

CHAPTER TWO

INTERNATIONAL NORMATIVE STANDARDS REVELANT TO THE LRA ATORICITY IN UGANDA

2.1 Introduction

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

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

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

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

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

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

⁵ Ratner et al., (n 1 above) 4.

⁶ CAT art 4.

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

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

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

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

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

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

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

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

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

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

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

¹⁶ Uganda assented to CAT on 3 November 1986.

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

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

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

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

¹⁸ Uganda ratified the ACHPR on 27 May 1986.

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

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

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

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

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

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

2.2 War crimes

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

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

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

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

²⁶ As above para 128-137.

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

2.2.1 'Internationalised' conflict?

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

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

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

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

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

³⁰ Protocol I art 1(4).

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

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

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

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

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

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

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

³⁵ *Nicaragua v United States of America* para 115

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

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

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

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

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

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

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

³⁹ *Rajic Review* para 12.

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

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

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

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

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

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

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

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

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

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

2.2.2 Threshold for application

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

⁴⁶ Fourth Geneva Convention art 4.

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

⁴⁸ Cassese (n 24 above) 89.

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

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

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

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

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

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

⁵¹ Rome Statute art 8(1).

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

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

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

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

2.2.3 Acts punishable as war crimes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁷ Soto (n 40 above) 33.

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

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

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

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

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

⁷⁰ UHCR & UNOHCHR (n 65 above) 39.

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

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

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

⁷⁴ Soto (n 40 above) 29.

⁷⁵ Gersony (n 56 above) 45.

⁷⁶ Protocol II art 4(3)(c).

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

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

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

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

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

⁸⁰ ILO Convention 182 art 1.

⁸¹ ILO Convention 182 art 2.

⁸² ILO Convention 182 art 3(a).

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

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

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

⁸⁶ UHCR & UNOHCHR (n 65 above) 43.

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

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

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

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

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

⁸⁹ UHCR & UNOHCHR (n 65 above) 43.

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

⁹¹ See background notes in chapter one of this thesis.

⁹² UHCR & UNOHCHR (n 65 above) 45.

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

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

⁹⁵ UHCR & UNOHCHR (n 65 above) 45.

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

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

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

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

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

⁹⁹ CAT art 2.

¹⁰⁰ Rome Statute art 7(2)(e).

¹⁰¹ CAT art 1.

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

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

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

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

¹⁰³ Rome Statute art 7(1)(k).

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

¹⁰⁵ Rome Statute art 8(2)(c)(ii).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹⁴ Hague Regulations reg 47.

¹¹⁵ Fourth Geneva Convention art 33(2).

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

¹¹⁷ UDHR art 17(2).

¹¹⁸ ACHPR art 14.

¹¹⁹ Generally see the discussion contained in chapter one.

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

¹²¹ UHCR & UNHCHR (n 65 above) 52.

¹²² UHCR & UNHCHR (n 65 above) 53.

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

2.3 Crimes against humanity

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

2.3.1 Threshold of crime

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

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

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

¹²⁴ Schabas (n 27 above) 139.

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

¹²⁶ Cassese (n 24 above) 99.

¹²⁷ Rome Statute art 7(1).

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

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

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

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

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

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

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

¹³² Schabas (n 27 above) 149.

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

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

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

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

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

2.3.2 Acts punishable as crimes against humanity

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

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

¹³⁸ Brubacher (n 59 above) 269.

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

¹⁴⁰ Rome Statute art 7 (1)(b).

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

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

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

¹⁴⁴ Ntoubandi (n 122 above) 72.

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

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

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

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

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

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

¹⁴⁸ Rome Statute art 7(1)(g).

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

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

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

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

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

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

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

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

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

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

¹⁵⁶ UHCR & UNOHCHR (n 65 above) 49.

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

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

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

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

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

¹⁵⁹ UHCR & UNOHCHR (n 65 above) 48.

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

¹⁶¹ Rome Statute art 7(1)(c).

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

¹⁶³ Rome Statute art 7(1)(d).

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

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

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

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

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

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

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

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

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

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

2.4 Conclusion

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