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INTERNATIONAL CRIMINAL JUSTICE AND *JUS POST BELLUM*.

The Challenge of ICC Complementarity : A case-study of the situation in Uganda

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RÉSUMÉ

En 2004, le gouvernement ougandais a renvoyé la situation au nord de l'Ouganda — où le gouvernement était empêtré dans un conflit armé avec les rebelles de l'Armée de Résistance du Seigneur (ARS) — à la Cour Pénale Internationale (CPI). Plus tard, le gouvernement s'est engagé dans un processus de justice transitionnel afin de gérer les effets du conflit sur le plan interne. Ceci soulève la question de savoir si la CPI doit s'en remettre aux efforts du gouvernement sur la base du principe de complémentarité, en particulier pour ce qui concerne ses mandats d'arrêt à l'encontre des responsables de l'ARS. Dans cet article, les auteurs plaident pour que le test d'admissibilité mis en œuvre par la Cour soit informé par les perceptions des acteurs de terrain concernant les approches pertinentes de la justice traditionnelle qui sont susceptibles de conduire à la réconciliation. La Cour devrait adopter une perspective critique à l'égard des conceptions occidentales préconçues sur la responsabilité et la justice rétributive dans les situations post conflictuelles. En ce sens, la Cour pourrait, dans l'intérêt de la paix et de la réconciliation, admettre l'application de sentence alternative ou moins sévère.

ABSTRACT

In 2004, the Government of Uganda referred the situation in northern Uganda — where the Government was embroiled in an armed conflict with the rebels of the Lord's Resistance Army — to the International Criminal Court. Lately, the Government has embarked on a transitional justice process to deal with the effects of the conflict internally. This raises the question whether the ICC should defer to the Government's efforts on the basis of the complementa-

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rity principle, notably with respect to its arrest warrants against the LRA commanders. In this contribution, it is argued that the Court's admissibility determination should be informed by grassroots perceptions regarding appropriate transitional justice approaches towards reconciliation. The Court may want to critically engage with preconceived Western notions of accountability and retribution in *post bellum* situations, and possibly countenance 'alternative' or somewhat more 'lenient' sentencing of LRA leaders in the interest of peace and reconciliation.

Introduction

Jus post bellum logically addresses the law that is, or should be, applicable after a conflict ends. Among the legal mechanisms designed to address the aftermath of a violent conflict, international criminal justice, the topic of this contribution, plays a prominent role. By ensuring prosecution and punishment of the individual perpetrators who are responsible for the commission of international crimes in the course of the conflict, in theory, criminal justice aims to deter future perpetrators from committing crimes, and thus ultimately to prevent the renewed outbreak of violent conflict. (3)

Here, it is not our aspiration to engage in a wide-ranging analysis of the value of international criminal trials in preventing conflict. Rather, we examine what role international criminal justice can play *in the course of a conflict*, and, in particular, how it relates to (a) efforts to bring an end to an on-going conflict, and (b) to the establishment and operation of non-penal mechanisms that deal with a legacy of atrocities and that are geared toward preventing resurgence of the conflict through fostering reconciliation instead of meting out retribution. The broader research question at the foundation of this examination is whether the decision of prosecutors and judges should, be informed, "in the interest of peace and reconciliation", by (a) political realities and compromises, that may include pledges of amnesty to combatants to convince them to lay down arms and end the conflict, and (b) non-penal transitional justice mechanisms, such as truth and reconciliation commissions or traditional justice rituals, that prefer truth and pardon to punishment. Will this indeed further the ability of

(3) That being said, it is not (yet) empirically proven that international criminal justice really deters future atrocities. See for an early exploration : P. Akhavan, "Beyond Impunity : Can International Criminal Justice Prevent Future Atrocities ?", *American Journal of International Law*, vol. 95, 2001, pp. 7 and s. See for a recent argument doubting that international criminal justice has much deterrent effect : E. Fish, "Peace Through Complementarity : Solving the *Ex Post* Problem in International Criminal Court Prosecutions", *Yale Law Journal*, vol. 119, 2010, pp. 1703 and s., especially p. 1710. See generally on the effectiveness of international criminal justice : C. Ryngaert, (ed.), *The Effectiveness of International Criminal Justice*, Antwerp, Intersentia, 2009.

international criminal justice solutions to positively contribute to the transition of a situation of *bellum* to a situation of *post bellum*?

Given the vastness of the topic, we approach this research question from a specific angle. We inquire into how the International Criminal Court (ICC) construes, and should construe, its role of "complementary" jurisdiction *vis-à-vis* domestic attempts at addressing atrocities and securing peace and reconciliation in the territorial State. As is well-known, a cornerstone of the ICC *régime* is the complementarity principle. On the basis of this principle, the ICC will declare a case inadmissible if, and only if, the State proves able and willing to genuinely carry out an investigation into, and a prosecution of atrocity cases (4). It is not fully clear, however, what a "genuine investigation and prosecution" precisely implies. Should non-penal transitional justice mechanisms be discounted because they are not geared toward meting out formal retributive justice? Are such mechanisms shielding perpetrators from justice and accountability? If the answers to these questions are in the affirmative, and the Court should thus declare such cases formally admissible, is there no other way for the Court to take the interests of peace and reconciliation into account, provided that there is some empirical proof of the effectiveness of political and non-penal solutions in securing a durable peace?

From the *jus post bellum* perspective that this special issue espouses, it is important to note that the contexts of war, peace, justice, and reconciliation in which the ICC operates differ from the *ad hoc* international criminal tribunals. The latter tribunals were established *ad hoc* after the end of a conflict. Accordingly, they were part and parcel of the *jus post bellum*. Because some form of peace, or at least the absence of conflict, had returned, those tribunals did typically not have to negotiate the tension between peace and justice. In contrast, the ICC has been established as a permanent institution which does not necessarily have to wait until the end of the conflict before initiating its investigations and issuing its arrest warrants. As a result, the ICC may become enmeshed, as one actor among many, in sometimes almost intractable conflicts. As the case may be, ICC intervention may isolate actors that are suspected of having committed international crimes, and thus contribute to ending the conflict, or it may prove to be a major stumbling block to the brokering of a peace deal that discards criminal justice solutions as a post-conflict transitional justice mechanism in the interest of peace and reconciliation. It is almost axiomatic that, given the potential impact of ICC intervention on local conflict resolution, one ought to bear in mind that, ultimately, international crim-

(4) Statute of the International Criminal Court, Rome, 17 July 1998, 2187 *U.N.T.S.* 3 (hereinafter, ICC Statute), art. 17.

inal law should be an *instrument* to attain such wider social goals as peace and reconciliation, rather than an end in itself. (5)

These abstract questions necessitate wide-ranging empirical inquiries that are bound to go far beyond the space allocated to us for this contribution. In fact, any solution to the "*peace v. justice*" conundrum may be contingent on the local context of a particular conflict. (6) Accordingly, in order not to get bogged down in a sterile abstract discussion, we have opted to focus on one particular conflict in which the ICC is involved, namely the conflict between the Government of Uganda (GoU) and the rebels of the Lord's Resistance Army (LRA) in northern Uganda.

We have not selected the situation in Uganda at random. The Ugandan situation was the first situation ever that was referred to the ICC by a State party (Uganda itself). It was also the first situation where the ICC issued arrest warrants. And, most importantly, of the situations under investigation, the Ugandan situation is probably the most intractable for the Court. From the outset, its investigative and prosecutorial efforts have been entangled with a peace process between the GoU and the LRA that the parties embarked on shortly after the ICC issued arrest warrants against the leaders of the LRA. This peace process resulted in the adoption of an Agreement on Accountability and Reconciliation (2007) and an Annexure to this agreement (2008), (7) which contemplate the establish-

(5) Compare P. CLARK, "Grappling in the Great Lakes : the Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda", *in* B. BOWDEN et *al.* (eds.), *The Role of International Law in Rebuilding Societies after Conflict : Great Expectations*, Cambridge, Cambridge University Press, 2009, pp. 244-269, who asked the following rhetorical question as to the ultimate objective of international criminal justice : "is it simply to fulfil a legal obligation to respond to gross criminality or a broader vision of the potential for international justice to help facilitate peace, reconciliation or some other wider social goal ?" Clark, who is in favor of a more outward-looking ICC, observes that the ICC Prosecutor statements as to the precise role of the ICC in the conflict in Uganda are ambiguous. On pp. 258-59, he notes that the ICC Prosecutor at one point de-emphasized the Court's impact on reconciliation in Uganda, when he stated : "We have to fulfil our judicial mandate only." See on the still prevailing uncertainty as to the goals of international criminal justice also "Discussion", *Journal of International Criminal Justice*, vol. 6, 2008, pp. 681 and s., especially p. 701 (Mirjan Damaska) : "Goals proclaimed by international criminal judges and their affiliates are manifold, far exceeding the tasks proclaimed by national systems of criminal justice. What complicates matters further is that these goals are capable of sabotaging one another : they pull in different directions and generate tensions. Bringing symphonic consonance to these goals is bedeviled by the fact that no clear sense has emerged about their relative weight. What is central to the mission of international criminal justice is thus necessarily uncertain."

(6) It is noted that some authors have ventured into this minefield and have come up with a number of abstract criteria that may guide the Court in its decisions. See F. MEYER, "Complementing Complementarity", *International Criminal Law Review*, vol. 6, 2006, pp. 549 and s.; C. STAHN, "Complementarity, Amnesties and Alternative Forms of Justice", *Journal of International Criminal Justice*, vol. 3, 2005, pp. 697 and s. Of course, application of these criteria depends on local particularities.

(7) Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, 29 June 2007, available online at http :/ /www.icc-cpi.int/iccdocs/doc/doc589232.pdf (last visited 18 November 2011) (hereinafter, the Agreement); Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008, available online at http ://www.icc-cpi.int/iccdocs/doc/doc589233.pdf (last visited 18 November 2011) (hereinafter, the Annexure).

ment and operation of various transitional justice mechanisms within Uganda, including traditional justice, truth-telling and criminal prosecution. Back in 2000, the Government already adopted a fourth mechanism : amnesty. (8) All mechanisms, except the existing Amnesty Act, are still in the process of operationalization. In this contribution, it is our aim to shed light on the relationship between these mechanisms and the ICC's complementarity principle. When discussing the relationship between these mechanisms and the ICC criminal law *régime*, we will tackle the following three questions. Firstly, do Uganda's transitional justice mechanisms satisfy the requirements of the complementarity principle ? Secondly, how flexible an interpretation of "genuine investigation and prosecution" should the ICC embrace for complementarity purposes ? Thirdly, how does criminal prosecution, also at the Ugandan national level, relate to non-penal transitional justice mechanisms ?

One should not fail to appreciate the significance of the complementarity principle for the Ugandan situation. In the absence of Security Council intervention, complementarity is the ICC gateway through which all peace, justice or accountability mechanisms that purport to deal with international crimes have to pass. Once arrest warrants have been issued — as it is the case for Uganda — the ICC Prosecutor's option of deciding not to investigate or prosecute a case in the interests of justice, by virtue of Article 53 of the ICC Statute, (9) disappears. The Prosecutor cannot simply suspend a case "to give peace a chance". Only the UN Security Council has the power to do so under Article 16 of the ICC Statute. Since, so far, the Security Council has refrained from directly addressing the "peace v. justice" tension with respect to the Ugandan situation, the ICC itself has to mediate the imperatives of justice and peace through a well-considered application of the complementarity principle.

The relationship between the ICC's complementarity principle and Ugandan transitional justice instruments cannot properly be understood without a discussion of the socio-political context in which ICC intervention and the establishment of transitional justice instruments took place. Therefore, section 1 offers a brief overview of this context, as informed by grassroots perceptions. We will then proceed to tackle the promises for peace and reconciliation held by traditional justice (section 2) and truth-telling (section 3), and review these mechanisms in light of the ICC's complementarity principle. Subsequently, we will discuss the conditions which domestic criminal

(8) Amnesty Act, 2000.

(9) C. Stahn, *loc. cit.*, p. 18, doubts whether Article 53 of the ICC Statute really offers much leeway for prosecutorial discretion ("These criteria make it clear that the notion of 'interests of justice' is linked to justice in a specific case ('Einzelfallgerechtigkeit') rather than general policy considerations. It is therefore doubtful whether Article 53 offers a vast space to weigh general interests of national reconciliation or objectives of peacemaking versus interests of individual accountability.").

proceedings in Uganda should meet for them to provide a basis for challenging the admissibility of the pending cases before the ICC (section 4).

Our working hypothesis is that the Court does, and should, take into account the views of various stakeholders to the conflict, and the victimized local population in particular, when drawing the exact boundary between the need for Court intervention and the need to defer to local efforts with regards to accountability and reconciliation in Uganda. (10) This is what complementarity is ultimately about. In order to identify grassroots views of the value of transitional justice mechanisms and of the Court's role in the conflict in northern Uganda, one of the authors (Lauren Gould) conducted nine months of grassroots field research in northern Uganda during a five month period in 2007 and a three month period in 2009. (11) (12) The data gathered and compared has been used to inform our legal analysis on how to implement the ICC's complementarity principle in the Ugandan context of competing transitional justice mechanisms.

I. — Context

We understand *reconciliation* to be a relational process, occurring between and within identity groups, of shifting antagonistic identity boundaries towards being less salient and more inclusive, such as to counter a process of lethal political conflict, while conversely advancing and facilitating minimally acceptable cohabitation. (13) To understand the role that

(10) Greenawalt has similarly argued that the Court, as regards the situation in Uganda, sought the assistance of various stakeholders, including victims, when determining its stance on the need for continued ICC intervention. See A.K.A. Greenawalt, "Complementarity in Crisis : Uganda, Alternative Justice, and the International Criminal Court", *Virginia Journal of International Law*, vol. 50, 2009, pp. 145-158, in particular pp. 147-151.

(11) Through focus group discussion and in-depth semi-structured interviews, the opinions of a total of 130 respondents were collected, including former rebels, community members, family members of the deceased, traditional and religious leaders, lawyers, civil society members, journalists, members of the ICC outreach team, and political leaders. Interviews were held in Kampala and across the northern Ugandan provinces Kitgum, Gulu and Pader in internally displaced people (IDP) camps, satellite camps and traditional homesteads.

(12) The data collected was analyzed using the digital qualitative analysis program *MAX QDA*. Unfortunately due to limited time and funding, research was not conducted in the neighbouring war affected regions of Lango and Teso. Considering the particular relationship between the Acholi, the LRA and GoU, we do not presume that the data collected within the Acholi region can be generalized to the Lango and Teso regions. For an overview of related perspectives from the Lango and Teso regions, see P. Pham *et al.*, "Abducted; The Lord's Resistance Army and the Forced Conscription in Northern Uganda", *Berkeley-Tulane Initiative on Vulnerable Populations*, 2007 and L. Komakech et A. Sheff, "Tradition in Transition : Drawing on the Old to Develop a New Jurispudence for Dealing with Uganda's Legacy of Violence", *Beyond Juba Working Paper*, n° 1, 2009 available online at http ://www.beyondjuba.org/working_papers/BJP.WP1.pdf (last visited 18 November 2011).

(13) This definition was constructed in close collaboration with Assistant Professor Mario Fumerton, Centre for Conflict Studies, Utrecht University. See also J.P. Lederach, *Building Peace : Sustainable Reconciliation in Divided Societies*, Washington, D.C., Institute of Peace Press, 1997; L. Kriesberg, "Changing forms of coexistence", *in* M. Abu-Nimr (ed.), *Reconcilia-*

international criminal justice and transitional justice solutions can play towards facilitating reconciliation in the Ugandan context, one cannot do without a brief reconstruction of the history and dynamics of the war and the antagonistic identity boundaries that have been constructed between the various parties involved and their constituencies.

A. — *Antagonistic identity boundaries in Uganda : how to devise transitional justice solutions*

For over twenty years, northern Uganda was the site of a protracted civil war, within which a spectrum of war crimes and crimes against humanity were committed. The roots of the violent conflict lie in a north-south divide introduced during British colonial rule (1894-1962). Herein, people from the south, largely Bantu ethnic groups, received political and economical advantages, while people from the north, Acholi and West Nile ethnic groups, were used to fill the military ranks. (14) Once independence came in 1962, these policies created a context in which elites played into the north-south divide to gain support for multiple military coups. This period especially affected the Acholi people's sense of ethnic identity and their position within society. In representing the majority of the military when independence came, they proceeded to become important pawns in the following military struggles for power, either as perpetrators or victims in mass scale violence. When the current president, Yoweri Museveni, and his National Resistance Army (NRA) came into power through yet another military coup in 1986, he failed to integrate the Acholi into his military. This marked the first time since independence that economic, political and military power shifted to the south. This led to the rise of three successive rebellions; the last remaining being the LRA under the rule of Joseph Kony.

Like its predecessors, the LRA claims to be fighting to undermine the position of the president and gain a political existence for the Acholi people. (15) However, over the years, the extreme levels of violence perpetrated by the LRA against the Acholi people themselves, and its use of mass scale abduction from the Acholi's communities to fill its ranks, negate any legitimate concerns and grievances that they might have for waging rebellion. In this regard, the LRA has been unable to articulate their polit-

tion, Justice, and Coexistence. Theory and Practice, Lanham, MD, Lexington Books, 2001, pp. 47 and s.; D. Bloomfield *et al.* (eds.), *Reconciliation After Violent Conflict : A Handbook*, Stockholm, IDEA, 2003; N. Aiken, "Learning to Live Together : Transitional Justice and Intergroup Reconciliation in Northern Ireland", *International Journal of Transitional Justice*, vol. 4, 2010, pp. 166 and s.

(14) T. Allen et K. Vlassenroot (eds.) *The Lord's Resistance Army : Myth and Reality*, London, Zed Books, 2010.

(15) R. Doom et K. Vlassenroot, "Kony's message : A New Koine? The Lord's Resistance Army in Northern Uganda", *African Affairs*, vol. 98, 1999, pp. 5 and s.

ical goals in a way that gains the sympathy of a larger international, national and or local audience. (16) The Acholi feel great bitterness towards the LRA for the suffering they have endured and for the thousands that have been abducted and killed in combat, but the LRA's warfare tactics have also helped to maintain the Acholi's sense of resentment towards the government. Not only do the Acholi perceive that the Government has not done enough to bring the 20 years of conflict to an end, its counterinsurgency strategies have also been experienced as brutal and unjustified. (17) Respondents clearly expressed that they perceive the GoU and its military as major perpetrators within the conflict and remain to see themselves as socially, economically and politically deprived. (18) Many voice that if the LRA top leaders are to be investigated and tried by the ICC, then so should a number of Government officials and soldiers within the United Peoples Defence Force (UPDF). (19)

To facilitate national reconciliation in Uganda, transitional justice solutions should therefore be geared towards accountability of both the LRA and the Government and should be perceived as impartial and even-handed. Unfortunately, Uganda's state referral of the situation in northern Uganda to the ICC has yielded an openly constructive relationship between the ICC and the Government of Uganda. This has, not surprisingly, led to the ICC only issuing warrants for the arrest of LRA leaders, and not of Government commanders or leaders. Whether or not the crimes committed by the LRA are graver than the crimes committed by the Government, and the choice to target the LRA in the first place is thus justified, may be beside the point. What may matter more is the perception among the population that the Government side gets away with its crimes. (20) This in turn may lead to the ICC and any Government-backed transitional justice

(16) See for an insight into how the LRA frames their rebellion S. Finnstorm, "An African hell of colonial imagination? The Lord's Resistance Army in Uganda, another story", *in* T. Allen et K. Vlassenroot (eds.), *op. cit.*

(17) As an Acholi respondent testified : *"The people here do not want the government well, because they form the opinion that 1) the government did not protect them and 2) they also committed atrocities on them. It is as if the GoU wanted what happened to take place, even what the LRA did, because they were also punishing people or maybe killing people. They are not that different from the LRA. People are not here to support either of them It is not the case that when you do not support the government that you then support the LRA. These are just two mad people"*. Interview with male counselor to returnees, Gulu, 14 August 2009.

(18) See, *e.g.*, P. Pham et P. Vinck, "Transitioning to Peace : a Population-Based Survey on Attitudes about Social Reconstruction and Justice in Northern Uganda", Human Rights Center, University of California, Berkeley, 2010, p. 34 (noting, however, that the population is eager to participate in elections).

(19) Male Former LRA combatant and counselor, Gulu, 14 August 2009, e.g., the following statement by an Acholi respondent : *"It is because of the approach of the ICC that led to the negative opinion of the ICC being formed so strongly. The first time they came people were exited that somebody will whip for us those people who did wrong to us. They are going to whip the LRA and they are also going to whip the government. But on understanding that they cannot whip the government, that is where the problems started coming and why the people were fed up with the ICC straight away."*

(20) Note that, as Pham and Vinck pointed out in their 2010 survey, "the proportion of respondents implicating the government [in atrocities] has increased significantly since 2005". P. Pham et P. Vinck, *loc. cit.*, p. 39.

solutions being seen as partial and illegitimate, which may not be particularly conducive to national reconciliation in Uganda. (21)

To counter this legitimacy deficit, the ICC may want to inform the grassroots communities of the limitations of the ICC, and it may want to emphasize the role that *national* transitional justice solutions can and should play in dealing with northern Uganda's past. Espousing a "positive" or "proactive" complementarity approach, (22) the ICC may want to put pressure to bear on Uganda to apply transitional justice processes in an even-handed manner, by subjecting both the rebel and government side to such processes. Only when thus taking into account the dynamics of the conflict and the antagonistic identity boundaries that have been formed herein, can the ICC and transitional justice actors aspire to live up to the expectation of facilitating processes of reconciliation in the face of a problematic state referral.

When devising and applying transitional justice mechanisms, and considering them in light of ICC complementarity, transitional justice actors should however not only take into account the antagonistic identity boundaries between the LRA and the Government, or the GoU, the LRA and its victims, but they also should realize that identity is not always static but can instead be fluid. In particular, the line between perpetrators and victims can be blurred. The LRA's mass scale use of abductees to fill its ranks has left people in the north facing the devastating reality that the majority of the LRA rebels inflicting the pain and suffering they endure, are in fact abducted civilians. The violence experienced by these abductees fundamentally changes and charges their identities, leaving them in a situation where they feel both powerless to have avoided committing atrocities, and powerless in preventing from being identified with the group perpetrating violence. If they manage to escape and return from the bush, they and those they return have to renegotiate an identity that defies the role between "civilian" and "rebel", "victim" and "perpetrator", "community member" and "outside aggressor". The result is that many former combatants face stigmatization, exclusion and loneliness and, for some, a return to violence remains a viable option. (23) To achieve genuine reconciliation and sustain-

(21) Interview Village Chief, Lacen Otinga, 2 August 2009 : *"If the ICC is truly there, then even the government of Uganda should be tried for its failure to protect the community. That would be faire because this will bring healing to the community that suffered in the hands of both of these people. But if you only take one party, yet the community knows that both committed atrocities then that will not be fair."*

(22) See ICC Office of the Prosecutor, Prosecutorial Strategy 2009-2012, 1 February 2010, para. 17 ("The *positive approach to complementarity* means that the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance.") (original emphasis).

(23) From a 2007 survey of the International Center for Transitional Justice, it could be collected that 39 pct. of former LRA abductees reported problems upon returning to their home communities. This percentage was higher for those that had remained longer than six months in the bush (68 pct) The most frequently reported problems were difficulty with school or work (20 pct) and stigmatization (18 pct), see P. PHAM et P. VINCK, *loc. cit.*, p. 30.

able peace, such former combatants may have to be re-integrated into society. (24) Transitional justice instruments should be fashioned accordingly. They should be geared toward stabilizing former combatants' behavior and turning the latter into functioning morally- and law-abiding civilians. Although such instruments may address very serious crimes, they need not, or should not, *per se* be retributive in nature, if retribution, *e.g.*, in the form of formal sanctions being taken against former combatants, could adversely impact their re-integration. The lesson to be learned from this is that the state's duty to investigate or prosecute atrocities, which underlies the ICC's complementarity principle, should not stand in the way of the goal of re-integration of lower ranked former combatants, many of whom can be considered as victims in their own right rather than full-fledged perpetrators.

B. — *The catalyzing effect of ICC complementarity on Ugandan transitional justice processes*

ICC complementarity has already had an important catalyzing effect on domestic processes within Uganda. In the wake of, and as a result of, the ICC investigation and the ensuing ICC arrest warrants, it became clear that Uganda did not want to contract out to the ICC its responsibility to address atrocities committed on its soil. Proposals for the reform of the Ugandan justice sector were aired, and the role of traditional justice mechanisms, including their relation to the ICC, started to be discussed.

Serious thinking about domestic accountability solutions has its origins in the initial political effects of the threat that the ICC posed to the LRA, rather than in the ICC's "threat of complementarity" posed to Uganda. As a result of the ICC's dealing with the LRA, the LRA lost regional support from Sudan, became increasingly marginalized, and was forced to the negotiating table in 2006. (25) The negotiating table was particularly attractive for the LRA, because it appeared as the only means to get rid of the arrest warrants which the Court had issued against its leaders. Indeed, it was hoped that a peace solution negotiated with the Ugandan Government could include "dropping the arrest warrants". A peace agreement could open essentially two options of saving the LRA from the claws of the ICC (a third, the ICC repealing the arrest warrant being very improbable). Firstly, by showing its disposition to enter into such an agreement, that would be accompanied by pledges to lay down arms, the LRA could curry

(24) See also *id.*, whose most recent survey bears out that the majority of respondents are comfortable in the presence of former LRA combatants.

(25) In early 2006, the first overtures to open dialogue were made, and Riek Machar, vice president of South Sudan, offered to mediate. On 26 August 2006, the LRA and the Ugandan government signed the first Cessation of Hostilities (CoH) Agreement. For an extensive analysis on the Juba peace talks, see International Crisis Group, "Peace in Northern Uganda", *ICG Africa Briefing*, n° 41, 13 September 2006.

favor with the international community, which, acting through the UN Security Council, could suspend the ICC's investigations for a renewable period of one year "to give peace a chance". (26) During this period, alternative transitional justice options could be explored. (27) Secondly, a peace agreement could imply a commitment on behalf of the Government to put in place domestic justice mechanisms before which LRA leaders could appear. The existence and well-functioning of these mechanisms may allow Uganda to successfully challenge the admissibility of LRA cases before the ICC on the grounds that it is able and willing to genuinely deal with the cases arising from the situation that it has referred to the Court and thus satisfies the complementarity requirements. The latter option was pursued within the negotiations. Based in the joint desire of both the LRA and the GoU to have the ICC withdraw its indictments, agenda item 3 "Accountability and Reconciliation" paved the way for two agreements : first, the Agreement on Accountability and Reconciliation of 29 June 2007 that outlines the framework for accountability and reconciliation and, second, the Annexure to the Agreement on Accountability and Reconciliation of 18 February 2008 that constitutes the implementation framework to the principal agreement.

The principal agreement states that the "Parties shall promote national legal arrangements, consisting of formal and non formal institutions and measures for ensuring justice and reconciliation with respect to the conflict". (28) It provides for the establishment of national criminal justice, traditional justice, truth seeking and a reparation scheme, while the annexure provides for the implementation of these mechanisms.

In spite of these developments, the LRA top leaders were not confident about the prospects of withdrawal and after a number of LRA delegates briefly visited the ICC in The Hague to gain clarity, Kony pulled out of the negotiations in November 2008. He demanded further assurances on the exact process, most importantly that a Security Council deferral of the ICC prosecution be obtained before he signs the final peace agreements and presents himself for disarmament and national prosecution. This presented a complex situation in which a number of agreements were signed by the LRA and the GoU, including a Cease Fire Agreement, an Agreement on

(26) See art. 16 of the ICC Statute.

(27) K. Southwick, *Uganda : Challenges of Peace and Justice*, Refugees International, Washington DC, 19 February 2008, p. 3. It may appear as a rather fanciful idea that the Security Council would adopt such a resolution, as the Council has in the past not been involved in the Ugandan situation. M. Otim and M. Wierda, "Justice at Juba : International Obligations and Local Demands in Northern Uganda", *in* N. Waddell and P. Clark (eds.), *Peace, Justice and the ICC in Africa,* London, Royal African Society, 2007, p. 24. In late 2009, the Council adopted a resolution condemning the continuing atrocities committed by the LRA in the DRC, but the tone of the resolution did not bode well for the LRA's case for suspension of ICC investigations. See UN Security Council Resolutions 1896 and 1906 (2009).

(28) Agreement, cl 2.1.

Comprehensive Solutions to the War and of course the Agreement on Reconciliation and Accountability. But it was obvious through the LRA's resumed tactics in Southern Sudan, Congo and Central Africa that the LRA was no longer genuinely interested in a peace process. The government for its part did pledge to implement various agreements, including the Agreement on Accountability and Reconciliation, to serve to fulfill the principle of complementarity of the Rome Statute. Various reasons for this willingness could be offered, but the most convincing reason is probably Uganda's desire to claim ownership of its justice process in the aftermath of the LRA's weakening. This desire is fanned by the international community's interest in local prosecution, given the obvious proximity benefits of such prosecution in terms of cost, evidence, and reconciliation. This is evidenced by the concept of positive complementarity, cited above, pursuant to which the ICC, and the international community at large, take positive and proactive steps to persuade States to genuinely investigate and prosecute atrocity cases.

In any event, in the wake of the Agreement and the Annexure relating to accountability and reconciliation in northern Uganda, the Justice Law and Order Sector (JLOS) was given the task to formulate transitional justice policies for Uganda. It has since gone ahead to establish five sub-committees on (1) formal criminal justice, (2) truth telling, (3) traditional justice, (4) re-integration and (5) funding.

Somewhat paradoxically, given Uganda's initial self-referral to the ICC, we see that the ICC's complementarity requirements have become a serious force that the Ugandan Government has to reckon with, when implementing its transitional justice reforms. The ICC will, and should, check that such reforms meet the requirements of complementarity, and that serious offenders are not allowed to go scot-free, whether they come from the rebel or government side. At the same time, the ICC needs to take note of these reforms. It is imperative that the ICC mandate does not once again overshadow the needs of the local population towards reconciliation, given that the ICC may have failed to take grass roots perceptions on justice and reconciliation into account when it issued its arrest warrants in 2005 only in respect of the LRA and not the GoU. To this effect, the ICC should realize (1) that the justice reforms being promoted and implemented were negotiated in a highly politicized environment of ongoing war, (2) that those reforms cannot be separated from attempts to achieve a final peace accord, (3) that no transition in government has taken place in Uganda.

Therefore, ICC complementarity should not be considered in a void, but should be informed by realities on the ground. While it should obviously serve to foster genuine accountability mechanisms in Uganda itself, it should not do so at the expense of sustainable peace and reconciliation. When applying the principle of complementarity, the ICC should thus try

to reconcile the imperative of accountability, which undergirds complementarity, with the imperative of facilitating co-habitation between various constructed identity groups at the local level. This may lead the ICC to tolerate, or even encourage, transitional justice solutions that de-emphasize classic criminal or retributive accountability in order to encourage reconciliation.

The following sections provide empirical insight into the complex relationship between the transitional justice reforms contemplated for Uganda and the possibility of facilitating reconciliation in the context of the ICC complementarity. Traditional justice, truth telling, and domestic criminal prosecution will be reviewed consecutively in light of the ICC's complementarity standard. (29)

1. *Traditional justice*

The accountability framework of the Agreement and the Annexure emphasizes traditional justice mechanisms as a means to address the crimes committed in northern Uganda : "Traditional Justice mechanisms, such as Culo Kwor, Mato Oput, Kayo Cuk, Ailuc and Tonuci Koka and others as practiced in the communities affected by conflict shall be promoted, with necessary modifications, as part of a central part of the framework". (30) In the negotiations leading up to this agreement, some of these traditional mechanisms were promoted at the national and international level, because arguably, (only) when codified, formalized, and somewhat modified, procedures before these mechanisms could be considered in the ICC's complementarity analysis. Not only does the question arise as to whether such "upgraded" mechanisms indeed satisfy the complementarity requirements, but also whether they truly satisfy the needs of the grassroots community. After all, as will be discussed below, they differ from the traditional justice mechanisms that are currently used in practice.

Of the traditional justice mechanisms listed, *Mato Oput* in particular was initially strongly supported by various actors in Acholi-land as a preferred alternative to the retributive style of the ICC. This mechanism involves a process of separating the affected clans, voluntary confession by the perpetrator, mediation and truth seeking by elders, payment of compensation, and drinking blood of a sacrificed sheep mixed with the bitter root. Top LRA leaders obviously found the idea of some kind of reconciliation ritual more appealing than criminal prosecution. (31) But advocates also included

(29) The issue of reparations, which is contemplated in clause 9 of the Accountability Agreement and which warrants a discussion of its own, will not be discussed in this article. This is partly because space is lacking, but also because the issue of reparations may only arise after the other mechanisms have had their role to play, in particular after the truth has been told and the responsible persons have been identified through accountability processes.

(30) Clause 3.1 of the Agreement, and Clauses 19-21 of the Annexure.

(31) T. ALLEN, *Trial Justice : The International Criminal Court and the Lord's Resistance Army*, London, Zed Books, 2006, p. 47.

local and international NGOs, and traditional and religious leaders of northern Uganda, who saw the ICC arrest warrants as an obstacle towards the LRA leaders laying down their weapons and who, prior to the ICC involvement in Uganda and the Juba peace talks (32), had both lobbied for the Amnesty Act of 2000 and promoted traditional justice as a means of welcoming home lower ranked combatants. (33) Understandably, the return and reintegration, rather than the criminal prosecution, of thousands of lower ranked LRA members, are more pressing concerns for the local communities in northern Uganda. After all, as set out above, those lower ranked members are often former abductees and victims in themselves.

While much was indeed said in favor of the use of *Mato Oput*, research established that advocates showed inconsistencies and did not per definition represent local beliefs and practices. (34) In fact, grassroots research done in the IDP camps showed that the majority of Acholi people did not feel *Mato Oput* could be applied straightforwardly, in a case-by-case manner, to promote justice and reconciliation in the current circumstances. (35) With time, the delegates in Juba also became increasingly aware of the practical limitations of *Mato Oput* and the fact that traditional justice mechanisms were unlikely to meet the threshold of complementarity as set out in the Rome Statute. (36)

It is indeed doubtful whether *Mato Oput*, and the other regional traditional justice mechanisms listed alongside it in the agreement, can pass the

(32) The talks that led to the adoption of the 2007 Agreement.

(33) M. Otim et M. Wierda, "Uganda : Impact of the Rome Statute and the International Criminal Court", *ICTJ Briefing*, June 2010, p. 22 available online at http ://ictj.org/sites/default/files/ICTJ-Uganda-Impact-ICC-2010-English.pdf (last visited 18 November 2011).

(34) T. Allen, *op. cit.*, p. 138.

(35) E.K. Baines, *Roco Wat I Acoli : Restoring Relations in Ancholi-land. Traditional Approaches To Reintegration and Justice*, Vancouver, Liu Institute for Global Issues, 2005, p. 66. Respondents mentioned a number of crucial obstacles to the use of *Mato Oput*. One, due to the scale and nature of the conflict, perpetrators are often unaware of the victim's identity or clan. Without the victim's identity, the perpetrator is unable to confess his or her crimes, ask for forgiveness from the victim's clan and pay compensation to the victim's clan. Two, compensation would also be impossible to pay from one clan to the next, as the scale of crimes is so high and people barely have enough resources to get by as a consequence of the war. Three, *Mato Oput* cannot address all the crimes committed in Acholi-land because not all the perpetrators involved in the conflict are Acholi. The LRA spread its tactics to other regions in the north, and the war-affected people here, including the Madi, Lango and Teso communities, have differing perspectives on how to attain justice and reconciliation. Finally, the legitimacy of the traditional leaders has also waned during the conflict. They have increasingly been accused of politicization, corruption and abuse of traditional structures. Most surprisingly, research proved that the widely promoted *Mato Oput* ritual only occurred rarely and there were no reported cases of it ever being used to address crimes committed related to the war. See C. Rose, "Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda : a Proposal for Truth-Telling and Reparations", *Boston College Third World Law Review*, vol. 28, 2008, pp. 368-370.

(36) For example, in the lead up to the negotiations on agenda item three, Accountability and Reconciliation, the international NGO International Centre for Transitional Justice and the locally based NGO Justice and Reconciliation Project held a seminar in Juba, for the delegates of the LRA and the GoU, on the local perceptions and use of traditional justice mechanisms and the complementarity requirements of the ICC.

Court's complementarity test, especially if leading perpetrators of international crimes are allowed to undergo only *traditional approaches* and not formal criminal proceedings. This explains why the agreement recognizes that "modifications may be required within the national legal system to ensure a more effective and integrated justice and accountability response". (37) This clause suggests that one overarching approach will be incorporated into domestic law, which will entail elements from the different instruments, (38) and may possibly include retributive elements that could satisfy the ICC's complementarity standard. (39) More importantly though, as will be explained in section 4, the delegate's focus shifted away from traditional justice mechanisms towards the construction of a full-fledged national war court to deal with the top LRA leaders and to meet the complementarity requirements of the ICC.

It is one thing, however, to focus on what is needed to meet the ICC's complementarity test regarding the top LRA leaders, but it is quite another to meet the demands of the grassroots community when it comes to the codification of traditional justice mechanisms to deal with the thousands of lower ranked LRA combatants that have managed to return. It is indeed questionable whether codification and modification of traditional justice mechanisms would meet grassroots demands in this regard. First of all, the traditional justice mechanisms currently in use focus predominantly on cleansing and welcoming and on reconciliation and forgiveness. They do not necessarily include elements of public truth telling, accountability, reparation or punishment. (40) Secondly, although this research has only been

(37) See Agreement, cl 5.1.

(38) L. Mallinder, "Uganda at a Crossroads : Narrowing the Amnesty ?", *Transitional Justice Institute Working Paper*, n° 1, 2009, p. 51.

(39) See also L. Keller, "Achieving Peace with Justice : The International Criminal Court and Ugandan Alternative Justice Mechanisms", *Connecticut Journal of International Law*, vol. 23, 2007, pp. 209 and s., arguing at pp. 265-278 that with some modifications *Mato Oput* could advance the goals of international criminal justice (retribution, deterrence, expressivism, restorative justice).

(40) Research demonstrates that, in general, former combatants and the Acholi community prefer mechanisms, however named, that address the occurrence of *Cen*, the haunting of the dead spirit, combined with those that address the perceived aggressive tendencies of combatants. Respondents described how homecoming rituals such as *Nyono Tonggweno* (stepping on the egg), visiting the Ajwaka (witch doctor), the use of traditional herbs and certain cleansing rituals, such as the slaughtering of the goat, are utilized to prevent or address symptoms indicating the haunting of the dead spirit (*Cen*), such as flashbacks, panic attacks and uncontrollable behavior. By eliminating the symptoms and taking away the possibility of contamination, these instruments contribute to the perception of combatants as cleansed and stable community members, with which free and normal interaction is possible. In addition, respondents explained that the use of the respected role of traditional leaders to mediate between the combatants and the broader community as well as participation in traditionally inspired dance, song and drama groups were methods utilized to reduce the aggressive tendencies of lower ranked combatants and prove their ability to adhere to socially acceptable behavior. See E.K. Baines, *op. cit.*, and T. Harlacher *et al.*, *Traditional Ways of Coping in Ancholi : Cultural Provisions for Reconciliation and Healing from War*, Kampala, Caritas Gulu Archdioceseo, 2006 for an extensive overview of traditional practices. The common thread in all these adapted traditional instruments is

conducted in Acholi-land, it is likely that including principles of truth telling, responsibility, punishment and reparation will give rise to the same practical limitations as *Mato Oput* and, as will be explained in the section on truth telling, respondents are clearly against holding lower ranked former combatants verbally accountable. Finally, codification would mean the loss of a flexible application of the different transitional justice instruments. This could diminish their effectiveness towards individual healing and reconciliation for those who are directly involved. (41) Thus, codification of these rituals and symbols to include such elements as accountability, reparation and punishment — so as to bring them into line with a perceived ICC complementarity standard — would not build on the traditional mechanisms that are now lending meaning to people's social reality and could jeopardize the progress towards reconciliation.

That said, it may in fact not matter much whether or not the traditional justice instruments evince a desire to bring perpetrators of international crimes to criminal justice and thus meet the ICC's complementarity standards. This is so for the simple reason that the issue of ICC complementarity will normally not arise in the first place. If the outstanding ICC arrest warrants and the statements of the ICC Prosecutor are anything to go by, (42) the ICC is not interested in lower-ranking perpetrators. (43) As far as devis-

that they are directed at combatant's current behavior and their perceived effectiveness lies in their ability to stabilize this behavior and turn them into functioning morally- and law-abiding community members. They are all voluntary and used in a flexible manner, many are non-verbal and symbolic in nature and aside from an optional confession to traditional leaders, none of them require former combatants to openly talk about the violent acts they were personally involved in. As the following quote illustrates, none of these mechanisms include the involvement of both the combatant and the family members of those they killed : *"All of these processes are focused on the well-being of the rebels by settling the problem between the former combatant and the deceased spirit but not the deceased family."* Focus Group Discussion, Elder, Anaka, 23 April 2007.

(41) See interview Patricia Thaft, Public International Law and Policy Group, Kampala, 27 August 2009 : "From having spoken to traditional leaders, the good thing about traditional justice is that it is flexible. If you codify something, it makes it a lot less flexible and there are so many different traditional justice mechanisms, everybody talks about Mato Oput, but there are so many. So I do not know about codifying all of them into one law, basically saying we are going to put them into all together and they will apply to everybody. I do not think communities will accept that. I think the beauty of traditional justice in Uganda is that it is flexible." See also interview with former combatant and counselor to returnees, Gulu, 14 August 2009 : "No one single mechanism can cut across, it will have to be the choice of the person affected and perhaps the person offended."

(42) F. Osike, "Uganda : ICC Prosecutor Louis Ocampo in His Office at the Hague", *The New Vision*, 13 July 2007, available online at http ://allafrica.com/stories/200707160105.html (last visited 18 November 2011). Ocampo stating that "[t]his case in Uganda is to show how traditional mechanisms to reconcile people can work together with investigation and prosecution" and that "[b]asically we are doing a case on four people, all the others could be handled using different mechanisms."

(43) In its recently unveiled prosecutorial strategy 2009-2012, the Office of the Prosecutor has unambiguously stated the following as to its targets : "In accordance with this statutory scheme, the Office consolidated a *policy of focused investigations and prosecutions*, meaning it will investigate and prosecute those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation. Thus, the Office will select for prosecution those situated at the highest echelons of responsibility [...]." See ICC Office of the Prosecutor, Prosecutorial Strategy 2009-2012, 1 February 2010, para. 19 (original emphasis).

ing suitable transitional justice mechanisms for such perpetrators is concerned, the ICC instead merely *encourages* investigations at the national or grassroots level in the context of its policy of proactive complementarity, presumably out of respect for national sovereignty and because of resource constraints. (44) Arguably, as regards lower-level perpetrators, Uganda may well choose to apply "alternative" non-penal mechanisms, including traditional justice, to deal with the past. So, much is also recognized by clause 9 of the Annexure to the Accountability Agreement, which states that "for the proper functioning of the special division of the court ... legislation may provide for the recognition of traditional and community justice processes in proceedings." This clause suggests a policy of deference on the part of the Ugandan High Court, a criminal court, to traditional justice mechanisms, at least in respect over lower-level perpetrators.

If traditional justice remains flexible in nature, international and national criminal policy appears to be well-tuned to the demands of grassroots groups that support traditional justice mechanisms that involve stabilizing behavior and increasing mutual understanding, and that do not favor formal criminal accountability for lower-level perpetrators. There is no need for the ICC Prosecutor or the Pre-Trial Chamber to clarify that the Court will not target lower-level perpetrators who undergo non-retributive traditional justice processes. It is an accepted policy of the ICC, and also of the *ad hoc* international criminal tribunals for that matter, that such cases do not warrant prosecution by the ICC. That being said, it remains to be defined who those "higher-level perpetrators" or "those who bear the greatest responsibility" precisely are, as will be illustrated in section 4.

2. *Truth telling*

The limitations of *Mato Oput* not only led to a shift in focus towards criminal accountability, but local, national and international actors also increasingly moved towards emphasizing the importance of adapting and incorporating the two core principles of *Mato Oput*, voluntary confession and truth seeking, into a wider truth and reconciliation process. (45)

These developments were taken into account during the Juba peace talks and agenda item three provided that "truth-seeking and truth-telling processes and mechanisms shall be promoted". In clause 2.3 of the Agreement both parties support the establishment of "a comprehensive, independent and impartial

(44) "If the Office does not deal with a particular individual, it does not mean that impunity is granted. Consistent with positive complementarity, the Office supports national investigations of alleged crimes that do not meet the criteria for ICC prosecution". See ICC Office of the Prosecutor, Prosecutorial Strategy 2009-2012, 1 February 2010, para. 19. See also A.K.A. GREENAWALT, *loc. cit.*, p. 144. He notes however that "[i]n the end, this approach may be more about shielding the prosecutor from controversial decisions than about providing a principled framework for transitional justice".

(45) E.K. BAINES, *Cooling of the Hearts : Community based truth-telling in Acholi-land*, Vancouver, Liu Institute for Global Issues, 2007, p. 3.

analysis of the history and manifestations of the conflict, especially the human rights violations and crimes committed during the course of the conflict, as an essential ingredient for attaining reconciliation at all levels". To foster reconciliation, it is consequently agreed in clause 4 of the Annexure to establish a body to analyze the history of the conflict, to inquire into its manifestations including human rights abuses committed during its course, hold public hearings, protect witnesses, promote truth telling and other forms of memorials, gather information about the disappeared and make recommendations for the appropriate modalities for implementing a regime of reparations. Its findings shall be disclosed in a public document.

As far as the relationship between ICC complementarity and truth-telling mechanisms is concerned, it is noted that the Court's position on truth-telling is in essence one of neutrality. The Court is a judicial organ administering international criminal law, and is not for or against the use of truth-telling as a non-penal transitional justice mechanism. For the Court, truth-telling is only relevant to the extent that it *replaces* the State's duty to genuinely investigate those who bear the greatest responsibility for the crimes, leaders in particular. If this is the case, the State will have failed to satisfy the complementarity criteria, and the Court will be in a position to declare cases admissible. This applies with equal force to traditional justice mechanisms that shield from prosecution those who bear the greatest responsibility.

Our research indicates that, as far as lower-level perpetrators are concerned, grassroots actors prefer welcoming and forgiveness over truth-telling. While Baines found that 97,5 percents of 1.145 IDPs were in favor of the truth about the conflict being known, on the grounds that truth-telling promotes reconciliation and prevents conflict in the future (46), her research leaves the question of *who* the Acholi people believe should be held verbally accountable within this truth-telling process undefined. (47) Unfortunately, this ambiguity also exists within the 2008 Agreement on accountability and reconciliation. The mandate of the truth telling body is imprecise : it does not state clearly who should participate in private and/or public hearings. (48) Recent research, con-

(46) *Idem.*

(47) Within the survey held among 1,145 IDP's, the respondents were asked whether FAP should tell the truth about what happened during the conflict, 28,5 % said *Yes* without probing and 61 % said *Yes* with probing. When asked the same question about top commanders, 29,9 % said *Yes* without probing and 46,9 % with probing. However, when asked whether the perpetrators should tell the truth about the conflict only 11,5 % said *Yes* without probing and 41,1 % with probing. These relatively contradictory findings suggest that respondents understood the 'truth about the conflict' to mean the general truth about what has happened and not the specific crimes particular people have committed. While this of course remains speculation, the divergent answers suggest that further investigation is required.

(48) As Iversen astutely observes, the establishment of a truth commission most likely reflects a reluctant compromise agreed by the leaders of the GoU and the LRA, neither of whom are interested in a genuine truth and reconciliation process that might reveal the history of the atrocities and damage inflicted by them on the people of Northern Uganda throughout the conflict. See A. Iversen, *Transitional Justice in Northern Uganda : A Report on Justice in Ongoing Conflict*, Master Thesis under the supervision of P. Kaarsholm, Roskilde University, 2009.

ducted at a grass roots level about community truth-telling, however, shows that many communities are deeply hesitant to require returning lower ranked combatants to go through a truth-telling process. The general sentiment was that these individuals were not acting under their own will when committing abuses and thus did not need to explain their actions or motivations. (49) These findings cohere with data collected in this research. All respondents, including those who had lost a family member to the LRA, declared that lower ranked combatants should not be held verbally accountable for the crimes they committed. Two lines of reasoning were common in their answers. One, that they thought it would only increase enmity and it would trigger revenge killing by the family members of the deceased. Two, it was felt that lower ranked combatants did not have to confess because they were forced to commit violent acts. (50) On the other hand, results suggested that there would be strong support for holding top commanders within the LRA and the Ugandan military verbally accountable, including president Museveni. (51) Many voiced that they should publicly confess their behavior and motivations and ask for forgiveness. This would bring justice for the victims and would actually improve the legitimacy of the GoU within northern Uganda, allowing for the "north-south" divide to become less salient. (52)

That said, irrespective of the merits of the desire of grassroots communities to know the truth from all sides to the conflict, a truth-telling process that allows top commanders to get entirely off the prosecutorial hook will not meet ICC standards. The requirements of the complementarity principle will *a fortiori* not be met if truth-telling is accompanied by some sort of pardon or amnesty for past crimes. It might be true that truth-telling "would likely advance expressivism [defined as "signaling moral con-

(49) L. Komakech et A. Sheff, *loc. cit.*

(50) Interview family member of deceased, Amuru, 1 June 2007 : "*Do you believe returnees should confess to family members?*" "It is hard because at the time of confession the deceased family might take it in their stride, but when they sit down and start thinking about what you told them, then it could turn out bad." "*Bad?*" "The fact they live in the same community, when they confess, they can say that it is ok, but if any small dispute comes up, it reminds them of killing and may stimulate them to do something bad, like fight, kill or say things like 'Remember, you are the one who killed my child.'" See also interview family member of deceased, Amuru, 2 June 2007 : *"So this means that the confession by the lower ranked combatants to the family members of the deceased cannot take place?"* "No, it is even not possible for these to confess." "*Will this bring justice to the family members of the deceased?*" "Yes, because all these killings were forcefully imposed on the lower ranked combatants. As I speak even my own brother was killed by the LRA and what I know is that he too was forced to kill him, but it was not his wish".

(51) L. Komakech et A. Sheff, *loc. cit.*, p. 40.

(52) When asked who should tell the truth, respondents told the following : "The police have to be involved, the president of Uganda and those people who are still in the bush, especially the commanders. Then a full investigation has to take place." Interview with returned lower ranked combatant, Gulu, 3 August 2009; "Government and the rebels. The president of Uganda, Mr Yoweri Museveni should come out to say the truth and also Kony should come and say the truth." Interview with village chief, Lacen Otinga, 3 August 2009. The most recent survey of perceptions among the population of Northern Uganda found that 64 % felt the GoU should also be held accountable, P. Pham et P. Vinck, *loc. cit.*, pp. 40-41.

demnation"] to a similar if not greater extent than prosecution", as Linda Keller argued, (53) a statement which is corroborated by our findings, at least in respect of top commanders. Also, South Africa's experiences with its truth and reconciliation commission can be cited in support of truth-telling without prosecution. However, data collected so far may bears out that Ugandan respondents would like to know the truth about the conflict (of course, who would not?), but it does not conclusively bear out that truth should come at the expense of justice, and in particular can only come to light through a non-judicial process. (54) Also, from a legal perspective, it is difficult to reconcile a pure truth commission with the text of Article 17 of the Statute, which considers proceedings that shield the perpetrator from accountability as proceedings that are not genuine for purposes of the application of the complementarity principle. (55)

As far as the Ugandan situation is concerned, it is currently not yet clear how truth-telling could go hand in hand with criminal prosecution of those most responsible. The Annexure merely provides that the truth-seeking body should give "precedence to any investigations or formal proceedings" (56). Commanders, or even lower ranked combatants or soldiers, will in any event be very unlikely to confess publicly in a truth-telling process if this could possibly expose them to prosecution. Therefore, when establishing the "[d]etailed guidelines and working practices" that will "regulate the relationship between the [truth-telling] body and any other adjudicatory body" (57), the Government should probably offer some guarantees that their statements cannot have probative value in a court of law. Prosecutors would then have to come up with external evidence corroborating statements made in the course of the truth-telling process so as to establish the accused guilt beyond doubt (58).

At a more structural level, a sequenced approach, with criminal trials coming first and a truth commission and reparations programme following later, appears as an attractive option to limit potential conflicts between retribution and truth-telling, (59) although it would seem that the Annex-

(53) L. Keller, *op. cit.*, p. 274.

(54) The most recent survey of perceptions among the population of Northern Uganda did not feature a specific question regarding the value of truth-telling. That being said, responding to the question of which accountability mechanism they supported, 32 % of respondents supported a truth mechanism, and only 15 % peace with trials, and 8 % peace with traditional ceremonies, while 45 % supported peace with amnesty. 73 % of respondents to the survey indicated that they had already forgiven the LRA. P. Pham et P. Vinck, *loc. cit.*, pp. 40-41.

(55) E. Fish, *loc. cit.*, pp. 1712-13.

(56) Annexure, cl. 5.

(57) *Id.*

(58) Obviously, this may prove to be an arduous task for the prosecutor.

(59) See S. Worden, "The Justice Dilemma in Uganda", *US Institute of Peace Briefing*, February 2008, available at http://www.usip.org/files/resources/1_3.PDF (last visited 18 November 2011). H. Chatlani, "Uganda: A Nation in Crisis", *California Western International Law Journal*, vol. 37, 2007, pp. 285-286.

ure contemplated the concurrent operation of criminal trials and truth-telling. (60) In this context, it is noted that a truth commission has recently been proposed to deal with the Rwandan genocide, although, as is known, since the mid-1990s many prosecutions, both international and domestic, have already been brought, and traditional trials (*gacaca*) have been conducted in relation to the Rwandan genocide. (61) The merit of sequencing traditional justice mechanisms along the above lines goes beyond the mere practical benefits of limiting conflicts over confessions. At the more fundamental level of "establishing the truth", a subsequent truth commission could usefully complement the truth told by courts, which after all only establish a partial, judicial truth in relation to one specific offender or a limited number of specific offenders, and tend to neglect the wider accountability context. (62)

3. *Prosecutions before the International Crimes Division of the Ugandan High Court*

As explained above, during the negotiations on the Agreement on Accountability and Reconciliation the delegates at Juba increasingly realized that traditional justice and truth-telling mechanisms were limited in their applicability in the current context and that national criminal proceedings were much more likely to meet the complementarity threshold of the ICC.

Reflecting this insight, the delegates came to the following accord under the Agreement on Accountability and Reconciliation : "Formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict. Provided that, state actors shall be subjected to existing criminal justice processes and not to special justice processes under this Agreement." (63) The annexure specifies that "a War Crimes Division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict." (64)

This War Crimes Division (WCD) was established by administrative decree in July 2008, and was renamed International Crimes Division (ICD)

(60) See L. Mallinder, *loc. cit.*, pp. 54-55.

(61) J. Sebarenzi, "Beyond Gacaca Courts : Restorative Justice in Rwanda", PhD thesis, National University of Ireland, Galway, 2010.

(62) See the 'Scorpions' trial conducted by the Belgrade War Crimes Chamber, which convicted members of a Bosnian Serb paramilitary group for their involvement in the 1995 Srebrenica massacre, without considering the wider context of the massacre. District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Slobodan Medi? et al.*, Case no. K.V. 6/2005 (*Scorpions* case), Judgment, April 10, 2007.

(63) Agreement, cl. 4.1.

(64) Annexure, cl. 7.

in 2011. (65) Since resources have been allocated, judges and registrar have been appointed to the Court. The law to be applied by the Court can be found in the International Criminal Court Act, which was passed on March 10, 2010. (66) The incentive to pass the Bill at this time, although an initial draft was already drawn up in 2006, seems to be largely driven by the desire to host the ICC Review Conference held in Kampala from May 31 to June 11, 2010. (67)

More fundamentally, of course, the passing of the Bill and the establishment of the ICD could go quite some way to satisfying the ICC's complementarity standard in respect of the investigation and prosecution of the most responsible perpetrators of international crimes — the LRA leaders against whom the ICC has issued an arrest warrant in particular — provided that trials are actually conducted. However, it is unclear who exactly the ICD intends to prosecute and it is also unclear whether individuals can be charged with the crimes listed in the ICC Act if committed before the entry into force of the ICC Act on 25 June 2010. (68)

It may appear that the establishment of the special division of the High Court was merely grounded on a desire to prosecute the ICC suspects (the LRA leaders). Still, the Agreement on Accountability and Reconciliation does not limit its mandate to prosecuting the LRA leadership only, without however stating who will be included. The International Criminal Court Act just passed even includes no prohibition against prosecution of state actors. (69) While prosecution of UPDF military leaders appears desirable in that it furthers the even-handedness and legitimacy of the contemplated justice processes, and ultimately positively affects reconciliation in northern Uganda, it is very unlikely this will occur in the current political con-

(65) The Legal Notice Practice Directions No. 10 of 2011, that redesigned the WCD as the ICD determines the jurisdiction of the ICD as "any offence relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crimes 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 any penal enactment

(66) ICC Act, art. 7-9, *Ugandan Gazette No. 39*, CIII, 25 June 2010 (on file with the authors).

(67) M. Otim and M. Wierda, "Uganda : Impact of the Rome Statute and the International Criminal Court", *loc. cit.*

(68) The principle of legality indeed prohibits retroactive application of the law, *i.e.* application of the law to facts committed before the entry into force of the law. That said, it is arguable that the acts committed in northern Uganda at the time were already criminal under *international law*, so that the application of the substantive provisions of the ICC Act is not retroactive after all. See art. 15.1 of the International Covenant on Civil and Political Rights (setting out that the prohibition of non-retroactive application of the law shall not "prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations"). Alternatively, Ugandan courts may apply domestic incriminations (murder etc.) to the LRA's crimes, although a failure to apply *international* humanitarian and criminal law may weaken any admissibility challenge to the ICC's jurisdiction mounted by Uganda or the accused person.

(69) Art. 2(g) of the ICC Act generally refers to "persons who have committed crimes referred to in the [Rome] Statute."

text, and given the apparent unwillingness of the ICC to go after the government side.

Not only is it unclear whether state actors will be prosecuted, but, given the broad mandate given to the ICD in the 2007 Agreement, it is unclear whether also mid-ranked LRA combatants (apart from high-ranking commanders) could in fact face trial before the ICD. In this respect, it is particularly ambiguous what the ICD's position will be in regards of the 2000 blanket Amnesty Act. (70) In the 2007 Agreement, there are no provisions prohibiting amnesties for international crimes and they appear to leave in place the amnesties granted, which are widely supported by the population for that matter. (71) The legality of amnesties granted has recently been upheld in the case of Thomas Kwoyelo, a mid-level LRA commander against whom no ICC arrest warrant was issued, but who was apprehended during "Operation Lightning-Thunder" (2008-2009) in the Democratic Republic of Congo (DRC). In this case, before the ICD ruled on the matter, in September 2011, the Constitutional Court of Uganda ruled that Kwoyelo qualified for amnesty following his application for it, as he had acquired a legal right to be granted amnesty or pardon under the Amnesty Act. In so doing, it followed the defense's argument that the Prosecution's failure to respond the Ugandan Amnesty Commission's plea to grant Kwoyelo amnesty was discriminatory treatment and unequal application of the law in violation of the Constitution, considering that other senior commanders had been granted amnesty. The Constitutional Court then ordered that the trial of Thomas Kwoyelo before the ICD cease. This ruling may seriously undermine efforts at bringing LRA fighters to justice, since, pursuant to the ruling, all rebels who denounce rebellion can apply and be granted amnesty under Ugandan law. All this may explain why the Attorney General filed an emergency appeal with the Supreme Court against the Constitutional Court's ruling. Kwoyelo remains in prison while the appeal is pending. (72)

Kwoyelo's case raises the question as to what role amnesty has to play in respect of mid- and lower-ranking LRA members whom the ICD may be

(70) Amnesty Act, 2000, ch. 294 §3 (2000) (Uganda).

(71) 87 % of respondents to a 2010 survey responded that LRA members should not be prosecuted if given amnesty. P. PHAM et P. VINCK, *loc. cit.*, p. 40. In the aftermath of the ICC arrest warrants the blanket Amnesty Act was amended in 2006 to allow the Minister of Internal Affairs to exclude named individuals from the scope of amnesty with approval of the parliament. The Minister has not yet done this, however. This means that those indicted by the ICC and other presumed offenders, such as Thomas Kwoyelo (see below) remain eligible for amnesty under Ugandan law. See L. MALLINDER, "Uganda at a Cross Roads; Narrowing the Amnesty? Beyond Legalism; Amnesties, Transition and Conflict Transformation". *Working Paper 1*, 1-72, 2009, and Refugee Law Project "Witness to the Trial: monitoring the Kwoyelo Trial", available at http://www.refugeelawproject.org/kwoyelo_trial.php.

(72) See for a discussion of the potential implications of the case: M. ODOKONYERO et B. OKETCH, "Kwoyelo amnesty leaves justice at crossroads", *Daily Monitor (Uganda)*, 26 November 2011.

willing to prosecute of there being no ICC warrant for their arrest. In principle, because mid- and lower-ranking LRA members are not targeted by the ICC in the first place, and because it is unlikely anyway that the ICC will issue additional arrest warrants in respect of the Ugandan situation, no strict Court demands as regards prosecution are imposed on Uganda. It appears to be Uganda's sovereign decision to grant lower-ranking perpetrators amnesty or not, although such decision should preferably, as Carsten Stahn has argued, be conditional and accompanied by alternative forms of justice. (73) In any event, grassroots research has borne out that subjecting lower-level perpetrators to a formal criminal accountability process would in some cases make no particular sense. The population may see some of them as not responsible at all but rather as victims (74) and reneging on the amnesty promise could cause uncertainty among former LRA fighters and make a return to violence more attractive, which is hardly in the interest of reconciliation and peace. (75)

Therefore, the impact of the Amnesty Act 2000 on the criminal justice process may have to be studied. Lesser offenders could continue to be covered by the act, but to the extent that this act has removed, and continues to remove perpetrators of very serious crimes from the jurisdiction of Ugandan courts, (76) it may have to be revisited. (77) Letting the worst offenders off the hook may indeed send a signal that perpetrators of atroc-

(73) C. STAHN, *loc. cit.*, pp. 708-718.

(74) See the sections on traditional justice and truth-telling, *supra*.

(75) If this approach toward Kwoyelo may also be applied to other, rank-and-file LRA members, reconciliation at a local level could be adversely affected. Former lower ranked combatants (often former abductees) who have returned to their communities in Acholi-land expressed fear that their amnesty certificate would no longer be valid and that they could be arrested and brought before the ICD. They voiced confusion about their already uncertain future and some voiced that the prospect of imprisonment makes the return to violence an attractive alternative. As a Village Chief, Lacen Otinga, 3 August 2009 related : "*When arrest takes place and if at all a person like Kwoyelo was arrested without a cause then former combatants will think that the amnesty that they were granted has ceased to work. Many begin to think that they too would be arrested, so most of them fear for their own arrest.*"

(76) Article 3 of the Amnesty Act states that from 1986 onward "any Ugandan who has … engaged in war or armed rebellion against the government by either participating in combat, engaging in any other criminal activity connected with the conflict, or aiding or abetting insurgents shall not be prosecuted or subjected to any form of punishment" as long as he agrees to renounce his affiliation with rebel groups. An "Amnesty Commission" was created to implement the Act. See Part III of the Amnesty Act. Under Article 3.10 of the 2007 Agreement on Accountability and Reconciliation, a person who has already been exempted from liability for any crime or civil acts or omissions, shall not be subjected to any other proceedings with respect to this conduct. This provision appears to exclude persons who have been granted amnesty from the jurisdiction from the court, and undermines the Ugandan Government's statement that "both the agreement and the annexure do not provide for or contemplate immunity or impunity". Letter from the Ugandan Solicitor General to the ICC, dated 27 March 2008. See also L. MALLINDER, *loc. cit.*, pp. 44-46.

(77) So much was conceded by Ugandan Minister of Justice Freddie Ruhindi, The Hague, 16 September 2009. Under an amendment to the amnesty law, dated 24 May 2006, the Minister of Internal Affairs can declare an individual ineligible by statutory act. This possibility has so far only existed on paper, however. See S. WORDEN, *loc. cit.*

ities can get away with their crimes, which far from promoting reconciliation, actually furthers a climate of impunity. As indicated by Dan Akiiki, Head of the International Crimes Division of the High Court of Uganda — *i.e.*, the division that was established on the basis of the Accountability and Reconciliation Agreement —, the three remaining ICC indictees and any other senior commanders who committed similar crimes will be brought before this court. (78) That may be a defensible compromise in light of grassroots' acceptance that only leaders should be brought to book. That said, in the interest of national reconciliation, the ICD would do well to ensure that it is not seen as partial towards the LRA — which is even more likely as the ICD is an organ of the GoU — by only targeting LRA leaders and allowing responsible UPDF commanders to go scot-free. Unfortunately, it is unlikely that the ICC will bring pressure to bear on the GoU to prosecute its own commanders, so that the complementarity principle does not come into play here.

In practice, the ICC's complementarity principle will play its principal role in the context of the domestic prosecution of the most responsible LRA perpetrators of atrocities. Pursuant to the complementarity principle, as regards the LRA leaders against whom the ICC has issued an arrest warrant, Uganda will be able to successfully challenge the admissibility of the cases pending before the ICC only to the extent that the ICD does not shield from responsibility the perpetrators in question, but instead genuinely brings them to justice. (79)

Obviously, the very establishment of the ICD and the adoption of the ICC Implementation Act does in itself not fulfill the complementarity requirements : perpetrators should be actively brought before the ICD. It is — surprisingly perhaps — not yet fully clear whether the LRA leaders, and notably Joseph Kony will also be brought before the Court. Because the ICC has issued warrants for their arrest, the complementarity principle requires that they be brought adequately to book in Uganda if Uganda wants to successfully challenge the admissibility of the cases before the ICC. Unfortunately, contradictory statements as to the subjection of LRA

(78) Remarks at conference on complementarity organized by the Grotius Centre, The Hague, 16 September 2009.

(79) If the latest survey of grassroots perceptions is anything to go by, the local population does not seem to have much confidence in the formal Ugandan justice system : more respondents (29 %) supported ICC prosecution of those responsible for the atrocities than prosecution by Ugandan courts (28 %). It is noted, however, that 25 % supported the Amnesty Commission and 8 % traditional mechanisms. Thus, a majority of respondents preferred local accountability mechanisms over the ICC. See P. Pham and P. Vinck, *loc. cit.*, p. 39. If faced with the choice of where to prosecute Kony and his top commanders, however, 70 % of respondents named the ICC, while only 28 % named the Ugandan courts. *Ibid.*, p. 44 (noting that "[i]n-depth interviews revealed the ICC is perceived more frequently as neutral and less corrupt than the Ugandan courts"). The authors of the survey nonetheless observe that the population may need to be better informed about the ICC. 66 % of respondents indeed described their knowledge of the ICC as being "bad" or "very bad". *Ibid.*, p. 43.

leaders to the Ugandan criminal justice system have emanated from the Government. President Museveni indicated publicly in 2008 that LRA leaders will be subjected to the traditional justice mechanism of *Mato Oput*, (80) and in 2009 reportedly that they would even be granted amnesty. (81) In contrast, as noted above, the 2008 Annexure seemingly unambiguously provides that they should, and will, face the criminal law before a Special Chamber of the High Court of Justice. (82)

Criminal prosecution of LRA leaders is desirable as traditional justice or truth-telling mechanisms that lack the retributive and deterrent teeth of the criminal law are ill-fitted to deal with top leaders of a group that may have perpetrated particularly heinous crimes (see the ICC arrest warrants). While their use may generally be supported by the people, as our research also bears out, (83) "tougher" accountability with respect to LRA leaders will be necessary if the ICC complementarity criteria are to be met : the ICC will only declare the cases against top-ranked indictees inadmissible if it is satisfied that the Government is truly intent on bringing them to justice in domestic criminal processes.

The question then arises as to the point at which the Government can be considered as being truly intent on bringing LRA leaders to justice. The ICC should realize in this respect that it is highly doubtful whether the LRA is really satisfied with the solution contemplated in the 2008 Annexure : prosecution of those most responsible, in practice its commanders. After all, Kony eventually refused to sign the Agreement. Bearing this in mind, if LRA leaders are subjected to the full force of the law before the Ugandan High Court, and may be expected to receive stiff penalties that are commensurate to the gravity of the crimes they

(80) Y. Mugerwa, "Museveni, ICC 'heading for confrontation'", *Daily Monitor*, 15 March 2008. BBC News, "Museveni Rejects Hague LRA Trial", 12 March 2008 available online at http://news.bbc.co.uk/2/hi/africa/7291274.stm (last visited 18 November 2011).

(81) "LRA should fool nobody again", *The New Vision*, 11 February 2009 ("President Yoweri Museveni has assured the Lord's Resistance Army (LRA) second-in-command, Okot Odhiambo and other rebel commanders of amnesty if they surrender."). See also AFP, "Kony still has a chance",10 March 2009 (reporting that Museveni stated that "Kony still has a chance to take advantage of the amnesty if he stops fighting"). Uganda's Attorney General, Dr. Khiddu Makubuya, quickly dismissed this report, however, and stated that "[t]hroughout the peace negotiations, the Government made it clear that whatever the outcome of the peace talks, those responsible for the atrocities in northern Uganda would pay for their actions', adding that 'the Government's unwavering stance against impunity... was reflected in the Accountability and Reconciliation agreement." See S. Candia, "Uganda : Odhiambo to Face Court — Makubuya", *The New Vision*, 17 February 2009.

(82) Cl. 5 states that "a special division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict."

(83) A policy of removing lower-ranking perpetrators from the remit of (international) criminal tribunals is not necessarily supported by local communities in all contexts. In Sierra Leone, for instance, it appears that the Special Court of Sierra Leone's policy not to target lower-ranking individuals was not always well-understood by the population. See D. Cohen, "'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia : 'Lessons Learned' and Prospects for the Future", *Stanford Journal of International Law*, vol. 43, 2007, pp. 26 and s.

ordered or committed, they may remain reluctant to lay down arms. (84) Alternatively, if they have already surrendered or have already been captured, their supporters may well rearm. Either way, the peace process will be endangered.

Given the risk of continuing strife, it is not impossible that the Government will somehow promise, and effectively hand down, more lenient or "alternative" sentences for LRA leaders as an alternative to granting amnesty. Such alternative sentencing is already contemplated in the 2007 Agreement, which provides that "[l]egislation shall introduce a regime of alternative penalties and sanctions which shall apply, and replace existing penalties, with respect to serious crimes and human rights violations committed by non-state actors in the course of the conflict." (85)

In our view, in the interest of a sustainable peace, the ICC may possibly want to accept such a sentencing practice, if the sentences imposed are sufficiently severe. In this respect, also Burke-White and Kaplan have called on the ICC "to accept something less than perfect accountability". (86) Such a solution may wed justice to peace. It ensures that criminal accountability processes do not cast a shadow over the prospects of reconciliation. Indeed, imposing harsh sentences on LRA leaders could be viewed by the Acholi people as a form of victor's justice — especially in case the Government forces escape conviction for their crimes — and sow the seeds for a flaring-up of the conflict. At any rate, research into grassroots perceptions of accountability does not appear to support harsh sentencing of LRA leaders. The population appears to prefer knowing the truth and effecting peace and reconciliation over criminal prosecution. (87)However, considering

(84) See however as far as Joseph Kony himself is concerned : "LRA's Joseph Kony to seek protection from Sudan army Sunday", *The New Vision*, 22 November 2009 ("Kony wants to fight until he overthrows the Government of Uganda. He will never sign a peace agreement. He cannot believe that once he allows himself to be disarmed, he will be forgiven.").

(85) Section 6.3 of the 2007 Agreement. Section 6.4 adds that such penalties and sanctions shall "as relevant, reflect the gravity of the crimes or violations; promote reconciliation between individuals and within communities; promote the rehabilitation of offenders; take into account an individual's admissions or other cooperation with proceedings; and, require perpetrators to make reparations to victims."

(86) W. Burke-White et S. Kaplan, "Shaping the Contours of Domestic Justice. The International Criminal Court and an Admissibility Challenge in the Uganda Situation», *Journal of International Criminal Justice*, vol. 7, 2009, p. 279. See also K. Southwick, *op. cit.*, p. 3 (stating, in respect of the ICC's admissibility analysis under Article 17 of the Statute, the Court "may have to recognize alternative sanctions, such as reparations, exile, public apologies, or mandatory participation in a truth commission or traditional justice mechanisms, as sufficiently meeting international standards of punishment in the Uganda context."). Note that it can be gleaned from the latest survey of grassroots perceptions that only one out of three respondents wanted to see LRA members arrested and put on trial, or captured, whereas respondents most frequently said they should be persuaded to simply "come out of the bush» (24 %) and be pardoned and/or given amnesty (23 %). See P. Pham et P. Vinck, *loc. cit.* The ICC may attempt to reconcile those responses by tolerating that Uganda hands down mitigated sentences to LRA leaders with a view to persuading them to "come out of the bush».

that the peace negotiations may now be off the table, the population may be somewhat more positive about prosecution, especially of the top commanders, provided that state actors are also prosecuted. Accordingly, the ICC, unlike the *ad hoc* tribunals, is willing to effect societal reconciliation, it may want to ensure that a somewhat more lenient sentence being given to the LRA leaders does not bar a finding of inadmissibility of the case.

The ICC Prosecutor has carried a rather big stick so far. He has maintained that under no circumstances will the arrest warrants be withdrawn, citing that Kony does not truly want peace, but "uses the peace process to get money, weapons, food, to strengthen and then to attack again", and that arrest warrants cannot be reviewed based on political considerations. (88) Accordingly, there is a possibility that an inflexible ICC may want to "retain" the prosecution of the LRA indictees on the grounds that Uganda is too accommodating towards the LRA "in the interest of peace". It can only be hoped that the ICC realizes that what international criminal lawyers would term "milder sentencing" may ultimately have beneficial results for sustainable peace and reconciliation in Acholi-land, particularly in the case that criminal law is also brought to bear on Government commanders. (89) Unlike Eric Fish, we believe that the ICC Statute need not be amended to accommodate milder sentencing : the requirement of "genuine prosecutions" already subsumes somewhat milder sentencing, as such sentencing is not aimed at shielding the perpetrator from responsibil-

(87) For instance, from a 2007 survey of the International Center for Transitional Justice, it could be collected that 44.1 pct. mentioned peace as the main priority for northern Uganda, whereas only 3.2 pct. mentioned justice. P. Pham et *al.*, *When the War Ends : A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda*, Berkley/New York/New Orleans, Human Rights Center, University of California/Payson Center for International Development, Tulane University/International Center for Transitional Justice, December 2007, p. 1 and p. 22. To the question "what should be done for the victims ?" only 1.7 pct. answered justice (*Ibid.*, p. 33). At the same time, however, as the most appropriate mechanisms to deal with abuses in northern Uganda, 28.7 per cent chose the ICC, 27.9 per cent chose the High Court, 20.4 per cent the Amnesty Commission, whereas 3.0 per cent opted for the traditional system (*Ibid.*, p. 34). This answer can only be explained by a lack of information about the exact roles of the different mechanisms. In fact, the response to another question as to the preferable options for peace mechanisms — peace being, as follows from the response to the first question described above, the undeniable priority for Ugandans — only 14.6 pct. of respondents supported criminal justice trials, whereas a whopping 51.4 per cent answered "peace with amnesty", 25.6 per cent "peace with truth commissions", and 8.4 per cent "peace with traditional ceremonies" (*Ibid.*, p. 36), a response that may even cast doubt on the usefulness and legitimacy of the traditional justice mechanisms anticipated in the Agreement and Annexure.

(88) P. Smith, "Interview with Luis Moreno Ocampo", *The Africa Report*, 21 September 2009, available online at http ://www.theafricareport.com/archives2/politics/3281793-interview-luis-moreno-ocampo-icc-prosecutor.html (last visited 3 December 2009).

(89) That said, only 10 % of respondents to a 2010 survey of local perceptions believed that the ICC hindered the situation in Northern Uganda. P. Pham and P. Vinck, *loc. cit.*, p. 43.

ity. (90) Obviously, this is different for amnesties, which *do* shield the perpetrator from responsibility. In any event, the opportunity to amend the Statute in 2010 has now passed; the amendments to the Rome Statute at the Kampala conference did not concern Article 17.

Supporting milder sentencing may obviously become a slippery slope. Should the Court not take into account the ultimate "milder sentence" of amnesty or pardon, also with regards to LRA leaders, such as Kony himself? Amnesties in particular shield the perpetrator from responsibility and may therefore be in tension with Article 17 ICC Statute. For the Court to take into account amnesties in its complementarity analysis, the Statute may quite probably have to be amended, unless, as Stahn has pointed out, "such amnesties are given after an effective inquiry into the facts, through testimony or written evidence before an independent body, with full disclosure and a public identification of the perpetrator and the crimes committed by him or her" and the possibility of criminal prosecution in case of non-compliance is retained'. (91) Thus, a decision of the Government of Uganda to grant amnesty to LRA leaders as part of a final peace deal with the LRA on the ground that there is no other means to impel the LRA to lay down arms and end the conflict can only produce legal effects if it is accompanied by a serious investigation into the crimes, and if the option of criminal sanctions is not entirely discarded in case of LRA non-compliance with the conditions of the peace deal, including full disclosure of all crimes. In order to legitimize such an amnesty deal, moreover, the Government is well-advised to consult grassroots groups. Possibly, it may want to organize a referendum on the wisdom of granting amnesty. Only if all these conditions are satisfied, the ICC may consider accepting such amnesties in the context of its complementarity analysis. It is not very likely, however, that the Government will go down this route; after all, its interests lie primarily with improving its international reputation and gaining international support and funding for its military campaigns against the LRA. (92) Moreover, the ICC, being a legal institution, may be ill-equipped to review amnesties and in fact any other non-penal transitional justice solutions that are inspired by peace and security rather than legal considerations. Therefore, as Greenawalt has also suggested, it would be desirable that the

(90) E. FISH, *loc.cit.* He proposes to add the following section to Article 19 of the ICC Statute : "12. If a State which has jurisdiction challenges a case's admissibility under paragraph 2(b), the Pre-Trial Chamber or Trial Chamber shall ignore questions of sentence severity and promises of administrative pardons for purposes of determining jurisdiction under 17 (2)(a) and 20 (3)(a), if it determines that a. the suspect in question is willing to submit themselves to the State's jurisdiction but not that of the ICC, and b. efforts to bring the suspect into ICC jurisdiction would risk violence and jeopardize peace."

(91) C. STAHN, *loc. cit.*, p. 716.

(92) This strategy has paid off, as, for instance, in October 2011, the United States announced it would deploy 100 military advisers to aid the Government of Uganda in its fight against the LRA. *See* S. WILSON et C. WHITLOCK, "Small U.S. force to deploy to Uganda, aid fight against Lord's Resistance Army", *Washington Post*, 14 October 2011.

UN Security Council assumes its responsibility if the need for an amnesty deal is felt, by endorsing a peace deal featuring amnesties. (93) Because the Security Council has primary responsibility for international peace and security under the UN Charter, its decisions negotiating the tension between peace and justice may be imbued with a greater degree of legitimacy than similar decisions taken by the ICC.

4. *Conclusion*

Complementarity mandates the ICC to ascertain whether States are genuinely intent on bringing to justice perpetrators of atrocities which fall within the Court's jurisdiction and whether they do not shield such perpetrators from responsibility. The discussion of Uganda's transitional justice mechanisms that are designed to deal with the aftermath of the conflict in Acholi-land makes it clear that it is not an easy call for the Court to determine whether or not an atrocity case is adequately investigated or prosecuted by Uganda. The outcome of the complementarity test depends in large measure on how one construes the State's duty to investigate and/or prosecute which undergirds the complementarity principle. Is the State under an obligation to initiate *criminal* investigations and prosecutions or could the State satisfy the requirements of complementarity by employing alternative justice mechanisms short of formal prosecution?

In this contribution, we have argued that realities at the grassroots level should inform the complementarity analysis and that accountability mechanisms should be adjusted so that they contribute rather than constitute an obstacle to fostering peace and reconciliation. Based on our research, we came to the conclusion that, unlike what some scholars argue, traditional justice mechanisms in Uganda, like *Mato Oput*, should not be given the trappings of a formal justice process with a view to satisfying the complementarity principle, lest they lose their value in Uganda's society. In fact, such mechanisms may not be in particular need of any formal "upgrading", since they are, and should be, harnessed to deal with lower-level perpetrators only. After all, the ICC is only interested in those most responsible, who may usually be equated with leaders and commanders, as the ICC's issuance of the arrest warrants regarding the situation in Uganda, and its prosecutorial strategy at large, bear out.

Our research also indicated that the much lauded transitional justice mechanism of truth-telling does not enjoy broad support among the Acholi population, at least not if it is applied to rank and file LRA members. These combatants may often be viewed as victims in their own right of whom it cannot be expected that they tell "the truth" about the motivations of their deeds. In contrast, truth-telling by leaders and commanders,

(93) A.K.A. Greenawalt, *loc. cit.*, p. 156.

of both the LRA and the Government, is strongly supported. This raises the question as to whether a truth commission as such, *i.e.*, not accompanied by criminal investigation and prosecution, would meet the ICC's complementarity criteria. There may be strong arguments in favor of considering the proceedings conducted in the framework of a truth commission as genuine investigations. However, if such proceedings result in only token sanctions, or no sanctions at all, they are difficult to reconcile with the emphasiswhich Article 17 of the ICC Statute places on accountability. This applies all the more so to amnesties that are promised under an Amnesty Act (amnesties which were recently upheld by the Ugandan Constitutional Court)

However, if the International Crimes Division of the Ugandan High Court will bring the full force of the criminal law to bear on the LRA leaders, the risk of continued strife or a renewed conflagration is real. The Government and the High Court may therefore contemplate handing down lenient sentences as regards the LRA leaders, even for atrocious crimes. If lenient sentencing can foster a climate of reconciliation, especially in a context of the Government evading any accountability for crimes committed in the course of the conflict, it deserves support. Unlike other transitional justice processes, the ICC can, and should, accept a formal justice process resulting in lenient sentences for complementarity purposes. After all, such process does not shield perpetrators from responsibility.

Lenient sentencing proves that peace and justice are not mutually exclusive. Plea- and sentence-bargaining between the Government of Uganda and the LRA, may effectively contribute to the transition of a conflict to a post-conflict society, and at the same time meet the ICC's complementarity standards. That being said, if it is established that defection or surrender of LRA leaders can only be brought about by amnesty pledges, the ICC may, on an exceptional basis, take such amnesties into account in its complementarity analysis, provided that the amnesty deal — probably forming part of a broader peace deal — is endorsed and legitimized by the UN Security Council and is accompanied by an elaborate truth-telling process that does not rule out criminal sanctions in case of non-compliance.

ETUDES