(Local) Peace vs. (International) Justice in Uganda? Mato Oput, the ICC and the Conundrums of Transitional Justice in the Middle of Conflict

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[T]here can be no political compromise on legality and accountability.2

“Traditional justice mechanisms… shall be promoted… as a central part of the framework for accountability and reconciliation.”3

The situation in Northern Uganda was the first case to be referred to the ICC. It encapsulates the many challenges the ICC, and the international community more generally, face in prosecuting individuals who are involved in an on-going conflict. On the one hand, the responsibility to prosecute4 and the norm against impunity for atrocities is becoming ever more entrenched. At the same time, there is a perception that attempting to prosecute key actors in a conflict may undermine attempts to bring about peace as those who may be prosecuted will have an incentive to keep fighting to forestall a post-conflict prosecution. Uganda also represents a situation where a state may find its freedom of maneuver restricted after engaging with the ICC, while simultaneously illustrating how states may use the ICC for their own purposes, as Uganda used the referral to gain legitimacy for its continued military actions against the LRA. Further, in Uganda there was a stark framing of a conflict between the implementing global norms and local, traditional norms as the ICC was perceived as undermining local justice and conflict resolution mechanisms.

This paper will examine these key debates and conflicts in the Ugandan case. It begins with a brief discussion of the roots of the conflict in northern Uganda. It then discusses the introduction of the ICC into the conflict, examine the dynamics of state self-referral and the

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peace vs. justice dynamic. It then turns to an examination of perceived conflict between the ICC and local justice mechanisms.

The Origins of the Conflict in Northern Uganda

The focus of the conflict in Uganda has been the LRA and its brutal fight against the government (and, indeed, the population). The common narrative of a brutal, insane leader in Joseph Kony depoliticizes a movement and a conflict which is, in fact, deeply political. The usual narrative involves little reference to the brutality of the Ugandan government and its potential interest in keeping the LRA as a useful foil. Indeed, both the actions of the ICC and the global popular movements which have arisen to shine a light on LRA brutality elide any brutality on the part of government forces.

The roots of the conflict are based in ethnic politics which were at least partly constituted during the colonial period and which have resulted in a north-south divide. In the northern part of Uganda, which was to become known as Acholiland, the British imposed an administrative rule which replaced traditional power structures with a new set of appointed rulers. At the same time, they imposed a concrete Acholi identity and political unity where such structures had been much more diffuse. Although there is debate on exactly how much of an Acholi identity existed before the British, as Adam Branch observes, “it is incontestable that the British reified and essentialized an Acholi identity along with other tribal identities, rendering the tribe the dominant political category in national politics.”

Acholi district, which has been at the core of the conflict, was created in 1937 in the context of creating power structures which, it was hoped, would bring into the system anti-colonial segments of society. Many Acholi found work in the civil service and thus, while the Acholi had the highest rate of employment, they were also particularly dependent on the government for work. Many also joined the police and the army, at least partly facilitated by the fact that the British recruited from the north to deal with rebellions in the south. The Acholi thus held a position of privilege under colonial rule which, combined with a local political dynamic against the imposed colonial power structures and in favor of an Acholi political identity both locally and nationally, would set the scene for anti-Acholi sentiment post-independence.

Uganda’s first Prime Minister, Milton Obote, although wanting to move away from the tribal politics of pre-independence Uganda and instead create a national political identity, ended up doing the opposite. He brought in many northerners to the central government and created a system of patronage in northern Uganda (where he was from). This ended up creating a north-south divide and reified tribal political differences. Obote eventually ended up banning all parties but his own Ugandan People’s Congress, and continued to favor northern tribes – the Acholi and the Langi (his own tribe). In 1971, Idi Amin took power in a coup, and he immediately set about to undermine northern ethnic privilege, purging the military, and then the civil service, of Acholi and Langi. He then undertook widespread political killings in the north, eventually wiping out the Acholi political class (and dividing the country in the

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6 See Ibid., pp. 45-53 for a more in-depth discussion.
process). When Obote came back into power following the Tanzanian ouster of Amin in 1979, he again brought Acholi and Langi into the military, the Ugandan National Liberation Army, in large numbers. This did not last, and the Acholi overthrew Obote, who they accused of favoring Langi. During the same period, a new insurgency appeared. In response to the violent and corrupt elections of 1980, the National Resistance Army (NRA) took up arms under the leadership of Yoweri Museveni. Most of the NRA were from the south; there were also some Rwandan Tutsi refugees (including future Rwandan President Paul Kagame, who took part in the first attack). As part of his strategy to gain support for his movement, Museveni built up a regional ethnic identity in the Luwero Triangle in the south, which became his stronghold, although several hundred thousand people were killed in the fighting in Luwero. Thus, the movement became about southerners ejecting northerners from power. Because of their predominance in the military, and the Acholi-based coup in 1985, the Acholi came to represent northern oppression.

When Museveni took power in 1986, the remnants of the UNLA retreated to the north and, eventually many went to Sudan. Acholi were prevented from sharing in national power while local power structures were undermined. And the National Resistance Movement (NRM), the only political actor given any room to operate, engaged in a brutal counterinsurgency campaign against what it perceived as the unreliable and rebellious north, and in particular portraying Acholi as the enemy. This crackdown against an imaginary enemy resulted in the very thing it was supposed to stop – an armed rebellion. This new rebellion came in the form of the Ugandan People’s Democratic Army (UPDA), made up of three to four thousand former UNLA troops who had reentered Uganda from Sudan, and which coalesced around Acholi identity and gained support among the population. The counterinsurgency expanded, intensifying the feeling of ethnic targeting among the Acholi, while at the same time preventing any local political leadership to develop, thus opening the way for local armed groups.

Thus the stage was set for the forerunner of the LRA, the Holy Spirit Movement (HSM), to emerge. Embedded within local spiritual traditions, which drew from Pentecostal Christianity, Islam and indigenous practices, and which emphasized the need for spiritual cleansing and healing, an Acholi spirit medium named Alice Auma (later known as Alice Lakwena) emerged as a potent force. Claiming to be possessed by a number of spirits, including a

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10 Branch, *Displacing Human Rights*, pp. 53-61.
11 Partially as a result of the fear engendered when the NRA instructed all Acholi former fighters to report to army headquarters. HRW, *The Scars of Death*, p. 74.
13 Finnström points out that by 1988, there were twenty-seven rebel groups fighting the government in different parts of the country. There have also been attacks by Rwandan Hutu from the DRC. Ibid., pp. 70-71.
particularly powerful spirit named Lakwena, she was said to be able to cleanse people of bad spirits. She claimed that it was her power which allowed the coup to succeed. She healed retreating UNLA soldiers of bad spirits, and became directly involved in 1986 when, with the help of UNLA soldiers, she freed from prison many people said to have been kidnapped by the NRA. This was the start of a violent movement against the Museveni regime as well as a variety of “impure” people which came to be known as the Holy Spirit Movement. Building upon both Acholi identity and a discourse of cleansing, and stepping into a religious lacuna in northern Uganda, Lakwena mobilized an army numbering as many as 10,000 soldiers, although she claimed to have as many as 18,000. She claimed she could address both the local political crisis through cleansing returning Acholi soldiers as well as fight the NRA. Eventually she also came into direct violent conflict with the UPDA, and her movement ended up relying on engaging in violence against the Acholi (although this was justified as part of a campaign to move the Acholi away from their “evil ways of life.”). She soon moved into the national context, taking thousands of soldiers south toward Kampala in 1987 in a bid to liberate the Acholi from Museveni regime. Her forces collapsed when confronted by the NRA and local armed units just a few miles from Kampala. Infighting expanded among armed groups in Acholiland. The UPDA was brought into negotiations with the government. Many took advantage of an amnesty while the rest joined factions from the former HSM.

The most prominent of these factions, and the one which would become the dominant rebel group, was led by Joseph Kony. Kony claimed to be related to Alice Lakwena, although the exact relationship is unclear. He also claimed to have been possessed by a number of spirits, and he also engaged in healing and divining. By 1990, Kony’s group, which he had named the Lord’s Resistance Army, had become the only effective rebel group, even as the government engaged in increasingly more violence in the north. Kony fought against the NRA, but also those seen as collaborators. However, he failed to get significant popular support since many Acholi were tired of the fighting, and increasingly relied on violence against local populations for survival, while portraying the Acholi collaborators he fought against as “false” Acholi. Kony used religious language to ground his claim to legitimacy, and although many have described the LRA as bizarre and beyond comprehension, based

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16 Finnström, *Living with Bad Surroundings*, p. 78.
18 Allen, *Trial Justice*, p. 35.
19 Finnström, *Living with Bad Surroundings*, p. 76.
23 Allen, *Trial Justice*, p. 36.
25 Ibid., p. 39.
26 Branch, *Displacing Human Rights*, p. 69.
29 Ibid., p. 82.
partly on this religious language, Branch argues that religion was used to bind the group together, and in particular to bind LRA troops to the leadership, and thus it should not be given nearly as much emphasis as it has received in the popular imagination.  

In short order, as the NRA further expanded its violence against the Acholi population as it attempted to find the rebels, it seemed that rather than fighting each other, both the NRA and LRA were fighting civilians. By early 1991 the LRA began significant attacks against civilian targets like clinics and schools, and expanded its child abductions. After failed peace talks in 1993-94, the LRA set up bases in southern Sudan. The Sudanese government, which had been providing some support to the LRA, significantly expanded its support as the LRA was used as a proxy against the Sudanese People’s Liberation Front (SPLA), which had been fighting the government in Khartoum for years.

In 1996, the government began to forcibly move civilians into camps. This strategy, which supposedly was to protect civilians from the LRA in “protected villages,” was a way to control the population. Anybody outside of the camps was labeled a rebel and killed. Within a few months there were a few hundred thousand people in the camps, expanding to one million within ten years, most of the rural population of Acholiland, and by 2005 there were two million displaced Ugandans, including 90% of the Acholi. This military strategy created its own humanitarian crisis. Instead of protecting the population, the camps had the opposite effect. First, by concentrating the population, it was easier for the LRA to attack the civilian population, and the government did little to protect the camp populations. The LRA perceived those in the camps to be against the LRA, demanding that they leave and periodically attacking the camps as punishment (although it also attacked people in the villages). Second, the horrible conditions in the camp, with “virtually no provision for sanitation or sustenance” – the UN High Commissioner for Human Rights called the conditions in the camps “appalling” – led to disease and excess deaths of around 1,000 per week by the middle of the first decade of the 21st century (with most dying from malnutrition or curable diseases). By cutting the population off from its usual forms of subsistence, the

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30 Ibid., Displacing Human Rights, p. 71.
31 Including widespread torture, extrajudicial killings and looting. Finnström, Living with Bad Surroundings, pp. 71-72.
32 Branch, Displacing Human Rights, p. 72.
33 HRW, The Scars of Death, p. 83.
35 Although figures varied widely. UNICEF estimated 240,000 displaced in June 1997, while local officials claimed as many as two million were displaced. HRW, The Scars of Death, p. 59.
36 Finnström, Living with Bad Surroundings, p. 133.
37 Ibid., p. 142.
38 Indeed, at one camp in Gulu district only around 80 guards protected a camp population of 45,000. HRW, “Abducted and Abused: Renewed Conflict in Northern Uganda,” p. 64.
39 Ibid., p. 36.
40 HRW, The Scars of Death, p. 62.
41 UNHCHR Uganda Report, p. 11.
42 Finnström, Living with Bad Surroundings, p. 133.
camps created need and aid dependency where there was none before,\textsuperscript{43} even as “[t]he government and donors [were] far from meeting basic humanitarian needs in the North.”\textsuperscript{44}

The government was not providing necessary resources or protection, and many camp inhabitants left the camps for their villages, undeterred by the threat of violence from the government. The government thus began to integrate humanitarian organizations into its internment efforts, asking the World Food Program (WFP) to feed 200,000 people. Other aid agencies ramped up their efforts in the camps. The humanitarian community faced a dilemma – should it cooperate with the government in its counterinsurgency strategy by providing food to those the government was trying to suppress? Although some organizations initially withheld assistance,\textsuperscript{45} any hesitation was short-lived as the agencies started establishing a significant presence and provided large quantities of aid.\textsuperscript{46} By supporting the government and providing cover for its forced displacement policy, humanitarian organizations “normalized” the forced displacement and internment, thus undermining the possibility of naming it as a war crime.\textsuperscript{47}

\textbf{Child Soldiers}

While the government engaged in its campaign to pacify the Acholi population, the LRA continued its reign of terror in the north\textsuperscript{48} with sometimes little response from the government. While the LRA was not a serious threat to the government, neither was it so weak that it could be completely eliminated.\textsuperscript{49} The LRA “turned Gulu and Kitgum into permanent battle zones,”\textsuperscript{50} although, in line with the previous discussion, it must be noted that the government was a full participant in the violence in the north. The LRA preyed on the local population, killing large numbers of civilians, with hundreds if not thousands dying every month.\textsuperscript{51} In less than one week in January 1996, for example, 400 civilians were killed during an LRA attack in Kitgum.\textsuperscript{52} The LRA became known, in particular, for abducting children to serve as soldiers or to support the rebels in other ways, such as carrying supplies or as “wives.”\textsuperscript{53} The government responded to this new phase in the conflict with Operation North, a violent campaign which, while failing to wipe out the LRA, terrorized and exacerbated tensions with the civilian population in the north.\textsuperscript{54}

\textsuperscript{43} Branch, \textit{Displacing Human Rights}, p. 92.
\textsuperscript{46} Branch, \textit{Displacing Human Rights}, pp. 93-4.
\textsuperscript{47} Ibid.
\textsuperscript{49} HRW, \textit{The Scars of Death}, p. 22.
\textsuperscript{50} Ibid., p. 23.
\textsuperscript{51} Ibid., p. 69.
\textsuperscript{52} Ibid., p. 58.
\textsuperscript{53} Ibid., pp. 99-100.
\textsuperscript{54} Ibid., pp. 84-85.
It was the child soldiers which provided the lens through which the world viewed the conflict in northern Uganda. Indeed, as Human Rights Watch stated in 1997, “[a]lthough children are far from the only ones who are suffering as a result of the Lord’s Resistance Army, it is unquestionably the very young who are suffering the most.”\(^5^5\) In a report released in 2001, the UN High Commissioner for Human Rights noted:

> The greatest tragedy throughout the conflict has been the strategic use of children by the LRA. Children are taken from homes, schools and communities, and from refugee settlements and camps for the displaced, to be trained as fighters, forced into slave labour or serve as wives for commanders…. The prolonged conflict has had a severe socio-economic and psychosocial impact, not only on the young people concerned but on the entire Acholi population.\(^5^6\)

Indeed, the report goes on to say:

> Estimates suggest that over 10,000 children from northern Uganda have been abducted by the LRA since 1986.

> By now, the vast majority of LRA fighters and camp followers are either children or were children at the time of their abduction into the movement. The experiences described above, combined with the acts of violence that the children are forced to commit against their own people, have very strong repercussions for their rehabilitation and reintegration into society. The LRA is devouring the lives of children in northern Uganda in order to sustain itself, given that it cannot attract young men to the rebel movement as volunteers.\(^5^7\)

The LRA is portrayed as evil men who abduct and enslave children. While this is true, Branch argues that the reality is more complicated, particularly given the multiple reasons children might have for joining or staying with the LRA, including escaping the dire situation created by the government in the north.\(^5^8\) More importantly, it is precisely the actions of the government which are shoved aside and ignored. Indeed, while the LRA is recognized as recruiting child soldiers, the government has engaged in similar activities, recruiting children into Local Defense Units (LDUs). LDUs were supposed to ensure the security of villages or camps, but many children were sent to the front lines to fight the LRA.\(^5^9\) Some of the children recruited into the UPDF were former LRA child soldiers.\(^6^0\) The recruitment of child soldiers by Ugandan security forces appears to have coincided with the start of Operation

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\(^{55}\) Ibid., p. 100.

\(^{56}\) UNHCHR Uganda Report, p. 5.

\(^{57}\) Ibid.


Iron Fist, an operation in southern Sudan to go after the LRA, conducted with the consent of the Sudanese government, and continued for several years.

Museveni was perceived by Western governments as one of the new leaders of Africa, one of the leaders, along with Paul Kagame, Laurent Kabila and others who were the face – to Western eyes anyway – of the African Renaissance. As a result of its adherence to neoliberal economic policies and its attempts to deal with AIDS, Uganda was seen in a positive light and, as with Rwanda under Kagame, was given a pass on the less positive aspects of its governance, including the brutality in the north. It was also perceived as an ally in the War on Terror.

This lens of child soldiers, along with relative inattention to northern Uganda, is evidenced in the paucity of UN Secretary-General reports on Uganda. Between 1995 and 2012, there were only three reports specifically on Uganda (Uganda figured in a number of other reports in the context of the conflict in the DRC) – in 2007, 2008, and 2009. These reports all focused specifically on children and armed conflict.

Thus, the “official discourse” of the LRA as incompressible, bizarre, pseudo-Christian child kidnappers – a reflection of the “heart-of-darkness” paradigm where Africa is perceived as incompressibly violent – drowned out the rest of the reality of the conflict in Uganda. This included the fact that the LRA did produce political manifestos and some in the north saw the LRA as freedom fighters (although in 1997 90% of the Acholi in Gulu and Kitgum indicated that they did not support the LRA). While they may not necessarily have supported the LRA, or thought that the LRA could realize its political goals, some in the north did think that the LRA “puts words to their experiences” of marginalization and violence. This discourse not only depoliticized the LRA, but in conjunction with the new

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61 Ibid., p. 60.
64 Branch, Displacing Human Rights, p. 81.
68 Finnström, Living with Bad Surroundings, p. 99
70 Although, Payam Akhavan, who advised the Ugandan government on its ICC referral, maintained that “the LRA has no coherent ideology, rational political agenda, or popular support [and is a] brutal insurgency focus on terror.” Payam Akhavan, “The Lord’s Resistance Army Case: Uganda’s Submission of the First State referral to the International Criminal Court,” American Journal of International Law 99 (2 2005): 407.
71 Finnström, Living with Bad Surroundings, pp. 119-23.
73 Finnström, Living with Bad Surroundings, p. 242.
African leader narrative, it deified Museveni and obscured the widespread human rights violations being committed by the government. This official discourse allowed the conflict to be seen in humanitarian terms rather than in political terms – reinforced by the statement in 2003 by UN Undersecretary-General for Humanitarian Affairs Jan Egeland that northern Uganda was the worst humanitarian situation in the world – which could justify the humanitarian support discussed above. And, it led to the Western view that Kony should be “‘eliminated,’” undermining support for negotiations. Museveni thus was not only not constrained in his conduct of the war in the north, but was also able to pursue his militaristic policies in Sudan and the DRC. Museveni supported the SPLA in Sudan, thus providing a rationale for Sudanese support for the LRA. Uganda hosted Tutsi refugees (including Paul Kagame) who invaded Rwanda in 1990 (and again in 1994 in response to the genocide).

Museveni was given another boost in December 2001 when the LRA was identified as a terrorist organization by the US government. In the wake of the 9/11 attacks by Al Qaeda, those perceived as fighting terrorism were given military and diplomatic support by the US. Given the LRA’s connection to the hardline Islamist Sudanese government, and the way it terrorized the people in northern Uganda, it was easy to identify the LRA as terrorists, even though it did not threaten the US in any way, or engage in the kind of terrorism that the US “War on Terror” was supposedly fighting. As a result of being seen as an ally in the “War on Terror,” Uganda was given significant military support to help fight the LRA. There were also reports that the US had previously given Uganda military assistance which was then passed on to the SPLA. The aid given to fight the LRA supported the strengthening of the military and more generally the government of Uganda. In addition, around 50% of the government’s budget was provided by development agencies. Yet, much of this was not used for its given purpose. With all of the resources at its disposal, the government in 2002 launched Operation Iron Fist against the LRA. Ostensibly intended to fight the LRA, it took an immense human toll on the local population, with widespread torture, ill-treatment, rape, sexual abuse, arbitrary arrest and extra-judicial killings reported on the part of the UPDF and paramilitary bodies. On 2 October 2002, the military issued an order to evacuate “abandoned villages” in three northern districts, thus “converting the entire northern Uganda into a military operational zone in which civilian movement is sharply limited.”

Within months, the number of people in IDP camps increased from 350,000 to 1.8 million. Instead of bringing the LRA to heel, the war spread, thus providing further reasons for the West to

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74 Ibid., p. 116.
76 Finnström, Living with Bad Surroundings, p. 112
78 Finnström, Living with Bad Surroundings, p. 112.
79 Although there are claims that the LRA was trained by Al Qaeda. Ibid., p. 127.
80 Branch, Displacing Human Rights, p. 86.
81 Ibid., p. 85.
82 Finnström, Living with Bad Surroundings, p. 113.
83 HRW, “Abducted and Abused: Renewed Conflict in Northern Uganda.”
84 Ibid., pp. 41-52.
85 Ibid., p. 62.
provide military support to eliminate the LRA.\textsuperscript{86} Iron Fist was "a catastrophe for the people of northern Uganda."\textsuperscript{87}

The violence wrought by the LRA also expanded in southern Sudan. The Sudanese government reduced the assistance it gave to the LRA under pressure from the US after the LRA was deemed a terrorist organization. As a result, the LRA engaged in attacks in government controlled territory in addition to its attacks in SPLA areas. Its attacks in Sudan also increased as a result of Iron Fist. As the UPDF began to operate in southern Sudan the LRA had to move around more, thus expanding its area of terror and forcing more people to become displaced. It also attacked Sudanese refugee camps in Uganda.\textsuperscript{88} This expansion into Sudan was the start of a trend whereby the LRA was eventually pushed out of Uganda almost entirely, thus transferring the problem to other countries. The UPDF also exported its violence against civilians to southern Sudan, including recruiting Sudanese to fight.\textsuperscript{89}

**Using the ICC**

In December 2003, the conflict in northern Uganda became the first case to come before the ICC. Just a month after Jan Egeland declared northern Uganda to be the worst humanitarian crisis in the world, and only months after the start of Operation Iron Fist, President Museveni referred the situation in northern Uganda to the ICC and set the stage for a debate over the instrumentalization of the ICC. Museveni sent his letter on 16 December, and on 29 January 2004 he and ICC Prosecutor Ocampo appeared at a joint news conference.\textsuperscript{90} This moment was a triumph for the ICC. This was its first case, five and half years after the Rome Statute was signed, and it represented the potential of international institutions playing a positive role in upholding international human rights norms. At the same time, it raised disquiet. Ocampo had lobbied for this referral,\textsuperscript{91} and indeed had begun preliminary investigations. Even though a state cannot refer only one party to the ICC, this is what Museveni tried to do, asking the ICC to investigate the LRA. It seemed that Ocampo was happy to oblige, setting aside concerns about atrocities by the UPDF, thus calling into question the impartiality of the ICC. Further, it raised a significant question – what is the proper role of the ICC in the midst of an ongoing conflict? The LRA was still active, even though the government had instituted an

\textsuperscript{86} Mwenda, "Uganda’s politics of foreign aid and violent conflict," pp. 52-53.
\textsuperscript{89} Schomerus, "‘They forget what they came for,’” pp. 135-137, 141.
\textsuperscript{90} ICC, "President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC,” (29 Jan. 2004).
\textsuperscript{91} Phil Clark, “Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda,” in Nicholas Waddell and Phil Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008): 43; Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years* (July 2008): 40; author interviews. Indeed, as Ocampo notes, the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court. This policy resulted in referrals for what would become the Court's first two situations: Northern Uganda and the DRC. The method of initiating investigations by voluntary referral has increased the likelihood of important cooperation and on-the-ground support.
amnesty in 2000\(^{92}\) to try to induce members of the LRA to leave the group. How would this independent international judicial process affect the local peace process? Would the “interests of justice” undermine the “interests of peace”? Is such a stark trade-off inevitable? Furthermore, how would the ICC interact with local traditional justice mechanisms?

That press conference on 29 January was important for the ICC – it was the first referral for the ICC. And it was important for Museveni. The focus was on the LRA – no mention was made of the UPDF. Thus began the instrumentalization of the ICC. The referral made it easier for Ocampo to gain the cooperation of the government – a key consideration in any investigation. The price for this cooperation was a statement by the ICC that only mentioned the LRA. According to the statement, Museveni indicated that he would amend the amnesty law “to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for crimes against humanity committed in Northern Uganda are brought to justice.” Indeed, this was in accord with the Office of the UN High Commissioner for Human Rights which had stated in 2001:

The issue of 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. In that connection, it should be noted that the practices of the LRA, including murder, enslavement, torture, rape and sexual slavery, are not only grave human rights violations but may also be considered war crimes. In conformity with the relevant international legal norms, the top leadership of the LRA must remain accountable for those crimes.\(^{93}\)

It further recommended that “[t]he international community should take the necessary steps to isolate further the top leadership of the LRA and to hold it accountable for the gross human rights violations for which it is responsible.”\(^{94}\)

Payam Akhavan, who served as an advisor to the government, claims that “[i]nternational trials were also viewed [by the Ugandan government] as a depoliticized venue for justice that would be perceived as impartial if and when the LRA’s top leaders were captured…. the ICC could also become an instrument for national reconciliation.”\(^{95}\) But was this really an act of depoliticization, or was it, in fact the exact opposite – an act of politicization of the supposed impartial and nonpolitical global judicial body? Museveni was handing Ocampo his first case on a silver platter, (seemingly) removing impediments to prosecuting the LRA,\(^{96}\) while steering the Prosecutor away from the many human rights violations committed by his own troops.\(^{97}\) Although many of these violations had taken place before 1 July 2002, before which no violations could be prosecuted, there were plenty of war crimes committed after that date.

\(^{94}\) Ibid., p. 19.
\(^{96}\) The ICC would have the authority to prosecute Kony and others regardless of whether or not they were given amnesty.
\(^{97}\) Benjamin Schiff, Building the International Criminal Court (Cambridge: Cambridge University Press, 2008): 199.
in particular in the context of Operation Iron Fist – as well as in the DRC. Thus, appearing with Museveni could undermine a perception of impartiality. Some of Ocampo’s own staff urged him not to appear with Museveni,\(^98\) and a few days after the press conference, Human Rights Watch stated that “the ICC prosecutor cannot ignore the crimes that Ugandan government troops have committed,” noting further that “President Museveni’s referral does not limit the prosecutor’s investigation only to crimes allegedly committed by the LRA…. The prosecutor should operate independently and has the authority to look at all ICC crimes committed in Uganda.”\(^99\) The clear message was that Ocampo was not being impartial, which could significantly undermine the credibility of the ICC. The lack of impartiality was further underlined when various Ugandan officials indicated that they would not be subject to the ICC jurisdiction, including the Attorney General Amama Mbabazi who declared that the UPDF had not engaged in any war crimes and thus would not be tried by the ICC. There were threats to withdraw cooperation if the UPDF was investigated.\(^100\) The ICC was also pressured by the US not to investigate the UPDF.\(^101\) Museveni was one of the “new” African leaders the US and other Western governments had pinned its hopes on, and certainly would not want anything to undermine the regime. The ICC was thus instrumentalized by both the domestic regime and a powerful international actor (which is not even a member of the ICC), creating strong partiality, which the ICC seemed more than happy to embrace.

Although Museveni would say a few weeks later that he would cooperate with the ICC if it investigated the army for war crimes,\(^102\) he reinforced this partiality, declaring:

> The Uganda Government is using its capacity to fight these terrorists within the country’s borders but those beyond our reach deep inside our neighbouring countries will be dealt with by the special prosecutor.

A key issue will be locating and arresting the LRA leadership. This will require the active co-operation of states and international institutions in supporting efforts of the Ugandan authorities… This will require the concerted support of the international community – Uganda and the Court cannot do this alone.\(^103\)

Museveni thus positioned the conflict as an international issue, seeming to indicate that it was only because the LRA was outside its borders that Uganda was calling in the ICC. Uganda had obviously failed to deal with the LRA when it was based on Ugandan soil – and sometimes it seemed it was not trying very hard to eliminate the LRA, expending more of its

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\(^100\) branch, *Displacing Human Rights*, p. 187.


efforts on attacking its own people – and it had not shied away from using its troops in other
countries. But with this statement, Museveni continued to position Uganda as not only a
victim but also a good international citizen, asking for cooperation from international
institutions to help it solve the LRA problem, while also shoring up its democratic credentials
which had been tarnished by its conduct of the war. And by cooperating on the LRA,
Museveni hoped to push aside any action by the ICC against Uganda for its activities in the
DRC (in September 2003 Ocampo had indicated that he was looking at the DRC, and wanted
states to refer the situation to the ICC), while also using the ICC as another weapon in the
war against the LRA and allowing it to deal with Sudan, which had previously given support
to the LRA. Indeed, this was a way to further bring in the international community. Who
will go after Kony to arrest him? According to the Ugandan Minister of Defence, “It is not
Uganda; if they ask us we shall lend a hand, but actually it will be international forces.”
As Nouwen and Werner argue, “The ICC could turn the LRA from enemies of the Ugandan
government into enemies of the international community as a whole.” Ocampo reiterated
the requirement for international cooperation, including from Sudan, while also seeming to
tie the case into the “War on Terror”: “The case is so awful I don’t think any state would be
against co-operating… I believe all the states in the world would co-operate [against] these
terrorist attacks.”

Less than three weeks later, Sudan indicated that it would, indeed, cooperate with the ICC,
with the Sudanese ambassador to Uganda predicting that “Kony’s days are numbered,”
citing the peace process in Sudan and the havoc the LRA had wrought in southern Sudan.
The ambassador indicated that Sudan would comply with an ICC arrest and surrender order.
While citing the problems Kony created in southern Sudan, Sudan was probably also hoping
that its stated intention to cooperate would divert attention from Darfur, although these
hopes were in vain. A month later, Sudan and Uganda signed an agreement – Iron Fist II – to
allow the UPDF to go after the LRA in southern Sudan, which contributed to a weakening of
the LRA.

Six months later, on 29 July, the ICC announced that it was opening an investigation. On 6
May 2005, Ocampo asked the Pre-Trial Chamber to issue arrest warrants for Kony and

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106 Quoted in Ibid., p. 949.
107 Nouwen and Werner, p. 949.
108 Price, “Kony probe begins June.”
110 Nouwen and Werner, p. 953.
112 ICC, “Prosecutor of the International Criminal Court opens an investigation into Northern Uganda” (29 July 2004).
four of his top deputies, which it did on 8 July, under seal. The arrest warrants were unsealed on 13 October. Akhavan argues that the fact that it took seven months for the Prosecutor to make this decision, “despite Uganda’s need for swift action”\textsuperscript{114} is an indication of the safeguards in place to prevent states from using the ICC for their own political purposes, as is the fact that situations rather than specific individuals are referred. Yet, aside from the fact that the Office of the Prosecutor (OTP) was also analyzing another situation – the DRC – and announced its intention to open an investigation in the DRC the month before, this period of time says little about the politics involved. Ocampo obviously wanted the case. Yet, the case for the investigation – including the gravity threshold – needs to be made. While the OTP argued that the greater “gravity” lay with the LRA actions,\textsuperscript{115} there were still many UPDF abuses,\textsuperscript{116} and the OTP made a calculated decision to go after only one side in the situation, for the reasons noted above. However, as Allen points out: “[f]orceful displacement of population is a war crime under the Rome Statute, and it has obviously occurred on a massive scale. It is hard to see how it lacks gravity.”\textsuperscript{117} Ocampo envisioned going after only a few people in any given situation, and it is understandable that he would not want to investigate people who could hinder his investigation of the greater gravity crimes. But this is hardly proof of a nonpolitical process.

Yet, the referral did seem to have had a couple of effects. First, as noted, it put more pressure on Sudan to cut off its support of the LRA. This weakened the LRA, and forced it to abandon some – although by no means all – of its bases in southern Sudan, and led to increased attacks within Uganda.\textsuperscript{118} Second, it had a “sobering” effect on the LRA.\textsuperscript{119} Two senior leaders of the LRA – the LRA’s chief negotiator Sam Kolo and Onen Kamdulu, its chief of operations – defected in February 2005. Although this seemed to indicate splits within the LRA leadership, the LRA also responded by reorganizing its leadership.\textsuperscript{120} It also seemed to create pressure – at least for a while – on the LRA to engage in peace negotiations.\textsuperscript{121} More LRA foot soldiers were leaving, likely to take advantage of the amnesty.\textsuperscript{122} The government was at the same time pursuing both peace negotiations and a military victory, seeming to prefer the latter.\textsuperscript{123} The ICC investigation helped to legitimate its military actions. The military pressure might have, in turn, worked with the ICC to push the LRA towards

\textsuperscript{114} Akhavan, “The Lord’s Resistance Army Case,” p. 411.
\textsuperscript{117} Allen, \textit{Trial Justice}, p. 195.
\textsuperscript{119} Ibid., p. 5.
\textsuperscript{120} Ibid., pp. 2, 4.
\textsuperscript{123} ICG, “Shock Therapy,” p. 4. Although with twenty times more manpower in Northern Uganda than the LRA, the government’s ability to accomplish such a military victory was in question, given the army’s many failings. International Crisis Group, “A Strategy for Ending Northern Uganda’s Crisis,” (11 January 2006).
negotiations. As the International Crisis Group noted, “[f]ormer LRA commanders agree that military pressure is the only kind the LRA really understands and responds to and that more of it could help drive Kony to the negotiating table.”\textsuperscript{124} The arrest warrant also seemed to have another effect. In October and November the LRA attacked five humanitarian workers in retaliation for the arrest warrants, thus connecting the palliators to the prosecutors.\textsuperscript{125} This would presage a similar action by Sudanese President Omar al Bashir a few years later, and represented the difficult relationship between the prosecutors and palliators.

**Peace vs. Justice?**

The ICC investigation, and eventual arrest warrants, complicated two intertwined dynamics. First, while the ICC may have created an incentive for peace negotiations, it also created a disincentive. Without firm guarantees that they would not face prosecution for their actions, why would senior LRA leaders negotiate a settlement and re-enter society? The government perhaps could give such assurances for domestic prosecution – although it had committed itself to removing the amnesty so as not to interfere with the ICC – but neither it nor the Prosecutor could give such assurances for ICC. Only the Pre-Trial Chamber could permanently suspend proceedings – although the Prosecutor can determine that a prosecution is not in the “interests of justice” and request that the Pre-Trial Chamber stop the case.\textsuperscript{126} Indeed, in 2005 Ocampo indicated that in order to comply with the requirement that a prosecution be in the interests of justice, “the Prosecutor will follow the various national and international efforts to achieve peace and security, as well as the views of witnesses and victims of the crimes.”\textsuperscript{127} Although this was written in the context of Darfur, it would equally apply to Uganda, especially given the controversy within the Acholi community over the role of the ICC. Ocampo appeared to rule out stopping prosecutions just two years later when he said that

\begin{itemize}
  \item calling for amnesties, the granting of immunities and other ways to avoid prosecutions…. are not consistent with the Rome Statute…. there can be no political compromise on legality and accountability.\textsuperscript{128}
\end{itemize}

The UN Security Council could indefinitely suspend proceedings on a yearly basis, but could not do so permanently, and given the place of the LRA on the US’ terrorism list, a deferral was unlikely. Both the US and EU supported the ICC position.\textsuperscript{129} Indeed, in November 2006, the US supported the arrest warrants, while also discouraging the ICC from looking at the UPDF.\textsuperscript{130}

\textsuperscript{125} Perrot, “Northern Uganda,” pp. 189-190.
\textsuperscript{126} Peskin, “Caution and Confrontation in the International Criminal Court’s Pursuit of Accountability in Uganda and Sudan,” p. 681.
\textsuperscript{129} Atkinson, “‘The realists in Juba’?”, p. 213.
\textsuperscript{130} Perrot, “Northern Uganda,” p. 199.
Second, in addition to the effects on the formal peace process, there were questions about how the ICC might undermine local and national reconciliation, especially the reconciliation ritual known as mato oput. Given that the origins of the LRA in the HSM were supposedly tied into cleansing and reconciliation, this further grounded these concerns. Taken together, these concerns came to be defined under the peace vs. justice debate. That is, would the ICC, as the embodiment of global retributive justice, undermine local and national efforts – as found in the amnesty and mato oput – towards ending the conflict and reconciling those who had fought with the LRA with rest of the Acholi people? Although it was frequently put in such stark terms, the reality of the situation was much more nuanced, as the ICC seemed to have both positive and negative effects on the peace process, the amnesty possibilities for the leaders of the LRA were ambiguous, and the so-called “traditional” ceremonies and informal justice mechanisms also seemed to have more dubious foundations.

As noted above, the government had engaged in negotiations and reconciliation with a number of groups from the late 1980s to as late as 2003, which included amnesties under the Amnesty Statute of 1987. Like the 1987 amnesty law, a 1998 Amnesty Bill was introduced to encourage Ugandans in exile to return home, while also excluding some crimes, such as genocide. The 2000 Amnesty Act (which had been driven by civil society groups, including the Acholi Religious Leaders Peace Initiative, and opposed by Museveni) did not have any such restrictions – it could apply to the top leadership of the LRA as well as low level soldiers. While the amnesty initially had little effect on top LRA commanders, eventually, in conjunction with the ICC referral, it did provide the framework for at least a few high level LRA soldiers to come in. More broadly, as Lomo argues, “the amnesty law provided a framework with which they can woo back the conscripts in the LRA to come home,” although, as Allen points out, in a survey carried out in mid-2005, except for some high-level and mid-level commanders, there was “little evidence that the amnesty was an important factor in encouraging LRA combatants to surrender.” By 2004, thousands of LRA fighters had applied for amnesty, but then there was a significant reduction in amnesty applications, and then a renewed rate of applications, with 20,592 amnesty applications by April 2006. Indeed, the fighting capacity of the LRA had begun to reduce significantly, with up to 5 fighters being lost on average every day – either through being killed, being captured or defecting – leading many commanders to favor negotiating with the

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133 Rodman and Booth, “Manipulated Commitments,” p. 282.
134 Including, for example, Brigadier Dam Kolo, who was described as “a voice of moderation within the LRA.” ICG, “Peace in Northern Uganda: Decisive Weeks Ahead,” p. 2.
136 Allen, Trial Justice, p. 188.
government. At the same time, the government amended the Amnesty Act in April 2006 to allow top LRA commanders to be excluded from the amnesty. In the following months, there would be confusion about whether Kony and other commanders were, indeed, excluded. Three days after the amendment, Museveni said that those who had been indicted by the ICC were excluded from the amnesty, which was reiterated by the Security Minister in June, while in July, Museveni reversed course and offered amnesty to Kony and the others, while Uganda Internal Affairs Minister Ruhakana Rugunda indicated that since a list had not been approved by parliament yet, Kony and the others would still be eligible for amnesty. Rugunda also stated that alternative reconciliation and accountability mechanisms, such as those practiced by the Acholi, were a “logical modality that will supplement discussions.” Museveni further pledged that no LRA member would be turned over to the ICC, while his Security Minister, Amama Mbabazi, had not made a formal request for withdrawal of the warrants. The Ugandan government thus had a very confused position on the ICC, making it that much more difficult for the LRA commanders to know where they stood.

ICC Prosecutor Ocampo, on the other hand, was not ambiguous. While the ICC may have worked very deliberately and held off on the execution of arrest warrants to give space for former Ugandan State Minister Betty Bigombe to engage in mediation and negotiations, Ocampo stated in July 2006 that “[t]he best way to finally stop the conflict is to arrest the top leaders.” He thus left no doubt about his intentions to pursue the arrest of Kony and other LRA leaders. International leaders also indicated support for the ICC warrants over amnesty. The UK ambassador to the Security Council, Emyr Jones Parry, stated: “I think I would support the proposition that the five indictments issued by the International Criminal Court should be given effect.”

However, while the ICC may have been a useful way of regaining international credibility for the government and legitimizing the war against the LRA, it soon appeared to be a barrier to peace. Given the inability to arrest or militarily defeat the LRA, lack of international support, and a need to shore up its image after flawed elections and the continued humanitarian situation in the north, the government decided to attempt to get the LRA to participate in peace talks in the middle of 2006 (this followed on from previous attempts to engage the LRA, led by Betty Bigombe). This decision was taken even though Museveni had previously and subsequently expressed skepticism about, or indeed opposed, peace talks. These negotiations began on 14 July 2006, mediated by the Government of South Sudan.

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141 Ibid., p. 13.
142 Ibid., p. 15.
144 Ibid., p. 11.
145 Rodman and Booth, “Manipulated Commitments,” p. 291.
(GoSS)\textsuperscript{149} – which was uncomfortable with the continued presence of the UPDF\textsuperscript{150} – leading to a cessation of hostilities on 26 August.\textsuperscript{151} The semi-autonomous GoSS was created after the signing of the Comprehensive Peace Plan in January 2005, which brought to an end decades of conflict between the government of Sudan in the North and the South, and was highly motivated to end the LRA attacks in South Sudan.\textsuperscript{152}

As a result of the cessation of hostilities, most LRA fighters left northern Uganda. The few that remained were told by Kony not to attack civilians. This opened up some restrictions on movement, and within a few months 230,000 civilians left the IDP camps (although most of those did not actually go home). There were some violations of the cessation of hostilities, which expired on 28 February 2007, and LRA fighters failed to gather at designated places in southern Sudan.\textsuperscript{153} In addition to southern Sudan, the LRA also had a significant presence in the DRC, having previously established a significant presence in Garamba National Park, beginning in September 2005, with hundreds appearing in the following months.\textsuperscript{154} In April 2006 Uganda had asked the Security Council for permission to enter the DRC to strike against the LRA in Garamba, and in August the Chief of the Ugandan Defence Forces, General Aronda Nyakirima, indicated that if the LRA did not take “‘advantage of the peace talks, Uganda will go to [Congo] with or without the government’s authority.’”\textsuperscript{155} Thus, even as talks continued in Juba between the government and the LRA, the LRA itself was becoming more a regional pest, and the Uganda-focused negotiations seemed less able to deal with the broader threat of the LRA. More broadly, it appeared that the government was just using the peace talks as leverage to gain support for military action in the DRC if and when the talks failed.\textsuperscript{156}

Although there were continuing violations of the cessation of hostilities, talks resumed in Juba on 26 April 2007, leading to two agreements. The first, on 2 May, was an agreement on comprehensive solutions, providing a general framework to address long-term grievances in Northern Uganda – social, political, and economic. While a positive step, it was very vague, did not directly address many of the issues raised by the LRA, and put off concrete implementation for further negotiation. In addition, while the LRA formally gave up on its power-sharing demands, these still lurked in the background. More fundamentally, however,


\textsuperscript{150} Schomerus, “‘They forget what they came for,’” p. 8.

\textsuperscript{151} ICG, “Peace in Northern Uganda?” pp. 1-2.

\textsuperscript{152} Ibid., pp. 5-6.


\textsuperscript{154} Ibid., p. 9.

\textsuperscript{155} Ibid., p. 7. Although the DRC government perceives this sabre rattling as an attempt to divert attention from Uganda’s previous and ongoing meddling in Ituri (actions which led to an International Court of Justice judgment against it in December 2005). Ibid., p. 12.

\textsuperscript{156} Ibid., p. 8.
there were continuing questions as to whether the LRA was a legitimate interlocutor to negotiate over long-standing issues in Northern Uganda.157

The second agreement, on 29 June, was on reconciliation and accountability. The government and LRA committed themselves to “promote national legal arrangements, consisting of formal and non formal institutions and measures for ensuring justice and reconciliation with respect to the conflict.”158 The agreement recognized the necessity of producing an impartial history of the conflict. Traditional justice mechanisms were seen “as a central part of the framework for accountability and reconciliation,” and would include “alternative sentences, reparations, and any other formal institutions or mechanisms.” State actors (e.g. the military) were exempted from special procedures set up by the agreement and would only be subject to existing criminal justice processes (the same processes which had exempted the military from any significant accountability for years). Domestic courts would address the most serious crimes, including international crimes, as a substitute for the ICC, with the government agreeing to “[a]ddress conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA/M.” An Annex, which made reference to ICC complementarity, specified that there would be a special division of the Ugandan High Court set up for this purpose.159 Alternative penalties and sanctions, intended to promote reconciliation and reparations, would replace existing penalties.

The agreement thus seemed designed to address questions of local accountability and justice (discussed in the next section) and the concerns of the LRA leadership with regard to the ICC arrest warrants. And it seemed to reflect the government’s (conflicted) preference for amnesty over prosecution. The LRA had continuously demanded that it be exempted from prosecution by the ICC,160 and the government had previously promised to request that the ICC suspend its investigation of the LRA after a peace agreement was concluded161 and give Kony and other commanders amnesty - while periodically contradicting itself on the amnesty question. While the agreement seems to indicate that LRA leaders would face criminal proceedings, it also appears that they might just face traditional justice, which would not involve the usual penalties such as incarceration, or indeed the death penalty. The mixed messages from the government on amnesty were detailed above, but are encapsulated in the following two quotes from Museveni. First, in May 2005, he stated that “If we capture him, he would be tried under our law, since he refused amnesty. We have the death penalty, the ICC doesn’t.”162 This may have been an attempt to encourage the LRA to come to an

159 “Annexure to the Agreement on Accountability and Reconciliation,” Juba, Sudan (19 February 2008), http://www.amicc.org/docs/Annexure_to_agreement_on_Accountability_and_Reconciliation.pdf.
161 Ibid.
agreement to end the conflict as soon as possible. The second quote, as reported by Reuters, is from March 2008, a month after the conclusion of the Annex. Museveni said that Uganda had invoked the ICC because the LRA was outside of Uganda:

If the rebels returned to Uganda, “what we have said in the agreement is that instead of using this formal Western type of justice we are going to use the traditional justice, a traditional blood settlement mechanism,” he said. Under this system, someone who has “committed a mistake” asks for forgiveness and pays some compensation, he said. “That settles their accountability.” “In that case, we can approach the ICC and say, yes, those people who we have brought to your attention have now come (back) ... Therefore we ask you to withdraw our complaint.” If they opted for the traditional settlement, Kony and the other LRA leaders would avoid prison, he said.163

Did this represent just a straightforward trade-off between peace and justice – a reflection of Museveni’s long-standing strategy to reach peace deals by offering impunity164 – or was it an attempt to create a more nuanced approach to justice? The issue of traditional justice will be addressed in more depth in the next section, but given the government’s flip flopping on the issue of amnesty, this would appear to be more of a strategy to end the conflict rather than address significant issues of justice.

In any event, it was clear that Ocampo would have nothing to do with attempts to evade ICC jurisdiction. In June 2007 he stated that “the drafters [of the Rome Statute] were well aware that rendering justice in the context of conflict or peace negotiations would present particular difficulties and they prepared our institution well to meet those challenges.”165 He noted that he was given a clear mandate “to apply the law without political considerations” and that amnesties, immunity, and withdrawal of indictments for “short-term political goals…. are not compatible with the Rome Statute.”166 He saw no incompatibility between the ICC and peace processes, noting the deterrence value of the ICC and the role of arrest warrants in bringing parties to a conflict to the negotiating table, and maintaining that national mechanisms could be used for all except those which bore the greatest responsibility – i.e. those indicted by the ICC.167 He said that:

It is the lack of enforcement of the Court’s decisions which is the real threat to peace. Allowed to remain at large, the criminals exposed are continuing to threaten the victims, those who took tremendous risks to tell their stories; allowed to remain at large, the criminals ask for immunity under one form or another as a condition to stopping the violence. They threaten to attack more victims. I call this extortion, I call it blackmail. We cannot yield.168

164 As well as “plush jobs and money” for former rebel leaders. ICG, “Northern Uganda Peace Process,” p. 8.
166 Ibid., p. 6.
167 Ibid., p. 8.
168 Ibid., p. 9.
This would seem to be a clear indication that he would not be amenable to dropping the arrest warrants, which he reaffirmed in March 2008.169

There were also significant questions regarding the how arrest warrants might be suspended or withdrawn in practice. The Security Council could suspend the proceedings for a year, indefinitely renewable. As noted above, there seemed to be little appetite on the part of the Security Council for this action.170 Furthermore, the Security Council would have to make a positive decision every year for the rest of the lives of those with arrest warrants against them to suspend the warrants. It seems unlikely that Kony and the others could count on that. Further, the experience of other mass murderers, such as Augusto Pinochet and Charles Taylor, who thought they had achieved permanent impunity – Pinochet through a domestic amnesty law and Taylor through safe haven in another country – should give any mass murderer who has become the target of international criminal justice mechanisms pause.

The second avenue for stopping proceedings is for the Prosecutor to apply to the Pre-Trial Chamber for the arrest warrants to be withdrawn. This could be done on two bases. First, under the principle of complementarity the Ugandan government could claim that it was able to carry out investigations and prosecutions where necessary. It would have to show that it had the necessary legislation to prosecute individuals for the relevant individual crimes (which Uganda did not have at that point), the necessary impartial judicial institutions, and the intent to actually prosecute the relevant individuals. The contradictory statements from the Ugandan government, as well as the language in the accountability agreement and Annex, would have called this into significant question. If the government did defer to nonlegal, nonformal, nonpunitive measures such as traditional justice, this also would not satisfy complementarity (although some, as will be discussed below, argue the opposite171). The other option for the Prosecutor should he or she wish to ask the Pre-Trial Chamber to withdraw the warrants is to argue that the action would be in the interests of justice. Although ICC officials had indicated in 2005 that the investigation could be halted in the interests of justice, even after arrest warrants had been issued,172 given Ocampo’s previous statements, there seemed little chance of this happening.

In September 2007, the Office of the Prosecutor released a Policy Paper on the Interests of Justice, which laid out the thinking of the OTP on this issue. It noted that “the text and purpose of the Rome Statute clearly favour the pursuit of investigations” and that “it is clear that only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation or a prosecution may not serve the interests of justice.”173 Three specific factors were to be considered: the gravity of the crime, the interests of victims, and the particular

circumstances of the accused. In the case of the LRA, the gravity criteria were clearly met, and there were no issues relating to the accused – e.g. age or infirmity. The interests of the victims were cast in terms of the protection and safety of the victims in the context of an investigation.

One might argue that a situation where fighting stopped, people could stop living in fear of attack from the LRA, and 1.5 million IDPs could go home might be a form of justice. This relates to a broader discussion about whether the interests of peace could and should be used as a rationale for suspending investigations and arrest warrants, such as those against the LRA. There is no mention of the interests of peace in the Rome Statute – although, as will be seen in the next chapter, there have been proposals from African governments to explicitly allow the Prosecutor to invoke the interests of peace in deciding not to investigate, or to suspend an investigation or other proceeding, in particular cases. The Policy Paper specifically noted

that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor.

With respect to peace processes, the OTP noted that “[t]he ICC was created on the premise that justice is an essential component of a stable peace,” citing the UN Secretary-General: “Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.” It recognized that

In situations where the ICC is involved, comprehensive solutions addressing humanitarian, security, political, development and justice elements will be necessary. The Office will seek to work constructively with and respect the mandates of those engaged in other areas but will pursue its own judicial mandate independently.

The clear message was that the “concept of the interests of justice…. should not be conceived of so broadly as to embrace all issues related to peace and security.” The latter is the mandate of the Security Council – and others – and the Security Council could take it upon itself to defer an investigation or prosecution if it saw fit. Peace and security are political matters best left to others.

While one cannot say that the ICC is not a political body – it was (and continues to be), after all, the outcome of a global political process which included high-level geopolitical interests – at its most fundamental level it was designed to be independent of outside political influences. And even though they may intrude (for example via an Article 13 referral or Article 16 deferral by the Security Council), it would be very difficult for the Prosecutor to claim the expertise and wisdom to decide when one peace process justified stopping

174 Ibid., pp. 4-7.
175 Ibid., p. 1.
176 Ibid., p. 8.
177 Quoted in Ibid.
179 Ibid.
proceedings and another did not (although he did feel confident to say that if Kony was arrested, “we will have peace tomorrow”\(^\text{180}\)). For certainly, such a situation is a common characteristic of the ICC’s operating environment. The Prosecutor would thus face such a dilemma in many situations, rendering them unexceptional rather than exceptional. Further, in the case of the LRA, while it started in Uganda, it has now spread far beyond Uganda, operating in South Sudan, the DRC, and the Central African Republic. The focus on peace in Uganda ignores these other contexts. Thus, recognizing an amnesty in Uganda could do a significant disservice to victims in other countries.

The question of amnesty became moot as the agreement fell apart. There was internal dissension within the LRA (including the execution of Kony’s second in command, Vincent Otti, who had been the lead negotiator, by Kony in October 2007) and confusion over a number of points, including disarmament, demobilization and reintegration of LRA fighters, as well as the types of accountability the LRA would face, including the ICC. After several delays, it was announced on 25 May that Kony would not sign the final agreement. In the ensuing months, even as peace began to come to northern Uganda, if haltingly, with the exit of the LRA, preparations for more fighting occurred. Indeed, it appeared that Kony was using the negotiations to rearm and regroup\(^\text{181}\), which was facilitated by humanitarian aid provided to the LRA during the negotiations\(^\text{182}\) (which the ICC called for an end to\(^\text{183}\)), and after one more deadline on 30 November, at which Kony failed to show, the UPDF attacked the LRA in Garamba. Although supposedly a joint operation between Uganda, the DRC, and the GoSS, Operation Lightning Thunder was dominated by the UPDF (discussed further below).\(^\text{184}\) Museveni indicated in 2009 that he would not reopen negotiations with Kony.\(^\text{185}\)

This seemed to be the end of the ICC-amnesty debate for Kony, although the issue of amnesty remained alive for a while. Between 2000 and 2011, more than 26,000 former LRA members received amnesty.\(^\text{186}\) In 2010, the Directorate of Public Prosecutions initiated its first prosecution against a former LRA Colonel, Thomas Kwoyelo, denying him amnesty. This was overturned in September 2011.\(^\text{187}\) However, the amnesty expired in May 2012. This had particular significance for a recently captured LRA commander Major General Caesar


\(^{184}\) Atkinson, “‘The realists in Juba’?” pp. 219-222.


Achellam who, unlike Kwoyelo, appeared to face trial. The lack of amnesty could potentially undermine efforts to induce other LRA soldiers to surrender.188

The ICC and (Traditional) Justice – Incompatible Concepts?
In addition to the question of amnesty and the government’s position on amnesty and the negotiations, the ICC, which was described as “a third independent actor in the civil war,”189 and its main premise – that people should be punished for committing crimes by being put in jail – seemed to conflict with local perspectives on justice. According to Lomo,

[International justice is not the same as justice as understood by the local people affected by the war. According to the majority of the people who support the amnesty law, criminal justice – in this sense, punishing LRA leaders for the crimes they have committed – must lead to an end of the conflict. Seen from their perspective, criminal justice is a process of confessions, forgiveness, cleansing, reconciliation, responsibility, restoration, rehabilitation, stability and continuity. Unlike national and international criminal justice that is adversarial, it is consensual and restorative with the primary aim of social cohesion and ending communal conflict.190

This perspective relates to what Branch has called the ethnojustice agenda, reflecting a turn to culture and cultural identities – which may or may not be in direct opposition to liberal Western ideas – where “the breakdown of war-affected societies [is seen] as a result of the collapse of traditional values and social harmony…. [and thus] the fulfillment of justice is equated with the establishment of a traditional social order.”191

While the government wanted to end the war, it seemed more concerned about ending it on its own terms, potentially through a military victory. It offered amnesty, but its statements were contradictory, as was its position on justice. The ICC held a clear and firm understanding of justice as retribution. The people most affected by the LRA – the inhabitants of northern Uganda – held nuanced yet ambiguous and contradictory perspectives on justice. After the insertion of the ICC into the conflict, a dominant discourse developed which pitted the ICC against peace and traditional justice. They were described as being “on a collision course… rais[ing] a number of questions related to issues of legitimacy and sovereignty.”192 The ICC was perceived and framed as an outside force which interfered with the quest for peace and centuries old indigenous accountability and conflict resolution mechanisms:

The Amnesty Act represents a contextual approach to ending violence and creating the conditions for sustainable peace. As Afako points out,

191 Branch, Displacing Human Rights, p. 155.
international law “has afforded little protection or possibility of redress for African civilians in the frontline of intense conflict and ethnic, political or genocidal violence.”

Traditional justice, and especially the mato oput ceremony of the Acholi, became reified and romanticized. The amnesty in Uganda, with its connections to local justice, was portrayed as without precedent, and thus not understandable by outsiders. International (retributive) and traditional (restorative) justice became dichotomized. “Traditional justice” was instrumentalized by local leaders to buttress their power and by the government to help it regain control of the justice debate after it invited the ICC in. The whole of northern Uganda was held to believe in the primacy of traditional justice, although the reality was significantly more complicated. There were significant disagreements among and between various groups in northern Uganda.

The one thing they did agree on, though, was the need for peace so that people would not need to live in fear and would be able to go home (although, as we have seen, the insecurity and displacement had significantly to do with the actions of the government as well as the LRA). According to one study, in 2005 there was “overwhelming support for the amnesty process throughout the country” which was seen as a way to achieve the above goal. Further, there was a perception that the involvement of the ICC had undermined the amnesty process. The confluence of the amnesty law, various traditional justice mechanisms, and the ICC involvement raised a couple of important questions: “Who should drive the process of justice within this context? How should international understandings of justice influence local perceptions, and which should take precedence?”

In February 2005, a group of Acholi community leaders released a statement calling on the ICC to “suspend its investigation and refrain from planned issuance of arrest warrants until peace is achieved in Northern Uganda.” The ICC reached out to engage in dialogue with the communities and hosted a delegation of Acholi community leaders in March 2005. They again asked that the ICC respect the traditional justice and reconciliation processes of the Acholi. Another meeting was held the next month, with a more representative group from across northern Uganda. The response from both meetings seemed to undermine the argument that local leaders were completely opposed to the ICC intervention. Local NGOs, and some international NGOs working in Uganda, such as Save the Children, voiced dissent against the ICC investigation. Yet, in 2005, a year after the original Save the Children

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193 Ibid., p. 4.
194 Allen, Trial Justice, pp. 130-131.
195 “Whose Justice?” pp. 4-5. Allen observes that “[i]n Gulu town, in particular, it is presented as a kind of ‘received wisdom’ that the Acholi people have a special capacity to forgive, and that local understandings of justice are based upon reintegration of offending people into society.” Allen, Trial Justice, p. 129.
196 “Whose Justice?,” p. 3.
198 Ibid., p. 5.
201 Allen, Trial Justice, pp. 178-179.
statement, it released another statement which supported the work of the ICC while also raising some concerns. While it recognized that there had not been an increase in attacks as a result of the preliminary investigation, it was still worried that the issuance of warrants might lead to such attacks.\(^{203}\) The ICC was also identified as a neocolonial intervention which ignored local practices.\(^{204}\) These practices are purported to be core to the identity of those in northern Uganda, and in particular the Acholi. Yet, there are significant questions about the status of these practices and the level of support they garner, so we must ask what are these practices, how traditional are they, and is there indeed a significant conflict between them and the ICC?

While there are a variety of traditional justice mechanisms identified in northern Uganda,\(^{205}\) the focus has been on the Acholi, and one particular process called \textit{mato oput} – drinking the bitter root. It is intended to allow “for reconciliation with compensation, rather than revenge.”\(^{206}\) After an agreement on compensation for a killing, “the killer and the family of the bereaved [would drink] a concoction made from the blood of sacrificed sheep and a bitter root in such a way as to indicate that their dispute had been set aside.”\(^{207}\) Advocates of the use of this ceremony focused on the religious – and specifically Christian – question of forgiveness. It was a report written by Dennis Pain in 1997 for International Alert after a meeting of government officials, church leaders and representatives from the LRA, which helped to focus the discussion on how to facilitate reconciliation (as well as promote Acholi unity). The report was entitled “The bending of the spears,” which referred to another traditional (if rarely used) ceremony called \textit{gomo tong}, “bending the spears,” and was framed in an explicitly religious manner. It supported a combination of amnesty and \textit{mato oput}, along with \textit{gomo tong}, to facilitate reconciliation.\(^{208}\) As Branch observes, the report “reduced [the war] to an internal social crisis brought about by the breakdown of traditional authority, to be resolved through rebuilding traditional Acholi order,”\(^{209}\) noting that Pain (and the World Bank)

\begin{quote}
ignore the violence used by the LRA and the government against each other and ignore the violence of the government against civilians, in favor of focusing on LRA violence against civilians, defining it as intra-Acholi violence.\(^{210}\)
\end{quote}

Although there were also many historical practices which supported retribution rather than reconciliation, \textit{mato oput} was quickly supported by local activists and religious leaders as well as international organizations. By the middle part of 2005, numerous \textit{mato oput}

\begin{itemize}
\item \(^{203}\) Save the Children in Uganda, “Child Protection Concerns related to the ICC Investigations and possible Prosecution of the LRA Leadership,” (30 March 2005).
\item \(^{206}\) Allen, “Bitter roots,” p. 244.
\item \(^{207}\) Ibíd., p. 245.
\item \(^{208}\) Ibíd., pp. 245-246.
\item \(^{209}\) Branch, \textit{Displacing Human Rights}, p. 156.
\item \(^{210}\) Ibíd., p. 158.
\end{itemize}
ceremonies were performed. These were sometimes attended by journalists and aid workers, and were claimed to be very effective.\textsuperscript{211}

These ceremonies were concentrated in and around Gulu. Further afield, and particularly in the IDP camps, there was less support for \textit{mato oput}. Non-Acholi were particularly unenthusiastic. As Allen puts it: “They had also suffered at the hands of the LRA, so why should it be the Acholi who do the forgiving?”\textsuperscript{212} One might also point out that the LRA had expanded far beyond Uganda (and a significant portion of the LRA has become Sudanese,\textsuperscript{213} as well as Congolese and Central Africans), and it is difficult to see how one group of people in one country (even if that country was affected the most) could make a decision on how those who carried out the violence should be treated. While this might be more understandable for those – especially child soldiers – who were being reintegrated into their former communities, it would be harder to make the case for Kony and other senior commanders who bore the greatest responsibility for the death and destruction wrought by the LRA. There was significant interest in seeing Kony and others prosecuted at the same time as worry about security issues related to the arrest warrants. Further, many of the \textit{mato oput} ceremonies performed had to do with local murders, perhaps encouraged by the international funding provided for compensation. And those that did involve former LRA rebels were not performed in the way they were supposedly performed in the past.\textsuperscript{214} Further, as Keller points out, “Reconciliation and reintegration places very difficult burdens on Acholi victims, who are asked to ‘welcome home’ those who butchered their family and maimed them.”\textsuperscript{215} Many will not want to engage in such forgiveness. As Neu observes:

It is naïve to believe that reconciliation will occur if we bring people together without addressing the root causes of their fears, anger, and suffering. It is naïve to believe that the Acholi people have a traditional reconciliation process that will magically make everyone forgive each other. All of this talk of reconciliation also makes those affected by the war wonder what is wrong with them if they cannot “just get along together.” What is even worse for the Acholi people is that the people they are trying to reconcile with in many cases are their children. Who can imagine the guilt of parents wanting to love children they haven’t seen in years and yet who they know have killed and committed untold atrocities?

After 20 years of war, one would have to be superhuman to forgive a government that turned its back on the war and to forgive those who made life a living hell for so long. Local reconciliation mechanisms are being stretched beyond the breaking point. Returning combatants are not being reintegrated.

\textsuperscript{211} Allen, “Bitter roots,” pp. 247-249.
\textsuperscript{212} Ibid., p. 249.
We should not romanticize the Acholi people – they are not superhuman and will not forget or forgive easily.  

Further, these “traditional” ceremonies seemed to harken back to a past which did not exist, or at least not in the way imagined, and seemed to be more tied into supporting and reifying certain power structures. The word “Acholi” itself dates back to British colonial times in the late 19th century, thus highlighting the role of “nontraditional” forces in creating “traditional” identities. The practice of many rituals has been tied into the creation of new classes of “traditional” leaders by the colonial administration. This continues to the present day as “traditional” chiefs maneuver for power, using “traditional” rituals to shore up that power. This is not to argue that there may not be value in these ceremonies, or that they are entirely constructed from the outside or completely instrumentalized, thus undermining their claim to any authenticity. Rather, whereas many outside observers romanticized and essentialized mato oput specifically, and a culture of forgiveness more generally, among the Acholi, it must be recognized that there are a multiplicity of voices in northern Uganda on the issue of amnesty, forgiveness, and traditional justice.

In a survey conducted in April and May 2005, 66% wanted punishment for the LRA, while only 22% preferred forgiveness or reconciliation. 91% of those who had heard of the ICC thought it would facilitate peace and 89% thought it would support justice. Only 10% felt that traditional leaders could bring peace and justice. Between 50% and 70% thought that traditional ceremonies were useful in dealing with the LRA. In the same study, when asked what justice is, 31% identified trials, 18% said reconciliation, 11% said truth and fairness, 10% said assistance to victims, 8% said compensation, and 7% said traditional justice.

Another survey conducted two years later revealed concern about the effect of the ICC on the peace process and support for peace with amnesty while simultaneously demonstrating support for accountability, and specifically the ICC. Indeed, 58.5% said it was important that the LRA be put on trial, and 64% said that the international community should conduct the trials. 76.1% indicated that trials at that point (mid-2007 when the Juba process appeared to hold out hope of ending the conflict), might endanger the peace process. When given the choice of national trials, international trials, or no trials, 44.3% indicated a preference for international trials, 24.7% for national trials, and 31.1% for no trials. 67% felt that the ICC

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218 See Branch, Displacing Human Rights, pp. 154-178, for a critique of the role of traditional justice and its instrumentalization.
219 Allen, Trial Justice, pp. 147-148.
220 Ibid., p. 168.
should be involved in responding to the atrocities in northern Uganda (even as 44.1% said that the ICC should stop its arrest warrants). 222 Thus, as Allen observes:

People in Northern Uganda require the same kinds of conventional legal systems as everyone else living in modern states. Far from there being widespread antipathy for the ICC, those that know about it are generally positive, and concerns expressed about it are mostly to do with the way in which it might secure arrests.223

Overall, then, people in northern Uganda wanted peace and a better life and were concerned about the best way to achieve this. There was strong support for punishing at least the main leaders of the LRA, preferably through the ICC, although concern about how this would affect the peace process was present. There was also support for traditional justice, in particular for those lower down in the LRA hierarchy (including the children of northern Uganda who had become child soldiers, frequently by being kidnapped). This demonstrates how both the ICC and traditional justice can exist side by side. Mato oput and other similar ceremonies can be used to facilitate healing and reconciliation for many who have been caught up in the fighting and facilitate the reintegration of LRA fighters back into the community. At the same time, those with the most responsibility for the conflict – Kony and a few other top commanders – can be pursued by the ICC to provide a different type of justice than with respect to lower level fighters. The one thing missing from this equation, of course, is the government and UPDF (55% indicated that the UPFD should be punished224). There is little prospect of any significant form of justice for crimes committed by the government and UPDF (including, of course, the crime of forced displacement), particularly given the ICC’s refusal to pursue such crimes.

In addition, as the International Crisis Group points out, “[t]raditional reconciliation ceremonies receive tepid support in part because they are insufficient to the scale and nature of the conflict.”225 The “traditional” mato oput ceremony involves an individual admitting guilt, asking forgiveness, and paying compensation to the clan of the victim. While Kony had asked southern cultural leaders for forgiveness, he repeatedly denied attacking the Acholi.226 The former LRA commander Sam Kolo said that he would not ask for reconciliation and pay compensation to his victims, but said he would engage in the mato oput ceremony performed by the paramount chief.227 Kony sees the killing as justified, and so would be unlikely to admit guilt and ask for forgiveness.228 He has indicated a preference for traditional justice229 – not a surprise given that it would likely allow him to avoid jail – although this does not square with his previous position. This seems to indicate, first, that there is an unwillingness on the part of senior LRA commanders to be serious about reconciliation, and second, that

222 Ibid., pp. 6-7.
223 Allen, Trial Justice, p. 168.
225 ICG, “Peace in Northern Uganda?”, p. 16.
226 Ibid., p. 16.
the “traditional” ceremonies carried out may, in at least some circumstances, fall far short of
the robust reconciliation process attributed to them. The ICG notes that “[m]ato oput has
never been applied to the types of crimes the LRA has perpetrated, such as abduction, use of
child soldiers and sexual slavery.”\textsuperscript{230} Mato oput was designed to deal with disputes between
clans up to “simple murder,” and was generally not used in the case of killing in war\textsuperscript{231}
(perhaps recognizing, as does international humanitarian law, a difference between killing, or
at least many types of killing, during war, and killing outside of war). If the ceremony is
supposed to be about individual reconciliation, how does one scale this up to a situation
where the LRA has killed more than 100,000 people and abducted between 60,000 and
100,000 people across a vast area including not only northern Uganda, but also Sudan, the
DRC, and the CAR over 25 years?

It may be possible to engage in individual reconciliation at a very local level of individuals
who have come from an Acholi village, killed or abducted people from that village, and then
come back to that village to ask for forgiveness. The people in the village can forgive that
person for what they have done to the people in that village. They cannot forgive them what
they have done in other parts of northern Uganda (particularly given that those in other parts
of northern Uganda were more supportive of prosecution than those in Acholi\textsuperscript{232}), or indeed
in other countries. Traditional justice mechanisms can only deal with direct victims, whereas
[i]ndirect victims include all of Uganda and indeed the entire world; international crimes are thought of as crimes against the international
community as a whole. The general trend in the international community is for
prosecution.\textsuperscript{233}

At the lowest levels of responsibility – foot soldiers, and especially abducted children – this
may not matter. But for Kony and others of his inner circle, especially, who have directed
this swathe of destruction across central Africa, how can a village forgive? How can an entire
country forgive? While other soldiers might sit down with a paramount chief, who could
Kony sit down with? Museveni? Given the government’s role in the misery brought to
northern Uganda, those from the region would hardly accept him speaking on their behalf. He
certainly would not be perceived as a representative of the people of northern Uganda.
Further, as the ICG argues, “[p]eace deals without accountability have generally not worked
in Uganda,”\textsuperscript{234} with grievances not addressed.

Thus, while local justice mechanisms such as mato oput might deal with a significant number
of former LRA fighters, for those most responsible for the killing – including those with
arrest warrants from the ICC – traditional mechanisms are likely not enough, for five reasons
identified by Keller:

\begin{enumerate}
\item “the unprecedented complexity of perpetrators needing reconciliation”;
\item “the traditions themselves have atrophied and lack legitimacy”;
\end{enumerate}

\textsuperscript{230} ICG, “Peace in Northern Uganda?”, p. 16.
\textsuperscript{231} Keller, “Achieving Peace with Justice,” p. 231.
\textsuperscript{232} Ibid., p. 226.
\textsuperscript{233} Ibid., p. 229.
\textsuperscript{234} ICG, “Peace in Northern Uganda?”, p. 16.
3) “the ceremonies require ‘acknowledgement and truth telling’ as a ‘vital part of the process’”;
4) “the Acholi require compensation prior to reconciliation ceremonies. Compensation is difficult if the perpetrator is unknown…. [and] Given the brutality, depravity, and scale of the atrocities, it might be impossible to compensate for the crimes”; and
5) “there is currently confusion over the ceremonies, with some calling any tradition ‘mato oput’ and others confusing the various ceremonies.”

And while an amnesty might or might not be available for Kony and other senior commanders – the government is hardly clear on this point – it was not enough to entice Kony to sign a peace deal. And an amnesty would still leave a mass murderer responsible for large numbers of deaths and abductions across four countries walking free amongst his victims. There is little evidence that this would lead to a stable situation where his victims felt that they received any kind of real justice. Indeed, a survey carried out in eastern DRC in 2008 revealed that 85% believe “it is important to hold those who committed war crimes accountable and that accountability is necessary to secure peace.” In fact, in March 2010, victims of an attack in Faradje, northeastern Congo led by LRA Lt. Col. Charles Arop, who was responsible for the so-called “Christmas massacres” in 2008 (discussed below), asked the Congolese Justice Minister to prosecute Arop. Arop had surrendered to Ugandan soldiers the previous September and requested amnesty in Uganda. Is it reasonable for Uganda to override the wishes of Arop’s victims in the DRC by granting amnesty – which eventually occurred? Yet, Congolese hopes for justice seemed to be in vain, given, as the UN Secretary-General noted in December 2012:

In the Democratic Republic of the Congo, there are currently no plans to prosecute LRA combatants for crimes committed there. Judicial investigations, indictments and arrests are not carried out after attacks and plans for transitional justice mechanisms are lacking. This is due in part to the apparent lack of capacity in the judicial system.

Further, even if an amnesty was granted, there would still be the ICC warrants to deal with. While, superficially, the warrants seemed to have pushed Kony to the negotiating table and then away again, the situation appears more complex. There is little evidence that Kony would have signed the peace agreement if the warrants had been suspended or rescinded.

Only the ICC Pre-Trial Chamber could permanently rescind the warrants, which seemed an unlikely occurrence. The Security Council has not seemed interested in suspending the warrants to facilitate the peace process, and even if it had, this would not be a permanent situation. It could fail to renew its suspension, thus leaving Kony exposed. Museveni provided assurances in 2006 that he would not turn Kony over to the ICC, but would this have actually provided permanent insulation from the ICC? The only other option would be granting Kony safe haven in a country not a party to the ICC and unlikely to become one any time soon. While many in northern Uganda might have supported this option, unlike Idi Amin, Kony would not necessarily be as certain that this would last permanently, as Charles Taylor found out. Indeed, there has been a permanent shift in the calculations of dictators and mass murderers. It is increasingly possible to escape the reach of the international criminal justice regime, even in “safe” countries. While Museveni might have promised Kony that he would ask the ICC to rescind the warrants if he signed the peace deal, Kony could not be sure that this would indeed happen, or if some other mechanism, such as universal jurisdiction, might eventually be used to put him on trial. Kony had demanded that the Security Council defer the warrants before he signed the peace agreement, a demand with little prospect of being fulfilled.

The Depoliticized and Instrumentalized ICC
What does this discussion tell us about the role of the ICC in the northern Ugandan (and now beyond) conflict? The ICC was portrayed by its supporters as a savior of Uganda. It would help the people get rid of Kony, and bring justice to an area which has known little justice for decades. So far, however, that has been a pipe dream, and once the Acholi realized that the ICC does not have an army or a policy force to arrest Kony, their support for the ICC waned. Its role has been much more ambiguous. By being portrayed as a savior, it ties into the so-called “savage-victim-savior” structure identified by Makau Mutua and developed by Adam Branch. As Branch argues, “[t]he savage is the African violator of criminal justice…. outside the pale of politics, and even humanity,” while “[t]he victim is individualized but anonymous, defined in terms of a universally applicable set of basic rights…. [and] depoliticized.” The victim thus requires “the savior [who is] the self-proclaimed enforcer of global law” who pushes aside any alternative approaches to justice. The depoliticized savior rushes in to protect the depoliticized victim who is suffering at the hands of the depoliticized savage. If all actors are depoliticized, it is easier to avoid the political context in which the savagery occurs, and allows the savior to avoid looking into other potential savages (i.e. the UPDF) since it was the government which called in the savior

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244 International Crisis Group, “Northern Uganda: The Road to Peace, with or without Kony,” p. 9.
245 I am indebted to Steve Lamony for this observation.
247 Branch, Displacing Human Rights, p. 182.
248 Ibid.
in the first place. Further, since the savage has been depoliticized and dehumanized, and other potential savages identified as the savior, it is easier to justify the use of force against the savage. The ICC is thus instrumentalized by one political actor to go after another political (if depoliticized) actor, as well as to use force against the victims themselves (for their own good). As Schabas notes, “when a State is actively engaged in initiation of the process, there is potential for manipulation. In effect, the State quite predictably uses the international institution to pursue its enemies.” The use of the ICC to legitimate the use of force has been noted by the special advisor to the Prosecutor, and was used to good effect by Museveni. The ICC arrest warrants legitimated not only military action within Uganda against the LRA (as well as the citizens of Northern Uganda), but also in Sudan, CAR and the DRC. It also legitimated circumscribing and cracking down on internal political dissent.

Further, as a dominant (depoliticized) global political actor, the ICC is able to define the justice narrative. It shoves aside local justice alternatives. The supporters of these local justice alternatives – “traditional justice” such as mato oput – in turn attempted to portray their approaches as indigenous and apolitical, threatened by a neocolonial outsider whose very presence threatened the possibility of peace and undermined local culture. Neither of these narratives capture the full reality. The ICC is limited in what it can do. It cannot arrest and bring to The Hague those against whom it has issued arrest warrants. It must rely on other actors – usually states, or maybe international peacekeeping forces, particularly those with a more robust mandate such as the previously mentioned Intervention Brigade in the DRC. Or, indeed, as Ocampo has argued, “coalitions of the willing” and “special forces” are needed to arrest those sought by the ICC, led by the US – the same country which was pressuring the ICC not to investigate the UPDF. So, special forces are needed to go after illegitimate political actors, but legitimate, Western-friendly governments are exempted from the reach of the special forces. And the US seemed willing, after several years of hostility toward the ICC under the Bush administration, to help out. Again, though, at the risk of politicizing the ICC. Further, states can constrain not only its ability to arrest perpetrators, but also limit investigations if the ICC does not act in a way which accords with their wishes. Thus, Uganda can threaten to withhold cooperation if the ICC (a supposedly depoliticized actor) does not act in a politically sensitive manner. The traditional justice narrative masks deep internal divisions, romanticizes local traditions which may be completely unsuited to deal with widespread atrocities, makes its own claims about justice in a transnational context which have not necessarily been accepted by others who have been affected by the LRA violence, and which does little to address much broader political concerns.

249 Certainly the rhetoric after 9/11 and in the context of the “War on Terror” bears this out.
251 Branch, Displacing Human Rights, p. 186.
252 Branch, Displacing Human Rights, pp. 191-192
253 Ibid., pp. 201-202.
Neither the ICC nor other forms of transitional justice can actually bring justice if there is no transition.255 Certainly Museveni’s entire strategy was to avoid transition. There was no serious prospect that any type of political realignment would be allowed. If the top LRA commanders were, indeed, allowed to return to Uganda and given amnesty, it would be the government, as the sole legitimate political power, which granted the amnesty. There would be no inclusion of the LRA into the political process. Indeed, by branding Kony and other senior leaders outlaws, the ICC undermined any possibility of political inclusion of the LRA. Similarly, there seemed little interest in responding to the demands of the people of Northern Uganda which the LRA claimed (if rather disingenuously) to represent. The only justice would be, in the end, that given by the government – including a grant by the government to cooperate with the ICC. There would be no change in power relations, and certainly there would be no real prosecutions of senior military and government figures who were responsible for much of the suffering in Northern Uganda, an impunity effectively supported by the ICC as part of the bargain to be able to investigate the LRA.256 None of this helps the people in Northern Uganda, while mato oput and similar mechanisms may only serve to reinforce the government’s attempts to depoliticize the conflict and avoid real change. The argument for mato oput and the amnesty is that they will end the war and bring peace to Northern Uganda. While the amnesty may have provided space for many LRA to come back home, and mato oput may have helped integrate some of those back into society, they have not brought relief to the conditions under which those in Northern Uganda have suffered for years. And while the LRA violence may have left Northern Uganda, it has been displaced across the border to other countries in the region. The government still enjoys significant impunity for what Olara Otunnu calls the “secret genocide” of the Acholi,257 bolstered by the ICC and states like the US who rely on “new” African leaders like Museveni to provide a modicum of stability and veneer of democracy, as well as excuses to extend US political and military reach in Africa.

The government has been contradictory on whether or not it would prosecute Kony, but its commitment to this was never tested because it never had Kony in custody. On the other hand, it obviously has no interest in prosecuting the UPDF. In some ways, even though Ocampo relied on a quantitative analysis of gravity to buttress his decision to go after the LRA but not government forces, it is precisely those government forces for which the ICC was created – a situation where the government is unwilling to prosecute. Yet, the ICC has allowed itself to be diverted from such situations to situations where a government might have (at least initially) been willing to prosecute – essentially acting as a surrogate for the government against its enemies, while allowing the government to act as it likes – resulting in a so-called “asymmetric” referral.258 As Schabas notes, “in a domestic justice setting

255 Ibid., pp. 192-193.
256 Ibid., p. 189.
258 Andreas Th. Müller and Ignaz Stegmiller, “Self-Referrals on Trial: From Panacea to Patient,” Journal of International Criminal Justice 8 (2010): 1270. Issues raised with regard to self-referrals – in particular attempts by referring states to restrict who might be investigated and to “withdraw” a referral when it is politically
involving ordinary crime, would we countenance a national prosecutor who ignored clandestine police death squads on the grounds that gangsters were killing more people than the rogue officials?”

Peace and/or via Justice
The dominant discourse in Uganda has put peace and justice in opposition, while others argue that one gets peace via justice – that there can be no peace without justice, and justice thus comes first. Yet, the relationship between the two is more complex. As Hayner argues, “‘[w]orking for both peace and justice requires a broader and more holistic view of how both of these aims are achieved and the important connection between them.’” We also need broader understandings of both concepts, which recognizes that peace is more than an absence of violence. Further, Clark argues that:

“Justice” is a multi-dimensional concept that encompasses judicial and non-judicial forms, retributive and restorative elements. To understand it solely or primarily as criminal trials, therefore, is not only short-sighted but also places a great burden on judicial bodies like the ICC.

Thus, “peace” means an absence of physical conflict, but it also means a broader context in which there is a lack of political oppression or fear of such, as well as a lack of fear of a return to violence. “Justice” can involve both retributive and restorative forms. It can facilitate the absence of violence or return to violence by removing from society – or by reintegrating perpetrators back into society and removing their ability to return to harm – those who carried out the violence. Returning LRA have been reintegrated into society via the amnesty and mato oput, while the top leaders of the LRA (and others) have been marginalized and excluded from Northern Uganda via the ICC warrants and the military campaign. That this has displaced the violence to other countries does not undermine the effect of this marginalization. Yet, a significant element of peace – a broader political reconciliation or transition – has not occurred. This will likely continue to be the case unless there is “justice” – of the retributive kind – for members of the UPDF and government who were responsible for significant widespread suffering on the part of the civilian population.

Peace and justice are not inherently dichotomous. In Uganda they have been portrayed as expedient – lead Müller and Stegmiller to conclude “that the over-extensive use of self-referrals by the OTP must come to an end,” to be replaced by the use of proprio motu powers by the Prosecutor. Ibid., p. 1293.


Mamdani argues starkly:

The main external obstacle to a peace agreement between the LRA and the government of Uganda is in fact the ICC’s determination to criminalize the LRA’s leadership in the name of pursuing justice.


Ibid., p. 543.

such, but we have seen both imperfect and partial peace and justice in Uganda precisely because they have not been better integrated and because there has been attempt to manipulate justice for short-term, partial peace which leaves intact existing political and social inequalities.

Branch argues that the ICC is too narrow, ignoring the role of western states, aid agencies and corporations in creating and maintaining political and humanitarian crises as exemplified in northern Uganda. And it ignores broader concepts of global justice.265 This is true, although how to realistically craft a court which could address all of these concerns is a difficult question to answer. Schabas notes that

Weeks after the arrest warrants were issued by the International Criminal Court against the enemies of the Ugandan government, the International Court of Justice ruled that the very same regime was liable for serious violations of international humanitarian law committed in the territory of another State [the DRC]. At the same time as the International Court of Justice is condemning Museveni and his regime, the International Criminal Court is cooperating with it. The international legal regime looks incoherent.266

Incoherent indeed. Both our concepts and institutions thus seem too narrow, too easily diverted from looking at the *sui generis* aspects of particular situations, but also too easily diverted from examining broader contexts in which these particular situations operate and the multiple culpabilities of multiple actors and the multiple dimensions of peace and justice embedded within such situations.

The role of the ICC in Uganda was cast in very stark peace vs. justice terms. But it was, in fact, much more complicated – as is the broader debate over peace and justice.267 The ICC warrants may have played a role in bringing the LRA to the bargaining table as well as driving it away, although there were other factors at play.268 The bigger question, however, was who gets to speak for the victims? Arguments against ICC involvement came most forcefully from the Acholi community – or at least part of it – who advocated for traditional justice. There was a divergence of views among the Acholi – as well as others in northern Uganda who had also been significantly affected by the LRA (and indeed the government counterinsurgency campaign). There were different interpretations of justice put forth. Most forceful was, perhaps, the argument that peace was more important than anything else. Yet, others in northern Uganda advocated retributive justice. International NGOs argued that there could be no peace without justice. The government was ambiguous on the issue. It passed the amnesty law, offered amnesty to all LRA – including Kony – and, most recently, Museveni

266 Schabas, “Complementarity in Practice,” p. 33.
268 Including the greed of some of the negotiators, such as LRA spokesperson David Matsanga who was eventually given amnesty, who seemed more interested in enriching themselves. Stephen Oola, “Matsanga should not have been amnesty,” *New Vision* (10 June 2010), http://www.newvision.co.ug/D/8/459/722373.
has become a vocal critic of the ICC. But it also flip flopped, attempting to deny amnesty to one LRA commander and ultimately allowing the amnesty law to lapse. The “international community” in the guise of the ICC was firm – the warrants must stand, and retributive justice must take its course. The ICC represented global morality which laid claim to the dominant narrative.

Which community should we listen to? The community of victims? But which victims? The Acholi, who became cast as the sole victims in the conflict, but who had split opinions on the role of the ICC? Other communities of victims in northern Uganda, who might have leaned more towards retributive justice? The government, which was less victim and more perpetrator (thus, as in the DRC, becoming both a victim and villain), but which claimed victim status to justify its own victimization of others? The ICC, which while claiming to represent the victims in Uganda, also claimed to represent the international community as victim of international crimes? People in communities outside of Uganda who were also affected by the LRA, and some of whom very forcefully demanded justice of the retributive kind? Just as the LRA created a regional insecurity complex, so did it, along with other local, regional and international actors, create a regional justice complex, where multiple and overlapping justice claims and counterclaims existed, raising questions about the proper locus of judicial authority. Such authority has been transnationalized through the Rome Statute, as have the multiple local and transnational claims for justice by individuals and groups.

This makes dealing with ongoing conflicts very complex. Yet, a stark peace vs. justice framing fails to capture the actual dynamics of bringing peace and justice to populations beset with violence. Further, skepticism should be expressed when one community claims to speak with one voice and speak on behalf of all affected by violence. There will more than likely be multiple perspectives which need to be listened to. Skepticism should be also be employed when a state attempts to draw international actors like the ICC into a domestic conflict. Such actors much employ strict neutrality, which was lacking in the Uganda case. Overall, the issue is not whether to reach for peace or justice, but rather how to achieve both peace and justice for all while drawing on both international and local norms and processes.

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