



Refugee Law Project

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Why the International Criminal Court must withdraw Indictments against the Top LRA Leaders: A Legal Perspective

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Background

Over the last two months, there has been raging debate going on sparked by the decision of the government of Uganda to accept a proposal from the Government of Southern Sudan for peace talks with the Lord's Resistance Army rebels. At the centre of the storm is the decision of the President of Uganda, Yoweri Museveni, to grant amnesty to the Lord's Resistance Army (LRA) rebels, as one of several confidence building measures for the peace process. The International Criminal Court (ICC) and its supporters have decried these decisions to talk and to grant amnesty as illegal because they fly in the face of the warrants of arrest for the five top commanders of the LRA which the Court unsealed in October 2005.

The International Criminal Court's angry reaction (*Daily Monitor*, 6 July 2006, "Museveni amnesty to Kony illegal—ICC") is understandable. Only a month earlier the Court's Chief Prosecutor had penned an article in the *Daily Monitor* (12 June 2006, "Sudan to execute Kony arrest warrant") in which he and the Court appeared upbeat and in control of unfolding events, namely, the emerging consensus in European capitals that peace talks with the top five LRA leaders were out of the question and that the warrants of arrests must be effected. The International Bar Association were angry too; they accused the President of Uganda of using the International Criminal Court as a tool of the government of Uganda (*Daily Monitor*, 19 July 2006, "Lawyers slam Museveni's LRA amnesty offer").

From these reactions and also following international news broadcasts on television and radio stations such as the BBC, the message being sent out there is that, in seeking a peaceful means to ending the suffering of millions of Ugandans in northern Uganda, the government of Uganda, and the people of Uganda for that matter, have committed a serious crime. The message these critics of the Government want to convey is that the obligations of the Government of Uganda to the International Criminal Court override its obligations to ensuring the security of its citizens, ending conflict through peaceful means, and protecting the human rights and dignity of its citizens.

The Contestation

In what follows I wish to show that while some of these arguments against the peace process are valid from a positivist legal perspective, namely, that the law must be implemented as it is regardless of its broader moral, social, judicial, political, and economic consequences, they

do not represent the full truth of how international legal obligations are and should be operationalised. I will demonstrate firstly that it is legal for the government to talk peace with the LRA; second, that the obligations of the government of Uganda to the protection of the interests of its citizens in northern Uganda are superior to its obligations to the International Criminal Court and for the Court and its supporters to insist otherwise is *an act of impunity*. Thirdly, I will demonstrate that in international law, a state can be released from its obligations if grave circumstances occur that render it practically impossible for it to implement the obligations it assumed under a particular treaty. Finally, I will discuss the politics of the International Criminal Court and show that the ICC is a threat to the independence and sovereignty of peoples and democratic processes. I will suggest that Uganda should reconsider its ratification of the Rome Statute and withdraw from it.

Let me state categorically that this is not an argument against prosecution of individuals who are suspected to have committed serious crimes. Rather, the argument is that in seeking to hold accountable those we suspect to have committed serious crimes, we must not do so at the expense of the lives and security of millions of hapless civilians, or the overall social and political stability of the country. More fundamentally, we should not falsify the facts and issues and misinterpret international law to support trials by the ICC at every cost because trial justice is selective and *cannot comprehensively* address the root causes which are intricately intertwined with local and international politics and economic and social policies.

That victims want some form of justice is not disputed. What is being contested is the idea that all the victims want trial justice and trial justice will act as a deterrent for future crimes. Some victims actually want the perpetrators of the crimes, be they LRA or UPDF, to be shot on spot. Some want to forgive on condition that those accused of committing the crimes apologise and own up to their crimes and others wish to forgive unconditionally as a form of healing. Thus, in this complex context, to tout trials as a magical panacea is intellectually dishonest, hence this contestation. There are several ways in which those who have suffered direct or indirect loss from the conflict in northern Uganda can receive justice and that justice must not be understood only from the perspective of trials by the ICC alone.

One argument made by supporters of the ICC indictment is that because Uganda has ratified the Rome Statute (which establishes the ICC), Uganda is bound by its obligations thereunder, one of which is to either prosecute, or surrender to the ICC for prosecution, individuals suspected of committing international crimes. The logic underlying this argument is that Uganda's obligations under the Rome Statute take precedence over any other obligations it may have, be they at the domestic or international level. According to this argument therefore, it is illegal to talk peace with the top five indicted LRA commanders.

Whatever the merits of this argument, it fails to take into account the broader international legal context. Indeed, it is based on a selective and highly misleading interpretation of international law.

First, Article 1(1) of the Charter of the United Nations enjoins member states to "take effective collective measures for the prevention and removal of threats to the peace ... and to bring about by peaceful means, and in conformity to principles of justice and international law, adjustments or settlements of international disputes or *situations which might lead to a breach of the peace* (emphasis supplied because it reflects the situation in northern Uganda)". The cardinal principle here is the use of *peaceful means* to remove threats to the peace such as internal or international conflict. The conflict in northern Uganda has raged on for two decades. As it spills from Uganda into Sudan and the Democratic Republic of Congo it

threatens two very fragile post-conflict situations, and thereby jeopardises peace in the entire region. In that respect, the Government of Southern Sudan demonstrated considerable prudence when it took steps to initiate talks between the Government of Uganda and the LRA.

Second, the UN Charter enshrines two other fundamental principles, both of which are very relevant to this matter. These are the principles of sovereignty and self-determination of peoples (Articles 2(1) and 1(2) of the Charter). Under these principles Uganda and its people as a sovereign are entitled to pursue peaceful means to resolving conflict and promoting national reconciliation and justice in the context of their own situation.

Sovereignty and Complementarity

Interpreted within the present context, the principle of sovereignty implies that the ICC Statute *cannot* be superior to the national laws of any member state. This view is captured by the principle of *complementarity* enshrined in Paragraph 10 of the preamble and Article 1 of the Rome Statute that establishes the ICC. It emphasizes that the jurisdiction of the ICC is aimed at complementing, and *not* replacing, the domestic criminal justice system. The same principle is further re-enforced by Article 17 of the ICC Statute which bars the ICC from prosecuting an individual unless the State concerned is either *unable* or *unwilling* to carry out such prosecution.

It is submitted here that these provisions all serve to re-affirm the significance of the principle of State sovereignty, insofar as criminal justice is concerned. The real essence of sovereignty is for a state to provide security for its citizens. In that respect, Uganda as a sovereign is entitled to seek solutions by peaceful means that bring lasting peace and security to its citizens. Even if Uganda referred to the situation in the north, as a sovereign state, it does not surrender its residual authority to determine the best approach to handling the situation in northern Uganda that will maximise security for its citizens.

Self-Determination and the ICC

Furthermore, Article 1(2) of the UN Charter encapsulates the right of *self-determination*. This exhorts States, among other things, to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace" (emphasis supplied).

Crucially, however, the right to self-determination does not simply relate to the secession of ethnic minorities from the mainstream body politic and the establishment of new sovereign political entities (such as was the case of Eritrea seceding from Ethiopia, or East Timor from Indonesia). Rather, it also includes the *internal* dynamics of statehood—emphasising the right of people to determine how to deal with problems affecting them in ways deemed appropriate by them, and without unnecessary or overzealous interference from outsiders.

Stated differently, the people of Uganda are a sovereign who have the right to chart their political, economic, or socio-cultural destiny, or to decide on any matter that concerns them such as the complex conflict in the northern part of the country that has not only affected millions of people there but also the whole nation in terms of the resources being devoted to military operations and the lost productive capacity of much of the north.

Similarly, the people of northern Uganda have the right to self-determination, and this implies the primary prerogative of determining how to end the conflict in northern Uganda. If they decide that the best way to deal with their past is to forgive all those who have committed crimes against civilians, that wish has to be respected by others, including the ICC. If they decide that those who were responsible for the violation of human rights should be dealt with in accordance with their own traditions, that too has to be respected by all who do not share the values of the people affected. To impose on them an approach that negates prospects of ending the conflict and addressing its root causes, primarily because we want to punish impunity, is in itself an act of impunity, an insult, and a violation of the peoples' right to self-determination. It must, therefore, be contested and resisted. Of course Ugandans can take advice from outsiders but only if it promotes their interests.

In summary, the right to self-determination is supreme and cannot be overridden by the provisions of any other instrument, be it the ICC Statute.

In 2000, well before the Rome Statute become operational, the people of Uganda, through the Amnesty Act of 2000, expressed their desire to resolve the conflict in the north and other parts of the country through peaceful means, including the grant of amnesty to all individuals who took arms against the governments. This decision was born of a realisation that the causes of the conflicts are deeply embedded in Uganda's politics. This is not to say that we are not mindful of justice. We certainly are. But justice is not just about trying, convicting, and sentencing those who have committed crimes to prison in order to appease those who suffered as a result of the actions of the accused. That is avenging the dead. True justice must first and foremost ensure that those alive can continue living in dignity and security. That requires a far more holistic approach than the self-righteous one of the ICC and its supporters (namely fixing the bad guys). The latter, approach is both simplistic and mechanistic, if not superficial and fails to address the root causes which are both internal and external. Thus, in light of the right to sovereignty and self-determination, as stipulated in the Charter of the United Nations, which is the normative basis of modern international treaty law, the wish of the people of northern Uganda to end the conflict through peaceful means (even if this means forgiving the five LRA leaders indicted by the ICC) must be respected.

Supremacy of the UN Charter Over ICC Statutes

The ICC and its supporters have attempted to show that Uganda's obligations to the ICC override its obligations to its citizens that flow from the Charter of the United Nations whose principles have been incorporated in Article one of the Constitution of Uganda. That is why they are angry at the Government's decision to talk peace and to offer amnesty for Joseph Kony and his commanders. I would argue, however, that, as a sovereign, Uganda's obligations to guarantee the security of its citizens override those of cooperating with the ICC, insofar as the former are embedded in the Charter of the United Nations which is the supreme instrument in international treaty law

In other words, where, as is presently the case, there is conflict between Uganda's obligations to its citizens (which flow from the UN Charter) and its obligations under any other instrument, including the ICC (Rome) Statute, the obligations under the UN Charter trump or override those assumed under the other agreement. This is categorically stated in Article 103 of the UN Charter, "*in the event of a conflict between obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*" (emphasis supplied). In

other words, Uganda's obligations under the UN Charter take precedence over its obligations under other instruments, including the Rome Statute.

In addition, international treaty obligations are based on the consent of the State Party, because states are sovereign; they cannot be forced to sign and ratify a treaty. And just as a state cannot be compelled to sign onto a treaty, it can also withdraw from the treaty if it believes that the treaty cannot serve its interests or those of its people. That is why every treaty must have a provision for withdrawal, and the Rome Statute is no exception. Article 127(1) of the Statute provides for withdrawal, although clause 2 of Article 127 makes the withdrawal practically useless because, "[a] State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it's a Party to the Statute... Its withdrawal shall not affect its cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate..." Uganda can withdraw from the Statute, despite the injunction in clause 2.

Pacta Sunt Servanda

Even excluding the unequivocal import of Article 103 of the UN Charter, any comprehensive interpretation of international law, taking account of the context, makes it clear that the interests and well-being of the Ugandan people must supersede the obligation to hand over Joseph Kony and his top commanders for prosecution by the ICC.

It is true that under Article 86 of the ICC Statute, as well as the broader international law principle of *pacta sunt servanda*, (a Latin phrase literally meaning "Promises must be kept" or "pacts must be respected"), Uganda is bound to co-operate fully with the ICC in the latter's decision to prosecute the five leaders of the LRA. In addition to the principle of *pacta sunt servanda*, judicial decisions of the International Court of Justice have held that a state cannot invoke its domestic legislation to defeat or avoid its international obligations. But these principles set the general rule to which there is an exception.

Under the Vienna Convention on the Law of Treaties, a party to a treaty may be released from its obligations if there are supervening circumstances that make it impractical for it to implement those obligations, or if implementing such obligations would cause a disproportionately greater harm or damage than the anticipated good. This position is reaffirmed under the ICC Statute itself. Article 53(1)(c) of the ICC Statute makes it clear that in deciding whether or not to proceed with an investigation, the ICC Prosecutor must consider the "the interests of the victims" and determine whether, taking these into account, the investigation will serve the interests of justice. In this case the crucial point is that the concept of justice must be viewed primarily from the standpoint of the people of northern Uganda.

Revoking the Indictments

Unfortunately, the ICC and its supporters would want us to believe that once the warrants were issued and unsealed, it is a *fait accompli*. In fact, Article 53(4) of the ICC Statute provides that "The Prosecutor may, *at any time*, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information" (emphasis supplied). Clearly, while we are past the investigation stage, the Chief Prosecutor can stop the prosecutions by withdrawing the indictments because new facts have emerged: a peace process is in place, brokered by a third party, something that had not happened before.

It is my contention that going by the current peace talks in Juba between the LRA and some of the demands made by Joseph Kony, the offer of amnesty will substantially enhance the prospects for peace in northern Uganda. As noted above, this development could be interpreted as a set of "new facts or information". In other words, the ICC can withdraw its indictment of the five top leaders of the LRA and give peace talks a chance.

Will the ICC Act?

From the way the Chief Prosecutor and the Court have conducted themselves vis-à-vis the situation in northern Uganda, it is clear that the Court is not disposed to listen. There are several interests at stake here.

First, the LRA case is the kind of test case any prudent prosecutor, aware of international politics, would wish to start with. Uganda is a poor country which can be easily manipulated with a few sticks and carrots. There is little risk of the public demonstrating against the Court or of Ugandans blowing themselves up in suicide bombs at The Hague in contrast to places like Iraq where war crimes and crimes against humanity are being committed every day.

Second, European states have an interest in the success of the ICC. Having at one point supported a peaceful means to conflict as the realist option, now most of them are for the indictments and want the warrants of arrest against the five leaders of the LRA to be effected. They believe that if the ICC withdraws the indictments, this will damage its future potential as a deterrent institution, and that it would play into the hands of the Americans who are notoriously opposed to the ICC and have withdrawn from the Rome Statute (former US President Bill Clinton signed the Rome Statute but when George W. Bush became president, his administration withdrew their signature). Once again, international politics are being allowed to determine the fate of millions of internally displaced persons living out their unduly short lives in camps.

The Chief Prosecutor, in his article that appeared in the *Daily Monitor*, spuriously argued that in the past Kony has used peace talks to rearm and continue fighting, and that only through threats of indictment has Kony appeared to accept peace talks. This assertion is not only unfortunate, but also intellectually dishonest and morally repugnant because it does not represent an honest analysis of the objective reasons why peace talks between the government of Uganda and the LRA have failed in the past. To the contrary, recent developments in the Juba peace process have actually demonstrated that the threat of indictments is one of the factors that are pushing the LRA away from the negotiating table. The Prosecutor's claim not only ignores the political context in which the war in the north has taken place, but is extremely counter-factual.

One might ask, for instance, where the ICC was when, in 1994, the LRA and government came close to a peace deal (brokered by Betty Bigombe). Furthermore, if the indictments are truly what served to bring Kony to the negotiating table and ultimately to a peaceful solution, then it can hardly be said that a withdrawal of the indictments would be a victory for impunity. Indeed, quite the opposite would appear to be the case and would demonstrate a statesmanlike use of the political tools at the disposal of the prosecutor.

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