

February 19, 2008

Contact: Katherine Southwick

UGANDA: CHALLENGES OF PEACE AND JUSTICE

Lasting peace for northern Uganda, which has been plagued by conflict and displacement for twenty-one years, seems almost within reach. But what to do about the International Criminal Court's (ICC) indictments issued against top leaders of the rebel Lord's Resistance Army (LRA) remains a thorny question, with the potential to derail the peace effort. Rebel leaders state that they cannot sign an agreement unless the ICC indictments are dropped. Lifting the indictments, however, poses serious concerns about the integrity of international justice. To break the deadlock, all parties should carefully consider practical approaches to provisions of the Rome Statute (the treaty constituting the ICC) that would enable suspension of the indictments.

Background

Led by Joseph Kony, the LRA is a splinter group of the Ugandan People's Democratic Army (UPDA). The insurgency began in northern Uganda soon after current President Museveni, who is from southern Uganda, came to power in 1986. Museveni's government negotiated peace with the UPDA in 1988, but the LRA considered that it had been excluded from the process. In continuing its attacks against the government, the LRA brutalized its own people, the Acholi, and other ethnic groups in the north of the country. It abducted around 60,000 children, forcing them to commit atrocities and risk their lives in battle against the Ugandan army. At the height of conflict, nearly two million people subsisted in deplorable displacement camps, in which 1,000 people were dying per week as a result of disease or violence. Ugandan army abuses against war-affected populations, such as rape, torture, and murder, are also well-documented.

In late December 2003, President Museveni referred the situation in northern Uganda to the newly created International Criminal Court. In July 2004, the ICC's Office of the Prosecutor (OTP) officially opened an investigation, and in October 2005, the ICC issued indictments for five top LRA leaders, including Joseph Kony.

The Peace Process

The current peace talks began in Juba, South Sudan, in July 2006. Dr. Riek Machar, Vice President of the South Sudanese Government (GOSS) and Chief Mediator of the peace process, has played a crucial role in bringing both sides to the negotiating table. Striving to uphold the 2005 Comprehensive Peace Agreement for southern Sudan, the GOSS has a clear interest in ending the threat to regional security the northern Ugandan conflict poses.

While peace talks had been attempted several times in the past, the Juba process is widely seen as northern Uganda's most promising opportunity to end the war. The process has weathered setbacks that would have undermined efforts in the past, such as extended deadlines, lack of full compliance with preliminarily agreed terms, and the death or defection of top LRA commanders. Two of the ICC's indictees are believed to have died, including Raska Lukwiyaya, who was killed in combat, and second-in-command Vincent Otti, who was allegedly executed on Kony's orders following an internal dispute. Sources suggest that the parties aim to conclude negotiations within the next few weeks and many observers remain cautiously optimistic.

Partly because the outcome of the peace talks has remained uncertain, efforts to encourage people to leave the camps and start afresh have progressed in fits and starts. Some displaced people have slowly begun to farm and live outside the camps, either in smaller “transition” camps or in other areas closer to their original homes. However, the majority remain in large displacement camps. In some areas of return, basic services are scarce or inaccessible. The departure of heads of household to work in the fields raises protection concerns for the women and children left behind in the camps, and many are reluctant to resettle permanently because Otti’s death has raised fears about the peace effort’s viability. Moreover, disputes over land are likely to become increasingly common.

Peace and Justice in Northern Uganda

Real progress on ending the humanitarian crisis and pursuing a coherent long-term strategy for reconstruction in the north cannot take place without guarantees of peace and security. Establishing peace, however, will require difficult decisions about how to reconcile humanitarian imperatives and the unquestionable need for stability in the region with the outstanding ICC indictments.

As stated in the Rome Statute, the goal of the ICC is to prevent atrocities like war crimes, crimes against humanity, and genocide by ending impunity. In the statute’s Preamble, the states parties affirm that such crimes “must not go unpunished and that their effective prosecution must be ensured.” States also pledge in the Preamble to “reaffirm the Principles and Purposes of the Charter of the United Nations.” The UN Charter commits states to take collective measures to maintain peace and security through peaceful means when possible. This obligation is rooted in a fundamental principle to avoid the instability, atrocities, and protracted humanitarian crises war often produces.

Ideally, these international commitments to prosecute and punish serious crimes and peacefully end or prevent conflict should work hand in hand. To some extent, this scenario has occurred in northern Uganda. In addition to pressure from the GOSS, the LRA’s decision to negotiate in Juba is partially attributed to the international indictments, which initially raised rebel fears that an international force would attempt to arrest the LRA leaders and that finding safe haven would become more difficult. During the negotiations, LRA attacks in northern Uganda have essentially stopped.

The involvement of the ICC has also strengthened discussions of justice and accountability in Uganda and within the

context of the negotiations. In fact, one of the five agenda items of the talks, Agenda Item Three, specifically addresses reconciliation and accountability. The agreement on Agenda Item Three provides for formal judicial processes within Uganda to adjudicate allegations of serious human rights violations arising from the conflict. As stated in the annexure to the agreement, a special division of the High Court of Uganda would try such cases. The agreement also provides for “a regime of alternative penalties and sanctions,” which would reflect the gravity of the crimes and promote reconciliation within communities. The parties have discussed domestic justice mechanisms because under the complementarity provisions of the Rome Statute, a state may lawfully reclaim a case begun by the ICC and try it domestically if the state is genuinely willing and able to carry out prosecution and conform to international standards of prosecution and punishment.

The twin goals of peace and justice begin to diverge, however, when we assume that imprisonment is the only form of punishment acceptable under the Rome Statute and under international standards more generally. It is unlikely that Kony and the other ICC indictees will agree to subject themselves to a judicial process which would ultimately lead to their incarceration. Consequently, imprisonment is probably not among the “alternative penalties and sanctions” envisioned in the Agenda Item Three Agreement on Reconciliation and Accountability signed by the LRA. If the final agreement does not include imprisonment as a punishment option, then some international observers, including the ICC, are likely to determine that the peace agreement fails to meet international standards and that the indictments must remain in place. The LRA leadership would in turn find such a continuing threat of arrest and imprisonment untenable, and the prospects for peace in northern Uganda would wane.

The Regional Context

The absence of a solution for northern Uganda imposes serious costs and risks on the region. For more than twenty years, over two million people in northern Uganda have suffered the indignity of remaining dependent on humanitarian aid; have been vulnerable to disease, sexual violence, and lawlessness; and have been economically marginalized and divided from the rest of Ugandan society and development. The LRA presence in eastern Congo and southern Sudan poses a security risk to the efforts of these regions to consolidate fragile peace agreements, upon which millions of Congolese and Sudanese lives depend, and in which the international community has invested substantially.

In the past, the Sudanese Government in Khartoum has used the LRA as a proxy army to fight southern Sudanese forces and there are fears that Khartoum may use the LRA in Darfur. Last year, there were reports that LRA fighters had crossed into Central African Republic (CAR) to join another rebel group fighting against the CAR government. Without peace, young LRA abductees must continue to live with the trauma of committing atrocities and the risk of being maimed or killed. Prolonging such considerable costs and risks is inconsistent with the UN Charter and thereby the Rome Statute. Moreover, population surveys in northern Uganda convey that while northern Ugandans are sensitive to the need for accountability, they do not want justice issues to interfere with the peace process.

Ways to Apply the Rome Statute

While the Rome Statute upholds the obligation to end impunity and punish perpetrators who commit terrible atrocities, the treaty also leaves room in certain provisions to deal with hard cases where a range of factors must be weighed. While these provisions could conceivably preclude international or domestic prosecution and incarceration, their careful use is nonetheless consistent with international law. The flexibility they allow also serves to uphold respect for the international justice system over the long run. Moreover, implementation of these provisions need not involve a zero-sum trade-off of justice for peace. In each instance, justice should certainly be maximized within the limitations raised by the case at hand.

Options

- ❑ **Article 16: Security Council Deferral.** Article 16 permits the UN Security Council to supersede the ICC Prosecutor's judicial mandate. Under that provision, the Security Council may, through a Chapter VII resolution, request that the Prosecutor defer the prosecution for one year. The request is renewable each year. Taking the form of a Chapter VII resolution, such a deferral would implicitly be made in the interests of peace and security. During the one-year deferral period, alternative accountability options could be developed further or more permanent security arrangements for the LRA leadership could be made. However, obtaining consensus within the Security Council to pass a resolution under Article 16 will be difficult.
- ❑ **Article 17: Complementarity.** The ICC could also find the case inadmissible in the ICC under the complementarity provisions of Article 17, which would permit

Uganda to try the case within its national judicial system. To find the case inadmissible on this ground, the ICC and certain observers 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. Some of these transitional justice options were pursued with mixed success in South Africa and Mozambique. Assuming the LRA indictees went through with such processes, peace and some measure of meaningful justice could be achieved.

- ❑ **Article 53: The "Interests of Justice."** Under Article 53, the ICC Prosecutor can also determine that a case is inadmissible if he finds that pursuing prosecution is not in the "interests of justice." If the Pre-Trial Chamber chooses to review that decision, then the Pre-Trial Chamber's confirmation of the decision is required. The concept of the "interests of justice" is intentionally vague to allow the Prosecutor discretion in difficult cases. Among the factors the Prosecutor must consider are the "interests of victims," which would include taking into account victims' protection needs and any other concerns with pursuing prosecution. The value of domestic accountability mechanisms, in terms of establishing truth, ensuring victim participation, and promoting reconciliation, may also be a factor for the Prosecutor to consider under Article 53.

In the long term, it is critical to build the ICC's enforcement capacity. The Rome Statute envisions an international justice system where perpetrators of major international crimes are arrested, tried, and punished with commensurate prison terms. But the enforcement challenges presented by the Uganda case suggest that expectations of what the ICC can achieve in its early stages may be too high. Insisting on unrealistic outcomes causes the victims to pay unacceptably for the challenges the international justice system currently faces. Instead, the international community should explore ways to strengthen the ICC's enforcement capacity in ways that minimize the risks to stability and to drawing out protracted humanitarian crises. Moving forward, a more tangible international commitment to improved enforcement would counter any concerns about the integrity of international justice raised by the Uganda case.

Katherine Southwick is the Bernstein Fellow at Refugees International.