

**CHALLENGING IMPUNITY IN NORTHERN UGANDA: THE TENSION
BETWEEN AMNESTIES AND THE PRINCIPLE OF INTERNATIONAL
CRIMINAL RESPONSIBILITY**

Submitted in partial fulfillment of the requirements for the degree LL.M

(Human Rights and Democratisation in Africa)

Faculty of law, University of Pretoria, South Africa

By

NELDJINGAYE KAMELDY

Student No 27543839

Prepared under the supervision of

Dr Ben Kiromba Twinomugisha

At the Faculty of Law, Makerere University, Kampala, Uganda

29 October 2007

DECLARATION

I, **NELDJINGAYE KAMELDY**, declare that the work presented in this dissertation is original. It has never been presented at any other university or institution. Where other peoples' works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed_____

Date_____

Supervisor: Dr Ben Kiromba Twinomugisha

Signed_____

Date_____

DEDICATION

To my father KAMELDY YAMBANG for his tireless support and indefatigable affection;

To my mother Julienne NASSINGAR and my stepmother Marguerite NDIGUINYAM;

To my brothers and sisters;

To all the victims of the conflict in northern Uganda, I dedicate this work.

ACKNOWLEDGEMENTS

My gratitude goes first to the Centre for Human Rights, University of Pretoria, for affording me the opportunity to participate in the prestigious Masters' Programme in Human Rights and Democratisation in Africa. My sincere thanks go to Prof. Frans Viljoen, Prof. Michelo Hansungule, Norman Taku, Martin Nsibirwa, Jeremie Munyamarebe, John Wilson and all the tutors, especially Tarisai Mutangui and Solomon Ebobrah for their academic and administrative guidance.

With gratitude, I appreciate the assistance of various other people whose contribution was instrumental in one way or another during this challenging course. I extend my sincere thanks to Dr. Cecile Aptel, Prof. Joe Oloka-Onyango, Rose Mary Bareebe, and Alice Muhoozi for their encouragement and wise counsel. To my friend Nadjita Ngarhodjim Francis who opened my eyes on the LLM programme and raised my interest in human rights, I owe a debt of gratitude to him.

I am particularly indebted to my supervisor, Dr. Ben Kiromba Twinomugisha, for his insightful comments and his patience. The hospitality of the staff of the Human Rights and Peace Centre, Faculty of Law, Makerere University, deserves a special mention.

I would like to say thanks from the bottom of my heart to all my friends all over the world who have kept on praying for me. They urged me on at every time I was about to give up. They gave me an impetus to begin and a will to continue. These include: David Djitaingue, Jean Pierre Djimasngar, Zybne Payabe, Ladjimdon Madjita, Madjitebaye Ganguimbaye, Jocelyn Madjenoum, Eric Loum, Ndadjal Dingam-Asde, Nodjiasde Marius, Temadji Ndimanagar, Titimbaye Minayade, Djonguera Yana among others, the list is endless. Those I have not mentioned here, you were of great inspiration to me, please, receive this work in compensation of my absence.

My appreciation is extended to my classmates LLM 2007, who provided me a family away from home. I wish you all the best and I will always cherish the commitment we had to implement the values of human rights in our continent.

May Eternal God bless you all.

TABLE OF CONTENTS

Title page	i
Declaration.....	ii
Dedication	iii
Acknowledgements	iv
Table of contents.....	v
List of abbreviations	ix
Forward.....	xi
CHAPTER I.....	1
INTRODUCTION.....	1
1.1 Background to the study.....	1
1.2 Statement of the research problem.....	3
1.3 Focus and objectives of the study.....	4
1.4 Significance of the study.....	5
1.5 Hypotheses/Research questions	5
1.6 Literature survey.....	6
1.7 Methodology.....	9
1.8 Limitations of the study.....	9
1.9 Structure of the study	9
CHAPTER 2.....	10
PROTRACTED CONFLICT AND HUMAN RIGHTS ABUSES IN NORTHERN UGANDA	10
2.1 Introduction	10

2.2 An overview of the conflict.....	10
2.2.1 The Lord’s Resistance Army.....	11
2.2.2 Operation iron first.....	13
2.2.3 The peace talks.....	14
2.3 The Humanitarian disaster.....	15
2.3.1 Internal displacement.....	15
2.3.2 The night commuters.....	17
2.3.3 Devastation of the northern economy.....	17
2.4 The atrocities committed during the conflict.....	17
2.4.1 The atrocities committed by the LRA.....	17
2.4.1.1 Abduction of children.....	18
2.4.1.2 Attacks on civilians.....	18
2.4.1.3 Torture.....	19
2.4.1.4 Rape.....	20
2.5 Atrocities committed by the UPDF.....	20
2.6 Violation of the right to security by the Ugandan government.....	20
2.7 CONCLUSION.....	21
CHAPTER 3.....	23
INVESTIGATING PROSECUTION OF GRAVE HUMAN RIGHTS VIOLATIONS.....	23
3.1 Introduction.....	23
3.2 The African human rights system in prosecuting grave human rights violations.....	23
3.2.1 The Hissene Habre case.....	24
3.3 The establishment of the ICC.....	25
3.4 The Jurisdiction of the ICC.....	28
3.4.1 The Jurisdiction racione temporis.....	28

3.4.2 The jurisdiction <i>ratione personae</i>	29
3.4.3 Jurisdiction <i>ratione materiae</i>	29
3.5 The principle of complementarity.....	29
3.6 Investigations	30
3.7 The Trust Fund for Victims	31
3.8 The Ugandan referral case	32
3.9 The ICC indictments.....	33
3.10 CONCLUSION	34
CHAPTER 4.....	35
TENSIONS EMANATING FROM THE UGANDAN AMNESTY ACT AND THE INVOLVEMENT OF THE ICC IN NORTHERN UGANDA.....	35
4.1 Introduction	35
4.2 The Ugandan Amnesty Act of 2000	35
4.3 Amnesties and Truth Reconciliation Commissions	36
4.4 Controversies around the Ugandan Amnesty Act	37
4.4.1 Ugandan Amnesty Act as a tool for achieving peace in northern Uganda.....	38
4.4.2 Ugandan Amnesty Act as a human rights violation.....	38
4.4.2.1 Violation of the victims' right to an effective remedy.....	38
4.4.2.2 Impunity: violation of victims' right to an effective prosecution	39
4.5 The Acholi traditional method of reconciliation: the <i>Mato oput</i>	40
4.6. The legal implications of the Ugandan Amnesty Act with regard to ICC proceedings..	41
4.6.1 Can a state whose judicial system is not deficient and therefore able to prosecute, voluntarily recourse to the ICC jurisdiction?.....	42
4.6.2. Can a state grant blanket amnesty to individuals indicted by the ICC and thereby absolve them from international prosecutions?.....	42
4.6.3 The interpretation of article 53 of the Rome statute	44

4.7 CONCLUSION	45
CHAPTER 5.....	46
5.1 CONCLUSIONS	46
5.2 RECOMMENDATIONS.....	47
5.2.1 To the International Criminal Court.....	47
5.2.2 To the government of Uganda	47
5.2.3 To the Lord's Resistance Army.....	47
5.2.4 To the government of Sudan	48
5.2.5 To the African Committee on the Right and Welfare of the Child	48
5.2.6 To NGOs and International Agencies operating in Uganda.....	48
5.2.7 To donors.....	48
BIBLIOGRAPHY	49
ANNEXTURE	56

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACrtHPR	African Court on Human and People's Rights
ADF	Allied Democratic Forces
AU	African Union
AU	African Union
CAT	Convention Against Torture
ECHR	European Court of Human Rights
ECOSOC	Economic and Social Council
ECPHRFF	European Convention for the Protection on Human Rights and Fundamental Freedoms
GOSS	Government of Southern Sudan
GoU	Government of Uganda
HRC	Human Right Committee
HSM	Holy Spirit Movement
IACHR	Inter American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for ex Yugoslavia
IDPs	Internal Displaced Persons
ILC	International Law Commission

LRA	Lord's Resistance Army
NSAs	Non State Actors
OAU	Organisation of African Unity
RSG	Representative of the United Nations Secretary General
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
TFV	Trust Fund for Victims
UN	United Nations
UNSC	United Nations Security Council
UPA	Uganda People's Army
UPDA	Uganda People's Defence Army
UPDF	Ugandan Peoples' Defence Forces
WNBF	Western Nile Bank Front

FORWARD

Where domestic law and orders has broken down, individuals may feel that they can commit even the most atrocious crimes without fear of legal sanction. When this happens, there is an urgent need to re-establish the principle of individual responsibility for crimes. If serious human rights violations are not addressed and a climate of impunity is permitted to continue, then the effect will be to stoke the fires of long term social conflict. Where a community splits along religious or ethnic lines, such conflict can vent itself through cycles of vengeance over decades, and even centuries.

M Robinson, former U.N High Commissioner for Human Rights in 'Genocide, war crimes, Crimes against Humanity,' *Fordham International Law Journal* 23 (1999), 277-78

The International Criminal Court at The Hague represents one way of holding those who commit atrocities responsible for their crimes. The raw eggs, twigs and livestock that the Acholi people of northern Uganda use in their traditional reconciliation ceremonies represent another.

M Lacey, 'Victims of Uganda Atrocities Choose a Path of Forgiveness' *The New York Times* (18 April 2005) A.1.

CHAPTER I

INTRODUCTION

1.1 Background to the study

It is now twenty years since the conflict in northern Uganda¹ broke out, causing one of the worst humanitarian disasters in the world today.² The root causes of the conflict go back to the tension between North and South that has marked Ugandan politics and society since independence.³ It is also the result of the struggle between the Lord's Resistance Army (LRA)⁴ and the Ugandan national army known as the Uganda Peoples' Defence Forces (UPDF). The conflict began in the late 1980s when Joseph Kony, the leader of the LRA started his mission to free the Acholi people of northern Uganda by overthrowing the government and installing a system based on the Biblical Ten Commandments.⁵ Over the years, the LRA turned on the very people it claimed to represent considering decline of popular support as sympathy for president Museveni.⁶ For nearly two decades, the LRA engaged in a perpetual campaign of killing, maiming, rape, looting and destruction of property against the Acholi people. Children have been

¹ International Crisis Group 'Northern Uganda: Understanding and solving the conflict', (April 2004) available on the site <www.crisisgroup.org> (Accessed on 31 July 2007)

² The UN Under Secretary General for Humanitarian Affairs, Jan Egeland has depicted the conflict in northern Uganda as the 'biggest forgotten, neglected humanitarian emergency in the world today' see OCHA News, Issue No 122, 14 November 2003 on <www.reliefweb.int/OCHA_ol/pub/ochanews/on_141103.PDF> (accessed on 31 July 2007)

³ International Crisis Group (n 1 above)

⁴ The LRA started as the Lord's Salvation Army (LSA). It later became the United Salvation Christian Army (USCA) and finally the Lord's Resistance Army in 1994. For more details about the insurgency, see Human Rights Watch 'Abducted and abused: renewed conflict in northern Uganda' (July 2003), and Behrend Heike, *War in Northern Uganda*, Christopher Clapham (ed.) African Guerrillas Oxford: James Currey (1998) 107-118

⁵ K Phillip Apuli 'Amnesty and International Law: The case of the Lord's Resistance Army insurgents in Northern Uganda', available on <www.accord.org.za/ajcr/2005-2/AJCRvol5no2_pg33-61.pdf> (Accessed on 31 July 2007)

⁶ H Abigail Moy 'The international Criminal Court's arrest warrants and Uganda's Lord's Resistance Army: Renewing the debate over amnesty and complementarity' (2006) Harvard Human Right Journal 273

one of the most vulnerable groups since the conflict started as a result of abductions being one of the common tactics of the LRA.

More than 20,000 children have been abducted over the years by the LRA⁷ and these children constitute up to 80 percent of the rebellion's membership.⁸ In addition to the fact that the abducted children are abused and often used as sex slaves, they are forced to take part in atrocities against their communities, or in the killings of other disobedient children, thereby isolating the survivors from society and binding them for ever to the LRA.⁹

After many years of unsuccessful attempts to overcome the LRA by force and being under pressure from local and international civil society organisations, the Ugandan government (GoU) opted to engage in talks with the rebel movement.¹⁰ An Amnesty Act was therefore enacted in 2000 whose purpose was to grant amnesty to all members of the rebellion regardless of rank, who voluntarily surrendered. Despite these efforts, the LRA has not given up its armed insurrection and the situation in the northern Uganda remains of particular concern to the international community.

On 16 December 2003, President Museveni referred the situation in Northern Uganda to the International Criminal Court (ICC) and that was the first time a country invoked article 13(a) and 14 of the Rome Statute to grant the ICC jurisdiction.¹¹ In 2004, after a year-long investigation, the ICC issued arrest warrants against five senior LRA commanders.¹² Although the action of the ICC has been acclaimed by many international human rights organisations and other activists for international justice

⁷ Human Right Watch 'Abducted and abused: Renewed conflict in Northern Uganda' (July 2003) on <<http://www.hrw.org>> (Accessed on 11 July 2007)

⁸ Waiting for Elusive Peace in the War-Ravaged North, IRIN News, June 9, 2005, <http://www.irinnews.org/S_report.asp?ReportID=47568&SelectRegion=East_Africa> (accessed on 11 June 2007)

⁹ P Akhavan 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court', 99 Am. J. Intl L. 403, 407-08 (2005)

¹⁰ K Phillip Apuuli (n 5 above)

¹¹ P Akhavan (n 9 above)

¹² Press Release 'International Criminal Court, Warrant of Arrest Unsealed Against Five LRA Commanders' (Oct. 14, 2005), available at <<http://www.icc-cpi.int/press/pressreleases/114.html>> (Accessed on 11 July 2007)

outside Uganda as opening the 'door for justice to be done,'¹³ it has been disapproved on the other side by most local and international NGOs working in northern Uganda and groups advocating for a negotiated settlement to the conflict.¹⁴ The reason being that it undermines peace efforts, thereby perpetuating the cycle of violence in northern Uganda. The involvement of the ICC in the Ugandan conflict has renewed the debate over the dichotomy between amnesties and international prosecutions, a tricky issue on which the Rome Statute is silent. This paper explores how the International Court is managing to build up the foundation of the jurisprudence on amnesties with regard to the Ugandan referral case which in its nature, is the first one.

1.2 Statement of the research problem

The practice of amnesties which absolve perpetrators of human rights violations from accountability constitutes a violation of the fundamental right of victims to an effective remedy.¹⁵ One author pointed out that amnesties impact on human rights in that:

By fashioning amnesties that eliminate the right of victims to pursue and secure appropriate remedies, state conduct seems to indicate, and mistakenly so, that this is the case. To analogise, amnesty can be regarded as a door to the gate of justice, of which the state is a gatekeeper; a door that the state bangs in the face of those seeking to walk in the narrow corridors of justice and refuses to open and to listen to their hoarse cries for redress.¹⁶

There is a growing consensus among scholars that for the most heinous crimes, amnesties are impermissible.¹⁷ However, amnesties are considered in certain

¹³ Human Rights Watch 'ICC Takes Decisive Step for Justice in Uganda,' (October 2005) available at <<http://hrw.org/english/docs/2005/10/14/uganda11880.htm>> (Accessed on 11 July 2007)

¹⁴ See Makerere University's Refugee Law Project Statement on the ICC intervention in northern Uganda, available at <http://www.hrea.org/lists/refugee-rights/markup/msg00503.html> (accessed on 11 July 2007) see also 'Suggestions by the Acholi Religious and Cultural Leaders in Response to the Request by the International Criminal Court', Statement, Gulu 12/11/2004, quoted by T Allen 'War and justice in northern Uganda: an assessment of the International Criminal Court's Intervention' (2005)

¹⁵ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the right to an effective remedy, sec (C) para (d)

¹⁶ G Musila 'Whistling the graveyard: Amnesty and the right to an effective remedy under the African Charter: the case of South Africa and Mozambique', (2004), 4

¹⁷ N Roth- Arriaza 'States responsibility to investigate and prosecute human rights violations in international law' (1990) 78, *California Law Review* 451; J Paust (1989) *Houst Journal of International Law* 337; D F Orentlicher (1991) 100 *Yale Law Journal* 2537

circumstances as an effective transitional justice mechanism, particularly in situations of post conflicts.¹⁸ In this regard, there is a clear tension between the obligation of states to prosecute and punish violation of human rights and the necessity of peace and national reconciliation often forwarded as the rationale for granting amnesties. The ICC has been established to ensure accountability of the perpetrators of human rights violations. It has the mission to function as a second sieve so that criminals can not escape the mesh of international justice in the case where their state of origin fails to prosecute them.¹⁹

The Ugandan referral case sheds light on the issue of amnesties which has raised serious controversies during the draft process of the Rome Statute establishing the ICC. Beyond the difficult question of reconciling amnesties and the principle of international criminal responsibility, the Ugandan referral case has posed an interesting question of whether national amnesties may constitute a hurdle to international criminal prosecutions. Furthermore, it poses the question of whether a state party to the Rome statute can grant blanket amnesty to individuals indicted by the ICC and thereby shield them from ICC prosecutions. This study proposes to grapple with those interrogations, particularly with the aim of determining how the question of amnesties should be dealt with at the international level, in this case, before the ICC.

1.3 Focus and objectives of the study

This dissertation intends to analyse the practice of amnesties in the context of grave human rights violations using northern Uganda as a case study. It will also examine its consistency with the obligation upon states to protect human rights through the prosecution of perpetrators of the said violations. It will, accordingly, analyse the implications of the complementary mandate of the ICC to national jurisdictions. Furthermore, it will explore the tension which results from national amnesties and the principle of international criminal responsibility, a principle that the ICC has the mandate to enforce.

¹⁸ Reisman 'Legal responses to genocide and other massive violations of human rights', 59 *Law and Contemporary Problems* (1996) 75; Landsman, 'Alternative responses to serious human rights abuses: Of prosecutions and truth Commissions', 59 *Law and Contemporary Problems* (1996) 197

¹⁹ According to article 1 of the Rome Statute, the International Criminal Court has jurisdiction for the most serious crimes of international concern and shall be complementary to national jurisdictions. The Court is therefore competent, when a state is unwilling or unable to prosecute the authors of those grave human rights violations

1.4 Significance of the study

Although the issue of amnesties has for long been at the heart of debates surrounding the question of human rights protection, never before have they been clearly placed in the context of international criminal justice.²⁰ At the African level, the African Charter has not adequately articulated the issue of granting amnesties for violations of human rights.²¹ This study is particularly significant as it seeks to explore how the Ugandan referral case - which represents an important test not only for the ICC and the international community, but also for the future generation of transitional justice practices-, will be dealt with. This study hopes to contribute to the process of crystallisation of international law on that matter, which seemingly constitutes a grey area, especially from an international human rights perspective.

1.5 Hypotheses/Research questions

This study takes the view that amnesties represent a challenge to the crusade against impunity, a breach of the peremptory states obligation to prosecute and punish grave violations of human rights.

The second premise contends that the imperative needs of peace and national reconciliation which urge states into the practice of amnesties should not trump international prosecutions which solely, may ensure regional and international peace and security.

²⁰ The matter was discussed before the Special Court for Sierra Leone; however it did not raise some pertinent questions posed by the Ugandan referral. In effect, the Statute of the Special Court for Sierra Leone clearly states that 'an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to in article 2 to 4 of the present Statute shall not be a bar to prosecution' (article 10 of the Statute). Crimes listed under article 2 to 4 are basically war crimes and crimes against humanity

²¹ The African Commission as well as the African Court on Human Rights have the mandate to monitor and implement rights encapsulated in the African Charter. Their mission is to ensure that states parties do not violate the rights provided for in the said Charter. International prosecutions of crimes against humanity, war crimes and genocide perpetrated by individuals do not fall under their jurisdiction

The study therefore attempts to answer to the following research questions:

- (i) Can a state whose judicial system is not deficient and therefore able to prosecute, voluntarily resort to the ICC's jurisdiction?
- (ii) Can a state grant blanket amnesty to individuals indicted by the ICC and thereby absolve them from international prosecutions?
- (iii) Can amnesty granted under circumstances mentioned above constitute a bar to ICC jurisdiction?

1.6 Literature survey

The issues of amnesties and international prosecutions have raised a plethora of literature this last decade, especially after the establishment of the ICC in 1998. Although some papers written on the subject refer to the involvement of the ICC in Uganda, they are limited to theoretical debates which do not touch upon the legal implications of the Ugandan referral.

In the course of debates over the issue of amnesties, it has been pointed out that what makes the use of amnesties today so controversial is not the discharge of legal prosecutions they grant to individuals responsible for systematic human rights violations, but rather their increased use and acceptance in a world which adhered to the idea that fundamental human rights should be protected in any circumstances.²² It is therefore clear that the very *raison d'être* of the ICC is to ensure that serious international crimes do not go unpunished,²³ while amnesties favour in a way or another impunity in the ultimate goal to implement peace, especially, in situations of conflicts.²⁴

One author asserted that if the drafters of the Rome Statute have avoided delving into the question of amnesties, it is because it would have been rash to attempt 'to codify a comprehensive test to distinguish between acceptable and unacceptable reconciliation

²² Ronald C. Slye 'The legitimacy of amnesties under international law and general principles of Anglo-American law: is a legitimate amnesty possible?' *Virginia Journal of International Law*, (2002)

²³ See preamble of the Rome Statute

²⁴ C Lekha Sriram 'Conflict mediation and the ICC: Challenges and options for pursuing peace with justice at the regional level' (2007)

measures and lock such a test into the Statute'.²⁵ Additionally, it is argued that one of the reasons for which the Rome Statute is silent on amnesties is because the Statute was never drafted with the intention of allowing amnesties to prevail over the International Court's jurisdiction.²⁶ Requiring accountability for grave human rights violations is regarded as a remedy to impunity and a necessary condition for the re-establishment of peace.²⁷ Conversely, some authors have conveyed the idea that there are many challenges to the ideal of accountability.²⁸ These challenges are generally the desire to trade peace for justice in order to resolve a conflict more quickly,²⁹ and the point that criminal trials may constitute a barrier to reconciliation processes.³⁰ Though the flood of literature constitutes a good starting point, it does not address the precise issues that this dissertation raises.

Among scholars who have examined the Ugandan referral, Apuuli expressed the view that the ICC has the duty to prosecute the LRA's commanders, who have been responsible for terrible crimes committed in northern Uganda.³¹ Abigail Moy however, contended that the case shows the potential manipulation of the ICC for political ends.³² He went on to add that president Museveni might have called upon the ICC as a strategy to increase his chances to contain the LRA after unsuccessful attempts to apprehend Kony, the thinking head of the rebellion.³³ In that regard, it has been vehemently

²⁵ D Robinson 'Serving the interest of justice: Amnesties, Truth Commissions and the International Criminal Court', available on <www.ejil.org/journal/vol14/no3/art3.pdf> (Accessed on 31 July 2007).

²⁶ J Dugard 'Conflicts of Jurisdiction with Truth Commissions' in A Cassese et al (eds) *The Rome Statute of the International Criminal Court: A commentary* (2002) 700-1

²⁷ M. Martha, *Between vengeance and Forgiveness: Facing history after genocide and mass violence* (1998) Boston, Beacon Press

²⁸ L Nadya Sadat 'Universal Jurisdiction, national amnesties, and truth Commissions: Reconciling the irreconcilable', in Stephen Macedo *Universal Jurisdiction: National courts and the prosecution of serious crimes under international law* (2003)

²⁹ Arsanjani 'The international Criminal Court and national amnesty laws', *ASIL Proceedings* (1999); and Scharf 'The amnesty exception to the jurisdiction of the International Criminal Court', 32 *Cornell International Law Journal* (1999) 507

³⁰ L Nadya Sadat (n 28 above)

³¹ K Phillip Apuuli (n 5 above)

³² H Abigail Moy (n 6 above)

³³ As above

contended that the principle of complementarity under which the ICC is operating³⁴ should be comprehended as requiring that no case should be admissible where a state's judicial system is not deficient and therefore able to prosecute.³⁵ More interestingly, some scholars like Ssenyonjo³⁶ wonder the usefulness of the ongoing peace talks between the Ugandan government and the LRA³⁷, since a peace agreement granting a total amnesty to the LRA would not be binding upon the ICC which seemingly has decided to demonstrate to the world that 'the most serious crimes of concern to the international community as a whole must not go unpunished'.³⁸ Challenging the credibility of the *Mato oput* which is often opposed to ICC prosecutions,³⁹ Michael Otim took the view that the traditional Acholi justice cannot address all crimes committed in Acholiland and beyond since not all the perpetrators and victims involved in the conflict are Acholi.⁴⁰ One of the most relevant interrogations which do not feature in these different analyses is how article 53 of the Rome Statute which provides that in prosecuting, the Prosecutor shall consider whether 'a prosecution is not in the interest of justice, taking into account all the circumstances' can be interpreted in light of the of the Acholi's claim for the traditional justice system which implies the granting of a comprehensive amnesty.⁴¹

³⁴ See article 1 of the Rome Statute

³⁵ M Ssenyonjo 'The international Criminal Court and the Lord's Resistance Army Leaders: Prosecutions or amnesty?' *Netherland International Law Review* (2007) 58; H. Abigail Moy (n 6 above); A. Slaughter & W. Burke-White, 'The future of international law is domestic', *Harvard International Law Journal* (2006) 347

³⁶ As above

³⁷ As of time of the study, negotiations have resumed at Juba between the LRA and the Ugandan government under the mediation of the government of southern Sudan

³⁸ T Allen 'War and justice in northern Uganda: an assessment of the International Criminal Court's intervention' available at <<http://www.crisisstates.com/download/others/AllenICCRReport.pdf>> (Accessed on October 2007)

³⁹ *Mato Oput* literally means 'drinking of the bitter root from a common cup'. It is an Acholi traditional ritual performed to cleanse somebody and reconcile him/her with the victims that he/she offended. See Liu Institute for Global Issues, 'Restoring relationships in Acholiland: Traditional approaches to justice and reconciliation', September 2005, available at <www.ligi.ubc.ca/admin/Information/543/Roco%20Wat%20I%20Acoli-2005.pdf> (accessed on August 2007)

⁴⁰ M Otim 'Challenges in the pursuit of transitional justice: A case of northern Uganda', April 2007, available on <www.ligi.ubc.ca/admin/Information/920/challenges> (Accessed on 4 August 2007)

⁴¹ For the claim of Acholi people for amnesty, see Refugee Law Project, Faculty of Law, Makerere

1.7 Methodology

The research was carried out following two types of methods:

- (i) Non empirical: The major part of the study was conducted through library and desk research, reviewing international instruments, case law and literature regarding the principle of international criminal responsibility and the debate on amnesties.
- (ii) Empirical: The study was also informed by information collected from Human Rights NGO's operating in Kampala and the Amnesty Commission.

1.8 Limitations of the study

Although cognisant that the study covers two broad areas which are amnesties and international prosecutions, this dissertation focuses on the involvement of the ICC in Uganda. After having provided an overview of the conflict in northern Uganda, the study attempts to analyse the legal implications of the Ugandan referral case. Moreover, the study discusses the issue of international prosecutions under the African human rights system when exposing the ambiguities of the complementarity principle under the Rome Statute.

1.9 Structure of the study

The study is structured into five main chapters. Chapter one provides the foundation and the structure of the dissertation. Chapter two draws the context in which the study emerges. Chapter three analyses the issue of international prosecutions. Accordingly, the chapter attempts to sound legal avenues for international prosecutions at the African level. Chapter four explores the tensions which emanate from the Ugandan amnesty and the involvement of the ICC. Chapter five is devoted to the conclusions and recommendations.

University, Position paper on the ICC; see also *New vision* 'Acholi chief opposes Kony trial', 8 November 2004 & J. Muto 'Acholi prefer mato oput to ICC for Kony rebels', *Daily Monitor*, 3 October 2006

CHAPTER 2

PROTRACTED CONFLICT AND HUMAN RIGHTS ABUSES IN NORTHERN UGANDA

2.1 Introduction

The conflict in northern Uganda is one of the oldest conflicts in Africa. The atrocities committed during this everlasting unrest defy any description. The conflict has evidenced the vulnerability of internally displaced persons (IDPs) and the necessity of an adequate legal protection mechanism. Additionally, children have paid the biggest price in the conflict and their suffering should remain unforgotten. Today, one of the most relevant questions that one may wonder is how the Lord's Resistance Army has managed to sustain for so long. The aim of this chapter is therefore to explore the conflict in northern Uganda and its humanitarian consequences.

2.2 An overview of the conflict

Northern Uganda or Acholiland, comprises mainly the districts of Gulu, Kitgum, and Pader.⁴² From 1986, a string of religious movements emerged in northern Uganda to wage war against the National Resistance Movement (NRM) led by Yoweri Museveni which seized power by overthrowing the previous regime.⁴³ The Lords' Resistance Army (LRA) is the only rebel movement of the 1980s that has persisted in waging war against the NRM government as all the others have petered out.⁴⁴ Among the defeated insurgencies are the Uganda People's Defence Army (UPDA) of Brigadier Odong Latek, the Uganda People's Army (UPA) of Peter Otai, the Holy Spirit Movement I (HSM I) of Severino Lukoya, the Holy Spirit Movement II (HSM II) of Alice Lakwena, the Western Nile Bank Front (WNBF) of Juma Oris and the Allied Democratic Forces (ADF) of Jamil Mukulu.⁴⁵

Four main characteristics feature frequently in the literature regarding the protracted conflict in northern Uganda.⁴⁶ It was first, as a result of the struggle between the

⁴² See the map of Uganda in annex

⁴³ H Behrend 'War in northern Uganda: The Holy Spirit of Alice Lakwena, Severino Lukoya and Joseph Kony' in C Clapham *African Guerrillas* (1992) 107

⁴⁴ K Phillip Apuuli (n 5 above)

⁴⁵ As above

⁴⁶ See International Crisis Group 'Northern Uganda: Understanding and solving the conflict', (April

government and the LRA; a struggle between the predominantly Acholi LRA and the wider Acholi population who have borne the brunt of violence that includes indiscriminate killings and the abduction of children to become fighters, auxiliaries and sex slaves; fuelled by animosity between Uganda and Sudan, who support rebellions on each other's territory; lastly, as a continuation of the North South conflict that has marked Ugandan politics and society since independence.⁴⁷

The North-South divide is a result of the economic imbalance that was instituted by the colonialists. The British reserved the introduction of industry and cash crops for the South, and considered the North as a reservoir of cheap manual labour and recruits for the army.⁴⁸ The situation did not change under the successive governments of post colonial Uganda.

Although the root causes of the insurgency in northern Uganda include the divide between north and south which has actually dominated the pre and post colonial period, the immediate cause is reported by some analysts to be the unbecoming and the undisciplined behaviour of the 35th battalion of the NRA.⁴⁹ The atrocities committed by the soldiers of the 35th battalion of the NRA in the district of Gulu, compelled some of the Acholi ex-soldiers to take up their weapons again and go into the bush to join the UPDA.⁵⁰ The LRA later drew support from UPDA deserters.

2.2.1 The Lord's Resistance Army

The rebellion of Joseph Kony started as the Lord's [Salvation] Army and later the United [Salvation] Christian Army before becoming the Lord's Resistance Army in 1994.⁵¹ The

2004) available on the site <www.crisisgroup.org> (Accessed on 31 July 2007); K Phillip Apuuli (n 5 above)

⁴⁷ International crisis group (n 1 above)

⁴⁸ International Crisis Group (n 1 above)

⁴⁹ H Berend 'Is Alice Lakwena a witch? The Holy Spirit Movement and its Fight against Evil in the North' in H Holger Bernt & Twaddle Michael *Changing Uganda: the Dilemmas of Structural Adjustment and Revolutionary Change* (1991) London, James Currey

⁵⁰ (n 4 above)

⁵¹ See H Behrend, "Is Alice Lakwena a witch? The Holy Spirit Movement and its fight against evil in the north," (n 7 above)

LRA claims to fight for democracy,⁵² constitutional reforms,⁵³ and against the marginalisation of tribes in Northern and Eastern Uganda and that it wants to replace the Government of Uganda with one based on the Biblical Ten Commandments.⁵⁴ Surprisingly, the LRA has failed to realise its objectives in this attempt despite claims to provide a coherent political agenda and has increasingly turned against the very people it claims to represent. In July 2006, the United Nations (UN) Under Secretary-General for Humanitarian Affairs, Jan Egeland described the LRA activities as 'terrorism of the worst kind anywhere in the world'.⁵⁵ That declaration came in to reinforce the view of the Government of Uganda⁵⁶ and the United States (US)⁵⁷ which had earlier characterized the LRA as a 'terrorist organisation'.

Since 1994, the LRA has been assisted by the Sudanese government as retaliation for the assistance that president Museveni gives to the Sudanese rebels, the SPLM/A.⁵⁸ However, in December 1999, the Government of Uganda and Sudan signed an agreement in Nairobi committing themselves to stop backing each others' rebel forces. Though this agreement was neither immediately nor completely honoured, it marked the outset of a rapprochement between the two countries.⁵⁹ The LRA insurgency has claimed the life of approximately 100,000 peoples besides the massive internal displacement it has caused.⁶⁰

Kony's insurgency had some popular support in the 1980s but this support waned in the early 1990s as a result of attacks against civilians, abductions, and mutilations.⁶¹ The

⁵² S Farmar 'Uganda rebel leader breaks silence' *BBC News*, 28 June 2006 <news.bbc.co.uk>

⁵³ M Ojul 'Latest statement on demands by the LRA delegation' *Daily Monitor*, 25 October 2006

⁵⁴ F Nyakairu 'We are fighting for 10 Commandments', *Daily Monitor*, 1 August 2006

⁵⁵ See 'Amnesty for Uganda rebel chief', BBC News, 4 July 2006, available at <news.bbc.co.uk/2/hj/Africa/5147882.stm> (Accessed on 12 June 2007)

⁵⁶ Anti-Terrorism Act 2002 (Act No. 14 of 2002), The Uganda Gazette No. 33, vol.XCV 7 June 2002.

⁵⁷ US Department of State 'Terrorist exclusion list designees' 5 December 2001, available at <www.state.gov/r/pa/prs/ps/2001/6695.htm> (Accessed on 12 June 2007)

⁵⁸ See Human Rights Watch (n 7 above)

⁵⁹ As above

⁶⁰ H Chatlani 'Uganda: a nation in crisis' *Cal. W. Int'l L.J* 277 (2007)

⁶¹ Human Right Watch 'Uprooted and forgotten: impunity and human rights abuses in northern

LRA considered anyone living in camps created in the mid 1990s as a government supporter. The scale of suffering occasioned by the LRA in northern Uganda is immense and there is no doubt that war crimes and crimes against humanity have been committed.

During the third week of October 2007, Opio Makasi the third in rank in the LRA defected and is being held in Kin-Manziere prison in Kinshasa (DRC).⁶² The defection of Makasi has confirmed that there are internal dissensions within the LRA.⁶³ This can be interpreted as a serious blow to the insurgency.

2.2.2 Operation iron first

In 2001, the governments of Sudan, Uganda and their allies discussed how to find a definitive solution to the conflict in northern Uganda. After discussions, it was finally agreed that the Sudanese government would permit the UDPF to enter Sudan in order to wipe out the LRA and to rescue abducted children.

The Government of Uganda launched Operation Iron First in March 2002 in Southern Sudan, deploying over 10,000 soldiers. The Operation targeted LRA camps Southeast of Juba inside Sudan, in the triangle between the Nile and the Kit Rivers.⁶⁴ The result of the Operation was a total failure in that the LRA, instead of being wiped out escaped the UPDF forces in Sudan and came back in northern Uganda by June 2002, highly equipped and trained.⁶⁵ Following the Operation, the LRA stepped up abductions and attacks on civilians, spreading the conflict into non Acholi districts of Lira and Soroti.⁶⁶

It is particularly strange that Joseph Kony has succeeded waging war in northern Uganda for almost twenty years while the UPDF forces have never stopped hunting him down. The fact that the LRA has survived for so long has led to speculation that the

Uganda', available on <<http://hrw.org/reports/2005/Uganda0905/Ugnada0905.pdf>> (Accessed on May 2007)

⁶² See Vision Reporter 'Top Kony man defects' *Sunday Vision*, October 21, 2007

⁶³ As above

⁶⁴ See Human Rights Watch (n 7 above)

⁶⁵ As above

⁶⁶ UNOCHA 'When the sun sets, we start to worry' 2004, online IRIN News <www.irinnews.org> (Accessed on 29 October)

Government of Uganda is in one way or another benefiting from the situation in Acholiland. As a matter of fact, the continuation of the conflict in Northern Uganda cannot be seen in isolation from the larger political context in Uganda, especially issues regarding the consolidation and the perpetuation of the NRM's power game. The conflict is to be considered in light of the competition between the NRM and opposition forces, but more importantly through the leverage it gives the government to monopolise the army as a key power base.⁶⁷

2.2.3 The peace talks

Despite the indictment of five top commanders of the LRA in July 2005 by the ICC, peace talks started on 14 July 2006 between the GOU and the LRA in Juba, the capital of the regional government of Southern Sudan (GOSS).⁶⁸ The Government of Uganda contended that it entered into negotiations with the LRA at the urging of the GOSS, in order to find a way out of the twenty-year conflict and also because of the persisting difficulties in effecting the arrests and the need to protect abducted women and children.⁶⁹ To do so, the Government of Uganda is prepared to grant a 'total amnesty' to all the LRA members, including the top leaders indicted by the ICC as part of the peace deal.⁷⁰

In late 2006, President Museveni rejected a proposal of the Belgian government to arrest Joseph Kony and surrender him to the ICC arguing that he should be granted an amnesty if he agrees to give up the insurgency through the ongoing peace process.⁷¹ The ICC was and is not a party to the peace talks. Consequently, on 30 November 2006 the ICC Chamber requested the Prosecutor to provide information, on or before Friday 8 December 2006 on 'whether and to what extent the peace negotiations and recent events in the region have affected the level of cooperation by the relevant governments'.⁷²

⁶⁷ International Crisis Group (n 46 above)

⁶⁸ M Ssenyonjo (n 35 above)

⁶⁹ Submission of Information on the Status of the Execution of the Warrants of Arrest in The Situation in Uganda, ICC-02/04-01/05, 6 October 2006 (see M Ssenyonjo n 35 above)

⁷⁰ M Ssenyonjo (n 35 above)

⁷¹ See Vision Reporter 'M7 rejects Kony hunt', *The New Vision*, 17 November 2006

⁷² Pre-Trial Chamber II, Order to the Prosecutor for the Submission of Additional Information on the

2.3 The Humanitarian disaster

Although the Government of Uganda has failed to declare the north a humanitarian disaster with regard to the crisis caused by the conflict,⁷³ the humanitarian situation in northern Uganda has seriously deteriorated over the years. In 2003, the UN undersecretary for Humanitarian Affairs, Jan Egeland has depicted the conflict in northern Uganda as the ‘the biggest forgotten, neglected humanitarian emergency in the world today.’⁷⁴ He further called for a special envoy to northern Uganda arguing that such an official would bolster regional action and help to facilitate and coordinate military and political efforts.⁷⁵ Despite the appointment of the envoy in late 2006⁷⁶ and the joint efforts of UN agencies and other humanitarian organisations, suffering of thousands of people in northern Uganda has not ended.

2.3.1 Internal displacement

While the protracted conflict in northern Uganda was initially rooted in a popular rebellion against the government of Yoweri Museveni, it has over the years become a profoundly violent conflict in which civilians are the main victims.⁷⁷ As of 2006, international human rights organisations estimated to 1.7 million internally displaced persons (IDPs) over northern Uganda, the majority being as a result of government’s counter-insurgency strategy that forced people into so called ‘protected villages’. The strategy was intended to remove the population from the rural areas in which the LRA operates, in a bid to paralyse the rebellion in its subversive actions.

However, tens of thousands more have been killed, raped or abducted. The forced displacement policy set up by the Government of Uganda appears to have been aimed at working out the classic counter insurgency strategy of ‘draining the sea’.⁷⁸

Status of the Execution of the Warrants of Arrest in the Situation in Uganda, No. ICC-02/04-01/05
30 November 2006, para 2

⁷³ Internal Displacement Monitoring Centre ‘Only peace can restore the confidence of the displaced’ available on <<http://www.internal-displacement.org/publications/ugandareport>> (Accessed on 6 September 2007)

⁷⁴ OCHA News, Issue No 122, 14 November 2003 (n 2 above)

⁷⁵ Minutes of Protection Working Group Meeting, Kampala, 28 August 2006

⁷⁶ United Nations Security Council S/2006/930

⁷⁷ Internal Displacement Monitoring Centre (n 73 above)

⁷⁸ Human Rights Watch (n 7 above)

While the government calls the camps 'protected villages', they are most accurately identified as internment or concentration camps, because of the forced displacement and the continued government violence used to keep civilians from leaving.⁷⁹ Some scholars and activists have argued that this forced displacement constitutes a war crime or crime against humanity.⁸⁰ This contention is based on the fact that the government has not only forcibly removed people from their homes, but it has also failed to provide adequate relief aid to the people in the camps, leading to a massive humanitarian crisis with excess mortality levels of approximately 1,000 per week.⁸¹ Taking into account the continuing internment of over a million people by the GoU without military necessity and without adequate protection, I share the view that the GoU has committed war crimes and crimes against humanity and that falls within the ICC's jurisdiction.⁸²

In August 2003, the Representative of United Nations Secretary General (RSG) on internally displaced persons (IDPs) undertook an official visit to Uganda in order to

Gain a better understanding of the situation of internal displacement in Uganda. Particular focus was on persons displaced by the conflict with the LRA, and to explore ways of enhancing the response of the Government of Uganda, United Nations agencies, NGOs and other actors.⁸³

The RSG, Francis Deng, noted the need for a regional perspective and a possibly third party mediation to address the problems and achieve lasting peace.⁸⁴

⁷⁹ A Branch 'Uganda's civil war and the politics of ICC intervention' available on <<http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1747-7093.2007.00069.x>> (Accessed on 9 May 2007)

⁸⁰ As above

⁸¹ UN IRIN 'Uganda: 1,000 displaced die every week in War-torn North' August 29, 2005; available at <www.aegis.com/news/IRIN/2005/IR050886.html> (Accessed on 29 August 2007)

⁸² See Articles 13 and 17 of Protocol Additional II to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts; available at <www.unhcr.ch/html/menu3/b/94.htm> (Accessed on 19 September 2007)

⁸³ Paragraph 2, Report of the Representative of the Secretary-General (RSG) on internally-displaced persons, M Deng, Mission to Uganda, Commission on Human Rights, E/CN.4/2004/77/Add.1, 3 March 2004

⁸⁴ UNOCHA 'When the sun sets, we start to worry' (2004) online IRIN News <www.irinnews.org> (Accessed on 9 June 2007)

2.3.2 The night commuters

One of the perceptible signs of the collective trauma to which the people of northern Uganda have been subjected is the phenomenon of 'night commuters'. Every night, thousands of children poured into Gulu and other northern Ugandan towns from surrounding areas, in the bid to avoid abduction.⁸⁵ They sleep on verandas, in bus parks, on church grounds, and at local hospitals – wherever they think they can spend the night in safety- before returning home the next morning. Most of these are children who walk up to 10 kms to seek refuge from the threat of abduction and violence. Many have to sleep in the open, where they are vulnerable to abuse and exploitation. The UN has estimated the number of night commuters in Gulu and Kitgum districts at 25,000.⁸⁶

2.3.3 Devastation of the northern economy

Large scale looting and destruction of civilian property perpetrated by both the LRA and UDF forces, along with forced displacement of the population are prime factors in the destruction of the economy in northern Uganda.⁸⁷ The conflict has thoroughly affected agriculture and cattle rearing, which constitute not only the livelihood of the population but also, the pillars of the northern economy.

2.4 The atrocities committed during the conflict

The scale of atrocities committed in the course of the conflict in northern Uganda defies any description. Those atrocities are committed both by the LRA and the UDF forces.

2.4.1 The atrocities committed by the LRA

The LRA, ostensibly dedicated to the ousting of the Ugandan government, has brutalised the population of northern Uganda. Highlighted below are some of the atrocities committed by the LRA, which include abduction of children, attacks on civilians, torture and rape.

⁸⁵ Human Rights News 'Uganda: Child abduction skyrocket in North' (2005), available at <<http://www.hrw.org>> (Accessed on 7 August 2007)

⁸⁶ UNOCHA (n 84 above)

⁸⁷ Human Rights Watch (n 61 above)

2.4.1.1 Abduction of children

Children⁸⁸ were abducted in record number by the LRA and they constitute up to 80 per cent of the insurgency.⁸⁹ They are most of the time abducted from schools, homes and off the streets, and are subjected to brutal treatment as soldiers, labourers, and sexual slaves.⁹⁰ Since June 2002, an estimate of 5,000 children have been abducted from their homes and communities, a larger number than any previous year of the protracted conflict, and a dramatic increase from less than 100 children abducted in 2001.⁹¹ It is estimated that more than 20,000 children were abducted during the course of the conflict, the rate of abductions having stepped up in early 2002 when a military action launched by the UPDF resulting in the LRA returning to Uganda from their camps in southern Sudan.⁹² The suffering of the abducted children is immense: they are frequently beaten and forced to carry out raids, to work long hours fetching water, firewood, gathering food and performing domestic duties. Many have been killed in battle or have died from mistreatment, disease and hunger. Above all, they are forced to participate in atrocities such as killing of civilians or abduction of other children.

2.4.1.2 Attacks on civilians

The civilian population has paid the biggest price in the protracted conflict. Although directing some attacks on UPDF detachments, the LRA continues to make the people of northern Uganda its main targets.⁹³

Under international humanitarian law (the laws of war), the armed conflict in northern Uganda can be regarded as a non-international (internal) armed conflict. The law

⁸⁸ 'Children' refers to the group of people under the age of eighteen. Article 1 of the Convention on the Rights of the Child defines a child as 'every human being under the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.' Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25, ratified by Uganda on August 17, 1990. Likewise, the Ugandan Children Act talks about the age of below eighteen (see article 2 of the Act)

⁸⁹ Irin News 'waiting for elusive peace in the war ravaged north' June 2005 available on <http://www.irinnews.org/S_report.asp?> (Accessed on 5 September 2007)

⁹⁰ Human Rights Watch (n 61 above)

⁹¹ As above

⁹² As above

⁹³ As above

applicable is therefore article 3 common to the four Geneva Conventions of 1949⁹⁴, the Second Additional Protocol of 1977 to the Geneva Conventions⁹⁵ and customary international humanitarian law.⁹⁶ International humanitarian law, which applies to both government forces and rebel groups prohibits direct or indiscriminate attacks against civilians and civilian property, and requires the humane treatment of all persons in custody.

2.4.1.3 Torture

The LRA has committed many acts of torture during the course of the conflict. The commonest of these consist of maiming, use of padlocks to lock people's mouths, and beatings to name but a few. Uganda is party to many international human rights Conventions among which are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁹⁷ The CAT obliges States to protect individuals from 'severe pain or suffering' intentionally inflicted 'by public officials' for such purposes as obtaining information or a confession, intimidating or coercing a person for an act committed.⁹⁸ Torture is 'the most serious violation of the human right to personal integrity and dignity'⁹⁹ and it can be committed both by states actors as well as non-states actors (NSAs) like armed rebel movements.¹⁰⁰ Uganda has therefore the obligation under international law to:

⁹⁴ Four Geneva Conventions of 1949. Uganda ratified the 1949 Geneva Conventions in 1964

⁹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977. Uganda ratified Protocol II in 1991. Protocol II prohibits, among other things, murder, torture and other cruel treatment, rape, acts of terrorism, and pillage (see article 4)

⁹⁶ See generally, International Committee of the Red Cross, *Customary International Humanitarian Law*(Cambridge: Cambridge Univ. Press, 2005)

⁹⁷ Uganda accessed to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 26 June 1987

⁹⁸ See article 1(1) of the Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment

⁹⁹ M Nowak, 'What Practices Constitute Torture?: US and UN Standards', *28 Human Rights Quarterly* (2006) pp. 809-841 at p. 839

¹⁰⁰ See, European Court of Human Rights, *HLR v. France* (1997) 26 *EHRR*, para. 40; *A. v. United Kingdom* (1999) 27 *EHRR* 611; *Z. and Others v. United Kingdom* (2002) 34 *EHRR* 97, para. 73

Take vigorous steps to eliminate the impunity of the alleged perpetrators of acts of torture and ill-treatment, carry out prompt, impartial and exhaustive investigations, try and, where appropriate, convict the perpetrators of torture and ill-treatment, impose appropriate sentences on them and properly compensate the victims.¹⁰¹

2.4.1.4 Rape

In general, the LRA has not been implicated in acts of rape during attacks on displaced persons' camps or even when encountering women in rural areas. Rape, on many occasions especially gang rape, has been committed after the young women and adolescent girls were taken back to the LRA bases.¹⁰² The exact number of women who have been raped in one way or another remains unknown, but it may be estimated to thousands. According to a new international jurisprudence, rape came up as a war crime and crime against humanity.¹⁰³

2.5 Atrocities committed by the UPDF

Though the Government of Uganda has called upon the ICC to investigate and prosecute the abuses by the LRA, it should not be overlooked that the Ugandan Army itself has carried out serious crimes.¹⁰⁴ The UPDF has along with the LRA perpetrated human rights abuses in the north, including the murder and rape of civilians, recruitment of children, and the looting of property.¹⁰⁵

2.6 Violation of the right to security by the Ugandan government

The failure of the Government of Uganda to protect the people of northern Uganda has been especially troubling. It has not provided adequate protection to its citizens, even to

¹⁰¹ Committee against Torture, Conclusions and Recommendations: Uganda, UN Doc. CAT/C/CR/34/UGA (2005) para. 10(g)

¹⁰² Human Rights Watch (n 61 above)

¹⁰³ *Prosecutor v. Akayesu*, case No. ICTR 96-4-T, ICTR Trial Chamber Judgement, 2 September 1998

¹⁰⁴ See Human Rights watch 'Uganda: army and rebels commit atrocities in the north' (2005) on <www.hrw.org> (Accessed on 5 September 2007)

¹⁰⁵ See Human Rights Watch, 'Hostile to Democracy: The Movement System and Political Repression in Uganda' (New York: Human Rights Watch, August 1999), pp. 120-123. See also, G Robert, *The Anguish of Northern Uganda: Results of a Field-Based Assessment of the Civil Conflicts in Northern Uganda* (Kampala: U.S. Agency for International Development, August 1997), pp. 45-48, Human Rights Focus 'Between Two Fires: The Human Rights Situation in 'Protected Camps' in Gulu District', February 2002, pp. 43-54

those living in IDPs camps. To illustrate, the LRA's 2005 offensive targeted displaced persons camps and resulted in numerous atrocities, but the Ugandan army did little to protect this vulnerable population.¹⁰⁶ Again, while President Yoweri Museveni has gained donors' favour by pursuing economic reforms that brought a relative prosperity to Uganda, the north has not benefited from those improvements and has remained economically marginalised.¹⁰⁷

All these facts evidence a wanton violation of the right to national peace and security as provided for under article 23 of the African Charter on Human and Peoples' Rights (ACHPR). The situation of war in northern Uganda and the fact that the state agents are not the immediate cause of the violation –in case the Government of Uganda wants to argue so- can not shelter it from discharging its international obligations. In *Commission Nationale des Droits de l'Homme et des Libertes v Chad (2000) AHRLR 66 (ACHPR 1995)*,¹⁰⁸ the African Commission on Human and Peoples' Rights (the Commission) found that the government of Chad has committed serious and massive violations because it failed to protect its citizens, regardless of the fact that their attackers had not been government agents.¹⁰⁹ It went on to add that the African charter does not allow state parties to derogate from their Charter obligations during emergency situations.¹¹⁰ The view of the African Commission is reinforced by the case *Velasquez v Honduras*¹¹¹ and the case *X and Y v Netherland*¹¹² where the Inter-American Court of Human Rights (IACHR) as well as the European Court of Human Rights (ECHR) declared substantially that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by another private person.

2.7 Conclusion

The situation in northern Uganda is not a normal guerrilla war between insurgents and a government; it is a war against civilians. To end the conflict and create conditions

¹⁰⁶ Human Rights Watch (n 61 above)

¹⁰⁷ As above

¹⁰⁸ Communication 74/92

¹⁰⁹ See para 20 as above

¹¹⁰ See para 21 as above

¹¹¹ See Inter-American Court of Human Rights, *Velasquez Rodriguez case*, judgement of 19 July 1988, Series C, no 4

¹¹² 91 ECHR (1985) (Ser A) at 32

conducive to peace and security, the government should adopt a strategy which must include political measures intended to improve the situation of the population of northern Uganda and beyond affected by the conflict. Particular attention should be paid to the abducted children through specific programmes for their rehabilitation, education and resettlement in their families. In this regard, the international community has a valuable contribution to make, politically and financially in assisting the Government of Uganda.

Above all, it is only by creating conditions conducive for prosecution of perpetrators of human rights violations that the GoU would respect its international obligations. The atrocities committed in northern Uganda fall under the jurisdiction of the ICC, but the success of ICC prosecutions depends on the good willing of the GoU, since the Court does not have an army and relies heavily on cooperation of states parties to the Rome Statute.

CHAPTER 3

INVESTIGATING PROSECUTION OF GRAVE HUMAN RIGHTS VIOLATIONS

3.1 Introduction

The adoption of the Rome Statute was a milestone in that states decided to take a stand against the perpetration of serious human rights violations. The ICC has therefore a pivotal role to play under international human rights protection system. This chapter looks at the prosecution of grave human rights violations by the ICC.

3.2 The African human rights system in prosecuting grave human rights violations.

In order to appreciate the mandate of the ICC, the study needs to consider prosecution of grave human rights violations prior establishment of ICC.

The African system for protecting human rights originated from the adoption of the ACHPR in Nairobi in 1981. In effect, the question of human rights did not feature prominently on the agenda of the Organisation of African Unity (OAU) following its creation in 1963. A fact very illustrative in this regard is that, it took almost two decades before the Assembly of Heads of States and Governments was prepared to adopt the ACHPR, the first comprehensive human rights document for the continent.¹¹³ In 1987, an oversight body, the Commission, was established under the Charter. The Charter and the Commission have come to be considered as the principal means by which human rights might be promoted and protected on the continent.

The Commission has judicial powers and has over the years developed an abundant jurisprudence. However, the scope of action of the Commission is limited to states since the Charter is basically an instrument protecting individuals from state abuses.¹¹⁴

¹¹³ M du Plessis 'The African Union' in J Dugard *International Law: A South African Perspective*, 3rd edition (2005), Landsdowne: Juta law

¹¹⁴ See for instance *Avocats Sans Frontieres (on behalf of Bwampamye) v Burundi* (200) AHRLR 48 (ACHPR 2000); *Achuthan and Another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995); *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000); all these cases were decided against states

One of the main shortcomings of the Charter is that, it did not take into account the reality that human rights can be violated by state actors as well as non state actors.¹¹⁵ Though the Charter imposes duties on individuals,¹¹⁶ it is mainly a document protecting individuals against human rights violations from state actors. International prosecutions of individuals are therefore, a notion unknown under the African System of human rights protection. Both the Commission, and the African Court on Human and Peoples' Rights (ACrHPR)¹¹⁷ are not competent to uphold the principle of international criminal responsibility. In his work on the African system for protecting human rights, J D Boukongou¹¹⁸ pertinently noted that:

if the AU wants to improve the system, it would be better to go beyond the idea of a fusion of the two organs to enlarge the field of competence and action of the African system of protecting human rights, by including a competence in criminal matters.

3.2.1 The Hissene Habre case

The Hissene Habre case¹¹⁹ has evidenced the necessity to put into place at the continental level mechanisms to exercise international prosecutions. Sixteen years after the former Chadian president Hissene Habre fled to Senegal, the victims of his brutal regime are still waiting for justice to be done. Hissene Habre ruled Chad from 1982 to 1990 and is accused of having killed over 40,000 people during his tenure as president.¹²⁰

In 2006, at Khartoum and Banjul summits of the African Union (AU) featured prominently on the agenda the decision to be taken with regard to the request of Belgium for

¹¹⁵ See European Court of Human Rights, *NHL v. France* (1997) 26 *EHRR*, para. 40; *A. v. United Kingdom* (1999) 27 *EHRR* 611; *Z. and Others v. United Kingdom* (2002) 34 *EHRR* 97, para. 73

¹¹⁶ See Chapter II (article 27, 28, 29)

¹¹⁷ The Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights was adopted in Addis Ababa, Ethiopia, in June 1998 and entered into force in January 2004. In terms of the protocol (article 2), the Court has the mission to complement the protective mandate of the Commission

¹¹⁸ J D Boukongou 'The appeal of the African system for protecting human rights' *AHRLJ* Vol 6 No 2 (2006) 268

¹¹⁹ The matter was introduced on the agenda of the 6th Session of the Assembly of the African Union on proposition of Senegal. It was entitled 'The Hissene Habre case and the African Union' (Assembly/AU/8(VI) Add.9

¹²⁰ See <<http://www.hrw.org/justice/habre> (Accessed on 14 May 2007)

extradition from Senegal of Hissene Habre. This was following an international warrant arrest for crimes against humanity, war crimes, acts of torture and serious violations of international humanitarian law delivered on 19 September 2005 by a Belgian judge.¹²¹ Senegal highest court, the *Cour the Cassation*, had ruled in 2001 that Senegal did not have the jurisdiction to try the former dictator Habre; and in November 2005 the Indictments Chamber of the Court of Appeal refused jurisdiction to rule on the extradition request.

At the 6th Session of the Assembly of the AU in Khartoum, heads of States dodged the necessity for an immediate decision by mandating the chair of the AU Commission to 'set up a committee of eminent African jurists to consider all aspects and implications of the Hissene Habre case as well as the options available for his trial' and submit a report to the July 2006 summit.¹²² The head of states' Assembly accordingly decided to mandate Senegal to prosecute and ensure that Hissene Habre be tried, 'on behalf of Africa', by a competent Senegalese court with guarantees for fair trial.¹²³ As of the time of the study, Hissene Habre is awaiting his trial before Senegalese jurisdictions. Taking into account the attitude of Senegalese authorities who have at many occasions dodged their responsibility to prosecute Hissene Habre, one of the main interrogations at the moment is whether the trial will be fair, in the event it finally occurs.

This case is indicative of how regional and national mechanisms in Africa have been incompetent to deal with the issue of non-states actor's responsibility for war crimes, crimes against humanity and genocide. The limited mandate of the African Commission on Human and Peoples' Rights and national court's reluctance to prosecute violators of human rights, revealed that alternative methods were needed to deal with the issue. This is dealt with in the field of International Criminal Law.

3.3 The establishment of the ICC

One of the main developments of international law in the post-World War II period is the emergence of the individual as subject- or at least a partial subject- of international law. That is manifested through the protection of the individual by specific rules applicable

¹²¹ As above for background on the case

¹²² Decision on the Hissene Habre case, Assembly/AU/Dec.103 (VI)

¹²³ Decision on the Hissene Habre case and the African Union, Assembly/AU/Dec.127 (VII)

during war periods as well as peace time¹²⁴ and obligations imposed upon the individual by international law. International law and more specifically international human rights law aims to spare individuals from abuses either from state actors or non state actors.

The adoption of the Rome Statute establishing the ICC in 1998 was as a result of efforts many times undertaken by the international community in this field, with numerous aborted attempts to set up a permanent international criminal jurisdiction since the early twentieth century. It was the treaty of Versailles of 28 June 1919 which was to give birth to the first sketch of a permanent criminal court, since its Article 277 set up a Special Criminal Tribunal to prosecute the former Kaiser of Germany, Emperor Guillaume II for 'a supreme offence against international morality and sanctity of treaties'. The attempt to bring the Emperor to trial was thwarted when he was granted asylum by the Netherlands.¹²⁵

Again, in 1937, following the assassination in 1934 of King Alexander of Yugoslavia by Croatian nationalists in Marseilles, the League of Nations mandated a committee of experts to draft two Conventions; the first one dealing with the outlawing of terrorism and the second, to try terrorists before an international tribunal.¹²⁶ The two Conventions were effectively signed on 16 November 1937, however they did not come into force for lack of ratifications.¹²⁷ Important to mention is that the atrocities committed by German officials and soldiers during the World War II compelled the creation of an ad hoc international military tribunal at Nuremberg, a similar tribunal was set up in Tokyo in respect of crimes committed by Japan's leaders. Though the Military Tribunal of Nuremberg and Tokyo are considered to be a justice of victors against the

¹²⁴ J Dugard noted for instance that at Nuremberg, the notion of crimes against humanity was limited to those acts that occurred only during an international armed conflict and that today, the nexus between crimes against humanity and war crimes has disappeared in international law. Customary international law prohibits crimes against humanity whether they are committed in times of war or peace. See J Dugard (n 113 above) 174

¹²⁵ M Kamara 'Le Statut de Rome de la Cour Pénale Internationale (17 Juillet 1998) et la répression des crimes de droit international' in Bulletin Semestriel de Droit et D'Information de l'Association des Hautes Juridictions Francophones (A.A.H.J.F) n 05&06 (2005) 97

¹²⁶ M du Plessis 'International Criminal Courts, the International Criminal Court, and South Africa's implementation of the Rome Statute' in J Dugard (n 113 above)

¹²⁷ M Kamara (n 125 above)

vanquished,¹²⁸ they constitute nevertheless the first act posed by the international community towards the institutionalisation of criminal international justice.

The work of these two military tribunals energised the UN General Assembly which in Resolution 177 (II) mandated the International Law Commission (ILC) to draft a text of the international law principles laid down by the Nuremberg Court and its judgements.¹²⁹ Moreover, in December 1948, the GA, in Resolution 260B (III), called upon the ILC to study the possibility of setting up an international court to try the crimes of genocide and other international crimes. However, for a series of both political and legal reasons, it was fifty years later that an intergovernmental conference to establish an ICC was convened.¹³⁰ If the end of the Cold War allowed a more unified UN to renew its interest in a permanent international court,¹³¹ dramatic events in former Yugoslavia in 1991 and Rwanda in 1994 showed the necessity of establishing an ICC working on a permanent basis.

An International Criminal Court (ICC) was created on July 1998, under the Rome Statute adopted by the United Nations Diplomatic conference on Plenipotentiaries on the Establishment of the said court.¹³² After five weeks of intense negotiations, 120 countries voted to adopt the treaty. Only seven countries voted against it, including China, Israel, Iraq, and the US and 21 abstained. The treaty came into force upon 60 ratifications. Sixty six countries- six more than the threshold needed to establish the court –had ratified the treaty by 11 April 2002. As of 17 October 2007, 105 countries are states parties to the Rome Statute.¹³³ Of those 105, 29 are African countries.¹³⁴

¹²⁸ R Overy 'The Nuremberg trials: international law in the making' in P Sands (ed) *From Nuremberg to the Hague- the future of International Criminal Justice* (2003) 1 quoted in M du Plessis (n 112 above)

¹²⁹ U Leaza 'The Rome conference on the establishment of international criminal court: A fundamental step in the strengthening of international criminal law' in F Lattanzi & W Schabas *Essays on the Rome Statute of the International Criminal Court* (1999)

¹³⁰ As above

¹³¹ M du Plessis (n 126 above)

¹³² United Nations: Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF183/9 (July 17, 1998)

¹³³ See <<http://www.icc-cpi.int/statesparties.html>> (Accessed on 10 October 2007)

¹³⁴ As above

3.4 The Jurisdiction of the ICC

Under this section, it is important to look at the jurisdiction *ratione temporis*, *ratione personae* and *ratione materiae* of the ICC. The jurisdiction *ratione temporis* deals with the period of time within which starts the competence of the ICC, the jurisdiction *ratione personae* explore the category of subjects over which the Court is competent and the jurisdiction *materiae* exposes the category of crimes over which the ICC is competent.

3.4.1 The Jurisdiction *ratione temporis*

The Rome Statute clearly addresses the question of jurisdiction *ratione temporis* and limits the Court's jurisdiction to crimes committed after the entering into force of the Statute.¹³⁵ The Rome Statute came into force on 1 July 2002 after the deposit of the sixtieth instrument of ratification to the Secretary General of UN,¹³⁶ and the ICC is competent to try crimes committed from this date. However, there are some cases where a state ratifies the Statute after its entry into force. In such circumstances, the jurisdiction of the Court can be exercised only with regard to crimes committed after the entry into force of the Statute for that state, unless that state has made a declaration under article 12, paragraph 3.

The ambit of the Court's jurisdiction varies, depending on the mechanism by which the case comes to the Court. In the event that the Security Council refers the matter, jurisdiction covers the territory of every state in the world, whether or not the State in question is a party to the Statute.¹³⁷ The case of Sudan exemplifies this. Indeed, Sudan was referred in 2005 to the ICC by Resolution 1593 of the Security Council regardless of the fact that it is not party to the Rome statute.¹³⁸ As a result, in February 2007, the ICC issued summons to appear for Ali KUSHAYB a former Sudanese militia leader and Ahmad Muhammad HARUN the former Sudanese minister of internal affairs.

Regarding situations where a matter is referred by a state party or initiated *proprio motu* by the prosecutor, the Court's jurisdiction is more restricted. In such instances, jurisdiction extends to the territory of a non party State only if that state consents to the

¹³⁵ See article 11(1) of the Rome Statute

¹³⁶ This is in line with article 126 of the Rome Statute

¹³⁷ See article 13 (b) of the Rome Statute

¹³⁸ SC Resolution 1593, 31 March 2005

jurisdiction of the Court, and either the acts were committed in the territory of the consenting State or the accused is a national of the consenting State.¹³⁹

3.4.2 The jurisdiction *ratione personae*

In the first place, it is important to mention that the Court can exercise its jurisdiction only for the most serious crimes committed by individuals.¹⁴⁰ Thus, unlike the *ad hoc* Tribunals and in line with a principle generally acknowledged in international law, the Rome Statute put aside any idea of criminal responsibility of states and retains only the notion of individual criminal responsibility.¹⁴¹ However, Article 26 of the Statute excludes from the jurisdiction of the Court people who are under the age of eighteen at the time of the alleged commission of a crime. Furthermore, article 27 of the Statute declares that the official capacity can not constitute a bar to prosecution or a ground for reduction of sentence.¹⁴²

3.4.3 Jurisdiction *ratione materiae*

The ICC can take up only the most serious crimes of concern to the international community as a whole. Those crimes are genocide, crimes against humanity, and war crimes, all of which are defined in the Statute.¹⁴³ Aggression also falls within the competence of the ICC, but an acceptable definition of this crime has yet to be added to the Statute.¹⁴⁴

3.5 The principle of complementarity

The principle of complementarity is one of the main principles within which the ICC operates.¹⁴⁵ The Statute of the ICC clearly states, in paragraph 10 of its preamble that: The International Criminal Court shall be complementary to national criminal jurisdictions. Furthermore, article 1 of the Statute provides that the ICC 'shall be a permanent institution and shall have the power to exercise its jurisdiction over persons

¹³⁹ See articles 4(2) and 12(2) of the Rome Statute

¹⁴⁰ See article 5 (1) of the Rome Statute

¹⁴¹ M Kamara (n 125 above)

¹⁴² According to article 27 of the Statute, the official capacity is irrelevant with regard to criminal responsibility and can not constitute a ground for reduction of sentence

¹⁴³ Article 5-8 of the Rome Statute

¹⁴⁴ See article 5 (2) as above

¹⁴⁵ Brown, 'Primacy or Complementarity: Reconciling the jurisdiction of National Courts and International Criminal Tribunals', in *YJIL*, (1998) 383

for the most serious crimes of international concern.’ It is therefore clear that the complementary character of the ICC jurisdiction implies the idea that the primary responsibility in prosecuting serious crimes of international concern lies on national criminal tribunals. In this regard, paragraph 4 of the Statute Preamble affirms that

The most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international prosecution.

The principle of complementarity which characterises the jurisdiction of the ICC is in compliance with precedent on the repression of crimes of international concern, whereby states have the primary responsibility for prosecuting crimes, even in situations where the international character of the crimes urges the creation of international mechanisms for repression.¹⁴⁶

As discussed above, the jurisdiction of the ICC comes to the fore and takes the place of national jurisdictions only exceptionally, in circumstances where a state is unable or unwilling to prosecute human rights violators.

3.6 Investigations

According to the Rome Statute, investigations can commence only with the authorisation of the Pre- Trial Chamber, which, upon examination of the request for prosecution and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court.¹⁴⁷ The request for authorisation of an investigation is submitted to the Pre- Trial Chamber by the Prosecutor.¹⁴⁸ However, in the event that the Chamber refuses to authorise an investigation, this does not preclude the presentation of a subsequent request by the prosecutor based on new facts or evidence regarding the same situation.¹⁴⁹

¹⁴⁶ P Benvenuti, ‘Complementarity of the International Criminal Court to National Criminal Jurisdictions’ in F Lattanzi & W Schabas (n 129 above)

¹⁴⁷ See article 15(4) of the Rome Statute

¹⁴⁸ See article 15 (3) as above

¹⁴⁹ See article 15 (5) as above

3.7 The Trust Fund for Victims

One of the main points of departure between the ICC and the two *ad hoc* Tribunals is the grating of compensation. Before the ICTR and the ICTY, victims were not granted compensation and that constitutes a violation of victim's rights to an effective remedy. The situation is remedied before the ICC under article 75 (2) which declares that

The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

The Trust Fund for victims (TFV) is one of the major tools for the implementation of victim's right to redress before the ICC.¹⁵⁰ The ICC and the TFV, both born out the Rome Statute are independent institutions. The TFV has an Assembly of States Parties which elected a board of Directors for the institution and adopted regulations establishing the TFV secretariat.¹⁵¹ The TFV is supplied by fines or forfeiture,¹⁵² voluntary contributions from governments, international organisations, individuals, corporations as well as other entities and resources other than assessed contributions allocated by the Assembly of States Parties to the Fund.¹⁵³ Moreover, states who are parties to the Rome Statute fund the TFV secretariat as part of their contribution to the Court.¹⁵⁴ However, the question of who will be the beneficiaries of the TFV was not clearly dealt with under the Rome Statute. Article 79 (1) of the Statute states broadly that

A Trust Fund shall be established by decision of the assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

That provision has led to serious controversies¹⁵⁵ and it is difficult to foresee how the matter will be dealt with practically by the ICC since the first cases before the Court are

¹⁵⁰ M Kouadio 'Critical analysis of victim's rights before international criminal justice' (2006) 36

¹⁵¹ See <<http://www.icc-cpi.int/vtf.html>> (Accessed on 28 October 2007)

¹⁵² See article 79(2) of the Rome Statute

¹⁵³ M Kouadio (n 150 above) 37

¹⁵⁴ (n 149 above)

¹⁵⁵ Some delegations have interpreted article 79 to apply only to victims or family members of victims in cases under consideration before the ICC. However, other delegations interpreted the article more broadly to mean that the Trust Fund should benefit victims of crimes within the jurisdiction of

still ongoing. Premising his argument on the existence of the Victims and Witnesses Unit, Kouadio¹⁵⁶ contended that the best option is that all victims should benefit from the TFV regardless of whether or not their case is under consideration before the ICC.

3.8 The Ugandan referral case

In December 2005, the government of Canada and the Secretary General of the United Nations (UNSG) suggested that the UN Security Council (UNSC) seize itself of the situation in northern Uganda, but Mr. Adonia Ayebare, the Chargé d'affaires of the Permanent Mission of Uganda to the United Nations opposed the proposal.¹⁵⁷ His protestation was based on two grounds: first, he contended that comparing the situation in northern Uganda to that in Darfur, Nepal, and the DRC was 'unacceptable' since it 'masks a politically activist attitude that should be beyond his [the Secretary General's] office.'¹⁵⁸ And second, that Uganda has control over the situation and therefore, any international intervention aimed at ending the conflict is not necessary.¹⁵⁹

In the face of these reservations expressed by the government of Uganda, the UNSC Resolution 1653 of January 2006 condemned the LRA alongside other rebel forces operating in the Great Lakes region, and called upon the government to renew its commitment to end the conflict and respond to the humanitarian crisis.¹⁶⁰ Throughout the Resolution 1663 of March 2006, the Security Council called upon the UN's Secretary-General to continuously appraise himself of, and make recommendations to it about the situation. A third Resolution sponsored by the British government and calling for the complete disarmament of the LRA by Ugandan, Sudanese and UN forces, have been

the Court, though the case is not before it. See Amnesty International 'ICC: ensuring an effective Trust Fund for victims' IOR 40/05/2001 used in M Kouadio (n 145 above) 38

¹⁵⁶ M Kouadio (n 150 above) 38

¹⁵⁷ Internal Displacement Centre (n 73 above)

¹⁵⁸ Letter dated 13 December 2005 from the Chargé d'affaires of the Permanent Mission of Uganda to the United Nations addressed to the President of the Security Council, Gen. S/2005/785 quoted in Internal Displacement Monitoring Centre 'Only peace can restore the confidence of the displaced' (n 73 above)

¹⁵⁹ (n 73 above)

¹⁶⁰ Internal Displacement Monitoring Centre (n 73 above)

drafted but not yet tabled, this is perhaps because tabling it at this moment could jeopardise the nascent peace process.¹⁶¹

In 2000, the GoU enacted the Amnesty Act which intended to grant amnesty to all the insurgents regardless of rank who voluntarily renounced rebellion and surrendered their arms. Surprisingly, in December 2003, President Yoweri Museveni referred the situation to the prosecutor of the ICC.¹⁶²

3.9 The ICC indictments

On 9 July 2005, the ICC Pre-Trial Chamber II (the Chamber) issued warrants of arrest, under seal, naming five senior commanders of the LRA (Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen).¹⁶³ The ICC charged these LRA leaders with crimes against humanity and war crimes.¹⁶⁴ On 27 September 2005, following an urgent application by the OTP, the Chamber ordered that the Registrar transmit, under seal, Requests for Arrest and Surrender to the governments of Uganda, the DRC, and Sudan.¹⁶⁵ On 13 October 2005, the ICC Pre-Trial Chamber II unsealed the warrants of arrest for the five senior leaders of the LRA and the Requests for Arrest and Surrender.¹⁶⁶ These warrants of arrest are important in that they are the first to be issued by the ICC since its establishment by the Rome Statute in 1998. They confirmed the implementation of international criminal justice.

As in any criminal proceedings, the ICC does not have jurisdiction over a person who is deceased. On 29 October 2007, the Court has therefore terminated proceedings against Raska Lukwiya¹⁶⁷ who was killed on 12 August 2006 in Kitgum (northern Uganda).

¹⁶¹ Internal Displacement Monitoring Centre (n 73 above)

¹⁶² Press Release, Int'l Criminal Court, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC' (Jan. 29, 2004), available at <http://www.icc-cpi.int/pressrelease_details&Id=16&l=en.html> (Accessed on June 2007)

¹⁶³ These warrants are available at <www.icc-cpi.int/cases/UGD.html>

¹⁶⁴ See Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58, ICC-02/04-01/05-1, 8 July 2005

¹⁶⁵ See Decision on the Prosecutor's Urgent Application Dated 26 September 2005, ICC-02/04-01/05-27, 27 September 2005

¹⁶⁶ ICC Press Release, 'Warrant of Arrest unsealed against five LRA Commanders', 14 October 2005, available at <www.icc-cpi.int/press/press_releases/114.html> (Accessed on 29 September 2007).

¹⁶⁷ See ICC-02/04-01/05-248 available on <<http://www.icc-cpi.int/library/cases/icc-02-04-01-05-257->

3.10 Conclusion

The coming into being of the ICC is the best option taking into cognisance the impossibility to continuously set up special tribunals with different headquarters and mandates. After dramatic events in Yugoslavia and Rwanda, massive human rights and humanitarian law abuses continue to be committed worldwide. An ICC is therefore necessary to help end impunity for egregious crimes under international law. Though the challenge of overturning what Morris and Scharf referred to as 'the unfortunate triumph of impunity over justice'¹⁶⁸ is being overcome at international level thanks to the Rome Statute, a possibility of creating a mechanism at the African level should not be overlooked, since human rights abuses have dramatically escalated in the continent during the last decade; such mechanism will complement the ICC in its mission of tracking down human rights violators.

There is no doubt that the coming into being of the ICC has filled the gap existing within the international system of human rights protection. However, the Court is confronted by some practical difficulties in the accomplishment of its mission. One of these difficulties is the issue of amnesties. The Ugandan referral case throws a spotlight on that important question overlooked by the Rome Statute.

Anxl_Englisgh.pdf> (Accessed on 28 October 2007)

¹⁶⁸ V Morris & M P Scharf 'the International Criminal Tribunal for Rwanda' (1998) 5 *ILSA Journal of International Comparative Law* 1

CHAPTER 4

TENSIONS EMANATING FROM THE UGANDAN AMNESTY ACT AND THE INVOLVEMENT OF THE ICC IN NORTHERN UGANDA

4.1 Introduction

This chapter discusses the legal implications the Ugandan referral has raised. Besides these legal implications, the referral shed light on the classic debate over amnesties and international criminal prosecutions. The specificity of the Ugandan amnesty law is that it is the result of the advocacy of the majority of victims. Though the victims consent to the amnesty law, there is strong opposition on the basis that a comprehensive amnesty in situations of gross human rights abuse constitutes a human rights violation.

4.2 The Ugandan Amnesty Act of 2000

On 17 January 2000, the president of Uganda signed into law the Amnesty Act (the Act) to 'provide for an amnesty for Ugandans involved in acts of a war-like nature in various parts of the country and for other connected purposes'¹⁶⁹ since 26, January 1986. The Act defines amnesty as 'pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State'.¹⁷⁰ The Amnesty Act has been promoted as a tool to promote peace and to encourage rebels from all parts of Uganda to come out from the bush. An Amnesty Commission was established to oversee the implementation of the amnesty law¹⁷¹ and nearly 22,000 insurgents have been granted amnesty.¹⁷² However, the Amnesty Commission is confronted by a number of challenges. These challenges include insufficient financial resources, lack of adequate knowledge among reporters and the community about the amnesty law, implementation of amnesty law whilst the insurgency still persists in some parts of the country, principled

¹⁶⁹ See preamble of the Amnesty Act

¹⁷⁰ Article 2 of the Amnesty Act

¹⁷¹ See article 7 of the Amnesty Act.

¹⁷² N Twinomugisha (legal officer at the Amnesty Commission), during an interview at the Headquarters of the Amnesty Commission in Kampala on 17 October 2007.

international opposition to the amnesty, mistrust between the government and the insurgents to name but a few.¹⁷³

The international legal community criticised the Amnesty Act, arguing that 'a blanket amnesty, particularly where war crimes and crimes against humanity have been committed, promotes a culture of impunity and is not in conformity with international standards and practice.'¹⁷⁴ The United Nations acknowledged that prosecution would not be practical taking into account the younger age of the vast majority of LRA rebels, but maintained however that Uganda has the obligation under international law to hold the top LRA commanders accountable for their crimes.¹⁷⁵ Article 17 of the Amnesty Act provides that the 'Act will remain in force for a period not exceeding six months and on expiry, the Minister may by Statutory Instrument extend that period.' Since its enactment in 2000, the Amnesty Act has been extended many times. The last extension,¹⁷⁶ issued under the Amnesty Act is supposed to expire by May 2008. The short term of the amnesty law was intended to pressurise the LRA and accelerate defections within the rebellion.¹⁷⁷

In May 2006, the GoU amended the amnesty law giving room to Parliament to exclude a person from eligibility for grant of amnesty.¹⁷⁸ If that amendment seems to target some prominent members of the LRA, Parliament has not yet taken a similar decision.

4.3 Amnesties and Truth Reconciliation Commissions

Societies over the last twenty years have increasingly opted to use Truth and Reconciliation Commissions (TRCs) to do away with history of massive human rights violations committed in the hand of the state.¹⁷⁹ TRCs have been therefore used as instruments to pave the way for justice and reconciliation. In that regard, the Truth and Reconciliation Commission of Sierra Leone rightly pointed out that:

¹⁷³ N Twinomugisha as above

¹⁷⁴ See H Chatlani (n 60 above), quoting from a UN High Commissioners for human rights' report on the situation in northern Uganda

¹⁷⁵ H Chatlani (n 60 above)

¹⁷⁶ See An Act to amend the Amnesty Act, Cap 294

¹⁷⁷ N Twinomugisha (n 172 above)

¹⁷⁸ N Twinomugisha (n 172 above)

¹⁷⁹ Q Joanna 'The Un-Doing of the Ugandan Truth Commission' *Human Rights Quarterly* vol. 26, no 2, (May 2004) 404

[T]hose who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict.... The Commission also recognizes the principle that it is generally desirable to prosecute perpetrators of serious human rights abuses, particularly when they rise to the level of gravity of crimes against humanity. However amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities after periods of brutal armed conflict. Disallowing amnesty in all cases is to deny the on-ground reality of violent conflict and the urgent need to bring such strife and suffering to an end.¹⁸⁰

The granting of amnesties is an important side of truth commissions while their role in criminal proceedings should not be overlooked.¹⁸¹ In the case of the South African TRC which has positively marked the history of transitional justice, amnesty was only granted in 'respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past'.¹⁸² Quite rightly, DP Mahomed noted that abuses committed during the period of 'debilitating war of internal political dissention and confrontation' where 'human rights became a major casualty'

[...] can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.¹⁸³

4.4 Controversies around the Ugandan Amnesty Act

The enactment of the Amnesty Act in 2000 has raised serious controversies with regard to the scope of the Act which intends to grant amnesty to all rebels regardless of rank who freely decide to renounce the insurgency. If there is a shared feeling that the lower rank of the LRA who are mainly children should benefit from amnesty, a consensus is far to be reached on whether the amnesty should be extended to the top commanders or not. A comprehensive amnesty is approved by the population of northern Uganda and religious leaders as a tool for achieving peace. However, human rights activists and international human rights organisations oppose it on the ground that it constitutes a human rights violation.

¹⁸⁰ Report of the Sierra Leone Truth and Reconciliation Commission, October 2004, chap. 3, p. 362

¹⁸¹ In effect, findings of truth commissions can be used in the course of future criminal proceedings. For instance, high-ranking officials of the apartheid regime who were denied amnesty were brought to trial for their crimes

¹⁸² See Section 3(1) (b) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

¹⁸³ DP Mahomed in *Azarian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* (n 178 above)

4.4.1 Ugandan Amnesty Act as a tool for achieving peace in northern Uganda

There is a common perception in northern Uganda that only amnesty is the best hope to end the conflict.¹⁸⁴ The feeling is indeed a clear denunciation of a failed military attempts to resolve the conflict.

Assuming the case that the conflict ended, it is improbable that the Acholi in their majority would oppose the bringing to justice of Kony and his accomplices taking into account the need they have frequently expressed to discover the truth about the past.¹⁸⁵ The advocacy in favour of amnesty as a means to abate the conflict is a result of the failure of the government of Uganda and the international community to find a definitive solution to the conflict. Overwhelmed by the sufferings caused by the conflict, the population of northern Uganda is literally compelled to trade justice for peace.

4.4.2 Ugandan Amnesty Act as a human rights violation

Two broad categories of rights are at stake with the granting of a blanket amnesty to the perpetrators of atrocities during the conflict. These rights are the victims' right to an effective remedy and the victims' right to an effective prosecution.

4.4.2.1 Violation of the victims' right to an effective remedy

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Magna Carta for victims) defines victims as:

persons who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member States, including those laws proscribing criminal abuses of power.¹⁸⁶

Article 13 of the European Convention for the Protection on Human Rights and Fundamental Freedoms (ECPHRFF) was interpreted in the 1990s by the European

¹⁸⁴ Refugee Law Project 'Whose justice? Perceptions of Uganda's Amnesty Act 2000: the potential for conflict resolution and long-term reconciliation' (2005) available at <<http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP15.pdf>> (accessed on 17 October 2007)

¹⁸⁵ Office of the United Nations High commissioner for Human Rights 'Victims' perception of accountability, reconciliation and transitional justice in northern Uganda' (2007) available at <http://www.unog.ch> (Accessed on 15 October 2007)

¹⁸⁶ See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, article 1

Court on Human Rights (ECHR) as prescribing the right of surviving victims to an effective prosecution as a remedy for violations of their rights to life and humane treatment. At many occasions, the ECHR took the view that a state's failure to prosecute infringements on the right to life and humane treatment was a violation of individual victim's right to an effective remedy.¹⁸⁷ The Human Rights Committee has prescribed through the interpretation of article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) that states must conduct an effective prosecution to remedy the harm caused to victims of right to life and humane treatment violations.¹⁸⁸ Article 2(3) provides in substance that states must accord an effective remedy to any person whose rights under the covenant have been violated. In *Rodriguez v. Uruguay*,¹⁸⁹ the Human Rights Committee declared that the adoption of amnesty laws by states violates their responsibility to provide victims with an effective remedy. The Committee went on to specify that the adoption of amnesty laws

Effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the state party from discharging its responsibility to provide effective remedies to the victims of those abuses.¹⁹⁰

Under the African human rights system, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa points out that the fact for a state to grant amnesty to absolve perpetrators of human rights abuses from accountability violate the right of victims to an effective remedy.¹⁹¹

4.4.2.2 Impunity: violation of victims' right to an effective prosecution

International human rights tribunals have defined impunity as a state failure to prosecute any violation of the fundamental rights of individuals protected by human rights treaties.¹⁹² Impunity is frequently highlighted by human rights organisations as one of the

¹⁸⁷ See *Egmez v. Cyprus*, 34 Eur. H.R. Rep. 29 (2000); *Assenov*, 28 Eur. H.R. Rep. 652 (1998)

¹⁸⁸ Communication No. 859/1999 (*Jimenez Vaca v. Colombia*), CCPR/C/74/D/859/1999 (2002), 9; Communication No. 821/1998 (*Chonwe v. Zambia*), CCPR/C/70/D/821/1998 (2000), 7; Communication No. 540/1993 (*Atachahua v. Peru*), CCPR/C/56/D/540/1993 (1996), 10, all available at <www.unhchr.ch/tbs/doc.nsf>

¹⁸⁹ Communication No. 322/1988 (*Rodriguez v. Uruguay*), 12.3-12.4

¹⁹⁰ Communication No. 322/ 1988 (*Rodriguez v. Uruguay*), 12.3-12.4

¹⁹¹ (n 15 above)

¹⁹² The Inter- American Court on Human Rights for instance defines impunity as 'the total lack of

worst continuing human rights challenges.¹⁹³ However, impunity should be understood in a sense to mirror the state's duty to prosecute human rights violations.

This duty requires states to conduct investigations into human rights abuses and engage prosecutions with the aim of punishing the human rights perpetrators, whether the abuses are committed by state agents or private actors.¹⁹⁴

It is interesting to mention that international treaty-body mechanisms have interpreted some provisions in general human rights treaties to prescribe victims' right to prosecutions. For instance, the Inter- American Court has considered surviving human rights victims as having the right to have the crime investigated and to have the perpetrators prosecuted, and when necessary, punished.¹⁹⁵ The IACHR went further to declare that victims' rights in the criminal process have been violated when states have refused to prosecute by adopting amnesty laws; it declares more specifically that 'self amnesty laws lead to the defencelessness of victims and perpetuate impunity'.¹⁹⁶ It is therefore obvious that the Ugandan government by enacting the Amnesty Act, has violated the victims' rights to prosecute perpetrators of atrocities during the conflict.

4.5 The Acholi traditional method of reconciliation: the *Mato oput*

Traditional and religious leaders in northern Uganda advocate for traditional reconciliation mechanism in lieu of criminal prosecutions. They premise their contention on the fact that the ICC prosecutions are inconsistent with traditional reconciliation rituals of the Acholi people who happen to be the main ethnic grouping- but not the only one- affected by the LRA atrocities.

investigation, prosecution, capture, trial and conviction of those responsible for violation of the rights protected by the American Convention'. See *Castillo Paez V Peru*, Case n 43, IACHR, OEA/Ser.C. 107 (1998) available at <www.corteidh.or.cr>

¹⁹³ Amnesty International Annual report Introduction: Impunity in 2001 quoted in R Aldana-Pindell 'An emerging universality of justifiable victims' rights in the criminal process to curtail impunity for State-sponsored crimes' Human Rights Quarterly Vol. 26

¹⁹⁴ R Aldana- Pindell 'An emerging universality of justifiable victims rights in the criminal process to curtail impunity for state- sponsored crimes' Human Rights Quarterly Vol.26

¹⁹⁵ See *Paniagua Morales*, Case No 37, Inter- Am. C.H.R. 155-56; *Dunand & Ugarte*, Case No 68, Inter- Am. C.H.R, 130

¹⁹⁶ See *Barrios Altos*, Case No. 73, Inter- Am. C.H.R, 41-49

The Acholi (Luo) traditional method of reconciliation or *mato oput* (bitter root or juice) consists in a ceremony mediated by elders whereby the wrongdoer admits his responsibility, and asks for forgiveness ending by the drink of *mato oput* and the bending of spears to represent reconciliation.¹⁹⁷ According to Luo culture, justice can not be achieved without forgiveness:

When a crime is committed against humanity with impunity, the accused or perpetrator must be the first witness against himself or herself. He/she must stand outside the “Gate of the Village” and tell the people his/her name and names of his/her parents and uncle. He/she also talks about the crime he/she committed and why he/she committed it the way he/she did. After his/her testimony, the elders of the Village immediately take collective responsibility on his/her behalf. After the confession and the culprit’s community taking collective responsibility, the elders then perform the rituals of the self-confessed culprit [...].¹⁹⁸

A main shortcoming of the *mato oput* approach is the tolerance of impunity. The Acholi traditional reconciliation process intends to bring back into the community after rituals the perpetrators, but does not take into account the views of the individual victims who might want justice to be done. Likewise, the *mato oput* cannot be expected to satisfy those who are not Acholi, yet the Acholi have not been the only victims of the LRA. The population of Lira and Soroti districts, most of whom are non- Acholi have been greatly affected by the atrocities of the conflict since 2002.¹⁹⁹

4.6. The legal implications of the Ugandan Amnesty Act with regard to ICC proceedings

The Ugandan case will undoubtedly contribute to jurisprudence on the issue of amnesties. This is mainly because of the legal implications the referral has raised.

¹⁹⁷ Tim Allen (n 38 above)

¹⁹⁸ J Muto, ‘Acholi Prefer Mato Oput to ICC for Kony rebels’, *Daily Monitor*, 3 October 2006 quoted in M Ssenyonjo ‘The International Criminal Court and the Lord’s Resistance Army Leaders: Prosecution or amnesty’ (n 35 above)

¹⁹⁹ UNOCHA (n 66 above)

4.6.1 Can a state whose judicial system is not deficient and therefore able to prosecute, voluntarily recourse to the ICC jurisdiction?

At the time when the situation in northern Uganda was referred to the ICC, Uganda had an effective and functioning national judicial system able to exercise criminal prosecutions.²⁰⁰

With the current state of affairs, Uganda opposes ICC prosecutions alleging that it will grant amnesty to all combatants if the peace talks happen to be successful and that is the best way to end the conflict.²⁰¹ The fact of granting a comprehensive amnesty to the LRA suggests that Uganda withdrew informally its referral to the ICC, an act not contemplated under the Rome Statute. It is therefore my contention that President Museveni used the ICC to mobilise the international community and especially gain the cooperation of Sudan after having failed to apprehend Kony. I premise my contention on the fact that the ICC intervention has altered Sudan's support to the LRA and added pressure to end the insurgency.

Having in mind the principle of complementarity and the responsibility to prosecute human rights violations which primarily lies on states, a state whose judicial system is not deficient and therefore able to prosecute, can not normally recourse to ICC jurisdiction. The reason being that by allowing such possibility, the ICC might be used as a political tool instead of a criminal jurisdiction of last resort as it is seemingly the case of the Ugandan referral case.

4.6.2. Can a state grant blanket amnesty to individuals indicted by the ICC and thereby absolve them from international prosecutions?

Though international law explicitly encourages the use of amnesties at the end of an armed conflict, and such encouragement is codified in the Protocol II to the 1949 Geneva Conventions, Relating to the Protection of Victims of Non international Armed Conflicts,²⁰² these amnesties should be distinguished from amnesties for gross human

²⁰⁰ Prof G W Kanyeihamba noted that besides the jurisdiction, power and courage in cases of human rights violations, Ugandan Courts have been prepared to grant effective remedies.(See G.W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance* Kampala, Renaissance (2006) 55 cited in M Ssenyonjo (n 35 above)

²⁰¹ H Mukasa, 'Government, LRA Sign Peace Deal', *Sunday Vision*, 27 August 2006

²⁰² The article 6(5) of the Protocol II states that 'At the end of hostilities, the authorities in power shall

rights abuses. The International Committee of the Red Cross, the authoritative interpretative body under the Geneva Conventions, in a recent statement confirmed that amnesties under Protocol II to the Geneva Conventions of 1949 were meant to apply only to the granting of amnesty to 'those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law'.²⁰³ It is obvious that amnesties under the Geneva Conventions are amnesties for acts that violate national criminal laws, but not international law.

Furthermore, the United Nations General Assembly,²⁰⁴ the Economic and Social Council (ECOSOC)²⁰⁵ and the Human Rights Committee (HRC)²⁰⁶ have declared that amnesties constitute a violation of international law norms.

Despite the fact that international jurisprudence concerning amnesties is limited,²⁰⁷ critics of amnesties for human rights violations point to various principles of international law to

endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained'

²⁰³ R Slye 'The legitimacy of amnesties under international law and general principles of Anglo-American law: is a legitimate amnesty possible? *Virginia Journal of international law* (2002) (citing letter to Margaret Popkin from Toni Pfanner, Head of the Legal Division, International Committee of the Red Cross Headquarters, Geneva, April 5, 1997)

²⁰⁴ See Declaration on the Protection of all Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No 49, at 207, U.N. Doc. A/RES/47/133 (1992) (stating that amnesty shall not be granted for the benefit of those responsible for the crime of disappearance)

²⁰⁵ E.S.C. Res. 1989/65, Annex, U.N. ESCOR, 1st Sess., Supp. No. 1, Principle 19.2 U.N. Doc. E/1989/89 (1989) (In no circumstances, including a state of war, siege, or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.)

²⁰⁶ Report of the Human Rights Committee, 47 U.N. GAOR, Supp. No. 40, Annex VI, general comment 20 at 195, U.N. Doc. A/47/40 (1992) (Stating that amnesties for torture are generally incompatible with the obligations of state under international law)

²⁰⁷ There are for instance the interesting cases of *Prosecutor v. Kallon* (Case No. SCSL-2003-07-PT, 16 June 2003) and *Prosecutor v. Kamara* (Case No. SCLS-2003-10-PT, 16 June 2003) where the Appeals Chamber of the Special Court for Sierra Leone ruled that any state has the sovereign right to grant amnesty to rebels 'for acts of rebellion and challenge to the constitutional authority of the state'. However, the conduct of the accused is alleged to amount to international crime and therefore, Sierra Leone could not legally declare amnesty for such crimes which are subject of universal jurisdiction

argue that amnesties are illegal.²⁰⁸ The ICC has been established to prosecute perpetrators of grave human rights abuses when a state fails to do so. Thus, the granting of amnesty by a state to individuals indicted by the ICC can not absolve them from international prosecutions. The ICC is a Court of last resort and therefore acts only if a case is not investigated or prosecuted by a national judicial system. The ICC can stop prosecutions only if Uganda shows a genuine willingness to arrest those who bear the greatest responsibility in the atrocities committed in northern Uganda and prosecute them to the full extent of the Ugandan criminal laws. These include the top commanders of the LRA as well as UPDF members who were involved in atrocities.

4.6.3 The interpretation of article 53 of the Rome statute

Article 53 of the Rome Statute is the provision under which deference could be accorded to reconciliation measures allowing the Prosecutor to exercise prosecutorial discretion not to move forward with an investigation or prosecution.²⁰⁹ Article 53 declares that the Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is reasonable basis to proceed under the Statute. More specifically, article 53(1) (c) requires the Prosecutor to consider whether

taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

However, a consensus is yet to be reached on the broad term 'interest of justice'. Consequently, the interpretation to be given to the provision of article 53(1) (c) of the Statute in the case of northern Uganda, where the amnesty law was enacted in reaction to the wishes of the victims of the atrocities, rather than by perpetrators is subject to intense debate. In my view, that provision can not be interpreted as to have impeded prosecutions since the victims have opted for traditional reconciliation mechanisms in *lieu* of retributive justice. It is abnormal that the feeling of desperation of the Acholi population is raised as pretence to grant a blanket amnesty to the LRA despite the worst kind of atrocities it has committed. The Acholi population deserves a twofold justice; first, a justice that consists in finding a definitive solution to the conflict and another justice

²⁰⁸ N Roht- Arriaza (n 17 above)

²⁰⁹ D Robinson 'Serving the interests of justice: amnesties, Truth Commissions and the International Criminal Court' *EJIL* (2003)

that consists in prosecuting the LRA leaders along with the UPDF forces involved in the atrocities.

In effect, crime constitutes an offence against the state; that is the society and therefore, victims traditionally are deemed to lack a judicially cognizable interest in the prosecution or non-prosecution.²¹⁰The ICC prosecutor is the representative of the international community whose mission is to seek justice by protecting the innocent and convicting the guilty. If article 53 of the Statute happens to be interpreted in such a manner as to halt prosecutions in situations where victims are literally compelled to trade justice for peace as it is the case in the situation at hand, the ICC would have taken back with one hand the hope it has given to the international community with another hand.

4.7 Conclusion

The ICC intervention in northern Uganda is opposed by some analysts on the ground that the conflict is still ongoing. Taking into account the protracted nature of the conflict and unorthodox methods of war used by the LRA which consist of attacking, hacking, maiming and killing innocent civilians, I submit respectfully that asking the ICC to review its involvement is a risky option. By delaying its intervention, the ICC would endanger the life and security of populations in the areas affected by the conflict. It is my belief that preventing the ICC from intervening in situations of grave, and protracted human rights abuses, would amount to depriving it of its very *raison d'être*. The ICC cannot make provisional measures to order the end grave human rights violations since it can only exercise jurisdiction over individuals, such interventions could help to halt situations of gross human rights violations.

In effect, the warrant arrests issued by the ICC have added pressure on the LRA and compelled it into the Peace talks. The government of Uganda, Sudan, DRC and the international community should help the ICC to move forward with prosecutions so as to demonstrate that the world is becoming a smaller place for human rights violators. The fact that Sudan is not party to the Rome Statute can not be a reason for it to refuse to cooperate with the Court. The ICC accomplishes its mission not only on behalf of the states parties to the Rome Statute but of the international community as a whole.

²¹⁰ D Beloof Victims in Criminal Procedure (1999) 280

CHAPTER 5

5.1 CONCLUSIONS

On the basis of the forgoing, it has been found that the war in northern Uganda is far from abating, despite the relative lull occasioned by the peace talks and the victims have still got no peace, justice or protection. The occasional spike in media coverage of the conflict has not spared the people from remaining subject to human rights abuses from both sides.

The conflict in northern Uganda is not a normal guerrilla war between insurgents and a government; it is a war against civilians where the suffering of children has reached terrible proportions. The government of Uganda has failed for long the population of northern Uganda through its passivity to stop the war and that constitutes a violation of the right to national peace and security as provided for under article 23 of the ACHPR. Besides, the atrocities committed by some UPDF forces should not go unpunished if real justice has to be done. By prosecuting only the LRA, the International Criminal Court would have condoned another kind of injustice.

A real peace can be achieved in Uganda through an inclusive process combining trials, amnesty and truth commissions. An effective transitional justice mechanism should take into account the goals of justice, deterrence and the need for peace in a country ravaged by war since decades. While amnesty for lower rank members of the LRA made up of abducted children is a useful tool in a peaceful negotiation to end the protracted conflict, such amnesty should not be used to shield from prosecution and accountability the LRA leaders who bear the greatest responsibility for atrocities committed in the course of the conflict. By granting a comprehensive amnesty to the LRA, the GoU would violate in a flagrant manner its international obligations.

Critics against the current ICC intervention suggest a deferral by the UNSC of the ICC's action against the LRA in compliance with article 16 of the Rome Statute. In the absence of a fair and credible prosecution at national level, such deferral could be used to shield the LRA commanders from accountability perhaps for ever. Likewise, the UNSC deferral would open the door to unfortunate interferences in the work of the ICC.

5.2 RECOMMENDATIONS

The above mentioned findings call for recommendations which if implemented could help in the search for a definitive solution to the conflict in northern Uganda and also, preserve the right of victims to prosecution and effective remedy. In this regard recommendations are directed to various stakeholders.

5.2.1 To the International Criminal Court

The ICC should take an intermediate position by favouring a selective amnesty. Such position would conciliate the necessity for peace and reconciliation and enhance its mission to fight impunity. The ICC should therefore proceed with the prosecution of the LRA commanders who bear the greatest responsibility of crimes. On the other side, the International Court should also prosecute the UPDF forces who have perpetrated serious atrocities during the conflict. It is only by prosecuting from both side that a real justice can be done. Since the Ugandan referral is one of the very first cases before it, the ICC should handle it in a way not to hinder its reputation.

5.2.2 To the government of Uganda

The government of Uganda in turn should look at the possibility of establishing a Truth and Reconciliation Commission with a mandate to shed light on the past, especially to determine the identity of perpetrators and grant compensations to victims. In fact, the TRC should be independent and have also the mandate to investigate human rights abuses committed by army personnel and cooperate fully with the ICC. Likewise, the GoU should adopt a strategy which must include political measures intended to improve the situation of those affected by the conflict. This strategy must include the establishment of specific programmes that should function hand in hand with international agencies and Non Governmental Organisations (NGOs) for the rehabilitation, education and resettlement of abducted children in their families. Furthermore, the strategy should be intended to provide adequate protection to civilians and IDPs and adopt appropriate measures for the return of IDPs to their homes. The building of confidence with populations in the North and Northeast Uganda is another task that the GoU should seriously undertake.

5.2.3 To the Lord's Resistance Army

It is in the interest of the LRA to declare a willingness to find a peaceful way out to the conflict with regard to the current mobilisation of the international community, especially

the involvement of the ICC in the situation in northern Uganda. The LRA must therefore cease all operations against civilians, including attacks on IDP camps and abduction of children. Again, the LRA must take the genuine decision to stop using the abductees who are mainly children as combatants and allow abductees who do not want to remain with the LRA to return home.

5.2.4 To the government of Sudan

The government of Sudan must help the GoU and the LRA in the search for a peaceful solution to the conflict. However, the Government of Sudan must also give its entire support to the ICC in the event that the ICC elects to move forward with prosecutions whatever the outcome of the Juba peace talks might result.

5.2.5 To the African Committee on the Right and Welfare of the Child

The African Committee on the Rights and Welfare of the Child should seize itself about the situation of children in northern Uganda. Uganda is a state party to the African Charter on the Rights and Welfare of the Child and the abuses committed against children especially by the UPDF forces and the failure of the GoU to protect children fall under the competence of the Committee.

5.2.6 To NGOs and International Agencies operating in Uganda

NGOs and International Humanitarian Agencies should increase their humanitarian assistance to the affected populations. A particular attention should be paid to IDPs and former abductees.

5.2.7 To donors

Donors must work with the Ugandan government to develop incentives for the LRA commanders and low ranking soldiers to drop out of the insurgency. Donors have an important role to play in assisting the Ugandan government to improve the critical economic situation of northern Uganda.

Word count: 17, 696 (including footnotes)

BIBLIOGRAPHY

Books

1. Dugard J, *International Law: A South African Perspective*, 3rd edition (2005), Lansdowne: Juta law
2. Heike, B *War in Northern Uganda*, Christopher Clapham (ed.) African Guerrillas (1998) Oxford: James Currey
3. International Committee of the Red Cross, *Customary International Humanitarian Law* Cambridge: Cambridge Univ. Press, 2005
4. Martha, M *Between vengeance and Forgiveness: Facing history after genocide and mass violence*: Boston, Beacon Press, (1998)

Chapters in books

1. Benvenuti, P 'Complementarity of the International Criminal Court to National Criminal Jurisdictions' in F Lattanzi & W Schabas *Essays on the Rome Statute of the International Criminal Court* (1999) 21, il Sirente
2. Du Plessis, M 'International Criminal Courts, the International Criminal Court, and South Africa's implementation of the Rome Statute' in J Dugard *International law, a South African Perspective* 3rd edition (2005), Lansdowne: Junta law
3. Du Plessis, M 'The African Union' in J Dugard *International law, a South African Perspective* 3rd edition (2005), Lansdowne: Junta law
4. Dugard, J 'Conflicts of Jurisdiction with Truth Commissions' in A Cassese et al (eds) *The Rome Statute of the International Criminal Court: A commentary* (2002) 700-1
5. Heike, B 'Is Alice Lakwena a witch? The Holy Spirit Movement and its Fight against Evil in the North' in H Holger Bernt & Twaddle Michael *Changing Uganda: the Dilemmas of Structural Adjustment and Revolutionary Change*: London, James Currey (1991)
6. Leaza, U 'The Rome conference on the establishment of international criminal court: A fundamental step in the strengthening of international criminal law' in F Lattanzi & W Schabas *Essays on the Rome Statute of the International Criminal Court* (1999) 7
7. Sadat, L 'Universal Jurisdiction, national amnesties, and truth Commissions: Reconciling the irreconcilable', in Stephen Macedo *Universal Jurisdiction: National courts and the prosecution of serious crimes under international law* (2003)

Articles

1. Slaughter & W. Burke-White, 'The future of international law is domestic', (2006) *Harvard International Law Journal*
2. Akhavan, P 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court', (2005) 99 *American Journal of International Law*. 403, 407–08
3. Aldana- Pindell, R 'An emerging universality of justifiable victims rights in the criminal process to curtail impunity for state- sponsored crimes' (2004) *Human Rights Quarterly* Vol.26. 606
4. Apuuli, K P 'Amnesty and International Law: The case of the Lord's Resistance Army insurgents in Northern Uganda, available on <www.accord.org.za/ajcr/2005-2/AJCRvol5no2_pg33-61.pdf> (accessed on 31 July 2007)
5. Branch, A 'Uganda's civil war and the politics of ICC intervention' available on <<http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1747-7093.2007.00069.x>> (Accessed on May 2007)
6. Kamara, M 'Le Statut de Rome de la Cour Pénale Internationale (17 Juillet 1998) et la répression des crimes de droit international' in Bulletin Semestriel de Droit et D'Information de l'Association des Hautes Juridictions Francophones (A.A.H.J.F) n 05&06 (2005)
7. Moy, A 'The international Criminal Court's arrest warrants and Uganda's Lord's Resistance Army: Renewing the debate over amnesty and complementarity' (2006) *Harvard Human Right Journal* 273
8. Nowak, M 'What Practices Constitute Torture? US and UN Standards', (2006) 28 *Human Rights Quarterly*.
9. Otim, M 'Challenges in the pursuit of transitional justice: A case of northern Uganda', (April 2007), available on <www.ligi.ubc.ca/admin/Information/920/challenges> (Accessed on 4 August 2007)
10. Robinson, D 'Serving the interest of justice: Amnesties, Truth Commissions and the International Criminal Court', available on <www.ejil.org/journal/vol14/no3/art3.pdf> (Accessed on 31 July 2007)
11. Roth- Arriaza, N 'States responsibility to investigate and prosecute human rights violations in international law' (1990) 78, *California Law Review* 451
12. Scharf 'The amnesty exception to the jurisdiction of the International Criminal Court', (1999) 32 *Cornell International Law Journal*

13. Slye, R 'The legitimacy of amnesties under international law and general principles of Anglo-American law: is a legitimate amnesty possible?' (2002) *Virginia Journal of International Law*
14. Ssenyonjo, M 'The international Criminal Court and the Lord's Resistance Army Leaders: Prosecutions or amnesty?' (2007) *Netherland International Law Review*
15. T Allen 'War and justice in northern Uganda: an assessment of the International Criminal Court's intervention' available at <<http://www.crisisstates.com/download/others/AllenICCRReport.pdf>> (Accessed on October 2007)

Reports

1. Human Right Watch 'Abducted and abused: Renewed conflict in Northern Uganda' (July 2003) on <<http://www.hrw.org>> (Accessed on 11 July 2007)
2. Human Right Watch 'Uprooted and forgotten: impunity and human rights abuses in northern Uganda', available on <<http://hrw.org/reports/2005/Uganda0905/Ugnada0905.pdf>> (Accessed on May 2007)
3. Human Rights Watch 'Uganda: army and rebels commit atrocities in the north' (2005) on <www.hrw.org> (Accessed on 5 September)
4. Human Rights Watch 'Uganda: Child abduction skyrocket in North' (2005), available at <<http://www.hrw.org>> (Accessed on August 2007)
5. Human Rights Watch 'Stolen children: Abduction and recruitment in northern Uganda' available on <<http://hrw.org/reports/2003/uganda0303/uganda0403.pdf>> (Accessed on 2007)
6. Internal Displacement Monitoring Centre 'Only peace can restore the confidence of the displaced' available on <<http://www.internal-displacement.org/publications/ugandareport>> (Accessed on September 2007)
7. International Crisis Group 'Northern Uganda: Understanding and solving the conflict' (April 2004) available on the site <www.crisisgroup.org> (31 July 2007)
8. Report of the Representative of the Secretary-General (RSG) on internally-displaced persons, Francis M. Deng, Mission to Uganda, Commission on Human Rights, E/CN.4/2004/77/Add
9. Report of the Sierra Leone Truth and Reconciliation Commission, October 2004
10. UNOCHA 'When the sun sets, we start to worry' 2004, online IRIN News <www.irinnews.org> (Accessed on 29 October)

International instruments

1. Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
2. Constitutive Act of the African Union
3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
4. Convention on the Rights of the Child
5. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
6. Declaration on the Protection of all Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 47th Session
7. Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa
8. Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights
9. Statute of Special Court for Sierra Leone

Domestic instruments

1. The Ugandan Amnesty Act, Amnesty Commission *An Act of Forgiveness* (2006) 26
2. The Ugandan Anti-Terrorism Act 2002 (Act No. 14 of 2002), The Uganda Gazette No. 33, vol.XCV 7 June 2002
3. The Ugandan Children Act

Newspapers

1. 'Acholi Prefer Mato Oput to ICC for Kony rebels' *Daily Monitor* 3 October 2006
2. 'Latest statement on demands by the LRA delegation' *Daily Monitor* 25 October 2006
3. 'Top Kony man defects' *Sunday Vision* 21 October 2007.
4. 'We are fighting for 10 Commandments' *Daily Monitor* 1 August 2006

Others

1. Decision on the Hissene Habre case and the African Union, Assembly/AU/Dec.127 (VII)
2. Decision on the Hissene Habre case, Assembly/AU/Dec.103 (VI)

3. Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58, ICC-02/04-01/05-1, 8 July 2005
4. Decision on the Prosecutor's Urgent Application Dated 26 September 2005, ICC-02/04-01/05-27, 27 September 2005
5. E.S.C. Res. 1989/65, Annex, U.N. ESCOR, 1st Sess
6. Musila, G (2004) 'Whistling the graveyard: Amnesty and the right to an effective remedy under the African Charter: the case of South Africa and Mozambique'
7. M Kouadio 'Critical analysis of victim's rights before international criminal justice' (2006)
8. Pre-Trial Chamber II, Order to the Prosecutor for the Submission of Additional Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda, No. ICC-02/04-01/05 30 November 2006
9. Report of the Human Rights Committee, 47 U.N. GAOR
10. S.C. Res. 955, U.N. Doc. S/RES/955 (1994)
11. S/Res/1315 (2000)
12. SC Resolution 1593, 31 March 2005
13. Submission of Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda, ICC-02/04-01/05, 6 October 2006
14. United Nations Security Council S/2006/930.
15. United Nations Security Council, Resolution 827 (1993), S/Res/827

Case law

The International Tribunal for Rwanda

1. *Prosecutor v. Akayesu*, case No. ICTR 96-4-T, ICTR Trial Chamber Judgement, 2 September 1998

The Special Court for Sierra Leone

2. *Prosecutor v. Kallon* (Case No. SCSL-2003-07-PT, 16 June 2003)
3. *Prosecutor v. Kamara* (Case No. SCLS-2003-10-PT, 16 June 2003)

African Commission on Human and Peoples' Rights

1. *Commission Nationale des Droits de l'Homme et des Libertes v Chad* (2000) AHRLR 66 (ACHPR 1995)

The European Court on Human Rights

1. *Assenov*, 28 Eur. H.R Rep. 652 (1998)
2. *A. v. United Kingdom* (1999) 27 EHRR 611
3. *Egmez v. Cyprus*, 34 Eur. H.R. Rep. 29 (2000)
4. *HLR v. France* (1997) 26 EHRR
5. *Z. and Others v. United Kingdom* (2002) 34 EHRR 97

The Inter- American Court on Human Rights

1. *Barrios Altos*, Case No. 73, Inter- Am. C.H.R
2. *Castillo Paez V Peru*, Case n 43, IACHR, OEA/Ser.C. 107 (1998)
3. *Dunand & Ugarte*, Case No 68, Inter- Am. C.H.R
4. *Paniagua Morales*, Case No 37, Inter- Am. C.H.R
5. *Rodriguez v. Uruguay*, communication No. 322/1988
6. *Velasquez Rodriguez case*, judgement of 19 July 1988, Series C, no 4

South African Constitutional Court

1. *Azarian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, South African Constitutional Court, Case No CCT 17/96

Committee against Torture

1. Committee against Torture, Conclusions and Recommendations: Uganda, UN Doc. CAT/C/CR/34/UGA

Press releases

1. Human Rights Watch 'ICC Takes Decisive Step for Justice in Uganda,' (October 2005) available at <<http://hrw.org/english/docs/2005/10/14/uganda11880.htm>> (Accessed on July 2007)
2. ICC Press Release, 'Warrant of Arrest unsealed against five LRA Commanders', 14 October 2005, available at <www.icc-cpi.int/press/press_releases/114.html>
3. Press Release 'International Criminal Court, Warrant of Arrest Unsealed against Five LRA Commanders' (Oct. 14, 2005), available at <http://www.icc-cpi.int/press/pres_releases/114.html> (Accessed on 11 July 2007)

4. Press Release, Int'l Criminal Court, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC' (Jan. 29, 2004), available at <http://www.icc-cpi.int/pressrelease_details&Id=16&l=en.html>

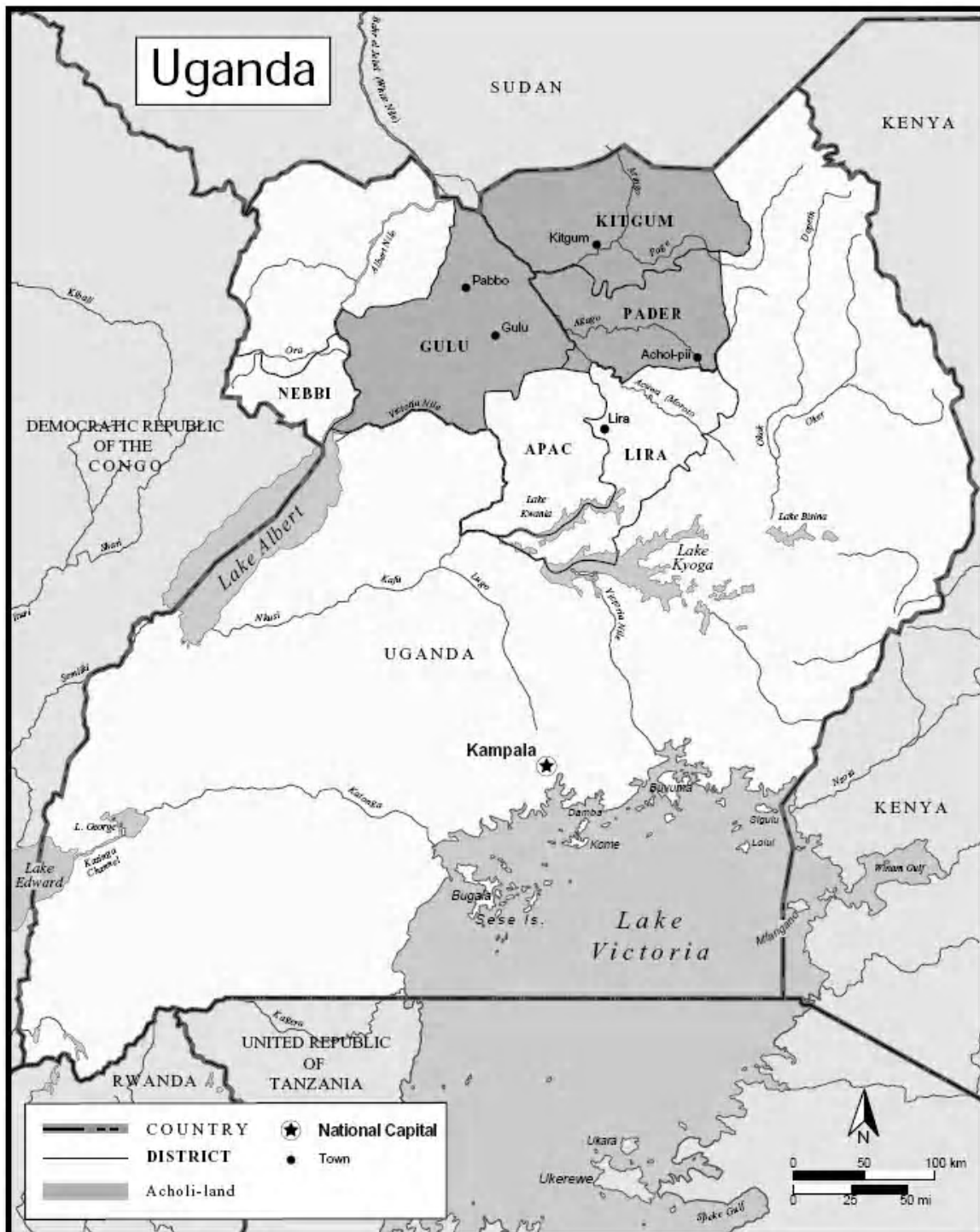
Interviews

1. Twinomugisha, N Legal officer at the Amnesty Commission, (17-10-07), 11h 30-12h 20

Websites

1. <<http://www.hrw.org/justice/habre/> for background>
2. <www.icc-cpi.int/cases/UGD.html>
3. <www.iccnw.org>

ANNEXTURE



Source: Human Rights Watch (2003).