The case of the Lord's Resistance Army

# Peace and justice?

Can peace and justice be achieved at the same time? This old dilemma has acquired a new dimension with the creation of the International Criminal Court (ICC). Is the ICC a spur or an obstacle to peace and reconciliation? In northern Uganda, an answer to this question is beginning to emerge.

Roger Lemoyne / Redux , Hollandse Hoogte

*Drawing made by a child who had been abducted and pressed into service in the Lord's Resistance Army (LRA), Uganda*

By **Lars van Troost**

In October 2005 the International Criminal Court in The Hague issued warrants for the arrest of five leaders of the Lord's Resistance Army (LRA), including Joseph Kony and Vincent Otti. This move has not yet led to the apprehension of the suspects, but it has generated much criticism.

According to some commentators, the ICC is hampering the search for a solution to the more than 20-year-old conflict in northern Uganda. Former peace negotiator Betty Bigombe is reported to have responded to the warrants with disappointment: 'There is now no hope of getting them to surrender. I have told the court that they have rushed too much'. Some have criticized not only the notion of international prosecution, but of any form of prosecution. 'Obviously', said Father Carlos Rodríguez of the Acholi Religious Leaders' Peace Initiative in 2004, 'nobody can convince the leaders of a rebel movement to come to the negotiating table and at the same time tell them that they will appear in courts to be prosecuted'. That opinion is being voiced more frequently, and not only with regard to rebel leaders.

There are also doubts about the possibilities of peace in Darfur while the ICC threatens Sudanese government officials with prosecution. If government leaders and rebels throughout the world can only be brought to trial by sacrificing peace to justice, the international courts in The Hague could find themselves with very little to do. Is there a danger of the world's legal capital turning into a legal ghost town?

There are a number of reasons for doubting that this will happen, as the opinion expressed by Father Rodríguez is perhaps less obvious than it at first may seem. On 29 June 2007, the Ugandan government and the LRA sat around the negotiating table and reached agreement on accountability and reconciliation. The first point in this agreement states: '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'. A few sections later it states: 'The Parties shall promote procedures and approaches to enable individuals to cooperate with formal criminal or civil

**Lars van Troost** (1962) is head of external relations at Amnesty International Nederland. This article does not necessarily reflect the views of Amnesty International.

investigations, processes and proceedings'. This is clearly the language of a statement of intent and not a final commitment, not to mention a statute book. Yet the parties did discuss accountability, the prosecution and trial of offenders and restitution for victims. The combination of negotiation and prosecution is clearly not as improbable as Father Rodríguez seemed to think only a short time ago.

## Catalyst

Adam O'Brien of the International Crisis Group recently went a lot further, stating that 'the ICC has spurred, not smothered, peace efforts in northern Uganda'. In his view, peace negotiations and prosecution go very well together. 'We are in the midst of the most promising peace initiative in the last 20 years', he says, adding that the security and humanitarian situation in northern Uganda has also improved. By way of illustration, O'Brien points out that the ICC's criminal investigation has seriously restricted the flows of material support for Kony and his supporters from Khartoum.

In O'Brien's analysis, the investigation by ICC prosecutor Luis Moreno-Ocampo has also acted as a catalyst in the peace process because it has 'raised awareness and focused engagement among the international community, which in turn provided a crucial broad base of regional and international support for this fledgling peace process. One of the key problems of previous peace initiatives was weak external support'. O'Brien believes that Moreno-Ocampo's investigation has resulted in accountability and victim interests becoming part of the peace process. According to this argument, this would not have happened without the threat of international prosecution.

## National accountability

Will the threat of international prosecution lead to prosecution at national level, and will this, in turn, prevent the international prosecution of the LRA's leaders? To address these questions, we need to return to the agreement of 29 June. The agreement indeed suggests that the Ugandan government would be prepared to abandon international prosecution if the LRA leaders were committed to taking part in some form of accountability or reconciliation process at national level. This is the reasoning behind the vague pledge from the government to 'address conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA'.

At first glance, the principle of complementarity, one of the pillars of the ICC Statute, would appear applicable here. 'If states fulfil their obligations under international law by exercising effective jurisdiction over the crimes set out in the Rome Statute', says John Holmes, then the Court would recognize the primacy of national jurisdictions, and would not intervene. Complementarity has its origins in two opposing ideas upheld ten years ago by the authors of the ICC Statute. Some of them believed that the ICC should not erode the sovereignty of states, while others emphasized that sovereignty should not be used as a shield against actual investigation, trial and punishment. 'The difficult aspect of the negotiations was to develop the criteria setting out the circumstances when the Court should assume jurisdiction even where national investigations or prosecutions had occurred. Two broad concepts emerged: unwillingness and inability'. If the ICC should therefore choose to leave it up to a national mechanism to deal with Kony and the other LRA leaders, then any such mechanism should not reflect the inability or unwillingness of the Ugandan authorities to prosecute them for the war crimes and other crimes that Moreno-Ocampo suspects them of having committed.


Eric Miller /Linear Foto

*LRA leader Joseph Kony and UN envoy Jan Egeland at a meeting in November 2006.*

There is good reason to doubt whether the June agreement on accountability and reconciliation will actually lead to any of the LRA leaders being prosecuted at national level and, if they are found guilty, being punished for their crimes. The agreement states, for example, that 'provisions may be made for confessions or other forms of cooperation to be recognized for purposes of sentencing or sanctions'. It is not difficult to imagine this leading to reduced sentences or sentences that will not be served. In this way, any prosecution and punishment could very easily be overturned.

If prosecution at national level results in inappropriate punishments or post-conviction amnesties, the consequences for moving forward with international prosecution and punishment cannot be foreseen with certainty. The ICC Statute contains no provisions regarding pardons, paroles and amnesties, because the authors could not agree on whether they were necessary or desirable. Some of them, as John Holmes writes, 'continued to argue that the Statute should not permit the Court to intercede in the administrative (parole) or political decision-making process (pardons, amnesties) of a State'. Others did not consider a provision on pardons, paroles and amnesties necessary 'as the provisions [in the Statute] on admissibility could give the Court sufficient breadth to examine cases of pardons or amnesties made in bad faith'. In this last interpretation, the ICC would see no reason to abandon international prosecution proceedings in the case of amnesties intended to protect suspects from prosecution. Pre-conviction amnesties would therefore appear to provide no protection against intervention by the ICC.

The agreement between the Ugandan government and the LRA also suggests that anyone who has been through one accountability process will not be subjected to any other national mechanism. That provides a guarantee against double jeopardy that appears to go far beyond criminal law. Again, this can be interpreted in such a way that is more likely to provide protection against punishment than to lead to actual prosecution. Anyone who appears before a reconciliation committee, for example, will no longer have to account for their actions in a criminal court. Conflicting and negotiating parties may prefer this scenario to >

Jerry van Marle/ Hollandse Hoogte

*International Criminal Court, The Hague, The Netherlands*

actual prosecution, but it will not protect them from further intervention by the ICC. If a national mechanism does not lead to prosecution and trial, the Ugandan government will probably have little success if they ever request the ICC to declare a case against the LRA leaders inadmissible. According to the Court's Statute, that can only occur if the case concerned has already been or is being genuinely investigated elsewhere, or if it is considered of insufficient gravity to be tried at the Court.

## Alternative mechanisms

National accountability and reconciliation mechanisms other than criminal prosecution will not prevent international investigation by the ICC. It is also doubtful whether alternative mechanisms exist in Uganda and have sufficient public support. Some traditional and religious leaders advocate traditional justice as an alternative to national and international criminal justice. It is, however, not clear if they mean this to apply only to lower-ranking LRA fighters – whose crimes are possibly less serious or on a smaller scale – or also to the movement's leaders. The ICC has not yet announced any prosecutions of such LRA fighters. In any case, traditional justice is by no means a single, clear system, but a collective name for customs maintained by various groups, many of which may no longer be in use. There is a lot of talk about *Mato Oput*, but it is only one of many forms of traditional justice. In an investigation of traditional approaches to justice and reintegration in northern Uganda conducted in 2005, the Liu Institute for Global Issues noted that 'the majority of respondents argued that *Mato Oput* could not be adapted straightforwardly to play a role in realizing justice in the current circumstances. This was due to two reasons: a) reconciliation cannot be fostered until the conflict ends, and b) the specific requirements of *Mato Oput* do not immediately translate to the scope and scale of the present conflict'. Kony and the other LRA leaders are suspected of sexual slavery, rape, the coerced recruitment of child soldiers, murder, cruelty, attacking civilians, looting and other crimes, on a large scale and over a sustained period of time.

A recent study by the Office of the UN High Commissioner for Human Rights, based on interviews with 1725 victims of the violence in northern Uganda, concludes that '[c]ontrary to many recent interpretations of victims' perceptions in northern Uganda, there was no universal support for, nor opposition to, any of these transitional justice options'. The study showed that most victims consider amnesty appropriate for lower-level perpetrators, and trial as a means of addressing serious crimes committed by high-level perpetrators. A study in 2005 by the Human Rights Center of the University of California, Berkeley, based on interviews with 2500 residents of four districts in northern Uganda, reached similar conclusions. Victims have different views on the desirability of prosecution but 'about three-quarters (76%) of the respondents said those responsible for abuses should be held accountable for their actions'. The Berkeley researchers also found that '[t]hose who had heard about the ICC (27%) expressed high levels of support. Also, when respondents were asked whether they would accept amnesty if it were the only road to peace, 29% still said no'. The studies showed that many respondents feel that, not only LRA fighters, but also members of the Ugandan armed forces, should be prosecuted for serious crimes committed in the long conflict in northern Uganda.

At the press conference announcing the arrest warrants for Kony, Otti and other LRA leaders in October 2005, ICC prosecutor Moreno-Ocampo said: 'The next step is arrest'. If the peace negotiations succeed – whether as the result of the international arrest warrants or not – the question of who is willing to make the arrests becomes more pressing. Perhaps the ICC can no longer rely on the Ugandan government. But it also looks as though the government and the LRA leaders together cannot negotiate their way out of international prosecution, no matter what national accountability mechanisms they try to invoke. ■

*Thanks are due to Willem van Genugten, professor of international law at Tilburg University, for his comments on this article.*


- A. O'Brien (2007) *The Impact of International Justice on Local Peace Initiatives: The Case of Northern Uganda.* International Crisis Group.
- Liu Institute (2005) *Roco Wat I Acoli. Restoring Relationships in Acholi-land.* Liu Institute for Global Issues, Gulu District NGO Forum, and Ker Kwaro Acholi
- OHCHR (2007) *Making Peace Our Own.* Office of the UN High Commissioner for Human Rights.
- Phuong Pham et al. (2005) *Forgotten Voices: A Population-based Survey on Attitudes about Peace and Justice in Northern Uganda.* Human Rights Center, UCB, and International Center for Transitional Justice.


*A longer version of this article can be found at www.thebrokeronline.eu.*