



## Session 7: Transitional Justice and Domestic Justice Systems

### DOMESTIC JUSTICE SYSTEMS AND THE IMPACT OF THE ROME STATUTE

#### Discussion Paper By

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*I have been gang-raped. Twice. My oldest daughter was gang-raped too and she continues bleeding as a consequence. My two younger children were killed in front of my own eyes. How many more crimes should I suffer for my case to be important enough so that someone cares and ensures that justice is done?*

A Congolese woman commenting on the jurisdictional limitations of the ICC, Kinshasa, June 2007.

#### 1. The Centrality of Domestic Justice to Building an International Justice System

The establishment of the International Criminal Court (ICC) has created significant expectations among victims that justice will be done whenever and wherever serious international crimes are committed. The Preamble to the Rome Statute refers to ending impunity on a global level. Despite its best efforts, the ICC alone cannot fulfill these expectations by investigating and trying each of these crimes. As a result, the vast majority of international crimes will remain unpunished unless and until domestic systems or other mechanisms are able to deal with them.

The Rome Statute enshrines the principle of complementarity, which stipulates that the ICC should assume jurisdiction only when the relevant States are unwilling or genuinely unable to

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carry out the investigation or prosecution. The Statute provides that domestic jurisdictions bear the primary responsibility in furthering accountability for the most serious international crimes. Its Preamble recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. This duty to dispense criminal justice is part of the intrinsic sovereign powers of States. In addition, most States have undertaken the international obligation to investigate or prosecute particularly grave crimes by acceding to treaties such as the Geneva Conventions and their Additional Protocols, the Torture or the Genocide Convention, or by incorporating into domestic law the crimes in the Rome Statute.<sup>2</sup>

The obligation to prosecute rests firmly with States, particularly with those on whose territory the crimes were committed, or whose nationals are either accused of perpetrating the crimes or are victims of the crimes. It can be assumed that States on whose territory the crimes occurred are better able to access and collect the evidence than tribunals that operate remotely. Domestic trials, if adhering to certain standards, have more potential to transform societies and lead to domestic institutional reforms than those conducted far away from the contexts in which the crimes were committed. It is therefore at the domestic level that long-term and sustainable solutions to ending impunity must be found.

## **2. Challenges Facing Domestic Systems in Trying International Crimes**

The reality however is that there are usually tremendous challenges facing domestic criminal justice systems in investigating and prosecuting international crimes. The main challenge is often the lack of political will to pursue justice. The involvement of powerful segments of the political, military or other security forces in these crimes is frequent, as their commission usually requires planning, organization, and the capacity to mobilize and deploy resources over extended periods of time and over large territories. In many instances, those who are themselves responsible for the crimes are still in power or have the means to ensure that those in power protect their interests.

In addition, domestic prosecutions often include the following challenges:

- Legal barriers: such as a substantively or procedurally deficient legal framework, or other impediments such as amnesties, immunities, statutes of limitations;
- Lack of an independent judiciary: some systems may not be sufficiently insulated from political interference;
- Lack of capacity: domestic judicial systems may lack capacity in terms of technical or professional skills for investigating and prosecuting system crimes, ranging from forensic to other analytical expertise needed to trace complex patterns of crimes;

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<sup>2</sup> On this basis, some States may exercise jurisdiction under the principle of universal jurisdiction. The use of universal jurisdiction is an important component of the ability to try serious international crimes at the national level, yet its implementation faces many challenges. While the exercise of prosecutions for serious crimes on the basis of the principle of universal jurisdiction is an important trend which deserves further attention, it goes beyond the focus and scope of this paper.

- Security and access issues, including a volatile security environment, continued armed conflict, lack of a safe environment for victims and witnesses or legal professionals.

These factors have meant that comprehensive prosecutions for international crimes at the domestic level remain rare. Strategies that seek to promote the exercise of criminal justice on the domestic level must seek to build political will, while at the same time addressing the various challenges relating to legal barriers, lack of an independent judiciary, lack of capacity, and security issues. Such strategies must be sustained over the long-term and must involve domestic judicial and political actors and also local civil society. Not enough attention has been given to these issues to truly and more systematically foster the fight against impunity at the domestic level.

Instead, over the last two decades, efforts to combat impunity have encompassed the establishment of ad hoc international or mixed criminal jurisdictions, culminating with the ICC. While an extensive international architecture has been developed as a result, the international criminal justice system remains marked by selectivity and gaps in jurisdiction and enforcement. Far from a coherent system, what emerges seems a complex and fragmented picture where international and domestic jurisdictions interact in a wide variety of ways, through catalyzing, augmenting, or in some cases competing with each other. Nonetheless, many of the individual building blocks constitute progress towards incrementally constructing a global system.

### **3. A Global Fight Against Impunity for Serious International Crimes**

The challenges facing the fight against impunity for serious international crimes and the interplay between domestic jurisdictions and the ICC are evident in contexts where the ICC currently operates, such as in the Democratic Republic of the Congo (DRC) and Uganda, and also where it has not opened a formal investigation but is conducting preliminary examinations, such as in Colombia and Kenya. To highlight some of the complexities of building a global justice system in the wake of the Rome Statute, this paper provides a selective overview of issues and challenges encountered in promoting domestic judicial accountability in these four countries.

Particular issues and challenges for domestic justice systems are faced in:

- *Building Judicial Capacity in a Post-Conflict Context.* In such situations, domestic legal systems themselves are usually in urgent need of reform and rebuilding. Where should the emphasis be - on rebuilding those systems or trying past crimes? Which individuals and crimes should be tried where and who decides? What about the impunity gap or large numbers of victims who do not have access to justice? Should the establishment of mixed or hybrid tribunals be encouraged and supported even when the ICC is involved? The case of the **DRC** illustrates some of these complex challenges in practice (See Case Study 1 below).

- *Demonstrating genuine intention to do justice.* What laws should a national government adopt and what capacity should it establish to demonstrate its genuine intention to do justice through national proceedings? What amount of delay is reasonable? What can the executive do in preparing a judiciary for this role without violating its independence? What specific acts demonstrate a willingness or ability “to genuinely investigate or prosecute” as formulated under the Rome Statute? What steps can be taken to prevent giving the impression that domestic proceedings are “for the purpose of shielding” a perpetrator from criminal responsibility? How should victims be involved in the process? The case of **Colombia** is used to discuss some of these questions (See Case Study 2 below).
- *Balancing peace and justice in domestic justice options.* How can a domestic system negotiate a settlement that relies primarily on domestic prosecution once ICC arrest warrants are already in place? What steps can a domestic system take to assert jurisdiction when the ICC is involved? The case of **Uganda** illustrates these dilemmas (See Case Study 3 below).
- *Activating criminal justice to prevent future crimes.* What specific steps can governments take where time is of the essence if future crimes are to be prevented? What are legitimate expectations from victims in this regard? How can a domestic system make positive use of the ICC in preventing further crimes? The case of **Kenya** is used to highlight these issues (See Case Study 4 below).

#### 4. Reducing the Impunity Gap: an Agenda for Transitional Justice

It is critical to bridge the impunity gap which arises from the great numbers of victims and perpetrators who will not fall within the purview of the ICC, due to limitations on its jurisdiction and capacity. In some situations, the ICC may encourage domestic investigations and prosecutions in specific cases, at least indirectly but also sometimes directly, notably through exchanging information and evidence. International investigations against those bearing the greatest responsibility usually lead to the collect of a wide array of evidence pertaining to individuals other than those directly ‘targeted’, which may be conducive to or facilitate domestic investigations and prosecutions.<sup>3</sup> In other situations, tensions between possible claims for jurisdiction exercised by domestic jurisdictions and by the ICC may give impetus to domestic criminal jurisdictions to initiate, or proceed more swiftly or vigorously with prosecutions than might otherwise have been the case. In this sense, both newly assumed legal obligations resulting from the Rome Statute and the specter of the ICC’s own activities – or of

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<sup>3</sup> Should the ICC convey such evidence to the national authorities so as encourage accountability? If so, under which conditions, particularly in relation to the possible impact on the protection of victims and witnesses who may not be adequately protected by local or national authorities? The practice and standards developed by other international criminal jurisdictions, in particular the transfer of cases from the UN ad hoc international tribunals to domestic jurisdictions, for instance by the ICTY to the War Crimes Chamber of the State Court of Bosnia-Herzegovina, provide useful guidance in this regard.

the use of universal jurisdiction by a third State - may encourage some States to overcome internal obstacles to domestic prosecutions.

Nevertheless, it is important to recognize that criminal justice, whether domestic or international, is slow and formal; even where it is prioritized properly, there will always remain scores of victims whose plight will not be considered. The causes for international crimes are deeply embedded in complex historical, sociological, economic and political factors; and complex problems need comprehensive multi-faceted solutions. Often, even a combination of international and domestic criminal justice measures could not fully satisfy victims of systemic crimes. In various victims' surveys carried out, including in Uganda, Colombia and the DRC, victims expressed a desire for a range of other justice measures in addition to criminal justice.<sup>4</sup>

Seeking, designing and implementing holistic solutions to address the needs of all victims and communities are a challenge that ultimately forms a central part of both preventing and redressing mass atrocities.

## **5. Conclusion**

While the ICC should in principle support domestic initiatives to investigate or prosecute international crimes, its resources to do so in practice are obviously limited. States should live up to their obligations to prosecute and punish those responsible for international crimes, and, where possible, should bring their initiatives into alignment with the Rome Statute.

Building a global, comprehensive, and victim-sensitive approach to criminal justice requires domestic systems to:

- Strengthen domestic legal frameworks, including repealing amnesty laws and other legal barriers to prosecutions, such as statutes of limitations, and incorporating the definitions of international crimes and modes of liability into domestic law;
- Build capacity for effective investigation, prosecution and trials of system crimes, including the development of effective prosecutorial strategies, cases selection and prioritization, and of information management systems;
- Prosecute more systematically serious crimes; participate in peer-review mechanisms;
- Re-enforce victims' participation and implementation of the right to effective remedy and to reparations.

Fighting against impunity and building a global system of justice requires not only establishing and supporting international and hybrid tribunals, but also reinforcing domestic justice systems.

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<sup>4</sup> See for instance *Forgotten Voices* (Uganda, 2005), *When the War Ends* (Uganda, 2007), *Living with Fear* (DRC, 2008) available on [www.ictj.org](http://www.ictj.org).

## CASE STUDY 1: THE DEMOCRATIC REPUBLIC OF THE CONGO

### *Challenges in Building Judicial Capacity in a Post-Conflict Context*

Countries recovering from conflict involving the widespread commission of serious international crimes often have enormous deficits in their domestic criminal systems, in some cases amounting to “substantial collapse or unavailability” referred to in the Rome Statute.

What are the best modalities to simultaneously build or re-build a domestic justice system while fostering accountability for serious international crimes on the other? This is a challenge faced in many post-conflict societies. In the DRC, this challenge is compounded by the sheer size of the country and the scale of the crimes committed, as detailed in various reports compiled by the UN and NGOs, including the recent UN Justice Mapping Exercise undertaken by UNOCHR and MONUC. Many of these crimes were committed prior 2002, thus falling outside the jurisdiction of the ICC.

#### 1. Challenges facing domestic justice

To rebuild the domestic justice sector, the Government of the DRC has elaborated an “Action Plan for Justice Reform” in collaboration with international donors. The Action Plan is generally forward-looking in its objectives, and there is a risk that it may not provide sufficient attention and capacity to deal with the system crimes committed over the last few years. In these circumstances, there is a tension between the investigation and prosecution of mass atrocities of the past and efforts to foster the rule of law going forward, including security and justice sector reform. Additional challenges include:

- Crimes are still being committed in a widespread and systematic manner in different parts of the country, complicating any efforts to reform both the security and justice sectors;
- Peace efforts have resulted in the integration of former rebel factions into the army and police services, the adoption of a series of amnesty laws, and the nomination of suspected war criminals into leading positions of the security sector without any prospects for vetting them as part of comprehensive security system reform;
- Rampant corruption is yet another factor impeding reform of the security and the justice sectors.

In 2002, the DRC transitional legislature granted Congolese military courts exclusive jurisdiction over international crimes, even when the suspects or accused are civilians. Despite contrary constitutional provisions adopted in 2006,<sup>5</sup> the military justice system retains and continues to

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<sup>5</sup> Article 156 of the 2006 Constitution of the DRC limits the jurisdiction of military justice to members of the armed forces and of the police.

exercise jurisdiction over such cases, but has proceeded with only a few. These cases have only targeted relatively low-ranking individuals, in part due to restrictions in the military criminal procedure, and in part because Congolese military prosecutors and judges are predictably reluctant to prosecute and try their own higher-ranking senior officers. Despite these limitations, a handful of cases have resulted in convictions for international crimes, such as the *Songo Mboyo* case which successfully prosecuted mass rape and sexual violence as war crimes. Unfortunately, most of those convicted have escaped from jail and civil damages have not been paid to the victims.

## 2. The co-existence of the ICC and mixed chambers?

The context of the DRC begs the question whether it may be appropriate – or possibly essential - to temporarily supplement domestic capacity to investigate or prosecute international crimes, especially those committed prior 2002, with an external capacity. This capacity may take the form of a mixed or internationalized court or chambers, with a limited subject-matter and temporal jurisdiction.<sup>6</sup> Some commentators argue that in situations where the ICC has jurisdiction, hybrid tribunals are no longer necessary, whereas others argue that, in such circumstances, *ad hoc* hybrid structures can play a role in accompanying and supporting domestic accountability.

## 3. “Division of labor” between the ICC and local jurisdictions?

When some cases are tried by the ICC and others at the domestic level, who controls which jurisdiction should try which cases? While the principle is that the ICC concentrates on those bearing the greatest responsibility who in fact ‘controls’ which jurisdiction should try which cases? In the DRC, the Government has shown willingness to surrender certain suspects to the ICC, whereas it is apparently unwilling to deliver others. In the recent hearing in *Katanga*, the Congolese government itself argued that its judicial system has neither the capacity - due to security concerns and insufficient resources - nor the intention of investigating or prosecuting Katanga. It added that it is the Government’s wish, as evidenced by its collaboration in arresting and handing over Katanga to the ICC, that he be prosecuted internationally. This argument, accepted by the ICC, risks blurring the distinction between unwillingness and inability, and undermines the fact that States themselves remain responsible for investigating and prosecuting international crimes.<sup>7</sup>

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<sup>6</sup> In the DRC, all parties to the 2003 Sun City Peace Accords adopted a resolution calling for the creation of an ‘International Criminal Tribunal for the DRC’, without detailing its jurisdiction, procedure or other modalities. Since then, this resolution has never been seriously discussed or officially considered. Nevertheless, some Congolese civil society actors and other international observers have called for the establishment of such a mechanism to investigate and prosecute notably the crimes that took place before 2002.

<sup>7</sup> See paragraphs 76-78, *Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire (article 19 du Statut)*, 16 June 2009, ICC TC II, available on <http://www2.icc-cpi.int/iccdocs/doc/doc700134.pdf>.

In contrast, in the case of *Bosco Ntaganda*, the DRC initially requested the assistance of MONUC to apprehend him when he was commanding the CNDP under Laurent Nkunda's leadership. However, since Ntaganda helped to oust Laurent Nkunda, and led the CNDP integration into the Congolese national army, the Government of the DRC is openly stating it will not pursue his arrest in the interests of peace, given that he must continue to play a critical role in integrating CNDP troops into the Congolese national army.

In sum, the DRC illustrates the huge difficulties to foster accountability for serious international crimes when there are ongoing simultaneous reforms of the army, police and judiciary, as well as concomitant initiatives to reform the Congolese criminal codes for both ordinary civilian jurisdictions and the military court system. This is particularly complex in the DRC, which has vast needs and requires not only training and capacity-building, but also the rehabilitation of its entire judicial infrastructure. Although the ICC will certainly try some cases, its involvement may be limited by the reluctance of the Government to selectively cooperate. Domestic legislation to implement the Rome Statute is still pending. In any case, many serious international crimes fall outside the jurisdiction of the ICC, leading to discussions on the opportunity of creating mixed chambers.

## CASE STUDY 2: COLOMBIA

### *Challenges in Demonstrating Genuine Intention to Do Justice*

In instances where domestic criminal justice is being pursued, doing so in ways that meet international standards and constitute a genuine investigation and prosecution according to the threshold set by the Rome Statute can be intricate, as demonstrated in the case of Colombia. Colombia continues to be plagued by conflict both between the army and guerillas, and by paramilitary groups and criminal gangs.<sup>8</sup> Despite official claims of successful demobilization of the paramilitaries, there are allegations of broken promises on both sides.<sup>9</sup> Power dynamics have shifted towards the criminal underworld, and human rights organizations and intergovernmental specialized bodies in most of Colombia report ongoing drug-trafficking and violence by paramilitary groups which have not dissolved. This volatile context makes it very difficult for victims to assert their rights, and poses a threat to investigators, prosecutors and judges who are determined to administer justice.

#### 1. Balancing peace and justice through Law 975

At the heart of Colombia's effort to fulfill its obligations under the Rome Statute is the Law on Justice and Peace, known as Law 975(2005).<sup>10</sup> This Law offers an exit strategy to members of illegal armed groups, in particular paramilitary groups, who are willing to demobilize. Members can obtain significantly reduced prison sentences of 5-8 years in exchange for their "contribution to the attainment of national peace, collaboration with the justice system, reparation for the victims, and adequate re-socialization." "Collaboration with the justice system" takes place mainly through depositions containing disclosure of crimes committed. The reduced sentences in Colombia have provoked much debate as to whether they should be considered adequate punishment given the gravity of the crimes, or whether they constitute a covered attempt to shield the perpetrators from full criminal accountability.

Some politicians argue that, under this law, more people are under investigation for massive human rights violations in Colombia than in any other country. Nevertheless, Law 975 resulted from a negotiated deal between the Colombian government and paramilitary leaders, casting doubt on its legitimacy. Further concerns have arisen from the fact that it was approved by a Congress composed of senators and representatives, more than 60 of whom are currently

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<sup>8</sup> Clashes amongst warring factions, surprise attacks and the violence directed against civilians produce thousands of casualties each year. Hundreds of thousands of people have been forced to abandon their homes and possessions, and been pushed from the countryside into the slums of major cities. Specialized UN agencies have estimated that over 3 million people have been forcibly displaced and are now urban outcasts.

<sup>9</sup> According to official sources, negotiations between the Uribe administration and the paramilitary groups and the drug traffickers that backed these groups, yielded nearly 30.000 demobilized combatants.

<sup>10</sup> Ley 975 of 2005, Diario Oficial No. 45.980 (July 25, 2005). An unofficial English translation of Law 975 is available at [http://www.mediosparalapaz.org/downloads/Law\\_975\\_HRW\\_and\\_AI.rtf](http://www.mediosparalapaz.org/downloads/Law_975_HRW_and_AI.rtf). Law 975 was passed by the Colombian Congress in July 2005 as the preferred mechanism for encouraging the demobilization of members of paramilitary groups.

being investigated, or have been tried and, in several cases, convicted for ties to paramilitary groups.

## 2. Jurisdictional limitations of Law 975

Law 975 has important jurisdictional limits:

- It is restricted to a very limited group of persons and explicitly excludes State officials. It is only applicable to demobilized members of illegal armed groups considered as eligible candidates by the national government (executive), not by judicial authorities.<sup>11</sup> All others remain eligible to be investigated under ordinary penal laws. The Justice and Peace prosecutors have sent preliminary information to ordinary prosecutors in relation to 196 politicians, 140 members of the armed forces, 40 public officials and 3,996 others.<sup>12</sup>
- The subject-matter jurisdiction of Law 975 is limited to crimes as codified in national legislation committed in the context of conflict. Some prosecutors have applied interpretations that are not consonant with international law.<sup>13</sup>
- The temporal jurisdiction of the Law is also subject to different interpretations by individual prosecutors.<sup>14</sup>

## 3. Progress of cases under Law 975

Four years after the adoption of Law 975, many operational obstacles exist which undermine its achievements. The process has moved very slowly: according to official records, up until 31 May 2009, only five depositions have reached a stage where prosecutors have formulated charges, and only one case has reached the trial and sentencing phase. Even this one sentence is partial, pertaining only to four crimes.<sup>15</sup> The implementation of Law 975 is also impeded by a lack of sufficient capacity and technical ability to conduct complex investigations and poor

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<sup>11</sup> The list drawn by the executive includes persons who apparently should not have been included because they did not contribute to truth-telling: approximately 1,200 out of roughly 3,000 persons.

<sup>12</sup> According to official records as of 23 June 2009.

<sup>13</sup> Some prosecutors have indicated that they will not include crimes that are “private” in nature or crimes that were not committed in a warlike context. A result to date is that sexual and gender-based crimes have not been pursued as systematically as they should be.

<sup>14</sup> Some prosecutors think that their competence is determined by the public appearance of the particular paramilitary group to which the nominee belonged; others interpret the initiation of their competence to be marked by the constitution of the *Autodefensas Unidas de Colombia* (AUC), while others believe that the time frame of their competence is established by the nominees’ criminal career.

<sup>15</sup> On an interlocutory appeal before reaching the sentence, the Supreme Court said that it could not understand how someone who participated in a paramilitary organization for 12 years was only responsible for the commission of four crimes. The court ordered the judicial and investigative authorities to reinitiate an investigation. According to official sources, this individual is now a prime suspect of 29 other acts, including massacres and forced displacement of civilians. Nonetheless, this person has continued to be treated as eligible for the benefits of Law 975 despite his manifest lack of compliance with the requirements of full disclosure of his involvement in crimes.

planning and management. With some exceptions, the prosecutors focus on the facts of a particular case but fail to tackle the overall criminal structure. Partial investigations and partial sentences risk undermining any possibility of demonstrating the widespread and systematic nature of crimes to establish criminal responsibility at different levels. This contrasts with the emphasis on the widespread or systematic nature of international crimes, policy requirement, and modes of liability as defined under the Rome Statute.

#### 4. Is there a sufficient political commitment?

Whether Law 975 is supported by a clear political commitment is subject to debate. The Justice and Peace process is taking place in the midst of an ongoing armed conflict and a highly polarized political environment. High ranking public officials have expressed their reservations about proceedings. While some paramilitaries have confessed to links with State officials, State officials in turn, including the Minister of the Interior and Justice, have publicly said that society should not believe what “these thugs and crooks” are saying.

The commitment to prosecute paramilitary leaders has been diminished by the decisions to extradite to the United States of America for drug-related offences over a dozen paramilitary commanders who had been advancing through Justice and Peace proceedings. The extradition took place as some of them were confessing. Though the paramilitaries are now subject to heavy sentences in the US, they have lost their incentives to continue collaborating with the Justice and Peace system in Colombia.

The executive has questioned ongoing criminal investigations led by the Supreme Court into elected representatives accused of links with paramilitary apparatus. In recent months, the executive has accused members of the Court of conducting “political persecution”, undermining the independence of the judicial branch.

Victims are currently not eligible for any structured assistance to participate in the proceedings or to seek and obtain psychological support. Security threats and personal harassment incidents have been widely reported. Last year, the Constitutional Court ordered the Government and the Office of the Prosecutor to establish an effective victim protection program,<sup>16</sup> but so far, little progress has been made. Rural victims in Colombia have a deep mistrust of State institutions, particularly of justice institutions including the Office of the Prosecutor, and more than the current efforts will be needed to overcome this legacy.

In sum, the Colombian case illustrates the complexities in assessing the investigation and prosecution of international crimes at the domestic level, and possible concerns about political commitment, prosecutorial integrity and accountability loopholes.

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<sup>16</sup> Corte Constitucional, sentencia T-496 de 2008.

## CASE STUDY 3: UGANDA

### *Challenges in Balancing Peace and Justice in Domestic Justice Options*

In balancing peace and justice considerations, amnesty or exile were frequently considered and offered in years gone by. Nowadays, amnesties for serious international crimes are considered increasingly impermissible. But the situation in Uganda demonstrates that governments remain eager to be able to provide an alternative to full-fledged prosecutions as part of negotiated processes. Does this mean that governments can legitimately challenge ICC arrest warrants even after they have already been issued and after state cooperation is sought in their enforcement? Would this fundamentally undermine the ICC as an institution?

#### 1. Arrest warrants and their role in the negotiations

In October 2005 the ICC issued arrest warrants against the top leadership of the Lord's Resistance Army (LRA), following a self-referral by the Government of Uganda to ICC jurisdiction announced in January 2004. When the arrest warrants were issued, there was no viable peace process underway: negotiations between the Government and LRA under the auspices of Betty Bigombe had faltered. However, in early 2006, a new peace initiative under the auspices of Riek Machar, Vice President of South Sudan, commenced and resulted in the signing of a Cessation of Hostilities Agreement between the Government of Uganda and the LRA in August 2006. During the two years of negotiations, violence in Northern Uganda abated and many internally displaced were able to return to their homes. Some commentators claim that the arrest warrants were a factor in bringing the LRA to the negotiating table.

#### 2. Domestic justice as an alternative to the ICC in a brokered solution

The arrest warrants were a central issue in the negotiations from the outset and threatened to derail the process. Joseph Kony, the LRA leader, repeatedly declared that he would not sign a final peace agreement as long as the ICC warrants remained in place. He proposed submitting himself to Acholi traditional justice instead. Conversely, the Government of Uganda took the position that a signature of the peace agreement should precede any action regarding the arrest warrants, such as a challenge to the admissibility of the case before the ICC.

To break the deadlock, negotiators proposed that the LRA should submit to a range of domestic measures. On 29 June 2007, the Government of Uganda and the LRA signed an Agreement stating that: "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." An Annex was concluded in February 2008 providing for the establishment of a Special Division of the High Court of Uganda to try war crimes and crimes against humanity, and for several other transitional justice mechanisms.

Several attempts to coax Joseph Kony to sign the Final Peace Agreement and demobilize the LRA ended in failure in November 2008. In the meantime, the LRA returned to its violent ways. A late 2008 joint military operation (Operation Lighting Thunder) staged by Uganda, the DRC and South Sudan to defeat the LRA and to enforce the arrest warrants was unsuccessful, and hundreds of new abductions and killings that fall within the jurisdiction of the ICC have taken place at the hands of the LRA, notably in Eastern DRC.

### 3. Establishment of new national institutions

In spite of the failure to sign a Final Peace Agreement, in July 2008, the Government of Uganda committed to implementing the Agreement on Accountability and Reconciliation and has since established a special War Crimes Division composed of three High Court judges, and a unit in the Department of Public Prosecutions to investigate and prosecute these crimes. It has also drafted legislation in the form of the International Crimes Bill, to incorporate Rome Statute Crimes into domestic law. This Bill is expected to pass through Parliament in advance of the Review Conference on the Rome Statute to be held in Kampala in 2010.

These developments at the domestic level have sparked important debates on complex legal and policy issues, such as the domestication of international crimes, the implications for the prohibition of retroactive application of the law, whether cooperation with traditional or other transitional justice mechanisms can be a mitigating factor in sentencing,<sup>17</sup> and the links between formal justice and other transitional justice mechanisms.<sup>18</sup> Additional steps to build the capacity of domestic actors on these issues are currently being planned. There is also an extensive ongoing discussion on whether the Government should establish a truth commission and consider reparations.

The Pre-Trial Chamber of the ICC has decided that the case of the LRA leaders under arrest warrants remains admissible. Certainly it is premature to consider whether Uganda will be found willing and able genuinely to investigate and prosecute the LRA leadership: this issue would only become relevant if LRA leaders were to find themselves in the custody of Ugandan authorities and if a domestic investigation were to be opened. Nonetheless, the case of Uganda illustrates the positive impact that the involvement of the ICC can have on incentivizing

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<sup>17</sup> A similar question about mitigation in sentencing arose in the context of the Justice and Peace Law (2005) in Colombia. Under that law as revised by the Colombian Constitutional Court, demobilized paramilitaries who have committed international crimes are currently eligible for reduced sentences of 5-8 years, provided they meet certain conditions specified in the law.

<sup>18</sup> The provisions of the Juba Agreement are currently being implemented by the Justice, Law and Order Sector, which has formed a Working Group on Transitional Justice involving around 100 lawyers from across the justice sector. It is headed by the Principal Judge, Justice James Ogoola. Other issues discussed include the impact of non-retroactivity on the temporal jurisdiction of the War Crime Division in the Department of Public Prosecutions, whether this Division should try both state and non-state actors, the composition of the bench and whether it should include international judges.

developments in domestic jurisdictions. It also shows that, since the adoption of the Rome Statute, amnesties are less likely to feature in peace agreements.

## CASE STUDY 4: KENYA

### *Challenges in Activating Criminal Justice to Prevent Future Violations*

Following decades of low-level unrest, Kenya was engulfed in a period of intense violence during and after the 2007 elections. An international mediation, led by Kofi Annan, managed to establish a coalition Government based upon a power-sharing agreement between the two major political forces in the country. Several measures were adopted, including the establishment of a Commission of Inquiry into Post-Election Violence (CIPEV, also known as the Waki Commission), and a Truth Justice and Reconciliation Commission. The CIPEV report issued in October 2008 recommended the creation of a Special Tribunal for Kenya to hold accountable “persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya.”<sup>19</sup> It suggested that the Special Tribunal should apply Kenyan law, sit in Kenya, and be composed of Kenyan and international judges, as well as Kenyan and international staff. CIPEV also provided mediator Kofi Annan with a list of names of suspects, asking him to forward the list to the ICC if Kenya failed to establish a Special Tribunal within a given time-frame.

#### 1. Victim expectations

A pre-condition to the establishment under Kenyan law of any Special Tribunal is a constitutional amendment, which would protect it from constitutional challenges. While a draft Bill defining the jurisdiction of the Special Tribunal was under discussion, a hurriedly drafted Constitutional Amendment Bill was rejected by Parliament on 12 February 2009. Parliamentarians with diverging agendas joined in opposing the Constitutional Amendment Bill. Some wanted to delay justice for powerful suspects, some deplored the weaknesses of the draft Bills and the resulting lack of a guarantee of independence and yet others argued they simply had no faith in any local justice system, even with international participation. This effectively blocked the establishment of a Special Tribunal for Kenya. Any further progress depends on a new amendment bill being proposed and adopted, which will require a two third majority vote by Parliament. This remains politically unlikely. The hope of many in Kenya rests with the ICC, due to a profound lack of trust in the domestic justice system. There are significant expectations that the ICC will act, yet for the moment its jurisdiction has not been triggered.

#### 2. Criminal law as a deterrent for future crimes?

On 9 July 2009 Kofi Annan formally transmitted the list identifying those most responsible in the political violence prepared by CIPEV to the Prosecutor of the ICC. This followed a meeting between an official delegation from Kenya, led by two Kenyan Ministers and the Attorney-

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<sup>19</sup> Recommendation 1, Report of the Commission of Inquiry into Post-Election Violence, October 2008.

General, and the ICC on 3 July 2009, the 'Agreed Minutes' of which referred to the possibility of a Kenyan self-referral of its situation to the ICC.

While Kenya has experienced recurring political violence, the strong calls for judicial accountability emanating from different quarters, including civil society, parts of the Kenyan middle-class, and even some politicians are unprecedented. Their calls are powerfully echoed by many diplomats and by Kofi Annan.

Beyond calling for justice for its own sake, these are calls animated by a strong belief that, in the case of Kenya, judicial accountability could be the factor that breaks the vicious cycle of violence perpetuated by impunity. It is widely hoped that criminal accountability will put an end to this violence, to politicians establishing and using militias for their own political gain, and to the vicious manipulation of ethnic divides, all creating long-term grievances for short-term political gains. However, in the case of Kenya, it remains unclear whether justice will be delivered either on the domestic or the international level.