

## 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.<sup>1</sup> The ICC Prosecutor determined that there was sufficient basis for investigations and, in July 2004, commenced investigations.<sup>2</sup> Warrants of arrest were issued under seal by Pre-Trial Chamber II on 8 July 2005 and unsealed on 13 October 2005.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> Vincent Otii charged on 32 counts, comprising 11 counts of crimes against humanity and 21 counts of war crimes.<sup>6</sup> Okot Odhiambo charged on 10 counts, comprising 2 counts of crimes against humanity and 8

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<sup>1</sup> '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.)

<sup>2</sup> 'Prosecutor of the International Criminal Court Opens Investigations into Northern Uganda', ICC-CPI-20040729-65.

<sup>3</sup> 'Warrants of Arrest unsealed Against 5 LRA Commanders', ICC-CPI-20051014-110.

<sup>4</sup> As above.

<sup>5</sup> 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.

<sup>6</sup> 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.<sup>7</sup> Dominic Ongwen is charged on 7 counts, comprising 3 counts of crimes against humanity and 4 counts of war crimes.<sup>8</sup> Raska Lukwiya is charged on 4 counts, comprising of 1 count of crimes against humanity and 3 counts of war crimes.<sup>9</sup> 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.<sup>10</sup> 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'.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> Amnesty International and Human Rights Watch applauded the ICC for taking steps against the gross human rights violations in the conflict but also brought

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<sup>7</sup> ICC Pre-Trial Chamber II 'Public Redacted Version: Warrant of Arrest for Okot Odhiambo' (8 July 2005) ICC-02/04 para 5, 24 & 32.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> IrinNews.org 'Uganda: Indictment of LRA leaders draws widespread praise,' 17 Oct 2005 (accessed 3 August 2009).

<sup>13</sup> '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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> The immediate

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<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> 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).

<sup>17</sup> As above.

<sup>18</sup> '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](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.

<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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 LRA<sup>24</sup> when it is clear that the UPDF had also been responsible for crimes committed in the conflict.<sup>25</sup> The ICC Prosecutor maintained

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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.

<sup>19</sup> For more information on this see Refugee Law Project 'ICC Statement' 23 July 2004.

<sup>20</sup> 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 Abiyo 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.

<sup>21</sup> 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.

<sup>22</sup> A Branch, 'Uganda's Civil War and Politics of ICC Intervention' (2007) 21 (2) *Ethics and International Affairs* 185.

<sup>23</sup> 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.

<sup>24</sup> 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.'

<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup> 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

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<sup>26</sup> 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](http://www.opendemocracy.net/article/globalisation/international_justice/the-iccs-first-five-years) (accessed 18 Dec 2010).

<sup>27</sup> 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.

<sup>28</sup> '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.<sup>29</sup> 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,<sup>30</sup> 'revealing the government's confidence in its having a firm grip on the ICC proceedings.'<sup>31</sup> Indeed, the Ugandan owned newspaper, the New Vision, has carried headlines announcing that the ICC had 'cleared' the UPDF of wrongdoings in Northern Uganda.<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> In addition, the government for a long time did not provide

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<sup>29</sup> 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.

<sup>30</sup> 'Statement Defence Minister Mbabazi' (29 July 2004) Hansard [http://www.Parliament.go.ug/index.php?option=com\\_wrapper&Itemid=33](http://www.Parliament.go.ug/index.php?option=com_wrapper&Itemid=33) (accessed 12 October 2011).

<sup>31</sup> Nouwen & Werner (n 29 above) 950.

<sup>32</sup> 'ICC Clears UPDF in the North' Saturday Vision 30 August 2008 1.

<sup>33</sup> 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.

<sup>34</sup> 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.

<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup> 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.'<sup>39</sup>

In June 2010, Olara Otunnu, a prominent politician in Uganda<sup>40</sup> 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.<sup>41</sup> The ICC Prosecutor in the later years

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*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.

<sup>36</sup> See further details in chapter two.

<sup>37</sup> '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.

<sup>38</sup> 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.

<sup>39</sup> 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.

<sup>40</sup> 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.

<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

### 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

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<sup>42</sup> 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.

<sup>43</sup> Branch (n 22 above) 185 – 186.

<sup>44</sup> Nouwen & Werner (n 29 above) 953.

<sup>45</sup> Branch (n 22 above) 189.



alienate them from their communities.<sup>46</sup> 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,<sup>47</sup> 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.<sup>48</sup> However, the ICC issued an arrest warrant for Dominic Ongwen<sup>49</sup> who was abducted by the LRA when he was about 10 years old while on his way to school.<sup>50</sup>

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.<sup>51</sup> 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.<sup>52</sup>

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<sup>46</sup> 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.

<sup>47</sup> 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.

<sup>48</sup> Allen (n 15 above) 93.

<sup>49</sup> Arrest Warrant for Dominic Ongwen (n 8 above).

<sup>50</sup> 'Uganda Picking up the Pieces' IRIN News (7 October 2007) <http://www.irinnews.org/Report.aspx?ReportId=74572> (accessed 12 January 2010).

<sup>51</sup> 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).

<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup> Armed groups purposively select children because they are 'amenable to indoctrination, more loyal, and less questioning of commands that present moral difficulties.'<sup>58</sup> In such an environment, the

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<sup>53</sup> Arrest Warrant for Ongwen (n 8 above) counts 28, 29, 31 and 32.

<sup>54</sup> 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.

<sup>55</sup> 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.

<sup>56</sup> 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.

<sup>57</sup> A Honwana *Child Soldiers in Africa* (2007) 53.

<sup>58</sup> 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.<sup>59</sup>

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.<sup>60</sup>

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.<sup>61</sup> 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

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<sup>59</sup> Honwana (n 57 above) 28.

<sup>60</sup> JPR Field Note (n 54 above) 15.

<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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

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<sup>62</sup> 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.

<sup>63</sup> 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.

<sup>64</sup> 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.

<sup>65</sup> LM Ocampo 'Remarks at the 27<sup>th</sup> 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 affairs<sup>66</sup> therefore may have little time, interest or strength to engage in the ICC pursuits against the LRA.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> 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.<sup>70</sup> Also appearing before the ICC is Bahr Idriss Abu Garda who was the chair and general coordinator of military operations of

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<sup>66</sup> 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.

<sup>67</sup> 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.

<sup>68</sup> Clark (n 21 above) 43.

<sup>69</sup> 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).

<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup>

The international law principle of '*pacta sunt servanda*'<sup>77</sup> 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

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<sup>71</sup> 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).

<sup>72</sup> Both accused are still at large; see <http://www.icc-cpi.int/Menus/ICC/situations+and+cases> (accessed 14 Oct 2011).

<sup>73</sup> 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).

<sup>74</sup> 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.

<sup>75</sup> 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.

<sup>76</sup> Roper & Barria (n 74 above) 458.

<sup>77</sup> 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.<sup>78</sup>

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.<sup>79</sup> 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.<sup>80</sup> These provide hope that the LRA suspects will be captured.<sup>81</sup>

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

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<sup>78</sup> 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.

<sup>79</sup> International Crisis Group analysis, 'African Peace-building Agenda: Elements of a New Strategy to Disarm the LRA' 6 November 2009.

<sup>80</sup> 'Joseph Kony: African Union Brigade to Hunt Down LRA Leaders' the Guardian 24 March 2012.

<sup>81</sup> 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) 229<sup>th</sup> 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.<sup>82</sup>

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.'<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup>

In that case, the ICTR dismissed genocide charges against Barayagwiza because of violations of the pre-trial rights of the accused.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> Rwanda's

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<sup>82</sup> 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*.

<sup>83</sup> See article 72 ICC Statute (protection of national security information).

<sup>84</sup> Rome Statute art 93(4).

<sup>85</sup> *Prosecutor v Jean Bosco Barayagwiza* Case No. ICTR-97-19-AR72 (Decision of 2 Nov 1999) ICTR Trial Chamber (*Barayagwiza* Case).

<sup>86</sup> *Barayagwiza* Case para 72 & 106 – 111.

<sup>87</sup> E Goujin, 'Rwanda Suspends Cooperation with Genocide Court over Release' Agency France Press 6 Nov 1999.

<sup>88</sup> *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.<sup>89</sup>

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.<sup>90</sup> 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.<sup>91</sup> 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'.<sup>92</sup>

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<sup>89</sup> 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.

<sup>90</sup> '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.

<sup>91</sup> *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.

<sup>92</sup> '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.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

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

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<sup>93</sup> *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.

<sup>94</sup> *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.

<sup>95</sup> '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.

<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> The African Union also endorsed the position of Kenya in seeking to delay or postpone the ICC proceedings.<sup>99</sup> 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.<sup>100</sup>

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.<sup>101</sup> 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.<sup>102</sup> 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

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<sup>97</sup> 'Statement by the Prosecutor of the International Criminal Court on the Kenya Ruling' ICC Press and Media 24 Jan 2012.

<sup>98</sup> 'Kenya Petitions UN organ to Delay Trial' Daily Nation 02 Oct 2011.

<sup>99</sup> 'Africa Union Backs Kenya Call to Delay ICC case' BBC News 2 Jan 2011.

<sup>100</sup> *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.

<sup>101</sup> Wartanian (n 93 above) 1310.

<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup>

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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

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.<sup>108</sup> A withdrawal from the Rome Statute therefore does not prejudice in any way the continued consideration

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<sup>103</sup> 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.

<sup>104</sup> Amnesty International (n 99 above) 1.

<sup>105</sup> 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.

<sup>106</sup> 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.

<sup>107</sup> Arsanjani & Reisman (n 103 above) 397.

<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup> 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 Charter<sup>113</sup> has powers to request the Court to defer or suspend an investigation.<sup>114</sup> This implies that the matter must

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<sup>109</sup> Rome Statute art 127(2).

<sup>110</sup> This is an indication that the Rome Statute does not permit the withdrawal of a specific referral.

<sup>111</sup> Uganda has not considered this option and there are no indications that the state may wish to withdraw from the ICC at present.

<sup>112</sup> Rome Statute art 121.

<sup>113</sup> Security Council Chapter VII resolutions are actions with respect to threats to peace, breaches of peace and acts of aggression.

<sup>114</sup> 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.<sup>115</sup>

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.<sup>116</sup> The Court may also determine a case inadmissible under article 17 where a state is willing or able to prosecute.<sup>117</sup> 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.<sup>118</sup>

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,<sup>119</sup> 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.<sup>120</sup> 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

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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.

<sup>115</sup> 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.

<sup>116</sup> Rome Statute art 53(a).

<sup>117</sup> Rome Statute art 53(b).

<sup>118</sup> 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.

<sup>119</sup> Rome Statute art 53(c).

<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup> The Prosecutor viewed the ‘interest’ in Uganda as interests to resolve the LRA conflict peacefully but not as interests of justice.<sup>123</sup> 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.<sup>124</sup>

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.<sup>125</sup> 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.<sup>126</sup> 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

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<sup>121</sup> Burke-White & Kaplan (n 100 above) 83; Moy (n 96 above) 272.

<sup>122</sup> Burke-White & Kaplan (n 100 above) 82 – 83 referring to LM Ocampo ‘Address Building a Future on Peace and Justice (25 June 2007).

<sup>123</sup> 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).

<sup>124</sup> As above.

<sup>125</sup> *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.

<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup>

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.’<sup>129</sup> Indeed the ICC Prosecutor indicated that his first task is to make best efforts to help national jurisdictions fulfil their mission.<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> Indeed, President Museveni is said to have stated that if cases

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<sup>127</sup> Rome Statute preamble paras 4, 6 and 10.

<sup>128</sup> 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.

<sup>129</sup> Rome Statute preamble para 6.

<sup>130</sup> 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).

<sup>131</sup> Rome Statute art 17(1)(a).

<sup>132</sup> Further discussion on this is contained in chapter four and six of this thesis.

<sup>133</sup> Rome Statute art 17(3).

<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup>

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.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup> 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.<sup>140</sup> 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

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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.

<sup>135</sup> K Southwick ‘Investigating War in Northern Uganda: Dilemmas for the International Criminal Court’ (2005) *Yale Journal of International Law* 108.

<sup>136</sup> As above.

<sup>137</sup> JT Holmes ‘The Principle of Complementarity’ in RS Lee (ed) *International Criminal Court: The Making of the Rome Statute* (1999) 41, 49.

<sup>138</sup> Arsanjani & Reisman (n 103 above) 395.

<sup>139</sup> As above.

<sup>140</sup> 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.<sup>141</sup>

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.<sup>142</sup> 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.<sup>143</sup>

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.<sup>144</sup> This submission resonates with the ICC Prosecutor’s vision of

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<sup>141</sup> *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.*).

<sup>142</sup> *Prosecutor v Joseph Kony et al.*, (n 140 above) para 5

<sup>143</sup> *Prosecutor v Joseph Kony et al.*, (n 140 above) para 8.

<sup>144</sup> *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.<sup>145</sup> 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.<sup>146</sup>

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.<sup>147</sup>

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.<sup>148</sup> 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.<sup>149</sup> 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

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<sup>145</sup> 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.

<sup>146</sup> *Prosecutor v Joseph Kony et al.*, (n 140 above) para 51.

<sup>147</sup> Arsanjani & Reisman (n 103 above) 395 – 396.

<sup>148</sup> Rome Statute art 53(1)(b).

<sup>149</sup> Rome Statute art 53(2).

to authorise the investigation.<sup>150</sup> The Rome Statute further requires that states that would normally exercise jurisdiction in such cases be notified of the impending investigations.<sup>151</sup> 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.<sup>152</sup> The Pre-Trial Chamber is mandated to allow such a deferral based on national prosecutorial efforts<sup>153</sup> 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.<sup>154</sup>

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.<sup>155</sup> This challenge can only take place once and must come prior to or at the commencement of trial.<sup>156</sup> 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.<sup>157</sup>

## 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.'<sup>158</sup> Article 75 of the Statute provides that the ICC

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<sup>150</sup> Rome Statute art 15.

<sup>151</sup> Rome Statute art 18(1).

<sup>152</sup> Rome Statute art 18(2).

<sup>153</sup> Rome Statute art 18(2).

<sup>154</sup> Rome Statute art 19(1).

<sup>155</sup> Rome Statute art 19(2)(a) & (b).

<sup>156</sup> Rome Statute art 19(4).

<sup>157</sup> Rome Statute art 19(4).

<sup>158</sup> 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.<sup>159</sup> Reparations generally encompass ‘any economically assessable damage resulting from violations of human rights and humanitarian law.’<sup>160</sup> 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.<sup>161</sup>

A Victims and Witnesses Unit is established under the Court's Registry.<sup>162</sup> 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.<sup>163</sup> At least 18 victim assistance projects that incorporate gender specific interventions have been approved for Uganda.<sup>164</sup> 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.<sup>165</sup> 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

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<sup>159</sup> Rome Statute art 75(1).

<sup>160</sup> 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.

<sup>161</sup> 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).

<sup>162</sup> For more information see <http://www.icc-cpi.int/victimissues.html>.

<sup>163</sup> See [http://www.vrwg.org/download/publications/05/FormReparations1\\_en.pdf](http://www.vrwg.org/download/publications/05/FormReparations1_en.pdf) (accessed 9 January 2011).

<sup>164</sup> 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).

<sup>165</sup> 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.<sup>166</sup>

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.<sup>167</sup> 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.’<sup>168</sup> 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 evidence<sup>169</sup> 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

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<sup>166</sup> 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.

<sup>167</sup> 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.

<sup>168</sup> 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.

<sup>169</sup> According to rule 94; evidence includes address of the claimant, description of harm, location and date of incident, description of property etc.

exceptional circumstances.<sup>170</sup> In Uganda, several persons have made applications for reparations to the ICC.<sup>171</sup>

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.’<sup>172</sup> 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.<sup>173</sup> 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.<sup>174</sup> 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

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<sup>170</sup> 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.

<sup>171</sup> 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.

<sup>172</sup> 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.’

<sup>173</sup> 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.

<sup>174</sup> 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.<sup>175</sup>

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.<sup>176</sup> 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.<sup>177</sup>

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

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<sup>175</sup> 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.

<sup>176</sup> 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.

<sup>177</sup> 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.<sup>178</sup>

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.'<sup>179</sup> 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.<sup>180</sup>

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.<sup>181</sup>

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<sup>178</sup> 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/Menus/ICC/Structure+of+the+Court/Victims?Trust+Fund+for+Victims/Current+Projects> (accessed 10 July 2010).

<sup>179</sup> Rules of Procedure and Evidence of the International Criminal Court rule 96.

<sup>180</sup> 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.

<sup>181</sup> 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 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.<sup>182</sup> 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

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<sup>182</sup> 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.