AFRICA AND THE INTERNATIONAL CRIMINAL COURT: STOCKTAKING IN UGANDA

Peter Girke / Mathias Kamp

Since its foundation, there have always been high hopes for the International Criminal Court (ICC). Eight years after the Rome Statute came into effect, which was the basis for establishing the ICC, hundreds of representatives from the 111 signatory countries, as well as civil society representatives met between May 31 and June 11, 2010, in Kampala, the capital of Uganda. The goal of this first review conference was to summarise what had already been achieved, as well as to amend and revise the statute.

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THE ICC AND THE KAMPALA REVIEW CONFERENCE

The jurisdiction of the ICC is limited to four, particularly severe crimes, which affect the international community as a whole: genocide, crimes against humanity, war crimes and, in the future, the crime of aggression. The Rome Statute aims to strengthen the rule of law within international relations by requiring individuals, who have violated duties towards the international community, to account for their actions before an independent, international judicial institution. Thus, the ICC is a judicial voice acting on behalf of the international community. It can exercise its jurisdiction in cases where the court has been recognized by the nation state, in whose sovereign territory the crime was committed, or the state, of which the suspected perpetrator is a citizen.[1] Currently the court is examining cases relating to Uganda, Sudan/Darfur, the Democratic Republic of Congo and Kenya, for example.

1 | Cf. Auswärtiges Amt, http://www.auswaertiges-amt.de/diplo/de/Aussenpolitik/InternatRecht/IStGH/Hintergrund.html (accessed September 2, 2010).

The most important subject of negotiation during the Review Conference was the crime of aggression. Although this was already part of the ICC's jurisdiction from the start, it could not be prosecuted de facto. On the one hand, there was a lack of a binding definition of what constitutes "aggression," and, on the other, the role of the United Nations' Security Council in determining an aggressive action between states had hitherto remained unresolved. Despite strong controversy and widespread skepticism prior to and during the conference, a compromise could be achieved at last minute and a definition adopted.[2] With reference to the elements of the offense, the U.S.A., which – although not a signatory of the Statute of Rome – pushed with some pressure for the UN Security Council to be solely responsible, failed to achieve its aims. Admittedly, pursuant to the compromise achieved, it is the primary responsibility of the Security Council to determine whether the elements of the crime of aggression are present; however, the ICC prosecutor has the opportunity to initiate proceedings of his or her own accord – having been instructed by a signatory country – if the Security Council fails to act. Nevertheless, the Security Council may intervene in turn to stop this.

Despite strong controversy and widespread skepticism prior to and during the conference, a compromise about the crime of aggression could be achieved at last minute and a definition adopted.

The process for actually implementing the resolution will be a long and complex one. The ICC shall only be competent to arbitrate in respect of the crime of aggression from 2017 at the earliest, following renewed approval of the amended statute by the signatory countries, and then only if at least thirty states ratify the provisions agreed in Kampala. Nevertheless, the decision reached in Kampala regarding the crime of aggression should be seen as an important step towards strengthening the International Criminal Court in the long run and towards prosecuting aggressive wars effectively.

2 | Drawing on Resolution 3314 of the UN General Assembly from December 14, 1974 the elements of the crime of „aggression" have been defined as „the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

The other resolutions passed at the conference in Kampala relate, among other things, to the amendment of Article 8 of the Rome Statute, whereby particular war crimes, which had previously only been defined for an international context (such as the use of poisoned gas), are redefined to cover national, armed conflicts; as such they now too fall under the jurisdiction of the ICC. It was agreed not to amend hotly disputed Article 124, which enables new signatory countries to preclude prosecution of alleged crimes for a period of seven years committed by their own citizens or on their own territory.

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Additionally, the conference served to review comprehensively the previous work of the ICC. It took stock of the situation with regard to four central aspects:

1. impact on victims and the communities affected;
2. complementarity (primacy of national criminal jurisdiction);
3. cooperation (collaboration between the court and individual states);
4. relationship between peace and justice.

This article is dedicated to examine these four points with reference to the concrete example of the host country, Uganda. As well as analyzing the conflict in Northern Uganda in terms of the role of the International Criminal Court, it is also worth considering the country's relationship with its neighbor, the Sudan, as this also shows the diplomatic dimension involved in prosecuting war criminals and the dilemmas associated with this.

UGANDA, THE HOST, AND THE ICC

The host country Uganda has played a particular role in the relatively short history of the International Criminal Court. As early as March 1999, the Ugandan government signed the Rome Statute, which was ratified in June 2002. Against the backdrop of the war between the rebels of the Lord's Resistance Army (LRA) and the Ugandan government under President Museveni, which has been going on since 1988 and has devastated huge parts of Northern Uganda, causing immense suffering to the civilian population,

Uganda officially turned to the ICC in 2003 and asked it to investigate the human rights abuses committed by the LRA. Thus, Uganda was the first signatory country to refer a suspected war crime to the ICC of its own accord.

This decision had less to do with interest in an effective prosecution – and the confession of weakness in the Ugandan judicial system – but was rather more linked with the hope of generating increased international awareness and support for the action against the LRA, which had withdrawn to the other side of the Ugandan border to avoid the Ugandan army. Previously, the North of Uganda had been heavily disadvantaged in terms of its economic and social development over the past decades, sewing the seed for the extremely violent activities of the LRA and ethnic conflicts. The rebels and their leader, and self-appointed Messiah, Joseph Kony, terrorized the civilian population by murdering, torturing, raping and kidnapping for more than two decades in the desire to create a Christian fundamentalist theocracy. In so doing the LRA kidnapped more than twenty thousand children and forced them to become child soldiers or sex slaves. Two million refugees spent years living in extremely harsh conditions in refugee camps.

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After years of fighting, with no side proving victorious, and in the face of growing international pressure, it was finally possible to get both parties to the negotiating table in 2006, thanks to the mediation of the vice president of the Government of Southern Sudan, Riek Machar. The so-called Juba negotiations, named after the capital of Southern Sudan where the negotiations took place, initially brought promising results. Five different agreements achieved, among other things, a ceasefire, the withdrawal of the LRA from Northern Uganda to Southern Sudan, as well as reforms to tackle the socio-economic inequalities between Northern Uganda and the rest of the country. The aim was for both parties to sign the *Final Peace Agreement* (FPA) in order to finalize the peace process. However, this agreement was never signed. The LRA withdrew to remote areas of Southern Sudan, the Democratic Republic of the Congo and the Central African Republic, where it continues to resist all attempts of its elimination and still terrorizes the local population.

In the meantime, having investigated the allegations, the ICC brought charges in July 2005 against five key leaders of the LRA, including Kony, the rebel chief. The ICC issued its first arrest warrants for the accused rebels, under which they can be detained in any member country of the Rome Statute and handed over to the ICC. The indictment is for serious war crimes and human rights abuses against the civilian population living in Northern Uganda – murder, dismemberment, torture, and kidnapping of tourists, as well as thousands of incidents where children have been raped or recruited as soldiers.

CONTROVERSY SURROUNDING ARREST WARRANTS

The charges of the ICC prompted profuse controversy. Opinions about the implications of the arrest warrants for the peace process were divided. While the warrants were welcomed on the one hand, being seen as effective leverage, on the other, people criticized the poor timing and considered the arrest warrants as an obstacle to signing the peace agreement.

From the ICC's perspective, the Ugandan government's invitation was initially a blessing, since it represented the preferred method of instructing the court as the country was both a signatory country and the scene of the atrocities. In this way, the court can rely on the support of the state in question; furthermore, accusations about infringing national sovereignty can be avoided.

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However, the Ugandan case quickly proved to be trickier than expected. The ICC is still facing stiff opposition even today. Many people in the conflict area see the ICC as another opponent, rather than a neutral party.[3] Its impartiality was, for example, also called into question because inquiries were all directed towards the LRA and failed to include the possible human rights abuses committed by the Ugandan Army (UPDF). However, the chief prosecutor,

3 | Cf. Office of the United Nations High Commissioner for Human Rights, "Making Peace Our Own. Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda", 2007; Civil Society Organisations for Peace in Northern Uganda (CSOPNU), "Report of Consultations on Reconciliation and Accountability", *Briefing Paper*, August 2007.

Moreno Ocampo, repeated assurances that the court was initially focusing on the worst atrocities of the LRA, but was also conducting investigations in all directions, and this included the crimes of the UPDF, provided that these fell within the jurisdiction of the International Criminal Court. Most recently, he emphasized this fact in talks with Ugandan opposition politicians that took place on the fringe of the Kampala conference. However, at the same time he stressed that the court would not let itself be drawn into a "political debate."

To date, there have been no charges brought against the Ugandan military as the suspected serious human rights abuses of the UPDF mainly took place before July 2002, and therefore, are not covered by the mandate of the International Criminal Court, which can only prosecute crimes committed after the Statute of Rome had been ratified.

The somewhat negative perception of the ICC among the Northern Ugandan population can be traced back to a lack of knowledge and information. Many people do not have a clear understanding or appreciation of the role of the International Criminal Court.

APPROACHES TO CONFLICT RESOLUTION: FREEDOM VERSUS JUSTICE?

The debate on the issue of how to deal with the war crimes of the LRA revolves around two central ideas: justice and peace. With reference to the situation in Uganda, these two concepts are often portrayed in polarized and, sometimes, unsophisticated discussions as being mutually exclusive. In particular, critics of the International Criminal Court and advocates of local approaches to reconciliation draw on this juxtaposition, describing peace as a priority, over and above justice. However, the ideas are not necessarily incompatible or concurrent. By contrast, there are critical issues relating to the interplay between the two aspects, particularly in terms of the consecutive temporal dimension. Finally, the debate centers on two seemingly opposing interpretations

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of law and justice, the *restorative justice* adopted by local approaches, whereby atonement and reintegration take priority, and the *retributive justice*, which sees justice in terms of punishment and vengeance. The latter approach is one of the ideals of international law and a founding principle of the ICC. The case of Northern Uganda clearly shows the challenges of international proceedings and the difficulties in balancing local circumstances. Therefore, it is worth looking in greater detail at the developments in Uganda and the arguments presented as part of the controversial debates.

AMNESTY ACT

The *restorative justice* approach can be seen with the particular example of the Amnesty Act, which was passed in 2000. Against the backdrop of failed peace negotiations and attempts to find a military solution, and in view of the mood among the population and the pressure exerted by numerous civil society groups, the Ugandan government thus created a basis for amnesty. With heavy reliance on the traditional methods of conflict resolution, reconciliation has played a particular role in this. All former enemy combatants who abandoned their ties with the LRA were pardoned and guaranteed immunity from prosecution.[4]

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After hesitation in the run up to the act, its implementation has proved to be relatively successful, and thousands of LRA fighters have returned from the outback to take advantage of amnesty in return for their weapons. The granting of general amnesty is still very controversial, since it grants immunity even in the case of the most heinous war crimes and, therefore, goes against the basic principles of international criminal law and the ICC, which both focus on fighting impunity in conflict areas and war zones. Ever since the ICC was called in by the Ugandan government, this has been one of the main points of contention in the debate surrounding how to deal correctly with the rebels of the LRA. In April 2006, a clause of the Amnesty Act was

4 | Refugee Law Project, "Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation," Working Paper 15, February 2005.

finally amended, which granted the Ugandan interior minister – with the agreement of the parliament – the power to declare certain individuals ineligible from being granted amnesty.

IMPACT OF THE ARREST WARRANTS ON THE PEACE PROCESS

In the eyes of many religious and cultural leaders in Northern Uganda and according to various non-governmental organizations, the arrest warrants issued by the ICC are an obstacle to achieving peace, as they undermine traditional reconciliatory methods and the efforts for peace by guaranteeing amnesty, meaning that the LRA's willingness to negotiate is reduced. Initially, however, the exact opposite was true. Most experts agree that the International Criminal Court's investigations increased international awareness of the conflict and the crimes of the LRA, removing support for the LRA among the dispora and neighboring countries. Even in the case of victory – although highly unlikely – the arrest warrants would have continued to exist. This meant there was no positive outcome for the LRA leadership and meant that the path to the negotiating table was unavoidable.

Most experts agree that the International Criminal Court's investigations increased international awareness of the conflict and the crimes of the LRA, removing support for the LRA among the dispora and neighboring countries.

Nevertheless, the arrest warrants of the ICC turned from being an effective means of exerting pressure to a burden for the peace process. The regionalization of the conflict increased as the LRA increasingly withdrew into areas in the East Congo and the Central African Republic, and carried on their bloody activities there. While the Juba negotiations made the LRA increasingly dependent on signing the peace agreement in order to avoid the arrest warrants, its leadership refused to participate in talks, pointing to the threat of prosecution. These remarks were echoed by critics of the ICC trial, who promulgated perceptions that the charges stood in the way of the peace process.[5]

5 | Cf. Scott Worden, "The Justice Dilemma in Uganda," *USI Peace Briefing*, February 2008.

Chief prosecutor, Moreno Ocampo, supporter of the ICC and international human rights organizations, such as Amnesty International rejected demands to revoke the arrest warrants. He claimed that it was impossible to grant amnesty in light of the gravity of the crimes; in addition, there was a lack of alternative, suitable accountability mechanisms. Dropping the charges would set a dangerous precedent for impunity. Critics of the ICC and, above all, local leaders, pointed out that traditional methods of punishment and reconciliation were sufficient, and they supported demands to revoke the warrants. In the meantime, the Ugandan government climbed on the bandwagon and held out the prospect that the rebels would be protected if the peace agreement were signed – although their hands were tied according to international law.

TRADITIONAL APPROACHES AS AN ALTERNATIVE?

In the case of the aforementioned traditional procedures, advocated by local NGOs, church representatives and other local authorities, the focus is on the so-called *Mato Oput*, a traditional legal ritual of the Acholi. Like other ethnic groups in Northern Uganda, the Acholi have a long tradition of internal conflict resolution and jurisdiction based on oral transmission, that is derived from social cohesion. Voluntary subjugation of the perpetrator and his or her public exculpation, discussions about compensation and, finally, reconciliation through symbolic gestures are key elements of the process. Advocates believe that the *Mato Oput* represents a suitable, local alternative to the approach taken by the international judicial system, and they call for the withdrawal of the ICC, so that people can concentrate on traditional methods of peace and conciliation.[6]

Advocates of traditional legal rituals believe that the Mato Oput represents a suitable, local alternative to the approach taken by the international judicial system, and they call for the withdrawal of the ICC.

6 | Cf. Refugee Law Project, "Peace First, Justice Later: Traditional Justice ion Northern Uganda," Working Paper 17, July 2005; Liu Institute for Global Issues und Gulu District NGO Forum, "Roco Wat I Acholi. Restoring Relationships in Acholiland: Traditional Approaches to Justice and Reintegration," September 2005.

Many observers and experts indeed recognize that the traditional approach offers opportunities, but they warn that it should not be overestimated. It is almost an insurmountable challenge to use the *Mato Oput* approach alone to deal with a crime of this scale, particularly as carrying out the ritual hardly seems practical in each instance and, in many cases it is often difficult to trace the victim-perpetrator relationship. Furthermore, the approach also advocates material compensation for victims, although it is unlikely that either the perpetrator or their clan would be able to do so in view of the thousands of victims. The argument that the population would better understand the traditional system, and that this always provides a sound method of reconciliation, is questionable. After twenty years of civil war, social fabrics and traditional values have been eroded in conflict areas. Years of living in refugee camps have weakened the role of traditional authority, and traditional rituals are rarely understood, particularly among the younger generation.[7]

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From the point of view of an observer, therefore, it becomes clear that traditional approaches do not represent a suitable option in their original form and as the sole mechanism. It seems pertinent that one should consider potential modifications and find a way of combining the different approaches sensibly. Is it possible to bring the different aspects of *restorative justice* and *retributive justice* together? Considering the polarized positions, this seems a difficult task. It would first be necessary to overcome the misleading dichotomy of peace and justice. Assuming that "*Mato Oput* = peace without punishment" and that "ICC = punishment without peace" is a false equation. It fails to recognize that *Mato Oput* can also represent justice in many situations, and that the approach taken by the International Criminal Court can also make a significant contribution to peace.

7 | Cf. Okello Lucima, "Mato Oput is a Cloak for Impunity in Northern Uganda," May 2008, http://friendsforpeaceinafrica.org/analysis-op-ed/48/209-mato-oput-is-a-cloak-for-impunity-in-northern-uganda.html (accessed September 2, 2010).

Finally, it is well worth making a distinction between instances where *Mato Oput* might and might not be an option for the perpetrators. A traditional approach is not a sensible and realistic one in the case of the LRA leadership.

THE JUBA AGREEMENT AND THE ISSUE OF PROSECUTION AND RECONCILIATION

The ICC's arrest warrants and the issue of general means of dealing with the war crimes have been central points of discussion during the Juba peace talks. The third agreement, which was reached in June 2007 and heavily criticized for its vagueness, presented a sort of compromise between judicial prosecution – albeit at a national, rather than international level – and the use of traditional, reconciliatory rituals.[8]

An important addendum to the agreement was passed in February 2008. It provides for the establishment of a special department within the Supreme Court, which is tasked with prosecuting serious war crimes and systematic human rights abuses. This should enable the LRA leaders to be dealt with by the Ugandan judiciary, taking into account the provisions of the Rome Statute and the International Criminal Court, and pointing to the principle of complementarity. According to this principle, the ICC can only be convened if the state in question is not willing or not in a position to prosecute crimes in an appropriate manner, which fulfill the elements of a statutory offense. At the same time, there is a provision to apply traditional approaches for a broad number of individual crimes.

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Public response to the agreement was, again, divided. Many local players welcomed it. Some human rights organizations even saw a good opportunity to enable suitable trials to be held in Uganda, to which the ICC, in certain circumstances, might be able to cede its responsibility.

8 | Cf. International Crisis Group, "Northern Uganda: The Road to Peace, With or Without Kony," in: *Africa Report* 146, December 2008.

Other organizations, including Amnesty International, did not find this acceptable. The ICC itself rejected calls to suspend the arrest warrants and cede responsibility.[9]

When Joseph Kony failed to appear to sign the final peace agreement, and following Operation "Lightning Thunder," which was the military option chosen by the Ugandan government in December 2008, this marked the end of the peace process – temporarily at least. In spite of differing international signals, the Ugandan government appeared to have backed down from its earlier position regarding the arrest warrants following the failure of the peace agreement and promise to transfer any prisoners immediately to Den Haag.

NATIONAL OR INTERNATIONAL PROSECUTION?

Although the peace negotiations had failed and despite recent signals from the Ugandan government, the debate surrounding the persecution of suspected war criminals is still relevant, as is the question of the interplay between national and international jurisdiction. Above all, it is interesting to consider the circumstances under which a trial before a national Ugandan court could replace a trial before the ICC. The legal basis for this is set down in the Rome Statute. One of the central elements of the statute is the principle of complementarity.

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As Uganda requested the involvement of the International Criminal Court itself, the court's authority is undisputed for the time being. Nevertheless, the principle of complementarity still poses the question of whether the ICC can yield from a trial in favor of national jurisdiction in certain circumstances, i.e. primarily in cases where legal reforms mean that suitable, national trials are credible. Among other things, the inclusion of the Rome Statute and its legal provisions into national law, the guarantee of a fair and independent trial, judicial capacity to effectively carry out the trial, as well as appropriate regulations for witness participation and protection are all key prerequisites.

9 | IRIN News, "Uganda: Peace, Justice and the LRA," February 21, 2008, http://irinnews.org/Report.aspx?ReportId=76860 (accessed September 2, 2010).

Alternatively, there are two further options for suspending ICC proceedings. Firstly the chief prosecutor from the court can, in certain circumstances, abate legal proceedings if he deems them incompatible with the interests of justice. Secondly there is the possibility for the UN Security Council to intervene, which could abate legal proceedings for a renewable term of one year in each instance.
Even if voices within Uganda called repeatedly for such measures, one must remember that both options are neither realistic nor sensible in Uganda's case.

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Thus there remains the question of whether Uganda's judiciary and legal situation can ensure an appropriate trial of the war criminals and, as such, represent a real alternative to the proceedings of the International Criminal Court. To date observers and experts have been rather more critical. Indeed the Ugandan judicial system, particularly its supreme court, is thoroughly qualified and competent. However it lacks experience in dealing with crimes of the same nature and extent as those in the Northern Uganda conflict. Furthermore, within Ugandan criminal law, there is currently no clear basis for punishing war crimes and crimes against humanity. Also, in view of the scope of the proceedings, the independence of the Ugandan judiciary is viewed with some skepticism.

The bill incorporating the elements of a crime under the Rome Statute has a central role to play in Ugandan national law (ICC Bill). The bill seeks to harmonize national and international law, facilitate the prosecution of war crimes and human rights abuses, and to promote collaboration with the ICC. After years of delay it was passed unanimously by the Ugandan parliament on March 10, 2010 – much to the relief of observers as it was in time for the Review Conference. Thus, alongside Senegal, South Africa, Mali and Kenya, Uganda is only the fifth African country to have modified its national legal framework.

NEIGHBORING SUDAN AND THE AL-BASHIR CASE

The International Criminal Court issued in 2009 an arrest warrant for the Sudanese president. It is the first time that the ICC has accused a head of state while he or she is in office.

The case involving the Sudan, Uganda's neighbor, and its diplomatic implications are particularly important for the relationship between Uganda and the International Criminal Court. At the start of March 2009, the International Criminal Court issued an arrest warrant for the Sudanese president, Omar al-Bashir, on the grounds of crimes against humanity and war crimes in Darfur. It is the first time that the ICC has accused a head of state while he or she is in office. The arrest warrant alleged that al-Bashir was personally responsible for murders, torture, rapes and forced expulsions in the Darfur region. In two instances he is accused of war crimes involving plundering and military attacks on the civilian population.

Sudan itself has not signed the Rome Statute. It is unlikely that the Sudanese government will extradite its president to Den Haag. Therefore the focus is now on countries, particularly in Africa, which have already ratified the statute. Uganda is one of these.

Article 89 (1) of the Statute of Rome sets down the following provisions for each member country: "The Court may transmit a request for the arrest and surrender of a person […] to any state on the territory of which that person may be found and shall request the cooperation of that state in the arrest and surrender of such a person. States parties shall, in accordance with […] the procedure under their national law, comply with requests for arrest and surrender." Should a state neglect this obligation, article 87 (7) provides that the International Criminal Court may refer the matter to the United Nations' Security Council.

THE POSITION OF THE AFRICAN UNION

Allegations against the Sudanese president have prompted hefty discussion on the African continent. Among other things it has been a topic at previous assemblies of the African Union (AU). The Union has appealed to the Security Council to use its mandate and suspend the arrest warrant for al-Bashir issued by the International Criminal Court

for one year, arguing that the arrest warrant does not help calm the situation in Darfur; rather it is more likely to escalate. However, the call was unheeded; the arrest warrant is still in force.

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At the summit of the African Union at the beginning of July 2009 in Libya, a resolution was drafted, which declared that member states of the Union would not comply with the terms of the arrest warrant, should the Sudanese president enter their respective territories. In other words, President al-Bashir was at liberty to move freely on the African continent despite the arrest warrant and he must not fear arrest. The AU justified its actions, among other things, with reference to the failure of the United Nations' Security Council to respond to its request to suspend the arrest warrant.

Even if a number of African signatory countries have more or less explicitly backed away from the resolution – sometimes under pressure from critical voices among the population[10] – and have stated their intentions to arrest al-Bashir, this still shows a serious rupture in cooperation between the court and African signatory countries, something which is central to effective international prosecution.

UGANDA'S DILEMMA BETWEEN LEGAL OBLIGATIONS AND DIPLOMACY

As a result of these developments Uganda was again confronted by a legal and political dilemma, as international obligations and its relationship with its neighbor Sudan – which is particularly important for overcoming the LRA conflict – are directly opposed. This was apparent even in the run-up to the international conference, which took place in July 2009 in Kampala, and to which the Sudanese president was invited. An éclat was triggered on the Sudanese side by comments made by different, high-ranking Ugandan politicians, claiming that Uganda

10 | Howard Lesser, "African Civil Society Groups Rebuke AU Stand on Bashir," in: *Voice of America News* (voanews.com), July 31, 2009, online unter http://ictj.org/en/news/coverage/article/2883.html (accessed September 2, 2010).

would meet its obligations to arrest al-Bashir if he set foot on Ugandan soil. Generally, however, the Ugandan side continued to represent the view that the declaration, which had been drafted at the AU Summit in Libya, would remain a political document and have no legal force – the exact opposite of the Rome Statue that had been ratified by Uganda. There was now a struggle to find a way out of the situation that saved face for all sides. Consequently the Sudanese president was still invited, but sent representatives instead. The Sudanese side believed the risk was too great that Uganda would meet its obligations, i.e. arrest and deport the president.

On the fringe of the International Criminal Court Review Conference there were renewed irritations surrounding Uganda's actions in the al-Bashir case. Initially a spokesman for the Ugandan president said that al-Bashir had not been officially invited to the summit of the African Union in Kampala in July 2010. This position seemed to represent a deviation from the diplomatically sensitive course and was welcomed by the ICC and many observers as an important signal to other African states, but Sudan protested, demanding an apology, and called for the summit to be relocated. A few days later the Ugandan foreign ministry issued a revised statement, stressing that al-Bashir was invited to the summit. Even if the background is unclear at present, it seems that Uganda is shying away from taking a stronger line towards al-Bashir in light of pressure from its neighbor, Sudan, and other African partners. Recently it became clear that Uganda is not alone in this position: as part of the celebrations to mark the introduction of a new constitution in Kenya at the end of August 2010, al-Bashir was among the guests in Nairobi. He was not arrested, although Kenia has signed and ratified the Rome Statute.

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SUMMARY

The example of Uganda represents a central point for discussion surrounding the work of the International Criminal Court and illustrates the on-going problems and challenges it faces, particularly in relation to Africa.

Claim versus Reality?

Ever since its foundation there have been high hopes for the ICC. The creation of an international organization for prosecuting war crimes and human rights abuses internationally is, quite rightly, a milestone in the history of international relations. However, the reality has been somewhat more sobering; ensuring that crimes are prosecuted has proven extremely difficult in practice, particularly since the court tends to rely on the cooperation of individual states.

To date the International Criminal Court has yet to make a significant, active contribution to justice in Uganda. In the seven years since ICC proceedings were launched, it has not been possible to arrest even one of the alleged LRA perpetrators. This leads to frustration, particularly among the population directly affected, and gives wind to critics, which argue that the court is ineffective.

Freedom versus Justice?

The case of Uganda shows pointedly the complex problems in dealing with war crimes and human rights abuses in the context of a civil war, particularly in situations where the conflict remains unresolved. There are a number of different dilemmas and challenges facing local, national and internationally players. The different responses to these challenges by the parties involved are evidence of various interests, priorities and notions of justice. In this regard a polarizing discussion, in which peace and justice are compared and contrasted against each other, is improper and also an obstacle for resolving the problems in the long run. The fact that peace and justice are not mutually exclusive should be an axiom in the debate, as should an understanding that lasting peace is unlikely without justice. This would facilitate a serious debate about sensible, holistic solutions, which is focused on the existing problems. However, the example of Uganda makes it clear that this is hardly reality. Instead, it seems that the different sides oppose each other, with the ICC being seen as a stumbling block to achieve peace. The same can be said for the al-Bashir case, as critics also argue that the arrest warrants endanger the peace process in Darfur.

The fact that peace and justice are not mutually exclusive should be an axiom in the debate, as should an understanding that lasting peace is unlikely without justice.

In this context it would be helpful to develop a mutual understanding of each side's position in order to enable constructive dialog. While prosecution of the main perpetrators is vital – in view of the atrocities that have been committed – it is nevertheless advisable to find options, which take into account local and traditional approaches, and which critically highlight the question of timing with arrest warrants. Generally, the key issue is the ability of the ICC to act in a manner sensitive to the conflict and to adapt to local circumstances. This is extremely important for an effective and acceptable court, and for future proceedings, particularly in Africa.

Justice versus Diplomacy?

The ICC, as an international justice body, faces a further challenge in terms of how to integrate into international diplomatic frameworks. In this regard the court faces the difficult task of ensuring its independence as a legal and moral organization within international relations, which are primarily defined on the basis of power. This is particularly difficult since the court lacks sufficient power of its own to implement its laws. The universality of human rights and the absolute nature of laws oppose the political reality, which is based on diplomatic links, and from which the Court can effectively isolate itself in view of its independence and its cooperation with nation states. This is particularly clear from the way in which African countries have dealt with the al-Bashir case.

The International Criminal Court faces the difficult task of ensuring its independence as a legal and moral organization within international relations. This is particularly difficult since the court lacks sufficient power of its own to implement its laws.

Alongside this, the ICC must strike a permanent bridge between diplomacy at an international level and the practical matters of the victims at a local level. Within this almost impossible balancing act, it is vital to have a constructive interplay between local players and trials.

The West versus Africa?

There is a particular diplomatic challenge resulting from the relationship between the ICC and the African signatory countries. On the African government's part there have been repeated accusations that the ICC only concentrates

on illegal actions in Africa and is blind to crimes on other continents. Indeed all the on-going proceedings relate to cases in Africa, even though preliminary investigations are being carried out in countries outside Africa. Many African governments believe that the ICC is a neo-colonial tool used by Western states to exert influence indirectly on Africa. To a certain extent this perception explains the reaction to the al-Bashir case, in which the court was not convened at the invitation of the signatory country involved, unlike other proceedings.

Again constructive dialog is called for. The Review Conference in Kampala provided a good opportunity for this, even if further dialog forums are needed. In so doing there is a need on the part of Africa to overcome the "anti-imperialist" reflex and the blind mutually protection of other African states. At the same time the ICC and its Western supporters must develop a stronger sensitivity to the dangers of politicizing the court. Honest efforts are called for, which counteract perceptions held about the ICC, namely that it merely reflects inequalities in global power.