

UGANDA-FROM REFERRAL TO REVIEW CONFERENCE

Introduction

I will start with a little historical overview of the conflict in Northern Uganda. Although such matters are more within your academic purview than my practitioner experience, it serves to set the backdrop for my presentation on the Northern Ugandan situation before the ICC. Of course, this presentation is without prejudice to any judicial findings on the facts that may be made in the future by the ICC judges.

According to scholarly articles, British colonial power in Uganda recruited its army mainly from the Northern Ugandan Acholi ethnic group predominant in the districts of Gulu, Kitgum and Pader, whilst at the same time favouring the South of the country economically. When Uganda gained independence, Prime Minister Milton Obote relied mainly on his Acholi dominated army to affirm his authority. Returning to power after the brutal 8 year reign of Idi Amin, Obote was again overthrown in 1985 by General Tito Ochello, another Acholi man. When Yoweri Museveni took power in 1986, the Acholi predominance in public life was abruptly put to an end, and Acholi people were marginalised from positions of power. This created two Acholi resistance movements, the Ugandan people's Democratic Army and the Holy Spirit Movement, led by the mysterious Alice Lakwena. Both of these disbanded in a matter of years, and in their ashes arose the Lord's Resistance Army, led by Joseph Kony.

Although initially claiming to represent the Acholi people in a political struggle against the South, the literature highlights that the LRA soon turned against its constituency. Condemning the public's lack of enthusiasm as support for the Ugandan government, it is alleged that the LRA began subjecting the Acholi people to a continuous campaign of murders, mutilation, rape, looting, destruction of property and abduction, mainly of children, as a method of forced conscription to replenish its ranks. According to UN reports, more than 20,000 children have been abducted by the LRA, constituting up to 80 of its membership. These children receive military training, and they are often abused, and used as labourers, sex slaves or human shields in combat. They are forced to take part in atrocities against their own community, or in the killing of other disobedient children which serves to isolate them from their community and bidding them to the LRA. In order to escape this fate, the UN estimates that 40,000 children seek safety from LRA raids by commuting from their rural homes to urban centres. Nearly two million people have abandoned their homes and moved to crowded IDP camps, seeking safety in numbers and the protection of the Ugandan army.

The LRA soon found a place in the regional conflict dynamics, and according to analysts, began receiving logistical and financial support from the Sudanese Government, which was retaliating against

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Museveni for sponsoring the southern Sudanese Sudan People's Liberation Movement. This was rule book war by proxy, and the LRA found a safe haven in Sudanese territory, far from the reach of the Ugandan army. By the end of the 1990's however, relations between Sudan and Uganda improved culminating in an agreement to stop this proxy war and allowing the Ugandan army to conduct anti LRA operations in Sudan. This was supplemented by Sudan's Comprehensive Peace Agreement signed in 2005, which put an end to the conflict in Sudan.

The Ugandan military sought to capitalise on these developments and put in place two military operations, both code named Operation Iron Fist in 2002 and 2004. According to different sources, this weakened but did not put an end to the LRA, fracturing it into smaller units and becoming more mobile. It is thought that consequently, the LRA moved from Southern Sudan to Garambo National Park in DRC.

Uganda and the ICC

This is where we can introduce the ICC into our presentation. Uganda, a member of the United Nations and the African Union, ratified the Rome Statute on 14 June 2002 which means that the ICC has jurisdiction for the crimes specified in the Rome Statute, namely genocide, crimes against humanity and war crimes, committed by Ugandan nationals or in the territory of Uganda after 1st July 2002.

Uganda is a dualist system, however, and the rights of individuals cannot be affected by international treaties until these have been adopted into national law. Without implementing legislation, the crimes under ICC jurisdiction are not crimes recognised under Ugandan law, the Court itself has no certain legal standing and a request for surrender from the Court may cause difficulties for compliance by the Ugandan authorities. Nevertheless I would recall that pursuant to Article 27 of the 1969 Vienna Convention on the Law of Treaties, the Uganda remains under an international obligation to enforce Part 9 of the statute.

The Ugandan Ministry of Justice prepared, early in 2004, a draft implementing legislation, the International Criminal Court Bill which was done with the technical assistance of the Commonwealth Secretariat. The Bill was immediately tabled before the Seventh Parliament but did not pass the Committee stage and lapsed. It was reintroduced in the Eighth Parliament in December 2006, and had a first reading but was again not adopted and lapsed once more. I understand that it is now at Committee stage again, and I hope it will finally be adopted into law.

Despite this lack of implementing legislation, on 16 December 2003, President Museveni took the decision to refer the situation concerning the LRA to the Prosecutor of the ICC, asking the ICC to

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“locate and arrest the LRA leadership”, and relying on Article 13(a) and 14(1) of the Statute to ground the referral. This was the first ever referral by a state party to the ICC. At the time, the Attorney General of Uganda stated that, “while both willing and able” to prosecute the alleged perpetrators of the atrocities allegedly committed in Northern and Western Uganda during the preceding seventeen years, the Ugandan judicial system had been unable to secure their arrest, principally because those alleged perpetrators operated from bases in Southern Sudan, as such beyond the reach of Ugandan law. The Office of the Prosecutor informed the Government of Uganda that, in compliance with its obligations of impartiality, it would interpret the referral to include all crimes committed in Northern Uganda.

In July 2004, the Prosecutor determined that there was reasonable grounds to open an investigation into the situation concerning Northern Uganda, after a thorough analysis of available information in order to ensure that the requirements set out in the Rome statute were met. This was an independent assessment, which the prosecutor undertook separate from the referral of the situation by Uganda. An investigation team from the Office of the Prosecutor was sent to Uganda to begin gathering and evaluating evidence, and on 6 May 2005, the Prosecutor filed an application for warrants of arrest for crimes against humanity and war crimes against five senior commanders of the LRA: the LRA commander Joseph Kony, his deputy Vincent Otti, as well as Okot Odhiambo, Dominic Ongwen, and Rascot Lukwiya. The Prosecutor alleged that Joseph Kony issued orders in mid 2002 and late 2003 to attack, kill, loot and abduct civilian populations, including those living in IDP camps, whilst the other suspects directly participated in carrying out these orders.

In July 2005, the Pre-Trial Chamber issued these warrants under seal. The warrants were unsealed on 13 October 2005. Pursuant to Part 9 of the Rome Statute, the Registry sent out requests for cooperation in the arrest and surrender of the five suspects the Ugandan authorities, as well as the Congolese and Sudanese authorities. Pursuant to Part 9 of the Statute, Uganda and DRC have an obligation to arrest the suspects, whilst Sudan is invited to do so.

In the meantime, and to support the Prosecutor’s investigations as well as Registry operations in the areas of outreach, victims participation and witness protection, the ICC opened an office in Kampala in April 2005. The Court signed an MOU with the Ugandan Government giving the Court legal status in Uganda as well as granting privileges and immunities to its staff and property. This was very important in view of the lack of implementing legislation, which I have touched upon.

The outreach activities of the Court in Uganda commenced in 2006, and are a crucial part of the Registry’s mandate in situation countries. Outreach activities are intended to give an understanding of the Court’s mandate and of its work in the situation, so as to bring the Court and its proceedings closer to the affected population. As such, workshops in northern and eastern Uganda with over 150



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traditional leaders, 50 religious leaders, over 120 representatives of non-governmental organizations, and over 60 local government representatives were organized in 2006. The aim was to share and receive information concerning the activities of the Court and to further develop sustainable networks and mechanisms to disseminate information more broadly within the local community. In 2007, the Court prioritized outreach in the northern and north eastern parts of the country, focusing in particular on raising awareness among persons living in IDP camps. Over 6,000 persons participated in the events organized by the Court. To multiply the impact of its outreach, the Court's outreach team based in Uganda provided training for leaders within the camps who volunteered to further explain the Court within the camps. The Court also participated in weekly radio programmes. According to the Court's monitoring reports and data from independent studies, awareness of the Court in the region has risen from 25 per cent of the population in 2005 to approximately 70 per cent. The Court continued engaging the general population in the north and north-eastern parts of the country, especially reaching out to youth and women. One hundred interactive meetings were conducted in towns, villages, schools and Internally Displaced Persons' (IDP) camps with 28,000 people targeted directly. The Court also focused on interactive radio talk shows in local languages prepared in partnership with four radio stations. A total of 45 one hour weekly radio programmes were conducted by the Court's outreach partners in the Acholi, Lango, Teso and Madi sub-regions, reaching an estimated audience of 9.5 million. Evaluations indicated that people directly informed and engaged significantly increased their understanding of the work of the Court.

The outreach of the Court continues to this day. For instance, on 24 April 2009 outreach officials conducted a one-day workshop for over 30 traditional leaders representing the different clans and chiefdoms from the districts of Gulu, Kitgum, Pader and Amuru in the Acholi sub-region. The workshop, organised in partnership with the office of the traditional prime minister of the Acholi, was held in the Gulu municipality and provided accurate information on the latest developments regarding the situation in northern Uganda as well as other situations under investigation. In his opening statement, the deputy paramount chief of the Acholi noted the importance of knowledge and information on the ICC for the benefit of their subjects. Outreach officials explained the recent developments at the Court, including the ongoing trial in the case *Thomas Lubanga*, the issuance of the arrest warrant against President Omar al Bashir of Sudan, as well as the 10 March, 2009, and the decision on admissibility in the case of *Joseph Kony et al*, which I will explore further later.

The field office also supported missions from the Court's Victims Participation and Reparations Unit, which conducted a number of workshops in 2006 and 2007 to affected communities in Northern Uganda, explaining the procedures available to them at the Court as victims, and assisting them in filling out application forms to join in the proceedings. As a result of this work on the ground, the Court has received 466 applications from victims to participate in the Northern Uganda situation. From there, victims can be assisted by the Office of Public Counsel for victims who has represented or



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assisted 106 victims applying to participate in proceedings in the situation. 21 have so far been admitted by the Pre-Trial Chamber. The Pre-Trial Chamber has also admitted 41 victims to participate in the case against *Kony et al.* As victims in the case, they may be allowed to challenge and call evidence, where their interests are affected. The exact parameters of their participation is still to be decided by the evolving jurisprudence of the Court on victim participation, but a recent Appeal Chamber decision held that victims can, by leave of the Chamber, challenge and introduce evidence at trial, where they show that their interests are affected.

The interests of victims has also been taken up by the Court's Trust Fund for Victims, and on 28 January 2008, the Board of Directors of the Trust Fund notified Pre-Trial Chamber II of its intention to carry out activities in Uganda. In accordance with regulation 50 of the Regulations of the Trust Fund for Victims, the Chamber assessed whether the proposed activities would "pre-determine any issue to be determined by the Court, including jurisdiction and admissibility, or violate the presumption of innocence, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." Finding this not to be the case, the Chamber approved the proposed activities and the Trust Fund is now busy setting up 18 projects in Uganda. Examples of these projects are the provision of psychological support and material support for ex-child soldiers and abducted children in Gulu and Lira; the physical rehabilitation and psychological support for mutilated victims in Gulu, Soroti, and Lira; the physical rehabilitation and psychological support for handicapped victims in Gulu, Pader and Lira; and the psychological support and material support for victimized villages in Apungi, Adjumani, and Teso and Lango regions.

Of course, real progress in the case has been hampered by the absence of the accused before the Court. It is unfortunate that the requested cooperation from states never fully materialised. The Court has nevertheless been active, with the Registry continuously seeking the cooperation of states in the arrest of the suspects. The Court has also done a substantial amount of work, with 27 filings (including annexes) for a total of 362 pages filed in the situation in 2009 alone. In the case, 63 filings (including annexes) for a total of 620 pages have so far been filed in 2009. The Registry has also been working to protect the identified witness in the case. In this respect, the Victims and Witnesses Unit has worked closely with the Ugandan authorities to set up a Rapid Response Mechanism to protect vulnerable witnesses, as well as working on international relocations, as a last resort and where the threat cannot be met by local measures. Again, however, the cooperation of states has not been too forthcoming, and the Court only has 10 witness relocation agreements in place. Even within those frameworks agreements, each request for relocation has to be examined in detail by the state in question, and a number of requests have not been met.



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In an effort to cut off the supply and support network of the suspects, the Office of the Prosecutor pursued several requests for cooperation with a number of States to take specific action against individuals suspected of providing the LRA with material support.

The Prosecutor received evidence in 2007 that one of the suspects may have been killed, and presented such evidence to the Chamber. As a result, on 11 July 2007, the Pre-Trial Chamber terminated the proceedings against Mr. Lukwiya following confirmation of his death, thereby rendering the warrant of arrest for him without effect. Another of the four, the Deputy Commander Vincent Otti, was allegedly killed in October 2007 on the orders of Joseph Kony. Otti's reported death has not yet been corroborated by DNA evidence and has not been confirmed by the Chamber. You will have also heard very recent rumours that Dominic Ongwen and Okot Odhiambo were in the process of surrendering, but again this did not materialise and the four suspects remain at large and wanted by the Court.

Another interesting development in the case occurred on 10 March 2008, when a delegation of the LRA travelled to The Hague and met with officials of the Registry to discuss procedural issues related to the legal representation of those accused before the ICC, as well as procedure and time limits for the filing of documentation and materials with the Court. As a neutral organ that facilitates fair trial, the Registry does not engage in substantive discussions with any of the parties on the merits of cases before the Court. As such, the delegation was received by the Registry and was provided with all pertinent information about the applicable procedure and the available defence counsel. It is unclear whether this was what they had expected and whether they returned to Uganda convinced of the fairness of the procedure. Either way, the suspects did not surrender to the Court.

Amnesties and Ugandan prosecution of serious international crimes

Before I turn to the Juba Peace process and issues of admissibility of the Kony et al case before the Court, I will briefly look at Uganda's track record of dealing with serious international crimes committed in its territory.

According to academic literature, there have been no recorded prosecutions of international crimes per se in Uganda's legal history. Although Uganda introduced legislation in the late 1950s to incorporate the 1948 Geneva Conventions into national law, I understand that no prosecutions grounded in this law have yet been brought. Uganda has ratified but not implemented the Additional protocol relating to attacks on civilians, which would criminalise violations of common article 3.

As a response to the insurgencies that the Government has faced since 1986, I understand that it has periodically offered amnesties as incentives to rebels to come into the fold. The present amnesty regime is found in the Amnesty Act enacted in January 2000, which appears to grant complete amnesty



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with respect to any crime committed in the course of war and armed rebellion. Whereas I understand that the previous amnesty legislation of 1987 made exceptions for certain categories of crimes, such as genocide, the current amnesty appears to depart from that approach. After the referral of the Northern Uganda situation to the ICC and the subsequent issuance of the arrest warrants, it has been reported that the government sought to introduce amendments to the Act, excluding in general terms leaders of rebel groups from receiving amnesty. Parliament appears to have only accepted a limited reform of the amendment, which granted the Minister of Internal Affairs to propose a list of excluded persons to parliament, for its approval.



The Juba peace process

In the presentation of the peace process that follows, I note initially that the facts presented have been derived from open source information. In July 2006 representatives of the Ugandan Government and the LRA arrived in Juba, South Sudan, for peace negotiations initiated and mediated by Southern Sudanese Vice President Riek Machar, allegedly after signals from Joseph Kony that he was ready to talk. In late August 2006, after weeks of negotiations, the parties signed a cease fire agreement, whereby the LRA agreed to relocate its forces to assembly points in Southern Sudan. The LRA did not do this, and a second round of talks began in April 2007 with five items on the agenda. Cessation of hostilities; comprehensive solutions to the conflict, accountability and reconciliation, formal ceasefire, and DDR. Against a backdrop of the LRA demands that the Court drop the arrest warrants against its leaders, an Agreement on Accountability and Reconciliation was reached on 29 June 2007. The agreement declares that “the parties shall promote national legal arrangements, consisting of formal and non-formal institutions and measures for ensuring justice and reconciliation with respect to the conflict”. The agreement further provides that the Ugandan courts will exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes during the course of the conflict. The agreement also states that traditional justice mechanisms, such as Mato Oput, are to be promoted as a central part of the framework for accountability and reconciliation. The parties also agreed to the principle of legal finality of the proceedings carried out under the mechanisms for accountability set out in the agreement. The 29 June agreement provided that “the parties will expeditiously consult upon and develop proposals for mechanisms for implementing the principles therein.”

When the Juba peace talks reopened in February 2008, the parties signed an Annexure Agreement to the June 29 Agreement, declaring that “there is national consensus in Uganda that adequate mechanisms exist or can be expeditiously established to try offences committed during the conflict. It states that “A Special Division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict”. The division shall be serviced by a Registry which inter alia “shall make arrangements to facilitate the protection and participation of witnesses, victims, women and children”. A Unit shall also be established to carry out investigations and prosecutions in support of trials, inter alia, of individuals who are alleged to have planned or carried out widespread, systematic or serious attacks directed against civilians. The prosecution is to focus on individuals alleged to have planned or carried out these acts.

The 29 June Agreement and its Annexure, as well as the agreements on the other thematic areas that had been negotiated, were supposed to be signed by the parties as a Final Peace Agreement in 10 April 2008. Joseph Kony did not show up. Negotiations continued and Kony agreed to sign in November 2008. Again, Joseph Kony did not show up. The Government declared the Juba Peace Process dead



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and went on the military offensive, launching Operation Lightning Thunder with the cooperation of the Congolese and Sudanese militaries. The operation did weaken the LRA significantly, but it did not destroy it and the LRA fractured into smaller unit and went on the rampage again, allegedly committing a series of massacres in DRC territory in the Christmas period. To this date, the LRA continues to mount attacks on civilian populations in the DRC from their bases in Garamba National Park.

Admissibility Proceedings

In response to the June 29 Agreement and its annexure, the Chamber made a number of requests for information to Uganda seeking clarification as to the status of these proposed national proceedings. The Chamber made an initial request for information on 29 February 2008, to which Uganda responded on 28 March 2008 and an additional one on 18 June 2008, to which Uganda responded on 10 July 2008. In its first response, the Attorney General states that the Special Division "is not meant to supplant the work of the International Criminal Court" and that individuals for whom a warrant has been issued by the latter "will have to be brought before the special division of the High Court for trial". The Attorney General also stated, in his second response, that Uganda's position remained "that there must not be impunity for the perpetrators of the crimes in Northern Uganda" and that the provisions on the Special Division of the High Court contained in the Agreement and the Annexure were "without prejudice to Uganda's commitments" under the Statute as well as the "Cooperation Agreement between the Government of Uganda and the Office of the Prosecutor".

In the view of the Chamber, Uganda's responses were ambiguous as to where and by whom the suspects should be tried and showed lack of clarity on the respective powers of the Court and of the national judicial authorities as to who has the last say regarding the admissibility of the Case and, as a consequence, as to the judicial venue in which the Case should be tried. The Chamber had particular concerns on Uganda's position that "in the absence of the final peace agreement and in view of the ongoing military hostilities, the provisions of the Agreement are irrelevant in respect of the four indicted fugitives". For the Chamber, these statements implied that the relevance of the Agreement vis-à-vis the persons sought by the Court in the Case may resurface if and once the military hostilities were to cease and a final peace agreement were signed.

The Chamber therefore decided to exercise its proprio motu powers under article 19(1) and granted Uganda, the Prosecutor, the Defence and the victims to submit observations in the Proceedings. The Uganda Victims' Foundation and the Redress Trust intervened as "Amici curiae" on issues of the state of implementation of the Annexure and the experiences of victims in seeking justice from Ugandan courts. The Prosecutor, Uganda and the office for Public Counsel for Victims submitted that the case was still admissible.



In its decision of 10 March 2009, the Chamber stressed that once the jurisdiction of the Court is triggered, it is for the Court and not for any national judicial authorities to interpret and apply the provisions governing the complementarity regime and to make a binding determination on the admissibility of a given case. It then looked at the progress Uganda had made in the implementation of the Agreement and Annexure, and noted that these are "in the initial stages" and "a lot is yet to be done". The Agreement has not yet been signed or submitted to the Parliament. As such, it was not until both documents can be regarded as fully effective and binding upon the parties that a final determination can be made regarding the admissibility of the case. On this basis, the Chamber determined that the case continued to be admissible under Article 17.

The decision is now under appeal by the defence, which has raised four issues: (a) the role and mandate of the defence in the Article 19(1) proceedings (b) proper use of the Chamber's discretion in convocating the proceedings in the absence of the defendants (c) whether a determination on admissibility would not jeopardize the suspects right to later bring a challenge pursuant to article 19(2) and (d) whether the defence had been granted adequate time and resources. On 3rd April, the Appeals Chamber decided that Judge Daniel David Ntanda Nsereko would be the presiding judge in this appeal. We now await their deliberations and decision.

I wish to stress here that the decision of the Chamber does not place into question the complementarity regime of the Court, but rather it re-enforces it. Indeed, genuine national proceedings for crimes within the jurisdiction of the Court are welcome developments to be encouraged insofar as they are applied against people that are not the subjects of arrest warrants by the ICC. Should such proceedings get under way, and should Uganda consider that they should be extended also to the ICC suspects, the Chamber did stress, however, that the decision as to whether the requirements set out in the Rome Statute for giving precedence to national proceedings had been met would be the Chambers. As such, Uganda would have to bring a challenge to the admissibility of the case under Article 19, and the Chamber would have to decide whether the grounds set out in Article 17 are met before deciding that the case is inadmissible as a result of genuine national proceedings being conducted against the suspects. Until such time, the case against *Kony et al* continues before the Court and awaits the cooperation of states in arresting and surrendering these suspects to the Court.

At the 7th Assembly of states parties in November last year, the states decided that Kampala would be the venue of the ICC the Review Conference, tentatively scheduled for April 2010. I sincerely hope that this important occasion will give new impetus to Uganda, DRC and Sudan to cooperate and arrest and surrender the suspects to the Court so that due process of law can move forward. It is also hoped that Uganda takes this occasion to push through parliament the much awaited ICC Bill so that the Court will have a sound legal basis for its work in Uganda.