CHAPTER 3

UGANDA: COMPROMISING COMPLEMENTARITY

> *The Republic of Uganda has indicated that the ICC is the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility for the crimes within the referred situation . . . Accordingly . . . the Ugandan authorities have not and do not intend to conduct national proceedings, preferring instead that the cases be dealt with by the ICC. With this in mind, I have determined . . . that the situation involves cases that would be admissible under article 17 of the Statute.*
>
> ICC Prosecutor Luis Moreno-Ocampo[1]

In December 2003, a Ugandan official flew to The Netherlands. In his briefcase was a twenty-seven-page letter containing the first ever referral to the ICC.[2]

Three months earlier and newly appointed, the Court's first Prosecutor had publicly stated his intention closely to follow the situation in the east of the Democratic Republic of the Congo (DRC) and had invited states to refer this situation to the Court.[3] The Ugandan official did not, however, carry a letter referring the situation in the DRC to the ICC. At the time, the International Court of Justice (ICJ) was adjudicating the DRC's claims that Uganda had violated international law in its involvement in eastern DRC.[4] The African Commission on Human and Peoples' Rights had already found for the DRC and against Uganda in relation to violations of human rights law and international humanitarian law.[5] Referral of the situation in the DRC

[1] *Notification Investigation Uganda*. Parts of this chapter also feature in Nouwen and Werner 2010a, Nouwen 2011, Nouwen 2012b and Nouwen 2014a, forthcoming.
[2] Interview with a Ugandan official involved in the referral, Kampala, October 2008.
[3] ICC-OTP 2003e:4.
[4] In *Armed Activities (DRC* v. *Uganda)*:[207] (see also [211] and [250]), the ICJ would later establish that the Ugandan armed forces had committed 'massive human rights violations and grave breaches of international humanitarian law' on the territory of the DRC.
[5] African Commission on Human and Peoples' Rights, *Democratic Republic of Congo* v. *Burundi, Rwanda and Uganda*.

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to the ICC would trigger the jurisdiction of yet another international court that could establish the involvement of Ugandan state actors in war crimes in eastern DRC.[6] Rather than referring the situation in the DRC to the Court, Ugandan President Museveni wrote to the United Nations Secretary-General expressing his concern that an investigation into the conflict in the DRC would threaten the Congolese peace process.[7]

However, some of Uganda's foreign lawyers involved in the case before the ICJ, advised by colleagues working in international criminal justice, suggested to both the Government of Uganda (GoU) and the ICC's Office of the Prosecutor (OTP) that Uganda had a situation on *its own territory* that would be ideal for the ICC.[8] The OTP welcomed the idea.[9] So did the Ugandan Minister of Defence, Amama

[6] In its first judgment on the guilt of an accused, the ICC would mention in passing that Uganda had for some years supported defendant Thomas Lubanga in training child soldiers (*Judgment Lubanga (TC)* [1027]–[1037]).

[7] Letter from President Yoweri Katuga Museveni to H. E. Kofi Annan, Secretary-General of the UN, Re: Integration of Ituri Armed Groups, 3 July 2004, reported in: Human Rights Watch 2005a:117. See also, four years later, a letter from the Government of Uganda to the UN Sanctions Committee on the DRC, advising the Committee not to take any action upon the recommendation made by the Group of Experts to urge the DRC authorities to remove (ICC suspect) Bosco Ntaganda from his position of deputy commander of a specific operation of the national army. (UN Doc. S/AC.43/2009/COMM.64 (2009); thanks to Eric Witte for sharing this document).

[8] Interview with Minister of Internal Security (Minister of Defence at the time of the referral) Amama Mbabazi, Kampala, October 2008; interview with an international lawyer involved in the referral, The Hague, June 2008; phone interview with a former ICC official, June 2008 and email exchange with an international lawyer involved in the referral, July 2008. See also Schiff 2008:198. The idea of the ICC's investigating the situation in northern Uganda was not entirely new. Even before the entry into force of the Rome Statute, organisations such as UNICEF had suggested northern Uganda as a good case for the ICC (Allen 2006:82–3).

[9] Colleague Phil Clark goes further, arguing that 'for nearly a year before President Museveni referred the situation in Uganda to the ICC Prosecutor, there were substantial negotiations between The Hague and Kampala over the nature and ramifications of a state referral' and suggesting that 'Prosecutor Moreno-Ocampo approached President Museveni in 2003 and, despite the President's initial reluctance, persuaded him to refer the northern Uganda situation to the ICC' (Clark 2011:1198–9, referring to Clark 2008 and Clark 2009). Illustrating the difficulties of one type of empirical research, Clark cites interviews for his views, while the Ugandan officials and lawyers involved in the referral whom I interviewed explicitly denied that there was any such discussion between the ICC and Ugandan

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Mbabazi,[10] one of President Museveni's closest advisors.[11] Subsequently, a foreign international lawyer drafted, the Ugandan Attorney-General signed and the Ugandan official, once arrived at the ICC in The Hague, submitted a letter referring the 'Situation concerning the Lord's Resistance Army' to the ICC.[12]

The referral was the wedding ring in an arranged marriage of convenience between Uganda and the ICC. Little catalysing effect was thus to be expected on the part of complementarity, a principle that allowed Uganda to obstruct the ICC's exercise of jurisdiction. Indeed, on the face of it, Uganda's history with the ICC shows the opposite of a catalysing effect on domestic proceedings. Rather than

officials prior to the referral. So did interviewed ICC officials. Whereas there may have been informal consultations between Ugandan and OTP officials, my data indicate that the initiative was not with the ICC Prosecutor but with Uganda's foreign lawyers. Moreover, it is questionable that the 'nature and ramifications' of the referral as such were discussed between Uganda and the OTP *prior to* the referral in December 2003. Only in 2008 did Prosecutor Ocampo begin to mention Uganda as an invited self-referral, whereas with respect to the DRC he had done so explicitly from the outset (Moreno-Ocampo 2008c). The correspondence between the ICC and Uganda that Clark cites in Clark 2011:1199 (reported in Izama 2008) dates from *after* the referral; it is uncontested that such discussions occurred after the referral. It can be argued that, precisely because the referral letter had been drafted by Uganda's foreign lawyers prior to substantive discussions on the 'nature and ramifications' of the referral, there was a lot to clarify in discussions between the GoU and the OTP after the referral, most importantly the fact that, despite Uganda's referral of the 'LRA', the OTP would be able to investigate all sides to the conflict in northern Uganda. Indeed, it is noteworthy that, in contrast to all other referral letters, the OTP has not made Uganda's letter public, perhaps because the letter clearly shows the GoU's intention that only the LRA would be prosecuted and because the GoU seems to deny in the letter that there is an armed conflict in northern Uganda. Possibly because of this experience, the OTP was in fact involved in the drafting of the letter by which the DRC referred the situation on its territory to the Court (interview with an ICC official involved in the drafting, The Hague, June 2008). With respect to the LRA referral, more evidence is needed to tell what was discussed prior to the referral.

[10] Interview with Amama Mbabazi, Kampala, October 2008.

[11] Amama Mbabazi is also referred to as the 'Super Minister' on account of the fact that he has held many important positions in the government (Minister of Defence, Minister of Security, Prime Minister, Attorney-General, sometimes at the same time) and positions in the National Resistance Movement (Chairman of the Delegates Caucus, Secretary-General).

[12] Uganda 2003:[1]. Thanks to Adam Branch, who received the letter at a workshop on the ICC in Kampala in 2004 (see Branch 2011:276), for sharing this document.

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trying to avoid ICC intervention through the conduct of domestic investigations and prosecutions, the GoU invited the ICC into Uganda by referring a situation on its territory to the Court. Rather than considering ICC intervention as costly to its sovereignty and reputation, the GoU expected, and obtained, dividends from the intervention.

And yet, complementarity did have a catalysing effect in Uganda, especially when the marriage began to show cracks.

THE CONTEXT FOR CATALYSIS

Before turning to the effects that complementarity catalysed in Uganda, we must understand the dynamics of the context in which they took place. One key dynamic is that of the relationship between the GoU and the ICC. As this section will elaborate, the referral launched a joint enterprise based on a convergence of ICC and GoU interests. Initially, neither party paid much attention to complementarity; scrutiny of admissibility could only threaten the partnership. However, the interests of the ICC and the GoU seemed to diverge at the start of the Juba peace process. Whilst itself still committed to ICC involvement, the GoU was under pressure to end this. It was then that complementarity became the linchpin of the talks and agreements. These agreements, in turn, provided the starting point for some important effects of complementarity. Some of these effects continued even when the GoU's and ICC's interests were visibly realigned.

The ICC in Uganda: a joint enterprise

The ICC Prosecutor and the Ugandan President announced the referral of the 'situation concerning the Lord's Resistance Army' at a joint press conference in London on 29 January 2004.[13] In the referral letter – not yet made public by the ICC – the Ugandan Government accused members of the Lord's Resistance Army (LRA) of crimes against humanity. The letter did not mention war crimes, presumably because the GoU believed that such allegations could be read as undermining its argument that 'the LRA does not qualify as a belligerent entitled to the lawful conduct of hostilities'.[14] The letter was equally silent on the possible commission of crimes by the Ugandan

[13] ICC 2004. [14] Uganda 2003:[34].

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People's Defence Forces (UPDF): the GoU referred to the Court the 'situation concerning the Lord's Resistance Army' – not the UPDF.

NGOs, however, were quick to advocate that the ICC should equally investigate the UPDF.[15] The Prosecutor thus informed the Ugandan authorities: 'we must interpret the scope of the referral consistently with the principles of the Rome Statute, and hence we are analyzing crimes within the situation of northern Uganda by whomever committed'.[16] The OTP changed the name of the situation from 'situation concerning the Lord's Resistance Army' into 'situation in northern Uganda'.[17]

Nonetheless, to date, the Prosecutor has opened an investigation and requested warrants of arrest only with respect to the LRA. On 8 July 2005, the Court issued warrants against Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen. The five LRA commanders are alleged to bear individual criminal responsibility for crimes against humanity and war crimes committed in a non-international armed conflict, including rape, murder, enslavement, sexual enslavement and forced enlistment of children.[18] At the time of writing, none of the five warrants has been executed. Two of the five persons are either dead[19] or presumed dead.[20] Concerning further cases against the LRA, the OTP has stated that it will further

[15] Amnesty International 2004b, Human Rights Watch 2004 and International Crisis Group 2004:20.

[16] *Letter from the Chief Prosecutor to the President of the Court Uganda*:4.

[17] The Presidency subsequently assigned to PTC II the situation 'in Uganda'. Geographical names of the situation are misleading with respect to the Court's jurisdiction, since many in the OTP acknowledge that the situation is defined by the scope of the conflict rather than on the basis of fixed geographical boundaries. In this view, the Prosecutor could, without prior PTC authorisation, investigate allegations of crimes committed by Ugandans in neighbouring countries as long as they relate to the conflict with the LRA (in this sense, it is still the 'situation concerning the LRA'). However, all public charges thus far relate to crimes committed in northern Uganda.

[18] *Arrest Warrant Kony*, *Arrest Warrant Otti*, *Arrest Warrant Ongwen*, *Arrest Warrant Odhiambo* and *Arrest Warrant Lukwiya*.

[19] The Chamber terminated proceedings against Raska Lukwiya, having established that he was killed on 12 August 2006 (*Decision to Terminate Proceedings against Lukwiya*) in a fight with the UPDF (*Submission Information Lukwiya*).

[20] The arrest warrant against deputy LRA leader Otti is still effective, even though Kony does not deny having had him executed (*Submission Information Otti* and Egadu and P'Lajur 2008).

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investigate only crimes committed after the request for the arrest warrants for the LRA leadership.[21]

Officially, ICC analysis of information concerning UPDF crimes is ongoing,[22] and the OTP only 'started' with an investigation of LRA members because it believed their crimes were graver.[23] A more convincing legal reason could be that the majority of the UPDF crimes were committed prior to the beginning of the Court's temporal jurisdiction, namely, 1 July 2002.[24] Even with respect to crimes allegedly committed by state actors within the Court's jurisdiction *ratione temporis*, it has become unlikely that the OTP will open an investigation: the OTP has reassigned its investigative staff in Uganda to other situations. The more realist explanation for the ICC's starting with – in fact exclusive focus on – the LRA is that any investigation into UPDF crimes would fall outside the terms of the marriage of convenience between Uganda and the ICC.

Uganda and the ICC: a marriage of convenience

At the time of the referral, both the ICC and the Ugandan Government considered ICC intervention in Uganda in their respective interests.[25] The Ugandan Government perceived the referral of the LRA to the ICC as a new means to obtain international support in its long-standing conflict with the relentless Ugandan rebel movement.[26] After seventeen years of combat and aborted peace negotiations, the GoU had proven unable either to vanquish or come to a settlement with the LRA. Corruption scandals, the failing military operations,

[21] ICC Prosecutor on radio Mega FM, transcript in an email dated 8 December 2005.

[22] *OTP Submission Status Conference Uganda*, Moreno-Ocampo 2007a:4 and Musoke and Oluput 2010.

[23] See Chapter 2, 'Looking for a catalysing effect: the potentially confounding and intervening variables'.

[24] According to RS, art. 11(1), the ICC has jurisdiction only with respect to crimes committed after the entry into force of the Statute, 1 July 2002. Uganda, which ratified the Statute on 14 June 2002, extended the Court's temporal jurisdiction from 1 September 2002 back to 1 July 2002 by lodging a declaration pursuant to RS, arts. 11(2) and 12(3), accepting the Court's jurisdiction as of the Statute's date of entry into force. (The GoU's 'declaration on temporal jurisdiction', dated 27 February 2004, is referred to in *Arrest Warrant Kony*:[32].)

[25] Parts of this section also appear in Nouwen and Werner 2010a and Nouwen and Werner 2011, in which the developments are assessed through the theoretical prism of the politics of international criminal justice.

[26] See also Refugee Law Project 2004.

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their disastrous humanitarian consequences and the UN's classification of northern Uganda as the 'world's biggest neglected crisis'[27] were beginning to tarnish the government's reputation. Riots in the streets of Kampala arising from prosecutions of the government's political opponents aggravated the image problem for what had been a donor-darling government. After several years of rewarding Uganda for being Africa's leading 'post-conflict' success story,[28] international donors, funding between 35 and 50 per cent of Uganda's budget,[29] added their voice to local leaders' criticism of the government's failure to resolve the conflict in the north and to calls to end the government's human rights violations in combating the LRA.[30] Pressure for a peaceful solution was building.

For the Ugandan Government, asking the ICC to investigate and prosecute the LRA was a way to counter that pressure. The referral had the potential to worsen the image of the LRA and to improve that of the GoU, to delegitimise any suggestion of peace talks and to rally international support for continuation and intensification of the executive's preferred military approach. Following the GoU's previous attempts to brand the LRA as irrational, religious fundamentalists or terrorists, the ICC could brand the LRA as internationally wanted 'criminals'. The ICC could transform the LRA from enemies of the Ugandan Government into enemies of the international community as a whole.[31] ICC supporters would then no longer treat the LRA and the government as equal warmongers, but would view President Museveni's administration as a legitimate government

[27] 'Northern Uganda "world's biggest neglected crisis"' 2004. See also Egeland 2008:201.

[28] See Hauser 1999:632–4, Perrot 2005:3 and Mwenda 2007.

[29] The figure depends on the way in which the budget is composed. See also Tripp 2010:186 and Perrot 2005:6.

[30] See, *inter alia*, Lomo 2004:3–4.

[31] See, for example, President Museveni's address on the state of the nation in June 2005: 'The International Criminal Court is a good ally because it makes Kony untouchable as long as it has got indictment; anybody who touches him will have problems with the International Criminal Court, therefore, that is the advantage ... Like for instance, if Kony goes in the part of Sudan which is far away from where we operate and there is an indictment, they will be under pressure to follow him, but if there is no pressure, then he will be free. They wouldn't be as pressurised as when there is an ICC indictment' (Uganda 2005b). See also Museveni 2010:1–2, equating the fight against impunity with the just war theory.

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fighting a criminal movement. The referral would thus recharacterise the GoU, the first government to refer a situation to the ICC, as an ally of the ICC, a champion of international criminal justice and a friend of mankind.[32] Linking the arrest of the LRA leadership to the credibility of the ICC,[33] European governments – staunch ICC supporters – would replace their criticism of UPDF abuses and of the GoU's failure to ameliorate the humanitarian situation in the north with renewed support for the UPDF's operations against the LRA 'criminals'.[34] Finally, a referral of the situation concerning the LRA had the additional potential benefit that it would make the ICC's Prosecutor dependent on the cooperation of the Ugandan Government; and the OTP might hesitate to jeopardise such cooperation by charging UPDF officials with crimes committed in neighbouring DRC.

The referral also suited the OTP. The Rome Statute had obtained the sixty ratifications required for its entry into force in a surprisingly short period, and the Court's supporters expected the ICC to prove its right to exist. This was given added urgency by the open hostility of the US.[35] Fearing for the Court's survival, its newly appointed staff felt pressure to select for the first investigations situations that would, at the least, reassure doubting states that the Court was not driven by a prosecutor zealously using *proprio motu* powers and, ideally, convince them of the Court's usefulness.[36] 'For the ICC', according to one international lawyer advising the Ugandan Government, 'the voluntary referral of a compelling case by a state party represented both an early expression of confidence in the

[32] See e.g. the Minister of State for Defence, explaining to the Ugandan Parliament: 'When you are fighting and you are engaged in something, you should know who your allies are. The ICC is an ally to Uganda. Uganda approached them when we had a problem. The LRA were outside our jurisdiction so we could not handle them. We approached the ICC. They responded and indicted these leaders' (Uganda 2006c). See also President Museveni's reference to the ICC as his 'allies' in his address on the state of the nation (Uganda 2006a).

[33] See also Akhavan 2005:404.

[34] See also Branch 2007 and Branch 2004.

[35] Discussion with a former ICC staff member, The Hague, May 2008: 'The US had more money available to destroy the ICC than we had for the ICC's start-up budget.'

[36] On the need for a cautious approach if the Court wished to gain the confidence of states not parties to the Statute, see also Cryer 2009:121 *et seq.*

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nascent institution's mandate and a welcome opportunity to demonstrate its viability.'[37]

For the OTP, a self-referral had at least three potential advantages.[38] First, fears of the ICC's trampling on state sovereignty could be calmed. As Uganda had referred the situation itself, neither the Ugandan Government nor any other state could reasonably argue that the Court disrespected state sovereignty. Secondly, a self-referral could ease the Court's greatest handicap, namely, its total dependence on state cooperation for acts ranging from issuing visas for its investigators to executing its warrants of arrest. In its letter referring the situation to the ICC, the GoU had pledged 'full cooperation', at least with respect to 'the investigation and prosecution of *LRA* crimes'.[39] Finally, in case of a referral, as opposed to when using his *proprio motu* powers, the Prosecutor need not ask the Pre-Trial Chamber (PTC) for authorisation to open an investigation.[40]

But it was not just the self-referral that made the situation in Uganda attractive for the OTP. In an OTP official's words, Uganda was 'a perfect case for [the OTP's] first ... investigation'.[41] First, the OTP expected an investigation in Uganda to be relatively easy. *Vis-à-vis* situations already under preliminary analysis, for instance the DRC and the Central African Republic (CAR), the situation in Uganda concerned fewer parties, involved a smaller territory and lacked the sensitivities of a transitional government.[42] Secondly, the LRA topped the list of internationally ostracised groups – few would come to the defence of an armed band whose leadership has for a long time been stereotyped as a self-styled prophet with his acolytes abducting children and committing other crimes in the name of the Ten Commandments. An investigation of the LRA might even warm the US, officially hostile to any ICC action, towards the Court. The US shared the revulsion towards the LRA, as evidenced by the LRA's appearance on the US international terrorist list, and it had already ensured that Uganda would not hand over any US national to the ICC by concluding a 'bilateral immunity agreement'. Finally, the OTP counted on international cooperation in the arrest of the LRA, even from Sudan. The reasoning was that, in the same way that Uganda had discouraged

[37] Akhavan 2005:404. [38] See also Nouwen and Werner 2010a.
[39] Uganda 2003:4 (emphasis added). [40] Cf. RS, arts. 13(a) with 15(3).
[41] Brubacher 2013, forthcoming:1.
[42] Interview with a former ICC staff member, Amsterdam, June 2009.

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ICC proceedings against the UPDF in the DRC situation by extending cooperation in the LRA case, Sudan would cooperate in the LRA case in order to distract attention from the Sudanese Government's role in Darfur.[43]

There are suggestions, although nothing more than that, that there was another non-legal reason for the OTP to welcome a referral of the situation in Uganda in particular. Most situations under preliminary examination in 2003 were in francophone and civil-law African states. Their orientation rendered the Court particularly dependent on cooperation from France and Belgium. The UK, however, had been one of the staunchest supporters of the Court and, in particular, of the election of the first Prosecutor. The favour could be returned by enhancing the UK's potential influence by opening an investigation in an anglophone, common-law and Commonwealth-oriented state.[44] An investigation in an anglophone state would also go some way in justifying the predominance of English-speaking staff in the OTP, which was in sharp contrast to the Registry that was known as 'little France'. An investigation into a common-law state by anglophone staff could thus influence the outcome of the struggle for dominance between lawyers from a common-law and lawyers from a civil-law background.[45] The Fashoda Incident still reverberates, also in The Hague.

Compromised complementarity

Against this background, the Ugandan Government as well as the ICC (OTP and PTC alike) considered complementarity only as a potential obstacle to a mutually beneficial cooperation. Both explicitly argued that the principle did not block any ICC investigations of the LRA.

The Ugandan referral letter followed the shorthand description of complementarity, dominant in the academic literature at the time, as a test of the willingness and ability of the overall justice system of a state

[43] Prosecutor Moreno-Ocampo reportedly said 'Khartoum will help me because of Darfur' (interview, Kampala, 2008). On Sudan's willingness to cooperate with the ICC in the LRA case, see Allio 2004.

[44] This view was put forward in interviews with three ICC officials (two former, one present). One former official refuted it when asked about it. Another informant confirmed that French officials expressed dissatisfaction with the Ugandan referral since it 'stole the thunder from DRC'.

[45] More generally on this battle during the negotiations of the Rome Statute and of the RPE, see Bitti 2004:273–4.

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with jurisdiction over the alleged acts; the referral letter was written before the case law that emphasises that article 17 first requires an assessment as to whether or not the state has conducted any domestic proceedings in the same case.[46] The GoU argued that, '[h]aving exhausted every other means of bringing an end to this terrible suffering', it 'now turn[ed] to the newly established ICC and its promise of global justice'.[47]It emphasised that the Ugandan judicial system was 'widely recognised as one of the most independent and impartial and competent on the African continent'. There was 'no doubt that Ugandan courts have the capacity to give captured LRA leaders a fair and impartial trial'.[48] Nonetheless, Uganda had referred the situation because

> without international cooperation and assistance, it cannot succeed in arresting the members of the LRA leadership and others most responsible for [crimes against humanity]. Furthermore, Uganda is of the view that the scale and gravity of LRA crimes are such that they are a matter of concern to the international community as a whole. It is thus befitting both from a practical and moral viewpoint to entrust the investigation and prosecution of these crimes to the Prosecutor of the ICC.[49]

With respect to factors relevant to the admissibility assessment, the GoU did not say that it had never conducted any proceedings (the relevant test); nor did it say that it was unwilling to conduct domestic proceedings genuinely. Rather, the GoU argued that it was unable to conduct proceedings (an argument only relevant where domestic proceedings are or have been on foot but have been impeded by other events). But the GoU immediately qualified its 'inability':

> Inability in this instance does not in any way imply the total or substantial collapse of the national judicial system within the purview of Article 17(3), but merely the 'unavailability' of the system, because Uganda is 'unable to obtain the accused' since those most responsible are either sheltered in the Sudan, or in remote regions of Uganda for limited time periods, making arrest and prosecution difficult without international assistance.[50]

In short, Uganda argued the admissibility of cases emerging from the situation concerning the LRA on two grounds: first, its own inability to arrest the LRA leadership; secondly, that the ICC would be the

[46] On the shorthand description and subsequent case law, see Chapter 2, 'The substance of complementarity: the criteria for inadmissibility'.
[47] Uganda 2003:[6]. [48] *Ibid.*:[24]. [49] *Ibid.*:[25]. [50] *Ibid.*:[30].

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most appropriate forum. Only the inability-to-arrest argument is a ground for admissibility recognised in the Rome Statute[51] (even though the ICC, entirely reliant on state cooperation as it is, hardly has a comparative advantage when it comes to arresting suspects).

The OTP, for its part, also argued that complementarity was not an issue, despite its stated adoption of a policy of positive complementarity according to which the OTP would encourage domestic proceedings wherever possible.[52] As the citation opening this chapter illustrates, when notifying states parties of his decision to open an investigation into northern Uganda, the Prosecutor echoed the GoU's reasoning for the referral, stressing that the Ugandan authorities preferred ICC proceedings because of the appropriateness and effectiveness of the ICC.[53] No OTP document addressed the statutorily relevant question of admissibility, namely, whether Uganda had genuinely investigated or prosecuted crimes within the Court's jurisdiction. The OTP never mentioned existing Ugandan arrest warrants for Joseph Kony and other senior LRA members.[54] The sole ground for inability that Uganda had advanced, namely, inability to arrest, was not subject to critical reflection, the ICC's own inability on this front notwithstanding. No attention was paid to the irony that in many other ways, too, for instance with respect to the logistics of the investigations, military intelligence and forensic evidence, the OTP would rely heavily on the services of the 'unable' state. Instead, the OTP asked the Ugandan government for a letter explicitly confirming that it was not conducting domestic proceedings against the LRA, to serve as evidence in the event that one of the future accused were to challenge admissibility.

Some OTP officials recognised that in hindsight complementarity should have been reviewed more thoroughly. But at the time it was not an issue, they argued, because the GoU showed no interest in domestic proceedings.[55] The OTP seems to have reasoned that,

[51] See Chapter 2, 'The substance of complementarity: the criteria for inadmissibility'.
[52] *Ibid.*, 'The policy of positive complementarity'.
[53] *Notification Investigation Uganda*.
[54] The present author found these in the archives of the Buganda Road Court in Kampala. See *Warrants of Arrest for Otti Lagony, Kony Joseph and Matsanga David Nyekorach*. See also *Charge Sheet Otti Lagony, Kony Joseph and Matsanga David (Terrorism)* and *Otti Lagony, Kony Joseph and Matsanga David Nyekorach DPP Withdrawal Form*.
[55] Interviews with a senior OTP official (The Hague, April 2008), another OTP official (The Hague, May 2008) and a former ICC official (The Hague, June 2008).

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because the GoU considered the ICC 'the most appropriate and effective forum', it would abstain from conducting domestic proceedings and from challenging admissibility. The OTP presumed the GoU would not change its policy, glossing over the final sentence of Uganda's referral letter, in which 'in accordance with Articles 17 to 19 of the ICC Statute', it reserved 'the right to make relevant submissions and otherwise participate in the proceedings as to the admissibility or jurisdiction of the ICC'.[56]

When deciding on the issuance of the arrest warrants, the PTC for its part did not scrutinise the admissibility of the LRA cases either. PTC II merely stated with respect to complementarity that, 'based upon the application, the evidence and other information submitted by the Prosecutor, and without prejudice to subsequent determination, the case against [the LRA leaders] . . . appears to be admissible'.[57] In its arrest warrants, as seen from the following extracts, the Chamber repeatedly quoted from a letter which the OTP had requested from Uganda's Solicitor-General to bolster its admissibility arguments:

> 'the Government of Uganda has been unable to arrest . . . persons who may bear the greatest responsibility' for the crimes within the referred situation . . . 'the ICC is the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility' for those crimes; and . . . the Government of Uganda 'has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible'.[58]

The PTC did not engage with the GoU's argument that it was unable to conduct domestic proceedings only because of the LRA's absence from Ugandan territory. Nor did the PTC dismiss the (for admissibility irrelevant) assertions of the ICC's being 'the most appropriate and effective forum'. By highlighting Uganda's submissions that it neither had conducted nor intended to conduct domestic proceedings, PTC II seems to establish admissibility on grounds of domestic inaction. The cited sources suggest that the PTC, in arriving at this finding, relied only on the letters submitted by the Ugandan government. There is no indication of any investigation into past or existing Ugandan proceedings against the LRA. The PTC seems to have assumed that these were absent, and would remain absent.

[56] Uganda 2003:[44]. [57] *Decision Arrest Warrants LRA*:2.
[58] *Arrest Warrant Kony*:[37].

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But then, in 2006, the possibility of Ugandan proceedings loomed, and the GoU's and ICC's interests began to diverge. At least, so it seemed. The ICC (the OTP and, even more so, the PTC) wished to maintain its case against the LRA. But the Ugandan government incurred domestic political costs when the ICC proved unable to do what the GoU had involved it for, namely, arrest or in any other way 'neutralise' the LRA leadership.[59] Northern Ugandans blamed the GoU for involving the Court and thereby obstructing a peaceful solution to the conflict. Local and regional demands to resolve one of Africa's longest civil wars by talks rather than trials increased.

The conflict in northern Uganda – and far beyond

In addition to the GoU–ICC relationship, the dynamics of the conflict in which the ICC intervened are key to understanding complementarity's catalysing effect in Uganda. At the surface, the conflict appears an armed struggle between the GoU and a rebel movement. However, mistrust and grievances *vis-à-vis* the GoU on the part of those who have suffered most from the LRA–GoU conflict constitute a deeper layer of conflict. Northern Ugandans are particularly suspicious of the failure of the national army (the UPDF) to protect them, and, against that background, of the absence of ICC proceedings against state officials.

Triggered by the seizure of power by Museveni's National Resistance Movement/Army (NRM/A) in 1986, but rooted in pre-existing tensions and grievances, the conflict between the GoU and northern Ugandan opponents had been ongoing seventeen years at the time of the referral.[60] Over time, dozens of groups resisted Museveni's rule, but most of them sooner or later were defeated, signed an agreement or were otherwise appeased.[61] Joseph Kony, however, continued with his

[59] See also Kakaire 2006: 'In a stinging attack on the United Nations, Museveni said he had been betrayed by the world body, which initiated the establishment of the ICC through the 1998 Treaty of Rome, because UN peacekeeping forces in the Democratic Republic of Congo, DRC – Uganda's eastern neighbour – had either failed or declined to arrest Kony. They had also denied permission to Ugandan forces to cross the border to kill or detain Kony and his followers.'

[60] See, more extensively on the conflict in northern Uganda, the sources mentioned in the references of this section and, *inter plurima alia*, Allen and Vlassenroot 2010b, Branch 2011, Dolan 2011, Finnström 2008, Behrend 1999 and Doom and Vlassenroot 1999.

[61] Lomo and Hovil 2004:4.

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Lord's Resistance Army (as it was renamed in 1993), combining the military experience of remnants of the previous national armed forces with the spiritual drive of Alice Auma's defeated Holy Spirit Movement.[62] Kony claimed to be Alice's cousin and, like Alice, to be possessed by spirits that order him 'to kill evil', including the government and its supporters. Kony's own Acholi community has suffered the brunt of the conflict,[63] accused by the LRA of cooperating with Museveni's rule[64] and punished with indiscriminate killings, torture, mutilation, looting, arson, enslavement and forced recruitment.[65]

However, the conflict in northern Uganda is more complex than is suggested by the dominant caricature of an irrational movement whose only agenda is its own survival by the gun.[66] First, there are indications that the LRA does have a political agenda, albeit not communicated in conventional ways.[67] Secondly, even if not best represented by the LRA, the Acholi have political grievances that are shared by other northern groups. The origins of such discontent go back to pre-independence, when the British colonisers exploited tensions between northerners and southerners. Since its independence, Uganda has seen violent inter-ethnic struggle for power in the national government. A change in power was often followed by reprisals against the ethnic groups associated with the predecessor regime. It was in this light that many northerners interpreted harsh operations against possible rebels in northern Uganda by Museveni's National Resistance Army (in 1996 renamed UPDF), shortly after he

[62] On this movement, see Allen 1991.

[63] Areas other than the Acholi region have also been subjected to LRA violence, particularly (in Uganda) Lango and Teso, and (outside Uganda) in southern Sudan, eastern DRC and eastern CAR.

[64] On the LRA's distinction between an 'external' and 'internal' enemy, see Branch 2010:40–2.

[65] See OHCHR 2007:*passim* and Human Rights Watch 2005b:15–24.

[66] For an example of how Western media accounts use such stereotypes, see Farmar 2006. On the disgrace of that account, see Schomerus 2010a, Schomerus 2010b and Finnström 2010. See Titeca 2010:59 *et seq.* for a more general critical account of the 'often ethnocentric descriptions of religion and spirituality [that] give exoticizing and isolated reports which do not take into account the wider political, social and economic context, representing the LRA's activities as radically irrational and as such neglecting, for example, how a spiritual discourse [and acts of terrorism] can act as a medium through which other grievances can be framed'.

[67] For some LRA demands aimed at ending the economic and political marginalisation of the north, see Nyeko and Lucima 2002. See also Finnström 2008 and Finnström 2010.

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had militarily defeated a president from the north. The fact that in those operations many civilians were robbed of their livelihoods confirmed their fear that southerners, who had suffered under previous northern presidents, were now after northerners.

The war between the government and the LRA subsequently exacerbated the northern population's resentment towards Museveni's administration.[68] If the risk of abduction by the LRA had not yet done so,[69] the GoU's encampment policy drove the Acholi off their land.[70] Anyone found outside the camps would be considered a rebel and killed, the Acholi were told.[71] At the conflict's peak, 1.84 million people[72] (90–95 per cent of the population in the three Acholi districts)[73] lived in camps for internally displaced persons in 'appalling' humanitarian circumstances.[74] More people died because of the encampment than from direct attacks by the belligerent parties.[75] The UPDF sometimes used the displaced as human shields, rendering the so-called 'protected camps' in fact 'pick-up centres' for LRA abduction raids.[76] Torture and killing became other risks of UPDF presence.[77]

Many northerners bitterly observe that the government has sent the UPDF on missions to promote peace throughout Africa, but did the opposite in northern Uganda.[78] They see the government's failure to address the situation as evidence of a policy to keep the north underdeveloped, steal land, ruin the local culture and socially disintegrate the Acholi.[79] In the words of one famous Acholi, ending with a

[68] Lomo and Hovil 2004:1 and 23 *et seq*. See also Dolan 2005.
[69] The numbers of abducted persons and the percentage of children are disputed. See Allen 2006:63–4. On the lives of (formerly) abducted persons, see Amone-P'Olak 2007.
[70] See OHCHR 2007:7, 12–17, 35 and 39. See also Human Rights Watch 2005b:4, 17 and 24–37. On the difficulties of reclaiming that land, see Okot *et al*. 2012.
[71] Branch 2008:154. [72] UNHCR 2012.
[73] This figure does not include those who have taken flight in major urban centres such as Kampala, whose numbers remain uncounted. See Refugee Law Project 2007.
[74] Commission on Human Rights 2001:13.
[75] At one stage, about 1,000 people a week died on account of the conditions ('Uganda: 1,000 displaced die every week in war-torn north – report' 2005).
[76] See Nyakairu 2008a, Commission on Human Rights 2001:13 and Human Rights Watch 2005b:24 and 70.
[77] See, *inter alia*, Human Rights Committee 2004:[17] and Human Rights Watch 2003.
[78] See OHCHR 2007:24, see also 16 and 26. [79] See e.g. Otunnu 2006a.

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quotation from a Catholic missionary priest in the region: 'under the cover of the war against these outlaws [the LRA], an entire society, the Acholi people, has been moved to concentration camps and is being systematically destroyed – physically, culturally, and economically . . . "Everything Acholi is dying."'[80]

Even if they did not intend to target the Acholi, political and military elites reaped such benefits from the conflict in northern Uganda that they had little incentive to secure a military victory.[81] First, the conflict secured an income for the bedrock of Museveni's rule: the army.[82] It provided a justification for a disproportionally high defence budget and an opportunity to supplement salaries with the fruits of plunder, commerce and creative administration. UPDF soldiers looted harvest and cattle. Others made money out of procurement and arms trade, including with the LRA. Commanders could multiply their salary by not reporting casualties of combat or HIV/AIDS and collecting the income of those whose lives continued on the payroll only. At one stage, over half of the UPDF division operating in the north consisted of such 'ghost soldiers'.[83]

Secondly, the seemingly inexplicable cruelty meted out by Joseph Kony, even on his 'own' people, gave Museveni one of his core arguments for maintaining the support of his mostly southern constituency: any alternative party, particularly those with supporters in the north, would bring back the violence from the days of the 'northern' Idi Amin and Milton Obote.[84] Thirdly, the war offered an excuse for the use of repressive methods against opposition – political opponents, including a presidential runner-up, were imprisoned on charges of collaborating with LRA 'terrorists'. Last but not least, the presence of a local 'war on terror' provided a bonding experience with, and grounds for support from, the world's only superpower.

[80] Otunnu 2006b.

[81] See, *inter alia*, Tripp 2010:169–71, Dolan 2011:Chapter 4, Allen and Vlassenroot 2010a:12 and Mwenda 2010.

[82] See also Tripp 2010:52: 'From the outset of Museveni's government, the army was seen as the core of the state; the NRM was merely its political wing.'

[83] See Nyakairu 2008a.

[84] See a poster of Museveni's election campaign, reproduced and discussed in Atkinson 2010b:293–4, showing a field of skulls and bones and reading: 'Think. Don't forget the past: Over one million Ugandans, our brothers, sisters, family and friends lost their lives. Your Vote Could Bring it Back: in ten years under Museveni, peace and development has come to our country. Let's keep it. Vote Museveni.'

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Against this background, it comes as no surprise that attempts over the years to end the conflict through negotiations have been equivocal. President Museveni has always favoured a military end to the LRA problem.[85] Refusing to recognise the LRA as a movement with political motives, he kept the conflict off Parliament's agenda for eleven years. However, showing goodwill to people from the north who criticised the failing military approach, he occasionally allowed others to pursue alternative tracks to peace.

For example, in 1994 Betty Bigombe, then Ugandan Minister for the Pacification of the North and herself from northern Uganda, managed to agree a ceasefire with the LRA.[86] But, when the LRA did not unconditionally surrender, Museveni laid down the ultimatum that, if the LRA did not abandon the armed struggle within seven days, his army would destroy them. The fighting resumed. The LRA moved its base to southern Sudan, where it received military support from the Government of Sudan (GoS) in exchange for joint operations against the Sudan's People Liberation Army, which for its part was backed by the GoU. Attacks on civilians in northern Uganda continued.

In December 1999, proponents of peace talks won an important battle when, after years of lobbying by religious leaders from northern Uganda,[87] Parliament adopted an Amnesty Act offering pardon to all Ugandans formerly or currently engaged in acts of rebellion against the Ugandan Government since 1986.[88] Parliament did not accept the President's proposal to exclude certain groups of people from the amnesty.[89] Kony, however, rejected the amnesty, since the offer of non-prosecution alone did not meet the LRA's demands and implied defeat.[90]

[85] 'Uganda: interview with President Yoweri Museveni' 2005 ('There are those who believe in the magic of the peace talks – which I do not believe in. However, I do not want to be obstructive to those who wish to pursue this avenue – if you believe that you can convince evil to stop being evil, go ahead. But in the meantime, I do not want to give up my option [the military option]. That is why we have a dual track.').

[86] Agreement between the Uganda Government and the Lord's Resistance Army 1994.

[87] See Khadiagala 2001:8, Otim 2009 and Apuuli 2011.

[88] See this chapter below, 'Discouraging amnesties'.

[89] See the extensive parliamentary debate on the Bill in Uganda 1999a and Uganda 1999b.

[90] See also Khadiagala 2001:15.

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Meanwhile, a simultaneous improvement in GoU–GoS relations increased the hopes of hardliners in the GoU for a military solution. When in 2002 the GoS allowed the UPDF to fight the LRA in southern Sudan, the GoU launched 'Operation Iron Fist' to pursue this aim. However, the rebels moved back to northern Uganda 'like a swarm of bees'[91] and spread the conflict to the Ugandan regions of Lango and Teso.

It was in this context of failed attempts to defeat the LRA militarily or in peace talks that the Ugandan government referred the situation concerning the LRA to the ICC. But the Court's involvement did not herald the end of the military option.

Peace-making in the shadow of the ICC

The ICC's involvement initially gave an impetus to the military approach to addressing the conflict with the LRA. Immediately after the referral, the UPDF made a new attempt to defeat the LRA. It failed. The option of peace talks featured again when the GoU unilaterally declared a ceasefire and Betty Bigombe renewed mediation initiatives. At that point, in late 2004, the ICC had not yet issued arrest warrants, but the LRA leadership was apprehensive about the Court and insisted on guarantees for its security.[92] The ICC's involvement notwithstanding, President Museveni repeated the offer of amnesty to the LRA leaders.[93] He assumed that the Ugandan government, having itself referred the situation, could also 'withdraw' the referral of the situation to the ICC, 'like a plaintiff can withdraw the civil case he brought in court'.[94] Options were explored to find the LRA leadership asylum in a state not party to the Rome Statute.[95] But, in early 2005, when two high-level LRA commanders defected and the government resumed military operations, the talks collapsed.

But then, in July 2006, peace negotiations began in the city of Juba, the capital of the new semi-autonomous region of Southern Sudan, that were different from previous talks between the LRA and the GoU: for the first time, a representative of a foreign state conducted

[91] Interview with Rt Rev. Baker Ochola II, Kitgum, September 2008.
[92] Interview with a person involved in the mediation, Kampala, September 2008. For an account of the LRA's concerns about the ICC in 2005, see Schomerus 2010b:96.
[93] Interview with a person involved in the Bigombe mediation, February 2009.
[94] *Ibid.* [95] *Ibid.*

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the mediation, the GoU and the LRA agreed upon a broad substantive agenda, hostilities ceased and the parties concluded several agreements.[96] The talks have been widely considered the most promising chance for peace in northern Uganda.[97]

The beginning of the Juba peace talks not long after the publication of the ICC arrest warrants has often been cited as evidence for the claim that criminal justice can enhance peace negotiations.[98] However, there were more decisive reasons for the LRA to be interested in talks than the ICC arrest warrants.[99] The LRA had lost military support since the rapprochement between the GoU and the GoS. After the conclusion of the Comprehensive Peace Agreement (CPA) between the GoS and the Sudan People's Liberation Movement/Army (SPLM/A) it risked losing a core military asset: territorial sanctuary.[100] The CPA granted the newly formed Government of Southern Sudan (GoSS) considerable autonomy, including the right to have its own army (the SPLA), and obliged the Sudanese Armed Forces to withdraw from Southern Sudan. Faced with a few thousand LRA combatants and twice that number of UPDF soldiers on Southern Sudanese territory,[101] over and above the security risk created by southern militias allegedly supported by the Sudanese Armed Forces at the northern border, the GoSS gave the LRA three options:

[96] For captivating accounts of the Juba peace talks, see Atkinson 2010a and Atkinson 2010b:Afterword.

[97] See, *inter alia*, O'Brien 2007:2 and Atkinson 2010b:308.

[98] See e.g. *OTP Submission Information Status LRA Arrest Warrants*:6 (citing the GoU) and ICC official Brubacher 2010:277.

[99] Atkinson's correction of the dominant literature on the relationship between the peace talks and the arrest warrants is worthy of full citation: 'The role of the GoSS in getting the LRA/M into peace talks . . . seems crucial, far more so than one of the most common alternative arguments: that the top rebel leaders feared [ICC] warrants issued against them in October 2005, and saw peace talks as a means to postpone or avoid arrest. This latter view has been put forth by the Court itself, and seems to have become part of accepted wisdom, repeated over and over again in the media, numerous reports, and public comments from a wider range of people in and outside Uganda. Although the ICC warrants surfaced as an issue for the LRA/M during the talks – and in the end became perhaps the main obstacle that derailed the talks – there is no evidence the warrants were a major factor in the rebels' decision to enter talks.' (Atkinson 2010b:308–9, footnote omitted). See also Atkinson 2010a:211–12 for a nuanced assessment of the LRA's interests in the talks. More elaborately on the ICC's impact on peace negotiations in Uganda and Sudan, see Nouwen 2012a and Nouwen 2012c.

[100] Mwenda 2010:57.

[101] See Atkinson 2010b:308.

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leave Southern Sudan; negotiate; or be defeated by the SPLA. The LRA opted for negotiations.

The true accomplishment of the GoSS was to convince the GoU to commit to third-party-led negotiations. In the twenty years of conflict with the LRA, the GoU had always controlled the peace initiatives. Due to the GoU's unwillingness to recognise the LRA as a negotiating partner, such initiatives were in fact more opportunities for a submissive surrender, implying one side's victory and the other's defeat, than negotiations in which two parties would make concessions. Without any external actor monitoring the process, the GoU could set its ultimatums and go back to war at its sole discretion.

The involvement of the ICC had initially made the GoU less, rather than more, interested in the option of a negotiated settlement: with the community of ICC states parties and the war-on-terror coalition on its side, it had increased hopes of militarily defeating the LRA. But when it became apparent that the ICC arrest warrants as such did not increase the likelihood of arrest, when international pressure on the GoU to improve the humanitarian situation in northern Uganda increased, and when Salva Kiir, President of Southern Sudan and the leader of the SPLM, Museveni's long-standing ally against the GoS, personally visited Kampala and set out the GoSS's interest in the talks, President Museveni, despite contrary indications a few weeks earlier, consented to the first internationally mediated talks between the GoU and the LRA. For President Museveni, this concession was worthy of a justification in his 2006 address on the state of the nation:

> Although their ringleaders are indicted by the International Criminal Court, and our view is that these criminals should be hunted to the bitter end in order to provide a lesson for the people who may be inclined to behave in a similar way in [the] future[,] I agreed with His Excellency Salva Kiir's proposal for two reasons . . .
>
> First of all, it is clear that we have no reliable partners, as far as fighting terrorism is concerned, in the Democratic Republic of Congo Government and the United Nations who are now in charge of Eastern Congo; those two parties are not serious. The UN always excels in superficiality, their protestation to the contrary notwithstanding. If you want superficiality the best place to go is the United Nations.
>
> Secondly, the UPDF has defeated Kony in both Northern Uganda and Southern Sudan. Kony did not go to Garamba for tourism . . . we defeated Kony. Kony is now in the part of Congo that has no borders

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> with Uganda. We are making contingent plans to react vigorously in case Kony comes to the part of Congo that has got a border with Uganda . . .
>
> As of now, however, where Kony is located is more a problem of Southern Sudan and Congo than ours. Our forces are in Southern Sudan just to help our brothers the SPLA but Kony as of now is not our problem . . . The remnants, which are still there, we are picking them. Even today we were hunting the group of Lasco Lukwiya near Juba–Tolit road, and I am sure we shall get that group, which was trying to join Kony in Congo.
>
> Some people were asking . . . "Has Museveni become a softie? Why is it that he is willing to talk with Kony again?" Even my allies, the International Criminal Court, were doubting my credentials; they thought that I had become a softie. My answer is this . . . it is rational that since Kony now is not in Northern Uganda, he is not in the part of Southern Sudan where we were allowed to operate, he is in Congo, which is under the control of the United Nations and the Congo Government who are not allowing us to go there and he is in the part of Congo, which has no border with Uganda, it is rational that we follow the leadership of the government of Southern Sudan, they should be the ones to lead us. If they say we negotiate, we negotiate because it is their problem now, it is not ours.[102]

It was thus that a Ugandan delegation travelled to Juba to engage in talks with the LRA under the auspices of the GoSS.

The Juba peace talks produced an unparalleled number of substantive agreements between the delegations representing the LRA and the GoU. The first breakthrough came after a month of negotiations, when the Ugandan government and the LRA signed a Cessation of Hostilities Agreement[103] which immediately had a positive impact on security in southern Sudan. The signed agreement also served as the GoU's recognition of the LRA as a negotiating partner. The following one and a half years of on-and-off negotiations in Juba and lengthy stakeholder consultations in Uganda eventually generated agreements between the GoU and the LRA on the five adopted agenda items, as well as on implementation matters.

From the outset of the talks, it was obvious that the agenda item on 'accountability and reconciliation' would be one of the most

[102] Uganda 2006a.

[103] Agreement on Cessation of Hostilities between the Government of the Republic of Uganda and Lord's Resistance Army Movement 2006.

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difficult.[104] The LRA's entry position was that '[n]o rebel w[ould] come out [of the war] unless the ICC revoke[d] the indictments'.[105] By then the GoU realised that it could not simply withdraw the referral[106] and that an amnesty could not undo the ICC's involvement. The closest thing the GoU could offer the LRA was to conduct domestic proceedings so that it would be possible for it or the ICC suspects successfully to challenge admissibility on the basis of articles 17, 19 and 20 of the Rome Statute.[107] Complementarity became the linchpin of the agreement on accountability and reconciliation.

Complementarity: the linchpin of the agreement

The Agreement on Accountability and Reconciliation (the A&R Agreement)[108] and its Annexure[109] (together: the A&R Accords) were never intended merely as the written reflection of a peace deal between two warring parties. They were also a message to all in the international-criminal-justice movement, ranging from the ICC Prosecutor to NGOs and states supportive of the ICC, that the pursuit of peace did not have to come at the expense of justice (understood holistically), and that the way the two parties had agreed to pursue peace and justice was entirely consistent with the Rome Statute. Indeed, the A&R Accords signalled that substituting the ICC with Ugandan alternatives was entirely in accordance with and in the spirit of the Rome Statute's cornerstone principle: complementarity.

It is thus that, in the preamble, the parties to the A&R Agreement, 'conscious of … the need to honour the suffering of victims by

[104] Phone interview with a person involved in the negotiations, May 2008. The interviewee specified: 'It was blatantly obvious from the very first day of the talks that the ICC arrest warrants would be the biggest obstacle.'

[105] Wallis 2006. Pictures of the ICC's detention centre in Scheveningen, provided by the GoU, did not change this position. Interview with a Ugandan government minister, Kampala, October 2008.

[106] Cf. *contra* Bassiouni 2005:194.

[107] See also interview with a government minister, Kampala, October 2008: 'We moulded and developed … domestic facilities [for domestic proceedings] in order for us to reach the peace agreement. This was a compromise, it was a sweetener to soften on our side, because the LRA team doesn't like the ICC. If we offered domestic proceedings, it would be more sellable to them.'

[108] Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement 2007.

[109] Annexure to the Agreement on Accountability and Reconciliation 2008.

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promoting lasting peace *with* justice',[110] express their commitment 'to preventing impunity and promoting redress in accordance with the Constitution and international obligations and recall ... in this connection, the requirements of the Rome Statute of the International Criminal Court (ICC) and in particular the principle of complementarity'.[111] The parties' first substantive commitment is to 'promote *national* legal arrangements ... for ensuring justice and reconciliation with respect to the conflict'.[112] For the purposes of the A&R Agreement, 'accountability mechanisms shall be implemented through the adapted legal framework *in Uganda*'.[113] The phrase 'in Uganda' refers to both the territory and the applicable law, thus ruling out, for the purpose of the A&R Agreement, use of extra-territorial justice mechanisms.[114] The same conclusion flows from the provision that the formal justice processes shall be handled by '[f]ormal courts provided for *under the Constitution*' or 'tribunals established *by law*'.[115] In the Annexure to the A&R Agreement, the parties recall 'their commitment to preventing impunity and promoting redress in accordance with the Constitution and international obligations, and ... the requirements of the Rome Statute of the International Criminal Court (ICC) and in particular the principle of complementarity'.[116] They also express their 'confiden[ce] that the Principal Agreement embodies the necessary principles by which the conflict can be resolved with justice and reconciliation and consistent with national and international aspirations and standards'.[117]

It is in this spirit of complementarity that the A&R Accords set forth a framework based on exclusively national legal arrangements, existing or to be adapted or newly established. As regards 'formal measures', the Annexure provides for the establishment of a 'special division of the High Court of Uganda [(SDHC)] ... to try individuals who are alleged to have committed serious crimes during the conflict'[118] and 'a unit for carrying out investigations and prosecutions in support of trials and other formal proceedings'.[119] Recognising the transitional-justice context in which these formal measures are to operate, and that conflict

[110] Second recital (emphasis added). [111] Third recital.
[112] A&R Agreement, clause 2.1 (emphasis added).
[113] *Ibid.*, clause 4.4 (emphasis added). [114] Afako 2007:8.
[115] A&R Agreement, clauses 6.1 and 6.2, respectively (emphases added).
[116] Annexure, fifth recital. [117] *Ibid.*, sixth recital.
[118] *Ibid.*, clause 7. [119] *Ibid.*, clause 10.

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resolution, truth discovery and reconciliation are difficult to square with the retributive penalties under the extant criminal law, the A&R Agreement also provides that '[l]egislation shall introduce a regime of alternative penalties and sanctions which shall apply and replace existing sanctions'.[120] The intention seems to have been to make trial by the SDHC more palatable a prospect than trial by the ICC.

The plan for dealing with the ICC is apparent in the A&R Agreement's obligations on the GoU,[121] which are specified in the Agreement on Implementation and Monitoring Mechanisms. The GoU shall 'take the necessary steps to establish national mechanisms of accountability and reconciliation', prioritising 'commencing criminal investigations and establishing the special division of the High Court'.[122] In order to allow Uganda to make such preparations without being at the same time under an obligation to execute the arrest warrants and transfer suspects to the ICC,[123] the GoU shall 'request the UN Security Council to adopt a resolution under Chapter VII of the Charter of the United Nations, requesting the International Criminal Court to defer all investigations and prosecutions against the leaders of the Lord's Resistance Army'.[124] The GoU shall also 'give to the ICC a comprehensive report on the Juba Peace Process, the Agreements between the Parties, and the progress on the implementation of the Agreement on Accountability and Reconciliation'.[125] The Agreement does not oblige the GoU to challenge admissibility, but the ICC suspects themselves could do so during or – with higher chances of success[126] – after having been subjected to domestic proceedings.

[120] A&R Agreement, clause 6.3.

[121] *Ibid.*, clauses 14.5 and 14.6. Note that clause 14.10 also obliges the LRA/M 'actively [to] promote the principles of [the] Agreement'. The Agreement encourages voluntary cooperation with accountability and reconciliation mechanisms (see e.g. clause 3.2).

[122] Agreement on Implementation and Monitoring Mechanisms 2008, clause 36.

[123] RS, art. 95, which allows a state to postpone the execution of a cooperation request pending an admissibility challenge, is by itself not enough to deal with the tension between an obligation to arrest and transfer a person to the ICC and the wish to investigate and prosecute the same person domestically. For the obligation to be postponed under art. 95, the admissibility challenge must be pending, whereas for this challenge to be successful sufficient progress in concrete investigations must be demonstrated, which requires time.

[124] Agreement on Implementation and Monitoring Mechanisms 2008, clause 37.

[125] *Ibid.*, clause 38.

[126] See Chapter 2, 'Where domestic proceedings have been initiated: unwillingness and inability'.

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The transitional-justice structure agreed upon in the A&R Accords goes beyond formal criminal justice. As regards the 'complementary alternative justice mechanisms', the Annexure provides for a national truth-telling process[127] and gives instructions to the government for the creation of reparations schemes[128] and the identification of roles for traditional-justice mechanisms.[129]

In addition to accountability and reconciliation, the implementation mechanisms and the cessation of hostilities, the delegations of the GoU and LRA reached agreements on comprehensive solutions to the political, social and economic problems in eastern and northern Uganda; disarmament, demobilisation and reintegration; and a permanent ceasefire. Together these agreements constitute the Final Peace Agreement (FPA), to be signed by the leader of the GoU delegation and the leader of the LRA.

The ICC: sword of Damocles

But Joseph Kony refused to sign the FPA. He feared the consequences of compliance with the disarmament agreement for his personal security and did not trust that the GoU would save him from the ICC. According to some northern Ugandans, Kony had reason to be suspicious: there had been an incident in which UPDF soldiers killed a senior member of a movement with whom the GoU had just concluded peace.[130] Kony did not trust the international community either: he himself had read in the papers the news of the transfer of former Liberian President Charles Taylor to the Special Court for Sierra Leone despite a previous grant of asylum by Nigeria.[131] Already in 2006 he had addressed Acholi leaders and UN officials, saying:

> Take the example of Charles Taylor. He was accepting that the only way was to give up and call it quits, Taylor surrendered himself. But what happened to him? He was arraigned and put on trial. If this is the *modus operandi* of the international community you will not get any cooperation. The problem will only get worse.[132]

Similarly questioning the value of national promises in an international judicial market, the late Vincent Otti, at the time Kony's

[127] Annexure, clauses 4–6. [128] *Ibid.*, clauses 16–18. [129] *Ibid.*, clauses 19–22.
[130] See also Finnström 2010:79 and, on the death of Michael Kilama, Lamwaka 2002.
[131] Interview with a member of the Juba talks mediation team, Switzerland, July 2009. See also Schomerus 2010a:113.
[132] Joseph Kony, speech to UN and Acholi leaders in Ri-Kwangba, translation from Acholi, 12 December 2006, as reported in Schomerus forthcoming.

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deputy, observed that Congolese ex-rebel 'Lubanga was arrested after a negotiated settlement but is now being tried in The Hague'.[133]

A catch-22 situation emerged. Kony would not sign 'if the ICC indictments were not dropped',[134] whereas the government was willing to make representations to the Security Council and ICC only once Kony had signed the FPA. If the arrest warrants had driven the LRA to the negotiating table, the ICC's sword thus proved double-edged, the sharpest side being an insurmountable obstacle to trust in the value of any agreement.

When Kony ignored the GoU's ultimatum demanding that he sign the FPA before 30 November 2008, the military approach to resolving the conflict regained the upper hand. The UPDF, nominally in cooperation with the armies of the DRC and the GoSS, launched 'Operation Lightning Thunder' in the DRC. LRA commanders were killed or captured,[135] but not the ones sought by the ICC.[136] The action came at a predictable price: consistent with its known war strategy, the LRA avenged against the soft targets that it sees as supportive of its enemy and killed a thousand or more civilians, abducted hundreds and caused the displacement of up to 200,000 people.[137]

Since Operation Lightning Thunder, the UPDF has continued military operations in the DRC, the CAR and Southern Sudan, sometimes with, sometimes without, the host government's consent, occasionally killing or capturing members of the LRA but also pushing the LRA into new areas. After the collapse of the Juba peace talks, the US openly provided military support to the UPDF's LRA hunt; the EU followed with financial support.[138]

Cracks in the marriage: the opening for complementarity's catalysing effect

During the Juba peace talks, the Ugandan Government publicly toyed with the idea of taking measures to facilitate ending the ICC's

[133] 'Uganda: IDPs unlikely to meet deadline to vacate camps' 2006. See also Otti's observations on Taylor, expressed to the Community of Sant'Egidio, an NGO with contacts with the LRA, as reported in Hume 2006b: 'Otti repeated several times that he does not want to share Charles Taylor's fate.'

[134] Nyakairu 2008b. See also Afako 2009, Iya 2010:181–2, Wasswa 2008, 'Uganda: US accuses LRA of abuses, calls for a quick peaceful solution' 2008 and Wheeler 2008.

[135] Baguma 2009. [136] Eichstaedt 2008. [137] See Atkinson 2010b:320.

[138] Matsiko 2011 and Muwonge 2011.

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involvement. In order to show Ugandans that it still controlled the situation despite having referred it to the ICC, the GoU promised that it would take action domestically and internationally to displace the Court. By signing the Juba Agreement and its Annexure, the GoU committed to providing an alternative to the ICC.

But the GoU never took steps actually to end ICC involvement. It never requested the Security Council to defer the ICC's proceedings. When the PTC *proprio motu* assessed complementarity,[139] the GoU did not argue inadmissibility. Before, during and after the negotiations, it considered the ICC as a useful instrument of pressure on the LRA and did not want this removed until Kony actually signed the FPA and surrendered.[140]

ICC officials, by contrast, were fearful that the peace talks and the outcome could undermine the Court's first case. The Prosecutor, for his part, initially seemed to show an open mind about talks. Just after the referral, he was supportive of the Bigombe mediation and withheld his request for arrest warrants.[141] When the Juba talks started, the OTP emphasised that it was not a party to the negotiations and reminded actors of the obligation to execute the arrest warrants, but did not oppose the talks.[142] But when the parties ultimately agreed on national proceedings, the Prosecutor did not seem willing to give them a chance.[143] The OTP declared that it would 'fight any admissibility challenge in court',[144] apparently irrespective of the genuineness of eventual national proceedings.[145] In another comment that would not have increased Kony's willingness to sign the FPA, the head of the OTP's Jurisdiction, Complementarity and Cooperation Division stated in May 2008:

[139] See below, this section.

[140] Interview with a Ugandan official involved in the implementation of the Juba agreements, Kampala, October 2008: 'We have refused to request the ICC to lift the arrest warrants, as then there would no longer be pressure on the LRA.'

[141] Interview with a person involved in the Bigombe mediation, February 2009. See also 'Court rules out Kony immunity' 2005.

[142] See also UN Doc. S/PV.5525 (2006):4 (Mr Egeland). In *OTP Submission Information Status LRA Arrest Warrants*, the OTP defended Uganda's participation in peace talks instead of executing the arrest warrants before a less lenient PTC.

[143] See also Seils 2011:1001–3.

[144] OTP quoted in Glassborow 2008. See also ICC-OTP 2008b.

[145] See also interview with a Ugandan government minister, Kampala, October 2008: 'We've been in touch with the Prosecutor, but the Prosecutor insists that the case must be handled in The Hague. Our counter-argument is complementarity.'

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> You cannot sign an agreement and tell a criminal that we're going to do [a trial] at a national level … There is no way that anyone can guarantee to Kony that he will not be judged here.[146]

When northern Ugandan leaders, mediators and diplomats were trying to convince Kony to sign the FPA, the Prosecutor set his face against the Juba talks. He implicitly criticised those who had supported the Juba talks, stating that 'Kony [had been] allowed to use the time and the resources of the "Juba talks" to promote his criminal goals'.[147]

The Registrar has equally insisted that the LRA case should remain on the ICC's docket. Ironically, given that one of Uganda's stated reasons for referring the case to the ICC was its own inability to arrest the leadership of the LRA, the Registrar argued that Uganda's failure to execute the ICC warrants for the LRA leadership amounted to a lack of compliance with Uganda's obligation effectively to cooperate with the Court.[148] In her view, the establishment of the SDHC was a positive development if it was for future Ugandan cases, but not if it aimed at the withdrawal of the ICC arrest warrants.[149]

The ICC judges have guarded the Uganda case even more than the other organs of the Court. In a first-time move, the PTC on its own initiative requested the Ugandan government to provide the Chamber 'with detailed information on the implications of the Annexure [to the Agreement on Accountability and Reconciliation] on the execution of the Warrants'.[150] Uganda responded that it had yet to take steps to implement the agreements, but added that the SDHC was 'not meant to supplant the work of the International Criminal Court and accordingly, those individuals who [had been] indicted by the International Criminal Court [would] have to be brought before the special

[146] Ayugi and Eichstaedt 2008.

[147] Moreno-Ocampo 2008a:5–6. See also ICC official Brubacher 2010:275: 'The LRA needed space to finish its regrouping effort. After numerous failed attempts at contacting possible mediators to restart peace talks, the LRA found a willing party in the Government of Southern Sudan.'

[148] Participant observation, Assembly of States Parties, Sixth Resumed Session, New York, 2–6 June 2008, side event for African States. See also the head of the ICC's Jurisdiction, Complementarity and Cooperation Division (JCCD), cited by Ayugi and Eichstaedt 2008: 'When asked who had primary responsibility for Kony's capture, [the head of the JCCD] said, "Uganda has to do it and Uganda has to be leading all the efforts".'

[149] Interview with the ICC Registrar, The Hague, June 2008.

[150] *Request Information Execution Arrest Warrants Kony et al.*

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division of the High Court for trial'.[151] Although potentially the ICC's first story of 'success' as defined in the Prosecutor's inaugural address,[152] the possibility of Ugandan proceedings for persons sought by the ICC did not appeal to the PTC. Not willing to wait until such time as Uganda or one of the accused might decide to lodge an admissibility challenge, the PTC decided on its own volition to initiate proceedings to assess complementarity.[153]

Unsurprisingly, considering the fact that the GoU did not conduct investigations as long as the FPA was still to be signed and the LRA leadership still outside Uganda's jurisdiction, the PTC found that the case remained admissible.[154] In doing so, the PTC pointed out that the GoU's statement on the envisaged role for the SDHC appeared contradictory: 'whilst it is said that the work of the Court, "will not be supplanted" by the establishment of the Special Division, it is also said, that the individuals sought by the Court in the Case "will have to be brought" before this Special Division'.[155] The PTC thus implicitly rejected the idea, promoted by the Prosecutor in speeches outside the Court, of a 'Rome System' based on complementarity in which domestic courts and the ICC together pursue the aim of ending impunity. Instead, it revealed what the admissibility rule in the Rome Statute boils down to: either a domestic court or the ICC may exercise jurisdiction. The decision also highlighted that Uganda's response had relied 'on a number of assumptions which [were] inconsistent both with the system enshrined in the Statute and principles of international law'.[156] Specifying only one such assumption, the PTC reminded Uganda that, 'once the jurisdiction of the Court [has been] triggered, it is for the latter 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'.[157] Whilst staying within the boundaries of the law, the decision did more to discourage than to encourage domestic proceedings.

The apparent crisis in the marriage between the ICC and the GoU was resolved when the peace talks collapsed. The GoU resumed an exclusively military approach to the LRA and no longer seemed to seek an end to the ICC's involvement. The ICC had been more

[151] *Uganda Letter on Execution Arrest Warrants*:3. [152] See Chapter 1, epigraph.
[153] *Decision Proprio Motu Admissibility Assessment LRA*.
[154] *LRA Admissibility Decision (PTC)*. [155] *Ibid*.:[45]. [156] *Ibid*. [157] *Ibid*.

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concerned than the GoU about losing its partner as a result of the peace talks. For the GoU, the ICC's concerns had been much ado about nothing, because it had never intended to challenge admissibility – at most, if Kony had signed, the peace agreement would have allowed the LRA to do so. In the GoU's view, ICC–GoU interests had barely diverged.

That said, the GoU's search for alternatives to the ICC, no matter how short and hypothetical, did allow complementarity to catalyse effects that, once set in motion, appeared untameable.

EFFECTS CATALYSED

Indeed, complementarity has catalysed at least seven effects: it led to the promotion of local alternatives to international criminal justice; it stimulated a debate on transitional justice; it broadened the approach towards the conflict in northern Uganda to include a legal dimension; it stirred the establishment of a Ugandan international crimes division; it increased the attention paid to 'international standards'; it had some influence on the Ugandan International Criminal Court Act; and, eventually, discouraged amnesties. Many of these effects have not been catalysed by complementarity directly, but have been encouraged by norm entrepreneurs.[158] As a result, the effects are often based more on the meaning of complementarity as mediated by these actors than on complementarity as set forth in article 17 of the Statute.

Promoting the study of local justice practices

For a moment, some people in northern Uganda were hopeful when news spread that the ICC would 'intervene': 'The ICC will come and arrest Joseph Kony!' But positions radically shifted when it was discovered that the ICC does not have its own enforcement powers. 'Does the ICC want to use *the UPDF* to arrest people? We are moving from the frying pan to the fire.'[159] People became even more critical of the ICC when it disclosed its arrest warrants for the LRA leadership. As one elder explained:

[158] See Chapter 1, n. 56 and accompanying text.

[159] Interview with an attendant of a workshop on the ICC in northern Uganda in 2004, Kampala, November 2011.

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> If you want to issue arrest warrants, then make sure that Kony is within your reach. If you cannot arrest Kony, then it is the local people that will suffer. This is what [the government's] *Operation Iron Fist* has shown. Arms were cut off, because they had responded to the [government's] call to take up weapons against Kony. Ears were cut off because they had been used for picking up LRA messages for the government. Lips were cut off because they had been used for talking about the LRA to the government.[160]

The ICC's investigations in northern Uganda were also perceived as dangerous. According to one community leader:

> It was really bad. People who collaborated with the ICC could have lost their lives. The LRA tried to kill one camp commander who had cooperated with the ICC. Vincent Otti issued threats. People know who talk with the ICC. If you are a *mzungu* [foreigner[161]] and enter a camp, people know that, even if you keep, as the ICC claims to do, a 'low profile'.[162]

Thus, while longing for comprehensive justice probably more than anyone else, many northern Ugandans were alarmed by the price that they might have to pay for the ICC's intervention.

A second cause of concern was the possible effect of the ICC's intervention on people in LRA captivity – people who were often not just perpetrators of crimes committed against northern Ugandans but also northern Ugandans' abducted relatives.[163] Attempts to execute ICC arrest warrants were expected to be accompanied by military action, a type of action that many northern Ugandans had opposed because it was likely to harm first and foremost the abducted footsoldiers. Instead, they had supported an Amnesty Act, but the ICC arrest warrants undermined the Act and discouraged defections.

A third anxiety was that the arrest warrants painted the LRA leadership into a corner, limited the attractiveness to the LRA of any future peace agreement and thus perpetuated the conflict. As a result, chances of abducted people returning alive would decrease and 'free' northern Ugandans would continue to languish in camps.

[160] Interview, Gulu, September 2008.
[161] Literal meaning: 'someone who roams around aimlessly'. Footnote inserted.
[162] Interview with a community leader, Kampala, November 2011.
[163] See also Ogora 2007:290.

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No prospect on peace meant no prospect on regaining control over land, livelihood and life.

Perceiving the ICC's intervention to undermine their advocacy for a more conciliatory approach towards the LRA, leaders of ethnic groups and clans ('traditional leaders'), religious leaders and community-based civil society organisations in northern Uganda became the voices of northern resistance against the ICC.[164] In addition to raising the above-mentioned primary concerns about the possible negative consequences on peace, these leaders challenged the ICC's notion of justice, employing a diverse set of arguments.

First, by failing to investigate the GoU's conduct in the conflict, the ICC provided 'partial' or 'selective' justice, an injustice in itself.[165] The ICC Prosecutor should equally have investigated crimes allegedly committed by state actors. The GoU's failure to protect civilians in northern Uganda was, in the view of many, as serious as the LRA's actions. There was little justice in a body of law that seemed to classify only Kony's acts as criminal and the GoU's acts as 'mere' human rights violations not involving criminal responsibility.[166]

Secondly, religious and traditional leaders contended that the ICC provided limited justice by focusing on a few top leaders and ignoring the larger group of offenders whom victims must confront in their communities.[167] Those offenders, too, should be subject to a form of justice.

Thirdly, the ICC failed to provide distributive justice. By portraying the conflict in northern Uganda as one between a legitimate government and a criminal organisation, the ICC ignored the political and economic grievances of the Acholi. In the view of the leaders, this

[164] See, *inter plurima alia*, Odongo 2004, Latigo 2006 and 'Uganda: peace groups and government officials worried about ICC probe into LRA' 2004.

[165] *Inter plurima alia*, a focus group on access to justice for conflict-related crimes, Gulu, 18 September 2008; participant observation of the Reflection Workshop on the Juba Peace Talks for Religious and Cultural Leaders, Gulu, 10–12 September 2008; Ochola II 2009:20–1 and Ogola 2010. See also Hovil and Quinn 2005:15. An ICC outreach officer confirmed in an interview in Kampala in November 2011 that '50% of the questions is: why does the ICC do one-sided justice?'

[166] Focus group on access to justice for conflict-related crimes, Gulu, 18 September 2008.

[167] Participant observation of the Reflection Workshop on the Juba Peace Talks for Religious and Cultural Leaders, Gulu, 10–12 September 2008.

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required a political solution but 'political solutions have never been found in a court room'.[168]

Fourthly, community leaders argued that ICC-style justice failed to do justice in the restorative sense, in two ways. First, the ICC was not able to do the type of justice that northern Ugandans needed most urgently: socio-economic recovery. This need went far beyond any reparations that the ICC could hypothetically order a convicted person to pay to victims of the crimes charged. After decades of war, *all* northern Ugandans had a pressing need for return of their land and cattle and access to health care, schooling and infrastructure. Secondly, even in terms of symbolic justice, the ICC was unable to do what was most needed: to restore relationships. Instead of reconciling victim and offender, and their respective clans, criminal justice sets people apart. As a religious leader argued:

> The court system is justice through punishment. The offender and offended are put aside. This leads to polarisation which will lead to death.[169]

Moreover, ICC-style justice was unable to restore the existential relationships between an offender and the spirits of an offended person and between people and their land. As a result, *cen*, the vengeance of the spirit world (particularly of those who suffered from a wrongful death or were not buried correctly) would manifest itself in the form of nightmares, sickness or death and would haunt the entire clan of the wrongdoer, if not in this generation then in the next.[170] ICC-style justice did not redress these violations of the cosmological world. As one leader observed: 'There is a balance in the community that cannot be found in the briefcase of the white man.'[171]

Finally, leaders questioned whether the ICC was able to do what it was best known for: punitive justice. One elder stated:

> If [the LRA leaders] are taken to The Hague, they will be locked up with air conditioning and will live the lifestyle of Ugandan ministers. But they will have to come here and make up with the community. Let them live with the people whose ears they have chopped off. Let them

[168] *Ibid.* [169] Interview with a religious leader, Kitgum, September 2008.
[170] See Liu Institute for Global Issues and Gulu District NGO Forum 2005:12, 72 and 124, Gulu District NGO Forum and Liu Institute for Global Issues 2007:7 and Ochola II 2009:36.
[171] The head of the Gulu-based Human Rights Focus, quoted in Allen 2006:87.

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> see for the rest of their lives what suffering they have caused. That is punishment. In our view, ICC punishment is very light. Let them morally come and confess.[172]

Resisting imposition of international norms and procedures,[173] cultural and religious leaders campaigned for local justice practices.[174] They emphasised that some of these practices focus, like formal criminal justice, on truth and accountability. However, arguing that local justice practices can do what the ICC cannot do, they also juxtaposed the former to the latter: local accountability practices tend to be collective (involving the clans of the perpetrator and victim), to be based on the voluntary participation of perpetrators, and to aim not for punishment of the individual perpetrator but for restoration of relations between the victim's and perpetrator's clans through truth, acknowledgment and compensation. One religious leader explained:

> The court system is justice through punishment after truth. We don't do it like that. Once the truth has been revealed we look for a healing process. We have restorative justice. *Mato oput* [an Acholi justice mechanism] is pro life and holistic.[175]

It was also argued that Acholi elders, unlike ICC judges, were close enough to the spiritual world to appease bad omens by conducting cleansing ceremonies.[176]

[172] Discussion with two Acholi elders, Gulu, September 2008.
[173] On 'imposed justice', see Dolan 2008.
[174] Local justice practices are sometimes also referred to as 'informal', 'alternative' or 'traditional' justice. All these terms are somewhat misleading. 'Informal' is incorrect in that these mechanisms often have formal procedures, albeit not always codified (see Quinn 2006). 'Alternative' suggests that another mechanism is the standard, whereas for many people it is not. Moreover, official and local justice mechanisms are often complementary and not alternative. 'Traditional' may raise the incorrect impression of a static mechanism, whereas local justice mechanisms are alive, contested like other cultural practices and hence dynamic (see also Baines 2007:96 and Harlacher 2006:9–10). Moreover, some scholars have contested that such practices ever 'traditionally' existed in the way that they are now propagated (see Branch 2011:Chapter 5 and Allen 2007). With these caveats, this chapter uses the term 'local justice practices' because it acknowledges their pluriformity, but at times the chapter also refers to 'traditional justice', since the A&R Accords and some Acholi leaders use this term.
[175] Interview with a religious leader, Kitgum, September 2008.
[176] See also Liu Institute for Global Issues and Gulu District NGO Forum 2007b:11.

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Their range and divergence notwithstanding, the arguments against the ICC and in favour of local justice practices shared a central message. As Barney Afako has observed, for most Acholi praise for *mato oput* was simply shorthand for saying: 'Please leave us alone and let us address these problems ourselves.'[177]

The call by traditional leaders for local justice practices in opposition to the ICC must also be seen as part of an older struggle for authority with the Ugandan government and with competitors within Acholi society.[178] In the view of many traditional leaders, the powers of their institution as recognised in the 1995 Constitution fall far short of the political authority that such leaders enjoyed before Uganda's independence, let alone colonialism.[179] Some traditional leaders, and also religious leaders for that matter, expressed a concern that their position would be further undermined by the advance of formal court proceedings with the expansion of the government's authority in northern Uganda. As one leader explained:

> Since the situation has been more peaceful, since 2004, people go more to courts than to traditional justice mechanisms, because they want a quick fix. But they don't think about restoring relationships.[180]

Within Acholi society, traditional leaders have faced competition from other types of leaders that emerged during the conflict. Individuals with purchasing power became more influential than cultural leaders seemingly powerless to address the dire circumstances in the camps. The respect on which their leadership is based crumbled with the leaders' equally having to queue for food or resorting to corruption as a strategy for their own survival. Women became more assertive in

[177] Afako paraphrased in Waddell and Clark 2007:10. See also Allen in Waddell and Clark 2007:27.

[178] On the impetus provided by the ICC, see e.g. Liu Institute for Global Issues and Gulu District NGO Forum 2005:7 ('Following the announcement of the [ICC] Prosecutor … that he would investigate crimes committed since July 2002, members in this loose coalition [Acholi community of traditional and religious leaders, human rights workers, the NGO community and the Liu Institute for Global Issues] recognized the urgency of documenting local traditional justice mechanisms and [analysing] the role cultural leaders were playing or could play in the promotion of justice in the region.').

[179] See Ugandan Constitution 1995, art. 246.

[180] Participant observation of the Reflection Workshop on the Juba Peace Talks for Religious and Cultural Leaders, Gulu, 10–12 September 2008.

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the light of men's inability to cope with camp life,[181] thereby challenging the male monopoly on leadership. Generations of young Acholi grew up in camps where traditional leaders did not have the authority that their title would suggest. Irrespective of whether traditional leaders ever enjoyed the claimed 'traditional' authority and whether their practices are as 'traditional' as they are nowadays branded, attempts to reinvent or invent the practices are thus also attempts to reinvent or invent the position of those who perform them.[182]

An act of resistance against international norms, the rediscovery of the 'traditional' or 'local' has itself also been part of an international movement.[183] In response to the ICC's intervention, international researchers and NGOs working in northern Uganda offered their assistance to traditional and religious leaders in making their case for traditional justice. They documented proceedings on the basis of oral history, emphasised common features with international criminal justice and drew parallels with local justice practices used in other parts of Africa.[184] Formulating a forceful response to the 'globalisation of justice', international traditional-justice advocates have thus themselves been part of processes of what has been called 'glocalisation'.[185] In that process, the transnational traditional-justice movement may have romanticised traditional justice in a way similar to the international-criminal-justice movement's romanticisation of international criminal justice.[186] Traditional-justice

[181] See also Dolan 2003.

[182] See Allen 2006:154–5 and Branch 2011:Chapter 5. Notice in this light the suggestion made by the above-cited leader who worried about formal courts' lack of attention for the restoration of relationships: 'it would be good if traditional and religious leaders help implement court decisions'. Evidently, invention or restoration of authority of some will challenge that of others, in this case mostly women, youth, government officials and democratically elected leaders. See also Clarke 2009:131. For an illustration of youth resentment towards elders, see the excerpt from an interview with Jimmy Otim in Finnström 2006:211.

[183] See also Clarke 2009:xiv–xvi. This movement differs from the international-criminal-justice movement in that it promotes local or 'traditional' mechanisms as opposed to international courts. The movements share, however, a suspicion about the state's capacity to provide justice to communities.

[184] E.g. see the work of the Justice and Reconciliation Project at www.justiceandreconciliation.com.

[185] Tomlinson 1999:69 defines 'glocalisation' as the tendency for the promotion of the legal rights and cultural identities of indigenous peoples to be coordinated by political movements at a global level.

[186] On the 'dangers of eulogisation' of localised processes, see McGregor 2008:59–64.

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advocates have been criticised for downplaying social transformations induced by sustained conflict and the risks of reintroducing a justice system that was the instrument of the colonial power's indirect rule,[187] and for overstating the actual practice of *mato oput* for conflict-related crimes and the forgiving nature of Acholi victims in general.[188] Valid or exaggerated, these criticisms do not deny that local justice practices are accessible and allow those directly affected by the conflict to play a role in the process of obtaining justice, including to dispute any romanticised version of 'traditional justice'.

Taking the promotion of Acholi forms of justice beyond local resistance against an international movement, some of its advocates packaged them as an export product. Rwanda's *gacaca* proceedings provided an inspiring example: these neo-traditional-justice practices had gained world-wide fame as an alternative to formal court proceedings for conflict-related crimes. Studies on Acholi justice practices were also, in the words of a prominent Ugandan bishop, 'a special gift' of the Acholi to 'humanity'.[189] In contrast to most of Uganda's legal profession, the then Principal Judge and chairman of the government's Transitional Justice Working Group, his Lordship James Ogoola, enthusiastically adopted the idea set forth in the A&R Agreement of allowing traditional justice to play a role in connection with the formal justice system:

[187] See Allen 2007:162, arguing that the 'accusation of "neo-colonialism" levelled at the ICC is actually more appropriately directed at those attempting to institutionalise local rituals'.

[188] Allen 2006:76, 132, 135 and 152 has described how traditional and religious leaders backed up by Christian organisations have emphasised the forgiving nature of the Acholi. Various population surveys bear out that many Acholi do want to see some form of accountability, but not if it threatens the prospects for peace or punishes their abducted children (see, *inter alia*, Hovil and Quinn 2005, International Center for Transitional Justice and Human Rights Center 2005, OHCHR 2007 and Human Rights Center and Payson Center for International Development and International Center for Transitional Justice 2007). See also International Crisis Group 2004:23, arguing that the wide diversity of opinions among the Acholi is not always represented by their spokespersons. If peace were achieved, forgiveness in the sense of amnesty would not suffice: the elements of acknowledgment and compensation in the *mato oput* procedure remained essential to those questioned.

[189] Interview with Rt Rev. Baker Ochola II, Kitgum, September 2008.

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> Let us not talk about the extremes, but let us bring Western justice and *mato oput* together. This is an opportunity for Africa to craft something for world jurisprudence.[190]

According to this view, northern Ugandan justice practices could be an internationally respected alternative or supplement to Western punitive justice.[191]

Proponents of local justice practices have had some successes. First, *mato oput* has become part of the national vocabulary. At first known only to Acholi and dismissed by many Ugandan lawyers as an inferior form of justice,[192] local justice practices were discussed in the national parliament, media and formal justice sector as a potential alternative or complement to criminal justice.[193] Leading international media gave attention to ceremonies such as the 'drinking of the bitter root' (*mato oput*) and 'stepping on the egg' (*nyono tong gweno*) as illustrations of ways of dealing with the past other than through courtrooms and prisons.[194]

Secondly, traditional justice attracted donor funding. Foreign development agencies paid for 'traditional' leaders to rediscover their 'traditions' and for the transport and animals required for the ceremonies. The promotion of reconciliation mechanisms had been part of the Amnesty Commission's mandate since its inception,[195] but it was only after the ICC's intervention that it obtained financial resources for doing so from donors.[196] While facilitating the conduct of such

[190] Participant observation of the Reflection Workshop on the Juba Peace Talks for Religious and Cultural Leaders, Gulu, 10–12 September 2008.

[191] See also Ogoola 2010:186: 'For the legal fraternity of the African Region, the issue is deeply fundamental. We are on the threshold of a new jurisprudence – an amalgam of the formal and the informal, the punitive and the reformative justice working in happy tandem – a crossbreed between Africa and Europe – truly, a poignant point where justice meets peace and where justice embraces healing.'

[192] In a similar vein, see Allen 2010:249, warning of the 'danger that the institutionalization of local justice will socially infantilize the whole of the war-affected North if it implies that the people of the region are at an earlier stage of development, and are not ready for modern forms of governance'.

[193] See e.g. Uganda 2006b, Uganda 2006c, Uganda 2007, 'Uganda: interview with President Yoweri Museveni' 2005. Also, explicitly, Principal Judge Ogoola at Reflection Workshop on the Juba Peace Talks for Religious and Cultural Leaders, Gulu, 10–12 September 2008: '*mato oput* is now part of the national vocabulary'.

[194] See e.g. Lacey 2005 and Afako 2006.

[195] Amnesty Act 2000, s. 8(c).

[196] Interview with a staff member of the Amnesty Commission, Kampala, September 2008.

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processes and enhancing the purchasing power of those that perform them, the commercialisation of ceremonies also undermines their meaning and relevance.[197]

Thirdly, local justice practices received a prominent place in the transitional-justice framework of the A&R Accords. According to one person who met with the LRA leadership at the beginning of the Juba talks:

> Mato oput is an element that Kony and Otti talked to us about when we went to Garamba to meet them. They believe that it is the basis on which they can escape the International Criminal Court … indictment and be reconciled with our people.[198]

For its part, the GoU had no objections to recognising practices that are by definition 'local' – it matches the government's depiction of the problem in northern Uganda as an *inter* and *intra* 'tribal' conflict. And thus, '[d]riven by the need for adopting appropriate justice mechanisms, including customary processes of accountability, that would resolve the conflict while promoting reconciliation',[199] the parties to the A&R Agreement agreed that, as a principle of general application:

> Traditional justice mechanisms, such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka* and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation.[200]

The Annexure provides that '[t]raditional justice shall form a central part of the alternative justice and reconciliation framework'[201] and obliges the government to 'examine the practices of traditional justice mechanisms in affected areas, with a view to identifying the most appropriate roles for such mechanisms'.[202] Highlighting the envisaged integration of local justice practices in the larger transitional-justice framework, the Annexure suggests legislation to provide for '[t]he

[197] Interview with a civil society leader from northern Uganda, Kampala, November 2011. See also, critical of these developments, Branch 2010:43 and Branch 2011: Chapter 5 (on 'ethnojustice').
[198] Uganda 2006b. [199] A&R Agreement, fourth recital.
[200] Clause 3.1. [201] Clause 19.
[202] Clause 20. Clause 21 also lists *Okukaraba* in Ankole (which is surprising, since it is in the extreme southwest of the country) (see Quinn 2008:9) and 'communal dispute settlement institutions such as family and clan courts'.

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recognition of traditional and community justice processes in proceedings' of the SDHC.[203] Whilst heeding the 'constitutional duty on the courts of Uganda to promote reconciliation between contesting parties',[204] such integration of local justice practices and formal state procedures would as such be new to the Ugandan legal system.

Gaining in recognition, local justice practices were also pushed to conform to international practices.[205] A first step in this direction was its documentation. As a prominent religious leader explained:

> Our problem is that these things have not been documented. We, Africans, see through the eyes of imagination, through telling stories. Western people see through the eyes of reading. We are now trying to document the *mato oput* justice system so that the world can see it ... We must show the ICC that we can do it on our own.[206]

According to one northern Ugandan author, 'work to codify the process in conformity with acceptable and feasible "Western" standards is already in an advanced stage'.[207]

Some northern Ugandan leaders have argued that traditional practices should not just be documented, but also be recognised by formal law.[208] According to the LRA delegation to the Juba peace talks, for instance, such provision had to be made, '[b]ecause of the apparent difficulty encountered in persuading the western countries to accept Traditional Justice system[s] as sufficient to meet the standards of international criminal justice'.[209] The Uganda Law Reform Commission has indeed been requested, as part of the preparation for the implementation of the Juba peace talks, to introduce legislation on

[203] Annexure, clause 9.

[204] A&R Agreement, fifth recital. See Constitution, art. 126(2): 'In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles – ... (d) reconciliation between parties shall be promoted.'

[205] See also, more generally, Drumbl 2007:145.

[206] Interview with Rt Rev. Baker Ochola II, Kitgum, September 2008. A cultural leader argued in a similar vein during an interview in Gulu in September 2008 that harmonisation and documentation were necessary to explain traditional justice to people working for or researching the ICC.

[207] Latigo 2008:110.

[208] See e.g. Ochola II undated:3. Already in 2001 the Paramount Chief, with the advice and consent of Acholi chiefs and council of elders, 'enacted' a 'law to declare the Acholi customary law' (Ker Kwaro Acholi 2001). This law has never obtained the status of law promulgated by the state.

[209] LRA 2006:14.

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traditional justice. If such legislation were to include codification, this would raise fundamental questions as to whether diverse and flexible local practices can be fitted into the rigid frameworks of formal law, and whether doing so would jeopardise their credibility with and usefulness for the populations from which they originate.

Secondly, as indicated by the term 'with necessary modifications' in the above-cited passage from the A&R Agreement, the implementation of the A&R Accords would continue, and possibly accelerate, the adjustment of traditional practices to external demands, whether of donors or changing circumstances. As one donor representative explained:

> For traditional leaders to be compliant with human rights standards, they have to modify their practices. That is what we want them to do.[210]

One example is the requirement in the Annexure to consider 'the role and impact of the processes on women and children'.[211]

Thirdly, the push of local justice practices towards international practices was apparent in the fact that ICC-style accountability became the point of reference for the debate over the merits of local practices. Proponents of international criminal justice had discarded local justice practices as an alternative to the ICC, arguing that they did not suffice for crimes within the ICC's jurisdiction. An ICC judge, indeed the Ugandan judge, publicly stated:

> Crimes against humanity, genocide, aggression against other states and war crimes are internationally condemned and cannot be tried by traditional courts but by the ICC … You cannot expect someone who caused the death of 100 people to be tried in a traditional court if you are looking for justice to be done … You must convince the international community that justice was done and that the punishment is proportionate with the crime.[212]

Similarly, international human rights NGOs argued that '[w]hile traditional justice processes may provide an important complement to prosecutions, they are not a substitute for them'.[213] In their view, traditional justice fails to meet 'international benchmarks',[214]

[210] Interview with a representative of a European development agency, Kampala, November 2011.
[211] Annexure, clause 20. [212] Maseruka 2009.
[213] Human Rights Watch 2011:6–7.
[214] See also Ogora 2007:289, observing a 'tendency to downplay the significance of traditional justice, with the main argument that they do not conform to international benchmarks manifested in formal justice processes'.

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comprising, 'consistent with the Rome Statute, other international standards, and international and domestic practice':

> impartial and independent investigation capable of leading to the identification of those responsible, and a determination of liability before an independent tribunal, during which an accused benefits from fair trial guarantees … and, if convicted, [receives] appropriate punishment.[215]

Rather than rejecting the ICC framework as such, the proponents of local justice practices defended such practices from the same perspective, highlighting the similarities between local justice and formal court proceedings. For instance, the Justice and Reconciliation Project stated:

> *Mato Oput* encompasses the same principles of truth, accountability and compensation, and restoration of relationships as other justice processes. It is both an independent and transparent process, where elders act as neutral arbitrators of disputes.[216]

Similarly aware of the 'somewhat tragic reality that resistance must work, to some extent, within the parameters established by that which is being resisted',[217] the LRA delegation in Juba insisted that the A&R Accords describe traditional justice in terms used by proponents of international criminal justice. At the delegation's instigation, 'full accountability' was added to the definition of each and every practice listed in the A&R Agreement.[218] It is thus that the definition of *mato oput* reads: 'the traditional ritual performed by the Acholi *after full accountability* and reconciliation has been attained between parties formerly in conflict, *after full accountability*'.[219] The deliberate duplication suggests that in the LRA delegation's view it could not be stressed enough that local justice practices, like the ICC, pursue 'full accountability'.

[215] Human Rights Watch 2007.
[216] Liu Institute for Global Issues and Gulu District NGO Forum 2007a:3. For another example, see Ogora 2007.
[217] Rajagopal 2003:10. See also Wastell 2001:194.
[218] Interview with a member of the Juba mediation team, Kampala, September 2008.
[219] See A&R Agreement, clause 1 para. 9 (emphases added). See also clause 1 para. 8: '"Kayo Cuk" refers to the traditional accountability and reconciliation processes practiced by the Langi communities *after full accountability* and reconciliation has been attained between parties formerly in conflict, *after full accountability*' (emphases added).

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The attempts to fit local justice practices into the ICC mould led to the downplaying of fundamental differences in the concepts of justice underlying the respective paradigms. The term 'justice' does not exist as an Acholi notion.[220] The term used by the Acholi to cover the English word 'justice' may be translated as 'correct judgment' or 'interpretation'.[221] More relevant to the Acholi experience of justice is *roco wat*, which means 'to restore relationships'.[222] An accountability mechanism such as *mato oput* aims to restore relationships between the clans of the perpetrator and the victim and includes truth-telling and compensation. Cleansing ceremonies, in turn, focus on restoring the wrong committed and can concern either the perpetrator or the victim. For some acts, for instance rape, there are cleansing ceremonies for the victim but no accountability mechanisms. Assessing Acholi traditional practices, international-criminal-justice experts commented that cleansing ceremonies did not suffice for accountability. They advised: 'If you want traditional justice to be credible, you'll have to adapt it so that it can deal with war crimes and crimes against humanity.'[223] In order to deal with international crimes, so it was argued, traditional justice had to shift from being communal to individual, to mete out punishment rather than provide compensation, to focus on the perpetrator instead of the victim, and to turn cleansing ceremonies for offences such as abduction and mutilation into accountability mechanisms.[224]

Attempts to show that traditional justice does ensure accountability resulted in a focus on the Acholi practice with the most aspects of accountability, namely, *mato oput*. While used only in cases involving death and where the perpetrator can identify the victim or the victim the perpetrator, *mato oput* became the umbrella term for all Acholi justice practices in national and international discussions of Acholi traditional justice. In 2008, the Ugandan Amnesty Commission advertised an event in which former LRA combatants would be

[220] Interview with an expert, Gulu, September 2008. On different understandings of the concept 'justice', see also Dolan, Tamale and Oloka-Onyango 2009:2.

[221] Interview with an expert, Gulu, September 2008.

[222] *Ibid.*

[223] *Ibid.*, citing international-criminal-justice experts commenting on whether traditional justice in northern Uganda meets ICC standards.

[224] *Ibid.* Ironically, this comes at a time when international-criminal-justice and criminal-justice systems in some Western countries are criticised for failing to provide sufficient rehabilitation and compensation for victims and are, in response to this criticism, becoming increasingly victim-oriented.

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welcomed home as a *mato oput* ceremony.[225] In fact, what took place was *nyono tong gweno*, the stepping-on-the-egg ceremony, which is a cleansing ceremony to facilitate integration rather than an accountability mechanism.[226] But *mato oput* was used as a brand name for traditional justice, because that is the name that international donors know.[227]

Despite all the attention and study, there has thus far been hardly any catalysing effect on the actual practice of traditional accountability proceedings for conflict-related crimes.[228] People are still settling back into their communities and have considered it more important to carry out *moyo piny*, a ceremony to cleanse land blighted by unburied dead. Moreover, resources are scarce, especially for compensation. A more structural obstacle is that the practice of *mato oput* is based on the assumption that perpetrator and victim know each other.[229] One of the first attempts to apply *mato oput* to conflict-related crimes failed because the LRA commander who confessed his crimes could not identify his victims.[230] Reformist 'traditional' leaders argue that practices 'will be adjusted' to characteristics of conflict-related crimes.[231] When and how remain undetermined.

Even if the adjustment of the practices to the characteristics of conflict-related crimes were to continue, the study of, advocacy for, and practice of local justice practices have less and less to do with complementarity. In the first few years after the ICC's intervention, the link was stronger. Some religious and cultural leaders, members of the LRA delegation and government officials referred to *mato oput* as *the* Ugandan alternative to the ICC. The LRA stated in its position paper for the Juba talks:

> As these talks proceed, the Warrant of Arrest issued by the ICC hovers over the heads of the Chairman and the three surviving members of the

[225] 'Invitation for Mato-Oput Cleansing Ceremony in Gulu' 2008.

[226] *Nyono tong gweno* can be an element of a larger *mato oput* procedure (Ochola II 2009:23–4).

[227] The event was sponsored by the International Organisation for Migration, the United States Agency for International Development and the United Nations Development Programme. On 'donor-driven justice', see Oomen 2005:902–6.

[228] A religious leader in an interview in Kitgum in September 2008 reported one *mato oput* proceeding that had been set in motion for a conflict-related crime.

[229] See also Justice and Reconciliation Project 2011a:2.

[230] See 'Uganda: former LRA combatants struggle for forgiveness' 2010 and Negara 2011.

[231] Interview with elders, Kitgum, September 2008.

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> LRA High Command. This paper examines how the Traditional Justice system, which has for time immemorial been used by most of the people in the affected areas, would be a perfect alternative, and would be the preferred option to the formal prosecutory [*sic*] criminal justice system of the ICC.[232]

The leader of the GoU delegation also presented traditional justice as an alternative to the ICC, when explaining in Parliament:

> It is true that the ICC has taken steps to ensure that the indicted leaders of the LRA are tried for the crimes they have been indicted for. ICC's stand is that impunity should never be condoned and that those responsible for crimes committed must be brought to justice and punished. The Uganda Government fully supports this stand . . . It is for this reason and in view of the fact that the indicted LRA leaders cannot easily be brought to book using the normal criminal justice system and the fact that the affected population is longing for peace and is willing to forgive so as to start new lives, that Government has proposed the use of the Acholi traditional system of justice called Mato put . . .
>
> Madam Speaker, it is not possible for the ICC to review the indictments before the question of impunity is adequately addressed. This is why Government has proposed the Acholi traditional alternative justice process of Mato put. The Government will formally engage the ICC only after a formal peace agreement has been reached or signed and after the LRA has gone through the process of Mato put. The Government has, however, maintained close contacts with the ICC and the UN on this very subject-matter . . .
>
> Government remains committed to a peaceful resolution to the conflict; Government sees the ICC as complementing the work of Uganda to see a peaceful end to this conflict.[233]

However, the more Ugandan delegations visited the ICC[234] and the more lawyers were consulted, the more all involved in the talks became convinced that local justice practices would probably not amount to domestic proceedings in the sense of the ICC's complementarity principle, if only because traditional justice does not include prosecution. As one religious leader recalled:

[232] LRA 2006:4. [233] Uganda 2007.

[234] On the visits to the ICC, see ICC 2005, ICC-OTP 2005d, ICC-OTP 2005e, ICC 2008 and Glassborow and Eichstaedt 2008.

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> When we [cultural and religious leaders from northern Uganda] were in The Hague, the ICC said that *mato oput* is lower than formal justice. They said their benchmarks were higher.[235]

Others suggested that, while 'traditional justice' on its own might not be enough for a successful complementarity challenge, complementarity would be challenged on the basis of a package of mechanisms that, taken together, could be an alternative to the ICC. The Minister of State for Defence thus explained to Parliament:

> This is the package, which I am sure Government will present to the ICC, to convince them that we now have this process, the *Mato put*, and the legal base we will put on top of that. Maybe then the prosecutor will use the statute to say that on the issue of impunity, Uganda is going to handle and therefore the case falls by the way side.[236]

The idea reflects an understanding of complementarity as an assessment of how a state deals with impunity in a situation as a whole rather than on a case-by-case basis.[237]

However, ever since the A&R Accords provided for the SDHC to deal with serious crimes, the push for traditional justice as *the* alternative to the ICC diminished. As one religious leader explained:

> Uganda is now putting forward a complete system: formal and traditional ... if the ICC doubts the traditional justice system then it can trust the Special Division. The Special Division can do it alone.[238]

With the creation of the special division of the High Court as the 'complementarity court', it was this body alone, and not local justice practices or any other transitional-justice mechanism, that was expected to meet the ICC's complementarity standards. The debate over whether local justice meets international standards, or more specifically the ICC's complementarity requirements, thus went quiet.

[235] Interview with one of the members of the delegation, Kitgum, September 2008.

[236] Uganda 2006c. See also the Deputy Attorney-General, as reported in International Bar Association Human Rights Institute 2007:32 ('he had written to the Uganda Law Reform Commission with the view to introducing legislation on traditional justice. In this respect, he suggested that if peace talks were successfully concluded, aspects of the traditional justice system such as *mato oput* instituted and amnesty provided, this would reflect a "meaningful" process and would give the GoU sufficient grounds to make an admissibility challenge before the ICC.').

[237] On the Statute's providing for a case-based assessment, see Chapter 2, 'The complementarity assessment is case-specific'.

[238] Interview, Kitgum, September 2008.

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The calls to 'codify' traditional justice were toned down, too. No longer under pressure to compete with the ICC, elders recognised the advantages of keeping local justice practices flexible:

> Codification is not useful since traditional justice evolves. There is also a risk that when you make it a legal document you take away the authority of the traditional leaders and shift it to the lawyers.[239]

More generally, advocacy for local justice practices faded with the weakening of resistance against the ICC. Disillusioned by Kony's refusal to sign the FPA even after their travelling to Garamba to implore him to sign, community leaders were tired of fighting for peace with the government, the ICC and the LRA. With the LRA out of Uganda and people returning home, disputes over land became more pressing than finding an alternative to the ICC. As one leader explained the change in positions:

> In the heat of the moment people express certain views, more or less because of the demands of the situation. [In the first few years after the ICC's intervention] there was high-level violence. There were a lot of leaders who were demanding traditional justice, mainly because of the pressure of IDP [internationally displaced persons] life, the level of violence and fear for reprisals. But when the Juba peace talks and the cessation hostilities forced the LRA out of northern Uganda, the demand for traditional justice decreased. Now people are home.[240]

Northern Uganda being more secure, many community leaders are less vehemently opposed to criminal justice, whether conducted by the ICC or Ugandan courts.[241] Local justice practices remain relevant, but in their own right; not as an alternative to the ICC.[242]

The catalysing effect on local justice practices began immediately when local leaders opposed the ICC's intervention in northern Uganda. Most other effects of complementarity in Uganda, however, were catalysed only when the Ugandan government searched for an

[239] Interview with an Acholi leader, Kampala, November 2011.
[240] Interview with an elder from northern Uganda, Kampala, November 2011.
[241] See also Allen 2010:261.
[242] According to some traditional leaders, the force of donor money driving 'traditional' practices has also diminished (interview with an elder from northern Uganda, Kampala, November 2011: 'traditional leaders are dependent on the support of international donors. That support has dried up. The focus has changed to issues of resettlement. No embassy now has interest in traditional justice.').

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alternative to the ICC. It began to do so, at least seemingly, during the Juba peace talks.

Putting accountability and transitional justice on the peace-talks agenda

The ICC's sword of Damocles hanging over Juba resulted in the paradoxical situation that it was in the rebel movement's interests to insist on accountability instead of amnesty. In the dozens of earlier rounds of negotiations with movements fighting the GoU, accountability had not featured on the agenda. But in the Juba peace talks, the LRA stressed the importance of accountability. It was first and foremost driven by a desire to terminate the existence of the ICC arrest warrants against its leadership. But the LRA delegation did not merely require the lifting of the ICC arrest warrants 'in the interests of justice ... including ... the interests of victims'[243] – a reference to article 53 of the Rome Statute – and accept the government's proposal to use traditional justice. Rather, the LRA delegation insisted on all sides being held accountable, including for crimes committed before 1 July 2002, in order to cover the period when most of the alleged UPDF crimes were committed.[244] In doing so, the LRA informed its adversary: accountability could come to haunt you, too. It did the same by demanding, in line with long-held positions of some civil society organisations, a 'National Truth and Reconciliation Commission' and a 'Compensation Fund'.[245] Thus, as a result of the LRA's aggressive negotiation strategy on accountability and reconciliation, transitional-justice mechanisms other than criminal proceedings entered into the negotiations.

The GoU, in turn, offered in its initial position paper only amnesty and traditional justice.[246] It saw no need for reparations or for a truth commission, particularly not one that involved the nation as a whole.[247] Yet, over time it calculated that, in light of civil society's and international pressure for more comprehensive transitional-justice

[243] LRA 2006:5–6. [244] *Ibid.*:1. [245] *Ibid.*:11–12. [246] Uganda 2006d.
[247] Interview with a government minister, Kampala, October 2008 and interview with an international advisor in the negotiations, The Hague, May 2008. The resistance to a national mechanism was in line with the GoU's propensity to describe the conflict as 'local' and an 'Acholi affair', to disregard the origins of the conflict and to underplay questions of political and economic tensions between the centre and periphery.

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mechanisms, it was costly to be seen as obstructing an agreement on these points. It acceded to demands for a truth commission and reparations.[248]

But the parties realised that a truth commission, reparations and traditional justice, individually or together, were unlikely to be successful in rendering the ICC case inadmissible on grounds of complementarity. For cases of 'serious crimes', domestic criminal proceedings were agreed upon.[249] To the LRA leadership, both domestic and international trials were humiliating and off-putting. But an agreement on domestic proceedings could keep an untrustworthy and culturally remote international court at bay[250] whilst domestic proceedings could allow for more negotiations on charges and sentences. Seemingly aware of the complementarity principle, Kony argued that '[t]he ICC should leave Uganda to handle the issue of accountability since Uganda has a functional justice system with jails in Luzira, Lugore, etc.'.[251]

In order to make domestic accountability acceptable to the LRA, Ugandan sentences would have to be substantially reduced. Details could not be spelled out in any agreement, as this might have jeopardised any future assessment of the genuineness of the Ugandan proceedings by the ICC.[252] But the Agreement does provide for 'recognition of confessions or other forms of cooperation to be recognised for purposes of sentencing or sanctions'[253] and obliges the GoU to introduce alternative sanctions,[254] which are to 'reflect the gravity of the crimes or violations' and at the same time 'promote reconciliation between individuals and within communities; promote the rehabilitation of offenders; take into account an

[248] In order to overcome the GoU's resistance to an obligation to pay reparations and to allow fiscal questions to be addressed, Annexure, clause 4(j) pushed reparations down the time line of the transitional-justice programme by leaving it to the truth-finding body to make recommendations on a reparations regime.

[249] Annexure, clause 7.

[250] Expressing his distrust of international institutions, Kony referred to the 'poisoning of Milošević' (interview with someone involved in peace talks with Kony, February 2009).

[251] 'Uganda: IDPs unlikely to meet deadline to vacate camps' 2006.

[252] Interview with a member of the mediation team, Kampala, September 2008. See also Chapter 2, 'Low punishment or a pardon is not a ground for admissibility *per se*'.

[253] A&R Agreement, clause 3.6. See also the encouragement to cooperate with proceedings in clauses 3.2 and 3.5.

[254] *Ibid.*, clause 6.3.

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individual's admissions or other cooperation with proceedings; and, require perpetrators to make reparations to victims'.[255] Reflecting 'the very clear understanding by all parties that death penalties or long sentences would not have a role to play',[256] this provision implicitly excludes these sentences since they would not 'promote the rehabilitation of offenders'.

As the mediator, the GoSS took as a starting point that any agreement concerning the LRA would have to fit within the framework of the Rome Statute.[257] It did not do so out of a normative conviction:[258] a year before, the SPLM, the dominant party in the GoSS, had itself signed a 'comprehensive' peace agreement which has hundreds of provisions on wide-ranging issues but is silent on accountability.[259] However, the ICC's involvement had changed the context for the GoU–LRA negotiations. In the words of one of the Acholi traditional leaders advising the Mediator:

> The Uganda situation was negotiated against the backdrop of the ICC. Accountability had to be handled. You cannot remove the ICC unless you meet the complementarity standards.[260]

Commenting on the difference in context of the GoS–SPLM and GoU–LRA negotiations, chief mediator Riek Machar concluded, with a sigh: 'Accountability is a whole new thing in this world.'[261]

[255] *Ibid.*, clause 6.4.

[256] Email exchange with an advisor to the Chief Mediator in the Juba peace talks, 8 November 2009.

[257] Interview with Chief Mediator Riek Machar, Switzerland, July 2009. See also Afako 2010.

[258] In a discussion with Western diplomats, Chief Mediator Machar contrasted the ICC's approach to the conflict with his own initiative: 'I won't say the ICC was wrong, but it has no capacity to implement. The ICC is a European solution to an African problem, but what we're doing is an African solution to an African problem.' (Hume 2006a).

[259] See Chapter 4, 'Fostering interest in transitional justice'.

[260] Interview with an Acholi traditional leader, Kampala, September 2008. See also interview with Hon. Justice Benjamin J. Odoki, Chief Justice of Uganda, Kampala, 7 October 2008, comparing the negotiations with the LRA with the GoU's negotiations with other movements: 'This is different than other conflicts, because here the ICC has come in. "Accountability and Reconciliation" [the title of the agreement on agenda item 3] is camouflage for "ICC".'

[261] Interview with Chief Mediator Riek Machar, Switzerland, July 2009.

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Whether ultimately considered beneficial or detrimental, with the ICC as 'bogeyman',[262] accountability in general and some type of formal criminal proceedings in particular had to be on the agenda of the peace talks as long as the LRA objected to the Court's involvement. The ICC investigations and, even more so, the ICC arrest warrants and the principle of complementarity thus helped to put the issue of accountability firmly on the Juba negotiating table – a first in the many negotiations between the GoU and rebel movements.

Stimulating a debate on transitional justice

The discussion has gone far beyond the parties at the negotiating table, far beyond Juba and far beyond accountability: civil society and government agencies throughout Uganda have taken up the concept of transitional justice. To some extent, this effect is one of ICC intervention as such – it started immediately after the referral. However, the transitional-justice debate really took off in the context of the search for alternatives to the ICC, in which complementarity, more as big idea than as legal principle, played a key role.

The referral of the situation in northern Uganda as such led to some civil society activity, ranging from organisations working in northern Uganda criticising the ICC's intervention,[263] to the creation of the Ugandan Coalition for the International Criminal Court (UCICC)[264] and the Advocates for Public International Law Uganda ('established to soften the perception of the Rome Statute').[265] During the Juba peace talks, both the GoU and the LRA conducted public consultations. The discussion expanded beyond the question whether the ICC obstructed peacemaking to questions as to how Uganda, not just

[262] A term used by Anton Baaré, consultant at the Juba negotiations, telephone conversation with the author, May 2008.

[263] See e.g. Refugee Law Project 2004 and responses from NGOs documented by Okumu-Alya 2006:44.

[264] Interview with a UCICC staff member, Kampala, September 2008. Initially funded by the Coalition for the International Criminal Court, the Ugandan Coalition *for* the International Criminal Court later changed its name in its publications and on its website into Ugandan Coalition *on* the International Criminal Court, to allow NGOs that were critical of the ICC to be part of the coalition.

[265] Interview with one of the founders of APILU, Kampala, November 2011. See also Adriko 2008:3.

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northern Uganda, should deal with its past, characterised by the widespread commission of crimes of violence against civilians by state and non-state actors alike.

This is a revolutionary effect. Uganda – like many other states – has never developed a policy of dealing with the past other than moving on. Incoming governments lacked the legitimacy, stability or resources to prosecute the apparatus of the previous regime[266] where the latter had not fled into exile.[267] For the sake of national reconciliation, opponents were bought off with power, wealth and amnesty or informal guarantees of non-prosecution. To the extent that people were convicted, it was for treason.[268] Uganda had two government-sponsored truth commissions (the Commission of Inquiry into the Disappearance of People in Uganda established by President Idi Amin in 1974, and the Commission of Inquiry into Violations of Human Rights created by President Museveni in 1986),[269] but their findings were never widely disseminated, their recommendations not implemented, and their existence largely forgotten. Hardly any follow-up was given to the referral by Uganda's second truth commission of dozens of cases to the Director of Public Prosecutions or the Criminal

[266] Exceptionally, members of the previous regime were prosecuted for conflict-related crimes. See e.g. Ugandan courts, *Abdalla Nasur* (a lieutenant under Amin convicted of murdering a mayor), *Chris Rwakasisi* (Rwakasisi was a Minister of State under Obote's second administration and convicted of kidnapping with intent to murder) and *Haji Musa Sebirumbi* (a constituency chairman under the same administration convicted of murder of civilians who had been accused of supporting Museveni). After the fall of Idi Amin, a statute was drafted to establish a 'Human Rights Court for the Trial of Persons Accused of Offences Against Humanity and Others Specified Offences Committed During the Idi Amin Regime Up to the Date Of Total Liberation (3rd June, 1979) and to Make Provisions for Other Matters Connected Therewith or Incidental Thereto', with criminal jurisdiction over offences including genocide. The Statute was never enacted into law (Commission of Inquiry into Violations of Human Rights 1994:419–20 and Appendix 5; thanks to Joanna Quinn who had the 720 pages scanned and shared her copy).

[267] Former president Milton Obote fled to Dar es Salaam and later to Lusaka, General Tito Okello to eastern Sudan and Idi Amin to Saudi Arabia. See also Baker 2004:1493–5.

[268] This crime is not included in the concept of conflict-related crimes because it does not correspond with conduct also criminalised in the Rome Statute. One of the most famous treason cases related to the conflict with the LRA has been *Professor Isaac Newton Ojok*. Ojok was initially convicted and sentenced to death because of his support to Alice Lakwena's Holy Spirit Movement, but was finally acquitted.

[269] See Quinn 2010 and Hayner 2011:239–40 and 243.

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Investigations Department.[270] Various reasons have been cited, including the high evidentiary standard in court (in contrast to that of a truth commission), the fear of witnesses of the possible consequences of cooperating with criminal investigations, the Criminal Investigations Department's lack of capacity, and unwillingness.[271] Only a handful of victims of conflict-related crimes have been successful in obtaining reparations by privately bringing cases before courts. A national debate on whether and how to come to terms with the past was never part of the aftermath of peace talks or violent changes of government.

In the final stages of the Juba peace process, when there were still hopes that Kony would sign the FPA, the GoU mandated its Justice Law and Order Sector (JLOS) to prepare the implementation of the legal aspects of the Juba Agreements.[272] JLOS, adopting concepts used by international advisors to the Juba talks, created its own 'Transitional Justice Working Group' with sub-committees on formal proceedings, traditional justice, truth-telling, integration of the different systems and budgetary issues.

JLOS 'donors', those states that traditionally provide financial support to JLOS programmes, including Austria, Denmark, Ireland, Norway and The Netherlands, were enthusiastic about the idea of JLOS doing its bit to implement the results of the Juba peace talks and promoting transitional justice in Uganda. JLOS's transitional-justice plans also attracted new donors such as Canada and the US. Donors offered to fund preparatory activities such as training courses, study tours, public consultations, needs assessments and courtroom improvement. They also paid for two transitional-justice advisors, one Ugandan, one foreign, to be embedded in the JLOS Secretariat, with a view to strengthening the JLOS Secretariat. An additional reason for funding two such persons was to have 'a contact person within

[270] Commission of Inquiry into Violations of Human Rights 1994:625–9 and Appendix 9.

[271] *Ibid.*:626, Hayner 2011:97–9 and interview with an official working for the Director of Public Prosecutions, Kampala, October 2008.

[272] JLOS is a coordinating forum bringing together senior officials in government agencies working in the areas of justice, law and order, including the Ministry of Justice and Constitutional Affairs, the Ministry of Internal Affairs, the judiciary, the Uganda Police Force, the Uganda Prison Service, the Directorate of Public Prosecutions, the Judicial Service Commission, the Uganda Law Reform Commission, the Uganda Human Rights Commission and the Uganda Law Society.

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JLOS working on transitional justice', one donor explained, so that the transitional-justice agenda could be pushed.[273]

Donors' enthusiasm was matched by that of international NGOs. The ICC's intervention in Uganda, and especially the outcome – on paper at least – of the Juba talks, attracted a caravan of international NGOs with transitional-justice experience. One representative explained her NGO's 'anti-impunity programme' in Uganda as follows:

> We began that programme because we have expertise in international crimes. We had been involved in DRC since 2005. We try to use that expertise elsewhere . . . With respect to international justice, our mandate is to fight against impunity. We also bring complaints from the country to the ICC. If the ICC opens up in a place, then [we] will open up an office.[274]

International NGOs' proposals to 'train', 'capacity-build', 'workshop' and 'advise' Ugandans were readily funded by donors. International NGOs for their part looked for 'local partners' with 'grassroots connections', thereby opening up a world of funding for Ugandan NGOs willing to adopt the international NGOs' anti-impunity agenda. The Ugandan economy, in which the NGO sector is the fastest growing employer after government,[275] readily supplied the international NGOs' demand.

The last piece of the puzzle was for NGOs and donors to find a Ugandan demand for the offered and funded international expertise. With project proposals with six-figure budgets annexed tucked under their arms, representatives of international NGOs queued up to meet with the chairman of the JLOS Transitional Justice Working Group and the registrar of the newly created International Crimes Division.[276] They would leave with an 'invitation' from the Ugandan government to implement their proposed programmes.[277] The efforts

[273] Interview with a donor representative, Kampala, November 2011.
[274] Interview, Kampala, November 2011.
[275] Mwenda 2007:34. As part of a larger explanation of the increasing authoritarianism in Uganda, he adds: 'The middle-class know-how and energy that might have gone into democratizing the state have instead been diverted into the work of NGOs that carry out "policy advocacy", "humanitarian relief" and bureaucratized human rights activism.' See also Dicklitsch and Lwanga 2003.
[276] See below, 'Stimulating the establishment of a Ugandan international crimes division'.
[277] When one Ugandan official was asked in an interview in Kampala in November 2011 whether an NGO had conducted a particular assessment at the request of

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of international and domestic 'norm entrepreneurs' seem to have been successful: in Uganda, 'TJ' is in vogue.[278]

Nonetheless, it would be wrong to conclude that these processes evince 'norm infiltration'[279] or 'norm internalisation' as developed in theories on how international norms emerge, spread and become globally accepted.[280] First, 'transitional justice' owes its popularity in Uganda in large part to its nebulousness which allows everyone to embrace it, but at the same time caters for diverging (mis)understandings. For many of the norm entrepreneurs, transitional justice, defined by the UN Secretary-General as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation',[281] has at its core criminal accountability, possibly complemented by truth commissions and reparations. Operating in accordance with this understanding of transitional justice, the donor-funded JLOS transitional-justice advisors published on behalf of JLOS – but without any discussion within JLOS – a piece arguing against Uganda's amnesty law.[282] Many of the Ugandan government actors, by contrast, are interested in transitional justice precisely because it could be an *alternative to* ordinary criminal justice. The chairman of the JLOS Transitional Justice Working Group, for instance, understood transitional justice to refer to justice involving short punishments, which was best done through 'traditional justice'.[283] Transitional justice's universalist façade, to paraphrase Sally Engle Merry, thus obscures the fact that

the GoU, the official responded: 'We *kind of* requested it. They offered it, pushed for it, and then we accepted it.'

278 For the concept of 'norm entrepreneurs', see Chapter 1, n. 56 and accompanying text.

279 Norm infiltration is the process by which a norm becomes taken for granted as an internal (as opposed to imposed) norm. This process can take place with respect to national norms and individuals, but also with respect to international norms and domestic legal orders.

280 See, *inter alia*, Finnemore and Sikkink 1998 and Risse, Ropp and Sikkink 1999.

281 UN Doc. S/2004/616 (2004):[8].

282 Transitional Justice Team of the JLOS Secretariat 2011.

283 Interview with the chairman of the Transitional Justice Working Group, Kampala, September 2008. See also Justice Ogoola's comments at Refugee Law Project 2010: 'We were mandated to discuss three things from Juba: how to set up a court for punitive purposes, and then two other pillars: the transitional justice – the reformative justice side of the coin – and truth-telling.'

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it is still understood in local ways.[284] In the norm entrepreneurs' view, Ugandan actors' interpretation of transitional justice comes closest to 'subversion' on Merry's continuum of 'vernacularization': 'The name and the transnational referent are retained but the content of the ideas . . . is dramatically changed.'[285]

A second caveat is that, to date, the success of the transitional-justice norm entrepreneurs has been due less to the persuasiveness of the advocated norm than to the political economy of the entrepreneurship. In other words, government actors have allowed transitional-justice norm entrepreneurs to operate in Uganda because they have something to offer: training with 'sitting allowances',[286] study tours abroad[287] and needs assessments. Such offers are lubricants of the patronage system through which the state is administered.[288] Sitting allowances are welcome additions to officials' salaries; free study tours abroad are useful perks for the most loyal officials; and the outcomes of needs assessments constitute shopping lists for donors: this (buildings, computers, cars and petrol) is what we 'need' to do the transitional justice that you insist on.[289] Because it is donor-driven, transitional justice's popularity may decline with a decrease in donors' interest.[290]

Even with persisting donor interest, transitional justice has already lost some of its appeal to officials. JLOS, the GoU's leading actor on transitional justice, in 2011 omitted transitional justice from its draft

[284] Merry 2006b:43. [285] *Ibid.*:44.

[286] Fees paid in exchange for a participant's attending an event.

[287] See also Clapham 1977:87 ('International relations offer the chance of an escape into the big time world of global politics, which must be justified rhetorically in terms of world peace or third world development, but in which the activity itself is to a large extent its own reward. This extends beyond the head of state to other members of the government.').

[288] See also International Crisis Group 2012 on the shift in Museveni's Uganda 'from a broad-based constitutional government to patronage-based personal rule'.

[289] See also Mwenda 2007:31: 'Civil servants who write projects typically set them up so that a project's main benefits go to its staffers in the form of salaries, allowances, official cars, and domestic or foreign trips complete with per-diems.'

[290] Indeed, this is what some Ugandan actors who have not been co-opted in the transitional-justice niche have warned. As one legal actor observed with respect to the creation of the SDHC: 'as usual, we are heavily relying on development partners . . . We must think in terms not only of establishment but continuity. The sad story of the judiciary is that institutions are coming to a hold when development partners no longer fund.' (Participant observation, official meeting, Kampala, October 2008).

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strategic investment plan for the next decade.[291] At donors' insistence,[292] transitional justice in the end received one page in the report, even though, according to the relevant JLOS actors, transitional justice is 'only transitional, and will thus not even be years', and therefore need not be incorporated in any long-term plans.[293] Three years after the creation of the Transitional Justice Working Group, JLOS had not yet developed a transitional-justice policy. Some officials cited a need for elaborate consultations. Others said there was a lack of political guidance, and thus interest, from the President and his cabinet.[294] The donor-funded transitional-justice advisors embedded within JLOS, expected to push the transitional-justice agenda, operate largely on their own. In the words of one donor representative: 'It seems that the JLOS Secretariat thinks "good, now TJ is covered by them."'[295] Many donors acknowledge that transitional justice has been donor-driven, but hope that in due course the GoU will consider transitional justice as unavoidable.[296]

However, transitional justice is not a priority of the Ugandan President, and thus, in a state characterised by head-of-state-driven politics, not of the Ugandan government.[297] Now that Kony has refused to sign the FPA, there is even less of an incentive for the GoU to develop a transitional-justice policy: there has been no transition.[298] Facing corruption scandals, protests against the NRM's twenty-five-plus years of rule and disputes over land, President Museveni and his cabinet have more pressing issues on their minds.

The GoU cabinet has not allowed implementation of transitional-justice instruments that it had conceded in the Juba peace talks. The cabinet had never been a great supporter of truth-telling, for instance, as the latter could expose the NRM's own past and result in

[291] Interviews with donors, Kampala, November 2011.
[292] Interview with a JLOS official, Kampala, November 2011: 'There is a lot of pushing from donors on transitional justice.'
[293] Interviews with donors, Kampala, November 2011, reporting the discussion with JLOS actors.
[294] Interview with government official, Kampala, May 2010.
[295] Interview with a JLOS donor, Kampala, November 2011.
[296] *Ibid.*
[297] Interview with a presidential advisor, Kampala, November 2011: 'Uganda is characterised by head-of-state driven politics … The ministers prioritise what the head of state wants. That is not transitional justice.'
[298] According to a presidential advisor (*ibid.*), the cabinet had not devoted any time to transitional justice because 'the Final Peace Agreement has not been signed'.

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recommendations for expensive reparations[299] (for example, for failure to protect the population).[300] The following excerpt from an interview with a Ugandan State Minister illustrates that extolling concepts of transitional justice does not imply commitment to taking any related measures. Asked about the GoU's plans to implement the Juba agreements as long as Kony refuses to sign the FPA, he replied:

> [W]ithin the government we are divided. The army is frustrated. We [in our Ministry] and [another Ministry] are more patient than in the Ministry of Defence. We say: 'We can implement agenda items 2 [comprehensive solutions] and 3 [accountability and reconciliation].'
>
> [Interviewer:] *All elements of these agenda items? For instance, also a truth commission?*
>
> I am not so sure about it. We have debated against it. The idea of a TRC comes from civil society organisations, not from the government. People in the government are opposing it. How far back shall it go? Which conflict shall it cover?
>
> [Interviewer:] *But Uganda has already had two truth commissions.* Has it?
>
> [Interviewer:] *Yes, President Amin established one and President Museveni established the Oder commission.*
>
> [*Laughs*] People want a juicy-type of truth commission, like in South Africa, they want a juicy soap opera.[301]

Interviewed three years later, another government minister, asked about possible reform of the Amnesty Act, expressed similar scepticism about pursuing truth: 'A blanket amnesty is better than one in exchange for truth-telling: truth is dangerous.'[302] The coalescence of the interests of transitional-justice norm entrepreneurs and the GoU, which contributed to the sudden rise of the transitional-justice debate, is thus only partial and may be short-lived.

Some more home-grown transitional-justice initiatives, however, could continue. Transitional justice was an issue raised in campaigns

[299] Some claims have already emerged, the biggest case thus far being *Celestina Odong Adyera*, for damages for the unlawful acts of the NRA/UPDF committed in the cause and scope of its duties.

[300] A first case is *Albertina Opio*, in which the claimants request damages because the UPDF had been tipped off about an upcoming LRA attack but failed to intervene.

[301] Interview with a State Minister, Kampala, October 2008.

[302] Interview with a State Minister, Kampala, November 2011.

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for the 2011 presidential election.[303] The ICC was referred to, mostly as an instrument to defame one's political opponent.[304] Demands for the truth have arisen in the elections also beyond northern Uganda, for example in the Luwero triangle where in the early 1980s the then government army took revenge against thousands of people for supporting Museveni's rebellion against Obote. The Beyond Juba Project of Makerere University's Refugee Law Project aims explicitly to move the debate on transitional justice beyond the Juba peace talks.[305] However, freedom of expression on matters of transitional justice may be limited the more the spotlight shifts to government accountability, as is suggested by incidents such as a raid on a Ugandan newspaper that had been reporting on UPDF scandals and detention of political opponents who accuse the GoU of international crimes.[306]

By making allowance for a national alternative to the ICC, the principle of complementarity fostered the emergence of a Ugandan transitional-justice debate. This effect is still a far cry from the conduct of domestic proceedings, the only action that can render ICC cases inadmissible on grounds of complementarity. Yet a debate may be a precursor to other effects and is, in itself, a break with the past.

[303] The northern Ugandan NGO Justice and Reconciliation Project campaigned to put transitional justice on the election agenda (see http://justiceandreconciliation.com/2011/01/campaign-to-put-tj-on-the-election-agenda).

[304] Independent presidential candidate Samuel Lubega 'promised to "take President Museveni to the International Criminal Court" if he refuses to hand over power peacefully or tampers with the electoral process' (Ninsiima 2010). The UPC's presidential candidate, Olara Otunnu, asked the ICC Prosecutor to investigate Museveni for 'crimes against humanity, war crimes, genocide, and aggression' committed in northern Uganda, the DRC and Kampala (Musoke and Oluput 2010). Ironically, given his uncritical response to the equally 'political' referral by the GoU of the situation concerning the LRA to the ICC (see Nouwen and Werner 2010a), the Prosecutor 'challenged Otunnu to produce concrete evidence, and not engage in "political debate"'. The GoU's response to these allegations demonstrated its limitations to any debate on transitional-justice issues: Otunnu was 'wanted by the Police for alleging that Museveni funded Kony's LRA rebels and masterminded the northern Uganda war for over 20 years' (Musoke and Oluput 2010).

[305] See www.beyondjuba.org and Refugee Law Project 2011a.

[306] See e.g. the facts of *Onynango-Obbo and Mwenda*, 'Uganda journalists held in raid' 2008 and Musoke and Oluput 2010. On developments in the freedom of the press in Uganda, see also Tabaire 2007.

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Broadening the approach to the conflict to include a legal dimension

Covered in a legal cloak, the referral of the LRA to the ICC fitted neatly into the GoU's military strategy. The referral provided several opportunities. By referring the situation to the ICC, President Museveni could legitimise and intensify his military approach, and in doing so satisfy the demands of military elites. Meanwhile, ICC-supporting Western states would not criticise the military's counter-insurgency campaign when fought against internationally wanted 'war criminals'. The northern electorate, tired of conflict and demanding a peaceful approach, could be informed that the LRA was now an international problem, the resolution of which was no longer at the sole discretion of the Ugandan government, and that, as it happened, the ICC opposed conciliatory approaches to persons it sought. The referral thus offered an opportunity to placate two pillars of Museveni's regime – in order of importance: the military and Western international allies – while providing a seemingly legitimate though fallible argument to rebut criticism of the third and weakest pillar – the electorate.

The referral had other advantages for the military. The ICC Prosecutor would be cautioned against opening proceedings against the UPDF or other Ugandan officials in the DRC situation, needful as he was of the Ugandan government's cooperation in the LRA situation. Furthermore, the Sudanese government, wishing to be on the 'good' side in the 'war on terror' and under pressure on account of the conflict in Darfur, would try to avoid association with persons sought by the ICC and to that end discontinue its military support to the LRA. The referral could also reduce international criticism of Uganda's extraordinarily high defence budget – the UPDF now had to arrest 'war criminals' – and thus justify the securitisation of the Ugandan state.[307] Indeed, the GoU thought that the referral could rally international assistance for the Ugandan military. It was in this vein that the Minister of Defence answered a parliamentary question (conflating

[307] See, *inter alia*, Uganda 2006a, in which President Museveni promises in his address on the state of the nation: 'Security is a major pillar to our continued stability . . . As I have stated at different fora in the recent past, I would like to reiterate that mistakes of the past, which tended to compromise the security of our country, will not be repeated. We shall never under-spend on defence. Never! It was a mistake, it will never be repeated. Consequently, although we may exchange experience with our development partners, we shall not accept a line we know will be fatal for our country.'

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the ICC and ICTY and skipping over the fact that enforcement is the weakest chain in the ICC's operations):

> How does ICC operate? . . . They have the office of the prosecutor; they carry out investigations and actually the international community supports them. So, for this Serbian, for example, there is an international force, which is hunting for that person. So, should Kony be indicted, and should he be indicted before we capture him, who will look for him in order to compel him to appear before this committee? It is not Uganda; if they ask us we shall lend a hand, but actually it will be international forces.[308]

The ICC's legal and the Ugandan executive's military approaches thus shared the avowed aim of catching the LRA, the former with a view to legal proceedings, the latter in order to defeat the enemy. It was thus the Minister of *Defence* who introduced the idea of the referral to President Museveni. The Attorney-General's Chambers and the Ministries of Justice and Foreign Affairs became involved only 'when [the military] needed an official contact with the ICC' to submit the actual referral letter.[309] As another senior cabinet minister explained:

> [The Ministry of Foreign Affairs] was not involved in the ICC referral. It was a UPDF matter, so it was done by the Minister of Defence.[310]

Given the dominance of the military paradigm with which the GoU had always approached the conflict in northern Uganda, most Ugandan lawyers, whether working for the state or in private practice, did not consider the ICC's intervention as competition, a loss to Ugandan sovereignty or a stain on the reputation of the Ugandan legal sector. The Uganda Police Force, the Office of the Director of Public Prosecutions (DPP), the judiciary and the JLOS Secretariat simply did not consider the conflict as within their remit. The military would work on 'neutralising' the LRA, while religious leaders, civil society actors and politicians were at times permitted to negotiate. Law was involved only by means of the Amnesty Act 2000, which was to exclude legal accountability, and hence to curtail the role of the law and

[308] Uganda 2004. In 2004, neither Radovan Karadzic nor Ratko Mladic had been arrested.

[309] Interview with the (at the time of the referral) Minister of Defence, Kampala, October 2008.

[310] Interview with a Ugandan government minister, Kampala, October 2008.

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of lawyers.[311] Because the situation in northern Uganda had been largely disregarded by domestic lawyers, the ICC did not usurp the role of any Ugandan legal player.

Once the ICC was involved, it bolstered the military paradigm. Internationally, it turned the LRA into an 'enemy of mankind' that should be defeated at any cost, and its opponent, the UPDF, into an international partner worthy of moral, political and military support in its war on the LRA, terror and impunity.

In the national context, the Court's involvement initially did not add a legal dimension to the conflict paradigm. For instance, asked about the UPDF's killing of Raska Lukwiya, one of the persons for whom the ICC had issued an arrest warrant, government officials did not see any inconsistency with the legal approach. In their view, the killing served the same purpose as the ICC's arrest warrant. They were strengthened in their view, they said, by the silence of the ICC in response to Lukwiya's death.[312]

The OTP, for its part, actively lobbied for a strong military approach. It fostered, so its officials suggest, an agreement between the DRC and Uganda to conduct joint military operations against the LRA in collaboration with MONUC, the UN peacekeeping mission in the DRC.[313] The agreement entitled the GoU to re-enter the DRC, two years after the ICJ had condemned it for its illegal activities in that country. The OTP called for the United States to provide military assistance to arrest Kony, thus legitimising a stronger US military presence in the region:

> In the case of Joseph Kony . . . [w]e need . . . the operational support of countries like the US, to the DRC, to Uganda, to the Central African Republic, to assist them in mounting an operation to arrest him. They have the will – so it's a totally legitimate operation, politically, legally – but they need this kind of assistance. And the US has to be the leader.[314]

The US boots-on-the-ground support was delivered. For the Ugandan government, it was one of the concrete and positive results of the ICC referral. A government minister explained:

> Uganda has been on the frontline in the fight against terrorism: Somalia, Great Lakes and anything that Uganda does in the fight

[311] When JLOS was constituted, the Amnesty Commission was not part of it. It was considered a commission concerned with military issues (namely, demobilisation), rather than legal matters.

[312] Interview with a senior government official, Kampala, October 2008.

[313] Brubacher 2010:276.

[314] Lerner 2010. See also, sharply, Al-Balushi and Branch 2010.

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> against crimes against humanity, terrorism and related crimes is part of this fight. This has improved our image internationally. The practical benefits come mainly from countries that are fighting wars against such crimes, particularly from the Americans. Recently America deployed 100 armed personnel to help the UPDF. That is a practical benefit from our focused measures, including the referral to the ICC.[315]

In addition to supporting the military approach, the ICC's involvement helped the GoU to discredit alternative approaches to the conflict. International calls for a negotiated settlement softened because many ICC supporters believed, and in some cases were made to believe by the OTP,[316] that, because the LRA leaders were internationally sought 'war criminals', they should not be negotiated with.[317] The above-mentioned GoU–DRC military agreement dealt a blow to the simultaneously ongoing peace talks in Juba. Domestically, the GoU referred to the ICC's powers to rebut calls for a peaceful resolution. When the Minister of Internal Affairs, the GoU's representative at the Juba peace talks, was asked in Parliament whether the ICC could not be substituted by *mato oput*, the Minister responded:

> Then the question of dropping ICC: ICC is an independent body set up by statute by more than 100 nations. Therefore, when we are talking about ICC here let us give no impression at all that ICC is a body there to be told by the Parliament of Uganda . . . we should be talking about ICC with substantial amount of reverence.
>
> As Hon. Odonga Otto said, that what we are saying could be subjudice; could really affect what is happening in The Hague. So, I appeal to all of us and I agree with my younger brother that we should be [as] restrained as possible and we should not provoke the ICC to exercise its overwhelming authority over these matters. It has a lot of authority and definitely the Government of Uganda does not order ICC, we have no authority . . . we can never attempt to undermine the independence and the authority of the ICC (Interruption)
>
> Mr John Odit: Honourable Minister seems to be threatening us. I want to understand from him. When the Government of Uganda took this case to the ICC, did you know that this power existed before and if so, why have you instituted this *mato put*?
>
> [Minister of Internal Affairs]: Madam Speaker, the Government of Uganda has always been fully aware of the authority and

[315] Interview with a Ugandan government minister, Kampala, November 2011.
[316] See Chapter 5. [317] See also Schomerus and Acan Ogwaro 2010:12.

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powers of the ICC. That is actually the very reason why we took the case to ICC because we tried to catch Kony and Otti and other leaders but we could not catch them. So, we said, who has the powers that can reach them and we found that ICC had these powers. So, we went to them very deliberately.

Secondly, we are going to them again now. Again very deliberately because we know they have powers but we also know that they have some limitations. If they had their own Police force and there was adequate international cooperation, they would have arrested, indicted people, but they have those limitations. So, we have gone to them because we think that this peace initiative, initiated by the Government of Southern Sudan and embraced by us in government and the country as a whole, is a viable route forward. So, government is consciously doing these matters dealing with ICC (Interruption)

Mr Kassiano Wadri: Honourable Minister, you have actually confused me the more. From the onset you do admit and accept that ICC has bigger powers than we as the government who went to report a criminal to them. Recognizing that ICC has bigger powers and knowing that it is a court of its own, we again went further to engage ourselves into a subjudice act by putting in place *mato put*. You have gone ahead to say you again went to ICC to say, 'Look, we do appreciate your weakness, you do not have an arresting institution of your own' – are you not trying to use the peace talks and *mato put* as a trap to lure Kony and his people into your custody and then thereafter say, 'ICC come they are in my possession you can now come'? Do you not think that will really not only undermine ICC but even the confidence that these people would have laid in these peace talks? Would you kindly clarify on that? . . .

[Minister of Internal Affairs]: On the question of the terms of reference to the ICC, I think I have really made that point. The ICC is an independent body, it has its own constitution and it has its own methods of work. Uganda is just one of the more than 100 countries that are members to this body. If the Parliament of Uganda has got some good ideas, and I know we do, we can send those ideas for consideration by the ICC but we cannot tell them to do this or not to do that.[318]

The executive had thus found in the ICC a no-choice argument for its preferred military approach.

[318] Uganda 2007.

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It was only at the negotiating table in Juba that the ICC's involvement in northern Uganda led the GoU to consider *judicial* mechanisms to deal with the conflict in northern Uganda. The Ugandan executive realised that it could be blamed for obstructing peace by having invited the ICC to northern Uganda. For it to be seen as still in control, the GoU had to show it was able to ward off international prosecutions, which was possible only by adopting an approach similar to that of the ICC. Whilst originally intended as an extension of GoU military policy, the ICC's involvement, and in particular the public search for a solution to the 'ICC problem', thus had the effect of adding a legal dimension to a military conflict paradigm.

This legal dimension of the Juba peace talks, in turn, awoke the Ugandan legal sector: Ugandan lawyers became relevant as alternative actors to the ICC. During the Juba talks, security people were dominant: thirteen out of the sixteen government delegates were officers, sometimes lawyers, in the different security forces.[319] However, in the A&R Accords the parties, including the executive, assigned Ugandan lawyers an important part in resolving the conflict with the LRA.

Keen to make such contribution, some Ugandan lawyers worked hard to implement elements of the Juba transitional-justice agenda. They saw the space opened up as an opportunity to strengthen the position of JLOS in the domestic political field, to advance their own institution within JLOS, to acquire prestige among national and international colleagues, to become part of (Western-dominated) transnational networks,[320] and possibly then to be co-opted into the priesthood of international lawyers.

Yet this effect of adding a legal dimension to the domestic approach to the conflict in the north and of awakening the Ugandan legal sector has to date been professionally limited. Professionally, this catalysing effect has been strong only on a few individuals participating in international-criminal-justice events; to most other Ugandan lawyers, not (yet) 'targeted' by NGO activities promoting the ICC or transitional justice, or not a member of the JLOS Transitional Justice Working Group, international criminal justice remains a hobby horse for the selected few. Those not targeted often fear that the investment in this special justice for conflict-related crimes will be at the expense

[319] Schomerus 2010b:231.
[320] For an enthusiastic welcome and promotion of such networks, see Slaughter 2005.

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of the already backlogged ordinary justice system. Moreover, many officials in the Uganda Police Force and Directorate of Public Prosecutors continue to prefer staying outside these politically sensitive cases, relieved that 'the ICC now deals with the matter'.[321] Particularly those who have assisted the ICC in their investigations in Uganda argue that conflict-related crimes in northern Uganda now 'belong to' their 'colleagues' at the ICC. They look up to ICC staff as more advanced and are relieved that they do not have to enter the political minefield.[322] Their approach to the conflict in the north has thus expanded to encompass a legal dimension, according to which justice has a role to play, but in their view this role is to be played by the ICC rather than by domestic actors.

Geographically, the expansion of the paradigm also remains limited. Most law-enforcement officials outside Kampala still do not see any role for themselves in conflict-related criminal proceedings. They refer to the army,[323] the SDHC,[324] the ICC[325] or traditional leaders[326] as more relevant actors and to the applicability of the Amnesty Act[327] as an impediment to successful completion of proceedings.

The inclusion of a legal approach to the conflict may also be only temporary. The GoU's tolerance of norm entrepreneurs' promoting international criminal justice has to date primarily been based on a cost–benefit assessment, rather than on a belief that it is legally obliged or diplomatically compelled to prosecute international crimes domestically. When other options, such as militarily defeating the LRA, providing an amnesty[328] or handing over the LRA leadership

[321] Discussion with officials of the Criminal Investigations Department, Gulu, September 2008.
[322] Interview with a senior official of the Uganda Police Force, Kampala, October 2008 and interview with an official of the Criminal Investigations Department, Kampala, October 2008.
[323] Discussion with officials of the Criminal Investigations Department, Gulu, September 2008.
[324] Interview with an official in the Uganda Police Force, Kitgum, September 2008.
[325] Discussion with officials of the Criminal Investigations Department, Gulu, September 2008.
[326] Interview with a representative of the Uganda Police Force, Gulu, September 2008.
[327] *Ibid.*
[328] In response to rumours that two LRA commanders sought by the ICC were willing to surrender, Museveni repeated the offer of amnesty ('Odhiambo won't face

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to the ICC[329] promise to be more convenient, the GoU is likely simply to discard its newfound commitment to domestic legal accountability and leave lawyers without a role to play.[330]

Finally, the expansion of the role of lawyers and law-enforcement agents in the approach to the conflict in northern Uganda takes place against the background of a countervailing and probably stronger move towards the securitisation of the Ugandan state: the army and the illegal private security squads at the President's service assume responsibilities far beyond their constitutional roles to the detriment of organs such as the police and judiciary. In situations that matter to the President – rallies by the opposition, release of opposition candidates – security operatives take over. Thus, the army detained the President's political opponents after they had been released by the police on account of a lack of evidence;[331] and demonstrations were put down by organised armed groups in civilian clothes. In the words of one interlocutor, 'if the heat is hot, the police are no longer in charge of policing – the President and his men take over.'[332] Security agents were also part of the delegation that visited the ICC to discuss the referral and attend meetings of the UN Human Rights Council.[333] Securitisation of the state in the interest of its President has gone hand in hand with marginalisation of the police generally, and in particular organs such as the Criminal Investigations Department. It is thus not just conflict-related crimes, but crimes against civilians more generally that have received little investment from the state.

world court' 2009). See also interview with a representative of the Ugandan Government, The Hague, April 2008: 'We [in the GoU] have always said that *we* were willing to give amnesty.'

[329] When asked where Kony would go if he were arrested without having signed the FPA, a government minister replied, 'Why waste our time? We [the GoU] can send him to The Hague. This is the kind of punishment that he does not want' (interview, Kampala, October 2008).

[330] According to some lawyers, Operation Lightning Thunder already announced the end of the legal approach. Since then, 'the military approach has been dominant. The government allows lawyers to go ahead [with the International Crimes Division] but there is now less attention for the legal option. When [the President and his cabinet] engage the military, the legal thing is stuck. Harmonisation [of transitional-justice initiatives] will gather dust because the legal approach has failed to serve a political purpose' (interview with a senior government lawyer, Kampala, November 2011).

[331] Kobusingye 2010:65. [332] Interview, Kampala, November 2011.

[333] Interviews, Kampala, November 2011.

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By providing that national legal proceedings can render an ICC case inadmissible, complementarity has thus expanded the Ugandan approach to dealing with the LRA to include a legal dimension. The search for an alternative to the ICC has also created a role for the Ugandan legal sector in an area that Ugandan lawyers and officials of law-enforcement agencies previously shunned. However, the legal dimension in the conflict paradigm remains limited, is far from secure and must be considered against the backdrop of the securitisation of the state.

Stimulating the establishment of a Ugandan international crimes division

Possibly the most visible effect indirectly catalysed by complementarity in Uganda is the creation of a Ugandan international crimes division. First envisaged in the A&R Accords as the 'Special Division of the High Court', then referred to by its creator as the 'War Crimes Court', then referred to as the 'War Crimes Division' and most recently renamed the 'International Crimes Division',[334] this special division of the Ugandan High Court has become the focus of donors' transitional-justice interest.

Recognising that a successful admissibility challenge on the ground of complementarity would require formal criminal justice proceedings at the domestic level, the A&R Accords provide for the SDHC 'to try individuals who are alleged to have committed serious crimes during the conflict'[335] and for 'a unit for carrying out investigations and prosecutions in support of trials and other formal proceedings'.[336] According to an LRA representative,

> in the Agreement on Accountability and Reconciliation, we came with the idea of forming the SDHC ... We did this as an indication to the ICC that we can also do these things amongst ourselves.[337]

[334] Annexure, clause 7, speaks of 'a special division of the High Court'; Administrative Circular No. 1 of 2008, clause 2, speaks of 'the War Crimes Court'; the International Crimes Bill Working Document 2009, Memorandum sub 2, speaks of 'the War Crimes Division of the High Court'; and the High Court (International Crimes Division) Practice Directions 2011 speaks of 'the International Crimes Division'. This chapter uses the terms interchangeably.

[335] Annexure, clause 7.

[336] *Ibid.*, clause 10.

[337] Interview by Refugee Law Project researchers Alex Scheff and Justine Earl, Gulu, September 2008.

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The envisaged division would be 'special' in that it, unlike the ordinary divisions of the High Court, would apply a regime of alternative sanctions and would take into account other transitional-justice mechanisms such as traditional justice, truth-telling and reparations. As envisaged by the A&R Accords, the establishment of the SDHC was thus one of many ingredients of a complex post-Juba transitional-justice recipe.

The A&R Accords left important issues for resolution to the executive, the legislature and, where necessary, the judiciary. For instance, it remained to be decided under which laws persons appearing before the SDHC would be tried, how possible issues of retroactivity would be addressed, which alternative sanctions would apply, how the Amnesty Act 2000 would be dealt with, how formal and traditional justice would relate to each other, and how individuals' cooperation with transitional-justice mechanisms would be rewarded.[338] In 2008, when Kony's signature to the FPA was still being pursued and in order to show its commitment to resolving these issues, the Ugandan cabinet instructed JLOS to prepare for the implementation of the A&R Accords. JLOS, for its part, established the Transitional Justice Working Group to develop a transitional-justice policy.

However, once the Transitional Justice Working Group was up and running, its preparations for a transitional-justice policy became more and more detached from the likelihood of Kony's signing the FPA. According to the Principal Judge, the chairman of the working group, whether or not Kony would sign was a 'political' question from which lawyers should stay clear of it.[339] Even if Kony never signed the FPA, he argued, the GoU should implement its parts of the agreement. 'The peace process has taken off' and 'Uganda has reached a point of no return.'[340]

[338] See A&R Agreement, clauses 3.6, 5.6, 6.3, 14.3 and 14.4, and Annexure, clauses 2 and especially 9 ('For the proper functioning of the special division of the court in accordance with the agreed principles of accountability and reconciliation, legislation may provide for: (a) The constitution of the court; (b) The substantive law to be applied; (c) Appeals against the decisions of the court; (d) Rules of procedure; (e) The recognition of traditional and community justice processes in proceedings.').

[339] When asked about the possible political impact of budgeted radio jingles announcing the establishment of a WCC, he responded: 'For political questions you are with the wrong people here' (meeting, Kampala, October 2008).

[340] The Principal Judge at the Religious and Cultural Leaders Reflection Workshop on the Juba Peace Talks, Gulu, 10–12 September 2008.

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Leading by example, the chairman of the Transitional Justice Working Group did his bit to implement the A&R Accords. In his capacity as Principal Judge, he issued an administrative circular in which he announced plans to establish a new division of the High Court, called the War Crimes Court (WCC), and assigned judges and members of the registry to that court.[341] In hindsight he explained that '[t]he existence of the Uganda War Crimes Court … is derived from the Complementarity provision of the Rome Statute, Article 17'.[342]

In the Principal Judge's vision, the WCC would be a general 'court of complementarity' that would remain operational even after the LRA cases had been handled.[343] Recounting how Uganda in the past had 'exported' its judges to international courts such as the ICTR, the SCSL and even the ICC,[344] he described a Ugandan war crimes court that would be a role model for the region, just as the Ugandan Commercial Court had become.[345] A newspaper quoted a spokesperson for the judiciary expressing the same vision when the WCC was operational:

> 'Yes, [the ministers in Kenya accused by the ICC] can be tried here because this court now complements the Internal [*sic*] Criminal Court. We now have the equivalent of Geneva or Hague in Africa.' All African countries like Kenya, Libya and Sudan whose leaders were recently indicted by the ICC, he added, will be looking at the possibility of requesting for the referral of their cases to Uganda … [The spokesperson] said most international war crimes and crimes against humanity can now be tried in the Uganda International War Crimes Tribunal, the first of its kind in Africa.[346]

The establishment of the WCC was also enhanced by the expectation within JLOS that the special division would attract substantial international resources. Just as the JLOS donor group had been keen to support an Anti-Corruption Division, it would be equally if not more enthusiastic about a court covering conflict-related crimes, so it was rightly assumed.[347]

[341] Administrative Circular No. 1 of 2008, High Court Divisions and Circuits and Staff Deployment.
[342] Ogoola 2010:183. [343] See also *ibid.*:184.
[344] Meeting, Kampala, September 2008. [345] *Ibid.* [346] Musoke 2011.
[347] Observation of a meeting between JLOS officials and JLOS donors, Kampala, September 2008.

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In this sense, there was little 'special' about the creation of this special division of the High Court. In times of budget cuts as a result of structural adjustment programmes of the Bretton Woods Institutions, various 'special' commissions, agencies and courts have mushroomed in Uganda as alternative ways to maintain expensive patronage systems.[348] International donor money for such special bodies guarantees income outside the ordinary national budget. In the case of the SDHC, loyalty to the NRM could be rewarded by secondment to a body that promises training with sitting allowances, access to international networks and travel abroad as fringe benefits.[349]

So, while Parliament was still to decide on the law applicable in any domestic international-crimes proceedings, while the fate of the Amnesty Act was still to be determined, while the relationship between traditional and formal justice was still to be settled on, while the Chief Justice was yet to formalise the creation of the SDHC, while a transitional-justice policy was still to be developed, and, indeed, while the FPA was still to be signed, the judiciary presented to donors a preliminary budget for the start-up phase of the SDHC which envisaged a new building, radio jingles publicising the WCC and study tours for its staff to The Hague, Sierra Leone and 'Bosnia (Kosovo)'.[350]

The judiciary did this successfully, and donors and international NGOs embraced the WCC. The WCC provided foreign norm entrepreneurs the long-desired Ugandan focal point for their transitional-justice work in Uganda: with judges and a registrar with business cards

[348] See Mwenda 2007:30: 'According to an audit conducted by Uganda's Ministry of Finance, Planning, and Economic Development, as of 2003 the country had 95 semi-autonomous government agencies, mostly created with donor support. Almost four-fifths of these agencies revealed their budgets at the auditors' request, though nearly all refused to submit figures on the numbers of people that they employ. The audit found that the total budget allocated to these bodies had been growing by 30 percent every year, and that as of 2003 it was US$280 million. This is a huge sum in Uganda, whose entire Gross Domestic Product (GDP) for 2006 is estimated to amount to only slightly more than $8.5 billion.' See also Green 2010, demonstrating that new sub-national political units (districts) proliferated in Uganda also as an alternative source of patronage.

[349] See also Quinn 2010:69, suggesting that President Museveni created the 1986 truth commission not to deal with the past but to reward the commissioners for their loyalty to the NRM during its rebellion against the then incumbent Ugandan government.

[350] JLOS 2008 and observation of a meeting between JLOS donors and JLOS officials, Kampala, September 2008.

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saying 'War Crimes Court', there was 'real' transitional-justice work that could be done, even though Kony moved further and further away from Uganda and the FPA. Of all the transitional-justice components in the A&R Accords, formal criminal proceedings were also best aligned with the normative agendas of most international actors.

Consequently, ever since the creation of the Transitional Justice Working Group, and in particular of the WCC, the Principal Judge, the judges and registrar of the court have had an almost full-time job in receiving visiting diplomatic delegations, international NGOs and foreign scholars (present author included), offering 'capacity building', 'study tours' and asking questions about the Ugandan experience with trying international crimes. The WCC staff have also toured the world to participate in seminars on transitional justice, visit international courts and observe truth commissions. Donors and international NGOs, for their part, have funded or conducted these study tours, the refurbishment of a building for the WCC, several needs and risks assessments, training for court interpreters and brainstorm sessions on outreach strategies.[351] Ugandan actors have observed the international enthusiasm with some amazement. As one of the judges observed after serving on the WCC for three years:

> [International NGOs] are all seeking to assist. They all come and offer training. But we are trained enough now. Now they want to come and sit with us during our work. We never reject it, out of diplomacy, but usually say 'perhaps in the future'. Meanwhile, they duplicate their work … are competing and … all have their personal interests. On their websites they claim to have done more than they have, because they have received money from a government to do something. We have never seen that money.[352]

And yet, international norm entrepreneurs have been influential in shaping the WCC. On the basis of discussions with foreign human

[351] When the first case came before the WCC, donors were reluctant to provide any form of support to the defence: 'As donors we cannot be seen supporting the defence. We always talk about the victims; then we cannot say that we pay for the defence. Instead, we trained court interpreters.' Interview with a donor representative, Kampala, November 2011. Another donor representative observed that JLOS and its donors 'do not want to prioritise the offenders of international crimes, while other offenders have bad state-brief lawyers, too'. Interview with a donor representative, Kampala, November 2011.

[352] Interview with a WCC judge, Kampala, November 2011.

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rights activists who explained complementarity, and in order to tally with a perceived wish-list on the part of international donors, the Principal Judge modelled the WCC on international criminal tribunals. In his words:

> Complementarity means: 'We do something close to the real thing here.' We have a fair procedure, a just procedure and we give the accused a proper defence, representation and due process. There is no *in absentia* trial. All the standards we have are similar to the international ones. What we don't have is a prosecution unit that is part of the court. In Uganda these are separate. But because of the international practice we are going to explore a unit of the prosecution and a unit of the defence all as part of the court. The War Crimes Court will be a holistic court.[353]

So the Principal Judge's administrative circular envisaged a WCC that would 'comprise a bench of at least three judges and a Registry; to which [would] be attached an OTP, and an Office of the Defence Counsel'.[354] Nothing in the Rome Statute suggests that, in order to benefit from the principle of complementarity, domestic proceedings must be conducted in a specific war crimes court that integrates judges, prosecutors, defence lawyers and a registry. In the domestic context, many Ugandans consider this integration into one court a threat to the separation of powers and the independence of the judiciary. However, by reference to the ICC, the ICTR and the SCSL, senior officials in JLOS argued that judges, prosecution, defence and registry must at least be 'under one roof'[355] in order to meet the complementarity criteria.[356] Similarly, the Ugandan practice of a single high court judge adjudicating most serious crimes was substituted by the use of a bench:

[353] Interview with the then Principal Judge, Kampala, September 2008. See also Ogoola 2010:184: 'The Court's standards and procedures – including a trial bench of three Judges, Prosecution, Investigation and Defence Office, and in-house translation service – all mirror those of the modern international criminal courts such as the Hague, Arusha, Bosnia, Yugoslavia, Sierra Leone, etcetera.'

[354] Administrative Circular No. 1 of 2008, clause 2.

[355] Interview with a prosecutor involved, Kampala, October 2008: 'We will have to work under one roof as in Sierra Leone'; and in Kampala, June 2010: 'The Court is supposed to be The Hague kind of style: all under one roof.'

[356] Interview with the then Principal Judge, Kampala, September 2008.

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> [T]he way that [these international] courts work is to have a bench of three. But the nature of these cases is such that they take forever: a year, or two, just to hear one case. In the course of the year also, the three judges that started may not all still be around. So I am told what the practice is in international courts, is to have a fourth judge, for instance in case one of three exits or gets sick or something.[357]

A fourth judge was appointed to the WCC.

The ICC, a court which has taken pains to mirror diverse domestic legal systems, was thus itself mirrored – not only in substance but also in form – in the domestic sphere. One of the officials appointed to the WCC explained this mimicry as follows:[358] 'If you are driving, you need a driving mirror; the War Crimes Court mirrors the ICC-van.'[359] The mirroring goes so far that those explaining the proposed WCC budget argued that it must be a long-term budget since the cases against the LRA will take a very long time, given the duration of the cases before the ICTR.[360]

The ICC, rather than the Juba A&R Accords, became the template for the SDHC.[361] With the retirement of Principal Judge Ogoola, the judiciary lost interest in developing a framework that integrates formal and traditional justice. The chair of the SDHC was said to have no intention of taking into account local justice practices in the absence of the legal framework envisaged in the Juba Agreements.[362]

Less intentionally, the WCC also mirrored the first years of practice of the ICC Chambers: no trials, even no cases before it. In its

[357] The Principal Judge cited in Refugee Law Project 2010:9. See also Ogola 2010: 'Justice Akiiki Kiiza, who presides over the division, says that war crimes trials held in the country will function in a similar fashion to those in The Hague, with three judges officiating each case. The court currently has four judges capable of overseeing war crimes trials, and is searching for a fifth, which Kiiza hopes could come from the international community, in order to bring some outside expertise.'

[358] The term 'mimicry' in the legal context is derived from Drumbl 2007:Chapter 5.

[359] Interview, Kampala, September 2008.

[360] Meeting between JLOS officials and JLOS donors, September 2008.

[361] Note how Judiciary of the Republic of Uganda (undated) distinguishes between the court envisaged in the peace agreements and the 'court of complementarity': 'While originally meant to be part of a comprehensive peace agreement with the LRA, the international crimes division has now come to be viewed as a court of "complementarity" with respect to the international criminal court, thus fulfilling the principle of complementarity stipulated in the preamble and Article 1 of the Rome Statute.'

[362] Interview, Kampala, November 2011.

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enthusiasm in setting up the WCC, the judiciary had left the Uganda Police Force, specifically the Criminal Investigations Department, and the Directorate of Public Prosecutions behind. Enjoying less independence than their judicial counterparts, investigators and prosecutors waited for a political imprimatur for criminal proceedings for conflict-related crimes. Entering into politically sensitive areas such as the implementation of a peace agreement[363] could be costly to their careers.[364] So they argued that the Court's jurisdiction and applicable law should first be determined and that it would be a waste of time and resources to start building cases against persons who may never be arrested.[365]

When on the eve of the Review Conference of the Rome Statute in Kampala there was still not a single case before the WCC, the Ugandan Chief Justice expanded the Court's jurisdiction and rebranded it as the 'International Crimes Division' (ICD). According to paragraph 6(1) of the High Court (International Crimes Division) Practice Direction, the Division shall try any offence relating, not just to genocide, crimes against humanity and war crimes, but also to 'terrorism, human trafficking, piracy and any other international crime as may be provided for under the Penal Code Act, Cap 120, the Geneva Conventions Act, Cap 363, the International Criminal Court Act, No. 11 of 2010 or under any other penal enactment'. With its jurisdiction expanded to include terrorism, a crime for which many were (and still are) lingering in prisons, the ICD soon had its first case.

Offered to the LRA as a carrot to match the stick of The Hague, the SDHC was an effect catalysed by complementarity. But, as a court meant to facilitate a transition, it failed before it was created: the idea could not offset the LRA's fear of the ICC. Nonetheless, international norm entrepreneurs and Ugandan donor spotters hand-picked the special division out of the A&R Accords and freed it from its

[363] Paradoxically, implementation of some parts of the signed agreements could jeopardise the signing of the FPA. For instance, it is questionable whether the radio jingles that were initially budgeted to publicise the WCC would encourage Kony to sign.

[364] These views emerged in interviews with senior police officers and prosecutors in Kampala and northern Uganda in September and October 2008, in June 2010 and in November 2011.

[365] *Ibid.*

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transitional-justice context.[366] Without institutional links to other transitional-justice instruments such as amnesties, reparations and truth-telling mechanisms, it could pursue criminal justice without concessions. Not tied up in a transitional-justice deal, it did not have to sacrifice some retributive justice for the benefit of, for instance, truth, peace, democracy or restorative justice. Rather than an instrument of transitional justice that was meant to contribute to a complex balance of peace, restorative justice, accountability and democracy, the SDHC became an aim in itself. Without these inherently political aims to pursue, the SDHC also seemed a technical rather than a political enterprise, which made it easier for donors and domestic lawyers to run with it.

But there was a price to pay for the transformation from a court embedded in a transitional-justice framework to a stand-alone ICC-style court, from an instrument to an aim in itself and from a component of an inherently political endeavour to a technical development project. First, in mimicking the justice model of the ICC, the SDHC does no better than the ICC in pursuing a concept of justice that resonates with the people directly affected by the conflict with the LRA. Secondly, no transition without politics: without a political deal, the SDHC as such does nothing to facilitate a transition, in this case, an end to the conflict in northern Uganda. The result is a 'court of complementarity' that mimics the ICC not just in design and rhetoric but also in its effectiveness in addressing the LRA and bringing justice to northern Uganda.

Increasing the attention paid to 'international standards'

As the section on the WCC began to reveal, the preparation for domestic proceedings went hand in hand with a belief that domestic proceedings must be like proceedings in the ICC or must at least meet so-called 'international standards'. Asked about the rationale for the SDHC, Uganda's Chief Justice, for instance, explained:

> To meet international standards … it must meet ICC standards. A special division is necessary to convince the ICC.[367]

[366] See also the legal draftsman of the A&R Accords, Afako 2010: 'Whilst laudable, these unilateral moves on the question of justice might, without the benefit of the oversight mechanisms envisaged by the agreement, risk losing the nuances that were designed to make the agreements palatable to the LRA and to affected communities.'

[367] Interview with Chief Justice Benjamin Odoki, Kampala, October 2008.

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And one senior JLOS official elaborated on these standards:

> If [the A&R Accords are] going to be implemented, complementarity means that there will be two units: one in The Hague and one municipal. These two must not divorce each other. It must be complementary. [The domestic Court] must look like the real thing in The Hague: the benchmarks, the procedure, substantive definitions, what is a war crime, what are massacres, violations of human rights. The Rome Statute has these, ours cannot be different . . . We have to be complementary to the ICC, even with sentences, otherwise we have to justify why we differ. If the ICC says 10 years, we cannot say 100 years or 10 days . . . Complementary means let us do something they [the ICC] can live with. That is why we are trying to live up to their norms.[368]

The belief that complementarity requires a mirroring of ICC proceedings led to proposals to adjust several features of Ugandan criminal law and practice in case of international-crimes proceedings. One example is the role of victims. As it is, Ugandan law of criminal proceedings does not provide for victim participation with a view to reparations. In order to make up for their absence in the negotiations, the A&R Accords anticipated an increased role for victims in transitional-justice proceedings. However, in JLOS's preparations for the SDHC, complementarity rather than the A&R Accords became the dominant rationale for considering increasing victims' participation. Although there is nothing in articles 17 and 20 of the Rome Statute that supports the argument that cases are admissible before the ICC if victims cannot participate or obtain reparations in domestic criminal proceedings,[369] many JLOS actors believed that proceedings in the WCC would have to include victim participation and reparations in order to meet the complementarity standard. They found support in statements from international actors. For instance, when submitting its observations on the admissibility of the LRA case, the ICC Office of the Public Counsel for Victims concluded:

[368] Interview, Kampala, September 2008.

[369] Cf. *contra* the (in this context inapplicable) ICTY case law on rule 11 *bis* referrals (see Chapter 2) in particular ICTY, *Ademi and Norac Referral Decision*:[53]: 'In the present context, the explicit requirement under Rule 11bis for a fair trial of the Accused is properly complemented by a concern for fairness towards other interested parties, such as victims and the international community, and has a relevance as a policy consideration for the referral Bench when it considers whether or not to refer a case.'

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> [C]onsidering that the Ugandan legal framework derives from the common law system where victims' participation is not recognised as such, the victims . . . are of the view that the exercising of its jurisdiction by the Special division of the High Court would deprive them of their rights as granted in the Rome Statute, unless the Ugandan Authorities carefully implement the said rights with regard to the establishment of the Special division of the High Court, for the participation of victims to be meaningful.[370]

With respect to witness protection too, it was argued that international regimes should be copied. In a conference organised by the United Nations High Commissioner for Human Rights, Ugandan judges argued that there was a need to relocate high-risk witnesses from their villages. According to a newspaper report, Uganda's judge on the Special Court for Sierra Leone added: 'It's advisable for the sake of protecting our witnesses that they should be driven in cars with tinted glasses from where they are kept to the court rooms.' Local actors thought this was unnecessary. Revealing a different perception of justice, the Gulu district chairman argued that 'all the people need is restoration of human dignity and maintaining social relationship with other community members'.[371]

JLOS actors also held up a mirror to the ICC for inspiration for detention facilities. In 2008, when there was still some hope that Kony would sign the FPA, the Chief Justice mentioned that the Prisons Department had

> asked for good holding facilities, commensurate with international standards. Kony is different – he should not be kept with ordinary criminals.[372]

And, indeed, the Commissioner General of Prisons said he was readying detention facilities that met 'international standards' for the persons sought by the ICC.[373] Asked about such standards, one

[370] *Observations on behalf of Victims Kony et al.*:[32]. The conclusion was based on responses to *Questionnaire Ugandan Victims on Admissibility*, containing questions such as 'Do you think a Ugandan criminal procedure will take into account your concerns?', 'What should a Ugandan court do to respect your needs?' and 'Do you want the LRA trial to be in Uganda or at the ICC?' It is of note that the responses were given by victims who have applied for participation in ICC proceedings and hence have an interest in the continuation of these proceedings.

[371] Eriku and Livingstone 2011. [372] Interview, Kampala, October 2008.

[373] Interview with a senior official in the Ministry of Internal Affairs in Kampala, October 2008.

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government minister suggested that the gym and DVD players in the ICC's detention centre were representative.[374] Another official proposed to build 'hotels' in Luzira, Kampala's run-down maximum-security prison.[375] Motivating his support for the Ugandan ICC Bill (see next section), one parliamentarian expressed his enthusiasm for the Rome Statute, citing the detention facilities of the ICC (or ICTY/ICTR for that matter):

> The ICC, particularly the Rome Statute, has done great work to resolve the dispute in Yugoslavia and Rwanda. I visited the UN facility, the ICC detention facility in Arusha and I recommend that honourable members, especially Cabinet members, visit this detention facility to acquaint themselves with what happens there, particularly considering the sort of crimes the inmates committed.[376]

'Outreach' is another oft-invoked 'international standard'. During study tours in The Hague, Sierra Leone and Sarajevo, JLOS members were bombarded with the importance of courts' doing 'outreach'.[377] Donors, too, have been keen on outreach,[378] and funded NGOs to do outreach for JLOS – a striking resemblance to donors' funding of NGOs to do outreach for the ICC.[379] The concept of outreach has inspired the JLOS sector beyond the field of transitional justice. While judges have remained reluctant to tour the country to talk about their cases, the sector as such has been considering doing more to inform the public about its work.[380]

Only a few senior Ugandan judicial officials have explored developing alternatives to the ICC with a view to a possible admissibility challenge on grounds of complementarity that do not follow all the Court's and other 'international standards'. The same senior JLOS

[374] Interview with a Ugandan government minister, Kampala, October 2008.
[375] Participant observation at an official meeting, Kampala, October 2008. The intended special facilities for special criminals present a clear risk of a Rwanda scenario, where initially those suspected of being most responsible in the genocide received imprisonment sentences and the best detention facilities, while the much larger number of less important actors faced the possibility of a death sentence, languishing in overcrowded jails.
[376] Uganda 2010a:[3.37].
[377] Interview with a participant of a study tour, Kampala, November 2011.
[378] Interview with a JLOS donor, Kampala, November 2011: 'We insisted: outreach, outreach.'
[379] Interview with a JLOS donor, Kampala, November 2011.
[380] Interview with a JLOS advisor, Kampala, November 2011.

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official who stated that '[i]f the ICC says 10 years, we cannot say 100 years or 10 days' expressed support in a later discussion for the use of traditional justice at sentencing. He was inspired by the Colombian Peace and Justice Act, which provides for investigations and prosecutions of crimes in the Statute, but contains sentences milder than in ordinary Colombian law.[381]

The obsession with 'international standards' stems in part from a lack of study of the actual provisions in the Rome Statute. Primarily regulating proceedings before the ICC, the Rome Statute is, as has been explained in Chapter 2, relatively silent on domestic proceedings. It provides only that, in order to render an ICC case inadmissible, domestic proceedings in that case must be genuine. The manifestations of inability and unwillingness which would demonstrate this lack of genuineness are narrowly described.[382] Victim participation, reparations for victims, outreach, and the quality of detention centres are, no matter how important, not part of the definition of inability or unwillingness. Because its jurisdiction is conditional upon the statutory requirements of complementarity being fulfilled, the ICC does not have the same freedom in setting conditions for referrals of cases to domestic jurisdictions as the ICTY and ICTR enjoy on the basis of their primacy of jurisdiction.[383]

For many influential actors in the international-criminal-justice movement, this is precisely the problem with complementarity. Their argument is that the ICC should not just serve as a back-up court to avoid impunity but also oversee domestic compliance with various human rights and other 'international standards' when adjudicating international crimes. As part of their promotion of a laudable human rights agenda far beyond the Rome Statute, they explain complementarity as how it, in their view, should have been regulated.[384]

[381] Peace and Justice Act 2005, arts. 3 and 30, providing for an alternative punishment of between five and eight years' imprisonment.

[382] RS, arts. 17 and 20(3). See Chapter 2, 'Where domestic proceedings have been initiated: unwillingness and inability'.

[383] See Chapter 2, 'The ICC does not have a conditional deferral procedure like the ICTY and ICTR'.

[384] NGO representatives who fly in and out, or write from afar, are often most uncompromising in demanding compliance with so-called 'international standards'. Local staff and international staff who live in Uganda for a substantial amount of time are more oriented towards marrying international norms with the contextual reality, intuitively aware of Merry's 'paradox of making human rights

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Thus, when the Juba A&R Accords provided for domestic proceedings as an alternative to the ICC, many international NGOs expressed strong views on whether this was desirable and on the 'benchmarks' that such proceedings should meet.[385] They were aided by diplomats with instructions from European capitals who argued that 'international standards' must be met for domestic proceedings to be 'ICC-proof' and left it to the international-criminal-justice movement to specify what these standards were.[386] The practice of the ICC is still fairly limited, so, when drawing up these standards and benchmarks, experts relied on experience of other international criminal tribunals, in particular the ICTY's and ICTR's case law on rule 11 *bis* referrals.[387] It was considered self-evident that a statute of an international court requires national proceedings to meet international standards, whether for trials, for prisons or for court design.[388] The promoted norms are laudable from a human rights perspective, but do not fit complementarity.

Uganda proved an easy target for such norm hijacking. When the option of domestic proceedings began to feature, few government ministers, JLOS actors and judges appointed to the WCC had ever read the Rome Statute.[389] But, accustomed to donors offering 'technical experts'[390] to accompany financial support for development programmes, JLOS welcomed their project proposals for 'transitional justice

in the vernacular', which is that '[t]o be accepted, they have to be tailored to the local context and resonant with the local cultural framework. However, to be part of the human rights system, they must emphasize individualism, autonomy, choice, bodily integrity, and equality – ideas embedded in the legal documents that constitute human rights law' (Merry 2006b:49).

385 E.g. see Amnesty International 2007, Human Rights Watch 2007 and Human Rights Watch 2008. See also Keppler 2013, forthcoming:*passim*.

386 Interview with a European diplomat, Kampala, August 2008.

387 See e.g. Burke-White and Kaplan 2009:273.

388 See e.g. Nakandha 2011.

389 See also, rather explicitly, President Museveni in his opening speech for the Review Conference: 'I belong to a political organization that has been fighting impunity for the last 45 years … [O]ur contribution to this debate is to re-introduce words which I do not hear so much in the international jargon. I have not read the Rome Statute, but I do not know whether those words are there. We, in our political tradition, we make a distinction between just and unjust wars. This war you are fighting; what war is it? Is it a just war, or is it a war of aggression? I do not know whether the Statute sorts that one out.' (Museveni 2010:1–2).

390 Baylis 2008:385 aptly queries the qualification required for the title 'expert' ('people with no real expertise in areas that matter, like international criminal law … have been deemed experts merely because they are foreigners with expertise in some area of the law').

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workshops', 'study tours' and 'legislative drafting assistance'. In exchange, they listened to the advice of international experts. Consequently, some of the principal defenders of the WCC, who said in interviews that they had never read the Rome Statute, *were* reading Human Rights Watch's 'Benchmarks for Justice for Serious Crimes in Northern Uganda'.[391] Similarly, one government minister, who confessed never to have seen the Rome Statute prior to the Juba talks, pointed on his desk to a 122-page 'Manual for the Ratification and Implementation of the Rome Statute', written by Canadian NGOs, when he said:

> We really realised the role of the ICC only when the Juba peace process started; now there is a Rome Statute on my desk.[392]

Nonetheless, perceived requirements of complementarity for a successful admissibility challenge were not the decisive factor in catalysing Ugandan expressions of devotion to international standards. At least as important were donors' checklists. From experience Ugandan JLOS actors knew that donors are keen to subsidise their own export products. References to 'international standards' could thus be construed as funding for training abroad and infrastructure (buildings and cars). Interest in international standards thus also quickly evaporated where donors were reluctant to pay, for instance, for reparations, defence counsel or prisons. When, three years after the first interview, the Commissioner General of Prisons was asked about the progress he had made with readying cells for the LRA, he answered:

> We did not prepare anything. There was no money. We keep the cells just like the ordinary cells. We have only [one accused of the LRA] in jail, who will soon be released. We had wanted to convert some cells, to have a library, flushing toilets and very humane treatment in accordance with international standards.
> [Interviewer:] *Do the prisons now meet these standards?*
> Luzira does not meet these standards.
> [Interviewer:] *Could donors not provide assistance?*
> Donors funding prisons?! [*Laughs*][393]

[391] Human Rights Watch 2007. The report was distributed during a JLOS meeting. The UCICC, funded by foreign organisations, has been equally influential. Mistaking the UCICC for a satellite of the ICC, many officials e.g. one of the judges appointed to the WCC, consider the Coalition's information as authoritative (interview, Kampala, September 2008).
[392] Interview with a government minister, Kampala, October 2008.
[393] Phone interview, November 2011.

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Finally, and paradoxically, part of the explanation of the popularity of references to 'international standards' is that 'international standards' appeared to offer discretion, an escape route from the constraints of Ugandan law. Many Ugandan lawyers for instance believed – with reason – that the evidentiary requirements of international criminal law were lower than those of Ugandan law.[394] When drafting the practice directions for their court, the judges of the ICD thus provided that the applicable rules of procedure and evidence would be not just those applicable to criminal trials in Uganda, but also 'international practices and rules'.[395] Protecting the rule of law against the rule of lawyers, the practice directions eventually adopted by the Chief Justice reined the judges back in,[396] foregrounding the Ugandan legal order of which the ICD, no matter how special, remains part.

Shaping the International Criminal Court Act?

When Uganda ratified the Rome Statute in 2002, the prospects of the GoU's adopting legislation to give effect to its obligations under the treaty were bleak. Uganda had joined the Rome Statute because it was internationally fashionable and improved the GoU's image in the eyes of European donors (the US being placated by a 'bilateral immunity agreement').[397] It had paid hardly any attention to the obligations

[394] See e.g. interview with the Director of Public Prosecutions, Kampala, November 2011: 'It is easier to prove an international crime than a domestic crime because of the jurisprudence that has developed with respect to war situations.' And a judge on the International Crimes Division, asked about the applicable law of evidence: 'Perhaps we will use that of international criminal procedure, because it is more flexible' (Kampala, November 2011).

[395] Interview with a judge, Kampala, November 2011.

[396] For remains of the provision as initially drafted, see a speech written for the Deputy Attorney-General to be delivered at a 'Policy Dialogue on Complementarity and Transitional Justice' organised by the United Nations Development Programme in New York, where it says: 'Procedurally, the ICD will adopt rules of procedures and evidence applicable to criminal trials in Uganda *as well as international practices and rules, including those by the ICC or other international criminal tribunals*', footnoting a 'High Court (International Crimes Division) Order, 2011' (Ruhindi 2011:2, emphasis added).

[397] Interviews with officials, Kampala, September and October 2008. Asked why the GoU signed a treaty that departed from Uganda's practice of transitions without justice, while it refused to follow the Western fashion with respect to, for instance, the rights of homosexuals, one Ugandan lawyer working for the government explained: 'The type of [international] pressure for gay rights is nothing in comparison to war crimes. Those shock the conscience of mankind. You've got

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actually incurred when it ratified the Statute, not unlike when it became party to other 'human rights' treaties.[398] Uganda had ratified the Genocide Convention,[399] the 1977 First Additional Protocol to the Geneva Conventions[400] and the Convention against Torture[401] without giving them any follow-up in domestic legislation.[402] Some international NGOs and one Ugandan MP, part of a transnational network of parliamentarians supporting the ICC, pushed for Ugandan legislation to give effect to obligations in the Rome Statute,[403] but such legislation was not a priority for either the executive or the legislature.[404] So, contrary to the widespread expectation in academic literature, in Uganda domestic legislation criminalising the offences in the Rome Statute was not an effect catalysed by the principle of complementarity *per se*.[405]

The referral, however, catalysed sudden Ugandan attention on ICC legislation. The OTP stressed to Ugandan officials the need for legislation to facilitate the ICC's investigations in Uganda. For the

to belong to the community of nations. In the past there was a lack of will and not so much pressure of the international community . . . The world was not so much talking about prosecution, prosecution. They were more concerned about remedying it' (interview, Kampala, October 2008).

398 Not unlike elsewhere, in Uganda the term 'human rights treaties' is frequently used to cover everything with a 'humanitarian dimension', ranging from human rights law proper to international criminal law and international humanitarian law. The Rome Statute is thus frequently considered a 'human rights treaty' (for a clear distinction between the loose and proper concepts of 'human rights law', see O'Keefe 2011:1003–4).

399 Entry into force on 12 January 1951, Uganda acceded on 14 November 1995.

400 Entry into force on 7 December 1978, Uganda acceded on 13 March 1991.

401 Entry into force on 26 June 1987, Uganda acceded on 3 November 1986.

402 Since its ratification of the Rome Statute, Uganda has also ratified the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination 2006, which obliges Uganda (art. 9) to criminalise genocide, crimes against humanity and war crimes. For other treaties that Uganda has ratified, but failed to implement, see ICRC 2008. Uganda gave domestic effect to the Convention against Torture 1984, to which it had acceded in 1986, through a private member's bill in April 2012 (see Mugerwa 2012).

403 See also Clarke 2009:133–5.

404 Interview with the parliamentarian concerned, Kampala, September 2008.

405 As argued in Chapter 2, 'An obligation to criminalise in domestic law?', the Statute requires states to adopt legislation only to facilitate cooperation, but many states have also criminalised the Rome Statute offences by way of national legislation for the purpose of domestic investigations and prosecutions.

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purposes of cooperation, it would have sufficed to adopt legislation on cooperation only – indeed, the OTP feared that comprehensive legislation including Rome Statute crimes would slow down the adoption of cooperation provisions[406] – but international NGOs successfully lobbied for legislation also domesticating the crimes within the ICC's jurisdiction. With influential assistance from the Commonwealth Secretariat, the Ministry of Justice drafted a Ugandan ICC Bill on the basis of the Canadian, South African and New Zealand ICC legislation,[407] which then was hastily gazetted in May 2004.[408] The rationale for the legislation was thus to smooth the progress of the ICC's proceedings, rather than to use it for challenging the ICC's jurisdiction on grounds of complementarity.

But, after its hasty introduction, the Ugandan ICC Bill lingered in Parliament. First, in 2004/5, it was considered that discussing the Bill could jeopardise the progress that Betty Bigombe was making in her talks with the LRA.[409] Next, a petition was filed in the Constitutional Court challenging the constitutionality of the government's ratification of the Rome Statute. The petition contended that Parliament rather than cabinet should have ratified the Statute, as ratification necessitated constitutional amendments.[410] This petition was ultimately dismissed, officially for want of prosecution,[411] but in the

[406] Interview with a former OTP official, The Hague, June 2008.

[407] Email exchange with an official in the Ministry of Justice and Constitutional Affairs, December 2008 and Hurinet-U 2005.

[408] International Criminal Court Bill 2004 (ICC Bill 2004).

[409] See also Uganda 2005a:[12.03]: the 'debate [on the ICC Bill 2004] could not move on because government said there were processes that are going on for negotiation with the LRA and they did not think it would be appropriate to begin discussing the ICC Bill at that time.'

[410] The Constitutional Court of Uganda at Kampala, *John Magezi, Judy Obitre-Gama, Henry Onoria* v. *Attorney General*. The petitioners mentioned four aspects of the Rome Statute that required constitutional amendment. First, the non-applicability of immunities before the Court undermined the President's constitutional immunities. Secondly, the ICC could retry persons who had been convicted or acquitted in Uganda. Thirdly, the ICC does not respect national pardons, whereas the Ugandan Constitution protects them. Finally, Uganda's cooperation with the ICC could violate the right to protection against self-incrimination if Uganda were to hand over information obtained from persons seeking or benefiting from an amnesty in accordance with the Amnesty Act 2000.

[411] In reality due to government obstruction. Interview with one of the lawyers involved, Kampala, October 2008.

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meantime the Bill was not discussed on second reading.[412] In addition, preparations for the first multiparty elections in 2006 occupied much of Parliament's attention and created a backlog in parliamentary activity.[413] As it happened, cooperation with the ICC proved possible even without domestic ICC legislation.[414]

As the 2004 Bill lapsed with the prorogation of that Parliament, a new but substantially similar ICC Bill was tabled before the next Parliament on 5 December 2006.[415] In international fora, the Ugandan Minister of Justice promised that the Bill would be enacted before the end of 2008, in view of Uganda's bid to host the Rome Statute Review Conference in 2010 and, more remotely, for Uganda to be elected to the UN Security Council.[416] Back in Uganda, however, Parliament was instructed 'to go slow' with the Bill[417] as its passage was thought to send the wrong message in relation to the ongoing Juba talks.[418] Members of the international-criminal-justice movement organised, with international funding, seminars for parliamentarians

[412] Email discussion with a parliamentarian involved, October 2008.
[413] See also Afako 2008:94 and 99.
[414] Instead, a Memorandum of Understanding between the Government of Uganda and the Registry of the Court was concluded on 20 August 2004 (see ICC-ASP/6/WGRC/INF.1 (2008):6).
[415] International Criminal Court Bill 2006 (ICC Bill 2006).
[416] Makubuya 2008. See also ICC-ASP/6/WGRC/INF.1 (2008):5: 'The Ugandan authorities expressed their full commitment to expedite the approval of the implementing legislation for the Rome Statute, which would most likely occur within 2008.' Similarly, a government minister, asked about the status of the ICC Bill, replied in an interview in Kampala on October 2008: 'We have urged [the legal and parliamentary affairs committee to consider the Bill] as soon as possible.' [Interviewer:] *'Why?'* 'Because we are bidding for the 2010 ICC Review Conference. One of the conditions is that we have passed this Bill. Even though we should not be put under pressure to pass our own national legislation.'
[417] Interview with a senior government official, Kampala, October 2008: 'When there was a prospect for peace [Parliament] was instructed to go slow' with the Bill.
[418] See also the Minister of State for Justice and Constitutional Affairs' explanation to Parliament for the long time it had taken for the Act to be adopted: '[T]he long time taken on deliberating on this matter was not by accident. Interestingly, we are not even recalling that the first one was a 2004 Bill which lapsed with the Seventh Parliament. Then we came out with the 2006 Bill and at one point, you may recall that we were in very serious negotiations with the Kony group and everyone of us was actually quite reluctant to disturb that process by coming on the Floor of the House and at the end of the day derailing the process. But as we speak, that has gone bad and there is nothing to stop us from going ahead with the enactment of this law in full swing' (Uganda 2010a).

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and lawyers to keep the legislation on the parliamentary agenda (not always effectively – one of the more active MPs on the ICC legislation file was on an ICC event abroad when the Bill was eventually discussed in Parliament).[419] But the executive prioritised commercial laws for debate in the overburdened Parliament.[420] As it happened, Uganda was elected a member of the Security Council and chosen to host the Review Conference without domestic ICC legislation.

It was only the imminent arrival of thousands of delegates for the Rome Statute Review Conference in Kampala in May 2010 that provided the decisive push for Parliament's adoption of the ICC Bill. The JLOS Transitional Justice Working Group, judges of the Ugandan WCC and the Ugandan judge on the ICC pressed the importance of an ICC Act on parliamentarians.[421] As the JLOS Secretariat reviewed the Act's adoption:

> As a result the Government of Uganda was able to successfully host the ICC review conference. This could not have been possible since one of the conditions that was set by the ICC to allow the country to host the conference was domestication of the Rome statute.[422]

So, on 10 March 2010, six years after the first introduction of the Bill and less than three months before the beginning of the Review Conference, Parliament adopted the ICC Act 2010.[423]

The debate of 10 March 2010 and the preceding discussions reveal a notable confusion between the concepts of, on the one hand, ratification, and on the other, adoption of domestic legislation to comply with obligations under the Rome Statute, and between on the one hand giving effect to the obligations imposed on states parties by the Rome Statute and on the other embodying the entire Rome Statute in domestic law.[424] For instance, it was argued that article 11 of the

[419] Interview with a parliamentarian, Kampala, May 2010.
[420] Interview with a parliamentarian, Kampala, October 2008.
[421] See Judiciary of the Republic of Uganda (undated) and Uganda 2010a.
[422] JLOS 2010:65. See also Uganda's ambassador to the Assembly of States Parties: 'It was important to have the bill signed before the review conference took place . . . [The Assembly of States Parties] wouldn't have cancelled the review conference if it hadn't been, but it was an understanding that we would' (cited in Oketch 2010).
[423] Uganda 2010a.
[424] See *ibid.* (e.g.: The Speaker: 'This Bill is giving the force of law in Uganda [to] the Statute of International – there is already a statute, the Rome Statute . . . I think it is not intended to amend the statute but to give force to this. The statute which

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Rome Statute prohibited domestic trials for crimes committed before 2002, whereas as a matter of Ugandan law it was more relevant that the Ugandan Constitution prohibited domestic proceedings under a Ugandan ICC Act for crimes committed before its enactment.[425] The ICC contributed to this lack of clarity by stating in outreach activities that 'States Parties are obliged to implement *all* the provisions of the Rome Statute'.[426]

The Bill that was passed in 2010 was almost the same as the one introduced in 2006; Parliament made only a few amendments.[427] The resulting ICC Act 2010 proscribes war crimes, crimes against humanity and genocide in Ugandan law – almost all of these for the first time in Ugandan history[428] – by reference to the Rome Statute's definitions. It also declares applicable the Statute's 'general principles of criminal law' in Ugandan proceedings for these crimes,[429] including

you see . . . you may not actually go beyond what it says . . . But as to whether we can amend the Rome Statute, I do not know.').

425 Participant observation, symposium on 'The Domestication of the Rome Statute in Africa: Challenges and Prospects', Entebbe, 5–6 September 2008. See also Ogoola 2010:183–4.

426 Email exchange with ICC outreach office, May 2008. For a similar confusing statement in the Kenyan context, see Moreno-Ocampo 2009a:2 ('Kenya is a state party to the Rome Statute. The ICC is therefore a part – an independent part – of the legal and judicial system of Kenya, in the same way it is part of the legal system of the other 109 States Parties of the Rome Statute.').

427 See Uganda 2010a. The amendments concerned mostly procedural roles (consent for prosecution required from the DPP instead of the Attorney-General and jurisdiction of the High Court instead of the Magistrates Court). The only substantive amendment was to change the punishments from those under the Penal Code (which includes the death penalty) to those under the Rome Statute. The amendment ensured that persons prosecuted in Uganda under the ICC Act would not by definition get a harsher punishment than those tried under the Rome Statute by the ICC (Uganda 2010a:[3.02]), but created a discrepancy in the Ugandan courts, namely, that a person prosecuted under the Penal Code Act can receive a harsher punishment than a person prosecuted under the ICC Act. A proposal to delete the provision according to which someone's official capacity is no ground to refuse complying with a cooperation request from the ICC was rejected (ultimately with the unconvincing argument that the irrelevance of official capacity is provided in the Rome Statute and the Statute prohibits reservations).

428 Grave breaches of the Geneva Conventions of 1949 had already been criminalised in the Geneva Conventions Act 1964. When the ICC Act was adopted in March 2010, the Geneva Conventions Act had never been applied in court.

429 ICC Act 2010, s. 19. It adds the Rome Statute's article on *ne bis in idem*, which in the Statute falls under 'jurisdiction, admissibility and applicable law', to the part with 'general principles of criminal law'.

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the modes of responsibility.[430] Another novelty for the Ugandan legal order is the establishment of extraterritorial jurisdiction on grounds other than nationality, namely, employment by the state of Uganda, passive personality and universality on the condition of the offender's subsequent presence in Uganda.[431]

Still, for some NGOs, donors and international consultants the 2010 Act came as a disappointment. USAID-funded American lawyers had produced for JLOS, in the words of one of the American lawyers involved, 'a state-of-the-art ICC Act, better than in many western countries'.[432] This unofficial draft International Crimes Bill included even more references and similarities to the Rome Statute than the 2006 Bill.[433] For instance, it provided that '[g]rounds for the excusal or disqualification of a judge shall be consistent with Article 41 of the Statute'[434] and listed Article 68 of the Statute (on witness and victim protection) as one of the provisions applicable as part of 'general principles of criminal law'.[435] The International Crimes Bill also explicitly provided for the jurisdiction of a 'War Crimes Division',[436] which would be remarkably open to international elements. For instance, the War Crimes Division could seek the services of foreign advisors to provide assistance to the judges, prosecution and defence counsel, similar to the practice of the Iraqi Special Tribunal.[437] Moreover, as amended by the American advisors, the draft Bill provided that the War Crimes Division would adopt its own rules of

[430] Not included are those principles that are already part of Ugandan domestic law (most of the *nullum crimen* and *nulla poena sine lege* guarantees) and the principles on the irrelevance of official capacity.

[431] Cf. ICC Act 2006, s. 18 with the Penal Code Act 1950, ss. 4 and 5. The Geneva Conventions Act 1964, s. 2(1) and (2), already recognised such broad extraterritorial jurisdiction (even without requiring any link to Uganda) for the grave breaches of the four Geneva Conventions of 1949. Note that the ICC Act 2010 establishes this broad jurisdiction not merely for war crimes, crimes against humanity and genocide but also for offences against the administration of justice. It is questionable whether international law permits the exercise of such broad jurisdiction over offences against the administration of justice. RS, art. 70(4)(a) requires jurisdiction on the basis of territoriality and nationality only. See also Commonwealth Expert Group 2004:[35].

[432] Discussion, Amsterdam, June 2009. Amnesty International, too, had lobbied Uganda to adopt an International Court Act that would be more progressive than the Rome Statute itself (see Amnesty International 2004c).

[433] International Crimes Bill Working Document 2009.

[434] *Ibid.*, clause 20(2).

[435] *Ibid.*, clause 19(a)(xi).

[436] *Ibid.*, clauses 18 and 18 *bis*.

[437] *Ibid.*, clause 20(3).

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procedure and evidence, apparently in deviation from existing rules for Ugandan courts. The provision continued that 'the judges may adopt modifications [to the existing rules for the Ugandan High Court] modeled after the best practices of international tribunals'.[438] Equally unprecedented in the Ugandan context would be that 'representatives of victim's [*sic*] groups may present perspectives on matters related to sentencing',[439] and that the 'ICC may send a designated observer ... to attend public proceedings before the [War Crimes Division] to provide first-hand information to the ICC for the purposes of its findings related to Article 17'.[440] In the end, demonstrating the influence of international-norm entrepreneurship when push comes to shove in Uganda, this draft International Crimes Bill was never formally introduced in Parliament.

While the text of the ICC Act 2010 does not differ much from the 2004 Bill, the rationale for its adoption changed. In 2004, the focus was on cooperation with the ICC;[441] in 2010, the immediate reason for adoption was the Review Conference, but the dominant rationale was complementarity.[442] The focus had shifted from facilitating ICC proceedings to conducting domestic trials. Implicitly recognising thorny questions of retroactivity, the A&R Accords had not referred to any still-to-be-adopted ICC Act; as set out above, the A&R Accords had explicitly left the determination of the law to be applied in such proceedings to the legislature.[443] As an instruction for prosecutorial policy – not necessarily for applicable law[444] – the Annexure provided that '[p]rosecutions shall focus on individuals alleged to have

[438] *Ibid.*, clause 20(4). [439] *Ibid.*, clause 20(6). [440] *Ibid.*, clause 20(7).

[441] The Committee on Legal and Parliamentary Affairs, however, did not share the focus of the executive. For the first and only time that the 2004 Bill would be discussed in Parliament the committee produced a report that recommended adding provisions on alternative criminal justice proceedings, alternative sanctions and the role of the Amnesty Commission (see Committee on Legal and Parliamentary Affairs 2004 and Oulanyah 2004). The Ministry of Justice wrote a negative reply, but sent it to the ICC rather than the committee (interview with a parliamentarian involved, Kampala, September 2008).

[442] See e.g. one parliamentarian arguing in the debate on the adoption of the ICC Act: 'My support to the passing of this Bill into law is based on three fundamental grounds: One is that this Bill, when passed into law, will empower the local courts to carry out trials rather than having to appeal to The Hague.' (Uganda 2010a: [3.09]).

[443] Annexure, clause 9(b).

[444] Interview with a member of the mediation team, Kampala, September 2008.

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planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions'.[445] From the perspective of a future admissibility challenge on the ground of complementarity, this focus on conduct rather than applicable law was sufficient. As discussed in Chapter 2, domestic proceedings can render ICC cases inadmissible as long as the same conduct is charged. The Ugandan Penal Code Act covers almost all the conduct stated in the ICC arrest warrants.[446] Nonetheless, after several workshops and discussions with international advisors, many parliamentarians as well as JLOS officials believed that, if Uganda were not to charge the conduct in terms corresponding to the crimes provided for in the Rome Statute, the gravity of the offences would not be accurately reflected and the complementarity criteria not met.[447]

A key obstacle to applying the ICC Act 2010 to crimes allegedly committed by the LRA before 2010, for instance for the crimes of which LRA leaders have been accused by the ICC, is the prohibition against retroactivity. In this case, international human rights law is not the biggest impediment, as it makes an explicit exception to the prohibition in case of acts or omissions that were crimes under international law at the time they were committed.[448] So, as long as the offences in the Rome Statute were crimes pursuant to international law at the time they were committed, which is doubtful with respect to some of the Statute's crimes before 1998, Uganda would not violate international law by applying the ICC Act retroactively. The

[445] Annexure, clause 14.

[446] With the exception of the enlistment of children. The UPDF Act 2005, s. 52(2)(c) (arguably applicable to the LRA because it applies, according to s. 119(1)(h), to every person found in unlawful possession of arms) prohibits, but does not criminalise, enrolment of persons under eighteen. See also Wrange 2008a:1.

[447] Participant observation of discussions among parliamentarians (among which 'The Domestication of the Rome Statute in Africa: Challenges and Prospects', organised by the UCICC, Entebbe, 5 and 6 September 2008), participant observation JLOS meeting, Kampala, October 2008 and discussions at the Uganda Law Reform Commission, Kampala, October 2008. See also Glassborow 2008: '[A representative] of Parliamentarians for Global Action, a network of members of parliament from around the world promoting democracy and peace, said that if Uganda could apply the definition of crimes as laid out in the ICC statute in its investigations, prosecutions and adjudications, it could successfully challenge the jurisdiction of the international court.'

[448] International Covenant on Civil and Political Rights 1966, art. 15.

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Ugandan Constitution, however, contains a stricter prohibition: 'No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.'[449] It has been argued that this does not prevent application of the proposed ICC Act, since

> [t]he Constitution does not say 'constitute a criminal offence under Ugandan law', but leaves it open whether it is restricted to domestic legislation or not. These acts did constitute criminal offences under international law, which is a law binding also on Uganda. Hence, under this reading, there is no obstacle to introducing new legislation which criminalises acts under domestic law that have already been criminalised under international law.[450]

In this light, JLOS's American international law consultants suggested adding the following provision to the Bill:

> In accordance with Article 15 of the International Covenant on Civil and Political Rights, to which Uganda is a Party, the legislature recognises that Genocide, Crimes Against Humanity, and War Crimes, as defined in this law and Articles 5–8 of the Statute, constitute crimes under customary international law and as such Uganda may prosecute these crimes domestically even where their commission occurred before Uganda enacted provisions expressly criminalising such offenses in its domestic law.[451]

However, article 15(2) of the International Covenant on Civil and Political Rights (ICCPR) does not fulfil the constitutional requirement of a pre-existing criminal offence. In a state with a dualist approach to the international order, the term 'a criminal offence' in the constitutional provision must be read as 'a criminal offence under Ugandan law' (and not foreign or international law), unless the Constitution had made an explicit exception for crimes pursuant to international law, in accordance with article 15(2) of the ICCPR, which it does not.

[449] Constitution of the Republic of Uganda 1995, art. 28(7).
[450] Wrange 2008b:61 (footnote omitted).
[451] International Crimes Bill, Working Document, 2009, clause 18 *bis*(2). Cf. a government official's report of what he had learnt during the study tour to The Hague, Sierra Leone and Sarajevo: 'There the argument was that you can try these suspects because customary international law has been in existence. The argument is strengthened by the existence of the Geneva Conventions and the ICCPR' (interview, Kampala, November 2011).

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A way to reconcile the constitutional prohibition against retroactivity with the application of the ICC Act to crimes committed prior to its entry into force is to distinguish between 'act' and 'offence'. Wrange has convincingly argued that

> the Constitution provides that '[n]o person shall be charged with or convicted of a criminal offence which is founded *on an act or omission* that did not at the time it took place constitute a criminal offence' (emphasis added). Hence, it is not prohibited to introduce new crimes with retroactive application, as long as the acts or omissions in question were criminal at the time of commission. Otherwise the Constitution would have said, '[n]o person shall be charged with or convicted of a criminal offence, which is founded on an act or omission that did not at the time it took place constitute *that* criminal offence'.[452]

Whether or not Ugandan law supports this interpretation remains for decision by the Constitutional Court if the ICC Act ever were to be retroactively used and this were challenged.

Alternatively, it was suggested that problems of retroactivity could be avoided by using the 1964 Geneva Conventions Act for the LRA crimes.[453] That Act, however, does not cover crimes against humanity or war crimes committed in a non-international armed conflict.[454] Faced with all this legislation, none of which neatly covered the conflict between the GoU and the LRA, Principal Judge Ogoola playfully proposed his own solution – 'supplementarity':

[452] Wrange 2008b:62. See for a similar reasoning in a different jurisdiction, High Court of Australia, *Polyukhovich* v. *Commonwealth*.

[453] See also below, on the case against Thomas Kwoyelo, who was charged under the Geneva Conventions Act 1964.

[454] The Geneva Conventions Act 1964 criminalises 'grave breaches' of the four Geneva Conventions of 1949, which concern war crimes committed in international armed conflicts only. It is questionable whether the GoS ever had the 'overall control' (see *Tadić Judgment*:[122]) over the LRA required to render the conflict an international armed conflict. Nonetheless, if it wished to use this Act as part of the implementation of the Juba Agreements, Parliament could have made a legislative determination that, for the purposes of the implementation of the FPA, the conflict in northern Uganda must be considered an international armed conflict. Alternatively, if the question whether the conflict amounted to an international armed conflict were to arise in proceedings, the Minister, pursuant to s. 2(4) of the Geneva Conventions Act 1964, could determine this and issue a binding certificate accordingly.

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> What about we leave the doctrine of complementarity and we use the Ogoola doctrine of supplementarity? We will use all three: the ICC Bill, the Penal Code and the Geneva Conventions Act.[455]

Part of the explanation for the attempts closely to mimic ICC charges and procedures could be that in the absence of clear precedents of challenging complementarity the safer route is to follow the ICC as closely as possible, particularly in light of the ICC's narrow definition of what constitutes the same 'case', as discussed in Chapter 2. The Principal Judge, for instance, explained the readiness to copy the ICC model by saying that '[t]he ICC wants us to do everything the way they did it: we must use the same Statute and the same standards'.[456]

But the mirroring of the international norms and practices is also explained by international advice according to which international crimes must be prosecuted as international crimes and as in international proceedings.[457] An example often cited to the Ugandan JLOS actors was the ICTR's refusal to hand over Michel Bagaragaza for trial in Norway because the Norwegian criminal code did not contain the crime of genocide with which the ICTR had indicted him.[458] Only a few advisors explained that this decision was made under the ICTR's regime of primacy, and would be difficult to square with the ICC's arrangement of complementary jurisdiction.[459] Most presented this simply as reflective of 'international law'.[460]

And yet again, when push came to shove and the first LRA member was to be tried before the ICD, the lobbying of the international norm entrepreneurs who wished to see the LRA charged with crimes under the ICC Act proved insufficiently persuasive. The DPP brought charges

[455] Discussion, Kampala, October 2008. See also Ogoola 2010:184.

[456] Principal Judge at the Reflection Workshop on the Juba Peace Talks for Religious and Cultural Leaders, Gulu, 10–12 September 2008.

[457] For this view, see e.g., *Amicus Curiae Brief Uganda Victims' Foundation and Redress Trust*:[40]: 'The use of ordinary offences in lieu of international crimes itself fails to capture the gravity and aggravated nature of the international crimes.' See also Human Rights Watch 2012:27, recommending Uganda to 'pursue prosecutions of crimes against humanity and war crimes as defined by the ICC Act for crimes committed prior to 2010'. See also Human Rights Watch 2011:6.

[458] ICTR, *Bagaragaza Referral Decision (AC)*.

[459] See Wrange 2008b:55.

[460] See also Drumbl 2011:202–3, predicting that the ICC is likely to be inspired by ICTR rule 11 *bis* case law, even though it operates under another jurisdictional regime.

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against Thomas Kwoyelo (on whom more below), first on the basis of the Penal Code Act, then exclusively under the Geneva Conventions Act,[461] and then on the basis of the Geneva Conventions Act with alternative charges under the Penal Code Act;[462] the DPP did not charge Kwoyelo under the ICC Act. To the Ugandan lawyers involved, the prohibition on retroactivity was too strong an impediment.

Discouraging amnesties

Without considering any possible inconsistency in obligations, Uganda passed the Amnesty Act 2000 within a year of signing the Rome Statute. Also, after Uganda's ratification of the Rome Statute and adoption of legislation giving domestic effect to the Statute, the Amnesty Act remained in force.[463] Uganda thus belied the widespread assumption that states would consider joining the Rome Statute incompatible with the use of amnesties.[464]

Unique in comparison to amnesties across the globe, the Amnesty Act 2000 had been lobbied for by representatives of *victims* of the conflict, not by its would-be direct beneficiaries.[465] Religious leaders from northern Uganda hoped that an amnesty would entice the LRA leadership to give up their armed struggle. Addressing possible fear of prosecution, an amnesty could also encourage abductees to defect. In return for the government's amnesty, the Acholi communities would welcome members of the LRA back as their prodigal children.[466]

Amnesty was not new to Uganda. It had been used before to ensure impunity for crimes committed by state agents as well as to persuade

[461] *Uganda* v. *Kwoyelo Thomas* (Indictment 2010). See also *Charge Sheet Kwoyelo* September 2010.

[462] *Uganda* v. *Kwoyelo Thomas* (Indictment 2011).

[463] Uganda did not issue a declaration as Colombia did upon ratification, according to which '[n]one of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent[s] the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia.' (United Nations Secretary-General 2002).

[464] See Chapter 2, 'A prohibition on amnesties?'

[465] See also Wierda and Otim 2011:1160.

[466] In this vein, Mr Jacob Oulanyah, MP from northern Uganda, at the event 'Dialogue: The Crossroads of Amnesty and Justice', Kampala, 11 November 2011. On Acholi feeling a sense of responsibility for the LRA as originating from the Acholi community, see Finnström 2006.

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armed opposition groups to lay down their weapons. Sometimes the promise of non-prosecution was given in a legal instrument,[467] other times it was an implicit component of a package including government jobs, money and other benefits.

The Amnesty Act 2000 contains an amnesty that does not require any consent of the President in individual cases. It 'declares' an amnesty[468]

> in respect of any Ugandan who has at any time since the 26th day of January, 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by—
> (a) actual participation in combat;
> (b) collaborating with the perpetrators of the war or armed rebellion;
> (c) committing any other crime in the furtherance of the war or armed rebellion; or
> (d) assisting or aiding the conduct or prosecution of the war or armed rebellion.[469]

President Museveni and army officials had wished to exclude 'heinous crimes',[470] in much the same way that the 1987 Amnesty Statute had explicitly ruled out genocide, murder, kidnapping and rape.[471] But leaders from northern Uganda considered any exclusion of combatants an obstacle to a peaceful resolution of the conflict and insisted on a general amnesty.[472] Nor does the Act exclude crimes committed after its entry into force. The only crimes that are not within the scope of the amnesty are those not committed 'in the furtherance' or 'in the cause' of the war or armed rebellion.

[467] See e.g. Decree No. 8, promulgated by Idi Amin on 8 May 1972, according to which '[n]otwithstanding any written or other law, no court shall make any decision, order or grant any remedy or relief against the Government or any person acting under the authority of the Government in respect of anything done or omitted to be done for the purpose of maintaining public order or public security in any part of Uganda, or for the defence of Uganda or for the enforcement of discipline or law and order in respect of or anything relating to, consequent upon or incidental to any those purposes during the period between 24.1.1971 and such date as the President shall determine'. See also the 1987 Amnesty Statute. On amnesty in Uganda, see also Afako 2002, Apuuli 2005, Mallinder 2009 and Tripp 2010.

[468] Amnesty Act 2000, s. 1(a) defines 'amnesty' as 'a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State'.

[469] *Ibid.*, s. 2(1). [470] Amnesty Bill 1998. [471] Amnesty Statute 1987, s. 2.

[472] Acholi Religious Leaders 1999. See also Afako 2002 and Allen 2006:74.

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A 'reporter', which is 'a person seeking to be granted amnesty under this Act',[473] shall be taken to be granted the amnesty only if he or she:

> (a) reports to the nearest army or police unit, a chief, a member of the executive committee of a local government unit, a magistrate or a religious leader within the locality;
> (b) renounces and abandons involvement in the war or armed rebellion;
> (c) surrenders at any such place or to any such authority or person any weapons in his or her possession; and
> (d) is issued with a certificate of amnesty as shall be prescribed in regulations to be made by the Minister.[474]

If the person has already been charged or lawfully detained, he or she is still deemed to be granted the amnesty if he or she:

> (a) declares to a prison officer or to a judge or magistrate before whom he or she is being tried that he or she has renounced the activity referred to in section 2;[475] and
> (b) declares his or her intention to apply for the amnesty under this Act.[476]

In that case, the reporter

> shall not be released from custody until the Director of Public Prosecutions has certified that he or she is satisfied that—
> (a) the person falls within the provisions of section 2; and
> (b) he or she is not charged or detained to be prosecuted for any offence not falling under section 2.[477]

The Amnesty Act thus does not make the enjoyment of amnesty conditional upon a confession, truth-telling or an apology.

It is ambiguous whether the amnesty certificate, mentioned in section 3(1)(d), is a criterion for enjoyment of the amnesty or merely a piece of paper evincing qualification for the benefits of the Act.

[473] Amnesty Act 2000, s. 1(e). [474] *Ibid.*, s. 3(1).

[475] The Amnesty Act as incorporated into the Laws of Uganda refers here to s. 3 instead of s. 2. When the Amnesty Act was incorporated into the Laws of Uganda, all sections moved up by one but not all cross-references were adjusted. The fact that the correct reference is to s. 2 is confirmed by *Kwoyelo* (Constitutional Court Ruling), p. 11. The same applies to the references to s. 2 in s. 3(3)(a) and (b).

[476] *Ibid.*, s. 3(2). The word 'apply' in subsection (b) is misleading in that the Act does not provide for an 'application' process; '[a] reporter shall be taken to be granted the amnesty declared' if he or she completes the required steps.

[477] *Ibid.*, s. 3(3).

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While the text of section 3(1)(d) suggests the former, its context suggests the latter: the Act 'declares' an amnesty, a reporter 'shall be taken to be granted the amnesty [that has already been] declared' and section 3(6) provides that a reporter who fulfils the conditions of the Act shall be granted an amnesty certificate.[478] It would be illogical to make the grant of an amnesty certificate conditional upon the issuance of an amnesty certificate.

The consequence of the amnesty is that the reporter

> shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion.[479]

The Act does not protect against civil suits.[480] In 2002, the Act was amended to exclude persons who rejoined the LRA.[481]

The Amnesty Act also establishes an Amnesty Commission

> (a) to monitor programmes of—
> (i) demobilisation;
> (ii) reintegration; and
> (iii) resettlement of reporters;
> (b) to coordinate a programme of sensitisation of the general public on the amnesty law;
> (c) to consider and promote appropriate reconciliation mechanisms in the affected areas;
> (d) to promote dialogue and reconciliation within the spirit of this Act;
> (e) to perform any other function that is associated or connected with the execution of the functions stipulated in this Act.

Originally valid for six months,[482] the Amnesty Act had its twelfth anniversary in 2012. In May of that year, 26,288 people had benefited from it.[483] Forty-nine per cent of these people were members of the LRA.[484] The questionnaire that each reporter was requested to fill in did not ask whether he or she had committed

[478] The provision is ambiguous in that it makes obtaining the certificate conditional upon compliance with any of the provisions of subsections (1), (2), (3), (4) and (5), but a reporter cannot comply with subsections (3) and (4) as they contain obligations on the Director of Public Prosecutions.
[479] Amnesty Act 2000, s. 2. [480] See also *ibid.*, s. 1(a) *a contrario*.
[481] Amnesty (Amendment) Act 2002. [482] Amnesty Act 2000, s. 16.
[483] Amnesty Commission 2012.
[484] The other reporters were part of one of twenty-seven other rebel groups.

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any crimes.[485] Nobody was denied an amnesty certificate on the ground that his or her acts, for instance rape in the base camps, were not committed 'in the furtherance' or 'in the cause' of the war.[486]

The practical relevance of the Amnesty Act has extended beyond its legal consequences. A resettlement package consisting of seeds, saucepans, a mattress, blanket and cash payment of 263,000 USH (approximately US$100) handed out by the Amnesty Commission to each reporter was for many at least as attractive as the promise of non-prosecution.[487] The UPDF made people who reported while in its captivity debrief and then join the army to fight the LRA.[488] State agents at times also abused the Amnesty Act by making release after arbitrary detention conditional upon confession of links with 'terrorist organisations' in exchange for amnesty.[489]

Neither the Ugandan executive nor the Ugandan legislature considered the application of the Amnesty Act to be incompatible with the ratification of the Rome Statute; one was an instrument of domestic peacemaking, the other foreign policy. Rather than, as many legal writers seemed to expect, seeing the principle of complementarity as an incentive to end the application of the Amnesty Act, Ugandan government officials initially argued that the Amnesty Act was fully consistent with complementarity. As the Minister of State for Justice

[485] Amnesty Commission 2008a.

[486] Interview with a Commissioner of the Amnesty Commission, Kampala, September 2008. Amnesty was denied, however, to persons who first committed crimes outside the context of the conflict, then joined the rebellion and asked for an amnesty (interview with a staff member of the Amnesty Commission, Kampala, September 2008) or to those who feigned to have been a rebel in order to obtain amnesty, and particularly, a reintegration package (Mallinder 2009:26). Paradoxically, the argument that rape is not a crime committed 'in the cause of' the conflict and hence cannot be covered by amnesty is undermined by the emerging case law of international criminal courts, recognising rape as an instrument of war, albeit an illegal one.

[487] For a critique of these packages, see Lomo and Hovil 2005:14.

[488] Dolan 2011:100. In the absence of any vetting procedure, senior LRA commanders have been incorporated into the UPDF. One example is Charles Arop, accused by the Ugandan army of leading one of the LRA's attacks on civilians in DRC towns during Christmas 2008, leaving hundreds dead. See Human Rights Watch 2009c:34.

[489] See e.g. Kobusingye's account of how her brother in prison had received visits of state officials to try and persuade him to apply for amnesty (Kobusingye 2010:131). See also Human Rights Watch 2009a:Chapter VIII.

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and Constitutional Affairs and Deputy Attorney-General explained to the Ugandan Parliament:

> Hon. Alaso also talked about amnesty – do we throw it overboard; what happens to our amnesty law? No. You need to understand the concept of enforcing this process under the international criminal justice system. Do you understand the principle of complementarity, for instance? As Hon. Kyanjo has put it, there is where the state is unwilling or is unable, but where it is willing and able, that is where the matter should be tried first. In other words, that is the principle of complementarity . . .
>
> International criminal justice does not throw away our own initiatives to try some of these renegades. In other words, we can still have our amnesty law. However, you cannot invoke amnesty when a person is indicted to go to the ICC, because it will not be applicable. You cannot say, We have already granted amnesty to Kony or whoever. You cannot invoke amnesty when these persons or suspects are being indicted at the international level. However, you can actually have amnesty internally or domestically under the complementarity principle.[490]

Nevertheless, the practical effect of the executive's referral of the situation concerning the LRA to the ICC was to undermine the legislature's amnesty law by triggering the jurisdiction of a forum not bound by Ugandan law. The executive also tried to amend the Act without revealing its motive. In December 2003, when due to its confidentiality the referral was not yet known to the Ugandan Parliament, the executive gazetted an Amendment Bill to exclude 'leaders of rebellion' as beneficiaries of the amnesty.[491] The link between the gazetted amendment to the Amnesty Act and the referral to the ICC was disclosed only when the ICC issued a press statement announcing the referral which noted:

> In a bid to encourage members of the LRA to return to normal life, the Ugandan authorities have enacted an amnesty law. President Museveni has indicated to the Prosecutor his intention to amend this amnesty so as to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda are brought to justice.[492]

[490] Uganda 2010a:[4.12].
[491] Amnesty (Amendment) Bill 2003.
[492] ICC 2004.

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Parliament opposed the hastily drafted Amendment Bill on account of its possible consequences for any peace process.[493] An amended version was ultimately passed in 2006, empowering the Minister of Internal Affairs to draw up a list of specified individuals ineligible for amnesty, a list that Parliament must approve for it to take effect.[494]

As such, the amendment to the Bill should not be considered an effect catalysed by complementarity. As explained by the parliamentary Defence and Internal Affairs Committee:

> Uganda has asked the International Court of Justice [*sic*] (ICC) to indict the LRA leaders, a position that has in principle been agreed to. The ICC is in custody of adequate information to indict the LRA leaders. However, the current position in the Amnesty Act puts the government's cooperation with the ICC in jeopardy, by providing for amnesty to the LRA leadership as provided for in the current Amnesty Act.
>
> The passage of this Bill will therefore . . .
>
> - Enable the ICC [to] indict the LRA leaders and other similar groups . . . without any impediments,
> - Explicitly express [the] government's position on the fact that rebel leaders who are regarded as international terrorists, and are operating within our country, are not protected by our domestic legislation against trial in the International Court of Justice [*sic*],
> - Provide a basis for [the] government to collaborate with international institutions in the fight against terrorism.
> - Harmonise the amnesty Law and the ICC Law, which was passed by this House [*sic*: the ICC Bill would be passed four years *after* this statement].[495]

While enhancing the possibility of domestic proceedings against the LRA leadership, the amendment was thus primarily introduced to facilitate ICC proceedings.[496]

The Juba A&R Accords for their part did not undermine the amnesty process either. The A&R Agreement explicitly stated that '[t]he parties consider that . . . the Uganda Amnesty Commission [is] capable of implementing relevant aspects of this Agreement'.[497] It also

[493] Interview with a parliamentarian involved, Kampala, September 2008.
[494] Amnesty (Amendment) Act 2006.
[495] Seventh Parliament of Uganda Defence and Internal Affairs Committee 2006.
[496] Interview with a Cabinet Minister involved in the referral of the situation concerning the LRA to the ICC, Kampala, October 2008.
[497] A&R Agreement, clause 5.5.

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ensured legal certainty by providing that '[w]here a person has already been subjected to proceedings or exempted from liability for any crime or civil acts or omissions, or has been subjected to accountability or reconciliation proceedings for any conduct in the course of the conflict, that person shall not be subjected to any other proceedings with respect to that conduct'.[498] Only with a view to possible future proceedings did the A&R Agreement instruct the government to '[i]ntroduce any amendments to the Amnesty Act' to bring it into conformity with the agreement.[499]

The ICC, for its part, has not discouraged Uganda's amnesty process as such.[500] According to a member of Uganda's Amnesty Commission, the OTP told the Commission: 'We are only interested in a few people; we will not affect existing amnesties and we will not undermine the amnesty process.'[501] True to its word, the OTP has not charged any high-level LRA commander who has received amnesty, not even those who renounced the rebellion only after the ICC had opened its investigation and against whom substantial evidence existed, for instance Kenneth Banya, Sam Kolo or Charles Arop.[502] The Prosecutor explicitly encouraged LRA members to defect, promising on Ugandan radio that he would not issue new warrants unless commanders committed new crimes.[503] He stated in an interview:

[498] *Ibid.*, clause 3.10. Even if not covered by this clause, the amnesty is protected by art. 28(10) of the Constitution ('No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence').

[499] A&R Agreement, clause 14.4. See also clause 5.6: 'The Government will introduce any necessary legislation, policies and procedures to establish the framework for addressing accountability and reconciliation and shall introduce amendments to any existing law in order to promote the principles in this Agreement.'

[500] The decrease in the number of reporters after the issuance of the ICC arrest warrants (Amnesty Commission 2008b) should probably not be attributed to potential defectors' concern over ICC prosecutions, but rather to a decrease in direct combat with the LRA. If the ICC warrants have had any influence on the decrease in the number of applications, it has been to cause the LRA leadership to tighten its control, reducing opportunities for defections (interview with a humanitarian aid worker, Gulu, September 2008).

[501] Interview with a Commissioner of the Amnesty Commission, Kampala, September 2008.

[502] Banya received amnesty on 12 August 2004, Kolo surrendered on 16 February 2005 and Arop in November 2009 and received amnesty shortly afterwards.

[503] Transcript of a public radio announcement of the ICC Prosecutor, Mega FM, December 2005: '[I]f new commanders of the LRA commit new crimes, I may

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> We want just the five top leaders. They can do whatever with the others; they can invite them to come out . . .[504]

suggesting that only persons sought by the ICC cannot benefit from amnesty.

The OTP's statements and practice are difficult to reconcile with the Court's stated aims of ending impunity and contributing to deterrence. They are not, however, inconsistent with the letter of the Statute, which, as Chapter 2 has noted, is silent on amnesties. Moreover, the statements and practice reflect the Court's institutional interest insofar as widespread defections from the LRA increase the chances of arrest of those against whom the ICC has issued warrants. In contrast, ICC proceedings against persons whom the Ugandan Government has already granted an amnesty certificate could jeopardise the GoU's willingness to cooperate with the Court.

The anti-amnesty campaign came, however, from other actors outside Uganda. To the surprise of its Ugandan proponents, international human rights organisations turned against the Amnesty Act, especially after the ICC's intervention. For instance, one international human rights organisation asked a local human rights group: 'How can you as a human rights organisation lobby for amnesty?'[505] For the local human rights organisation, the answer was clear: the Amnesty Act could be a means for the realisation of the most basic human rights such as security, land, family life and dignity. But international human rights organisations focused on the 'fight against impunity'. One parliamentarian from northern Uganda observed:

> Amnesty International is dead against amnesty. I do not know why they called themselves Amnesty. They work day and night to kill amnesty.[506]

With a view to the upcoming ICC Review Conference a year later, Ugandan JLOS actors used the arrest of Thomas Kwoyelo in March 2009 to prepare a first case for the Ugandan ICD. But, for a long time, the question remained: on what legal ground could he be denied amnesty?

request new arrest warrants against them . . . All other members of the LRA can come out and return home. I will not prosecute them.'

504 'Uganda: Kony will eventually face trial, says ICC prosecutor' 2006.

505 Statement by a human rights activist at 'Dialogue: The Crossroads of Amnesty and Justice', Kampala, 11 November 2011.

506 Statement by Mr Jacob Oulanyah, MP from northern Uganda, at 'Dialogue: The Crossroads of Amnesty and Justice', Kampala, 11 November 2011.

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Thomas Kwoyelo was captured by the UPDF during Operation Lightning Thunder in the DRC, twenty-two years after the LRA had abducted him at the age of thirteen.[507] In June 2009, Kwoyelo was charged with crimes allegedly committed as a member of the LRA. On 12 January 2010, after a visit in prison from the Principal Legal Officer of the Amnesty Commission, Kwoyelo signed a form renouncing the rebellion.[508] According to the Amnesty Act, once amnesty was taken to be granted, Kwoyelo's release further depended on the DPP's certifying that Kwoyelo was not charged with, or detained in order to be prosecuted for, an offence unrelated to the rebellion. The Amnesty Commission interpreted the Amnesty Act to make the issuance of an amnesty certificate conditional upon the DPP's consent. It wrote to the DPP, saying that in its view Kwoyelo qualified to benefit from the amnesty process, and asked for the DPP's views.[509] The DPP did not respond, and so Kwoyelo remained in prison.

Just over a month before the opening of the ICC Review Conference, the Ministry of Internal Affairs requested Parliament to approve the exclusion of four persons from eligibility for amnesty: Joseph Kony, Dominic Ongwen, Okot Odhiambo and Thomas Kwoyelo.[510] The first three were the ICC suspects who were still alive; Kwoyelo was the only senior LRA commander in Ugandan custody. But Parliament refused to approve the Ministry's proposed statutory instrument on account of procedural irregularities and a lack of information on the reasons for the proposal. Members resented that the executive had not bothered to report that the peace talks had come to an end.[511] The Minister of State said he would come back with a renewed proposal, but never did. Kwoyelo was still not granted amnesty and remained in prison. One prosecutor explained: 'The ICC Review Conference put Uganda in the spotlight; then it is not good to grant an amnesty.'[512] A few months later, Kwoyelo was the first person to be committed to the ICD to face trial for conflict-related crimes.[513]

[507] *Uganda v. Thomas Kwoyelo (Proceedings Kasule)*:3.
[508] Kwoyelo 2010. Nonetheless, three months later, the Minister of State for Internal Affairs informed the Ugandan Parliament that Kwoyelo had 'never taken advantage of the [amnesty] law' (Uganda 2010b:[3.26]).
[509] Amnesty Commission 2010. [510] Uganda 2010b. [511] *Ibid.*
[512] Interview with a prosecutor involved in the Kwoyelo case, Kampala, June 2010.
[513] Anyoli 2010.

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The different application – indeed, the *non*-application – of the Amnesty Act in Kwoyelo's case did not reflect a change in policy: there was no policy. The lack of policy is illustrated by the diversity in legal reasons advanced by officials for why Kwoyelo could not benefit from the Amnesty Act. The Ugandan Deputy Attorney-General explained in 2009 that the Amnesty Act did not apply to Kwoyelo because he had been captured.[514] This argument fails to convince: the Amnesty Act provides for application for amnesty by detained persons,[515] and in practice many persons who had been captured have been released under the Amnesty Act.

A prosecutor involved in the Kwoyelo case argued in the same year that the Amnesty Act did not apply because Kwoyelo had been charged with crimes other than 'crimes against the state'.[516] Considering the text of the Amnesty Act, this could constitute an explanation only if it meant that Kwoyelo's crimes, comprising kidnapping with an intent to murder, were not committed 'in the cause of' the conflict. The weakness of this argument is that kidnapping has been one of the main tactics of the LRA rebellion. The argument does indicate, however, a revolutionary reinterpretation of the Amnesty Act; in no other case has the DPP argued that crimes committed by an LRA member while part of the rebellion were not covered by the Amnesty Act. One year earlier, the DPP had explained the fact that proceedings against members of the LRA were seldom initiated by arguing the exact opposite, namely, that LRA members could *always* invoke the Amnesty Act.[517]

In 2010, a prosecutor in the team responsible for cases before the ICD was the first to make a link between the denial of amnesty to Kwoyelo and the ICC. He explained that Kwoyelo could not be granted amnesty now the ICC Act had been adopted. The ICC Act is silent on amnesties, and is, like any other penal act, not by definition incompatible with an amnesty act. But his argument went as follows:

> The Amnesty Act and the ICC Act are in apparent conflict. Implicit is that when two acts of law are in conflict, the latter should prevail. The

[514] Discussion with the Deputy Attorney-General, The Hague, September 2009.
[515] Amnesty Act 2000, s. 3(2).
[516] Phone interview with a prosecutor involved in the Kwoyelo case, September 2009.
[517] Interview with the Director of Public Prosecutions, Kampala, October 2008.

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> argument now used goes that amnesty was in respect of penal code crimes, but not international crimes. They may thus have to amend the charges [against Kwoyelo] into international crimes.
>
> [Interviewer:] *But the Amnesty Act does not say it is only for Penal Code Act crimes*.
>
> Amnesty has in mind the crimes under the penal code. When [the Amnesty Act] was drafted one did not have the ICC on the back of their minds. The ICC Act frowns upon immunity. Even constitutional guarantees of immunity may not apply. The framers of the Amnesty Act did not have the ICC Act in mind.[518]

The interviewed prosecutor argued that the Amnesty Act must be reinterpreted as not to apply to international crimes, not just international crimes in the ICC Act, but also in the much older Geneva Conventions Act. Unlike the ICC Act, the Geneva Conventions Act could be applied in the Kwoyelo case without problems of retroactivity (although raising the separate question whether the armed conflict was international in the sense of the 1949 Geneva Conventions).[519] It was this argument, that the Amnesty Act does not cover international crimes, that the Director of Public Prosecutions maintained when asked why he had not given the Amnesty Commission the green light to issue an amnesty certificate:

> Kwoyelo was the first to be charged under the Geneva Conventions. If he had been charged under the laws of Uganda alone, he would have qualified for amnesty. We maintain the position that amnesty is inapplicable to international crimes.[520]

The weakness of the argument is that Kwoyelo has not been charged under the Geneva Conventions, but under the Geneva Conventions Act. This latter act, like the Penal Code Act, is a domestic act. Crimes under domestic law are excluded from the scope of the Amnesty Act only if there is an act explicitly stating so. There is none that does.

[518] Interview with a prosecutor involved in the SDHC, Kampala, June 2010.

[519] See above, nn. 453 and 454. Initially, Kwoyelo's defence lawyers challenged the applicability of this Act. They dropped that challenge, however, possibly because the maximum punishment under the Geneva Conventions Act is lower than under the ordinary Penal Code Act, a pattern consistent with the fact that in many instances penalties for international crimes are lower than those for ordinary crimes (see Heller 2012).

[520] Interview, Kampala, November 2011.

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The most revolutionary argument against the Amnesty Act was brought by a representative of the Attorney-General's Chambers before the Ugandan Constitutional Court in August 2011. During preliminary proceedings before the ICD in July 2011, Kwoyelo had successfully applied for a reference to the Constitutional Court complaining, among other things, that the DPP and the Amnesty Commission had not accorded him equal treatment under the Amnesty Act and had thus discriminated against him in contravention of the Constitution.[521] The response of the Attorney-General's representative, who acted on behalf of the DPP, came as a surprise to many, including the DPP[522] and, as later appeared, the Attorney-General and his Deputy.[523]

The representative argued that Kwoyelo could not derive any legal right to amnesty under the Amnesty Act because the Amnesty Act was unconstitutional.[524] She admitted that it was 'rather unusual for the Attorney General to contend that a law is unconstitutional because he is involved in its enactment'.[525] Nonetheless, she continued, 'whereas the [Attorney-General] has the power to amend or appeal laws when their illegality comes to his attention, where the issue arises in a suit and there is no time for amendment/repeal, it is his duty as an officer of Court to guide the Court on the same'.[526] She claimed the Amnesty Act infringed on the constitutional independence of the DPP, the constitutional independence of the judiciary, Article 287 of the Constitution and Uganda's obligations under international law.[527] On the first point, she elaborated that 'the Act in granting a blanket amnesty without provision for the DPP's consent, denies him the opportunity to consider the facts/circumstances of

[521] *Uganda* v. *Thomas Kwoyelo (Proceedings)*:23–4 and *Uganda* v. *Thomas Kwoyelo (Reference to the Constitutional Court)*:2.

[522] The DPP commented in an interview in Kampala, November 2011: 'Unconstitutionality was never our argument. It was never our position before the Court. Someone in the Attorney-General's Chambers developed this, on the basis of the *Susan Kigula* case. [Laughs] The argument came suddenly when we were in court.' (In the *Susan Kigula* case, the Supreme Court held that a mandatory death sentence was unconstitutional.)

[523] See below, text preceding footnote flag 552.

[524] *Uganda* v. *Thomas Kwoyelo (Constitutional Directions Proceedings)*:3; *Uganda* v. *Thomas Kwoyelo (Proceedings Kasule)*:7; and *Uganda* v. *Thomas Kwoyelo (Attorney-General's Legal Arguments)*.

[525] *Uganda* v. *Thomas Kwoyelo (Attorney-General's Legal Arguments)*:1.

[526] *Ibid.* [527] *Ibid.*

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individual cases, available evidence and then take the specified issues into consideration and make an independent decision to prosecute or not to prosecute'.[528] Among the factors that the DPP should be able to consider were, according to the Attorney-General's representative:

- Whether the offences constitute violations of international humanitarian law and whether the suspect was individually responsible for such violations?
- Does Uganda have any international obligation to prosecute the offences? Is there universal jurisdiction by other states on international tribunals e.g. ICC over these offences?
- Uganda's *foreign policy* supporting the prosecution of international crimes as illustrated by its enactment of the ICC Statute and establishment of an International Criminal [*sic*] Division of the High Court.[529]

The inconsistency with Article 287 was argued on the basis that this article 'recognizes the validity of ratified treaties under Ugandan law', including the Geneva Conventions. However, Article 287 does not specify the status of international treaties in the domestic legal order – it is merely a transitional provision according to which the new Constitution does not affect Uganda's obligations under pre-existing treaties.

So in addition, but without providing an explanation of how this would lead to a *constitutional* violation, the Attorney-General's representative argued that the Amnesty Act compelled Uganda to violate its 'international legal obligation to punish grave breaches of the Geneva Conventions on war crimes'.[530] Reference was made to the principle of *pacta sunt servanda*, the unavailability of the excuse of municipal law to justify a violation of international law, the finding of the Inter-American Court of Human Rights in *Barrios Altos* v. *Peru* that the Peruvian amnesty laws lacked effect, the decision of the Special Court for Sierra Leone in *Prosecutor* v. *Morris Kallon and Brima Bazzy Kamara* denying validity to an amnesty for serious war crimes, and the ICTY's (*obiter*) finding in *Furundžija* that a state cannot take national measures absolving its perpetrators of torture through an amnesty law.[531] The Attorney-General's representative explained the adoption of the Amnesty Act as 'a justifiable case of human error': the existence of the Geneva Conventions Act had 'escaped the attention of the [Attorney-General] and Parliament'.[532]

[528] *Ibid.*:2. [529] *Ibid.*:3 (emphasis added). [530] *Ibid.*:4.
[531] *Ibid.*:5–6. [532] *Ibid.*:6.

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Kwoyelo's lawyers in turn referred to the constitutional protection of a pardon and the decision of the South African Constitutional Court to uphold South Africa's amnesty act in *AZAPO*. They also distinguished between amnesties granted for the benefits of rulers and, as in Uganda, abducted children.[533]

The Constitutional Court dismissed the Attorney-General's argument that the Amnesty Act was unconstitutional, found that Kwoyelo had been given unequal treatment and directed the ICD to cease his trial forthwith.[534] In upholding the Act's constitutionality, the Constitutional Court argued that pardon was a constitutionally protected right, that the use of amnesty to bring a rebellion to an end was within the framework of the Constitution, and that the Ugandan Amnesty Act, unlike the South African, benefited only rebels. It stressed that the DPP could still prosecute people, namely, those who refused to renounce rebellion, those who were declared ineligible for amnesty by the Minister of Internal Affairs (with Parliament's approval) and government agents. The Constitutional Court explicitly rejected the idea that Uganda had an obligation under the Rome Statute not to grant amnesties:

> There is evidence on record contained in the affidavit of the applicant to the effect that top commanders of the LRA were indicted by the International Criminal Court under the Rome Statute. *Their indictment clearly shows that Uganda is aware of its international obligations, while at the same time it can use the law of amnesty to solve a domestic problem.* We have not come across any uniform international standards or practices which prohibit states from granting amnesty.[535]

In the same way that the Deputy Minister of Justice argued before Parliament, the Constitutional Court thus separates compliance with the Rome Statute from issuing amnesties.

Following the Constitutional Court's ruling, the ICD directed the Amnesty Commission and the DPP 'to comply with the provisions of the Amnesty Act',[536] leaving room for interpretation as to whether this required the Amnesty Commission to issue Kwoyelo with an amnesty certificate or whether certification by the DPP was still

[533] Summarised in *Uganda* v. *Thomas Kwoyelo (Proceedings Kasule)* and *Kwoyelo (Constitutional Court Ruling)*:18–19.
[534] *Kwoyelo (Constitutional Court Ruling)*. [535] *Ibid.*:24 (emphasis added).
[536] *Uganda* v. *Kwoyelo Thomas (ICD Order)*:2.

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required. Believing the latter to be the case, the Amnesty Commission again asked for the DPP's permission to issue a certificate, but in vain.

When Kwoyelo sought an order of *mandamus* to compel the Chairman of the Amnesty Commission and the DPP to grant him an amnesty certificate, the Attorney-General's representative argued that Kwoyelo did not qualify for amnesty as he also faced charges for offences other than kidnap with an intent to murder, including grave breaches of the Geneva Conventions for which no amnesty could be granted.[537] In an interview, the DPP elaborated:

> Neither the Constitutional Court nor the High Court gave me an instruction to release Kwoyelo. They just said: do your job, act. Now our position is that amnesty does not apply to international crimes. That is why Kwoyelo is still in prison.[538]

In January 2012, the High Court judge deciding on the request for an order of *mandamus* rejected the DPP's arguments, finding that the alleged offences were committed by the applicant during the period in which he was a participant in the rebellion and that this brought him within the operation of the Amnesty Act.[539] It was clear to the judge that the Constitutional Court found that violations of the Geneva Conventions Act also fell within the scope of the Amnesty Act, and he issued the order of *mandamus* compelling the Chairman of the Amnesty Commission and the DPP to process and grant an amnesty certificate to the applicant for his immediate release.[540]

And yet, the DPP continued to refuse to certify the grant of an amnesty certificate and to release Kwoyelo,[541] stating: 'This office maintains the position that under the principles of international law, no amnesty can be granted to persons accused of committing war crimes under the Geneva Convention.'[542]

The prosecution of Kwoyelo was prompted by opportunism rather than law or policy. Kwoyelo is considered of little use by the ruling party.[543]

[537] *Thomas Kwoyelo* v. *Attorney General* (*Order of Mandamus*):7 and 18.
[538] Interview, Kampala, November 2011.
[539] *Thomas Kwoyelo* v. *Attorney General* (*Order of Mandamus*):18.
[540] *Ibid.*:19 and 20.
[541] Kwoyelo is not the first not to be released despite qualification for amnesty. See also the story of Ismail Ssenfuka (see Okanya and Akampa 2010 and the comments by parliamentarian Kamya in Uganda 2009:[3.47]).
[542] Anyoli 2012.
[543] See also Chapter 5, 'High cost of action: obstacles to domestic proceedings' on political trials and political impunity.

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Rather, Kwoyelo, as a Ugandan 'Tadić', could satisfy the ICD's institutional craving for a first case, and during the ICC Review Conference in Kampala the preparations for his case served to demonstrate the host country's commitment to international justice at home. As a prosecutor interviewed in Kampala explained during the ICC Review Conference:

> The DPP has little room to manoeuvre. Legally, Kwoyelo would qualify for amnesty. Politically, as a country that has committed to the ICC, we must give an example. We don't have a single case before the War Crimes Court. If he gets amnesty it pulls the carpet under our feet and we shall have nobody.[544]

With the Review Conference successfully concluded, the pressure diminished. In the words of the interviewed prosecutor: 'Now that we are done with the ICC review conference',[545] law could prevail over opportunism.

The Kwoyelo case was thus pursued at all costs, obvious legal obstacles notwithstanding. The Attorney-General's Chambers' argument that the Amnesty Act was unconstitutional put at risk the legal certainty of more than 26,000 beneficiaries of the Amnesty Act in order to prosecute one man before the ICD.[546] In the words of one Ugandan lawyer, musing on this 'trial by ambush': 'They fell every man to get their man; we the people are bleeding.'[547]

Donors, for their part, also changed their position on the amnesty. Welcoming the Act in 2000 as a peaceful conflict-resolution mechanism and afterwards putting pressure on President Museveni to extend its application,[548] they expressed shock when the Act appeared to obstruct the work of the ICD and echoed international

[544] Interview with a prosecutor involved in the Kwoyelo case, Kampala, June 2010.
[545] *Ibid.*
[546] Possibly in an attempt to convince the judges that a finding of unconstitutionality would not have such far-reaching consequences, the Attorney-General's representative argued before the Constitutional Court that any such finding would not have retrospective effect (*Uganda* v. *Thomas Kwoyelo (Proceedings Kasule)*:9). However, according to the Ugandan Constitution, a law inconsistent with the Constitution is void to the extent of the inconsistency (Constitution, art. 2(2)), making it impossible for an unconstitutional act to have any legal effect.
[547] Phone discussion with a Ugandan lawyer, November 2011.
[548] See Dolan 2011:99.

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human rights organisations in arguing that international crimes should be excluded from its scope.[549]

If the Kwoyelo case reveals any policy, it is the absence thereof. Individuals in JLOS, backed by donors and international NGOs, were given a free hand to pick and develop one component of the Juba transitional-justice package, namely, criminal justice for the LRA. Once created, the Division needed cases to justify its existence.[550] The Juba A&R Accords had foreseen the need to reconcile criminal accountability with the existing amnesty and with other transitional-justice aims and had therefore instructed the government to develop a comprehensive transitional-justice policy, including amendments to the Amnesty Act.[551] But, in the absence of a signed Final Peace Agreement, a transitional-justice policy never became a priority for the cabinet. In interviews in 2011, it appeared that neither the Attorney-General nor the Deputy Attorney-General were even aware, let alone supportive, of their representative's argument that the Amnesty Act was unconstitutional. The Attorney-General explained

[549] Interviews with donors, Kampala, November 2011.

[550] Actors working for or supporting the International Crimes Division, including donors, international NGOs, and the donor-funded transitional-justice experts seconded to JLOS, thus condemned the Constitutional Court's decision upholding the constitutionality of the Amnesty Act for frustrating the work of the ICD. (Interview with the DPP, Kampala, November 2011: 'We were shocked when we heard that Kwoyelo could walk free … We need the Supreme Court Decision. People will say: if you cannot try Kwoyelo, then you cannot try anybody.'; Interview with an ICD judge, Kampala, November 2011: 'If the Supreme Court upholds the decision of the Appeals Court [in Kwoyelo], nobody will be tried. That would be ridiculous.'; Discussion with a JLOS donor, November 2011: 'This Amnesty Act is unacceptable and in violation of international standards. It is to be hoped that the Supreme Court will overrule the Constitutional Court on the amnesty issue so that Kwoyelo can be tried.'; Interview with a JLOS official, Kampala, November 2011: 'It was a shock: everybody was ready, and then, now this trial is not going to take place.'). For more general criticism of the decision, see Transitional Justice Team of the JLOS Secretariat 2011:3 ('This decision has created serious concern with regard to its implications on the pursuit of justice and accountability in Uganda. In particular, the decision has implications for Uganda's national and international human rights obligations and its duty to ensure justice for victims of these violations.' See also *ibid*.:8: 'The sector is concerned about the serious implications created by the ruling of the Constitutional Court especially with regard to our own commitments at the Juba Peace process, our international obligations, and our obligations to the victims of crimes.') and Amnesty International 2011.

[551] A&R Agreement, clauses 5.6, 14.3 and 14.4.

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that he had not been involved in the case at all.[552] The Deputy Attorney-General, for his part, said:

> I believe the Act is constitutional. I know that it offends international norms. But the ICC also recognises complementarity; it has ceded much of its mandate to try to partner states. Then it is up to partner states to do their best to handle these offenders, including through amnesty.
>
> [INTERVIEWER:] *But this is not what the Attorney-General's representative argued in Court.*
>
> In Court it is all a different matter. We should not have argued unconstitutionality. Sometimes our staff are short of instructions what to do.[553]

Nonetheless, even if itself not guided by any policy, the Kwoyelo case itself did bring about a general, and radical, departure from the practice of the twelve-year-old Amnesty Act. The events in the case provided reasons for international organisations, most of which were against amnesties for crimes under international law, to host events on the future, or the 'expiration', of the Amnesty Act.[554] Representatives from northern Uganda, Ugandan NGOs and JLOS actors including the Amnesty Commission met to discuss whether the Amnesty Act should be extended (as had happened in previous years), be amended to set more conditions for amnesty or be abolished altogether. Many representatives from northern Uganda argued for continuing to renew the Amnesty Act for as long as the conflict persisted.[555] While they have opposed the ICC to a lesser degree ever since the LRA migrated out of northern Uganda, and resent the fact that the Amnesty Commission gave packages to former rebels and not to victims, they continued to see the Amnesty Act as a useful mechanism as long as members of their own communities were held captive by the

[552] Interview, Kampala, November 2011.
[553] Interview, Kampala, November 2011.
[554] UNHCHR and UN Women changed the title proposed by the Ugandan NGO, the Refugee Law Project, from 'Reconciling Amnesty and Accountability: Mission Impossible?' to 'Dialogue: The Crossroads of Amnesty and Justice – A Reflection on the *Expiration* of the Amnesty Act in May 2012' (emphasis added).
[555] See e.g. interventions by representatives from northern Uganda at 'Dialogue: The Crossroads', Kampala, 11 November 2011. See also Justice and Reconciliation Project 2011b.

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movement,[556] communities in neighbouring countries were terrorised by the LRA or there was a real threat of the LRA returning.[557] Some civil society organisations argued that the Amnesty Act should be amended to make it part of a broader transitional-justice arrangement that includes, for instance, truth-telling.[558]

JLOS, however, adopted the anti-amnesty arguments provided by its donor-funded transitional-justice advisors. These arguments were primarily based on international law, including purported 'complementarity obligations':

> The Amnesty Act presents challenges to Uganda's ability to *comply* with the principle of complementarity under the Rome Statute. Under this principle, the ICC can only intervene when a national government is '*unwilling or unable*' to investigate. The complementarity principle would *require* those responsible for serious human rights violations to be excluded from the amnesty process, and instead, be investigated by the national courts. However, without any declaration from the Government thus far that certain individuals are ineligible for amnesty, the ability of the ICD to hear cases against those alleged to have committed serious crimes during the conflict is unclear. Uganda's amnesty law raises important issues for the ICD's operation, Uganda's ability to *comply* with the principle of complementarity, and the effectiveness of current and future accountability mechanisms for holding perpetrators to account.[559]

[556] That number is declining. Since 2006, the LRA has operated outside Uganda, and its new abductees are Congolese, South Sudanese and Central African. To them, the Ugandan Amnesty Act is of little relevance.

[557] For instance, one northern Ugandan representative responded to the Office of the UN High Commissioner for Human Rights' line that 'there can be no amnesty for war crimes, genocide, crimes against humanity and gross violations including gender-based violence' with the question: 'Are international doctrines saving the mothers and children being killed there?' (Discussion, 'Dialogue: The Crossroads', Kampala, 11 November 2011).

[558] Interventions at *ibid*.

[559] JLOS 2012a:3 (footnotes omitted; emphases added). See also JLOS 2012b:11: 'The Rome Statute of the ICC *establishes* the *duty* to prosecute serious violations of international law, first in its Preamble and then in Article 17 of the Statute, whereby national courts have not only the first opportunity to prosecute international crimes, but an *obligation* to prosecute them, thereby placing on the State the *primary responsibility* of bringing perpetrators of crimes within the jurisdiction of the ICC to justice. Uganda domestication of both the Geneva Conventions and the Rome Statute signify that these instruments have become part of national law and therefore, the obligations are directly enforceable in Uganda' (emphases

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As the italicised words illustrate, JLOS thus invoked complementarity as 'big idea' rather than the admissibility rule in the Rome Statute (which, as Chapter 2 has pointed out, does not contain obligations on states and is silent on amnesties).

On the basis of these arguments, the Minister of Internal Affairs adopted in May 2012 a remarkable statutory instrument, declaring that 'the operation of Part II of the Amnesty Act' – containing the actual declaration of the amnesty and the procedure for benefiting from it – had 'lapsed'.[560] At the same time, he adopted a statutory instrument extending the 'expiry period of Part I, III and IV of the Amnesty Act' – on the Act's interpretation, the Amnesty Commission and general issues – for another twelve months.[561] If this move is treated as valid, the consequence is that the (donor-funded) Commission survives but the amnesty for which it was created does not. (The Minister's statutory instruments seem *ultra vires*: section 16 of the Amnesty Act allows the Minister to extend the expiry period of the Act; it does not allow him to pick and choose provisions for extension and expiration.)

Four features of these developments are particularly noteworthy. First, complementarity's effect on Uganda's Amnesty Act has been largely indirect. Kwoyelo himself was never accused by the ICC – in his case there was no complementarity to invoke to render an ICC case inadmissible. However, entering the country in the wake of the ICC's intervention, international human rights activists, backed by donors, extended the ICC's anti-impunity spirit to advocate against amnesty. Indeed, they argued that not just the Statute, but specifically complementarity prohibited amnesties, a position for which neither the Statute nor complementarity as set forth in article 17 of the

added). See also Kastner 2011:84 ('Although the Ugandan Amnesty Act is inconsistent with the requirements of the Rome Statute . . . '). See also interview with a prosecutor involved in the Kwoyelo case, Kampala, November 2011: 'The Amnesty Act is in violation of the ICC Act, article 17 [what the prosecutor probably meant was the Rome Statute; art. 17 of the ICC Act concerns the requirement of consent for domestic proceedings], which does not agree with amnesty; it frowns at amnesty . . . Now when we insist on justice, we use the Hague approach, which is a departure of amnesty. The Ocampos would say that amnesty is impunity.'

[560] Amnesty Act 2012 (Declaration of Lapse of the Operation of Part II) Instrument, s. 2.

[561] Amnesty Act 2012 (Extension of Expiry Period) (No. 2) Instrument, s. 2.

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Statute gives much support. Secondly, whilst the advocacy against the amnesty has to a large extent been done in the name of victims' rights, those few people from northern Uganda who were 'consulted' had in fact not criticised the amnesty *per se* – indeed, many argued for its extension – but held that it did not do *enough*, particularly in terms of reparations to victims.[562] As a result of anti-amnesty advocacy, however, the victims' baby – recall how the Act had been lobbied for by people from northern Uganda – has been thrown out with the bath water: the amnesty has expired without the implementation of the other mechanisms for which northern Ugandans lobbied. Thirdly, the objective of excluding people from the amnesty could have been achieved in accordance with the law, since the Act allowed for exclusion of individuals with parliamentary approval. Instead, Parliament was bypassed.

This leads to the fourth remarkable feature: whilst increased chances for accountability may seem beneficial for the enhancement of the rule of law in Uganda, the process and the outcome of the anti-amnesty campaign suggest the opposite. First, the pick-and-choose way to end the amnesty – itself probably an *ultra vires* act – was chosen by JLOS while the question of the Act's constitutionality was still before the Supreme Court.[563] Secondly, cabinet ministers accepted this JLOS proposal on the assumption that the President could still give amnesties on a case-by-case basis (even though, constitutionally, the President may grant only pardons). If the pre-Amnesty-Act practice of the President's promising impunity in individual cases resumes, the grant of amnesty will have shifted from the will of Parliament, lobbied for by people from northern Uganda, to the discretion of the President. This development would fit neatly into a trend that Andrew Mwenda has called the 'personali[sation] of power' in Uganda.[564] Favouritism, rather than the rule of law, has been promoted.

[562] See e.g. JLOS 2012b.

[563] *Kwoyelo Thomas* v. *Uganda (Notice of Appeal)*. The grounds for appeal are summarised in *Uganda* v. *Thomas Kwoyelo (Affidavit in Support of Application)*.

[564] Mwenda 2007. Just before this book went to print, on 24 May 2013, the Minister of Internal Affairs adopted, at Parliament's instigation, two statutory instruments to bring the amnesty back into operation: Amnesty Act (Revocation of Statutory Instrument No. 34 of 2012) Instrument 2013 revoked the statutory instrument by which the Minister had declared the lapse of Part II of the Amnesty Act, and Amnesty Act (Extension of Expiry Period) Instrument 2013, extended the application of the Amnesty Act until 25 May 2015.

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EFFECTS EXPECTED BUT NOT CATALYSED

No matter how unexpected or revolutionary complementarity's effects on local justice practices, transitional-justice debates, court institutions and amnesties, for the purpose of rendering a case inadmissible on grounds of complementarity the only relevant effect is that on actual investigations, prosecutions and trials.

Encouraging more trials, prosecutions and/or investigations?

Shortly after the referral to the ICC, there were indications that the strongest potential for a catalysing effect on domestic proceedings would be with respect to crimes committed by state actors. The GoU had been willing to outsource jurisdiction over the LRA, but it was protective of its 'own' people.[565] The referral of the 'situation concerning the Lord's Resistance Army' was meant to focus the ICC's proceedings exclusively on the LRA. Informed by the OTP that the referral was interpreted as a referral of the entire situation, all parties included, the GoU made a clear distinction between the LRA and state actors, as is illustrated by the statement that the Minister of Defence made in Parliament to announce the Prosecutor's decision to open an investigation:

> [A]llow me to brief this august House and the general public on the progress so far made in the preparatory process that will eventually culminate in the international criminal prosecution of the leaders of Lord's Resistance Army (LRA) terrorists by the International Criminal Court . . .
>
> The office of the prosecutor has, during the last several months, been undertaking independent, preliminary investigations with a view to determining whether there is sufficient basis to proceed with formal investigations that will eventually lead to the international criminal prosecution of the LRA terrorists in the ICC.
>
> Yesterday, the Prosecutor of the International Criminal Court issued letters of notification to all states parties to the Rome Statute of the ICC and other concerned states, in which he announced his decision to formally initiate an investigation in relation to the situation concerning atrocities committed by LRA terrorists against the people of Northern Uganda . . .

[565] For a discussion of 'self' in the context of 'self-referrals', see Nouwen and Werner 2010b.

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> Lastly, the Government of Uganda wishes to profoundly thank the prosecutor for his very important decision, and takes the opportunity to renew the assurance of its commitment to providing all assistance that may be required by the prosecutor to advance the realization of justice and peace in the Northern part of Uganda. Should the International Criminal Court come across any information or evidence implicating any Ugandan Government official in the commission of any of the crimes complained of, Uganda shall immediately prosecute such officials. (*Applause*)[566]

In sum, in the GoU's vision the LRA would be tried by the ICC, and government officials by Uganda '[s]hould the International Criminal Court come across any information or evidence implicating any Ugandan Government official'.

But most Ugandan officials are convinced that the ICC will not investigate state actors. They argue that state actors seldom commit crimes, and, if they do, the crimes are always immediately investigated, prosecuted, tried and punished, with even the death penalty being handed down by field courts-martial and carried out summarily.[567] In addition, they are convinced that the ICC's proceedings concern the 'situation concerning [only] the Lord's Resistance Army', despite the OTP's use of the name 'situation in northern Uganda' or 'situation in Uganda'.

Apart from changing the name of the situation, the ICC has not given the GoU any reason to believe that state actors may be subject to its proceedings. First, it has not opened an investigation into crimes allegedly committed by state actors. When asked about the absence of Ugandan proceedings against senior UPDF officers for crimes committed on a widespread or systematic scale, army officials express a sense of vindication by the absence of ICC proceedings and argue that 'even the ICC has not found anything'.[568] Ugandan officials refer to

[566] Uganda 2004. See also 'Museveni pledges to cooperate with ICC to probe Uganda war crimes' 2004 and 'Uganda: interview with President Yoweri Museveni' 2005.

[567] *Inter plurima alia*: Interview with senior UPDF official, Kampala, October 2008; interview with a military intelligence officer, Kampala, October 2008 and interview with a military lawyer, Kampala, October 2008. See also 'Uganda: interview with President Yoweri Museveni' 2005. The GoU has used the same reason to argue that the UPDF need not be subjected to local justice practices. See the statement by the Minister of Internal Affairs in Uganda 2007.

[568] Interview with a military intelligence officer, Kampala, October 2008. See also Ogola 2010 ('Army spokesman Lieutenant-Colonel Felix Kulayigye . . . maintains

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headlines in a national newspaper, which announced that the ICC had 'cleared' the UPDF.[569] The article quotes an ICC outreach official to the effect that 'the Prosecutor said there was evidence against Kony and not against the UPDF commanders'.[570] Theoretically, the OTP could still open an investigation into Ugandan state actors, for instance when the case against the LRA reaches its conclusion. However, it has not been lost on Ugandan officials that the ICC's investigation team has been reassigned to other situation countries.

Moreover, the OTP's actions from the announcement of the referral onwards have left Ugandan officials with an indelible impression that the ICC acts at the behest of the Ugandan President. Prosecutor Ocampo and President Museveni announced the referral in a joint news conference.[571] The accompanying ICC press release mentioned 'locating and arresting the LRA leadership' as a key issue,[572] even though the Prosecutor still had to conduct an official investigation. Subsequently, a Uganda–ICC team spirit emerged, at least on the Ugandan side. This was nourished, at the practical level, by joint conduct of investigations between ICC staff and Ugandan military intelligence, police and army in Uganda, and at the diplomatic level of most senior OTP officials on the one hand and the Minister of Defence and Attorney-General on the other by joint leisure activities such as a boat trip along the Dutch canals.[573]

In the context of allegations against state actors, and in sharp contrast to the investigation into the LRA, ICC officials emphasised the importance of complementarity. When Olara Otunnu, a political leader of a Ugandan opposition party (and formerly the UN Secretary-General's Representative for Children in Armed Conflict) requested ICC officials to begin an investigation into crimes allegedly committed by the UPDF, Prosecutor Ocampo 'advised Ugandans to only involve the ICC in cases which they feel the national legal system is inadequate to handle', according to the reporters at the press

that during its investigation into events in northern Uganda, the international court probed the army and came up with little. "The ICC has investigated the UPDF, but only found isolated cases that do not measure up to the atrocities that the LRA committed in the country," he said. "I find that these allegations [against the army] are nothing more than politicking.'"); and Lt. Col. Kulayigye 2009.

569 Focus group, Gulu, September 2008.

570 Mugisa and Nsambu 2008. The newspaper's correction of this article ('Corrections Column' 2008) seems to have gone largely unnoticed.

571 ICC 2004. 572 *Ibid.* 573 See below, Chapter 5, n. 233.

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conference.[574] In a similar vein, ICC President Song 'pointed out ... that the ICC was supposed to be a court of last resort and that it should be up to national courts to try lower-level perpetrators'. He was quoted as adding:

> I realise others, too, have committed crimes and all who commit crimes should be held responsible ... But the ICC is only one piece of the puzzle. It is an important part, but by no means a full answer to your search for peace and justice.[575]

As long as there are no ICC proceedings against state officials, a catalysing effect on domestic proceedings against state officials is unlikely. Neither the army nor the police nor the DPP has an incentive to enter into this political arena, and risk their job,[576] without external pressure or 'cover'. Consequently, allegations that UPDF crimes were the rule rather than the exception and that the government's policy of forced displacement[577] or indiscriminate air attacks killing civilians[578] could amount to crimes have, to date, not been investigated at an official level, either domestically or by the ICC. Rather than catalysing procedures to increase the accountability of state actors, the ICC, by demonstrating an apparent lack of interest in state actors, may have entrenched their impunity.

With respect to crimes committed by non-state actors, specifically the LRA, the Kwoyelo case is so far the only case indirectly catalysed by the ICC's complementarity principle. Prosecutors attached to the ICD say they are investigating other cases, but it is unclear how far these investigations have progressed. After the signing of the A&R Accords, some within the Ugandan political leadership were convinced that Uganda was 'ready' for domestic trials. In the words of one government minister: 'We are ready, we have overwhelming evidence ... I laugh at them who say we are not ready.'[579] Underlining this, the Minister and his colleagues emphasised that the ICC's case was based on Ugandan evidence and was

[574] Musoke and Oluput 2010. [575] Ogola 2010.

[576] As one JLOS actor confided to researcher Tessa Wright: 'There would be fear by ... people in the DPP that they might be putting themselves out of a job' if they were to investigate state actors (Wright 2011:141).

[577] See RS, art. 8(2)(e)(viii). Additional Protocol II to the Geneva Conventions, art. 17, is more specific, but does not criminalise conduct. See also Seils 2009:60.

[578] See RS., art. 8(2)(e)(i).

[579] Interview with a cabinet minister, Kampala, October 2008.

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investigated with the support of the Ugandan military, the Ugandan Criminal Investigations Department and Ugandan forensic experts.[580]

However, technocrats in the police and the Directorate of Public Prosecutions expressed doubts as to whether their institutions were ready.[581] To the extent that the ICC's case was built on Ugandan material, it was largely on military intelligence. The ICC had used this material as a springboard for the collection of evidence for criminal proceedings; the Criminal Investigations Department was yet to do this. Police had reports of incidents, but, apart from the investigations conducted with or for the ICC, most reports had not been investigated further owing to insecurity in the north. Even after the conflict in northern Uganda began to subside, they were still not investigated. Revealing a possible opposite of a catalysing effect on domestic proceedings, namely, burden-shifting to the ICC, some police explained that they no longer needed to investigate the LRA since the ICC was now involved.[582] Other Ugandan officials explained the absence of investigations by referring to the impossibility of arresting suspects and the continued applicability of the Amnesty Act – there are few incentives to investigate a person who can be assured of amnesty.[583] While Kwoyelo's test-case was ongoing, investigations in other cases were put on hold.[584]

Whether Kwoyelo was just the first or also the last to be brought before the ICD for conflict-related crimes remains to be seen. The ferocity with which his case was pursued, legal obstacles notwithstanding, can to some extent be explained by the circumstances at the time. The ICC Review Conference put Uganda in the spotlight. JLOS took pride in Uganda's being

[580] Interview with a senior government official, assisting the cited cabinet minister, Kampala, October 2008 ('The ICC case is based on our evidence. Otherwise they couldn't know. How do you think that the white man otherwise does investigations here?').

[581] Interviews, senior officials in the Directorate of Public Prosecutions and the Criminal Investigations Department, Kampala, September and October 2008, June 2010 and November 2011.

[582] Discussion with officials in the Criminal Investigations Department, Gulu, September 2008, interview with an official in the Criminal Investigations Department, Gulu, September 2008 and interview with a senior official in the Criminal Investigations Department, Kampala, October 2008.

[583] Interview with a police spokesperson, Gulu, September 2008.

[584] Interview with a prosecutor involved, Kampala, November 2011.

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> the first African country to try nationally those alleged to have committed war crimes and crimes against humanity, all crimes of international concern and the first country complementing the works of the International Criminal Court.[585]

The problem for this 'frontline country in applying the complementarity principle' was, in the words of a government minister, that, 'since establishing the War Crimes Division, no one had been tried; luckily enough we had Kwoyelo'.[586] A prosecutor attached to the ICD felt the same pressure: 'After two years of existence [of the ICD], we had to make an example of Kwoyelo to show that something was being done.'[587] In addition to satisfying an institutional hunger, Kwoyelo's case made, in the prosecutor's words, 'good PR on the international plane: we were the first state to refer a situation; doing a case makes us look like the good guys'.[588]

While both the institutional hunger for cases and a desire to be seen internationally as 'the good guys' will continue to exist, when the memory of the Review Conference has faded they may be satisfied by cases other than those involving crimes within the ICC's jurisdiction, particularly now the ICD's jurisdiction has been expanded to include terrorism. In the context of a regional scramble for US support, a judicial war on terror is one way to demonstrate commitment to the primary agenda item of the world's most desired international ally. Moreover, there is no shortage of detained terrorism suspects. Even the case against Kwoyelo, although not charged on that count, fitted into the terrorism paradigm. The military parade at the opening of his trial before the ICD, and the army's presence as a 'stakeholder' during the trial, signalled internationally that Uganda was an active ally in the war on terror.[589] If terrorism becomes its bread and butter, the ICD can do its part in clearing a notorious backlog of cases. It will also mean that, despite its origins in the complementarity principle, the ICD will bring Uganda not much that is new: a focus on crimes against the state, as opposed to crimes against civilians.

[585] See JLOS 2011. See also interview with an ICD judge, November 2011: 'We are the only African court that is complementary to the ICC. Kenya had been given the opportunity but did not take it.'
[586] Interview with a government minister, Kampala, November 2011.
[587] Interview, Kampala, November 2011. [588] *Ibid.*
[589] View the scene in the documentary Refugee Law Project 2011b.

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CONCLUSION: COMPLEMENTARITY'S CATALYSING EFFECT IN UGANDA

On the face of it, Uganda's history with the ICC shows the opposite of the widely anticipated catalysing effect on domestic proceedings. Rather than trying to avoid ICC intervention by conducting domestic investigations and prosecutions, the GoU invited the ICC into Uganda, introduced the International Criminal Court Bill and Amnesty Amendment Bill to facilitate ICC proceedings and conducted domestic investigations into conflict-related crimes primarily to support ICC prosecutions. These effects were catalysed by the ICC's existence in general and by the ICC's intervention in particular, not by complementarity.

It was only when Ugandan actors began to search for alternatives to the ICC that complementarity spurred domestic developments. Cultural and religious leaders in northern Uganda, considering the ICC's involvement an endorsement of the military approach to the conflict with the LRA and an obstacle to peace, did so from the outset of the ICC's intervention. Their response was to promote local justice practices as an alternative to the ICC (albeit largely within the parameters of ICC-style justice).

The Ugandan Government for its part began to explore alternatives to the Court only once its interests seemed to diverge from those of the Court. It was thus during the Juba peace talks that the seeds for most of complementarity's catalysing effects were sown. When Joseph Kony refused to sign the FPA and the GoU reverted to its preferred exclusive military approach, the ICC's and GoU's strategies and interests in ICC involvement were realigned. Nonetheless, the GoU did allow others to run with projects based on the complementarity arrangements in the A&R Accords.

Complementarity thus catalysed several processes in Uganda. It spurred the study of local justice practices as an alternative to the ICC; put accountability firmly on the agenda of the Juba peace talks; triggered a national debate on transitional justice; broadened the national approach to the conflict in northern Uganda to include a legal dimension; set in motion preparations for a Ugandan WCC; and focused attention on compliance with so-called 'international standards'. However, with the exception of one case pursued for opportunistic reasons, domestic investigations and prosecutions of conflict-related crimes, the only action that could render ICC cases inadmissible, seem not to have increased.

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Analysis of how these effects were catalysed reveals that normative processes and cost–benefit analyses, the factors that underpin the expectations of complementarity's catalysing effect,[590] have been instrumental in bringing about both this effect and discouraging effects on domestic proceedings. The GoU's initial cost–benefit analysis resulted in the opposite of a catalysing effect on domestic proceedings, namely, the outsourcing of proceedings to the ICC. Rather than considering ICC intervention as costly to its sovereignty and reputation, the GoU expected, and obtained, dividends from the intervention. The GoU recognised that providing the ICC with its first situation could be good for its international reputation and serve its military interests. It introduced ICC legislation because this seemed necessary for the ICC to be able to do its work and in order to win the bid for the Review Conference. In Juba, however, the GoU's analysis changed. The ICC had been unable to 'neutralise' the LRA and was publicly regarded as the major obstacle to the successful conclusion of the talks. The GoU felt obliged to be seen domestically to take initiatives that could end the ICC's involvement. The only way to end the ICC's involvement in the long term was on the basis of complementarity. The focus shifted, at least on paper, to the possibility of domestic proceedings. In order to gain international credit by showing its commitment to the peace process (in stark contrast to the LRA), the GoU co-opted norm entrepreneurs' emphasis on transitional justice and allowed the Principal Judge of the High Court to establish a WCC. Acting on the basis of their own cost–benefit analysis, members of the Ugandan judiciary pushed for the WCC so as to enhance the position of their professional group, domestically and internationally.

The GoU's actions in the first ten years after the Rome Statute's entry into force have not been inspired by any infiltration of a putative expectation on states to investigate and prosecute crimes within the Court's jurisdiction. For the Ugandan executive, signing and ratifying the Rome Statute appears not to imply such a (non-legal) responsibility. For instance, for almost a decade it applied the Amnesty Act without considering this at odds with its ratification of the Statute. The judiciary, in turn, never considered the executive's referral as an outsourcing of its responsibility to an international body.

[590] See Chapter 1, 'Assumptions underlying the expectation of a catalysing effect'.

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However, the ICC's involvement triggered the attention of, and created space for, organisations with normative agendas. The questions that the ICC's involvement raised created an opportunity for local organisations to push for transitional justice in Uganda. The ICC's involvement led international NGOs to seek and build alliances with Ugandan institutions and organisations, which they supported financially in exchange for promotion of their agenda on transitional justice or, more specifically, international criminal justice.

The catalysing effect was strongest when branches of government co-opted, on the basis of their cost–benefit analysis, the agendas of the norm entrepreneurs.[591] Examples are the executive's referral of the situation to the ICC; the Amnesty Commission's funding of traditional-justice practices; JLOS's creation of a Transitional Justice Working Group; and the judiciary's preparations for the WCC. The actors had institutional and financial incentives, primarily offered by foreign donors, to adopt these agendas:[592] international donors became less critical of the GoU's human rights violations in northern Uganda; provided the Amnesty Commission with funds to encourage traditional justice; funded JLOS study tours all over the world; and gave the judiciary financial support for the WCC. In addition to the financial and personal freedom that went with adoption of the transitional-justice discourse, international law seemed to offer legal discretion in that it appeared, and probably is, less strict than Ugandan law with respect to issues such as retroactivity, evidence and procedure.

[591] This is not to say that norm entrepreneurs did not act rationally and according to their own cost–benefit analyses. (On the political economy of morality-driven NGOs, see Clarke 2009:Chapter 1.) Equally, the above observations as to the GoU's rational cost–benefit analysis do not mean that the GoU paid no attention to norms. Norm entrepreneurs operate rationally and governments' rational strategies encompass norms. The difference is mainly in the reason for invocation of the norm, namely, whether it is because of a belief in the value of the norm itself or because the norm serves interests external to it. On combining constructivist and rational choice approaches, see Finnemore and Sikkink 1998:888 and 909–15, pointing out that the two schools are divided over the role that choice plays in norm-based behaviour, about what motivates choice and about the role persuasion plays in normative processes, rather than about whether or not states act rationally. See, on the relevance of the combination of normative and material explanations in the context of the ICC specifically, Wippman 2004:155–6 and Schiff 2008. See also Burke-White 2008c:n. 78 and Mégret 2006:14.

[592] On bureaucrats as rational economic actors seeking to maximise power, see Mueller 2003:Chapter 16.

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The dynamics of the creation of the WCC illustrate this coalescence of norm, institutional and personal entrepreneurship on the part of rational actors in a space that the government has (temporarily) supplied. The government's agreement to conduct domestic proceedings provided the Ugandan judiciary with an opportunity to strengthen its institutional position by way of a new, specialised division that could attract international attention and funding. International norm entrepreneurs equally entered this space and adopted into their transnational networks the Ugandan transitional-justice proponents.[593] The latter, in turn, promoted a domestic war crimes court resembling an international court. The government allowed this for its international-reputation benefits and patronage potential.

The GoU's role in these developments followed the logic of governance practices in Uganda generally: based on expediency rather than law or policy and used for the benefit of those who are loyal to those in power and against those whose loyalty has been lost. It thus never developed the transitional-justice policy envisaged in the A&R Accords but gave coalitions of norm and patronage entrepreneurs *carte blanche* to pick, choose and develop their preferred parts of the Agreements, on the implicit but well-understood condition that they would target only the government's enemies. Elements of the agreement that involved burdens on the state and were unlikely to be funded by donors, for instance reparations, were ignored. The transitional-justice deal upon which the Juba A&R Accords were founded was thus undone and the delicate balance of transitional-justice aims that the Accords encapsulated unsettled. Given Kony's unwillingness to accept the agreement in the first place, it may seem that little was lost. But the use of transitional-justice instruments in the absence of a transition is bound to be one-sided and aimed at strengthening the position of the side that 'does' transitional justice.

Many of the effects were thus catalysed by complementarity but subsequently took on a dynamic of their own. Complementarity triggered the effects by acknowledging a domestic alternative to the ICC. But the processes that followed the debate over whether and how to use the primary right to investigate and prosecute became increasingly detached from the possibility of actually using this right in order to challenge admissibility. The Statute's requirements for a successful admissibility

[593] See Khagram, Riker and Sikkink 2002:17 on how international norms can create political opportunities, providing resources for leverage and spaces for access.

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challenge were soon given less attention than the 'international standards' that must be met, at least rhetorically, to please international observers whose satisfaction is relevant to goodwill and funding.

Analysis of complementarity's catalysing effect also shows that the ICC, rather than bringing about an immediate catalysing effect, provided through its intervention an occasion for other organisations with more horizontal relations *vis-à-vis* Ugandan actors to boost a catalysing effect indirectly.[594] Through transnational interactions, international norm entrepreneurs adopted into their networks Ugandan legal professionals, who, in turn, promoted activities initially catalysed by complementarity, such as the discussions in the JLOS Working Group on transitional justice and preparations for the WCC. Through their direct interactions with government officials, legal practitioners and grassroots NGOs, these organisations were in a better position to promote familiarisation with concepts such as accountability and transitional justice than were ICC officials in The Hague, who kept a professional and physical distance.

Indeed, despite the OTP's espoused policy of positive complementarity,[595] the Court in many ways did the very opposite of encouraging a catalysing effect on Ugandan proceedings. First, the OTP's diplomatic efforts to obtain self-referrals encouraged Uganda to outsource to the ICC rather than to conduct domestic proceedings. Secondly, neither the Prosecutor nor the judges took the opportunity publicly to consider admissibility at stages where the Prosecutor was obliged, or the judges were allowed, to do so.[596] They ignored the fact that the GoU once issued an arrest warrant for Joseph Kony and that the GoU explicitly reserved, in the final sentence of the referral letter, the right to challenge admissibility. Instead of encouraging domestic proceedings, the OTP requested the GoU to confirm in a letter that it had 'not conducted and [did] not intend to conduct national proceedings in relation to the persons most responsible'.[597] Thirdly, the Court uncritically echoed Uganda's extra-statutory arguments about the ICC being

[594] With respect to such developments in the DRC, see Baylis 2009.

[595] See Chapters 1 and 2 ('The policy of positive complementarity').

[596] In accordance with theories stressing the importance of communication about the meaning of rules to promote compliance (e.g. Chayes and Chayes 1993), the mere paying of attention could foster complementarity as a norm in the sense of a political expectation on states to conduct domestic proceedings.

[597] Cited in *Arrest Warrant Kony*:[37]. The latter part of the statement is irrelevant to complementarity. If Uganda conducted genuine domestic proceedings, these

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the 'most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility'.[598] Fourthly, the Court demonstrated a prickly protectiveness over the cases on its docket. The OTP stated that it would 'fight any admissibility challenge [ensuing from the A&R Accords] in court',[599] apparently irrespective of the genuineness of eventual national proceedings. The Prosecutor also incorrectly suggested that national proceedings could be useful only for 'those who did not bear the greatest responsibility'.[600] The judges, faced with the prospect of the case becoming inadmissible in view of the A&R Accords, initiated a review of admissibility, which concluded on the discouraging note that, despite the GoU's preparations, the situation in Uganda had remained 'one of total inaction on the part of the relevant national authorities'.[601] A fifth way in which the Court refrained from encouraging domestic proceedings in Uganda was by fostering a team spirit with Ugandan officials that strengthened the latter's perception of OTP staff as their 'brothers' from whom they had nothing to fear.[602] Domestic proceedings against state officials so as to avoid ICC proceedings have thus not been considered necessary. In all these ways, the Court did the opposite of encouraging Ugandan proceedings.

The OTP began to implement aspects of the policy of positive complementarity that envisage concrete support for domestic proceedings[603] only when officials of the ICD emphasised that they would be 'complementary' to the ICC in that they would prosecute persons *other* than those sought by the ICC. In the words of one judge at the ICD:

> Ocampo thought we were going to get his cases. But why should we fight him? The ICC can have the top leaders. As far as we are

could render cases before the ICC inadmissible, irrespective of the GoU's earlier statements of intent.

598 *Arrest Warrant Kony*:[37]. See also *LRA Admissibility Decision (PTC)*:[37] and this chapter, 'Compromised complementarity'.

599 OTP quoted in Glassborow 2008.

600 Moreno-Ocampo 2008a:4.

601 *LRA Admissibility Decision (PTC)*:[52].

602 Interview with a military intelligence officer, Kampala, October 2008. See further Chapter 5, n. 233 and accompanying text.

603 See Chapter 2, 'The policy of positive complementarity'. The OTP provided mobile phones, airtime and a taxi budget to Ugandan police officials, but these were meant to improve their ability to protect ICC witnesses, not to facilitate domestic investigations (interview with an official of the Criminal Investigations Department, October 2008).

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> concerned, a court is a court. Since we said that, Ocampo agreed to assist us. The DPP got some evidence against Kwoyelo. This is because we are not competing [with the ICC]: we are complementary to them.[[604]] That is the principle of complementarity.[605]

While the OTP facilitated Ugandan proceedings by handing over some material that the ICD prosecution could use against Kwoyelo,[606] it also complicated domestic investigations by having instructed ICC-protected witnesses not to cooperate with other courts. Moreover, Uganda was not offered access to the Case Matrix of the Court's Legal Tools Project,[607] since, in the words of one person working for the Court's Legal Tools Project, Uganda's officials 'could use it as an excuse for not cooperating with the Court, arguing that with the Case Matrix they themselves could prosecute'.[608] All in all, the OTP's causal claim in the following statement seems exaggerated:

> We have worked with the Ugandan authorities, sharing our experiences and information with them and showing them at least how to handle cases of this magnitude. And this has resulted in the war crimes

[604] On this use of the term 'complementarity', see Chapter 5 'Complementarity as primary right: confusion, ambiguity and misrepresentation'. Footnote inserted.

[605] Interview, Kampala, November 2011. See also Coalition for the International Criminal Court 2011:31 reporting a statement by one of the ICD's judges as follows: 'Justice Akiiki Kiiza talked of the Ugandan government's initiatives in addressing the impunity gap. This involved the creation of a reconciliation commission and the War Crimes Division of the High Court which Justice Kiiza emphasized worked in partnership and not in competition with the ICC. In this regard, Justice Kiiza pointed to the fact that the War Crimes Division was trying the remaining bulk of criminals and not those pursued by the ICC.' See also Van de Wiel 2011, reporting on the 'stakeholders meeting' prior to the opening of the Kwoyelo trial before the International Crimes Division: '[T]he ICD judges publicly stated that the ICD "[is] not after the ICC cases" but that it is able to try them were they [to] be brought before the Division. It was stated that the ICD seeks to "complement" the ICC proceedings.'

[606] ICC-OTP 2010c:1 mentioned as possible assistance to the Ugandan ICD: logbooks and radio intercepts (originally provided by the Ugandan authorities), transcripts in English and Acholi and searchable records of these intercepts and of handwritten logbooks and maps and graphs. See also ICC-OTP 2011a.

[607] While most of the Legal Tools Project's resources on international criminal law are available to all Internet users, its Case Matrix is available only to those institutions working in the field of international criminal prosecutions which have concluded an agreement with the Court. The Case Matrix is a data management system that provides a template for recording, categorising and cross-referencing evidence to link it to elements of crimes. See www.icc-cpi.int/legal_tools.html.

[608] Discussion, November 2007.

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> tribunal in Uganda being able to investigate and prosecute one of the criminals in Uganda.[609]

Norm entrepreneurs did boost complementarity's catalysing effect, but their work led not just to norm promotion but also to norm distortion. Many members of the international-criminal-justice movement interpreted the Statute on the basis more of their functional biases than of the international rules of interpretation as codified in the Vienna Convention on the Law of Treaties.[610] The biases of international experts stem from their background in international fora and favour the international:[611] an international court, international crimes and international standards. Often having never worked at the domestic level, let alone in the Ugandan justice system, their frame of reference and language is that of the international. On the basis of their rich international experience, they often give more attention to the practice of other international tribunals such as the ICTY, ICTR and SCSL than to the text of the Rome Statute, even though the Statute's complementarity is a different jurisdictional arrangement from the other tribunals' primacy. Having hardly studied the Rome Statute themselves, Ugandan officials have received these 'international norms' with open arms, at least rhetorically. Experience had taught that echoing 'international standards' could serve the state as a shield against international criticism.[612]

One example of norm distortion is the suggestion that, in order for a state to be able successfully to challenge admissibility on the ground of complementarity, it needs a special international-criminal-justice infrastructure, consisting of special legislation and special courts, at the domestic level. Illustrative is the consideration of PTC II when it assessed the admissibility of the LRA case:

> It remains a fact that the Agreement has not yet been signed and that neither the Agreement nor the Annexure has been submitted to the

[609] The head of the JCCD quoted in International Center for Transitional Justice 2012.

[610] On such biases, see Koskenniemi 2005:600–15.

[611] More generally, see also Drumbl 2007:125.

[612] Cf. Mwenda 2007:32 on the effects of international donor support for the GoU generally: 'Amongst the most important consequences of Museveni's relationship with donors was that once he gave them nearly the free rein over the policy- and budget-making processes, the donors left him a free hand (and sometimes even gave him a helping hand) with his military plans.'

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> Parliament. It is 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, since the Chamber will only be in a position to assess the envisaged procedural and substantive laws in the context and for the purposes of article 17 of the Statute after they are enacted and in force. In this respect, the contents of the envisaged legislation regarding the substantive and procedural laws to be applied by the Special Division, as well as the criteria presiding over the appointment of its members, will be critical.[613]

This emphasis on legislation stems from legal and factual misunderstandings. First, the quoted consideration of the PTC suggests that the PTC could determine admissibility once Ugandan legislation was in place. But the test is, as Chapter 2 has set out, whether the state conducts genuine proceedings in a specific case, not whether the state's overall justice system is 'willing and able' and, in this context, has the appropriate legislation. Secondly, as also discussed in Chapter 2, an admissibility challenge based on complementarity in a specific case requires prosecution of the same conduct, not necessarily the same crime. A charge of the ordinary crime of murder could cover the same conduct as a charge of murder as a crime against humanity. Specific legislation is not necessarily required. Finally, and most importantly, the emphasis on legislation and courts gives the wrong impression that the absence of legislation and the courts are the key impediments to conducting domestic proceedings. It distracts attention from some of the real obstacles, which will be discussed in Chapter 5.

The sustainability of the effects that complementarity has catalysed is doubtful. The A&R Accords may have been signed, and theoretically do not require Kony's signature on the FPA, but without his signature and subjection to Uganda's jurisdiction implementation remains to a large extent theoretical. Faced with diminishing chances of a successful conclusion to the Juba peace talks, the GoU seems to have discarded its newfound commitment to domestic legal accountability in favour of other options. Based on *ad hoc* expediency rather than long-term policies, the GoU's interest in transitional justice is over as soon as it flips the hour-glass.

[613] *LRA Admissibility Decision (PTC)*:[49]. *Decision Authorizing Kenya Investigation*: [183] equally suggests that a special tribunal is needed for domestic prosecution of crimes within the ICC's jurisdiction.

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The fact that some of the activities catalysed by complementarity have taken on a dynamic of their own suggests that they could continue irrespective of any implementation of the FPA. Their sustainability may be limited, however, since they have been driven more by short-term cost–benefit assessments than by a normative commitment. References by Ugandan officials to 'international standards', for instance, do not imply that these standards have infiltrated. So experienced at drafting proposals that at one stage 50 per cent of the national budget was externally funded, the GoU knows what jargon to use to please international donors. Once the money has been collected, however, many programmes have not been implemented in accordance with their purpose.[614] Activities catalysed by complementarity but sustained by other external incentives, for instance debates on transitional justice and the establishment of the WCC, may wither on the vine.

Nonetheless, it is possible that the continuation of these processes, even if inspired by external incentives, may lead to infiltration of a norm, in the form of an expectation on states to address issues of transitional justice or, more specifically, to investigate and prosecute conflict-related crimes. Only then will the phenomena catalysed by the ICC's principle of complementarity have truly taken on a life of their own.

[614] See e.g. Omach 2009a on how Uganda received British financial support for programmes to reduce its military, but in fact used the programmes to expand militarisation and to 'shed-off' soldiers who had been integrated into the UPDF from rival armed groups.

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