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UGANDA AND THE INTERNATIONAL CRIMINAL COURT: DEBATES AND DEVELOPMENTS

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SUMMARY

- Uganda was the first country targeted for intervention by the International Criminal Court (ICC). This intervention prompted three critical discussions about international criminal justice: ‘peace vs. justice,’ ‘selective justice,’ and ‘international vs. local justice’
- The ICC entered a second phase of operations in Uganda after peace talks failed between the government and the Lord’s Resistance Army (LRA). With no arrests or new charges, the ICC faded from the headlines. ICC programs continued, however, including several significant support programs for victims of conflict.
- The ICC has now entered a third phase in Uganda, which requires it to wind down most operational activities and shift resources elsewhere, while at the same time remaining able to quickly ramp-up activities, should there be arrests.
- To guide this third phase and to derive lessons to improve future ICC interventions, a better understanding of the ICC’s impact in Uganda to date is needed. This research must include the views and concerns of victims of conflict.

BACKGROUND

The ICC launched its investigations in Uganda in 2004, but to date there have been no arrests, trials or reparations. There have, however, been controversies. First, many argue that the ICC’s arrest warrants blocked a peace deal between the Ugandan government and the LRA, contributing to the ‘peace vs. justice’ debate. Second, critics argue that the ICC has been used as a tool by the

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Ugandan government to deflect attention from its own lack of transparency. Concern about the impartiality of the ICC can be called the 'selective justice' debate. Third, some claim that northern Ugandans would prefer a justice rooted in customary practices, rather than the ICC's legalistic and retributive approach. Such concerns have been called the 'international vs. local justice' debate.

These debates dominated discussion of the ICC when it first intervened in Uganda. ICC operations assumed a lower profile after the Juba peace talks failed in 2008. During this second phase the Court continued to run several programs. In particular, the ICC's Trust Fund for Victims provided assistance to thousands of people. This backgrounder assesses the changing role of the ICC in Uganda. It ends by looking at the research and policy development needed to guide the Court's third phase in Uganda to maximize its impact locally, while simultaneously strengthening its legitimacy internationally.

THE ICC'S INTERVENTION IN UGANDA: THREE DEBATES

In 2003 the Ugandan government asked the ICC to address violations of international criminal law committed on its territory. The LRA had been fighting the Ugandan military since 1987 and had perpetrated mass killing, looting, abduction, and other forms of violence against civilians. The referral letter from the Ugandan government stated: "Having exhausted every other means of bringing an end to this terrible suffering, the Republic of Uganda now turns to the newly established ICC and its promise of global justice" (Government of Uganda, 2003 : 3-4). Prosecutor Luis Moreno-Ocampo began investigations in early 2004, and the conflict in Uganda became the first situation before the new court.

In mid-2005, the ICC issued arrest warrants for Joseph Kony, the LRA leader, and four of his commanders. Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen were accused of committing war crimes and crimes against humanity, ranging from murder to sexual enslavement. To date, none of the charged persons have been captured, although Lukwiya and Otti have since died.¹

¹ Lukwiya was killed in a clash with the Ugandan military in 2006. Otti was executed on Kony's orders in 2007.

The ICC intervention in Uganda was controversial from the beginning, prompting three important debates. First, arrest warrants were issued in the midst of peace talks between the LRA and the Ugandan government. These talks began in 2004, shortly after the ICC prosecutor started investigations, and in 2006 the talks developed into high-profile negotiations in Juba, South Sudan. Throughout the peace negotiations, Kony and his senior commanders raised the issue of the ICC arrest warrants. Some observers therefore feared that the ICC's involvement would stymie negotiations (Hovil and Quinn, 2005). The ICC arrest warrants were not the only impediment to a successful peace deal, however. There were problems with the process and the mediators, and Kony and Ugandan President Yoweri Museveni showed only sporadic interest in peace (Atkinson, 2010; Otim and Wierda, 2008). Nevertheless, when Kony finally rejected the peace deal he declared that he would rather die in the bush than hand himself over to the ICC or the Ugandan government. Negotiations ended in 2008 without an agreement.

Second, considerable speculation exists about why the Ugandan government referred a situation on its own territory to the ICC. The government claimed that it needed international assistance for investigations and arrests, in part because LRA forces were often based in Sudan. But some experts pointed to other possible motives. By using the ICC to label LRA rebels as perpetrators of international crimes, the Ugandan government could legitimize itself as a terrorism-fighting state and could ignore LRA political demands (Branch, 2007; Nouwen and Werner, 2010).² Prosecutor Moreno-Ocampo was also apparently eager to take on the Ugandan situation. He is believed to have actively sought the referral from the Ugandan government, hoping that ICC involvement in Uganda would help build the legitimacy of the new court (Clark, 2010).

Related to suspicions about the referral and its acceptance are such widely-held concerns that the Office of the Prosecutor (OTP) has *partnered* with the Ugandan government, rather than investigating the true intent of the Ugandan government in seeking international assistance. A partnership between the Ugandan government and ICC could be seen as problematic given that the Ugandan military has been known to commit extensive looting,

² In the words of Nouwen and Werner, "the Ugandan government decided to refer the LRA to the ICC as part of a military strategy and international reputation campaign, rather than out of a conviction about law and justice" (p. 949).

torture, and extrajudicial killings, as well as forcibly confining civilians in dangerous internally displaced persons (IDP) camps in the past (Dolan, 2009; Human Rights Watch, 2011). Despite these concerns, the ICC has not charged any military or government leaders in Uganda to date. The OTP may have good reasons for condoning these charges, but it has not provided evidence to the public, leaving many Ugandans skeptical toward the ICC's impartiality.

The third major criticism is that the ICC's approach to justice may not resonate with northern Ugandans. Some have characterized this debate as a tension between "international" and "local" justice (Baines, 2007). *Matosoput* and other customary processes in northern Uganda emphasize forgiveness and community reconciliation (Refugee Law Project, 2009), and some argue that these processes would be more legitimate and effective in northern Uganda than retributive criminal law (Ochola, 2006).

These issues were hotly contested by civil society, policy makers, and academics during the early years of the ICC intervention in Uganda, and they continue to remain key topics of research in the field of transitional justice.

THE ICC'S SECOND PHASE IN UGANDA: PROGRAMS FOR VICTIMS

The profile of the above three debates began to slip after 2008. Once the Juba peace talks failed, there were no peace negotiations for the ICC to jeopardize. And in the absence of arrests or trials there was less urgency to discussions of bias in the ICC's investigations or conflict between ICC and customary justice. The Court continued to operate in Uganda, however, and some of its programs focused on victims.

First, ICC staff members continued to meet with victims who had expressed interest in participating in judicial proceedings.³ To date the Court has granted participation status to 21 applicants in the overall situation and 41 applicants in the Kony et al. case. Many more applications are awaiting review. However, the lack of arrests has meant that there have been few

³ The ICC's Rome Statute and Rules of Procedure and Evidence grant victims the right to present their "views and concerns" at different stages of Court proceedings. For more on victim participation see my previous background.

judicial proceedings, and victim participation has been limited to sporadic and private discussions between victims and ICC staff.

Second, outreach officers attempted to inform victims and their communities about the ICC's work, visiting communities and communicating indirectly through media and civil society groups.

Third, the ICC's Trust Fund for Victims (TFV) began to offer assistance to victims in northern Uganda beginning in 2008.⁴ As of July 2011, an estimated 38,625 victims in northern Uganda have benefited from material support, psychological rehabilitation and/or physical rehabilitation programs (Trust Fund for Victims, 2011: 6). These programs have been implemented by partner organizations, and many victims may not realize that they benefited from the TFV. Nevertheless, this program has had a tangible impact on victims in Uganda.

Finally, the ICC contributed to developments in the Ugandan judiciary. In 2010 the government passed the ICC Act, which incorporated ICC crimes and modes of liability into domestic law. In 2011 the government created the International Crimes Division (ICD), a division of the Ugandan High Court. The ICC prosecutor has since met with ICD officials to provide assistance.⁵ The ICD will be able to prosecute serious crimes by the UPDF or the LRA, depending on legal developments and political will.

This second, quieter phase of operations was geared toward preparations for possible trials. Though there were few judicial developments, the outreach and participation programs tried to keep victims informed about ICC activities, and the TFV provided assistance and rehabilitation to some victims. But as years passed without arrests, the Court has begun to look at winding down even these operations.

4 The TFV was established "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims," according to Article 79(1) of the Rome Statute. The TFV has two mandates. First, to implement awards for reparations ordered by the Court against convicted persons. Second, to provide assistance to victims of crimes under ICC jurisdiction in countries where the Court is conducting investigations or trials. TFV activity in Uganda has followed this second mandate.

5 To date the ICD has attempted to prosecute one senior LRA leader, Thomas Kwoyello. That case was thrown out when Uganda's Constitutional Court ruled that Kwoyello had been granted amnesty under the Amnesty Act. For more on the case and the ICD see Human Rights Watch (2012).

THE ICC'S THIRD PHASE IN UGANDA: WINDING DOWN AND ASSESSING IMPACT

Ugandan and non-Ugandan forces continue to seek Kony and other LRA leaders indicted by the ICC. Should arrests occur the Court must be prepared to quickly ramp up its programs in Uganda. Given resource constraints, however, the ICC will have to reduce or end most programs in Uganda if arrests do not occur. The following program modifications may be appropriate:

- Victim participation: address outstanding and incomplete applications,⁶ and meet with all accepted applicants to explain what will happen if arrests occur or do not;
- Outreach: maintain an outreach officer to explain any developments, challenge misinformation, and collaborate with supportive civil society and media;
- Office of the Prosecutor: continue to observe the situation and monitor possible witnesses, including those who may need protection;
- Trust Fund for Victims: wind-down program funding and seek other organizations or donors to take on programs that should be sustained.

Importantly, the ICC — as well as its supporters and critics — need to take the lessons learned from the Uganda intervention to inform future policy. This backgrounder therefore concludes with a sketch of four key areas for research and policy development:

- 1 *Negotiating peace and justice.* International law and norms have shifted in the last two decades, putting greater emphasis on accountability for international criminal law violations. This development has a significant impact on peace negotiations. Mediators and negotiating partners must pursue solutions that balance law, political realities, and the demands of stakeholders, including victims.⁷ Further research on the Juba peace process can contribute to deepening the understanding of this issue, and in particular research that explores how beliefs about the ICC

6 Along these lines, the ICC's Pre-trial Chamber II has requested that all applications for participation be assessed by September, 2012.

7 For a thoughtful exploration of these considerations for mediators see Hayner (2009).

affected the negotiating positions of different actors, including the Ugandan government and the LRA.

- 2** *Promoting accountability.* The ICC was intended to be a court of last resort, pursuing accountability for key perpetrators when states failed to do so. Prosecutor Moreno-Ocampo and others have argued that the Court can also shape national processes through normative and legal influence, as well as advice or technical assistance. More research on the relationship between national and international accountability-seeking is needed, and this research can help address the ‘selective justice’ debate. Key research questions about the Uganda situation include: Did the ICC’s focus on the LRA provide an alibi for a government bent on hiding past crimes and continuing new ones? Did it convince the government and military to substantially improve their conduct? Did it contribute to fair processes of accountability for past violations by the LRA and the government? Will Uganda’s ICD make a significant contribution to accountability, and will it advance the ICC’s legal standards and principles?
- 3** *Providing assistance.* The TFV is a novel contribution to international criminal justice, and the Fund’s work in Uganda presents an early and important test of its assistance mandate. An assessment of the criteria and processes the TFV used to select beneficiaries are needed, as well as an assessment of the quality of programming by the TFV and its implementing partners. There also needs to be an evaluation of the Fund’s decision not to publicize its programs, based on concerns about security risks to beneficiaries and about tension between those who receive assistance and those who does not. This policy of not publicizing the TFV has had several consequences: victims don’t know about (and can therefore not evaluate) the Fund’s work, and there is little acknowledgment of the ICC’s contribution to restorative justice.
- 4** *Engaging victims.* The ICC needs to engage victims for several reasons. It must inform them about participation, reparations, and protection, so they can seek to benefit from these programs. It must include victims’ interests and perspectives in judicial and bureaucratic decision-making, to ensure that trials and programs

assist victims. Finally, victims are a key constituency of the ICC, and the Court's legitimacy should be assessed in part through evaluations from victims.

- 5** To assess the ICC's engagement with victims requires analysis of the Court's formal and informal channels for consultation, and evaluation of the impact of victims' interests and perspectives on decision-making. It also requires research with victims about their (possibly changing) evaluations of the ICC's programs and principles. Such analysis is needed to see if programs are working, and to assess whether there are serious or unresolvable tensions between 'international' and 'local' justice approaches. Much more research, therefore, is needed to judge whether the ICC can live up to its billing as a 'victim-centred' court.

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