a felony shall be appointed to the Forum.

D. Terms of Employment, Tenure, Resignation and Removal

1. Members of the Forum shall be employed by the Government of Uganda and shall render services on a full basis. They shall be remunerated in an amount comparable but not less than a commissioner serving on a Commission of Inquiry. Their remuneration shall not be reduced during the term of that member's service on the Forum.

2. All Forum members shall hold office for the full duration of the Forum unless terminated in accordance with this Act.

3. Notwithstanding the above, a Forum member may at any time resign by tendering his or her resignation in writing upon giving a 30-day notice to the Chairperson of the Forum; and if it is the Chairperson who is resigning, to the Chief Justice.

4. A Forum member may be removed from the Forum only by following existing procedures and substantive grounds for the removal of Judicial Officers under the Constitution of the Republic of Uganda.

E. Chairperson and Vice-Chairperson

1. Members shall designate from amongst themselves one of the members as the Chairperson, and another as the Vice Chairperson.

2. If both the Chairperson and the Vice-Chairperson are absent or unable to perform their duties, the other members shall from among their number nominate an Acting Chairperson for the duration of such absence or incapacity.

3. The duties of the person then serving as the Chairperson shall include, but not be limited, to the following:

- a) chairing all meetings and hearings of the Forum;
- b) supervise the administrative functions of the Secretariat;
- c) represent the Forum;
- d) undertake any other such duties set forth in this Act.

F. Vacancy in the Forum

If a member resigns, is removed from office or dies, the Forum shall in consultation with the Chief Justice fill in the vacancy by appointing a new member from the representative group from which that member was originally selected.

G. Staffing of the Forum and Consultants

1. A national secretariat shall be established to render technical, professional, administrative and clerical assistance to the Forum. It shall comprise such sections or units and staff or consultants of diverse professional background as are relevant to the work of the Forum.

2. The Secretariat shall establish a traditional justice liaison section, staffed by persons highly qualified with respect to traditional justice mechanisms who shall liaise with victims, perpetrators and their families or communities to encourage or facilitate the use of alternative traditional reconciliation and truth telling mechanisms.

3. The national secretariat shall be headed by an Executive Secretary selected by the Forum who shall serve the Forum as Secretary and be responsible for the daily administrative and operational functioning of the Forum. The Forum shall establish such

offices and employ such staff, on such terms and conditions, as it may deem necessary and appropriate for the conduct of its mandate under this Act.

4. The persons employed by the Forum shall receive such remunerations, allowances, and other employment benefits, and shall be appointed on such terms and conditions and for such periods as the Forum may determine.

5. Funds shall be allocated to contract independent consultants for the purpose of examining specific issues as they arise and shall be allocated for the creation of a data base to assist in the processing, storage, organisation and analysis of witness statements, documents, investigations and other necessary matters.

H. Amnesty Committee

1. There is hereby established an Amnesty Committee comprised of five members. Its members shall be appointed by the Forum Chairperson after consultations with the other members of the Forum.

2. The Amnesty Committee shall consist of a Chairperson who shall be a member of the Forum. The other four members need not be members of the Forum. However, they shall meet the criteria for appointment of members of the Forum pursuant to Part V (C).

3. Any application for amnesty shall be decided by any three members of the Amnesty Committee selected by the Committee's Chairperson.

I. Investigation Committee

1. There is hereby established a committee to be known as the Investigation Committee. Its members shall be appointed by the Chairperson after consultations with the other members of the Forum.

2. The Investigation Committee shall consist of a Chairperson who shall be a member of the Forum and two additional members who have specialized knowledge in investigating complex societal and criminal conflicts. Those two members need not be members of the Forum.

J. Financial Support

1. The work of the Forum shall be financed from the consolidated fund but it may accept grants and assistance from international donors and agencies. The national secretariat shall adopt a system of sound financial management policies in conformity with the public finance regulations and internationally acceptable principles and accounting practices to ensure prudent and efficient management of funds.

2. The Forum shall be self-accounting and may deal directly with the Minister responsible for finance in relation to its finances, which shall be charged on the Consolidated Fund.

PART V – HEARINGS AND PROCEDURES OF THE FORUM AND ITS COMMITTEES

A. General

1. The Forum shall have no jurisdiction to admit for hearing and grant amnesty in respect of any crime that falls within the jurisdiction of the War Crimes Division of the High Court, until such time as the Director of Public Prosecution shall advise the Forum that it will not prosecute the said person before the War Crimes Division.

2. Time and place of meetings

a) The Forum shall hold as many public hearings as possible in the different regions taking into account the number of violations or abuses reported, public interest, logistics, and access to and safety of witnesses.

b) A meeting of the Forum shall be held at a time and place determined by the Chairperson or, in the absence or inability of such Chairperson, by the Vice-Chairperson or, in the absence or inability of both, the Acting Chairperson.

3. Quorum

The quorum for all meetings of the Forum shall not be less than five members and not less than three members for any hearing.

4. Standing

Anybody with knowledge, direct or indirect, of any matters within the mandate of the Forum shall have standing to initiate proceedings by filing a complaint with the mandate of the Forum. This includes natural persons, groups of persons, and institutions. The Forum may also initiate investigations based on information that becomes available to it.

B. Amnesty Committee Hearings and Procedures

1. Applications for granting of amnesty and eligibility

a) Subject to Part V (A) (1), a person is eligible for amnesty, if the said applicant proves that the acts, omissions, or offenses for which amnesty is sought;-

(i) falls within the mandate of the Forum; and

- (ii) the applicant has made a full disclosure of all relevant facts.
- b) The Committee shall grant amnesty in respect of those acts, omissions, or offences for which the applicant has made full disclosure; provided, however that if it is subsequently determined the applicant failed to disclose all acts for which he would otherwise have been eligible for amnesty, he shall be barred from presenting a new amnesty application for those acts.
- c) In considering whether or not to grant amnesty for a particular act, omission or offence the Committee shall consider the following:
 - (i) the motive of the person who committed the act;
 - (ii) the legal and factual nature of the act, omission or offence, including the gravity of the act;
 - (iii) whether the act was committed in the execution of an order of, or on behalf of, or with the approval of, the organization, institution, government, non-governmental political movement or body of which the person who committed the act was a member, an agent or a supporter; and
 - (iv) the relationship between the act and the political objective pursued or the effect on the public, and in particular the directness and proximity of the relationship and the proportionality of the act to the objective pursued, but does not include any act committed by the applicant who acted-
 - (aa) for personal gain, provided that an act by any person who acted and received money or anything of value as an informer of any political actor or an organization who was terrorizing the public, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or
 - (bb) out of personal malice, ill-will or spite directed against the victim of the acts committed.
- d) Any person who wishes to apply for amnesty shall, within the five-year filing period of the Forum's existence, submit such an application to the Forum in the prescribed form.
- e) The Committee shall give priority to applications of persons in custody for offenses, acts, or omissions for which the applicant is seeking amnesty.
- f) Once the Committee concludes its investigation, the Committee may-
 - (i) either

inform the applicant that the application does not relate to an act for which amnesty is available; and, in the absence of the applicant and without holding a hearing refuse the application and inform the applicant accordingly; or

(bb) afford the applicant the opportunity to make a further submission;

(ii) if it is satisfied that-

the acts set forth in the application are ones for which amnesty is available; and

(bb) there is no need for a hearing; then

(cc) grant amnesty and inform the applicant accordingly; provided however, that reasonable notice is first given to any known victims who shall be afforded an opportunity to first express their views before the decision is made.

g) If an application has not been dealt with as set forth immediately above, the Committee shall-

(i) in the prescribed manner, notify the applicant and any victim or person implicated, or having an interest in the application, of the place where and the time when the application will be heard;

(ii) inform the applicant and victims of their right to be present at the hearing and to testify, adduce evidence and submit any article to be taken into consideration;

(iii) either grant or deny the amnesty application;

(iv) if either the applicant or any victim cannot afford legal representation, the Committee shall provide that person a legal representative

h) The Committee may consider jointly individual applications in respect of any particular act, omission or offence to which such applications relate.

If the act or omission which is the subject of the application constitutes the ground of any claim in civil proceedings instituted against the person who submitted that application, the court hearing that claim may at the request of such person, if it is satisfied that the other parties to such proceedings have been informed of the request and afforded the opportunity to address the court or to make further submissions in this regard, suspend those proceedings pending the consideration and disposal of the application.

j) If the person who submitted an application is charged with any offence constituted by the act or omission to which the application relates, or is standing trial upon a charge of having committed such an offence, the Committee may request the appropriate authority to postpone the proceedings pending the consideration and disposal of the application for amnesty.

k) (i) Prior to or in the absence of a public hearing, all information in the possession of the Committee, shall be confidential for the life of the Forum; provided, however, that with respect to an application being handled without a public hearing, any victim of the applicant who is commenting on the application pursuant to Part (B)(1) e)(ii)(cc) shall have access to the file.

(ii) The confidentiality referred to in the preceding paragraph shall lapse when a hearing is scheduled.

l) The Committee shall inform the applicant and, if possible, any victim, of the decision of the Committee to grant or deny amnesty to such person in respect of a specified act and the Committee shall submit to the Forum a record of the proceedings.

m) No statements or testimony given by one applying for amnesty, either in the amnesty application, statements to the Investigation Committee or testimony before the Amnesty Committee, or in any other forum proceeding may be used directly or indirectly against the applicant in any criminal or civil proceeding.

2. Grant of Amnesty and effect thereof

a) The Committee shall forthwith by proclamation in the Gazette make known the full names of any person to whom amnesty has been granted, together with sufficient information to identify the act, omission or offence in respect of which amnesty has been granted.

b) Subject to the provisions of Part 5 (B), this Act, no person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence.

c) Where amnesty is granted to the applicant, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the applicant.

d) If any person-

(i) has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or

(ii) has been convicted of, and is awaiting the passing of sentence in respect of or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted, the criminal proceedings shall forthwith upon publication of the proclamation in the Gazette become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released.

e) If any person has been granted amnesty in respect of any act or omission that formed the grounds of a civil judgment which was delivered at any time before the granting of the amnesty, the publication of the proclamation in the Gazette shall not affect the

operation of the judgment in so far as it applies to that person and the applicant shall be obligated to respond to the judgment as if no amnesty application had been granted.

f) Where any person has been convicted of any offence constituted by an act or omission associated for which amnesty has been granted, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.

3. Refusal of amnesty and effect thereof

a) If the Committee has refused any application for amnesty, it shall as soon as possible notify-

(i) the applicant and any victims known to the Committee; and

(ii) the Forum, in writing of its decision and the reasons for its refusal.

b) If any criminal or civil proceedings were suspended pending a decision on an application for amnesty, and such application is refused, the court concerned shall be notified within fifteen days..

c) No adverse inference shall be drawn by the court concerned from the fact that the proceedings that were suspended pending a decision on an application for amnesty are subsequently resumed.

4. Authority of the Forum respecting Amnesty determination

The Forum shall not have any authority to review any grant or denial of amnesty.

C. Investigation Committee Procedures

1. The Investigation Committee shall conduct all investigations required by the Forum in furtherance of its mandate, including the interviewing of potential witnesses, victims and alleged perpetrators, the gathering of documentary evidence and any other investigations requested by the Forum. For the purposes of this section, the investigative authority of the Forum and this Committee are identical.

2. To ensure the narratives of those affected by the conflicts are told, the Committee shall have its statement takers in each region record the narratives of persons willing to share their experiences.

3. Subject to this Act, no article or information obtained by the Committee shall be made public, and no person except a member of the Committee and the Forum, shall have access to such article or information until such time as the Forum or the Committee

determines that it may be made public or until the commencement of any hearing which is not held *in camera*.

Powers of Forum with regard to investigations and hearings

3. a) The Forum and this Committee may for the purposes of or in connection with the conduct of an investigation or the holding of a hearing, as the case may be-

(i) at any time before the commencement or in the course of such investigation or hearing conduct an inspection *in loco*;

(ii) by notice in writing, require that any individual, governmental or non-governmental organization preserve any documents or class of documents and not remove them from a designated place until such time as the Forum gives notice for the production of any such documents pursuant to this Act;

(iii) by notice in writing call upon any person who is in possession of or has the custody of or control over any article or other thing which in the opinion of the Forum is relevant to the subject matter of the investigation or hearing to produce such article or thing to the Forum.

b) Subject to this Act, the Forum may retain any article or other thing so produced for a reasonable time;

(i) by notice in writing call upon any person to appear before the Forum and to give evidence or to answer questions relevant to the subject matter of the hearing;

(ii) in accordance with this Act seize any article or thing which in the opinion of the Forum is relevant to the subject matter of the investigation or hearing.

c) A notice compelling the attendance of a witness or the production of any document or article shall specify the time when and the place where the person to whom it is directed shall appear. It shall be signed by a member of the Forum, shall be served by a member of the staff of the Forum or by a designated official by delivering a copy thereof to the person concerned or by leaving it at such person's last known place of residence or business, and shall specify the reason why the article is to be produced or the evidence is to be given.

d) If the Forum is of the opinion that the production of any article in the possession or custody or under the control of the State, or any department or division thereof may adversely affect any intended or pending hearings or the conduct of any investigations, the Forum shall take steps aimed at the prevention of any undue delay in or the disruption of such investigation or hearings.

4. The Forum may require any person who in compliance with a requirement in terms of this section appears before it to take the oath or to make an affirmation and may through the Chairperson or any member of the staff of the Forum administer the oath to or accept an affirmation from such person.

Compellability of witnesses and inadmissibility of incriminating evidence given before Forum

5. a) Any person who is questioned by the Forum in the exercise of its powers in terms of this Act, or who has been subpoenaed to give evidence or to produce any article at a hearing of the Forum shall, subject to the provisions of this Act, be compelled to produce any article or to answer any question put to him or her with regard to the subject-matter of the hearing notwithstanding the fact that the article or his or her answer may incriminate someone.

b) Subject to the provisions of this Act, the existing laws of evidence regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a court of law shall apply.

c) Any person appearing before the Forum shall be entitled to peruse any article, which was produced by him or her, as may be reasonably necessary to refresh his or her memory.

Entry upon premises, search for and seizure and removal of certain articles or other things

7. a) The Forum or its authorized representative may on the authority of a search warrant, issued under this Act enter upon any premises in or upon which any article or thing-

(i) which is concerned with or is upon reasonable grounds suspected to be concerned with any matter which is the subject of any investigation in terms of this Act;

(ii) which contains, or is upon reasonable grounds suspected to contain, information with regard to any such matter, is or is upon reasonable grounds suspected to be, and may be required on the authority of a search warrant, issued under this Act.

(aa) inspect and search such premises and there make such inquiries as he or she may deem necessary;

(bb) examine any article or thing found in or upon such premises;

(cc) make copies of or extracts from any such article found upon or in such premises;

(dd) seize any article or thing found upon or in such premises which he or she upon reasonable grounds suspects to be an article or thing mentioned in paragraph 7 (a) (i) and (ii) above;

(ee) after having issued a receipt in respect thereof, remove and retain such article or thing for a reasonable period for the purpose of further examination or, make copies thereof or extracts there-from, provided that any article or thing that has been so removed, shall be returned as soon as possible after the purpose of such removal has been accomplished.

(ii) An entry or search warrant referred to in this Act shall be issued by the Chairman of the Forum or any person acting on his/her behalf.

(iii) The power conferred by this section is in addition to, and does not limit or restrict, a power conferred by any other provision of this Part.

c) A warrant issued under this Act shall be executed by day unless the person who issues the warrant authorizes the execution thereof by night at times, which shall be reasonable

d) Any person executing a warrant in terms of this section shall immediately before commencing with the execution-

(i) identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises;

(ii) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

8. a) Any person who on the authority of a warrant issued under the provisions of this Act enter upon to search any premises, may use such force as may be reasonably necessary to overcome resistance to such entry or search.

b) No person may enter upon or search any premises unless he or she has audibly demanded admission to the premises and has notified the purpose of his or her entry, unless such person is upon reasonable grounds of the opinion that any article or thing may be destroyed if such admission is first demanded and such purpose is first notified.

9. A warrant issued under this Act may be issued on any day and shall be of force until-

a) it is executed; or

b) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or

- c) after the expiry of three months from the day of its issue; or
- d) the purpose for the issuing of the warrant has lapsed, whichever may occur first.

10. Power to take photographs of accused persons or related property

a) The Forum or its authorized representative may cause photographs to be taken of any person or property under investigation, in lawful custody or reasonable suspicion for any incident under investigation or relevant to such investigations.

b) If any such person, when required to do so, refuse to allow those photographs to be taken to the satisfaction of the Forum or its authorized person, he or she commits an offence and is liable on conviction to a fine not exceeding 25 currency points or to imprisonment for three months; and, after conviction

D. Forum Hearings and Procedures

1. Hearings open to the public

a) The hearings of the Forum and Amnesty Committee shall be open to the public whenever consistent with other provisions of this Act.

b) The Forum may, at its absolute discretion, direct sufficient witness protection measures during public proceedings in cases where the physical or mental security of alleged perpetrators, victims, or witnesses is deemed to be at risk.

2. Proceedings *in camera*

a) An application for proceedings to be held *in camera* may be brought by any witness.

b) Where the Forum or Amnesty Committee directs that the public or any part thereof shall not be present at any proceeding, it may direct that:

(i) No information relating to that proceeding or any part thereof shall be made public in any manner, provided, however, that any such information may be given to the Director of Public Prosecutions with respect to a potential future prosecution within the jurisdiction of any court; and

(ii) No person may in any manner make public any information revealing the identity of any party to the proceedings for whom the order to hold *in camera* hearings was designed to protect, provided however, that the Forum may identify the name of any alleged perpetrator who it determines bears significant responsibility for any of the conflicts covered by its mandate.

3. Attendance of witnesses

The Forum shall have the power to compel attendance and the production of any documents or any person for interviews by the Investigation Committee or to testify at any hearing called by the Forum or Amnesty Committee in a manner consistent with the Act.

4. Compelled witness

a) Any person who has been summoned or called upon to appear before the Forum or Amnesty Committee may appoint a legal representative or, if he cannot afford one, the Forum shall pay the reasonable expense incurred by the witness.

5. A right of appeal is available in the following situations only:

a) A victim or one who has applied for amnesty may appeal the Amnesty Committee's decision to the High Court.

b) Any decision of the Forum with respect to the issuances of summons, searches and seizures and the productions of documents may be appealed to the appropriate court in the same manner as if it had arisen under any law in Uganda.

6. Guiding principles on victims and witnesses

When dealing with alleged victims and perpetrators, the Forum shall be guided by the following principles:

a) All alleged victims and perpetrators shall be treated with compassion and respect for their dignity;

b) All alleged victims and perpetrators shall be treated equally, without regard to race, ethnicity, religion, language, sex, gender social group, ability, nationality or age;

c) Procedures dealing with alleged victims and perpetrators shall be expeditious and fair.

d) Appropriate measures shall be taken to minimise inconvenience to alleged victims, perpetrators and witnesses and, when necessary, to protect their privacy and safety and that of their families. The Forum shall take sufficient measures to allow victims to communicate in the language of their choice. Where necessary, an interpreter will be provided by the forums.

7. Confidentiality of information

a) Every member and every staff member of the Forum shall keep in strict confidence any information which comes to his or her knowledge by virtue of their office or association with the Forum, and shall take an oath or affirmation of that duty.

b) The Forum shall not release or communicate any of the information it acquires during the course of its existence to any individual or institution except as is necessary to carry out its mandate.

8. Grant of immunity

The Forum shall have the discretion to grant use immunity from prosecution so that testimony given before the Forum or statements given to a Forum investigator cannot be used against that witness in a subsequent criminal proceeding as evidence. Use immunity shall not prevent the Director of Public Prosecutions from using such statements to develop leads or for background purposes in developing criminal cases or establish the crime base in cases of war crimes and crimes against humanity.

9. Obstruction and interference

Any person who wilfully obstructs or otherwise interferes with the work of the Forum or any of their members or officers engaged in the discharge of their functions under this Act commits an offence and shall be liable on conviction to a fine of not less than 20 currency points or a term of imprisonment not less than three months, or both.

10. Once the final report is issued, the Forum shall cause a record to be kept of its proceedings and all documents in its possession arising out of its work. In addition to the final report, its written summaries, audiovisual summaries and electronic communications, all verbatim or other record of the statements of witnesses in hearings (except those made *in camera*) of the Forum or Amnesty Committee along with the documents referred to in the hearings shall be available to the public under any law relating to Access to Information

11. Identification of responsible persons

During the course of hearings or in the final report, the Forum shall have the right to name individuals or institutions it concludes bear significant responsibility for any of the conflicts covered by its Mandate; provided, however, that the Forum first notify the person or institution to be named and provide a reasonable opportunity to object to that proposed naming and the basis of that request. Notwithstanding the above provision, a person or institution shall not be named unless evidences supporting such conclusion is corroborated by at least two sources; the implicated person or institution shall be given the opportunity to make a statement setting out his or her version of the facts or submit a document in rebuttal for inclusion in the file within 14 days from date of notice.

PART VI – INDEPENDENCE OF THE FORUM

A. Independence

1. The Forum, its members and every member of staff shall function without political or other bias or interference and shall, unless this Act expressly otherwise provides, be independent and separate from any party, government, administration or any other person or body.

2. Every member shall:

a) Notwithstanding any personal opinion, preference or former party affiliation, serve impartially and independently and perform his or her duties in good faith and without fear, favour, bias or prejudice;

b) Serve in a full- or part-time capacity in preference to any other duty or obligation arising out of any other employment or occupation or the holding of any other office;

c) No members shall:

(i) Through association, statement, action or in any other manner jeopardize his or her independence, or in any other manner harm the credibility, impartiality or integrity of any forum;

(ii) Make private use of or profit from any confidential information gained as a result of his or her membership of any forum; or

(iii) Divulge any such information to any other person except in the course of the performance of his or her functions as a member.

B. Fair Hearing and Conflict of Interest

1. If at any stage during the course of a proceeding or other meeting of the Forum it appears that a member has or may have a pecuniary or personal interest or is acquainted with any witness likely to come before that forum which could cause a conflict of interest in the performance of his or her functions, that member shall forthwith disclose the nature of his or her interest and absent him- or herself from the meeting so as to enable the remaining members to decide whether the member should be precluded from participating in the meeting by reason of that interest.

2. If the member fails to disclose any potential conflict of interest and the non-disclosure is subsequently discovered, all decisions previously taken which could be tainted or otherwise affected by the conflict of interest must be reviewed without the participation of the member concerned. Where, upon review, a decision appears to have been affected by the conflict of interest, it should be varied or set aside.

3. The same meeting dedicated to determining whether a conflict of interest took place shall also decide what disciplinary steps to take against the offending member in

instances where the said member failed to disclose the conflict of interest at the earliest opportunity.

PART VII – REPORTING AND RECOMMENDATIONS

A. Reporting and Recommendations

1. The Forum shall simultaneously submit a final report at the end of its tenure to the President and Parliament, and shall have the report published both in the Official Gazette and any electronic media websites established by the Forum. The Forum may also prepare a summary report of not more than 300 pages, an audiovisual documentary, and any other kind of electronic communication to assure the work of the Forum gains wide public and international distribution.

2. The Final report, in addition to such other matters the Forum deems appropriate, shall:

- a) Detail all aspects of the Forum’s work, including investigations, hearings, findings and the emerging impartial historical record;
- b) Contain conclusions regarding the needs of victims, as well as recommendations regarding public memorials and prosecution;
- c) Make recommendations for reparations for victims;
- d) Identify those individuals who bear particular responsibilities for the conflicts that are the subjects of the Forum’s mandate; and
- e) Recommend the steps that should be taken, including new legislation, changes in government policy and changes to the law, to assure that the horrors visited on the citizens of Uganda never recur.

B. Final Responsibilities

1. The Amnesty Commission, Uganda Human Rights Commission, Courts of Judicature and other Governmental organs like the IGG, DPP, UPDF and the Police force etc, shall faithfully and diligently consider the implementation of the recommendations of the report that are directed to such bodies and encourage or facilitate the implementation of any recommendations that may be directed to others.

2. The President shall immediately upon receiving the report of the Forum appoint a reparation committee to faithfully consider implementing the recommendations of the Forum and Parliament shall appoint a Joint Committee to supervise the implementation of these recommendations.

3. The Forum shall in collaboration with all political, cultural and religious leaders conduct a nation-wide symbolic reconciliation, as part of its mandated reconciliation activities and encourage or facilitate, inter-communal reconciliation symbolic activities, within the different communities through out the nation.

PART VIII – GENERAL

A. Conflicting Provisions of Other Legislation

The provisions of this Act shall be interpreted in such a manner so as not to contradict any other law. In the event where contradiction is inevitable, this Act shall prevail.

B. General Offences and Punishment

Any person who wilfully makes confidential information available, reveals identity of any confidential witness, performs acts prejudicial to proceedings before the Forum, bears false witness or does anything in the course of Forum proceedings which, if done in a court of law, would constitute contempt of court, commits an offence and shall on conviction be liable to a fine of 20 currency points or to imprisonment for a period of three months, or to both such fine and imprisonment